

2013

EXPOSURE DRAFT

*SUSTAINING THE SUPERANNUATION CONTRIBUTION
CONCESSION*

DRAFT EXPLANATORY MEMORANDUM

Glossary

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

<i>Abbreviation</i>	<i>Definition</i>
Commissioner	Commissioner of Taxation
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
ITTPA 1997	<i>Income Tax (Transitional Provisions) Act 1997</i>
TAA 1953	<i>Taxation Administration Act 1953</i>
SSCCI Bill	Draft exposure legislation: Superannuation (Sustaining the Superannuation Contribution Concession) Imposition Bill 2013
TLASSC Bill	Draft exposure legislation: Tax Laws Amendment (Sustaining the Superannuation Contribution Concession) Bill 2013

Chapter 1

Sustaining the superannuation contribution concession: context and overview

Outline of chapter

1.1 This exposure draft legislation reduces the tax concession that individuals with income above \$300,000 receive on their concessional superannuation contributions from 30 per cent to 15 per cent by imposing the tax under Division 293 of the *Income Tax Assessment Act 1997* (ITAA 1997). The exposure draft legislation will also amend, the *Income Tax (Transitional Provisions) Act 1997* (ITTPA 1997), the *Taxation Administration Act 1953* (TAA 1953) and the *Superannuation (Resolution of Complaints) Act 1993*.

1.2 Superannuation contributions that are potentially affected are concessional contributions—low tax contributions—to interests other than defined benefit interests and defined benefit contributions for defined benefit interests, other than contributions that are subject to excess contributions tax. Certain contributions to interests in constitutionally protected funds, including employer contributions and defined benefit contributions, are also potentially impacted by the change. Special rules apply to Commonwealth judges and justices, and certain State higher level office holders.

1.3 The amendments apply in relation to contributions made or received by very high income earners on or after 1 July 2012.

Context of amendments

1.4 Currently, high income earners receive a significantly larger tax concession on superannuation contributions than average income earners. Concessional contributions that are included in the assessable income of superannuation funds are subject to a flat rate of tax of 15 per cent regardless of the income of the individual members of the fund. If the superannuation contributions made for the individual had instead been included in their salary and wages or business income, the high income earning individual would have been taxed on this income at a marginal income tax rate of 45 per cent (excluding the Medicare levy). As a result, currently these individuals effectively receive a 30 per cent tax concession (excluding the Medicare levy) on their superannuation contributions. In contrast, average income earners are subject to a marginal tax rate of

32.5 per cent (excluding the Medicare levy) and effectively receive a 17.5 per cent tax concession (excluding the Medicare levy) on their superannuation contributions.

1.5 These amendments give effect to the 2012-13 Budget measure, 'Superannuation - reduction of higher tax concession for contributions of very high income earners' announced by the Minister for Financial Services and Superannuation on 8 May 2012 in Media Release No. 024.

1.6 Sustaining the superannuation contribution concession will improve the fairness of the taxation system by ensuring the tax concession received by those individuals earning more than \$300,000 is more closely aligned with the concession received by average income earners.

1.7 In general, the tax concession for very high income earners with contributions made to an interest, other than a defined benefit interest or notional contributions in respect of a defined benefit interest will be reduced from 30 per cent to 15 per cent (excluding the Medicare levy) by these changes. It is estimated that these changes will only impact around 1.2 per cent of individuals contributing to superannuation in 2012- 13.

1.8 Individuals whose total income for surcharge purposes (other than reportable superannuation contributions) and concessional taxed superannuation contributions for an income year are above \$300,000 will be affected by the change. Income for surcharge purposes is a measure of income similar to that used to assess if individuals are liable for the Medicare levy surcharge.

1.9 Individuals affected by the change will be liable to pay an amount of 15 per cent of the total of concessional taxed contributions, including defined benefit contributions, which exceed \$300,000. There are some exceptions to this rule in respect of Commonwealth judges and justices, and certain State higher level office holders.

1.10 Broadly, superannuation contributions which attract tax concessions to which the changes apply include:

- employer contributions to accumulation interests;
- personal contributions which are claimed as an income tax deduction, generally claimed by the self-employed; and
- contributions for defined benefit interests (valued by an actuary).

1.11 Contributions that are subject to excess contributions tax in the form of either excess concessional contributions tax and/or excess non-concessional contributions tax do not attract a tax concession. Accordingly, they are not included in amounts of low tax contributions to which these changes apply.

1.12 This measure complements the low income superannuation contribution measure, which, from 1 July 2012 effectively refunds the income tax paid by superannuation providers (capped at \$500 each year) on concessional contributions for individuals with adjusted taxable income up to \$37,000. These individuals previously received limited or no tax concessions on their superannuation contributions.

1.13 On 5 April 2013, the Government announced further reforms to make the superannuation system fairer, including reforming the tax exemption for earnings on superannuation assets supporting income streams. In addition, individuals will be taxed at their marginal personal tax rate (rather than the top marginal tax rate) on any excess concessional contributions made from 1 July 2013 plus an interest charge. These changes are not reflected in this exposure draft explanatory memorandum.

Constitutional issues

State higher level office holders

1.14 The High Court ruled that the Commonwealth could not impose the superannuation contributions tax (surcharge) under legislation that was enacted in 1997 on contributions to constitutionally protected funds for State higher level office holders. However, the Commonwealth has legislative power to impose the Division 293 tax on contributions made to a superannuation interest in a constitutionally protected fund, where those contributions are salary packaged contributions made in respect of constitutionally protected State higher level office holders. Accordingly, contributions (including defined benefit contributions) that are not salary packaged contributions made to a constitutionally protected fund by a State on behalf of individuals identified in the regulations (constitutionally protected State higher level office holders) are not subject to the Division 293 tax.

1.15 Accordingly, the legislation imposes Division 293 tax on such salary packaged contributions made to an interest in a constitutionally protected fund.

Commonwealth justices and judges

1.16 The Constitution requires justices and judges of the High Court, and of other courts created by the Parliament, to receive such remuneration as determined by the Parliament and prevents the remuneration being reduced during their period in office. There are concerns that the imposition of Division 293 tax may in effect constitute a diminution of judicial remuneration in cases where certain defined benefit pension entitlements form part of their remuneration.

1.17 Accordingly, the legislation giving effect to this measure does not impose Division 293 tax on the contributions in respect of a defined

benefit interest in a superannuation fund established under the *Judges' Pensions Act 1968*.

Summary of new law

1.18 Division 293 tax is imposed at a rate of 15 per cent on very high income earners whose income and relevant concessional tax superannuation contributions (referred to in the exposure draft legislation as low tax contributions) exceed \$300,000 for an income year.

1.19 Special rules for working out Division 293 tax apply to:

- individuals with defined benefit interests;
- State higher level office holders with superannuation contributions to constitutionally protected funds; and
- Commonwealth justices and judges in respect of contributions for a defined benefit interest in a superannuation fund established under the *Judges' Pensions Act 1968*.

1.20 The amount of Division 293 tax is assessed by the Commissioner of Taxation (Commissioner) and is generally due and payable within 21 days of the Commissioner giving the notice of assessment. For defined benefit interests Division 293 tax is generally deferred for payment until 21 days after the first benefit is paid from the interest. Individuals are authorised to have amounts released from certain superannuation interests for the payment of Division 293 tax.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>Certain superannuation contributions are included in the assessable income of the superannuation provider and taxed at 15 per cent regardless of the taxable income of the individual for whom the contributions are made.</p> <p>Generally, individuals with combined income and concessional tax contributions exceeding \$300,000 in an income year are subject to Division 293 tax at 15 per cent on those contributions exceeding the \$300,000 threshold.</p>	<p>Certain superannuation contributions are included in the assessable income of the superannuation provider and taxed at 15 per cent regardless of the taxable income of the individual for whom the contributions are made.</p>

Chapter 2

Division 293 tax: calculation and imposition

Outline of chapter

- 2.1 This Chapter explains how Division 293 tax is worked out and imposed under the tax law.
- 2.2 References in this Chapter are to the Tax Laws Amendment (Sustaining the Superannuation Concession Concession) Bill 2013 unless otherwise specified.

Summary of new law

- 2.3 Division 293 tax is payable by individuals whose combined income for surcharge purposes (other than reportable superannuation contributions) and concessional tax contributions—low tax contributions—for an income year exceed \$300,000. The amount of tax payable is 15 per cent of the amount of low tax contributions that exceed the \$300,000 threshold.
- 2.4 Division 293 tax does not apply to:
- non-concessional contributions as they do not receive concessional tax treatment;
 - concessional contributions that are subject to excess concessional contributions tax or refunded excess contributions that are disregarded by the Commissioner for the purposes of excess contributions tax;
 - State higher level office holders in respect of contributions to constitutionally protected funds unless salary packaged contributions; and
 - Commonwealth justices and judges in respect of contributions for a defined benefit interest in a superannuation fund established under the *Judges' Pensions Act 1968*.
- 2.5 The Commissioner will make an assessment of Division 293 tax. Where Division 293 tax relates to defined benefit interests, payment of the tax is deferred until a superannuation benefit is paid from the interest.

2.6 Former temporary residents who receive a departing Australia superannuation payment are eligible for a refund of the amount of any Division 293 tax paid as they effectively do not receive any concessional tax treatment on their contributions to superannuation.

Detailed explanation of new law

Overview

Imposition of the Division 293 tax and severability

2.7 For constitutional reasons, a separate exposure draft Bill imposes liability for Division 293 tax on individuals who have Division 293 taxable contributions in an income year. *[Item 4 of the Superannuation (Sustaining the Superannuation Contribution Concession) Imposition Bill 2013 (SSCCI Bill)]*

2.8 The Division 293 tax does not apply if the imposition of the tax on an individual exceeds the legislative power of the Commonwealth. This ensures that the exposure draft legislation cannot be invalid because it seeks to impose the Division 293 tax in circumstances which are not within the Commonwealth's legislative power under the Constitution. *[Item 6 of the SSCCI Bill, and Schedule #, Part 1, item 1, subsection 293-145(3)]*

What is the rate of tax?

2.9 Division 293 tax applies at a rate of 15 per cent of an individual's Division 293 taxable contributions (see paragraph 2.21) for an income year. *[Item 5 of the SSCCI Bill]*

Who is liable for the tax?

2.10 Individuals are liable to pay the tax if they have Division 293 taxable contributions for an income year. *[Schedule #, Part 1, item 1, section 293-15]*

2.11 The meaning of income year and Division 293 taxable contributions in the SSCCI Bill take their meaning from the ITAA 1997. *[Item 3 of the SSCCI Bill]*

Working out Division 293 tax

2.12 Broadly, an individual has a liability for Division 293 tax for an income year if their income for surcharge purposes (less reportable superannuation contributions) and low tax contributions for a corresponding financial year exceed \$300,000 (see Diagram 2.1).

2.13 Income for surcharge purposes is similar to the income test used for determining whether an individual is liable for the Medicare levy surcharge. For an individual with superannuation interests that are not defined benefit interests or an interest in a constitutionally protected fund,

low tax contributions are low tax contributed amounts (effectively concessional contributions) less any excess concessional contributions. As superannuation interests that are not defined benefit interests are the most common, this would apply in the majority of cases.

2.14 This general method for calculating an amount of low tax contributions is modified by special rules in respect of:

- individuals with defined benefit interests, where the individual's low tax contributions include low tax contributed amounts to any interests other than defined benefit interests, plus any defined benefit contributions for defined benefit interests, less any excess concessional contributions. (The method of calculating defined benefit contributions is to be set out in regulations);
- certain State higher level office holders, whose low tax contributions are low tax contributed amounts plus defined benefit contributions (except for contributions in respect of constitutionally protected funds that are not made as part of a salary package), less any excess concessional contributions; and
- certain Commonwealth justices and judges whose low tax contributions are low tax contributed amounts plus defined benefit contributions (except defined benefit contributions for a defined benefit interest in a superannuation fund established under the *Judges' Pensions Act 1968*), less any excess concessional contributions.

2.15 Division 293 taxable contributions are the lower of:

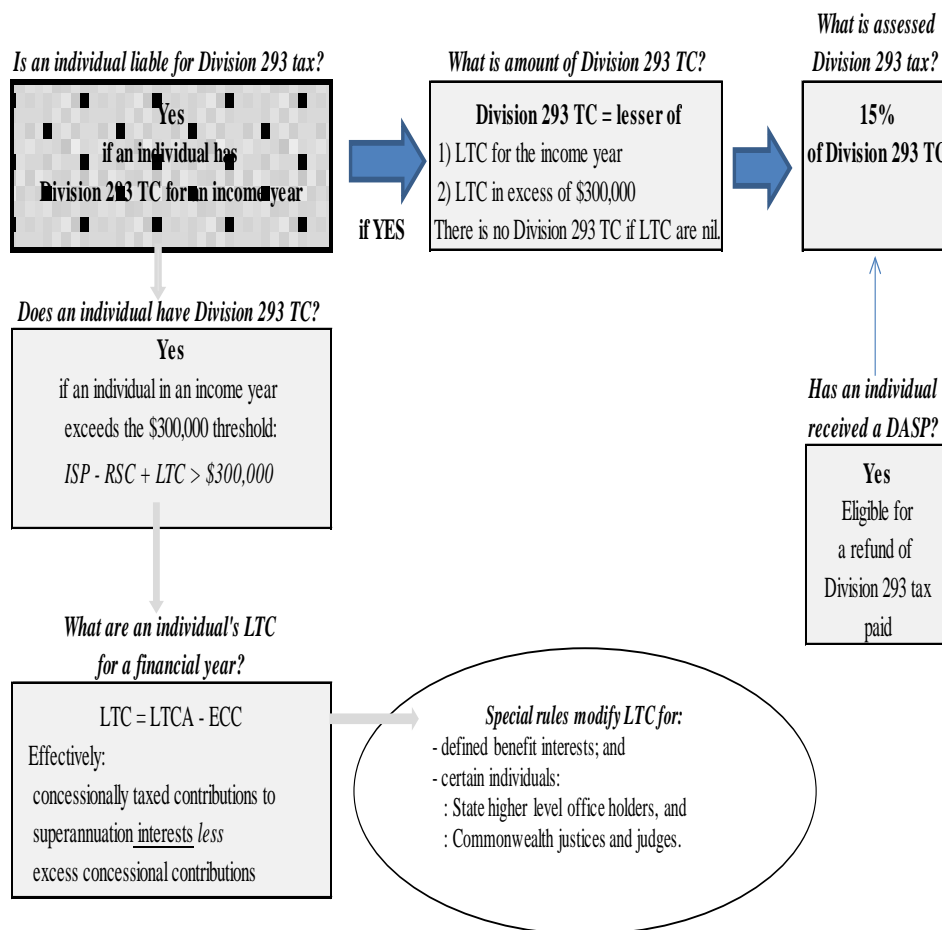
- the amount of low tax contributions; and
- the sum of income for surcharge purposes (less reportable superannuation contributions) and low tax contributions above the \$300,000 threshold.

2.16 However, if an individual does not have low tax contributions (that is, if an amount of low income contributions is zero) then there are no Division 293 taxable contributions and no liability arises for Division 293 tax.

2.17 The Commissioner makes an assessment of Division 293 tax payable for each income year for an individual equal to 15 per cent of Division 293 taxable contributions.

2.18 Individuals who receive a departing Australia superannuation payment are entitled to a refund of any Division 293 tax that they have paid.

Diagram 2.1 Working out Division 293 taxable contributions



LEGEND:

Division 293 TC: Division 293 taxable contributions LTC: low tax contributions DASP: departing Australia superannuation payments
 ISP: income for surcharge purposes LTCA: low tax contributed amounts
 RSC: reportable superannuation contributions ECC: excess concessional contributions

When does an individual have Division 293 taxable contributions?

2.19 Individuals have Division 293 taxable contributions if their combined income and low tax contributions for an income year exceed \$300,000.

2.20 In particular, an individual has Division 293 taxable contributions if an individual has low tax contributions and the sum of:

- the amount of their income, measured as income for surcharge purposes less reportable superannuation contributions for an income year; and
- the amount of low tax contributions for a corresponding financial year

exceed \$300,000.

