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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TAX AND SUPERANNUATION LAWS AMENDMENT (2014 MEASURES NO. 7)
BILL 2014

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Treasurer, the Hon J. B. Hockey MP)

Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

[illegible]

Chapter 1

Fairer taxation of excess non-concessional contributions

Outline of chapter

1.1 The *Tax and Superannuation Laws Amendment (2014 Measures No. 7) Bill 2014* (Bill) amends the *Income Tax Assessment Act 1997* (ITAA 1997) and the *Taxation Administration Act 1953* (TAA 1953) to establish a fairer system for the treatment of individuals with excess non-concessional contributions.

1.2 The amendments allow a choice for individuals to release from superannuation an amount equal to their superannuation contributions in excess of the non-concessional contributions cap (cap) plus an associated earnings amount, with these earnings included in the individual's assessable income and taxed at the individual's marginal tax rate.

1.3 All references to legislative provisions in this chapter are references to the ITAA 1997 unless otherwise stated.

Context of amendments

1.4 Non-concessional contributions are, broadly, contributions made to a complying superannuation plan that are not included in the assessable income of the complying superannuation provider. Generally, these contributions are made out of after-tax income.

1.5 Earnings from investing non-concessional contributions receive concessional tax treatment (a rate of up to 15% tax) in the complying superannuation plan.

1.6 Under the existing regime, an individual is liable for excess non-concessional contributions tax on non-concessional contributions that exceed the individual's non-concessional contributions cap. It is imposed at the top marginal tax rate to deter breaches of the cap. The annual cap for non-concessional contributions for the 2014-15 financial year is \$180,000. For the 2013-14 financial year and earlier financial years the cap was \$150,000 per year. There is a rule which allows individuals under the age of 65 to 'bring forward' their cap for the next two years.

1.7 The tax limits the superannuation contributions that can be made in a financial year that receive concessional tax treatment.

1.8 The Commissioner of Taxation (Commissioner) must make an assessment of an individual's excess non-concessional contributions tax for a financial year, and give the individual a notice of assessment.

1.9 As soon as practicable after making the assessment, the Commissioner must give the person a release authority in respect of their excess non-concessional contributions tax liability, which they must give to a superannuation provider. A release authority requires the provider to pay amounts from an individual's superannuation interest. Released amounts are generally paid to the Commissioner in satisfaction of the individual's excess non-concessional contributions tax liability.

1.10 The Commissioner has discretion to disregard non-concessional contributions or allocate them to another financial year for the purposes of excess non-concessional contributions tax. Excess non-concessional contributions tax is not imposed on contributions that are disregarded. The discretion can only be exercised in special circumstances and consistent with the object of the excess non-concessional contributions tax regime.

1.11 Excess non-concessional contributions that do not have to be released to pay the tax remain in the individual's superannuation interest, and the earnings on investments made with those contributions continue to be taxed at concessional rates (up to 15%) as assessable income of the superannuation provider.

1.12 Despite this, taxing excess non-concessional contributions at the top marginal tax rate may be regarded as punitive, and applies to both intentional and inadvertent breaches of the cap. This treatment can also be seen as double-taxation, because the contributions have generally been made out of the after-tax income of the contributor.

Summary of new law

1.13 The Bill provides that an individual who has made non-concessional contributions in excess of their cap in the 2013-14 financial year or in later financial years can elect to release an amount equal to those excess contributions plus an associated earnings amount for those contributions from superannuation, with the associated earnings amount being included in the individual's assessable income.

1.14 Excess non-concessional contributions tax will not be imposed on excess contributions to the extent that an amount of those contributions is released from superannuation, or where the value of an individual's remaining superannuation interests is nil.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Individuals can elect to release from their superannuation interest an amount equal to non-concessional contributions made in excess of the cap plus associated earnings for those excess contributions to avoid liability for excess non-concessional contributions tax. Amounts are released to the individual.	Individuals cannot elect to release non-concessional contributions made in excess of the cap and are liable for excess non-concessional contributions tax.
Excess non-concessional contributions tax is imposed at the top marginal tax rate on excess contributions not released from superannuation unless the Commissioner has directed that the value of an individual's superannuation interests is nil (which would prevent any unreleased amounts from being treated as excess non-concessional contributions).	Excess non-concessional contributions tax is imposed at the top marginal tax rate on non-concessional contributions in excess of an individual's cap. Individuals must release an amount from superannuation equal to the excess non-concessional contributions tax liability.
An associated earnings amount for the released amount of excess contributions is included in the individual's assessable income. An associated earnings amount for the excess contributions is included in the individual's assessable income where an individual elects not to release an amount equal to their excess contributions and associated earnings and the Commissioner has directed that the value of an individual's superannuation interest is nil.	No earnings amount is included in assessable income.

