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Manager, Contributions and Accumulation Unit  
Personal and Retirement Income Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Email: [recc@treasury.gov.au](mailto:recc@treasury.gov.au)

Dear Manager,

**RE: Consultation Paper – Refund of Excess Concessional Contributions**

The Association of Superannuation Funds of Australia (ASFA) would like to lodge this submission in relation to the Consultation Paper outlining the preliminary views of Treasury on how the refund of excess concessional contributions is intended to operate.

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, plus self managed superannuation funds (SMSFs) and small APRA funds through its service provider membership, represent over 90% of the 12 million Australians with superannuation.

**Comments on the policy**

In previous submissions to Treasury and in the course of responding to other inquiries, ASFA has outlined its concerns about the halving of the concessional contribution caps which took effect from 1 July 2009.

We reiterate our view that the current concessional contribution caps are too low and are not appropriately targeted in that they have a significant impact on individuals who do not have sufficient superannuation savings but who are attempting to catch up at a time of their life when they can afford to make substantial contributions. This can be particularly the case for women who have re-entered the full-time workforce after a break from paid work (or having worked part-time) as well those individuals who have paid off their mortgage and are now in a position to contribute more to their superannuation savings.

We note that many fund members are encountering significant difficulties in complying with the current contribution limits. These difficulties, which have led to a significant number of inadvertent breaches, appear to arise from a combination of a desire to maximise contributions, the impact of third party contributions, difficulty in planning contributions over a 12 month period and a lack of understanding/appreciation of the operation of the law by both individuals and their advisers.

ASFA continues to advocate for a reinstatement of the original concessional contribution caps. We believe the current large number of breaches is directly attributable to the halving of the concessional caps in 2009.

Also, in a supplementary submission to Treasury in June 2011, ASFA (along with the Financial Services Council and the Self-Managed Super Fund Professionals' Association of Australia) recommended that the concessional contributions cap for people over 50 should be set at \$35,000 instead of \$50,000 at this time – but should not be dependent on an individual's account balance. We recommended the removal of the \$500,000 account balance threshold for the following reasons:

- The implementation of the threshold would be a costly exercise for funds as they would have to make extensive changes to their administration systems, and this would be a particular burden for funds given all of the Stronger Super changes.
- Also, the cost of implementation would impact all members when it would only benefit a few.
- Simplicity of the system – complexity is one of the reasons for member disengagement and a simpler measure such as the one we have proposed would be more likely to engage those individuals who have been caught by the contribution caps – an overly complex measure will not.
- RBL type structures were abandoned for good reason and the industry should be moving away from a system that creates both contribution controls and account balance controls.
- Overall, the elimination of the account balance threshold would remove an additional layer of uncertainty for members who are seeking to save enough for their retirement.

Although ASFA would prefer a concessional contribution cap of \$50,000 for those over age 50, we believe \$35,000 is a good holding point given the Government's current fiscal considerations, and that not imposing an account balance limitation would allow the policy to be more easily and quickly implemented at this time. That said, should the Government adopt our proposal, we have recommended that it should undertake to increase the cap for individuals over 50 to \$50,000 at the first possible opportunity, possibly in incremental amounts.

Despite our criticism of the current level of concessional contribution caps, ASFA is supportive of the policy that gives individuals a once-only opportunity to rectify a breach of the superannuation caps by up to \$10,000 without penalty. Although it does not address the fundamental issues outlined above, the policy to allow a refund of excess concessional contributions is a commonsense solution which gives individuals the opportunity to recover from a mistake and learn from it.

The comments in the remainder of this submission address the specific issues arising from the contents of the Consultation Paper.

### **Specific comments on the Consultation Paper**

ASFA's view is that the processes outlined in the Consultation Paper for refunding excess concessional contributions provide a sensible and practical approach to implementing the Government's policy. In particular, we support the fact that the ATO will have the major responsibility for administering this measure and the intention that funds and their administrators will not be overly impacted by additional complexities or processing requirements as a result of this measure being implemented.

