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The Manager
Individuals Tax Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600
Email: RESC@treasury.gov.au

Dear Manager

RE: Tax Laws Amendment (2011 Measures No. 2) Bill 2011: Reportable employer superannuation contributions (RESC)

The Association of Superannuation Funds of Australia welcomes the opportunity to provide comments on the above exposure draft bill. The release of the bill follows the earlier government announced of its intention to review certain aspects of the definition of a reportable employer superannuation contribution (RESC) in the Tax Administration Act to deal with certain unintended consequences.

In addition to commenting on the exposure draft, this submission seeks to draw attention to broader issues relating to the operation of the RESC definition and to seek consideration of the need for broader changes than those proposed.

The Association of Superannuation Funds of Australia ("ASFA") is a non-profit, non-political national organisation whose mission is to advance effective retirement outcomes for members of superannuation funds through research and advocacy. We focus on the issues that affect the entire superannuation industry. Our membership, which includes corporate, public sector, industry and retail superannuation funds, has as members over 90% of the approximately 12 million Australians with superannuation. ASFA members manage or advise on the bulk of the $1.3 trillion in superannuation assets as at September 2010. ASFA is the only organisation that represents all types of superannuation funds and associated service providers.

Comments on the exposure draft

ASFA considers that the amendments, as drafted, will be effective in ensuring that additional employer contributions that result from the requirements of an Australian law and where the employee does not have the ability to influence whether these are paid from pre-tax or post-tax salary are not treated as a RESC payment.

With respect to the explanatory memorandum:

Paragraph 1.13

For clarity, the opening sentence of this paragraph should make reference to the change in the law. As it stands, some confusion arises on reading the paragraph because in example 1.1, which precedes this paragraph, the employee **can** influence the level of the employer contribution.

Perhaps the sentence should begin with 'Where an employer contribution is not required under an Australian law then the amendments do not alter the fact that generally, additional employer ….."

Example 1.3

This example could be improved by including a reference to the provision (16-182(1)(d)) under which the payment is a RESC.

ASFA is very concerned that the amendment introduces into the law an inequity in so far as where contributions are mandated by Australian Law they are not a RESC, but where they are mandated by a fund trust deed they are a RESC. In both circumstances the requirement for the additional contributions is imposed by an instrument under which the employee has no direct influence.

In effect, it would appear that employer contributions in respect of politicians and public servants have been given special treatment over persons who similarly cannot affect the level of employer contribution merely because the requirement is legislated.

General comments on the operation of the current law

When the Reportable Employer Superannuation Contributions (RESC) provisions were announced the stated intention was to ensure that employment remuneration amounts that were salary sacrificed into superannuation would be reflected as income of the employee for a broad range of purposes. The announcement reflected concern of inequities that existed between those who were and those who were not able to salary sacrifice into superannuation or separately negotiate additional employer superannuation contributions. The capacity to do so enabled those individuals to enhance their access to a range of government entitlements and reduce certain taxation and other obligations.

However, under the law as enacted, considerable doubt exists as to how Reportable Employer Superannuation Contributions (RESCs) must be determined in certain situations.

This concern has arisen from:

- The wording in the relevant legislation;
- A change over time in the ATO's interpretation of the legislative requirements;
- Apparent inconsistencies in the ATO's guidelines to employers as it attempts to reconcile the policy intent with the legislation; and
- The media release (No.080) issued by the former Minister, Chris Bowen, on 30 June 2010 announcing that the legislation would be amended (retrospective to 1 July 2009) to remove some unintended consequences (without specifically identifying the changes that would be made).

Many employers remain confused as to how to determine the amounts to be reported. This has created problems in them meeting the legislated requirement to provide relevant details on Payment Summaries for terminating employees.

Specific matters of concern with the operation of the current provisions

Matters which ASFA considers still need addressing are as follows:

A clear statement and enactment of the underlying principles of the provisions

The present law appears to lack a clear focus on how it should operate. The initial understanding that the law was intended to operate in respect of salary sacrificed contributions has not proved to be correct in practice and has led to the need for the proposed amendments.

ASFA considers that the law should operate on the following basic principle:

> Where, if the contribution was not paid, the amount of the contribution would not be payable to the employee (or related party) as some other form of remuneration, the contribution should not be considered to be a RESC payment.

