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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

SUPERANNUATION (OBJECTIVE) BILL 2016
TREASURY LAWS AMENDMENT (FAIR AND SUSTAINABLE
SUPERANNUATION) BILL 2016
SUPERANNUATION (EXCESS TRANSFER BALANCE TAX) IMPOSITION
BILL 2016

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Treasurer, the Hon Scott Morrison MP and
Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP)

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Glossary

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

<i>Abbreviation</i>	<i>Definition</i>
Accumulation phase	The period during which a superannuation interest is not in the retirement phase
APRA	Australian Prudential Regulation Authority
ATO	Australian Taxation Office
AWOTE	Average Weekly Ordinary Time Earnings
Cap increment	A component of a child recipient's personal transfer balance cap
Capped defined benefit balance	The net amount of capital an individual has transferred to their superannuation retirement phase to support capped defined benefit income streams
Capped defined benefit income stream	Certain superannuation income streams that are subject to modifications
CGT	Capital gains tax
Child recipient	A child dependant that receives a death benefit income stream because of the death of a parent
Commissioner	Commissioner of Taxation
Commutation	The process of ceasing, in whole or in part, a superannuation income stream and converting it into a superannuation lump sum
Commutation authority	A notice the Commissioner issues to a superannuation income stream provider requiring the provider to commute an amount of a specified superannuation income stream.
CPI	The Consumer Price Index
Crystallised reduction amount	An individual's excess transfer balance that the Commissioner has determined is required to be removed from the retirement phase
Debit value	The residual component of a capped defined benefit income stream's special value

Superannuation (Objective) Bill 2016, Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016; Superannuation (Excess Transfer Balance Tax) Imposition Bill 2016

Abbreviation	Definition
Deferred superannuation income stream	To be defined in related regulations. Includes guaranteed annuities and group self-annuities where a superannuation income stream benefit payment is delayed
Defined benefit income	Superannuation income stream benefits an individual receives from capped defined benefit income streams
Defined benefit income cap	The amount of superannuation income stream benefits an individual can receive from capped defined benefit income streams before being subject to additional income tax — \$100,000 in 2017-18 (indexed in line with the general transfer balance cap).
Division 293	Division 293 of the <i>Income Tax Assessment Act 1997</i>
Excess transfer balance	The amount by which an individual's transfer balance exceeds their personal transfer balance cap on a particular day (unless the excess is attributable to the individual's capped defined benefit balance)
Excess transfer balance earnings	A notional amount in respect of an excess transfer balance for a particular day, generally credited to an individual's transfer balance account
Excess transfer balance period	A period during which an individual has an excess transfer balance
Excess transfer balance tax	Tax imposed on excess transfer balance earnings over an excess transfer balance period
First year cap space	The difference between the general transfer balance cap and an individual's total superannuation balance
General transfer balance cap	An amount of \$1.6 million in 2017-18 and indexed to the CPI in \$100,000 increments
IT(TP)A 1997	<i>Income Tax (Transitional Provisions) Act 1997</i>
ITAA 1936	<i>Income Tax Assessment Act 1936</i>
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
ITAR 1997	<i>Income Tax Assessment Regulations 1997</i>
LISTO	Low Income Superannuation Tax Offset
Objective Bill	Superannuation (Objective) Bill 2016
OBPR	Office of Best Practice Regulation
PAYG Withholding	Pay-As-You-Go Withholding

<i>Abbreviation</i>	<i>Definition</i>
Personal transfer balance cap	The maximum amount of capital an individual can transfer to their superannuation retirement phase, indexed proportionally to the general transfer balance cap
Reversionary income stream	A superannuation income stream that automatically reverts to a nominated beneficiary on the death of its current recipient
RIS	Regulation Impact Statement
RP or Retirement phase	The period during which a superannuation income stream is currently payable, or, if it is a deferred superannuation income stream, when a person has met a relevant nil condition of release. A TRIS is never in the retirement phase.
RSA	Retirement Savings Account
RSAR 1997	<i>Retirement Savings Accounts Regulations 1997</i>
SISR 1994	<i>Superannuation Industry (Supervision) Regulations 1994</i>
SMSF	Self-managed superannuation fund
Special value	The modified value of a capped defined benefit income stream
SUMLMA	<i>Superannuation (Unclaimed Money and Lost Members) Act 1999</i>
Superannuation death benefit	A superannuation lump sum, superannuation income stream or superannuation income stream benefit a person receives because of the death of another person
Superannuation income stream	Generally a right to receive periodic payments from a superannuation interest, for example a pension or annuity
Superannuation income stream benefit	Each individual payment an individual receives under a superannuation income stream
Superannuation lump sum	A benefit (other than a superannuation income stream benefit) an individual receives from a superannuation interest
Superannuation income stream provider	The trustee of a superannuation fund or approved deposit fund, a RSA provider or a life insurance company that provides a superannuation income stream to an individual
TAA 1953	<i>Taxation Administration Act 1953</i>

Superannuation (Objective) Bill 2016, Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016; Superannuation (Excess Transfer Balance Tax) Imposition Bill 2016

<i>Abbreviation</i>	<i>Definition</i>
TLA Bill	Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016
Total superannuation balance	A method for valuing all of an individual's superannuation interests
Transfer balance or transfer balance account	The net amount of capital an individual has transferred to their superannuation retirement phase
Transfer balance cap	See general transfer balance cap and personal transfer balance cap
TRIS	Transition to retirement income stream (generally also includes transition to retirement income pensions, non-commutable allocated annuities and non-commutable allocated pensions)

General outline and financial impact

Superannuation Reform package

The Government's Superannuation Reform Package was announced in the 2016-17 Budget on 3 May 2016 with some later changes announced by the Treasurer and Minister for Revenue and Financial Services on 15 September 2016. The package:

- makes the superannuation system fairer and fiscally sustainable by ensuring that the superannuation tax concessions are well targeted and affordable;
- enables more choice and flexibility to encourage and provide more opportunities for people to save for their retirement; and
- improves the integrity of the superannuation system to ensure that it is used for the purpose of providing income in retirement to substitute or supplement the age pension and not for tax minimisation and estate planning purposes.

Financial impact

The Superannuation Reform Package is estimated to increase the underlying cash balance by \$2,793.6 million over the forward estimates period comprising:

<i>\$m</i>	<i>2016-17</i>	<i>2017-18</i>	<i>2018-19</i>	<i>2019-20</i>	<i>Total</i>
Objective of the superannuation system	-	-	-	-	-
Transfer Balance Cap	-4.4	500.0	650.0	700.0	1,845.6
Concessional superannuation contributions	-2.8	499.1	797.8	1,048.9	2,343.0
Annual non-concessional contributions	50.0	150.0	200.0

Superannuation (Objective) Bill 2016, Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016; Superannuation (Excess Transfer Balance Tax) Imposition Bill 2016

<i>\$m</i>	<i>2016-17</i>	<i>2017-18</i>	<i>2018-19</i>	<i>2019-20</i>	<i>Total</i>
Low income superannuation tax offset	-	-2.8	-651.1	-801.1	-1,455.0
Deducting personal contributions	-	350.0	-500.0	-700.0	-850.0
Unused concessional cap carry forward	-	-	-	-100.0	-100.0
Tax offsets for spouse contributions	-	-	-5.0	-5.0	-10.0
Innovative income streams and integrity	..	130.0	160.0	180.0	470.0
Anti-detriment provisions	-	-	105.0	245.0	350.0
Administration and consequential amendments	-	*	*	*	*
Total	<i>-7.2</i>	<i>1,476.3</i>	<i>606.7</i>	<i>717.8</i>	<i>2,793.6</i>

.. represents an estimate that is not zero, but has been rounded to zero.

*the impact of the administration and consequential changes has been assessed as unquantifiable but small.

The financial implications reflect changes to the package announced by the Treasurer and the Minister for Revenue and Financial Services on 15 September 2016. This has implications for a number of the 2016-17 Budget measures due to interactions between policies, and results in an increase in the underlying cash balance of \$180 million over the forward estimates. The financial implications also include variations arising from detailed changes to the implementation of the package informed by the consultation. Overall, these variations reduce the underlying cash balance by \$320 million over the forward estimates period.

The objective of the superannuation system

The Superannuation (Objective) Bill 2016 (the Objective Bill) establishes a legislative framework to guide the development of future superannuation policy. It does this by enshrining the primary objective of the superannuation system in legislation and the subsidiary objectives of the superannuation system in regulation. It requires new bills and regulations relating to superannuation to be accompanied by a statement of compatibility with the objective of the superannuation system. The subsidiary objectives of the superannuation system will be prescribed by regulation.

Part 5 of Schedule 10 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 (the TLA Bill) makes a consequential amendment to the *Legislation Act 2003* to require a statement of compatibility with the objective of the superannuation system to be included in an explanatory statement for a regulation relating to superannuation.

Date of effect: The Objective Bill applies from commencement, which is the start of the first day of the first quarter following Royal Assent of the Objective Bill.

The amendments made by Part 5 of Schedule 10 to the TLA Bill apply from commencement, which is the start of the first day of the first quarter following Royal Assent of the TLA Bill.

Proposal announced: This measure was announced by the Treasurer as part of the 2016-17 Budget on 3 May 2016.

Financial impact: This measure does not have a financial impact.

Human rights implications: See Statements of Compatibility with Human Rights — Chapter 2, paragraphs 2.42 to 2.47.

Cost of Compliance impact: There is no compliance cost impact from this measure.

Transfer balance cap

Schedule 1 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 (the TLA Bill) imposes a \$1.6 million cap (the transfer balance cap) on the amount of capital that can be transferred to the tax-free earnings retirement phase of superannuation.

Schedule 1 to the TLA Bill also introduces additional income tax rules on recipients of certain defined benefit income streams in excess of \$100,000 per annum to achieve a broadly commensurate taxation outcome.

Date of effect: The amendments made by this Schedule take effect from 1 July 2017.

Proposal announced: This measure was announced by the Treasurer as part of the 2016-17 Budget on 3 May 2016.

Financial impact: The transfer balance cap measure is estimated to increase the underlying cash balance by \$1,845.6 million over the forward estimates period comprising:

<i>\$m</i>	<i>2016-17</i>	<i>2017-18</i>	<i>2018-19</i>	<i>2019-20</i>	<i>Total</i>
Underlying Cash Balance	-4.4	500.0	650.0	700.0	1,845.6

Human rights implications: See Statements of Compatibility with Human Rights — Chapter 3, paragraphs 3.365 to 3.379.

Compliance cost impact: The introduction of a transfer balance cap is expected to result in a medium increase in compliance costs.

Concessional superannuation contributions

Schedule 2 to the TLA Bill reduces:

- the annual concessional contributions cap to \$25,000 (from \$30,000 for those aged under 49 at the end of the previous financial year and \$35,000 otherwise); and
- the threshold at which high-income earners pay Division 293 tax on their concessional contributions to superannuation, to \$250,000 (from \$300,000).

Schedule 2 to the TLA Bill also amends how concessional contributions are determined to ensure that amounts included in concessional contributions in respect of constitutionally protected funds and unfunded defined benefit superannuation schemes count towards an individual's concessional contributions cap.

Date of effect: The amendments made by this Schedule apply with effect from 1 July 2017, Part 1 applies to the 2017-18 financial year and later financial years and Part 2 applies to the 2017-18 income year and later income years.

Proposal announced: This measure was announced by the Treasurer as part of the 2016-17 Budget on 3 May 2016.

Financial impact: The concessional superannuation contributions measure is estimated to increase the underlying cash balance by \$2,343 million over the forward estimates period comprising:

\$m	2016-17	2017-18	2018-19	2019-20	Total
Underlying Cash Balance	-2.8	499.1	797.8	1048.9	2,343.0

Human rights implications: See Statement of Compatibility with Human Rights — Chapter 4, paragraphs 4.60 to 4.72.

Compliance cost impact: The changes to the concessional contributions cap and Division 293 are expected to result in a low increase in compliance costs.

Non-concessional contributions cap

Schedule 3 to the TLA Bill amends the annual non-concessional contributions cap from \$180,000 to \$100,000, introduces criteria for an individual to be eligible for the non-concessional contributions cap and makes other minor amendments in respect of the non-concessional contributions rules.

Date of effect: The amendments made by this Schedule take effect from 1 July 2017, applying to the 2017-18 and later financial years.

Proposal announced: This measure was announced by the Treasurer and Minister for Revenue and Financial Services on 15 September 2016.

Financial impact: The annual non-concessional contributions cap measure is estimated to result in a gain to revenue over the forward estimates period of \$200 million on an underlying cash balance basis comprising:

<i>\$m</i>	<i>2016-17</i>	<i>2017-18</i>	<i>2018-19</i>	<i>2019-20</i>	<i>Total</i>
Underlying Cash Balance	50	150	200

.. represents an estimate that is not zero, but has been rounded to zero.

Human rights implications: See Statement of Compatibility with Human Rights — Chapter 5, paragraphs 5.82 to 5.93.

Compliance cost impact: The changes to non-concessional contributions are expected to result in a low increase in compliance costs.

Low income superannuation tax offset

Schedule 4 to the TLA Bill amends the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* to enable eligible low income earners to receive the low income superannuation tax offset.

Date of effect: The amendments made by this Schedule apply to the 2017-18 income year and later income years.

Proposal announced: This measure was announced by the Treasurer as part of the 2016-17 Budget on 3 May 2016.

Financial impact: The low income superannuation tax offset measure is estimated to reduce the underlying cash balance by \$1,445 million over the forward estimates period comprising:

<i>\$m</i>	<i>2016-17</i>	<i>2017-18</i>	<i>2018-19</i>	<i>2019-20</i>	<i>Total</i>
Underlying Cash Balance	-	-2.8	-651.1	-801.1	-1,445.0

Human rights implications: See Statement of Compatibility with Human Rights — Chapter 6, paragraphs 6.33 to 6.38.

Compliance cost impact: Introducing the low income superannuation tax offset is expected to result in a low increase in compliance costs.

Deducting personal contributions

Schedule 5 to the TLA Bill removes the requirement in the income tax law that an individual must earn less than 10 per cent of their income from their employment related activities to be able to deduct a personal contribution to superannuation and make it a concessional contribution.

Date of effect: The amendments made by this Schedule apply to the 2017-18 income year and later income years.

Proposal announced: This measure was announced by the Treasurer as part of the 2016-17 Budget on 3 May 2016.

Financial impact: The deducting personal contributions measure is estimated to result in a cost to revenue over the forward estimates period of \$850 million on an underlying cash balance basis comprising:

\$m	2016-17	2017-18	2018-19	2019-20	Total
Underlying Cash Balance	-	350	-500	-700	-850

Human rights implications: See Statement of Compatibility with Human Rights — Chapter 7, paragraphs 7.42 to 7.50.

Compliance cost impact: Improving the access to concessional contributions is expected to result in a medium increase in compliance costs.

Unused concessional cap carry forward

Schedule 6 to the TLA Bill introduces provisions to allow catch-up concessional contributions. This will allow individuals to make additional concessional superannuation contributions in a financial year by utilising unused concessional contribution cap amounts from up to five previous financial years, providing that the individual's total superannuation balance just before the start of the financial year is less than \$500,000.

Date of effect: The amendments made by this Schedule apply in relation to working out an individual's concessional contributions cap in the 2019-20 financial year and later financial years.

Proposal announced: This measure was announced by the Treasurer as part of the 2016-17 Budget on 3 May 2016 with amendments announced on 15 September 2016.

Financial impact: The unused concessional cap carry forward measure is estimated to result in a cost to revenue over the forward estimates period of \$100 million on an underlying cash balance basis comprising:

<i>\$m</i>	<i>2016-17</i>	<i>2017-18</i>	<i>2018-19</i>	<i>2019-20</i>	<i>Total</i>
Underlying Cash Balance	-	-	-	-100	-100

Human rights implications: See Statement of Compatibility with Human Rights — Chapter 8, paragraphs 8.22 to 8.26.

Compliance cost impact: Providing individuals with the ability to make catch-up contributions is expected to result in a low increase in compliance costs.

Tax offsets for spouse contributions

Schedule 7 to the TLA Bill amends the tax law to encourage individuals to make superannuation contributions for their low income spouses. This is achieved by increasing the amount of income an individual's spouse can earn before the individual ceases to be entitled to a tax offset for making superannuation contributions on behalf of their spouse.

Date of effect: The amendments made by this Schedule apply to the 2017-18 income year and later income years.

Proposal announced: This measure was announced by the Treasurer as part of the 2016-17 Budget on 3 May 2016.

Financial impact: The tax offset for spouse contributions measure is estimated to result in a cost to revenue over the forward estimates period of \$10 million on an underlying cash balance basis comprising:

<i>\$m</i>	<i>2016-17</i>	<i>2017-18</i>	<i>2018-19</i>	<i>2019-20</i>	<i>Total</i>
Underlying Cash Balance	-	-	-5	-5	-10

Human rights implications: See Statement of Compatibility with Human Rights — Chapter 9, paragraphs 9.19 to 9.23.

Compliance cost impact: Extending the ability of individuals to benefit from the spouse tax offset is expected to result in a low increase in compliance costs.

Innovative income streams and integrity

Schedule 8 to the TLA Bill amends the earnings tax exemptions in the *Income Tax Assessment Act 1997* to:

- extend the earnings tax exemption to new lifetime products such as deferred products and group self-annuities;
- remove the earnings tax exemption in respect of transition to retirement income streams; and
- introduce an integrity measure that will apply to self-managed superannuation funds and small Australian Prudential Regulation Authority funds to support the operation of the transfer balance cap measure.

Date of effect: The amendments made by this Schedule apply to the 2017-18 income year and later income years.

Proposal announced: This measure was announced by the Treasurer as part of the 2016-17 Budget on 3 May 2016.

Financial impact: The innovative income streams and integrity measure is estimated to result in a gain to revenue over the forward estimates period of \$470 million on an underlying cash balance basis comprising:

\$m	2016-17	2017-18	2018-19	2019-20	Total
Underlying Cash Balance	..	130	160	180	470

.. represents an estimate that is not zero, but has been rounded to zero.

Human rights implications: See Statement of Compatibility with Human Rights — Chapter 10, paragraphs 10.66 to 10.79.

Compliance cost impact: Extending the tax exemption on earnings in retirement phase to deferred products such as deferred lifetime annuities and group self-annuity products is expected to result in a medium increase in compliance costs. The changes to transition to retirement income streams are expected to result in a low increase in compliance costs.

Anti-detriment provisions

Schedule 9 to the TLA Bill removes the income tax deduction available to a complying superannuation fund, life insurer, or complying approved deposit fund that pays an increased lump sum, because of the death of a

member for the benefit of their spouse, former spouse or child, can effectively result in a refund of income tax paid by the fund in respect of contributions made for the member during their lifetime.

Date of effect: The amendments made by this Schedule take effect on and from 1 July 2017.

Proposal announced: This measure was announced by the Treasurer as part of the 2016-17 Budget on 3 May 2016.

Financial impact: The anti-detriment measure is estimated to result in a gain to revenue over the forward estimates period of \$350 million on an underlying cash balance basis.

<i>\$m</i>	<i>2016-17</i>	<i>2017-18</i>	<i>2018-19</i>	<i>2019-20</i>	<i>Total</i>
Underlying Cash Balance	-	-	105	245	350

Human rights implications: See Statement of Compatibility with Human Rights — Chapter 11, paragraphs 11.17 to 11.22.

Compliance cost impact: Removing the anti-detriment provision is expected to result in a low reduction in compliance costs.

Administration and consequential amendments

Part 1 of Schedule 10 to the TLA Bill 2016 amends the tax law to simplify and consolidate the range of existing processes for the release of amounts from individuals' superannuation using a release authority.

The amendments will replace existing release authorities (except those relating to deferred debt account discharge liabilities for Division 293 tax) with a new simplified release authority regime. This will ensure that the release of all such superannuation amounts is subject to common processes and timeframes.

Part 2 of Schedule 10 to the TLA Bill 2016 simplifies the taxation law to assist in streamlining the administration of the Division 293 tax regime. The amendments reduce compliance costs for superannuation providers and individuals where superannuation benefits become payable from defined benefit interests by removing the requirements in the taxation law relating to superannuation interests for which a Division 293 tax debt account is being kept for:

- superannuation providers to notify the Commissioner of Taxation (Commissioner) of the amount of end benefit caps for their members in some circumstances; and
- individuals to notify the Commissioner in any circumstance when their superannuation benefits from such interests first become payable.

Part 3 of Schedule 10 to the TLA Bill 2016 clarifies that the Commissioner can provide a single notice that includes two or more separate notices that are required to be provided.

Part 4 of Schedule 10 to the TLA Bill makes consequential amendments to the *Superannuation Act 1976* that sets out the rules that govern the Commonwealth Superannuation Scheme (CSS) in relation to release authorities issued by the Commissioner. The amendments take account of changes made by other parts of the Superannuation Reform Package.

Date of effect: The amendments made by this Schedule apply as follows:

- Part 1 — financial years commencing on or after 1 July 2018;
- Part 2 — end benefit notifications for which the obligation to provide the notification arises on or after 1 July 2017;
- Part 3 — on and from 1 July 2017;
- Part 4 — financial years commencing on or after 1 July 2018

Proposals announced: These measures are consequential to the measures announced by the Treasurer as part of the 2016-17 Budget on 3 May 2016 and the amendments announced on 15 September 2016.

Financial impact: The impact of the administration and consequential changes are estimated to have an unquantifiable but small financial impact.

Human rights implications: See Statements of Compatibility with Human Rights — Chapter 12, paragraphs 12.127 to 12.136.

Compliance cost impact: Streamlining administration is expected to result in a low reduction in compliance costs for both individuals and superannuation providers.

Summary of regulation impact statement

Impact: The Regulation Impact Statement (RIS) — Chapter 14 of this Explanatory Memorandum finds that the recommended package of measures would improve the sustainability, flexibility and integrity of the superannuation system.

In establishing the recommended package of measures consideration was given to overarching costs (including compliance costs), benefits, and the fiscal impact of the measures both individually and as a package. Compliance costs will include those arising from the need for stakeholders to familiarise themselves with the changes and the need for superannuation providers to update systems. After considering the costs and benefits, the RIS concludes that the recommended package of measures would provide the highest net benefit while taking into account the Government's broader fiscal strategy.

Main points:

- Better targeting of tax concessions will improve the fairness and sustainability of the superannuation system. These measures will require all stakeholders to familiarise themselves with the changes. Superannuation providers would also need to update systems to give effect to the required changes.
- The flexibility measures will enable more individuals to save for their retirement. Providing individuals, especially those individuals with low incomes or with broken work patterns, with more ways to save for their retirement will enable them to be more likely to have higher retirement incomes. While individuals will benefit from these measures, they will also incur costs in familiarising themselves with the changes and considering their current superannuation tax affairs.
- The integrity measures will ensure that superannuation is not primarily used for tax minimisation purposes, increase alignment with the objective of superannuation and streamline processes across the superannuation system. These measures will require all stakeholders to familiarise themselves with the changes. Superannuation providers would also need to update systems to give effect to the required changes.

Chapter 1

Superannuation reform package overview

Outline of chapter

1.1 The Superannuation (Objective) Bill 2016 (the Objective Bill), the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 (the TLA Bill) and the Superannuation (Excess Transfer Balance Tax) Imposition Bill 2016:

- legislate the primary objective and subsidiary objectives of the superannuation system; and
- make a number of changes to the taxation and regulation of superannuation to make the system fairer and more sustainable, and to provide more flexibility and choice.

Context of amendments

1.2 These Bills implement the Government's reforms to superannuation announced in the 2016-17 Budget and the subsequent changes announced following consultation with a wide variety of interested persons and organisations.

1.3 As Australia's population ages and fiscal pressures increase it is important that our superannuation system is used for its core purpose of providing income in retirement to substitute or supplement the age pension and not for tax minimisation and estate planning purposes.

1.4 The Government's changes will make the superannuation system fairer and more sustainable by ensuring superannuation tax concessions are well-targeted and affordable. The measures in the TLA Bill reduce access to tax concessions for the wealthiest individuals and better target tax concessions to encourage all Australians to be more self-sufficient in retirement.

1.5 These reforms also increase flexibility and choice in superannuation to support how people work and save for retirement in Australia's modern economy.

Objective of the superannuation system

1.6 Together with the age pension and private savings, savings from compulsory and voluntary contributions to superannuation are important elements of the three-pillars that underpin Australia's retirement income system. Superannuation is the second largest savings vehicle of the Australian financial sector.

1.7 Given its importance, it is essential that future superannuation policy is guided by clear objectives. To achieve this, the Government will legislate the objective of the superannuation system in the Objective Bill. Subsidiary objectives will be prescribed by regulation.

1.8 All future changes to superannuation policy will be assessed for compatibility with the primary objective and subsidiary objectives of the superannuation system.

Fairer and more sustainable superannuation

1.9 Currently, superannuation tax concessions are poorly targeted — a significant proportion go to people who will save for their retirement regardless of the concessions and who will never depend on the age pension.

1.10 To ensure the superannuation system is fairer and fiscally sustainable the Government's changes will better target tax concessions to those who most need them to save for their retirement.

1.11 The introduction of a \$1.6 million transfer balance cap will limit the amount of superannuation that an individual can transfer into a tax free retirement phase interest.

1.12 Lowering both the concessional contributions cap to \$25,000 and the threshold at which high income earners pay Division 293 tax on their concessional contributions to \$250,000 also better targets the tax concessions.

1.13 Lowering the annual non-concessional contributions cap from \$180,000 to \$100,000 and restricting the ability of individuals to make non-concessional contributions to those with total superannuation savings of less than \$1.6 million ensures the ability to make after-tax contributions is focused on those individuals aspiring to acquire superannuation savings up to the limit of the transfer balance cap.

1.14 The Government's changes also provide for broadly commensurate taxation treatment for members of defined benefit schemes and constitutionally protected funds.

1.15 In addition to better targeted tax concessions the Government will introduce the low income superannuation tax offset. This will ensure that most people earning \$37,000 or less are not paying more tax on their superannuation than they are on their take-home income.

More choice and flexibility

1.16 The Government recognises that in Australia's modern economy the superannuation system needs to be flexible and encourage all individuals to save for their retirement, regardless of their employment circumstances. Many Australians have interrupted work patterns or irregular income as a result of the work-life choices they make.

1.17 The Government's changes will allow more individuals to claim a deduction for personal contributions they make to superannuation. This will ensure that most workers, regardless of their employment circumstances can choose to make concessional contributions up to their cap.

1.18 The introduction of catch-up arrangements will allow individuals with a total superannuation balance of less than \$500,000 just before the beginning of a financial year to carry forward unused concessional contribution cap space from the five previous financial years. This will provide more flexibility for those with interrupted work patterns or irregular income to make concessional contributions to their superannuation when they have the capacity to do so.

1.19 The changes also extend the current spouse tax offset arrangements to assist more couples to support each other in accumulating superannuation.

1.20 Extending the earnings tax exemption to assets supporting deferred products will encourage the development of new retirement income products. This will ensure individuals have more choices about how to manage their consumption, and manage the risks associated with outliving their retirement savings.

Improved integrity

1.21 Australians should have confidence that the superannuation system is being used for its core purpose of providing income in retirement. A number of the changes in the TLA Bill will build this confidence.

1.22 Removing the earnings tax exemption from assets supporting transition to retirement income streams (TRIS) will encourage the use of TRIS for their intended purpose of supplementing income for workers who have reduced their hours or responsibilities as they near retirement, rather than for tax minimisation.

1.23 The integrity of the system will also be enhanced by the removal of the inconsistently applied and out-dated anti-detriment provision which serves no justifiable policy purpose.

Chapter 2

The objective of the superannuation system

Outline of chapter

2.1 The Superannuation (Objective) Bill 2016 (the Objective Bill) establishes a legislative framework to guide the development of future superannuation policy. It does this by enshrining the primary objective and subsidiary objectives of the superannuation system in legislation, and requiring new bills and regulations relating to superannuation to be accompanied by a statement of compatibility with the primary and subsidiary objectives of the superannuation system.

2.2 All legislative references in this Chapter are to the Objective Bill.

Context of amendments

2.3 Superannuation is important to improving the retirement income of all Australians and is one pillar of the Australian retirement income system, together with the age pension and other voluntary savings. Over 80 per cent of working age Australians have superannuation savings. It is the second largest savings vehicle, making up around 22 per cent of all assets held by Australian households.

2.4 Superannuation is also a key component of the financial services industry and the economy more broadly. Superannuation assets have increased from \$245 billion in 1996 to over \$2 trillion today, representing well over 100 per cent of Australia's Gross Domestic Product.

2.5 In response to the Financial System Inquiry, the Government agreed to enshrine the objective of the superannuation system in legislation. This will provide a way in which competing superannuation proposals can be measured and a framework for evaluating future changes in the superannuation system.

2.6 As the superannuation system matures and financial assets increase further, the role of superannuation will increase. It is therefore important that new superannuation proposals be considered in light of the objective of the superannuation system so that future changes build and maintain confidence in the superannuation system.

2.7 The objective of the superannuation system was an important anchor for the development of the Government's 2016-17 Budget Superannuation Reform Package.

Summary of new law

2.8 The Objective Bill enshrines the primary and subsidiary objectives of the superannuation system in legislation. It also introduces a requirement for statements of compatibility with the primary objective and subsidiary objectives of the superannuation system to be prepared for every Bill or regulation relating to superannuation.

2.9 The subsidiary objectives of the superannuation system will be set out in regulation. Regulations will also prescribe certain Acts that are exempt from the requirement to prepare a statement of compatibility. These Acts relate to the operation of Commonwealth superannuation schemes, which are similar to the trust deeds of other superannuation funds, rather than relating to superannuation policy more generally.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>A statement of compatibility with the primary objective and subsidiary objectives of the superannuation system must be prepared for every Bill or regulation that relates to superannuation.</p> <p>Regulations may be made to prescribe the subsidiary objectives of the superannuation system, and certain Acts that are exempt from the requirement to prepare a statement of compatibility.</p>	<p>No equivalent</p>

Detailed explanation of new law

2.10 For every Bill or regulation relating to superannuation, there must be a statement of its compatibility with the primary objective and subsidiary objectives of the superannuation system.

The objective of the superannuation system

2.11 The Objective Bill enshrines the primary objective and subsidiary objectives of the superannuation system in legislation.

2.12 The primary objective of the superannuation system is to provide income in retirement to substitute or supplement the age pension. *[Section 4, subsection 5(1)]*

2.13 This objective clarifies that the role of the superannuation system is to assist individuals to support themselves by providing income to meet their expenditure needs in retirement, rather than being a concessionally taxed investment vehicle for tax minimisation and estate planning.

2.14 Superannuation, through a combination of requiring compulsory employer superannuation guarantee contributions and allowing voluntary contributions, supports the other pillars of the retirement income system — the age pension and other savings. Its purpose is not to allow for tax minimisation or estate planning.

2.15 The subsidiary objectives of the superannuation system will be prescribed by regulation. *[Section 4, subsection 5(2)]* They are to:

- facilitate consumption smoothing over the course of an individual's life;
- manage risks in retirement;
- be invested in the best interests of superannuation fund members;
- alleviate fiscal pressures on Government from the retirement income system; and
- be simple, efficient and provide safeguards.

2.16 Enshrining the primary objective of the superannuation system in legislation, in combination with the subsidiary objectives prescribed by regulation, will provide a framework against which future superannuation policy proposals can be assessed.

2.17 The primary objective and subsidiary objectives of the superannuation system do not affect the meaning of any law of the Commonwealth (other than the Objective Bill and its regulation). This means that the primary objective and subsidiary objectives cannot be used to interpret other Commonwealth laws. *[Subsection 5(3)]*

2.18 For example, the objective of the superannuation system will not affect the interpretation of provisions such as section 62 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act), which outlines the sole purpose test for regulated superannuation funds. This provision states that funds must be maintained solely for one or more of the core purposes (including provision of benefits on retirement, attainment of certain age and death) or for one or more of the ancillary purposes (including termination of employment, ill-health, and death). Benefits that are provided within the scope of the sole and ancillary purposes are consistent with the objectives of the superannuation system.

Statements of compatibility with the objective of the superannuation system

2.19 A statement of compatibility must be prepared for a Bill or regulation that relates to superannuation.

2.20 It is the responsibility of the member of Parliament proposing to introduce a Bill into a House of Parliament to cause a statement of compatibility to be prepared. The statement of compatibility must be presented to the House of Parliament by the member of Parliament who introduces the Bill, or another member acting on his or her behalf. *[Subsection 6(1), subsection 6(2)]*

2.21 A statement of compatibility with the primary objective and subsidiary objectives of the superannuation system will ordinarily form part of the explanatory memorandum for a Bill that is introduced into a House of Parliament.

2.22 It is the responsibility of the rule-maker for a regulation to cause a statement of compatibility to be prepared for a regulation relating to superannuation. The statement must be included in the explanatory statement relating to the regulation. *[Subsection 7(1), note to subsection 7(1)]*

2.23 Whether a Bill or regulation relates to superannuation is discussed at paragraphs 2.36 to 2.38.

2.24 The term ‘rule-maker’ has the same meaning as in the *Legislation Act 2003*. *[Section 4]*

2.25 A regulation is a form of legislative instrument. The note to subsection 8(1) of the *Legislation Act 2003* states that legislative instruments may be described by their enabling legislation in different ways, for example as regulations, rules, ordinances or determinations. As such, regulations are legislative instruments that are so described by their enabling legislation.

2.26 A statement of compatibility will not be required for legislative instruments that are not regulations, for example determinations made by the Commissioner of Taxation (Commissioner) or prudential standards made by APRA. This is because Bills and regulations are more likely to contain measures implementing Government policy decisions than legislative instruments made by regulators such as the ATO, ASIC and APRA. Since the purpose of legislating the objective of the superannuation system is to guide the development of superannuation policy, it would be unnecessary to require regulators instituting such legislative instruments to comply with the requirement to prepare a statement of compatibility.

2.27 There is no prescribed format that a statement of compatibility must take. However, the statement must include an assessment of whether the Bill or regulation is compatible with the primary objective and subsidiary objectives of the superannuation system. [*Sections 6(3) and 7(2)*]

2.28 The statement of compatibility should address the major components of the Bill or regulation. It is not necessary to address any aspects of the Bill or regulation that are minor or machinery in nature.

2.29 The statement of compatibility need only address those parts of the Bill or regulation that relate to superannuation. For example, if an omnibus Bill implements several measures, one of which relates to superannuation, the statement need only be prepared in relation to that measure.

2.30 A statement of compatibility with the objective of the superannuation system prepared for a Bill or regulation is not binding on any court or tribunal. [*Subsection 6(4), subsection 7(3)*] This is not intended to exclude the operation of section 15AB of the *Acts Interpretation Act 2001*, which deals with the use of extrinsic materials in the interpretation of an Act or legislative instrument. A statement of compatibility could be used by a court or tribunal to ascertain the meaning of provisions in the Act or regulation to which the statement relates, where the meaning of those provisions is unclear or ambiguous.

2.31 If a statement of compatibility is not prepared for a Bill or regulation relating to superannuation this will not affect the validity, operation or enforcement of the Act or regulation or any other law of the Commonwealth. [Subsections 6(5) and 7(4)]

2.32 Regulations may prescribe certain Acts and regulations that, if amended or repealed, do not require a statement of compatibility to be prepared. These Acts relate to the operation of Commonwealth superannuation schemes, which are similar to the trust deeds of other superannuation funds, rather than relating to superannuation policy more generally. Amendments to these Acts (or regulations made under these Acts) will not require a statement of compatibility to be prepared as the Acts do not relate to superannuation policy more generally. [Subsection 6(6) and 7(5)]

2.33 The simplified outline of the Objective Bill states that for every Bill or regulation relating to superannuation, there must be a statement of its compatibility with the primary and subsidiary objectives of the superannuation system. [Section 3]

2.34 Simplified outlines are non-operative provisions that are used to assist readers understand the legislation. They are not intended to be comprehensive and the substantive provisions of the Bill must be relied upon.

2.35 The Governor-General may make regulations prescribing matters required or permitted by the Objective Bill to be prescribed by the regulations, or necessary or convenient to be prescribed for carrying out or giving effect to the Objective Bill. [Section 8]

Relating to superannuation

2.36 Statements of compatibility with the objective of the superannuation system must only be prepared for Bills or regulations relating to superannuation. 'Relating to superannuation' is not a defined term so takes its ordinary meaning.

2.37 A Bill or regulation will relate to superannuation if it amends a law that is relevant to superannuation, irrespective of whether the relevant instrument being amended predominantly relates to superannuation (such as the *Superannuation Guarantee (Administration) Act 1992*) or merely contains some provisions that deal with superannuation (such as the *Taxation Administration Regulations 1976* or the *Fair Work Act 2009*). It is the subject matter of the amendment that is relevant as to whether it relates to superannuation, rather than the instrument being amended.

2.38 Whether a Bill or regulation relates to superannuation and requires a statement of compatibility to be prepared will ultimately be a decision for the relevant member of Parliament or rule-maker.

Example 2.1: Statement required

The Government proposes to amend the mandatory disclosure requirements for superannuation products in the *Corporations Regulations 2001*. This would require a regulation to be made by the Governor-General in accordance with the regulation making power in section 1364 of the *Corporations Act 2001*.

Provisions in the *Corporations Regulations 2001* predominantly relate to regulating corporations as a whole; however some parts of the Regulations are specific to corporate trustees that are superannuation providers. Part 10 of Schedule 10A of the *Corporations Regulations 2001* contains the provisions that modify mandatory disclosure requirements in relation to superannuation products.

The Treasurer, as the Minister responsible for administering the *Corporations Act 2001*, would need to cause a statement of compatibility with the objective of the superannuation system to be prepared in respect of the proposed regulation. This is because the proposed regulation would amend provisions that relate to superannuation.

Example 2.2: Statement not required

Section 15A of the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (SUMMLMA) allows the Commissioner to specify, by legislative instrument, certain dates by which superannuation providers must give to the Commissioner statements and payments in relation to unclaimed superannuation money.

The Commissioner makes a new legislative instrument under this provision.

Although this legislative instrument would relate to superannuation it is not a regulation because section 15A of the SUMMLMA refers to a 'legislative instrument' rather than a 'regulation'. This means that a statement of compatibility with the objective of the superannuation system would not need to be prepared.

Example 2.3: Statement not required

Under section 34C of the SIS Act, APRA may determine prudential standards concerning registrable superannuation entities.

APRA makes a new prudential standard under this provision.

Subsection 34C(10) of the SIS Act states that an instrument made under section 34C is a legislative instrument (with some exceptions).

Although a prudential standard made by APRA under section 34C of the SIS Act would relate to superannuation, it would not be a regulation because the enabling legislation refers to it as a 'legislative instrument'. As such, a statement of compatibility with the objective of the superannuation system would not be required.

Consequential amendments

A consequential amendment is made to the *Legislation Act 2003* to require a statement of compatibility with the objective of the superannuation system to be included in an initial explanatory statement, or replacement explanatory statement, for a regulation relating to superannuation (unless the regulation is exempt from the requirement). [*Schedule 10 of the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016, item 112, paragraph 15J(2)(fa)*]

Commencement

2.39 The Objective Bill commences from the start of the first day of the first quarter following Royal Assent of the Objective Bill. [*Section 2*]

2.40 Bills introduced into a House of Parliament or regulations made after this time, are required to be accompanied by a statement of compatibility with the objective of the superannuation system, if they relate to superannuation.

2.41 The consequential amendment to the *Legislation Act 2003* commences from the start of the first day of the first quarter following Royal Assent of the TLA Bill. [*Item 8 of the table in section 2 of the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016*]

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Superannuation (Objective) Bill 2016

2.42 The Superannuation (Objective) Bill 2016 (the Objective Bill) and the consequential amendment to the *Legislation Act 2003* in Schedule 10 of the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 (the TLA Bill) are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

2.43 The Objective Bill establishes a legislative framework to guide the development of future superannuation policy. It does this by enshrining in legislation that the primary objective of the superannuation system is to provide income in retirement to substitute or supplement the age pension. It also provides for subsidiary objectives of the superannuation system to be prescribed by regulation.

2.44 Bills and regulations relating to superannuation will need to be accompanied by a statement of compatibility with the primary and subsidiary objectives of the superannuation system. This will ensure that future superannuation policy is considered against the primary objective and subsidiary objectives of the superannuation system.

2.45 Part 5 of Schedule 10 to the TLA Bill makes consequential amendments to the *Legislation Act 2003* in relation to the objective of the superannuation system.

Human rights implications

2.46 The Objective Bill and Part 5 of Schedule 10 to the TLA Bill do not engage any of the applicable rights or freedoms.

Conclusion

2.47 The Objective Bill and Part 5 of Schedule 10 to the TLA Bill are compatible with human rights as they do not raise any human rights issues.

Chapter 3

Transfer balance cap

Outline of chapter

3.1 Schedule 1 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 (the TLA Bill) imposes a \$1.6 million cap (the transfer balance cap) on the amount of capital that can be transferred into the retirement phase of superannuation. The transfer balance cap applies from 1 July 2017 and is intended to limit the extent to which the retirement phase interests of high wealth individuals attract an earnings tax exemption.

3.2 Schedule 1 also introduces additional income tax rules on recipients of certain defined benefit income streams in excess of \$100,000 per annum to achieve a broadly commensurate taxation outcome.

3.3 Unless otherwise indicated, all legislative amendments referred in this Chapter are contained in the TLA Bill 2016.

Context of amendments

3.4 This measure forms part of the Government's Superannuation Reform Package announced in the 2016-17 Budget. The measure improves the fairness and sustainability of the superannuation system.

3.5 Individuals' investments in superannuation are generally subject to a concessional earnings tax rate of 15 per cent. The tax is imposed on individuals' superannuation funds. Members benefit through higher after-tax returns. This rate generally applies while the individual is of working age and contributing towards their superannuation (the accumulation phase).

3.6 When an individual accesses their superannuation (for example, because they have retired), they may take their superannuation in the form of a superannuation lump sum, a superannuation income stream such as a pension, or a combination of the two. If they commence a superannuation income stream, income earned on the ongoing investment of the capital that supports the income stream is exempt from tax. This exemption applies to the fund for the benefit of members. Individuals in receipt of a superannuation income stream, and the assets supporting those income streams, are said to be in the retirement phase or pension phase.

3.7 The purpose of the earnings tax exemption is to encourage individuals to save for their own retirement and relieve pressure on Australia's age pension system. However, there is currently no limit to the amount of superannuation an individual can transfer into the retirement phase where it benefits from the tax exemption. As such, the exemption provides a significant tax concession to high wealth individuals with significant superannuation balances and who will almost certainly never be reliant on the age pension. The amendments made by Schedule 1 ensure the superannuation tax concessions are better targeted and reduce the extent to which superannuation is used for tax minimisation and estate planning.

Operation of the existing law

The earnings tax exemption

3.8 The earnings tax exemption is provided for in sections 295-385 and 295-390 of the *Income Tax Assessment Act 1997* (ITAA 1997). Those provisions broadly exempt income that a superannuation fund receives in respect of assets it holds to fund its liabilities to provide superannuation income stream benefits to its members.

3.9 A superannuation income stream is an individual's right to receive a series of periodic payments over an identifiable period of time. This includes pensions and annuities. A superannuation income stream benefit is any one of those periodic payments (section 307-70 of the ITAA 1997 and regulation 995-1.01 of the *Income Tax Assessment Regulations 1997* (ITAR 1997)).

3.10 Funds can segregate the assets they hold that support superannuation income stream benefit liabilities, with earnings on segregated assets exempt from tax. Alternatively, where assets are not held solely to fund pension liabilities, funds are required to use the proportionate method, where a proportion of earnings on all of a fund's assets are exempt.

3.11 Life insurance companies and Retirement Savings Account (RSA) providers can also have liabilities in relation to superannuation income stream benefits. However, in most cases, the exemptions that apply to those entities use related concepts.

3.12 The earnings tax exemption is discussed in more detail in Chapter 10, including modifications made to the earnings tax exemption for deferred superannuation income streams and transition to retirement income stream (TRIS) products.

Taxation of superannuation income stream benefits

3.13 Most superannuation income stream member benefits are non-assessable non-exempt income to individuals aged 60 or over (section 301-10 of the ITAA 1997). This is because they are wholly from a taxed source (or ‘element taxed in the fund’) (subsection 307-275(2) of the ITAA 1997).

3.14 A number of superannuation funds provide benefits that contain untaxed elements. These include constitutionally protected funds (section 307-280 of the ITAA 1997) and some public sector defined benefit schemes (section 307-295 of the ITAA 1997). Where the benefit is from an untaxed source, the benefit is assessable to the individual, subject to a 10 per cent tax offset (section 301-100 of the ITAA 1997).

3.15 Similar rules to the above apply in the case of superannuation income stream benefits that are superannuation death benefits paid to dependants. The difference is that the treatment for individuals aged 60 or over (who receive member benefits) is replicated for a younger person if their superannuation death benefits are from a deceased person who was aged 60 or over (Subdivision 302-B of the ITAA 1997).

Summary of new law

3.16 Schedule 1 to the TLA Bill imposes a transfer balance cap from 1 July 2017 to limit the amount of capital individuals can transfer to the retirement phase to support superannuation income streams. This, in turn, limits the amount of superannuation fund earnings that are exempt from taxation.

3.17 An individual’s transfer balance cap is \$1.6 million for the 2017-18 financial year and is subject to proportional indexation on an annual basis in \$100,000 increments in line with the Consumer Price Index (CPI).

3.18 The value of superannuation interests that support superannuation income streams as at 30 June 2017, together with the commencement value of new superannuation income streams that start after that date, count towards an individual’s cap.

3.19 If an individual exceeds their transfer balance cap, the Commissioner of Taxation (the Commissioner) will direct an individual’s superannuation income stream provider to commute (reduce) their retirement phase interests by the amount of the excess (including excess transfer balance earnings) to rectify the breach. The individual will also be

liable for excess transfer balance tax on their excess transfer balance earnings to neutralise the benefit received from having excess capital in the earnings tax exempt retirement phase. Breaches in the 2017-18 financial year attract a single tax rate. The tax rate on excess transfer balance earnings increases for second and subsequent breaches occurring in the 2018-19 financial year or a later financial year.

3.20 The transfer balance cap that applies to child dependants in receipt of a death benefit income stream from a deceased parent is subject to modifications. The modifications generally allow the child to receive their share of the deceased's retirement phase interest without prejudice to the child's future retirement. This recognises that most child dependants are currently required to commute the death benefit income streams by age 25.

3.21 Defined benefit lifetime pensions and certain other superannuation income streams with commutation restrictions are subject to broadly commensurate taxation treatment. An equivalent outcome to the operation of the transfer balance cap is achieved, albeit in a different manner, recognising that commutation restrictions make it impractical for individuals to reduce an excess amount.

3.22 The value of lifetime pensions and other defined benefit income streams is counted towards an individual's transfer balance cap. Excess transfer balance tax is not imposed for a breach of the transfer balance cap that is attributable to certain defined benefit income streams. Excess defined benefit income is instead subject to additional income tax rules.

3.23 For individuals receiving superannuation income streams on 1 July 2017 transitional arrangements will apply if they are in excess of their transfer balance cap by less than \$100,000 on 1 July 2017.

3.24 Transitional arrangements also provide capital gains tax (CGT) relief for complying superannuation funds. Complying superannuation funds are able to reset the cost base of assets reallocated or re-apportioned from the retirement phase to the accumulation phase in the period between introduction of the TLA Bill and 1 July 2017. This relief is available for funds in respect of the assets held for individuals who choose to transfer amounts from the retirement phase to the accumulation phase to comply with the transfer balance cap or new TRIS arrangements prior to the commencement of those provisions.

3.25 Where these assets are already partially supporting interests in the accumulation phase (the proportionate method), a superannuation fund choosing to apply CGT relief will be subject to tax on the proportion of the capital gain (if any) that had accrued prior to 1 July 2017. This tax may be deferred until the asset is sold.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Limit the amount an individual can transfer to the retirement phase of superannuation where it is subject to the earnings tax exemption	
<p>The fund earnings tax exemption is generally retained. However, individuals are required to limit transfers to the retirement phase to \$1.6 million (indexed to CPI in \$100,000 increments).</p> <p>Individuals that exceed the transfer balance cap will have their superannuation income streams commuted (in full or in part) back to the accumulation phase and will be subject to excess transfer balance tax.</p>	<p>A superannuation fund is exempt from tax in relation to earnings on assets that support its superannuation income stream liabilities. Individuals receive a benefit from the exemption in the form of higher after-tax returns.</p> <p>There is no limit to the amount of superannuation an individual can move into retirement phase where it is subject to the exemption.</p>
Include half of the defined benefit income (other than from untaxed sources) in a recipient's assessable income to the extent it exceeds a \$100,000 defined benefit income cap	
<p>In taxed defined benefit arrangements, half of the capped defined benefit income stream payments are included in the recipient's assessable income and taxed at the individual's marginal rates to the extent they exceed a defined benefit income cap of \$100,000 (indexed).</p>	<p>Superannuation income stream benefits (member benefits) from taxed sources are non-assessable non-exempt income to recipients aged 60 or over.</p> <p>Superannuation income stream benefits that are dependant death benefit payments from taxed sources are also non-assessable non-exempt income if the deceased was 60 or over.</p>
Limit the defined benefit income from untaxed sources that can attract a tax offset to the defined benefit income cap	
<p>In untaxed defined benefit arrangements, the tax offset is limited to the first \$100,000 (indexed) of defined benefit income the individual receives.</p> <p>Defined benefit income received in excess of the defined benefit income cap does not attract the offset.</p>	<p>Member benefits from untaxed sources are assessable income to recipients. Recipients aged 60 or over are entitled to a 10 per cent tax offset.</p> <p>Superannuation income stream benefits that are dependant death benefit payments from untaxed sources are also entitled to a 10 per cent tax offset if the deceased was 60 or over.</p>

<i>New law</i>	<i>Current law</i>
Adjustments to the defined benefit income cap for other defined benefit income	
<p>Other superannuation income stream member benefits and dependant death benefits remain subject to their existing tax treatment.</p> <p>However, if the other benefits are defined benefit income, the defined benefit income cap is reduced by the amount of that income.</p>	<p>Other superannuation income stream member benefits and dependant death benefits are subject to a variety of different tax treatments. Concessions for these types of income are generally limited.</p>
Allow complying superannuation funds reallocating assets from retirement phase to the accumulation phase before 1 July 2017 to reset their cost base	
<p>Complying superannuation funds are able to reset the cost base of assets to their market value where those assets are reallocated or re-apportioned from the retirement phase to the accumulation phase prior to 1 July 2017 in order to comply with the transfer balance cap or new TRIS arrangements.</p> <p>Where these assets are already partially supporting interests in the accumulation phase, tax will be paid on this proportion of the capital gain made to 1 July 2017. This capital gain may be deferred until the asset is sold.</p>	<p>Where fund assets are segregated, movements between the pension and accumulation pool have no bearing on the cost base of the asset. For funds that are not segregated, gains on assets used to support accounts in the accumulation phase are included in the assessable income of the fund on realisation under the CGT provisions and tax liability is determined using a proportionate method.</p>

Detailed explanation of new law

3.26 The transfer balance cap is designed to limit the amount of capital that an individual can transfer to the retirement phase of superannuation. Unlike other balance tests in the TLA Bill, the transfer balance cap does not require an annual revaluation of superannuation assets. The transfer balance cap is directed towards net transfers to the retirement phase and does not value earnings, losses or draw-downs that occur within the retirement phase. *[Schedule 1, item 4, sections 294-1 and 294-5 of the ITAA 1997]*

3.27 Each individual with superannuation interests in the retirement phase has a personal transfer balance cap reflecting the total amount they can transfer to the retirement phase. To determine an individual's position with respect to their transfer balance cap, these individuals each have a transfer balance account, which tracks the net amounts the individual has transferred to the retirement phase. The Australian Taxation Office (ATO) is able to provide individuals with information (including information reported to the ATO by superannuation funds and life insurance companies) that it holds at a time about their transfer balance account, which may include their personal transfer balance cap and their transfer balance at a particular time. *[Schedule 1, item 4, section 294-10 and subsection 294-15(1) of the ITAA 1997]*

The transfer balance account

3.28 The policy intent of the transfer balance cap is achieved by using the structure of a transfer balance account. This section explains when superannuation income streams are added to an individual's transfer balance account (a credit), as well as when the transfer balance account is reduced by amounts removed from the retirement phase (a debit). The purpose of the transfer balance account and the system of credits and debits is to ensure that individuals retain flexibility to manage and change their retirement phase interests.

3.29 The transfer balance account operates in a similar way to a bank account balance or the balance of a general account ledger. Amounts an individual transfers to the retirement phase give rise to a credit (increase) in their transfer balance account. Similarly, certain transfers out of the retirement phase give rise to a debit (decrease) in the individual's transfer balance account. *[Schedule 1, item 4, subsection 294-30(2) of the ITAA 1997]*

3.30 The balance in an individual's transfer balance account (their transfer balance) at a particular time is determined by looking at the sum of credits in the account at that time less the sum of any debits in the account at that time. *[Schedule 1, item 3, subsection 294-30(2)]*

Example 3.1: Determining the balance in your transfer balance account

On 1 July 2017, Melinda has a superannuation income stream of \$800,000 with the Blue Superannuation Fund.

In October 2017, Melinda decides she wants to roll-over her superannuation income stream to her self-managed superannuation fund (SMSF), the Ukulele Band Super Fund.

On 10 October 2017, the Blue Superannuation Fund commutes Melinda's superannuation income stream into a superannuation lump

sum and sends the amount to the Ukulele Band Super Fund. The Ukulele Band Super Fund receives the amount on the same day and immediately starts a new superannuation income stream for Melinda.

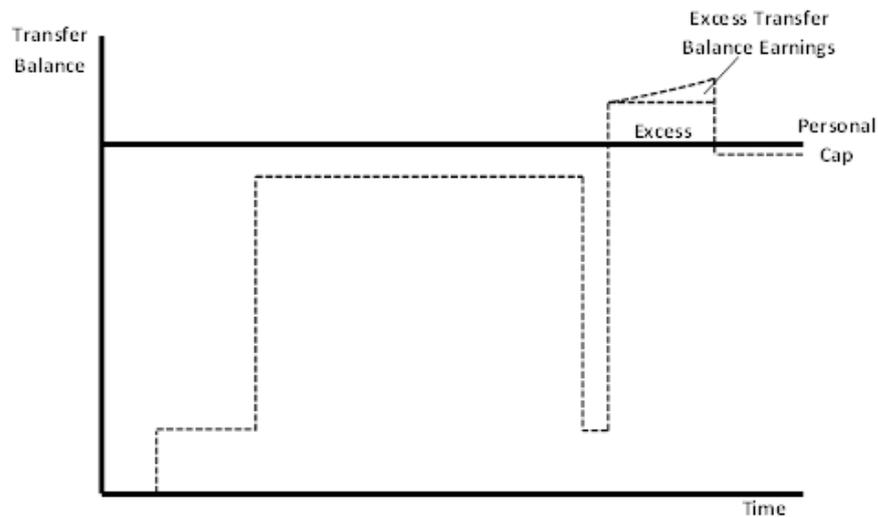
On 10 October 2017, Melinda's transfer balance account recorded the following amounts:

- a credit for the Blue Superannuation Fund superannuation income stream of \$800,000 (dated 1 July 2017), less
- a debit for the commutation of the Blue Superannuation Fund superannuation income stream for \$800,000 (dated 10 October 2017), plus
- a credit for the Ukulele Band Super Fund superannuation income stream of \$800,000 (dated 10 October 2017).
- The balance in Melinda's transfer balance account is \$800,000 at the end of 10 October 2017.

3.31 An individual can transfer amounts to the retirement phase provided it does not cause their transfer balance to exceed their personal transfer balance cap. By comparing the balance of their transfer balance account with their personal transfer balance cap, it is possible to determine how much an individual can transfer to the retirement phase without exceeding the cap (their available cap space).

3.32 An individual breaches their transfer balance cap if their transfer balance exceeds their personal transfer balance cap. Excess transfer balance earnings accrue on the excess transfer balance and are credited to the transfer balance account, compounding the excess until it is rectified.

Diagram 3.1: Transfer balance, credits, debits and excess amounts



This diagram is a visual representation of an individual's transfer balance account over time. Upward movements in the dotted line represent credits arising in the individual's transfer balance account. Downward movements represent debits.

In this diagram, the individual (in chronological order):

- starts a small superannuation income stream;
- starts a larger superannuation income stream;
- commutes the larger superannuation income stream;
- starts a new superannuation income stream that results in them exceeding their transfer balance cap; and
- rectifies the breach by partially commuting a superannuation income stream by an amount slightly larger than their excess transfer balance (including excess transfer balance earnings that arose during the time the individual had an excess transfer balance).

Between specific actions of the individual (that is, the starting of superannuation income stream or the commuting of them), the transfer balance account remains constant (as reflected by the horizontal movements above). Investment gains and losses and payments made to comply with the minimum drawdown requirements during these periods are not taken into account. When the transfer balance account is in excess, however, excess transfer balance earnings are generally credited to the individual's transfer balance account daily.

At a particular time, an individual can start a superannuation income stream with their available cap space, which is represented as the distance by which the personal cap line exceeds the dotted line.

3.33 It is possible for an individual's transfer balance account to have a negative transfer balance if the debits in their account exceed the credits. This could arise if investment earnings meant that a superannuation income stream is worth more when it is commuted from retirement phase than its initial value when it commenced. A negative transfer balance means an individual can commence a new superannuation income stream that does not exceed their personal transfer balance cap because the negative transfer balance absorbs the value by which the commuted superannuation income stream was greater than the transfer balance cap (see Example 3.13).

When an individual has a transfer balance account

3.34 An individual's transfer balance account is created when credits first arise in the account. Generally, this is when they first receive a superannuation income stream that is in the retirement phase. *[Schedule 1, item 4, subsection 294-15(2) of the ITAA 1997]*

3.35 As noted above, the colloquial concept of the retirement phase of superannuation is not new. However, the concept is now incorporated into the taxation law and is relevant to superannuation providers' earnings tax exemptions (see Chapter 10). *[Schedule 11, item 1, sections 307-75 and 307-80 of the ITAA 1997]*

3.36 An individual generally starts to be a recipient of a retirement phase superannuation income stream when they start a superannuation income stream and superannuation income stream benefits are payable to them. *[Schedule 1, item 4, subsection 294-20(1) of the ITAA 1997]*

3.37 For individuals that are receiving retirement phase superannuation income streams on 1 July 2017, their transfer balance account begins on that date. *[Schedule 1, item 4, paragraph 294-15(2)(a) of the ITAA 1997]*

3.38 For individuals with deferred superannuation income streams, it is not necessary that benefits be currently payable to the individual. It is sufficient that the benefits will become payable and the deferred superannuation income stream is in the retirement phase. *[Schedule 1, item 4, subsection 294-20(2) of the ITAA 1997]*

3.39 An individual's transfer balance account is generally a lifetime account and only ceases on their death. *[Schedule 1, item 4, section 294-45 of the ITAA 1997]*

3.40 However, a modification generally applies to cease a child's transfer balance account that is created when the child started to receive a death benefit income stream as a child recipient (see paragraphs 3.266 to 3.294). The child may start a new transfer balance account if they later start to receive superannuation income stream benefits other than as a child recipient.

The transfer balance cap

3.41 This section sets out the interaction between the general transfer balance cap and an individual's personal transfer balance cap. An individual's personal transfer balance cap begins as the general transfer balance cap at the time they first have a transfer balance but is then modified by the proportional indexation of their cap.

3.42 The general transfer balance cap is \$1.6 million for the 2017-18 financial year and is subject to indexation in \$100,000 increments on an annual basis in line with the CPI. [*Schedule 1, item 4, subsection 294-35(3) of the ITAA 1997*]

3.43 At the time an individual first commences a retirement phase superannuation income stream, the individual's personal transfer balance cap will equal the general transfer balance cap for that financial year.

Example 3.2: Starting to have a personal transfer balance cap

Amy first commences an \$800,000 retirement phase superannuation income stream on 18 November 2017. A transfer balance account is created for Amy at that time. Amy's personal transfer balance cap is \$1.6 million for the 2017-18 financial year.

Allen first becomes entitled to a superannuation income stream benefit on 15 July 2021. A transfer balance account is created for Allen at that time. In 2021-22, the general transfer balance cap has indexed to \$1.7 million. Allen's personal transfer balance cap is \$1.7 million for the 2021-22 financial year.

Proportional indexation of the personal transfer balance cap

3.44 Where an individual starts to have a transfer balance account and has not used the full amount of their cap, their personal transfer balance cap is subject to proportional indexation in line with increases in the general transfer balance cap. [*Schedule 1, item 4, subsections 294-35(1) and (2) of the ITAA 1997*]

3.45 Proportional indexation is intended to hold constant the proportion of an individual's used and unused cap space as the general cap increases. Indexation is only applied to an individual's unused cap percentage. This is worked out by finding the individual's highest transfer balance at the end of a day at an earlier point in time, comparing it to their personal transfer balance cap on that day and expressing the unused cap space as a percentage. The transfer balance cap is intended to limit the amount that can be transferred to the retirement phase. Therefore, once a proportion of cap space is utilised, it is not subject to indexation, even if the individual subsequently removes capital from their retirement phase. If this were not the case, individuals could continue to 'top up' the amount they can have in retirement phase contrary to the policy intent. *[Schedule 1, item 4, section 294-40 of the ITAA 1997]*

3.46 The purpose of proportional indexation is to provide equitable treatment to all individuals over time. It also recognises the expected benefit gained by individuals from commencing a retirement phase account at an earlier time.

Example 3.3: Proportional indexation

Further to Example 3.2, Amy's transfer balance account is credited by \$800,000 on 18 November 2017. As Amy has not made any other transfers to her retirement phase account, her highest transfer balance is \$800,000. At that time, she has used 50 per cent of her \$1.6 million personal transfer balance cap.

Assuming the general transfer balance cap is indexed to \$1.7 million in 2020-21, Amy's personal transfer balance cap is increased proportionally to \$1.65 million. That is, Amy's personal transfer balance cap is increased by 50 per cent of the corresponding increase to the general transfer balance cap. As such, Amy can now transfer a further \$850,000 to the retirement phase without breaching her personal transfer balance cap.

Example 3.4: Proportional indexation and the highest balance

On 1 October 2017, Nina commences a superannuation income stream with a value of \$1.2 million. On 1 January 2018, Nina partially commutes her superannuation income stream by \$400,000 to buy an investment property.

Nina's transfer balance on 1 October 2017 was \$1.2 million and, on 1 January 2018, it is \$800,000 (Nina's account is debited in respect of the \$400,000 partial commutation, see paragraphs 3.105 to 3.111).

In 2020-21, assume the general transfer cap is indexed to \$1.7 million. To work out the amount by which her personal cap is indexed, it is necessary to identify the day on which Nina's balance was at its highest. In this case, the highest balance was \$1.2 million and the day on which she first had this balance was 1 October 2017. Nina's personal cap on that date was \$1.6 million. Therefore, Nina's unused cap percentage on 1 October 2017 is 25 per cent.

To work out how much her personal cap is indexed, Nina's unused cap percentage is applied to the amount by which the general cap has indexed \$100,000 (the indexation increase). Therefore Nina's personal transfer balance cap in 2020-21 is \$1.625 million.

In 2022-23, assume the general transfer balance cap is indexed to \$1.8 million. As Nina has not transferred any further amount into the retirement phase, her unused cap percentage remains 25 per cent. Her personal transfer balance cap is now \$1.65 million (25 per cent of the indexation increase of \$100,000).

In this year, Nina decides to transfer the maximum amount she can into the retirement phase. This will be her personal cap for the 2022-23 year (\$1.65 million) less her transfer balance of \$800,000. This means Nina transfers another \$850,000 into the retirement phase without exceeding her transfer balance cap.

Once Nina has used all of her available cap space, her transfer balance cap will not be subject to further indexation. This is the case even if Nina later partially commutes her superannuation income stream and her transfer balance falls below her transfer balance cap.

3.47 A modified transfer balance cap applies to a child dependant that receives a death benefit income stream from a deceased person (see paragraphs 3.266 to 3.294). The above rules generally do not apply to these transfer balance caps.

Indexation of the general transfer balance cap

3.48 New indexation rules are inserted into the ITAA 1997 to provide a framework for indexing amounts in increments. [*Schedule 11, item 6, section 960-285 of the ITAA 1997*]

3.49 The general transfer cap is indexed in \$100,000 increments in line with CPI. [*Schedule 11, items 5 and 6, item 10A in the table in section 960-265 and item 3 in the table in subsection 960-285(7) of the ITAA 1997*]

3.50 The general transfer balance cap is indexed by being multiplied by the indexation factor and rounding down to the nearest \$100,000. The indexation factor is determined by dividing the CPI number for the quarter ending 31 December in the prior financial year by the number for the base quarter (ending 31 December 2016). *[Schedule 11, item 6, subsections 960-285(1), (2), (3) and (5) of the ITAA 1997]*

3.51 The indexation factor is rounded to 3 decimal places. *[Schedule 11, item 6, subsection 960-285(6) of the ITAA 1997]*

3.52 The general transfer balance cap does not index where the indexation factor is one or less than one. *[Schedule 11, item 6, subsection 960-285(4) of the ITAA 1997]*

Credits to an individual's transfer balance account

3.53 The value of an individual's transfer balance account changes according to the credit and debit entries made to the account. A credit reduces the amount of available cap space an individual has. This section sets out when and how a retirement phase income stream, including a death benefit income stream, is credited to an individual's account.

Table 3.1: Summary of credit events

<i>Item</i>	<i>Credit</i>	<i>Relevant paragraphs</i>
1	Superannuation income streams on 30 June 2017	3.55 to 3.57
	Reversionary income streams commenced between 1 July 2016 and 30 June 2017	3.81 to 3.82
2	Superannuation income streams commenced on or after 1 July 2017	3.55 to 3.60
	Reversionary income streams commenced on or after 1 July 2017	3.79 to 3.80
3	Excess transfer balance earnings	3.62 to 3.72
1 & 2	Death benefit income streams generally	3.73 to 3.98
	Capped defined benefit income streams credits generally	3.224 to 3.231

3.54 Generally, a credit arises in an individual's transfer balance account when an individual becomes the recipient of a superannuation income stream that is in the retirement phase. That time is when the superannuation income stream begins to attract an earnings tax exemption for the superannuation income stream provider.

3.55 The following amounts are credited towards an individual's transfer balance account:

- the value of all superannuation interests that support superannuation income streams in the retirement phase the individual is receiving on 30 June 2017;
- the commencement value of new superannuation income streams (including new superannuation death benefit income streams and deferred superannuation income streams) in the retirement phase on or after 1 July 2017;
- the value of reversionary superannuation income streams at the time the individual becomes entitled to them, although the time the credit arises is deferred (see paragraphs 3.79 to 3.82); and

- excess transfer balance earnings that accrue on excess transfer balance amounts.

[Schedule 1, item 4, subsection 294-25(1) of the ITAA 1997]

3.56 The value of a superannuation interest is worked out under section 307-205 of the ITAA 1997 and the regulations made under that section.

3.57 After a superannuation income stream has commenced, changes in the value of its supporting interest are not counted as credits or debits. That means a superannuation interest that supports a superannuation income stream that increases in value because of investment earnings does not have its growth counted towards the cap. Similarly, a superannuation interest that supports a superannuation income stream that loses value because of investment losses or the drawdown of superannuation income stream benefits does not have that reduction reflected in the individual's transfer balance account.

Example 3.5: Transfer balance account credits

On 1 August 2017, John starts a pension worth \$1 million. At 1 July 2018, the value of the superannuation interest that supports John's pension has grown to \$1.1 million because of investment earnings. By 1 January 2030, John has drawn-down the full value of the superannuation interest that supported his pension.

At all times, John has a transfer balance of \$1 million reflecting the credit that arose on 1 August 2017.

3.58 The Government will review the impact of the transfer balance cap amendments if there is a macroeconomic shock that substantially affects retirement incomes (see paragraphs 3.102 to 3.103).

3.59 For the purposes of determining whether an individual is a retirement phase recipient of a superannuation income stream and the credit that arises in their transfer balance account for the superannuation income stream, it is assumed that:

- the rules or standards under which the superannuation income stream is provided will be complied with; and
- the superannuation income stream remains in the retirement phase, even if it later leaves the retirement phase because of non-compliance with a commutation authority (see paragraphs 3.191 to 3.197).

