



## Issues in the Bill

### **Schedule 3 – Indexing the concessional contributions cap**

#### Background

- 2.1 Schedule 3 imposes a temporary pause on the indexation of the superannuation concessional contributions cap, so that the concessional contribution will remain fixed at \$25,000 up to and including the 2013-14 financial year. Future indexation will continue as if the pause had not occurred.
- 2.2 Reactions to Schedule 3 varied. Some industry stakeholders readily acknowledged the Government's budgetary constraints which has driven the measure. Others did not.
- 2.3 Certified Public Accountants Australia (CPA Australia) opposed the proposal to pause the indexation of the contributions caps.<sup>1</sup> Their grounds for taking this position were:

While it is appropriate to limit the amount of money that can be contributed by or for an individual to the superannuation system on a concessional basis, we believe the current contribution caps, particularly the concessional contribution caps, are both confusing and inflexible. As a consequence, they act as a deterrent that prevents many ordinary Australians from saving adequately through superannuation in order to maintain an appropriate standard of living in retirement. Further, the penalties for

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1 Certified Public Accountants Australia (CPA Australia), *Submission 3*, p. 2.

exceeding the caps are excessive, even for the most inadvertent errors, compared to penalties in other areas.<sup>2</sup>

- 2.4 Consequently, CPA Australia believes that it is becoming increasingly difficult for many people to adequately save for their retirement and that the proposal in Schedule 3 would compound this. CPA Australia were concerned that indexing the cap does not address the need of individuals who are at the stage of their lifecycle when saving for retirement becomes a greater priority than it once was:

Particularly with the halving of the contribution caps in 2009, it makes it very difficult for people to save adequately for their retirement. Our concerns are around people, often in their 50s, who have paid off the mortgage, paid off education costs and had their kids move out. They are the people who often would want to put extra money into superannuation to catch up on the contributions they have lost or missed out on over the years.<sup>3</sup>

- 2.5 The Institute of Chartered Accountants in Australia (ICAA) and the Self Managed Super Fund Professionals' Association of Australia (SPAA) broadly agreed with CPA Australia's position on the schedule.<sup>4</sup>
- 2.6 The Association of Superannuation Funds of Australia (ASFA), on the other hand, recognised the Government's budgetary constraints that underlie Schedule 3, but hoped that the caps will be re-adjusted in the future, once present constraints no longer apply.<sup>5</sup> ASFA recommended that the Government review the contribution caps once its budgetary position improves.<sup>6</sup>

## Analysis

- 2.7 At the hearing, Treasury advised that the measure in the Bill is of marginal significance to superannuation outcomes in the long term:

... while it might reduce someone's ability to contribute by \$5,000 in one year, it is just a one-year transition. So, in aggregate, the difference would be quite small on most people's balances.<sup>7</sup>

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2 CPA Australia, *Submission 3*, p. 1.

3 Mr Michael Davison, CPA Australia, *Committee Hansard*, Canberra, 16 March 2012, p. 2.

4 The Institute of Chartered Accountants in Australia (ICAA) and the Self Managed Super Fund Professionals' Association of Australia (SPAA), *Committee Hansard*, Canberra, 16 March 2012, p. 2.

5 Association of Superannuation Funds of Australia (ASFA), *Submission 5*, p. 2.

6 Mr Robert Hodge, ASFA, *Committee Hansard*, Canberra, 16 March 2012, p. 3.

7 Ms Ruth Gabbitas, Treasury, *Committee Hansard*, Canberra, 16 March, 2012, p. 5.

2.8 Further, Treasury did not see a pressing need to increase the concessional cap in the long run because the great majority of individuals do not exceed it:

... the caps in the current environment are quite generous. As an example, someone who is on what is termed the maximum contribution base, which is a high-income earner who is just getting the superannuation guarantee contribution has scope to contribute in addition to their superannuation guarantee of around \$9,000. Someone who is on a lower income level has scope to make significant voluntary salary sacrifice or other employer contributions and still fit within their cap. For the majority of people, the cap is more than they are able to, capable of or want to contribute to super, so I acknowledge there are a proportion who clearly would like to contribute more, but in general the cap accommodates the majority of people.<sup>8</sup>

2.9 The Australian Institute of Superannuation Trustees (AIST) agreed that the caps are a marginal issue in the wider field of taxation and superannuation policy:

... we are also of the view that this is not the main game as far as equity and superannuation. In discussions with our member funds, only one, two or three per cent of members in any given year are typically affected by the operation of the caps as they stand.<sup>9</sup>

2.10 ASFA argued that these figures would increase if a whole of life approach, rather than a snapshot, was used to measure this statistic.<sup>10</sup> However, the ASFA did not provide modelling on what proportion of people would be affected by the caps over their lifetime. The committee takes the AIST's point that it is very much a minority who are affected by the caps.

2.11 Generally, representatives of the superannuation industry at the hearing would like the caps to be increased significantly. ASFA stated that, '[a]ggregate concessional contributions are lower than they would otherwise be and the impact on some accounts quite marked'.<sup>11</sup> SPAA reported that, if the caps had remained at previous levels, an additional \$15 billion would have been contributed to super two years ago, and an

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8 Ms Ruth Gabbitas, Treasury, *Committee Hansard*, Canberra, 16 March 2012, p. 4.

9 Mr David Haynes, Australian Institute of Superannuation Trustees (AIST), *Committee Hansard*, Canberra, 16 March 2012, p. 6.

