FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

REFORMING THE SUPERANNUATION EXCESS NON-CONCESSIONAL CONTRIBUTIONS TAX

FPA SUBMISSION TO THE TREASURY | DATE: 23.10.2014

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

Email: ENCCTax@treasury.gov.au

23 October 2014

RE: REFORMING THE SUPERANNUATION EXCESS NON-CONCESSIONAL CONTRIBUTIONS TAX

Dear Sir/Madam,

The Financial Planning Association of Australia (FPA) [1] welcomes the opportunity to provide feedback on the Exposure Draft Bill and Explanatory Memorandum for the *Tax and Superannuation Laws Amendment (2014 Measures No.7) Bill 2014: Excess Non-concessional Superannuation Contributions Tax Reforms*.

Our view is that this Bill achieves the policy intention of providing a disincentive for individuals to exceed their non-concessional contributions cap whilst protecting individuals from disproportionate tax penalties for inadvertent breaches of the cap. However, there remain a few policy issues with the Bill, regarding insurance inside superannuation and regarding liquidity in SMSFs.

Taxable/tax-free components

Under Item 19 of the Bill, the proposed subsection 96-20(1B) requires that a superannuation provider complies with the release authority by releasing funds from the tax free component of the individual's superannuation interests held by the provider before being paid from the taxable components of those interests. A similar provision (Item 23, subsection 96-25(3)) applies regarding defined benefit funds.

This approach has the benefit of preventing many individuals from refunding their taxable component and retaining their tax-free component, but the lack of discretion available to the superannuation provider may affect insurance policies held in those accounts.

[1] The Financial Planning Association (FPA) represents more than 10,750 members and affiliates of whom 8,055 are practicing financial planners and more than 5,500 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- We banned commissions and conflicted remuneration on investments and superannuation for our members in 2009 – years ahead of FOFA.
- We have an independent conduct review panel, Chaired by June Smith, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 24 member countries and the 150,000 CFP practitioners that make up the FPSB globally.
- We have built a curriculum with 17 Australian Universities for degrees in financial planning. All new members of the FPA are required to hold, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional bodies, eg CPA Australia.
- We are recognised as a professional body by the Tax Practitioners Board

We do not know how widespread or difficult of an issue this may be. On one hand, many of the individuals making excess non-concessional contributions will do so accidentally and in amounts too small to deplete an account enough to affect whether or not they will be insured. On the other, larger excess non-concessional contributions can take place in a variety of circumstances, including decisions made under advice with erroneous or incomplete information regarding the individual's present contributions. These could deplete a smaller account with insurance attached to it.

Allowing the individual to issue a partial release election, or an initial election that specifies amounts from multiple superannuation providers, may remedy this problem. However, this approach would pose further administrative complexity, cost, and delay. Until the extent of this vulnerability becomes clear, we would support an approach which encourages individuals to discuss with the ATO how the release may affect their insurances, and which discretion is employed to allow individuals time to contact their superannuation and/or insurance providers to arrive at the best outcome.

Another problem with the proposed subsections 96-20(1B) and 96-25(3) is that withdrawal from the tax-free component of existing pension is not possible as the tax components are proportioned. A unique position could be adopted for pensions, where instead of requiring the tax-free component to be withdrawn that the proportioning rule be used instead.

Furthermore, as growth is added to the taxable component, the requirement to withdraw the tax-free component comprises of a penalty to the member to the extent that the member already had tax-free component in his/her super fund before making the excess NCC. This position was apparently chosen to ensure simplicity but would seem to unfairly and inconsistently penalise some. However, we anticipate that this 'penalty' will be small relative to the simplicity of the proposed measure.

Lastly, because the draft legislation allows the member to elect which superannuation provider should receive the release authority (and this fund may be a fund other than the one that received the contributions), this provides an opportunity to nominate a fund which only holds a taxable component. A member may choose to do this in order to reduce a member's overall taxable amount, which would offer potential estate planning tax benefits.

The draft legislation does allow the Commissioner discretion to select a fund other than the one the member has nominated, and we expect that if this draft legislation is not amended to address this possibility then the ATO will use this power in circumstances where the election of the member intentionally or inadvertently causes a significant change in the proportions of their tax-free/taxable components.

SMSFs and liquidity

Under Item 19 of the Bill, the proposed subsection 96-20(1A) requires that a superannuation provider issued with a release authority must, within seven days after the release authority is issued, pay the individual either the amount stated in the release authority or the maximum available release amount for each superannuation interest held by the provider for the individual in superannuation plans. A similar provision exists (Item 23, subsection 96-25(2)) with respect to defined benefit funds.

The short timeframe for release may prove problematic for SMSF trustees, where the relative size and different regulation of APRA-regulated funds generally results in more liquid asset allocation. For SMSFs, in specie contributions and the asset allocation generally may affect whether or not the

superannuation provider can release the funds required by the ATO's determination in the seven day period.

Furthermore, we note that the Interim Report of the Financial System Inquiry has questioned whether the existing regulatory settings have required superannuation funds to hold unsuitably liquid assets for the long-term approach required of investing within superannuation. Whether or not the Government agrees with the Panel that 'short-termism' within superannuation is a systemic problem may affect whether these regulations will have to be revisited in the near future. While we anticipate that fund liquidity will be an issue for some SMSFs, our view of the best approach would be to support larger timeframes for the release of amounts elected by individuals, as well as discretion from the Commissioner to engage with the superannuation provider on the timeframe.

Technical matters

Under Item 14, the proposed 96-7(5) states that an individual may "make a further election under paragraph (1)(a) or (b) for the release, or non release, of that amount", where "that amount" is an amount that the superannuation provider did not pay in relation to a release authority issued in relation to an excess non-concessional contribution determination. However, the wording of (1)(a) and (1)(b) relate specifically to the total amount of the most recent determination, rather than the amount which may remain after the Commissioner gives the individual a notice of an amount that the superannuation provider did not pay in relation to the release authority issued in relation to the original election.

As such, the individual would not have the power, under that original election under (1)(a) to elect to release the remaining amount from a different provider, without an amended determination from the Commissioner. We recommend that either the election should be robust enough to accommodate payments following a notice from the Commissioner, or the Commissioner should be required to issue an amended determination which the individual is then required to elect under (1)(a), (1)(b), or (1)(c).

Furthermore, the proposed 96-7(5) does not specify that an individual can elect not to release the remaining amount for some other reason as per (1)(c). We are unsure of the policy behind this drafting, but cannot see a reason why an individual should not be able to elect not to release the remainder for any other reason, given that the proposed 303-17(4) in Item 4 of the Bill would require the associated earnings to be calculated on the original excess non-concessional contribution amount where the total released amount is less than the amount of the original determination.

The FPA would welcome the opportunity to discuss our submission further. If you have any questions, please contact me ona 02 9220 4500 or dante.degori@fpa.asn.au, or Nicholas Melas, Policy and Standards Analyst on nicholas.melas@fpa.asn.au.

Yours sincerely

Dante De Gori
General Manager Policy and Conduct
Financial Planning Association of Australia