[Schedule 1, item 4, section 294-50 of the ITAA 1997]

3.60 These assumptions ensure that the creation of a transfer balance account and a transfer balance credit are not invalidated because these subsequent events mean there is no longer a superannuation income stream in the retirement phase. A debit arises if an income stream ceases to be superannuation income stream in the retirement phase (see paragraphs 3.136 and 3.138 to 3.143).

3.61 Modifications apply to working out the amount of credits that arise in relation to capped defined benefit income streams (see paragraphs 3.214 to 3.246).

Excess transfer balance earnings

3.62 An individual in excess of the transfer balance cap will benefit from earnings on that excess capital while they are in excess of the cap. Consistent with the policy intent, these earnings should be removed from the retirement phase. Recognising the difficulty with attributing actual earnings to specific amounts of capital, this section sets out the process for determining an amount of notional earnings ('excess transfer balance earnings') on excess capital.

3.63 An individual has an excess transfer balance when the balance of their transfer balance account exceeds their personal transfer balance cap on a particular day. *[Schedule 1, item 4, section 294-30 of the ITAA 1997]*

3.64 Excess transfer balance earnings accrue on excess transfer balances. Excess transfer balance earnings accrue daily and are generally credited towards an individual's transfer balance account. This means excess transfer balance earnings compound daily until the breach of the transfer balance cap is rectified or the Commissioner issues a determination. *[Schedule 1, item 4, item 3 in the table in subsection 294-25(1) and subsection 294-235(1) of the ITAA 1997]*

3.65 The rate at which excess transfer balance earnings accrue is based on the general interest charge. *[Schedule 1, item 4, subsection 294-235(2) of the ITAA 1997]*

3.66 The daily rate is worked out as follows:

$$\frac{90 \text{ Day Bank Accepted Bill yield} + 7 \text{ percentage points}}{\text{The number of days in the year}}$$

3.67 The 90-day Bank Accepted Bill yield is the benchmark indicator for short-term interest rates. For example, during the 2015-16 financial year, the general interest charge averaged 9.2 per cent per annum. The indicator is published by the Reserve Bank of Australia.

3.68 A Treasury portfolio minister may vary the daily rate downwards by legislative instrument. *[Schedule 1, item 1, subsections 294-235(2) and (3) of the ITAA 1997]*

Example 3.6: Excess transfer balance earnings

On 1 August 2018, Andrew's SMSF starts a pension for Andrew worth \$2 million. Andrew has a personal transfer balance cap of \$1.6 million. On 1 August 2018, Andrew has an excess transfer balance of \$400,000. Andrew realises his mistake 30 days later and decides to make a partial commutation of the pension to remove the excess.

Over the course of the 30-day period, Andrew's transfer balance account is credited with excess transfer balance earnings of \$3,036 (all examples in this Chapter assume an annual excess transfer balance earnings rate of 9.2 per cent). This brings Andrew's transfer balance account up to \$2,003,036.

Andrew calculates his excess transfer balance at the end of the 30-day period and, on that day, makes a partial commutation in return for a superannuation lump sum of \$403,036. Andrew receives a debit for that amount in his transfer balance account. This brings his transfer balance account back in line with the \$1.6 million transfer balance cap. Andrew cannot transfer any further amounts to the retirement phase.

3.69 Excess transfer balance earnings continue to accrue but are no longer credited to an individual's transfer balance account once the Commissioner has issued a transfer balance determination (see paragraphs 3.144 to 3.152). This means the excess transfer balance earnings that arise during this period do not contribute to an individual's excess transfer balance. This allows the Commissioner's determination to identify a fixed excess transfer balance that must be removed from the retirement phase. However, excess transfer balance earnings will start to be credited to a transfer balance account again if an individual receives another credit in their transfer balance account (for starting a new superannuation income stream). *[Schedule 1, item 1, subsection 294-25(2) of the ITAA 1997]*

3.70 Excess transfer balance tax is payable on accrued amounts of excess transfer balance earnings whether or not those amounts have been credited to, or debited from, an individual's transfer balance account. Excess transfer balance tax is assessed for the excess transfer balance period during which an individual was in breach of their transfer balance cap (see paragraphs 3.203 to 3.213).

3.71 An excess transfer balance is disregarded if it is less than \$100,000, is caused by existing superannuation income streams on 30 June 2017, and the individual rectifies the breach within 6 months (see the discussion of transitional provisions at paragraphs 3.315 to 3.318).

3.72 Capped defined benefit income streams do not give rise to an excess transfer balance and are not subject to excess transfer balance tax. Instead, capped defined benefit income streams are subject to additional income tax rules to achieve a taxation outcome broadly commensurate to that of the transfer balance cap (see paragraphs 3.214 to 3.265).

Credits arising from death benefit income streams

3.73 This section sets out how death benefit superannuation income streams are treated under the transfer balance cap. References in this explanatory memorandum to a death benefit are references to a superannuation death benefit as defined in subsection 995-1(1) of the ITAA 1997. This section also outlines some amendments to the death benefit provisions of the law that are made to facilitate the introduction of the transfer balance cap.

When a death benefit may be paid as a death benefit income stream

3.74 Where an individual has a superannuation interest when they die, superannuation providers (for example, fund trustees) are required to cash the remaining interest from the superannuation system as soon as practicable (see *Superannuation Industry (Supervision) Regulations 1994* (SISR 1994) regulation 6.21 and *Retirement Savings Accounts Regulations 1997* (RSAR 1997) regulation 4.24).

3.75 Generally, the trustee of the superannuation fund will pay the deceased's remaining superannuation interests (accumulation and retirement phase interests) as a death benefit lump sum to a beneficiary of the deceased. This money is cashed out of the superannuation system.

3.76 A superannuation provider is allowed to pay a death benefit as a superannuation income stream (rather than a lump sum) if the beneficiary is a dependant of the deceased member (see subregulation 6.21(2A) of the SISR 1994 and subregulation 4.24(3A) of the RSAR 1997). A dependant is a person who is:

- a spouse of the deceased,
- a child of the deceased (less than 18 years of age, financially dependent or has a disability), or
- a person who was in an interdependency relationship with the deceased.

3.77 The value of a death benefit income stream that is paid to a dependant will be credited to the dependant's transfer balance account. This value may include investment gains that accrued to the deceased's superannuation interest between the time that person died and the death benefit income stream became payable to the beneficiary.

3.78 A death benefit beneficiary will need to manage their affairs to ensure that a death benefit income stream does not result in them exceeding their transfer balance cap. If a death benefit income stream in combination with the individual's own superannuation income stream results in a beneficiary exceeding their transfer balance cap, they will need to decide which superannuation income stream to commute. Importantly, a superannuation death benefit cannot be held in an accumulation interest as this contravenes the regulatory requirement to cash the benefit out of the system as soon as practicable.

Example 3.7: Inclusion of a death benefit income stream in the beneficiary's transfer balance account

On 17 August 2017, Harry commences a \$500,000 superannuation income stream. Harry has a transfer balance of \$500,000.

Harry's wife, Sally, dies on 30 November 2018, leaving superannuation interests of \$288,000. On 15 July 2019, Sally's superannuation fund advises Harry that he is the sole beneficiary of Sally's superannuation interest.

The superannuation fund cashes the death benefit (now worth \$290,000) in the form of a death benefit income stream to Harry from 1 August 2019. This increases Harry's transfer balance account to \$790,000 on that date, which is still below his transfer balance cap. Harry does not need to take any further action.

Example 3.8: Death benefit income stream where beneficiary spouse has not used all their transfer balance cap

As at 1 July 2017, Leonie and her husband Garry are both being paid superannuation income streams from the Wanderers Super Fund. Each has a superannuation interest of \$1 million to support their superannuation income streams. They each have a transfer balance of \$1 million.

On 31 October 2018, Garry passes away leaving \$800,000 in superannuation interests. Garry's superannuation income stream was not reversionary so the trustee of the Wanderers Super Fund takes into consideration all the possible beneficiaries of Garry's superannuation interest.

On 15 January 2019, the trustee of the Wanderers Super Fund contacts Leonie and advises her that, as Garry's only dependant, she is eligible to receive a death benefit income stream. Leonie requests some time to get some financial advice before deciding whether she wants to receive Garry's superannuation interests as a death benefit income stream.

Leonie's financial advisor identifies that, if Leonie was to receive the \$800,000 death benefit income stream in addition to her own \$1 million superannuation income stream, she would exceed her transfer balance cap by \$200,000.

Leonie may either:

- receive from Garry's superannuation interest a \$600,000 death benefit income stream and a \$200,000 death benefit lump sum. The \$200,000 death benefit lump sum would need to be cashed out of the superannuation system; or
- receive from Garry's superannuation interest an \$800,000 death benefit income stream and partially commute her own superannuation income stream by \$200,000. The \$200,000 lump sum Leonie would receive from the commutation could be retained in superannuation in an accumulation interest.

Under either option, Leonie will have a transfer balance account with a balance of \$1.6 million, fully exhausting her transfer balance cap.

Example 3.9: Death benefit income stream where beneficiary has no transfer balance account

Meredith and her husband Matthew are both retired. Matthew has commenced a superannuation income stream with \$1 million and Meredith has no superannuation interests.

Matthew passes away and his superannuation fund pays his \$800,000 superannuation income stream to Meredith.

Meredith is eligible to receive the full \$800,000 as a death benefit income stream. Her transfer balance account starts when she becomes the recipient of the death benefit income stream and her transfer balance account is credited with the \$800,000.

Example 3.10: Death benefit income stream where beneficiary spouse has used all their transfer balance cap

Kurt and his wife Katherine are retired. In July 2017, Katherine commences a superannuation income stream with \$1 million and Kurt commences a superannuation income stream with \$1.6 million. Kurt has exhausted his transfer balance cap.

On 31 October 2018, Katherine passes away, leaving Kurt as the sole beneficiary of her remaining superannuation interests, now worth \$800,000.

At this time, the superannuation interest that supports Kurt's superannuation income stream has a value of \$1.4 million (the value of both individual's superannuation interests have been reduced over time by the drawdown of superannuation income stream benefits). However, as Kurt started the superannuation income stream with the full value of his transfer balance cap he cannot transfer further amount into the retirement phase without reducing his transfer balance first.

Kurt may take Katherine's superannuation interest of \$800,000 as a death benefit lump sum, which would have to be cashed out of the superannuation system.

Alternatively, he could partially commute \$800,000 of his superannuation income stream, retaining it in the accumulation phase, and take a death benefit income stream of \$800,000. Kurt would still have his original superannuation income stream in the retirement phase (now supported by a superannuation interest of \$600,000) and would also have \$800,000 in accumulation. If Kurt chose this option, he would not need to cash any of Katherine's superannuation interest out of the superannuation system as a death benefit lump sum.

Modifications for reversionary superannuation income streams

3.79 Reversionary superannuation income streams are different from other death benefit income streams because they revert to the beneficiary immediately on the death of the member (rather than at the discretion of a superannuation provider). That is, the next superannuation income stream benefit payment (whenever that may be) is payable to the beneficiary. The beneficiary must still be someone who is eligible to receive a death benefit income stream (see paragraph 3.76). The credit that arises in the beneficiary's transfer balance account is the value of the supporting superannuation interest at the time it becomes payable to the beneficiary. This is consistent with the general rules outlined above.

3.80 A modification applies to defer the time the credit arises in the beneficiary's transfer balance account for reversionary superannuation income streams. The deferred time is twelve months after the superannuation income stream benefits first become payable to the beneficiary. This gives the new beneficiary sufficient time to adjust their affairs following the death of the member before any consequences — for example, a breach of their transfer balance cap — arise. *[Schedule 1, item 4, paragraph (b) of column 3 in item 2 of the table in subsection 294-25(1) of the ITAA 1997]*

Example 3.11: Credits for reversionary superannuation income streams

John has a reversionary pension worth \$1 million at the time of his death on 1 August 2017. The pension reverts to John's wife, Heather, and payments from the pension continue to be made to their joint bank account. Heather already has her own pension and a transfer balance account with a balance of \$800,000.

In September 2017, Heather is advised that, in August, she became the recipient of John's pension. Heather is advised that, unless she acts, the combined value of the two pensions will cause her to breach her transfer balance cap. Heather has a number of options to respond to the situation. She can fully commute either pension or she can undertake a partial commutation of her pension for the amount of the potential excess, \$200,000.

On 1 December 2017, Heather makes a partial commutation of her pension and receives a superannuation lump sum of \$200,000. On that date, a debit arises in her transfer balance for that amount bringing her transfer balance down to \$600,000.

The \$1 million credit in respect of the reversionary pension arises in Heather's transfer balance account on 1 August 2018. Heather has not breached her transfer balance cap. The value of the credit that arises in Heather's transfer balance account will be the value of the superannuation interest when it started to be paid to her on John's death (\$1 million) regardless of the value of the reversionary pension on 1 August 2018.

3.81 The deferral that applies to the time a credit arises also applies for individuals receiving a reversionary superannuation income stream on 30 June 2017. Where a reversionary superannuation income stream is payable to a beneficiary on 30 June 2017, the credit for this arises on the later of 1 July 2017 or 12 months after the superannuation income stream benefits became payable to that beneficiary. *[Schedule 1, item 4, paragraph (b) of column 3 in item 1 of the table in subsection 294-25(1) of the ITAA 1997]*

3.82 The variation in timing gives effect to the policy objective that beneficiaries of reversionary superannuation income streams should have 12 months after becoming entitled to the superannuation income stream to arrange their financial affairs. Where the reversionary superannuation income stream benefits became payable before 1 July 2016, the beneficiary will have had at least 12 months to adjust their affairs when these amendments begin to apply on 1 July 2017.

Death benefit income stream must also be in the retirement phase

3.83 The Government will amend the SISR 1994 and RSAR 1997 provisions that allow for payment of death benefit income streams to require that the superannuation income stream also be in the retirement phase. This aligns the regulatory provisions with the introduction of the transfer balance cap and ensures that any death benefit income stream paid to an individual must be within their transfer balance cap.

3.84 The Government will release the amendments to the SISR 1994 and RSAR 1997 for public consultation.

3.85 For a detailed discussion on when a death benefit income stream ceases to be in the retirement phase, see paragraphs 3.198 to 3.202.

Roll-over of death benefits

3.86 To facilitate the payment and roll-over of death benefit income streams for eligible beneficiaries, the taxation definition of a 'roll-over superannuation benefit' is amended to allow a superannuation lump sum death benefit to be rolled over. [*Schedule 1, item 5, paragraph 306-10(a) of the ITAA 1997*]

3.87 This will ensure that a death benefit that is rolled over will receive taxation treatment consistent with that of member benefits that are rolled over. In particular, it is not treated as a superannuation contribution and it is considered non-assessable non-exempt income (see section 306-5 of the ITAA 1997).

3.88 This amendment only applies where the beneficiary of the deceased member's superannuation interest is a dependant eligible to receive a death benefit income stream under the regulatory rules.

3.89 This amendment provides more flexibility for dependants receiving death benefits, allowing them to rollover lump sums to their choice of fund.

3.90 Where the beneficiary is not eligible to receive a death benefit income stream, the death benefit is excluded from being a roll-over superannuation benefit. The existing regulatory rules provide that these beneficiaries can only receive a death benefit lump sum cashed out of the superannuation system.

3.91 The Government will amend the ITAR 1997 to ensure that death benefits paid to beneficiaries not eligible to receive a death benefit income stream under the regulatory rules continue to not be included within the

meaning of roll-over superannuation benefit. The Government will release the amendments to the ITAR 1997 for public consultation.

3.92 These changes do not alter the requirement that a deceased individual's superannuation interest cannot remain in the accumulation phase. That is, if a superannuation income stream provider is not allowed to pay the amount as a death benefit income stream, the amount must be cashed out of the superannuation system as a death benefit lump sum as soon as practicable.

3.93 Further, because the deceased member's superannuation interest remains subject to compulsory cashing under the regulatory rules it cannot be mixed with the beneficiary's own superannuation interest.

Example 3.12: Roll-over of death benefits

Inger and Fredrick are married and are members of an APRA regulated superannuation fund. Fredrick has not yet started a superannuation income stream in his own right and has a small accumulation phase interest of \$50,000. Fredrick decided not to start a superannuation income stream with the \$50,000 because he does not want to make regular drawdowns on his superannuation interest.

On Inger's death, the superannuation fund trustee decides that Fredrick should receive a death benefit lump sum from Inger's superannuation interest worth \$900,000. The superannuation fund explains that Frederick may either have the death benefit lump sum cashed out of the superannuation system or rolled-over to a new superannuation fund to be paid as a death benefit income stream.

Fredrick decides that he would rather take a death benefit income stream and a change to a superannuation fund that better suits his needs. Fredrick decides to roll-over his accumulation interest and the death benefit to a new fund.

When these amounts are received by the new fund they immediately commence a death benefit income stream with the \$900,000 and place the \$50,000 into an accumulation interest per Fredrick's instructions. The new fund recognises that, as the \$900,000 is a death benefit, it cannot be mixed with Fredrick's own superannuation interest and cannot be held in an accumulation interest.

3.94 Section 390-10 of Schedule 1 to the TAA 1953 broadly requires that, where an individual's superannuation interest is rolled over, the superannuation provider that originally held the superannuation interest is required to provide the receiving superannuation provider with a roll-over superannuation benefit statement contain particulars as to the superannuation interest and the individual. The roll-over superannuation benefit statement is an approved form.

3.95 The approved form requirements for roll-over superannuation benefit statements will be updated, as soon practicable, to ensure that death benefits that are rolled over are notified to the receiving fund and continue to receive death benefit treatment under both the regulatory and income tax provisions.

3.96 As a consequence of including a death benefit in the meaning of roll-over superannuation benefit, subsections 307-5(3), (3A) and (3B) of the ITAA 1997 are repealed [*Schedule 1, item 6, subsections 307-5(3), (3A) and (3B) of the ITAA 1997*]

3.97 These subsections previously had the effect of turning a superannuation death benefit into a superannuation member benefit for taxation purposes where a death benefit income stream was commuted after the time prescribed in paragraph 307-5(3)(c) (generally 6 months). Where the death benefit income stream was paid to a spouse, this had the effect of including the commuted amount in the meaning of a roll-over superannuation benefit if the commuted amount was paid to another superannuation fund.

3.98 As death benefits are now included in the meaning of roll-over superannuation benefits, these subsections are no longer necessary and their repeal ensures that a superannuation death benefit will always receive death benefit taxation treatment.

Transfer balance account debits

3.99 This section sets out when an individual's transfer balance account will receive a debit. An individual's transfer balance account is debited when they commute capital from the retirement phase of superannuation. This facilitates roll-overs and ensures that an individual's transfer balance reflects the net amount of capital an individual has transferred to the retirement phase of superannuation. An individual's transfer balance account also receives a debit for certain other events that reduce the value of the individual's retirement phase interests. [*Schedule 1, item 4, sections 294-75 and 294-80 of the ITAA 1997*]

3.100 Superannuation income stream benefit payments that reduce the value of a superannuation interest that supports a superannuation income stream (pension drawdowns) are not debited from the individual's transfer balance. This reflects the expectation that, once an individual has utilised their cap, the value of the individual's retirement phase assets will eventually decline as the individual uses this income to support themselves in their retirement. This ensures the benefit of the retirement phase earnings exemption is limited appropriately to support individuals during their retirement.

3.101 Just as investment gains are not credited towards an individual's transfer balance account, investment losses do not give rise to debits.

3.102 During consultation on the amendments, stakeholders raised concerns about the potential impact of a macroeconomic shock that reduces the value of individuals' retirement phase interests. Stakeholders were concerned that, under the amendments, individuals that have already used their transfer balance cap would be prevented from replenishing their retirement phase interests for their investment losses.

3.103 The Government will review the impact of the transfer balance cap in the event of a macroeconomic shock that substantially affects retirement incomes. The review would be expected to seek advice from the Council of Financial Regulators to understand the magnitude and financial market implications of the macroeconomic shock and actuarial advice from the Australian Government Actuary to inform what response, if any may be required. This approach is consistent with the Government's response to the Review of Retirement Incomes, announced in the 2016-17 Budget, that advice from the Australian Government Actuary will be sought in the event of a significant economic shock in relation to whether changes should be made to minimum drawdown requirements.

3.104 This section describes the general rules for debiting the transfer balance account. Modifications apply to debits in relation to capped defined benefit income streams (see paragraphs 3.237 to 3.243).

Table 3.2: Summary of debit events

<i>Item</i>	<i>Debit</i>	<i>Relevant paragraphs</i>
1	Commutations	3.105 to 3.111
2	Structured settlement contributions	3.112 to 3.116
3	Losses due to fraud and	3.118 to 3.119
	Void transactions under the <i>Bankruptcy Act 1966</i>	3.120 to 3.122
4	Family law payment splits	3.123 to 3.134
5	Superannuation income streams that cease to be in the retirement phase	3.136
6	Superannuation income streams that fail to comply with the standards	3.138 to 3.143
7	Write-off of excess transfer balance where excess cannot be reduced	3.137
	Capped defined benefit income streams generally	3.232 to 3.234 and 3.237 to 3.243

Debits for commutations

3.105 A superannuation income stream may be reduced by commuting it into a superannuation lump sum. A superannuation lump sum (other than a death benefit lump sum) arising from a commuted superannuation income stream may be retained in the superannuation system. Retained superannuation lump sums are held in the accumulation phase where earnings are generally taxed at 15 per cent. Alternatively, a superannuation lump sum may be paid outside the superannuation system to the individual personally.

3.106 An individual that commutes a superannuation income stream is entitled to a debit in their transfer balance account equal to the value of the superannuation lump sum. The debit is applied regardless of whether the commuted amount is retained within the superannuation system or is paid out. [*Schedule 1, item 4, item 1 in the table in subsection 294-80(1) of the ITAA 1997*]

3.107 Because the debit reflects the value by which the superannuation interest that supports the superannuation income stream has been converted to a superannuation lump sum, the amount of a debit applied for a full commutation may exceed the balance of the individual's transfer balance account (or even their transfer balance cap). The debit could be higher (due to growth) or lower (due to drawdowns or losses) than the commencement value of the superannuation income stream. Where the value of the superannuation interest that supports the superannuation income stream has increased, recognising this increase in the commutation debit effectively allows an individual to start a new superannuation income stream up to the value of the fully commuted superannuation income stream without exceeding their transfer balance cap. This ensures an individual who rolls-over their superannuation income stream has the same transfer balance position as if they had not performed the roll-over.

Example 3.13: Commutation debits

On 1 July 2017, Taylor purchases a pension worth \$1.6 million. On 1 June 2018, the superannuation interest that supports the pension is valued at \$1.7 million because of investment earnings. Taylor fully commutes the pension on this day and receives a \$1.7 million superannuation lump sum. Taylor's transfer balance account is debited by \$1.7 million to reach a balance of — \$100,000. Taylor is entitled to start a new pension worth up to \$1.7 million without breaching his transfer balance cap.

3.108 An individual may also make a partial commutation of a superannuation income stream. A partial commutation is recognised in the same way. The individual receives a debit for the value of the superannuation lump sum they receive.

Partial commutations and minimum draw-down requirements

3.109 To facilitate the ability for individuals to make partial commutations and receive a debit for the full value of that commutation against their transfer balance account, consequential amendments will be made to the SISR 1994 and RSAR 1997. These amendments will ensure that partial commutations cannot be counted towards the minimum annual payment requirement for superannuation income streams.

3.110 This ensures consistency with the objective of superannuation, which is to provide income to support retirement, and ensures that the benefit of the retirement phase earnings exemption is limited appropriately. Without this change, individuals who had reached their transfer balance cap would be able to cycle their minimum superannuation income stream benefits back into the retirement phase without breaching the cap. This would effectively allow minimum drawdown payments to

be made from accumulation phase interests, which is inconsistent with the objective of the minimum drawdown requirements.

3.111 The Government will release the amendments to the SISR 1994 and RSAR 1997 for public consultation.

Structured settlement debits

3.112 A debit also arises with respect to a structured settlement an individual receives and contributes towards their superannuation interests. A structured settlement is a payment for a personal injury the individual has suffered and is defined in section 292-95 of the ITAA 1997 in the context of the excess non-concessional contributions regime. *[Schedule 1, item 4, item 2 in the table in subsection 294-80(1) of the ITAA 1997]*

3.113 The personal injury payment must be in the form of a structured settlement, an order for a personal injury payment or lump sum workers compensation payment. Two legally qualified medical practitioners must certify that the individual is unlikely to ever be able to be gainfully employed in a capacity for which they are reasonably qualified as a result of the injury.

3.114 Subject to the modification in paragraph 3.115, the contribution must be made to a superannuation fund within 90 days (or a longer period allowed by the Commissioner, see paragraphs 5.59 to 5.60) of the payment being received or the structured settlement or order coming into effect, whichever is later. The individual must notify the superannuation provider that the contribution is being made under this exemption before, or when, making the contribution. *[Schedule 3, item 3, paragraph 292-95(1)(b) of the ITAA 1997]*

3.115 A modification applies to structured settlements an individual received before the start of the excess non-concessional contributions regime on 10 May 2006. The modification removes the requirement that the individual make the contribution within 90 days and the requirement that the individual notify their superannuation provider. This reflects that it was not necessary to comply with these requirements before the start of the excess non-concessional contributions regime. *[Schedule 1, item 4, subsection 294-80(2) of the ITAA 1997]*

3.116 The debit arises at the time the individual contributes the structured settlement amount or the time the individual first has a transfer balance account, whichever is later. The debit that arises is the value of the contribution. It is not necessary to link the contribution to any particular amount of capital in the retirement phase.

Example 3.14: Structured settlements

Alice, 42, is seriously injured in a car accident. She undertakes legal proceedings against the driver and is awarded a court ordered structured settlement of \$4 million due to the severity of her injuries.

Alice contributes the \$4 million into her superannuation fund and immediately commences a superannuation income stream with the amount, notifying the fund and the Commissioner of this contribution. A credit and a debit of \$4 million arise in her transfer balance account on the same day. Alice's transfer balance account is now nil. Alice is entitled to start another superannuation income stream worth up to \$1.6 million without exceeding her transfer balance cap.

Alice never had an excess transfer balance because the transfer balance is only measured at the end of a day. Similarly, Alice's transfer balance cap is subject to full indexation in the future as she has never had a transfer balance greater than nil at the end of a day.

Replenishment debits

3.117 There are a limited number of events that may result in an individual losing some or all of the value in their superannuation interests. These include family law payment splits, fraud and void transactions under the *Bankruptcy Act 1966*. In these specific circumstances, an affected individual is able to notify the Commissioner in the approved form of the event and receive a debit in their transfer balance account. There is no time limit within which the Commissioner needs to be notified. *[Schedule 1, item 4, items 3 and 4 in the table in subsection 294-80(1), and sections 294-85 and 294-90 of the ITAA 1997]*

Fraud

3.118 Where the superannuation interest that supports an individual's superannuation income stream is reduced because of a loss suffered by the superannuation income stream provider as a result of fraud or dishonesty, and the offender is convicted, the individual is able to notify the Commissioner and receive a debit in their transfer balance account which reflects the amount by which the superannuation interest was reduced. *[Schedule 1, item 4, item 3 in the table in subsection 294-80(1) and subsections 294-85(2) to (4) of the ITAA 1997]*

3.119 Though uncommon, sometimes superannuation is the target of fraudulent or dishonest activities that can result in losses suffered by the superannuation provider. If this loss is brought home to the individual member in respect to their retirement phase interests, and another person is convicted of fraud or dishonesty, the member is entitled to a debit equal to their loss.

Example 3.15: Debits for fraud

James is a member of Cyclist Superannuation Fund. James has \$2 million in superannuation and, on 1 July 2018, commenced a superannuation income stream with \$1.6 million, leaving the remaining \$400,000 in accumulation. James' transfer balance account on 1 July 2018 is \$1.6 million.

During the 2018-19 financial year, Cyclist Superannuation Fund invested its pension portfolio in a managed fund called Investments Galore based on financial advice given to the fund by Simon.

In the 2019-20 financial year, it becomes apparent that Investments Galore was a front company set up by Simon to siphon investment income offshore. The money Cyclist Superannuation Fund invested in Investments Galore is lost and the superannuation interest that supports James' superannuation income stream is reduced by \$400,000.

Cyclist Superannuation Fund is never able to recover the money it lost. Nevertheless, in 2020-21, Simon is convicted of fraud in relation to Investments Galore.

James notifies the Commissioner in the approved form that the superannuation interest that supports his superannuation income stream was reduced by \$400,000 because of the fraudulent loss that resulted in Simon's conviction. \$400,000 is debited against James' transfer balance account to bring his balance to \$1.2 million. James can use the \$400,000 he had remaining in accumulation to replenish his retirement phase interests.

Bankruptcy and void transactions

3.120 Where the superannuation interest that supports an individual's superannuation income stream is reduced because of payments required to comply with the *Bankruptcy Act 1966*, the individual is able to notify the Commissioner and receive a debit in their transfer balance account which reflects the amount by which the superannuation interest was reduced. *[Schedule 1, item 4, item 3 in the table in subsection 294-80(1) and subsections 294-85(5) to (7) of the ITAA 1997]*

3.121 Generally, superannuation interests cannot form part of a bankrupt estate. However, there are very specific circumstances where some superannuation contributions can form part of the bankrupt estate and are made available to the trustee in bankruptcy.

3.122 An example of where a superannuation contribution can form part of a bankrupt estate is where out of character contributions were made to superannuation with the intent to defeat creditors or to stop the amount otherwise becoming part of the bankrupt estate (see for example section 128B of the *Bankruptcy Act 1966*). In these circumstances, the

contributions may be required to be transferred from superannuation to the bankrupt estate.

Example 3.16: Debits for void transactions

In the 2018-19 financial year, Tim runs his own business and, because he is getting close to retirement, contributes to his superannuation fund the maximum amount of contributions allowed, being \$25,000 of concessional contributions and \$300,000 of non-concessional contributions (utilising the three-year bring forward). Previously, Tim only made yearly concessional contributions of \$5,000 and no non-concessional contributions.

On 1 July 2019, Tim retires and commences a superannuation income stream using the total value of his superannuation interests, \$1 million. His transfer balance is now \$1 million.

Shortly after this, Tim files for bankruptcy and, notwithstanding Tim's claim that the additional funds were for his retirement, it is determined that the sum of \$320,000 contributed in the 2018-19 financial year was an out of character contribution made to defeat the creditors of his business (see paragraphs 128B(1)(c) and (3)(b) of the *Bankruptcy Act 1966*). The trustee of Tim's superannuation fund pays \$320,000 to the bankrupt estate as required under the *Bankruptcy Act 1966*.

Tim notifies the Commissioner in the approved form that the superannuation interest that supports his superannuation income stream has been reduced by \$320,000 because of the payment to comply with the *Bankruptcy Act 1966*. Tim's transfer balance account is then debited \$320,000 reducing his transfer balance account to \$680,000.

Family Law payment splits

3.123 There are circumstances where, following a divorce or other relationship breakdown, superannuation interests may be split as part of the division of property. Under Part VIII B of the *Family Law Act 1975*, this may occur as a result of a court order or by the agreement of the parties. Most commonly, one party (the member spouse) will be required to provide a proportion of their superannuation interests to the other party (the non-member spouse).

3.124 Family law payment splits that occur prior to the individual commencing a superannuation income stream will not affect the individual's transfer balance account as the division occurred prior to the interest entering the retirement phase.

3.125 There are two ways in which a family law payment may affect the superannuation income stream of an individual. Depending on the way the split is given effect to, the appropriate outcome is provided for under either the general debit rules or specific replenishment debit rules.

Application of general rules

3.126 Generally, the member spouse will partially commute their superannuation income stream, receive a superannuation lump sum and pay this amount to the non-member spouse. In these circumstances, a debit will arise in the member-spouse's transfer balance because of the commutation. A replenishment debit does not need to arise in these circumstances. [*Schedule 1, item 4, item 1 in the table in subsection 294-80(1) of the ITAA 1997*]

3.127 If the non-member spouse uses the proceeds of the member spouse's superannuation lump sum to start a new superannuation income stream, the new income stream will give rise to a credit in their transfer balance account. Again, this arises under the general rules outlined above.

Example 3.17: Application of general rules to a payment split

On 1 October 2017, Nancy commenced a superannuation income stream with the value of \$1 million. This means Nancy's transfer balance account is credited \$1 million.

On 30 September 2018, as part of finalising her divorce, Nancy needs to transfer \$500,000 of her superannuation to her ex-husband Michael. Nancy partially commutes her superannuation income stream by the \$500,000 and transfers it to Michael's superannuation fund.

Nancy's transfer balance account is debited by \$500,000 meaning her transfer balance is now \$500,000.

Michael uses \$200,000 of the amount he receives to start his own superannuation income stream. He receives a \$200,000 credit in his transfer balance account.

Application of replenishment debit rules

3.128 In some uncommon cases, the family law payment split may have the effect of splitting the superannuation income stream benefits attached to the member spouse's superannuation income stream. That is, the member spouse will retain complete ownership of the superannuation interest but a portion of each superannuation income stream benefit (or payment) they receive will be directed to the non-member spouse.

3.129 The member spouse is entitled to a debit in their transfer balance account equal to the value of the superannuation interest that the non-member spouse is effectively entitled to. *[Schedule 1, item 4, item 4 in the table in subsection 294-80(1), subsection 294-90(2) and paragraph 294-90(3)(a) of the ITAA 1997]*

3.130 The non-member spouse receives a credit in their transfer balance account equal to the full value of member spouse's superannuation interests they are partially entitled to. To address the overvaluation of the non-member spouse's credit, they also receive a debit to reflect the member spouse's retained entitlement. *[Schedule 1, item 4, paragraph 294-90(3)(b) of the ITAA 1997]*

3.131 Either spouse must notify the Commissioner in order for their debits to arise. It is not necessary for each spouse to make a separate notification. The debit arises at the time the payment split becomes operative under the *Family Law Act 1975* or when the individual starts to have a transfer balance account, whichever is later. *[Schedule 1, item 4, subsections 294-90(1) and (4) of the ITAA 1997]*

Example 3.18: Application of the payment split debit rules

Bradley is a member of Guild Workers Superannuation Fund. On his retirement on 2 February 2015, Bradley starts to receive a pension valued at \$1.6 million. This is the only superannuation interest that Bradley has.

On 1 July 2017 Bradley's transfer balance account is \$1.6 million. Bradley's wife, Angie, has not retired and does not have a transfer balance account.

In 2020, Bradley and Angie get divorced and Bradley is required by the family law court orders to split 50 per cent of his superannuation with Angie. However, the rules of Bradley's pension are that it is not capable of being commuted until 10 years after it first commenced. Therefore, it is determined that the family law payment split should apply to the monthly pension payments with Bradley receiving approximately \$4,000 and Angie receiving approximately \$4,000 per month, commencing 1 October 2020.

Bradley notifies the Commissioner that 50 per cent of the pension payments he receives from his lifetime pension are being paid to Angie as a result of the family law payment split.

Bradley's transfer balance account is debited by \$800,000 being the proportion of all the pension payments to be paid to Angie. This means Bradley's transfer balance is now \$800,000.

As Angie has started to receive a superannuation income stream, she begins to have a transfer balance account on 1 October 2020. Her

account is immediately credited with \$1.6 million. This reflects the overall value of the superannuation interest supporting the superannuation income stream to which Angie is now partially entitled.

To correct the inappropriate credit Angie has received, a replenishment debit is also applied to Angie's transfer balance account. The debit is \$800,000, Bradley's remaining portion of the pension. Angie's transfer balance is now \$800,000.

In both cases, the debit of \$800,000 for Bradley and Angie are applied to their transfer balance accounts with effect from 1 October 2020. Both have a transfer balance account at \$800,000. This reflects their effective interest in the pension.

Consequences for future debits

3.132 Generally, family law payment splits that apply to a portion of each superannuation income stream benefit are done this way because the superannuation income stream of the member spouse cannot be commuted.

3.133 Where these circumstances change and the superannuation income stream of the member spouse is later commuted, both the member spouse and non-member spouse will receive a superannuation lump sum because a superannuation income stream of which they were the retirement phase recipients is commuted. Consequently, both the member spouse and the non-member spouse will receive a debit for the value of the superannuation lump sum they receive in their transfer balance account (in relation to a superannuation income stream that is not a capped defined benefit income stream). *[Schedule 1, item 4, item 1 in the table in subsection 294-80(1) of the ITAA 1997]*

3.134 Where an individual receives a debit for the commutation of a capped defined benefit income stream or a different type of debit arises — because of fraud, bankruptcy or because the income stream ceases to be in the retirement phase — the amendments operate to modify the debit to take into consideration the debit that has already applied in respect of the family law payment split. *[Schedule 1, item 4, section 294-95 of the ITAA 1997]*

Example 3.19: Future consequences of a payment split

Further to Example 3.18, under the rules of Bradley's pension it is allowed to be commuted 10 years after its commencement.

On 2 February 2025, Bradley decides to commute his pension in full and 50 per cent of the superannuation lump sum (now worth \$1.2 million) resulting from the commutation is paid to Angie under the terms of the family law payment split.

A debit of \$600,000 arises in Bradley's transfer balance account because of the superannuation lump sum he receives from the commutation. A debit of \$600,000 also arises in Angie's transfer balance account for the superannuation lump sum she receives from the commutation. As a result both Bradley and Angie have transfer balances of \$200,000 (\$800,000 — \$600,000).

Both may recommence a pension worth up to \$1.4 million.

Debits following a determination

3.135 This section sets out two additional types of debits that may arise during the process of the Commissioner acting to reduce an individual's excess transfer balance.

3.136 Firstly, where a superannuation income stream provider does not comply with a commutation authority, the provider may lose the earnings tax exemption associated with the relevant superannuation income stream (see paragraphs 3.191 to 3.197). A debit equal to the value of the superannuation income stream arises to reflect that the income stream is no longer in the retirement phase. *[Schedule 1, item 4, item 5 in the table in subsections 294-80(1) of the ITAA 1997]*

3.137 Secondly, there may be circumstances where an individual has insufficient superannuation interests available to rectify an excess transfer balance. In these circumstances, a debit arises to write-off the excess transfer balance (see paragraphs 3.189 and 3.190). *[Schedule 1, item 4, item 7 in the table in subsections 294-80(1) of the ITAA 1997]*

Debits for when a superannuation income stream fails to meet the pension or annuity standards

3.138 In certain circumstances a superannuation income stream may cease to be a superannuation income stream because it has failed to comply with the rules or standards under which it is provided.

3.139 The most common of these circumstances is where the superannuation income stream provider fails to pay the minimum amount of superannuation income stream benefits required under the regulatory rules.

3.140 Where this occurs, the superannuation income stream provider is taken not to have been paying a superannuation income stream during the income year. Therefore, for that income year, the income stream ceases to be a superannuation income stream that is in the retirement phase and ceases to be eligible for the earnings tax exemption.

3.141 Because the income stream is no longer in the retirement phase, no debit will arise in the individual's transfer balance account if they choose to fully commute the income stream.

3.142 For the superannuation interest to once again be eligible for the earnings tax exemption it must be commuted in full and a new superannuation income stream that complies with the standards started. To enable this to happen, a debit arises in the individual's transfer balance account. The debit arises at the end of the superannuation income stream provider's income year in which the income stream ceased to be a superannuation income stream. The debit arises at this time because in most cases it is only once the income year has ceased that it can be determined whether the superannuation income stream has met the standards. *[Schedule 1, item 4, item 6 in the table in subsection 294-80(1) of the ITAA 1997]*

3.143 The value of the debit is for the value of the superannuation interest that supports the income stream at the end of the superannuation income stream provider's income year.

Excess transfer balance determinations

3.144 This section sets out the consequences and processes that apply if an individual exceeds the transfer balance cap and receives a determination from the Commissioner

3.145 The Commissioner may make an excess transfer balance determination (a determination) where an individual has an excess transfer balance in their transfer balance account. *[Schedule 1, item 15, section 136-10 in Schedule 1 to the Taxation Administration Act 1953 (TAA 1953)]*

3.146 The purpose of the determination is to advise the individual of their excess transfer balance and to crystallise the amount of the individual's excess. The individual's excess transfer balance is crystallised because further excess transfer balance earnings that accrue after a determination is issued will not be credited towards the individual's transfer balance account. This is the first step in the process of removing capital the individual has in the retirement phase to bring their transfer balance account in line with their transfer balance cap. *[Schedule 1, items 13 to 15, Part 3-20 (heading), Division 113 (heading), and sections 136-1 and 136-5 in Schedule 1 to the TAA 1953]*

3.147 Where an individual has already taken steps to rectify their breach and has removed their excess transfer balance, it is not necessary for the Commissioner to issue a determination. Though the individual may not receive an excess transfer balance determination, they are still liable for excess transfer balance tax (see paragraphs 3.203 to 3.213).

3.148 If the Commissioner issues a determination, it must state the amount of the individual's excess transfer balance as at the date the determination is issued. The amount that must be removed is called the 'crystallised reduction amount' and is the sum of transfer balance credits relating to superannuation income streams in the retirement phase and excess transfer balance earnings that remain in excess of the individual's transfer balance cap at the date of the determination. *[Schedule 1, item 15, subsection 136-10(3) in Schedule 1 to the TAA 1953]*

3.149 The crystallised reduction amount is the value by which the individual's superannuation income streams must be commuted to bring their transfer balance account back in line with their transfer balance cap.

3.150 The Commissioner may amend or revoke a determination at any time to take into account additional information that comes to his or her attention. *[Schedule 1, item 15, subsection 136-10(4) in Schedule 1 to the TAA 1953]*

3.151 The determination will include a notice that outlines the default commutation authority that the Commissioner intends to issue if the individual does not make an election to commute a different superannuation income stream. This is intended to help an individual understand what steps the Commissioner will undertake if they do not make an election or choose to reduce a superannuation income stream themselves. *[Schedule 1, item 15, subsections 136-10(6) and (7) in Schedule 1 to the TAA 1953]*

3.152 This default commutation notice sets out the superannuation income stream provider and superannuation income stream from which it is intended the crystallised reduction amount will be commuted. Where there is more than one superannuation income stream provider or more than one superannuation income stream, the notice will state the amount by which each superannuation income stream is intended to be commuted, the sum of which cannot be more than the crystallised reduction amount.

Example 3.20: Excess transfer balance determinations and default commutation notices

On 1 July 2018, Bec commences a superannuation income stream of \$1 million from the superannuation fund her employer contributed to (Master Superannuation Fund). On 1 October 2018, Bec also commences a \$1 million superannuation income stream in her SMSF, Bec's Super Fund.

On 1 July 2018, Bec's transfer balance account is \$1 million. On 1 October 2018, Bec's transfer balance is credited with a further \$1 million bringing her transfer balance account to \$2 million. This means that Bec has an excess transfer balance of \$400,000.

On 15 October 2018, the Commissioner issues an excess transfer balance determination to Bec setting out a crystallised reduction amount of \$401,414 (excess of \$400,000 plus 14 days of excess transfer balance earnings). Included with the determination is a default commutation authority which lets Bec know that, if she does not make an election within 60 days of the determination date, the Commissioner will issue a commutation authority to Master Superannuation Fund requiring the trustee to commute her \$1 million superannuation income stream by \$401,414.

Elections

3.153 Where an individual has more than one superannuation income stream, they may elect the income stream or streams that are commuted or partially commuted. The total amount of the commutations specified in the individual's election must equal the crystallised reduction amount. *[Schedule 1, item 15, section 136-20 in Schedule 1 to the TAA 1953]*

3.154 The individual must make the election in the approved form to the Commissioner within 60 days from the date the determination was issued (or such further time as the Commissioner allows). *[Schedule 1, item 15, subsection 136-20(4) in Schedule 1 to the TAA 1953]*

3.155 The individual's election is irrevocable and the Commissioner will issue commutation authorities in accordance with the election. *[Schedule 1, item 15, subsection 136-20(5) in Schedule 1 to the TAA 1953]*

3.156 If the superannuation income stream the individual wishes to have commuted is the same superannuation income stream included in the default commutation notice issued by the Commissioner, it is not necessary for the individual to make an election.

Notifying the Commissioner of transfer balance debits

3.157 After receiving a determination, an individual may advise the Commissioner, in the approved form, of a debit that has arisen in their transfer balance account. A debit may arise where a superannuation income stream of the individual has been fully or partially commuted after the determination was issued. Advising the Commissioner of these amounts allows the Commissioner to determine whether the individual still has an excess transfer balance and whether there is a requirement to issue a commutation authority. *[Schedule 1, item 15, section 136-25 in Schedule 1 to the TAA 1953]*

3.158 The individual must notify the Commissioner in the approved form that the debit has arisen before the individual makes an election and before the end of the 60-day period in which they are allowed to make the election.

Example 3.21: Transfer balance debits notified after a determination

Further to Example 3.20, Bec became aware that she had exceeded her transfer balance cap on 12 October 2018 and put in place instructions with the accountant that manages Bec's Super Fund to partially commute her superannuation income stream by \$500,000.

On 20 October 2018, the superannuation income stream provided by Bec's Super Fund is partially commuted, with \$500,000 being placed in an accumulation interest within the fund.

As the debit from the partial commutation arises after the Commissioner issued the determination, Bec notifies the Commissioner in the approved form that a debit of \$500,000 arose in her transfer balance account on 20 October 2018.

Bec's transfer balance on 15 October 2018 was \$2,001,414 (\$2 million plus 14 days of excess transfer balance earnings on an excess of \$400,000). After the applying the debit of \$500,000, Bec's transfer balance is \$1,501,414 on 20 October 2018.

As Bec no longer has an excess transfer balance in her transfer balance account the Commissioner is not required to issue a commutation authority. However, Bec is still liable for excess transfer balance tax (see paragraphs 3.203 to 3.213)

Objections

3.159 Where an individual is dissatisfied with an excess transfer balance determination that has been issued to them, they may object against the determination under the standard objection regime for taxation matters, Part IVC of the TAA 1953. An individual may wish to lodge an objection if the Commissioner did not know about, or did not take into account, certain debits that arose before the Commissioner issued the determination or otherwise made an error in making the determination. *[Schedule 1, item 15, subsection 136-15(1) in Schedule 1 to the TAA 1953]*

3.160 The individual has 60 days from the date the determination was served on them to lodge an objection against the determination (see paragraph 14ZW(1)(c) of the TAA 1953).

3.161 The default commutation notice included with the determination does not form part of the taxation decision to which the individual can object. *[Schedule 1, item 15, subsection 136-15(2) in Schedule 1 to the TAA 1953]*

3.162 This is because the default commutation notice is only intended to inform the individual of the superannuation income stream(s) in respect of which the Commissioner intends to issue a commutation authority if the individual does not make an election. The individual can choose a

different superannuation income stream to be commuted by making an election as discussed in paragraphs 3.153 to 3.156.

3.163 An excess transfer balance determination is included in section 14ZVA of the TAA 1953 to limit objection rights against later excess transfer balance tax assessments to grounds that neither were — nor could have been — grounds for objection against the determination. This prevents the Commissioner from having to apply resources to addressing the same objection grounds twice. *[Schedule 1, items 11 and 12, paragraphs 14ZVA(b) and (c) of the TAA 1953]*

3.164 The *Administrative Decisions (Judicial Review) Act 1977* is amended to ensure that that Act does not apply to excess transfer balance determinations and other decisions the Commissioner makes in relation to the transfer balance cap. Individuals are instead entitled to object to these decisions under Part IVC of the TAA 1953 as this provides a more appropriate review and remedy process for individual affected by transfer balance decisions. *[Schedule 1, item 1, paragraph (gab) in Schedule 1 to the Administrative Decisions (Judicial Review) Act 1977]*

Commutation authorities

Issuing of commutation authorities

3.165 The second step in managing breaches of the transfer balance cap is for the Commissioner to issue a commutation authority to the superannuation income stream provider to ensure that an individual's transfer balance is brought back to their transfer balance cap. *[Schedule 1, item 15, sections 136-50 and 136-55 in Schedule 1 to the TAA 1953]*

3.166 The Commissioner is required to issue a commutation authority if a determination has been issued to an individual and the individual has not notified the Commissioner that they have subsequently received debits equal to the crystallised reduction amount stated on the determination (the commutable amount). *[Schedule 1, item 15, subsection 136-55(1) in Schedule 1 to the TAA 1953]*

3.167 If the individual has made a valid election for a different superannuation income stream to be commuted then the commutation authority issued by the Commissioner must be in accordance with the individual's election. *[Schedule 1, item 15, subsection 136-55(2) in Schedule 1 to the TAA 1953].*

3.168 If the individual's election would not result in the commutable amount being commuted because it applied to a lesser amount, the Commissioner must issue additional commutation authorities in addition to those specified in the election. *[Schedule 1, item 15, subsection 136-55(3) in Schedule 1 to the TAA 1953]*

3.169 Where the individual has not made an election to commute a different superannuation income stream, the Commissioner will issue commutation authorities consistent with the default commutation notice. *[Schedule 1, item 15, paragraph 136-55(5) in Schedule 1 to the TAA 1953]*

3.170 The Commissioner is also required to issue a commutation authority to the superannuation income stream provider specified in the default commutation notice if the amount the individual elects to have commuted falls short of the commutable amount. *[Schedule 1, item 14, subsection 136-55(4) in Schedule 1 to the TAA 1953]*

3.171 Each commutation authority issued by the Commissioner must contain:

- the superannuation income stream that the superannuation income stream provider is required to fully or partially commute;
- the amount by which the superannuation income stream is to be commuted (the reduction amount);
- the date issued; and
- any other relevant information.

[Schedule 1, item 15, subsection 136-55(5) in Schedule 1 to the TAA 1953]

3.172 The total of all reduction amounts stated in all commutation authorities must not exceed the commutable amount. *[Schedule 1, item 15, subsection 136-55(6) in Schedule 1 to the TAA 1953]*

3.173 The Commissioner may vary or revoke a commutation authority at any time before the Commissioner receives a response from the superannuation income stream provider. *[Schedule 1, item 15, section 136-60]*

3.174 The Commissioner may also issue further commutation authorities where the initial authority was insufficient to achieve the required reduction or the superannuation income stream provider has not complied with the original commutation authority. *[Schedule 1, item 15, section 136-65 in Schedule 1 to the TAA 1953]*

Complying with commutation authorities

3.175 A superannuation income stream provider is required to comply with commutation authorities issued to it by commuting the identified income stream by the reduction amount stated in the commutation authority. *[Schedule 1, item 15, section 136-80 in Schedule 1 to the TAA 1953]*

3.176 Where the maximum available release amount of the identified superannuation income stream is less than the reduction amount stated in the commutation authority, the superannuation income stream provider is required to commute the superannuation income stream in full.

3.177 The 'maximum available release amount' is defined in section 131-45 in Schedule 1 to the TAA 1953 and means the total amount of all superannuation lump sums that could be paid from the superannuation interest at that time.

3.178 The superannuation income stream provider is required to reduce the superannuation income stream within 60 days of when the commutation authority is issued.

3.179 A superannuation income stream provider should make reasonable efforts to consult with the individual on whether they wish the amount by which the superannuation income stream is fully or partially commuted to remain within superannuation or, where the individual meets a relevant condition of release, whether they wish it to be paid to them as a superannuation lump sum.

3.180 Where the amount remains in superannuation, the amount will no longer be in the retirement phase and the superannuation income stream provider may need to create an accumulation interest for the individual, if one does not already exist. In determining how to deal with an amount that remains in superannuation, the superannuation income stream provider should consult with the individual member and where this is not possible continue to act in the interests of the member. This may require the superannuation income stream provider to set up an accumulation interest without the consent of the member. Superannuation providers may choose to nominate a default accumulation interest in the Product Disclosure Statement that is issued to members on commencement of an income stream.

3.181 Where a superannuation income stream provider transfers an amount into an accumulation interest to comply with a commutation authority, the superannuation income stream provider will be subject to the requirement to disclose significant events in section 1017B of the *Corporations Act 2001*. This requirement will assist an individual who has not consented to a transfer to locate the amount.

3.182 Where the amount is paid out of superannuation, the amount will be a lump sum superannuation benefit. For the majority of individuals 60 years of age or over the superannuation lump sum will not be taxable. In certain circumstances, the superannuation lump sum will be included in the individual's assessable income and taxed at the individual's marginal

income tax rate with a tax offset applying where relevant (see Division 301 of the ITAA 1997).

3.183 To facilitate the creation of new accumulation phase interests where required, the Government will amend the *Corporations Regulations 2001* to allow a superannuation income stream provider to transfer an interest without an eligible application to the superannuation income stream provider.

3.184 The Government will release the amendments to the *Corporations Regulations 2001* for public consultation.

Example 3.22: Complying with commutation authorities

Milla has superannuation interests with two superannuation funds, Major Superannuation Fund (\$1 million) and Investments Super (\$2 million). Before going on an overseas trip, Milla sent instructions to her superannuation funds to commence superannuation income streams as follow:

- \$1 million in Major Superannuation Fund, and
- \$600,000 in Investments Super.

However, due to a miscommunication, both superannuation funds start superannuation income streams of \$1 million on 20 March 2018, meaning Milla exceeded her transfer balance cap by \$400,000 on this date.

On 30 March 2018, the Commissioner issues a determination to Milla stating that she has a crystallised reduction amount of \$401,009 (\$400,000 excess plus 10 days of excess transfer balance earnings). The determination includes a default commutation authority notice that provides that unless Milla elects otherwise, the Commissioner will issue a commutation authority to Major Superannuation Fund in the amount of \$401,009.

Milla has already left for overseas and therefore is not aware of the determination.

On 29 May 2018, the Commissioner issues a commutation authority to Major Superannuation Fund. Major Superannuation Fund tries to contact Milla to find out what she wants. However, as Milla is still overseas, she is still uncontactable.

Major Superannuation Fund considers that, in the absence of Milla's direction, it is in her best interest that the amount remains in superannuation. Major Superannuation Fund partially commutes Milla's superannuation income stream by \$401,009 and transfers this amount to an accumulation interest for Milla. Major Superannuation

Fund then issues Milla with a new product disclosure statement for her new account.

3.185 There are two circumstances where a superannuation income stream provider is not required to comply with a commutation authority. The first circumstance arises where the superannuation income stream is a capped defined benefit income stream (see paragraphs 3.224 to 3.321). The second circumstance is where the individual who has been issued the determination has died. *[Schedule 1, item 15, subsection 136-80(2) and (3) in Schedule 1 to the TAA 1953]*

3.186 Where a superannuation income stream provider is issued a commutation authority, they are required to notify the Commissioner and the individual in the approved form of:

- the amount by which the superannuation income stream has been commuted; or
- that the superannuation income stream provider has not complied with the commutation authority because the superannuation income stream is a capped defined benefit income stream.

[Schedule 1, item 15, sections 136-85 and 136-90 in Schedule 1 to the TAA 1953]

3.187 The superannuation income stream provider must also notify the Commissioner if they have not complied with the commutation authority because the individual has died. *[Schedule 1, item 15, subsection 136-85(2) in Schedule 1 to the TAA 1953]*

3.188 The notices must be given within 60 days after the commutation authority was issued. *[Schedule 1, Part 1, item 15, subsections 136-85(3) and 136-90(2) in Schedule 1 to the TAA 1953]*

Non-commutable excess transfer balance amounts

3.189 In certain circumstances, the Commissioner is required to notify an individual that they have a non-commutable excess transfer balance. This situation may arise where the individual has an excess transfer balance and has no remaining account-based superannuation income streams to be commuted. *[Schedule 1, item 15, section 136-70 in Schedule 1 to the TAA 1953]*

3.190 Where the Commissioner issues a notice in this situation, a debit for the remaining excess balance identified in the notice is applied to the individual's transfer balance account. This is to recognise that, although the individual still has an excess transfer balance, they no longer have any superannuation income stream or their only remaining superannuation

interests are non-commutable. This effectively writes off the remainder of the excess so that excess transfer balance earnings do not continue to accrue. [Schedule 1, item 4, item 7 in the table in subsection 294-80(1) of the ITAA 1997]

Example 3.23: Non-commutable excess transfer balance

Marney has superannuation interest with two superannuation funds: \$500,000 in her SMSF, MM Super Fund, and a defined benefit interest with Government Employees Superannuation Fund.

Marney, who had turned 63 during the year, decides to retire on 1 December 2017 and commences a superannuation income stream in MM Super Fund of \$500,000. Her transfer balance therefore is \$500,000 on this date.

The rules of Government Employees Superannuation Fund however, provide that a pension is not payable until Marney turns 65.

On 30 May 2019, when Marney turns 65, she starts to receive a capped defined benefit income stream from Government Employees Superannuation Fund.

The value of Marney's pension from Government Employees Superannuation Fund is \$1.6 million (see paragraphs 3.224 to 3.231 for modified valuation rules for capped defined benefit income streams).

On 30 May 2019, Marney's transfer balance is \$2.1 million. Marney's transfer balance cap is \$1.6 million (as the general cap has not yet indexed) and Marney has an excess transfer balance of \$500,000.

On 9 June 2019, the Commissioner issues a determination to Marney with a crystallised reduction amount of \$501,262 and a default commutation notice identifying MM Super Fund. The crystallised reduction amount includes \$1,262 of excess transfer balance earnings that were credited to Marney's transfer balance account between 30 May and 9 June 2019.

On 13 August 2019, the Commissioner issues a commutation authority to MM Super Fund for \$501,262 as Marney has not elected a different superannuation income stream to commute.

The balance of Marney's superannuation income stream in MM Super Fund is \$380,000 due to superannuation income stream payments and some negative returns over the last two years. On 15 August 2019, MM Super Fund commutes Marney's superannuation income stream in full moving the \$380,000 back into an accumulation interest. MM Super fund notifies the Commissioner and Marney of this in the approved form.

On 15 August 2019, a debit for the full commutation of \$380,000 arises in Marney's transfer balance account, reducing her transfer balance to \$1,721,262 and her excess transfer balance to \$121,262.

Although Marney still has an excess transfer balance after the debit is applied, the Commissioner is aware that Marney's only other superannuation income stream is a capped defined benefit income stream.

On 20 August 2019, the Commissioner issues a non-commutable excess transfer balance notice to Marney for the amount of \$121,262 meaning a debit for that amount arises on that date and Marney's transfer balance again equals her cap of \$1.6 million. Excess transfer balance earnings cease to accrue.

Consequences of not complying with a commutation authority

3.191 Where a commutation authority has been issued in respect of a superannuation income stream and the superannuation income stream provider is required to comply with the authority but has failed to do so, the income stream will not be in the retirement phase. *[Schedule 11, item 1, subsection 307-80(4) of the ITAA 1997]*

3.192 The consequence of the superannuation income stream not being in the retirement phase is that the income stream will no longer qualify for the earnings tax exemption in Subdivision 295-F of the ITAA 1997.

3.193 The superannuation income stream will cease to be in the retirement phase from the start of the financial year in which the superannuation income stream provider failed to comply with the commutation authority and all later financial years. This means that an earnings tax exemption cannot be claimed in respect of the superannuation income stream for that financial year (the year in which the commutation authority was not complied with) or any later financial year.

3.194 A debit arises in the individual's transfer balance account for the value of the superannuation interest that supports the superannuation income stream that has ceased to be in the retirement phase because the superannuation income stream provider has failed to comply with the commutation authority. The debit arises at the end of the period in which the superannuation income stream provider was required to comply with the commutation authority. Generally, this will mean that the individual no longer has an excess transfer balance at this time. *[Schedule 1, item 4, item 5 of the table in subsection 294-80(1) of the ITAA 1997]*

3.195 If the individual wishes to again have a superannuation income stream in the retirement phase — and have it qualify for the earnings tax exemption — they will need to commute the superannuation income stream in full and start a new superannuation income stream. The individual will not get a debit for this commutation as the superannuation income stream will not be in the retirement phase at this time and a debit has already arisen with respect to the income stream.

Example 3.24: Consequences of non-compliance

On 15 January 2019, Craig commences a \$3 million superannuation income stream in his SMSF, Cormac Super Fund. Craig's transfer balance account is \$3 million and he has a \$1.4 million excess transfer balance on this date.

On 20 January, the Commissioner issues a determination to Craig stating his crystallised reduction amount as \$1,401,765 (\$1.4 million excess plus 5 days of excess transfer balance earnings). Craig does not have any other superannuation income streams and therefore Craig does not make an election.

On 13 April 2019, the Commissioner issues a commutation authority to Cormac Super Fund requiring the trustee to partially commute Craig's \$3 million superannuation income stream by \$1,401,765.

Craig does not think he should have to commute his superannuation income stream and therefore, as trustee of Cormac Super Fund, chooses not to comply with the commutation authority.

On 14 May 2019, as Cormac Super Fund has failed to comply with the commutation authority, Craig's \$3 million superannuation income stream ceases to be in the retirement phase with effect from 1 July 2017. Consequently, Cormac Super Fund is not eligible to claim any earnings tax exemption in respect of this superannuation income stream for the 2017-18 income year or a later income year.

When Craig's superannuation income stream ceased to be in the retirement phase, a debit arises in Craig's transfer balance cap for the value of the superannuation interest that supported the superannuation income stream. In this case, the debit is \$3 million.

Therefore, Craig's transfer balance account on 14 May 2019 is \$1,765 (\$3,001,765 less \$3,000,000). Craig is entitled to commute his superannuation income stream and start a new superannuation income stream in the retirement phase with up to \$1,598,235.

3.196 A superannuation income stream provider does not fail to comply with a commutation authority if:

- it commuted the superannuation income stream by the maximum available release amount; or
- it was not required to comply with the commutation authority because the identified superannuation income stream was a capped defined benefit income stream or because the relevant individual had died.

3.197 The requirement to comply with a commutation authority is also a regulatory provision for SMSFs. [*Schedule 1, item 7, subparagraph 38A(ab)(iii) of the Superannuation Industry (Supervision) Act 1993*]

Death benefit income streams that are not in the retirement phase

3.198 As discussed in paragraphs 3.83 to 3.85, the regulatory rules that allow for the payment of a death benefit income stream to eligible beneficiaries are being changed to also require that the death benefit income stream be in the retirement phase.

3.199 As death benefits cannot remain in the accumulation phase, any amount that cannot be used to pay a death benefit income stream in the retirement phase must be cashed out as a death benefit lump sum. This ensures that the superannuation income stream provider does not contravene the compulsory cashing regulatory rules. This effectively limits the value of a death benefit income stream to the amount available under the beneficiary's transfer balance cap.

3.200 A death benefit income stream would cease to be in the retirement phase if the superannuation income stream provider is required to comply with a commutation authority but has failed to do so.

3.201 Where this happens, the individual will get a debit in their transfer balance account because the death benefit income stream ceases to be in the retirement phase (see paragraph 3.136). Using this debit, an individual could recommence a death benefit income stream in the retirement phase up to the value of the individual's unused transfer balance cap. The amount above their transfer balance cap would need to be cashed out as a death benefit lump sum.

Example 3.25: Superannuation death benefit income stream that ceases to be in the retirement phase

Sasha and Ivan have a SMSF, Siberia Superannuation Fund, in which they have both commenced a superannuation income stream of \$1.2 million each.

On 15 April 2018, Ivan passes away. Ivan's superannuation income stream reverts to Sasha on his death. Sasha chooses not to commute any amounts from the reversionary superannuation income stream.

Twelve months later, on 15 April 2019, a credit for the reversionary superannuation income stream arises in Sasha's transfer balance account. Her transfer balance on that day is \$2.4 million.

An excess transfer balance determination, followed by a commutation authority, is issued to commute \$800,000 of the reversionary superannuation income stream. However, for various reasons, no action is taken.

This means that the reversionary superannuation income stream ceases to be in the retirement phase and, therefore, no longer met the regulatory rules that allow it to be paid out as a death benefit income stream on that date.

The Siberia Superannuation Fund must pay this death benefit to Sasha as a death benefit lump sum.

Alternatively, to the extent that Sasha has space in her transfer balance account (after the debit that arose when the reversionary superannuation income stream ceased to be in the retirement phase — see paragraph 3.133), the Siberia Superannuation Fund may commence a new superannuation death benefit income stream but the value must not cause Sasha to exceed her transfer balance cap again.

3.202 A similar situation may arise if the death benefit income stream ceases to be a superannuation income stream because it has failed to comply with the rules or standards under which it is provided (see paragraphs 3.138 to 3.143).

Excess transfer balance tax

3.203 The consequences of exceeding the transfer balance cap for the first time are intended to be restorative, rather than punitive. In addition to removing the excess transfer balance from the retirement phase, an individual is subject to a tax on the excess transfer balance earnings accrued while the individual was in excess of the cap. The excess transfer balance earnings are calculated for the period from the date the individual's transfer balance first exceeds their transfer balance cap to the

date of the rectification (when their transfer balance is no longer in excess). For first breaches the tax rate is intended to broadly replicate the tax outcome if the excess capital had been in the accumulation phase. Therefore, the tax rate is set at 15 per cent for breaches in 2017-18. From 2018-19, the tax rate is also 15 per cent for a first breach, and increases to 30 per cent for second and subsequent breaches.

3.204 Excess transfer balance tax is applied to an individual's accrued amount of excess transfer balance earnings over a period the individual had an excess transfer balance. Excess transfer balance earnings are taxable regardless of whether the Commissioner issued a determination or commutation authority to rectify the excess, or the individual rectified the excess on their own initiative. *[Schedule 1, item 4, section 294-230 of the ITAA 1997; and sections 1, and 3 to 5 of the Superannuation (Excess Transfer Balance Tax) Imposition Bill 2016]*

3.205 The standard rate of excess transfer balance tax is 15 per cent. Although based on a notional earnings rate rather than actual earnings, this tax is intended to neutralise the advantage the individual receives from the superannuation provider's earnings tax exemption. This reflects that, but for the individual's breach, the excess amount on which excess transfer balance earnings are calculated would have been in the accumulation phase and the earnings taxed at 15 per cent. *[Schedule 1, item 4, section 294-225; and subsection 5(1) of the Superannuation (Excess Transfer Balance Tax) Imposition Bill 2016]*

3.206 A tax rate of 30 per cent applies to additional excess transfer balance tax assessments the individual receives. An individual who exceeds their transfer balance cap after receiving an earlier assessment most likely believes their actual earnings will exceed the excess transfer balance earnings rate. Imposing a higher rate of taxation is designed to discourage such behaviour. That is, the higher rate includes a deterrent effect in addition to a restorative effect for subsequent breaches of the transfer balance cap. *[Section 5 of the Superannuation (Excess Transfer Balance Tax) Imposition Bill 2016]*

3.207 However, throughout the 2017-18 financial year, all excess transfer balance tax is assessed at a rate of 15 per cent. In addition, an assessment that applies to an excess transfer balance period beginning before 1 July 2018 does not count as an earlier assessment for the purposes of increasing subsequent assessments to a 30 per cent rate. *[Subsection 5(2) of the Superannuation (Excess Transfer Balance Tax) Imposition Bill 2016]*

3.208 Excess transfer balance earnings generally compound daily while the individual has an excess transfer balance. However, once the Commissioner issues a determination to the individual, notional earnings are no longer credited to the individual's transfer balance account. To

account for this, an adjustment is made to the tax calculation to include amounts of excess transfer balance earnings that would have arisen but for the determination. [*Schedule 1, item 4, paragraph 294-230(3)(b) of the ITAA 1997*]

Example 3.26: Excess transfer balance tax

Further to Example 3.6, on 1 July 2019, Andrew starts a second pension worth \$1 million. Andrew had no available cap space, meaning he has breached his cap for a second time and has an excess transfer balance of \$1 million.

60 days later, the Commissioner issues a determination to Andrew identifying a crystallised reduction amount of \$1,015,236 (\$1 million excess plus 60 days of notional earnings).

65 days after issuing the determination, the Commissioner issues a commutation authority to Andrew’s superannuation fund.

10 days after the Commissioner issues the commutation authority, Andrew’s superannuation fund complies with the authority and makes a partial commutation of Andrew’s pension, paying Andrew a lump sum of \$1,015,236.

Notional earnings accrue to Andrew during the 60-day period before the determination and the subsequent 75-day period before the fund partially commuted the pension.

The Commissioner assesses Andrew for excess transfer balance tax as follows (amounts do not add up due to rounding):

<i>Excess</i>	<i>Period</i>	<i>Excess transfer balance earnings</i>
\$400,000	30 days (see Example 3.6)	\$3,036
	Tax (at 15 per cent):	\$455
\$1,000,000	60 days	\$15,236
\$1,015,236	75 days	\$19,372
	Subtotal:	\$34,609
	Tax (at 30 per cent):	\$10,383

3.209 The Commissioner will issue an excess transfer balance tax assessment imposing the tax liability after the breach has been rectified. An excess transfer balance tax assessment is due and payable 21 days

after the Commissioner issues the assessment. *[Schedule 1, item 4, section 294-240 of the ITAA 1997]*

3.210 If the Commissioner issues an amended excess transfer balance tax assessment, the additional amount of assessed excess transfer balance tax is due and payable 21 days after the Commissioner issues the amended assessment. *[Schedule 1, item 4, section 294-245 of the ITAA 1997]*

3.211 Where the amount of excess transfer balance tax is not paid by the required time, the general interest charge will start accruing on the unpaid amount. *[Schedule 1, item 4, section 294-250 of the ITAA 1997]*

3.212 Where an individual is dissatisfied with an excess transfer balance assessment, they may object under Part IVC of the TAA 1953 (see paragraph 3.164 and section 155-90 in Schedule 1 to the TAA 1953).