10 Mr Ross Clare, ASFA, *Committee Hansard*, Canberra, 16 March 2012, p. 6.

11 Mr Ross Clare, ASFA, *Committee Hansard*, Canberra, 16 March 2012, p. 5.

additional \$12 billion in the past 12 months, within the self managed sector.<sup>12</sup>

- 2.12 The committee's response to these comments is fourfold. Firstly, the level of the caps in general is outside the scope of the inquiry because the Bill only provides for a one-off pause in the concessional cap's indexation. Secondly, the caps were reduced to improve funding for the pension, which is also relevant to retirement incomes. The committee supports this policy as bringing about more equitable retirement incomes in Australia. Thirdly, the caps are already generous. Finally, as discussed in chapter 1, the Government has announced a \$50,000 concessional cap for individuals with a superannuation balance up to \$500,000.

## Conclusion

- 2.13 The committee concludes that Schedule 3 should be passed in its present form. The Government has made a decision to improve its fiscal position. It is only fair that the superannuation sector makes a contribution to this. The size of this contribution is small and its impact on those affected marginal. The alternative is to wait until conditions deteriorate as a result of the business cycle, when the costs of sound fiscal decisions rise sharply. Making firm decisions now will put Australia on a better footing for the future.

## Schedule 4 – Excess contributions tax refund

### Background

- 2.14 Schedule 4 enables eligible individuals the option to have excess concessional contributions of \$10,000 or less refunded to them. If the refund is accepted, the excess concessional contributions will be assessed as income for the year of the excess contributions, rather than being subject to excess contributions tax. The policy intent is to provide relief to those who have inadvertently made superannuation contributions in excess of their concessional contributions cap.
- 2.15 Opinions in the superannuation industry ranged between those who do not support the schedule and those who support its intent but have suggestions as to how to improve it.

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12 Ms Andrea Slattery, SPAA, *Committee Hansard*, Canberra, 16 March 2012, p. 5.

- 2.16 ICAA oppose the schedule. In their submission they state that while they appreciate the policy driving the amendments they nonetheless 'believe that the availability of the relief is so limited that it does little to truly address the inequities of the excess contributions tax regime.'<sup>13</sup> This relates to one of the features of the proposal, namely that the refund is only available on the first occasion that it occurs. A taxpayer cannot waive the refund on the first occasion if it is only for a small amount and then use it in a later year.
- 2.17 ICAA also point out that the excess contributions tax was only ever intended as a disincentive to exceeding the caps; it was not intended as a source of revenue. In their view, the penalty regime for inadvertently exceeding those caps is not reasonable.<sup>14</sup> CPA Australia took the same view as ICAA.<sup>15</sup>
- 2.18 ASFA expressed their support for the proposed legislation and believed that it will be effective. However, they also advised that the rules concerning excess concessional contribution are frustrating for many people, who end up being caught out by their lack of detailed knowledge of the timing and volume amount of contributions made on their behalf.<sup>16</sup> In particular:
- ... due to the complex processing arrangements around determining excess contributions tax liabilities, by the time of notification of a breach the person may already be in breach again, or be in a position where a second breach of the rules is unavoidable.<sup>17</sup>
- 2.19 To remedy this, ASFA suggested a fundamental review of the operation of the excess contribution tax rules, in particular, a review of the situations in which the Commissioner may exercise his discretion and the types of discretions available.<sup>18</sup>

## Analysis

- 2.20 In evidence, Treasury outlined the legislative design behind the provisions. Their key points were that many individuals ask for a second chance once they have been informed that they have breached the cap.

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13 ICAA, *Submission 6*, p. 3.

14 ICAA, *Submission 6*, p. 3.

15 Mr Michael Davison, CPA Australia, *Committee Hansard*, Canberra, 16 March 2012, p. 8.

16 ASFA, *Submission 5*, p. 2.

17 ASFA, *Submission 5*, p. 2.

18 ASFA, *Submission 5*, p. 2.

Further, a more generous refund may be used by some individuals as merely a higher cap:

... a lot of people say they were unaware, that they were trying to do the right thing but they made excess contributions, that they should not be penalised the first time and should be given a second chance. That was a key part. The intent of the measure was that people should not be penalised, especially individuals who are on less than the top marginal tax rate because the difference of the taxation treatment really affects people on the top marginal tax rate. Whether they take a refund or not, the taxation arrangements will be identical. That was a broad part of it.

The other reason for it being a one-off is clearly that there would be a higher fiscal cost if you made it an ongoing measure and indeed it would differentiate between those who complied with their caps and those who view this as, in effect, raising the caps for a group of individuals.<sup>19</sup>

- 2.21 The AIST stated in evidence that the average amount by which taxpayers are exceeding the cap is \$8,000. Therefore, applying the refund to amounts up to \$10,000 will catch the majority of individuals who exceed the concessional cap.<sup>20</sup> The ATO estimated this proportion at 70 per cent.<sup>21</sup> In total, the measure is expected to benefit 30,000 individuals over the forward estimates.<sup>22</sup>
- 2.22 Treasury also stated that the Government is putting in place measures to improve reporting.<sup>23</sup> Indeed, Schedule 6 of this Bill creates the framework for regulations that will require employers to give an expected date when the employee's super contribution will be paid and, possibly on 1 July 2013, the date when it was paid. The AIST reported that the Government is also developing an online ATO superannuation tool that will allow individuals to track what super contributions have been made on their behalf.<sup>24</sup>

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19 Ms Ruth Gabbitas, Treasury, *Committee Hansard*, Canberra, 16 March 2012, p. 9.