[Schedule #, Part 1, item 1, subsection 293-20(1)]

2.21 The amount of Division 293 taxable contributions is the lesser of:

- the amount of low tax contributions; and
- the amount of the excess of the sum over the \$300,000 threshold.

[Schedule #, Part 1, item 1, subsection 293-20(1)]

2.22 The calculation of Division 293 taxable contributions ensures that the tax applies to low tax contributions only to the extent that they exceed the \$300,000 threshold when added to income for surcharge purpose (other than reportable superannuation contributions). Accordingly, even if an individual has income exceeding the \$300,000 threshold but does not have low tax contributions, the individual is not liable for Division 293 tax. This reflects that the measure applies to low tax contributions to the extent the \$300,000 threshold is exceeded. *[Schedule #, Part 1, item 1, subsection 293-20(2)]*

Example 2.1 Determining the amount of Division 293 taxable contributions

Low tax contributions equal to Division 293 taxable contributions

David's income (income for surcharge purposes other than reportable superannuation contributions) is \$315,000 and his low tax contributions are \$25,000 in an income year.

David's combined income and low tax contributions are \$340,000, being \$315,000 (income for surcharge purposes other than reportable superannuation contributions) plus low tax contributions (\$25,000).

As the amount of low tax contributions (\$25,000) is lower than the amount of combined income and low tax contributions (\$340,000) that exceed the \$300,000 threshold (that is, the excess is \$40,000), the amount of Division 293 taxable contributions is the amount of low tax contributions, that is \$25,000.

For an illustration of David's case see Diagram 2.2 (Case 1).

Division 293 taxable contributions are lower than low tax contributions

Sabina’s income (income for surcharge purposes other than reportable superannuation contributions) is \$285,000 and her low tax contributions are \$25,000 in an income year.

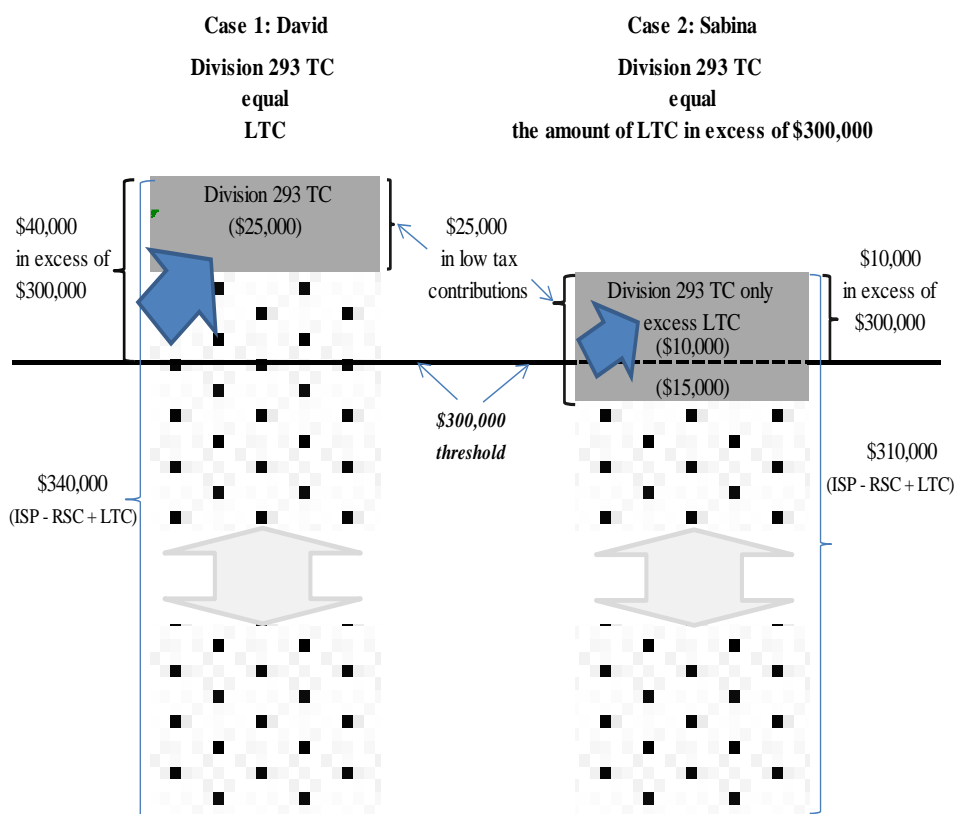
Sabina’s combined income and low tax contributions are \$310,000, being \$285,000 (income for surcharge purposes other than reportable superannuation contributions) plus \$25,000 (low tax contributions).

The amount of low tax contributions (\$25,000) is greater than the excess of the amount of combined income and low tax contributions over the \$300,000 threshold. The excess equals \$10,000 (\$310,000 less \$300,000).

Hence, Sabina’s Division 293 taxable contributions are \$10,000.

For an illustration of Sabina’s case see Diagram 2.2 (Case 2).

Diagram 2.2 An illustration of David’s and Sabina’s Division 293 taxable contributions in Example 2.1



LEGEND:

Division 293 TC: Division 293 taxable contributions
LTC: low tax contributions

ISP: income for surcharge purposes
RSC: reportable superannuation contributions

Working out income

2.23 The purpose of the \$300,000 threshold is to ensure that Division 293 tax only applies to very high income earners with low tax contributions in an income year. The exposure draft legislation uses a broad based concept of income to ensure that various forms of income are included and to ensure that Division 293 tax cannot be reduced or avoided by manipulating taxable income by for example entering into salary packaging agreements.

2.24 Income for surcharge purposes is the concept of income that is similar to the test used for determining whether an individual is liable to pay the Medicare levy surcharge. Income for surcharge purposes is defined in section 995-1 of the ITAA 1997. Broadly:

- it includes:
 - an individual's taxable income (including the net amount on which family trust distribution tax has been paid);
 - reportable superannuation contributions;
 - reportable fringe benefits; and
 - total net investment loss (includes both net financial investment loss and net rental property loss); but
- it excludes the taxed element of the taxable component of a superannuation lump sum benefit, other than a death benefit, up to the low rate cap amount (\$175,000 in the 2012 -13 income year) for individuals aged 55 to 59.

2.25 Reportable superannuation contributions are defined in section 995-1 of the ITAA 1997. Broadly, reportable superannuation contributions consist of:

- reportable employer superannuation contributions (essentially, contributions that could have been received by an employee as income if they had chosen; for example, salary sacrificed superannuation contributions, annual bonuses paid as superannuation contributions or higher superannuation contributions as a result of individual contracts); and
- personal superannuation contributions made by self-employed and other eligible individuals for which an income tax deduction is claimed.

2.26 For the purposes of the \$300,000 threshold, the amount of income for surcharge purposes is reduced by reportable superannuation contributions because reportable superannuation contributions are already included in low tax contributions. This avoids double counting of those contributions.

Working out low tax contributions

2.27 To determine whether an individual has Division 293 taxable contributions for an income year, the amount of low tax contributions for the corresponding financial year needs to be determined.

2.28 Low tax contributions are effectively concessional tax contributions generally made for an individual to an interest held by a superannuation provider.

2.29 The amount of an individual's low tax contributions for a financial year is worked out under:

- the general rules that apply to individuals with contributions made or amounts allocated to superannuation interests (other than defined benefit interests which are the majority of cases); and
- the special rules that apply to:
 - individuals with defined benefit interests;
 - certain State higher level office holders; and
 - certain Commonwealth justices and judges.

2.30 The calculation of low tax contributions by the Commissioner for individuals under the general and the special rules is outlined below. This commentary includes examples of situations in which individuals hold only superannuation interests other than defined benefit interests, only defined benefit interests, and where individuals hold both types of interests. The examples also take into account whether or not the individuals have excess concessional contributions.

General rules — individuals with interests that are not defined benefit interests

2.31 When individuals have only concessional tax contributions in respect of superannuation interests that are not defined benefit interests, the amount of low tax contributions for a financial year is worked out as follows:

- low tax contributed amounts for the financial year;
- less*
- excess concessional contributions for the financial year (if any).

[Schedule #, Part 1, item 1, section 293-25]

Low tax contributed amounts

2.32 Low tax contributed amounts are broadly concessional contributions as defined in section 292-25 of the ITAA 1997, however they:

- also include contributions to tax exempt constitutionally protected funds that would otherwise be concessional contributions; and
- exclude notional taxed contributions for defined benefit interests.

[Schedule #, Part 1, item 1, section 293-30]

2.33 In effect, in the majority of cases, where individuals only have contributions to superannuation interests that are not defined benefit interests (and none of which are in constitutionally protected funds), contributed amounts for a financial year will equal the amount of concessional contributions for the financial year. They will include contributions such as:

- all employer contributions made on behalf of that individual (including compulsory superannuation guarantee contributions and salary sacrificed amounts); and
- personal contributions made by that individual that are tax deductible (generally restricted to eligible self-employed persons).

Example 2.2 Calculation of low tax contributions: superannuation interest that is not a defined benefit interest

Maria's only superannuation interest is not a defined benefit interest. Concessional contributions made on Maria's behalf to her superannuation interest in the fund are \$21,000 in the 2012-13 financial year.

Maria's low tax contributions are \$21,000 in 2012-13, being her concessional contributions.

No further calculations are required to work out Maria's low tax contributions because:

- Maria has only concessional contributions in respect of a superannuation interest other than a defined benefit interest, which means that her low tax contributed amounts equal her amount of concessional contributions;
- Maria does not have excess concessional contributions as her concessional contributions of \$21,000 are lower than the concessional contributions cap for 2012-13 (\$25,000). Therefore no amount of excess concessional contributions need to be subtracted from her contributed amounts; and
- special rules for working out low tax contributions do not apply to Maria as she is not subject to any of the special rules.

Excess concessional contributions

2.34 Excess concessional contributions are determined under section 292-20 of the ITAA 1997. Broadly, excess concessional contributions are concessional contributions that exceed the individual's concessional contribution cap for the financial year (\$25,000 for the 2012-13 financial year).

2.35 In general, excess concessional contributions are subject to excess concessional contributions tax. However, in certain circumstances excess concessional contributions can be refunded, and concessional contributions can be disregarded or allocated to another financial year by the Commissioner exercising a discretion for the purposes of excess contributions tax. Whether or not contributions are subject to excess contributions tax, refunded, disregarded or allocated to another year has implications for whether they are included or excluded from low tax contributions and income for surcharge purposes. That is, whether they are potentially subject to Division 293 tax and whether they are included in the \$300,000 threshold. The effect of excess concessional contributions on low tax contributions for the purposes of Division 293 tax is summarised in Table 2.1.

2.36 Non-concessional contributions are not concessionally taxed and therefore are generally not included in low tax contributed amounts. However, there are some concessional contributions that are also non-concessional contributions, for example, excess concessional contributions. Any non-concessional contributions that are disregarded or allocated to another financial year by the Commissioner exercising a discretion are neither included in amounts of low tax contributions nor income for surcharge purposes.

Table 2.1 Summary of the treatment of excess concessional contributions for the purposes of Division 293 tax¹

<i>Types of excess concessional contributions</i>	<i>Is the amount included in low tax contributions?</i>	<i>Is the amount included in the \$300,000 threshold?</i>
Excess concessional contributions subject to excess concessional contributions tax (Subdivision 292-B of ITAA 1997).	No. Division 293 tax does not apply to this amount as it is effectively subject to tax at the highest individual marginal tax rate (inclusive of the Medicare levy).	No. This amount is not included in low tax contributions. It is also not included in income for surcharge purposes.

¹ The Government announced on 5 April 2013 that it would reform the treatment of concessional contributions in excess of the annual cap. These changes are not reflected in this exposure draft explanatory memorandum.

<i>Types of excess concessional contributions</i>	<i>Is the amount included in low tax contributions?</i>	<i>Is the amount included in the \$300,000 threshold?</i>
Excess concessional contributions that are refunded (that is, disregarded for the purposes of excess contributions tax under section 292-467 of ITAA 1997).	No. Division 293 tax does not apply to the excess contributions disregarded as that amount forms part of the assessable income of individuals and is subject to income tax at the individual's marginal tax rate.	Yes. The amount of the excess contributions disregarded is not included in low tax contributions. However, this amount is included in income for surcharge purposes as it forms part of assessable income. No double counting occurs as the amount of income for surcharge purposes is reduced by reportable superannuation contributions.
Concessional contributions disregarded for the purposes of excess contributions tax by the Commissioner's discretion under section 292-465 of the ITAA 1997.	Yes. This amount is subject to Division 293 tax as it is a low tax contribution that is not subject to excess contributions tax.	Yes. This is because the amount is included in low tax contributions. No double counting occurs as the amount of income for surcharge purposes is reduced by reportable superannuation contributions.
Concessional contributions allocated to another year for the purposes of excess contributions tax by the Commissioner's discretion under section 292-465 of the ITAA 1997.	Yes in the year the contributions were made. This amount is subject to Division 293 tax as it is a low tax contribution that is not subject to excess contributions tax. It is included in low tax contributions in the year the contributions were made. It is not included in low tax contributions in the year it is allocated to.	Yes in the year the contributions were made. This is because this amount is included in low tax contributions. No double counting occurs as the amount of income for surcharge purposes is reduced by reportable superannuation contributions. It is not included in the year it is allocated to. This is because it is not included in low tax contributions or income for surcharge purposes.

2.37 Generally, excess concessional contributions are subtracted from low tax contributed amounts in working out low tax contributions to prevent excess concessional contributions from being subject to Division 293 tax. This is because, in general, these contributions are subject to excess concessional contributions tax which effectively removes the concessional tax treatment of the excess concessional contributions by imposing excess concessional contributions tax on them at a rate of 31.5 per cent.

2.38 Similarly, excess concessional contributions are not included in the \$300,000 threshold test. This reflects that excess concessional contributions are not included in low tax contributions or in income for surcharge purposes (after excluding reportable superannuation contributions).

Example 2.3 Calculation of low tax contributions: interest that is not a defined benefit interest and excess concessional contributions

Mark only has one superannuation interest. It is not a defined benefit interest. Concessional contributions made on Mark's behalf are \$40,000 in the 2012-13 financial year.

Mark has excess concessional contributions of \$15,000 (being \$40,000 less \$25,000) as his concessional contributions cap for the 2012-13 financial year is \$25,000.

His low tax contributions are \$25,000, being effectively his concessional contributions (\$40,000) reduced by his excess concessional contributions (\$15,000).

No further calculations are required to work out Mark's low tax contributions because special rules for calculating his low tax contributions do not apply to Mark.

The \$15,000 of excess concessional contributions is also not included in the \$300,000 threshold to determine whether Mark has Division 293 taxable contributions. This is because excess concessional contributions are not only excluded from amounts of low tax contributions but also from the income test (income for surcharge purposes less reportable superannuation contributions).

Refunded excess concessional contributions

2.39 When the Commissioner makes a determination under section 292-467 of the ITAA 1997 for the purposes of excess concessional contributions tax, an amount of the excess contributions (reduced by 15 per cent in recognition of the tax paid by the superannuation provider on the contributions) may be released by a superannuation provider. The amount is paid to the Commissioner and the gross amount of the excess contributions is included in the assessable income of the individual. A net amount (if any) is refunded to the individual by the Commissioner after an amended income tax assessment is issued.

2.40 The amount of the excess concessional contributions is disregarded for working out excess concessional contributions subject to excess contributions tax. However, for the purposes of calculating low tax contributions the excess concessional contributions disregarded for the purposes of excess contributions tax continue to be treated as excess concessional contributions and accordingly are deducted from low tax contributed amounts. [*Schedule #, Part 1, item 1, section 293-35*]

2.41 This prevents these disregarded excess concessional contributions from being subject to Division 293 tax. This is because the disregarded contributions are included in an individual's assessable income and are therefore subject to income tax at the individual's marginal tax rate. This removes any concessional tax treatment of those contributions.

