The Parliament of the Commonwealth of Australia

### Advisory Report on the Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012

House of Representatives Standing Committee on Economics © Commonwealth of Australia 2012

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### Chair's foreword

The Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012 (the Bill) continues the Government's superannuation reforms and consolidates aspects of the tax system. The Bill will simplify superannuation consolidation, give individuals relief from the excess contributions tax, increase the information about superannuation contributions on payslips, pause the indexation of the superannuation concessional cap and provides the ATO with the discretion to withhold high risk tax refunds.

Schedule 1 ensures that a supply made by a health care provider to an insurer, government entity, compulsory third party scheme operator, or other certain bodies, is treated as a GST-free supply. Following a court case in 2009, Schedule 2 restores the policy intent that, when funded through appropriations, the non-commercial activities of government-related entities are not subject to GST.

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. It is anticipated that the impact on the relatively small number of individuals that will be affected will be marginal but the cumulative impact will improve Australia's fiscal position.

Schedule 4 implements a one-off refund for individuals who exceed the superannuation contribution cap by up to \$10,000. This will protect individuals who inadvertently exceed the cap from being subject to the excess contributions tax. Although, the superannuation industry sought a review of the excess contributions tax, the committee supports Schedule 4 because it provides targeted relief to taxpayers.

Schedule 5 will allow the ATO to provide super funds with details of members' accounts. Members will provide their consent to the ATO prior to the disclosure of account details. Currently, there are 5 million lost superannuation accounts worth

\$20 billion and 1.3 million new accounts created every year. This measure will help people find and consolidate their super accounts.

Schedule 6 allows the Government to make regulations to require employers to provide certain information about superannuation on payslips. The regulation initially requires employers to provide the amount and expected date of payment of the contribution, with the longer term aim of providing the actual date of payment. 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.

The remainder of the Bill deals with other tax matters. The key provisions for this inquiry are in Schedule 7, which provides the ATO with the discretion to withhold and review tax refunds for as long as is reasonable. The committee believes allowing the ATO to withhold potentially high risk refunds provides the appropriate balance between taxpayers' needs and revenue protection.

In summary, the Bill builds on the Government's agenda of strengthening Australia's superannuation system and consolidates aspects of the tax system. The committee concludes that the Bill should be passed.

On behalf of the committee I thank the organisations that assisted the committee during the inquiry through submissions or participating in the hearings in Canberra. I also thank my colleagues on the committee for their contribution to the report.

Julie Owens MP Chair

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### Membership of the Committee

Chair	Ms Julie Owens MP
Deputy Chair	Mr Steven Ciobo MP
Members	Mr Scott Buchholz MP Mr Stephen Jones MP Dr Andrew Leigh MP Ms Kelly O'Dwyer MP Mr Craig Thomson MP

### **Committee Secretariat**

Secretary	Mr Stephen Boyd
Inquiry Secretary	Mr David Monk
Research Officers	Ms Zoë Smith
	Dr Phillip Hilton
Administrative Officers	Ms Natasha Petrović

### Terms of reference

On 1 March 2012 the Selection Committee requested that the Economics Committee inquire into and report on the Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012.

Under Standing Order 222(e), the House is taken to have adopted the Selection Committee's report when they are presented.

### List of abbreviations

AIST	Australian Institute of Superannuation Trustees
ANAO	Australian National Audit Office
ASFA	Association of Superannuation Funds of Australia
ATO	Australian Taxation Office
BAS	Business Activity Statement
CPA Australia	Certified Public Accountants Australia
СТР	Compulsory Third Party (schemes)
FCAFC	Federal Court of Australia Full Court
GST	Goods and Services Tax
GSTR	GST Ruling
ICAA	Institute of Chartered Accountants in Australia
ICB	Institute of Certified Bookkeepers
IGT	Inspector-General of Taxation
ITAA	Income Tax Assessment Act 1997
RSA	retirement savings account
SGC	superannuation guarantee charge
SIS Act	Superannuation Industry (Supervision) Act 1993

SMSF	Self Managed Super Fund
SPAA	Self Managed Super Fund Professionals' Association of Australia
TFN	Tax file number
The Bill	Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012
The Council	Law Council of Australia

### Recommendation

### 2 Issues in the Bill

### **Recommendation 1**

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

# 1

### Introduction

### **Referral of the Bill**

1.1 On 1 March 2012 the Selection Committee referred the Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012 (the Bill) to the committee for inquiry and report.

### Contents and structure of the Bill

### **GST**-free health supplies

- 1.2 Schedule 1 amends the *A New Tax System* (*Goods and Services Tax*) *Act* 1999 (GST Act) to ensure that certain supplies made to insurers in settling insurance claims under both private health insurance policies and taxable insurance policies are GST-free to the extent that the underlying supply to the insured is GST-free under Subdivision 38-B of the GST Act. The amendments similarly apply to supplies made to a statutory compensation scheme operator, compulsory third party scheme operator, and the Commonwealth, State and Territory governments.
- 1.3 The amendments were triggered by the Full Federal Court in July 2010 in *Commissioner of Taxation v Secretary to the Department of Transport* (*Victoria*).<sup>1</sup> There, the department had an arrangement with taxi drivers to pay them a subsidy for providing taxi services to disabled passengers. The Commissioner argued that there had been no taxable supply made by the

<sup>1 [2010]</sup> Federal Court of Australia Full Court (FCAFC) 84.

taxi operators to the department, and denied the department's claim for input tax credits. The court found for the department.

- 1.4 The court took a broad interpretation of the law. The decision could potentially affect multi-party arrangements of supplies of GST-free health related goods and services made in settlement of claims under GST-free private health insurance and taxable insurance policies. This could also extend to statutory compensation schemes and Compulsory Third Party (CTP) schemes, and in relation to certain government health funding arrangements.
- 1.5 There will be no retrospective application of these amendments, which would result in compliance costs to change the GST treatment of past supplies. Organisations will be protected against paying underpaid GST if they have relied on GST Ruling 2006/9 (GSTR) to treat supplies as non-taxable. No GST will have been paid in acquiring the supplies, so insurers or other third party acquirers will not be disadvantaged.<sup>2</sup>

### GST treatment of appropriations

- 1.6 Schedule 2 of the Bill amends the GST Act to restore the policy intent that the non-commercial activities of government entities are not subject to GST. Paragraph 9-15(3)(c) of the GST Act currently provides that payments between government related entities are not treated as consideration if the payments are specifically covered by an appropriation under Australian law. This then excludes the payments from GST.
- 1.7 The Full Federal Court considered this provision in *TT-Line Co Pty Ltd v Commissioner of Taxation.*<sup>3</sup> The court decided that the provision will only apply where the terms of the appropriation are such that funds can only be paid to a government related entity. It will not apply where the appropriation permits a payment to either a government related entity or non-government related entity.
- 1.8 The amendments provide that, where the payment meets certain conditions, it will not be treated as consideration and will not be subject to the basic GST rules. The conditions are that the payment:
  - is made between government related entities for making a supply;

<sup>2</sup> Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012, *Explanatory Memorandum (EM)*, pp. 9-11.