20 Mr Thomas Garcia, AIST, *Committee Hansard*, Canberra, 16 March 2012, p. 10.

21 Mr Brett Peterson, ATO, *Committee Hansard*, Canberra, 16 March 2012, p. 12.

22 The Hon. William Shorten MP, Minister for Financial Services and Superannuation, *House of Representatives Hansard*, 1 March 2012, p. 1.

23 Ms Ruth Gabbitas, Treasury, *Committee Hansard*, Canberra, 16 March 2012, p. 9.

24 Mr David Haynes and Mr Thomas Garcia, AIST, *Committee Hansard*, Canberra, 16 March 2012, p. 11.

- 2.23 These measures are important because most breaches of the cap are inadvertent and are caused by uncertainty. For example, SPAA gave the following as the main reasons why people breach the caps:
- mistakes made by funds in their naming conventions;
  - administrative errors by the funds;
  - tax returns requiring cents to be detailed, putting a taxpayer 45 cents over the threshold;
  - university staff with high compulsory contribution rates with long running contracts and negotiation periods; and
  - individuals not understanding the rules.<sup>25</sup>
- 2.24 SPAA stated that a small number of individuals, probably round 1 per cent to 2 per cent, intentionally breach the caps.<sup>26</sup> ASFA advised that, although these individuals pay more tax up front, they receive benefits of 'reduced tax on earnings and tax-free withdrawals at the end.'<sup>27</sup> The committee expects that this would be a strategy for people further away from their retirement and with higher earnings potential. Therefore, the closer an individual is to retirement, the higher the costs to them of inadvertently breaching the concessional cap.
- 2.25 The key issue discussed in evidence was the industry's argument that the proposal in the Bill is only a short term solution and that the excess contributions tax should be reviewed or changed in some way.
- 2.26 However, from the committee's perspective, the difficulties in the tax arise through a combination of the tax and the uncertainty about taxpayers' contributions. Therefore, a suitable solution can address either of these matters. The Government's proposals to improve superannuation reporting through payslips and an online tool will not only reduce uncertainty, but also help individuals better engage with their superannuation. As the *Australia's future tax system* review argued, this will improve retirement incomes and retirement outcomes for many Australians.<sup>28</sup> In the wider context of superannuation reform generally, the committee regards the Bill as a suitable solution.

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25 Mrs Andrea Slattery, SPAA, *Committee Hansard*, Canberra, 16 March 2012, p. 10.

26 Mrs Andrea Slattery, SPAA, *Committee Hansard*, Canberra, 16 March 2012, p. 10.

27 Mr Robert Hodge, ASFA, *Committee Hansard*, Canberra, 16 March 2012, p. 13.

28 *Australia's future tax system, Report to the Treasurer, Part Two, Detailed Analysis*, vol. 1, December 2009, pp. 128-30.

- 2.27 Industry suggested a number of alternatives to the Bill. For example, ASFA suggested that individuals should be able to withdraw their funds when they have exceeded the cap, rather than be subject to tax.<sup>29</sup> Although this suggestion has the appearance of simplicity, the ATO advised that it would be difficult to implement and was considered and rejected in 2006:

The initial design for the contribution caps, back in 2006, was based on exactly that, to take the money back out. The issue with that tripping over were in relation to time value. If I can toss a stack of money in at the start of the year and let it sit until somebody catches up with me 18 months later, I might have made some income gains – or over the last few years it might have gone the other way. In the longer term I might have made some substantial gains which I can keep the benefit of in the fund. If you start to try and factor in things like income or change in value of the investment, it gets very individual and very complex very, very quickly. You also get the repeat process. Just as there are some individuals who see personal benefit for themselves in exceeding the contribution caps quite deliberately, there will be individuals who will see benefit for themselves in engaging in some form of repeat behaviour.<sup>30</sup>

- 2.28 CPA Australia suggested that, instead of a one-off refund of up to \$10,000, there should be a lifetime refund of up to \$25,000.<sup>31</sup> However, this is also difficult to implement. Treasury and the ATO stated that tracking excess contributions over a person's lifetime was complex and had already been implemented and moved away from in the past:

The ATO might want to comment on part of the administrative side, but it would add complexity. One of the reasons, when the government moved in, I think, 2006 to simplify super away from the lifetime cap and make it simpler by having annual caps, was that hopefully it would be easier for people to be aware and know what their contributions were. It would be much simpler in that sense. A lifetime cap still has issues about people who exceed their caps, so whether you have an annual or a lifetime cap you still will have a proportion of people who exceed their caps. It would be quite complicated. It would involve both individuals' funds and the ATO monitoring people's contributions over a long working

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29 Mr Robert Hodge, ASFA, *Committee Hansard*, Canberra, 16 March 2012, p. 13.

30 Mr Brett Peterson, ATO, *Committee Hansard*, Canberra, 16 March 2012, p. 16.

31 Mr Michael Davison, CPA Australia, *Committee Hansard*, Canberra, 16 March 2012, p. 8.

life, which means you could be looking at monitoring some people for 50-60 years ...<sup>32</sup>

It is prone to error over such an extended period and it is dependent upon data that is reported each year by the funds and often re-reported in a number of instances. It is a difficult piece of work. RBL [reasonable benefit limits] was more a lifetime kind of arrangement and it proved to be exceedingly difficult. In fact, it was too difficult a guess.<sup>33</sup>

## Conclusion

- 2.29 The committee notes industry's concerns about the excess contributions tax and whether the provisions in the Bill provide a full solution to it. However, the problem with the tax is also due to uncertainty around super contributions. The Government is addressing this uncertainty through better payslip reporting of super and the development of an online tool through the ATO to allow individuals to determine their actual super contributions. In this context, the Bill is appropriate. It also prevents individuals gaming the system and treating the refund arrangement as an extension of the concessional cap.