2.42 However, the disregarded contributions are included in the \$300,000 threshold. This is because, while the disregarded excess concessional contributions are not included in low tax contributions, they are included in income for surcharge purposes (as they are part of assessable income). This reflects that by disregarding them for excess contributions tax, they are included in the assessable income of the individual.

Example 2.4 Calculation of low tax contributions – interest that is not a defined benefit interest and refunded excess concessional contributions

Assume the same facts as Example 2.3, except that Mark's concessional contributions (and therefore his low tax contributed amounts) are \$30,000.

Mark has excess concessional contributions of \$5,000.

Mark accepts an offer by the Commissioner to have the excess concessional contributions disregarded for excess contributions tax and instead included in his assessable income. His fund releases 85 per cent of the amount of his excess contributions to the Commissioner and the Commissioner later refunds part of that amount to him.

His low tax contributions are still \$25,000, because his contributed amounts (\$30,000) are reduced by the amount of disregarded excess concessional contributions (\$5,000) as they are treated the same as other excess concessional contributions for the purpose of determining low tax contributions. The fact that the \$5,000 was disregarded as being excess concessional contributions as the Commissioner made a determination and Mark is not liable for excess contributions tax on those contributions is ignored.

However, the \$5,000 is included in Mark's assessable income and thus in income for surcharge purposes, so it will be a part of the \$300,000 threshold to determine whether Mark has Division 293 taxable

contributions. There is no double counting as the amount is not included in low tax contributions.

Disregarded and reallocated excess concessional contributions

2.43 When the Commissioner makes a determination under section 292-465 of the ITAA 1997 for the purposes of excess contributions tax, an amount of concessional contributions for a financial year can be disregarded for the purposes of excess contributions tax or allocated instead to another year.

2.44 However, the disregarded amounts are not included in excess concessional contributions (or subject to excess concessional contributions tax) and consequently are not subtracted from low tax contributed amounts. This ensures that amounts of concessional contributions that are disregarded for excess contributions tax are included in low tax contributions and makes them potentially subject to Division 293 tax.

2.45 Those disregarded amounts are included in the \$300,000 threshold test.

Example 2.5 Calculation of low tax contributions — interest that is not a defined benefit interest and disregarded concessional contributions

Assume the same facts as Example 2.4, except that Mark's concessional contributions are \$27,000 in the 2012-13 financial year.

Mark has excess concessional contributions of \$2,000. However, the Commissioner makes a determination to disregard an amount of \$2,000 of concessional contributions for the purposes of excess contributions tax. Mark therefore has no excess concessional contributions as a result of the Commissioner's determination.

Mark's low tax contributions are \$27,000. This is because the \$2,000 disregarded concessional contributions for the purposes of excess contributions tax are still part of low tax contributed amounts (for Mark, effectively concessional contributions) as they still receive concessional tax treatment. As Mark has no excess concessional contributions his low tax contributions are equal to his low tax contributed amounts.

As the \$2,000 disregarded concessional contributions are included in low tax contributions, they are also included in the \$300,000 threshold to determine whether Mark has Division 293 taxable contributions.

2.46 Where the Commissioner makes a determination to reallocate concessional contributions from one financial year to another financial year for the purposes of excess contributions tax, those contributions are:

- included in low tax contributed amounts in the year that they are made in determining low tax contributions;

- not included in excess concessional contributions in the year that they are made and consequently are not subtracted from low tax contributed amounts for determining low tax contributions for that year; and
- not included in low tax contributed amounts for determining low tax contributions for the year they are reallocated to.

2.47 However, the reallocated contributions are included in concessional contributions in the year they are allocated to for the purposes of excess contributions tax.

2.48 This ensures that contributions reallocated for the purposes of excess contributions tax are potentially subject to Division 293 tax in the year that they are made and that they are not subject to Division 293 tax in the year to which they were reallocated (thus avoiding any double taxation).

2.49 This also ensures that the contributions reallocated for the purposes of excess contributions tax are included in the \$300,000 threshold in the year they were made and not included in the \$300,000 threshold in the year to which they were reallocated (thus avoiding double counting).

Example 2.6 Calculation of low tax contributions: interest that is not a defined benefit interest and reallocated concessional contributions

Richard has concessional contributions of \$30,000 in the 2012-13 financial year.

Richard has excess concessional contributions of \$5,000. However, the Commissioner makes a determination to reallocate \$5,000 concessional contributions from the 2012-13 financial year to the 2013-14 financial year for the purposes of excess contributions tax.

2012-13 financial year

Richard's low tax contributions for the 2012-13 financial year equal the amount of concessional contributions; that is \$30,000.

This is because concessional contributions reallocated to the 2013-14 financial year due to the Commissioner's determination made for the purposes of excess contributions tax are not included in excess concessional contributions in 2012-13 (that is, in the year that they were made) and consequently are not subtracted from low tax contributed amounts for determining low tax contributions in that year.

The Commissioner's determination made for the purposes of excess contributions tax does not have the effect of reallocating the contributions for the purposes of low tax contributions.

As the \$5,000 in reallocated concessional contributions are included in low tax contributions for the 2012-13 financial year, they are also included in the \$300,000 threshold test to determine whether Richard

has Division 293 taxable contributions for Division 293 tax in 2012-13.

2013-14 financial year

Richard's concessional contributions of \$5,000 that were reallocated from the 2012-13 financial year and instead allocated to the 2013-14 financial year due to the Commissioner's determination made for the purposes of excess contributions tax count towards his concessional contributions cap of \$25,000 for the 2013-14 financial year for the purposes of excess contributions tax.

Concessional contributions actually made on Richard's behalf amount to \$23,000 in the 2013-14 financial year.

However, for excess contributions tax purposes concessional contributions for the 2013-14 financial year also include the \$5,000 reallocated by the Commissioner from the 2012-13 financial year. His total concessional contributions for the purposes of excess contributions tax are therefore \$28,000.

Richard therefore has excess concessional contributions of \$3,000 in the 2013-14 financial year. This amount is subject to excess concessional contributions tax, thus it is subtracted as excess contributions from low tax contributed amounts for the purposes of calculation of the low tax contributions.

Accordingly, Richard's low tax contributions amount to \$20,000 in the 2013-14 financial year which is \$23,000 in low tax contributed amounts (effectively Richard's concessional contributions made in the 2013-14 financial year) less \$3,000 in excess concessional contributions.

As the \$5,000 reallocated concessional contributions are not included in low tax contributions for the 2013-14 financial year, they are also not included in the \$300,000 threshold test to determine whether Mark has Division 293 taxable contributions for Division 293 tax in 2013-14.

Special rules — defined benefit interests

2.50 Where individuals have a defined benefit interest or interests, the amount of low tax contributions is calculated under special rules for defined benefit interests. These special rules modify the general calculation of low tax contributions discussed at paragraph 2.31.

2.51 The special rules for defined benefit interests provide that low tax contributions for a financial year are worked out as follows:

- include low tax contributed amounts as calculated under the general rules but only to the extent that they do not relate to the defined benefit interests (*Step 1*);
- subtract excess concessional contributions (*Step 2*);

- add defined benefit contributions in respect of defined benefit interests (*Step 3*).

If a negative amount results from the calculation under this method, then low tax contributions are nil and therefore there is no Division 293 tax. [*Schedule #, Part 1, item 1, section 293-105*]

2.52 A negative amount only arises where excess concessional contributions exceed the total of low tax contributed amounts plus defined benefit contributions for all superannuation interests.

2.53 Broadly:

- Step 1 and Step 2 (see paragraph 2.51) are effectively the same as calculations made under the general rules for individuals with interests that are not defined benefit interests as outlined above;
- the result of Step 2 is negative if excess concessional contributions are greater than the amount of the low tax contributed amounts for interests that are not defined benefit interests with the result that any remaining amount of excess concessional contributions reduces the defined benefit contributions; and
- Step 3 then includes concessionally taxed contributions for defined benefit interests (referred to as defined benefit contributions) to calculate the amount of low tax contributions.

2.54 If low tax contributions are nil then no Division 293 taxable contributions arise and there is no liability for Division 293 tax.

2.55 Set out below is further information on the steps for calculating low tax contributions for individuals with defined benefit interests. This is followed by examples involving the calculation of low tax contributions for individuals with defined benefit interests in different circumstances.

Include low tax contributed amounts that do not relate to a defined benefit interest (Step 1)

2.56 This ensures that low tax contributed amounts for interests that are not defined benefit interests are included in the amount of low tax contributions for individuals who have both types of interests in the same financial year.

Subtract excess concessional contributions (Step 2)

2.57 As discussed under the general rules, excess concessional contributions as subtracted from the amount of low tax contributed amounts as they are subject to excess concessional contributions tax which removes any concessional tax treatment on those contributions.

2.58 The treatment of excess concessional contributions for the purposes of low tax contributions is the same as outlined under the general rules. This includes the treatment of disregarded (and potentially refunded) excess concessional contributions under the Commissioner's determination for the purposes of excess contributions tax (as provided by section 292-467 of the ITAA 1997). Accordingly, such contributions are included in excess concessional contributions that are subtracted from the low tax contributed amounts in respect of interests that are not defined benefit interests; however, they continue to be included in calculating the \$300,000 threshold. *[Schedule #, Part 1, item 1, section 293-110]*

Add defined benefit contributions in respect of the defined benefit interests (Step 3)

2.59 Amounts of defined benefit contributions are added to ensure that (along with low tax contributed amounts for interests that are not defined benefit interests) concessional contributions for defined benefit interests are also included in low tax contributions and thus are potentially subject to Division 293 tax.

2.60 Both the scope of defined benefit contributions and the method of determining the amounts of defined benefit contributions are to be prescribed by regulations (defined benefit contributions regulations). *[Schedule #, Part 1, item 1, subsections 293-115(1) to (6)]*

2.61 The regulations may take the following into account in determining the scope of defined benefit contributions:

- the individual who has the superannuation interest that includes the defined benefit interest;
- the superannuation plan in which superannuation interest exists;
- the superannuation provider in relation to the superannuation plan; and
- any other matter.

[Schedule #, Part 1, item 1, subsection 293-115(3)]

2.62 The defined benefit contributions regulations may also specify circumstances in which the amount of defined benefit contributions for a financial year is nil. *[Schedule #, Part 1, item 1, subsection 293-115(4)]*

2.63 The listed matters that may be taken into account by the regulations in setting out what constitutes defined benefit contributions do not restrict the scope of the regulation making power. *[Schedule #, item 1, Part 1, subsection 293-115(5)]*

2.64 As the measure applies from 1 July 2012, regulations concerning defined benefit contributions also apply from this date. The amendments expressly allow the regulations to apply from 1 July 2012, despite

subsection 12(2) of the *Legislative Instruments Act 2003* which provides that legislative instruments will only apply on a prospective basis unless the principal legislation specifically provides to the contrary. Without retrospective regulations, there would be no definition or method for calculating defined benefit contributions for the 2012-13 financial year and the exposure draft legislation could not operate. Allowing for the regulations to apply retrospectively from the day from which the exposure draft legislation applies ensures that individuals with defined benefit interest are treated consistently with individuals with interests that are not defined benefit interests. [*Schedule #, item 1, Part 1, subsection 293-115(6)*]

2.65 It is intended that the inclusion of defined benefit contributions in low tax contributions will ensure that individuals with defined benefit interests are treated in a similar way to those individuals with interests that are not defined benefit interests for the purposes of Division 293 tax. This will be achieved in the regulations by estimating for defined benefit interests (including interests held in funded, unfunded and partially unfunded superannuation schemes) the amount of employer contributions that would be made if contributions were made annually in respect of the interest rather than only when the benefit is paid. Defined benefit contributions will also include employer contributions made under a salary sacrifice arrangement made in respect of the individual to defined benefit interests. Unlike notional taxed contributions (used for determining an individual's concessional contributions for the purposes of excess contributions tax) there will be no limit on the amount of defined benefit contributions because no grandfathering of defined benefit contributions applies.

Examples of calculation of low tax contributions

2.66 The following examples include calculations of low tax contributions under the special rules for individuals with a defined benefit interest or interests. They provide examples of calculations of low tax contributions for individuals with only a defined benefit interest and for individuals with both an interest that is not a defined benefit interest and a defined benefit interest. There are also examples for individuals that have notional taxed contributions determined for the purposes of excess contributions tax under the special rules for grandfathering and also where those grandfathering rules do not apply.

2.67 There are other special rules that apply to certain individuals that are discussed at paragraphs 2.68 to 2.83. Examples 2.7 to 2.10 do not apply to those individuals subject to the other special rules.

Example 2.7 Calculation of low tax contributions — defined benefit interest only

Victor has one superannuation interest which is a defined benefit interest. Victor's defined benefit contributions for the purposes of low tax contributions is \$24,000 for the 2012-13 financial year. Victor's notional taxed contributions for the purposes of excess contributions tax are also \$24,000.

Victor's low tax contributions are therefore \$24,000 in the 2012-13 financial year. This is the amount of his defined benefit contributions under Step 3 in the method statement in the special rules for defined benefit interests.

No further calculations under the method statement are required because Victor does not have:

- any interests that are not defined benefit interests (Step 1); and
- excess concessional contributions (Step 2).

Example 2.8 Calculation of low tax contributions — defined benefit interest and excess concessional contributions

Assume the same facts as in Examples 2.7, except that Victor's defined benefit contributions for the purposes of Division 293 tax are \$40,000 for the 2012-13 financial year.

Case 1 Excess contributions tax grandfathering does not apply

Victor's notional taxed contributions for the purposes of excess contributions tax also equal \$40,000 for the 2012-13 financial year.

Victor commenced to hold the defined benefit interest after 12 May 2009 so the special rules for grandfathering for excess contributions tax for defined benefit interests do not apply and therefore his notional taxed contributions are not equal to his concessional contributions cap of \$25,000. Accordingly, Victor's excess concessional contributions are \$15,000 ($\$40,000 - \$25,000$ (his concessional contributions cap)).

Accordingly, Victor's low tax contributions are \$25,000, calculated as follows:

- start with low tax contributed amounts that do not relate to the defined benefit interest (nil);
- deduct the amount of his excess concessional contributions (\$15,000) under Step 2 as those excess concessional contributions are subject to excess concessional contributions tax ($0 - \$15,000 = - \$15,000$); and
- add the amount of his defined benefit contributions (\$40,000) under Step 3 ($-\$15,000 + \$40,000 = \$25,000$).

Case 2 Excess contributions tax grandfathering applies

If Victor held the defined benefit interest before 12 May 2009 and meets all of the other conditions for eligibility for the grandfathering rules for excess concessional contributions tax, his notional taxed contributions for the purposes of excess concessional contributions tax will be equal to his concessional contributions cap of \$25,000. This results in no excess concessional contributions tax liability for Victor.

Accordingly, Victor's low tax contributions are \$40,000, being the full amount of his defined benefit contributions in Step 3.

Example 2.9 Calculation of low tax contributions – both a defined benefit interest and an interest that is not a defined benefit interest

Steve holds an interest that is not a defined benefit interest in a superannuation fund. Low tax contributed amounts made on his behalf to that interest amounted to \$15,000 in the 2013-14 financial year. Steve's concessional contributions for excess contributions tax are the same as the low tax contributed amounts. Steve also holds a defined benefit interest in a superannuation fund and his defined benefit contributions for that interest are \$10,000 for the 2013-14 financial year. Steve is not a constitutionally protected individual. Steve's notional taxed contributions for the purposes of excess contributions tax are the same as defined benefit contributions.

Steve's low tax contributions are \$25,000 in the 2013-14 financial year. This is calculated as follows:

- \$15,000 low tax contributed amounts in respect of his interest that is not a defined benefit interest (Step 1);
- plus \$10,000 in defined benefit contributions in respect of his defined benefit interest (Step 3).

No further calculation is required because Steve does not have excess concessional contributions (Step 2).

Example 2.10 Calculation of low tax contributions – both a defined benefit interest and an interest that is not a defined benefit interest-excess concessional contributions

Sonia holds both a defined benefit interest and an interest that is not a defined benefit interest.