<sup>3 [2009]</sup> FCAFC 178.

- is paid under a government appropriation or pursuant to specified intergovernmental health reform arrangements; and
- satisfies a non-commerciality test.<sup>4</sup>

### Superannuation general concessional contributions cap

1.9 Schedule 3 amends the *Income Tax Assessment Act 1997* (ITAA) to temporarily pause the indexation of the cap so that it will remain fixed at \$25,000 up to and including 2013-14. The pause will save \$485 million over the forward estimates, as detailed in the table below.

Table 1.1	Projected savings by p	soucing indevation	of the ear in 2012 11
	Projected Savinds by t	ausino moexanon	OF THE CAD IN 2013-14

– – \$360m \$125m	2011-12	2012-13	2013-14	2014-15
	_	_	\$360m	\$125m

Source Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012, Explanatory Memorandum, p. 4.

- 1.10 The general concessional cap is currently \$25,000. It is indexed in line with average weekly ordinary time earnings, rounded down to the nearest multiple of \$5,000. Treasury estimates that, without the amendments, the cap will increase to \$30,000 in 2013-14.<sup>5</sup>
- 1.11 The cap is important because this is the amount of superannuation that individuals can set aside annually at the concessional tax rate of 15 per cent (paid by the super fund). Individuals can exceed the concessional cap, but pay excess contributions tax of 31.5 per cent. These further amounts are limited by the non-concessional contributions cap, which is currently set at six times the general concessional contributions cap. Amounts above the non-concessional contributions cap are subject to excess contributions tax of 46.5 per cent.
- 1.12 A transitional concessional cap of \$50,000 applies to individuals aged 50 or over. This cap is not indexed and it is scheduled to expire on 1 July 2012. The Government has announced that the transitional cap will be replaced by a \$50,000 cap for individuals with super balances of less than \$500,000. The \$50,000 threshold will be indirectly indexed by being set at \$25,000 above the general concessional cap.<sup>6</sup>

<sup>4</sup> Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012, EM, pp. 19-20.

<sup>5</sup> Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012, EM, pp. 35-37.

<sup>6</sup> Treasury, *Concessional superannuation contribution caps for individuals aged 50 and over*, Consultation Paper, February 2011, p. 1.

1.13 The provisions in the Bill do not affect the indexing arrangements in the long term. The indexation provisions in section 960-285 of the ITAA will not be amended. Therefore, the provisions will allow the cap to increase by \$5,000 in 2014-15.<sup>7</sup>

### Refund of excess superannuation concessional contributions

- 1.14 Schedule 4 establishes a system whereby individuals, who exceed the superannuation concessional cap in a given year by less than \$10,000, can have the amount refunded to them. This amount will then be subject to income tax, rather than excess contributions tax.
- 1.15 The measure is expected to reduce revenue by \$19.9 million over the forward estimates, as outlined in the table below.

	-	, ,	•	
2011-12	2012-13	2013-14	2014-15	
\$0.8m	\$13.6m	\$3.3m	\$2.2m	

 Table 1.2
 Projected cost to revenue by refunding excess super contributions

*Source Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012, Explanatory Memorandum, p. 5.* 

- 1.16 A number of conditions will apply, some of which relate to a taxpayer's compliance record:
  - the Commissioner is satisfied that the individual has excess concessional contributions for a financial year;
  - the amount of excess concessional contributions is \$10,000 or less;
  - the individual has lodged an income tax return for the relevant income year within 12 months of the end of that year, or within such longer period as the Commissioner allows; and
  - the individual does not have excess concessional contributions for an earlier financial year starting from 1 July 2011.<sup>8</sup>
- 1.17 The last point has been criticised as a significant limitation on the proposal. If a taxpayer exceeds the limit by a small amount, the Australian Taxation Office (ATO) can offer that this sum be returned to them, increasing their taxable income accordingly. However, if the taxpayer does

<sup>7</sup> Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012, EM, p. 37.

<sup>8</sup> Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012, EM, pp. 39-45.

not accept this offer, then they will not be entitled to receive any offers if they exceed the limit in future.<sup>9</sup>

### Disclosure of superannuation information

- 1.18 Schedule 5 includes a further exception to the secrecy provisions in the *Taxation Administration Act 1953*. It allows the ATO to disclose superannuation information to a regulated super fund or similar body about their members' superannuation interests. This will assist these entities in finding and consolidating their members' multiple and lost super accounts.
- 1.19 The provisions are not expected to affect current secrecy arrangements around tax file numbers. The Explanatory Memorandum (EM) states:

... TFNs will continue to be protected by the existing provisions in the taxation laws and through the legally binding guidelines on the use, disclosure and storage of TFNs that are issued by the Office of the Australian Information Commissioner.<sup>10</sup>

1.20 The Office of the Australian Information Commissioner has been consulted on the amendments.<sup>11</sup>

### Payslip reporting of superannuation

- 1.21 Schedule 6 will require employers to report on payslips any information prescribed in the regulations about super contributions. The regulations will be made once the Bill has come into force. They are expected to require the employer to either state the amount paid, or the amount due and when it will be paid. This will enable employees to check that the payments have been made at the appropriate time.
- 1.22 Currently, employers are required to report on payslips either entitlements to superannuation accrued during the pay-period, or actual contributions. They are not required to report whether amounts have been paid. The legal requirement on employers is to pay super guarantee contributions within 28 days of the end of the relevant quarter. Employees may believe that listing a superannuation amount on a payslip means that it has been paid, when it may only mean that it has been accrued.

<sup>9</sup> Max Newnham, 'Super law sleight of hand trumps fairness and equity, *Sydney Morning Herald*, 9 March 2012, p. 10.

<sup>10</sup> Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012, EM, p. 58.