## Schedule 5 – Disclosure of superannuation information

### Background

- 2.30 Schedule 5 includes a further exception to the secrecy provisions in Division 355 of Schedule 1 to the *Taxation Administration Act 1953*. This will allow the ATO to disclose superannuation information to a regulated superannuation fund or public sector superannuation scheme, an approved deposit fund, retirement savings account (RSA) provider or their administrators for certain purposes. The intent of this schedule is to enable the ATO to provide the bodies with greater access to information that it holds on members' superannuation interests. This will allow funds to assist their members to find and consolidate their multiple and lost superannuation accounts.

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32 Ms Ruth Gabbitas, Treasury, *Committee Hansard*, Canberra, 16 March 2012, pp. 12-13.

33 Mr Brett Peterson, ATO, *Committee Hansard*, Canberra, 16 March 2012, p. 13.

2.31 The high number of multiple accounts and their significant value demonstrates that there is a clear need for legislation of this type. AIST stated in evidence:

... there are 28 million accounts for less than half this number of working Australians, and 1.3 million new accounts being created every year for net workforce growth of 200,000. Coupled with the five million accounts worth \$20 billion being recorded in the [register] means that the whole suite of these measures should be addressed as a policy priority.<sup>34</sup>

2.32 There was general support for Schedule 5. CPA Australia supported the schedule,<sup>35</sup> as did ASFA:

We see this legislation as an essential piece of the infrastructure required for enabling and facilitating the consolidation of accounts as set out in the Government's Stronger Super proposals. The legislation will also assist with reuniting members of superannuation entities with superannuation amounts held for their benefit by the ATO under the provisions of a range of superannuation related acts.<sup>36</sup>

2.33 The hearing covered two issues. The first related to privacy protections for individuals, in particular to ensure that their details would not be disclosed without their consent. The second, related to this, is that when an individual's details are disclosed to a super fund, that the material should be used for consolidation, rather than promotional purposes. AIST stated:

Accessed information should not be used carte blanche to drive aggressive marketing campaigns where a likely result is that fund members could end up dazed and confused, and possibly bombarded with multiple requests for consolidation.<sup>37</sup>

2.34 The reason for this concern was based on prior attempts at consolidation:

... on occasion funds would use SuperMatch in order to, quite legitimately, contact people to let them know about any small, lost and inactive accounts. Each time a fund undertook that exercise it regularly caused a massive spike in the number of contacts that we received in our call centre from people who had received

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34 Mr David Haynes, AIST, *Committee Hansard*, Canberra, 16 March, 2012, p. 13.

35 CPA Australia, *Submission 3*, p. 3.

36 ASFA, *Submission 5*, p. 2.

37 Mr David Haynes, AIST, *Committee Hansard*, Canberra, 16 March, 2012, p. 13.

communications. They did not know what it meant, they did not know what they were meant to do and they did not know how to compare different pieces of information.<sup>38</sup>

## Analysis

2.35 In response to the consent issue, the ATO stated that funds would need to obtain an individual's consent in writing before they approached the ATO for information. This is similar to current arrangements.<sup>39</sup> Breaching this requirement would have regulatory implications:

The SuperMatch will require a fund to submit a tax file number as part of the search. You will not get the data without the tax file number. Superannuation Industry (Supervision) Regulations ... require them to have express agreement from a member in order to use their TFN for that particular purpose. The system will not allow access without that and the person will not be able to use the system without that express agreement ...

[New SuperMatch agreements] ... will require them to endorse the fact that they will only use SuperMatch in accordance with the law, in other words, that they will have the express permission of the individual to use their TFN and to conduct the search on SuperMatch before they are signed up to use the facility at all ...

[The ATO will operate] with the backing of the law that requires the fund to have that sort of consent. If we were to discover that a fund had breached the agreement, in other words, they had been breaking the law, we would consider whether we needed to report that breach to APRA from a regulatory perspective and of course we would have to consider whether we would continue to allow that entity to have ongoing access to SuperMatch.<sup>40</sup>

2.36 On the basis of this evidence, the committee considers there will be sufficient protection for a fund to require an individual's consent before it can approach the ATO on their behalf.

2.37 In relation to how funds can approach individuals, the AIST made the following suggestion:

While we support [the] approach [which] is being made to members with multiple accounts, we say that the approaches

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38 Mr David Haynes, AIST, *Committee Hansard*, Canberra, 16 March, 2012, p. 16.

39 Mr Brett Peterson, ATO, *Committee Hansard*, Canberra, 16 March, 2012, p. 14.

40 Mr Brett Peterson, ATO, *Committee Hansard*, Canberra, 16 March, 2012, p. 14.

should be made in a consistent format containing prescribed information. This would also ensure that members can be made aware of the net returns, level of risk and insurance of the fund that are being consolidated into and indeed a comparison of the criteria could be provided in the letter.<sup>41</sup>

- 2.38 While ASFA also noted the privacy issue and the possibility that this might be used for inappropriate purposes (such as ‘poaching’ members), they expressed their confidence that these would be resolved by the overall system itself. At the hearing ASFA advised that:

The way we look at this is that this piece of legislation is enabling legislation ... I would suspect that, within that legislation, it would support the fact that when this data comes out from the ATO it can only be used by the fund for the purpose for which it is given, which is for the autoconsolidation of accounts or for some other purpose, in the same way that the current SuperMatch agreement restricts what the data can be used for when it is received. I suspect there will be all these checks and balances through the system which, while not being clear to the member, will address ... concerns about inappropriate behaviour going on, because the legislation will effectively prescribe the purposes for which that data could be used.<sup>42</sup>