Her contributions for the 2013-14 financial year are:

- for her interest that is not a defined benefit interest;
 - concessional contributions of \$40,000 (her low tax contributed amounts for low tax contributions are the same amount); and
- for her defined benefit interest (ignoring the special grandfathering rules for excess contributions tax);
 - notional taxed contributions of \$30,000 for the purposes of excess contributions tax; and

- defined benefit contributions of \$30,000 for the purposes of Division 293 tax.

Case 1 Excess contributions tax grandfathering does not apply

Sonia's notional taxed contributions in respect of her defined benefit interest are not eligible for the special arrangements which apply for excess contributions tax to limit the notional taxed contributions to her concessional contributions cap.

Sonia has \$45,000 in excess concessional contributions for excess contributions tax purposes. That is, \$40,000 of concessional contributions for her interest that is not a defined benefit interest plus \$30,000 (being notional taxed contributions) for her defined benefit interest less her concessional contributions cap of \$25,000.

Accordingly, Sonia's low tax contributions are \$25,000 for the 2013-14 financial year. This is calculated as follows:

- \$40,000 in low tax contributed amounts to her interest that is not a defined benefit interest (Step 1);
- *less* \$45,000 in excess contributions for the purposes of excess concessional contributions tax (Step 2); and
- *plus* \$30,000 in defined benefit contributions in respect of her defined benefit interest (Step 3).

Case 2 Excess concessional contributions tax grandfathering applies

In this case Sonia held the defined benefit interest before 12 May 2009 and meets all of the other conditions for eligibility for the grandfathering rules for excess concessional contributions tax.

Therefore her notional taxed contributions in respect of the defined benefit interest for the purposes of excess concessional contributions tax will be equal to her concessional contributions cap of \$25,000.

Sonia has \$40,000 of excess concessional contributions that are subject to excess concessional contributions tax. That is \$40,000 of concessional contributions for her interest that is not a defined benefit interest plus \$25,000 for her defined benefit interest less her concessional contributions cap of \$25,000.

Sonia's low tax contributions are \$30,000 for the 2013-14 financial year. This is calculated as follows:

- \$40,000 in low tax contributed amounts to her interest that is not a defined benefit interest (Step 1);
- *less* \$40,000 of excess concessional contributions for the purposes of excess concessional contributions tax (Step 2); and
- *plus* \$30,000 in defined benefit contributions in respect of her defined benefit interest (Step 3).

Special rules — certain individuals

2.68 The Constitution limits the Commonwealth from imposing Division 293 tax on certain superannuation contributions in respect of certain individuals.

2.69 Accordingly, the exposure draft legislation contains special rules for calculating low tax contributions for certain Commonwealth justices and judges and certain State higher level office holders. These special rules ensure that Division 293 tax applies to all high income earners regardless of their positions and roles but generally only to the extent of the legislative power of the Commonwealth.

Commonwealth justices and judges

2.70 Section 72(iii) of the Constitution provides that the remuneration of justices of the High Court, and justices and judges of other courts created by the Parliament shall be fixed by the Parliament and this remuneration shall not be diminished whilst they are in office.

2.71 There are concerns that the imposition of Division 293 tax may in effect constitute a diminution of judicial remuneration in cases where certain defined benefit pension entitlements form part of their remuneration.

2.72 To address these limitations, defined benefit contributions for a defined benefit interest in a superannuation fund established under the *Judges' Pensions Act 1968* are not included in low tax contributions and therefore are not subject to Division 293 tax. This is achieved by treating the amount of such contributions as nil. These special rules do not apply to all judiciary office holders, such as Federal magistrates. That is, the special rules do not apply to those officers who do not have a defined benefit interest in a superannuation fund established under the *Judges' Pensions Act 1968*. [*Schedule #, Part 1, item 1, subsection 293-175(1) and section 293-180*]

2.73 However, while there may be constitutional restrictions on taxing defined benefit contributions for a defined benefit interest in a superannuation fund established under the *Judges' Pensions Act 1968*, no such limitations apply to other contributions made to benefit Commonwealth justices and judges. Accordingly, contributions made by other employers after a justice or a judge leaves office are potentially included in low tax contributions.

2.74 To reflect the actual position of Commonwealth justices and judges in determining the Division 293 tax on these contributions, all low tax contributions, including these protected amounts, are included when determining if low tax contributions exceed the \$300,000 threshold at which Division 293 tax applies. Thus, while no Division 293 tax will be assessed on defined benefit contributions for defined benefit interests in a superannuation fund under the *Judges' Pensions Act 1968*, these

contributions affect whether Division 293 tax may be payable on other low tax contributions. [*Schedule #, Part 1, item 1, section 293-185*]

State higher level office holders

2.75 In *Austin v Commonwealth* (2003) 215 CLR 185 and *Clarke v. Federal Commissioner of Taxation* (2009) 240 CLR 272, the High Court found that the Commonwealth could not impose the superannuation contributions tax (surcharge), under legislation enacted in 1997, on contributions or notional contributions made by State Government bodies to constitutionally protected funds on behalf of State office holders and employees at the higher levels of government. In accordance with the High Court finding, Division 293 tax is not imposed on low tax contributions in respect of constitutionally protected funds for these higher level office holders.

2.76 This constitutional protection, however, does not extend to contributions to constitutionally protected funds on behalf of such individuals made by an employer (or associate) as part of a salary package. Accordingly, the exposure draft legislation ensures that constitutionally protected State higher level office holders do not pay Division 293 tax in respect of low tax contributions for constitutionally protected funds, unless the contributions are made as part of a salary package. [*Schedule #, Part 1, item 2, sections 133-30 and 133-35*]

2.77 The exposure draft legislation achieves this result by providing special rules for calculating low tax contributions for constitutionally protected higher level office holders with contributions to constitutionally protected funds.

2.78 The exclusion of some low tax contributions for constitutionally protected funds applies to the class of individuals declared by regulations. This ensures any issues that may arise in the future can be readily addressed in the regulations. [*Schedule #, Part 1, item 1, subsection 293-145(1)*]

2.79 Consistent with the regulation making power for defined benefit contributions in the exposure draft legislation, the regulation making power to prescribe individuals who are constitutionally protected State higher level office holders can apply from 1 July 2012. Without retrospective application of the regulation for constitutionally protected State higher level office holders, Division 293 tax would apply to these office holders in the 2012-13 income year under the exposure draft legislation. This would be inconsistent with the legislative power of the Commonwealth to impose tax under the Constitution. The retrospective regulation benefits constitutionally protected State higher level office holders by ensuring that explicit special rules contained in the exposure draft legislation apply from the date of its application. [*Schedule #, Part 1, item 1, subsection 293-145(2)*]

2.80 For these individuals, contributions to constitutionally protected funds are only included in low tax contributed amounts (under the general rules) and defined benefit contributions (under the special rules) if they are made as part of a salary package for the purpose of calculating low tax contributions. This ensures that amounts of low tax contributions in respect of constitutionally protected funds for such individuals only include contributions made as part of a salary package (and not other contributions to constitutionally protected funds) thus making only such salary packaged contributions potentially subject to Division 293 tax. *[Schedule #, Part 1, item 1, section 293-150]*

2.81 However, for the purposes of determining whether such constitutionally protected individuals have Division 293 taxable contributions for an income year that is, whether the \$300,000 threshold is met, all low tax contributed amounts and all defined benefit contributions are included in low tax contributions. *[Schedule #, Part 1, item 1, section 293-155]*

2.82 For the purpose of these rules, a salary packaged contribution is a contribution in respect of an individual to whom these provisions apply that is made because they agreed with an entity (or its associate) for the contribution to be made in return for a reduction in their remuneration. *[Schedule #, Part 1, item 1, subsection 293-160(1)]*

2.83 The reduction in the remuneration needs to be made by the employer reducing one of a number of types of payments covered by the Pay-As-You-Go Withholding regime in Part 2-5 in Schedule 1 to the TAA 1953. The relevant types of payments include:

- payments to employees (see section 12-35 in Schedule 1 to the TAA 1953);
- payments to company directors (see section 12-40 in Schedule 1 to the TAA 1953);
- payments to office holders (see section 12-45 in Schedule 1 to the TAA 1953);
- voluntary agreements to withhold (see section 12-55 in Schedule 1 to the TAA 1953); and
- payments under labour hire agreement, or specified by regulation (see section 12-60 in the Schedule 1 to the TAA 1953).

[Schedule #, Part 1, item 1, subsection 293-160(2)]

Refund of Division 293 tax for temporary residents departing Australia

2.84 Individuals receiving departing Australia superannuation payments are entitled to a refund of Division 293 tax that they have paid. These individuals are entitled to a Division 293 tax refund because any concessional tax treatment of their superannuation contributions is removed by a final withholding tax on departing Australia superannuation payments (effectively on a payment of a superannuation benefit) imposed under the *Superannuation (Departing Australia Superannuation Payments Tax) Act 2007*.

2.85 Individuals are entitled to a refund of Division 293 tax if they:

- made a payment of any of the following:
 - assessed Division 293 tax;
 - a voluntary payment to reduce the amount by which a debt account for deferred Division 293 tax is in debit; or
 - debt for deferred Division 293 tax;
- received a departing Australia superannuation payment; and
- applied to the Commissioner in the approved form for the refund.

[Schedule #, Part 1, item 1, section 293-195]

2.86 Broadly, under section 301-170 of ITAA 1997 and section 12-305 in Schedule 1 to the TAA 1953, a departing Australia superannuation payment is payable to an individual who held a temporary visa, has a superannuation interest with a superannuation provider, and at least six months have passed since the individual ceased to hold the visa and left Australia. A refund is not available for assessed Division 293 tax for a period when an individual is an Australian resident (but not a temporary resident) of Australia.

2.87 The amount of the refund is the sum of the following payments that an individual has made:

- assessed Division 293 tax;
- a voluntary payment to reduce the amount by which a debt account for deferred Division 293 tax is in debit; and
- debt for deferred Division 293 tax.

[Schedule #, Part 1, item 1, subsections 293-200(1) and (2)]

2.88 An individual is not entitled to a refund of the amounts of the above payments to the extent the individual has already received the refund in respect of those payments for an income year. Accordingly, the amount of refund is reduced by the amount that has already been paid by the Commissioner. *[Schedule #, Part 1, item 1, subsection 293-200(3)]*

2.89 Entitlement to a refund allows the Commissioner to release an individual from all current and future Division 293 tax liabilities (other than a liability in respect of a period when the individual is not a temporary resident). In particular, the Commissioner may extinguish any unpaid Division 293 tax that is due and payable, and also the amount by which a debt account for deferred Division 293 tax is in debit. *[Schedule #, Part 1, item 1, subsection 293-205(1)]*

2.90 The Commissioner may take such action as is necessary to give effect to the decision to release an individual from Division 293 tax liabilities, including notifying the individual of the decision. *[Schedule #, Part 1, item 1, subsection 293-205(2)]*

Chapter 3

Division 293 tax: assessment and payment

Outline of chapter

- 3.1 This Chapter explains the assessment of Division 293 tax and the payment arrangements that apply.
- 3.2 References in this Chapter are to the Tax Laws Amendment (Sustaining the Superannuation Contribution Concession) Bill 2013 unless otherwise specified.

Summary of new law

- 3.3 The amount of Division 293 tax is:
- due and payable within 21 days after the notice of assessment is issued, to the extent the tax relates to a superannuation interest that is not a defined benefit interest;
 - deferred for later payment and included in a debt account maintained by the Commissioner, to the extent the tax relates to a superannuation interest that is a defined benefit interest; and
 - due and payable within 21 days broadly after a superannuation benefit is paid from the defined benefit interest for which a debt account is maintained by the Commissioner.
- 3.4 The Commissioner must issue release authorities to allow amounts to be released from certain superannuation interests to facilitate payment of liabilities for Division 293 tax.

Detailed explanation of the new law

Overview of assessment and payment

Assessment and payment – interests other than defined benefit interests

- 3.5 The Commissioner must issue a notice of assessment to an individual that states the amount of their assessed Division 293 tax for an income year. The amount of assessed tax is generally due and payable 21 days after the Commissioner gives the notice of assessment (or amended

assessment). Amounts that remain unpaid after that period are subject to the general interest charge.

3.6 The Commissioner must also issue a release authority to an individual to enable an amount to be paid from the individual's superannuation interest (other than a defined benefit interest) to facilitate payment of all or part of the assessed Division 293 tax that is due and payable.

Assessment and payment – defined benefit interests

3.7 The Commissioner makes a deferred payment determination (deferred Division 293 tax determination) where an individual has deferred Division 293 tax. The determination sets out how much of the assessed tax that relates to an eligible defined benefit interest is deferred Division 293 tax.

3.8 Broadly, payment of the deferred Division 293 tax is deferred until a superannuation benefit is paid from the interest. The Commissioner keeps a debt account, to which interest is debited annually, for each superannuation interest that has deferred tax attributed to it. The Commissioner notifies the superannuation provider when a debt account for deferred Division 293 tax is established.

3.9 A release authority is issued to the individual at the time of issuing the deferred Division 293 tax determination to enable an amount to be paid from a superannuation interest (other than a defined benefit interest) of the individual to make voluntary payments to reduce the debt account balance.

3.10 As soon as the individual requests that the first benefit be paid from a defined benefit interest that has an associated deferred Division 293 tax debt account, the individual and the superannuation provider must notify the Commissioner. The Commissioner then calculates the debt for deferred Division 293 tax and issues a notice of debt for Division 293 tax to the individual, which is due and payable 21 days after the benefit is paid. The debt for deferred Division 293 tax is generally the amount the deferred tax debt account is in debit. However, it is limited to the end benefit cap, which protects the member from paying Division 293 tax on defined benefit contributions for benefits they do not end up receiving. A release authority is issued to the individual, to enable payment of the debt for deferred Division 293 tax with monies from the superannuation interest to which the debt relates.

Purpose of release authorities

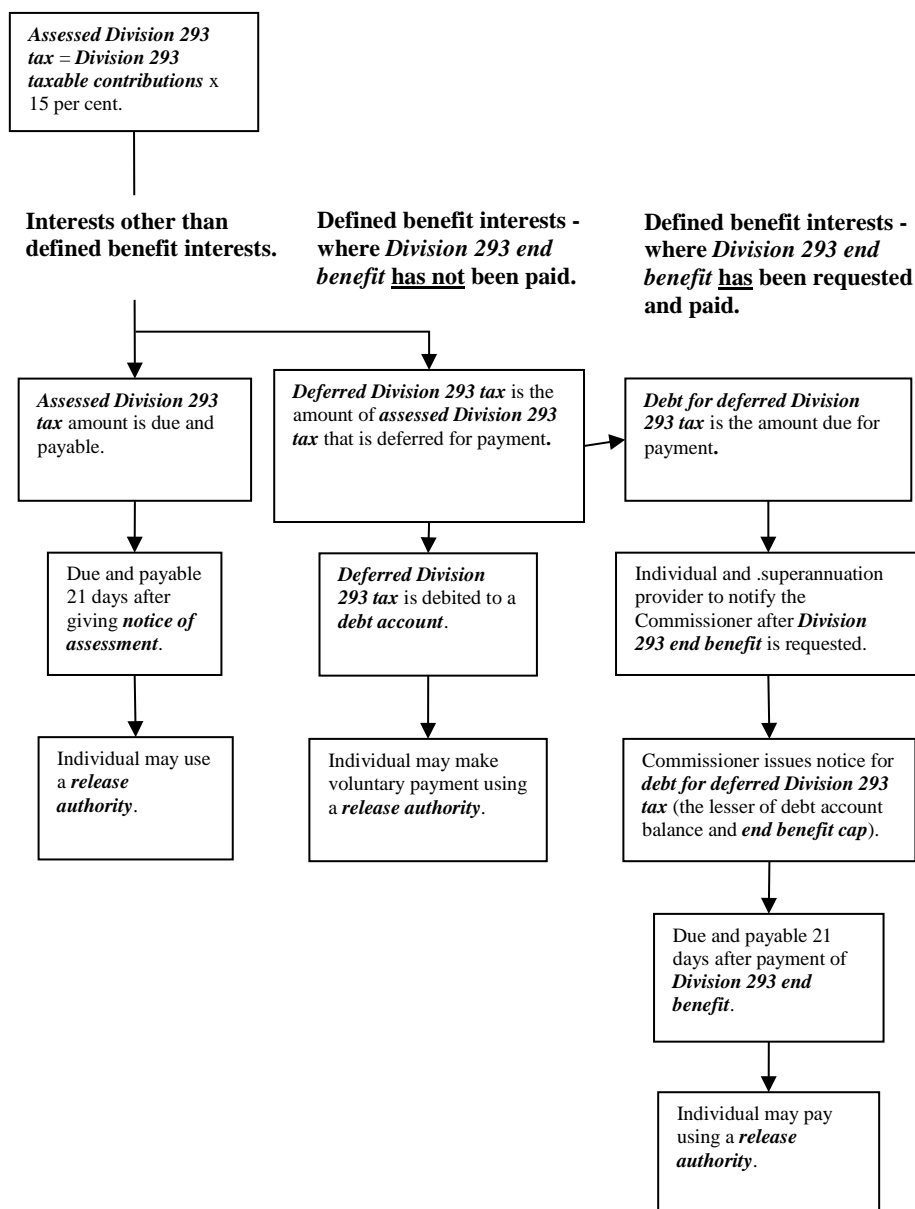
3.11 A release authority is issued to individuals by the Commissioner because generally, individuals are prevented from withdrawing money from superannuation interests until they have reached preservation age or retired. Where the individual gives a superannuation provider a release authority, the individual can withdraw an amount from certain

superannuation interests for the purpose of paying their Division 293 tax liability, making voluntary payments of deferred Division 293 tax or paying debt for deferred Division 293 tax. Individuals may also pay their Division 293 tax liabilities from other sources, such as with after tax income.

