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Taxation Laws Amendment (Superannuation Contributions Splitting) Bill 2003

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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Taxation Laws Amendment (Superannuation Contributions
Splitting) Bill 2003

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7 November 2003

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Taxation Laws Amendment (Superannuation Contributions Splitting) Bill 2003

Date Introduced: 11 September 2003

House: House of Representatives

Portfolio: Treasury

Commencement: Royal Assent

Purpose

The purpose of the Taxation Laws Amendment (Superannuation Contributions Splitting) Bill 2003 (the Bill) is to make consequential amendments to tax legislation to provide for the Commonwealth Government's 2001 election commitment allowing members of accumulation superannuation funds to split their personal and employer contributions with their spouse.¹ The Acts to be amended are the *Income Tax Assessment Act 1936* (the ITAA 1936) and the *Superannuation Contributions Tax (Assessment and Collection) Act 1997* (the SCT(AC) Act).

Background

The Bill does not include provisions for the operation of the splitting of contributions. The Explanatory Memorandum states:

The exact details of how this will operate will be specified in amendments to the Superannuation Industry (Supervision) regulations, Retirement Savings Account regulations and taxation regulations. Where a split of contributions is made in accordance with those regulations then the tax consequences will be as set out in this bill.²

However, the Explanatory Memorandum does indicate that the Government will be implementing an annual splitting model.³ As the Commonwealth Government is intending to implement superannuation contribution splitting through regulations and not an Act of Parliament, the issues concerning this policy will be discussed in this Bills Digest as background for the Bill.

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Basis of policy commitment

The Commonwealth Government originally announced its superannuation contribution splitting proposal during the 2001 Election campaign in its *A Better Superannuation System* announcement.⁴ The proposal was part of a package of reforms to the superannuation system that the Commonwealth Government proposed to introduce following the 2001 election. The policies announced in the *A Better Superannuation System* release included raising the tax deduction limit for self-employed taxpayers, the low earners co-contribution and a reduction in the superannuation surcharge. A key factor in Commonwealth Government's announcement was the desire to broaden the availability of superannuation⁵ from its origins of only being accessible to those in the paid workforce. The Commonwealth Government's reasoning for the superannuation contribution splitting initiative as announced in the *A Better Superannuation System* release and other general media releases covering its reform of superannuation is:

to assist families maximise the benefits available in superannuation and to provide an avenue for spouses to share their superannuation benefits equally.⁶

In July 2002 the Commonwealth Government released a Consultation Paper on three options it was considering for the splitting of superannuation contributions. The options outlined in the Consultation Paper were:

- prospective split (each contribution would be split as it was paid)
- annual split (contributions would be split at the end of the financial year), and
- joint accounts (a couple would own a joint superannuation account similar to a joint bank account).⁷

The Commonwealth Government did not include as an option the splitting of superannuation benefits (as opposed to contributions) as it was not consistent with the Government's election commitment and due to the higher cost to revenue.⁸ The Commonwealth Government has indicated that it will be implementing the annual split option.⁹

This Bill lays the ground work for the introduction, through amending regulations,¹⁰ of the splitting of superannuation contributions between spouses.

Superannuation Contributions Splitting - Features

The Consultation Paper outlined the key features and policy design for the contributions splitting initiative. While these are not dealt with in the Bill, they are important to understand how the policy is going to be implemented and consequently, why the amendments in this Bill are necessary.

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The Government is going to allow members of accumulation funds to split both personal and employer contributions, including superannuation guarantee contributions. They will be transferred to a separate account of the spouse receiving the split contribution. This gives the receiving spouse their own superannuation benefit with a separate eligible termination payment (ETP) low rate threshold (currently \$117 576) and reasonable benefit limits (RBL) (currently the lump sum RBL is \$588 056 and the pension RBL is \$1 176 106).¹¹

The features of the superannuation contribution splitting initiative are:

- the decision to split will be irrevocable once the split is effected¹²
- existing balances and the future earnings on those balances will not be eligible for splitting¹³
- only 50% of employer contributions can be split off to a member's spouse, but all personal contributions can be split off to a member's spouse¹⁴
- the spouse receiving the split contribution must be less than 65 years of age¹⁵
- a member's surcharge liability is not transferred to the spouse receiving the split contribution¹⁶
- splitting of contributions will not be available to members of defined benefit funds¹⁷
- self-employed people will only be able to claim a tax deduction for the contribution under section 82AAT of the ITAA 1936 that has been split if they have provided a notice to their fund in accordance with the requirements of section 82AAT prior to the contribution being split¹⁸
- the splitting of contributions will not affect the eligible service period of the spouse receiving the split contribution,¹⁹ and
- it will be mandatory for superannuation funds to provide contribution splitting to those members that have accumulation only benefits.²⁰

Position of significant interest groups/press commentary

The Association of Superannuation Funds of Australia (ASFA) stated in its response to the consultation paper that it:

supports Government policies that assist families, especially those with broken paid work patterns, to maximise the benefits available in superannuation and in retirement. The "splitting" proposal could improve the economic position of women (and

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couples) where one spouse is only able to work part time or for a reduced period of time.²¹

However, ASFA suggested that a better result could be achieved in terms of maximising retirement benefits along with providing a simple and efficient system if the splitting occurred at the retirement point of either spouse. ASFA recognises that this results in the non-working spouse not having control over superannuation assets to the same extent as through contributions splitting, but believes it will give a better outcome in the future. They also recognise that its proposal will probably need to be restricted to benefits accumulated after a specific date due to budgetary constraints.²² Both the Investment and Financial Services Association (IFSA)²³ and CPA Australia²⁴ also support the splitting of superannuation at the end benefit, or retirement stage.

ASFA also observed that there would be a low take up rate of contribution splitting by younger couples and that it would be more attractive to more mature people that actively plan and supplement their retirement income saving. Nevertheless ASFA stated it was concerned about the complexity of the options in the consultation paper and the impact it would have on administration costs for funds.

In its response ASFA disputes one claim in the Government's Consultation Paper. In its Consultation Paper the Commonwealth Government speculated that superannuation contributions splitting may result in a cost effective way for non-earning spouses to access death and disability insurance cover.²⁵ In its response ASFA states:

Contrary to the suggestion in the Consultation Paper, ASFA members have indicated that insurance would probably not be offered to a non-employee spouse in a fund that was not public offer. In most cases superannuation funds are unable to find insurance cover for disability benefits for those not in the paid workforce. Death cover is also likely to have higher premiums for individuals out of the paid workforce.²⁶

Therefore, it is highly unlikely that one of the benefits that the Commonwealth Government hoped for with this policy initiative will eventuate unless the receiving spouse is a member of a public offer superannuation fund.

Another issue ASFA raises in its response is the expected increase in administration costs under this policy which will be borne by employers where they operate superannuation funds for their employees. This does not meet the Commonwealth Government's aim of avoiding any administrative burden and costs being imposed on employers.

Other suggestions that have been included in submissions to the Commonwealth Government are:

- allowing 100 per cent of employer contributions (less amounts to cover the superannuation surcharge) being available for splitting [supported by the Corporate Superannuation Association and the Law Council of Australia]

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- extending the policy to defined benefit funds [supported by the Law Council of Australia], and
- giving funds the flexibility to determine the splitting administrative processes (prospective splitting, annual splitting or some other option) based on their structure and current administrative set up [supported by the Law Council of Australia].

Pros and cons

The advantages of the superannuation contribution splitting policy are:

- couples living on a single income will have access to two ETP low rate thresholds and two separate RBLs
- low income and non-working spouses will have access and control of their own superannuation
- couples can make superannuation savings when they cannot afford voluntary contributions, and
- continues the process of moving saving for old age via superannuation away from the restriction of it only being accessible to those in the paid workforce.

The disadvantages of the superannuation contribution splitting policy are:

- two separate accounts for single income couples results in two lots of fees and charges for what is effectively one contribution
- additional administration and system costs for superannuation funds
- cost to revenue of the annual model is \$6 million over the three years following its commencement²⁷ (this will increase to \$25 million in 2020-21 and \$100 million in 2040-41²⁸)
- discriminates against:
 - older workers who will have little time to build up significant benefits from the contribution splitting initiative despite the fact that mature workers are more likely to take advantage of the initiative, and
 - members of defined benefit funds who will not be able split their benefits with their spouse, and

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- will use surcharge data to ensure compliance and result in more complex surcharge administrative procedures to ensure that surcharge liabilities are not transferred to the spouse receiving the contributions split.