<sup>11</sup> Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012, EM, pp. 57-60.

- 1.23 This measure is part of the Government's *Securing Super* package. The measure complements one of the other components of the package. In particular, the Government plans to legislate to require regulated super funds and retirement savings account providers to:
  - notify members that they have either received or not received contributions during the quarter; and
  - maintain a web-based portal for members to consult; or
  - issue six-monthly notices to members, showing contributions made.
- 1.24 Current payslip reporting requirements are in the Fair Work legislation, which does not apply to public sector employers in some states and some unincorporated private sector employers in Western Australia. Therefore, the amendments in this schedule will be made to the *Superannuation Industry (Supervision) Act* 1993.<sup>12</sup>
- 1.25 The EM states that the compliance costs of this measure will be 'minimal' to 'medium'. Payroll software producers will need to add a field for the expected payment date, which employers will need to populate.<sup>13</sup>

### Tax refunds

- 1.26 Schedule 7 amends the *Tax Administration Act* 1953 to provide the Commissioner with discretion to delay paying a tax refund in order to verify the accuracy of a taxpayer's claim.
- 1.27 Until recently, the ATO's administrative practice in relation to refunds was to retain some amounts in exceptional circumstances pending verification checks. This was done on the basis that it was within the Commissioner's general powers of administration and that it was implied by the tax law. It was also seen as consistent with the requirements under the *Financial Management and Accountability Act* 1997 and the requirements for the Commissioner to pay interest on refunds if a certain period had expired under the *Taxation (Interest on Overpayments and Early Payments) Act* 1983.
- 1.28 In November 2011, the Full Federal Court handed down its decision in *Commissioner of Taxation v Multiflex Pty Ltd.*<sup>14</sup> The court found that the Commissioner is required to pay a GST refund within the time required to undertake the necessary administrative steps and to process the payment.

<sup>12</sup> Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012, EM, pp. 63-65.

<sup>13</sup> Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012, EM, p. 6.

<sup>14 [2011]</sup> FCAFC 142.

There is no provision in the law that allows the Commissioner to delay the payment to undertake additional verification, even if the ATO has reservations about the claim.<sup>15</sup>

- 1.29 The new system will apply to all running balance account surpluses and other entitlements to credits under the tax law. Broadly, the Commissioner will be able to retain an amount if it would be reasonable to require verification of the taxpayer's claim. The ATO must seek to balance the interests of both taxpayers and the integrity of the revenue. Factors to be considered include:
  - the likelihood of fraud or evasion;
  - the impact of retaining the amount on the entity's financial position;
  - whether retaining the amount is necessary for protecting the revenue; and
  - the time for which the Commissioner has already retained the revenue.
- 1.30 The ATO must inform the taxpayer that an amount has been retained under this provision. It may retain the amount until it would no longer be reasonable to require verification of the taxpayer's claim. The taxpayer may object to the Commissioner's decision to retain an amount under the normal complaints processes in Part IVC of the *Taxation Administration Act* 1953.<sup>16</sup>
- 1.31 The EM does not list any financial effects of the measure.<sup>17</sup> Although difficult to quantify, it would be expected that the measure would improve the Government's financial position, by protecting the revenue, reducing the ATO's costs, and allowing the ATO to shift resources to other high-risk parts of its operations.

### Background to the schedules examined in the inquiry

1.32 The committee received submissions on Schedules 3 to 7 and so focussed on these schedules during the inquiry. The background to these schedules is given below.

<sup>15</sup> Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012, EM, pp. 71-72.

<sup>16</sup> See Schedule 7 of the Bill.

<sup>17</sup> Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012, EM, pp. 6-7.

### Indexation of the superannuation concessional contributions cap

- 1.33 The tax treatment of superannuation was substantially amended in 2007 with the *Tax Laws Amendment (Simplified Superannuation) Act 2007.* The then Treasurer stated in his second reading speech that the legislation would 'cut the number of pages of superannuation law in the income tax assessment acts by over a third'.<sup>18</sup> These changes introduced a general concessional cap of \$50,000, to be indexed annually. Indexation was based on average weekly ordinary time earnings, with a base period of the final quarter of 2006.<sup>19</sup> The then Treasurer stated that the superannuation tax concessions would be appropriately targeted through a number of transitional caps. This included a limit of \$450,000 per person over three years on contributions from post-tax income.<sup>20</sup>
- 1.34 The review, Australia's future tax system, considered retirement incomes. In one of its consultation papers, the review panel stated that the superannuation caps and concessional arrangements favoured higher income earners with higher marginal tax rates. It also noted that, in 2005-06, 5 per cent of individuals accounted for 37 per cent of concessional superannuation contributions.<sup>21</sup>
- 1.35 The general concessional cap was changed in 2009 to the system applying today. It was reduced to \$25,000 and the base period for indexation was set to the final quarter of 2008. The original \$50,000 cap only applied to the 2007-08 and 2008-09 financial years. In his second reading speech, the Treasurer noted the opportunity to more fairly distribute government assistance in this area. The budget savings from this measure were directed to increasing the base rate for the pension.<sup>22</sup>
- 1.36 The final reports for the *Australia's future tax system* review were completed in December 2009 and released in May 2010. They stated that, 'The structure of the existing tax concessions is inequitable because high income earners benefit much more from the superannuation tax

<sup>18</sup> The Hon. Mr Peter Costello MP, Treasurer, *House of Representatives Hansard*, 7 December 2006, p. 1.

<sup>19</sup> Sections 292-20 and 960-285 of the *Income Tax Assessment Act* 1997, as amended by the *Tax Laws Amendment (Simplified Superannuation) Act* 2007.

<sup>20</sup> The Hon. Mr Peter Costello MP, Treasurer, *House of Representatives Hansard*, 7 December 2006, p. 2.

<sup>21</sup> Australia's future tax system, 'Retirement income consultation paper, 3 – An acceptable retirement income system', viewed on 13 March 2012 at http://taxreview.treasury.gov.au/content/ConsultationPaper.aspx?doc=html/publications/ Papers/Retirement\_Income\_Consultation\_Paper/Chapter\_3.htm.