Detailed explanation of new law

1.15 The Bill amends the excess non-concessional contributions tax regime for the 2013-14 financial year and later financial years so that an individual whose non-concessional contributions for a financial year exceed their non-concessional contributions cap can choose to have an amount equal to those excess contributions

plus an associated earnings amount released from their superannuation in accordance with a release authority issued by the Commissioner.

1.16 Excess non-concessional contributions tax will not be imposed on excess contributions to the extent that an amount of those excess contributions is released from a superannuation interest in accordance with a release authority issued by the Commissioner or where the Commissioner directs that the value of an individual's remaining superannuation interests is nil. This direction prevents any unreleased amounts from being treated as excess non-concessional contributions.

1.17 Excess non-concessional contributions tax will be imposed on excess non-concessional contributions that are not released from a superannuation interest where the remaining value of all the individual's superannuation interests is not nil.

1.18 There is no change to the amounts that are non-concessional contributions or to the way that an individual's non-concessional contributions cap is worked out. That is, the two year bring forward rules still apply for individuals that are under 65 years. The Commissioner also still has discretion to disregard non-concessional contributions or allocate them to another financial year in special circumstances and where doing so is consistent with the object of the excess non-concessional contributions tax regime.

Excess non-concessional contributions determination and election

1.19 The Commissioner must make a written determination for individuals who make non-concessional contributions in excess of their cap for the financial year. The determination states the amount of the excess contributions, the associated earnings amount for those contributions, and the total of the two amounts. A notice of a determination is given to the individual. The Commissioner may amend or revoke the determination.

1.20 Individuals who are notified of a determination can elect :

- to release the total amount of the determination from superannuation;
- not to release any amount from superannuation because the value of all their superannuation interests is nil; or
- not to release any amount from superannuation for another reason.

1.21 The election made is irrevocable for the amount in the determination. The election must be made by an individual in the approved form within 60 days of the date of issue of the determination or a further period allowed by the Commissioner. The Commissioner must be notified of the election.

1.22 An election to release the total amount must specify one or more superannuation providers that hold an interest for the individual from which the total

amount is to be released. Where more than one provider is specified the amount to be released from each provider must also be identified.

1.23 An individual may elect not to release an amount from superannuation because the value of all of their superannuation interests is nil. This may occur for example, if the individual has met a condition of release and has received all of their superannuation as a superannuation lump sum benefit before the Commissioner issues the excess non-concessional contributions determination.

1.24 An individual who has commenced a superannuation pension or income stream and continues to have an interest in such a pension or income stream is not taken to have superannuation with a value of nil. This is regardless of whether the pension or income stream can be commuted in order to pay a lump sum. This is also regardless of whether such a commutation (or partial commutation) in order to release an amount in accordance with a release authority issued in relation to an excess non-concessional contributions determination for this measure proves problematic or otherwise undesirable for the individual or the superannuation provider. An individual who has only a defined benefit interest is also taken to have a superannuation interest with a value greater than nil, regardless of whether or not the superannuation provider can release an amount from the interest in accordance with a release authority.

1.25 An individual who receives a determination can elect not to release for another reason. This election will be irrevocable in relation to the determination amount. In these circumstances the individual's amount of excess non-concessional contributions is the amount by which their non-concessional contributions for the financial year exceed their non-concessional contributions cap. The Commissioner will issue an assessment to the individual for excess non-concessional contributions tax in this case.

1.26 If no election is made, then no amount can be released from superannuation. The individual's amount of excess non-concessional contributions is the amount by which their non-concessional contributions for the financial year exceed their non-concessional contributions cap. The Commissioner will issue the individual with an excess non-concessional contributions tax assessment.

1.27 If a valid election to release the total amount is made and the Commissioner gives notice to the individual that the superannuation provider did not release the amount specified, the individual will be able to make a further election to release the unreleased amount from another superannuation interest. This further election must be made within 60 days of the notice or a further period allowed by the Commissioner.

1.28 Excess non-concessional contributions tax is not imposed where the amount released is equal to the amount of excess contributions. However, excess non-concessional contributions tax will generally be imposed where the amount of non-concessional contributions that exceed the cap is greater than the amount released from superannuation.