- 2.39 This issue is being pursued by the ATO via a funds reform reference group. ASFA advise that the suggestion of the AIST for prescribed form is supported by others in the industry and the ATO appear very receptive to it.<sup>43</sup>

## Conclusion

- 2.40 The committee notes the widespread support for Schedule 5 amongst stakeholders. Schedule 5 is expected to strengthen the *de facto* property rights of Australians by helping to reunite them with their lost super interests.
- 2.41 A few witnesses raised concerns about the uses to which such information could be put. However, careful consideration of the issue revealed that proposals to address these reservations were already under consideration. The committee concludes that the Bill, in conjunction with other

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41 Mr David Haynes, AIST, *Committee Hansard*, Canberra, 16 March, 2012, p. 14.

42 Mr Robert Hodge, ASFA, *Committee Hansard*, Canberra, 16 March, 2012, p. 16.

43 Mr Robert Hodge, ASFA, *Committee Hansard*, Canberra, 16 March, 2012, p. 16.

requirements on the superannuation system, will ensure that the information will only be used for appropriate purposes.

## Schedule 6 – Payslip reporting

### Background

- 2.42 Schedule 6 requires employers to report on payslips any information prescribed in the regulations about super contributions. The regulations will require employers to report (a) the amount of superannuation contributions and the date on which the employer expects to pay it, or (b) the actual amount and day the super contribution is transmitted. At the commencement of Schedule 6 and the expected regulations, employers will only be obligated to record the amount and the expected date of payment. An employer is required to make a super payment no later than the 28<sup>th</sup> day of the first month following each quarter.
- 2.43 As previously outlined, to ensure all super fund recipients are afforded the benefits of this amendment, the requirements will be transferred to the SIS Regulations. No new penalties for failing to make a contribution on the date nominated are proposed, although employers may still be liable for a penalty under other provisions.
- 2.44 Schedule 6 is a prelude to the requirement for payslips to report the actual super contribution paid to an employee.<sup>44</sup> The AIST recommended that:
- ... the Explanatory Memorandum be amended to note forthcoming Regulations to require the reporting of *actual* contributions paid from 1 July 2013 (subject to there being no significant payroll costs at that time). This will make the Explanatory Memorandum consistent with the Government's policy announcement of September 2011 in the *Stronger Super* information pack.<sup>45</sup>
- 2.45 Treasury clarified that reporting actual contributions was the second step in the process, and further consultation was necessary with industry before the commencement date of 1 July 2013 was confirmed.<sup>46</sup>

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44 Ms Ruth Gabbitas, Treasury, *Committee Hansard*, Canberra, 16 March 2012, p. 19; Mr David Haynes, AIST, *Committee Hansard*, Canberra, 16 March 2012, p. 19.

45 AIST, *Submission 2*, p. 9.

46 Ms Ruth Gabbitas, Treasury, *Committee Hansard*, Canberra, 16 March 2012, p. 19.

- 2.46 Schedule 6 was broadly supported. However, submitters and witnesses made recommendations about aspects of the schedule. These focussed on the timing and burden imposed by increasing the obligations on employers to require the reporting of actual super contributions, and the relative benefit to employees of only recording the expected date of payment.

## Analysis

- 2.47 Allowing employers sufficient time to update their payroll software was of concern to witnesses.<sup>47</sup> The committee was told that the proposal to introduce the reporting of the actual super contributions could take time for businesses to implement. The evidence suggested that reporting the amount of super due and when it was expected to be paid was technically easier. The EM supported this view:

This Schedule will require some modification of payroll software, while the proposed reporting of actual contributions may require more extensive modification.<sup>48</sup>

- 2.48 The AIST did not have a position on the implementation of Schedule 6, in its preliminary form. However, the AIST supported the 1 July 2013 date for the commencement of the proposed regulation requiring the reporting of actual super contributions on payslips.<sup>49</sup> The AIST told the committee:

We support the ultimate requirement to show actual contributions to superannuation. But we have sympathy with the position of software developers and payroll providers. We think that a start date of 1 July 2013 would enable the industry to show actual contributions. But we possibly accept that they need a little bit more time to get that functionality ready so that employers are able to show the date on which they expect to make the contribution. Different payroll providers are at different levels of readiness in this regard.<sup>50</sup>

- 2.49 The ASFA noted that the subsequent proposal to show actual super contributions would be complicated to implement. The ASFA outlined:

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47 Mr Ross Clare, ASFA, *Committee Hansard*, Canberra, 16 March 2012, p. 17; Mrs Andrea Slattery, SPAA, *Committee Hansard*, Canberra, 16 March 2012, p. 18.

48 Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012, *Explanatory Memorandum*, p. 64.