Overview diagram

3.12 A diagram summarising the assessment and payment mechanisms for the Division 293 tax is set out in Diagram 3.1.

Diagram 3.1 Division 293 tax - assessment and payment



Assessments for Division 293 tax

3.14 Assessments are made by the Commissioner for Division 293 tax for an income year. The Commissioner may also make a determination of deferred Division 293 tax that specifies how much of the tax is attributable to a defined benefit interest and is deferred for payment.

The Commissioner

3.15 The Commissioner makes an assessment of an individual's Division 293 tax for an income year and issues the assessment to the individual as soon as practicable after the assessment is made. The tax is payable by individuals with income, including certain superannuation contributions, for an income year above \$300,000. The assessed Division 293 tax is 15 per cent of low tax contributions that exceed the \$300,000 threshold. The notice of assessment is issued to individuals stating the amount of their assessed Division 293 tax.

3.16 The making of the assessment is governed by the generic assessment provisions in Division 155 in Schedule 1 to the TAA 1953. Subsection 155-5(1) gives the Commissioner a general power to make an assessment of an assessable amount. Subsection 155-35(1) gives the Commissioner the power to amend an assessment of an assessable amount within the period of review for the assessment. The Commissioner's power to make and amend assessments is restricted by the operation of other sections within Division 155.

3.17 The amendments include Division 293 tax payable in the generic assessment provisions in Schedule 1 to the TAA 1953. This is achieved by including an amount of Division 293 tax payable for an income year as an assessable amount for which the Commissioner can make an assessment in section 155-5 in Schedule 1 to the TAA 1953. [*Schedule #, Part 1, item 3, paragraph 155-5(2)(f)*]

3.18 Division 293 tax is not subject to self-assessment that applies to a range of taxes, including income tax. A note is added by the amendments to clarify that self-assessment does not apply to Division 293 tax. This reflects that the Commissioner also requires information statements in addition to income tax returns from superannuation providers before making an assessment. [*Schedule #, Part 1, item 4, note to subsection 155-15(1)*]

3.19 Section 155-30 in Schedule 1 to the TAA 1953 provides that if a taxpayer has lodged a return and has not been given a notice of assessment in relation to the assessable amount within six months of lodging the relevant return, the taxpayer may give the Commissioner a notice requiring the Commissioner to issue a notice of assessment. Section 155-30 does not apply to Division 293 tax payable, therefore individuals cannot require the Commissioner to make an assessment of Division 293 tax six months after they have lodged their income tax

return. This reflects that assessments of Division 293 tax are also based on information from statements lodged by superannuation providers with the Commissioner. [*Schedule #, Part 1, item 5, subsection 155-30(3)*]

3.20 The Commissioner requires both an individual's income tax return to be lodged and the information to have been given by superannuation providers to the Commissioner in member contributions statements and/or self-managed superannuation fund (SMSF) annual returns to make an assessment of Division 293 tax. In many instances the information statements will not be lodged with the Commissioner by the superannuation provider within six months of the date the individual lodges their income tax return.

3.21 Where an individual with a Division 293 tax liability dies, the individual's legal personal representative will be liable to pay the liability. This is consistent with the arrangements that apply to assessments of income tax following the death of an individual.

3.22 The framework in the tax law that provides for the review of the Commissioner's decision to make an assessment or to amend an assessment applies to assessments of Division 293 tax. Individuals who are dissatisfied with an assessment of Division 293 tax may lodge an objection to the assessment or amended assessment consistent with Part IVC of the TAA 1953.

The superannuation provider

3.23 Division 390 in Schedule 1 to the TAA 1953 sets out reporting obligations for superannuation providers. Superannuation providers are required to provide member contribution statements to the Commissioner in the approved form in respect of individuals who were members at any time in the reporting period (generally, a financial year). This information is used by the Commissioner in making an assessment of Division 293 tax.

3.24 Under section 390-5 in Schedule 1 to the TAA 1953, a superannuation provider must give the Commissioner a statement in relation to contributions made to the superannuation plan for an individual during the financial year. The statement may contain other information required by the Commissioner. Under the amendments superannuation providers are also required to report to the Commissioner the amount of defined benefit contributions for defined benefit interests in superannuation plans. [*Schedule #, Part 2, item 35, paragraph 390-5(9A)(d)*]

3.25 An individual can make a complaint to the Superannuation Complaints Tribunal under the *Superannuation (Resolution of Complaints) Act 1993* if they are dissatisfied with a statement given to the Commissioner by a superannuation provider under section 390-5 in Schedule 1 to the TAA 1953. [*Schedule #, Part 2, item 15, note to subsection 155-90(1)*]

3.26 The amendments also provide that complaints regarding the reporting of the amount of defined benefit contributions and the amount of the end benefit cap by superannuation providers to the Commissioner may be taken by individuals to the Superannuation Complaints Tribunal. *[Schedule #, Part 2, items 11 and 12]*

When assessed Division 293 tax is due and payable

Overview

3.27 The time at which the assessed Division 293 tax becomes due and payable to the Commissioner differs depending on whether the amount assessed is attributable in whole or part to a defined benefit interest.

3.28 As a general rule, assessed Division 293 tax is due and payable 21 days after the Commissioner gives an individual notice of the assessment of the amount of tax payable for an income year. This will be the outcome for the majority of superannuation interests.

3.29 Special rules apply for Division 293 tax attributable to certain defined benefit interests. To the extent that assessed tax is attributable to certain defined benefit interests, it is automatically subject to deferred payment. The amount subject to deferred payment is so much of the assessed tax stated in a determination made by the Commissioner to be deferred Division 293 tax.

Assessed Division 293 tax is due and payable: superannuation interests other than defined benefit interests

3.30 Assessed Division 293 tax is due and payable 21 days after the Commissioner gives a notice of assessment (or amended assessment). Amounts that remain unpaid after that period are subject to the general interest charge. The Commissioner may remit the general interest charge where appropriate, having regard to the existing remission guidelines. *[Schedule #, Part 1, item 1, subsections 293-65(1) and 293-70(1)]*

3.31 A release authority is issued to the individual by the Commissioner which the individual can use to authorise a superannuation provider to release an amount from a superannuation interest (other than a defined benefit interest) of an individual to pay some or all of the assessed Division 293 tax that is due and payable. The individual does not have to use the release authority and can choose to pay the liability from other sources. *[Schedule #, Part 1, item 2, Division 135]*

3.32 The assessed Division 293 tax is a tax-related liability for the purposes of general tax administration by the Commissioner. This enables an unpaid amount of assessed Division 293 tax to be treated like any other tax debt. Accordingly, the Commissioner may take legal action to recover an outstanding debt for Division 293 tax that remains unpaid after it is due and payable. An amendment is made to include references

to a liability to Division 293 tax in the index of tax-related liabilities in Schedule 1 to the TAA 1953. *[Schedule #, Part 2, item 17, table item 38BB subsection 250-10(2)]*

Assessed Division 293 tax that is deferred: defined benefit interests

3.33 Whilst an assessed Division 293 tax liability relating to contributions to a superannuation interest (other than a defined benefit interest) is due and payable 21 days after the assessment is given, Division 293 tax liability for contributions attributable to defined benefit interests is generally deferred until 21 days after the first benefit is paid from the superannuation interest. *[Schedule #, Part 1, item 2, Division 133]*

3.34 A determination of deferred Division 293 tax sets out how much of the assessed tax is deferred for later payment. Deferred Division 293 tax in relation to an assessment or amended assessment is not due and payable 21 days after the assessment or amended assessment is given. *[Schedule #, Part 1, item 1, subsection 293-65(2) and subsection 293-70(2)]*

3.35 Payment of assessed Division 293 tax is deferred for defined benefit superannuation interests because generally member benefits in defined benefit funds are pooled and it would be difficult to adjust a member's benefit if a payment was made out of the fund to enable Division 293 tax to be paid for a member. *[Schedule #, Part 1, item 2, Division 133]*

3.36 In contrast, member benefits in superannuation interests other than defined benefit interests are attributed to each member and a member's benefits can be reduced if a payment is made from the fund under a release authority used by the individual to release an amount from their superannuation to pay the liability for Division 293 tax.

3.37 While individuals may choose to pay their Division 293 tax liability for a defined benefit interest from other sources, the amount of the tax is deferred for payment with interest at the long term bond rate applied annually to the outstanding balance. *[Schedule #, Part 1, item 2, Division 134-15(1)]*

3.38 The amount of an individual's deferred Division 293 tax for an income year is so much of their assessed Division 293 tax for the income year that is attributable to their defined benefit superannuation interest (or interests) that is eligible for payment deferral (see below for the calculation method). *[Schedule #, Part 1, item 2, section 133-10]*

3.39 Deferred payment applies to deferred Division 293 tax that is attributable to a superannuation interest at a given time if, at that time:

- the superannuation interest is a defined benefit interest or includes a defined benefit interest; and
- no superannuation benefit (referred to as Division 293 end benefit) has become payable from the interest.

[Schedule #, Part 1, item 2, section 133-15]

Determination of deferred Division 293 tax

3.40 The Commissioner must make a determination of deferred Division 293 tax as soon as practicable after making an assessment or amended assessment for Division 293 tax for an income year for which the individual has deferred Division 293 tax. *[Schedule #, Part 1, item 2, subsection 133-60(1)]*

3.41 The Commissioner must keep a debt account for each superannuation interest for which a determination for deferred tax is made. *[Schedule #, Part 1, item 2, Subdivision 134-A]*

3.42 The deferred Division 293 tax determination must:

- specify how much of the assessed Division 293 tax (and the extra or reduced assessed Division 293 tax from an amended assessment) is deferred Division 293 tax;
- identify each superannuation interest to which the deferred Division 293 tax relates; and
- specify how much of the deferred Division 293 tax is attributable to each superannuation interest.

[Schedule #, Part 1, item 2, subsection 133-60(2)]

3.43 The Commissioner must issue a notice of the determination as soon as practicable after the determination is made. Where the individual has deferred Division 293 tax for defined benefit contributions for two or more defined benefit interests in an income year, the Commissioner may include two or more determinations in the same notice. The Commissioner will generally issue the notice with the notice of assessment of the Division 293 tax amount. *[Schedule #, Part 1, item 2, subsections 133- 60(3) and (4)]*

3.44 Unintentional non-compliance by the Commissioner with the legislation does not prevent the determination from having valid effect. This ensures that there is administrative certainty for individuals if there are minor technical breaches in the issue of the determination or notice. *[Schedule #, Part 1, item 2, subsection 133-60(5)]*

3.45 Individuals may object to the deferred Division 293 tax determination under Part IVC of the TAA 1953 if they are dissatisfied with a determination that has been made. Individuals may also object if the Commissioner makes an assessment of Division 293 tax and does not make a determination of deferred Division 293 tax. This ensures that individuals who consider that the Commissioner should have treated some or all of their Division 293 tax as being deferred Division 293 tax have a right of review. *[Schedule #, Part 1, item 2, section 133-65]*

3.46 The Commissioner has power to vary or revoke the Division 293 tax determination. *[Schedule #, Part 1, item 2, note to subsection 133-60(1)]*

Example 3.1 A determination of deferred Division 293 tax

Paul has a defined benefit superannuation interest only. Paul has not been paid a benefit from his superannuation interest. For the 2019-20 income year the Commissioner makes an assessment of Division 293 tax. The Commissioner also makes a determination of deferred Division 293 tax. The determination specifies that all the Division 293 tax is deferred Division 293 tax attributable to the defined benefit interest.

How deferred Division 293 tax is determined

3.47 The Commissioner works out the amount of Division 293 tax that is attributable to defined benefit interest and attributes it to each of the relevant defined benefit interests. The amount of deferred Division 293 tax is the amount of Division 293 tax attributed to each interest that is eligible for deferred payment at the time the assessment is made.

3.48 Division 293 tax is attributed to low tax contributions for interests other than defined benefit interests first, with the result that this amount is due and payable 21 days after the notice of assessment is given, where:

- Division 293 taxable contributions are less than low tax contributions (that is, when not all low tax contributions are taxable); and
- the individual has low tax contributions for both a defined benefit interest(s) and an interest(s) other than a defined benefit interest.

The remaining amount of Division 293 tax is the defined benefit Division 293 tax.

[Schedule #, Part 1, item 2, section 133-20]

3.49 The effect of this is that a lower amount of Division 293 tax may be deferred for later payment than if the Division 293 tax was attributed first to the low tax contributions for the defined benefit interest(s).

3.50 If an individual's excess concessional contributions are equal to or greater than low tax contributed amounts for interest(s) other than defined benefit interests, then all of the assessed Division 293 tax is defined benefit Division 293 tax and no attribution of Division 293 tax between defined benefit interest and interests that are not defined benefit is required. This reflects that excess concessional contributions first reduce low tax contributed amounts that are attributable to interests other than defined benefit interests. *[Schedule #, Part 1, item 2, subsection 133-20(2)]*

3.51 However, if excess concessional contributions do not fully offset low tax contributed amounts for interests other than defined benefit interests, then an attribution of Division 293 tax between defined benefit interests and interests other than defined benefit interests is required. This is calculated as follows:

- start with the amount of defined benefit contributions for all defined benefit interests for the financial year corresponding to the income year. (Step 1)
- subtract from the result of Step 1 the difference, if any, between Division 293 taxable contributions and low tax contributions. Division 293 taxable contributions may be equal to or less than the low tax contributions. Any difference is equal to the amount of low tax contributions that is below the \$300,000 threshold, which is not taxable. The result of Step 2 gives the amount of Division 293 taxable contributions attributable to defined benefits interests. (Step 2)
- multiply the result of Step 2 by 15 per cent. (Step 3)

Step 2 only applies where not all low tax contributions are taxable because income for surcharge purposes (less reportable superannuation contributions) is below the \$300,000 threshold and therefore some low tax contributions are not Division 293 taxable contributions. Accordingly, the effect of step 2 is to deduct the low tax contributions that are not Division 293 taxable contributions from defined benefit contributions for defined benefit interests first, before deducting the remainder (if any) from low tax contributed amounts for interests other than defined benefit interests. In other words this has the effect of ensuring that assessed Division 293 tax is attributed to defined benefit contributions for defined benefit interests last. [*Schedule #, Part 1, item 2, subsections 133-20(3)*]

Example 3.2 Working out the amount of defined benefit Division 293 tax - where *no* attribution is required between defined benefit interests and interests other than defined benefit interests

John holds both a defined benefit interest and an interest that is not a defined benefit interest. His concessional contributions made to his interest that is not a defined benefit interest are \$15,000 for the 2013-14 financial year. This is also the low tax contributed amounts for the purposes of Division 293 tax.