Associated Earnings

1.29 An associated earnings amount that approximates the amount earned from investing the released excess contributions while they were in superannuation is included in the excess non-concessional contributions determination.

1.30 Where the amount of the excess contributions are released from superannuation or the Commissioner determines that the value of the individual's superannuation interests is nil the associated earnings amount is included in the individual's assessable income. This removes a taxation benefit that would be obtained by making contributions in excess of the cap despite having them released under this regime or otherwise being removed from superannuation.

1.31 The associated earnings amount is calculated using an average of the General Interest Charge (GIC) rate for each of the quarters of the financial year in which the excess contributions were made and compounds on a daily basis. For the 2013-14 financial year the average GIC rate for the 4 quarters of the financial year is 9.66% and the daily rate for the purposes of calculating the associated earnings amount is therefore 0.02646575%.

1.32 The period the associated earnings is calculated for commences on 1 July of the financial year that the excess contributions were made (contributions year) and ends on the day that the Commissioner makes the first determination of excess non-concessional contributions for the relevant contributions year.

1.33 An approximation is used for this associated earnings amount to avoid the complexity that would be imposed on individuals and superannuation providers if calculations of actual earnings amounts on excess contributions for the actual period those contributions were in superannuation were required for this measure. However the Treasurer will be able to specify an alternative proxy rate that is lower than the default rate (or indeed a zero rate) for any specified contributions year.

Example 1.1

Belinda's non-concessional contributions for the 2013-14 financial year exceed her non-concessional contributions cap by \$100,000. The Commissioner issues Belinda an excess non-concessional contributions determination on 1 November 2014. She is taken to have associated earnings calculated as follows:

$0.02646575\% \times (\$100,000 \text{ plus the sum of the earlier daily proxy amounts}) \text{ for the 489 day period from 1 July 2013 until 1 November 2014.}$

The result of this formula is that the associated earnings equal \$13,814.

1.34 Where only part of the amount of the excess contributions in a determination is released, excess non-concessional contributions tax will appropriately continue to apply to any of the excess contributions amount that remains in a superannuation

interest. In this case associated earnings on the released amount up to the amount of excess contributions will be included in an individual's assessable income.

1.35 Where the Commissioner issues a direction that the value of all of an individual's interests remaining in superannuation is nil, then the full amount of associated earnings in the determination will still be included in the individual's assessable income. This will ensure that the integrity of the measure is maintained in relation to the treatment of associated earnings amounts.

Release of amounts from superannuation

1.36 The Commissioner may issue a release authority to the superannuation providers that the individual specifies in their election or any other provider the Commissioner considers is holding a superannuation interest for the individual. This will facilitate the release of as much of the determination amount as possible. The release authority will state the amount to be released from each provider.

1.37 The release authority requires the provider to pay amounts of superannuation from the individual's interest (other than from a defined benefit interest). Making payments from a superannuation interest to the individual could otherwise breach regulations that prevent the early release of superannuation (conditions of release). Regulations will be made to ensure that the release authority for this measure satisfies a condition of release.

1.38 A superannuation provider that receives a release authority must pay to the individual the lesser of the amount stated in the authority and the sum of the maximum amounts that can be released from interests it holds for the individual within 7 days of the date of issue of the release authority.

1.39 Where the provider specified in the authority only holds a defined benefit interest of the individual, compliance with the release authority is voluntary for the provider.

1.40 A payment in response to a release authority must be paid from the tax-free components of the interests held by the provider for the individual before being paid from any taxable component. This reduces the possibility of individuals obtaining a taxation advantage from the release process by using the release authority to alter the tax treatment of future payments from their superannuation interests.

1.41 The provider must notify the Commissioner of the amount released and any amounts unable to be released or that the provider does not need to comply with the release authority. If a payment is made, the provider must also notify the Commissioner that they complied with the requirement to make payment from the tax-free component of the interests first. The notification must be made in the approved form and within 7 days of the date of issue of the release authority. Administrative

penalties apply for not making the statement, not making the statement by the due date and for making false or misleading statements to the Commissioner.

1.42 The provider must also notify the individual of an amount released within 7 days of the date of issue of the release authority. This notification will not require any information to be provided to the individual about any unsuccessful release. .

1.43 Information about any unsuccessful release will be notified by the provider to the Commissioner. The Commissioner will then notify the individual that the provider did not release the full amount stated in the release authority. At the same time, the Commissioner will ask the individual to make a further election in respect of the unreleased amount. The individual may nominate another superannuation provider that holds an interest for them to which a release authority may be issued for the unreleased amounts or elect not to release the unreleased amount as the value of their remaining superannuation interests is nil. The individual must notify the Commissioner within 60 days of the date the Commissioner issues the notice of unsuccessful release.