It is accepted that some restrictions or exceptions might be necessary to minimise possible abuse by small business operators. The basic principle should be that an RESC only arises where the member's choice of remuneration impacts on their other income. This is consistent with the intent of the legislation: To catch salary which has been converted into additional employer superannuation contributions.

The interplay between the Choice of Fund rules and the RESC provisions

The following example is indicative of the type of issues that require resolution in this area.

> An employer pays a higher level of contributions to the employer's default fund compared to the contributions which would apply if the employee chooses a different fund. The additional contributions are a specified amount either paid in accordance with:
>
> - the rules of the default fund; or
> - an agreement between the trustee and the employer
>
> The additional contributions may be small (such as to cover the cost of administration or insurance costs charged by the default fund).
>
> Where the employee chooses another fund (exercises their right to Choice of Fund), no additional salary or other benefits are provided in lieu of the reduced employer contribution.

In early 2009 the ATO advised that in the above situation any additional contributions paid to the employer's default fund under arrangements such as the above **would not** be a RESC. This was considered to be appropriate and reflected the Government's intention.

In ATO ID 2012/10 the ATO has reversed this view stating that the legislation as enacted regards such contributions to be RESC payments even where choice of fund is not exercised by the employee. The ATO considers that the fact that the employee has a choice over which fund he/she joins (and hence the level of contribution) is determinative, even where such choice is not exercised.

In the above example, the employee has less opportunity to influence the size of the employer contributions than the employee in example 1.1 of the explanatory memorandum.

ASFA considers this to be an unreasonable outcome.

However, ASFA would agree with this outcome if, by choosing another fund, the employee had the option to take the additional contributions as additional salary (or fringe benefits).

The treatment of insurance premiums

A similar issue is where the relevant fund rules or agreement between the trustee and employer, require the employer to pay the cost of insurance premiums for a prescribed level of cover. As the contributions to pay these insurance premiums are effectively required by the rules of the fund, it would appear (based on the ATO Employer Guide) that these contributions are not RESCs. However the trust deed may include a provision which allows members to opt out of the insurance. While it is unclear why a member would make such an election, the ability to opt out of the cover would appear (based on ATO ID 2012/10) to make these contributions a RESC.

Additional mater of concern

Inconsistencies with ATO's Employer guide for reportable employer superannuation contributions

The degree of confusion with the operation of the provisions is highlighted by inconsistencies between ATO ID 2010/112 and the ATO's Employer Guide which was last updated on 16 September 2010, several months after the ID was issued.

The Guide indicates that a contribution which is the minimum required to be made under the trust deed or governing rules of a superannuation fund is not a RESC. This is inconsistent with the ID under which the additional contributions would be considered to be a RESC where the employee has choice of fund and the additional contributions are not payable to the chosen fund.

The Guide also indicates that a contribution to fund a defined benefit is not a RESC. (Defined benefit arrangements are generally excluded from the RESC regime as the ATO considers that contributions are determined by the actuary rather than the member.) However, as defined benefit members, with some exceptions, are also able to choose another fund, it is unclear why the arguments used in the ID, if they are valid, do not also apply to defined benefit arrangements. Please note that that this is by way of example - we are not suggesting that the rules should apply to contributions with respect to a defined benefit interest.

These inconsistencies highlight the current confusion and the difficulties the ATO must be having in interpreting this legislation.

Recommendation

ASFA considers that a fundamental rethink of the operation of the provisions is required. A concept that the government may consider adopting is:

- A contribution in excess of SG requirements by an employer is an RESC if the employee can influence whether the money is paid as a salary sacrifice or a post tax contribution.
- A contribution in excess of SG requirements is not an RESC if the employee is not entitled to additional salary or other benefits if the amount is not paid.

ASFA considers that adoption of the above rules would provide the current relief being sought whilst also appropriately extending the relief to employees receiving compulsory contributions in similar circumstances.

Amending the legislation along the lines of our recommendation above would enable many of the above inconsistencies to be resolved.

We urge reconsideration of the intent of the legislative requirements so that employers are able to ascertain what needs to be reported and all employees are treated equitably.

Yours Sincerely

David Graus

Director Policy and Industry Practice