John's defined benefit contributions for the purposes of Division 293 tax for the defined benefit interest are \$25,000 for the 2013-14 financial year. His notional taxed contributions for the purposes of excess concessional contributions tax are also \$25,000 for this interest.

His income for surcharge purposes (less reportable superannuation contributions) is \$295,000.

John's excess concessional contributions are \$15,000 (concessional contributions in excess of his cap, or \$40,000 - \$25,000) for the 2013-14 financial year.

John's low tax contributions are \$25,000 for the 2013-14 financial year. His Division 293 taxable contributions for the 2013-14 income year are \$20,000 (the amount by which his low tax contributions for the financial year corresponding to the income year exceed the \$300,000 threshold). John's assessed Division 293 tax is \$3,000 calculated as 15 per cent of \$20,000.

John's low tax contributions consists of only defined benefit contributions for defined benefit interests, therefore all of his Division 293 tax is defined benefit Division 293 tax. This is because his low tax contributed amounts for interests that are not defined benefit interests (\$15,000) are equal to his excess concessional contributions (\$15,000). Therefore only defined benefit contributions remain.

John's defined benefit Division 293 tax is \$3,000.

John's defined benefit interest is eligible for deferred payment as he has not yet received a benefit from the interest.

John will receive an assessment for Division 293 tax for \$3,000. Of this amount, the Commissioner will make a determination of deferred Division 293 tax of \$3,000 for his defined benefit interest.

Example 3.3 Working out the amount of defined benefit Division 293 tax - where attribution *is required* defined benefit interests and interests other than defined benefit interests

Mary holds both a defined benefit interest and an interest other than defined benefit interest. Her low tax contributed amounts for her accumulation interest are \$15,000, and defined benefit contributions for the defined benefit interest are \$10,000 for the 2013-14 financial year. Her income for surcharge purposes (less reportable superannuation contributions) is \$295,000 for the 2013-14 income year. Mary has no excess concessional contributions for the 2013-14 financial year.

Mary's low tax contributions are \$25,000 for the 2013-14 financial year. Her Division 293 taxable contributions for the 2013-14 income year are \$20,000 (the amount by which her low tax contributions exceed the \$300,000 threshold). Mary's assessed Division 293 tax is \$3,000 calculated as 15 per cent of \$20,000.

As Mary's low tax contributions consists of both defined benefit contributions for the defined benefit interest and low tax contributed amounts for the interest that is not a defined benefit interest, Division 293 tax must be attributed between these interests.

Mary's defined benefit Division 293 tax is 15 per cent of \$5,000 (\$750). The \$5,000 of low tax contributions attributed to the defined benefit interest is calculated as follows:

Step 1 – Start with defined benefit contributions for the defined benefit interest which is \$10,000.

Step 2 - Subtract the amount by which low tax contributions (\$25,000) exceed Division 293 taxable contributions (\$20,000) which is \$5,000. The result of step 2 for Mary is \$5,000 (\$10,000 - \$5,000).

Step 3 - Multiply the result of Step 2 (\$5,000) by 15 per cent which is \$750.

The effect of the calculation is that Mary's Division 293 taxable contributions are attributed first to her low tax contributions for interests other than defined benefit interests, with the remaining part of the Division 293 taxable contributions attributed to low tax contributions that are defined benefit contributions for the defined benefit interest.

Mary's defined benefit interest is eligible for deferred payment as she has not yet received a benefit from the interest.

Mary will receive an assessment for Division 293 tax for \$3,000. The Commissioner will make a determination of deferred Division 293 tax of \$750 for her defined benefit interest and the remainder of the assessed Division 293 tax of \$2,250 is due and payable 21 days after the Commissioner gives the notice of assessment.

3.52 If an individual has multiple defined benefit interests to which the defined benefit Division 293 tax is attributable, the defined benefit Division 293 tax is attributed to each interest in the proportion that amount of defined benefit contributions for each interest bears to the total defined benefit contributions for all of those interests. Deferred Division 293 tax needs to be attributed individually to each defined benefit interest because a separate debt account is maintained for each defined benefit interest and may be due and payable at different times. [*Schedule #, Part 1, item 2, section 133-25*]

Example 3.4 Attributing defined benefit Division 293 tax to multiple defined benefit interests

Nick has two defined benefit interests, one in Fund A and one in Fund B. For the 2013-14 financial year the defined benefit contributions are \$10,000 for the interest in Fund A and \$15,000 for the interest in Fund B. Deferred payment of Division 293 tax applies to both interests. The Commissioner calculates Nick's Division 293 taxable contributions to be \$20,000, for the 2013-14 income year and his Division 293 tax is \$3,000 ($\$20,000 \times 15$ per cent). The defined benefit Division 293 tax attributed to the interest in Fund A is \$1,200 ($\$10,000/\$25,000 \times \$3,000$) and \$1,800 for the interest in Fund B.

The Commissioner makes two deferred payment determinations as deferred payment of Division 293 tax applies to both interests. The amount of deferred Division 293 tax for the interest in Fund A is \$1,200, and for the interest in Fund B the amount is \$1,800.

Nick will receive a notice of assessment for assessed Division 293 tax of \$3,000. He will receive a determination of deferred Division 293 tax of \$1,200 for his interest in Fund A and a second determination of deferred Division 293 tax of \$1,800 for his interest in Fund B. No amount of Nick's assessed Division 293 tax is due and payable 21 days after the Commissioner gives the notice of assessment.

The Commissioner will keep debt accounts for deferred Division 293 tax

3.53 The Commissioner must maintain a debt account for an individual for each superannuation interest they hold for which the Commissioner makes a determination of deferred Division 293 tax. The Commissioner has power to vary or revoke the determination and make appropriate adjustments to a debt account kept by the Commissioner in relation to the superannuation interest. *[Schedule #, Part 1, item 2, subsection 134-10(1)]*

3.54 The Commissioner will debit the debt account by the amount of:

- deferred Division 293 tax from an assessment;
- any extra amount of deferred Division 293 tax from an amended assessment; and
- interest.

The Commissioner will credit the account (if required) as a result of:

- an amended assessment that reduces the deferred Division 293 tax; or
- if the individual makes a voluntary payment to reduce the amount of the debt.

[Schedule #, Part 1, item 2, subsection 134-10(2) and section 134-25]

3.55 When the Commissioner starts to keep a debt account for deferred Division 293 tax for a superannuation interest, the Commissioner must give the superannuation provider for that interest a notice that he has a debt account for the individual. The superannuation provider then has to notify the Commissioner when an individual requests payment of a benefit from the interest. *[Schedule #, Part 1, item 2, sections 134-105 and 134-115]*

3.56 Each debt account includes deferred Division 293 tax for which the Commissioner makes a determination until the Division 293 end benefit is paid from the defined benefit interest. The debt account is debited with an amount of interest on the outstanding balance at the end of each financial year using the long term bond rate for that financial year. This ensures that the value of the balance of the debt account is maintained until eventual payment. *[Schedule #, Part 1, item 2, subsection 134-15(1)]*

3.57 The Commissioner may remit part or all of the interest debited to the debt account concerning an amount of deferred Division 293 tax if the deferred Division 293 tax is later credited to the debt account as a result of an amended assessment or a varied determination, where the Commissioner is satisfied it would be fair and reasonable to do so. *[Schedule #, Part 1, item 2, subsection 134-15(2)]*

3.58 The Commissioner may also remit part or all of the interest debited to the debt account where he is satisfied that, because special circumstances exist, it would be fair and reasonable to do so. *[Schedule #, Part 1, item 3, subsection 134-15(3)]*

Example 3.5 Remission of interest

Paul receives a determination for deferred Division 293 tax on 29 June. The Commissioner debits a debt account for Paul for the amount of the deferred Division 293 tax. Generally interest would be debited to the debt account on 30 June. However, it would not be fair and reasonable for the Commissioner to do so as Paul was not given adequate time to make a voluntary payment before the interest is debited hence the Commissioner may remit the interest on the deferred amount.

3.59 Individuals may make voluntary payments to reduce the outstanding balance of the debt account at any time. *[Schedule #, Part 1, item 2, section 134-20]*

When debt for deferred Division 293 tax becomes due and payable

3.60 When an individual becomes liable to pay the debt for deferred Division 293 tax, the Commissioner extinguishes the deferred Division 293 tax debt account. This prevents interest from continuing to accrue on the debt account. *[Schedule #, Part 1, item 2, section 134-30]*

3.61 An individual has debt for deferred Division 293 tax and is liable to pay it if the Commissioner keeps a deferred tax debt account for the individual for a defined benefit interest and the Division 293 end benefit for that interest has become payable. Payment of the Division 293 end benefit also means that the interest is no longer eligible for deferred payment of Division 293 tax. *[Schedule #, Part 1, item 2, subsection 134-60(1)]*

3.62 When a superannuation benefit is payable from a defined benefit interest for which a debt account is held by the Commissioner the individual is liable for the amount of their debt for deferred Division 293 tax. Generally, the debt for deferred Division 293 tax is payable 21 days after the first benefit is paid from a defined benefit superannuation interest for which the Commissioner keeps a debt account. *[Schedule #, Part 1, item 2, section 134-70]*

3.63 When an individual requests a payment of a superannuation benefit (which is a Division 293 end benefit) from their defined benefit interest for which the Commissioner keeps a debt account they must notify the Commissioner in the approved form. This request for payment

of the benefit will typically occur at retirement. *[Schedule #, Part 1, item 2, section 134-110]*

3.64 The notice must be given by the individual to the Commissioner on or before the date the Division 293 end benefit becomes payable. *[Schedule #, Part 1, item 2, subsection 134-110(2)]*

3.65 If the individual becomes aware of any material change of information given in or omissions from the notice, the individual must advise the Commissioner of the change in the approved form, or give the omitted information to the Commissioner, and do so within seven days of the individual becoming aware of the change or omission. *[Schedule #, Part 1, item 2, subsections 134-110(3) and (4)]*

3.66 Division 286 in Schedule 1 to the TAA 1953 imposes an administrative penalty for failing to give returns, statements, notices or other documents to the Commissioner on time and in the approved form. The penalty is equal to one penalty unit for each period of 28 days (or part) for which the document is overdue (up to a maximum of five penalty units). The administrative penalty for failing to lodge relevant taxation documents is imposed where:

- the taxpayer is required under a taxation law to give a taxation document to the Commissioner by a particular day; and
- the taxation document is not given to the Commissioner by that day or in the approved form.

3.67 The Commissioner must provide a notice to the individual specifying the amount of their debt for deferred Division 293 tax that they are liable to pay. The Commissioner will issue the notice of debt for deferred Division 293 tax after the individual or the superannuation provider has lodged the approved form notifying the Commissioner of the request to be paid a superannuation benefit. *[Schedule #, Part 1, item 2, section 134-120]*

3.68 After giving the notice to the individual, the Commissioner must also, as soon as practicable, give a release authority to the individual, to enable the individual to pay the debt for deferred Division 293 tax from their superannuation monies. The release authority is only given for the purpose of paying the amount of the debt for deferred Division 293 tax specified in the notice. *[Schedule #, Part 1, item 2, table item 5 of subsection 135-10(1)]*

3.69 There are limited circumstances in which a superannuation benefit can be paid from a defined benefit interest for which the Commissioner keeps a debt account for deferred Division 293 tax without triggering liability to pay the debt for deferred Division 293 tax for that interest. These circumstances include if benefits are:

- rolled over or transferred to a successor fund that is a complying superannuation fund;
- paid due to satisfaction of a condition of release concerning severe financial hardship under the *Superannuation Industry (Supervision) Regulations 1994*; or
- paid due to satisfaction of a condition of release concerning compassionate grounds under the *Superannuation Industry (Supervision) Regulations 1994*.

3.70 The first of these exceptions ensures that where an individual's benefits are rolled over or transferred under an arrangement where a different fund assumes the obligation to provide the same superannuation benefits as the original fund that liability for payment of the debt for deferred Division 293 tax is not triggered. However, this exception does not apply to a roll-over or transfer made in any other circumstances such as where the individual requests the provider to roll-over their benefit to a different superannuation fund. *[Schedule #, Part 1, item 2, paragraph 134-60(2)(a)]*

3.71 The exceptions for superannuation benefits paid due to severe financial hardship or compassionate grounds ensure that an individual is not faced with liability for debt for deferred Division 293 tax when they face serious financial hardship or other events that are recognised under the superannuation law as qualifying for compassionate consideration. *[Schedule #, Part 1, item 2, paragraphs 134-60(2)(b) and (c)]*

3.72 The amendments achieve the above outcome by defining Division 293 end benefit to mean a superannuation benefit that is the first benefit payable from a superannuation interest other than roll-overs or transfers to successor funds, and benefits payable due to severe financial hardship or compassionate grounds. *[Schedule #, Part 1, item 2, subsection 134-60(2)]*

3.73 The first superannuation benefit payable can be a superannuation lump sum or the first payment of a superannuation income stream or a combination of both.

3.74 The Commissioner must give notice of the amount of debt for deferred Division 293 tax for a defined benefit interest for which the Commissioner keeps a debt account if the Division 293 end benefit is payable or has been paid. An individual has debt for deferred Division 293 tax and is liable to pay it if the Commissioner keeps a deferred tax debt account for the individual for a defined benefit interest and the Division 293 end benefit for that interest has become payable or is paid. A release authority is also provided to the individual to help pay the amount of their debt for deferred Division 293 tax. *[Schedule #, Part 1, item 2, section 134-120]*

3.75 At the time liability for debt for deferred Division 293 tax arises for a defined benefit interest, the balance of the deferred Division 293 tax debt account for that interest is reduced to nil and interest no longer accrues. *[Schedule #, Part 1, item 2, section 134-30]*

3.76 After the Division 293 end benefit becomes payable from a defined benefit interest, any assessments or amended assessments for assessed Division 293 tax made by the Commissioner attributable to defined benefit contributions for the defined benefit superannuation interest are payable within 21 days of the notice being given by the Commissioner as deferred payment no longer applies. *[Schedule #, Part 1, item 2, section 133-15]*

3.77 Where the Division 293 end benefit becomes payable or is paid for a superannuation interest to which deferred payment has applied (that is, a debt account is kept by the Commissioner for the interest) the Commissioner must:

- give a notice of the debt for deferred Division 293 tax; and
- advise of the amount payable (see below).

[Schedule #, Part 1, item 2, section 134-120]

3.78 General interest charge will accrue on debt for deferred Division 293 tax amounts that remain unpaid after they fall due. *[Schedule #, Part 1, item 2, section 134-70]*

3.79 Amounts of debt for deferred Division 293 tax unpaid after the due and payable date are subject to general interest charge. *[Schedule #, Part 1, item 2, section 134-75]*

Amount of debt for deferred Division 293 tax

3.80 An individual's debt for deferred Division 293 tax that is payable is the lesser of:

- the amount the deferred Division 293 tax debt account is in debit when:
 - the Division 293 end benefit is paid; or
 - if earlier, when the Commissioner gives the individual a notice of their liability; and
- the amount of the end benefit cap.