ALP/Australian Democrat/Greens policy position/commitments

The Australian Labor Party (ALP) has reserved its position on whether it is going to support superannuation contribution splitting and consequently this Bill until the Senate Economics Legislation Committee has completed its review of the Bill. However, the ALP has indicated in the past that it supports a reduction in contributions tax as it will benefit all workers. The ALP is concerned that the people who will benefit most from superannuation contribution splitting will be high income earners and their spouses, with little benefit going to low income earners.

The Democrats and Greens have not made any announcements concerning superannuation contributions splitting.

Recent debate in the Parliament regarding the amendment of the definition of spouse to cover same-sex couples and the introduction of the concept of interdependent relationships for determining who is a dependent when a death benefit is paid may be raised in the context of this bill dealing with the splitting of superannuation contributions with a spouse.

Main Provisions

Schedule 1 of the Bill makes amendments to the ITAA 1936 and the SCT(AC) Act to recognise a contribution splitting amount for taxation and superannuation surcharge purposes and to ensure that a superannuation surcharge liability remains with the member receiving the initial contribution.

Income Tax Assessment Act 1936

Item 1 inserts into subsection 27A(1) of the ITAA 1936 a new definition for 'contributions-splitting ETP'. The definition depends on the amount being designated as a spouse contribution-splitting amount in regulations that are yet to be released.

Items 2 to 8 amend definitions in subsections 27A(1) and 27A(12) so that:

- a contribution-splitting ETP has no eligible service period and the amount is treated as a post-30 June 1983 benefit for ETP tax purposes. (Benefits that relate to a service period prior to 1 July 1983 receive more favourable tax concessions than benefits that related to a service period after 30 June 1983.)

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- contribution-splitting ETP is adding to the definition of eligible termination payment so that contribution-splitting ETPs are taxed as an ETP (i.e. they receive concessional tax treatment), and
- a contribution-splitting ETP is a qualifying ETP which allows the amount to be rolled over within the superannuation system.

Item 9 amends the table in section 27AB of the ITAA 1936 so that the whole amount of a contribution-splitting ETP is treated as a post-30 June 1983 benefit.

Item 10 inserts **proposed subsection 27D(6)** into section 27D so that regulations can be made to allow a taxpayer to roll over a contribution-splitting ETP provided the election to roll over the amount meets the prescribed matters that will be included in the regulations. However, the proposed amendment is inserting a second subsection 27D(6) into section 27D. As the Bill states that the proposed amendment is to be added at the end of section 27D it should be numbered subsection 27D(8). Information from the Department of the Treasury is that this error will be corrected at Assent.

Item 11 inserts **proposed section 27HA** into the ITAA 1936. It requires the provider of a contribution-splitting ETP to report information set out in the regulations to the Commissioner of Taxation.

Proposed subsection 27HA(1) requires the person who pays the contribution-splitting ETP to provide the information to the Commissioner of Taxation. The term ‘person’ is defined in section 6 of the ITAA 1936 as including a company. Company is defined as including:

all bodies or associations corporate or unincorporate, but does not include partnerships or non-entity joint ventures.

It is questionable whether the definition of ‘person’ in ITAA 1936 covers superannuation funds, but it may cover the trustees of superannuation funds. This ambiguity may be resolved by the regulations dealing with how contributions splitting is going to work, but as they are still to be released there is uncertainty as to whether the proposed subsection has correctly identified the provider of contribution-splitting ETP information.²⁹

Items 12 to 14 insert provisions into sections 82AAS and 82AAT of the ITAA 1936 so that taxpayers cannot give a notice that they intend to claim a tax deduction for a contribution made to their superannuation fund or Retirement Savings Account (RSA) provider where that contribution has already been split. Therefore, once a contribution has been split the ability to claim a tax deduction for the contribution cannot be changed. This does not prevent taxpayers from giving a notice that they intend to claim a tax deduction for future contributions that may be split.