1.44 The amount paid to the individual by the superannuation provider in accordance with a released authority is a superannuation lump sum benefit of the individual but the amount itself does not have income tax consequences for the individual, as it is non-assessable non-exempt income. However the associated earnings amount is still included in the individual's assessable income.

Example 1.2 Full release

In the 2013-14 financial year Reginald makes non-concessional contributions that result in him exceeding his non-concessional contributions cap by \$100,000. The Commissioner gives him a notice of excess non-concessional contributions determination stating his excess contributions amount of \$100,000, an associated earnings amount of \$19,000 and a total amount of \$119,000.

Reginald makes a valid election to release the total of \$119,000 from his superannuation interests by notifying the Commissioner and specifying a superannuation provider that holds an interest for him.

The Commissioner issues Reginald's superannuation provider with a release authority requiring the provider to make a payment to Reginald of \$119,000.

That amount is paid to Reginald by his superannuation provider in compliance with the release authority. The amount is non-assessable non-exempt income in his hands.

The superannuation provider notifies the Commissioner and Reginald of the payment of \$119,000 made in accordance with the release authority.

As a result of the release Reginald no longer has excess non-concessional contributions, and so is not liable for excess non-concessional contributions tax. An

amount equal to the associated earnings amount of \$19,000 is included in his assessable income for the 2013-14 income year.

Example 1.3 Partial release

In the 2013-14 financial year Archibald makes non-concessional contributions that result in him exceeding his non-concessional contributions cap by \$100,000. The Commissioner gives him a notice of excess non-concessional contributions determination stating his excess contributions amount of \$100,000, an associated earnings amount of \$19,000 and a total amount of \$119,000.

Archibald makes a valid election to release the total of \$119,000 by notifying the Commissioner and specifying a superannuation provider that holds interests for him.

The Commissioner issues a release authority to the specified superannuation provider which holds a defined benefit interest for Archibald as well as an accumulation interest. The maximum amount that can be released from the accumulation interest is \$60,000. The tax-free component of the interest is \$60,000. Archibald has no other superannuation interest with this or any other superannuation provider.

In compliance with the release authority the superannuation provider pays the \$60,000 to Archibald. The provider does not have to release any amount from Archibald's defined benefit interest and does not do so. The provider notifies the Commissioner of the amount released and that it was paid entirely from the tax-free component. The provider also notifies the Commissioner of the amount unable to be released and the reason the amount was unable to be released.

Archibald's amount of excess non-concessional contributions for the financial year is \$40,000, being the excess contributions amount stated in the determination less the released amount. The Commissioner issues Archibald an assessment for excess non-concessional contribution tax on \$40,000.

An associated earnings amount is included in Archibald's assessable income for the 2013-14 income year. The amount is calculated in the same way as the associated earnings amount for the determination, but uses the released amount instead of the amount of his excess contributions for the financial year. As a result this amount will be less than the \$19,000 originally stated in the determination.

Commissioner's direction if value of superannuation interest is nil

1.45 Individuals who make non-concessional contributions in excess of their cap for a financial year may have already been paid some or all their superannuation benefits by the time they receive a determination from the Commissioner.

1.46 Once those benefits are paid from the superannuation system they will no longer receive concessional tax treatment.

1.47 The Commissioner must make a direction if he is satisfied that the value of all the individuals remaining superannuation interests is nil following the release of any amount stated in an excess non-concessional contributions determination, or where the individual elects not to release any amount from superannuation because the value of their superannuation interests is nil. The direction will mean an individual will not have excess non-concessional contributions that will be subject to excess non-concessional contributions tax for the financial year to which the determination relates.

1.48 The Commissioner may revoke a direction he makes under subsection 33(3) of the *Acts Interpretation Act 1901*. For example the Commissioner may revoke the direction if the Commissioner receives information after making the original direction from a superannuation provider that holds a superannuation interest for the individual.

1.49 Where this direction is made the associated earnings amount stated in the excess non-concessional contributions determination is included in the individual's assessable income. The associated earnings amount is included in the individual's assessable income to reduce any tax benefit obtained by an individual breaching the non-concessional contributions cap even though the amounts are no longer retained in superannuation.