[Schedule #, Part 1, item 2, subsection 134-65(1)]

3.81 The end benefit cap is 15 per cent of the employer financed component of the value of the superannuation interest that accrued after 1 July 2012. *[Schedule #, Part 1, item 2, subsection 134-65(1)]*

3.82 The debt for deferred Division 293 tax is, like assessed Division 293 tax, a tax-related liability for the purposes of the general tax administration by the Commissioner. Debt for deferred Division 293 tax

is included in the index of tax related liabilities in Schedule 1 to the TAA 1953. *[Schedule #, Part 2, item 20, table item 136A subsection 250-10(2)]*

3.83 An objection can be made concerning the notice of debt for deferred Division 293 tax under Part IVC of the TAA 1953. This does not include the ability to object to the amount of the debt for deferred Division 293 tax, unless the individual is instead seeking to be liable to only pay the end benefit cap. This reflects that individuals will already have been entitled to object to assessments and determinations made by the Commissioner that result in assessed Division 293 tax and tax being deferred, and ultimately forming part of the debt for deferred Division 293 tax. Providing a further right of objection may, in effect, allow a further review of determinations made by the Commissioner many years after the period to object to such determinations has elapsed. In contrast, it is important that individuals have a right to ensure that the end benefit cap is applied to them if they consider that it has not been properly applied by the Commissioner. *[Schedule #, Part 1, item 2, subsections 134-120(3) and (4)]*

End benefit cap

3.84 As the actual value of benefits received from a defined benefit interest can only be known with certainty when the benefit is paid, the annual assessment for Division 293 tax will be based on the defined benefit contributions which are determined with regard to the level of estimated final benefits. The actual benefit received from a defined benefit interest may be less than the level of estimated benefits on which the assessed Division 293 tax was based, sometimes significantly less. This means an individual may, in some cases, be liable for Division 293 tax despite receiving very limited benefits.

3.85 To protect individuals with defined benefit interests from paying amounts of Division 293 tax on estimated employer contributions for benefits that are ultimately not payable, the debt for deferred tax is limited to 15 per cent of the employer financed component of the value of the benefit payable to the member that accrues after 1 July 2012. An individual's debt for deferred Division 293 tax is the lesser of the amount by which their debt account is in debit or 15 per cent of the employer-financed component of that part of the value of the superannuation interest that accrued since 1 July 2012.

3.86 The value of the superannuation interest used to calculate the end benefit cap is worked out at the end of the financial year before the financial year in which the superannuation benefit becomes payable. *[Schedule #, Part 1, item 2, subsection 134-65(2)]*

3.87 A separate end benefit cap applies to each defined benefit interest held by an individual for which there is a debit balance for a debt account maintained by the Commissioner. The Commissioner will determine if the end benefit cap as advised by the individual or the superannuation provider is lower than the debt account balance before the

Commissioner issues the notice of debt for deferred Division 293 tax for an individual.

3.88 The Commissioner may request that a superannuation provider give a notice of the amount of the end benefit cap for a superannuation interest. The provider must give the notice in the approved form and within seven days of the Commissioner making the request. This information gathering power enables the Commissioner to issue a notice of debt for deferred Division 293 tax to an individual in a timely manner. The superannuation provider may also provide this information to the individual. *[Schedule #, Part 1, item 2, subsection 134-65(3)]*

Example 3.6 End benefit cap

John has a defined benefit interest for which the Commissioner keeps a debt account for deferred Division 293 tax. John resigns in the 2015-16 income year and requests his entire superannuation benefit from the fund. This benefit is the Division 293 end benefit as it is the first payment of a benefit from his interest. He notifies the Commissioner that he has requested payment of his benefit from his defined benefit interest. The payment of the benefit triggers the liability for debt for deferred Division 293 tax becoming due and payable. His debt account for the defined benefit interest maintained by the Commissioner has a debit balance of \$10,000 at the date his Division 293 end benefit is paid.

However, John receives a significantly lower resignation benefit from his defined benefit interest compared to the normal retirement benefit. The Commissioner requests the trustee of John's defined benefit interest to report the amount of his end benefit cap, based on the resignation benefit he actually received. The trustee works out the end benefit cap as 15 per cent of the amount of the employer financed component of the resignation benefit that accrued since 1 July 2012. The trustee advises the Commissioner that John's end benefit cap is \$6,000.

The Commissioner issues a notice to John for \$6,000 debt for deferred Division 293 tax due and payable within 21 days.

Report by superannuation provider

- 3.89 A superannuation provider must notify the Commissioner if:
- the Commissioner has notified the superannuation provider that a debt account is kept concerning the interest; and
 - an individual requests that a superannuation benefit be paid from a superannuation interest that is not a roll-over or transfer to a successor fund and is not a benefit payable that is due to severe financial hardship or on compassionate grounds.

[Schedule #, Part 1, item 2, subsection 134-115(1)]

3.90 The notice must be given in the approved form within 14 days of the request advising that the individual has requested the superannuation benefit. The notice must also set out the individual's end benefit cap and expected payment date. If there is a material change or omission in the information given in the notice, the correct or omitted information must be given within seven days of the provider becoming aware of the change or omission. [*Schedule #, Part 1, item 2, subsections 134-115(2) to (5)*]

Paying the Division 293 tax

3.91 Division 293 tax may be paid from an individual's own money or from superannuation using a release authority. Special provisions allow individuals to give release authorities to their superannuation providers and set out certain conditions for the payment of the money.

3.92 An overview of the operation of release authorities and the circumstances in which they can be issued by the Commissioner and given by individuals is set out in the table below.

Table 3.1 Summary of types of release authority and their features

	<i>For assessed Division 293 tax due and payable</i>	<i>For deferred Division 293 tax</i>	<i>For debt for deferred Division 293 tax</i>	<i>Commissioner gives release authority direct to the provider for assessed Division 293 tax due and payable</i>
<i>Obligation of Commissioner to issue release authority</i>	Commissioner must issue release authority to the individual.			Commissioner may give such a release authority directly to the provider.
<i>Time individuals can give a release authority within</i>	Individual may give release authority to provider within 120 days of issue.			N/A.
<i>Recipient of release authorities</i>	One or more superannuation providers with an interest other than a defined benefit interest for the individual.		Only to the superannuation provider that holds the defined benefit interest to which the debt for deferred Division 293 tax relates.	One or more superannuation providers with an interest other than a defined benefit interest for the individual.
<i>Provider's obligation to pay</i>	Least of: <ul style="list-style-type: none"> - the amount the release authority was issued for; - a lower amount specified by the individual in the release authority; or - the sum of all the superannuation lump sums that could be payable from the interests held by the superannuation provider for the person. 			Least of: <ul style="list-style-type: none"> - the amount specified by the Commissioner in the release authority; or - the sum of all the superannuation lump sums that could be payable from the interests held by the superannuation provider for the person.
<i>Obligation to comply by the provider</i>	Provider must comply within 30 days.			
<i>Recipient of released money</i>	The individual or the Commissioner.	The Commissioner only .		

Release authority for the payment of Division 293 tax - general provisions

3.93 Generally, individuals are prevented from withdrawing money from superannuation interests until they have reached preservation age and/or retired. However, where a superannuation provider is given a release authority by an individual that was issued by the Commissioner following the assessment of Division 293 tax, the individual can withdraw an amount from their superannuation for the purpose of paying their Division 293 tax liability.

3.94 The amendments provide a framework that applies to the Commissioner, individuals and superannuation providers concerning the issue and giving of release authorities issued for the payment of Division 293 tax liabilities. *[Schedule #, Part 1, item 2, Division 135]*

3.95 The Commissioner must give individuals a release authority to allow payment of Division 293 tax liabilities (but not debt for deferred Division 293 tax) using money from any of their superannuation interests other than a defined benefit interest. Individuals do not have to use the release authority. *[Schedule #, Part 1, item 2, Subdivision 135-A]*

The Commissioner

3.96 As soon as practicable after making an assessment of Division 293 tax or an amended assessment resulting in additional Division 293 tax payable, the Commissioner must give a release authority to the individual. This release authority enables the individual to have an amount released from a superannuation interest (other than a defined benefit interest) to pay all or some of the amount of their Division 293 tax liabilities. A more detailed explanation is provided below for each type of release authority. *[Schedule #, Part 1, item 2, table items 1 & 2 of subsection 135-10(1)]*

3.97 However, the Commissioner is not required to issue a release authority for a nil amount. This recognises that a document with a nil amount would not serve any useful purpose. *[Schedule #, Part 1, item 2, 135-10(2)]*

3.98 The release authority issued by the Commissioner must:

- state the maximum amount of money that the release authority authorises to be released by a superannuation provider (individuals may require that a superannuation provider release an amount less than the amount as stated on the release authority as issued);
- be dated; and
- contain any other information the Commissioner considers relevant.

[Schedule #, Part 1, item 2, section 135-15]

3.99 The Commissioner may re-issue a release authority to the individual at any other time if he is satisfied it is reasonable to do so. This may include when the individual requests a release authority from the Commissioner because the required 120 day period to provide the release authority has expired and there are circumstances that prevented the individual giving the release authority to a superannuation provider. Examples of such circumstances include where the individual was overseas or if the release authority has been lost. *[Schedule #, Part 1, item 2, subsection 135-20(1)]*

3.100 The re-issued release authority can be:

- identical or different to the previous release authority;
- dated with the date of the previous release authority or with a different date (for example, a later date may apply if the time for giving the previous release authority has expired or is close to expiry); and
- for the same or a lesser amount than the release authority issued previously.

[Schedule #, Part 1, item 2, subsection 135-20(2)]

3.101 If the re-issued release authority is for a lesser amount than the release authority it replaces then the new amount is taken to be the issued amount of the release authority. However, to ensure individuals are not disadvantaged where amounts have already been paid under the original release authority, the amount of the original release authority is taken into account in working out the amount of non-assessable non-exempt income. *[Schedule #, Part 1, item 2, subsection 135-20(3)]*

3.102 The Commissioner may give a copy of a release authority issued to an individual concerning an assessment or amended assessment (other than for an amount of deferred Division 293 tax) directly to one or more superannuation providers that hold a superannuation interest other than a defined benefit interest for the individual. The copy of the release authority can be given by the Commissioner, if at the end of 120 days after the date of the release authority:

- the individual has not paid the full amount of their assessed Division 293 tax that is due and payable; and
- the Commissioner reasonably believes:
 - the individual has not given the release authority to a superannuation provider;
 - the amount(s) paid by a superannuation provider(s) falls short of the amount of assessed Division 293 tax that is due and payable; or

- the superannuation providers that were given the release authority by the individual are unable to release the full amount of the unpaid liability as insufficient money is available for release in the superannuation interests.

[Schedule #, Part 1, item 2, subsection 135-55(1) & note to subsection 135-55(1)]

3.103 Allowing the Commissioner to directly obtain money from a superannuation provider gives the Commissioner an additional mechanism to enforce payment of outstanding liability for assessed Division 293 tax that is due and payable.

3.104 The Commissioner may specify, in writing, that a lower amount be released under the release authority than the issued amount. This ensures that where part of the liability has been paid, the Commissioner does not collect more funds from the superannuation provider than are needed to meet the outstanding liability. *[Schedule #, Part 1, item 2, subsection 135-55(2)]*

3.105 If a release authority was given by the Commissioner directly to the superannuation provider, the payment must be made by the provider to the Commissioner. The Commissioner must, as soon as possible, give the individual written notice that the payment has been made. This ensures that individuals are informed about amounts being released from their superannuation interests. *[Schedule #, Part 1, item 2, subsection 135-100(3)]*

The individual

3.106 Individuals can choose to withdraw an amount equal to all, or part, of their assessed Division 293 tax from superannuation interests (other than a defined benefit interest). If an individual decides to have funds released they must provide the release authority or a copy of the release authority to the superannuation provider. They must request in writing the amount for which the release authority was issued or a lower amount to be released. Alternatively individuals may choose to pay all or part of the assessed amount from non-superannuation monies, including from their after tax income. *[Schedule #, Part 1, item 2, subsection 135-50(2)]*

3.107 An individual has 120 days from the date of the release authority to decide whether to seek a release of an amount from their superannuation interests. This time period ensures that there is sufficient time to consider the decision to provide the release authority, whilst ensuring that the time period provided is not unlimited. Individuals may give the release authority to more than one superannuation provider by providing copies of the release authority. Individuals may choose to do this if, for example, one superannuation interest does not contain sufficient money. *[Schedule #, Part 1, item 2, subsection 135-50(1)]*

3.108 Payments under a release authority cannot be made from defined benefit interests, with the exception of a release authority issued for debt for deferred Division 293 tax. An individual can only give a

release authority issued for debt for deferred Division 293 tax to the provider that holds the defined benefit interest to which the debt relates. This reflects that there will be sufficient funds held in such a defined benefit interest at the time the Division 293 end benefit is paid, given that the end benefit cap (see above) limits liability to 15 per cent of the employer financed component of the value of the superannuation interest that accrued from 1 July 2012. *[Schedule #, Part 1, item 2, subsection 135-50(3)]*

3.109 Individuals are subject to both an administrative penalty and taxation consequences if they have amounts released from superannuation interests which exceed the maximum amount the release authority authorises to be released. If the superannuation provider does not comply with a release authority by releasing an amount in excess of the amount required to be released, an administrative penalty of 20 penalty units applies.

3.110 Payments made to the Commissioner in relation to release authorities are taken to be made in satisfaction of the current or anticipated tax debt of the individual for the purposes of the running balance account rules of the TAA 1953. This ensures that amounts are allocated appropriately by the Commissioner. *[Schedule #, Part 1, item 2, subsection 135-105(1)]*

3.111 The Commissioner will treat the payment under a release authority for deferred Division 293 tax for a defined benefit interest as made for the purpose of reducing the debt account for deferred tax for that interest. This ensures that the Commissioner credits the relevant debt account with the payment received. *[Schedule #, Part 1, item 2, subsection 135-100(2)]*

3.112 Where the superannuation provider makes a payment authorised by a release authority the payment is a superannuation benefit. The proportioning rule does not apply to the payment made. Therefore, the superannuation provider is not required to calculate either the tax free component or the taxable component of the superannuation benefit when they release an amount of money in accordance with the release authority. *[Schedule #, Part 1, item 2, section 135-110]*

The superannuation provider

3.113 Superannuation providers that are given a release authority for payment from an interest (other than a defined benefit interest) must pay the amount within 30 days of receiving the release authority. This ensures that amounts are paid within a reasonable period, whilst ensuring that superannuation providers have sufficient time to facilitate payments. Release authorities that must be actioned by superannuation providers are those which are issued to allow a payment in respect of:

- an original or amended assessment of Division 293 tax;

- the amount of a deferred Division 293 tax determination or amended deferred Division 293 tax determination; or
- the amount of debt for deferred Division 293 tax.

[Schedule #, Part 1, item 2, subsection 135-85(1)]

3.114 For integrity purposes, payments under a release authority generally must be made to the Commissioner. However, individuals may direct their superannuation provider to release money to themselves where the release authority is issued in relation to an assessment or an amended assessment to the extent it is payable within 21 days. This recognises that such assessments are due and payable within 21 days, whilst superannuation providers have 30 days to action a release authority they receive. Accordingly, individuals may choose in these circumstances to pay the Division 293 tax liability from other sources by the due and payable date and separately obtain the amount from the superannuation fund to compensate for this payment. *[Schedule #, Part 1, item 2, subsections 135-85(2) and (3)]*

3.115 If the release authority is given for an amount of deferred Division 293 tax or debt for deferred Division 293 tax, the payment may only be made to the Commissioner. If the release authority is given by the Commissioner to the provider, the payment must be made to the Commissioner. *[Schedule #, Part 1, item 2, subsection 135-85(2)]*

3.116 Where a member or the Commissioner has sought that a superannuation provider pay a liability (by providing a release authority) using the member's superannuation monies and the superannuation provider has acted on that authority, the superannuation provider must supply information to the Commissioner. The Commissioner must be given a statement in the approved form within 30 days of the amount being paid from the member's interest. The approved form must include details of the release authority provided by the individual or the Commissioner to the superannuation provider. This reporting requirement exists also where the superannuation provider has paid the amount to the Commissioner rather than to the individual. This reporting requirement ensures that the Commissioner is advised by the superannuation provider that the release authority has been complied with. *[Schedule #, Part 1, item 2, note 3 in subsection 135 85(3) and Part 2, item 36, 390-65(1)(a)]*

3.117 The approved form may require the statement to contain, among other things:

- details of the amount paid on behalf of or to the individual;
- information about the superannuation provider; and
- information about the individual who provided the release authority to the superannuation provider.