<sup>22</sup> The Hon. Mr Wayne Swan MP, Treasurer, *House of Representatives Hansard*, 27 May 2009, p. 4443.

concessions than low-income earners'. The review made some fundamental reform recommendations, in particular that super contributions in the fund should no longer be taxed and employer contributions treated as individuals' income. However, it also recommended that an offset should be applied to all super contributions, capped at an indexed amount of \$25,000.<sup>23</sup>

### Refund of excess superannuation concessional contributions

- 1.37 Excess contributions tax for superannuation was introduced as part of the 2007 reforms as a way of enforcing the caps that were introduced. However, press and industry reports suggest that many taxpayers breach these limits inadvertently and can be subject to excessive penalties for doing so.<sup>24</sup>
- 1.38 In response to a question on notice asked in the Senate, the Government gave the following reasons why taxpayers' contributions can exceed the caps:
  - taxpayers failing to take into account available information when planning their contributions for a financial year
  - incorrect superannuation fund reporting
  - taxpayers not completing their income tax return correctly
  - taxpayers not providing superannuation funds sufficient contribution information.

Specific to the concessional contribution cap:

 salary sacrifice arrangements, particularly caused by the timing of contributions made by employers. For example, contributions made in respect of one financial year not being received by the fund until the next year.

Specific to the non-concessional contribution cap:

- taxpayers not understanding the tax treatment of contributions
- taxpayers acting on professional advice
- superannuation funds not returning contributions which the fund was unable to accept at law as required.<sup>25</sup>
- 23 Australia's future tax system, *Report to the Treasurer, Part Two, Detailed Analysis,* vol. 1, December 2009, p. 100.

24 Max Newnham, 'Penalties for excess super contributions need review' *Business Day*, viewed on 13 March 2012 at http://www.smh.com.au/business/penalties-for-excess-super-contributions-need-review-20100408-rv8r.html; Liz Westover, 'Excess Contributions Tax ... the saga continues', viewed on 13 March 2012 at https://www.charteredaccountants.com.au/secure/myCommunity/blogs/lwestover/supera nnuation-blogs/122/excess-contributions-tax-the-saga-continues.

25 The Hon. Senator Nick Sherry, Assistant Treasurer, Senate Hansard, 3 March 2011, p. 1199.

- 1.39 In July 2011, the ATO published statistics on excess contributions tax, valid as at May 2011. Including the transitional period from 10 May 2006 to 30 June 2007, and thereafter, the ATO had issued 43,000 assessments for a total of \$400 million in liabilities.<sup>26</sup> Excess contributions tax, which was designed to encourage enforcement with the superannuation caps, has been criticised for becoming, in effect, a revenue collecting measure.<sup>27</sup>
- 1.40 The ATO has also received a number of applications to disregard or reallocate contributions. These are set out in the table below. They demonstrate that the ATO is exercising its discretion in approximately 20 per cent of cases.

	Transitional	2007-08	2008-09	2009-10
Applications received	408	1,100	225	31
Number finalised	398	857	111	10
In progress	10	243	114	21
Discretion exercised	84	146	7	Nil

 Table 1.3
 Applications to disregard or reallocate contributions at 4 May 2011

Source ATO, 'Excess contributions tax statistical report' viewed on 13 March 2012 at http://www.ato.gov.au/superfunds/content.aspx?menuid=0&doc=/content/00286671.htm&page=1&H1

- 1.41 In its annual report for 2010-11, the ATO reported an increased workload due to superannuation excess contributions tax. In particular, it provided 7 per cent more guidance products and the number of objections, disputes and reviews it received increased by 12 per cent. The ATO attributed both of these figures to excess contributions tax.<sup>28</sup> It is possible that the reduction in the limits in 2009, commencing in July 2010, had the practical effect of putting a higher number of people at risk of breaching the limits.
- 1.42 The Institute of Chartered Accountants in Australia (ICAA) and the Self Managed Super Fund Professionals' Association of Australia (SPAA) have called for super fund regulations to be amended to allow funds to return members' excess contributions.<sup>29</sup>
- 26 Australian Taxation Office (ATO), 'Excess contributions tax statistical report' viewed on 13 March 2012 at http://www.ato.gov.au/superfunds/content.aspx?menuid=0&doc=/content/00286671.htm& page=1&H1.
- 27 John Hewison, 'Excess superannuation contributions tax,' Hewison Private Wealth, viewed on 14 March 2012 at http://www.hewison.com.au/live/blog/read/excess-superannuationcontributions-tax-%E2%80%93-unfair-government-revenue-raising.

<sup>28</sup> ATO, Annual Report 2010-11, pp. 76, 106.

<sup>29</sup> Max Newnham, 'Penalties for excess super contributions need review' *Business Day*, viewed on 13 March 2012 at http://www.smh.com.au/business/penalties-for-excess-super-

### Disclosure of superannuation information

- 1.43 A number of systems already exist to help reunite super fund members with their superannuation interests. The *Superannuation (Unclaimed Money and Lost Members) Act 1999* provides for the administration of a lost members register. The aim of the register is to reunite members with their accounts before the funds become unclaimed. A number of conditions must be met for funds to become unclaimed, one of which is that the individual turns 65.
- 1.44 At 30 June 2010, the funds in the register totalled \$18.8 billion. This comprised 5.8 million member accounts. The amounts are treated like normal superannuation balances. The ATO keeps information on each account that is provided to it by super funds. If an individual provides their tax file number to the super fund, then the fund passes this on to the ATO. Matching of tax file numbers of lost super accounts with information in other ATO systems is a key method by which the ATO can reunite members with their super.
- 1.45 The ATO has a number of tools and strategies by which it aims to reunite individuals with their super accounts. SuperSeeker is a web-based search tool that allows individuals to enter their details, which are then matched against the lost members register. Individuals must first complete a proof of identity check by entering details such as their tax file number.
- 1.46 If an individual makes a successful SuperSeeker search, they receive a copy of a portability form with their personal details pre-filled. The individual then manually fills in the remainder of the form, such as the details of the fund to which their amounts should be consolidated, and sends it to the relevant super fund. Blank portability forms are also separately available. The value of the portability form to date is unclear. Amendments through the *Tax Laws Amendment (2011 Measures No. 9) Act 2012* have been made to allow this process to be more streamlined and for the ATO to do more of the work on behalf of the individual.
- 1.47 SuperMatch is an electronic commerce interface search tool which allows super funds to conduct bulk searches of their members' details against data on the register, the superannuation guarantee system and the superannuation holding account. Funds must sign an agreement with the ATO and have a digital certificate and ATO authorisation to access SuperMatch. Funds regard SuperMatch as a useful tool for finding lost accounts.

contributions-need-review-20100408-rv8r.html; Gillian Bullock, 'Canberra should stop tinkering with super' *Weekend Australian*, 25 February 2012, p. 32.