49 Mr David Haynes, AIST, *Committee Hansard*, Canberra, 16 March 2012, p. 17.

50 Mr David Haynes, AIST, *Committee Hansard*, Canberra, 16 March 2012, p. 18.

The reason for that is that if you are in a large organisation you would have a standalone payroll system that looks at your employees and does your payroll. That is separate from your accounting function. Effectively, putting an actual date on the payslip requires you to link your accounting system with your payroll system to transfer the information of when the payments were made. That is a very complicated exercise. That is part of the reason why the payroll industry has been quite concerned about the proposal to introduce that requirement.<sup>51</sup>

2.50 During previous consultations, the ICB provided Treasury with comments on the reporting of super contributions.<sup>52</sup> The ICB suggested that:

...most businesses will simplify the process and default the 'date on which they expect to make their contribution'...This will not necessarily bare [sp] any resemblance to the date of payment but it is arguably the 'expected' date may be later than when paid. Hence an administrative burden for all business, that meets the obligation with no useful information being provided.<sup>53</sup>

2.51 Similarly, ICAA was concerned about the cumulative effect of constantly imposing administrative tasks on small businesses. ICAA noted that many small businesses operate using basic payroll systems and that the schedule represented another administrative burden on them.<sup>54</sup>

2.52 Technology is progressing to support the proposed changes. The AIST provided the committee with a working example of a payslip from the IQ Group that showed the actual super contribution an employer received. The AIST told the committee that '[t]he capability exists now and it is being used by employers'.<sup>55</sup>

2.53 The committee heard evidence that payroll technology is constantly evolving to stay compliant with government regulations. ASFA stated:

It is interesting because with the introduction of the superannuation standards, which from 1 July 2014 will require employers to pay contributions electronically, we are seeing a trend that the payroll package is now being more fully integrated

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51 Mr Robert Hodge, ASFA, *Committee Hansard*, Canberra, 16 March 2012, p. 18.

52 The Institute of Certified Bookkeepers (ICB), 'Submissions: Exposure Draft – Payslip Reporting of Superannuation Contributions', Treasury, 16 February 2012, pp. 1-2.

53 ICB, 'Submissions: Exposure Draft – Payslip Reporting of Superannuation Contributions', Treasury, 16 February 2012, p. 1.

54 Ms Elizabeth Westover, ICAA, *Committee Hansard*, Canberra, 16 March 2012, p. 19.

55 Mr David Haynes, AIST, *Committee Hansard*, Canberra, 16 March 2012, p. 17.

into the accounting package, so they are sold as a single suite that does everything for the employer. There is a very strong anticipation that most employers will meet their electronic contribution requirements through a payroll package that is purchased as part of an overall accounting package. It is just where things are going.<sup>56</sup>

2.54 ICAA supported Schedule 6 but had reservations about its usefulness:

... the new legislation essentially requires reporting of anticipated superannuation contributions and the date on which the employer expects to pay them. This will assist employees in reconciling their superannuation entitlements, however it is limited in its usefulness in determining what contributions have actually been made for them and when. This is vital information for those who are attempting to maximise their super contributions without exceeding their contribution caps.<sup>57</sup>

2.55 The committee recognises that reporting actual contributions is the ultimate goal. However, the AIST told the committee that as an interim measure the current schedule acted to promote awareness amongst employees about the state of their superannuation - even if employers consistently took the default position of printing the last day of the super payment obligation.<sup>58</sup> As the AIST stated:

... Even if you put '28 days after the end of the quarter', that at least gives people an idea and allows them to say that it has not gone in yet. A lot of people reading their payslips would not understand that it is accrued. They would look at it and think the money has gone in and they would never check. If there was something written there that said, 'It is expected that this will go in by 28 July,' for instance, then they might start saying, 'I'd better check.'<sup>59</sup>

2.56 CPA Australia concurred that the schedule would help employees understand and keep track of their superannuation.<sup>60</sup> The AIST and

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56 Mr Robert Hodge, ASFA, *Committee Hansard*, Canberra, 16 March 2012, p. 21.

57 ICAA, *Submission 6*, p. 4.

58 Mr David Haynes, AIST, *Committee Hansard*, Canberra, 16 March 2012, p. 18.

59 Mr Thomas Garcia, AIST, *Committee Hansard*, Canberra, 16 March 2012, p. 18.

60 Mr Micheal Davison, CPA Australia, *Committee Hansard*, Canberra, 16 March 2012, p. 21.

CPA Australia supported the proposal to report the actual super contributions on payslips.<sup>61</sup>

## Conclusion

2.57 In relation to the start up date, the committee suggests that it would be more efficient to have a single commencement date which would provide for the reporting of actual contributions. Therefore, the committee has concluded that if the industry could meet the 1 July 2013 deadline for introducing the reporting of actual contributions then the government should cease plans for interim reporting. However, if the industry cannot meet the proposed 1 July 2013 deadline for actual reporting then, in this case, interim measures should be considered.

## Schedule 7 – Tax refunds

### Background

- 2.58 The committee received a submission from the Law Council of Australia (the Council) on these amendments. The Council raised six issues.<sup>62</sup>
- 2.59 Firstly, the Council was concerned that there is no time limit within which the Commissioner must commence verification activity. They argue that the Commissioner could in practice withhold the refund, notify the taxpayer and then do nothing further until issuing a request for information. The Council recommended that the ATO should be required to issue the request for information along with the withholding notification.
- 2.60 The Council was also concerned that there is no end date for the verification process. The Council would like to see a fixed deadline for verification of between 30 and 60 days. Adding a provision where the taxpayer could consent to an extension of time could benefit both parties:
- if the taxpayer consents, then the taxpayer does not need to decide whether to object against an assessment under Part IVC;

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61 Mr David Haynes, AIST, *Committee Hansard*, Canberra, 16 March 2012, p. 18; Mr Michael Davison, CPA Australia, *Committee Hansard*, Canberra, 16 March 2012, p. 17.