3.213 Excess transfer balance tax is imposed on individuals that exceed their transfer balance cap in order to discourage both inadvertent and wilful non-compliance with the amendments. Furthermore, schemes designed to exceed an individual's transfer balance cap for the purpose of producing a tax benefit are subject to the general anti-avoidance rules in Part IVA of the *Income Tax Assessment Act 1936*. Part IVA may also apply to other schemes that seek to circumvent the transfer balance cap, for example washing assets through the retirement phase.

Capped defined benefit income stream modifications

3.214 Modifications apply in relation to certain defined benefit income streams. Defined benefit superannuation income streams differ from more common account-based superannuation interests that reflect member contributions. Many defined benefit superannuation income streams are subject to commutation restrictions, which make the application of the general rules infeasible.

3.215 The modifications include modified valuation rules for certain defined benefit income streams. A further modification prevents an individual from having an excess transfer balance to the extent the excess is attributable to certain defined benefit income streams. *[Schedule 1, item 4, sections 294-120 and 294-125 of the ITAA 1997]*

3.216 Superannuation income stream benefits to which these modifications apply are subject to additional income tax rules (see paragraphs 3.247 to 3.265).

3.217 The purpose of these modifications is to provide broadly commensurate taxation treatment to certain non-commutable

superannuation income streams while recognising that it is inappropriate to require individuals to undertake commutations.

3.218 The scope of the rules is limited to certain defined benefit income streams that commenced prior to 1 July 2017 and lifetime pensions that commence at any time.

Capped defined benefit income streams

3.219 These modifications apply to certain non-commutable superannuation income streams referred to as capped defined benefit income streams. The concept of a capped defined benefit income stream does not depend on the concept of a defined benefit interest. Rather, the definition is based on a list of superannuation income stream products that are subject to commutation restrictions under the SISR 1994 or the RSAR 1997. Additional superannuation income streams may be prescribed under the ITAR 1997. *[Schedule 1, item 4, section 294-130 of the ITAA 1997]*

3.220 There are two categories of superannuation income streams the definition applies to:

- lifetime pensions that are covered regardless of when the pension started; and
- certain other superannuation income streams that are only covered if the income stream existed on 30 June 2017.

Lifetime pensions

3.221 Only lifetime pensions are subject to the modifications both in relation to existing superannuation income streams and new income streams that start on or after 1 July 2017. Lifetime pensions are often provided to Commonwealth, State and Territory public office holders, and military and civilian employees. Most of these schemes are closed to new members. However, existing members are entitled to receive pensions in the future. The extension of the modifications to these pensions reflects that, while the pension itself may not have started before the application of these amendments, the pension is part of a long-standing arrangement to which there is an existing legal entitlement. *[Schedule 1, item 4, paragraph 294-130(1)(a) and item 1 in the table in subsection 294-130(1) of the ITAA 1997]*

Capped defined benefit income streams existing on 30 June 2017

3.222 In addition to lifetime pensions, a number of other superannuation income streams are eligible for the capped defined benefit income stream modifications because they existed prior to the application

of these amendments. This application is limited to superannuation income streams that are subject to commutation restrictions under the rules of the superannuation income stream and the SISR 1994 (or RSAR 1997), which apply to the following:

- lifetime pensions and annuities;
- life expectancy pensions and annuities;
- market-linked pensions and annuities.

[Schedule 1, item 4, paragraph 294-130(1)(b) and items 2 to 7 in the table in subsection 294-130(1) of the ITAA 1997]

3.223 Life expectancy and market-linked products are collectively referred to as term pensions and term annuities, as appropriate.

Valuation of capped defined benefit income streams

3.224 Modifications apply to the valuation of capped defined benefit income streams. The rules allow an individual to determine the special value of a capped defined benefit income stream. This special value amount only applies for the purposes of an individual's transfer balance account. However, the transfer balance account is used to determine an individual's eligibility in relation to other areas of the law, for example, to make catch-up concessional contributions (see Chapter 8). *[Schedule 1, item 4, subsection 294-135(1) of the ITAA 1997]*

3.225 Lifetime pensions and annuities that are capped defined benefit income streams are valued by multiplying the annual entitlement by a factor of 16. The purpose of this rule is to provide a simple valuation rule based on general actuarial considerations. This means that a defined benefit pension that pays \$100,000 per annum would fully exhaust the \$1.6 million transfer balance cap in the 2017-18 financial year. *[Schedule 1, item 4, subsection 294-135(2) of the ITAA 1997]*

3.226 The use of a single factor of 16 is consistent with the general transfer balance cap. The general transfer balance cap is set at \$1.6 million regardless of the age or gender of a retiree, the earnings they are able to achieve on their assets or the rate at which these are drawn down. Using variable age-based factors would produce anomalous outcomes. For example, lower factors for older individuals would result in the individual having more cap space than their younger counterparts despite having lower life expectancy. It would also be inconsistent to use a single threshold above which income streams are subject to additional tax, while using different valuation factors.

3.227 Term pensions and term annuities are valued according to the superannuation income stream's annual entitlement multiplied by the number of years (rounded up to the nearest whole number) remaining on the term of the product. [*Schedule 1, item 4, subsection 294-135(3) of the ITAA 1997*]

Annual entitlements

3.228 An individual's annual entitlement to a superannuation income stream is worked out by reference to the first payment the individual is entitled to receive after the valuation is required. The first payment is annualised based on the number of days in the period to which the payment refers. Subsequent increases to the income stream benefit relative to the first payment due to indexation are not relevant to the calculation of the annual entitlement. [*Schedule 1, item 4, subsection 294-135(2) of the ITAA 1997*]

3.229 This can be expressed in the following formula:

$$\frac{\text{first payment}}{\text{days in period}} \times 365 = \text{annual entitlement}$$

Example 3.27: Annual entitlements and valuation

On 30 June 2017, Sarah is the recipient of a lifetime pension. Under the terms of the pension, Sarah is entitled to receive \$2,000 every fortnight. Sarah's first payment is \$2,000 and is referable to a 14-day period. Her annual entitlement is worked out as follows:

$$\frac{\$2,000}{14} \times 365 = \$52,142.86$$

Applying the multiplication factor of 16, Sarah's pension has a special value of \$834,285.71. A credit arises in Sarah's transfer balance account for this amount.

Example 3.28: Valuation of term products

Grant purchases a market-linked pension in January 2017. The term of the pension is five years. At 30 June 2017, the pension has an annual entitlement of \$100,000. The remaining term is rounded up to five years. The pension has a special value of \$500,000.

Credit and debit amounts arising from capped defined benefit income streams

3.230 The modified valuation rules are used to determine the amount of credits and debits that arise in relation to capped defined benefit income streams.

3.231 When a capped defined benefit income stream causes a credit to arise in an individual's transfer balance account, the amount of the credit is the superannuation income stream's special value (see Example 3.27).

Debit value

3.232 The debit amount that arises in relation to a capped defined benefit income stream is worked out by reference to the superannuation income stream's debit value.

3.233 The debit value of a lifetime pension or annuity is the residual of its special value, taking into account previous associated debit amounts (other than debits for payment splits). This ensures that the total debits an individual receives in relation to a lifetime pension or annuity they fully commute will equal the amount of credits associated with the superannuation income stream. [*Schedule 1, item 4, subsection 294-145(5) of the ITAA 1997*]

Example 3.29: Debit value of lifetime pensions and annuities

Mark starts a lifetime pension that has a special value of \$1 million. The debit value of the pension at this time is \$1 million.

Later, a debit of \$300,000 arises in relation to the pension. From this time, the debit value of the pension is \$700,000.

3.234 The debit value of a term product is the superannuation income stream's special value at the relevant time. This valuation will incorporate the ordinary decline in value of a term product, regardless of whether associated debits have previously arisen. [*Schedule 1, item 4, subsection 294-145(6) of the ITAA 1997*]

Example 3.30: Debit value of a term product

Further to Example 3.28, Grant's pension has an initial debit value of \$500,000.

On 30 June 2018, Grant's pension has an annual entitlement of \$90,000. The remaining term of the pension is four years. The pension has a debit value of \$360,000.

Table 3.3: Summary of special valuation rules for capped defined benefit income streams

<i>Product</i>	<i>Product definition</i>	<i>Special value</i>	<i>Debit value</i>
Lifetime pensions	SISR 1994 subregulation 1.06(2)	Annual entitlement multiplied by 16	Starting special value less previous debits
Lifetime annuities	SISR 1994 subregulation 1.05(2)		
Life expectancy pensions	SISR 1994 subregulation 1.06(7)	Annual entitlement multiplied by remaining term	Special value at the relevant time
Life expectancy annuities	SISR 1994 subregulation 1.05(9)		
Market-linked pensions	SISR 1994 subregulation 1.06(8); and RSAR 1997 subregulation 1.07(3A)		
Market-linked annuities	SISR 1994 subregulation 1.05(10)		

Additional capped defined benefit income streams under regulations

3.235 The ITAR 1997 may prescribe additional superannuation income streams that are subject to the additional capped defined benefit income stream rules. If the regulations prescribe additional superannuation income streams, they will also prescribe modified valuation rules and debit value rules in relation to the new income streams. *[Schedule 1, item 4, subsections 294-130(2), 294-135(4) and 294-130(7) of the ITAA 1997]*

3.236 Regulations may prescribe certain superannuation income streams as capped defined benefit income streams where it would be inappropriate to require individuals to undertake commutations, consistent with the intent of the defined benefit income stream treatment in paragraph 3.217. This may include, for example, where the fund rules, or the contract, do not permit commutation, or where the commutation value is unreasonably low when compared to the actual value of the superannuation income stream to the member.

Transfer balance debits

3.237 The transfer balance debit that arises for a full commutation of a superannuation income stream equals the superannuation income stream's debit value at that time. *[Schedule 1, item 4, paragraph 294-145(1)(a) of the ITAA 1997]*

Example 3.31: Transfer balance debit for full commutation

Further to Example 3.29, Mark later makes a full commutation of his lifetime pension. A debit of \$700,000 arises in Mark's transfer balance account.

Further to Example 3.30, on 30 June 2018, Grant fully commutes his pension. A debit of \$360,000 arises in Grant's transfer balance account.

3.238 The transfer balance debit that arises for a partial commutation (or similar event) is a proportion of the superannuation income stream's debit value. The proportion is worked out by subtracting from 1 the special value of the capped defined benefit income stream immediately after the commutation divided by the special value of the income stream immediately before that time. [*Schedule 1, item 4, paragraph 294-145(1)(b) of the ITAA 1997*]

3.239 This transfer balance debit can be expressed in the following formula:

$$\text{debit value} \times \left(1 - \frac{\text{special value after event}}{\text{special value before event}}\right) = \text{debit amount}$$

Example 3.32: Debit amount for partial commutation

In August 2017, Kyle starts a lifetime pension with a special value of \$1.6 million. Kyle's annual entitlement is \$100,000. At this time, the debit value of the pension is also \$1.6 million.

On 1 July 2018, Kyle's lifetime pension is indexed and he starts to receive \$105,000 per annum. The special value of the pension at this time is \$1.68 million. The indexation does not affect Kyle's transfer balance account.

In September 2018, Kyle makes a partial commutation of 25 per cent of his pension. Following this commutation, Kyle's annual entitlement is \$78,750. The special value of the lifetime pension at this time is \$1.26 million.

Kyle receives a debit in his transfer balance account for the following amount:

$$\$1.6 \text{ million} \times \left(1 - \frac{\$1.26 \text{ million}}{\$1.68 \text{ million}}\right) = \$400,000$$

The debit value of the pension is reduced by \$400,000.

In January 2021, Kyle fully commutes the pension. A debit of \$1.2 million arises in his transfer balance account at this time. The

total amount of debits Kyle has received (\$1.6 million) equal the credit that was applied when the pension commenced.

3.240 Transfer balance debits for bankruptcy and fraud that arise in respect of capped defined benefit income streams are worked out in the same way as debits for partial commutations. It would be unlikely for a debit of this kind to arise in relation to a capped defined benefit income stream because of the guaranteed nature of the member's entitlement. *[Schedule 1, item 4, subsection 294-145(2) of the ITAA 1997]*

3.241 The transfer balance debit that arises in relation to a capped defined benefit income stream that is subject to a family law payment split (see paragraphs 3.128 to 3.134) is worked out by applying the superannuation income stream's debit value. *[Schedule 1, item 4, subsection 294-145(3) of the ITAA 1997]*

3.242 Transfer balance debits that arise for payment splits that apply to a capped defined benefit income stream do not reduce the debit value of the income stream. These debits do not reflect a decline in value of the superannuation interest and the consequences of a payment split for a future debit are provided for under the payment split debit provisions. *[Schedule 1, item 4, paragraphs 294-95(a) and 294-145(5)(b) of the ITAA 1997]*

Example 3.33: Payment split of capped defined benefit income stream

Terri starts to receive a lifetime pension with a special value of \$1.6 million on 1 July 2018.

In 2020 Terri and her husband Beau get divorced and Terri is required by the family law court order to provide 50 per cent of her superannuation to Beau. However, as Terri's lifetime pension is non-commutable, the 50 per cent family law payment split applies to her monthly pension payments.

Terri notifies the Commissioner that 50 per cent of the pension payments she receives are to be paid to Beau as a result of the family law payment split.

A debit is applied to Terri's transfer balance account for the proportion of pension payments that became payable to Beau, so her transfer balance account is \$800,000.

As Beau has commenced to be in receipt of a superannuation income stream, his transfer balance account is credited with the special value of \$1.6 million and then debited for the proportion of the lifetime pension that remains with Terri meaning his transfer balance account is \$800,000.

The debit value of the lifetime pension for each individual remains \$1.6 million.

In 2022, the rules of the superannuation fund that provides Terri's lifetime pension change such that the pension can now be commuted. Terri decides to commute her lifetime pension in full with 50 per cent of the lump sum that arises from the commutation being paid to Beau.

The debit that arises in Terri's transfer balance account is 50 per cent of the debit value, \$800,000. Terri's transfer balance account is now nil and she can commence income streams up to her transfer balance cap.

Fifty per cent of the debit value also arises as a debit in Beau's transfer balance cap — he also can now commence new superannuation income streams up to the value of his transfer balance cap.

3.243 The debit that arises because a capped defined benefit income stream ceases to be in the retirement phase — or for an arrangement that fails to be a purported superannuation income stream because of a failure to comply with the regulatory standards — is equal to the debit value of the income stream. *[Schedule 1, item 4, subsection 294-145(4) of the ITAA 1997]*

Modification of excess transfer balance

3.244 If an individual has any capped defined benefit income streams, a modification applies when working out whether the individual has an excess transfer balance.

3.245 An individual will not have an excess transfer balance account to the extent their excess would otherwise be attributable to capped defined benefit income streams. This ensures that an individual cannot breach their transfer balance cap if they only have capped defined benefit income streams. *[Schedule 1, item 4, section 294-140 of the ITAA 1997]*

3.246 The extent to which an excess is attributable to capped defined benefit income streams is worked out by reference to an individual's capped defined benefit balance. This balance is a sub-account of the individual's transfer balance account and includes all debits and credits that relate to capped defined benefit income streams. That is, the capped defined benefit balance reflects the net amount of capital an individual has transferred to the retirement phase in respect of capped defined benefit income streams. *[Schedule 1, item 4, subsection 294-140(3) of the ITAA 1997]*

Example 3.34: No excess transfer balance

On 1 August 2017, Jane starts to receive a lifetime pension with a special value of \$3 million. \$3 million is credited to Jane's transfer balance account and Jane's capped defined benefit balance.

Although Jane's transfer balance exceeds her \$1.6 million transfer balance, Jane does not have an excess transfer balance because the excess is entirely attributable to her capped defined benefit income stream. Excess transfer balance earnings do not accrue to Jane. Jane is not required to reduce her retirement phase interests. However, Jane is subject to additional income tax rules in relation to her defined benefit income (see paragraphs 3.247 to 3.265). These rules provide a broadly commensurate taxation treatment of her lifetime pension as if she had an account-based superannuation income stream of the same value.

Example 3.35: Reduced excess transfer balance

Further to Example 3.34, on 1 January 2018, Jane purchases a superannuation income stream for \$200,000. The superannuation income stream is not a capped defined benefit income stream.

\$200,000 is credited to Jane's transfer balance account, which increases to \$3.2 million. Jane now has an excess transfer balance of \$200,000 being the amount by which her transfer balance account exceeds her capped defined benefit balance.

Jane will be forced to commute the \$200,000 superannuation income stream and will be subject to excess transfer balance tax. If the new superannuation income stream is insufficient to fully remove the crystallised reduction amount (\$200,000 plus notional earnings), any remaining excess will be written-off (see paragraphs 3.189 and 3.190).

Additional income tax rules for excess defined benefit income

3.247 Excess capped defined benefit income streams do not cause an individual to breach their transfer balance cap. Broadly commensurate taxation treatment is achieved by subjecting these arrangements to additional income tax rules. An individual is subject to additional income tax consequences in respect of capped defined benefit income streams to the extent that that income exceeds a separate defined benefit income cap. *[Schedule 1, item 32, section 303-1 of the ITAA 1997]*

3.248 The purpose of the additional income tax rules is to ensure that different schemes are subject to broadly commensurate tax changes under the package. A lower contribution cap, combined with the transfer balance cap, means that some accumulation members will be subject to higher taxation. Higher taxation of defined benefit income over \$100,000 per annum ensures that these schemes are subject to broadly commensurate tax outcomes. The net present value of the additional lifetime tax paid by high balance accumulation members is estimated to be comparable to the net present value of the additional lifetime tax paid on unfunded defined benefit income over \$100,000 per annum.

3.249 An individual's defined benefit income is the superannuation income stream benefits they receive from capped defined benefit income streams. *[Schedule 1, item 32, subsection 303-2(2) of the ITAA 1997]*

3.250 Defined benefit income is taxed differently under Divisions 301 and 302 of the ITAA 1997 depending primarily on the age of the beneficiary. Concessional tax treatment is provided for income to which sections 301-10, 301-100, 302-65 or 302-85 of the ITAA 1997 apply. These provisions generally apply if the recipient is aged 60 or over, or to death benefits a dependant receives from a deceased person aged 60 or over.

The defined benefit income cap

3.251 An individual's defined benefit income cap for a financial year is generally equal to the general transfer balance cap for the corresponding financial year divided by 16. *[Schedule 1, item 32, subsection 303-4(1) of the ITAA 1997]*

Example 3.36: The defined benefit income stream cap

For the 2017-18 financial year, the defined benefit income cap is generally \$100,000 (the \$1.6 million general transfer balance cap divided by 16).

3.252 An individual's transfer balance account is not relevant to working out the defined benefit income cap or the amount (if any) of the individual's additional income tax liability.

3.253 An individual's defined benefit income cap is reduced if they:

- first become entitled to concessional tax treatment in respect of defined benefit income part-way through a financial year (for example, because they turn 60 during the year); or
- they are also entitled to other defined benefit income that is not subject to concessional tax treatment (for example because they receive death benefits and member benefits in certain circumstances).

3.254 Only defined benefit income that is subject to concessional tax treatment can count towards the cap. If the individual first becomes entitled to that treatment part-way through a financial year, their defined benefit income cap is reduced proportionately. *[Schedule 1, item 32, subsection 303-4(2) of the ITAA 1997]*

3.255 The reduction is achieved by multiplying the defined benefit income cap by the following amount:

$$\frac{1 + \text{days remaining in the financial year}}{\text{days in financial year}}$$

Example 3.37: Part-year defined benefit income cap

Chris receives defined benefit income in the form of superannuation income stream member benefits from a taxed source. Chris' 60th birthday is 12 September 2017 (one-fifth of the way through the year). Chris becomes entitled to concessional tax treatment on this date.

Chris' defined benefit income cap for the 2017-18 financial year is worked out as follows:

$$\frac{\$1.6 \text{ million}}{16} \times \frac{1 + 291}{365} = \$80,000$$

3.256 A separate reduction applies if an individual receives defined benefit income that is not subject to concessional tax treatment under sections 301-10, 301-100, 302-65 or 302-85 of the ITAA 1997. Such non-concessional defined benefit income is used to reduce the cap but cannot contribute towards an individual's excess amount. The existing tax treatment for these types of income continues to apply. [*Schedule 1, item 32, subsection 303-4(3) of the ITAA 1997*]

Example 3.38: Cap reduction for non-concessional income

Brian, aged 57, receives \$90,000 of defined benefit income each year. This consists of \$75,000 of superannuation income stream member benefits and \$15,000 of dependant death benefits. Brian receives the death benefits because of an entitlement to the superannuation interests of his late wife, Samantha, who was 61 when she died.

These superannuation income streams are from a taxed source. Both have also been valued and credited against Brian's transfer balance account.

Brian is entitled to treat death benefits as non-assessable non-exempt income under section 302-65 of the ITAA 1997 but not his member benefits (see section 301-25 of the ITAA 1997).

Brian's defined benefit income cap for the 2017-18 financial year is consequently reduced by \$75,000 (his defined benefit income not covered by the relevant provisions) to \$25,000. His dependent death benefits of \$15,000 do not exceed his adjusted defined benefit income cap.

3.257 The reduction for non-concessional income is always applied after any proportionate reduction that applies for a part-year period. If both reductions apply, only non-concessional benefits received after the start of the part-year period are included in the second reduction.

3.258 The following example shows the reduction in the defined benefit income cap for a person receiving non-concessional income, who subsequently commences receiving concessional income part way through a year. Their cap is first reduced to reflect the part-year period, and then further reduced to reflect the amount of non-concessional income received after they commenced receiving the concessional income.

Example 3.39: Applying both reductions to the defined benefit income cap

In 2017-18, Freya, aged 57 and retired, receives taxed source defined benefit income of \$60,000 from her defined benefit fund. As Freya is under 60 years of age, her benefits are assessable income and she is entitled to a 15 per cent tax offset on that income.

On 1 January 2018, Freya becomes the beneficiary of a taxed-source reversionary pension, and receives \$40,000 of defined benefit income from this source in 2017-18. As her spouse was over 60 years of age when he died, these superannuation income stream benefits are treated as non-assessable non-exempt income.

As she commenced receiving this pension half way through the year, Freya's defined benefit income cap is reduced to reflect the proportion of the year in which the reversionary pension was received. That is, her cap is reduced to around \$50,000 (half of \$100,000).

Freya's defined benefit income cap is then further reduced by the amount of her defined benefit income received from 1 January 2018. That is, her cap is reduced to \$20,000 (\$50,000 less \$30,000, assuming her \$60,000 of defined benefit income was paid evenly over the year).

In 2018-19, assuming she receives the same defined benefit income amounts, Freya's defined benefit income cap will be \$40,000 (\$100,000 less her \$60,000 defined benefit income).

Additional income tax consequences

3.259 Superannuation income streams may be from a taxed or untaxed source, or a combination of the two. The additional taxation consequences are different depending on the source of the excess defined benefit income stream amount. Different rules also apply depending on whether the individual is under 60 years of age.

3.260 Taxed source and tax-free component defined benefit income is considered first and is applied to the defined benefit income cap before

untaxed source income. Taxed source superannuation income stream benefits paid to people aged 60 or over are generally non-assessable non-exempt income (section 301-10 of the ITAA 1997). Taxed source death benefits paid to a person aged 60 or over, or where the deceased was 60 or over, are also non-assessable non-exempt income (section 302-65 of the ITAA 1997). The tax-free component of a defined benefit income payment assessed under either section 301-10 or 302-65 is also non-assessable non-exempt income.

3.261 To the extent an individual's taxed sourced or tax-free defined benefit income exceeds their defined benefit income cap, 50 per cent of the amount is included in their assessable income. The 50 per cent inclusion reflects general actuarial assumptions made about the likely return of capital, including the tax-free component of any defined benefit income. Moreover, as the tax-free component of account-based superannuation interests is counted towards the transfer balance cap, it is necessary to include the amount here to ensure broadly commensurate taxation treatment. *[Schedule 1, item 32, subsection 303-2(1) of the ITAA 1997]*

Example 3.40: Consequences for taxed source benefits

In the 2017-18 financial year, Frances, aged 62, receives defined benefit income of \$160,000 from her funded defined benefit scheme. The defined benefit income cap for the 2017-18 financial year is \$100,000 (the \$1.6 million general transfer balance cap divided by 16).

Frances' defined benefit income exceeds the income cap by \$60,000. Therefore, \$30,000 (50 per cent of the \$60,000 excess) is included in her assessable income.

3.262 Untaxed source income is considered next. Untaxed source superannuation income stream benefits are generally assessable income subject to a 10 per cent tax offset if the recipient is aged 60 or over or, in the case of a death benefit, the recipient or the deceased was aged 60 or over (sections 301-100 and 302-85 of the ITAA 1997). Excess untaxed source defined benefit income, however, is not entitled to the tax offset and is assessable at the individual's full marginal rate.

3.263 Excess untaxed source defined benefit income is worked out by applying the individual's untaxed defined benefit income stream payments to any amount remaining in their defined benefit income cap (after having applied taxed source and tax free component defined benefit income). Any amount that exceeds the cap is not entitled to the tax offset. *[Schedule 1, item 32, section 303-3 of the ITAA 1997]*

Example 3.41: Consequences for untaxed source benefits

In 2017-18 Gordon, aged 65, receives defined benefit income of \$140,000 from his unfunded defined benefit scheme. His pension income is taxed at marginal rates, subject to a 10 per cent offset.

However, the amount of any tax offsets Gordon is entitled to receive is reduced by an amount equal to 10 per cent of the excess of his untaxed source defined benefit income over the defined benefit income cap. His pension income offset is therefore effectively capped at \$10,000.

That is, Gordon's offset entitlement of \$14,000 (10 per cent of his \$140,000 pension income), is reduced by \$4,000 (10 per cent of \$40,000 — the excess of his pension income over the income cap).

3.264 Some superannuation income streams contain both taxed elements and untaxed elements.

Example 3.42: Hybrid defined benefit pensions

Paul, who is 61, has a hybrid defined benefit pension and receives \$180,000 of defined benefit income in 2017-18. His pension comprises \$85,000 from an untaxed source, \$75,000 from a taxed source and \$20,000 is a tax free amount.

The combined taxed source and tax free amount of \$95,000 is counted towards Paul's \$100,000 defined benefit income cap. \$5,000 of the untaxed source income is also counted towards the cap, exhausting it. The remaining \$80,000 of untaxed source income is denied a tax offset under section 301-100 of the ITAA 1997. Paul's section 301-100 tax offset is limited to \$500 (10 per cent of the \$5,000 counted towards the cap).

The same outcome would occur if the elements were from separate superannuation income streams, regardless of when either income stream was established.

3.265 Further examples of these rules are provided below to demonstrate their interaction with the defined benefit income cap modifications.

Example 3.43: Death benefits

On 1 October 2017, Naomi, aged 63, becomes the beneficiary of a taxed-source reversionary pension, and receives \$80,000 of defined benefit income from this source in 2017-18.

As she commenced receiving this pension part way through the year, Naomi's defined benefit income cap is reduced to reflect the proportion of the year in which the reversionary pension was received.

That is, her cap is reduced to around \$75,000 (three-quarters of \$100,000).

Naomi's defined benefit income from the reversionary pension exceeds her defined benefit income cap by \$5,000 (\$80,000 less \$75,000). Therefore, she will have to include \$2,500 (50 per cent of the \$5,000 excess) in her assessable income.

Example 3.44: Death benefits and member benefits

Further to Example 3.39, in 2017-18, Freya's defined benefit income from her reversionary pension exceeds her defined benefit income cap by \$20,000 (\$40,000 less \$20,000).

Therefore, she will have to include \$10,000 (50 per cent of the \$20,000 excess) in her assessable income for the 2017-18 financial year.

Modifications for child dependants

3.266 This section sets out the modifications that apply where a death benefit recipient is a child. The general rules of the transfer balance cap apply, but the child's cap is generally set by reference to their portion of the deceased parent's retirement phase interests rather than the general transfer balance cap. The child's transfer balance account generally extinguishes when they reach age 25 (which is when they are required to cash out the death benefit income stream). This ensures that children do not exhaust their transfer balance cap before they retire.

3.267 A child recipient that receives a death benefit income stream from a parent is entitled to a modified transfer balance cap. [*Schedule 1, item 3, sections 294-170 and 294-175 of the ITAA 1997*]

3.268 A child recipient is a deceased person's dependent child that is (subregulation 6.21(2A) of the SISR and subregulation 4.24(3A) of the RSAR):

- under the age of 25; or
- between 18 and 25 and financially dependent on the deceased; or
- has a permanent disability.

3.269 A child recipient is required to commute all of their death benefit income streams and remove the capital from the superannuation system when they turn 25, unless they have a permanent disability (subregulation 6.21(2B) of the SISR). The child's transfer balance account and modified transfer balance cap will generally cease either

when they commute all their death benefit income streams at age 25 or the capital is exhausted.

3.270 The exception to this general rule is children with a permanent disability, who are not subject to the cashing out rule. Their modified transfer balance cap will cease when the funds supporting the death benefit income streams are exhausted (unless they also have other superannuation income streams such as a disability pension or an income stream funded by a structured settlement — see paragraphs 3.289 and 3.294).

The child's transfer balance cap

3.271 If the child is only receiving death benefit income streams as a child recipient, the child does not have a personal transfer balance cap set to the indexed value of the general transfer balance cap. Rather, the child's transfer balance cap is generally determined by reference to the value of the deceased's retirement phase interests that they receive. This is achieved through a series of transfer balance cap increments that accrue to the child. *[Schedule 1, item 4, subsection 294-185(1) of the ITAA 1997]*

3.272 In some rare circumstances, a child recipient may receive their own superannuation income stream — or a death benefit income stream, for example, from an interdependency relationship — in addition to a death benefit income stream they receive from a parent. This is most likely to be the case where the child has a disability or has received a structured settlement.

3.273 If the child recipient receives a death benefit income stream from a parent and has other superannuation income streams, their transfer balance cap is worked out as the sum of:

- their personal transfer balance cap, worked out according to the general rules (see paragraphs 3.41 to 3.51); and
- the total amount of transfer balance cap increments the child receives as a child recipient.

[Schedule 1, item 4, subsection 294-185(2) of the ITAA 1997]

Transfer balance cap increments

3.274 The amount of the child's transfer balance cap increments will depend on:

- whether the child started to receive death benefit income streams before 1 July 2017;

- if they started to receive them after that time, whether or not the deceased had a transfer balance account just before the time of their death; and
- if so, whether the deceased had an excess transfer balance in the retirement phase just before the time of their death.

Death benefit income streams that commenced before 1 July 2017

3.275 If a child is receiving death benefit income streams as a child recipient when these amendments begin to apply (because of the earlier death of one or more parents), the child's transfer balance cap increment is \$1.6 million. This reflects the amount of retirement phase interests a deceased parent could have had if they had instead died shortly after 1 July 2017. [*Schedule 1, item 4, section 294-190 of the ITAA 1997*]

Death benefit income streams commenced on or after 1 July 2017 where the deceased parent does not have a transfer balance account

3.276 If the deceased parent did not have a transfer balance account at the time of their death — and the child starts to receive a death benefits income stream on or after 1 July 2017 — the child's cap increment is:

- if the child is the sole beneficiary of the deceased parent's superannuation interests — the general transfer balance cap; or
- if the child is not the sole beneficiary of the deceased parent's superannuation interests — the child's proportionate share of the deceased's superannuation interests multiplied by the general transfer balance cap.

3.277 This situation is most likely to arise where the parent dies before they enter the retirement phase. [*Schedule 1, item 4, section 294-195 of the ITAA 1997*]

Example 3.45: Child's transfer balance cap increment where deceased parent does not have a transfer balance account — single beneficiary

Joseph dies on 15 November 2019, aged 56, with accumulation assets worth \$2 million. His 12 year old daughter Eliza is the sole beneficiary of his estate. As Joseph has not yet retired, he does not have a transfer balance account. As there are no other beneficiaries, the cap increment for Eliza is the general transfer balance cap. Eliza can receive \$1.6 million of the \$2 million as a death benefit income stream. The remaining \$400,000 would need to be paid to Eliza as a death benefit lump sum and removed from the superannuation system where it would most likely be managed by a guardian or held in trust.

Example 3.46: Child’s transfer balance cap increment where deceased parent does not have a transfer balance account — multiple beneficiaries

Emma dies on 6 June 2018, aged 55, with accumulation interests worth \$2 million. Emma’s two daughters Sana and Chloe are the beneficiaries of her superannuation interests. Emma had a binding nomination that her superannuation interests are to be shared equally between Sana and Chloe.

As Emma did not have a transfer balance account before her death, her beneficiaries are entitled to their proportion of the general transfer balance cap as corresponds with their share of Emma’s superannuation interest. Sana and Chloe will each receive a transfer balance cap increment of \$800,000 (50 per cent of the 2017-18 general transfer balance cap). Sana and Chloe may each receive a death benefit income stream of \$800,000. The remaining \$200,000 that each child receives would need to be taken as a death benefit lump sum and cashed out of the superannuation system.

Where the deceased parent does have a transfer balance account

3.278 If the deceased parent did have a transfer balance account, the child beneficiary’s transfer balance cap increment is their portion of the deceased parent’s superannuation interests that were in the retirement phase that the child received as a death benefit income stream. *[Schedule 1, item 4, subsections 294-200(1) and (2) of the ITAA 1997]*

3.279 A transfer balance cap increment arises with respect to each death benefit income stream the child receives from a parent. Each cap increment arises when the child starts to receive the death benefit income stream. However, in the case of a reversionary superannuation income stream, the cap increment is deferred for 12 months to align with the modification discussed at paragraphs 3.79 to 3.82. *[Schedule 1, item 4, subsection 294-200(6) of the ITAA 1997]*

3.280 To be within the cap increment, each death benefit income stream the child receives must be sourced solely from the retirement phase interests of the deceased parent. If a death benefit income stream the child received is not wholly sourced from the deceased parent’s retirement phase interests, the child will have an excess transfer balance (unless they also have a cap increment because of the death of another parent or they also have a personal transfer balance cap because they have another non-death benefit income stream).

Example 3.47: Death benefit wholly sourced from deceased parent's retirement phase interests

Esme dies on 29 July 2019. At this time Esme was being paid a superannuation income stream and had \$150,000 in an accumulation phase interest. The value of the superannuation interest that was supporting Esme's superannuation income stream at her death was \$750,000.

Esme left two dependants, her child Tiffany (aged 12) and her husband Mustrum.

The trustee of Esme's superannuation fund decided to pay a \$750,000 death benefit income stream to Tiffany from the superannuation interest that previously supported Esme's superannuation income stream and a \$150,000 death benefit lump sum to Mustrum from Esme's accumulation phase interest. Mustrum elected to receive a death benefit lump sum as he had already started a superannuation income stream to the full value of his transfer balance cap.

As the death benefit income stream paid to Tiffany is solely sourced from Esme's retirement phase interest, the amount of Tiffany's transfer balance cap increment is equal to her death benefit income stream — \$750,000.

3.281 If the child's death benefit income stream is wholly sourced from the deceased parent's accumulation phase interests, the transfer balance cap increment for the child's cap is nil. [*Schedule 1, item 4, subsection 294-200(3) of the ITAA 1997*]

Example 3.48: Death benefit wholly sourced from deceased parent's accumulation phase interests

Elrond dies on 24 November 2020. Elrond had been receiving a superannuation income stream, however, the superannuation interest that supported it was exhausted a few years earlier. Elrond still had \$500,000 in an accumulation phase interest just before he died.

Elrond's daughter, Arwen, seeks some financial advice in respect of her father's superannuation interest. She is advised that if she was to request a death benefit income stream, because it would be solely sourced from Elrond's accumulation phase interest, her transfer balance cap increment would be nil, making the whole amount in excess of her transfer balance cap.

Therefore Arwen instead requests that the \$500,000 be paid to her as a death benefit lump sum.

3.282 Similarly, if the child's death benefit income stream is only partly sourced from the deceased parent's retirement phase interests the amount of the child's cap increment will equal only this part. The part of the death benefit income stream paid to the child that is sourced from the deceased parent's accumulation phase interest will exceed the child's transfer balance cap (unless they also have a cap increment because of the death of another parent or they also have a personal transfer balance cap because they have another non-death benefit income stream) [*Schedule 1, item 4, subsection 294-200(4) of the ITAA 1997*]

Example 3.49: Death benefit partly sourced from deceased parent's retirement phase interest and partly from accumulation phase interest

Sam dies on 9 June 2019. At this time, Sam was being paid a superannuation income stream and had \$350,000 in an accumulation phase interest. The value of the superannuation interest that was supporting Sam's superannuation income stream at his death was \$750,000. Sam left two dependants, his child Junior, aged 5, and his wife, Sybil.

Sybil seeks financial advice in respect of Sam's superannuation interest as she wants to maximise the amount of any death benefit income stream paid to Junior because of his young age.

Sybil is advised that if the whole of Sam's superannuation interest were paid as a death benefit income stream to Junior, it would exceed the transfer balance cap increment that he would receive. This is because it would be partly sourced from Sam's accumulation phase interest.

Sybil requests that a death benefit income stream of \$750,000 from Sam's retirement phase interest be paid to Junior and a death benefit income stream of \$350,000 be paid to herself from Sam's accumulation phase.

As the death benefit income stream paid to Junior is solely sourced from Sam's retirement phase interest the amount of Junior's transfer balance cap increment is equal to his death benefit income stream — \$750,000

Sybil had not previously been paid a superannuation income stream, therefore the \$350,000 death benefit income stream she receives from Sam's accumulation interest does not exceed her transfer balance cap.

3.283 Generally, an amount is considered to be sourced from the deceased parent's retirement phase interest if it can be shown that the amount (that is, the interest that supports the child's death benefit income stream) came from superannuation interests that supported superannuation

income streams payable to the parent just before their death (their retirement phase interest).

3.284 Where the deceased parent had both retirement phase and accumulation phase interests, the deceased parent's superannuation income stream provider will need to specify the degree to which death benefit income streams payable to child beneficiaries are sourced from the retirement phase interests and accumulation phase interests (if any). This will provide the basis for determining the cap increments of the child beneficiaries.

3.285 Earnings that accrue on a deceased person's retirement phase interest after their death up until a death benefit income stream is paid are considered to be part of the deceased person's retirement phase interest. Therefore, to the degree that they are included in a death benefit income stream payable to a child they are considered to be sourced from the deceased parent's retirement phase interest. The child's transfer balance cap increment for the death benefit income stream will include these accrued earnings. Superannuation income stream providers should still endeavour to pay death benefits as soon as practicable however, as required by the regulatory rules. *[Schedule 1, item 4, subsection 294-200(7) of the ITAA 1997]*

3.286 However, these earnings do not include an amount paid from a life insurance policy or from a reserve. The amounts are considered to form part of the deceased parent's accumulation phase interest. *[Schedule 1, item 4, subsection 294-200(7) of the ITAA 1997]*

Example 3.50: Child's cap increment where deceased parent has a transfer balance account — multiple beneficiaries

Damien dies on 23 March 2018, aged 70, with retirement phase interests worth \$1.3 million and accumulation phase interests of \$400,000. Damien's two children, Alyssa, 15, and Zali, 13, are his sole superannuation beneficiaries. Damien leaves advice that his superannuation interests are to be evenly divided between his two children.

Consistent with Damien's advice, the trustee of Damien's superannuation fund pays Damien's retirement phase interests to Alyssa and Zali as \$650,000 death benefit income streams. As each of the death benefit income streams payable to Alyssa and Zali are sourced solely from Damien's retirement phase interest, each child receives a transfer balance cap increment of \$650,000.

They each receive \$200,000 from Damien's accumulation phase interests as death benefit lump sums that are cashed out of the superannuation system.

Example 3.51: Inclusion of investment earnings in transfer balance cap increment

Further to Example 3.50, assume that, between the time of Damien's death and the time Alyssa and Zali received their death benefit income streams, earnings of \$4,000 accrued to Damien's retirement phase interest. Each child could start a \$652,000 death benefit income stream that is accommodated under a transfer balance cap increment.

Where the deceased parent has an excess transfer balance

3.287 A child's transfer balance cap increment is reduced if their deceased parent had an excess transfer balance just before their death. The child's cap is reduced by their proportionate share of their parent's excess transfer balance. However, the cap increment is not reduced to the extent the child received their entitlement to the deceased's retirement phase interests as a death benefit lump sum and not as a death benefit income stream. *[Schedule 1, item 4, subsection 294-200(5) of the ITAA 1997]*

Example 3.52: Parent's excess transfer balance

Jonathan commenced a pension worth \$1.8 million. Jonathan has a personal transfer balance cap of \$1.6 million. His transfer balance is \$1.8 million meaning he has an excess transfer balance of \$200,000. Shortly after Jonathan commenced his pension Jonathan passed away. The superannuation interest that supported Jonathan's pension at the time of his death is \$1.7 million (it has reduced in value due to pension payments Jonathan had drawn down).

On his death in February 2018, Jonathan's son, Callum, aged 16, is Jonathan's sole beneficiary.

If Callum were to commence a \$1.7 million death benefit income stream, his transfer balance cap increment would be reduced from \$1.7 million to \$1.5 million because of the application of his father's excess transfer balance. This would result in a \$200,000 excess transfer balance for Callum.

Callum instead starts a \$1.5 million death benefit income stream. Callum takes the remaining \$200,000 as a death benefit lump sum cashed out of the superannuation system.

A credit of \$1.5 million arises in Callum's transfer balance account. Callum receives a transfer balance cap increment of \$1.5 million and this is not reduced because the amount of the lump sum Callum receives from Jonathan's retirement phase interests equals the amount of Jonathan's excess transfer balance.

Example 3.53: Parent's excess transfer balance — reversionary superannuation income stream

Thomas commenced a pension worth \$1.8 million. Thomas has a personal transfer balance cap of \$1.6 million. His transfer balance is \$1.8 million meaning he has an excess transfer balance of \$200,000. Shortly after Thomas commenced his pension Thomas passed away. The superannuation interest that supported Thomas' pension at the time of his death is \$1.7 million (it has reduced due to investment losses).

On his death in February 2018, Thomas' pension reverts to his son, Bruce, aged 16.

A credit for \$1.7 million will arise in February 2019, 12 months after the pension reverts to Bruce. A transfer balance cap increment of \$1.5 million (the value of the \$1.7 million pension less Thomas's \$200,000 excess transfer balance) will also arise for Bruce in February 2019.

If Bruce does nothing, he will have a \$200,000 excess transfer balance in February 2019. Bruce will need to partially commute his reversionary pension and take a death benefit lump sum of \$200,000 out of the superannuation system.

Where both parents die

3.288 Where both of a child's parents die, the child's transfer balance cap is the sum of amounts worked out in relation to each parent.

Example 3.54: Child's transfer balance cap increment where both parents die

Further to Example 3.53, shortly after Thomas' death, Bruce's mother, Martha, also dies. Martha had not retired and did not have a transfer balance account. Martha had accumulation interests worth \$4 million of which Bruce is the sole beneficiary.

Bruce receives a transfer balance cap increment equal to the general transfer balance cap of \$1.6 million. Bruce's temporary transfer balance cap is now \$3.1 million.

Bruce keeps his father's reversionary pension worth \$1.7 million. He can also start a new death benefit income stream worth \$1.4 million from his mother's accumulation interests. The remaining \$2.6 million must be cashed out of the superannuation system and provided to Bruce as a death benefit lump sum.

Where child already has a transfer balance account

3.289 There may be some rare circumstances where a child has a transfer balance account and a personal transfer balance cap either before or after they start to receive death benefit income streams as a child recipient. In those circumstances, the child's transfer balance cap is increased by the sum of cap increments discussed above.

3.290 To ensure credits and debits a child recipient receives in relation to transfer balance cap increments do not affect the indexation of the child recipient's personal transfer balance cap, these amounts are disregarded under the transfer balance cap calculation. This modification only applies for the purposes of calculating the child recipient's transfer balance cap, including their access to proportional indexation. [*Schedule 1, item 4, paragraph 294-185(2)(b) of the ITAA 1997*]

Example 3.55: Increasing an existing transfer balance cap

On 1 August 2017, Barbara received a structured settlement of \$5 million as a result of a debilitating injury she suffered. On 1 September 2017, Barbara contributes the settlement amount into her superannuation and, combined with her existing \$400,000 of accumulation phase interests, starts a superannuation income stream worth \$5.4 million.

Barbara starts to have a transfer balance account and transfer balance cap on 1 September 2017. Her transfer balance cap is \$1.6 million. Her transfer balance account is credited \$5.4 million for the new superannuation income stream and is debited by \$5 million for the structured settlement contribution. At the end of 1 September 2017, her transfer balance is \$400,000 and she has \$1.2 million of available cap space.

On 1 January 2018, Barbara's father, Jim, dies. Jim had a \$1.8 million superannuation interest that was supporting a pension paid to him (Jim's superannuation interest had grown due to investment earnings — he was not in excess of his transfer balance cap at the time of his death). The pension was not a reversionary pension and it ceased on Jim's death. Barbara, Jim's sole beneficiary, was paid a new \$1.8 million death benefit income stream from Jim's retirement phase interest.

On 1 January 2018, Barbara's transfer balance cap is increased to \$3.4 million (her \$1.6 million transfer balance cap plus the \$1.8 million cap increment from the value of Jim's retirement phase interests). A credit of \$1.8 million arises in her transfer balance account. Barbara's transfer balance is now \$2.2 million while her available cap space is still \$1.2 million.

For the purposes of proportional indexation, Barbara's highest transfer balance is \$400,000 (her credit of \$1.8 million for the death benefit income stream is disregarded). Assuming no further changes, she will be entitled to 75 per cent any future indexation of the general transfer balance cap.

Ceasing the child recipient's transfer balance account

3.291 The child recipient's transfer balance account generally ceases when they are forced to commute their death benefit income streams at the age of 25. Alternatively, if all of the child's death benefit income streams (that they receive as a child recipient) cease before that time, their transfer balance account generally ceases at that time.

3.292 If the child is not required to cash out their death benefit income streams at the age of 25 because they have a permanent disability, their transfer balance account ceases when the relevant death benefit income streams are exhausted or otherwise cease.

3.293 In any of the above cases, once a child recipient's transfer balance account ceases, their entire position with respect to the transfer balance account is reset. When they subsequently retire, they can start a new transfer balance account and have a new transfer balance cap based on the general transfer balance cap at that time. *[Schedule 1, item 4, section 294-180 of the ITAA 1997]*

3.294 A child recipient's transfer balance account does not cease if they have received any superannuation income streams other than as a child recipient at any time before they cease to be a child recipient (whether they were a child recipient at that earlier time or not). *[Schedule 1, item 4, paragraph 294-180(1)(c) of the ITAA 1997]*

Example 3.56: Ceasing a child's transfer balance account

Further to Example 3.54, Bruce does not have a disability and must commute his superannuation income streams and take a death benefit lump sum out of the superannuation system when he turns 25. At this time, his transfer balance account ceases.

Bruce retires many years later and is subject to the general rules. He commences his own superannuation income stream, starting a new transfer balance account. His new personal transfer balance cap is set equal to the amount of the general transfer balance account in that financial year.

Example 3.57: Where a child recipient's transfer balance account does not cease

Further to Example 3.55, Barbara's transfer balance account will not cease because she received a credit for her \$5.4 million superannuation income stream before she exhausted her \$1.8 million death benefit income stream.

Consequential amendments

Reporting obligations for life insurance companies

3.295 Life insurance companies will now be required to report to the Commissioner information relating to certain life insurance policies. Specifically, exempt life insurance policies that provide for annuities that are superannuation income streams in the retirement phase, and complying superannuation life insurance policies that are held by an individual. *[Schedule 1, items 21 and 25, sections 390-1 and 390-20 in Schedule 1 to the TAA 1953]*

3.296 The reporting requirement is to allow for information about annuities and immediate annuities to be given to the Commissioner for the purpose of administering the superannuation legislation. The reporting requirement is similar to that which already exists for member information statements for superannuation providers.

3.297 The information must be given in the approved form and the Commissioner may determine by legislative instrument both the period to which the information relates and the date by which the information must be provided.

3.298 Individuals will be able to ask a life insurance company to give them the same information that is given to the Commissioner. They will also be able to make a complaint to the Superannuation Complaints Tribunal that a decision by the life insurance company to set out an amount in respect of them was unfair or unreasonable. This is consistent with the existing treatment for statements given by superannuation providers to the Commissioner. *[Schedule 1, items 8, 9, and 22 to 24, paragraphs 15CA(1)(c) and (2)(c) of the Superannuation (Resolution of Complaints) Act 1953, and paragraph 390-15(1)(b) and subsections 390-15(2), (3) and (4) in Schedule 1 to the TAA 1953]*

Income tax withholding and reporting

3.299 A consequential amendment is made to ensure that the Pay-As-You-Go Withholding regime applies to superannuation income stream benefits that are defined benefit income. The Pay-As-You-Go

Withholding regime applies to income stream payments that are included in the assessable income of the recipient (sections 12-1 and 12-80 in Schedule 1 to the TAA 1953). *[Schedule 1, item 33, subsection 12-1(4) in Schedule 1 to the TAA 1953]*

3.300 Superannuation income stream providers may not know whether defined benefit income they pay to members is assessable income because they may not know if the member receives other defined benefit income.

3.301 Ensuring the withholding regime applies provides certainty to providers in relation to both their withholding obligations and associated reporting obligations. Importantly, reporting obligations apply to withholding payments even if the amount required to be withheld is nil. The reporting obligations, in turn, are important to the effective administration of these amendments.

3.302 The Commissioner will consult separately on the administrative aspects of these amendments, including if any changes are required to withholding schedules.

Other consequential amendments

3.303 An individual is not entitled to an income tax deduction for an amount of excess transfer balance tax. *[Schedule 1, Part 1, item 2, section 26-99 of the ITAA 1997]*

3.304 Excess transfer balance tax is included in the table of liabilities that attract general interest charge. *[Schedule 1, item 10, item 15B of the table in subsection 8AAB(4) of the TAA 1953]*

3.305 Consequential amendments are made to various provisions in the TAA 1953 to include excess transfer balance within the assessment and tax liability framework. This includes clarifying that excess transfer balance tax cannot be self-assessed. *[Schedule 1, item 16 to 20, paragraph 155-5(2)(h), Note 1 to subsection 155-15(1), subsection 155-30(3), item 38BC in the table in subsection 250-10(2) in Schedule 1 to the TAA 1953]*

3.306 Notes are added to provisions in Divisions 301 and 302 of the ITAA 1997 (about the income tax treatment of superannuation income stream member benefits and death benefits) that link to the new rules for excess defined benefit income. *[Schedule 1, items 26 to 31, sections 301-10, 301-90, 301-100, 302-65, 302-80 and 302-85 of the ITAA 1997]*

3.307 New definitions are inserted into the dictionary definitions of the ITAA 1997. *[Schedule 11, item 7, subsection 995-1(1) (definitions of ‘assessed excess transfer balance tax’, ‘capped defined benefit income stream’, ‘child recipient’, ‘crystallised reduction amount’, ‘debit value’, ‘defined benefit income’, ‘defined benefit income cap’, ‘default commutation notice’, ‘excess transfer balance’, ‘excess transfer balance determination’, ‘excess transfer balance earnings’, ‘excess transfer balance period’, ‘excess transfer balance tax’, ‘general transfer balance cap’, ‘member spouse’, ‘retirement phase recipient’, ‘rounding amount’, ‘special value’, ‘superannuation income stream provider’, ‘transfer balance’, ‘transfer balance account’, ‘transfer balance cap’, ‘transfer balance credit’ and ‘transfer balance debit’) of the ITAA 1997]*

Application and transitional provisions

Application provisions

3.308 The amendments in Schedule 1 to the TLA Bill commence on the first 1 January, 1 April, 1 July or 1 October to occur after the day the amendments receive Royal Assent. *[Item 2 in the table in section 2 of the TLA Bill]*

3.309 The amendments made by Schedule 1 generally apply on and after 1 July 2017. *[Schedule 1, item 34 and subitem 36(1), section 294-10 of the Income Tax (Transitional Provisions) Act 1997 (IT(TP) 1997)]*

3.310 The amendments that relate to life insurance company reporting obligations apply in relation to exempt life insurance policies and life insurance policies held on and after 30 June 2017. *[Schedule 1, subitem 36(2)]*

3.311 The amendments made by Part 2 of the TLA Bill (about additional income tax rules for defined benefit income) apply in relation to the 2017-18 financial year and later financial years. *[Schedule 1, subitem 36(3)]*

3.312 Similarly, the new indexation rules apply in relation to the 2017-18 financial year and future financial years. *[Schedule 11, item 9]*

3.313 New definitions that support the transfer balance cap generally apply from 1 July 2017. However, the ‘defined benefit income’, ‘defined benefit income cap’ and ‘rounding amount’ definitions apply to the 2017-18 financial year and later financial years. *[Schedule 11, item 9]*

3.314 The Superannuation (Excess Transfer Balance Tax) Imposition Bill 2016 commences on the same day as Schedule 1 to the TLA Bill and applies from 1 July 2017. *[Section 2 of the Superannuation (Excess Transfer Balance Tax) Imposition Bill 2016]*

Transitional relief

3.315 There are transitional rules to support individuals in bringing their income streams below the transfer balance cap, as well as transitional relief from capital gains tax to support funds in restructuring their affairs.

3.316 Transitional rules apply to transfer balance cap breaches of less than \$100,000 that occur on 30 June 2017. Such breaches do not give rise to notional earnings or an excess transfer balance tax liability if they are rectified within 6 months. [*Schedule 1, item 34, section 294-30 of the IT(TP) Act 1997*]

3.317 The rationale for this relief is that it may be difficult for individuals with existing superannuation income streams to predict their retirement phase balances as at 30 June and ensure they are not in breach of their \$1.6 million transfer balance cap. Small breaches of less than \$100,000 are likely to be unintentional.

Example 3.58: Transitional relief for small excess — excess identified by member

On 1 January 2017, Ian has an account-based pension worth \$2 million. Following the enactment of the transfer balance cap legislation, Ian partially commutes his pension on 15 June 2017 and receives a superannuation lump sum of \$400,000.

The superannuation interest that supports the pension increases in value by \$10,000 by 30 June 2017 because of market volatility. The value of the superannuation interest supporting Ian's pension on 30 June 2017 is \$1.61 million. A credit arises in Ian's transfer balance account for that amount on 1 July 2017. Ian has an excess transfer balance of \$10,000.

On 1 August 2017, Ian makes a partial commutation of the pension and receives a debit of \$10,000. Because Ian has rectified the breach of his transfer balance cap, and the excess was less than \$100,000, no notional earnings accrue to Ian, and he is not liable for excess transfer balance tax.

Example 3.59: Transitional relief for small excesses — excess identified by Commissioner

On 30 June 2017, Richard has an account-based pension worth \$1.7 million. On its annual member contribution statement, Richard's fund reports that Richard's pension had a value of \$1.7 million on 30 June 2017.

The ATO receives the member contribution statement on 31 October 2017. On 15 November 2017, the Commissioner issues a determination to Richard advising him of the excess, and that he will

need to remove the \$100,000 in excess plus the earnings on the excess transfer balance. On 15 December 2017, Richard requests that his fund partially commute his retirement phase interests to reduce it by the amount specified in the determination. Richard notifies the Commissioner in the approved form that he has rectified the breach. There are no further consequences for Richard

3.318 This transitional rule only affects excess transfer balance earnings. It does not allow an individual that has exceeded their transfer balance cap to gain any benefit from the indexation of the general transfer balance cap.

Calculating transfer balance for 30 June 2017

3.319 The concept of an individual's total superannuation balance is relevant for a number of other amendments in the TLA Bill. The calculation of an individual's total superannuation balance incorporates the individual's transfer balance. It may be necessary to calculate an individual's total superannuation balance on 30 June 2017, before they have a transfer balance account or a transfer balance. To facilitate this, an individual's transfer balance on 30 June 2017 is the sum of transfer balance credits that arise at the start of 1 July 2017 (because of existing superannuation income streams), taking into account any payment split debits that may apply to those income streams. [*Schedule 1, item 35, section 307-230 of the IT(TP) Act 1997*]

Transitional CGT Relief

3.320 Part 3 of Schedule 1 to the TLA Bill amends the IT(TP) Act 1997 to provide transitional CGT relief for superannuation funds that adjust their asset allocations before 1 July 2017. The relief ensures that tax does not apply to unrealised capital gains that have accrued on assets that were used to support superannuation income streams up until that time.

3.321 Where individuals need to commute superannuation income streams to transfer amounts from the retirement phase to the accumulation phase to comply with the transfer balance cap, earnings on assets supporting these commuted balances will become taxable. Similarly, where individuals have a TRIS, earnings on assets supporting these superannuation income streams will become taxable from 1 July 2017 as they will no longer be in the retirement phase.

3.322 The object of the provisions is to provide relief for complying superannuation funds from the tax consequences for capital gains accumulated before 1 July 2017, where these gains would have been exempt income if realised prior to a commutation being made to comply

with the transfer balance cap or the change to the treatment of TRIS.
[Schedule 1, item 34, section 294-100 of the IT(TP) Act 1997]

Interaction with CGT provisions in Parts 3-1 and 3-3 of the ITAA 1997

3.323 The CGT relief arrangements will allow complying superannuation funds that choose to apply the relief to reset the cost base on assets that are reallocated or re-proportioned from the retirement phase to the accumulation phase prior to 1 July 2017. [Schedule 1, item 34, subsections 294-110(3) and 294-115(3) of the IT(TP) Act 1997]

3.324 The relief is provided by deeming the superannuation fund to have sold and reacquired the relevant asset for market value. This deemed transaction triggers CGT event A1 under section 104-10 of the ITAA 1997 and results in the reacquired asset having its cost base set at its current market value. This will ensure that, when these assets are sold after 1 July 2017, capital gains only arise in relation to capital growth that accrued to those assets after the application of CGT relief. That is, tax will only be applied to gains that accrue once the asset is no longer supporting superannuation interests in the retirement phase (or is supporting them to a reduced extent). [Schedule 1, item 34, subsections 294-110(3) and 294-120(3) of the IT(TP) Act 1997]

3.325 As the superannuation fund is taken to have sold and then reacquired the asset, applying CGT relief would reset the 12-month eligibility period for the CGT discount. A superannuation fund is not required to apply CGT relief.

3.326 Any subsequent events that could affect the asset's cost base under Parts 3-1 and 3-3 of the ITAA 1997 apply to the reset cost base amount. For example, if the asset was real property and subsequent to the application of CGT relief, further costs are incurred in maintaining, repairing or insuring the property, those costs are able to be added to the reset cost base (see paragraph 110-25(4)(b) of the ITAA 1997).

General conditions for CGT relief

3.327 CGT relief applies differently and is subject to different conditions depending on whether the superannuation fund segregates assets to support its current pension liabilities or whether it applies the proportionate method. The following conditions apply to both methods.

3.328 The relief applies to reallocation or re-proportioning made during the pre-commencement period for the TLA Bill — the period from the introduction of that Bill into the House of Representatives until 30 June 2017 — in relation to assets a complying superannuation fund held throughout that period. [Schedule 1, item 34, section 294-105, and paragraphs 294-110(1)(c) and 294-120(1)(c) of the IT(TP) Act 1997]

3.329 The superannuation fund must choose to apply the relief if they wish to do so. The superannuation fund must make this choice and notify the Commissioner in the approved form on or before the day the trustee is required to lodge the fund's 2016-17 income tax return. A choice to apply the relief cannot be revoked. [*Schedule 1, item 34, paragraphs 294-110(1)(e) and 294-120(1)(e), and subsections 294-110(2) and 294-115(2) of the IT(TP) Act 1997*]

Application of general anti-avoidance provisions

3.330 The CGT relief arrangements are only intended to support movements or re-proportioning of assets and balances necessary to support compliance with the transfer balance cap and changes to the TRIS. It would be otherwise inappropriate for a fund to wash assets to obtain CGT relief or to use the relief to reduce the income tax payable on existing assets supporting the accumulation phase. Schemes designed to maximise an entity's CGT relief or to minimise the capital gains of existing assets in accumulation phase — by creating the circumstances in which the choice may be made — may be subject to the general anti-avoidance rules in Part IVA of the *Income Tax Assessment Act 1936*.

3.331 Where a member requests commutation of their superannuation income stream and the trustee of the superannuation fund and the member are at arm's length, it is reasonable for the trustee to assume that the commutation was not intended to maximise CGT relief in a way unrelated to ensuring compliance with the transfer balance cap or changes to TRIS arrangements.

3.332 The circumstances of individual members affected by the transfer balance cap will vary. In some cases, commutations may exceed the amount of the member's excess transfer balance (for example, where the fund holds a single asset). However, funds should not use commutations of superannuation income streams as a mechanism to cycle new assets into the retirement phase.

Segregated current pension assets

3.333 CGT relief applies to assets that are segregated current pension assets solely supporting a superannuation fund's superannuation income stream benefit liabilities (see subsection 295-385(3) of the ITAA 1997). Under subsection 295-385(3), the superannuation fund must have an actuary's certificate certifying the fund's segregated current pension assets can support the fund's superannuation income stream benefit liabilities.

3.334 Some superannuation funds' assets are currently considered segregated under subsection 295-385(4) of the ITAA 1997 without the need to obtain an actuary's certificate if all of their superannuation income stream benefit liabilities at a time are prescribed in the regulations. The

regulations broadly prescribe account-based superannuation income stream products (see regulation 295-385.01 of the ITAR 1997).

3.335 Where a superannuation fund chooses (and is eligible) to apply CGT relief because it has reallocated assets from the segregated pension assets pool to the segregated non-current assets pool and the liabilities in respect of the segregated pension assets pool remain solely in relation to account based superannuation income stream products, the fund can continue to use subsection 295-385(4), meaning they will not need an actuary's certificate in order to determine their exempt current pension income.

3.336 Where a superannuation fund is not able to reallocate assets to the segregated non-current assets pool, for example because it only has a single large value asset that must then support both retirement and accumulation phase liabilities, the superannuation fund can only use the proportionate method.

3.337 A regulation will be made for the purposes of subsection 295-390(7) to determine liabilities in respect of account based income stream benefits for the proportionate method. This means that superannuation funds who use the proportionate method but whose only superannuation income stream benefit liabilities arise from account based superannuation income stream products will also not be required to obtain an actuary's certificate for the purpose of determining their exempt current pension income.

3.338 To qualify for CGT relief, the relevant asset must be a segregated current pension asset at the start of the pre-commencement period and must cease to be so during the same period. A segregated current pension asset will cease to be segregated as such if:

- it is transferred to support other liabilities of the superannuation fund, that is it becomes a segregated non-current asset for the purposes of section 295-395 of the ITAA 1997; or
- the superannuation fund decides to use the proportionate method in relation to the asset.

[Schedule 1, item 34, paragraphs 294-110(1)(a) and (b) of the IT(TP) Act 1997]

3.339 To be eligible to apply CGT relief, the fund must be a complying superannuation fund from the start of the pre-commencement period until the date the asset ceases to be a segregated current pension asset and CGT relief is applied (the cessation time). *[Schedule 1, item 34, paragraph 294-110(1)(d) of the IT(TP) Act 1997]*

3.340 If the conditions for the relief are satisfied, the superannuation fund is deemed to have sold and reacquired the asset at the time it ceased to be a segregated current pension asset. The cost base of the asset is reset at that time at its market value. *[Schedule 1, item 34, subsection 294-110(3) of the IT(TP) Act 1997]*

3.341 This deemed transaction triggers CGT event A1 under section 104-10 of the ITAA 1997. However, because earnings on segregated current pension assets are entirely tax-exempt, there are no immediate tax consequences for a fund if a capital gain arises from the CGT event.

Example 3.60: Applying CGT relief to a segregated asset

Tim and Laura have an SMSF. The fund holds segregated current pension assets to support Tim's \$2.6 million superannuation income stream, and segregated non-current assets to support Laura's \$1 million accumulation interest.

To comply with the transfer balance cap, Tim partially commutes \$1 million of his superannuation income stream back to the accumulation phase during the pre-commencement period. The fund has two options when adjusting the allocation of its assets to its superannuation liabilities that would allow it to claim CGT relief:

- the fund may continue to use the segregated method and transfer assets between the two segregated asset pools; or
- the fund may cease to use the segregated method and adopt the proportionate method.

Option 1: continuing to use the segregated method until to 1 July 2017

On 1 March 2017, to give effect to Tim's \$1 million commutation, the fund transfers a segregated current pension asset with a present market value of \$1 million out of the segregated pool of exempt assets into its pool of segregated non-current assets. The asset is eligible for CGT relief as it has ceased to be a segregated current pension asset within the pre-commencement period.

The CGT cost base for this asset is \$750,000, meaning that it has already accrued unrealised capital gains of \$250,000. To ensure that this accrued gain is not taxed when the asset is eventually sold, the fund chooses to apply the CGT relief arrangements to this asset. As the trustees of the fund, Tim and Laura record this choice when they submit the fund's income tax return for the 2016-17 income year.

The relief deems the asset to be sold and reacquired for its market value on 1 March 2017. This will reset the cost base for the asset to

\$1 million. It will also reset the 12 month period for the asset to be eligible for the CGT discount.

CGT event A1 occurs in relation to the deemed sale and gives rise to a capital gain of \$250,000. However, as this capital gain arises while the asset is still a segregated current pension asset, the gain is exempt from tax.

Note, as Tim's total superannuation balance is more than \$1.6 million the fund will be required to use the proportionate method from 1 July 2017 onwards (see paragraphs 10.51 to 10.56).

The fund sells the asset on 30 March 2018 for \$1.15 million. Another CGT event and capital gain arise at this time. Because the cost base of the asset is now \$1 million, the fund makes a \$150,000 capital gain. The CGT discount applies to the capital gain because the fund held the asset for more than 12 months from the time the transitional CGT relief applied. The taxable proportion will reflect the proportion of the fund's superannuation liabilities that relate to Tim and Laura's accumulation phase interests at that time.

Option 2: adopting the proportionate method prior to 1 July 2017

Alternatively, to give effect to Tim's \$1 million commutation, the fund could adopt the proportionate method commencing on 30 June 2017. Under this method, \$1.6 million of the fund's total assets (worth \$3.6 million) would be considered to be supporting Tim's income stream on this day.

As the asset the fund is seeking to apply relief to was a segregated current pension asset just before the fund adopted the proportionate method, it must use the CGT relief provisions relevant to the segregated method. It cannot use the CGT relief provisions relevant to the proportionate method (even though the fund now applies the proportionate method) because the asset was a segregated current pension asset at the start of the pre-commencement period.

In this case, all of the assets that were segregated current pension assets during the pre-commencement period would be eligible for CGT relief because they all ceased to be segregated current pension assets on 30 June 2017. The fund could choose to apply relief to some or all of these assets.

The relief will reset the cost base for the chosen assets to their current market value immediately before the cessation time (30 June 2017). It will also reset the 12 month period for the assets to be eligible for the CGT discount.

The capital gains generated by the application of the relief would be exempt from tax, as these gains would arise while the assets were still segregated.

If an asset to which the relief applied is sold in a later year, a proportion of any net capital gain will be taxable to the fund. The taxable proportion will reflect the proportion of the fund's superannuation liabilities that relate to Tim and Laura's accumulation phase interests at that time.

Assets subject to the proportionate method

3.342 CGT relief also applies to the assets of a fund that uses the proportionate (or unsegregated) method provided for in section 295-390 of the ITAA 1997.