1.48 The ATO also conducts marketing and telephone and letter campaigns to increase individuals' awareness of lost superannuation and how it can be reclaimed.<sup>30</sup>

### Payslip reporting of superannuation

- 1.49 In December 2009, the review panel completed its final report of the review, *Australia's future tax system*. The panel found that there was a need to improve people's awareness of the retirement income system to improve the outcomes they get from it. The report recommended that employers should report when super contributions are made to employees.<sup>31</sup>
- 1.50 In March 2010 the Inspector-General of Taxation (IGT) published a report, *The Review into the ATO's administration of the Superannuation Guarantee Charge*. In this report he found that insolvent employers were responsible for approximately \$600.8 million owed to the ATO under the superannuation guarantee charge (SGC) and that most of this debt had been written-off as lost employee retirement savings.<sup>32</sup>
- 1.51 The report also found that the groups most affected by the problem were employees of micro businesses, contracted and casual employees, younger employees and employees in particular sectors — the arts and recreation services; the transport, postal and warehousing sectors; accommodation and food services; and the agriculture, forestry and fishing sector. The mean salary and wages across each of these high risk sectors is less than \$30,000 a year, which indicated that those most at risk of having insufficient superannuation contributed on their behalf by employers were low-income employees.<sup>33</sup>
- 1.52 The IGT stated that he had received many submissions on the growing practice of employers misclassifying workers as subcontractors, rather than employees, to avoid paying superannuation.<sup>34</sup> In addition, over 70 per cent of complaints concerning superannuation guarantee

<sup>30</sup> Australian National Audit Office (ANAO), *Administration of the Superannuation Lost Members Register,* February 2011, Audit Report No. 31, 2010-11, pp. 14-15, 98-120.

<sup>31</sup> Recommendation 23(b), Australia's future tax system, *Report to the Treasurer, Part Two, Detailed Analysis,* vol. 1, December 2009, pp. 128-30.

<sup>32</sup> Inspector General of Taxation (IGT), *The Review into the ATO's administration of the Superannuation Guarantee Charge*, March 2010, p. 3.

<sup>33</sup> IGT, *The Review into the ATO's administration of the Superannuation Guarantee Charge*, March 2010, p. 4.

<sup>34</sup> IGT, *The Review into the ATO's administration of the Superannuation Guarantee Charge*, March 2010, p. 4.

obligations come from ex-employees. There was also anecdotal evidence to suggest that many employees are concerned that, if they query their employer about their superannuation guarantee entitlement or lodge a complaint with the ATO, they could either lose their job or no longer be given work.<sup>35</sup> Finally, the IGT noted that:

A delay in triggering ATO audit activity significantly increases the likelihood of non-payment of SGC debt (requiring more costly debt recovery action) and irrecoverability through insolvency. It also hampers the ATO's and government's efforts to maintain a level playing field amongst employers and ensure that compliant employers do not face a financial disadvantage against non-compliant competitors.<sup>36</sup>

- 1.53 In June 2010, the review panel of the Super System Review finalised its reports. It endorsed the work of the Australia's future tax system review. The panel recommended that employees' payslips should detail the superannuation amounts to be paid.<sup>37</sup> In the 2010 election campaign, the Government endorsed this recommendation of the Super System Review in its Securing Super package.<sup>38</sup>
- 1.54 In February this year, Treasury conducted consultations on an exposure draft of Schedule 6. Some comments provided by the Institute of Certified Bookkeepers (ICB) and the Association for Payroll Specialists included:
  - a start date of July 2012 would be too early for businesses and payroll software developers to make the necessary changes;
  - compliance costs are excessive, given the large proportion of businesses who do the right thing;
  - mostly, employers are only required to pay super for employees who earn over \$450 a month. For mid-month payslips for some employees, their employer will not know if they will be paying them superannuation and so cannot provide an expected payment date;
  - businesses may choose to simplify the process and use the default approach of reporting the last day of the required super payment

<sup>35</sup> IGT, *The Review into the ATO's administration of the Superannuation Guarantee Charge*, March 2010, p. 5.

<sup>36</sup> IGT, *The Review into the ATO's administration of the Superannuation Guarantee Charge*, March 2010, p. 6.

<sup>37</sup> Super System Review, Final Report: Part Two, Recommendation Packages, June 2010, pp. 297-98.

<sup>38</sup> Australian Labor, 'Protecting Workers' Entitlements Package,' viewed on 14 March 2012 at http://www.alp.org.au/protecting-workers-entitlements-package/.

obligation, i.e. the 28<sup>th</sup> day of the first month following each quarter; and

- it may be more practical to require employers to provide employees with proof of payment of superannuation at least once a quarter (this is similar to one of the proposals in the Government's *Securing Super* package).<sup>39</sup>
- 1.55 Treasury responded to some of these points in its summary of the consultations. In relation to the start date, Treasury stated that this would depend on when the regulations are made, and it will be considered during this process. In relation to the \$450 cutoff, this will also be considered in the regulations, but the solution is likely to be that the employer should report the contribution in the later pay period.<sup>40</sup>
- 1.56 Treasury also noted that previous consultations had considered whether employers should report on payslips when super contributions had actually been paid during a pay period. However, this was rejected because of high cost software changes and possible confusion for employees, who would be receiving information on both accrued and actual contributions. The Government has announced that, provided payroll system costs are not significant, payslips will report actual contributions paid from 1 July 2013.<sup>41</sup>

### Tax refunds

1.57 The ATO has for at least a decade retained some tax refunds if significant risks were raised about the integrity of a taxpayer's claims. The idea that this practice may not be supported in the law is a recent issue. For example, the IGT conducted a comprehensive review into GST refunds in 2004 and 2005 and did not consider the legality of this practice.<sup>42</sup> The Australian National Audit Office (ANAO) considered the administration of high risk income tax refunds for individuals and micro enterprises in

<sup>39</sup> Institute of Certified Bookkeepers (ICB), 'Submissions: Exposure Draft - Payslip Reporting of Superannuation Contributions', Treasury, viewed on 14 March 2012 at http://www.treasury.gov.au/contentitem.asp?NavId=066&ContentID=2320.

<sup>40</sup> Treasury, *Superannuation: Payslip Reporting: Summary of Consultation Process*, pp. 2, 4, viewed on 14 March 2012 at http://www.treasury.gov.au/documents/2310/PDF/ Consultation\_Summary.pdf.