1.50 This direction is separate and in addition to the Commissioner's existing discretion under section 292-465 to disregard an individual's non-concessional contributions or allocate them to a different financial year in special circumstances, consistent with the object of excess non-concessional tax.

Example 1.4 Non-concessional contributions where value of superannuation interests are nil

In the 2013-14 financial year Regina makes non-concessional contributions that result in her exceeding her non-concessional contributions cap by \$100,000. The Commissioner gives her a notice of excess non-concessional contributions determination stating her excess contributions amount of \$100,000, an associated earnings amount of \$19,000, and a total amount of \$119,000.

Before receiving the determination Regina was paid a superannuation lump sum benefit of her entire balance of her only superannuation interest.

Regina makes a valid election to not release any amount from superannuation as the value of her superannuation interests is nil.

The Commissioner is satisfied that the total value of all Regina's superannuation interests is nil, and notifies Regina that he has directed her excess non-concessional contributions are nil.

As a result of this Regina does not have an excess non-concessional contributions tax liability for the 2013-14 financial year.

The amount of associated earnings stated in the excess non-concessional contributions determination of \$19,000 is included in Regina's assessable income for the 2013-14 income year.

Example 1.5 Non-concessional contributions where value of superannuation interests is nil after partial release

The Commissioner calculates that Paul's non-concessional contributions for a financial year exceed his non-concessional contributions cap by \$100,000 for the 2013-14 financial year. At this time, section 292-467 does not apply to Paul. The Commissioner gives Paul notice of an excess non-concessional contributions determination stating his excess contributions amount of \$100,000, an associated earnings amount of \$19,000, and the total amount of \$119,000.

Paul elects to release the total determination amount of \$119,000 by notifying the Commissioner and specifying a superannuation provider that holds an interest for him.

The Commissioner issues a release authority to the specified superannuation provider which holds a superannuation interest for Paul. The total value of that superannuation interest is \$60,000. Paul has no other superannuation interest with this or any other superannuation provider.

In compliance with the release authority the superannuation provider pays the \$60,000 to Paul, the maximum amount that can be released by the provider. Paul's excess non-concessional contributions under section 292-85 at this point would be \$40,000 being the excess amount stated in the determination less the amount released. The provider notifies the Commissioner of the amount released and that it was paid entirely from the tax-free component. The provider also notifies the Commissioner of the amount unable to be released and the reason the amount was unable to be released.

The Commissioner notifies Paul that full release has not been successful and asks Paul to make a further election in relation to the amount of \$59,000, being the unreleased amount of the determination, by nominating another superannuation provider that holds an interest for him or electing not to release if the value of his remaining superannuation interests is nil. Paul elects not to release the amount of \$59,000 because the value of his remaining superannuation interests is nil. He notifies the Commissioner of this election. The Commissioner is satisfied that the value of Paul's remaining superannuation interests is nil and directs that section 292-467 applies. The Commissioner notifies Paul of the direction. As a result, Paul no longer has any excess non-concessional contributions for the financial year under section 292-85.

The effect of the direction made by the Commissioner that section 292-467 applies does not affect the excess non-concessional contributions that were already released (\$60,000) in accordance with the release authority. The effect of both the amount released and the direction is that Paul does not have excess non-concessional contributions for the financial year. Similarly, the associated earnings amount included

in Paul's assessable income under section 303-17 is the total associated earnings amount in the determination of \$19,000.

Review rights

1.51 An individual who is dissatisfied with: an excess non-concessional contributions determination made in relation to them; an income tax assessment to include associated earnings in assessable income; a direction to disregard an individual's non-concessional contributions (or a decision not to make a direction) can object to the relevant decision in the manner set out in Part IVC of the TAA 1953.

1.52 If an individual who makes one of the objections above on a particular ground also makes, or could make, another one or more of the above objections on the same ground, the taxation decisions to which the objections are made are treated, for the purposes of Part IVC of the TAA 1953, as a single taxation decision.

1.53 This simplifies objection processes by allowing the individual to make a single objection to a number of taxation decisions they are dissatisfied with, the grounds of objection to which will overlap.

1.54 Individuals remain able to object to excess non-concessional contributions assessments and determinations to disregard or reallocate non-concessional contributions (or decisions not to make a determination).

Consequential amendments

1.55 A technical defect is corrected so that a person who fails to give a superannuation provider a release authority for the payment of excess non-concessional contributions tax is liable to administrative penalty.

Application and transitional provisions

1.56 The amendments made by the Bill apply in relation to non-concessional contributions for the 2013-14 financial year and later financial years.