62 The discussion is drawn from the Law Council of Australia, *Submission 7*, pp. 2-5.

- if the taxpayer does not consent, the ATO can issue an assessment and the taxpayer can object against the whole assessment under Part IVC, rather than conducting two sets of proceedings (one for the refund and one for the assessment); and
  - if the taxpayer does not consent, the ATO can release the refund and commence an audit.
- 2.61 Under the proposed schedule, the potential effective time before a taxpayer can commence Part IVC proceedings to object to the ATO's decision to withhold a refund is 194 days.<sup>63</sup> The Council believes that this period is too long and that the burden of proof for these matters should lie with the ATO.
- 2.62 Fourthly, the Council argued that the taxpayer's right to object to a decision is ineffective because the ATO can respond by issuing an assessment. The taxpayer will then have to restart the objections process. Further, the ATO does not need to give reasons for its decision to retain the refund. This makes it difficult for the taxpayer to object to the ATO's decision.
- 2.63 In the view of the Council, there is no obligation on the Commissioner to refund the amount or part thereof once he becomes satisfied that it is payable to the taxpayer. Conceivably, the taxpayer would have to commence formal proceedings to enforce a refund in these circumstances. The Council would like this also to be addressed.
- 2.64 Finally, the Council's interpretation of the provisions was that the ATO can verbally inform the taxpayer of its decision to withhold a refund. The Council is of the view that this can create difficulty in proving facts relating to a matter. The Council argued that the ATO's notification to the taxpayer should be in writing.
- 2.65 The Council's priority recommendation was that there should be a deadline for the Commissioner to either pay the refund or issue an assessment, subject to the taxpayer being able to consent to an extension of time for the Commissioner.<sup>64</sup>

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63 Withholding for 14 days; objection within 60 days; 60 days must pass before the taxpayer can require the ATO to decide on the objection; and after a further 60 days, the ATO is deemed to have disallowed the taxpayer's objection – see Law Council of Australia, *Submission 7*, p. 4.

64 Ms Gina Lazanas, Law Council of Australia, *Committee Hansard*, Canberra, 16 March 2012, p. 23.

## Analysis

2.66 The issue of whether there should be a limit on the Commissioner's power to withhold a refund involves balancing two interests. These are the interests of the revenue in reasonably ensuring there is not fraud, evasion or error in the taxpayer's claim, and the interests of compliant taxpayers, who may be looking forward to the refund to assist with their cash flow.

2.67 At the hearing, Treasury stated the Bill had taken the most practical course by using a reasonableness test. Imposing a deadline on the ATO could lead to poor outcomes:

If I might add something about there not being an end date, ... it does depend on the circumstances. In looking at what would be an appropriate form for the provision, there was concern that, in having an end date, that would become the default, and that would be the default against which reasonableness was balanced or measured, so to speak, then making all the other factors pointless.

There was also a concern that having a specified end date might undermine the integrity of the provision and also of the refund system so that taxpayers might say it was 180 days or something like that, then systems could be set up so as to avoid delaying things. So it was difficult for the commissioner to actually verify that information, and then the 180 days – or whatever the amount of days was – would expire and the commissioner would have to release the refund.<sup>65</sup>

2.68 In other words, a set period could allow the ATO to use that as a default. Therefore, if a fixed period were used, a shorter time would be preferable to reduce the scope for potential abuse by the ATO. However, a set period could work to the advantage of non-compliant taxpayers because, if they blocked attempts by the ATO to secure information, they would receive their refund through the passage of time. On this basis, a longer fixed period would be preferable.

2.69 Treasury argued that there is no one-size fits all solution to this issue.<sup>66</sup> On the basis of the above analysis, the committee agrees. For example, six to nine months could be required for the Commissioner to make the necessary inquiries in relation to a complex matter. Treasury advised the committee that this opinion was expressed by the Federal Court in the

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65 Ms Margot Tredoux, Treasury, *Committee Hansard*, Canberra, 16 March 2012, p. 26.

66 Ms Brenda Berkeley, Treasury, *Committee Hansard*, Canberra, 16 March 2012, p. 25.

*Multiflex* court decision.<sup>67</sup> On the other hand, a matter of weeks will only be required in simpler matters, especially where the taxpayer seeks to assist the ATO. Therefore, the committee supports a reasonableness test rather than a fixed period.

- 2.70 The ATO and Treasury responded to some of the Council's other recommendations. For example, the Council proposed that, if the Bill had a maximum time period for the ATO to withhold a refund, the Commissioner could issue an assessment at the end of that period as a means of securing the revenue and expediting the process in that the taxpayer would then be in a position to object to the assessment. However, the ATO stated that it believed that assessments should be as accurate as possible, rather than being used as a trigger for progressing a tax matter. Further, the ATO argued that pushing a matter to litigation would not be useful.<sup>68</sup> The committee supports this reasoning.
- 2.71 In relation to the Council's proposal that the ATO's notifications should be in writing, Treasury stated that verbal communications are more effective at solving issues. If the ATO had to notify taxpayers in writing, then communications would take longer and it would discourage effective communication between the ATO and taxpayers who may have their refunds withheld. ATO staff make contemporaneous notes of these conversations.<sup>69</sup> The committee recognises that a letter is an ideal way of proving that notification occurred, but the committee believes that taxpayers overall will get a better service from the ATO if initial communications are verbal. The ATO can always issue a letter if an issue appears high risk.
- 2.72 The ATO and Treasury made some other general points that give the committee additional comfort about the Bill. For instance, Treasury stated that the time periods set down in the Bill are more advantageous to taxpayers than what has been the ATO's administrative practice in the past.<sup>70</sup>
- 2.73 Further, the ATO has a low rate of withholding refunds. For GST, there are 2.2 million Business Activity Statements (BASs) that require a refund and the ATO withholds only 55,000, or 2.6 per cent, for verification. Up to \$600 million in adjustments are made in this process, out of \$48 billion in annual refunds. In 2010-11, 30,000 of these BASs were released within 28

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67 Ms Brenda Berkeley, Treasury, *Committee Hansard*, Canberra, 16 March 2012, p. 25.