<sup>41</sup> Treasury, Superannuation: Payslip Reporting: Summary of Consultation Process, p. 1, viewed on 14 March 2012 at http://www.treasury.gov.au/documents/2310/PDF/ Consultation\_Summary.pdf.

<sup>42</sup> IGT, Review of Tax Office administration of GST refunds resulting from the lodgment of credit BASs, January 2005.

2007 and also made no comment about the legality of the ATO's approach.  $^{\rm 43}$ 

### Committee objectives and scope

1.58 The objective of the inquiry is to investigate the adequacy of the Bill in achieving its various policy objectives and, where possible, identify any unintended consequences.

### Conduct of the inquiry

- 1.59 Details of the inquiry were placed on the committee's website. A media release announcing the inquiry and seeking submissions was issued on Monday 5 March 2012.
- 1.60 Nine submissions and eight exhibits were received. These are listed at Appendix A.
- 1.61 Public hearings were held in Canberra on Friday 16 March 2012. A list of the witnesses who appeared at the hearing is available at Appendix B. The submissions and transcript of evidence were placed on the committee's website at

http://www.aph.gov.au/house/committee/economics/index.htm.

<sup>43</sup> Australian National Audit Office (ANAO), Administration of High Risk Income Tax Refunds in the Individuals and Micro Enterprises Market Segments, November 2007, Audit Report No. 12, 2007-08.

## 2

### 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

<sup>1</sup> 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>

<sup>2</sup> CPA Australia, *Submission 3*, p. 1.

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

<sup>4</sup> 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.

<sup>5</sup> Association of Superannuation Funds of Australia (ASFA), Submission 5, p. 2.

<sup>6</sup> Mr Robert Hodge, ASFA, Committee Hansard, Canberra, 16 March 2012, p. 3.

<sup>7</sup> 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

<sup>8</sup> Ms Ruth Gabbitas, Treasury, Committee Hansard, Canberra, 16 March 2012, p. 4.

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

<sup>10</sup> Mr Ross Clare, ASFA, Committee Hansard, Canberra, 16 March 2012, p. 6.

<sup>11</sup> 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.  $^{12}$ 

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.

<sup>12</sup> 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.

<sup>13</sup> ICAA, Submission 6, p. 3.

<sup>14</sup> ICAA, Submission 6, p. 3.

<sup>15</sup> Mr Michael Davison, CPA Australia, Committee Hansard, Canberra, 16 March 2012, p. 8.

<sup>16</sup> ASFA, *Submission 5*, p. 2.

<sup>17</sup> ASFA, Submission 5, p. 2.

<sup>18</sup> 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>

<sup>19</sup> Ms Ruth Gabbitas, Treasury, Committee Hansard, Canberra, 16 March 2012, p. 9.

<sup>20</sup> Mr Thomas Garcia, AIST, Committee Hansard, Canberra, 16 March 2012, p. 10.

<sup>21</sup> Mr Brett Peterson, ATO, Committee Hansard, Canberra, 16 March 2012, p. 12.

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

<sup>23</sup> Ms Ruth Gabbitas, Treasury, Committee Hansard, Canberra, 16 March 2012, p. 9.

<sup>24</sup> 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.

<sup>25</sup> Mrs Andrea Slattery, SPAA, Committee Hansard, Canberra, 16 March 2012, p. 10.

<sup>26</sup> Mrs Andrea Slattery, SPAA, Committee Hansard, Canberra, 16 March 2012, p. 10.

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

<sup>28</sup> 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

<sup>29</sup> Mr Robert Hodge, ASFA, Committee Hansard, Canberra, 16 March 2012, p. 13.

<sup>30</sup> Mr Brett Peterson, ATO, Committee Hansard, Canberra, 16 March 2012, p. 16.

<sup>31</sup> 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.

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

<sup>33</sup> 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

<sup>34</sup> Mr David Haynes, AIST, Committee Hansard, Canberra, 16 March, 2012, p. 13.

<sup>35</sup> CPA Australia, Submission 3, p. 3.

<sup>36</sup> ASFA, Submission 5, p. 2.

<sup>37</sup> 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

<sup>38</sup> Mr David Haynes, AIST, Committee Hansard, Canberra, 16 March, 2012, p. 16.

<sup>39</sup> Mr Brett Peterson, ATO, Committee Hansard, Canberra, 16 March, 2012, p. 14.

<sup>40</sup> 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

<sup>41</sup> Mr David Haynes, AIST, Committee Hansard, Canberra, 16 March, 2012, p. 14.

<sup>42</sup> Mr Robert Hodge, ASFA, Committee Hansard, Canberra, 16 March, 2012, p. 16.

<sup>43</sup> 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>

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

<sup>45</sup> AIST, Submission 2, p. 9.

<sup>46</sup> 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:

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

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

<sup>49</sup> Mr David Haynes, AIST, Committee Hansard, Canberra, 16 March 2012, p. 17.

<sup>50</sup> 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

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

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

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

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

<sup>55</sup> 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

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

<sup>57</sup> ICAA, Submission 6, p. 4.

<sup>58</sup> Mr David Haynes, AIST, Committee Hansard, Canberra, 16 March 2012, p. 18.

<sup>59</sup> Mr Thomas Garcia, AIST, Committee Hansard, Canberra, 16 March 2012, p. 18.

<sup>60</sup> 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;

<sup>61</sup> 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.

<sup>62</sup> 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>

<sup>63</sup> 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.

<sup>64</sup> 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

<sup>65</sup> Ms Margot Tredoux, Treasury, Committee Hansard, Canberra, 16 March 2012, p. 26.

<sup>66</sup> 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

<sup>67</sup> Ms Brenda Berkeley, Treasury, Committee Hansard, Canberra, 16 March 2012, p. 25.

<sup>68</sup> Mr James O'Halloran, ATO, Committee Hansard, Canberra, 16 March 2012, p. 28.

<sup>69</sup> Ms Brenda Berkeley, Treasury, Committee Hansard, Canberra, 16 March 2012, p. 29.

<sup>70</sup> 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.

<sup>71</sup> Mr James O'Halloran, ATO, Committee Hansard, Canberra, 16 March 2012, pp. 24, 29.