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Superannuation Contributions Tax (Assessment and Collection) Act 1997

Items 15, 16 and 18 to 23 make amendments to the SCT(AC) Act to recognise contribution-splitting ETPs for superannuation surcharge purposes. They are necessary so that the superannuation surcharge liability associated with the contribution-splitting ETP can be allocated appropriately by **proposed section 10B**.

Item 17 inserts **proposed section 10B** into the SCT(AC) Act. The superannuation surcharge applies to taxpayers whose adjusted taxable income is greater than the surcharge threshold (for the 2003/04 financial year the surcharge threshold is \$94 691). Section 10 of the SCT(AC) Act prescribes who is liable for the superannuation surcharge and what happens to the liability if a member for whom a surcharge liability has been calculated leaves the fund. While the liability for the superannuation surcharge relates to a member's contributions paid into their account, it is the trustees of their superannuation fund who pay the liability on behalf of the member. The superannuation fund receives the assessment in relation to a member from the Australian Taxation Office (ATO) and is required to deduct the amount in the assessment from the member's account.

Proposed section 10B ensures that when a contribution is split the surcharge liability remains with the superannuation provider and the member that made the contribution split and does not become a liability associated with the spouse receiving the split contribution.

Concluding Comments

The Bill only makes minor consequential amendments to tax and surcharge legislation in anticipation of the introduction of the superannuation contribution splitting from 1 July 2004. Superannuation contribution splitting will be implemented through amendments to tax and superannuation regulations. This limits the ability to make comments in this Bills Digest on how the system will work. Nevertheless, some general comments can be made which should be considered in light of what the Government is trying to achieve.

Superannuation contributions splitting will narrow the tax base, but its benefits to low income couples versus high income couples with one low income earner are uncertain. In the short term the annual splitting of superannuation contributions will have revenue cost of \$6 million over the three years after commencement. This is due to the fact that only future contributions will be allowed to be split.

However, it is expected that in 20 years the cost to revenue in a single year will increase to approximately \$25 million and after 40 years approximately \$100 million per year in real dollar terms.³⁰ This will be a significant cost to revenue in real dollar terms in the future at a time when the Federal Budget will be straining to meet the demands of an aging population.

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One argument against the implementation of the superannuation contributions splitting initiative is that the main beneficiaries will be high income earners who are fast approaching the reasonable benefit limit.³¹ Evidence provided by both AFSA and Treasury to the Senate Select Committee on Superannuation's inquiry into 'Superannuation and standards of living in retirement' was that very few people have an RBL problem and that lump sum balances on average are small compared to the limits available. Evidence provided by the Treasury and cited in the report,³² issued in December 2002, included:

that the average superannuation holding per person is about \$62 000 and that average superannuation payouts are currently around \$72 000 per person.³³

Evidence provided by ASFA and quoted in the report was that each year approximately 650 people out of the one million or so taxpayers in the age group receiving superannuation benefits are paying tax on excess benefits, i.e. their benefit exceeds their RBLs.³⁴ For the 2003-04 year of income the lump sum RBL is \$588 056 and the pension RBL is \$1 176 106. There is little likelihood given that the average payout is around \$72 000 that many people will exceed their RBLs. The average lump sum payout does not even exceed the ETP low rate threshold of \$117 576.

While some high income earners will probably make use of contributions splitting to remain under their RBLs, given the possible number of taxpayers involved and that only future contributions will be involved, impact in the short term will be very small. By the time it does become a major issue the effects of the aging population will have begun to affect the Federal Budget. However, a whole of Budget approach covering loss of revenue, reduction in welfare benefits and reduction in Government funded health care and aged care costs resulting from taxpayers taking advantage of the superannuation contributions splitting provisions needs to be considered before any judgment can be made with respect to the equity, or otherwise, of this policy.

In the long run allowing an employee to split their employer superannuation guarantee contributions will result in a lower superannuation benefit for the employee. However, taking the into account the couple having access to two ETP low rate threshold limits and/or pension rebates and two lump sum/pension RBLs, the couple may in fact be better off by splitting superannuation guarantee contributions.

