



## THE TAX INSTITUTE

THE MARK OF EXPERTISE

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24 October 2016

Ms Jenny Wilkinson  
Division Head  
Retirement Income Policy Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Submitted by email: [superannuation@treasury.gov.au](mailto:superannuation@treasury.gov.au)

Dear Ms Wilkinson

### **Superannuation reform package – tranche 3**

The Tax Institute welcomes the opportunity to make a submission to the Treasury in relation to the *Superannuation reform package – tranche 3* set of exposure drafts and explanatory memoranda (**Tranche 3**).

We also thank you for the invitation to attend the Treasury consultation held on 18 October 2016 where our representative members were given the opportunity discuss their preliminary thoughts on Tranche 3 (**18 October consultation**).

Given the short timeframe provided for submissions on Tranche 3, the submission below does not purport to cover all of the substantive issues arising from this material. The Institute, along with its expert members in the area of superannuation, would be pleased to provide additional details on any of the matters set out below or to address the material in more detail in person.

### **Summary**

The Institute reiterates that further consultation is required to discuss and resolve the technical challenges in administering the current measures in practice. We again urge the Government to consider the practical difficulties with some of these measures and to consider alternatives that could largely achieve the same objective, but also with the subsidiary objective that the superannuation system be simple, efficient and provide safeguards in mind.

## **Discussion**

### **General comments**

We reiterate the general comments in our Tranche 2 submissions dated 10 October 2016 regarding the very short and limited consultation period for the superannuation reform package measures. We submit that these should be extended to allow a more considered review of alternative and simplified measures that will achieve the revenue outcomes but with less cost to industry. The very short consultation periods and having staggered tranches of legislation to review and comment on with very tight deadlines is inappropriate as it does not allow sufficient consideration of how each tranche interacts with the other. This also results in inefficiency when dealing with such complex measures that will impose great cost on industry, which taxpayers and their advisers will be dealing with for decades to come.

### **Proposed non-concessional contribution ('NCC') caps**

The complexity of the proposed NCC cap measures could be simplified if a single standard NCC cap bring forward rule of 3 x \$100,000 was applied for any individual provided their total account balance was less than \$1.6 million on the previous 30 June and they had not triggered 'bring forward' in the preceding two years.

The Institute is concerned about the overly complex proposed 'bring-forward' measures which operates such that a different test applies depending upon how close an individual's total account balance is to the general transfer balance cap amount (commencing at \$1.6 million). The Institute submits that the proposed regime is likely to lead individuals to inadvertently exceeding their NCC caps, including where advisors will struggle to access accurate up-to-date information (noting that the ATO records cannot necessarily be relied upon to present real time information) and to correctly apply and advise individuals on the numerous different threshold tests.

The Institute expects some errors will simply be due to members not accurately knowing their total account balances at 30 June. Particularly for self-managed superannuation funds, individuals will often not know their account balances until a much later date.

Further, the Institute is aware that even for larger APRA-regulated superannuation funds there may be factors that will prevent individuals from accurately identifying whether various thresholds of \$1.4 million, \$1.5 million and \$1.6 million have been exceeded as at 30 June. In some cases there may be errors that are retrospectively corrected – including unit pricing, misapplication of insurance proceeds and general administrative errors (allocation of incorrect rollovers or transfers).<sup>1</sup>

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<sup>1</sup> It is noted that the underlying policy implications of the Tranche 3 measures may be that individuals are encouraged to consolidate their superannuation into a single account in a single fund to avoid such errors. This policy intent is not stated and does not appear to have been examined. There can be adverse ramifications of consolidation – including loss of insurance cover and increased risk due to diminished diversification.

## **Insurance proceeds**

For the purposes of assessment against the \$1.6 million general transfer balance cap as at 30 June, the Institute submits that insurance proceeds for events such as death, incapacity and terminal medical condition should obtain similar treatment to 'structured settlement' proceeds (see s 292-95 ITAA 1997) as these insured events are broadly akin to compensation for 'personal injuries'. Accordingly, insurance proceeds should be excluded from the 'general transfer balance cap' and the 'total superannuation balance' under revised proposed s307-230 in Tranche 3.

## **Superannuation Industry Supervision Regulations**

In the 18 October consultation, Treasury confirmed that the current ability to return excess contributions above a member's 'fund capped contributions' as that term is defined in reg 7.04(7) of the Superannuation Industry (Supervision) Regulations 1994 (Cth) (**SISR**) will apply to the measures in Tranche 3 dealing with excess NCCs. For example, the Institute understands that if an individual had in a fund a total account balance over \$1.6 million on an immediately preceding 30 June and was therefore prevented by the new cap measures from making NCCs – the excess NCC amount paid to that fund would be compelled to be returned to the individual without triggering the excess contribution regime.

## **Self-managed superannuation funds ('SMSFs')**

The Institute has previously pointed out the difficulty of SMSFs making a timely and accurate calculation of member account balances as at 30 June. Such calculations are not typically available for a period until 9 months after the close of a financial year. The Institute again wishes to emphasise the difficulties that will be encountered by the SMSF industry in producing the accurate real time data that the Tranche 3 measures assume will be readily available. The Institute therefore asks that further consideration be to providing more flexibility for SMSFs. As a minimum the extent to which protective measures might be introduced to allow individuals who are members of SMSFs to place reasonable reliance on a genuine estimated position should be further examined.

## **Revised release authority ('RA') measures**

The Institute broadly welcomes making the RA measures consistent across the various measures, including those currently in place. The Institute submits that the default position for excess concessional contributions should be to require the member to withdraw them (and not permit them to be retained in the fund) to prevent such excess amounts inadvertently triggering the bring-forward rule for the NCC cap measures. The Institute also requests that the Commissioner's discretion in s 291-465 and s 292-465 be made more flexible as the 'special circumstances' discretion has proved very difficult and problematic to date in practice as revealed by the many decisions and

cases on point.<sup>2</sup> The Institute anticipates there will be an increased number of ‘excess’ matters arising as a result of genuine errors and mistakes in the application of the latest reforms, especially due to the substantial reduction in caps and the application of the total account balance threshold.

### **Superannuation Guarantee (SG)**

The Institute suggests a review of the SG legislation as it applies to individuals who will exceed the NCC caps as a result of the application of the Tranche 3 measures solely as a consequence of being paid SG contributions from a number of sources that in total exceed \$25,000 – where those individuals have a total account balance in excess of \$1.6 million. Ideally these individuals would be in a position to forego their SG contributions in order to save significant red-tape in having those ‘excess’ amounts later extracted from the superannuation system.

### **Indexation**

Indexation for NCC cap and transfer balance cap, particularly in the context of the bring forward rule, should be streamlined.

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If you would like to discuss any of the above, please contact either me or Tax Counsel, Thilini Wickramasuriya, on 02 8223 0044.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Arthur Athanasiou', with a stylized flourish at the end.

**Arthur Athanasiou**  
President

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<sup>2</sup> However, the Institute notes the recent judgment in *Ward v Commissioner of Taxation* [2016] FCAFC finding that the Commissioner’s application of ‘special circumstances’ was too narrow.