However, there are a number of areas of concern which we believe need to be addressed in order for this measure to be implemented effectively. These issues are discussed below.

#### ***(i) Refund from accumulation interests only***

We note that the Consultation Paper makes no reference to the situation in which an income stream has been commenced between the time of the concessional contributions and the individual being assessed with an ECT liability. Our view is that there should be no intention to refund monies from already established income streams as part of this measure. Instead, if the individual does not have any other accumulation account from which the refund can be drawn, the insufficient funds process would apply in this situation.

ASFA's view is that the exclusion of refunds from income streams should also apply to account-based pensions. Although an amount can be commuted from an account-based pension to pay a tax liability, for the sake of simplicity we believe it would be better to disallow refunds from all types of income streams. That is, refunds should only be available from accumulation interests.

Individuals who only have an account-based pension may end up with a tax liability, however they have the option of requesting their account-based pension provider to commute an amount sufficient to cover the tax liability.

**(ii) *Choice of fund(s) from which excess contributions can be refunded***

Paragraph 24 states that the regulations may specify how the Commissioner will determine which superannuation interest the individual's money is to be released from. ASFA's view is that individuals with monies in multiple (non-defined benefit) superannuation interests should be given the opportunity to choose which fund(s) the excess concessional contributions are to be refunded from.

For example, where an individual under age 50 has concessional contributions totaling \$30,000 in a particular year (split equally between 3 funds), the gross excess concessional contribution would be \$5,000. ASFA contends that the individual should have the choice of which of the 3 funds the excess contribution amount should be released. We believe this could be achieved with minimal additional cost or complexity by simply allowing individuals the opportunity of specifying the relevant fund(s) on the notice of offer to be returned to the ATO. However the notice of offer should make it explicitly clear that refunds are only available from accumulation accounts (i.e. not defined benefit or pension accounts).

**(iii) *Extension of the individual's decision period***

Paragraph 20 states that individuals have 28 days from the date of receipt of the notice of offer from the ATO to either:

- accept the offer or not (sub-paragraph 20.1);
- advise the ATO that the amount of concessional contributions attributed to the individual is incorrect (sub-paragraph 20.2); or
- advise that they intend to apply for the Commissioner's discretion to disregard or reallocate contributions (sub-paragraph 20.3).

Noting that the Commissioner may grant an extension to the 28 day period, we believe that there should be a fourth option (sub-paragraph 20.4) which enables the individual to request an extension to the 28-day period as part of the notification process. For example, the individual may be overseas or incapacitated for all or part of the notification period and/or the individual may wish to seek financial advice before deciding whether or not to accept the offer and receive a refund of the excess contributions. In our view, there will be circumstances in which 28 days may not be sufficient time for members to understand the implications and notify the ATO of their decision.

Paragraph 21 states that the Commissioner may allow an individual more than 28 days to make the above choices. ASFA fully supports this proposal, however we recommend that clarification be provided around the ability of the Commissioner to exercise this discretion even if the application for an extension is received by the ATO after the 28 day period has elapsed (in extenuating circumstances similar to those outlined above).

**(iv) *Provision of compulsory release authority to superannuation funds***

Paragraph 34 states that, where an individual decides to accept the offer, the refund process will involve the ATO providing a superannuation fund with a compulsory release authority. The actual process involves the ATO issuing compulsory release authorities to funds as and when they receive accepted notice of offers from individuals. For large funds that may receive a number of compulsory release authorities, this ad hoc process could become very onerous. Consideration should be given to the ATO collecting the returned notice of offers from individuals, batching them by fund and issuing the compulsory release authorities to the relevant superannuation funds on a monthly basis. If the ATO provides batches of these release authorities via the electronic channels already established, funds could then also process the refunds electronically in batches which would streamline the entire process. ASFA suggests that this could be achieved by way of a monthly batch process similar to the Government co-contribution scheme, the distribution of the SG charge, surcharge etc.