68 Mr James O'Halloran, ATO, *Committee Hansard*, Canberra, 16 March 2012, p. 28.

69 Ms Brenda Berkeley, Treasury, *Committee Hansard*, Canberra, 16 March 2012, p. 29.

70 Ms Brenda Berkeley, Treasury, *Committee Hansard*, Canberra, 16 March 2012, pp. 23, 27.

days and 5,600 were released in over 100 days. Fifty per cent of this final group had their refunds adjusted.<sup>71</sup> Therefore, the committee is satisfied that the ATO currently applies an appropriate level of judgment in withholding refunds.

- 2.74 Finally, Treasury reported that it had changed the draft legislation in response to previous consultations, a comment with which the Council agreed.<sup>72</sup>

## Conclusion

- 2.75 Tax administration legislation must strike a balance between the interests of the revenue and taxpayers on several levels. For example, it must encourage and reward compliance, but also give taxpayers and the ATO the opportunity to assert their respective rights. The arrangements in the Bill provide an appropriate balance.
- 2.76 The key provision in the schedule is that the Commissioner must act reasonably. The committee accepts that this represents some uncertainty to taxpayers, and the arguments presented by the Council were aimed at reducing this uncertainty. However, giving some discretion to the ATO to act reasonably is the best way of balancing all the different interests in tax administration, including taxpayer uncertainty, because circumstances vary so greatly between taxpayers.
- 2.77 Much public administration relies on officials exercising appropriate judgment. The ATO's track record in this area, combined with the design of the legislation, indicates that the Bill will implement the policy intent.

## Overall conclusion

- 2.78 The Bill continues the Government's program of superannuation reforms. In particular, the Bill needs to be considered in a wider context. For example, Schedule 3 pauses indexation of the superannuation concessional cap in 2013-14, leading to fiscal savings of approximately half a billion dollars over the forward estimates. These provisions reflect the Government's fiscal strategy and it is reasonable for the superannuation sector to make a contribution to this strategic goal.

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71 Mr James O'Halloran, ATO, *Committee Hansard*, Canberra, 16 March 2012, pp. 24, 29.

72 Ms Brenda Berkeley, Treasury, *Committee Hansard*, Canberra, 16 March 2012, p. 24; Ms Gina Lazanas, Law Council of Australia, *Committee Hansard*, Canberra, 16 March 2012, p. 28.

- 2.79 Schedule 4 implements a one-off refund for individuals who exceed the contribution cap by up to \$10,000. The issue that the Bill seeks to address, namely individuals inadvertently exceeding the cap and being subject to excess contributions tax, is due to uncertainty about superannuation payments combining with the tax. The Government has a program of reforms in this area, including payslip reporting of super and the development of an online tool through the ATO for people to track their super contributions. Therefore, although the superannuation industry sought a review of the excess contributions tax, the committee prefers Schedule 4 because it provides targeted relief to taxpayers that is appropriate within these wider reforms.
- 2.80 Schedule 5 facilitates the disclosure of information by the ATO to super funds about the details of members' accounts. Currently, there are 5 million lost superannuation accounts worth \$20 billion. Further, there are 1.3 million accounts being created every year for net workforce growth of 200,000. On these statistics, there is a clear need for legislation to facilitate consolidation.
- 2.81 Schedule 5 is designed to widen the number of accounts that can be searched by super funds for the purpose of reuniting members with their lost super accounts. The hearing focussed on the questions of whether individuals would be providing consent for their details to be disclosed and whether there would be controls on the material that funds would be sending to individuals after information was disclosed to them. The hearing confirmed that consent would be required and that the ATO is receptive to individuals not being subject to promotional campaigns when the object of disclosure is account consolidation. The committee drew these conclusions partly on the basis of the general system of superannuation regulation.
- 2.82 Schedule 6 allows the Government to make regulations to require employers to provide certain information on payslips about superannuation. The aim is to initially require the expected date of payment of the contribution, with the longer term aim of providing the actual date of payment. This will help individuals engage with their super and give them some information that will assist in making inquiries, where appropriate, with their employers. Even if some employers initially put a default date of the 28<sup>th</sup> day after the end of the quarter, the committee believes that this will provide useful information to employees and serve as a reminder to employers.
- 2.83 The remainder of the Bill deals with other tax matters. The key provisions for this inquiry are in Schedule 7, which provides a legislative framework

for the ATO to withhold tax refunds if they are high risk. The key element of this framework is that the Commissioner can only hold a refund for as long as is reasonable. This follows the recent *Multiflex* court decision, which found that the Commissioner does not currently have the discretion to withhold a refund and must pay it as soon as practicable. The Law Council of Australia gave evidence on this schedule and its key concern was to reduce uncertainty for taxpayers, particularly through having a set period for which the Commissioner could withhold a refund. The committee found that this was not necessary and that the reasonableness test in the legislation was the best way of balancing the interests of taxpayers and the revenue.

- 2.84 The final two schedules in the Bill covered technical GST matters for which the committee did not receive submissions or stakeholder comment.
- 2.85 In summary, the Bill makes important reforms to the superannuation system, especially when viewed in their wider context. It also sets an appropriate balance between taxpayers and the revenue in allowing the ATO to withhold high risk refunds. The Bill should pass.

### **Recommendation 1**

- 2.86 **That the House of Representatives pass the Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012 as proposed.**

Julie Owens MP  
Chair  
28 March 2012