Some sections of the media have suggested that one reason for introducing superannuation contribution splitting is to prevent taxpayers taking advantage of the recently commenced splitting of superannuation benefits in the event of divorce by entering into a sham divorce.³⁵ While this is possible, such a suggestion by a financial planner to a client so that they can stay under their RBLs and not pay any excess tax, would be unlawful.³⁶ Such a scheme may also result in the ATO taking a closer look at the actions of the taxpayer. This would be an expensive way of saving some tax and could potentially backfire on the high income spouse if the divorce remains permanent when that had not been the original plan.

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High income earners will eventually benefit from the implementation of this policy, but by the time they receive this benefit, middle income earners and those low income earners who are able to take advantage of the policy will also be receiving benefits. Alleging that it benefits high income earners more than low income earners is not on its own a reason for dismissing this policy, especially if the changes result in high income earners becoming less of a burden on the Federal Budget in the long term. The main problem will be convincing young couples to take advantage of this policy, if it commences, when it is an accepted fact that young people tend to concentrate on other issues such as paying off mortgages and educating children.

Endnotes

- 1 Members of defined benefit superannuation funds will not be able to split their personal and employer contributions under this proposal.
- 2 *Explanatory Memorandum*, p. 3.
- 3 *ibid.*
- 4 '[A Better Superannuation System](#)', *The Howard Government: Putting Australia's Interests First: Election 2001: Our Future Action Plan: A Better Superannuation System*, the Hon. John Howard, Prime Minister, Liberal Party of Australia, 5 November 2001, p. 4.
- 5 *ibid.*, p. 2.
- 6 '[Revitalising Superannuation](#)', *Media Release: C040/03*, Senator, the Hon. Helen Coonan, Minister for Revenue and the Assistant Treasurer, 25 May 2003.
- 7 [Splitting of Superannuation Contributions Between Couples – Consultation Paper July 2002](#), issued by Senator the Hon. Helen Coonan, Department of the Treasury, Canberra, July 2002, p. 6. ('Consultation Paper')
- 8 Consultation Paper, p. 6.
- 9 *Explanatory Memorandum*, p. 3.
- 10 The Explanatory Memorandum states that amendments will be made to the Superannuation Industry (Supervision) regulations, the Retirement Savings Account regulations and the taxation regulations.
- 11 Consultation Paper, p. 4.
- 12 Consultation Paper, p. 4.
- 13 Consultation Paper, p. 4.
- 14 Consultation Paper, p. 11.
- 15 Consultation Paper, p. 11.
- 16 Consultation Paper, p. 12.

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- 17 Consultation Paper, p. 12.
- 18 Consultation Paper, p. 13.
- 19 Consultation Paper, p. 13.
- 20 Consultation Paper, p. 13.
- 21 [ASFA Response to Government Consultation Paper – “Splitting of Superannuation Contributions Between Couples”](#), issued by the Association of Superannuation Funds of Australia Ltd, Sydney, August 2002 (‘ASFA Submission’).
- 22 ASFA Submission.
- 23 ‘Split Spouse Contributions’, *IFSA Voice*, November 2002, p. 4.
- 24 [Splitting of Superannuation Contributions Between Couples](#), issued CPA Australia, Sydney, 23 August 2003.
- 25 Consultation Paper, p. 3.
- 26 ASFA Submission.
- 27 *Explanatory Memorandum*, p. 4.
- 28 Consultation Paper, p. 5.
- 29 The draft regulations issued by the Department of the Treasury do not directly address this ambiguity. Information obtained from the Department of the Treasury concerning the use of the term ‘person’ suggests it was a conscious decision in the drafting of the Bill to cover companies and individuals administering the splitting of superannuation contributions.
- 30 Consultation Paper, p. 5.
- 31 Simon Hoyle, ‘Spouse super split: Options and ambiguities’, *Australian Financial Review*, 27 July 2002.
- 32 Senate Select Committee on Superannuation, *Superannuation and standards of living in retirement - Report on the adequacy of the tax arrangements for superannuation and related policy*, Canberra, December 2002.
- 33 *ibid.*, p. 106.
- 34 *ibid.*, p. 107.
- 35 Daryl Dixon, ‘Split the difference’, *Bulletin with Newsweek*, 27 August 2002, p. 45.
- 36 *Family Law Act 1975 (Cth)*, s. 90MZG.

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