3.343 To be eligible to apply CGT relief, the fund must be a complying superannuation fund for the duration of the pre-commencement period and must have some superannuation income stream benefit liabilities in the 2016-17 income year. To be eligible for CGT relief, the proportionate method must have applied to the asset throughout the pre-commencement period. That is, throughout the pre-commencement period, the asset was neither a segregated current pension asset nor a segregated non-current asset. *[Schedule 1, item 34, paragraphs 294-115(1)(a), (b) and (d) of the IT(TP) Act 1997]*

3.344 The fund may choose to reset the cost base of any or all of its assets to their market value as at 30 June 2017.

3.345 The relief provided is similar to the relief for segregated current pension assets. If the conditions for the relief are satisfied, the superannuation fund is deemed to have sold and reacquired the asset on 30 June 2017. The cost base of the asset is reset at that time for its market value. *[Schedule 1, item 34, subsection 294-115(3) of the IT(TP) Act 1997]*

3.346 This deemed transaction triggers CGT event A1 under section 104-10 of the ITAA 1997. Because the superannuation fund applies the proportionate method, a proportion of any net capital gain that arises from the CGT event is generally taxable in the 2016-17 income year. However, the superannuation fund may make an additional choice to defer the capital gain.

Example 3.61: Applying CGT relief to fund using proportionate method

Claire and Ashley have an SMSF supported by a single asset with a market value of \$3 million. The fund uses the proportionate method to calculate the proportion of income from the asset that is exempt income, with two-thirds of the asset supporting Claire's \$2 million superannuation income stream and one-third supporting Ashley's \$1 million accumulation phase interest.

To comply with the transfer balance cap, Claire partially commutes \$400,000 of her superannuation income stream back to the accumulation phase on 30 June 2017, leaving her with a retirement balance of \$1.6 million.

The cost base for the asset, acquired in 2010, is \$2.82 million, meaning that it has already accrued unrealised capital gains of \$180,000. The fund chooses to apply CGT relief to ensure it does not have to pay CGT in the future for the proportion of the asset that supported Claire's superannuation income stream that was commuted as a result of the introduction of the transfer balance cap.

The asset is eligible for relief under this method as it was subject to the proportionate method for the entire pre-commencement period.

The relief deems the asset to be sold on 30 June 2017, and reacquired immediately afterwards, for its market value. This will reset the cost base for the asset to \$3 million. It will also reset the 12 month period for the asset to be eligible for the CGT discount.

CGT event A1 occurs in relation to the deemed sale and a capital gain of \$180,000 arises from that event. If the fund does not elect to defer the capital gain, the gain will be brought to account in the 2016-17 income year.

Consequences if capital gain not deferred

The one-third CGT discount applies to the capital gain because the asset was held for more than 12 months prior to the deemed sale. Assuming the fund had no other CGT events or prior year CGT losses, the fund will have a net capital gain for the 2016-17 income year of \$120,000 (the \$180,000 capital gain less the CGT discount).

Due to Claire's commutation on the last day of the financial year, the fund's average exempt proportion for the 2016-17 year will be slightly less than two thirds. Therefore, just over \$40,000 will be included in the fund's assessable income for that year, representing the amount of the gain attributable to the proportion of the fund's asset that was supporting Ashley's accumulation phase interest.

Choice to defer capital gain arising from CGT relief

3.347 Superannuation funds applying the proportionate method have an additional choice to defer a capital gain that arises from the fund choosing to apply CGT relief. The choice to defer does not arise in relation to a capital loss. [*Schedule 1, item 34, subsection 294-120(1) of the IT(TP) Act 1997*]

3.348 The choice to defer a capital gain must be made at the same time and in the same manner as the choice to apply CGT relief to the asset.

The choice cannot be revoked. *[Schedule 1, item 34, subsection 294-120(2) of the IT(TP) Act 1997]*

3.349 The immediate consequence of the superannuation fund deferring the capital gain is the capital gain is disregarded. This ensures the capital gain is not brought to account in the 2016-17 income year. *[Schedule 1, item 34, subsection 294-120(3) of the IT(TP) Act 1997]*

Quantifying the deferred notional gain

3.350 The object of the deferral is to bring to account, in a future income year, the amount that would have been brought to account and subject to tax in the 2016-17 income year if the deferral did not occur.

3.351 Simply deferring the capital gain amount would fail to neutralise the effect of changes in the superannuation fund's circumstances (for example, regarding the existence of capital losses and the proportion of assets supporting superannuation income stream benefit liabilities).

3.352 To achieve the above object, a number of adjustments are made when calculating the deferred notional gain in the 2016-17 income year and additional adjustments are made in the year in which the gain is brought to account.

3.353 The deferred notional gain is calculated by hypothesising the net capital gain of the superannuation fund for the 2016-17 income year as if the deferral did not occur and a capital gain arose from the fund's choice to apply CGT relief. *[Schedule 1, item 34, paragraph 294-120(4)(a) and subsection 294-120(8) (definition of 'deferred notional gain') of the IT(TP) Act 1997]*

3.354 The deferred notional gain is calculated by reference to the net capital gain of the superannuation fund, rather than the capital gain on the relevant asset, to incorporate any CGT discount that applied to the gain (the CGT discount is applied as part of the net capital gain calculation in section 102-5 of the ITAA 1997). The CGT discount will apply to the capital gain if the fund acquired the asset on or before 30 June 2016, 12 months prior to the application of CGT relief.

3.355 In calculating the hypothetical net capital gain of the fund, other capital gains and losses that arose during the income year, and prior year unapplied net capital losses, are disregarded. The purpose of this exclusion is to isolate the impact of the hypothesised gain. Capital losses are not taken into account in calculating the deferred notional gain but may be applied against that amount when it is brought to account in a later income year. *[Schedule 1, item 34, paragraphs 294-120(4)(b), (c) and (d) of the IT(TP) Act 1997]*

3.356 Once the hypothetical net capital gain amount is calculated, the deferred notional gain can be calculated as the non-exempt proportion of the gain. The non-exempt proportion is the amount of the net capital gain that would have been subject to tax if the deferral did not occur. The non-exempt proportion is worked out as the proportion of the superannuation fund's unsegregated assets that supported superannuation benefit liabilities (other than superannuation income stream benefit liabilities) throughout the 2016-17 income year. [*Schedule 1, item 34, subsection 294-120(8) (definition of '2016-17 non-exempt proportion') of the IT(TP) Act 1997*]

Example 3.62: Calculating a deferred notional gain

In Example 3.61, it was shown that, if they did not elect to defer the capital gain, Claire and Ashley's SMSF would include just over \$40,000 in its assessable income in relation to the deemed sale of the fund's asset in the 2016-17 income year.

If the fund instead chose to defer the capital gain, the fund's deferred notional gain would be the same amount. The capital gain would be disregarded in the 2016-17 income year and the deferred notional gain would be brought to account in a future year.

Example 3.63: Disregarding capital losses

Further to Example 3.61, assume the fund had unapplied net capital losses from a prior year of \$90,000. If the fund chooses not to defer the capital gain, its net capital gain would be \$60,000, calculated by reducing the gain of \$180,000 by the net capital loss from a prior year and then applying the one-third CGT discount. Once the exempt proportion for the 2016-17 income year (just under two-thirds) is applied, an amount of just over \$20,000 would be included in the fund's assessable income for the 2016-17 income year.

However, if the fund chose to defer the capital gain, its deferred notional gain would still be just over \$40,000 because capital losses are disregarded in working out the deferred notional gain. The fund would still have the \$90,000 unapplied net capital loss to apply against future capital gains (including the gain that arises when the deferred notional gain is brought to account).

Bringing the deferred notional gain to account

3.357 If the CGT asset is sold or otherwise realised (that is, there is a realisation event) on or after 1 July 2017 the deferred notional gain is brought to account in the income year that the realisation event happens. [*Schedule 1, item 34, subsections 294-120(5) of the IT(TP) Act 1997*]

3.358 When the deferred notional gain is brought to account, it is brought to account as a deemed capital gain. Consistent with the object of bringing to account the amount of the gain that would be subject to tax in the 2016-17 income year, a number of modifications are made to prevent additional adjustments from applying based on circumstances in the income year the realisation event happens. *[Schedule 1, item 34, paragraph 294-120(5)(a) of the IT(TP) Act 1997]*

3.359 The capital gain is not associated with any particular CGT event. For the purposes of bringing the deferred notional gain to account, section 102-20 of the ITAA 1997 is disregarded. This is necessary because that section specifies that a capital gain can only arise where a CGT event has happened. *[Schedule 1, items 3 and 34, note 7 to section 102-20 of the ITAA 1997 and paragraph 294-120(5)(b) of the IT(TP) Act 1997]*

3.360 The deemed capital gain is treated as not being a discount capital gain. This reflects that the CGT discount (if any) that applied to the asset on its deemed sale on 30 June 2017 was already taken into account in calculating the deferred notional gain. This provision does not affect the CGT discount that may be available in respect of the realisation of assets the superannuation fund is deemed to have reacquired on 30 June 2017. *[Schedule 1, item 34, paragraph 294-120(5)(c) of the IT(TP) Act 1997]*

3.361 A final modification is made to ensure a proportion of the deferred notional gain is not exempt under section 295-390 of the ITAA 1997. This is because only the 2016-17 non-exempt proportion of the net capital gain was included in the calculation of the deferred notional gain. It is therefore not necessary to apply the proportion that applies to the fund in the gain year. *[Schedule 1, item 34, subsection 294-120(6) of the IT(TP) Act 1997]*

3.362 Section 121-20 of the ITAA 1997 provides that records must be kept for every act, transaction, event or circumstances that can reasonably be expected to be relevant in working out whether a capital gain or loss arises from a CGT event. Records are required to be kept whether the CGT event has already happened or will happen in the future.

3.363 Where a superannuation fund has chosen to defer a capital gain that arises from the fund choosing to apply CGT relief the trustee of the fund will be aware that a CGT event will happen in the future to bring the deferred notional gain to account when the asset is sold or otherwise realised.

3.364 Therefore, the superannuation fund must, at a minimum, keep records of the assets to which CGT relief was applied and the 2016-17 non-exempt proportion of the deferred notional gains for these assets so that when capital gains or losses on those assets are later realised

the deferred notional gain can be brought to account in that future income year.

Example 3.64: Bringing a deferred notional gain to account

Further to Example 3.62, in June 2021, the fund sells the asset for \$3.3 million. The general CGT provisions apply to this sale giving rise to CGT event A1 and a capital gain of \$300,000. The CGT discount applies to this gain because the asset was held for more than 12 months after CGT relief was applied.

The sale of the asset requires the \$40,000 deferred notional gain to be brought to account in the 2020-21 income year as a capital gain.

The fund's net capital gain is just over \$240,000 (\$200,000 for the discounted capital gain on the sale plus just over \$40,000 for the deferred notional gain).

The fund's exempt proportion for the 2020-21 income year is calculated as 50 per cent, which is Claire's remaining income stream as a proportion of the total value of the fund. However this exemption does not apply to the deferred notional gain, as the deferred notional gain amount has already factored in the 2016-17 exempt proportion.

As such, the fund's assessable income for the 2020-21 income year is just over \$140,000 (50 per cent of the \$200,000 component of the net capital gain plus the deferred notional gain).

Example 3.65: Choosing not to apply CGT relief

Genevieve and Katia have an SMSF supported by a single asset with a market value of \$3 million. The fund uses the proportionate method to calculate the proportion of income from the asset that is exempt income, with two-thirds of the asset supporting Genevieve's \$2 million income stream account and one-third supporting Katia's \$1 million accumulation account.

To comply with the transfer balance cap, Genevieve partially commutes \$500,000 of her income stream account back to the accumulation phase on 30 June 2017, leaving her with an income stream worth \$1.5 million.

The cost base for the asset is \$2.75 million, meaning that it has already accrued unrealised capital gains of \$250,000. However, the fund anticipates having a greater proportion of exempt current pension income by the time the asset will be sold, as Katia is close to retirement. Therefore, if the fund waits until the asset is sold they are likely to pay less CGT than if they apply relief in 2016-17. The fund does not lodge a choice in relation to applying CGT relief; the cost base of the asset remains \$2.75 million.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016

3.365 Schedule 1 to the Treasury Laws Amendment (Fairer and Sustainable Superannuation) Bill 2016 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

3.366 When an individual accesses their superannuation (for example, because they have retired), they may take it in the form of a superannuation lump sum or a superannuation income stream such as a pension, or a combination of the two. If they commence a superannuation income stream, income earned on the ongoing investment of the capital amount benefits from an earnings tax exemption. This exemption is available to the fund for the benefit of members. Individuals in receipt of a superannuation income stream, and the assets supporting those income streams, are said to be in the retirement phase.

3.367 Schedule 1 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 imposes a \$1.6 million cap (the transfer balance cap) on the amount of capital that can be transferred to the retirement phase of superannuation. The cap applies from 1 July 2017 and is intended to limit the extent to which the retirement phase interests of high wealth individuals attract an earnings tax exemption.

3.368 Defined benefit lifetime pensions and certain other superannuation income streams subject to commutation restrictions are subject to commensurate taxation treatment. Schedule 1 introduces additional income tax rules on recipients of these defined benefit income streams benefits in excess of \$100,000 per annum to achieve a broadly commensurate taxation outcome. An equivalent outcome to the operation of the transfer balance cap is achieved, albeit in a different manner, recognising that commutation restrictions make it impractical for individuals to reduce their benefit by an excess amount.

3.369 The Parliamentary Joint Committee on Human Rights has previously noted that superannuation changes are likely to engage the right to social security in article 9 and the right to an adequate standard of living in article 11 of the International Covenant on Economic, Social, and Cultural Rights.

3.370 Australia's retirement income system consists of three elements commonly referred to as the three pillars: the age pension, compulsory superannuation contributions, and voluntary savings including voluntary contributions to superannuation.

3.371 The first pillar, the age pension, provides a minimum safety net of income in retirement, and is the primary method through which Australia meets its obligations under article 9 of the International Covenant on Economic, Social, and Cultural Rights and article 11 as far as it relates to income in retirement.

3.372 The transfer balance cap falls within the pillars of mandatory and voluntary superannuation contributions.

3.373 Superannuation tax concessions are intended to encourage people to save for their retirement. They are not intended to provide people with the opportunity for tax minimisation or for estate planning. As earnings from retirement phase superannuation interests are tax-free they are a desirable investment choice for individuals. The \$1.6 million transfer balance cap reduces superannuation tax concessions to ensure the superannuation concessions are appropriately targeted and sustainable for future generations. It is estimated to affect less than one per cent of Australians with a superannuation interest. A superannuation interest with a value of \$1.6 million could purchase a superannuation income stream that provides an annual income of around four times the level of the single age pension.

Human rights implications

3.374 Schedule 1 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 does not engage any of the applicable rights or freedoms.

Conclusion

3.375 Schedule 1 to Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 is compatible with human rights as it does not raise any human rights issues.

Superannuation (Excess Transfer Balance Tax) Imposition Bill 2016 — Transfer balance cap (see Chapter 3)

3.376 The Superannuation (Excess Transfer Balance Tax) Imposition Bill 2016 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

3.377 The Superannuation (Excess Transfer Balance Tax) Imposition Bill 2016 imposes excess transfer balance tax for a person who has an excess transfer balance. The overview of the transfer balance cap is explained in paragraphs 3.364 to 3.371.

Human rights implications

3.378 Consistent with the view expressed in paragraphs 3.372 to 3.373, the Superannuation (Excess Transfer Balance Tax) Imposition Bill 2016 does not engage any of the applicable rights or freedoms.

Conclusion

3.379 The Superannuation (Excess Transfer Balance Tax) Imposition Bill 2016 is compatible with human rights as it does not raise any human rights issues.

Chapter 4

Concessional superannuation contributions

Outline of chapter

- 4.1 Schedule 2 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 (the TLA Bill) reduces:
- the annual concessional contributions cap to \$25,000 (from \$30,000 for those aged under 49 at the end of the previous financial year and \$35,000 otherwise); and
 - the threshold at which high-income earners pay Division 293 tax on their concessional contributions to superannuation to \$250,000 (from \$300,000).
- 4.2 Schedule 2 also amends how concessional contributions are determined to ensure that contributions and amounts included in concessional contributions in respect of constitutionally protected funds and unfunded defined benefit superannuation schemes count towards an individual's concessional contributions cap.
- 4.3 All references in this Chapter are to the *Income Tax Assessment Act 1997 (ITAA 1997)* unless otherwise specified. All legislative amendments referred to in this Chapter are contained in the TLA Bill 2016.

Context of amendments

- 4.4 This measure forms part of the Government's Superannuation Reform Package announced in the 2016-17 Budget. It improves the fairness and sustainability of the superannuation system.
- 4.5 The current treatment of concessional superannuation contributions means high-income earners disproportionately benefit from the superannuation tax concessions. This is, in part, because they have the capacity to make greater superannuation contributions and also benefit more from these contributions being included in the income of the fund rather than in their assessable income. As high-income earners will

generally save for their retirement, both within and outside the superannuation system, these concessions are poorly targeted.

4.6 Reducing the annual cap on concessional contributions will require high-income individuals to hold a larger portion of their savings outside the concessional tax superannuation environment. This reduces their ability to utilise the superannuation system as a tax advantaged savings vehicle.

4.7 Lowering the threshold at which the Division 293 tax applies ensures that the tax concession provided to those on high incomes is more closely aligned with the tax concession provided to low and middle-income earners.

Reducing the cap on concessional contributions

4.8 Prior to these amendments, the annual cap on concessional contributions to superannuation for a financial year was \$30,000 for those aged under 49 at the end of the previous financial year and \$35,000 otherwise (section 291-20 of the ITAA 1997 and section 291-20 of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997)).

4.9 Further, any increases in the general concessional contributions cap were rounded down to the nearest \$5,000 increment, with no increase applying if the increase would be less than \$5,000. The \$35,000 transitional cap was not subject to indexation, with the intention that eventually it would be overtaken by the general cap and at that time the same cap would apply regardless of age.

Lowering the threshold for Division 293 tax

4.10 Prior to these amendments, if the sum of an individual's:

- income for surcharge purposes less reportable superannuation contributions for an income year (broadly their taxable income disregarding investment losses, plus any reportable fringe benefits); and
- low tax contributions for the corresponding financial year (generally, their concessional contributions less their excess concessional contributions);

exceeded \$300,000, the individual was required to pay Division 293 tax.

4.11 This income test provides a broader definition of income than some other income tests but is considered to more accurately reflect whether an individual is a high-income earner.

4.12 Division 293 tax was payable by the individual at a rate of 15 per cent on the lesser of:

- the amount by which that sum exceeded \$300,000; or
- the individual's low tax contributions (see section 293-25).

4.13 This means Division 293 tax applied to the whole amount of an individual's low tax contributions if an individual's income (as modified above) exceeded \$300,000. Otherwise the additional tax was only imposed on the portion of the contributions that took the sum of the individual's relevant contributions and income over \$300,000.

Concessional contributions and constitutionally protected funds

4.14 Prior to these amendments, contributions to accumulation superannuation interests could not be concessional contributions if made to a constitutionally protected fund because they were explicitly excluded from counting as concessional contributions by subparagraph 291-25(2)(c)(iii). Contributions made to constitutionally protected funds also did not meet the requirements to be a concessional contribution in paragraph 291-25(2)(b) because constitutionally protected funds do not have assessable income.

4.15 Further, notional taxed contributions to defined benefit superannuation interests could not be concessional contributions if they related to a constitutionally protected fund. This is because Subdivision 291-C (which contains the rules counting certain amounts that relate to defined benefit interests as concessional contributions) did not apply for constitutionally protected funds (refer subsection 291-160(2)).

Concessional contributions and defined benefit interests

4.16 Subdivision 291-C contains rules that apply to determine concessional contributions for an individual with one or more superannuation interests that are defined benefit interests (broadly, interests where an individual's entitlement to a benefit is defined by reference to their remuneration or a fixed amount — see section 291-175). This is because contributions to defined benefit schemes may not be made specifically in respect of, or directly allocated to individual members. Rather, they are paid into a fund on an aggregate basis from which benefits are paid to members based on their final salary, length of service or other specified factors (rather than just an accumulation of contributions and earnings). Additionally, some defined benefit schemes are wholly or partially unfunded, meaning that the payment of the benefit to the individual is not sourced from contributions to the scheme.

4.17 If an individual has a defined benefit interest for an income year, their concessional contributions include the amount of their notional taxed contributions for a financial year in respect of that interest but no other contributions relating to that interest.

4.18 An individual's notional taxed contributions are determined using the approach set out in Subdivision 291-C of the ITAA 1997 and Subdivision 292-D and Schedule 1A to the *Income Tax Assessment Regulations 1997*. They are broadly equivalent to the contributions that would have been required in that year to fund the individual's expected final benefits. Notional taxed contributions are only calculated for defined benefit schemes to the extent that the schemes hold assets and are subject to tax. As a result, an individual's notional taxed contributions in respect of a defined benefit interest in a defined benefit scheme that is unfunded or a constitutionally protected fund are generally nil. Similarly, if a scheme is only partially funded, an individual's notional taxed contributions in respect of the scheme do not reflect the accrued benefit.

4.19 Transitional rules apply in determining an individual's notional taxed contributions for certain defined benefit interests that an individual held on 5 September 2006 or 12 May 2009 respectively. If an individual's notional taxed contributions for such an interest for a financial year would exceed the concessional contributions cap for that year, they will instead be treated as being equal to the cap (see Subdivision 291-C of the (IT(TP)A 1997)).

4.20 For Division 293 tax, an individual's low tax contributions do not include their notional taxed contributions, but instead include their defined benefit contributions. An individual's defined benefit contributions are defined, for most purposes, in Subdivision 293-DA of and Schedule 1AA to the *Income Tax Assessment Regulations 1997*.

4.21 The amount of an individual's defined benefit contributions is generally the same as the amount of their notional taxed contributions for funded defined benefit interests. However, the calculation of defined benefit contributions differs for unfunded defined benefit interests. The method used for calculating defined benefit contributions for these types of interests does not rely upon the scheme holding assets and paying tax. As a result, the amount of an individual's defined benefit contributions for such interests generally better reflects the benefits that accrue to the individual.

Summary of new law

4.22 The measure reduces:

- the annual concessional contributions cap to \$25,000 (from \$30,000 for those aged under 49 at the end of the previous financial year and \$35,000 otherwise); and
- the threshold at which high-income earners pay Division 293 tax on their concessional contributions (otherwise referred to as low tax contributions in this Chapter) to superannuation to \$250,000 (from \$300,000).

4.23 The measure also amends how concessional contributions are determined to ensure contributions and certain other amounts relating to constitutionally protected funds and unfunded defined benefit schemes count towards an individual’s concessional contributions cap in the same way as they would for other superannuation funds. Previously, these amounts did not count against a member’s concessional contributions cap. This meant that members of these schemes were able to make additional concessional contribution to other superannuation funds. Counting these amounts against a member’s cap means that additional contributions are only possible to the extent the member has remaining cap space. However, concessional contributions in respect of constitutionally protected funds and unfunded defined benefit schemes by themselves cannot result in a member’s concessional contributions cap being exceeded. This is because these interests are subject to taxation in the benefits phase at marginal tax rates less an offset, unlike taxed accumulation scheme interests. However, members will have excess concessional contributions if they have other concessional contributions and as a result their total concessional contributions exceed the cap.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Annual concessional contributions cap	
<p>The cap on concessional contributions for a financial year is \$25,000 for all individuals.</p> <p>The cap is indexed and increases in increments of \$2,500 in line with average weekly ordinary time earnings (AWOTE).</p>	<p>The cap on concessional contributions for a financial year is:</p> <ul style="list-style-type: none"> • \$30,000 for individuals aged under 49 years at the end of the last financial year; and • \$35,000 for individuals aged 49 and over at that time.

<i>New law</i>	<i>Current law</i>
	The \$30,000 cap is indexed and increases in increments of \$5,000 in line with AWOTE.
Division 293 tax threshold	
Division 293 tax applies to an individual for an income year if the total of the individual's combined income for surcharge purposes and concessional contributions exceeds \$250,000.	Division 293 tax applies to an individual for an income year if the total of the individual's combined income for surcharge purposes and concessional contributions exceeds \$300,000.
Concessional contributions — constitutionally protected funds and defined benefit schemes	
<p>Contributions and amounts in respect of constitutionally protected funds and unfunded defined benefit schemes count towards an individual's concessional contributions cap.</p> <p>The amendments ensure concessional contributions included as a result of these amendments are not treated as excess concessional contributions and subject to tax.</p> <p>However, counting such contributions towards an individual's concessional contributions cap limits their ability to make further concessional contributions. It may result in tax consequences for the individual in relation to their other concessional contributions.</p>	<p>Contributions to constitutionally protected funds do not count towards an individual's concessional contributions cap. Also no amount is included in concessional contributions in respect of a defined benefit interest in a constitutionally protected fund.</p> <p>The rules for calculating a taxpayer's concessional contributions in respect of their defined benefit interests in unfunded defined benefit schemes result in the amount of these contributions being zero for the purpose of the concessional contribution cap.</p>

Detailed explanation of new law

Annual concessional contributions cap

Cap amount and indexation

4.24 Schedule 2 to the TLA Bill reduces the concessional contributions cap for a financial year to \$25,000 (from \$30,000 for those individuals aged under 49 at the end of the previous financial year and \$35,000 otherwise). This \$25,000 concessional contributions cap applies regardless of an individual's age. *[Schedule 2, items 1 and 9, paragraph 291-20(2)(a) of the ITAA 1997 and Subdivision 291-B of the IT(TP)A 1997]*

4.25 The amount of the concessional superannuation contributions cap is set at \$25,000 for the 2017-18 financial year. It is subject to annual indexation in later years (subject to rounding — see paragraph 4.26). Indexation applies to the cap for the financial year in accordance with the growth in the annual rate of full-time Average Weekly Ordinary Time Earnings (AWOTE). [*Schedule 2, item 1, paragraph 291-20(2)(b) and Schedule 11, item 6, section 960-285*]

4.26 Increases in the cap as a result of indexation are rounded down in increments. The amendments lower the increments at which the cap is increased as a result of indexation. Prior to the amendments, increases in the cap were rounded down to the nearest multiple of \$5,000. Schedule 11 to the TLA Bill revises the indexation rules so that increases are instead rounded down to the nearest multiple of \$2,500, resulting in more frequent increases. Accordingly, the cap increases only once indexation results in the threshold equalling or exceeding a multiple of \$2,500. [*Schedule 11, item 6, column 3 of item 2 in the table in section 960-285*]

Example 4.1: Concessional contributions cap

During the 2017-18 income year, concessional contributions made by Oliver and his employer to Oliver's superannuation fund total \$28,000. The concessional contributions cap is \$25,000. Oliver's concessional contributions exceed this cap. Accordingly, Oliver has concessional contributions of \$25,000 and excess concessional contributions of \$3,000.

The \$3,000 is included in Oliver's assessable income and is taxed at his marginal tax rate. Consistent with the prior law, Oliver can elect to withdraw up to 85 per cent of the amount of these excess concessional contributions (the amount less the 15 per cent tax already paid by the fund), or retain the full amount in the superannuation system. He also receives a tax offset equal to 15 per cent of the amount of the excess concessional contribution, to compensate for the tax paid by his superannuation fund. Any excess concessional contribution amount retained in superannuation will be a non-concessional contribution and count towards Oliver's annual non-concessional contributions cap.

Division 293 tax on high-income earners

4.27 Schedule 2 to the TLA Bill reduces to \$250,000 (from \$300,000) the threshold at which high-income earners pay Division 293 tax on their concessionally taxed contributions. The threshold continues to be based on the total of an individual's income for surcharge purposes for an income year (within the meaning of the income tax law) and their low tax contributions for the corresponding financial year. The amendments do not change the method for calculating these amounts

other than the change to the level of the threshold. [*Schedule 2, item 18, subsection 293-20(1)*]

Example 4.2: Division 293 tax

During the 2017-18 income year, the sum of Tegan's income for surcharge purposes and her low tax contributions is \$295,000. Tegan is therefore required to pay an amount of tax under Division 293.

Tegan exceeded the \$250,000 threshold by \$45,000 (\$295,000 less \$250,000). Tegan's low tax contributions for 2017-18 are \$25,000. Therefore her taxable contributions are \$25,000, being the lesser of these two amounts.

The Division 293 tax is applied at a rate of 15 per cent to Tegan's taxable contributions of \$25,000. Accordingly, Tegan is required to pay \$3,750 in Division 293 tax for the 2017-18 income year.

Concessional contributions — constitutionally protected funds and defined benefit schemes

4.28 Schedule 2 to the TLA Bill better targets government support for retirement savings by amending the income tax law to count contributions and certain other amounts in respect of constitutionally protected funds and unfunded defined benefit schemes towards an individual's concessional contributions cap.

4.29 The amendments also ensure concessional contributions included as a result of these amendments are not treated as excess concessional contributions and subject to tax. However, counting such contributions towards an individual's concessional contributions cap limits their ability to make further concessional contributions. This may result in tax consequences for the individual in relation to their other concessional contributions.

Constitutionally protected funds — accumulation interest

4.30 Schedule 2 to the TLA Bill makes amendments to treat a contribution to a constitutionally protected fund as a concessional contribution within the meaning of the ITAA 1997. This treatment also applies for amounts covered under subsection 291-25(3) (certain amounts in a complying superannuation plan allocated by the superannuation provider) in respect of a constitutionally protected fund.

4.31 This is achieved by removing contributions to constitutionally protected funds from the category of contributions that are specifically treated as not being concessional contributions. Further to this, a contribution to a constitutionally protected fund is treated as forming part of assessable income solely for the purposes of determining if it is a concessional contribution (see paragraph 291-25(2)(b)). Such contributions would otherwise not be concessional contributions because constitutionally protected funds do not have assessable income. These amendments ensure that such contributions by themselves do not result in excess concessional contributions and therefore do not have these tax consequences. Commensurate treatment of untaxed schemes is obtained by imposing tax in the benefits phase at marginal tax rates less an offset. Benefits from taxed accumulation schemes, in contrast, are generally tax free. [*Schedule 2, items 2 and 3, paragraphs 291-25(2)(c) and (d) and subsection 291-25(4)*]

4.32 Prior to these amendments, a contribution (and amounts covered by subsection 291-25(3)) did not count towards the member's concessional contributions cap if it was made in respect of a constitutionally protected fund. This allowed members of these funds to receive or accrue any amount of employer contributions, other contributions and amounts to such funds without affecting their ability to have concessional contributions made to other superannuation interests.

4.33 These amendments remove this advantage by treating such contributions and amounts in respect of constitutionally protected funds as concessional contributions.

Rules for defined benefit interests (including defined benefit interests in constitutionally protected funds)

4.34 Schedule 2 to the TLA Bill amends the rules for calculating a member's concessional contributions for a financial year in respect of a defined benefit interest and extends these rules to defined benefit interests in constitutionally protected funds. The amendments ensure that the calculation of notional amounts representing contributions to unfunded defined benefit schemes and both funded and unfunded defined benefit constitutionally protected funds accurately reflects the value of a member's accrued benefits. The amendments ensure individuals with such superannuation interests are not unduly advantaged in saving for retirement.

4.35 The amendments provide that a taxpayer's concessional contributions for a financial year in respect of a defined benefit interest (including a defined benefit interest in a constitutionally protected fund) includes the amount by which the taxpayer's defined benefit contributions exceed their notional taxed contributions. This amount is intended to be a

proxy for contributions that would have been needed to support unfunded defined benefits scheme interests accrued for that financial year. The amendments ensure employer contributions and notional contributions in respect of a defined benefit interest in a constitutionally protected fund are included as concessional contributions. A member's concessional contributions for a financial year will still include the amount of their notional taxed contributions in respect of their other defined benefit interests, as well as any amounts in respect of interests that are not defined benefit interests currently required to be included (see paragraphs 291-165(a) and (b)). [Schedule 2, items 4 to 7, paragraph 291-165(1)(c), subsection 291-160(2) and sections 291-160 and 291-165]

4.36 An individual's defined benefit contributions are defined, for most purposes, in Subdivision 293-DA and Schedule 1AA to the *Income Tax Assessment Regulations 1997* (see paragraphs 4.20 to 4.21 above for more information). For the purposes of working out the individual's defined benefit contributions for a financial year, certain modifications to the meaning of defined benefit contributions must be disregarded. These modifications reduce these contributions to nil for most contributions to constitutionally protected funds and to interests established under the *Judges' Pensions Act 1968* in subsections 293-150(3) and 293-195(2). These modifications must be disregarded as such amounts are not intended to be treated as nil for the purpose of the concessional contributions cap. [Schedule 2, item 7, subsection 291-165(2)]

Capping the value of newly included concessional contributions

4.37 The amendments (described in paragraphs 4.28 to 4.36 above) are designed to ensure that contributions and amounts in respect of constitutionally protected funds and unfunded defined benefit schemes count towards an individual's concessional contributions cap. This limits the ability of the individual to make further concessional contributions to other funds and ensures a consistent treatment with individuals that are not members of such funds.

4.38 The amendments are only intended to limit the ability of the individual to make other contributions (and are not intended to disadvantage individuals who have superannuation interests subject to the transitional rules described at paragraph 4.16 above).

4.39 The amendments achieve this by providing that the sum of the following amounts that are concessional contributions are treated as equal to an individual's concessional contributions cap for the financial year if they would otherwise exceed that cap for that year:

- contributions for the individual for the financial year in respect of a constitutionally protected fund (see paragraphs 4.28 to 4.36 above);
- their notional taxed contributions covered by the 2006 or 2009 transitional arrangements (see section 291-170 of the IT(TP)A 1997— refer to paragraph 4.19 above); and
- the amount (if any) by which their defined benefit contributions (other than contributions covered by the first circumstance above) for the financial year exceeds their notional taxed contributions for the financial year (see paragraphs 4.34 to 4.36 above).

[Schedule 2, item 8, subsections 291-370(1) and (3)]

4.40 Amounts covered by paragraphs 291-165(1)(b) or (c), or subsection 291-25(3) are treated as contributions for the purposes of the first circumstance in the paragraph above. This means that contributions for an individual include amounts that are covered by subsection 291-25(3) relating to their interests in a constitutionally protected fund. These amounts will be included in the amount treated as being equal to the concessional contributions cap for an individual if they would otherwise be concessional contributions (including amounts that are concessional contributions because of paragraph 291-165(1)(a)). It also means contributions for an individual include amounts relating to their defined benefit interests in a constitutionally protected fund where the amounts are covered by paragraphs 291-165(1)(b) or (c). These amounts will also be included in the amounts treated as being equal to the concessional contributions cap for the individual to the extent those amounts would otherwise be concessional contributions. *[Schedule 2, item 8, subsection 291-370(2)]*

4.41 Concessional contributions made in excess of the concessional contributions cap would, but for the rule described in paragraph 4.39, be treated as excess concessional contributions. Excess concessional contributions are included in the assessable income of the individual (with a tax offset provided to account for the tax expected to have been paid by the fund). The individual may either elect to withdraw such contributions from the superannuation fund or retain the contributions as non-concessional contributions (sections 291-15 and 292-90 of the ITAA 1997 and Division 95 of Schedule 1 to the *Taxation Administration Act 1953*). They may also be subject to the excess concessional contribution charge (Division 95 of Schedule 1 to the *Taxation Administration Act 1953*). These amendments ensure that such contributions do not result in excess concessional contributions and therefore do not have these tax consequences.

4.42 The amendments prevent any combination of the contributions and amounts described in paragraph 4.39 above by themselves causing the individual's concessional contributions for a financial year to exceed the concessional contributions cap of \$25,000 (indexed annually) (see paragraphs 4.24 and 4.25 above). [Schedule 2, item 8, subsection 291-370(1)]

Example 4.3: Contributions to constitutionally protected fund and unfunded defined benefit interest

Marvin has employer contributions to a constitutionally protected fund of \$20,000 for the 2017-18 financial year. Marvin also has defined benefit contributions of \$22,000 and notional taxed contributions for that financial year of \$18,000 in respect of defined benefit interests (which are also not interests in a constitutionally protected fund). The difference between Marvin's defined benefit contributions and his notional taxed contributions (\$4,000) represents contributions in respect of unfunded defined benefit interests.

Prima facie, Marvin's total concessional contributions for the financial year are equal to \$42,000. This is worked out by applying the rules introduced by these amendments and the current law, which provide that Marvin's concessional contributions are the sum of his contributions to constitutionally protected funds, his notional taxed contributions and the difference between his defined benefit contributions and his notional taxed contributions ($\$20,000 + \$18,000 + (\$22,000 - \$18,000)$).

However, as the sum of these amounts (which are all capped amounts described in paragraph 4.39) exceeds the concessional contributions cap of \$25,000, the cap for newly included concessional contributions introduced by these amendments applies to treat the sum of these contributions as equal to the concessional contributions cap. Therefore rather than having concessional contributions of \$42,000, Marvin is treated as having concessional contributions of \$25,000. Hence, Marvin does not exceed the concessional contributions cap for the 2017-18 financial year.

When benefits are paid from Marvin's constitutionally protected fund and his unfunded defined benefit scheme to him, they are subject to higher rates of taxation than his benefits paid from a taxed source.

4.43 These amendments are not intended to alter the outcomes for taxpayers that benefit from the existing transitional rules that apply to some defined benefit interests as described in paragraph 4.19. Instead, these amounts are included so that the interaction between these rules and the new cap does not result in individuals with interests affected by both arrangements being subject to excess contributions tax. For the purpose of these amendments, amounts are covered by the transitional rules where:

- section 291-170 of the IT(TP)A 1997 applies to treat their notional taxed contributions as equal to their concessional contributions cap; or
- section 291-170 of the IT(TP)A 1997 does not apply but would apply had the taxpayer's notional taxed contributions exceeded their concessional contributions cap (see paragraphs 291-170(2)(b) and 291-170(4)(b) of IT(TP)A 1997).

4.44 The following example illustrates how including these amounts prevents an anomalous outcome arising from the interaction between these transitional rules and the cap for concessional contributions now included by these amendments. [*Schedule 2, item 8, paragraph 291-370(1)(b)*]

Example 4.4: Interaction between transitional cap and cap for newly included concessional contributions

Anh has notional taxed contributions of \$26,000 for the 2017-18 income year to a defined benefit superannuation interest which are covered by the transitional rules in section 291-170 of IT(TP)A 1997. Anh also has contributions to a constitutionally protected fund of \$27,000.

Under section 291-170 of IT(TP)A 1997, Anh's notional taxed contributions are treated as equal to her concessional contributions cap (that is, \$25,000), as \$26,000 exceeds this cap. Therefore prima facie, Anh's concessional contributions are equal to \$52,000. This is worked out by adding her notional taxed contributions calculated under section 291-170 of IT(TP)A 1997 to her contributions to constitutionally protected funds (\$25,000 + \$27,000).

However, as the sum of these amounts (which are all capped amounts described in paragraph 4.39) exceeds the concessional contributions cap of \$25,000, the cap for newly included concessional contributions introduced by these amendments applies to treat the sum of these contributions as equal to the concessional contributions cap. Therefore rather than having concessional contributions of \$52,000, Anh is treated as having concessional contributions of \$25,000.

If these amendments did not apply to include amounts capped under the transitional rules, Anh's notional taxed contributions would be treated as equal to \$25,000 under section 291-170 of IT(TP)A 1997 and these amendments would then treat the \$27,000 of contributions to the constitutionally protected fund as equal to \$25,000. Therefore Anh would have had concessional contributions of \$50,000 (twice the concessional contributions cap). The amendments ensure that this outcome does not occur.

4.45 The amendments do not prevent a taxpayer from exceeding their concessional contributions cap as a result of having amounts other than those described in paragraph 4.39 above (uncapped contributions), or as a result of having some combination of uncapped contributions and amounts described in paragraph 4.39 above (capped contributions).

4.46 The following examples illustrate situations where an individual can exceed their concessional contributions cap as a result of having a combination of uncapped and capped contributions.

Example 4.5: Contributions to unfunded defined benefit scheme and accumulation fund

Ruby has a defined benefit interest in an unfunded superannuation scheme. Her defined benefit contributions in respect of the fund for the 2017-18 financial year exceed her notional taxed contributions for the financial year by \$30,000. This gives her a capped contribution amount of \$30,000.

Ruby also makes concessional contributions of \$15,000 in the same financial year to a superannuation fund (that is not a constitutionally protected fund) in which she has an accumulation interest. This gives her an uncapped contribution amount of \$15,000.

Her capped contributions exceed the concessional contributions cap of \$25,000. However, the amendments treat these contributions as being equal to the concessional contributions cap of \$25,000. The total of Ruby's additional contributions to her accumulation interest of \$15,000 is therefore treated as being in excess of her concessional contributions cap. Accordingly, these are excess concessional contributions.

Example 4.6: Contributions to unfunded defined benefit scheme and accumulation fund

Assume the same facts as Example 4.5 except that Ruby's defined benefit contributions exceed her notional taxed contributions for the financial year by \$20,000. This gives her a capped contribution amount of \$20,000.

As Ruby also makes uncapped superannuation contributions of \$15,000 her total concessional contributions are treated as being \$35,000. Accordingly, contributions of \$10,000 are treated as being in excess of her concessional contributions cap and are excess concessional contributions.

Consequential amendments

Concessional contributions annual cap and Division 293 tax

General

4.47 Schedule 2 to the TLA Bill makes a number of consequential amendments to the income tax law and the *Taxation Administration Act 1953*. [Schedule 2, items 14-19, sections 293-1, 293-5, 293-10 and subsections 293-155(1) and 293-200(1) of the ITAA 1997 and the note to subsection 133-15(1) in Schedule 1 to the Taxation Administration Act 1953]

Maximum contribution base

4.48 Part 3 of Schedule 2 also amends how the maximum contribution base is determined under the *Superannuation Guarantee (Administration) Act 1992*.

4.49 The maximum contribution base is the cap on the amount of an employee's salary and wages that is taken into account in determining an employer's liability for the superannuation guarantee charge for a quarter. In effect, employers do not need to make mandatory superannuation contributions in relation to the amount of an employee's ordinary time earnings that exceeds the maximum contribution base.

4.50 The maximum contribution base is \$51,620 per quarter in the 2016-17 financial year. Accordingly, the effective cap on contributions required to avoid being subject to the superannuation guarantee charge for a quarter in the 2016-17 financial year is \$4,903.90 (the maximum contribution base multiplied by the charge percentage for the quarter divided by 100 or \$51,620 multiplied by 0.095). Extended over an income year, this would result in annual contributions for 2016-17 totalling \$19,615.60.

4.51 Indexation of the new concessional contributions cap under these amendments is subject to different rounding rules than the maximum contribution base. This will result in the contributions required for an employee with ordinary time earnings equal to or more than the maximum contribution base exceeding the concessional contributions cap within a number of years. The amendments ensure that mandatory employer contributions cannot by themselves result in employees having excess concessional contributions.

4.52 To address this issue, Part 3 of Schedule 2 provides that if the maximum contribution base for a quarter effectively requires contributions to be made that, if paid over the year, would result in the employee's concessional contributions exceeding the concessional

contributions cap, the maximum contribution base is instead reduced to the amount that would not result in excess concessional contributions. This is determined by the following formula:

$$\text{Concessional contributions cap} \times \frac{100}{\text{charge percentage}} \times \frac{1}{4}$$

[Schedule 2, item 21, subsections 15(5) and (6) of the Superannuation Guarantee (Administration) Act 1992]

4.53 This means that an employer will not be subject to the superannuation guarantee charge if they do not make contributions that would be excess concessional contributions for an employee. With the new concessional contributions cap and charge percentage as at 1 July 2017, this would occur if the maximum contribution base for the quarter is greater than \$65,789.47.

4.54 This change affects whether an employer will be subject to the superannuation guarantee charge if they do not make superannuation contributions or sufficient contributions for an employee. It does not limit employers from making contributions or alter the terms of an employee's remuneration.

Concessional contributions — constitutionally protected funds and defined benefit schemes

4.55 These amendments include guidance material for Subdivision 291-CA of the ITAA 1997 and notes to assist users of the legislation. *[Schedule 2, items 7, 8, 10 and 11, section 291-165 of the ITAA 1997 and subsections 291-170(2) and (4) of the IT(TP)A 1997]*

4.56 These amendments ensure that the 2006 or 2009 transitional arrangements (described at paragraph 4.19 above) do not apply in relation to a defined benefit interest in a constitutionally protected fund. *[Schedule 2, item 12, subsection 291-170(6) of the IT(TP)A 1997]*

Application and transitional provisions

4.57 The amendments in Schedule 2 to the TLA Bill commence on the first day of the first quarter after Royal Assent. *[Item 2 in the table in section 2 of the TLA Bill]*

4.58 Part 1 of Schedule 2 to the TLA Bill applies in relation to the financial year starting on 1 July 2017 and later financial years. This means that the amendments will apply in relation to superannuation contributions made on or after 1 July 2017. *[Schedule 2, item 13]*

4.59 Part 2 of Schedule 2 to the TLA Bill applies in relation to the 2017-18 income year and later income years. *[Schedule 2, item 20]*

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016

4.60 Schedule 2 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

4.61 Schedule 2 reduces the annual cap applying to concessional contributions made to superannuation in a financial year to \$25,000 (from \$30,000 for those aged under 49 at the end of the previous financial year and \$35,000 otherwise).

4.62 Savings invested in superannuation are not generally taxed at an individual's personal tax rate. Instead, concessional contributions and earnings are generally taxed at a concessional, flat rate of 15 per cent (below most individuals' personal tax rate) in the accumulation phase.

4.63 To ensure that the fiscal cost of these concessional contributions and earnings are sustainable, annual caps are placed on the amount of concessional contributions that an individual can make without being subject to higher rates of tax under the excess contributions tax provisions.

4.64 Schedule 2 also reduces the tax concession that individuals with income and superannuation above \$250,000 receive on their concessional contributions by lowering the Division 293 income threshold from \$300,000 to \$250,000.

4.65 Schedule 2 also amends how concessional contributions are defined to ensure that contributions, including notional contributions, to constitutionally protected funds and unfunded defined benefit superannuation schemes count towards an individual's concessional contributions cap.

4.66 The Parliamentary Joint Committee on Human Rights has previously noted that the area of superannuation are likely to engage the

right to social security in article 9 and the right to an adequate standard of living in article 11 of the International Covenant on Economic, Social, and Cultural Rights.

4.67 Australia's retirement income system consists of three elements commonly referred to as the three pillars: the age pension, compulsory superannuation contributions, and voluntary savings including voluntary contributions to superannuation.

4.68 The first pillar, the age pension, provides for a minimum safety net of income in retirement, and is the primary method through which Australia meets its obligations under article 9 of the International Covenant on Economic, Social, and Cultural Rights and article 11 as far as it relates to income in retirement.

4.69 Concessional superannuation contributions fall within the pillars of mandatory and voluntary superannuation contributions.

4.70 The existing taxation treatment of concessional contributions disproportionately benefits high income earners both because they have more savings and because the relative discount on their marginal tax rate is greater. These changes are modest reductions in existing tax concessions, and will not prevent affected individuals from using superannuation to support an adequate standard of living in retirement.

Human rights implications

4.71 Schedule 2 does not engage any of the applicable rights or freedoms because it reduces, but does not remove, the generous superannuation tax concessions available to higher income individuals and does not affect lower income earners.

Conclusion

4.72 Schedule 2 is compatible with human rights as it does not raise any human rights issues.

Chapter 5

Non-concessional contributions

Outline of chapter

5.1 Schedule 3 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 (the TLA Bill) amends the annual non-concessional contributions cap from \$180,000 to \$100,000, introduces criteria for an individual to be eligible for the non-concessional contributions cap and makes other minor amendments in respect of the non-concessional contributions rules.

5.2 All references to legislative provisions in this chapter are references to the *Income Tax Assessment Act 1997* (ITAA 1997) and all legislative amendments referred to in this Chapter are contained in the TLA Bill 2016 unless otherwise stated.

Context of amendments

5.3 This measure forms part of the Government's Superannuation Reform Package originally announced in the 2016-17 Budget. The Government announced refinements to the non-concessional contributions cap on 15 September 2016. The measure will improve the sustainability and integrity of the superannuation system.

5.4 To ensure superannuation is being used to increase individuals' income in retirement, and not for tax minimisation or estate planning purposes, there are limits on the amount of non-concessional contributions individuals can make. By reducing the annual non-concessional caps and restricting their use to those with balances less than the general transfer balance cap, this measure will better target the tax concessions. This will encourage those who have aspirations to build their superannuation balance up to an amount equal to the general transfer balance cap, while retaining the flexibility to accommodate lump sum contributions from one-off events such as receiving an inheritance or selling a large asset.

Summary of new law

- 5.5 Schedule 3 to the TLA Bill:
- amends the annual non-concessional contributions cap from \$180,000 to \$100,000 (which is subject to indexation based on average weekly ordinary time earnings (AWOTE));
 - introduces a requirement that an individual must have a total superannuation balance at 30 June of the previous financial year of less than the general transfer balance cap in the relevant year (\$1.6 million in the 2017-18 financial year) to be eligible for the non-concessional contributions cap;
 - prevents payment of the government co-contribution in respect of an individual who is not eligible to make non-concessional contributions; and
 - makes other minor amendments in respect of the non-concessional contributions rules.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Annual non-concessional contributions cap	
<i>Amount of cap</i>	
<p>The annual non-concessional contributions cap is four times the annual concessional contributions cap.</p> <p>This equals \$100,000 (4 x \$25,000) in the 2017-18 financial year.</p> <p>Note: the annual concessional contributions cap has been reduced from \$30,000 to \$25,000 in Schedule 2 to the TLA Bill.</p>	<p>The annual non-concessional contributions cap is six times the annual concessional contributions cap.</p> <p>This equals \$180,000 (6 x \$30,000) in the 2016-17 financial year.</p>
<i>Indexation of cap</i>	
<p>The annual non-concessional contributions cap is indexed as the concessional contributions cap is indexed. The concessional contributions cap is indexed in \$2,500 increments in line with AWOTE.</p>	<p>The annual non-concessional contributions cap is indexed as the concessional contributions cap is indexed. The concessional contributions cap is indexed in \$5,000 increments in line with AWOTE.</p>

<i>New law</i>	<i>Current law</i>
<i>Eligibility criteria</i>	
<p>An individual must have a total superannuation balance of less than the general transfer balance cap on 30 June of the previous financial year to be eligible for the non-concessional contributions cap in the relevant financial year.</p> <p>The general transfer balance cap for the 2017-18 financial year is \$1.6 million, and is indexed in \$100,000 increments in line with the Consumer Price Index (CPI).</p>	<p>There is no total superannuation balance test to determine whether an individual is eligible for the non-concessional contributions cap.</p>
<i>Total superannuation balance</i>	
<p>An individual's total superannuation balance at a particular time is the sum of:</p> <ul style="list-style-type: none"> • the accumulation phase value of their superannuation interests; • if they have a transfer balance account, an adjusted balance for that transfer balance account; and • any rolled over superannuation benefits not reflected in the individual's accumulation phase value or balance of their transfer balance account, <p>reduced by the sum of any structured settlement contributions.</p>	<p>No equivalent.</p>
<i>Bring forward cap</i>	
<p>Individuals may be able to access a bring forward period for their non-concessional contributions cap of two or three times the annual cap, depending on their total superannuation balance.</p> <p>In the 2017-18 financial year, the amount of the cap an individual may bring forward is three times the annual cap over three years if their total superannuation balance is less than \$1.4 million, two times the annual cap over two years if their</p>	<p>Individuals can access a three year bring forward period for their non-concessional contributions cap of three times the annual cap.</p>

<i>New law</i>	<i>Current law</i>
<p>superannuation balance is above \$1.4 million, and nil if their superannuation balance is \$1.5 million or above.</p> <p>An individual's total superannuation balance is determined on 30 June of the previous financial year.</p> <p>Transitional arrangements apply to individuals who brought forward their non-concessional contributions cap in the 2015-16 or 2016-17 financial years.</p>	
Eligibility for government co-contribution	
<p>In addition to the existing eligibility requirements, individuals are not eligible for the government co-contribution in an income year if:</p> <ul style="list-style-type: none"> • their non-concessional contributions exceed their non-concessional contributions cap for that year; or • if, at 30 June of the previous year, their total superannuation balance equals or exceeds the general transfer balance cap. 	<p>Non-concessional contributions and total superannuation balances do not affect eligibility for the government co-contribution.</p>

Detailed explanation of new law

Annual non-concessional contributions cap

5.6 Individuals with a total superannuation balance of less than the general transfer balance cap (\$1.6 million in the 2017-18 financial year) at 30 June of the previous financial year, are eligible for the general (or annual) non-concessional contributions cap. *[Schedule 3, item 2, subsection 292-85(2)]*

5.7 The general non-concessional contributions cap is equal to four times the concessional contributions cap. This means that for the 2017-18 financial year, the general non-concessional contributions cap is \$100,000 (four times the \$25,000 concessional contributions cap). This does not include any increases in the concessional contributions cap due to the carry forward of unused concessional contributions cap. *[Schedule 3, item 2, paragraph 292-85(2)(a)]*

5.8 The concessional contributions cap is indexed and increases in increments of \$2,500 in line with AWOTE. Indexation of the concessional contributions cap automatically flows through to the non-concessional contributions cap. [*Schedule 11, item 6, subsection 960-285(7) table item 2*]

5.9 More information on the concessional contributions cap, including amendments to that cap made by the TLA Bill, is contained in Chapter 4 of this explanatory memorandum.

Non-concessional contributions

5.10 Non-concessional contributions are, generally, contributions made from an individual's after-tax income (that is, from income that has been taxed at their marginal rate) and are therefore not included in the assessable income of the superannuation fund. Individuals may choose to make non-concessional contributions to their superannuation because future earnings on these contributions within the superannuation system will be taxed at the concessional rate of 15 per cent.

5.11 In comparison, concessional contributions are made from pre-tax income, and generally included in the assessable income of the superannuation fund and taxed at the concessional rate of 15 per cent.

Eligibility criteria

5.12 An individual is eligible for the non-concessional contributions cap in a financial year if, at 30 June of the previous financial year, the individual's total superannuation balance was less than the general transfer balance cap in the relevant financial year. [*Schedule 3, item 2, subsection 292-85(2)*]

General transfer balance cap

5.13 The general transfer balance cap is \$1.6 million for the 2017-18 financial year and is subject to indexation on an annual basis in line with CPI, in \$100,000 increments. [*Schedule 11, item 6, subsection 960-285(7) table item 3*]

5.14 The general transfer balance cap is discussed in Chapter 3 of this explanatory memorandum.

Total superannuation balance

5.15 The concept of ‘total superannuation balance’ is inserted by Schedule 11. This concept is relevant for several measures in the Government’s 2016-17 Budget Superannuation Reform Package and ensures consistent treatment for the valuation of an individual’s total superannuation balance across all of these measures.

5.16 An individual’s total superannuation balance, at a particular time, is the sum of the following:

- the accumulation phase value of their superannuation interests that are not in the retirement phase at that time;
- the retirement phase value of their superannuation interests which is the balance of their transfer balance account at that time (but not less than nil), adjusted to:
 - reflect the current value of account-based superannuation interests in the retirement phase; and
 - disregard any debits that have arisen in respect of structured settlements; and
- the amount of each roll-over superannuation benefit paid at or before that time, that is received after that time, and not reflected in the accumulation phase value or the retirement phase value.

This sum is then reduced by the sum of any structured settlement contributions.

[Schedule 11, items 2, 3, 4, 7 and 9, section 307-205, subsection 307-205(2), section 307-230 and the definitions of ‘account-based annuity’, ‘accumulation phase value’, ‘total superannuation balance’, ‘transfer balance’ and ‘transfer balance account’ in subsection 995-1(1)]

Accumulation phase value

5.17 The first component of an individual’s total superannuation balance is the accumulation phase value. The default rule for determining the accumulation phase value of an individual’s superannuation interest at a particular time is the total amount of superannuation benefits that would become payable, if the individual voluntarily ceased the interest at that time. Otherwise the accumulation phase value is the value of the superannuation interest as set out in the *Income Tax Assessment Regulations 1997*. *[Schedule 11, items 2, 3, 4, 7 and 9, section 307-205, subsection 307-205(2), paragraph 307-230(1)(a) and the definitions of ‘accumulation phase value’ and ‘total superannuation balance’ in subsection 995-1(1)]*

5.18 Where an individual had a single superannuation interest in a superannuation entity regulated under the *Superannuation Industry (Supervision) Act 1993*, this amount would be the individual's withdrawal benefit, which is the amount of benefits that would be payable to the individual, and/or rolled over to another superannuation fund or retirement savings account, if the individual voluntarily ceased to be a member of the fund.

5.19 However, if an individual has more than one superannuation interest in a given superannuation entity it would be possible for an individual to cease an interest in the entity but still retain membership of the entity in respect of other interests. For example an individual, on resignation from employment, could be entitled to be paid a defined benefit income stream (with no lump sum equivalent) and also have an accumulation account balance with their fund. In these circumstances, only the value of the accumulation account would be included in the accumulation value.

5.20 The regulation making power enables alternative valuation rules to be prescribed for certain types of superannuation interests, or superannuation interests in specific funds, in circumstances where the default rule could lead to a nil or minimal valuation. [*Schedule 11, item 3, paragraph 307-205(2)(a)*]

Retirement phase value

5.21 The second component of an individual's total superannuation balance is the retirement phase value, which is the balance of their transfer balance account, adjusted by:

- disregarding the effect of certain credits and debits to the transfer balance account to reflect the current value of account-based superannuation interests in the retirement phase; and
- disregarding the effect of any debits to the transfer balance account that arose for a structured settlement contribution.

[Schedule 11, items 4 and 9, paragraph 307-230(1)(b) and subsections 307-230(2), (3) and (4) and the definition of 'total superannuation balance' and 'transfer balance' and 'transfer balance account' in subsection 995-1(1)]

5.22 Schedule 1 to the TLA Bill, as explained in Chapter 3, introduces the concept of a ‘transfer balance account’. This account represents the net amount of capital an individual has transferred to their superannuation retirement phase.

5.23 An individual’s transfer balance account may be debited in certain circumstances, and it is possible for an individual’s transfer balance account to have a negative balance if their debits exceed their credits. However, for the purposes of the total superannuation balance, if an individual’s adjusted transfer balance account is less than nil, it is taken to be nil. [*Schedule 11, item 4, paragraph 307-230(1)(b)*]

Adjustments to the retirement phase value

Account-based income streams

5.24 The balance of an individual’s transfer balance account is adjusted for the purposes of working out their total superannuation balance to reflect the actual value of an interest in an account-based income stream at a particular time. All other superannuation income stream interests retain the value for the given interest attributed to the transfer balance account. [*Schedule 11, item 4, subsections 307-230(3) and (4)*]

5.25 Using this method ensures that an individual’s total superannuation balance is as up-to-date as possible without imposing an additional obligation on superannuation income stream providers to calculate other superannuation interest balances, for example for defined benefit interests, on an annual basis, as these interests have already been calculated for the purposes of the transfer balance account.

5.26 The adjustment to the transfer balance account balance disregards certain credit and debit amounts made to the account for superannuation interests that support an account-based superannuation income stream. An adjustment for the account balance of the income stream, being the value of the interest in the income stream if it is voluntarily ceased or is deemed to cease at that time, is made to the transfer balance account balance. The adjustment provisions cover all superannuation income streams for which there is an account balance attributable to a beneficiary being allocated, account-based or market linked pensions and annuities. [*Schedule 11, item 4, subsections 307-230(3) and (4)*]

5.27 An amendment to the *Superannuation Industry (Supervision) Regulations 1994* will be made to set out the meaning of an account-based annuity. [*Schedule 11, items 4 and 7, paragraph 307-230(4)(d) and the definition of ‘account-based annuity’ in subsection 995-1(1)*]

5.28 For further detail on the concept of a transfer balance account, see Chapter 3.

Structured settlement contributions

5.29 For the purposes of determining an individual's balance in their transfer balance account, any debits that arose under item 2 (relating to structured settlements) of the table in subsection 294-80(1) are disregarded. [*Schedule 11, item 4, subparagraph 307-230(2)(b)(i)*]

Roll-over superannuation benefit

5.30 The third component of the total superannuation balance is an individual's roll-over superannuation benefit that is paid at or before a time, which is received after that time, and not reflected in the individual's accumulation phase value or balance of the transfer balance account at 30 June of the relevant financial year. [*Schedule 11, item 4, paragraph 307-230(1)(c)*]

5.31 This third component is intended to capture amounts that are rolled-over at the end of a financial year that would not otherwise be accounted for in the accumulation phase value or retirement phase value of an individual's superannuation interests at a particular time because the amount is 'in transit'.

Example 5.1: Roll-over superannuation benefit

Jennifer has \$450,000 in the accumulation phase in her superannuation fund, Fund A.

On 29 June 2019 Jennifer requests Fund A to partially roll-over an amount of \$100,000 to Fund B. Fund B does not receive the \$100,000 roll-over superannuation benefit until 1 July 2019.

On 30 June 2019, Jennifer's total superannuation balance is the \$350,000 remaining in accumulation phase in Fund A, plus the \$100,000 roll-over superannuation benefit that is in transit to Fund B. This is because the roll-over amount was paid before 30 June 2019 but not received by Fund B until after that time, and it was not reflected in her accumulation phase value which is calculated at 30 June of that year.

Adjustment for structured settlement contributions

5.32 Once the sum of the accumulation phase value, retirement phase value (including the effect of any adjustments) and any roll-over amounts is calculated, this total is reduced by the sum of any structured settlement contributions. [*Schedule 11, item 4, paragraph 307-230(2)(a) and subparagraph 307-230(2)(b)(ii)*]

5.33 Schedule 11 provides that ‘structured settlement contribution’ has the meaning given by section 294-80. [*Schedule 11, item 9, subsection 995-1(1)*]

5.34 Subsection 294-80(2) provides that a structured settlement contribution is a contribution to a complying superannuation plan that satisfies the requirements of section 292-95 or if the contribution was made before 10 May 2006, the contribution would be covered by section 292-95 disregarding the following requirements (grandfathering rule):

- that the contribution is made within 90 days of the later of the day of receipt of the payment from which the contribution is made, or the day a settlement agreement is entered into or approved by a court (where applicable) (paragraph 292-95(1)(b)); and
- at the time the contribution is made to the fund (or earlier) the individual or their legal personal representative notifies the fund, in the approved form, that section 292-95 is to apply to the contribution (paragraph 292-95(1)(d)).

[*Schedule 1, item 4, paragraph 294 80(2)(b)*]

5.35 The grandfathering rule reflects the fact that it was not necessary to comply with these contribution timing requirements before the start of the excess non-concessional contributions regime.

5.36 The other requirements under section 292-95 include, broadly, that the contribution arises from the settlement of a personal injury claim and two legally qualified medical practitioners have certified that because of a personal injury, it is unlikely the individual can ever be gainfully employed in a capacity for which they are reasonably qualified or trained.

5.37 Structured settlement contributions are not counted towards the annual contributions caps under existing law, and are being excluded from the total superannuation balance calculation, to recognise that these are usually large payments that can provide the funds for ongoing medical and care expenses resulting from serious injury and income loss.

Example 5.2: Total superannuation balance where structured settlement contribution has been made

Masayo is 55 years old and has a balance of \$1 million in her superannuation account which is in the accumulation phase. She does not have any superannuation interests in the retirement phase. In the 2017-18 financial year, Masayo is involved in an accident that results

in her receiving a structured settlement of \$2 million, which she contributes to her superannuation account on 15 May 2018.

To determine whether she is eligible for the non-concessional contributions cap in the 2018-19 financial year, Masayo's total superannuation balance at 30 June 2018 is her accumulation phase value (\$3 million) less her structured settlement contribution (\$2 million), giving her a total superannuation balance of \$1 million. As Masayo's total superannuation balance is below \$1.6 million on 30 June 2018, Masayo is eligible for the non-concessional contributions cap in the 2018-19 financial year.

Example 5.3: Total superannuation balance for a defined benefit pensioner where structured settlement contribution has been made and account-based pension commenced

During the 2017-18 financial year, Morgan was in receipt of a lifetime pension from her defined benefit superannuation interest valued at \$1.1 million on 1 July 2017. On 1 May 2018, Morgan receives a structured settlement of \$1.5 million, contributes that amount to a defined contribution fund and commences an account-based pension valued at \$1.3 million on 28 June 2018. The remaining \$200,000 from the structured settlement amount remains in the accumulation phase.

Morgan's total superannuation balance on 30 June 2018 is calculated as her accumulation phase value (a), plus her retirement phase value (b), plus her rollover superannuation benefit (c), less her structured settlement contribution, where:

(a) Accumulation phase value: \$200,000;

(b) Retirement phase value (adjusted transfer balance account balance):

Transfer balance account balance on 30 June 2018:

		<i>Transfer balance account</i>	
		<i>Credit</i>	<i>Debit</i>
1/7/17	Defined benefit pension	\$1.1 million	
1/5/18	Structured settlement contribution		\$1.5 million
28/6/18	Account-based pension	\$1.3 million	
30/6/18	Balance	\$900,000 CR	

The retirement phase value for the purposes of calculating total superannuation balance is the transfer balance account balance on 30 June 2018, adjusted as follows:

1. Disregard the amount of the credit that arose in respect of the account based pension (\$1.3 million) (i.e. by reducing the balance);
2. Increase the balance by the amount that would become payable if the account-based pension ceased on 30 June 2018 (\$1.3 million assuming no change in value from 28 June 2018); and
3. Disregard the amount of the debit that arose in respect of the structured settlement contribution (\$1.5 million) (i.e. by increasing the balance).

Therefore, the transfer balance account balance for the purposes of calculating Morgan's total superannuation balance on 30 June 2018 is:

$\$900,000 - \$1.3 \text{ million} + \$1.3 \text{ million} + \$1.5 \text{ million} = \$2.4 \text{ million};$

(c) Rollover superannuation benefits = \$0.

Morgan's total superannuation balance = (a) + (b) + (c) — her structured settlement contribution:

$\$200,000 + \$2.4 \text{ million} + \$0 - \$1.5 \text{ million} = \$1.1 \text{ million}$

Calculation of total superannuation balance on 30 June 2017

5.38 The provisions regarding the calculation of total superannuation balance apply to the financial year starting on 1 July 2017 and later financial years. A transitional rule applies to calculate an individual's transfer balance account balance for the purposes of calculating an individual's total superannuation balance on 30 June 2017, see paragraph 5.71.

Bringing forward the non-concessional contributions cap

5.39 Individuals may be able to access a bring forward period for their non-concessional contributions cap equal to two or three times the annual cap, depending on their total superannuation balance (see calculation of the bring forward cap section below).

5.40 Once an individual has accessed the bring forward cap in a financial year (the first year), the bring forward cap and the bring forward period are calculated by reference to the difference between the general transfer balance cap and the individual's total superannuation balance in that first year. Once the bring forward period has expired, an individual may then access the annual cap or a new bring forward cap if eligible.

5.41 An individual is eligible to access the bring forward non-concessional contributions cap in a particular financial year (the first year) if:

- their non-concessional contributions for that financial year exceed their general non-concessional contributions cap;
- their total superannuation balance is less than the general transfer balance cap;
- the difference between the general transfer balance cap and their total superannuation balance (the first year cap space) is greater than the general non-concessional contributions cap;
- they are under 65 years of age at any time in that financial year; and
- a bring forward period is not currently in operation in respect of the financial year.

[Schedule 3, item 2, subsection 292-85(3)]

Example 5.4: Bring forward non-concessional contributions cap — eligibility

Maya is 43 years old, and her total superannuation balance on 30 June 2017 is \$500,000. In the 2017-18 financial year, she makes \$170,000 of non-concessional contributions. Maya can access the bring forward non-concessional contributions cap in the 2017-18 financial year because:

- Maya's total superannuation balance is less than the 2017-18 financial year general transfer balance cap of \$1.6 million; and
- the difference between the general transfer balance cap (\$1.6 million) and her total superannuation balance (\$500,000) is greater than the general non-concessional contributions cap (\$100,000); and
- she is under 65 years of age; and
- she does not currently have a bring forward period because of an earlier application of the bring forward rules.

Calculating the bring forward non-concessional contributions cap and the bring forward period

5.42 The amount of non-concessional contributions cap an individual may bring forward to a financial year and the bring forward

period depends on their total superannuation balance on 30 June of the previous financial year.

\$300,000 (indexed) and three year bring forward period

5.43 If the first year cap space (the difference between the general transfer balance cap in the relevant financial year and an individual's total superannuation balance as at 30 June of the previous financial year) is greater than two times the general non-concessional contributions cap, an individual's non-concessional contributions cap for the first year is three times their general non-concessional contributions cap and their bring forward period is three years. In the 2017-18 financial year, that would equal \$300,000 (three times \$100,000) with a three year bring forward period. [*Schedule 3, item 2, subsection 292-85(3) and paragraph 292-85(5)(b)*]

Example 5.5: Bring forward non-concessional contributions cap eligibility and period — three years

Karen is 60 years of age and has a total superannuation balance of \$1.35 million on 30 June 2017.