<sup>72</sup> 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

# Supplementary Remarks – Mr Steven Ciobo MP, Deputy Chair, Ms Kelly O'Dwyer MP, Mr Scott Buchholz MP, Liberal Party of Australia

# Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012

Liberal Members of the Committee agree with much of the analysis contained in the Report. However, these supplementary remarks provide greater detail regarding concerns held by Liberal Members with regard to the operation and impacts of the *Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill* 2012.

Liberal Members of the Committee do not believe the Bill should be opposed.

Supplementary comments from the Liberal Members are segregated by Schedule as per the Bill and confined to those schedules were we felt additional comments were warranted.

# Schedule Three – Indexation of the Concessional Superannuation Contributions Cap

As outlined in paragraph 2.1 of the report, there is a "temporary pause" of indexation of the superannuation concessional contributions cap, so that the concessional contribution will fixed at \$25,000 up to and including the 2013-14 financial year.

The Government and Treasury witnesses have outlined, and indeed the Labor Members of the Committee in the report make the point also at paragraph 2.13, that the rationale for this pause of indexation of the superannuation concessional contributions cap is to improve fiscal position of the Government - in other words, to improve the Government's bottom line.

**Mr CIOBO:** Can I ask Treasury: what is the policy rationale for the pausing of the indexation?

**Ms Gabbitas:** There are two elements to the rationale. The main one is in a tight fiscal environment the government indicated that a one year pause in the caps is warranted, given the saving it makes to the bottom line.

The other rationale is that 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.

**Mr CIOBO:** When you say a tight fiscal environment, what do you mean exactly?

**Ms Gabbitas:** The government is committed to returning the budget to surplus in 12/13 and, as part of that, it has had to look across the board, not just at super, to find a range of savings to deliver that goal. It thought that pausing the indexation of the cap was reasonable in that environment.

Liberal Members note the measure serves to improve the Government's fiscal position for the one year through a revenue increase of around \$485 million.

**Mr CIOBO:** When you talk savings of \$485 million, do you mean increased taxation of \$485 million?

**Ms Gabbitas:** In one sense it is because super is concessional and effectively means that people will be paying more tax.

**Mr CIOBO:** Is the government collecting an extra \$485 million in tax as a consequence of this decision?

Ms Gabbitas: Yes.

**Mr CIOBO:** So the government is collecting an extra \$485 million because the budget has been in significant deficit...

**Mr CIOBO:** ...Is it possible then from a policy perspective that had we not seen, for example, \$1 billion of wasted expenditure on the BER and a \$1 billion on pink batts, it would not be necessary to have this extra \$485 million of tax on concessional superannuation? Are they the kind of trade-offs that we are talking about?

**Ms Gabbitas:** That is a matter beyond the scope of my area of expertise.

**Mr CIOBO:** Let me put it another way — if we had not had to spend \$1 billion extra on BER, would it be necessary to raise this \$485 million in extra tax? Presumably, we would be in credit of around \$515 million.

**Ms Gabbitas:** That is a matter for the government to make policy based on the fiscal environment it is in. As I said, it is beyond the scope of my expertise.

It is clear to Liberal Members of the Committee that this Labor initiative serves simply to boost the Government's fiscal position next year. It is raising an extra \$485 million of tax revenue.

The Government is sacrificing the ability of Australians to provide for their retirement in order to help improve the Government's fiscal position next year.

Furthermore, the second rationale cited by Government for the pause in the indexation of the concessional superannuation contributions cap, that is because the cap is considered to be "quite generous", is not a view shared by many stakeholders.

**Mr CIOBO:** Can I ask about the second aspect. You spoke about the current caps being, to use your words, 'quite generous.' I am just interested in getting some comments from the Institute of Chartered Accountants and CPA Australia. In particular I think you, Mr Davison, made comments that the caps are actually quite

low in comparison to where they initially started. I just wonder how we reconcile the views of CPA Australia and the Institute of Chartered Accountants with Treasury's comments that the caps are actually quite generous, because they seem to be coming at opposite ends of the spectrum. Have you got some comments on that?

**Mr Davison:** Only to say that we would disagree with that. We believe the current concessional caps compared to the previous contribution limits, that is pre SimplerSuper, are considerably lower. The cap in 2006-07 was a bit over \$100,000 for someone aged over 50. Now it seems to have been reduced to \$50,000 and it has not been indexed since it was introduced. In fact, it has been halved since it was introduced. We would argue that it is not generous at all. It has certainly gone backwards.

**Ms Westover:** I would disagree with Treasury's comments as well. I think that the thing you need to understand about contribution caps is that it is a 'use it or lose it' regime. People do not have the capacity to put extra amounts into superannuation for a long time in their working lives — they are raising families, paying off mortgages and that type of thing. So at the time when they are able to, they are usually on a higher income. The kids have left school and the mortgage is paid and they need to be able to catch up. That is why it is important that these concessional caps remain at a level at which they can catch up.

For the reasons outlined above, Liberal Members of the Committee do not agree with the views outlined in the report in paragraphs 2.12 and 2.13.

#### Schedule Four – Excess Contributions Tax Refund

Liberal Members of the Committee considered the testimony of witnesses and the submissions in relation to Schedule Four to provide a comprehensive overview of the complexities and considerations in relation to excess contributions.

Indeed, analysis in the report succinctly outlines arguments surrounding the issue.

Nonetheless, it is our view the Government's rationale for the \$10,000 limit and the requirement that there is effectively only one opportunity to breach the cap without penalty remains opaque.

Stakeholders outlined a number of alternatives in submissions and their testimony of how best to tackle the 'problem' of excess contributions.

There were some concerns raised that Government was using the penalty as an opportunity to secure additional taxation revenue.

Mr Davison: Our understanding is that the excess contribution tax regime is there as a disincentive for people not to breach their caps, and people are inadvertently going to breach their caps. We should keep it as simple as possible to allow them, if they breach them, to make amends and get a refund or whatever to correct it. Having this measure where it is a one-off and then talking about having to introduce reporting and linking it to the individual to try and keep track of whether they have breached once or twice or whether they are going to breach et cetera is making it more complex. In many other regimes – even in the tax regime – if you pay the wrong tax amount or get your tax return wrong et cetera it is pretty simple to fix it. There are minor penalties. But you can correct it multiple times - it is not a once-off thing; it is not 'use it or lose it'. This is a bandaid, but it will alleviate a lot of problems with the current system. But our primary concern is that the oneoff nature of it is adding more complexity. No matter how good the reporting is, people are still going to get things wrong. There is still going to be confusion. This will unnecessarily penalise people.

