



24 January 2012

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

By email: recc@treasury.gov.au

Dear Sir/Madam

Exposure Draft - Refund of Excess Concessional Contributions

I am pleased to enclose a submission prepared by the Superannuation Committee of the Legal Practice Section of the Law Council of Australia on the *Exposure Draft – Refund of Excess Concessional Contributions*.

Due to time constraints this submission has not been considered by the Directors of the Law Council of Australia.

If you have any queries about this submission, please contact Mr Gerard O'Neill, Administrator, Legal Practice Section at gerard.oneill@lawcouncil.asn.au

Yours sincerely

Margery Nicoll.

Margery Nicoll
Acting Secretary-General

Enclosure

Exposure Draft – Refund of Excess Concessional Contributions

The Treasury

**Submission by the Superannuation Committee of the Legal Practice Section of the
Law Council of Australia**

24 January 2012

The Superannuation Committee is a committee of the Legal Practice Section of the Law Council of Australia. Its objectives include ensuring that the law relating to superannuation in Australia is sound, equitable and demonstrably clear. It fulfils this objective in part by making submissions and providing comments on the legal aspects of proposed legislation, circulars, policy papers and other regulatory instruments.

The Committee sets out below its comments on the exposure draft of *Tax Laws Amendment (2012 Measures No. 1) Bill 2012: refunded excess concessional contributions (draft bill)*.

1. The Committee refers you to its submission made on 7 September 2011 on the consultation paper issued in August 2011 regarding this issue. In particular, the Committee refer you to those issues previously raised concerning the terms of the policy which the Committee continues to be concerned about, including the harsh impact of the one-off nature of the relief measure and it being limited to \$10,000.
2. The draft bill does not address the issue the Committee had previously raised regarding the need for an express power to enable a trustee/provider to release the refund amount to the Commissioner notwithstanding any provision of the relevant fund's governing rules. It is important that there is a legislative provision that overrides the operation of the trust deed to ensure that the trustee/provider is able to comply with the terms of a release authority. Without such provision special amendments may be required to be made to the governing rules of funds to enable the measure to operate. Note, for example, section 90MB of the *Family Law Act 1975 (FLA)* which provides for the family law superannuation splitting provisions to override other laws and any provision of a trust deed.
3. It is unclear how the refund provisions would operate to bind the trustee to the extent that a member's superannuation interest is subject to a payment split or on which a payment flag (within the meaning of Part VIII B of the FLA) is operating. Further, it is unclear whether there should be an express reference to any refund not constituting a "splittable payment" for the purposes of regulation 12 of the *Family Law (Superannuation) Regulations 2001*.¹
4. The Committee also queries how it is proposed that a trustee/provider will be dealt with if funds to which a release authority operate are frozen (for example, due to suspension of trading in a managed fund) or are subject to a court order and whether there may need to be express provision for dealing with such scenarios.
5. The Committee assumes that regulations 6.22 and 6.26 of the *Superannuation Industry (Supervision) Regulations* dealing with the limitation on cashing of benefits in favour of persons other than members will be amended in due course to recognise payments made to the Commissioner under new section 292-420 of ITAA 1997.
6. Proposed new section 303-15 of the ITAA 1997 expressly excludes any refunded excess concessional contributions from forming assessable income or exempt income. The Committee suggests consideration be given to whether a similar exclusion is required in respect of "ordinary time earnings" and "salary and wages" for the purposes of the *Superannuation Guarantee (Administration) Act 1992* as the excess superannuation contribution is by operation of the provision in effect converted back to earnings of the taxpayer/member.

The Superannuation Committee of the Law Council of Australia would welcome the opportunity to discuss these issues further with Treasury.

¹ Note the operation of section 90ME(3) of the FLA 1975 which describes a situation in which a payment made to another person may nevertheless be taken to be a "splittable payment".

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 56,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.