If Karen makes more than \$100,000 of non-concessional contributions in the 2017-18 financial year, her bring forward cap in that year is \$300,000 and her bring forward period is three years. This is because the difference between the general transfer balance cap (\$1.6 million) and Karen's total superannuation balance (\$1.35 million) is more than two times the general non-concessional contributions cap (\$200,000).

\$200,000 (indexed) and two year bring forward period

5.44 However, if the first year cap space (the difference between the general transfer balance cap in the relevant financial year and the individual's total superannuation balance as at 30 June of the previous financial year) is between one and two times the general non-concessional contributions cap, then the bring forward cap is two times the general non-concessional contributions cap and the bring forward period is two years. That is, someone with a total superannuation balance of \$1.4 million to less than \$1.5 million on 30 June 2017 is able to access a \$200,000 bring forward cap over a two year bring forward period. [*Schedule 3, item 2, subsections 292-85(3) and (4), paragraph 292-85(5)(a)*]

Example 5.6: Bring forward non-concessional contributions cap eligibility and period — two years

Elliot has a total superannuation balance of \$1.45 million on 30 June 2017. His bring forward cap for the 2017-18 financial year (first year) is \$200,000 and his bring forward period is two years.

\$100,000 (indexed) and no bring forward period

5.45 However, if the difference between the general transfer balance cap in the relevant financial year and the individual's total superannuation balance as at 30 June of the previous financial year is less than the general non-concessional contributions cap, then the individual is not eligible to a bring forward cap but is eligible for the general non-concessional contributions cap (\$100,000 in 2017-18). [*Schedule 3, item 2, subsection 292-85(2) and paragraph 292-85(3)(e)*]

Example 5.7: Bring forward non-concessional contributions cap — no eligibility

Thomas is 63 years old and has a total superannuation balance of \$1.55 million on 30 June 2017.

As the difference between the general transfer balance cap (\$1.6 million in the 2017-18 financial year) and Thomas' total superannuation balance (\$1.55 million) is less than the general non-concessional contributions cap (\$100,000), Thomas can only make \$100,000 of non-concessional contributions in the 2017-18 financial year. He is not eligible to bring forward any future non-concessional contributions caps.

5.46 If the individual's total superannuation balance as at 30 June of the previous financial year, is equal to or greater than the general transfer balance cap in the relevant financial year (\$1.6 million in the 2017-18 financial year), they are not eligible for any non-concessional contributions cap in that financial year. This eligibility criterion applies in every year of an individual's bring forward period.

5.47 Where an individual is eligible to bring forward their non-concessional contributions caps to the 2017-18 financial year, their cap for the first year is set out in the following table:

<i>Total superannuation balance on 30 June 2017</i>	<i>Non-concessional contributions cap for the first year</i>	<i>Bring forward period</i>
Less than \$1.4 million	\$300,000	3 years
\$1.4 million to less than \$1.5 million	\$200,000	2 years
\$1.5 million to less than \$1.6 million	\$100,000	No bring forward period, general non-concessional contributions cap applies
\$1.6 million or more	Nil	N/A

Note: These values are subject to change in later financial years as the concessional contributions cap (and therefore non-concessional contributions cap) and the general transfer balance cap are subject to indexation (see paragraphs 5.8 and 5.13 respectively).

5.48 Those individuals who have triggered their bring forward in the 2015-16 or 2016-17 financial years are subject to transitional arrangements (see paragraphs 5.72 to 5.81).

Calculating the non-concessional contributions cap for the second year

5.49 An individual who has brought forward their non-concessional contributions cap is able to make further non-concessional contributions in the second year of the bring forward period if:

- their total superannuation balance on 30 June of the financial year before the start of the second year is less than the general transfer balance cap in that second year; and
- their non-concessional contributions for the first year fall short of their cap for the first year.

5.50 If both of these requirements are met, the individual's cap for the second year is the unused portion of their cap from the first year. That is, the difference between their cap in the first year and their non-concessional contributions made in the first year. [*Schedule 3, item 2, paragraph 292-85(6)(a)*]

5.51 If the individual has a total superannuation balance on 30 June of the financial year before the start of the second year that is equal to or more than the general transfer balance cap in that second year, or they used their entire cap in the first year, their cap in the second year is nil. [*Schedule 3, item 2, paragraph 292-85(6)(b)*]

Example 5.8: Calculation of the bring forward cap — second year

Alvaro accesses the bring forward rules in the 2017-18 financial year by making non-concessional contributions of \$170,000. Alvaro's bring forward cap was \$300,000 and his bring forward period is three years.

Alvaro wishes to make further non-concessional contributions in the 2018-19 financial year. Alvaro's total superannuation balance on 30 June 2018 is \$700,000. He meets the first requirement because his total superannuation balance on 30 June before the start of the second year is less than the general transfer balance cap (\$1.6 million).

Alvaro also meets the second requirement because his cap for the first year (2017-18) was \$300,000, and he only made non-concessional contributions of \$170,000.

Alvaro's cap for the second year is the difference between his cap in the first year and his non-concessional contributions for that year, \$300,000 — \$170,000 = \$130,000.

Calculating the non-concessional contributions cap for the third year

5.52 If an individual has a three year bring forward period, they may make further non-concessional contributions in the third year if their total superannuation balance on 30 June before the start of the third year is less than the general transfer balance cap in that third year and either:

- their non-concessional contributions for the second year fall short of their cap for the second year; or
- if their cap for the second year is nil, and their non-concessional contributions for the first year fell short of their cap for the first year.

5.53 If those requirements are met, the individual's cap for the third year is:

- if their non-concessional contributions for the second year fell short of their non-concessional contributions cap for the second year — the amount of the shortfall; or
- if their cap for the second year is nil, and their non-concessional contributions for the first year fell short of their cap for the first year — the amount of the shortfall.

[Schedule 3, item 2, subsection 292-85(7)]

5.54 This test allows individuals to use up any unused portion of their cap from the second year or, if their cap in the second year was nil, any unused portion of their cap in the first year if they are eligible in the third year.

Example 5.9: Calculation of the bring forward cap — third year

Natasha has a total superannuation balance of \$820,000 on 30 June 2017 and during the 2017-18 financial year, she made non-concessional contributions of \$120,000. Natasha's bring forward cap is \$300,000 and she has a three year bring forward period (2017-18, 2018-19 and 2019-20 financial years).

On 30 June 2018, Natasha's total superannuation balance is \$990,000 and in the 2018-19 financial year, she makes further non-concessional contributions of \$110,000. On 30 June 2019, Natasha's total superannuation balance is \$1.2 million and her remaining bring forward cap for the 2019-20 financial year is \$70,000 (\$300,000 — (\$120,000 + \$110,000)) = \$70,000).

5.55 If an individual's total superannuation balance on 30 June before the start of the third year equals or exceeds the general transfer balance cap, or they have used up their bring forward non-concessional contributions cap in the first and second years, their non-concessional contributions cap for the third year is nil. [*Schedule 3, item 2, subsection 292-85(7)*]

5.56 Where an individual has a two year bring forward period, at the expiry of the two year bring forward period (i.e. in the third year) they may access the general non-concessional contributions cap (annual cap) or bring forward cap again, if eligible, in this year.

Eligibility for government co-contribution

5.57 The Government makes superannuation co-contributions to superannuation interests of low or middle income earners who make personal contributions to their superannuation fund and meet other eligibility criteria.

5.58 Schedule 3 to the TLA Bill amends *the Superannuation (Government Co-contribution for Low Income Earners) Act 2003* to provide that, in addition to the existing eligibility criteria for the government co-contribution, a government co-contribution will only be made in respect of a person for an income year if:

- the individual's non-concessional contributions for the financial year corresponding to the income year do not exceed their non-concessional contributions cap for that financial year; and
- on 30 June before the start of that financial year, the individual's total superannuation balance is less than the general transfer balance cap for that financial year.

[*Schedule 3, item 7, paragraphs 6(1)(da) and (db) of the Superannuation (Government Co-contribution for Low Income Earners) Act 2003*]

Commissioner's discretion to extend time for structured settlement contributions to be made

5.59 Schedule 3 also amends the contribution timing requirements to provide the Commissioner with flexibility to allow a longer period (than 90 days) for a structured settlement contribution to be made. [Schedule 3, item 3, paragraph 295-95(1)(b)]

5.60 An individual may request the Commissioner to allow a longer period of time for the contribution to be made. If the individual is dissatisfied with the decision made by the Commissioner, they may object in the manner set out in Part IVC of the *Taxation Administration Act 1953* (TAA 1953). [Schedule 3, item 4, subsections 292-95(6) and (7)]

Technical amendment — administrative alignment of objection rights

5.61 Schedule 3 also amends the law to ensure that the objection rights that apply to discretionary decisions made by the Commissioner in respect of non-concessional contributions align with the objection rights that apply to discretionary decisions in respect of concessional contributions.

5.62 Section 292-465 provides the Commissioner with discretion to disregard non-concessional contributions in working out the amount of non-concessional contributions for a financial year or to reallocate non-concessional contributions to another financial year, on application by a person. A similar discretionary provision exists in section 291-465 in respect of concessional contributions. A person should have the right to object against the application of this discretion in the standard manner set out in Part IVC of the TAA 1953.

5.63 The majority of individuals who receive an excess non-concessional contributions determination will have the excess amount released from superannuation unless they specifically request that no amount be released. As such most individuals will not receive an excess non-concessional contribution tax assessment against which, in the absence of this specific review provision, the individual could object.

5.64 The *Superannuation Legislation Amendment Act 2010* (No. 117 of 2010) provided for objection rights in respect of non-concessional contributions by inserting subsection 292-465(9).

5.65 The terms of subsection 292-465(9) as originally enacted, *prima facie*, limit the grounds for review to being dissatisfied with a determination *that was applied for* under section 292-465. The intent of this provision was to provide an avenue for review for a taxpayer who was

dissatisfied with the Commissioner's determination, or a decision not to make a determination.

5.66 Following the decision of the Administrative Appeals Tribunal in *Ward and Commissioner of Taxation* [2015] AATA 138, these amendments are being made to align the review provisions in respect of the Commissioner's discretion to disregard or reallocate non-concessional contributions with those in respect of concessional contributions. This ensures that if a person is dissatisfied with the Commissioner's exercise of the discretion under section 292-465 (either in respect of the determination made or a decision not to make a determination), the person may object in the manner set out in Part IVC of the TAA 1953. [*Schedule 3, item 5, subsection 292-465(9)*]

5.67 For the avoidance of doubt, and also in alignment with the review provisions in respect of the Commissioner's discretion to disregard or reallocate concessional contributions, amendments are being made to clarify:

- the right to object under section 175A of the *Income Tax Assessment Act 1936* or section 97-35 in Schedule 1 to the TAA 1953; and
- the application of the *Administrative Decisions (Judicial Review) Act 1977*;

where a person is dissatisfied with the Commissioner's exercise of the discretion under section 292-465. [*Schedule 3, item 5, subsection 292-465(10)*]

Consequential amendments

5.68 Schedule 3 to the TLA Bill inserts a new subheading, 'Your excess non-concessional contributions' before subsection 292-85(1). [*Schedule 3, item 1, subheading to subsection 292-85(1)*]

5.69 Schedule 3 to the TLA Bill also amends the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* to insert the definitions of ‘total superannuation balance’, ‘general balance transfer cap’, ‘non-concessional contributions’, ‘non-concessional contributions cap’ and ‘total superannuation balance’. [*Schedule 3, item 8, section 56 of the Superannuation (Government Co-contribution for Low Income Earners) Act 2003*]

Application and transitional provisions

Application

5.70 The amendments in Schedule 3 apply in relation to working out your non-concessional contributions cap for the financial year commencing on 1 July 2017 and later financial years. [*Schedule 3, item 9*]

Transitional

Calculation of total superannuation balance on 30 June 2017

5.71 Where an individual’s total superannuation balance is calculated on 30 June 2017, the calculation of an individual’s transfer balance is based on the sum of credits to their transfer balance account just after the start of 1 July 2017 less the sum of certain debits to their transfer balance account on 1 July 2017. [*Schedule 1, item 35, section 307-230 of the Income Tax (Transitional Provisions) Act 1997*]

Bring forward rule

5.72 Transitional rules apply to individuals who have activated the bring forward rule in the 2015-16 or 2016-17 financial years, to ensure they do not retain the benefit of existing higher caps for the remainder of their bring forward period. The transitional provisions do not affect an individual’s non-concessional contributions cap for any financial year that ended before 1 July 2017. [*Schedule 3, item 6, subsection 292-85(3) of the Income Tax (Transitional Provisions) Act 1997*]

5.73 Individuals must have a total superannuation balance of less than the general transfer balance cap (\$1.6 million) as at 30 June 2017 to be eligible to access their bring forward cap in the 2017-18 financial year, and as at 30 June 2018 to be eligible to access their bring forward cap in the 2018-19 financial year. Individuals with a total superannuation balance that equals or exceeds the general transfer balance cap (\$1.6 million) on 30 June of the previous financial year will have a non-concessional contributions cap of nil in the relevant financial year of their transitional bring forward period, due to the application of the standard rules which apply a non-concessional contributions cap of nil for

individuals with total superannuation balances equal to or over the general transfer balance cap.

5.74 After a bring forward period that was triggered in the 2015-16 or 2016-17 financial year ends, the individual is subject to the general rules regarding bringing forward the non-concessional contributions caps (discussed at paragraphs 5.39 to 5.56).

Bring forward period triggered in the 2015-16 financial year

5.75 Where an individual triggered their bring forward period in the 2015-16 financial year, their non-concessional contributions caps for the first (2015-16) and second (2016-17) years are set by the rules that applied to those financial years. However, their cap for the third year (2017-18) will be set by the transitional rules put in place by this Schedule.

5.76 The third year cap (for 2017-18) is determined under the standard calculation for the third year cap (under subsection 292-85(6)), but applied as if the first year cap had been \$460,000. [*Schedule 3, item 6, subsection 292-85(1) of the Income Tax (Transitional Provisions) Act 1997*]

5.77 The transitional rules modify the calculation of the second year cap for the purposes of ensuring the correct third year cap. This is necessary because the third year cap is based on the unused portion of caps from prior years. However, this modification does not affect the actual cap that applies to the individual in the 2015-16 or 2016-17 financial year. [*Schedule 3, item 6, subsections 292-85(1) and (3) of the Income Tax (Transitional Provisions) Act 1997*]

5.78 This first year cap of \$460,000 represents \$180,000 for each of the first and second years (equal to the annual cap for 2015-16 and 2016-17), and \$100,000 for the third year (equal to the annual cap for 2017-18).

Example 5.10: Calculation of the bring forward cap — transitional

Henry made a non-concessional contribution to his superannuation fund of \$200,000 in the 2015-16 financial year (the first year). Under the non-concessional contributions cap rules applying to the 2015-16 financial year, he exceeded his yearly cap of \$180,000 and triggered the bring forward rules. These rules gave him a cap for the first year of \$540,000.

In the 2016-17 financial year (the second year), Henry's cap was \$340,000 (\$540,000 — \$200,000). He made a further \$100,000 of non-concessional contributions in that financial year.

As Henry's bring forward period started in the 2015-16 financial year, the standard rule for calculating his third year cap in the 2017-18 financial year is modified by the transitional bring forward non-concessional contributions cap rules.

As Henry's total superannuation balance on 30 June 2017 is \$550,000 he is eligible in 2017-18 for the transitional bring forward cap rules to apply, and his cap is calculated by taking the amended bring forward cap of \$460,000 less his contributions in the first and second years (\$200,000 + \$100,000). His cap for the 2017-18 financial year is therefore \$160,000.

Bring forward period triggered in the 2016-17 financial year

5.79 Where an individual triggered their bring forward period in the 2016-17 financial year, their non-concessional contributions cap for the first year is set by the rules that applied to that financial year. However, their cap for the second and third year is set by the transitional rules put in place by this Schedule.

5.80 The second and third year caps, for the 2017-18 and 2018-19 financial years, are determined under the standard calculation of those caps (under subsections 292-85(6) and (7)), but applied as if the first year cap had been \$380,000. [*Schedule 3, item 6, subsection 292-85(2) of the Income Tax (Transitional Provisions) Act 1997*]

5.81 This first year cap of \$380,000 represents \$180,000 for the first year (equal to the annual cap for the 2016-17 financial year), and \$100,000 for each of the second and third years (equal to the annual cap for 2017-18 and 2018-19 financial years, assuming the cap has not increased in 2018-19 due to indexation).

Example 5.11: Calculation of the bring forward cap — transitional

Molly has a total superannuation balance of \$200,000 as at 30 June 2016. In September 2016 she makes non-concessional contributions of \$250,000. This triggers her three year bring forward.

From 1 July 2017, as the cap has been lowered, Molly would be able to make further non-concessional contributions of up to \$130,000, given the transitional bring forward cap of \$380,000. Molly makes a non-concessional contribution of \$110,000 in the 2017-18 financial year and \$20,000 in the 2018-19 financial year.

Molly is 40 years old and has a total superannuation balance of \$675,000 on 30 June 2019. She can then access a new bring forward period and contribute up to \$300,000 in non-concessional contributions in the 2019-20 financial year if she wishes.

STATEMENT OF COMPATABILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016

5.82 Schedule 3 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

5.83 Schedule 3 to the Treasury Laws and Amendment (Fair and Sustainable Superannuation) Bill 2016 reduces the non-concessional (after-tax) contributions cap from \$180,000 to \$100,000 per annum, and introduces a requirement that for individuals to be eligible for the non-concessional contributions cap, they must have a total superannuation balance below the general transfer balance cap (\$1.6 million in the 2017-18 financial year). This Schedule also allows eligible individuals under 65 years old to bring forward up to 3 years of non-concessional contributions.

5.84 Non-concessional contributions are, generally, contributions made from an individual's after-tax income (that is, from income that has been taxed at their marginal rate). Individuals may choose to make non-concessional contributions to their superannuation because future earnings on these contributions within the superannuation system will be taxed at the concessional rate of 15 per cent.

5.85 To ensure superannuation is being used to increase individuals' income in retirement, and not for tax minimisation or estate planning purposes, there are limits on the amount of non-concessional contributions individuals can make.

5.86 By reducing the non-concessional annual caps and restricting their use to those with balances less than the general transfer balance cap, this measure will better target the tax concessions. This will encourage those who have aspirations to build their superannuation balance up to an amount equal to the general transfer balance cap, while retaining the flexibility to accommodate lump sum contributions from one-off events such as receiving an inheritance or selling a large asset.

5.87 The Parliamentary Joint Committee on Human Rights has previously noted that the area of superannuation may engage the right to social security in article 9 and the right to an adequate standard of living in article 11 of the International Covenant on Economic, Social, and Cultural Rights.

5.88 Australia's retirement income system consists of three elements commonly referred to as the three pillars: the age pension, compulsory superannuation contributions, and voluntary savings including voluntary contributions to superannuation.

5.89 The first pillar, the age pension, provides for a minimum safety net of income in retirement, and is the primary method through which Australia meets its obligations under article 9 of the International Covenant on Economic, Social, and Cultural Rights and article 11 as far as it relates to income in retirement.

5.90 Non-concessional superannuation contributions fall under the voluntary superannuation contributions pillar.

5.91 The existing annual non-concessional contributions cap disproportionately benefits high income earners both because they have higher savings and they benefit more from putting these savings into a concessional tax environment as the relative discount on their marginal tax rate is greater. These changes are expected to affect less than 1 per cent of fund members and will not prevent affected individuals from using superannuation to support an adequate standard of living in retirement.

Human rights implications

5.92 Schedule 3 does not engage any of the applicable rights or freedoms because it reduces but does not remove the ability for individuals to make non-concessional contributions until their superannuation balance meets the transfer balance cap (\$1.6 million in the 2017-18 financial year). Individuals with this level of superannuation savings are expected to enjoy a financially comfortable retirement.

Conclusion

5.93 Schedule 3 is compatible with human rights as it does not raise any human rights issues.

Chapter 6

Low income superannuation tax offset

Outline of chapter

6.1 Schedule 4 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 (the TLA Bill) amends the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* to enable eligible low income earners to receive the low income superannuation tax offset.

6.2 Unless otherwise indicated, all legislative references are to the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*. All legislative amendments referred to in this Chapter are contained in the TLA Bill 2016.

Context of amendments

6.3 The low income superannuation tax offset compensates low income individuals for the tax that their superannuation fund or retirement savings account provider pays on concessional contributions to the individual's superannuation.

Summary of new law

6.4 Concessional contributions are generally contributions to a superannuation fund that receives concessional tax treatment. Concessional contributions are generally 'before tax' contributions that include an employer's superannuation guarantee contributions, contributions made under a salary sacrifice arrangement and an individual's personal contributions that are deducted.

6.5 The low income superannuation tax offset seeks to effectively return the tax paid on concessional contributions by an individual's superannuation fund or retirement savings account provider to the person, if the individual is a low income earner up to a maximum capped amount. Low income earners are defined as individuals with an adjusted taxable income of \$37,000 or less.

6.6 The maximum amount payable is \$500 per year for each eligible individual.

Detailed explanation of new law

6.7 Currently concessional contributions to superannuation are taxed at 15 per cent regardless of the individual's relevant marginal income tax rate. An individual may have an effective tax rate that is lower than 15 per cent. The low income superannuation tax offset will ensure that most individuals who have an effective tax rate below 15 per cent do not pay more tax on their concessional contributions through their fund or retirement savings account provider than if they had received the money as salary or wages and paid tax in their own hands.

6.8 An individual is entitled to the low income superannuation tax offset if they satisfy the following requirements:

- the individual was not a holder of a temporary visa at any time in that income year other than certain limited situations;
- at least one concessional contribution has been made by or for that individual in the corresponding financial year; and
- either:
 - the individual has adjusted taxable income for that income year that does not exceed \$37,000 and at least 10 per cent of the individual's income for the income year is from business or employment; or
 - 12 months after the end of the income year the Commissioner reasonably believes there is insufficient information to determine the taxpayer's adjusted taxable income and estimates it does not exceed \$37,000 and at least 10 per cent of the individual's income for the income year is from employment.

[Schedule 4, item 2, section 12C]

Example 6.1 Entitlement to the low income superannuation tax offset

Kerry is an Australian resident. She has an adjusted taxable income of \$35,000 which comprises \$1,000 in interest from her savings and \$34,000 from working part time. Kerry's employer makes superannuation guarantee contributions on her behalf. These employer contributions are concessional contributions for Kerry. Kerry is

entitled to receive the low income superannuation tax offset with respect to the tax paid on her concessional contributions, as greater than 10 per cent of her income is from her employment.

6.9 There is no taper of adjusted taxable income. Individuals who have an adjusted taxable income of more than \$37,000 will not be eligible for the low income superannuation tax offset.

6.10 **Adjusted taxable income** is defined in Schedule 3 to the *A New Tax System (Family Assistance) Act 1999* (disregarding Clauses 3 and 3A of that Schedule) as including taxable income, adjusted fringe benefits total, target foreign income, total net investment loss, tax-free pensions or benefits, and reportable superannuation contributions less any deductible child maintenance expenditure for that year.

6.11 When an individual does not lodge an income tax return (for example, if an individual is under the tax-free threshold), the Commissioner of Taxation (Commissioner) will determine eligibility for the low income superannuation tax offset based on information available to the Australian Taxation Office (ATO). The Commissioner will generally do this at the end of 12 months after the end of the individual's income year.

6.12 The Commissioner can have regard to a broad range of information when determining eligibility for the low income superannuation tax offset. This includes information already held within the ATO which has been collected for another purpose, as well as information from other agencies with respect to the components of an individual's adjusted taxable income and an individual's member contribution statement. The Commissioner can also use information relating to an individual's tax file number if this has been provided to the ATO for another purpose.

6.13 These information-sharing provisions do not enable the ATO to gather additional information with respect to an individual but to make use of the information to which the ATO already has access.

6.14 These information-sharing provisions allow the ATO to automatically make a payment of the low income superannuation tax offset to a superannuation fund and operate in conjunction with section 353-10 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) which is a broad information-gathering power of the ATO. This ensures that individuals who are not required to lodge a tax return are not required to apply for the payment of the low income superannuation tax offset.

6.15 In accordance with paragraph 14(1)(d) of the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*, the ATO is able to make a payment if the Commissioner is reasonably satisfied that an individual is eligible for the payment based on the information the ATO holds for the individual. However the Commissioner may recover the amount that has been paid if the ATO later obtains information which shows that the person is not eligible for the low income superannuation tax offset. [Schedule 4, item 2, section 12F]

Example 6.2 Payment of the low income superannuation tax offset where individual does not lodge an income tax return

Domenik is a university student and will earn \$18,000 as a part time retail shop assistant in the 2017-18 income year and will have superannuation guarantee contributions of \$1,710. As Domenik will earn below the tax-free threshold of \$18,200 for that income year he may not be required to submit an income tax return. The ATO receives information about Domenik's income and his employer's superannuation contributions from his member contribution statement. The ATO is reasonably satisfied that Domenik is eligible for the low income superannuation tax offset and makes the payment of \$256.50 to his superannuation fund.

6.16 The low income superannuation tax offset will normally be paid to a superannuation account of an individual, but can be paid in other ways. For example, it can be paid to the individual, if they have no eligible account and have retired, or to the individual's estate if they have passed away. [Schedule 4, item 2, section 12B]

6.17 Eligible contributions that attract a payment of the low income superannuation tax offset must be concessional contributions of the person. [Schedule 4, item 2, paragraphs 12C(1)(a) and (2)(a)]

6.18 'Concessional contributions' is defined in the *Income Tax Assessment Act 1997* (ITAA 1997). Examples of concessional contributions that will be eligible include:

- superannuation guarantee contributions;
- notional taxed contributions;
- allocations from reserves that are concessional contributions;
- contributions an employer makes under a salary sacrifice arrangement; and
- personal contributions which are allowed as an income tax deduction.

6.19 As eligible concessional contributions include amounts allocated from a fund's reserves and the notional taxed contributions worked out for a defined benefit interest of an individual, the low income superannuation tax offset may be payable in relation to an amount that is not an actual contribution that has been included in a fund's assessable income as a contribution.

6.20 The ITAA 1997 defines *concessional contributions* as belonging to a 'complying superannuation plan'. As this legislation incorporates the definition of 'concessional contribution' from that Act, a concessional contribution must for the purposes of the low income superannuation tax offset belong to a complying superannuation plan.

Example 6.3 Allocation of superannuation fund reserves to members

Julia works for a company that has its own corporate superannuation fund. The trustee of the superannuation fund allocates an amount from the reserves of the superannuation fund to every member's interest in the fund. The superannuation fund reports this amount on Julia's member contribution statement. The ATO may make a payment of the low income superannuation tax offset in relation to the amount allocated to Julia's superannuation interest.

Example 6.4 Public sector superannuation fund contributions

Martin is a member of a public sector superannuation scheme. His interest in the fund is a defined benefit interest. Martin's employer is required to make contributions for Martin to fund part of the superannuation benefits payable to him (or his beneficiaries upon his death). These contributions are included in the assessable income of the scheme. These contributions are notional taxed contributions for Martin and are eligible for the low income superannuation tax offset.

Example 6.5 Defined benefit scheme superannuation fund notional taxed contributions

Georgina is a member of a public sector superannuation scheme that is subject to income tax on member's contributions. Her interest in the fund is a defined benefit interest. Notional taxed contributions for Georgina are worked out using the formula in the *Income Tax Assessment Regulations 1997*. These notional taxed contributions are eligible for the low income superannuation tax offset.

6.21 This low income superannuation tax offset will only apply for amounts of an individual's concessional contributions that are included in the assessable income of a superannuation fund. For example, payments to 'constitutionally protected funds' would be excluded. Similarly, an amount included in an individual's concessional contributions in relation to their

defined benefit contributions to an unfunded defined benefit scheme or an unfunded component of a partially funded defined benefit scheme would also be excluded as these amounts are also not taxed as contributions.

[Schedule 4, item 2, subsection 12E(3)]

6.22 The amount of the low income superannuation tax offset for an individual is calculated at a rate of 15 per cent of the total eligible concessional contributions for the year up to a maximum payment of \$500. However, the amount of the low income superannuation tax offset payable in relation to an income year cannot be less than \$10 (if an amount is payable) or more than \$500. *[Schedule 4, item 2, subsection 12E(2)]*

6.23 The general administrative machinery provisions that apply to payments under the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* will apply to the low income superannuation tax offset. *[Schedule 4, item 2, section 12B]*

6.24 As a result of these provisions applying, when the ATO has made a payment to an individual or their legal representative, the ATO must give information as prescribed in the regulations when the payment is made.

6.25 Similarly, the ATO may be liable to pay interest on late payments and underpayments after certain time periods, as may be prescribed in the regulations, are exceeded. The Commissioner may recover overpayments directly from individuals or funds into which the payment was made.

6.26 In accordance with section 353-15 of Schedule 1 to the TAA 1953, the ATO has broad powers of entry to premises to obtain and make copies of examinable documents to ensure compliance with the Act.

6.27 To ensure that Parliament is kept informed of how the low income superannuation tax offset is operating and details of how much low income superannuation tax offset is being paid, these amendments contain a requirement that the Commissioner must give the Minister quarterly and annual reports to be tabled in Parliament regarding the low income superannuation tax offset. *[Schedule 4, item 2, section 12G]*

6.28 The Governor-General may make regulations pertaining to the low income superannuation tax offset. This includes prescribing the information that must be included in the reports that the Commissioner must give to the Minister.

6.29 The low income superannuation tax offset is not a tax offset within the meaning of the income tax law. The name instead reflects the operation of the payment in offsetting the tax detriment that eligible low income earners would otherwise face as a result of the flat rate of tax on concessional contributions being in excess of their effective tax rate.

Consequential amendments

6.30 Schedule 3 to the TLA Bill also makes a number of minor consequential amendments to the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* through inserting referencing, adding a note and definitions and to allow for overpayments of low income superannuation contributions to be recovered by offsetting these against payments of the low income superannuation tax offset. An amendment is also made to the *Minerals Resource Rent Tax Repeal and Other Measures Act 2014* to ensure that the Commissioner continues to send a notice in situations where the Commissioner has decided that a payment of the low income superannuation contribution that was previously paid should not have been paid and is now recoverable. *[Schedule 4, items 3 to 5 and 7 and 8, subsection 49(1) and sections 55 and 56 of the Superannuation (Government Co contribution for Low Income Earners) Act 2003; and subitem 7(2) and item 8 of Schedule 7 to the Minerals Resource Rent Tax Repeal and Other Measures Act 2014]*

Application

6.31 The provisions contained in Schedule 4 to the TLA Bill commence on 2 July 2017.

6.32 They apply to the 2017-18 income year and later income years. *[Schedule 4, item 6]*

STATEMENT OF COMPATABILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016

6.33 Schedule 4 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

6.34 Schedule 4 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 amends the *Sustainable (Government Co-contribution for Low Income Earners) Act 2003* to enable eligible low income earners to receive the low income superannuation tax offset.

6.35 Currently concessional contributions to superannuation are taxed at 15 per cent regardless of the individual's relevant marginal income tax rate. An individual may have an effective tax rate that is lower than 15 per cent. The low income superannuation tax offset will ensure that most individuals who have an effective tax rate below 15 per cent do not pay more tax on their concessional contributions through their fund or retirement savings account provider than on their take-home pay.

6.36 It is expected that around 3.1 million people (almost two-thirds of whom are women) will benefit from the low income superannuation tax offset in 2017-18.

Human rights implications

6.37 This Schedule does not engage any of the applicable rights or freedoms because it ensures that the level of support for low income individuals is maintained.

Conclusion

6.38 This Schedule is compatible with human rights as it does not raise any human rights issues.

Chapter 7

Deducting personal contributions

Outline of chapter

7.1 Schedule 5 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 (the TLA Bill) removes the requirement in the income tax law that an individual must earn less than 10 per cent of their income from their employment related activities to be able to deduct a personal contribution to superannuation thereby making it a concessional contribution.

7.2 All references in this Chapter are to the *Income Tax Assessment Act 1997* unless otherwise specified. All legislative amendments referred to in this Chapter are contained in the TLA Bill.

Context of amendments

7.3 The measure forms part of the Government's Superannuation Reform Package announced in the 2016-17 Budget. This measure improves the flexibility of the superannuation system so that more individuals can make personal contributions to superannuation as concessional contributions.

7.4 Generally, personal contributions are non-concessional contributions (effectively 'after tax' contributions). These contributions are not usually taxed again in the superannuation fund unless the individual notifies the fund that they intend to deduct the contribution.

7.5 However, individuals can choose to deduct their personal contributions, if they satisfy certain requirements (see Subdivision 290-C). Deducted personal contributions are generally included in the assessable income of the superannuation fund, and become concessional contributions.

7.6 Prior to these amendments, the requirements for an individual to deduct a contribution included a requirement that, broadly, less than 10 per cent of the sum of the individual's assessable income, reportable fringe benefits and reportable employer superannuation contributions were attributable to employment or related activities (see section 290-160). Amounts that will generally be attributable to employment include salary, wages and benefits received from an employer. For

example, an individual with total assessable income of \$100,000 and no reportable fringe benefits or employer superannuation contributions would have been unable to deduct a personal contribution if they received a salary of \$10,000.

7.7 This requirement disadvantages individuals who did not work for employers that offered salary sacrifice arrangements and individuals that were substantially self-employed but who received 10 per cent or more of their income from employment.

7.8 The other requirements include age related conditions (see section 290-165), a condition requiring the individual to provide a valid notice of intention to deduct and also have received an acknowledgement of this notice from the fund (see section 290-170), and a condition that the contribution must have been made to a complying superannuation fund (see section 290-155).

Summary of new law

7.9 This measure removes the requirement in the income tax law that an individual must earn less than 10 per cent of their income from employment-related activities to be able to deduct a personal contribution to superannuation making it a concessional contribution.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>An individual is able to deduct personal contributions, making these contributions concessional contributions, regardless of whether they earn 10 per cent or more of their total income from employment or related activities.</p> <p>Other restrictions apply to limit when an individual can deduct personal superannuation contributions, including new restrictions on deducting contributions to certain defined benefit superannuation funds and contributions that are not included in the taxable income of the superannuation fund.</p>	<p>An individual is not able to deduct personal contributions if 10 per cent or more of their total income is from employment or related activities.</p> <p>Other restrictions apply to limit when an individual can deduct personal superannuation contributions.</p>

Detailed explanation of new law

7.10 The amendments made by Schedule 5 to the TLA Bill remove the restriction in the income tax law on individuals deducting personal contributions to their superannuation, which broadly required that, less than 10 per cent of the sum of an individual's:

- assessable income;
- reportable fringe benefits total; and
- reportable employer superannuation contributions;

was attributable to employment or related activities. [*Schedule 5, items 3 and 4, subsection 290-150(2) and section 290-160*]

7.11 This allows individuals that meet the other requirements of Subdivision 290-C to deduct the contribution resulting in it being a concessional contribution to superannuation.

7.12 This ensures that individuals receiving employment income are not dependent on whether their employers offer salary sacrifice arrangements should they wish to make contributions to their superannuation from, effectively, their pre-tax income.

7.13 This also ensures that self-employed individuals and individuals in receipt of passive income can make deductible personal contributions regardless of the amount of salary or wages they earn.

7.14 Entitlement to deductions for personal superannuation contributions still requires that individuals satisfy all other requirements for deducting personal superannuation contributions, including the new requirements discussed in paragraphs 7.15 to 7.33.

Example 7.1 Deduction for personal superannuation contribution

Sarah is 23 years old and decides to start her own luxury chocolate business. She continues to work part time as a retailer where she earns \$10,000 in the 2017-18 financial year, including a \$950 superannuation contribution made by her employer. In the same financial year she earns \$70,000 from her chocolate business. From Sarah's \$80,000 assessable income, she makes a personal contribution of \$15,000 to her complying superannuation fund. She has no other concessional superannuation contributions.

Despite receiving more than 10 per cent of her income from employment, Sarah can deduct her \$15,000 personal contribution, provided she satisfies the other relevant requirements in Subdivision 290-C.

Personal contributions that are not deductible

7.15 Schedule 5 to the TLA Bill also prevents certain personal contributions to certain superannuation funds from being deductible, even if the relevant fund is a complying superannuation fund. The amendments apply to certain contributions to two categories of funds — defined benefit contributions to Commonwealth public sector superannuation schemes and contributions to superannuation funds that are not included in the income of the superannuation fund. Further categories may be prescribed by regulation. *[Schedule 5, item 4, section 290-155]*

Contributions to Commonwealth public sector superannuation schemes

7.16 The first category of fund is Commonwealth public sector superannuation schemes in respect of contributions by members with defined benefit interests. *[Schedule 5, item 4, subparagraph 290-155(1)(a)(i)]*

7.17 Prior to the amendments, Commonwealth superannuation funds that provided defined benefit interests to members were able to operate on the basis that personal contributions were unlikely to be deducted by members. This meant that the fund could operate on the basis that these contributions would not be concessional contributions and did not have to be included in the assessable income of the fund. These superannuation funds were generally those that linked accrual of benefits in a defined benefit interest to the period of employment of members while permitting or requiring personal contributions by members.

7.18 There would be significant costs if these funds needed to restructure their rules and benefit calculations to allow their members to choose to deduct such personal contributions.

7.19 Accordingly, to avoid imposing such costs on these funds, the amendments prevent contributions to Commonwealth public sector superannuation schemes in which an individual has a defined benefit interest from being deductible.

7.20 Members of these Commonwealth public sector superannuation schemes continue to be able to deduct personal contributions they make to other types of superannuation funds such as accumulation funds, provided that the contributions satisfy the other requirements to be deductible under the income tax law.

Untaxed funds

7.21 The second category of superannuation funds for which personal superannuation contributions are now not deductible are funds that do not include an amount in their assessable income under section 295-190 as a result of receiving a superannuation contribution (untaxed funds).

[Schedule 5, item 4, subparagraph 290-155(1)(a)(ii)]

7.22 Without the amendment, a deductible personal contribution to an untaxed superannuation fund would not be taxed in the hands of either the fund or its members, providing such members with a benefit in excess of that available to members of other funds.

7.23 To prevent this anomaly arising, Schedule 5 to the TLA Bill ensures that a member of a fund cannot deduct a personal contribution to the fund that is not included in the assessable income of the fund (that is, the fund is an untaxed fund in relation to the contribution).

7.24 For this category of fund, the amendment applies only to contributions by members of such funds that are not included in the assessable income of these funds. It does not apply to contributions made to taxed funds or to other member contributions to such funds that are included in the assessable income of the fund.

7.25 In determining if a fund is an untaxed fund in respect of a contribution, amounts that are excluded from the assessable income of the fund due to Subdivision 295-D (such as transfers of liability for contributions to a life insurer or pooled superannuation trust) are disregarded. *[Schedule 5, item 4, subsection 290-155(2)]*

Prescribed funds and contributions

7.26 The amendments also provide that the regulations may prescribe further categories of funds and contributions to funds. This provides flexibility to include additional types of funds or contributions to funds if necessary to avoid such funds incurring excessive restructuring costs or other unintended consequences. *[Schedule 5, item 4, subparagraph 290-155(1)(a)(iii) and paragraph 290-155(1)(b)]*

7.27 This power would permit regulations to be made prescribing superannuation funds, including State and Territory public sector defined benefit schemes, and corporate defined benefit schemes, that request this treatment.

7.28 It also permits regulations to be made to prescribe all funds of a particular kind or certain contributions to all funds of a particular kind. For example, the regulations could prescribe all contributions to defined benefit interests in superannuation funds that have notified the

Commissioner in the approved form that they wish for the prescription to apply.

Publication of information to members

7.29 The amendments also make changes to the law to ensure members are informed about the treatment of personal contributions to prescribed funds.

7.30 First, the amendments provide that the Commissioner may publish information about funds to which contributions may not be deductible because of these amendments. [*Schedule 5, item 4, subsection 290-155(3)*]

7.31 If the regulation making power is used to prescribe all funds of a kind, the application of the prescription may not be apparent to members of that fund. For example, if the regulations prescribed funds that notified the Commissioner in the approved form, members of the fund would have no way of knowing that this occurred.

7.32 It is expected that in most, if not all cases, the superannuation fund trustees would provide this information to their members. However, by allowing the Commissioner to publish this information, the amendments ensure that this information will be available to members.

7.33 Secondly, the amendments change the rules around the validity of notices so that notices in respect of these contributions are not valid notices. This ensures that trustees are not required to acknowledge a notice to deduct a contribution that they know the member cannot deduct. [*Schedule 5, item 6, paragraph 290-170(2)(e)*]

Example 7.2 Personal contributions that are not deductible

Hannah is a public servant who makes fortnightly personal contributions totalling \$10,000 in 2017-18 to a Commonwealth public sector defined benefit scheme.

She also works part-time in a retail store on weekends and receives superannuation guarantee contributions in an industry-based accumulation fund. She makes a \$5,000 personal contribution to this fund in February 2018.

Hannah cannot deduct her personal contributions to the Commonwealth defined benefit scheme. However, she can deduct the \$5,000 contribution she makes to the accumulation fund in her 2017-18 tax return, provided she satisfies the other requirements in income tax law.

Consequential amendments

7.34 Schedule 5 to the TLA Bill also makes a number of consequential amendments to the income tax law, including guide material, to reflect the substantive amendments. [*Schedule 5, items 1 and 2, subsections 280-10(1) and (2) and Schedule 11, item 7, the definition of ‘Commonwealth public sector superannuation scheme’ in subsection 995 1(1)*]

7.35 These consequential amendments include an amendment to subsection 290-165(1). Currently, this subsection refers to income attributable to, among other things, activities within the meaning of subsection 290-160(1). As this Schedule repeals section 290-160 as part of removing the maximum earnings as an employee condition, it also removes the reference in subsection 290-165(1) and instead inserts the relevant definition of activities into that subsection. [*Schedule 5, item 5, paragraph 290-165(1)(b)*]

7.36 The definition is also simplified. Previously, it applied to activities consisting of:

- holding an office or appointment;
- performing functions or duties;
- engaging in work; or
- doing acts or things;

if those activities resulted in the individual being treated as an employee for the purposes of the *Superannuation Guarantee (Administration) Act 1992* (disregarding subsection 12(11) of that Act).

7.37 In moving this provision, it was identified that ‘doing acts or things’ encompassed all possible matters that would result in an individual being treated as an employee and the list of specific activities was unnecessary.

7.38 The rewritten provision omitting the list of activities and simply refers to any activities or circumstances that resulted in the individual being treated as an employee for the purposes of the *Superannuation Guarantee (Administration) Act 1992* (disregarding subsection 12(11) of that Act). This amendment clarifies the law without resulting in any change to outcomes.

Application and transitional provisions

7.39 The amendments commence from the start of the first day of the first quarter to begin after the day the TLA Bill receives Royal Assent. *[Item 2 of the table in clause 2 of the TLA Bill]*

7.40 The amendments apply to personal superannuation contributions made in the 2017-18 income year and later income years. *[Schedule 5, item 7]*

7.41 In determining whether the amendments apply to a contribution, it only matters in which income year the contribution was made. To the extent that a contribution is made before 1 July 2017, the amendments do not apply even if it is reported on or after that date.

STATEMENT OF COMPATABILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016

7.42 Schedule 5 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

7.43 Schedule 5 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 removes the requirement in the income tax law that an individual must earn less than 10 per cent of their income from their employment related activities for them to be able to claim a tax deduction for personal contribution to superannuation.

7.44 Deducted personal contributions are generally taxed in the fund at a flat rate of 15 per cent rather than the individual's marginal tax rate, and become concessional contributions.

7.45 Prior to these amendments, individuals were not able to deduct personal contributions for an income year and have them treated as concessional contributions unless they satisfied a number of requirements. This includes a requirement that, broadly, less than 10 per cent of the sum of the individual's assessable income, reportable fringe benefits total and reportable employer superannuation contributions were attributable to employment or similar activities (see section 290-160 of the *Income Tax Assessment Act 1997*). Income from employment broadly refers to income received in salary, wages and benefits from an employer.

7.46 This requirement disadvantaged individuals who did not work for employers that allowed them to make salary sacrificed concessional superannuation contributions or those that were substantially self-employed but who received 10 per cent or more of their income from employment.

7.47 Schedule 5 to the Bill also prevents personal contributions from being deductible when made to certain superannuation funds (such as

Commonwealth public sector superannuation schemes, untaxed funds and prescribed funds). This ensures that such funds do not have to incur significant costs to restructure their scheme rules and systems as result of the measure. However, members of these funds can, subject to their concessional contributions cap, make contributions to other superannuation funds that are not subject to these restrictions.

7.48 This measure improves the flexibility of the superannuation system so that more individuals can make personal contributions to superannuation as concessional contributions up to their concessional contributions cap.

Human rights implications

7.49 This Schedule does not engage any of the applicable rights or freedoms because it reduces tax payable on personal superannuation contributions.

Conclusion

7.50 This Schedule is compatible with human rights as it does not raise any human rights issues.

Chapter 8

Unused concessional cap carry forward

Outline of chapter

8.1 Schedule 6 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 (the TLA Bill) introduces provisions to allow catch-up concessional contributions. This will allow individuals to make additional concessional superannuation contributions in a financial year by utilising unused concessional contribution cap amounts from up to five previous financial years, providing their total superannuation balance just before the start of the financial year was below \$500,000.

8.2 All references in this Chapter are to the *Income Tax Assessment Act 1997* unless otherwise specified. All legislative amendments referred to in this Chapter are contained in the TLA Bill.

Context of amendments

8.3 This measure forms part of the Government's Superannuation Reform Package announced in the 2016-17 Budget. It will enhance the flexibility of the superannuation system for individuals who take time out of work or, work part-time (by and large women) or have 'lumpy' income (for example small business operators), by allowing them to make catch-up concessional contributions.

8.4 Annual concessional contributions caps can limit the ability of people with interrupted work patterns or irregular income to accumulate superannuation balances commensurate with those with more regular or steady income. Allowing people to carry forward unused concessional contributions cap amounts for a period of up to five financial years will provide them with the opportunity to 'catch-up' if they have the capacity and choose to do so.

8.5 The measure ensures that people who have not had the capacity to contribute up to their concessional contributions cap in prior years will be able to make catch-up contributions by targeting it to those individuals who have been unable to accumulate large superannuation balances.

8.6 Prior to these amendments individuals who could not fully utilise their annual concessional contributions cap in a financial year could not carry forward unused concessional contributions cap amounts.

8.7 Related measures in the Government’s 2016-17 Budget Superannuation Reform Package will reduce the annual cap on concessional superannuation contributions to \$25,000 and allow all individuals under 65 (and those between 65 and 74 who meet a work test) to make deductible personal contributions to superannuation.

Summary of new law

8.8 Schedule 6 to the TLA Bill will allow individuals with a total superannuation balance of less than \$500,000 just before the start of the financial year to make additional concessional contributions in that financial year by accessing unused concessional contribution cap amounts carried forward from the previous five years. Unused cap amounts can be carried forward from the 2018-19 financial year.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Increased concessional contributions cap	
<p>Individuals with a total superannuation balance of less than \$500,000 just before the start of a financial year can increase their concessional contributions cap in the financial year by applying previously unapplied unused concessional contributions cap amounts from one or more of the previous five financial years.</p> <p>An individual can carry forward unused concessional contributions cap amounts accrued from the 2018-19 financial year onwards.</p>	<p>There is an annual cap on the amount of concessional contributions made in respect of an individual for a given financial year. An individual has excess concessional contributions for a financial year if their concessional contributions for the year exceed their concessional contributions cap for the year.</p> <p>If an individual does not use the entire amount of their concessional contributions cap in a financial year they are not able to carry forward unused amounts.</p>

Detailed explanation of new law

8.9 Schedule 6 to the TLA Bill amends Division 291 to allow individuals who have a total superannuation balance of less than \$500,000

just before the start of the financial year to increase their concessional contributions cap in that year if they have unused concessional contributions cap amounts from any of the previous five financial years.

Background

8.10 Division 291 places an annual cap on the amount of superannuation contributions that may receive concessional tax treatment for an individual in a financial year. Concessional superannuation contributions are broadly those that are made to a complying superannuation provider by an employer on behalf of an individual or by the individual themselves, which are included in the assessable income of the superannuation provider in relation to the plan and in respect of which the employer or individual claims an income tax deduction.

8.11 Concessional contributions that exceed the annual cap are excess concessional contributions. An amount equal to the excess is included in an individual's assessable income with a tax offset to compensate for income tax already applied to the contributions in the superannuation fund.

Five year carry forward of unused concessional contributions cap

8.12 Schedule 6 to the TLA Bill introduces provisions to allow a five year carry forward of unused concessional contributions cap amounts. An individual will be able to make additional concessional contributions in a financial year using these carried forward amounts if:

- their concessional contributions for the year would otherwise exceed the concessional contributions cap for that year; and
- they had a total superannuation balance of less than \$500,000 just before the start of the financial year; and
- they have previously unapplied unused concessional contributions cap amounts from one or more of the previous five financial years. [*Schedule 6, items 1 to 4, subsections 280-15(1) and (2), section 291-1 and subsections 291-20(3)*]

Unused concessional contributions cap

8.13 An individual has unused concessional contributions cap for a financial year if they did not fully utilise their concessional contributions cap that year. The amount of the unused concessional contributions cap is the difference between the individual's concessional contributions and the concessional contributions cap. [*Schedule 6, item 4, subsections 291-20(6), and*

schedule 11, item 9, the definition of ‘unused concessional contributions cap’ in subsection 995-1(1)]

8.14 However, an individual cannot have unused concessional contributions cap for a financial year earlier than the 2018-19 financial year. This means that the first year in which an individual will be able to make additional concessional contributions by applying their unused concessional contributions cap amounts is the 2019-20 financial year. *[Schedule 6, item 4, subsection 291-20(7)]*

Increased concessional contributions cap

8.15 If an individual makes concessional contributions that exceed the concessional contributions cap (for example they make concessional contributions of \$40,000) they are able to increase their concessional contributions cap. To be eligible they must:

- have a total superannuation balance of less than \$500,000 just before the start of the financial year in which they want to make additional concessional contributions; and
- have unused concessional contributions cap amounts from one or more of the previous five financial years. *[Schedule 6, item 4, subsection 291-20(3)]*

8.16 Broadly, an individual’s total superannuation balance includes the value of their superannuation interests in the accumulation phase, the adjusted balance of their transfer balance account (if they have one), and ‘in transit’ rolled-over superannuation benefits. ‘Total superannuation balance’ is explained in further detail at paragraphs 5.15 to 5.38.

8.17 An individual’s concessional contributions cap cannot be increased by more than the amount by which they would otherwise exceed the concessional contributions cap. That is, only the exact amount of unused concessional contributions cap that is necessary is used, and any remaining unapplied unused concessional contributions cap is preserved and continues to be carried forward. *[Schedule 6, item 4, subsection 291-20(4)]*

8.18 Amounts of unused concessional contributions cap are applied to increase an individual’s concessional contributions cap in order from the earliest year to the most recent year. *[Schedule 6, item 4, subsection 291-20(5)]*

8.19 Unused concessional cap amounts not utilised after five financial years will no longer be able to be carried forward.

Example 8.1: Unused concessional contributions cap

In the 2018-19 financial year Layla’s employer made concessional superannuation guarantee contributions of \$10,000 on her behalf to her superannuation fund. Layla did not make any deductible personal contributions to her fund.

The concessional contributions cap for the 2018-19 financial year is \$25,000.

Layla’s unused concessional contributions cap amount for the 2018-19 financial year is therefore \$15,000.

Example 8.2: Increased concessional contributions cap

Between the 2018-19 and 2023-24 financial years Layla’s concessional contributions and available unused concessional contributions cap are as follows:

	<i>2018-19</i>	<i>2019-20</i>	<i>2020-21</i>	<i>2021-22</i>	<i>2022-23</i>	<i>2023-24</i>
Concessional contributions	\$10,000	\$10,000	\$10,000	\$10,000	\$10,000	\$40,000
Available unused cap	\$15,000	\$15,000	\$15,000	\$15,000	\$15,000	\$0
Cumulative available unused cap	\$15,000	\$30,000	\$45,000	\$60,000	\$75,000	\$60,000

In the 2023-24 financial year Layla makes a deductible personal contribution of \$30,000 in addition to her employer’s concessional superannuation guarantee contribution of \$10,000 on her behalf. At the end of 30 June 2023 Layla had a total superannuation balance of less than \$500,000.

Assuming the concessional contributions cap is \$25,000 (for all years between 2018-19 and 2023-24), Layla will have exceeded this cap by \$15,000. However, Layla will be able to increase her concessional contributions cap for the 2023-24 financial year by using \$15,000 of unused concessional contributions cap from the 2018-19 financial year.

Example 8.3: Increased concessional contributions cap

Further to Example 8.2, in the 2024-25 financial year Layla makes a deductible personal contribution of \$20,000 in addition to her employer’s concessional superannuation guarantee contribution of \$10,000 on her behalf. At the end of 30 June 2024 Layla’s total superannuation balance was still less than \$500,000.

	2019-20	2020-21	2021-22	2022-23	2023-24	2024-25
Concessional contributions	\$10,000	\$10,000	\$10,000	\$10,000	\$40,000	\$30,000
Available unused cap	\$15,000	\$15,000	\$15,000	\$15,000	0	\$0
Cumulative available unused cap	\$15,000	\$30,000	\$45,000	\$60,000	\$60,000	\$55,000

Assuming the concessional contributions cap is \$25,000, Layla will have exceeded this cap by \$5,000. However, Layla will be able to increase her concessional contributions cap for the 2024-25 financial year by using \$5,000 of her unused concessional contributions cap from the 2019-20 financial year.

The remaining \$10,000 unused concessional contributions cap from the 2019-20 financial year cannot continue to be carried forward. This is because in the 2025-26 financial year it would be outside of the five year carry forward period.

Example 8.4: \$500,000 total superannuation balance

In the 2021-22 financial year Ashlea intends to use her unused concessional contributions cap amounts to make concessional contributions of \$45,000, on top of her employer’s concessional superannuation guarantee contribution of \$5,000.

At the end of 30 June 2021 Ashlea had a total superannuation balance of \$480,000 and unused concessional contribution cap amounts from the previous three financial years. She is therefore eligible to make an additional concessional contribution in the 2021-22 financial year.

	2018-19	2019-20	2020-21	2021-22
Concessional contributions	\$5,000	\$5,000	\$5,000	\$50,000
Available unused cap	\$20,000	\$20,000	\$20,000	\$0
Cumulative available unused cap	\$20,000	\$40,000	\$60,000	\$35,000

Assuming the concessional contributions cap is \$25,000 for the 2021-22 financial year, Ashlea will have exceeded this cap by \$25,000. However, Ashlea will be able to increase her concessional contributions cap for the 2021-22 financial year by using the full amount of her unused concessional contributions cap from the 2018-19

financial year, plus \$5,000 of unused cap from the 2019-20 financial year.

At the end of 30 June 2022 Ashlea now has a total superannuation balance of \$530,000. This means that Ashlea will not be able to increase her concessional contributions cap using unused concessional contribution cap amounts in the 2022-23 financial year.

However, if Ashlea's total superannuation balance later falls below \$500,000 she will again be eligible to increase her concessional contributions cap by accessing her unused concessional contribution cap amounts from the five years prior to the year that she is now eligible to make further contributions.

Application and transitional provisions

8.20 The amendments made by Schedule 6 to the TLA Bill commence on the first day of the next quarter following the day of Royal Assent. *[Item 4 in the table in section 2]*

8.21 Schedule 6 to the TLA Bill applies in relation to working out the concessional contributions cap for the 2019-20 financial year and later financial years. *[Schedule 6, item 5]*

STATEMENT OF COMPATABILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016

8.22 Schedule 6 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

8.23 Schedule 6 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 will allow individuals with total superannuation balances of less than \$500,000 just before the start of a financial year to make additional concessional contributions in that year by allowing them to access unused concessional contribution cap amounts from the previous five financial years.

8.24 This Schedule improves access to superannuation for those individuals who take time out of work, work part-time, have ‘lumpy’ income or have not previously had the capacity to contribute up to their concessional contributions cap, by providing them the flexibility to make catch-up concessional contributions, if they have the financial capacity and choose to do so.

Human rights implications

8.25 This Schedule does not engage any of the applicable rights or freedoms because it improves the consistency of the superannuation system for individuals that may otherwise be unable to fully utilise their concessional contributions cap.

Conclusion

8.26 This Schedule is compatible with human rights as it does not raise any human rights issues.

Chapter 9

Tax offsets for spouse contributions

Outline of chapter

9.1 Schedule 7 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 (the TLA Bill) amends the tax law to encourage individuals to make superannuation contributions for their low income spouses. This is achieved by increasing the amount of income an individual's spouse can earn before the individual ceases to be entitled to a tax offset for making superannuation contributions on behalf of their spouse.

9.2 All references in this Chapter are to the *Income Tax Assessment Act 1997* unless otherwise specified. All legislative amendments referred to in this Chapter are contained in the TLA Bill unless otherwise specified.

Context of amendments

9.3 The measure forms part of the Government's Superannuation Reform Package announced in the 2016-17 Budget. The measure provides an incentive for individuals to contribute to the superannuation accounts of their lower income spouse. The measure improves the flexibility of the superannuation system.

9.4 A tax offset is available to an individual if they make a contribution to a complying superannuation fund or retirement savings account on behalf of their spouse and, amongst other things, the total of the spouse's assessable income, reportable fringe benefits amounts, and reportable employer superannuation contributions for an income year is less than a set threshold amount. Prior to these amendments that threshold was \$13,800.

9.5 The amount of this offset for an individual for an income year was equal to 18 per cent of the lesser of:

- \$3,000 less the amount by which the total of the spouse's assessable income, reportable fringe benefits amounts and reportable employer superannuation contributions for the income year exceeds \$10,800 (total spouse income); and

- the sum of the spouse contributions made by the individual in the income year.

9.6 The amount of the offset that an individual is entitled to for an income year cannot exceed \$540 (18 per cent of \$3,000), even if an individual has more than one spouse in the same income year.

Summary of new law

9.7 Schedule 7 to the TLA Bill increases to \$40,000 from \$13,800 the total spouse income threshold below which superannuation contributions made by an individual for their spouse entitles the contributing individual to a tax offset.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
A resident individual is entitled to a tax offset up to a maximum of \$540 in an income year for contributions made to a complying superannuation fund or retirement savings account if the contributions are for the purpose of providing superannuation benefits for their eligible spouse. A spouse is eligible, if, among other things, the total of the spouse's assessable income, reportable fringe benefits amounts and reportable employer superannuation contributions for the income year is less than \$40,000.	A resident individual is entitled to a tax offset up to a maximum of \$540 in an income year for contributions made to a complying superannuation fund or retirement savings account if the contributions are for the purpose of providing superannuation benefits for their eligible spouse. A spouse is eligible, if, among other things, the total of the spouse's assessable income, reportable fringe benefits amounts and reportable employer superannuation contributions for the income year is less than \$13,800.

Detailed explanation of new law

9.8 Schedule 7 to the TLA Bill increases the amount of income an individual's spouse can earn before the individual ceases to be entitled to a tax offset when they make superannuation contributions on behalf of their spouse.

9.9 Previously, the threshold for the total of the spouse's assessable income, reportable fringe benefits amounts, and reportable employer superannuation contributions (total spouse income) was \$13,800. As a

result of the amendments, this threshold is now \$40,000. [*Schedule 7, item 1, paragraph 290-230(2)(c)*]

9.10 The calculation of the amount of the offset for an income year is also changed to account for the increased spouse income threshold. It is now 18 per cent of the lesser of:

- \$3,000 less the amount by which total spouse income exceeds \$37,000 (previously \$10,800); and
- the sum of the spouse contributions made by the individual in the income year.

[*Schedule 7, item 3, paragraph 290-235(1)(a)*]

9.11 This means that an individual is entitled to a tax offset for an income year of the lesser of 18 per cent of their contributions on behalf of their spouse or \$540 (18 per cent of \$3000) until their spouse's total spouse income reaches \$37,000. If the total spouse income of an individual's spouse is between \$37,000 and \$40,000, the maximum tax offset available to the individual proportionally decreases, until at \$40,000 it is reduced to nil.

9.12 Other than this update to account for the increase in the threshold for total spouse income, the amendments do not alter the method for calculating the tax offset for an income year. The amendments also do not change the maximum tax offset amount of \$540 that is available to the individual under the current law. This maximum applies even if the individual has more than one spouse during an income year.

Example 9.1: Tax offset entitlement to low income spouse superannuation contributions — partial entitlement

Eloise and Leon are Australian residents who are married. In the 2017-18 income year, Leon works part time and has a total of \$39,000 of assessable income, reportable fringe benefits amounts and reportable employer superannuation contributions (total spouse income).

Eloise makes a contribution of \$3,000 on behalf of Leon to his complying superannuation fund during the 2017-18 income year. Accordingly, for the 2017-18 income year, Eloise has spouse contributions of \$3,000 and is entitled to a tax offset of \$180 calculated as follows:

Amount of the offset = 18% of the lesser of:

- spouse contributions; and

- \$3000 — (the amount by which total spouse income exceeds \$37,000).

Spouse contributions = \$3000

\$3,000 — (the amount by which total spouse income exceeds \$37,000)
= \$3,000 — (\$39,000 — \$37,000) = \$1,000.

\$1,000 is less than \$3,000 and therefore the amount of the offset available to Eloise in 2017-18 is

$\$1,000 \times 18\% = \$180.$

Example 9.2: Tax offset entitlement to low income spouse superannuation contributions — full entitlement

In the 2018-19 income year, Eloise continues to make superannuation contributions for the benefit of Leon. Leon reduces his work hours slightly and has total spouse income of \$31,000.

Eloise makes a contribution of \$6,000 on behalf of Leon to his complying superannuation fund during the 2018-19 income year. Accordingly, as Leon's total spouse income does not exceed \$37,000, Eloise is entitled to a tax offset of:

Amount of the offset = 18% of the lesser of:

- spouse contributions; and
- \$3000 — (the amount by which total spouse income exceeds \$37,000).

Spouse contributions = \$6000

\$3,000 — (the amount by which total spouse income exceeds \$37,000)
= \$3,000 — \$0 = \$3,000.

\$3,000 is less than \$6,000 and therefore the amount of the offset available to Eloise in 2018-19 is

$= \$3,000 \times 18\% = \$540.$

Example 9.3: Tax offset entitlement to low income spouse superannuation contributions — no entitlement

In the 2019-20 income year, Eloise continues to make superannuation contributions for the benefit of Leon. Leon has been promoted and has total spouse income of \$41,000.

Eloise is not entitled to a tax offset for any contributions made for the benefit of Leon, as Leon's total spouse income is \$40,000 or more.

Example 9.4: Tax offset entitlement to low income spouse superannuation contributions — multiple spouses

Larry and Tess are Australian residents in a de facto relationship. In the 2017-18 income year, Tess works part time and has total spouse income of \$25,000.

Larry makes a contribution of \$3,000 on behalf of Tess to her complying superannuation fund. Later in the year, Tess and Larry cease their de facto relationship, and Larry and Carmen enter into a de facto relationship. Also during the 2017-18 income year, Larry makes a contribution of \$1,000 on behalf of Carmen to her complying superannuation fund during the period of their de facto relationship. Carmen is an Australian resident who works part time during the 2017-18 income year and has total spouse income of \$30,000.

Larry is entitled to a tax offset for the 2017-18 income year in relation to his contributions for both spouses but not exceeding \$540. Larry is entitled to a tax offset of:

18 % of the lesser of:

- spouse contributions; and
- \$3000 — (the amount by which total spouse income exceeds \$37,000).

Spouse contributions = \$4000 (\$3000 for Tess and \$1000 for Carmen)

\$3,000 — (the amount by which total spouse income exceeds \$37,000)
= \$3,000 — \$0 = \$3,000 (as both Tess and Carmen had total spouse income for 2017-18 that was less than \$37,000).

\$3,000 is less than \$4,000 and therefore the amount of the offset is

$\$3,000 \times 18\% = \540 .

Consequential amendments

9.13 Prior to these amendments, because of the lower threshold for total spouse income (\$13,800) and the higher annual caps on non-concessional contributions (\$180,000) it was unlikely that spouse contributions would be made that would result in the spouse having excess non-concessional contributions.

9.14 However, with the changes to the spouse income threshold and the non-concessional contributions cap, including limits on contributions for individuals with a total superannuation balance exceeding the general transfer balance cap (see Chapter 5 for more information), it is more likely that individuals may have a spouse who has:

- exceeded their non-concessional contributions cap in a financial year or their total superannuation balance equals or exceeds the general transfer balance cap immediately before the start of the financial year; and
- total spouse income low enough that the individual would ordinarily be entitled to a tax offset for superannuation contributions for their spouse.

9.15 In this situation, an individual could receive the spouse tax offset for a contribution that the spouse withdraws from superannuation as an excess non-concessional contribution.

9.16 To address this, Schedule 7 also makes a consequential amendment to the eligibility criteria for the spouse tax offset. An individual is not entitled to the tax offset for an income year if their spouse's non-concessional contributions exceed the non-concessional contribution cap in the corresponding financial year or their total superannuation balance equals or exceeds the general transfer balance cap immediately before the start of the financial year. *[Schedule 7, item 2, subsection 290-230(4A)]*

Application and transitional provisions

9.17 The amendments commence from the start of the first day of the first quarter following Royal Assent. *[item 4 of the table in clause 2 of the TLA Bill]*

9.18 The amendments apply in determining entitlement to the tax offset for spouse superannuation contributions made in the 2017-18 income year and later income years. *[Schedule 7, item 4]*

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016

9.19 Schedule 7 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Outline

9.20 Schedule 7 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 amends the tax law to encourage individuals to make superannuation contributions for their low income spouses. This is achieved by increasing, to \$40,000 from \$13,800, the total spouse income threshold below which superannuation contributions made by an individual for their spouse entitle the contributing individual to a tax offset.

9.21 This Schedule assists more couples to support each other in saving for retirement, improve fairness and offers greater flexibility in the superannuation system for those who take time out of work, work part time or have ‘lumpy’ income and therefore have periods in which they make no or limited contributions to superannuation. It does so by encouraging more people to make superannuation contributions to their low income spouse.

Human rights implications

9.22 This Schedule does not engage any of the applicable rights or freedoms as it modifies income thresholds to encourage people to make contributions to superannuation on behalf of their low income spouses.

Conclusion

9.23 This Schedule is compatible with human rights as it does not raise any human rights issues.

Chapter 10

Innovative income streams and integrity

Outline of chapter

10.1 Schedule 8 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 (the TLA Bill) amends the earnings tax exemptions for complying superannuation funds, RSA providers and life insurance companies in the *Income Tax Assessment Act 1997* (ITAA 1997) to:

- extend the earnings tax exemption to new lifetime products such as deferred products and group self-annuities;
- remove the earnings tax exemption in respect of transition to retirement income streams (TRISs); and
- introduce an integrity measure that will apply to self-managed superannuation funds (SMSFs) and small Australian Prudential Regulation Authority (APRA) funds to support the operation of the transfer balance cap measure.

10.2 For the purposes of this Chapter, references to a TRIS will generally also include a transition to retirement income pension (TRIP), a non-commutable allocated pension and a non-commutable allocated annuity.

10.3 All references in this Chapter are to the ITAA 1997 unless otherwise specified. All legislative amendments referred to in this Chapter are contained in the TLA Bill 2016.

Context of amendments

10.4 The Government's 2016-17 Budget Superannuation Reform Package included measures to enhance the flexibility and integrity of the superannuation system. These measures will:

- remove tax barriers to the development of innovative income stream products by extending the earnings tax exemption to new lifetime products such as deferred products and group self-annuities;

- strengthen the integrity of superannuation income streams by removing the earnings tax exemption in respect of TRISs; and
- prevent SMSFs and small APRA funds, where one or more members have a superannuation interest in the retirement phase and a total superannuation balance of over \$1.6 million from using the segregated assets method to calculate earnings tax exemptions.

10.5 These measures seek to balance the integrity of the superannuation reform package, while maintaining the flexibility for trustees to operate their funds and manage funds' compliance costs.

Innovative retirement income products

10.6 In May 2016 the Government announced its response to the Retirement Income Streams Review and released its final report as part of the 2016-17 Budget.

10.7 The Government announced that it would remove tax barriers to the development of new retirement income products by extending the earnings tax exemption to new lifetime products such as deferred products and group self-annuities.

10.8 Currently, the earnings tax exemption provisions do not cover deferred products that may delay the commencement of annuity or pension payments for a number of years. This reflects the current annuity and pension standards in the *Superannuation Industry (Supervision) Regulations 1994* (SISR 1994) that require all superannuation income streams to make at least an annual superannuation benefit payment. These standards limit income stream product development, which then limits opportunities for individuals to better manage consumption and longevity risk in retirement.