**(v) *Insufficient funds in superannuation***

Paragraph 41 covers the situation where there are insufficient funds in a superannuation interest to refund the net excess concessional contribution. The example provided refers to where the individual has withdrawn all their super benefits. The treatment of this situation (i.e. allowing the excess concessional contribution to be treated as assessable income and taxed at their marginal rate rather than being assessed for ECT) would appear to be appropriate. However, there are other situations whereby the individual could have insufficient funds in their superannuation account, including where the individual's superannuation has been rolled over, partially or in full, to another superannuation fund – in this situation we would expect that the administration processes would enable the superannuation fund to simply return the release authority to the ATO under paragraph 37, stating the reason for the fund's inability to comply with the release authority.

However, where the individual's superannuation balance has been eroded by fees or significant market fluctuations such that the balance remaining is insufficient to cover the net excess concessional contribution amount, the individual could potentially have a tax liability to pay if they accept the refund offer. And unlike the example provided in the Consultation Paper, in this situation the individual would have no prior superannuation benefit receipt to offset the tax bill against. To cover this situation, and as discussed in section (ii) above, consideration should be given to allowing individuals to specify the fund(s) from which their refund can be released.

**(vi) Amended contributions**

Paragraph 50 states that the process of unwinding or correcting the transaction where a refund or ECT has already been paid is currently under consideration. In the case of a refund that has been paid to an individual, ASFA considers that the process for unwinding this would be best facilitated through the income tax return process. To correct or unwind a refund that has already been paid to the member through their superannuation fund would be an unnecessarily onerous and complex process for funds and their administrators.

In the case where the individual has paid ECT, any repayment to unwind or correct this could be facilitated through a similar process to the Government co-contribution scheme. The ECT that is credited to the member's account should not count towards the member's contribution cap for the year in which the ECT is received.

ASFA is willing to participate in a design workshop to assist Treasury to develop an appropriate solution to this complex administration issue.

**(vii) Eligibility for the refund**

Paragraph 16 outlines the conditions which must be met in order for an individual to be eligible for a refund. It is our understanding that, as long as the individual meets the conditions in this paragraph, they should be entitled to receive a notice of offer irrespective of when the MCS or amended MCS for the relevant financial year is lodged by their fund to the ATO. That is, a late lodgement of an MCS or amended MCS by a fund should not preclude an individual who satisfies the criteria from being able to access the refund.

**(viii) Late payment interest**

Paragraph 57 states that the Commissioner shall have 60 days after the receipt of all monies and other relevant documents from the fund to pay the refund back to the individual before interest starts to accrue.

ASFA's view is that, if the refund process can be batched and therefore streamlined (as discussed in section (iv) above), it may be possible for the ATO to calculate and deduct the correct amount of tax from the excess concessional contribution and process the refund to the individual in a shorter space of time (eg. within 30 days of receiving all monies and documentation required). This will ensure that the monies are refunded to the individual as quickly as possible.

**(ix) Clarification of wording**

Paragraph 31 states that:

*“31. The excess concessional contribution will not count towards the non-concessional contributions cap.”*

Although this paragraph sits under the heading “If the individual accepts the offer”, it can be open to misinterpretation if read in isolation. To mitigate the risk of ambiguity, the drafting of the legislation (and explanatory statement) based on paragraph 31 should make it clear that it is the **excess concessional contribution amount in the notice of offer** that will not be counted towards the non-concessional cap.

\* \* \* \* \*

We thank you for this opportunity to provide our submission on the process around the Government’s policy to allow eligible individuals to obtain a refund of excess concessional contributions. On the basis of the above issues being addressed, ASFA’s view is that this measure can be implemented effectively.

Should you have any questions on any of the matters raised in this submission please contact our Policy Adviser, Jon Echevarria, on 02 8079 0859.

Yours sincerely



David Graus  
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