3.118 If the superannuation provider does not comply with a release authority to the extent funds are available, an administrative penalty of 20 penalty units applies for failure to pay the amount on time. *[Schedule #, Part 1, item 2, note 1 in subsection 135-85(3) and Part 2, item 27, subsection 288-95(4)]*

3.119 A superannuation provider that makes a payment under a release authority must pay the lesser of the following amounts:

- the amount the release authority was issued for;
- a lower amount specified, by the individual or the Commissioner, in the release authority; or
- the total amount of all the superannuation lump sums of all the superannuation interests held by the superannuation provider for the person (this recognises that an amount cannot be paid to the extent it exceeds the sum held).

[Schedule #, Part 1, item 2, section 135-95]

3.120 The payment for a release authority must be made out of one or more superannuation interests held by the superannuation provider for the individual. However, a superannuation provider that is given a release authority and holds defined benefit interests for the affected individual, must not make a payment from those defined benefit interests, with the exception of making a payment for a release authority issued for debt for deferred Division 293 tax. *[Schedule #, Part 1, item 2, subsection 135-85(4) and section 135-105]*

3.121 A release authority can only be actioned by a superannuation provider holding a superannuation interest for the individual other than a defined benefit interest. This means that generally money can only be released from an interest other than the interest to which the defined benefit contributions which are subject to the Division 293 tax relate. An individual will generally have to hold a separate, second interest that is not a defined benefit interest to be able to use the release authority. *[Schedule #, Part 1, item 2, subsection 135-105(1)]*

3.122 A superannuation provider may make a payment, under a release authority issued for debt for deferred Division 293 tax, from the defined benefit interest to which the debt for deferred Division 293 tax relates. *[Schedule #, Part 1, item 2, subsection 135-105(2)]*

3.123 The Government intends that the regulations will be amended so that where a release authority is given to a superannuation provider after it has commenced paying a superannuation income stream, the superannuation provider will be allowed to commute some or all of the income stream to a lump sum in order to comply with the release authority, subject to the rules of the superannuation plan.

Paying assessed Division 293 tax that is due and payable

3.124 A release authority is issued in relation to assessed Division 293 tax or additional assessed Division 293 tax that is due and payable 21 days after the notice of assessment is given. [*Schedule #, Part 1, item 2, subsection 135-10(1), items 1 and 2 in table*]

3.125 Individuals receive an assessment for each year they have Division 293 tax. Amounts that remain unpaid after that time attract the general interest charge for each day an unpaid amount remains outstanding.

3.126 Individuals have the option to choose how they pay the amount of their assessed Division 293 tax that is due and payable. Payments can be made from their superannuation monies using the release authority provided (other than from defined benefit interests) or from other sources, such as after-tax income, or from a combination of both.

Example 3.7 Paying your assessed Division 293 tax due and payable

The Commissioner makes an assessment for Mark for 2012-13 for an assessed Division 293 tax amount of \$2,000. As there is no deferred payment determination the entire amount is due and payable within 21 days of the date of the notice of assessment. Mark is also issued with a release authority for \$2,000.

Mark pays the assessed amount of \$2,000 from his after tax income before the due and payable date. Mark has 120 days before the release authority expires to decide whether to give the release authority to his superannuation provider for the amount to be paid to him.

Example 3.8 Paying your assessed Division 293 tax due and payable — use of release authority

Mark is a member and a trustee of his self-managed superannuation fund. The Commissioner makes an assessment for Mark for 2012-13 for an assessed Division 293 tax amount of \$2,000. As there is no deferred payment determination the entire amount is due and payable within 21 days of the date of the notice of assessment. Mark is also issued with a release authority for \$2,000.

Mark indicates in writing on the release authority that \$1,000 is to be released from his interest in the SMSF directly to the Commissioner. As trustee of the SMSF, he arranges for the amount to be paid from his interest to the Commissioner before the due and payable date and provides a release authority statement to the Commissioner. Mark pays the balance of the assessment of \$1,000 to the Commissioner from his after tax income.

Making voluntary payments to reduce a debt account – defined benefit interests

3.127 Individuals do not have to pay the amount of their deferred Division 293 tax within 21 days from the notice of assessment. The deferred Division 293 tax is debited to the debt account the Commissioner

keeps for an individual's defined benefit superannuation interest. However, individuals may make voluntary payments to reduce the balance of their debt account at any time. Payments can be made from superannuation monies (other than from a defined benefit interest) using a release authority issued for the amount of the deferred Division 293 tax or from other sources. If a debt account is extinguished before the end of the financial year because an individual pays the outstanding balance, no interest will apply for that financial year.

3.128 After making a deferred Division 293 tax determination (in relation to an assessment or amended assessment), the Commissioner must, as soon as practicable, give a release authority to the individual. The release authority issued for a deferred tax determination may be used by an individual to assist with payment of so much of the assessed (or additional assessed) tax that is stated in the determination to be deferred Division 293 tax. *[Schedule #, Part 1, item 2, subsection 135-10(1) items 3 and 4 of table]*

3.129 If an individual makes a payment to the Commissioner to reduce the amount of their debt account, the Commissioner must:

- acknowledge receipt of the payment to the individual;
- credit the payment to the debt account at the time of receipt; and
- notify the individual of the revised balance of the debt account.

[Schedule #, Part 1, item 2, section 134-25]

Paying debt for deferred Division 293 tax – defined benefit interests

3.130 The debt for deferred Division 293 tax is payable 21 days after the day when the Division 293 end benefit for that interest is paid. This is broadly when the first benefit is paid from a defined benefit superannuation interest for which the Commissioner keeps a debt account. *[Schedule #, Part 1, item 2, section 134-70]*

3.131 Individuals have the option to choose how they pay their debt for deferred Division 293 tax:

- with monies from their defined benefit superannuation interest that gave rise to the debt for deferred Division 293 tax, using a release authority issued by the Commissioner; or
- from other sources, such as after-tax income or a combination of both.

3.132 The individual may only give the release authority for debt for deferred Division 293 tax to the superannuation provider that holds the defined benefit interest to which the debt for deferred Division 293 tax relates. *[Schedule #, Part 1, item 2, subsection 135-50(3)]*

3.133 Where the individual has debt for deferred Division 293 tax, they may wish to give the release authority to the superannuation provider to have the amount of the debt for deferred Division 293 tax paid directly to the Commissioner. The amount paid under the release authority is non-assessable non-exempt income of the individual and the proportioning rule does not apply to the amount paid. [*Schedule #, Part 1, item 2, section 135-110*]

Example 3.1 Paying debt for deferred Division 293 tax

The Commissioner issues a notice to Mark for \$20,000 debt for deferred Division 293 tax for his defined benefit interest. The amount is due and payable 21 days from the date of the payment of the Division 293 end benefit. The Commissioner also gives a release authority to Mark. Mark can only give the release authority to the provider holding the defined benefit interest to which the debt relates.

Mark gives the release authority to the superannuation provider requesting that the amount \$20,000 be paid from his interest. This amount is paid directly to the Commissioner before the due and payable date.

Income tax treatment of payments under release authorities

Non-assessable non-exempt payments

3.134 Where funds are released in accordance with a release authority, including from a defined benefit interest to which the debt for deferred Division 293 tax relates, the funds released to an individual (in the case of assessed Division 293 tax payable within 21 days) or paid to the Commissioner for the individual are non-assessable non-exempt income to the extent that the amounts released do not exceed the amount of the Division 293 tax liability as stated on the release authority issued by the Commissioner. [*Schedule #, Part 2, item 8, section 303-20*]

3.135 If the fund rules that apply in relation to the defined benefit interest do not allow the commutation of a superannuation benefit and require that it must only be paid as an income stream, then no amount can be paid by the superannuation provider. Individuals should notify the Commissioner as early as possible after requesting a superannuation benefit to enable a release authority to be provided by the Commissioner and funds to be released prior to or at the same time as the payment of the requested superannuation benefit. Funds released under a release authority and paid to the Commissioner are non-assessable, non-exempt income and the proportioning rule does not apply.

3.136 In contrast if the superannuation benefit is first paid to the individual as a lump sum and they organise to pay the Commissioner from these funds, they may be liable to income tax on the amount released to them under the taxation rules that apply to superannuation benefit payments. This can be avoided by the individual by ensuring the amount

of the tax is paid to the Commissioner from the fund by using a release authority before the any of the benefit is paid to the individual.

Treatment of excess payments from release authorities

3.137 If payments made in relation to a release authority are in excess of the issued amount of a release authority, the excess amount is assessable income of the individual. This ensures that individuals who, for example, provide multiples copies of a release authority to different superannuation providers and the total amount released from superannuation is in excess of the issued amount of the release authority then they are liable to income tax at their marginal tax rate on the excess amount. *[Schedule #, Part 2, item 9, section 304-20]*

3.138 In addition, individuals are liable to an administrative penalty of 20 penalty units if the total amount released from superannuation exceeds the amount the release authority is issued for. This is also intended to discourage individuals seeking to withdraw amounts from superannuation in excess of the amount which is authorised and therefore preserves the integrity of the superannuation system. *[Schedule #, Part 2, item 29, subsection 288-100(2)]*

Treatment of liabilities upon death

3.139 The exposure draft legislation does not include special rules for the treatment of liabilities of individuals for Division 293 tax, including deferred Division 293 tax upon the death of an individual. This reflects that these liabilities meet the definition of tax related liabilities under section 255-1 of Schedule 1 to the TAA 1953. Accordingly, they are subject to the generic rules concerning outstanding tax-related liabilities existing at the time of death as set out in section 260-140 of Schedule 1 to the TAA 1953. As a result, the liabilities will generally pass to the estate of the deceased individual.

Interest charge

Shortfall interest charge

3.140 Shortfall interest charge applies where an amount of Division 293 tax becomes due and payable as a result of an amended assessment for an income year. *[Schedule #, Part 2, item 23, subsection 280-102B(1)]*

3.141 Shortfall interest charge applies to the amount of an assessment for each day from the date that the first assessment of Division 293 tax was payable and ending on the day the amended notice of assessment was given by the Commissioner. *[Schedule #, Part 2, item 23, subsection 280-102B(3)]*

3.142 Where an amended assessment reduces a liability and a later amended assessment reinstates all or part of that liability, shortfall interest

charge applies to the amount that is reinstated, from the due and payable date of the earlier amended assessment. *[Schedule #, Part 2, item 23, subsection 280-102B(4)]*

3.143 Shortfall interest charge does not apply to an amount of deferred Division 293 tax arising as a result of an amended assessment. This is because the amount has not become due and payable. *[Schedule #, Part 2, item 23, subsection 280-102B(2)]*

3.144 The Commissioner must give an individual a notice stating the amount of the shortfall interest charge liability. This amount can be included in another notice that the Commissioner gives to the individual such as the notice of the amended assessment. The notice will serve as prima facie evidence of the shortfall interest charge liability.

Remission of shortfall interest charge

3.145 An individual can seek to have shortfall interest charge that has been imposed remitted in whole or part. The Commissioner has established guidelines setting out factors to be taken into account in deciding if shortfall interest charge should be remitted. *[Schedule #, Part 2, item 25, subsection 280-110(1)]*

3.146 An individual may object to a remission decision by the Commissioner. Where an unremitted amount of shortfall interest charge exceeds 20 per cent of the tax shortfall, the objection, review and appeal rights in Part IVC of the TAA 1953 are available to the individual. The rights include a right to object to the merits of a decision made by the Commissioner, a right to have the Administrative Appeals Tribunal review the objection decision and a right to appeal the decision to the Federal Court. *[Schedule #, Part 2, item 26, section 280-170]*

General interest charge

Assessed Division 293 tax unpaid by the due and payable date

3.147 Assessed Division 293 tax is due and payable 21 days after the notice of assessment or amended assessment is given to an individual by the Commissioner. General interest charge applies to an amount of assessed Division 293 tax, shortfall interest charge or general interest charge for each day they remain unpaid. The Commissioner may remit the general interest charge under the existing remission guidelines. General interest charge is calculated in accordance with Part IIA of the TAA 1953. *[Schedule #, Part 1, item 1, section 293-75]*

3.148 Shortfall interest charge is due and payable 21 days after the day on which the Commissioner gives the individual notice of the charge. Shortfall interest charge is calculated in accordance with Division 280 in Schedule 1 to the TAA 1953. *[Schedule #, Part 1, item 1, note 2 and note 3 in section 293-75]*

Debt for deferred Division 293 tax unpaid by the due and payable date

3.149 The debt for deferred Division 293 tax is payable 21 days after the day when the Division 293 end benefit for that interest is paid. Amounts that remain unpaid (including any debt for deferred Division 293 tax and any general interest charge) after that time attract general interest charge for each day they are unpaid. The Commissioner may remit the general interest charge under existing remission guidelines. The general interest charge is calculated in accordance with Part IIA of the TAA 1953. *[Schedule #, Part 1, item 2, section 134-75 and note]*

Other amendments

Compensation for acquisition of property

3.150 The amendments address the situation where the release of money under a release authority to allow payment of Division 293 tax, deferred Division 293 tax or debt for deferred Division 293 tax would interfere with a person's property rights in a way that contravenes section 51(xxxi) of the Constitution. If such a breach occurs so that the Commonwealth has acquired property from an entity otherwise than on just terms, then reasonable compensation must be paid by the Commonwealth to the entity. *[Schedule #, Part 1, item 2, subsection 135-90(1)]*

3.151 The provision confers jurisdiction on a court of competent jurisdiction to determine the compensation that might be necessary to ensure that the acquisition of property by the Commonwealth has occurred on just terms. *[Schedule #, Part 1, item 2, subsection 135-90(2)]*

Evidence and power to obtain information

3.152 The framework for the evidentiary effect of official tax documents in Division 350 in Schedule 1 to the TAA 1953 is extended to Division 293 tax. *[Schedule #, Part 2, item 30, paragraph 350(5)(c)]*

3.153 The rules that protect the confidentiality of taxpayer information and allow the Commissioner to access premises and gather information for other indirect tax laws is also extended to the Division 293 tax. *[Schedule #, Part 2, item 31, subparagraph 353-10(1)(a)(ia), item 32, subparagraphs 353-10(1)(b)(ia) and (c)(ia), item 33, section 353-15, and item 34, subsection 353-15(1)]*

Application and transitional provisions

3.154 These amendments apply in relation to Division 293 taxable contributions of very high income earners for the income year beginning on 1 July 2012 and later income years. *[Schedule #, Part 3, subitem 37(1) and item 38]*

3.155 The amendments do not impose a liability for an administrative penalty under section 286-75 in Schedule 1 to the TAA

1953 for failure to do something by a particular day, where the day is before Royal Assent of this Bill. This ensures that no administrative penalties can apply before Royal Assent of this Bill. *[Schedule #, Part 3, subitem 37(3)]*

3.156 The amendments impose an obligation on the Commissioner to give a notice, on and after 1 July 2014, to a superannuation provider if an individual first has a debt account relating to a defined benefit interest held by the superannuation provider. *[Schedule #, Part 3, subitem 37(4)]*

Consequential amendments

New defined terms

3.157 Defined terms for assessed Division 293 tax, debt for deferred Division 293 tax, deferred Division 293 tax, defined benefit contributions, defined benefit Division 293 tax, Division 293 end benefit, Division 293 tax, Division 293 taxable contributions, Division 293 tax law, and low tax contributions are included in the dictionary in the ITAA 1997. *[Schedule #, Part 2, item 10, Definition of assessed Division 293 tax, debt for deferred Division 293 tax, deferred Division 293 tax, defined benefit contributions, defined benefit Division 293 tax, Division 293 end benefit, Division 293 tax, Division 293 taxable contributions, Division 293 tax law, and low tax contributions in subsection 995-1(1)]*

General interest charge

3.158 A reference to payment of Division 293 tax or shortfall interest charge is included in the index of provisions that deal with the liability for the general interest charge. *[Schedule #, Part 2, item 13, subsection 8AAB(4)]*

3.159 A reference to payment of debt for deferred Division 293 tax is included in the index of provisions that deal with the liability for the general interest charge. *[Schedule #, Part 2, item 14, subsection 8AAB(4)]*