10.9 Related regulations will amend the annuity and pension standards in the SISR 1994 to facilitate the development of new innovative retirement income products including deferred products and group self-annuities.

Transition to retirement income streams

10.10 The SISR 1994 and the *Retirement Savings Accounts Regulations 1997* (RSAR 1997) currently permit individuals who have reached preservation age, but not retired from the workforce or attained age 65, to draw down their pension or annuity through commencing a TRIS, a transition to retirement income pension (TRIP) or a non-commutable allocated pension or non-commutable allocated annuity.

10.11 Non-commutable allocated pensions and non-commutable allocated annuities are old-style TRISs that were offered by superannuation funds between 1 July 2005 and 20 September 2007.

10.12 TRISs were intended to assist older individuals transition to retirement by supplementing reduced income from decreased working hours with payments from a superannuation income stream. However, they have also been used for the sole purpose of achieving tax advantages. For example, individuals can enliven the earnings tax exemption by commencing a TRIS, thus saving up to 15 per cent on earnings. They can also salary sacrifice income into superannuation and draw down their account balance by commencing a TRIS to receive income taxed at a concessional rate but not reduce their working hours. Further, individuals may elect to treat superannuation income stream benefits as lump sums, which are tax-free up to the low rate cap of \$195,000.

10.13 Related regulations will remove this election in regulation 995-1.03 in the *Income Tax Assessment Regulations 1997* (ITAR 1997) so that individuals are no longer able to treat superannuation income stream benefits as superannuation lump sums.

Excluding SMSFs and small APRA funds with members with large balances from segregating assets

10.14 The introduction of the transfer balance cap will mean that some individuals will be required to reduce the value of their interests in the retirement phase to \$1.6 million. Most will rollback some or all of their excess to the accumulation phase. If funds with members in both the pension and accumulation phase use the segregated assets method to determine their earnings tax exemption, assets can be cycled between the segregated pools for each phase to avoid capital gains tax.

10.15 These funds will now be required to use the proportioning method to determine their earnings tax exemption.

Summary of new law

10.16 Schedule 8 to the TLA Bill amends the earnings tax exemption provisions of the ITAA 1997 that treat income earned from assets that fund current pension liabilities as exempt income of a complying superannuation fund, RSA provider or life insurance company.

10.17 The earnings tax exemption will be extended to new innovative retirement income products that are deferred superannuation income streams (including guaranteed annuities and group self-annuities) and will no longer be available in respect of TRISs.

10.18 In order to implement these changes, the earnings tax exemption provisions are reframed so that they no longer refer to superannuation income stream benefits that are payable at the time. Instead, the earnings tax exemption will be applied when a superannuation income stream is in the ‘retirement phase’ at the time.

10.19 A superannuation income stream will be in the retirement phase at a time if:

- a superannuation income stream benefit is payable from it at the time; or
- in the case of a deferred superannuation income stream — a superannuation income stream benefit is payable at a later time and the person who will receive the benefit has satisfied a relevant nil condition of release.

10.20 However, a superannuation income stream will not be in the retirement phase if it is a TRIS.

10.21 A superannuation income stream will also not be in the retirement phase for an income year if a superannuation income stream provider has failed to comply with a commutation authority in respect of a member’s transfer balance cap.

10.22 The earnings tax exemption provisions are also amended so that SMSFs and small APRA funds are not able to use the segregated assets method in section 295-385 to determine their earnings tax exemption in certain circumstances.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Earnings tax exemption provisions	
The earnings tax exemption provisions for complying superannuation funds, RSA providers and life insurance companies in the ITAA 1997 will apply to superannuation income streams that are in the retirement phase. This will cover superannuation income streams that are payable at that time and also deferred superannuation income streams where a person to whom a benefit is payable or will be payable	The earnings tax exemption provisions for complying superannuation funds, RSA providers and life insurance companies in the ITAA 1997 apply to superannuation income stream benefits that are payable at a time.

<i>New law</i>	<i>Current law</i>
<p>has retired, has a terminal medical condition, is permanently incapacitated or has attained age 65.</p> <p>A superannuation income stream is not in the retirement phase if it is a TRIS, or if a superannuation income stream provider has failed to comply with a commutation authority in respect of a member's transfer balance cap.</p>	
SMSFs and small APRA funds	
<p>SMSFs and small APRA funds will not be able to use the segregated method to determine their earnings tax exemption for an income year if:</p> <ul style="list-style-type: none"> • at a time during the income year, there is at least one superannuation interest in the fund that is in the retirement phase; and • just before the start of the income year: <ul style="list-style-type: none"> – a person has a total superannuation balance that exceeds \$1.6 million; and – the person is the retirement phase recipient of a superannuation income stream (whether or not the fund is the superannuation income stream provider for the superannuation income stream). 	<p>Under Subdivision 295-F, all complying superannuation funds including SMSFs and small APRA funds can use both the segregated and proportional methods to determine their earnings tax exemption on assets that are used to discharge liabilities in respect of current pension liabilities.</p>

Detailed explanation of new law

Background

10.23 Currently, Subdivision 295-F and Division 320 give complying superannuation funds, RSA providers and life insurance companies an earnings tax exemption on income from assets that support currently payable pension and annuity liabilities.

10.24 These provisions are broadly framed in terms of liabilities to provide superannuation income stream benefits (or related concepts) that are currently payable.

10.25 A superannuation income stream benefit is a payment from a superannuation income stream. A superannuation income stream is an income stream that is taken to be an annuity or pension in accordance with the SISR 1994 and RSAR 1997. Annuities and pensions must comply with the minimum standards set out in regulations 1.05 and 1.06 of the SISR 1994 and regulation 1.07 of the RSAR 1997.

10.26 In order to extend the earnings tax exemption to new innovative retirement income products that are deferred superannuation income streams (including guaranteed annuities and group self-annuities), and to remove the earnings tax exemption in respect of TRISs, it is necessary to reframe the earnings tax exemption provisions so that they no longer require superannuation income stream benefits to be currently payable.

10.27 This is because the earnings tax exemption:

- will apply to deferred superannuation income streams prior to superannuation income stream benefits being payable, and
- will no longer be available for TRISs even when superannuation income stream benefits are currently payable.

Retirement phase

10.28 Schedule 8 to the TLA Bill amends the ITAA 1997 so that the earnings tax exemption provisions now apply to complying superannuation funds, RSA providers and life insurance companies if a superannuation income stream is in the 'retirement phase'.

10.29 A superannuation interest will be in the retirement phase at a time if it supports a superannuation income stream that is in the retirement phase at that time. *[Schedule 11, item 9, paragraph (b) of the definition of 'retirement phase' in subsection 995-1(1)]*

10.30 A superannuation income stream will be in the retirement phase if a superannuation income stream benefit is payable from it at that time. *[Schedule 11, items 1 and 9, subsection 307-80(1) and paragraph (a) of the definition of 'retirement phase' in subsection 995-1(1)]*

10.31 A superannuation income stream is also in the retirement phase at a time if it is a deferred superannuation income stream and a superannuation income stream benefit will be payable from it to a person after that time, and the person has retired, has a terminal medical condition, is permanently incapacitated or has attained the age of 65. This

exception is for deferred superannuation income streams that are not currently payable. *[Schedule 11, items 1 and 9, subsection 307-80(2) and the definition of ‘deferred superannuation income stream’ in subsection 995-1(1)]*

10.32 A deferred superannuation income stream has the meaning given by the SISR 1994. *[Schedule 11, item 9, the definition of ‘deferred superannuation income stream’ in subsection 995-1(1)]*

10.33 ‘Deferred superannuation income stream’ will be defined in the SISR 1994 as part of related regulations that will amend the annuity and pension standards in the SISR 1994 to facilitate the development of the new innovative retirement income products.

10.34 A deferred superannuation income stream (which will include guaranteed annuities and group self-annuities) will be a superannuation income stream where the rules governing the income stream meet these new standards.

10.35 If an individual purchases a deferred superannuation income stream prior to meeting one of the relevant nil conditions of release, the earnings tax exemption will not apply until one of the conditions is met. If an individual satisfies a condition of release prior to purchase (e.g. retirement), the earnings tax exemption will apply from the purchase date.

10.36 For example, where an individual purchases a deferred pension from the age of 55 that pays an income stream from the age of 80, the earnings tax exemption will apply from the date the individual satisfies a condition of release such as retirement or attaining the age of 65. Where an individual purchases a deferred pension at the age of 70 that pays an income stream from the age of 80 the earnings tax exemption will apply from the purchase date.

10.37 A superannuation income stream will not be in the retirement phase if it is a TRIS, a TRIP, a non-commutable allocated annuity or a non-commutable allocated pension. *[Schedule 11, item 1, subsection 307-80(3)]*

10.38 A superannuation income stream will also not be in the retirement phase in an income year if a superannuation income stream provider has failed to comply with a commutation authority in respect of a member’s transfer balance cap. For further discussion see paragraphs 3.191 to 3.197. *[Schedule 11, item 1, subsection 307-80(4)]*

Earnings tax exemption provisions for complying superannuation funds

10.39 Complying superannuation funds will receive the earnings tax exemption in respect of retirement phase (RP) superannuation income stream benefits of the fund at the time. [Schedule 8, items 1 to 3 and 6 to 8, paragraphs 295-385(3)(a) and (4)(a), subsections 295-385(5), 295-390(3) and (7) and 295-395(2)]

10.40 A superannuation income stream benefit is an RP superannuation income stream benefit of a superannuation fund if it is payable by the fund at that time from a superannuation income stream that is in the retirement phase at that time. [Schedule 11, items 1 and 9, subsection 307-75(1) and the definition of 'retirement phase superannuation income stream benefit (or RP superannuation income stream benefit)' in subsection 995-1(1)]

10.41 A superannuation income stream benefit is also an RP superannuation income stream benefit of a superannuation fund at a time if it is payable by the fund after that time from a superannuation income stream that is a deferred superannuation income stream and is in the retirement phase at that time. [Schedule 11, items 1 and 9, subsection 307-75(2) and the definition of 'retirement phase superannuation income stream benefit (or RP superannuation income stream benefit)' in subsection 995-1(1)]

Earnings tax exemption provisions for RSA providers

10.42 RSA providers will receive the earnings tax exemption in respect of a covered superannuation income stream. A superannuation income stream will be covered if it is a pension (within the meaning of the *Retirement Savings Accounts Act 1997*) and it is in the retirement phase. [Schedule 8, items 10 and 11, sections 295-405 and 295-407, and paragraph 295-410(a)]

Earnings tax exemption provisions for life insurance companies

10.43 Life insurance companies will receive the earnings tax exemption in respect of RP superannuation income stream benefits:

- where an exempt life insurance policy is held by a trustee of a complying superannuation fund; and
- in respect of annuities that are superannuation income streams that are in the retirement phase. [Schedule 8, items 15 to 18, items 20 to 25, paragraphs 320-137(3)(d) and (3)(e), subsection 320-137(3A), paragraph 320-246(1)(a), subparagraphs 320-246(1)(b)(i) and (1)(e)(ii) and paragraphs 320-246(1)(ea), 320-247(1)(a) and 320-247(2)(a)]

Life insurance companies — consequential amendments

10.44 Life insurance policies that are held to support superannuation income stream benefits paid from a TRIS will no longer be exempt life insurance policies because a superannuation income stream will not be in the retirement phase if it is a TRIS. If a superannuation income stream provider fails to comply with a commutation authority in respect of a member's transfer balance cap, the superannuation income stream will also no longer be an exempt life insurance policy because it will not be in the retirement phase. *[Schedule 11, item 1, subsection 307-80(3) and (4)]* As such, these policies will be reclassified as complying superannuation life insurance policies.

10.45 As a consequence of this reclassification, a life insurance company may need to transfer assets supporting these policies from its segregated exempt assets to its complying superannuation asset pool. Consequential amendments will allow life insurance companies to transfer assets in these circumstances without triggering unintended tax consequences. *[Schedule 8, items 19, 26 and 27, subsections 320-185(4) and 320-250(1A) and paragraph 320-255(1)(a)]*

10.46 The definition of 'complying superannuation life insurance policy' is amended so that it includes an immediate annuity directly held by an individual if it is a superannuation income stream that is not in the retirement phase, for example a TRIS. *[Schedule 11, item 8, the definition of 'complying superannuation life insurance policy' in subsection 995-1(1)]*

10.47 Annuities that are deferred superannuation income streams that are not yet in the retirement phase (because the individual has not met a relevant nil condition of release) are complying superannuation life insurance policies. Where the annuity is directly held by an individual it will be covered under subparagraph (b)(i) of the definition of 'complying superannuation life insurance policy' in subsection 995-1(1) because it is not presently payable.

10.48 Annuities that are deferred superannuation income streams that are in the retirement phase are exempt life insurance policies. This is because they will either be an immediate annuity that is a superannuation income stream that is in the retirement phase (presently payable), or because they will be an annuity that is not an immediate annuity that is a superannuation income stream that is in the retirement phase (has met a relevant nil condition of release but is not presently payable). *[Schedule 8, item 23, paragraph 320-246(1)(ea)]*

Superannuation death benefits

10.49 Subregulations 995-1.01(2) to (5) of the *Income Tax Assessment Regulations 1997* (ITAR 1997) expand the meaning of the term ‘superannuation income stream benefit’ for the purposes of the earnings tax exemption provisions. These subregulations ensure that where a complying superannuation fund member was receiving a superannuation income stream immediately before their death, the superannuation fund will continue to be entitled to the earnings tax exemption in the period from the member’s death until their benefits are cashed by paying them out as a lump sum and/or by commencing a new superannuation income stream.

10.50 These subregulations will continue to work as they currently do despite the earnings tax exemption provisions being reframed in terms of ‘RP superannuation income stream benefits’. This is because an RP superannuation income stream benefit is defined in terms of a superannuation income stream benefit.

Excluding SMSFs and small APRA funds with members that have large balances from segregating assets

10.51 If a complying superannuation fund is covered by section 295-387, assets of the fund cannot be segregated for an income year. [*Schedule 8, items 4 and 9, subsections 295-385(7) and 295-395(3)*]

10.52 A complying superannuation fund will be covered by section 295-387 if:

- at a time during the income year the fund is either an SMSF as defined by sections 17A and 17B of the *Superannuation Industry (Supervision) Act 1993*, or a fund with less than 5 members (generally known as a small APRA fund); and
- at a time during the income year there is at least one superannuation interest in the fund in the retirement phase; and
- just before the start of the income year:
 - a person has a total superannuation balance that exceeds \$1.6 million;
 - the person is a retirement phase recipient of a superannuation income stream; and
- at a time during the income year that person has a superannuation interest in the fund. [*Schedule 8, item 5, section 295-387*]

10.53 It will not be necessary for a person with an interest in the small fund to be receiving an income stream from that fund. A small fund will be excluded from using the segregated assets method where a member of the fund, with a total superannuation balance that exceeds \$1.6 million, is a retirement phase recipient of an income stream from another superannuation income stream provider. [Schedule 8, item 5, subsection 295-387(2)(c)]

Example 10.1: Individual with a large balance

On 30 June 2017 Jeremy has a total superannuation balance of \$2.1 million in retirement phase, with a \$1.6 million allocated pension in an SMSF and a \$500,000 allocated pension with ABC retail superannuation fund. On 1 July 2017 he rolls over \$500,000 from his SMSF into a new SMSF as an accumulation interest.

As Jeremy had a total superannuation balance exceeding \$1.6 million on 30 June 2017, neither of the SMSFs he is a member of are able to calculate exempt income using the segregated method and must use the proportional method for the 2017-18 financial year. The retail superannuation fund is not affected and can use either method to calculate exempt income

10.54 Assets of funds covered by section 295-387 are known as *disregarded small fund assets*. Such assets cannot be segregated current pension assets for the purposes of section 295-385 or segregated non-current assets for the purposes of section 295-395. [Schedule 8, items 4, 5, and 9, sections 295-385, 295-387 and 295-395 and schedule 11, item 9, the definition of 'disregarded small fund assets' in subsection 995-1(1)]

10.55 As a result, these funds must calculate their earnings tax exemption for funding current pension liabilities of an income year under section 295-390, applying the proportionate method with no assets taken to be segregated to pay current or future liabilities. For clarity, if a complying superannuation fund which is not covered by section 295-387 uses the segregated method to undertake asset cycling to avoid tax, it may be subject to the general Part IVA anti avoidance provisions of the ITAA 1997.

10.56 A regulation will be made for the purposes of subsection 295-390(7) to determine liabilities in respect of account based income stream benefits for the proportionate method. This means that superannuation funds who use the proportionate method but whose only superannuation income stream benefit liabilities arise from account based superannuation income stream products will not be required to obtain an actuary's certificate for the purpose of determining their exempt current pension income.

Consequential amendments

Proportioning rule

10.57 Section 307-125 contains the proportioning rule for the taxation of superannuation benefits. Currently, if a superannuation benefit arises from the commutation of a superannuation income stream, the proportioning rule is applied when superannuation income stream benefits commence being made from the income stream.

10.58 The proportioning rule is amended so that if a superannuation income stream benefit arises from the commutation of a deferred superannuation income stream before the commencement day of the income stream, the rule is applied at the time just before the commutation occurred. *[Schedule 8, item 14, paragraph 307-125(3)(c)]*

Tax treatment of a lump sum payment arising from a partial commutation

10.59 Currently, an individual is able to elect under paragraph 995-1.03(b) of the ITAR 1997, before a payment is made, that the payment is not to be treated as a superannuation income stream benefit (making it a superannuation lump sum).

10.60 This election will be removed by a related regulation. This will ensure that individuals can no longer take advantage of the election by treating normal or regular pension payments as lump sums, thereby accessing tax-free amounts up to the low rate cap.

10.61 However, the removal of this election will have an unintended consequence for individuals who partially commute their superannuation income stream. These individuals will no longer be able to make an election that the payment is a superannuation lump sum, which means the payment will be a superannuation income stream benefit.

10.62 However, lump sum payments arising from a partial commutation should be treated for both tax and superannuation purposes as superannuation lump sums. While this is appropriate, it will have the effect of preventing a superannuation fund from claiming the earnings tax exemption under section 295-385 to the extent that assets will no longer be held 'solely' to discharge liabilities in respect of superannuation income stream benefits, as it has supported the payment of a lump sum.

10.63 A consequential amendment is made so that a lump sum payment arising from a partial commutation of a superannuation income stream is generally treated as a superannuation lump sum for the purposes of the ITAA 1997. However, for the purposes of the exempt income provisions in Subdivision 295-F a lump sum payment arising from a

partial commutation of a superannuation income stream will be a superannuation income stream benefit. *[Schedule 8, items 12 and 13, section 307-65 and subsection 307-65(2)]*

Application and transitional provisions

10.64 The amendments in Schedule 8 commence on the start of the first day of the first quarter following Royal Assent *[Item 4 in the table in section 2 of the TLA Bill]*

10.65 The amendments in Schedule 8 apply in relation to the 2017-18 income year and later income years. *[Schedule 8, item 28]*

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016

10.66 Schedule 8 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

10.67 Schedule 8 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 amends the earnings tax exemption provisions in the *Income Tax Assessment Act 1997* to extend the earnings tax exemption to new lifetime products such as deferred products and group self-annuities, and remove the earnings tax exemption in respect of transition to retirement income streams (TRIS). It will also introduce an integrity measure that will apply to self-managed superannuation funds (SMSFs) and small Australian Prudential Regulation Authority funds to support the operation of the transfer balance cap measure.

Innovative retirement income products

10.68 Currently, the earnings tax exemption provisions do not cover deferred products that delay the commencement of annuity or pension payments for a number of years. This reflects the current annuity and pension standards in the *Superannuation Industry (Supervision) Regulations 1994* that require all superannuation income streams to make an annual superannuation benefit payment. These standards limit opportunities for individuals to better manage consumption and longevity risk in retirement.

Transition to retirement income streams

10.69 TRIS were intended to assist older individual's transition to retirement by supplementing reduced income from decreased working hours with payments from a superannuation income stream. However, they have also been used for the sole purpose of achieving tax advantages.

For example, individuals can access the earnings tax exemption in the fund by commencing a TRIS, thus saving up to 15 per cent on earnings. They can also salary sacrifice income into superannuation and draw down their account balance by commencing a TRIS to receive income taxed at a concessional rate but not reduce their working hours. Further, individuals may elect to treat superannuation income stream benefits as lump sums, which are tax-free up to the low rate cap of \$195,000.

Excluding SMSFs and small APRA funds with members with large balances from segregating assets

10.70 The introduction of the transfer balance cap will mean that some individuals will be required to reduce the value of their interests in the retirement phase to \$1.6 million. Most will rollback some or all of their excess to the accumulation phase. If funds with members in both the pension and accumulation phase use the segregated assets method to determine their earnings tax exemption, assets can be cycled between the segregated pools for each phase to avoid capital gains tax.

10.71 These funds will now be required to use the proportioning method to determine their earnings tax exemption.

10.72 The Parliamentary Joint Committee on Human Rights has previously noted that the area of superannuation is likely to engage the right to social security in article 9 and the right to an adequate standard of living in article 11 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR).

10.73 Australia's retirement income system consists of three elements commonly referred to as the three pillars: the age pension, compulsory superannuation contributions, and voluntary savings including voluntary contributions to superannuation.

10.74 The first pillar, the age pension, provides for a minimum safety net of income in retirement, and is the primary method through which Australia meets its obligations under article 9 of the International Covenant on Economic, Social, and Cultural Rights and article 11 as far as it relates to income in retirement.

10.75 This Schedule falls within the pillars of mandatory and voluntary superannuation contributions.

10.76 These changes seek to balance the integrity of the superannuation reform package, while maintaining the flexibility for trustees to operate their funds and manage funds' compliance costs. These changes will not prevent affected individuals from using superannuation to support an adequate standard of living in retirement.

10.77 Removing barriers to innovative income stream products offers Australians more flexibility and may increase retirement incomes.

Human Rights implications

10.78 This Schedule does not engage any of the applicable rights or freedoms as it facilitates the availability of new income stream products while improving the integrity of the superannuation reform package.

Conclusion

10.79 This Schedule is compatible with human rights as it does not raise any human rights issues.

Chapter 11

Anti-detriment provisions

Outline of chapter

11.1 Schedule 9 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 (the TLA Bill) removes the income tax deduction available to a complying superannuation fund, life insurer, or complying approved deposit fund that pays an increased superannuation lump sum, because of the death of a member for the benefit of their spouse, former spouse or child, to compensate for income tax paid by the fund in respect of contributions made for the member during their lifetime.

11.2 All legislative references in this Chapter are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise specified. All legislative amendments referred to in this Chapter are contained in the TLA Bill.

Context of amendments

11.3 The measure forms part of the Government's Superannuation Reform Package announced in the 2016-17 Budget. The measure improves the integrity and fairness of the superannuation system.

11.4 Following the death of a member of a superannuation fund or approved deposit fund, a payment can be made to a beneficiary or to the trustee of a deceased estate. The payment can be made as a superannuation lump sum, or to dependants of the member, as a superannuation income stream.

11.5 Currently the deduction under section 295-485 (the anti-detriment deduction) generally entitles complying superannuation funds and complying approved deposit funds to an income tax deduction when they provide a lump sum benefit because of the death of a member for the benefit of their spouse, former spouse or children. The amount a fund may deduct is broadly:

- the amount by which the benefit is greater than it would otherwise be to compensate for the income tax that was payable on the member's contributions;

- divided by the income tax rate that applies to assessable contributions to the fund (that is the amount of tax the fund is expected to have borne in relation to the contributions).

11.6 An equivalent deduction is available in the same circumstances for lump sum death benefits paid by life insurers in respect of exempt life insurance policies (within the meaning of section 320-246) and certain other life insurance policies relating to superannuation (see section 320-107).

11.7 The anti-detriment provision is inconsistently applied by funds and insurers. While the concession is intended to benefit certain dependants of deceased members, it relies upon the actions of funds and insurers. This is because not all funds and insurers are willing or able to increase benefits payable because of death.

11.8 The deduction was originally introduced to smooth the transition when superannuation contributions became subject to income tax in the hands of superannuation funds by ensuring that recipients of benefits paid in respect of a member's death were not disadvantaged. The transitional measures are no longer warranted and are inconsistent. Removing the anti-detriment income tax deduction better aligns the treatment of lump sum benefits paid in respect of the death of members across all complying superannuation and approved deposit funds, as well as life insurers, and the treatment of bequests outside of the superannuation system. The taxation treatment in the hands of recipients of lump sum benefits paid in respect of the death of a member is not changed.

Summary of new law

11.9 The amendments remove the anti-detriment deduction from the income tax law.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>Complying superannuation funds and complying approved deposit funds are not entitled to claim an income tax deduction if they pay a superannuation benefit on the death of a member to benefit their spouse, former spouse or children and this benefit is greater than it would otherwise be to compensate for income tax paid by the fund in respect of contributions made during the member's lifetime.</p> <p>The equivalent deduction for life insurers is also no longer available.</p>	<p>Complying superannuation funds and complying approved deposit funds are entitled to claim an income tax deduction if they pay a superannuation benefit on the death of a member to benefit their spouse, former spouse or child and this benefit is greater than it would otherwise be to compensate for income tax paid by the fund in respect of contributions made during the member's lifetime.</p> <p>An equivalent deduction is available for lump sum death benefits paid by life insurers in respect of exempt life insurance policies (within the meaning of section 320-246) and certain other life insurance policies relating to superannuation (see section 320-107).</p>

Detailed explanation of new law

11.10 The amendments repeal section 295-485 (the anti-detriment deduction). This section allowed complying superannuation and approved deposit funds an income tax deduction if a lump sum superannuation benefit paid to benefit the spouse, former spouse or children of a member following a member's death was greater than it would otherwise have been to compensate for tax payable on the contributions to the fund made for the member over the member's lifetime. [*Schedule 9, item 3, section 295-485*]

11.11 The amendments also repeal section 320-107 which provided an equivalent deduction to life insurers under the same circumstances. [*Schedule 9, item 3, section 320-107*]

11.12 Removing the anti-detriment income tax deduction better aligns the treatment of lump sum benefits paid in respect of the death of members across all complying superannuation funds, life insurers and approved deposit funds and the treatment of bequests outside of the superannuation system. The taxation treatment in the hands of recipients of lump sum benefits paid in respect of the death of a member is not changed.

Example 11.1: No entitlement to deduction

John is a superannuation fund member who passes away in February 2018. John has two children, Miranda and Sam. John's superannuation fund pays Miranda and Sam a superannuation lump sum death benefit. Although Sam and Miranda are John's children, because of these amendments the superannuation fund is not entitled to claim an income tax deduction for any increase in the amount of these payments to compensate for the income tax paid on contributions made in respect of John's superannuation interest with the fund.

Consequential amendments

11.13 Schedule 9 to the TLA Bill makes a number of consequential amendments to income tax law (including the transitional provisions) to remove items that become redundant following the repeal of the deduction. *[Schedule 9, items 1, 2 and 4, table item headed "superannuation and related business" in the table in section 12-5 and group heading before section 295-485 of the ITAA 1997 and sections 295-485A and 295-485 of the Income Tax (Transitional Provisions) Act 1997]*

Application and transitional provisions

11.14 The amendments in Schedule 9 to the TLA Bill commence on the start of the first day of the first quarter following Royal Assent. *[Item 4 of the table in subsection 2(1) of the TLA Bill]*

11.15 The repeal applies in relation to lump sums that are paid because of the death of a member where that member died on or after 1 July 2017. However, from 1 July 2019, it applies to all benefits paid after this time, irrespective of whether the member died before 1 July 2017. *[Schedule 9, item 5]*

11.16 This ensures that delays in the payment of a lump sum in respect of the death of a member in the first two years after the repeal do not result in differences in income tax treatment. However, limiting the transition period to two years avoids uncertainty and compliance costs that would result from indefinitely retaining the income tax deduction in respect of members that pass away prior to 1 July 2017 where payment of lump sums to beneficiaries is significantly delayed.

Example 11.2: Entitlement to income tax deduction

Susan is a complying superannuation fund member who passes away on 30 June 2017 and is survived by her husband, William. In December 2017, Susan's superannuation fund pays William a lump sum death benefit, representing the value of Susan's interest and an amount equal to the estimated income tax that has been paid in respect of the superannuation contributions made during Susan's lifetime. The superannuation fund is entitled to claim an income tax deduction under section 295-485 (the anti-detriment deduction) in respect of the payment, as Susan passed away before 1 July 2017.

Example 11.3: No entitlement to income tax deduction

Reuben is a complying superannuation fund member who passes away on 15 July 2017 and is survived by his adult son Alexander. Reuben's superannuation fund pays Alexander a lump sum death benefit. The superannuation fund is not entitled to claim an income tax deduction for any increase in the amount of this payment to compensate for the tax paid in respect of contributions to Reuben's superannuation interest with the fund because Reuben passed away after 30 June 2017.

Example 11.4: No entitlement to income tax deduction for payment made after 1 July 2019

George is a complying superannuation fund member who passes away on 15 June 2017 and is survived by his adult son Tim. George's superannuation fund pays Tim a lump sum death benefit. Due to delays in the grant of probate this payment is not made until 29 August 2019. The superannuation fund is not entitled to claim an income tax deduction because, although George passed away before 30 June 2017, the payment was not made until after 1 July 2019.

STATEMENT OF COMPATABILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016

11.17 Schedule 9 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

11.18 Schedule 9 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 removes the income tax deduction available to a complying superannuation fund, life insurer or complying approved deposit fund that pays an increased lump sum, because of the death of a member for the benefit of their spouse, former spouse or child, to compensate for income tax paid by the fund in respect of contributions made for the member during their lifetime.

11.19 Removing the anti-detriment income tax deduction better aligns the treatment of lump sum benefits paid in respect of the death of members across all complying superannuation funds, life insurers and approved deposit funds and the treatment of bequests outside of the superannuation system. The taxation treatment in the hands of recipients of lump sum benefits paid in respect of the death of a member is not changed.

11.20 The anti-detriment provision is an outdated provision that was introduced in 1989, when superannuation was taxed very differently. The provision is inequitable because it is provided inconsistently across superannuation funds. The removal of this provision aligns the treatment of superannuation death benefits with the tax treatment of other bequests for which no tax deduction is given for prior tax paid.

Human rights implications

11.21 This Schedule does not engage any of the applicable rights or freedoms as it removes an anomaly in the current tax treatment of these amounts.

Conclusion

11.22 This Schedule is compatible with human rights as it does not raise any human rights issues.

Chapter 12

Administration and consequential amendments

Outline of chapter

12.1 Part 1 of Schedule 10 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 (the TLA Bill) amends the tax law to simplify and consolidate the range of existing processes for the release of amounts from individuals' superannuation using a release authority.

12.2 The amendments replace existing release authorities (except those relating to deferred debt account discharge liabilities for Division 293 tax) with a new simplified release authority regime. This ensures that the release of all such superannuation amounts is subject to common processes and timeframes.

12.3 Part 2 of Schedule 10 to the TLA Bill simplifies the taxation law to assist in streamlining the administration of the Division 293 tax regime.

12.4 The amendments reduce compliance costs for superannuation providers and individuals where superannuation benefits become payable from defined benefit interests. The amendments remove the requirements in the taxation law relating to superannuation interests for which a Division 293 tax debt account is to be kept for:

- superannuation providers to notify the Commissioner of Taxation (Commissioner) of the amount of end benefit caps for their members in some circumstances; and
- individuals to notify the Commissioner in any circumstance when their superannuation benefits from such interests first become payable.

12.5 Part 3 of Schedule 10 to the TLA Bill clarifies that the Commissioner can provide a single notice that includes two or more separate notices that are required to be provided.

12.6 Part 4 of Schedule 10 to the TLA Bill makes consequential amendments to the *Superannuation Act 1976* that sets out the rules that govern the Commonwealth Superannuation Scheme (CSS) in relation to release authorities issued by the Commissioner. The amendments take

account of changes made by other parts of the Superannuation Reform Package.

12.7 All legislative references, other than those to Division 293 of the *Income Tax Assessment Act 1997* (Division 293) are to Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) unless the contrary is indicated. All legislative amendments referred to in this Chapter are contained in the TLA Bill 2016 unless the contrary is indicated.

Context of amendments

12.8 These measures form part of the Government's 2016-17 Superannuation Reform Package. The measures improve the administration of the superannuation system.

Release authorities

12.9 In general, individuals are only entitled to withdraw amounts of superannuation held by superannuation providers if they have satisfied a condition of release (Division 6.3 and Schedule 1 to the *Superannuation Industry (Supervision) Regulations 1994* (SISR 1994) and Division 4.3 and Schedule 2 to the *Retirement Savings Account Regulations 1997* (RSAR 1997). Conditions of release include retiring after attaining preservation age or attaining age 65.

12.10 The presentation of a release authority is a special condition of release for amounts held in regulated superannuation funds and retirement savings accounts (see the tables in Parts 1 and 2 of Schedule 1 to the SISR 1994 and the table in Schedule 2 to the RSAR 1997).

12.11 In conjunction with these regulations, the *Income Tax Assessment Act 1997* (ITAA 1997) and Schedule 1 to the TAA 1953 allow (and in many cases require) the superannuation provider that receives a release authority to pay an amount and reduce the value of the member's superannuation interest despite the normal restrictions on such payments.

12.12 Prior to these amendments different types of release authorities were available if an individual had:

- excess concessional or non-concessional contributions;
- a Division 293 tax liability or a debt account discharge liability; or
- an excess non-concessional contributions tax liability.

12.13 There were a number of differences in the operation of these release authorities, including:

- the entity that provided the release authority to the superannuation provider could be the Commissioner or the individual;
- the time for the provider to comply; and
- the entity to whom the amounts were released.

End benefit notifications for Division 293 tax

12.14 Division 133 provides for the deferral of the payment of Division 293 tax that is owed on concessional contributions for a defined benefit interest. Division 133 also provides that on payment of an end benefit from the defined benefit interest, a superannuation provider must report the end benefit cap for the defined benefit interest to the Commissioner.

12.15 The end benefit cap is 15 per cent of the employer-financed component of any part of the value of the superannuation interest that accrued after 1 July 2012. It ensures that a defined benefit member's deferred Division 293 tax debt reflects the member's defined benefit entitlement.

12.16 In particular, it protects defined benefit members from an unfair tax burden when the value of their defined benefit on exit is significantly lower than would be expected for the level of contributions that have been paid to finance the benefit — for example, when an entitlement is taken early from a scheme that does not vest its benefits evenly each year.

12.17 A superannuation provider of a defined benefit interest is required to advise the Commissioner of the amount of an end benefit cap for a member in certain situations where superannuation benefits first become payable.

12.18 Superannuation providers of defined benefit interests incur significant costs in working out the amount of their members' end benefit cap as it requires an actuarial calculation.

12.19 Prior to these amendments, superannuation providers were required to advise the Commissioner of a member's end benefit cap amount if:

- the Commissioner had started keeping a Division 293 tax debt account for the superannuation interest for the member;

- the Commissioner had given notice to the superannuation provider that a Division 293 tax debt account was being kept for that member; and
- an end benefit became payable from that superannuation interest for that member.

12.20 In addition, prior to these amendments, there was also a requirement for an individual to provide the Commissioner with an individual end benefit notice if they requested a superannuation provider pay an end benefit from a superannuation interest for which the Commissioner had started keeping a Division 293 tax debt account.

Combining notices

12.21 There are a range of circumstances in which the Commissioner has an obligation or may issue a notice to a taxpayer. This includes notices of assessment, determinations, statements and other documents. For the purposes of these amendments, they are collectively referred to as 'notices'.

12.22 There is uncertainty as to whether the Commissioner can provide multiple notices and other documents such as determinations in a single notice, in the absence of this being expressly authorised by the taxation law. Some parts of the taxation law specifically allow combined notices, whilst other provisions do not expressly deal with this issue.

12.23 In the superannuation context, this inconsistency also exists. For example, subsection 292-230(3) of the ITAA 1997 contains a specific provision for excess non-concessional contributions tax assessment notices to be contained in one document with other notices, whilst the Division 293 tax assessment provisions in Subdivision 155-A of Schedule 1 to the TAA 1953 do not.

12.24 Changes to the contribution caps (annual concessional cap and annual non-concessional cap) and to the Division 293 tax income threshold discussed in Chapters 4 and 5 of this Explanatory Memorandum are likely to result in an increase in the number of individuals who receive an assessment from the Commissioner for additional tax under these regimes.

12.25 Sending out separate notices for different assessments and determinations relating to superannuation (for example, assessments of Division 293 tax, assessments of excess non-concessional contributions tax, determinations of excess non-concessional contributions and determinations of excess concessional contributions) does not provide a

complete position for taxpayers and creates inefficiencies for the Commissioner.

Amendments relating to the Commonwealth Superannuation Scheme

12.26 The Commonwealth Superannuation Scheme (CSS) is a public sector superannuation scheme established on 1 July 1976 by the *Superannuation Act 1976*. It was closed to new members on 30 June 1990. The CSS is a hybrid scheme (part accumulation and part defined benefit) and is partially funded.

12.27 Funded amounts are made up of:

- basic post-tax (non-concessional) member contributions;
- supplementary post-tax member (non-concessional) contributions;
- accumulated funded employer productivity contributions; and
- amounts transferred (transfer amounts) into the CSS from other superannuation schemes.

12.28 Funded amounts are invested in the CSS Fund with scheme earning rates applied to them.

12.29 Members of the CSS can make basic contributions at five per cent of their superannuation salary or elect for a zero rate. There is no upper limit on the amount of supplementary post-tax member contributions that a CSS member can make.

12.30 Unlike accumulated basic post-tax member contributions, accumulated supplementary post-tax member contributions are never used to calculate a member's unfunded Consumer Price Index (CPI) indexed pension.

12.31 Most members of the CSS are also entitled to employer provided funded productivity contributions of between two per cent and three per cent depending on the amount of their superannuation salary.

12.32 Prior to these amendments accumulated supplementary and funded employer productivity contributions could not be released in relation to a release authority issued by the Commissioner.

Summary of new law

Release authorities

12.33 Part 1 of Schedule 10 to the TLA Bill amends the tax law to simplify and consolidate the range of existing processes for the release of amounts from individuals' superannuation interests using a release authority (except release authorities relating to Division 293 debt account discharge liabilities).

12.34 Under the new approach, release authorities are issued by the Commissioner directly to superannuation providers. Superannuation providers have a standard ten business day period to comply. The Commissioner can allow further time, if appropriate.

12.35 Where the release of an amount is voluntary (for example, the release of excess concessional contributions), individuals have 60 days to request that the Commissioner arrange the release of the specified amount. The Commissioner can allow further time, if appropriate. Where the release is mandatory (for example, the release of excess non-concessional contributions tax), the individual is not involved in releasing amounts and instead the Commissioner deals with funds directly.

End benefit notifications for Division 293 tax

12.36 The amendments remove the requirements under Division 293 for superannuation providers to notify the Commissioner of the amount of end benefit caps in some circumstances. Notification is not required if the superannuation provider has confirmed with the Commissioner that the relevant member does not have a Division 293 tax debt account amount owing at the time the member's superannuation benefit first becomes payable.

12.37 The amendments also reduce the superannuation compliance burden for individuals with defined benefit superannuation interests by removing the requirement for them to notify the Commissioner when their superannuation benefits for such interests first become payable.

Combining notices

12.38 This measure clarifies that the Commissioner can provide a single notice that includes two or more separate notices that are required to be provided under the taxation law.

Amendments relating to the CSS

12.39 These amendments provide for accumulated supplementary and funded employer productivity contributions to be released pursuant to a release authority (except those relating to debt account discharge liabilities for Division 293 tax) issued by the Commissioner.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Release authorities	
Individual to request the issue of a release authority	
<p>Individuals that receive excess concessional or non-concessional contributions determinations or a notice of assessment for Division 293 tax may request, in the approved form, for the Commissioner to release amounts from superannuation. This request must be made in the approved form within 60 days of the issue of the notice or determination (or such further time as the Commissioner may allow).</p> <p>The amount that may be released in relation to each circumstance permitting release remains the same.</p>	<p>Individuals that receive excess concessional or non-concessional contributions determinations may elect in the approved form for the Commissioner to release amounts from superannuation. This request must be made within 21 or 60 days of receiving the determination (or such further time as the Commissioner may allow).</p> <p>Individuals that receive a notice of assessment for Division 293 tax, also receive a release authority that they may provide to funds within 120 days of receiving the notice.</p>
Commissioner's obligation to issue release authorities to superannuation providers	
<p>The Commissioner must provide a release authority to a superannuation provider in respect of an interest upon receiving a valid request.</p> <p>The Commissioner may provide a release authority to a fund without a request if:</p> <ul style="list-style-type: none"> • the individual is liable for excess non-concessional contributions tax; • the individual is liable for assessed Division 293 tax and has neither paid the tax nor released the amount of the tax from superannuation within 60 days of 	<p>The Commissioner must provide a release authority to a superannuation provider in respect of an interest upon receiving a valid election.</p> <p>The Commissioner may provide a release authority to a fund without an election if:</p> <ul style="list-style-type: none"> • the individual is liable for excess non-concessional contributions tax; or • the individual is liable for assessed Division 293 tax and has neither paid the tax nor released the amount of the tax from superannuation in 120 days.

<i>New law</i>	<i>Current law</i>
<p>the issue of the notice; or</p> <ul style="list-style-type: none"> the individual has been issued with an excess non-concessional contributions determination and has not made a request to the Commissioner within 60 days of the issue of the determination (or been allowed more time by the Commissioner). 	
Superannuation providers required to action release authorities	
<p>A superannuation provider that receives a release authority must pay the lesser of the amount specified in the release authority and the value of the individual's specified superannuation interests (except interests that are defined benefit interests within the meaning of the tax law).</p> <p>Payment must be provided to the Commissioner within ten business days of the issue of the release authority (or such further time as the Commissioner may allow). The superannuation provider must also notify the Commissioner in the approved form of the payment (or lack of a payment) in the same timeframe.</p>	<p>A superannuation provider that receives a release authority must generally pay the lesser of the amount specified in the release authority, a lesser amount specified by the entity providing the release authority or the value of the individual's specified superannuation interests.</p> <p>The amount of time the fund has to pay, the entity to which payment must be provided, the reporting requirements for payment and the circumstances in which funds need not comply with a release authority differ.</p>
Character of amounts received from superannuation due to release authorities	
<p>Amounts released from superannuation because of a release authority are generally non-assessable non-exempt income and are exempt from the proportioning rule.</p> <p>Amounts released to the Commissioner are generally credited against an individual's tax liability, with any excess refunded to the individual. Interest is available for any undue delay in the payment of a refund.</p> <p>Amounts released to the Commissioner in relation to</p>	<p>Amounts released from superannuation because of a release authority are generally non-assessable non-exempt income and exempt from the proportioning rule.</p> <p>Amounts released to the Commissioner are generally credited against an individual's tax liability, with any excess refunded to the individual. For some, but not all types of release authorities, interest is available for any undue delay in the payment of a refund.</p> <p>Amounts released to the</p>

<i>New law</i>	<i>Current law</i>
Division 293 tax liabilities that are deferred to a debt account are treated as a voluntary payment towards the debt account.	Commissioner in relation to Division 293 tax liabilities that are deferred to a debt account are treated as a voluntary payment towards the debt account.
Superannuation provider's notification of end benefit cap amount	
The amendments do not require a superannuation provider of a defined benefit interest to disclose the amount of their member's end benefit cap when they give the Commissioner an end benefit notice if the provider has confirmed with the Commissioner that there is no amount owing on the member's Division 293 tax debt account.	A superannuation provider of a defined benefit interest is required to give the Commissioner an end benefit notice disclosing their member's end benefit cap amount once the end benefit has become payable from the interest if the Commissioner has: <ul style="list-style-type: none"> • started keeping a Division 293 tax debt account for the superannuation interest; and • given notice to the superannuation provider that a Division 293 tax debt account is being kept.
Individuals not required to provide end benefit notices	
There is no longer a requirement for an individual to provide the Commissioner with an individual end benefit notice.	An individual must notify the Commissioner by providing an individual end benefit notice if the individual requests a superannuation provider pay an end benefit from a superannuation interest and the Commissioner has established a Division 293 tax debt account in relation to that interest.
Combining notices	
The amendments clarify and confirm that the Commissioner can provide a single notice to a taxpayer which contains two or more separate notices for that taxpayer that are required to be given under any taxation law.	The taxation law in some cases specifically provides that the Commissioner may include a notice to a taxpayer with another notice to that taxpayer. In some cases that other notice has to be issued under the same Act as the notice that is to be issued. In other cases, there is no provision that specifically authorises a notice to be given with another notice.

<i>New law</i>	<i>Current law</i>
Amendments relating to the CSS	
Accumulated supplementary member contributions and accumulated funded employer productivity contributions can be released at any time in relation to a release authority (except those relating to debt account discharge liabilities for Division 293 tax) issued by the Commissioner.	Accumulated supplementary member contributions and accumulated funded employer productivity contributions cannot be released until the member satisfies a condition of release.

Detailed explanation of new law

Release authorities

12.40 This measure introduces a common legislative framework for the release of amounts from superannuation in relation to excess contributions to superannuation, tax liabilities related to these contributions and Division 293 tax (excluding amounts relating to Division 293 tax debt account discharge liabilities).

12.41 Amounts can still be released from superannuation in similar circumstances as they were previously, but this occurs under a common simplified framework for individuals and superannuation providers.

12.42 Where an individual chooses to release an amount, they have 60 days to make a request to the Commissioner for the release of an amount from specified superannuation interests (and the Commissioner may extend this time).

12.43 Similarly, in all cases when superannuation providers receive a release authority under the new framework they have ten business days to pay the amount to the Commissioner.

When amounts may be released

Release on request

12.44 Under the new release authority framework, individuals may request the release of an amount from superannuation for a financial year, including a nil amount, if they are issued:

- a determination that they have excess concessional or non-concessional contributions for that financial year; or

- a notice of assessment of an amount of Division 293 tax payable for the income year corresponding to the financial year.

[Schedule 10, item 1, subsection 131-5(1)]

12.45 These circumstances are the same as those in which individuals could choose for the amounts to be released under the prior law (see the former sections 96-5, 96-7 and 135-10 in Schedule 1 to the TAA 1953).

12.46 However, in place of the range of existing timeframes for making or using a release authority, the individual always has at least 60 days from when the determination or notice is issued in which to make a request. *[Schedule 10, item 1, subsections 131-5(3) and (5)]*

12.47 To be valid, a request must be in the approved form. It is expected that the Commissioner will specify that requests relating to excess non-concessional contributions will need to include information about whether an individual has any superannuation interests. This facilitates the Commissioner's consideration of whether it is appropriate to issue a direction that an individual has no superannuation interests under section 292-467 of the ITAA 1997. *[Schedule 10, item 1, subsection 131-5(3)]*

12.48 The request must specify a valid release amount and identify the superannuation interests from which it could be released. A valid release amount is:

- for determinations of excess concessional contributions, an amount up to 85 per cent of the excess contributions;
- for determinations of excess non-concessional contributions, an amount which is either the full amount of the excess contributions and 85 per cent of associated earnings (referred to as the total release amount) or nil; and
- for assessments of an amount of Division 293 tax, an amount up to the amount of the liability.

[Schedule 10, item 1, subsection 131-5(2) and section 131-10]

12.49 The amounts that can be released are also the same as the amounts that could be released previously.

12.50 Once made, a request is final and irrevocable. However, in some situations, for example, where insufficient funds remain in the superannuation interest, while an individual may make a valid request for the release of an amount from a superannuation interest, the identified amount will not be released, or will only be released in part. [*Schedule 10, item 1, subsection 131-5(6)*]

12.51 In this situation the Commissioner will notify the individual, who may then make a further request within 60 days, or such further time as the Commissioner may allow, for the release of the remaining amount from another superannuation interest. [*Schedule 10, item 1, subsection 131-5(4)*]

Example 12.1: Request for release

Isaac receives an excess non-concessional contributions determination from the Commissioner on 18 November 2019 specifying that the total release amount in respect of his excess non-concessional contributions (the amount of the excess contribution plus 85 per cent of the associated earnings) is \$10,000 for the 2018-19 financial year. He also receives notice of an assessment of Division 293 tax payable, which states he has an assessed Division 293 tax liability of \$5,000 for the same period.

Isaac has 60 days to request that the Commissioner arrange the release of either \$10,000 (the total release amount for his excess contributions and associated earnings) or a nil amount in respect of his excess non-concessional contributions. Alternatively, Isaac may choose not to make a request.

In respect of his assessed Division 293 tax, Isaac also has 60 days to request the release of any amount from nil up to \$5,000 (the total amount of his assessed Division 293 tax liability). Alternatively, Isaac may choose not to make a request.

Isaac does not make a request to the Commissioner in respect of either his excess non-concessional contributions or his Division 293 tax liabilities. The consequences of his choice under the amended law are discussed in Example 12.2.

Release without a request

12.52 The amendments also allow the Commissioner to issue release authorities to superannuation providers without a request by the individual if:

- the individual is liable for excess non-concessional contributions tax;

- the individual is liable for assessed Division 293 tax in relation to contributions to an interest that is not a defined benefit interest and 60 days after the notice of the liability, the liability has not been paid and amounts equal to the liability have not been released from superannuation; or
- the individual has:
 - received a determination that they have excess non-concessional contributions or a notice from the Commissioner that a superannuation provider was not able to release all or part of an amount identified in a prior request relating to such a determination: and
 - 60 days after the issue of the determination or notice, not requested the release of an amount, including a nil amount.

[Schedule 10, item 1, section 131-15]

12.53 The first two cases — release relating to excess non-concessional contributions tax and Division 293 tax — are the same circumstances in which involuntary release currently occurs. In both of these cases, the amount to be released is also not changed — it remains the amount of the relevant tax liability. *[Schedule 10, item 1, section 131-20]*

12.54 The amendments make a minor change to simplify the process for release for excess non-concessional contribution tax liabilities.

12.55 Previously, individuals who were liable for excess non-concessional contributions tax were issued with a release authority for the amount of the tax. If they did not release the amount within 90 days, they were liable for an administrative penalty under section 288-90 in Schedule 1 to the TAA 1953 and the Commissioner would directly arrange for the release of the amount from superannuation.

12.56 The amendments simplify this process, removing the obligation from individuals and instead making the release of the amounts for excess non-concessional contributions tax the responsibility of the Commissioner.

12.57 The amendments also introduce a new circumstance in which mandatory release may occur — where the individual has excess non-concessional contributions and has not notified the Commissioner about the amount that they want to be released.

12.58 Previously, if an individual did not make an election about the release of an amount upon receiving an excess non-concessional contributions determination, no amount would be released from their superannuation at that time.

12.59 This was almost always to the individual's detriment. If the amount was not released, the whole value of the contribution was subject to excess non-concessional contributions tax at a rate equal to the highest marginal income tax rate on the income of an individual (47 per cent in 2017-18). Further, as outlined above, the amount of this excess non-concessional contribution tax liability would then need to be released from the individual's superannuation interests.

12.60 Given the seriousness of this consequence, it is preferable that it only apply to an individual that has specifically chosen this outcome, rather than applying by default.

12.61 The amendments change this default position, allowing the Commissioner to release the amount of an individual's excess non-concessional contributions in the absence of a request by the individual. *[Schedule 10, item 1, subsection 131-15(2)]*

12.62 This position is only a default. An individual may still choose for no amount to be released by requesting the Commissioner not release an amount. This request will prevent the Commissioner from seeking the release of the full amount of the excess non-concessional contributions. However, it will not affect any subsequent mandatory release relating to the consequential excess non-concessional contribution tax liability.

Example 12.2: Release without a request

Following on from Example 12.1, Isaac does not request the release of any amount from his superannuation interests.

As Isaac has not made a request for the release of an amount (including a nil amount) in relation to his excess non-concessional contributions, 60 days after the issue of the determination of excess non-concessional contributions, the Commissioner may issue release authorities to superannuation providers holding superannuation interests for Isaac to seek the release of the full amount of his excess non-concessional contributions and 85 per cent of associated earnings.

Without this new default rule, if Isaac had inadvertently failed to notify the Commissioner of his intention to withdraw his excess non-concessional contribution he would have been subject to excess non-concessional contributions tax of 47 per cent (in 2017-18) on the full amount of his excess contribution (\$10,000).

Further, unless Isaac has paid the amount of his assessed Division 293 tax liability or it has been deferred to a debt account, the Commissioner may also issue release authorities to superannuation providers holding superannuation interests for Isaac to seek the release of the full amount of his assessed Division 293 tax (\$5,000).

Complying with release authorities

Superannuation providers

12.63 The framework establishes a consistent timeframe and process for superannuation providers to release amounts from superannuation interests using this type of release authority and also creates a new type of release authority.

12.64 A release authority can only be issued by the Commissioner to a single superannuation provider and states the amount to be released from each superannuation interest. It must also include the date of issue and contain any other information the Commissioner considers relevant. The Commissioner may also vary or revoke a release authority, so long as it occurs before the Commissioner is given notice by the superannuation provider that they have released the amount. *[Schedule 10, item 1, sections 131-25 and 131-30]*

12.65 Superannuation providers that have been issued with a release authority by the Commissioner are required to pay to the Commissioner the lesser amount of either:

- the amount stated in the release authority; or
- the sum of the maximum available release amounts for each of the superannuation interests held by the superannuation provider for that individual in their superannuation plans.

[Schedule 10, item 1, subsection 131-35(1)]

12.66 The maximum available release amounts for each superannuation interest includes the total amount of all the superannuation lump sums that could be payable from the interest at that time. *[Schedule 10, item 1, section 131-45]*

12.67 The superannuation provider has ten business days after the date of issue of the release authority to pay this amount to the Commissioner, unless a further period has been allowed by the Commissioner. *[Schedule 10, item 1, subsection 131-35(1)]*

12.68 By default, defined benefit interests are not included when calculating the sum of the maximum available release amounts for an individual's superannuation interests. This is consistent with the current

approach for release authorities relating to excess non-concessional contributions and Division 293 tax. The new approach preserves this treatment and ensures that superannuation providers of defined benefit interests will not be required to comply with a release authority.

[Schedule 10, item 1, subsection 131-35(2)]

12.69 However, this new approach differs slightly from the prior approach for excess concessional contributions. Previously subsection 96-20(2) provided that certain other kinds of superannuation interests (interests in non-complying superannuation funds and interests treated as a separate interest under section 307-200 of the ITAA 1997 that were supporting a superannuation income stream) were also not included in working out the maximum available release amount in relation to excess concessional contributions. This amendment requires the release of these amounts from these interests. It has been made to make the release process simpler and more consistent, noting that the release of amounts from such interests has not previously given rise to issues in the context of other release authorities.

12.70 However, superannuation providers of defined benefit interests have the option of complying with the release authority if it is practical in the circumstances and consistent with the provider's rules.

12.71 If the superannuation provider chooses to release an amount from a defined benefit interest, it must pay the same amount to the Commissioner as if the interest was not a defined benefit interest.

[Schedule 10, item 1, section 131-40]

12.72 For all superannuation interests, the superannuation provider has ten business days after the date of issue of the release authority to pay this amount to the Commissioner, unless a further period had been allowed by the Commissioner. *[Schedule 10, item 1, sections 131-35 and 131-40]*

12.73 When a payment is made, the superannuation provider must notify the Commissioner of the payment in the approved form within ten business days after the date the release authority is issued. *[Schedule 10, item 1, subsections 131-50(1) and (3)]*

12.74 If the provider is not required to make the payment, or the amount it is required to pay is less than the amount stated in the release authority, the superannuation provider must also notify the Commissioner that it is not required to comply with the release authority. The notification must be made in the approved form within ten business days after the date the release authority is issued. *[Schedule 10, item 1, subsections 131-50(2) and (3)]*

The Commissioner

12.75 The Commissioner is required to notify the individual if the superannuation provider has given a notice to the Commissioner or has not paid the full amount stated in the release authority within the applicable time. This allows the individual to make a further request to release the amount from another superannuation provider or take other steps to meet any outstanding liabilities. *[Schedule 10, item 1, subsection 131-55(1)]*

12.76 The notice provided to the individual must be in writing, identify the superannuation provider and state how much of the amount stated in the release authority was not paid within the applicable time. *[Schedule 10, item 1, subsection 131-55(2)]*

12.77 Issuing and acting upon a release authority has never been found to involve an acquisition of property by the Commonwealth. However, historically provisions creating release authorities have provided for the payment of compensation should their operation be found to involve an acquisition of property, to ensure that the provisions would not be invalidated as an acquisition of property on unjust terms. For the avoidance of doubt, the TLA Bill similarly provides for the payment of compensation should the operation of the release authority provisions result in an acquisition of property. It is not expected that this provision will ever operate. *[Schedule 10, item 1, section 131-60]*

Consequences of release

12.78 The consequences when an amount is released have generally not changed as a result of these amendments.

12.79 Consistent with the prior regime under Division 96, released amounts are paid to the Commissioner and applied as a credit, which arises on the day the Commissioner receives the amount, against the tax liabilities of the individual. To the extent the released amount exceeds the individual's liabilities, it is refunded to the individual. *[Schedule 10, item 1, subsection 131-65(1) and (2)]*

12.80 The individual is entitled to the payment of interest if there is an unreasonable delay between the Commissioner receiving an amount from a superannuation provider and the payment of any refund to the individual. *[Schedule 10, item 1, section 131-70]*

12.81 The exception to these rules is amounts released to the Commissioner in relation to Division 293 tax liabilities that are deferred to a Division 293 tax debt account. Consistent with the prior rules for these amounts in subsection 135-90(2), they are treated as a voluntary payment towards the Division 293 tax debt account under section 133-70.

Without this special rule, crediting the amount to the individual would not reduce the Division 293 tax debt account as the relevant liability has been deferred to a Division 293 tax debt account. *[Schedule 10, item 1, subsection 131-65(3)]*

12.82 All released amounts are non-assessable non-exempt income for the individual and are not subject to the proportioning rule (which prescribes how the components of a superannuation benefit are to be determined). *[Schedule 10, items 1 and 22, sections 131-75, 303-15 and 303-17 of the ITAA 1997]*

12.83 The release of an amount in response to an excess concessional or excess non-concessional contributions determination still reduces an individual's non-concessional or excess non-concessional contributions in the same way as it did previously.

12.84 However, a number of minor changes have been made to account for the changes to the release authority framework.

12.85 First, as the Commissioner is responsible for issuing release authorities to superannuation providers, the provisions that penalised individuals that misused release authorities to release excess amounts are no longer necessary. *[Schedule 10, item 24, section 304-15 of the ITAA 1997]*

12.86 Secondly, previously if an individual elected to release the amount of their excess non-concessional contributions and 85 per cent of associated earnings for a financial year (the total release amount), the amount of the associated earnings was included in their assessable income.

12.87 As the total release amount may now be released from an individual's superannuation interest even if they do not request the release, the amendments ensure that the amount of the associated earnings are included in the individual's assessable income regardless of whether the individual has made a request to the Commissioner in relation to the release. *[Schedule 10, item 9, section 292-20 of the ITAA 1997]*

12.88 However, consistent with the current law, an individual does not need to include an amount of associated earnings in relation to contributions if the individual must pay excess non-concessional contributions tax on those contributions. *[Schedule 10, item 9, section 292-20 of the ITAA 1997]*

12.89 Finally, the Commissioner previously could not issue a direction that an individual has no remaining superannuation interests unless the individual had made an election relating to the release of excess non-concessional contributions. As this direction prevents any further liability for excess non-concessional contributions tax for the relevant

financial year from arising, this disadvantaged individuals who had no superannuation interests and failed to make that election.

12.90 The amendments allow the Commissioner to issue such a direction, regardless of whether the individual has made a request to the Commissioner. *[Schedule 10, item 19, paragraphs 292-467(1)(b) and (c) of the ITAA 1997]*

Superannuation provider's notification of an end benefit cap amount

12.91 Part 2 of Schedule 10 to the TLA Bill removes the need for a superannuation provider of defined benefit interests to advise the Commissioner of an end benefit cap amount if the superannuation provider has confirmed with the Commissioner that their member does not have an amount owing on the member's Division 293 tax debt account in relation to the superannuation interest. *[Schedule 10, items 61 and 62, paragraph 133-140(1)(a) and subsection 133-140(1A)]*

12.92 Following receipt of a member's request to pay an end benefit from a defined benefit superannuation interest the superannuation provider may request in the approved form that the Commissioner advise if there is an amount owing on the Division 293 tax debt account that is associated with the interest. The Commissioner will be required to confirm this as soon as practicable, which the Commissioner expects would generally be within two business days. *[Schedule 10, item 60, section 133-135]*

12.93 The superannuation provider will not need to include the amount of the end benefit cap in their end benefit notification if the superannuation provider obtains the Commissioner's confirmation that there is no amount owing on the Division 293 tax debt account. The Commissioner will develop administrative processes to provide superannuation providers with evidence of such confirmation. *[Schedule 10, items 60 and 62, subsections 133-135(2) and 133-140(1A)]*

12.94 Alternatively, the superannuation provider could choose not to request the above information from the Commissioner and provide an end benefit notification which includes the amount of the end benefit cap amount. Given the costs of calculating the end benefit cap amount it is expected that most superannuation providers will seek information from the Commissioner about the status of their members' Division 293 tax debt accounts.

12.95 However, the superannuation provider will still have to provide an end benefit notice as required under the existing law even if the end benefit cap amount does not have to be provided (see section 133-140). This is because the Commissioner continues to need notification of the

pending payment of the superannuation benefit to close the Division 293 tax debt account in relation to the superannuation interest and to seek payment of any future Division 293 amounts payable.

Example 12.3: Superannuation provider not required to advise of end benefit cap amount

Sophie is planning to retire and has requested her superannuation provider pay her an end benefit from her defined benefit superannuation interest. Following receipt of her request, Sophie's superannuation provider contacts the Commissioner about the status of her Division 293 tax debt account. The Commissioner confirms there is no amount owing on the account.

Sophie's superannuation provider will not be required to report an end benefit cap amount. However, the provider will still need to give the Commissioner an end benefit notification for her superannuation interest. This allows the Commissioner to close Sophie's Division 293 tax debt account.

12.96 In addition to making consequential changes, the amendments also simplify the existing subsection 133-120(1) by splitting it into two provisions to make it easier to apply. This is not intended to change the application of the subsection in any way. *[Schedule 10, item 56, subsections 133-120(1) and (1A)]*

Individuals not required to provide end benefit notices

12.97 Part 2 of Schedule 10 to the TLA Bill also removes the need for individuals with defined benefit superannuation interests to provide the Commissioner with an individual end benefit notice. Previously this notice was required by individuals who requested that their superannuation provider pay an end benefit from their superannuation interest for which the Commissioner kept a Division 293 tax debt account. *[Schedule 10, item 60, section 133-135]*

12.98 This amendment removes this compliance obligation on individuals, and recognises that the Commissioner will continue to receive end benefit notifications from superannuation providers which provide the Commissioner with the information the Commissioner requires.

Example 12.4: Individual end benefit notification not required

Peter is retiring and requests his superannuation provider to pay him an end benefit from his defined benefit superannuation interest for which the Commissioner has been keeping a Division 293 tax debt account. There is no need for Peter to give the Commissioner an individual end benefit notice to advise the Commissioner of the request.

Combining notices

12.99 Part 3 of Schedule 10 to the TLA Bill introduces a specific provision to clarify and remove any doubt that the Commissioner can provide a single notice that includes two or more separate notices required to be provided under a taxation law. [*Schedule 10, item 65, section 990-5 in Schedule 1 to the TAA*]

12.100 An approach under which the Commissioner combines multiple notices into one document reduces compliance costs for taxpayers. For example, providing one notice that contains assessment notices for Division 293 tax and excess non-concessional contributions tax and notices concerning excess concessional contributions ensures affected taxpayers receive a more comprehensive picture of their superannuation tax position and allows them to seek advice about all matters at the one time rather than at different times.

12.101 The benefits from the Commissioner being able to include multiple notifications and determinations in a single notice apply wider than just superannuation. Accordingly, this measure applies to all taxes, not just aspects of the taxation law that concern superannuation.

12.102 The Commissioner can decide if notices should be combined. In doing so, the Commissioner would take into account existing administrative practice regarding the affected notices and the benefits to taxpayers from consolidating notices.

Amendments relating to the CSS

12.103 Part 4 of Schedule 10 to the TLA Bill provides for accumulated supplementary member contributions and accumulated funded employer productivity contributions to be released in relation to a release authority (except those relating to debt account discharge liabilities for Division 293 tax) issued by the Commissioner. [*Schedule 10, items 95 to 105, section 79A, subsections 79A(1),(2) and (3), subsection 79B(1), subsection 79B(1A), section 79B, subsection 79C(1)*]

12.104 In addition, the opportunity is being taken to consolidate existing provisions allowing the release of amounts that have been transferred into the CSS from other superannuation schemes.

12.105 This means that provisions relating to the release of amounts in relation to relevant release authorities are set out under a single division of the *Superannuation Act 1976* rather than being spread across sections.

12.106 Combined with the changes to allow the release of accumulated supplementary member contributions and accumulated funded employer productivity contributions this means that arrangements for the release of:

- accumulated supplementary member contributions;
- accumulated funded employer productivity contributions; and
- funded transfer amounts:

in relation to a release authority (except those relating to debt account discharge liabilities for Division 293 tax) are dealt with under Part V of Division 4A of the *Superannuation Act 1976*.

12.107 The total of these amounts is called the ‘early release authority amount’. [*Schedule 10, Part 4, item 2, the definition of ‘early release authority amount’ in subsection 79A(1) of the Superannuation Act 1976*]

12.108 Amounts can be released in relation to a CSS member who is:

- an eligible employee (a contributory member of the CSS);
- a deferred benefit member (generally a person who has ceased contributory membership before reaching minimum retirement age, and who has elected to leave all of their benefits in the scheme); or
- a postponed benefit member of the CSS (a person who has reached minimum retiring age (generally age 55) and became eligible for a CSS age retirement benefit, and who elected to postpone receipt of that benefit).

[*Schedule 10, item 9, subparagraph 79B(1A) of the Superannuation Act 1976*].

12.109 The amount that can be released cannot be greater than the ‘available early release authority amount’ (AERAA). This amount can be calculated by considering the definition as giving the following formula:

$$\text{AERAA} = (\text{ERAA} - \text{ERDA}) + (\text{lesser of ABC and MERDA})$$

12.110 Where:

- **early release authority amount** (ERAA) is the sum of the person's accumulated supplementary contributions, accumulated funded employer productivity contributions and accumulated funded transfer amounts); [*Schedule 10, item 2, paragraph (a) of new definition 'available early release authority amount' in subsection 79A(1) of the Superannuation Act 1976*];
- **early release deduction amount** (ERDA) is the total, for a person, of all previous lump sums released under both subsections 79B(1) and (1A) plus interest on those amounts; [*Schedule 10, item 2, paragraph (b) of new definition 'available early release authority amount' in subsection 79A(1) of the Superannuation Act 1976*]; and
- **accumulated basic member contributions** (ABC) is the person's accumulated basic member contributions [*Schedule 10, item 2, subparagraph (c)(i) of new definition 'available early release authority amount' in subsection 79A(1) of the Superannuation Act 1976*]; and
- **modified early release deduction amount** (MERDA) is the total, for a person, of all previous lump sums released under subsection 79B(1) plus interest on those amounts. [*Schedule 10, item 2, subparagraph (c)(ii) of new definition 'available early release authority amount'. in subsection 79A(1) of the Superannuation Act 1976*].

12.111 Existing subsection 79B(1) of *Superannuation Act 1976* allows the release of CSS funded amounts, including accumulated basic member contributions, on severe financial hardship or compassionate grounds as permitted by the *Superannuation Industry (Supervision) Regulations 1994*.

Example 12.5 Calculation of 'available early release authority amount'

Bill has:

- accumulated basic member contributions of \$1,000;
- accumulated supplementary member contributions of \$2,000; and
- accumulated funded employer productivity contributions of \$3,000.

Bill has never had any amounts released under subsections 79B(1) or 79B(1A) of the *Superannuation Act 1976*.

Bill's amount available for release (AERAA) under subsection 79B(1A) of the *Superannuation Act 1976* is \$5,000. This is calculated as follows:

$$\begin{aligned} \text{AERAA} &= (\$5,000 - \$0) + (\text{lesser of } \$1,000 \text{ and } \$0) \\ &= \$5,000 + \$0 \\ &= \$5,000 \end{aligned}$$

As intended, the amount available for release under subsection 79B(1A) does not include Bill's accumulated basic member contributions.