I want to pick up a point that Treasury made before when they talked about how there would be a fiscal impact if it was not a one-off thing. Given that this is supposed to be a disincentive, we are concerned that it appears to be becoming a revenue stream for the government. There should be no fiscal impact whether it is a once-off or multiple use thing. There was also the point about the tax position of an individual not being any different whether they breach it or not. Unfortunately, there is a flow-on effect if you breach your concessional cap and you happen to make nonconcessional contributions up to the limit. The combined excess tax is actually 93 per cent, not the top marginal rate. As Ms Westover said, considering timing issues, you may have breached your cap once or twice before you find out about it and even if you get the refund once you may still be subject to a 93 per cent tax penalty for the subsequent breaches.

Additionally, Liberal Members noted stakeholder comments that subsequent breaches of the cap can be inadvertent and a consequence of reporting timeframes.

**Ms Westover:** I would to refute one of Treasury's comments about the timing of the rationale for this one-off refund. The reality is that most people will have breached a second time before they become aware of the first time, and that is due to the reporting mechanisms of contributions into superannuation. The second year has already passed by the time all of the information has accumulated, which could be from a variety of super funds and indeed that person becomes aware of a breach. So the notion of a one-off only being required is questionable.

# **General Comments**

Liberal Members of the Committee do not oppose passage of the Bill. However, witness testimony and submissions indicate the conclusions reached in the report at paragraphs 2.78, 2.79 and 2.85 do not accurately reflect the validity of concerns raised by stakeholders.

Further, the stated rationale of pausing indexation of the concessional superannuation contributions cap to 'improve the Government's fiscal position' neglects the obvious reality that had the Government not eroded the Commonwealth's fiscal position so extensively, there would not now be a need to raise an extra \$485 million of tax revenue to attempt to repair it.

Finally, there remains uncertainty surrounding the rationale for the selection of the \$10,000 threshold for the excess contributions tax refund, as well as why only a single error is permitted in contrast to, for example, an income tax assessment.

Steven Ciobo MP Deputy Chair Kelly O'Dwyer MP

Scott Buchholz MP

# Α

# Appendix A – Submissions and exhibits

## Submissions

No.

- 1. Suncorp Group
- 2. Australian Institute of Superannuation Trustees
- 3. Certified Public Accountants Australia
- 4. Financial Services Council
- 5. The Association of Superannuation Funds of Australia
- 5.1 Supplementary Submission The Association of Superannuation Funds of Australia
- 6. The Institute of Chartered Accountants in Australia
- 7. Law Council of Australia
- 8. Department of the Treasury

#### Exhibits

No.

- 1. Consultation Paper Refund of Excess Concessional Contributions, presented by National Seniors Australia
- 2. Actual payslip, presented by AIST
- Intimate with Self-Managed Superannuation, An Inaugural annual study of Self – Managed Superannuation Funds, Full Report 2011, presented by SPAA
- Intimate with Self-Managed Superannuation, An Inaugural annual study of Self – Managed Superannuation Funds, Full Report 2012, presented by SPAA
- 5. Excess Contribution Tax Case Studies, poor record keeping, monitoring & advice, presented by SPAA
- 6. Cause of Excess Contributions, presented by SPAA
- 7. ECT Joint Industry Letter, A call for action on the unreasonably harsh treatment of excess superannuation contributions tax, presented by SPAA
- 8. Concessional contribution refund submission, Refund of excess concessional contributions consultation paper, presented by SPAA

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# **Appendix B – Hearings and witnesses**

Friday, 16 March 2012 - Canberra

The Association of Superannuation Funds of Australia

Mr Robert Hodge, Principal Policy Adviser Mr Ross Clare, Director of Research

Australian Institute of Superannuation Trustees

Mr David Haynes, Project Director Mr Tom Garcia, Policy & Regulatory Manager

**CPA** Australia

Mr Michael Davison, Senior Policy Adviser - Superannuation

Institute of Chartered Accountants in Australia

Ms Liz Westover, Head of Superannuation

Self Managed Superannuation Funds Professionals' Association of Australia

Mrs Andrea Slattery, Chief Executive Officer Mr Graeme Colley, Director-Education and Professional Standards The Department of Treasury

Ms Ruth Gabbitas, Manager, Contributions and Accumulation Unit Mr Cambeez Yazdan, Analyst

The Australian Taxation Office

Mr Brett Peterson, Assistant Deputy Commissioner, Superannuation

Law Council of Australia (Telephone Conference)

Ms Gina Lazanas

The Department of Treasury

Ms Brenda Berkeley, General Manager, Indirect Tax Division Ms Margot Tredoux, Senior Advisor, Indirect Tax Division

The Australian Taxation Office

Mr James O'Halloran, Deputy Commissioner, Indirect Tax Division Mr Ben Kelly, Senior Tax Counsel (Law Design Team) Mr Gordon Brysland, Senior Tax Counsel

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# Appendix C - List of advisory reports

Below is a list of advisory reports tabled by the House of Representatives Standing Committee on Economics in the 43<sup>rd</sup> Parliament.

#### No.

- Inquiry into the Income Tax Rates Amendment (Temporary Flood Reconstruction Levy) Bill 2011; and the Tax Laws Amendment (Temporary Flood Reconstruction Levy) Bill 2011
- 2. Inquiry into Indigenous economic development in Queensland and advisory report on the Wild Rivers (Environmental Management) Bill 2010
- 3. Advisory report on the Taxation of Alternative Fuels Bills 2011
- 4. Advisory report on the National Consumer Credit Protection Amendment (Home Loans and Credit Cards) Bill 2011
- Advisory report on the Competition and Consumer (Price Signalling) Amendment Bill 2010 and the Competition and Consumer Amendment Bill (No. 1) 2011
- 6. Advisory report on the Food Standards Amendment (Truth in Labelling -Palm Oil) Bill 2011
- 7. Advisory report on the Corporations (Fees) Amendment Bill 2011
- Advisory report on the Tax Laws Amendment (2011 Measures No. 8) Bill
  2011 and the Pay As You Go Withholding Non-compliance Tax Bill 2011

- 9. Advisory report on the Minerals Resource Rent Tax Bill 2011 and related bills
- 10. Advisory report on the Tax Laws Amendment (2011 No. 9 Measures) Bill 2011
- 11. Advisory report on the Insurance Contracts Amendment Bill 2011
- 12. Advisory report on the Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012