Example 12.6 Calculation of 'available early release authority amount'

Susan has:

- accumulated basic member contributions of \$1,000;
- accumulated supplementary member contributions of \$2,000; and
- accumulated funded employer productivity contributions of \$3,000.

Susan has previously had \$2,000 released under subsection 79B(1A) but has never had any amount released under subsection 79B(1).

Susan's amount available for release (AERAA) under subsection 79B(1A) is \$3,000. This reflects that Susan has already had \$2,000 released under subsection 79B(1A) in relation to an earlier release authority and that Susan's accumulated basic member contributions cannot be released under subsection 79B(1A) in relation to a release authority.

$$\begin{aligned} \text{AERAA} &= (\$5,000 - \$2,000) + (\text{lesser of } \$1,000 \text{ and } \$0) \\ &= \$3,000 + \$0 \\ &= \$3,000 \end{aligned}$$

Example 12.7 Calculation of 'available early release authority amount'

John has:

- accumulated basic member contributions of \$1,000;
- accumulated supplementary member contributions of \$2,000; and
- accumulated funded employer productivity contributions of \$3,000.

John has previously had \$4,000 released under subsection 79B(1) and has had \$2,000 released under subsection 79B(1A).

John's amount available for release (AERAA) under subsection 79B(1A) is \$0.

$$\begin{aligned} \text{AERAA} &= (\$5,000 - \$6,000) + (\text{lesser of } \$1,000 \text{ and } \$4,000) \\ &= (-\$1,000) + (\$1,000) \\ &= \$0 \end{aligned}$$

12.112 Released amounts must be paid out of the CSS Fund. However, consistent with the current law (see subsections 79C(1) and (2) of the *Superannuation Act 1976*), the release of an amount does not by itself trigger the payment of a benefit to which the person is entitled under the CSS.

12.113 At the time the CSS member is paid their benefit, the amount paid must reflect amounts previously released. Section 79D of the *Superannuation Act 1976* provides that the method to work out the reduction is to be determined by the Commonwealth Superannuation Corporation which is the trustee of the CSS.

Consequential amendments

12.114 Part 1 of Schedule 10 to the TLA Bill also makes consequential amendments to the ITAA 1997 and TAA 1953 to update various provisions, including guidance material, to account for the introduction of the new arrangements for release authorities and to repeal provisions that would otherwise have become inoperative. *[Schedule 10, items 2 to 8, 10 to 18, 20 to 21, 23, 25 to 48, items headed "superannuation" in the tables in sections 10-5 and 11-55, subsections 280-15(3) and (4), note 3 to section 291-15, sections 292-1 and 292-15, paragraph 292-25(2)(a), notes 1 and 2 to subsection 292-25(2), paragraph 292-85(1)(b), subsection 292-85(1), paragraphs 292-85(1A)(a) and 292-90(1A)(b), sections 292-405, 292-410 and 292-415, note 1 to subsection 292-467(1), note 2 to subsection 293-70(2), the heading to section 303-20, heading to section 304-20 and the definitions of maximum available release amount and total release amount in subsection 995-1(1) of the ITAA 1997, note 4 to subsection 292-80C(1) of the Income Tax (Transitional Provisions) Act 1997, paragraph 95-5(b), Division 96, sections 135-1 and 135-5, table items 1 and 2 in subsection 135-10(1), section 135-35, section 135-45, subsection 135-75(3), the note to section 135-85, subsections 135-90(1), (2) and (3), item 135R in the table in subsection 250-10(2), paragraph 286-75(2AA)(a), section 288-90, subsections 288-95(1), (3) and (4), subsection 288-100(1) and subparagraph 390-65(1)(a)(i) in Schedule 1 to the TAA 1953 and subsection 3(1) of the Taxation (Interest on Overpayments and Early Payments) Act 1983]*

12.115 Part 2 of Schedule 10 to the TLA Bill also makes several consequential amendments to the TAA 1953 to facilitate the changes to Division 293 tax end benefit notification. *[Schedule 10, items 55, 57 to 59 and 63, subsection 133-10(3), section 133-125 and subsection 133-145(1)]*

12.116 Part 3 of Schedule 10 to the TLA Bill also makes consequential amendments to the taxation law to remove provisions allowing the Commissioner to include a notice with any other notice that the Commissioner provides to a taxpayer. These provisions will be redundant following the enactment of the new provision to combine notices contained in Part 2 of this Schedule. *[Schedule 10, items 66 to 92, subsections 45D(1), 102AAM(13), 159GZZZZH(3), 177EA(6), 177EB(7) and 177F(2D) of the Income Tax Assessment Act 1936, subsections 204-50(4), 214-60(3), 214-140(1), 214-140(2), 275-615(3), 291-465(6), 292-230(3), 292-310(3), 292-465(8), 292-467(3), 295-625(1), the heading to subsection 295-625(2), 815-30(8), 815-35(8) and 815-145(6) of the ITAA 1997, subsections 214-25(3), 214-80(1) and 214-80(2) of the Income Tax (Transitional Provisions) Act 1997, subsection 98C(2) of the Petroleum Resource Rent Tax Act 1987, subsection 62(2) of the Superannuation Guarantee (Administration) Act 1992, subsection 8AAF(3) of the TAA 1953 and subsections 45-320(6), 45-473(1), 45-473(2), 97-5(4), 97-25(4), 133-30(2) and 280-110(2) in Schedule 1 to the TAA 1953]*

12.117 Part 4 of Schedule 10 to the TLA Bill 2016 also makes consequential amendments to ensure that the CSS release authority provisions in the *Superannuation Act 1976* correctly link to the new simplified release authority provisions being introduced into Schedule 1 to the TAA 1953 by Part 1 of Schedule 10 to the TLA Bill (except those relating to debt account discharge liabilities for Division 293 tax have not been updated). This ensures that the CSS release authority provisions can continue to operate as intended. *[Schedule 10, items 94, 106 to 111, subsection 3(1), subparagraphs 110SN(2)(i) and (iii), subsection 110SN(2), subparagraphs 130D(3)(a)(i) and (iii), subsection 130D(3) of the Superannuation Act 1976]*

Application and transitional provisions

12.118 The amendments in Schedule 10 to the TLA Bill excluding Parts 1 and 4 commence on the first day of the next quarter following the day of Royal Assent. The amendments in Parts 1 and 4 of Schedule 10 to the TLA Bill commence on 1 July 2018.

12.119 The amendments in Part 1 of Schedule 10 to the TLA Bill apply to all release authorities issued by the Commissioner on or after 1 July 2018.

12.120 This means that amendments apply in relation to excess concessional and excess non-concessional contributions determinations and notices of excess non-concessional contributions tax assessments issued on or after 1 July 2018, regardless of the applicable financial years

to which the determinations or notices relate. In addition, these amendments will apply in relation to notices of assessments of amounts of Division 293 tax issued on or after 1 July 2018 for all income years.

[Schedule 10, item 49]

12.121 It also means that from 1 July 2018, release authorities relating to valid elections made under the prior provisions or circumstances where the Commissioner could issue a release authority without a request will be issued by the Commissioner under the new release authority framework, even if they relate to circumstances before 1 July 2018. *[Schedule 10, items 50 to 53]*

12.122 This will be the case even if the Commissioner had issued the individual with a release authority in relation to either an excess non-concessional contributions tax assessment or a notice of assessment of an amount of Division 293 tax before 1 July 2018 under the prior provisions.

12.123 The amendments include a transitional rule providing that amounts released under the prior law will be taken into account for any release authorities issued under the new law. *[Schedule 10, item 54]*

12.124 The amendments in Part 2 of Schedule 10 to the TLA Bill apply to end benefit notifications for which the obligation to provide the notification arises on or after 1 July 2017. *[Schedule 10, item 64]*

12.125 The amendments in Part 3 of Schedule 10 to the TLA Bill apply on and from 1 July 2017. *[Schedule 10, item 93]*

12.126 The amendments in Part 4 of Schedule 10 apply on and from their commencement. *[Item 7 of the table in section 2]*

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016

12.127 Schedule 10 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 (the TLA Bill) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

12.128 Part 1 of Schedule 10 to the TLA Bill reduces compliance costs for individuals and superannuation providers by amending the tax law to simplify and consolidate the range of existing processes for the release of amounts from individuals' superannuation using a release authority.

12.129 The amendments will replace existing release authorities (except those relating to deferred debt account discharge liabilities for Division 293 tax) with a new simplified release authority regime. This will ensure that the release of all such superannuation amounts is subject to common processes and timeframes.

12.130 Part 2 of Schedule 10 reduces compliance costs for superannuation providers and individuals where superannuation benefits become payable for defined benefit interests.

12.131 The Schedule removes the requirements in the taxation law relating to superannuation interests for which a Division 293 tax debt account is being kept for:

- superannuation providers to notify the Commissioner of Taxation (Commissioner) of the amount of end benefit caps for their members in some circumstances; and
- individuals to notify the Commissioner in any circumstance when their superannuation benefits from such interests first become payable.

12.132 The amendments do not require a superannuation provider of a defined benefit interest to disclose the amount of their member's end benefit cap when they give the Commissioner an end benefit notice if the provider has confirmed with the Commissioner that there is no amount owing on the member's Division 293 tax debt account.

12.133 Part 3 of Schedule 10 to the TLA Bill clarifies that the Commissioner can provide a single notice in relation to multiple matters.

12.134 Part 4 of Schedule 10 to the TLA Bill makes consequential amendments to the *Superannuation Act 1976* that set out the rules that govern the Commonwealth Superannuation Scheme in relation to release authorities issued by the Commissioner. The amendments take account of changes made by other parts of the Government's 2016-17 Budget Superannuation Reform Package.

Human rights implications

12.135 This Schedule does not engage any of the applicable rights or freedoms as the changes are administrative and machinery in nature.

Conclusion

12.136 This Schedule is compatible with human rights as it does not raise any human rights issues.

Chapter 13

Statement of Compatibility with Objective of Superannuation

Prepared in accordance with section 6 of the Superannuation (Objective) Bill 2016

Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016

13.1 The Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 (TLA Bill) is compatible with the primary objective of the superannuation system as set out in subsection 5(1) of the Superannuation (Objective) Bill 2016 and with the subsidiary objectives of the superannuation system.

Overview of the Bill

13.2 The TLA Bill contains a package of superannuation reforms that will improve the sustainability, flexibility and integrity of the superannuation system.

Assessment

13.3 The TLA Bill is compatible with the primary objective of the superannuation system, which is to provide income in retirement to substitute or supplement the age pension. The TLA Bill is also compatible with the subsidiary objectives of the superannuation system, which are to:

- facilitate consumption smoothing over the course of an individual's life;
- manage risks in retirement;
- be invested in the best interests of superannuation fund members;
- alleviate fiscal pressures on Government from the retirement income system; and

- be simple, efficient and provide safeguards.

13.4 The superannuation reforms increase the ability of many Australians to improve their superannuation savings, which will increase their income in retirement. While some measures place limits on the amount of contributions that can be made to superannuation or that will receive tax-free status, these measures target superannuation tax concessions to ensure they are fiscally sustainable, consistent with the subsidiary objective of alleviating fiscal pressure on Government from the retirement income system.

13.5 In 2017-18, 96 per cent of superannuation account holders will not be adversely affected by these measures. The majority of the four per cent of individuals that are adversely affected by these changes are unlikely to rely on the age pension in retirement. Around a quarter of fund members (including many low income earners) will benefit from the Government's superannuation package.

Sustainability measures

13.6 The TLA Bill's sustainability measures improve the targeting of the superannuation tax concessions to those who need incentives to save. In particular the measures:

- introduce a \$1.6 million superannuation transfer balance cap that will limit the amount of superannuation that can be transferred into the tax-free retirement phase;
- lower the annual concessional contributions cap to \$25,000;
- lower the annual non-concessional cap to \$100,000 for those with a total superannuation balance below \$1.6 million;
- reduce the threshold at which high-income earners pay additional tax (Division 293 tax) on their concessional contributions to superannuation from \$300,000 to \$250,000; and
- introduce the Low Income Superannuation Tax Offset (LISTO).

13.7 The sustainability measures in the TLA Bill target superannuation tax concessions to those who need them most and where they will be most effective at increasing self-sufficiency in retirement. They will ensure that the tax concessions continue to encourage saving for retirement, thereby increasing income in retirement and reducing the reliance on the age pension. The measures limit the ability for wealthy

individuals to use the tax concessions for tax minimisation and estate planning purposes.

13.8 These changes continue to facilitate consumption smoothing over an individual's lifetime, by allowing individuals to save over their working lives to provide income in retirement. The LISTO will help to increase the superannuation savings of many low income earners by effectively refunding the tax paid on their concessional contributions. While the transfer balance cap places a limit on the amount of superannuation that will benefit from tax-free earnings, the \$1.6 million cap can support an income stream of around four times the level of the single age pension. Superannuation savings of this magnitude also allow individuals to manage risks in retirement, including reducing the chance of outliving their savings.

13.9 Targeting the tax concessions for superannuation will improve the sustainability of the concessions, and therefore reduce fiscal pressure on the Government from the retirement income system.

13.10 While the measures do involve some complexity, this is necessary to target tax concessions. This includes the transfer balance cap and the eligibility tests for the catch-up concessional contributions and non-concessional contributions measures. The transfer balance cap approach to limiting access to the retirement phase earnings tax exemption is less complex than alternative options to achieve similar policy outcomes. The ATO will provide appropriate interpretive guidance, fact sheets and information to help members and funds manage their obligations.

Flexibility measures

13.11 The flexibility measures in the TLA Bill will improve the superannuation system settings to reflect modern work patterns which vary across people's lives and provide greater choice for retirees in retirement.

13.12 In particular, the measures:

- allow more people to claim a tax deduction for superannuation contributions up to the concessional cap irrespective of their employment arrangements;
- allow unused concessional cap amounts to be carried forward so that those with interrupted work arrangements, variable incomes, and low superannuation balances can make 'catch up' superannuation contributions;

- extend access to the low income spouse superannuation tax offset; and
- encourage product innovation by extending the tax exemption on earnings in the retirement phase to deferred products such as deferred lifetime annuities and group self-annuities.

13.13 These measures will increase flexibility and choice for individuals, which will allow them to increase their superannuation savings and assist them to manage their risks in retirement.

13.14 Extending the tax exemption on earnings in the retirement phase of deferred products aims to remove barriers to innovative new retirement products, including deferred lifetime annuities and group self-annuities. These products will help people manage their consumption and risks in retirement, in particular longevity risk, so they do not outlive their savings and potentially increase the standard of living they can enjoy in retirement.

13.15 Extending the tax deduction for personal contributions and allowing catch-up concessional contributions will improve access to concessional contributions for many Australians, increasing the fairness of the superannuation tax concessions and increasing the ability to smooth consumption over the course of the person's life through increasing their superannuation savings.

13.16 The flexibility measures do have a fiscal cost for Government. However, the measures provide individuals with more opportunities to save through superannuation, increasing their self-sufficiency and reducing reliance on the age pension thereby alleviating fiscal pressure on the Government in the future. In addition, the package as a whole reduces the cost of the tax concessions provided to the superannuation system.

13.17 Extending the tax deduction for personal contributions and tax exemption for deferred products reduce complexity. While allowing carry forward of unused concessional contributions cap amounts does involve some complexity, this reflects elements that ensure that the measure is appropriately targeted. The ATO will provide appropriate interpretive guidance, fact sheet and information to help members and funds manage their obligations.

Integrity measures

13.18 The integrity measures in the TLA Bill reduce the extent to which the superannuation system is used for tax minimisation and estate planning. The measures build on the sustainability measures to improve

confidence that the superannuation system is being used for the primary purpose of providing income in retirement to substitute or supplement the age pension.

13.19 In particular, the measures:

- encourage individuals to use transition to retirement income streams for their intended purpose, rather than tax minimisation;
- remove the inconsistently applied and outdated anti-detriment provision;
- streamline some of the ATO's administrative processes (single notices, release authorities and end benefit cap calculations); and
- ensure that the objection rights that apply to discretionary decisions made by the Commissioner in respect of non-concessional contributions align with the objection rights that apply to discretionary decisions in respect of concessional contributions, as a matter of procedural fairness.

13.20 The measures will alleviate fiscal pressure on the Government by ensuring the tax concessions provided by the superannuation system are used for their intended purpose without impeding individuals' ability to save for their retirement or draw down their savings in retirement.

13.21 Individuals will still be able to access transition to retirement income streams as a means of supplementing their income as they move towards retirement and reduce their working hours. However, earnings in relation to these income streams will receive the same tax treatment as applied to earnings on accumulation accounts for individuals who are still working, improving the integrity of the superannuation system.

13.22 The removal of the anti-detriment provision simplifies the law by removing a transitional provision that is no longer warranted and is inconsistently applied.

13.23 The measures that streamline the ATO's administrative processes reduce the compliance burden on taxpayers and superannuation providers and improve efficiency in the superannuation system.

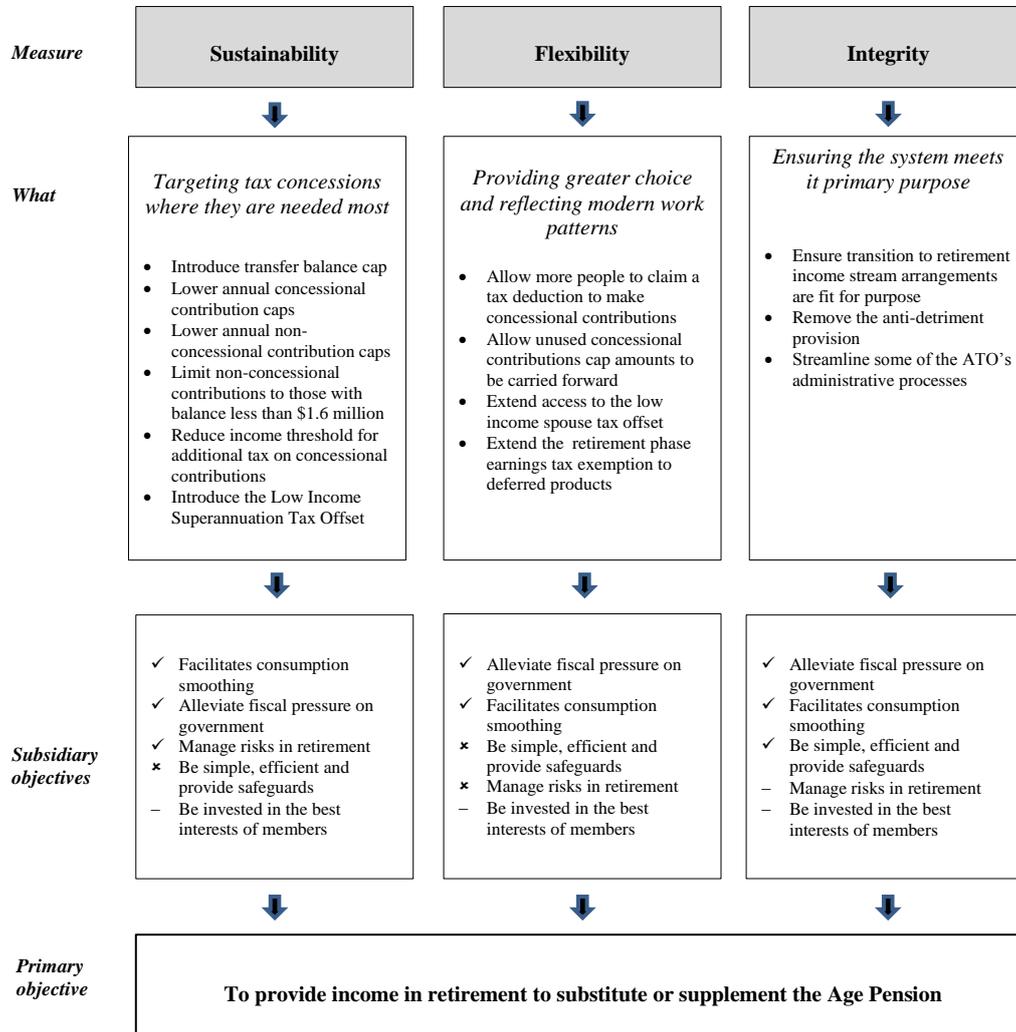
Conclusion

13.24 The measures in the TLA Bill improve the sustainability, flexibility and integrity of the superannuation system. The measures

better target superannuation tax concessions to those who need them most, enhance flexibility and choice in saving for retirement and managing income in retirement, and improve the integrity of the superannuation system (see diagram below). This is consistent with the primary objective of the superannuation system, which is to provide income in retirement to substitute or supplement the age pension.

13.25 The measures are also compatible with the subsidiary objectives of the superannuation system. The measures increase the ability of many people to facilitate consumption smoothing over their lifetime and improve their superannuation savings. The measures as a whole also alleviate fiscal pressures on government from the retirement income system by better targeting the tax concessions and increasing superannuation savings which ultimately reduce reliance on the age pension, though a number of the flexibility measures do have a fiscal cost. Removing barriers to innovative new products will also increase the ability of members to manage risks in retirement. While a number of the measures do involve complexity, this arises from the need to target assistance and tax concessions, to manage fiscal costs. The measures also do not raise concerns in relation to being inconsistent with the best interest of members.

Diagram 13.1: Bill’s superannuation reform and the objective of superannuation



Chapter 14

Regulation impact statement

Background

14.1 Australia's retirement income system is made up of three pillars: the age pension, compulsory superannuation, and other private saving (voluntary superannuation and other household savings including the family home).

14.2 This regulation impact statement (RIS) focuses on the compulsory superannuation and voluntary savings pillars and examines how Australia's tax and superannuation system could be amended to improve sustainability, flexibility and integrity.

14.3 Compulsory superannuation requires most Australians to save at least 9.5 per cent of their ordinary time earnings throughout their working life for their retirement. This amount is legislated to rise to 12 per cent by 2025. Australians can also make additional voluntary contributions to superannuation. Both compulsory contributions made by employers and voluntary superannuation contributions made by individuals can receive concessional tax treatment to provide incentives for people to save for retirement. Australians can also choose to save for retirement outside superannuation.

14.4 As Australia's population ages and fiscal pressures increase, it is important to ensure that the tax concessions for superannuation are affordable and well-targeted. Additionally, it is important to ensure that Australia's superannuation system provides flexibility for individuals, especially those with broken work patterns or variable incomes, to enable them to make contributions when they can. It is also vital that confidence in Australia's superannuation system is maintained by taking action to improve the sustainability and integrity of the system to ensure it is being used for its core purpose of providing income in retirement to substitute or supplement the age pension.

14.5 The Government's *Re:think Tax discussion paper (Re:think)* released in March 2015 was certified by Treasury as the interim RIS for the superannuation tax package prior to consideration of the measures canvassed in this RIS. Additionally, the lifetime non-concessional cap measure (Sustainability (2)) was subject to a short form RIS process prior to the 2016-17 Budget as it was considered by Treasury to be 'fundamentally an integrity measure to protect revenue'.

The problem

14.6 As Australia's population ages it is becoming increasingly important to ensure that the superannuation system is based on a clearly stated objective, is providing the right incentives for individuals to save, and is flexible enough to ensure all Australians are given the opportunity to enjoy a fulfilling retirement.

14.7 The Government has agreed to adopt the recommendation of the 2014 *Financial System Inquiry* (FSI) to enshrine the objective of superannuation in legislation, which will provide a clear framework for superannuation policy and a way to assess whether the system is meeting its objective. The objective of superannuation, as recommended by the FSI, is to 'provide income in retirement to substitute or supplement the age pension'.

14.8 The proposed new objective has been an important anchor for the development of the other superannuation changes announced in the 2016-17 Budget and canvassed in this RIS.

14.9 The problems in the superannuation system that have been identified in this RIS have been grouped into three categories:

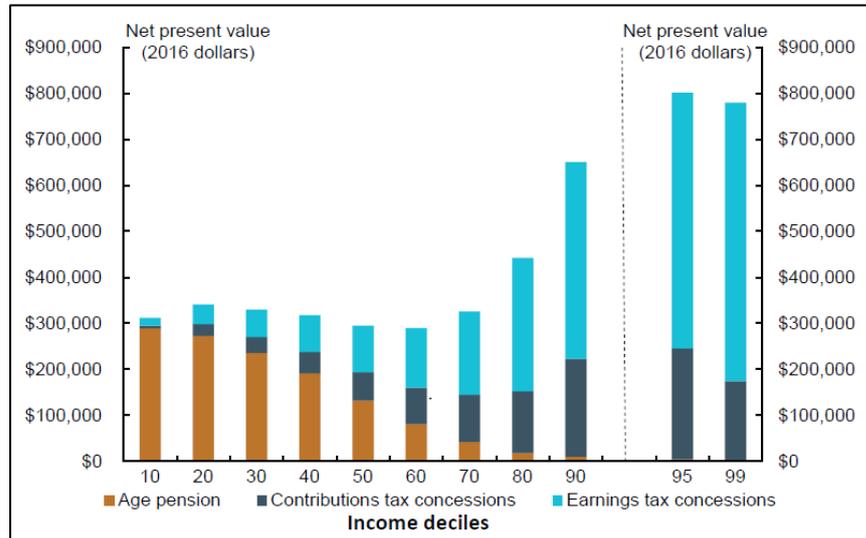
- *Sustainability*: Appropriately targeting tax concessions;
- *Flexibility*: Adjusting the settings for modern work patterns; and
- *Integrity*: Ensuring the system meets its core purpose.

Sustainability

14.10 At present, a number of superannuation tax concessions are poorly targeted — a significant proportion of these go to people who will save for their retirement regardless of the concessions, and who will never depend on the age pension. Improving the targeting of tax concessions will increase fairness and make the superannuation system more sustainable while fiscal challenges are ongoing and pressures from population ageing grow.

14.11 Superannuation tax concessions accrue disproportionately to high income earners as shown in Diagram 1, with significant revenue cost to the Government.

Diagram 14.1 Distribution of lifetime total Government support for retirement under current policy settings



14.12 The current superannuation tax concessions are poorly targeted and unsustainable. Many submissions in response to *Re:think* highlighted concerns in this regard, as did public commentary from industry bodies¹ and ‘think tanks’.²

14.13 While there was diverging views on how the system should be changed, there was clear agreement amongst almost all stakeholders that something needed to change.

14.14 Issues with the current superannuation tax concessions were also identified by the FSI which noted that tax concessions in the superannuation system are not well targeted at improving retirement incomes.

14.15 The FSI outlined some of the consequences of this issue which included:

- increasing the cost of the superannuation system to taxpayers;

¹ Australian Superannuation Funds, *Submission response to the tax discussion paper*

² Grattan Institute, media release, ‘For fairness and a stronger Budget, it is time to target super tax breaks’, 24 November 2015, <http://grattan.edu.au/for-fairness-and-a-stronger-budget-it-is-time-to-target-super-tax-breaks/>

- increasing distortions due to higher levels of taxation elsewhere in the economy and due to the differences in the way other savings vehicles are taxed; and
- contributing to policy instability, which imposes unnecessary costs on superannuation funds and their members.³

Flexibility

14.16 The superannuation system currently offers little flexibility for those who take time out of work, work part time, or have ‘lumpy’ income and therefore have periods in which they make no or limited contributions to superannuation.

14.17 Superannuation is based on the premise that contributions will be made to superannuation throughout an individual’s working life. As it is currently structured the superannuation system favours higher income earners who work full-time, without breaks, for the entirety of their working life. However, for a range of reasons, individuals are increasingly having broken work patterns and working flexibly resulting in, for example, women typically having less superannuation than men at the end of working life.⁴

14.18 In these cases, concessional contribution caps based on steady contributions can mean that superannuation is less likely to provide adequate retirement income for those whose working patterns do not fit this structure. For example in 2013-14, the average superannuation balance for males was around \$120,000 compared to around \$90,000 for women.⁵ Whilst this difference is driven by a number of complex and interrelated factors, inflexibility in the superannuation system is a contributing factor.

14.19 Australians are also expected to live longer and do so in better health, and more Australians will continue to lead an active lifestyle and participate in the workforce after they reach traditional retirement age. Participation rates among those aged 65 and over are projected to increase strongly, from 12.9 per cent in 2014-15 to 17.3 per cent in 2054-55. Older people have been able to extend their labour force participation as a result of the improvements that have led to longer life expectancy, the rise of

3 The Australian Government, The Treasury, *Financial System Inquiry: Final Report*, November 2014, p. 90

4 Senate Economics References Committee, *‘A husband is not a retirement plan’ Achieving economic security for women in retirement*, April 2016, p. xi

5 ABS, *Gender Indicators, Australia*, February 2016, cat. No 4125.0, Table 25

less physically demanding work and new technologies.⁶ The superannuation system is not sufficiently responsive to these changing work patterns.

Integrity

14.20 The Government will introduce legislation to provide that the objective of superannuation is ‘to provide income in retirement to substitute or supplement the age pension’. There are currently instances in which the superannuation system is used for estate planning and tax minimisation purposes, which is not consistent with the proposed objective of superannuation.

14.21 The FSI also cited the existence of a large number of accounts with assets in retirement in excess of \$5 million, which could each receive annual tax concessions more than five times larger than the single age pension.⁷ Individuals with very large superannuation balances are able to benefit from tax concessions on funds that are likely to be used for purposes other than providing retirement income, such as tax-effective wealth management and estate planning.

14.22 Confidence in the superannuation system risks being undermined when the system is being used for reasons other than its core purpose. Ensuring that superannuation is solely used to provide income in retirement to substitute or supplement the age pension, rather than for tax minimisation or estate planning purposes, will make the system more sustainable.

2. Why is Government action needed?

14.23 There is a strong case for changes to be made to the superannuation system to address identified problems and thereby improve the system’s sustainability, flexibility and integrity.

14.24 The superannuation system is a detailed regulatory framework established by the Government. Consequently, there are limited opportunities for the market to make changes to address these concerns; Government intervention is therefore necessary to address these issues.

6 The Australian Government the Treasury, *2015 Intergenerational Report: Australia in 2055*, March 2015, p. ix

7 The Australian Government the Treasury, *Financial System Inquiry: Interim Report*, July 2015, p. 2-120

14.25 In *Re:think*, the Government identified superannuation as a priority for tax reform. Submissions on the discussion paper also highlighted that Government intervention needs to be comprehensive and have a ‘whole of system’ approach. The breadth of concerns raised in the submissions indicated that comprehensive changes are needed rather than disjointed ad hoc reform.

3. Policy options

14.26 Three policy options were considered to address the various problems identified in the problem section of this RIS. The policy options considered a number of measures which targeted the three primary problems of sustainability, flexibility and integrity.

- Option 1 — No policy change.
- Option 2 — A suite of policy measures to address the problems of sustainability, flexibility and integrity.

The packaging of one or more of the following measures

To improve sustainability within the superannuation system:

- Better targeting tax concessions;
- Reforming the taxation of non-concessional contributions;
- Reforming the taxation of concessional contributions;
- Introduction of the low income superannuation tax offset (LISTO);

To improve the flexibility of the superannuation system:

- Improving access to concessional contributions;
- Allowing catch-up concessional contributions;
- Extending the spouse tax offset;
- Harmonising contribution rules for older Australians;
- Enhancing choice in retirement income products.

To strengthen the integrity of the superannuation system:

- Improving the integrity of transition to retirement income streams;
- Abolition of the anti-detriment rule.
- Streamlining administration
- Option 3 — All of the measures announced in the 2016-17 Budget superannuation reform package.

3.1 Option 1 — No policy change

14.27 Under this option, no new actions would be taken by the Government and existing policy settings would continue to be relied upon.

3.2 Option 2 — A suite of policy measures to address the problems of sustainability, flexibility and integrity

14.28 Under this option, one or more of the measures which address the sustainability, flexibility and integrity issues identified in the problem section could be packaged together to form a suite of measures to meet the primary objective of the superannuation system.

14.29 This option would enable the Government to implement a suite of measures to achieve the highest net benefit while taking into consideration the Government's broader fiscal strategy.

14.30 This option would help to address the three key issues identified in the problem section, consistent with the objective of the superannuation system, helping to:

- strengthen the sustainability of the superannuation system by better targeting tax concessions;
- improve the flexibility of the superannuation system; and
- enhance the integrity of the superannuation system.

Consideration of the objective of the superannuation system in the analysis of the measures

14.31 The Government has determined that the primary objective of superannuation is 'to provide income in retirement to substitute or supplement the age pension.' The subsidiary objectives which support the primary objective provide a framework for assessing the compatibility of a measure with this primary objective. The subsidiary objectives are to: facilitate consumption smoothing over the course of an individual's life;

manage risks in retirement; be invested in the best interest of superannuation provider members; alleviate fiscal pressures on Government from the retirement income system; and be simple, efficient and provide safeguards.

3.2.1 Measures to improve the sustainability of the superannuation system

14.32 The following measures would improve the sustainability of the superannuation system by improving the targeting of superannuation tax concessions to those who need incentives to save by reducing concessions for high wealth individuals, keeping concessions for other individuals unchanged and providing support to low income earners. These measures would ensure that tax concessions continue to encourage saving in retirement, boosting incomes in retirement and reducing the reliance on the age pension.

14.33 In effect these measures would be expected to improve the efficiency of the superannuation system, facilitate consumption smoothing for all individuals over their lifetime and reduce fiscal pressure on the Government from the retirement income system.

Better targeting tax concessions

14.34 To improve sustainability, the Government considered limiting the extent of the tax concessions that apply to superannuation accounts that have entered the retirement phase. Two different approaches were considered to achieve this goal.

14.35 The first approach involves introducing a cap on the total amount of superannuation that can be transferred into an earnings tax-free retirement account. This approach would limit the amount that high wealth individuals can benefit from the tax-free retirement phase. Under current policy settings, earnings on assets supporting a retirement income stream are not taxed. This disproportionately benefits people with high account balances, providing significant incentives for wealthy individuals to use earnings tax exempt retirement phase accounts as a tax minimisation vehicle to accumulate excessive amounts of wealth.

14.36 The transfer balance cap would be set at \$1.6 million, and apply from 1 July 2017. A cap of \$1.6 million is around twice the level of assets at which access to the age pension ceases. Superannuation savings accumulated in excess of the cap could remain in an accumulation superannuation account, where the earnings would be taxed at 15 per cent, or could be removed from the superannuation system. Individuals already in retirement as at 1 July 2017 with balances in excess of \$1.6 million would need to either transfer the excess amount back into an accumulation

superannuation account (where earnings would be taxed at 15 per cent); or withdraw the excess amount from their superannuation.

14.37 The cap would index in \$100,000 increments in line with the consumer price index, just as the age pension assets threshold does. A proportionate method which measures the percentage of the cap previously utilised would determine how much cap space an individual has available at any single point in time. For example, if an individual transfers \$800,000 when the cap is \$1.6 million, they would have used 50 per cent of the transfer balance cap. If they wish to make another transfer at some point in the future they would only be able to do so up to 50 per cent of the level of the cap at that point in time. Individuals who breach the cap would be subject to appropriate consequences to ensure excess capital is not retained in the retirement phase.

14.38 The value of defined benefit pensions, and other pension and annuity products, would also be determined and credited against an individual's cap space. However, unlike account based products, many defined benefit pensions, and certain legacy pension and annuity products (that is, commenced prior to 1 July 2017), cannot be commuted. Consequently, an alternative approach would apply in these circumstances where excess capital cannot generally be removed from retirement phase. This approach would impose additional tax on individuals who receive pension payments over \$100,000 per annum.

14.39 Members of unfunded defined benefit schemes and constitutionally protected funds (untaxed schemes) receiving defined benefit pensions would continue to be taxed at full marginal rates; however, the 10 per cent tax offset would be capped at \$10,000 from 1 July 2017 (that is, it would not apply to any untaxed source benefits above the \$100,000 threshold). Members of funded defined benefit schemes (taxed schemes) would have 50 per cent of their pension amount over \$100,000 taxed at their marginal rate.

14.40 Other possible approach: tax retirement-phase earnings above a threshold (this was not progressed as outlined in paragraph 14.148). This approach would limit the extent of superannuation tax concessions in the retirement phase by imposing a tax on superannuation earnings in the retirement phase that exceed a particular earnings threshold. In contrast to a transfer balance cap there would be no cap on the amount a person could transfer into a retirement phase account but earnings over a certain threshold would be subject to taxation. This approach would be a more complex way of improving fairness and sustainability of the superannuation tax concessions without materially affecting retirement incomes.

Reforming the taxation of non-concessional contributions

14.41 Non-concessional contributions are generally voluntary contributions into superannuation made out of an individual's post-tax income. Earnings on these contributions are taxed at a flat-rate of 15 per cent in accumulation accounts and then become tax free when transferred into a retirement account.

14.42 Individuals can currently make non-concessional contributions of \$180,000 per year (or \$540,000 every three years for individuals under 65). These generous annual caps are poorly targeted and allow wealthy individuals the opportunity to contribute large sums to the concessional taxed superannuation environment.

14.43 In the 2016-17 Budget, the Government announced that it would replace the current annual non concessional contributions caps with a \$500,000 lifetime cap. The lifetime non-concessional cap would help improve the sustainability of the superannuation system by targeting the tax incentives and would strengthen public confidence that the system is being used to achieve the primary objective of increasing retirement incomes.

14.44 In assessing the amount of an individual's non concessional contributions as at 7:30 pm (AEST) on 3 May 2016, for lifetime cap purposes only non-concessional contributions made since 1 July 2007 would be taken into consideration, as this is the date from which the Australian Taxation Office (ATO) has reliable contribution records.

14.45 This approach was subject to a short form RIS process prior to the Budget which is at Appendix A.

14.46 On 15 September 2016, the Government announced it would replace the lifetime cap with a \$100,000 annual cap, for a two or three year bring forward period, available to certain individuals with superannuation balances below the transfer balance cap (currently \$1.6 million).

14.47 This approach was identified through consultation with the industry and other stakeholders. The approach retains the flexibility to accommodate lump sum contributions, for example from the sale of a property or an inheritance.

14.48 This approach would also target tax concessions to those Australians who have an aspiration to maximise their superannuation balances and reach the transfer balance cap (if implemented) for their retirement. Individuals with a balance of \$1.6 million or more would no longer be eligible for non-concessional contributions. This would ensure

those who have saved well in excess of what is required to be self-sufficient in retirement would not be able to continue to access further concessional tax treatment by making after-tax contributions.

Reforming the taxation of concessional contributions

14.49 Concessional superannuation contributions are taxed in the hands of the superannuation provider at a flat rate of 15 per cent. If an individual's concessional contributions exceed their annual concessional contribution cap (currently \$30,000 for those aged 49 and under at the end of the previous financial year; \$35,000 otherwise), the amount of the excess is included in the individual's assessable income and taxed at marginal income tax rates (and the individual receives a tax offset to account for the tax paid by the provider). Additionally at present, individuals with income exceeding \$300,000 pay an additional 15 per cent Division 293 tax on their concessional contributions to the extent they are above the threshold for Division 293 tax to apply.

14.50 The current treatment means that high income earners disproportionately benefit from the concessions both because they have more savings and because the effective discount on their marginal rates for contributions taxed at the flat 15 per cent rate is greater. As high income earners generally save for their retirement, regardless of tax incentives, these concessions are poorly targeted.

14.51 This measure would lower the concessional contributions cap to \$25,000 (indexed by Average Weekly Ordinary Time Earnings (AWOTE)) and the threshold for the Division 293 tax to \$250,000, from 1 July 2017.

14.52 Both of these elements deliver targeted reductions in the tax concessions provided to those individuals who would not require additional income support in retirement.

14.53 Reducing the annual cap on concessional contributions would require high wealth individuals to hold a larger quantum of their retirement savings outside the concessional superannuation environment. This reduces the ability of these people to utilise the tax advantage of the superannuation system as a means of storing wealth in a concessional taxed environment.

14.54 Capping concessional contributions at \$25,000 per year (indexed in \$2,500 increments in line with AWOTE) would still allow individuals to contribute more than is needed for an adequate retirement income if they have the ability to do so, without providing excessive access to the concessional superannuation environment.

14.55 Additionally, lowering the Division 293 income threshold to \$250,000 would ensure the relative tax concession provided to those on high incomes (compared to tax on other income) is more closely aligned to the concession provided to average income earners. Mercer have stated that they support this change on the grounds it will improve the fairness of the superannuation tax concessions.

14.56 Existing processes for the administration of the concessional contributions caps and the imposition of the additional 15 per cent Division 293 tax on contributions (including the ability to withdraw the excess from superannuation to pay the additional liability), would be maintained.

14.57 This measure would apply in a broadly commensurate way to members of defined benefit schemes and constitutionally protected funds. Under existing treatment, the notional taxed contributions of members of taxed defined benefit schemes are used to assess liability for excess contributions tax. Individuals who were members of these schemes prior to May 2009 have these contributions capped at the level of the concessional contributions cap.

14.58 Members of untaxed defined benefit schemes and constitutionally protected funds would now have their defined benefit contributions included in assessing liability for excess contributions tax. However, for members of these schemes, their defined benefit contributions, and actual employer contributions to constitutionally protected accumulation funds, are effectively capped at \$25,000. This therefore would effectively reduce their ability to access concessional superannuation above \$25,000 a year, to the extent they are already in receipt of employer support.

Introducing the Low Income Superannuation Tax Offset

14.59 The superannuation system is designed to encourage Australians to save for their retirement. This is why concessional contributions are generally taxed at a lower rate than income outside of superannuation. However, for many low income earners, the 15 per cent tax on superannuation contributions means these individuals could be paying more tax on their superannuation contributions than on their income outside superannuation.

14.60 Currently, individuals with an adjusted taxable income of \$37,000 or less are entitled to the low income superannuation contribution (LISC) for their eligible concessional superannuation contributions made between the 2012-13 income year and the 2016-17 income year. This contribution pays an amount equal to 15 per cent tax on concessional superannuation contributions up to \$500. The contribution, in effect,

largely offsets the tax paid on a low income earner's concessional contributions. However, the LISC will be repealed from 1 July 2017 under the *Minerals Resource Rent Tax Repeal and Other Measures Act 2014*, meaning that from 1 July 2017, it will no longer be available to offset the tax disadvantage faced by low income earners.

14.61 In the 2016-17 Budget, the Government announced that it would introduce a low income superannuation tax offset (LISTO) from 1 July 2017 to replace the LISC. Under the LISTO, those with an adjusted taxable income up to \$37,000 would receive an effective refund into their superannuation account of the tax paid on their concessional contributions, up to a cap of \$500. Importantly, those who would benefit from the LISC could also benefit from the LISTO (all else equal).

14.62 The ATO would determine a person's eligibility for the LISTO and if eligible, the LISTO payment would be placed into the person's superannuation account. The LISTO would be provided directly to individuals (or their estates if they are deceased), if for example individuals do not have an eligible superannuation account because they have retired.

14.63 The LISTO measure announced in the Budget was a non-refundable tax offset, meaning that since superannuation providers pay the tax on superannuation balances the fund would be entitled to the tax offset, which it could then pass on to members. If the superannuation provider could not claim the full benefit of the offset (because, for example, its tax liability was less than the total amount of the offset), the non-refundable nature of the tax offset would mean that the superannuation provider would be required to seek a 'top-up' payment from the ATO to make up this difference. The LISTO measure announced in the Budget differs from the LISC, which is a payment made by the ATO to an individual's superannuation account through the individual's superannuation fund.

14.64 Feedback from superannuation providers during consultation indicated that this LISTO measure would be highly complex and costly to administer, with superannuation providers and the ATO requiring new systems, as well as amendments to superannuation funds' income tax returns. It would also likely result in delays in passing on the LISTO benefit to members.

14.65 As a result of this feedback, the Government announced it would adjust the LISTO model in the following way. The LISTO would be administered using a direct payment method where the benefit is determined by the ATO, based on information given to it by superannuation funds, and then contributed to the low income earner's superannuation account. The introduction of the LISTO reflects the

objective of the policy — to provide an offset to the tax paid on the superannuation of low income earners. While superannuation providers and the ATO would incur some compliance costs in implementing this method this would be much less costly than implementing a new system of distributing the LISTO.

14.66 Under either approach, the LISTO would apply to defined benefit schemes in the same way as for the LISC. The LISTO would be paid to eligible members of funded defined schemes to the extent that that person receives concessional contributions (known as notional taxed contributions) in the year. The LISTO would not be paid where there have been no ‘taxed’ concessional contributions made — for example, to members of fully unfunded defined benefit schemes or constitutionally protected funds. Contributions for members of these funds are taxed at the benefit phase rather than at the contribution phase. To the extent that a member receives ‘taxed’ concessional contributions, the LISTO would be paid to an unfunded defined benefit scheme for these contributions only.

3.2.2 Measures to increase flexibility in the superannuation system

14.67 The following measures would improve the flexibility of the superannuation system by adjusting the current systems to reflect modern work patterns to make it easier for individuals to boost their retirement savings to provide equality of access to the concessional contribution arrangements and encourage retirement product innovation to provide greater choice to retirees to manage their risks.

14.68 These measures would increase flexibility and choice for individuals to make concessional contributions and improve consumption smoothing over the course of an individual’s lifetime. Ultimately the measures would boost the superannuation savings of individuals and through greater choice in retirement products would help individuals manage their risks in retirement, which would reduce pressure on the age pension in the long-term.

Improving access to concessional contributions

14.69 This measure would improve access to concessional contributions by allowing all Australians under age 75 to claim an income tax deduction for eligible personal superannuation contribution into an eligible superannuation provider from 1 July 2017. These amounts would count towards the individual’s concessional contributions cap and be subject to 15 per cent contributions tax.

14.70 To access the tax deduction, individuals would lodge a notice of their intention to claim the deduction with their superannuation provider

or retirement savings provider. Generally this notice would need to be lodged before the individual lodges their income tax return. Individuals could choose how much of their contributions to deduct. The individual must receive an acknowledgement of this notice from the provider.

14.71 Certain untaxed and defined benefit superannuation providers would be prescribed, meaning members would not be eligible to claim a deduction for contributions to these funds. If a member of these funds wishes to claim a deduction, they must direct the personal contribution to another eligible superannuation fund. Prescribed funds would include Commonwealth defined benefit funds, funds that do not include an amount in assessable income due to receiving the contribution, and any other defined benefit scheme that is excluded from these arrangements.

14.72 This more flexible arrangement would benefit all Australians by allowing them to utilise more of their concessional cap if they have the capacity and choose to do so.

Allowing catch-up concessional contributions

14.73 Annual concessional contribution caps can limit the ability of people with interrupted work patterns—for example women or carers—to accumulate superannuation balances commensurate with those who do not take breaks from the workforce. Annual concessional contributions caps also limit people with lumpy or irregular income, for example small business operators, from fully utilising their available cap space.

14.74 This measure would allow individuals to access their previously unused concessional cap space to make additional concessional contributions. Access to unused concessional cap space amounts would be limited to those individuals with a total superannuation balance of less than \$500,000, and only unused amounts accrued from 1 July 2018 could be carried forward.

14.75 Carried forward amounts from any year in which an individual did not contribute up to the maximum allowed under the concessional contributions cap would be available for a period of up to five consecutive years. If the unused concessional cap space for a particular year remained unused after five years, that component would no longer be available to the individual to make catch-up contributions.

14.76 This measure would ensure that only those people who have not had the capacity to contribute up to their concessional cap in prior years would be able to make catch-up contributions and targets it to those individuals who have been unable to accumulate large superannuation balances. People with higher incomes who have already contributed up to their concessional contributions cap each year or those who have made

substantial non-concessional contributions would not be allowed access to any unused concessional cap space to carry forward.

Extending the spouse tax offset

14.77 Currently a tax offset is available for an individual if the individual makes a contribution to a complying superannuation provider or retirement savings account on behalf of their spouse and, amongst other things, the total of the spouse's assessable income, reportable fringe benefits, and reportable employer superannuation contributions for an income year is less than \$13,800.

14.78 Under this measure the eligibility rules for claiming the tax offset for superannuation contributions partners make to their low income spouses would be extended, by increasing income qualifying thresholds for the recipient spouse. This measure would provide added flexibility to the superannuation system by providing a greater incentive for a larger population of qualifying individuals to contribute to the superannuation balance of their low income spouses and assist them in accumulating a higher balance.

14.79 The current 18 per cent tax offset (of up to \$540) would be available for any individual, whether married or de facto, contributing to a recipient spouse whose income is up to \$37,000. This would be an increase from the current \$10,800. As is currently the case, the offset would be gradually reduced for income above \$37,000 and would be completely phased out at income above \$40,000 (currently phases out at income above \$13,800).

Harmonising contribution rules for older Australians

14.80 Currently, people who are aged 65 to 74 are only able to make voluntary or non-concessional superannuation contributions if they meet a work test. The work test involves having worked for at least 40 hours over 30 consecutive days in the financial year the individual wishes to make a contribution.

14.81 Additionally, people are only permitted to make contributions for a spouse aged 65 to 69 if that spouse meets a work test. If their spouse is aged 70 or over no spouse contributions can be made.

14.82 Under this measure the Government would remove the requirement that an individual aged 65 to 74 must meet a work test before making voluntary or non-concessional contributions to superannuation. In addition, individuals would also be allowed to make contributions to a spouse aged under 75 without the need for their spouse to meet a work test. This measure would add flexibility for older individuals to

accumulate higher superannuation balances, particularly in response to changing life events, such as leaving the workforce to care for family members or downsizing their home.

14.83 This measure would apply in a broadly commensurate way to members of defined benefit schemes and constitutionally protected funds. That is, members of defined benefit schemes would be able to accrue benefits until age 75.

Enhancing choice in retirement income products

14.84 The current rules restrict the ability of retirement income product providers to develop and bring to market new income stream products.

14.85 Under this measure, from 1 July 2017, the Government would extend the tax exemption on earnings in the retirement phase to products such as deferred lifetime annuities and group self-annuitisation products. These products seek to provide individuals with income throughout their retirement regardless of how long they live.

14.86 This measure would allow providers to offer a wider range of retirement income products to provide more flexibility and choice for Australian retirees, and help them to better manage consumption and risk in retirement, particularly longevity risk, where people outlive their savings.

3.2.3 Measures to strengthen the integrity of the superannuation system

14.87 The following measures would improve integrity of the superannuation system and build on the sustainability measures by reducing the extent to which the superannuation system is used for tax minimisation and estate planning.

14.88 These measures would also reduce fiscal pressure without impeding individuals' ability to save for their retirement.

Improving the integrity of transition to retirement income streams

14.89 Transition to retirement income stream (TRIS) arrangements were introduced in 2005 to provide limited access to superannuation for people wanting to move towards retirement by reducing their working hours and using their superannuation to supplement their income.

14.90 People who are still working can commence a TRIS arrangement once they reach preservation age. Individuals with a TRIS arrangement enjoy tax-free earnings on their superannuation assets. Recipients are also able to reduce their tax liability by salary sacrificing

their income (that would otherwise be taxed at their marginal tax rate) into superannuation and instead taking a superannuation income stream at a concessional tax rate.

14.91 This measure would involve removing the tax exempt status of income from assets supporting a TRIS from 1 July 2017. Earnings from assets supporting TRIS would be taxed concessional at 15 per cent. This change would apply irrespective of when the TRIS commenced. In addition, individuals would no longer be able to treat certain superannuation income stream payments as lump sums for tax purposes, which are currently tax-free up to the low rate cap (\$195,000).

14.92 Under this measure, reducing the tax concessional nature of TRIS would ensure they are fit for purpose and not primarily accessed for tax minimisation purposes and subsequently strengthen the integrity of the superannuation system.

Abolition of the anti-detriment provision

14.93 The current anti-detriment provision allows superannuation providers to increase lump sum death benefits by an amount equivalent to the tax the fund has paid on contributions for the member, and then claim a tax deduction for the increased death benefit amount. The provision is available for lump sum death benefit payments made to a spouse, former spouse or child of the deceased.

14.94 Not all superannuation providers offer this arrangement to their members. Whether a superannuation provider provides an anti-detriment payment depends on their governing rules. There is no legal requirement for the superannuation provider to make the payment and claim the associated tax deduction.

14.95 Under this measure the anti-detriment provision would be abolished. The lump sum death benefit paid to dependants would continue to be tax free; however, funds would no longer be able to receive a tax deduction in respect of the tax paid on contributions for the deceased. This measure would improve the fairness and integrity of the system to ensure all lump sum death benefits from superannuation providers are treated equally when paid to dependants and that there is consistency across the tax system.

Streamlining Administration

14.96 If changes to the contribution caps (annual concessional and non-concessional contributions caps) and to the Division 293 income threshold are legislated, the number of individuals who receive an assessment from the ATO for additional tax under these regimes would

increase. This could lead to individuals receiving a greater number of notices of assessment and determinations from the ATO for excess contributions in an income year.

Notifications from the ATO — Every superannuation product (Division 293 tax, excess contributions tax, refund of excess concessional contributions, fairer taxation of excess concessional contributions, and refund of excess non concessional contributions) has a separate notification process, which creates confusion for individuals as they can receive multiple notices in an income year relating to different tax regimes.

Release Authorities — Release authorities (issued by the ATO when an individual has made excess contributions into superannuation or has a Division 293 tax liability) currently have different timeframes depending on the type of superannuation product that they relate to, go to different entities (either the provider or the individual) and are either compulsory or voluntary. This leads to complexity and confusion for both superannuation providers and individuals.

14.97 In addition, individuals do not currently have consistent objection rights across all superannuation products. In relation to excess non-concessional contributions, an individual can only object to a decision by the Commissioner not to exercise the Commissioner's discretion to disregard or reallocate the contribution where an assessment has been issued. This means that where an individual has elected to withdraw the excess non-concessional contribution from the superannuation system they do not have an objection right to the Commissioner's decision not to exercise the discretion.

14.98 In relation to the application of Division 293 tax, superannuation providers offering defined benefit schemes are required to perform an end benefit calculation for certain members to determine if the fund calculated amount is lower than the ATO held liability for Division 293 purposes.

14.99 Superannuation providers are required to advise the Commissioner of a member's end benefit cap amount if:

- the Commissioner had started keeping a Division 293 tax debt account for the superannuation interest for the member;
- the Commissioner had given notice to the superannuation provider that a Division 293 tax debt account was being kept for that member; and
- an end benefit became payable from that superannuation interest for that member.

14.100 This is intended to protect certain individuals who have incurred a Division 293 tax liability in circumstances where the actual employer benefits accrued are less than the estimated benefits reported for Division 293 purposes. However, the compliance costs for funds to administer the end benefit cap calculation is largely disproportionate to the benefits for a limited number of individuals.

14.101 For example, approximately 40 per cent of individuals who incur a deferred tax liability for Division 293 pay their debt up front (approximately 3500) so the end benefit cap calculation is not required. Only five per cent of individuals have an end benefit cap less than the deferred debt amount (approximately 200). At present defined benefit funds have to calculate an end benefit cap for all individuals with a Division 293 tax debt account irrespective of whether they have a deferred tax liability owing or not (approximately 7000).

14.102 A number of actions are being proposed to address the issues raised above. These actions would streamline the ATO's administration processes, and improve the client experience, by reducing confusion, churn, and complexity for individuals and superannuation providers. The action to align objection rights would improve procedural fairness for individuals.

Proposed actions

14.103 Notifications from the ATO — Clarify in the law that the ATO can issue a single document that serves as a notice for any or all of an individual's different tax liabilities concerning notices of assessment, determinations, statements and other documents.

14.104 Release authorities — Replace the existing release authority requirements with standardised timeframes and processes (excluding release authorities relating to deferred debt account discharge liabilities for Division 293 tax). Introduce a default process for individuals who do not make an election (or who wish to undertake the default process) when dealing with all release amounts from superannuation. The default for each superannuation product would be set to the option that is most beneficial for the majority of individuals. Individuals would still have the ability to select other options if they wish, consistent with current arrangements.

14.105 Objection rights — Provide individuals with an objection right to any decision relating to the Commissioner exercising a discretionary power in respect of excess non-concessional contributions, as a matter of procedural fairness.

14.106 Division 293 (end benefit cap) — Remove the compulsory obligation for funds to calculate an end benefit cap for certain defined benefit members when they become entitled to an end benefit by only requiring funds to calculate an end benefit cap when an individual has a deferred Division 293 tax liability with the ATO. Under this option the Commissioner would advise the superannuation provider that the balance of an individual's Division 293 tax debt account is nil therefore removing the obligation for the fund to calculate an end benefit cap when it is not required.

3.3 Option 3 — All of the measures announced in the 2016-17 Budget superannuation reform package

14.107 This option would introduce all of the above mentioned measures for government action. This would maximise synergies within the package by introducing a set of measures that address the three issues identified in the problem section, helping to:

- strengthen the sustainability of the superannuation system by better targeting tax concessions;
- improve the flexibility of the superannuation system; and
- enhance the integrity of the superannuation system.

14.108 However, this option does not take into account any changes that may be made to the policy measures that would require further consideration of broader fiscal impacts.

4. Cost benefit analysis of each measure/Impact analysis

14.109 This section discusses the costs and benefits (including compliance costs) of each measure under the proposed options. The OBPR has agreed to the compliance cost estimates discussed in this section.

14.110 The cost benefit analysis for the individual measures is provided on the following pages. However, there are some common overarching costs and benefits that can be identified for individuals, financial professionals and financial market participants (businesses) across all or a number of the measures. These overarching costs and benefits are outlined below (these overarching costs are reflected in each individual measures' cost benefit analysis).

Individuals

14.111 The measures outlined below would all impose small costs on individuals. Most commonly these costs would be associated with the need for individuals to understand the changes that would result from the measures chosen. Some individuals (mainly high wealth individuals) may consider that some of the measures limit their ability to save for their retirement and obtain no or concessional tax rates to the same extent to which they had wished, notwithstanding the fiscal pressures such desires place on the taxpayer.

14.112 Additionally, depending on the financial literacy/proficiency, some individuals would incur costs associated with seeking financial advice or through unintentional non-compliance with the income tax law.

14.113 While individuals would incur costs in relation to these measures, depending on the option chosen, the superannuation system would become more flexible, sustainable and have an increased level of integrity which would likely benefit more Australians in the long-run.

Financial Professionals

14.114 Individuals often rely on financial professionals when making financial decisions and when seeking advice regarding superannuation taxation more broadly. As such, some of the costs identified for individuals would be passed onto financial advisers and accountants (tax agents). However, given the role that these professionals play in the financial services industry these costs would be expected to form part of business as usual practices and would be relatively insignificant.

14.115 Given some individuals would seek the assistance of financial professionals to understand and or comply with any of the proposed measures (if there were chosen as part of an option), financial professionals would be expected to benefit in the transition to the new arrangements through increased service and advice fees, and reduced operation costs (via economies of scale). The extent of the benefit cannot easily be estimated, as it would depend on the measures chosen and the behavioural responses of the affected individuals.

14.116 Note: the benefits provided to financial professionals through increased revenue would be obtained by imposing a cost (increased fees) on individuals.

Financial Market Participants (Businesses)

14.117 The measures outlined below cannot be seen to have overarching costs on businesses in general.

14.118 The measures which restrict amounts that individuals can contribute would however potentially result in a flow of funds out of superannuation and into other investment vehicles in the financial sector. This flow of funds would benefit other businesses within the financial services industry including life insurers, authorised deposit taking institutions, brokers, private equity funds, etc. The extent of this benefit cannot easily be estimated, as it would depend on the measures chosen and the behavioural responses of the affected individuals.

14.119 Note: the benefits provided through increased market access would be generally obtained through costs imposed (e.g. the limiting of tax concessions) on individuals.

Government

14.120 The ATO would face increased compliance and monitoring costs in respect to all of the measures outlined below. However, these increased costs would be largely absorbed by the ATO.

14.121 While there would be fiscal costs associated with some of the measures, these costs would be offset through improvements in flexibility; allowing more individuals to save for retirement. Other measures would result in increased government revenue, which could be directed to other measures that have a fiscal cost and to ensure the Government's fiscal strategy is maintained.

4.1 Option 1 — No policy change

14.122 This option involves no new actions by the Government and relies on existing policy settings. Consequently, it would introduce no new impacts on businesses, community organisations or individuals. At the same time, it would do nothing to address the issues outlined in the problem section.

4.2 Option 2 — A suite of policy measures to address the problems of sustainability, flexibility and integrity, combined or in isolation

14.123 Under this option, one or more of the measures which address the sustainability, flexibility and integrity issues identified in the problem section could be packaged together to form a suite of measures to meet the primary objective of the superannuation system.

14.124 The implementation of a suite of measures which takes into account costs, benefits, resulting net benefits and the Government's broader fiscal strategy, would directly affect individuals, financial professionals (such as tax agents and financial planners), superannuation providers and government.

14.125 The costs (including compliance costs) and revenue impacts would depend of the particular measures chosen and would broadly reflect their individual costs and impacts. The benefits of the chosen measures would also apply. However, depending on the final composition of the suite of measures further 'synergistic' benefits may be realised.

14.126 The final suite of measures (depending on which measures are chosen) could deliver net benefits, by addressing the issues of sustainability, flexibility and integrity. Due to the complementary nature of a number of measures the effectiveness of the final suite of measures would be expected to be more effective than implementing measures in isolation.

4.2.1 Measures to improve the sustainability of the superannuation system

14.127 These measures are consistent with the objective of the superannuation system, which makes it clear that the primary purpose of superannuation is to provide retirement income. The measures would improve sustainability of the system by improving the targeting of superannuation tax concessions to those who need incentives to save by reducing concessions for high wealth individuals, keeping concessions for others unchanged and providing support to low income earners.

Introduce a transfer balance cap

Costs

14.128 This measure would, as outlined above, result in costs for individuals, such as the loss of generous tax treatment and the need to understand and comply with the changes. The measure may also require some individuals to set up an accumulation account to accommodate excess amounts above the cap and potentially paying tax on the excess earnings. It is estimated that less than one per cent of high wealth individuals would be adversely affected by this measure.

14.129 The Industry Superannuation Australia (ISA) stated that 'the complexity of the detailed operation of these provisions is unlikely to be understood by most members, although few will accumulate balances high enough to be affected.'

14.130 Superannuation funds, life insurance companies and self-managed superannuation funds (SMSFs) would be expected to incur compliance costs in comprehending the changes and planning for the implementation of this measure.

14.131 More broadly, this measure would require increased reporting by all superannuation providers. Superannuation providers may need to design and implement new systems to be able to report the value of assets used to commence a retirement income stream.

14.132 Superannuation providers may also need to report other retirement phase account transactions. For APRA funds, these reporting changes are expected to be built using existing processes while for other superannuation entities (such as SMSFs and life insurance companies) the changes may be more significant.

14.133 The Association of Superannuation Funds of Australia (ASFA) has indicated that superannuation providers would need to:

- invest in significant changes to IT systems, including system build to cater for:
 - existing members over \$1.6 million who are invested in illiquid assets or in assets that incur a fee for disposal (e.g. term deposits);
 - additional tax payable on notional earnings based on excess cap amounts;
 - calculating penalty should 30 day SLA not be met;
- develop processes and procedures, disclosure material and training to reflect the proposed changes;
- provide for additional reporting (e.g. family law) and report more frequently to the ATO;
- undertake additional valuation calculations for the individual's total superannuation balance;
- provide more financial advice and information; and
- overcome additional operational challenges when ATO actions default fund option, including contacting member and determining which funds and assets are to be rolled back and in what they are to be invested should the client be uncontactable.

14.134 The Australian Institute of Superannuation Trustees (AIST) has indicated that they estimate the largest part of the cost associated with system changes required to implementing the superannuation reforms in the 2016-17 Budget would be attributable to the transfer balance cap.

14.135 For defined benefit and constitutionally protected schemes, there would be additional tax withholding and reporting requirements for benefits paid to members over the age of 60.

14.136 This measure would also reduce the volume of assets supporting retirement phase accounts. While capital in excess of \$1.6 million could still be held in the superannuation system, it would now be subject to a 15 per cent tax on earnings. This may result in some reinvestment of assets out of the superannuation system. The concessional nature of the superannuation system means that any reinvestment out of superannuation would be small.

14.137 This measure would be expected to have a medium compliance burden with compliance costs estimated to be \$317.5 million over ten years. This is based on estimated implementation costs of \$153.9 million and ongoing compliance costs of \$16.4 million per annum. The measure is estimated to have a positive impact on the underlying cash balance of \$1.846 billion over the forward estimates.

Table 14.1 REGULATORY COST TABLE (1)

<i>Potential compliance costs</i>	<i>Total (\$m)</i>	<i>Per client</i>
Implementation	\$153.9	\$455
Ongoing (p.a.)	\$16.4	\$48
Aggregate impact over 10 year duration	\$317.5	
Per year (10 years)	\$31.8	

Benefits

14.138 This measure is designed to improve the sustainability of the superannuation system.

14.139 Superannuation tax concessions are intended to encourage people to save for their retirement. They are not intended to provide people with the opportunity for tax minimisation or for estate planning. It is important that the tax concessions are targeted at the accumulation of retirement savings for average workers.

14.140 The earnings from retirement phase superannuation accounts are tax-free which makes them a very desirable investment choice. High wealth individuals with large balances, who save for their retirement and

do not rely on the age pension, disproportionately benefit from these concessions because they have more savings and because the discount on their marginal tax rates is greater.

14.141 Introducing a transfer balance cap would limit the ability for high wealth individuals to use the superannuation system for tax minimisation or estate planning purposes. However, the ability for individuals to benefit from tax concessions when seeking to save for their retirement would remain largely unchanged.

14.142 This measure, as outlined above, may also be beneficial for financial professionals and financial market participants. As the introduction of a transfer balance cap would require some individuals to seek financial advice in order to establish other avenues for investment. This would increase the need for financial advice (increasing the ability for financial professional to generate revenue) and the need for different types of investment vehicles to be made available (increased market access for financial market participants).

14.143 Compliance with the transfer balance cap would be measured at the time that an income stream becomes eligible for an earnings tax exemption. This means that individuals would only need to assess their compliance once — there would be no need for ongoing reporting on the balance of their retirement phase account. This also means that effective trustees who are able to deliver strong growth for their members would not be subject to a tax on their efforts.

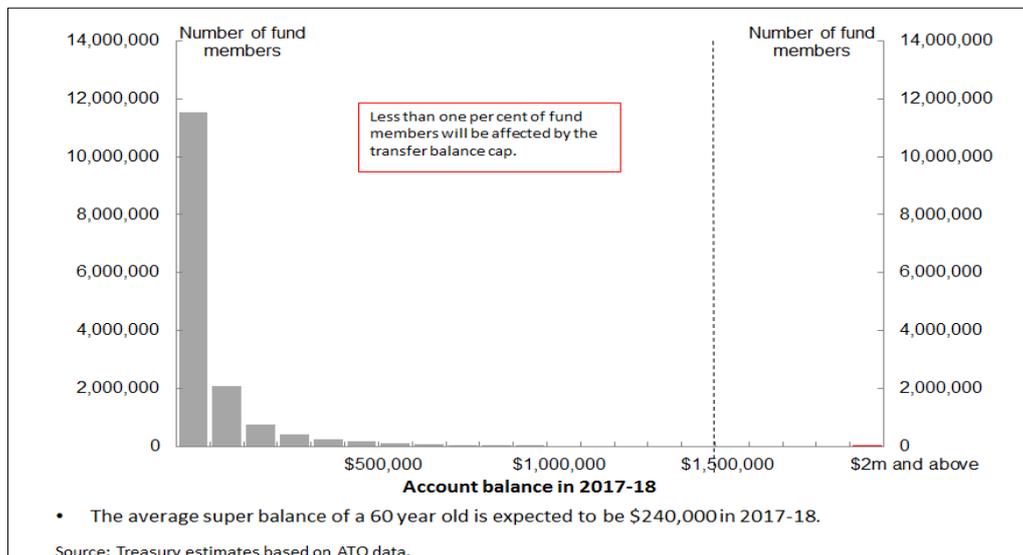
Net Benefit

14.144 When considering the costs and benefits, for both stakeholders and the superannuation system as a whole, this measure would be expected to deliver a net benefit.

14.145 Better targeting of tax concessions would improve the long-term fiscal sustainability of the superannuation system. The measure is estimated to affect less than one per cent of high wealth individuals and provides greater equity in the distribution of government concessions without unduly constraining the aspirations of most individuals to save for their retirement.

14.146 As shown in Diagram 2, this measure is expected to affect less than one per cent of fund members (55,000 individuals), who would never depend on the age pension. The average superannuation balance of a 60year old is expected to be \$240,000 in 2017-18.

Diagram 14.2 Estimated distribution of individuals affected by the transfer balance cap



14.147 This measure would reduce the ability for high wealth individuals to utilise the concessional taxed superannuation environment to facilitate tax minimisation and unlimited intergenerational wealth transfer.

14.148 Implementing a transfer balance cap is also a significantly less complex proposal than the approach of taxing earnings in the retirement phase above a certain earnings threshold. Taxing significant earnings in the retirement phase would likely require superannuation providers to substantially alter their reporting and accounting systems leading to a significant increase in compliance costs. Furthermore, this compliance cost increase would likely be distributed across all members in the retirement phase, despite the tax being targeted at a small number of wealthy members.

Reforming the taxation of non-concessional contributions

Costs

2016-17 Budget approach

14.149 The regulatory implications and costs of this proposal have already been agreed by OBPR in the short form RIS attached to this document.

Post Budget approach

14.150 Under this measure individuals may incur costs when evaluating their current contribution strategy and how they would utilise additional savings that fall above the annual non-concessional cap under this approach (including the bring forward rules), which would have fallen below the current annual non concessional contribution cap.

14.151 This measure would, as outlined above, also result in compliance costs for individuals in seeking to understand the policy changes. Some individuals would need to become aware that they are no longer able to make non-concessional contributions into their superannuation account.

14.152 This measure would, as outlined above, have an impact on financial professionals.

14.153 Businesses such as superannuation funds, life insurance companies and SMSFs would be likely to incur compliance costs in comprehending the changes and planning for the implementation of this approach. This may require these businesses to design and implement new systems as a result of complying with this measure.

14.154 Superannuation providers may also see an increase in the number of individuals breaching the new cap. This would lead to an increase in the number of release authorities and payments.

14.155 Defined benefit funds would also incur additional reporting requirements.

14.156 This approach would be expected to have a low compliance burden with compliance costs estimated to be \$21.8 million over ten years. This is based on estimated implementation costs of \$6.4 million and ongoing compliance costs of \$2.2 million per annum. The measure is estimated to have a positive impact on the underlying cash balance of \$200 million over the forward estimates.

Table 14.2 REGULATORY BURDEN TABLE (2)

<i>Potential compliance costs</i>	<i>Total (\$m)</i>	<i>Per client</i>
Implementation	\$6.4	\$77
Ongoing (p.a.)	\$1.6	\$19
Aggregate impact over 10 year duration	\$21.8	
Per year (10 years)	\$2.2	

Benefit

14.157 This measure (under either approach) is designed to improve the sustainability of the superannuation system.

14.158 Improved targeting of the non-concessional cap ensures superannuation tax concessions are provided to those individuals who wish to make non-concessional contributions to provide for their retirement futures. Currently, the generous annual caps may be used for estate planning because they provide wealthy individuals with the opportunity to contribute large sums to the concessional tax superannuation environment every year.

14.159 The 2016-17 Budget approach would only adversely affect a small number of individuals; very few Australians make non-concessional contributions of more than \$500,000 (less than one per cent of fund members since 1 July 2007).

14.160 This measure (under either approach) may also be beneficial for financial professionals and financial market participants as outlined above.

Net benefit

14.161 When considering the costs and benefits, for both stakeholders and the superannuation system as a whole, this measure would be expected to deliver a net benefit.

14.162 Better targeting of tax concessions would improve both the long-term fiscal sustainability of the superannuation system and while depending on the approach the measure is estimated to only impact a small number of individuals it would improve equity in the distribution of government concessions without unduly constraining individuals' aspirations to save for retirement.

14.163 As at 30 June 2015, under the 2016-17 Budget approach less than one per cent of fund members have made contributions above \$500,000. Of those who have made non concessional contributions above \$500,000, the average total non-concessional contribution amount is \$720,000 and the average super account balance is more than \$1.6 million. Similarly, under the post Budget approach, less than one per cent of fund members are expected to be affected in 2017-18.

14.164 This measure (under either approach) would improve the sustainability of the superannuation system as it would limit amounts that can be placed into superannuation by high income earners for estate planning purposes.

Reforming the taxation of concessional contributions

Lower annual concessional contributions cap

Costs

14.165 This component of the measure would result in compliance costs for individuals seeking to understand the implications of the policy changes, as outlined above. Extra compliance costs would be incurred for those individuals who would normally invest in superannuation but choose other investment options to reduce their contributions below the new cap. Other individuals may inadvertently breach the new cap.

14.166 Superannuation providers may incur additional compliance costs if their members decide to withdraw excess contributions from the fund. This impact is considered to be minimal as excess concessional contributions are taxed at an individual's marginal tax rate and can remain in the superannuation provider as non-concessional contributions (subject to the annual non-concessional cap). The impact of any increase in the withdrawal of excess contributions from the superannuation system is expected to also be mitigated by the streamlining of the release authority process. A reduced cap may also result in some allocation of funds to assets outside of the superannuation system.

14.167 The AIST indicated that the implementation of reduced concessional contribution caps involves relatively low system, process and compliance costs, and can be implemented relatively quickly. However, the lower caps are likely to result in superannuation providers receiving a greater number of pre-tax contributions that exceed the cap.

14.168 The effect of reducing the annual concessional cap would also be offset by the measure that allows individuals to bring forward any unused concessional cap space amounts from the previous five years (from 1 July 2018) reducing the risk of individuals exceeding their annual concessional cap.

14.169 For superannuation providers offering defined benefit and constitutionally protected schemes, there would be additional reporting requirements in respect of notional and actual contributions.

14.170 This component would be expected to have a low compliance burden with compliance costs estimated to be \$45.8 million over ten years. This is based on estimated implementation costs of \$31.6 million and ongoing compliance costs of \$1.4 million per annum.

14.171 The two components of this measure are estimated to have a positive impact on the underlying cash balance of \$2.343 billion over the forward estimates.

Table 14.3 REGULATORY BURDEN TABLE (3)

<i>Potential compliance costs</i>	<i>Total (\$m)</i>	<i>Per client</i>
Implementation	\$31.6	\$54
Ongoing (p.a.)	\$1.4	\$2
Aggregate impact over 10 year duration	\$45.8	
Per year (10 years)	\$4.6	

Note: this measure only changes a regulatory threshold. As such, the associated compliance costs would be minor.

14.172 According to the ISA, ‘this measure is likely to impact on more individuals than any other measure which reduce concessions (approximately 380,000 people). Those most affected are those on higher taxable incomes (in receipt of higher SG contributions from employers), and those approaching retirement who tend to make additional salary sacrifice contributions. ISA modelling suggests the average balance of those affected is \$650,000 which is around six times the average balance of all persons with super.’

Division 293 threshold

Costs

14.173 This component of the measure is expected to have a one off increase in compliance costs associated with moving from the current taxation treatment of concessional contributions to the proposed treatment, typically occurring in the first year.

14.174 Some individuals would have a new type of tax liability they would need to pay either themselves, or to release from their superannuation account. As such, individuals would need to become aware that the Division 293 threshold had reduced and what actions they would need to take to avoid incurring a Division 293 tax liability, or paying the Division 293 tax.

14.175 ASFA have indicated that superannuation providers would need to invest in changes to processes and procedures, disclosure material and training to reflect the proposed changes and deal with a greater manual workload due to a likely increase in the number of assessment notices.

14.176 Superannuation trustees offering defined benefit interests would see an increase in the number of members who have a deferred Division 293 tax liability with the ATO. Similarly, there would be a small increase in the number of members in respect of whom they need to calculate the end benefit cap; however, this impact is likely to be mitigated by the

removal of the obligation for providers of defined benefit schemes to calculate an end benefit cap for all of their defined benefit members that have a Division 293 tax debt account.

14.177 This component would be expected to have a low compliance burden with compliance costs estimated to be \$41.6 million over ten years. This is based on estimated implementation costs of \$21.5 million and ongoing compliance costs of \$2.0 million per annum.

14.178 The two components of this measure are estimated to have a positive impact on the underlying cash balance of \$2.343 billion over the forward estimates.

Table 14.4 REGULATORY BURDEN TABLE (3.1)

<i>Potential compliance costs</i>	<i>Total (\$m)</i>	<i>Per client</i>
Implementation	\$21.5	\$156
Ongoing (p.a.)	\$2.0	\$15
Aggregate impact over 10 year duration	\$41.6	
Per year (10 years)	\$4.2	

Note: this measure only changes a regulatory threshold. As such, the associated compliance costs would be minor.

Benefit

14.179 The superannuation system is designed to encourage Australians to save for their retirement. This is why contributions to, and earnings on, superannuation are generally taxed at a lower rate than income outside of superannuation.

14.180 The existing tax incentives in superannuation disproportionately benefit high income earners because they have more savings, are better able to fully utilise their contribution caps, and because the relative discount on their marginal tax rate is greater. As high income earners would generally save for their retirement regardless of tax incentives, these concessions are poorly targeted. For example, the average concessional contribution amount is approximately \$6,000 per annum, well below the annual concessional cap.

14.181 This measure would ensure that tax concessions are more appropriately targeted. Reducing the annual cap on concessional contributions would require high wealth individuals to hold a larger quantum of their savings outside the concessional superannuation environment. This would reduce the ability of these people to utilise the tax advantage of the superannuation system as a means of storing wealth.

However capping concessional contributions at \$25,000 per year would still allow individuals to contribute more than is needed for their retirement income if they have the ability to do so, without providing excessive access to the concessional superannuation environment.

14.182 Additionally, lowering the Division 293 income threshold ensures that the relative tax concessions provided to those on high incomes (compared to tax on other income) is more closely aligned to the concessions provided to average income earners.

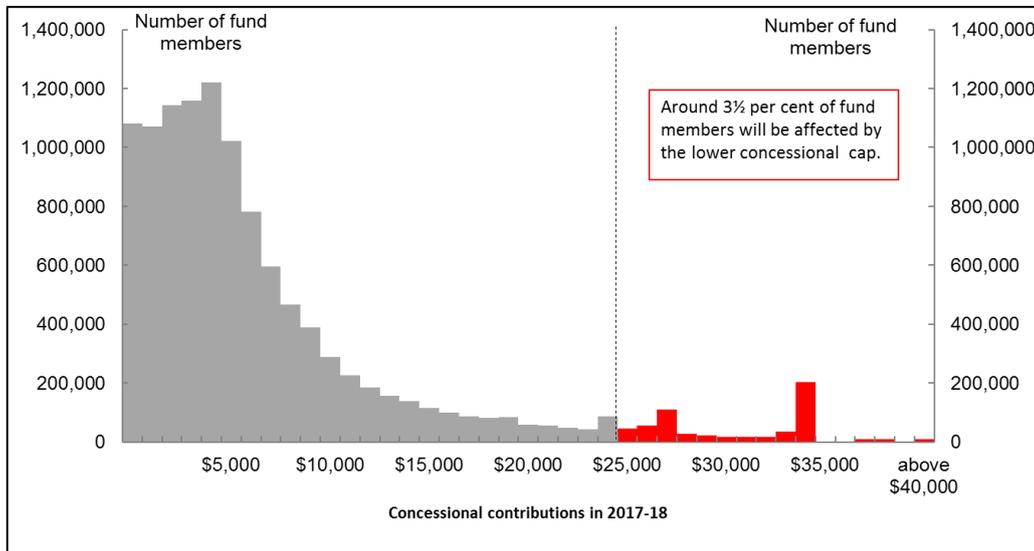
14.183 Proposed measures to streamline ATO administration processes, including a single notice for notices of assessment, determinations, statements, a streamlined release authorities process and a reduced requirement on funds to calculate end benefit caps for defined benefit members becoming entitled to end benefits would assist in offsetting the increase in compliance costs associated with this measure.

Net benefit

14.184 When considering the costs and benefits for both stakeholders and the superannuation system as a whole this measure would be expected to deliver a net benefit.

14.185 The impact of the lowering of the annual concessional cap on individuals is expected to affect only around three and a half per cent of superannuation provider members. Those affected are expected to have average taxable incomes of around \$200,000, and average superannuation balances of around \$760,000. These individuals have the ability to save for their retirement, if they wish to do so, outside the concessional tax superannuation system and are less likely to rely on the age pension. It is anticipated that a proportion of superannuation providers would also be impacted but this is expected to be limited because superannuation providers already have systems in place to monitor these caps.

Diagram 14.3 Estimated distribution of individuals affected by the lower concessional contributions cap



14.186 The reduction in the threshold for the Division 293 tax is estimated to impact around one per cent of high income individuals and would improve equity in the distribution of government concessions without unduly constraining individuals' aspirations to save for retirement.

14.187 It is anticipated that a proportion of superannuation providers would also be impacted but this is expected to be limited because superannuation providers already have systems in place to monitor this threshold.

Introducing the Low Income Superannuation Tax Offset

Costs

2016-17 Budget approach

14.188 As announced at Budget this change would have moderate to significant compliance costs for funds. There would also be compliance costs for the ATO. There would be no compliance costs for individuals as interactions for this payment would occur between the fund and the ATO.

14.189 Superannuation providers would have medium to significant increase in compliance costs as new systems would have to be set up to manage the various interactions between the tax system and member payments required to deliver the LISTO benefit to members. It is also expected there would be a medium to significant ongoing impact due to

the burden imposed from maintaining the interaction between the tax and payment systems. The ATO would also have to build new systems to accommodate the LISTO under this approach.

14.190 This approach would be expected to have a moderate to significant overall compliance burden with compliance costs, estimated to be \$180.7 million over ten years. This is based on estimated implementation costs of \$57.9 million and ongoing compliance costs of \$12.3 million per annum. This approach is estimated to have a negative impact on the underlying cash balance of \$1.455 billion over the forward estimates period.

Table 14.5 REGULATORY BURDEN TABLE (4A)

<i>Potential compliance costs</i>	<i>Total (\$m)</i>	<i>Per client</i>
Implementation	\$57.9	\$1,290
Ongoing (p.a.)	\$12.3	\$274
Aggregate impact over 10 year duration	\$180.7	
Per year (10 years)	\$18.1	

Post-Budget approach

14.191 Administering the LISTO using a direct payment method would result in much lower compliance costs to superannuation providers and for the ATO. In particular, both superannuation providers and the ATO would not have to adjust their systems significantly. There would also be no compliance costs associated with requiring superannuation providers to determine how much offset they could claim, the processing of top-up payments and amendments to funds' tax returns as new LISTO-eligible individuals were identified.

14.192 This approach would be expected to have a low overall compliance burden with compliance costs, estimated to be \$841,189 over ten years. This is based on estimated implementation costs of \$8.4 million and no ongoing compliance costs. This approach is estimated to have a negative impact of \$1.455 billion over the forward estimates period.

Table 14.6 REGULATORY BURDEN TABLE (4B)

<i>Potential compliance costs</i>	<i>Total (\$m)</i>	<i>Per client</i>
Implementation	\$8.4	\$188
Ongoing (p.a.)	\$0.0	\$0
Aggregate impact over 10 year duration	\$8.4	
Per year (10 years)	\$0.8	

Benefit

14.193 This measure is designed to improve the sustainability of the superannuation system. HESTA has strongly advocated for this important equity measure ‘that ensures those on lower incomes enjoy the same tax benefits from super as other working Australians.’

14.194 Introducing the LISTO (under either approach) would mean that low income earners would continue to receive a boost to their superannuation when the LISC ends. In effect, this means that most low income earners would continue to effectively pay no tax on their superannuation contributions.

14.195 Low income earners, who are disproportionately women, would benefit from the LISTO. This is important because women, on average, have lower superannuation balances than men despite having longer life expectancies. It is expected that in 2017-18, 3.1 million people (almost two-thirds of whom are women) would benefit from the LISTO (around 20 per cent of fund members).

14.196 The LISTO would also effectively avoid the situation in which low income earners would pay more tax on savings placed into superannuation than on income earned outside of superannuation.

14.197 Introducing the LISTO would help target tax concessions to where they are needed the most and ensures that low income earners have the opportunity to build their superannuation savings over the course of working life as much as possible. Better targeting tax concessions would be consistent with the objective of superannuation.

Net benefit

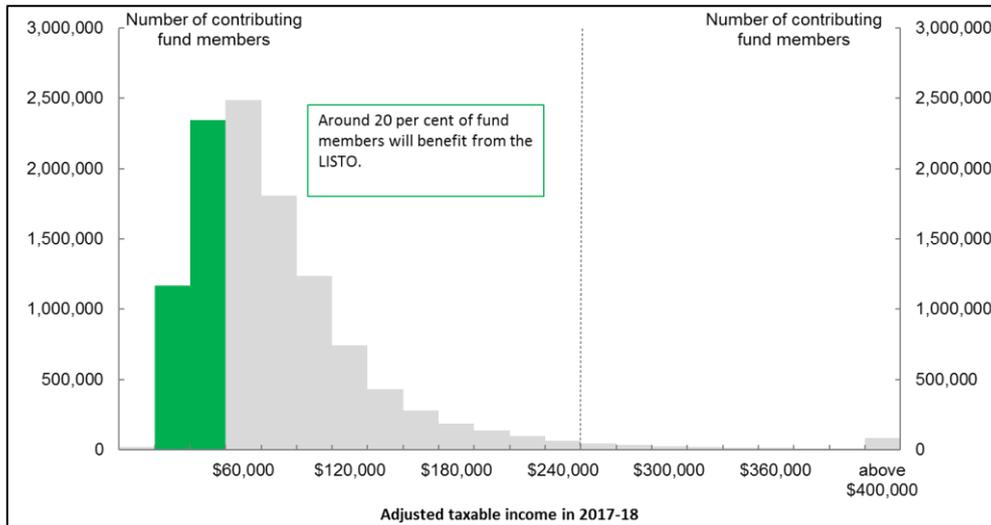
14.198 When considering the costs and benefits, for both stakeholders and the superannuation system as a whole, this measure would be expected to deliver a net benefit.

14.199 Under both models, the change gives low income earners a superannuation tax concession. Low income earners would otherwise receive little or no tax concessions from superannuation, therefore paying more tax on superannuation contributions than on their take-home pay.

14.200 This measure endeavours to improve equity by supporting low income earners in accumulating higher superannuation balances. About 20 per cent of fund members would receive this payment. Of the approximate 3.1 million low income earners that would receive the LISTO, around 1.9 million women are expected to receive this payment.

This would have cumulative benefits for women who typically have lower superannuation balances than men.

Diagram 14.4 Estimated distribution of individuals benefited by the LISTO



14.201 The post-Budget approach would be expected to result in a higher net benefit for superannuation providers and the ATO (and indirectly, to members) as a result of the lower compliance cost required to implement the approach.

4.2.2 Measures to increase flexibility in the superannuation system

14.202 These measures are consistent with the objective of the superannuation system. The measures would improve the flexibility of the superannuation system by adjusting the current systems to reflect modern work patterns to make it easier for individuals to boost their retirement savings and encourage retirement product innovation to provide greater choice to retirees to manage their risks.

Improving access to concessional contributions

Costs

14.203 This measure would, as outlined above, result in compliance costs for individuals in seeking to understand the changes. This measure would be expected to result in more taxpayers becoming eligible to claim a deduction for personal superannuation contributions, which would require more taxpayers seeking to re-evaluate their tax affairs and review their tax structures yearly. As such, individuals would be expected to have increased levels of paperwork and record keeping.

14.204 This measure would, as outlined above, have an impact on financial professionals.

14.205 Superannuation providers would not incur any material increase in compliance costs in respect to this measure. However, superannuation providers would withhold more tax from increased personal concessional contributions claims. As such, superannuation providers may require additional resources to cope with the increased number of notices from individuals choosing to claim a deduction for their personal contributions.

14.206 ASFA have indicated that superannuation providers would need to invest in changes to processes and procedures, disclosure material and training to reflect the proposed changes, provide more financial advice and deal with a greater manual workload due to a likely increase in the number of notices.

14.207 This measure would be expected to have a medium compliance burden with compliance costs estimated to be \$327.8 million over ten years. This is based on estimated implementation costs of \$44.1 million and ongoing compliance costs of \$28.4 million per annum. The measure is estimated to have a negative impact on the underlying cash balance of \$850 million over the forward estimates period.

Table 14.7 REGULATORY BURDEN TABLE (1)

<i>Potential compliance costs</i>	<i>Total (\$m)</i>	<i>Per client</i>
Implementation	\$44.1	\$52
Ongoing (p.a.)	\$28.4	\$33
Aggregate impact over 10 year duration	\$327.8	
Per year (10 years)	\$32.8	

Benefits

14.208 This measure is designed to improve the flexibility of the superannuation system.

14.209 Currently, an income tax deduction for personal superannuation contributions is only available to people who earn less than 10 per cent of their income from employment income. This means those who earn a small amount, but more than 10 per cent, of their income in salary and wages may be limited in their use of concessional contributions. It similarly means that some employees are prevented from fully utilising the concessional contributions cap simply because their employer does not allow them to make pre-tax contributions through salary sacrifice.

14.210 This measure would allow individuals, regardless of their employment circumstances, to make concessional superannuation contributions up to the concessional contributions cap. Individuals who are partially self-employed and partially wage and salary earners (for example contractors) and individuals whose employers do not offer salary sacrifice arrangements, would benefit from these changes, estimated to be around 800,000 individuals.

14.211 This measure may also be beneficial for financial professionals as outlined above.

Net benefit

14.212 When considering the costs and benefits, for both stakeholders and the superannuation system as a whole, this measure would be expected to deliver a net benefit.

14.213 Allowing access to tax deductions for all individuals would increase access to concessional contributions whether or not their employer offers salary sacrifice. This measure would allow approximately 800,000 individuals to make or increase their concessional contributions to superannuation. This measure would provide better access to superannuation for individuals who have multiple sources of income such as a business and part-time work.

Allowing catch-up concessional contributions

Costs

2016-17 Budget approach

14.214 Under this approach the measure would commence on 1 July 2017, with individuals being able to access their unused concessional contributions cap space amounts to make additional concessional contributions from the 2018-19 financial year onwards.

14.215 This measure would, as outlined above, result in compliance costs for individuals who would need to understand the proposed changes, for example individuals would need to decide if they want to utilise their unused concessional cap space in a particular financial year. Individuals would also need to maintain records and keep track of their concessional contributions, and their total superannuation balance, before this information is available on ATO online (which would be around the end of September each year).

14.216 This measure would, as outlined above, also have an impact on financial professionals.

14.217 Superannuation providers may incur increased compliance costs as a result of this measure; as individuals may be more likely to contact their fund to determine whether they are eligible to make additional concessional contributions in the current financial year. However, given this information would be made available on ATO online, these compliance costs are expected to be minor.

14.218 This approach would be expected to have a low compliance burden with compliance costs estimated to be \$23.4 million over ten years. This is based on estimated implementation costs of \$6.7 million and ongoing compliance costs of \$1.7 million per annum. The option is estimated to have a negative impact of the underlying cash balance \$350 million over the forward estimates period.

Table 14.8 REGULATORY BURDEN TABLE (2A)

<i>Potential compliance costs</i>	<i>Total (\$m)</i>	<i>Per client</i>
Implementation	\$6.7	\$69
Ongoing (p.a.)	\$1.7	\$17
Aggregate impact over 10 year duration	\$23.4	
Per year (10 years)	\$2.3	

Post-Budget approach

14.219 Under this approach the measure would commence on 1 July 2018, with individuals being able to access their unused concessional contributions cap space amounts to make additional concessional contributions from the 2019-20 financial year onwards.

14.220 The compliance costs associated with this approach would be consistent with the costs identified in the 2016-17 Budget approach (above). However, deferring the ability for individuals to make catch up contributions by a period of 12 months would result in a slight reduction in compliance costs over ten years, as the implementation costs would now be incurred from the 2018-19 financial year onwards.

14.221 Note: as a result of consultation, the assumptions underpinning Regulatory Burden Table 2A were revised prior to the costing on the post Budget approach. As such, while the compliance costs for the post Budget approach would be lower than the 2016-17 Budget approach the costs identified in Regulatory Burden Table (2B) can be seen to be higher.

14.222 This approach would be expected to have a low compliance burden with compliance costs estimated to be \$55.5 million over ten years. This is based on estimated implementation costs of \$15.9 million and ongoing compliance costs of \$4.0 million per annum. The option is

estimated to have a negative impact of the underlying cash balance \$100 million over the forward estimates period.

Table 14.9 REGULATORY BURDEN TABLE (2B)

<i>Potential compliance costs</i>	<i>Total (\$m)</i>	<i>Per client</i>
Implementation	\$15.9	\$69
Ongoing (p.a.)	\$4.0	\$17
Aggregate impact over 10 year duration	\$55.5	
Per year (10 years)	\$5.6	

Benefits

14.223 This measure is designed to improve the flexibility of the superannuation system. Annual concessional caps can limit the ability of people with interrupted work patterns to accumulate superannuation balances commensurate with those who do not take breaks from the workforce.

14.224 Allowing people to carry forward their unused concessional cap would provide them with the opportunity to ‘catch-up’ if they have the capacity and choose to do so.

14.225 Both approaches outlined above would ensure that only those people who have not had the capacity to contribute up to their concessional contributions cap in prior years would be able to make catch-up contributions, and targets those individuals who have been unable to accumulate large superannuation balances. People with higher incomes who have already contributed up to their concessional contributions cap each year, or those who have made substantial non-concessional contributions, would not be allowed to access any unused concessional cap space.

14.226 This measure may also be beneficial for financial professionals, as outlined above.

Net benefit

14.227 When considering the costs and benefits for both stakeholders and the superannuation system as a whole these measures would be expected to deliver a net benefit. Allowing individuals to make additional catch-up contributions, under either approach, would enhance the flexibility of the superannuation system and ensure that individuals who have broken work patterns, ‘lumpy’ income have the same ability to utilise concessional contributions caps as other individuals.

14.228 These measures would be expected to benefit around 230,000 individuals in 2019-20.

Extending the spouse tax offset

Costs

14.229 This measure would, as outlined above, result in compliance costs for individuals in seeking to understand the changes. There would also be some minor compliance costs for individuals seeking to benefit from the spouse tax offset as they would be required to complete item T1 on their individual tax return. However, changes are expected to be very minor as they draw on existing data and preparation processes. The method to calculating the tax offset for an income year has not changed.

14.230 Financial professionals would be unlikely to be affected by this measure.

14.231 Superannuation providers would not incur an increase in compliance costs in respect to this measure.

14.232 This measure would be expected to have a low compliance burden with compliance costs estimated to be \$677,200 over ten years. This is based on estimated implementation costs of \$433,600 and ongoing compliance costs of \$24,400 per annum. The measure is estimated to have a negative impact on the underlying cash balance of \$10 million over the forward estimates period.

Table 14.10 REGULATORY BURDEN TABLE (3)

<i>Potential compliance costs</i>	<i>Total (\$m)</i>	<i>Per client</i>
Implementation	\$0.4	\$15
Ongoing (p.a.)	\$0.0	\$1
Aggregate impact over 10 year duration	\$0.7	
Per year (10 years)	\$0.1	

Note: this measure only changes a regulatory threshold. As such, the associated compliance costs would be minor.

Benefits

14.233 This measure is designed to improve the flexibility of the superannuation system.

14.234 The superannuation system offers little flexibility for those who take time out of work, work part time, or have 'lumpy' income and therefore have periods in which they make no or limited contributions to

superannuation. This measure would improve the flexibility of the superannuation system by encouraging more people to make superannuation contributions to their low income spouse.

14.235 Broadening the eligibility for the spouse tax offset would assist more low income individuals accumulate their own superannuation savings. An extra 5,000 families would be expected to make use of this measure. These people could include individuals taking a temporary break from the workforce, or individuals who work small amounts on a casual or part-time basis that currently have an assessable income exceeding \$13,800 and less than \$40,000. The measure would be expected to mostly benefit the superannuation balances of women, who are disproportionately represented among low income earners. This means that it would assist with reducing the superannuation gender gap for those with a spouse.

Net benefit

14.236 When considering the costs and benefits, for both stakeholders and the superannuation system as a whole, this measure would be expected to deliver a net benefit.

14.237 Allowing more families to benefit from the spouse tax offset would impose a minor compliance cost on those families seeking to accumulate higher superannuation balances for the low income spouse. However, the increased flexibility provided to families with low income spouses that are trying to save for their retirement more than offset these costs.

14.238 This measure would assist more couples to support each other in accumulating higher superannuation balances and better target superannuation tax concessions to low income earners and people with interrupted work patterns.

14.239 This measure would be expected to benefit around 5,000 families, which would ensure that the ability to benefit from the spouse tax offset is available to more families with spouses with low incomes; thus improving the fairness of the superannuation system.

Harmonising contribution rules for older Australians

Costs

14.240 This measure would, as outlined above, result in compliance costs for individuals in seeking to understand the changes. A proportion of taxpayers may seek financial advice to better understand the implications of the changes. As such, given individuals would likely seek

advice on this measure, there would be expected to be an impact on financial professionals, as outlined above.

14.241 Superannuation providers would not incur any increase in compliance costs in respect to this measure.

14.242 This measure would be expected to have a low compliance burden with compliance costs estimated to be \$20,940 over ten years. This is based on estimated implementation costs of \$883,400 and a saving of ongoing compliance costs of \$67,400 per annum. This measure is estimated to have a negative impact on the underlying cash balance of \$130 million over the forward estimates period.

Table 14.11 REGULATORY BURDEN TABLE (4)

<i>Potential compliance costs</i>	<i>Total (\$m)</i>	<i>Per client</i>
Implementation	\$0.9	\$25
Ongoing (p.a.)	-\$0.1	-\$2
Aggregate impact over 10 year duration	\$0.2	
Per year (10 years)	\$0.0	

Note: this measure only changes a regulatory threshold. As such, the associated compliance costs would be minor.

Benefits

14.243 This measure is designed to improve the flexibility of the superannuation system.

14.244 This measure would provide flexibility and choice for those aged 65 to 74 by removing the need to be gainfully employed to make contributions, including for their spouse. In particular, this measure would assist individuals nearing retirement to increase the superannuation savings of themselves and their spouses. An estimated 40,000 individuals would be expected to benefit from this measure.

14.245 This measure which would remove existing regulatory burdens and compliance costs on funds and individuals would be relatively straightforward to implement, and as such, has system flexibility and simplicity benefits. There would also be an expected decrease in compliance costs for people currently restricted by the work test.

14.246 It would also benefit those people, later in life, that find themselves with additional available income as some costs diminish, such as paying a mortgage or family commitments. Finally, this measure would benefit people taking time out of the workforce (for example, to undertake caring responsibilities), who currently miss out on contributing

to their superannuation. In particular, it would provide an opportunity for women to top up their retirement savings up to and including age 74 without restriction. 40,000 individuals would be expected to benefit from this change.

14.247 This measure may also be beneficial for financial professionals, as outlined above.

Net benefit

14.248 When considering the costs and benefits, for both stakeholders and the superannuation system as a whole, this measure would be expected to deliver a net benefit.

14.249 Harmonising the age rules, by removing the requirement for those aged between 65 and 74 to be gainfully employed to make contributions, would impose minor compliance costs on those individuals between 65 and 74 seeking to make contributions. However, the increased flexibility provided to those individuals trying to save for their retirement, later in life, more than offset these costs.

14.250 This measure would also assist those individuals that have taken time out of the workforce (such as carers); as families that are able to utilise the spouse tax offset, can continue to increase the superannuation balance of the low income spouse for a longer period of time.

14.251 This measure would be expected to benefit 40,000 individuals, which would ensure that the benefit of the making superannuation contributions is fairer; as the impediments stopping those between 65 and 74 from making contributions would be removed.

14.252 Older individuals would have substantial flexibility to contribute to their superannuation savings in response to changing life events. For example an individual may wish to downsize their home and top up their superannuation savings with any excess funds, or make a contribution to a spouse who has left the workforce to undertake caring responsibilities.

Enhancing choice in retirement income products

Costs

14.253 This measure would result in some increased compliance costs for those individuals seeking to consider options for their retirement; as they would need to learn about the different products available as a result of this measure.

14.254 Superannuation providers and life insurance companies who wish to develop a new product would incur compliance costs as they

would need to learn how to meet the product requirements to enable them to qualify for the earnings tax exemption. They would need to seek confirmation from the ATO that the product qualifies as a 'superannuation income stream' and is eligible for the earnings tax exemption.

14.255 Compliance costs would also be incurred to ensure that record keeping systems and procedures cater for these new products.

14.256 This measure would be expected to have a medium compliance burden with compliance costs estimated to be \$23.0 million over ten years. This is based on estimated implementation costs of \$23.0 million and no change in ongoing costs. There is no underlying cash balance impact for this measure.

Table 14.12 REGULATORY BURDEN TABLE (4)

<i>Potential compliance costs</i>	<i>Total (\$m)</i>	<i>Per client</i>
Implementation	\$23.0	\$0.1
Ongoing (p.a.)	\$0.0	\$0.0
Aggregate impact over 10 year duration	\$23	
Per year (10 years)	\$2.3	

Benefits

14.257 This measure is designed to improve the flexibility of the superannuation system.

14.258 Many Australians receive income in retirement by drawing down regular amounts of superannuation from an account based pension. In doing so, they ensure that earnings on these savings are not subject to tax.

14.259 This measure would potentially open a new financial services market. Given the current value of the superannuation savings, opening up this market would be beneficial to all financial services participants.

14.260 Other, more tailored products could be made available to help individuals manage their income throughout their retirement years. These products do not currently receive the same tax treatment as account based pensions. This limits the ability of providers to competitively offer a wider range of products. This issue was highlighted in both the FSI and the Retirement Income Streams Review which recommended that barriers to the development of new products be removed.

14.261 Potentially all members of superannuation providers may be impacted by this measure. However, it is expected that members nearing or at retirement age are most likely to be impacted.

Net Benefit

14.262 When considering the costs and benefits, for both stakeholders and the superannuation system as a whole, this measure would be expected to deliver a net benefit.

14.263 Although this measure would have medium compliance costs, these costs would be outweighed by the net benefit this measure would deliver with new innovative products that deal with longevity risk for retirees. Extending the retirement phase tax exemption on earnings to a wider range of products would provide more choice and flexibility for retirees. It would also allow them to maintain a higher standard of living and give peace of mind to retirees that they have an income stream for life.

4.2.3 Measures to strengthen the integrity of the superannuation system

14.264 The following measures would improve integrity of the superannuation system and build on the sustainability measures by reducing the extent to which the superannuation system is used for tax minimisation and estate planning.

Improving the integrity of transition to retirement income streams

Costs

14.265 In complying with this measure individuals may incur costs in seeking information and advice to better understand the implications on their transition to retirement intentions. This would have an impact on financial professionals, as outlined above.

14.266 This measure would impact on individuals and businesses. Individuals, tax advisers (as outlined above) and superannuation providers would need to be familiar with the taxation changes to the treatment of TRIS.

14.267 At present, TRIS are treated by funds like other pension products that are exempt from tax on underlying earnings. Imposing a 15 per cent tax on earnings underpinning these products means they would have to be treated like accumulation products for tax purposes. This change would impose transitional compliance costs on superannuation providers that offer these products as they would have to move them to a different system that tracks tax events. In the longer term, these products may be less attractive to clients and less cost-effective for funds. It is estimated that 110,000 people would be affected by this measure.

14.268 ASFA have indicated that superannuation providers will be required to restructure TRIS arrangements with respect to their underlying assets. IT system changes will take a number of providers significant time to build a new tax engine. As such there is little likelihood of being able to meet the 1 July start date.

14.269 While it is recognised that system changes would be required, the extent of the changes would depend on the systems that superannuation providers currently have in place and the extent to which the new requirements could be incorporated into their current systems.

14.270 This measure would be expected to have a low compliance burden with compliance costs estimated to be \$21.3 million over ten years. This is based on estimated implementation costs of \$21.3 million and no ongoing compliance costs. The measure is estimated to have a positive impact on the underlying cash balance of \$470 million over the forward estimates period.

Table 14.13 REGULATORY BURDEN TABLE (1)

<i>Potential compliance costs</i>	<i>Total (\$m)</i>	<i>Per client</i>
Implementation	\$21.3	\$125
Ongoing (p.a.)	\$0	\$0
Aggregate impact over 10 year duration	\$21.3	
Per year (10 years)	\$2.1	

Benefits

14.271 This measure is designed to improve the integrity of the superannuation system.

14.272 This measure would reduce the tax concessional nature of TRIS ensuring they are fit for purpose and not primarily accessed for tax minimisation purposes. In doing so, it would improve the sustainability and integrity of the superannuation system.

14.273 TRIS were intended to help older workers transition to retirement by allowing them to access their superannuation to supplement a reduction in their salary from working fewer hours. In practice these arrangements are used almost exclusively to reduce tax payable without a reduction in working hours, and to take advantage of the tax free earnings in retirement phase.

14.274 Reducing the tax concessional nature of TRIS would ensure they are fit for purpose and not primarily accessed for tax minimisation purposes.

Net benefit

14.275 When considering the costs and benefits, for both stakeholders and the superannuation system as a whole, this measure would be expected to deliver a net benefit.

14.276 Whilst some individuals utilise TRIS for its intended objective, overwhelmingly the majority of individuals appear to utilise TRIS for tax minimisation purposes. This measure would improve the sustainability and integrity of the superannuation system by ensuring that TRIS are fit for purpose and help maintain confidence in the superannuation system.

14.277 The Productivity Commission also noted in a recent research paper that TRIS appear to be used much more often for tax planning purposes, than facilitating any change in work patterns in transitioning to retirement:

... the tax concessions embodied in transition to retirement pensions — designed to ease workers to part-time work prior to retirement — appear to be used almost exclusively by people working full-time and as a means to reduce tax liabilities among wealthier Australians.

... though intended to encourage a gradual shift from full-time work to full-time retirement, the transition to retirement arrangements can be used to reduce a worker's tax liability. In essence, wage income is salary sacrificed into a superannuation account to not only reduce the tax paid on that income, but also to allow the earnings on those contributions to be taxed in the concessional superannuation environment, even though the account can be accessed immediately.

14.278 In addition, a number of submissions to *Re:think* recommended reviewing TRIS and/or their tax treatment to ensure the policy objective behind TRIS is being met.

14.279 An estimated 110,000 individuals would be affected by this measure.

Abolition of the anti-detriment provision

Costs

14.280 This measure has no regulatory impact on individuals because the discretion of making the anti-detriment payment rests on the superannuation fund.

14.281 However, a consequence of this measure may be that the lump sum death benefit paid to some individuals is reduced. Additionally, some superannuation providers may not reduce the death benefit even though they would be unable to claim a deduction. In this case, the

impact of the forgone tax deduction would likely fall on the superannuation fund's investment returns.

14.282 Financial professionals would not incur any increase in compliance costs in respect to this measure.

14.283 Superannuation providers would not incur a minimal one off increase in compliance costs associated with moving from the current taxation treatment to the proposed treatment. On an ongoing basis, the measure would be expected to result in a decrease in compliance costs for superannuation providers as they would no longer need to keep records and undertake processes related to making anti-detriment payments.

14.284 This measure would be expected to have a low compliance burden with compliance savings estimated to be \$2.7 million over ten years. This is based on estimated implementation costs of \$281,000 and a saving in ongoing compliance costs of \$293,000 per annum. The measure is estimated to have a positive impact on the underlying cash balance of \$350 million over the forward estimates period.

Table 14.14 REGULATORY BURDEN TABLE (2)

<i>Potential compliance costs</i>	<i>Total (\$m)</i>	<i>Per client</i>
Implementation	\$0.3	\$391
Ongoing (p.a.)	-\$0.3	-\$409
Aggregate impact over 10 year duration	-\$2.7	
Per year (10 years)	-\$0.3	

Note: this measure only removes a regulatory provision that can be used at the discretion of superannuation funds. As such, the associated compliance costs would be minor.

Benefits

14.285 This measure is designed to improve the integrity of the superannuation system.

14.286 Removing the anti-detriment provision better aligns the treatment of death benefits across all superannuation providers and the tax treatment of other bequests outside of superannuation for which no tax deduction is given for prior tax paid.

14.287 Furthermore, this provision is inequitable so removing it would enhance the fairness of the superannuation system. Not all individuals receive this benefit as it is inconsistently applied and not all superannuation providers offer this arrangement to their members. Whether a Superannuation provider provides an anti-detriment payment

depends on their governing rules. There is no legal requirement for the superannuation provider to make the payment and claim the associated tax deduction.

Net benefit

14.288 When considering the costs and benefits, for both stakeholders and the superannuation system as a whole, this measure would be expected to deliver a net benefit.

14.289 It would improve the integrity of superannuation by better aligning the treatment of bequests from superannuation providers with the tax treatment of other bequests and gifts for which no rebate is given for prior tax paid. It ensures that all superannuation members' dependants are treated equally when receiving death benefits.

14.290 There is no estimate on the number of individuals that would be affected by this measure since the anti-detriment payment is not offered by all superannuation funds. However, it is estimated that 150 APRA funds and 568 SMSFs will be impacted.

14.291 A number of submissions to *Re:think* also supported the abolition of the anti-detriment provision noting its removal reduces complexity in the superannuation system and improves fairness.

Streamlining Administration

Costs

14.292 Individuals and financial professionals would not incur any increase in compliance costs in respect to this measure. Most individuals would see a decrease in compliance costs as a result of this measure, and following initial compliance costs these measures would result in a decrease in compliance costs for superannuation providers.

14.293 This measure would require superannuation providers to learn about the changes to release authority processes, including the new electronic processes. Superannuation providers may need to design and implement new systems to implement the required changes. However, superannuation providers (including providers offering defined benefit interests) would see a decrease in compliance costs on an ongoing basis.

14.294 This measure would be expected to result in a reduction in compliance costs estimated to be reduced by \$58.7 million over ten years. This is based on estimated implementation costs of \$22.8 million and reduction in ongoing compliance costs of \$8.2 million per annum. There is no underlying cash balance impact for this measure.

Table 14.15 REGULATORY BURDEN TABLE (3)

<i>Potential compliance costs</i>	<i>Total (\$m)</i>	<i>Per client</i>
Implementation	\$22.8	\$54
Ongoing (p.a.)	-\$8.2	-\$19
Aggregate impact over 10 year duration	-\$58.7	
Per year (10 years)	-\$5.9	

Benefits

14.295 This measure is designed to improve the integrity of the superannuation system.

14.296 Streamlining the ATO's administration processes would improve the client experience, reduce confusion, churn, and complexity for individuals and superannuation funds; thus improving the overall integrity of the superannuation system. The aligning of objection rights would also provide procedural fairness for individuals.

14.297 In particular:

- Clarifying that the ATO can issue a single document that serves as a notice of assessment, determinations, statements or other documents, would reduce confusion for individuals who may have previously received multiple notices over the same period. This change would also enable individuals to seek advice on all of their tax affairs at one time.
- Replacing the existing release authority requirements with common timelines and processes would reduce complexity and confusion for both individuals and superannuation funds.
- Changes to the process of release authorities would also provide individuals that do not make a choice about releasing excess contributions (or excess contributions and Division 293 tax) from superannuation with a default outcome that would place most individuals in a more beneficial position.
- Providing individuals with an objection right to any decision relating to the Commissioner exercising a discretionary power in respect of non-concessional contributions would ensure procedural fairness and provide consistent treatment for objection rights across all superannuation products.
- Ensuring that superannuation providers are only required to calculate an end benefit cap for individuals for which end benefits become payable if an individual has a deferred

liability for the purposes of Division 293 tax would remove an unnecessary regulatory burden on impacted superannuation funds.

14.298 It is expected that the changes made under this measure would affect 360,000 notices provided to individuals, with 100,000 release authorities being impacted by the electronic channel. It is also expected that a significant proportion of APRA funds and SMSFs would also be impacted.

Net benefit

14.299 When considering the costs and benefits for both stakeholders and the superannuation system as a whole this measure would be expected to deliver a net benefit.

14.300 Streamlining the ATO's administration processes would improve the client experience by reducing the number of notices an individual receives in a financial year, and by standardising the requirements for releasing excess contributions (and excess contributions and Division 293 tax) from the superannuation system. This would reduce confusion, churn and complexity for both individuals and superannuation funds, and in doing so would improve the overall integrity of the superannuation system.

14.301 This measure would also ensure procedural fairness across all superannuation products and would remove unnecessary obligations from defined benefit funds by reducing the number of end benefit cap calculations a fund is required to complete.

4.3 Option 3 — All of the measures announced in the 2016-17 Budget superannuation reform package

14.302 The comprehensive package option incorporates all the proposals identified by measures 3.2.1 to 3.2.4, measures 3.3.1 to 3.3.5 and measures 3.4.1 to 3.4.3.

14.303 The comprehensive package would directly affect superannuation funds, some ancillary service providers (such as tax agents and financial planners), individuals and government.

Costs

14.304 Costs (including compliance costs) and revenue impacts for the comprehensive package would broadly reflect the costs and impacts of each measure, outlined above. However, when considering the fiscal impacts the comprehensive package may result in a reduction in the

ability for the Government to pursue its strategy of returning the Budget to surplus by maintaining strong fiscal discipline, strengthening the Government's balance sheet and redirecting government spending to boost productivity and workforce participation.

Benefits

14.305 The benefit of implementing all of the measures outlined above would apply to the comprehensive package. In addition, there would be 'synergistic' benefits from a comprehensive package. Announcing the proposals as a comprehensive package is also more likely to address concerns that superannuation reform in Australia was developing on an ad hoc basis.

14.306 A comprehensive package should also reduce search costs for businesses and stakeholders as information about all the proposals could be promoted and made accessible through a single informational channel.

Net Benefits

14.307 A comprehensive package would deliver net benefits by addressing the issues of sustainability, flexibility and integrity in a holistic manner. Due to the complementary nature of a number of measures, the effectiveness of a package would be expected to be greater than if particular measures were implemented in isolation. Overall, only 4 per cent of Australia's 16 million superannuants, or around 700,000 people, would be adversely affected by this package.

14.308 The sustainability of the superannuation system is strengthened by realigning aspects of the superannuation framework where tax concessions are poorly targeted. This ensures those high wealth individuals with large balances that would not rely on the age pension; do not continue to disproportionately benefit from these concessions.

14.309 The various measures to improve flexibility would ensure Australian's such as part time workers, carers, older Australians and people with disrupted work patterns or variable incomes have a number of opportunities available to accumulate higher superannuation balances, than would ordinarily be the case if measures were implemented in isolation.

14.310 However, the comprehensive package may not provide the best opportunity for the Government to continue to pursue its strategy of returning the budget to surplus by maintaining strong fiscal discipline, strengthening the Government's balance sheet and redirecting government spending to boost productivity and workforce participation.

5. Consultation

Tax Discussion Paper: *Re:think*

14.311 The Government released *Re:think* in March 2015 which covered reform on the taxation system. Superannuation was considered as part of this process.

14.312 The development process for *Re:think* included extensive consultation with stakeholders on reform to the taxation system involving a number of key stakeholder engagements through face to face meetings, as well as an open submission process. In total, 882 formal submissions were received. The then Treasurer and the Treasury attended more than 130 meetings throughout Australia.

14.313 Of the 882 formal submissions received, around 310 identified superannuation as an area for reform. Many submissions indicated that current caps and contribution rules could be relaxed to allow more people, particularly women with broken work patterns, better access to concessional contributions.

14.314 Several submissions advocated lifetime concessional contributions caps, while others support applying caps on a carry forward basis, rather than an annual ‘use it or lose it’ basis.

14.315 Numerous submissions propose systemic changes to improve the integrity of the superannuation system (by defining the purpose of superannuation and adequacy of retirement income or reforming the taxation of contributions).

14.316 Some submissions have supported reducing the non-concessional contributions caps but have advocated that this be done on a lifetime rather than annual basis. Suggested lifetime caps for non-concessional contributions ranged from \$500,000 to \$1,000,000.

14.317 However, there were also some, albeit a minority, of submissions that argued that there should be no changes to the superannuation tax concessions.

14.318 Participants from stakeholder consultations roundtables had mixed views on superannuation. Some participants advised against changes to superannuation concessions, but other participants argued that concessions for very high income earners are excessively generous and suggested the reduction of concessions for people with high superannuation balances.

Consultation on the objective of superannuation

14.319 On 9 March 2016, the Government released a discussion paper entitled *The Objective of Superannuation* for consultation on the objective of superannuation as recommended by the FSI.

14.320 Consultation was conducted over four weeks between 9 March 2016 and 6 April 2016. Over 90 written submissions were received. Additionally, a roundtable of 14 stakeholders was held on 18 March 2016 in Canberra and individual consultations were held with stakeholders in Sydney on 31 March 2016 and Melbourne on 5 April 2016.

14.321 Many submissions supported the FSI wording. Although many stakeholders proposed different wording, there was not broad support for any other form of words.

14.322 There was a general consensus that the objective of superannuation is to provide for retirement income, rather than wealth accumulation. There was also broad agreement that the primary objective should be concise and supported by subsidiary objectives.

Consultation following announcement of the measures

14.323 These measures were announced as a package in the 2016-17 Budget. As a result of this public announcement, representations were made to Treasury from the general public and interested stakeholders regarding the package.

14.324 Treasury also engaged in targeted consultation with stakeholders following the Budget announcement to get feedback on the implementation of the measures and ensure there were no unintended tax consequences. These included roundtables and bilateral discussions with Government regulators, industry associations, superannuation funds, financial services organisations and specific superannuation sector experts, such as in the SMSF sector.

14.325 Treasury also publicly released and consulted on exposure draft legislation and explanatory material following the Budget announcement, divided into three tranches in September and November 2016. Over 150 submissions were received, from across industry, academics, experts and individuals.

General views

14.326 Stakeholders indicated their broad support for the measures announced in the 2016-17 Budget. However, stakeholders noted the

package of reforms represented a significant change to the way that some individuals view the superannuation system. In particular, stakeholders raised concerns regarding the impact the reforms would have on existing retirement planning positions.

Transfer balance cap

Initial views

14.327 While there was some support for the measure, a number of stakeholders indicated that the measure would result in technical drafting that may be significantly complex. For example, in support of the measure, AIST said that ‘this cap will make the super system more sustainable, while also funding other important measures like the LISTO.’

14.328 Concerns were also raised regarding the proposed 1 July 2017 start date, administration of measures, as the changes may result in increased reporting obligations, especially for SMSFs that tend to do manual changes. Mercer expressed concern ‘at the proposed 1 July 2017 start date’ for ‘the \$1.6 million pension transfer cap.’ The Self Managed Super Fund Association (SMSFA) said this ‘is a complex measure and refining the concessions for retirement phase could be done more efficiently.’

Views on exposure draft legislation

14.329 Submissions on the exposure draft legislation also tended to focus on the administration of the transfer balance cap, for example Mercer said that it considers ‘it essential the ATO advise members of amounts such as an individual’s transfer balance cap, personal transfer balance cap and unused cap space.’ The Tax Institute argued for extra flexibility: ‘the Institute would submit that the Commissioner be given a broad discretion to remit excess transfer balance tax or disregard a certain period when determining the notional earnings where the delay in issuing a determination is beyond the control of the member.’ Industry Super Australia reiterated its support for the policy as key to better targeting superannuation tax concessions, but highlighted the complexity of the legislation: ‘[t]he complexity of the detailed operation of these provisions is unlikely to be understood by most members, although few will accumulate balances high enough to be affected.’

14.330 Several stakeholders proposed changes to the operation of capital gains tax relief, which is part of the transitional arrangements for both the transfer balance cap and the changes to transition to retirement income streams arrangements. The final legislation removed the requirement for funds to potentially have to track two cost bases for assets

over the time in response to stakeholder concerns about the compliance burden of such an approach.

Reforming the taxation of non-concessional contributions

Initial views

14.331 While there was some support for the measure, some stakeholders believed that the cap of \$500,000 was not high enough. For example, the AIST said that they were ‘disappointed that the cap has been set this low.’ The SMSFA said ‘the \$500,000 balance limit...restricts people building truly adequate retirement incomes.’ In addition, stakeholders raised practical issues with the application of the lifetime non-concessional cap. In particular, the introduction of the lifetime cap would not take into consideration investment strategies that were already in place.

14.332 The SMSF Owners’ Alliance raised concerns about the start date of the cap stating that: ‘SMSFs [self-managed superannuation funds] in the process of buying an asset, e.g. a property, and had entered a legal contract prior to the 3 May budget, expecting to use non-concessional contributions to complete the purchase, would have been caught by the new back-dated contributions cap.’

Post Budget approach

14.333 In light of initial views of stakeholders the Government sought to consider a different approach to reform the taxation of non-concessional contributions. The alternate approach was to revert back to current approach with a reduced threshold and a \$1.6 million eligibility condition.

14.334 The FSC welcomed the announcement of the alternative approach ‘The removal of the \$500,000 cap gives Australians who can afford to save more, increased flexibility to do so and avoids administration that would have increased costs for superannuation savers.’

14.335 SCOA also stated its support for the move to an alternative approach ‘SCOA welcomes the Coalition’s decision to scrap the \$500,000 lifetime cap on non-concessional superannuation contributions and replace it with an annual limit of \$100,000 for people with superannuation assets of less than \$1.6 million.’

Views on exposure draft legislation (reflecting the Post Budget approach)

14.336 Stakeholders generally supported this measure and its change in approach since the 2016-17 Budget. In their submission on the superannuation reform package’s third tranche of legislation, the AIST

said that “this measure and its implementation is much simpler than the initial Budget proposal for a \$500,000 lifetime non-concessional; contributions cap.”

14.337 Some stakeholders continued to raise concerns with the proposed changes. “We also continued to be concerned by the additional complexity which these reforms shall create in the superannuation system, particularly the operation of the ‘bring forward’ rule for non-concessional contributions and its tapered application in the context of the new \$1.6 million transfer balance cap eligibility requirement.”

Reforming the taxation of concessional contributions

Initial views

14.338 While there was broad support of this measure, some stakeholders indicated that lowering the cap would limit the ability for individuals to top up their superannuation balances in a timely manner. With the reduction of concessional caps to \$25,000, the AIST raised concerns ‘about the impact on people over 50 who are planning for their retirement.’ (AIST, Media release, 3 May 2016). The SMSFA said that the ‘decision to reduce the concessional contribution cap down to \$25,000 is a backward step that will severely reduce the ability of people to save adequately for retirement.’

14.339 Some stakeholders indicated that the current caps should continue to apply and that higher caps should apply for individuals above 60 years of age.

14.340 Concerns were also raised in respect to the administrative improvements to the administration of the Division 293 tax. Stakeholders were particularly concerned with the impact of the changes, as the process can be manually intensive and the volume of assessments is anticipated to increase under the measure.

Views on exposure draft legislation

14.341 Following the release of the legislation stakeholders tended to not raise concerns with the draft legislation itself but the policy. Some continued to raise concerns about the application of the cap to older Australians, for example BT Financial argued that the ‘system is not yet fully mature, and many older Australians have not had the benefit of receiving SG contributions over their entire working life.’

14.342 In relation to the lowering of the Division 293 threshold most were supportive, however Chartered Accountants Australia New Zealand said: ‘it unfairly penalises higher income earners who are often ineligible

for the aged pension and also pay the majority of income taxes whilst working.’ Some, such as Industry Super Australia, argued the threshold should be indexed saying that ‘The threshold should be indexed to wages or set as a multiple of ten times the concessional contribution cap as indexed from time to time.’

LISTO

Initial views

14.343 Although there was some support for this measure, stakeholders raised concerns regarding the potential compliance costs of building systems changes to accommodate the measure. In support of the measure, the SMSFA were ‘pleased that the Government is going to maintain a more equitable treatment for low income earners by introducing the Low Income Superannuation Tax Offset to replace the Low Income Superannuation Contribution.’ Similarly, the ASFA ‘welcomes the introduction of the Low Income Superannuation Tax Offset (LISTO). This will provide a benefit of up to \$500 a year for over 3 million people, of whom around two-thirds are women.’

14.344 Some stakeholders expressed strong support for continuing the LISC as opposed to changing the payment to the LISTO as the LISC could be supported by existing provisions.

14.345 Post Budget approach — in light of initial views of stakeholders the Government sought to consider a different approach to implement the LISTO. The alternative approach was to adopt a direct payment approach to the administering the LISTO.

Views on exposure draft legislation (reflecting the post budget approach)

14.346 Stakeholders were supportive of the draft legislation which avoids administrative burden concerns with the initial approach. ASFA stated it ‘commended the government for listening to feedback about arrangements for the Low Income Super Tax Offset (LISTO) and simplifying administrative arrangements.’

14.347 Many argued that it improved the fairness of the superannuation system. David Whitely from Industry Super Australia stated that the LISTO ‘is critical to restoring the fairness and integrity of superannuation tax concessions. It starts the process of closing the superannuation gender gap, and making the super tax system more contemporary and in keeping with modern society.’

14.348 Mercer, in its submission of 16 September 2016, said that ‘we strongly support the Low Income Superannuation Tax Offset measure

making full use of the administration and payment processes established and in operation for the Low Income Superannuation Contribution. This will largely remove the implementation burden that would otherwise have been associated with the introduction of this measure.’

14.349 While the majority of stakeholders support the LISTO and its operation as detailed in the draft legislation, some submissions raised concern that the LISTO is not keeping pace with the scheduled increase in the superannuation guarantee rate. In its 16 September 2016 submission, ISA suggested ‘that...the maximum amount of LISTO increase in line with the increase in superannuation guarantee to 12 per cent (\$670) for those eligible.’

14.350 The LISTO was opposed by Chartered Accountants Australia New Zealand who opposed the measure on cost grounds, arguing that the ‘cost for the Low Income Super Tax Offset is being funded by mostly higher income earners.’

Improving access to concessional contributions

Initial views

14.351 Stakeholders generally supported this measure. For example, the SMSFA said ‘the Government does deserve plaudits for its decisions to remove the 10% rule for personal deductible contributions.’

14.352 However, some stakeholders were concerned about the way that the measure would be administered and timing gaps between the making of the concessional contribution and the claiming of the associated deduction.

Views on exposure draft legislation

14.353 ‘While the personal deductions measure seeks to achieve neutrality between members with different income sources, subject to behavioural responses the measure could be very costly over the long term and may not increase retirement savings unless individuals increase their personal contributions by 15 per cent to offset the additional fund level tax that will apply under this measure.’

14.354 Stakeholders generally supported the flexibility of this measure, although a few expressed concerns about the new restriction preventing deductibility of personal contributions made to certain defined benefit schemes.

Allowing catch-up concessional contributions

Initial views

14.355 This measure was broadly supported by stakeholders. However, concerns were raised regarding the ability for individuals to fully understand how the cap carry forward would work and about the impact on specific groups. For example, the AIST said that this measure ‘will have little impact on low income earning women who will have limited capacity to fund catch up payments.’

14.356 ‘It’s disappointing that they’re pursuing the ‘catch-up’ measure. Again, this undermines savings delivered by the lowering of the cap and largely benefits people on high incomes.’

14.357 Post Budget approach — in consideration of the broader fiscal context the Government sought to consider a different approach to the implementation of the measure to allow catch-up concessional contributions. The alternate approach was to delay the commencement of the measure for a period of 12 months. This alternate approach was announced by the Government on 15 September 2016.

Views on draft legislation

14.358 Stakeholders remained supportive of the broader policy but raised concerns around the mechanism for calculating the cap space. For example, BT Financial recommended that ‘an approach mechanism be explored that will enable the ATO to calculate an individual’s total super balance at 30 June each year without funds having to report all rollovers to the ATO, which will significantly increase the compliance costs for the industry.’ Self-managed Independent Superannuation Funds Association (SISFA) also stated that it believes that the ‘definition of “total superannuation balance” is overly complex.’

Extending the spouse tax offset

Initial views

14.359 Stakeholders broadly supported this measure. For example, Industry Super Australia (ISA) ‘supports extending eligibility for the tax offset for contributions to a low income spouse’s super.’

Views on exposure draft legislation

14.360 Most stakeholders recognised the policy merits of this measure, although some expressed concern that individuals will not be eligible for an offset if the receiving spouse has breached their non-concessional contributions cap. For example, in its 16 September 2016 submission on the reform package, AIST ‘supports this measure’ and noted ‘that the arrangements in the Bill to raise the maximum spouse income eligibility for this measure are consistent with the announcement in the 2016 Budget.’

Harmonising contribution rules for older Australians

Initial views

14.361 Stakeholders broadly supported this measure. The SMSF Owners Alliance (SMSFOA) said that ‘the good news is older Australians will not have to pass a work test to make super contributions.’

14.362 However, to fund the cost of changes to the non-concessional cap, the Government announced on 15 September 2016 that this measure would not proceed.

Enhancing choice in retirement income products

Initial views

14.363 Stakeholders broadly supported this measure. For example, the AIST said that ‘the extension of the earnings tax exemption on retirement products is a good start but there are other flexibility measures that are still needed.’

Views on draft legislation

14.364 Whilst most stakeholders were supportive of this measure, the Tax Institute pointed out the measure ‘excluding SMSFs [self-managed superannuation funds] from DSIS [deferred superannuation income streams] may significantly reduce the attractiveness of SMSFs’ as the products cannot be issued by SMSFs.

TRIS

Initial views

14.365 Some stakeholders supported this measure. For example, the AIST said that they ‘support measures to ensure that Transition to Retirement arrangements are used by those who are genuinely transitioning to retirement as opposed to looking for a tax break.’

However, concerns were raised regarding the compliance costs of required system changes. There was support for keeping the current arrangements as those that benefit are mostly middle income earners.

14.366 Concerns were also raised about the impact the changes would have on individuals who had their retirement planning ‘locked in’. For example, the ‘TTR strategy that helped thousands of middle to low income earners has effectively been killed off by the Government, meaning almost all financial planners and clients will need to carefully review the circumstances of those approaching retirement.’

Views on draft legislation

14.367 Most stakeholders who made substantive comments on this measure in the legislation stated that the start date of 1 July 2017 was not possible, due to administrative complexities. Several stakeholders proposed alternative mechanisms to try and avoid manipulation of the rules by people who are able to simultaneously contribute concessional while also not paying earnings tax in their pension account.

Abolition of the anti-detriment provision

Initial views

14.368 Some stakeholders supported this measure as the anti-detriment provision is largely outdated and poorly targeted. For example, KPMG have said that ‘broadly, the anti-detriment deduction...is grounded in certain historical circumstances and for the most part, the logic behind the anti-detriment deduction has ceased to be relevant. The deduction is not properly targeted. It is biased in favour of lump sum death benefits as it is not available for pensions, and it links poorly with terminal illness benefits. For all of these reasons, and as a simplicity measure, it should be abolished.’

Views on draft legislation

14.369 There were limited substantive comments on this measure following the release of the exposure draft legislation. Most were supportive of the measure. Mercer argued that the transitional arrangements ‘produce inequities and higher tax for funds where a member has died before 1 July 2017 but their beneficiaries have not received a benefit until after 1 July 2019.’

Streamlining Administration

Initial views

14.370 No significant comments were raised during consultation.

Views on exposure draft legislation

14.371 Most stakeholders supported the proposed changes to release authorities and the standardised period that payment must be provided to the Commissioner after issue of the release authority.

6. Recommended option

14.372 The recommended option is to implement a suite of measures that provides the greatest net benefit by taking into consideration broader fiscal considerations (Option 2). The recommended suite of measures includes all of the measures outlined in this RIS with the exception of the ‘Harmonising contribution rules for older Australians’ measure.

14.373 In addition, approaches for the ‘Reforming non-concessional cap contributions’, ‘Introducing the Low Income Superannuation Tax Offset’ (Sustainability (2) and (4)) and ‘Allowing catch-up contributions’ (Flexibility (2)) measures have been finalised and included in the recommended option.

14.374 As outlined above (cost benefit/impact analysis section), there are net benefits in proceeding with each of the measures contained in this RIS. These net benefit assessments take into consideration costs (including compliance costs), benefits, and the fiscal impact of each measure individually to determine if they address one or more of the issues identified in the problem section. The net benefit assessments include both the overarching costs and benefits and the costs and benefits of each specific measure.

Sustainability measures

14.375 It is recognised that high wealth individuals would incur additional costs associated with the inability to continue to benefit from the tax concessions that they are currently accessing and that all individuals would need to familiarise themselves with the changes. However, better targeting tax concessions to meet the new objective of superannuation will improve the overall sustainability of the superannuation system. We note that targeting tax concessions to a greater extent than proposed, could unduly and unintentionally constrain the aspirations of individuals to save for their retirement.

14.376 Like individuals, financial professionals such as tax agents and financial advisors would also need to familiarise themselves with the changes. However, as some individuals may seek to use their expertise, financial professionals may experience an increase in the number of individuals seeking their services particularly in the transition to the new arrangements.

14.377 Superannuation providers would, in addition to familiarising themselves with the changes, need to undertake system upgrades and may see the movement of investments (that would have normally flowed to superannuation) flowing to other investment vehicles (potentially benefiting the other financial market participants). However, a more sustainable superannuation system that reflects the objective of the superannuation system would benefit all stakeholders, including superannuation providers.

14.378 It is considered that while costs would be incurred (primarily relating to implementation — learning about the changes and IT system upgrades) the benefits provided through a more sustainable system through the better targeting of tax concessions outweigh these costs.

Flexibility measures

14.379 These measures are designed to improve the flexibility of the superannuation system to enable more individuals to save for their retirement. In particular, these measures will benefit individuals with lower incomes, interrupted work patterns and/or lumpy incomes. Providing individuals, especially for those individuals with low incomes or with broken work patterns, with more ways to save for their retirement would enable them to be more likely to have higher retirement incomes.

14.380 While individuals will benefit from these measures, they will also incur costs in familiarising themselves with the changes and considering their current superannuation tax affairs.

14.381 Like individuals, financial professionals such as tax agents and financial advisors would also need to familiarise themselves with the changes. However, as individuals would need to consider their current superannuation tax affairs, financial professionals may experience an increase in the number of individuals seeking their services particularly in the transition to the new arrangements.

14.382 There would be no major cost implications for superannuation providers as a result of these measures. However, superannuation providers would need to familiarise themselves with the changes. Superannuation providers may also experience an increase in member engagement when their members would be seeking information in order for them to benefit from the changes.

14.383 It is considered that while costs would be incurred (primarily relating to implementation — learning about the changes) the benefits of increasing the ability for individuals to save for their retirement outweigh these costs.

Integrity measures

14.384 These measures do not impose any major costs on individuals. However, individuals would need to familiarise themselves with the changes.

14.385 Similar to the sustainability and flexibility measures, financial professionals would also need to familiarise themselves with the changes. However, given the nature of the integrity measures (with the exception of TRIS) financial professionals would be unlikely to see any increase in individuals seeking their service.

14.386 Superannuation providers would need to familiarise themselves with the changes and may also need to undertake system upgrades to implement the changes.

14.387 These measures will ensure that superannuation is not primarily used for tax minimisation purposes, increase alignment and streamline processes across the superannuation system to improve its overall integrity.

14.388 It is considered that while there is an increase in compliance costs (primarily relating to implementation — learning about and implementing the changes) the benefits associated with a stronger superannuation system outweigh these costs.

Broader considerations

14.389 Given all of the measures provide a net benefit individually and when grouped together to address specific issues, the recommended option has taken the broader fiscal context into consideration.

14.390 The broader fiscal context was also considered when establishing the approaches for the ‘Reforming non-concessional cap contributions’, ‘Introducing the Low Income Superannuation Tax Offset’ (Sustainability (2) and (4)) and ‘Allowing catch-up contributions’ (Flexibility (2)) measures.

14.391 These approaches are the:

- introduction of a \$100,000 annual non-concessional cap with a three year bring forward, with eligibility restricted to the \$1.6 million threshold– this approach provides greater distribution of government concessions without unduly constraining the aspirations of most individuals to save for their retirement
- continuation of the current administration processes for providing a boost to the superannuation savings for low income earners while ensuring it is clear that the objective of the measure is to provide an offset to the tax paid on the superannuation of low income earners (LISTO)– this approach would reduce compliance costs, without having an impact on expected benefits; and
- 12 month deferral of the ability for individuals to make catch-up contributions — this approach would have a minimal reduction to compliance costs, without having an impact on the expected benefits over the medium to long-term.

14.392 It is recognised that the package of measures needed to take into consideration the Government’s continuing strategy of returning the budget to surplus by maintaining strong fiscal discipline, strengthening the Government’s balance sheet and redirecting government spending to boost productivity and workforce participation.

14.393 When considering the final composition of the suite of measures, the fiscal implications of the above approaches on the 2016-17 Budget fiscal strategy were taken into account. Given the fiscal impact of the recommended approach for reforming the taxation of non-concessional contributions (annual non-concessional contributions cap) and the requirement for new spending measures offset by reductions

in spending elsewhere within the budget, one of the measures that incurred a fiscal cost was required to be removed from the package.

Consideration of the implications of the flexibility measures within the broader package and why the harmonisation measure was ultimately removed from the package

14.394 Allowing catch-up contributions: this measure offsets the impact of the reduction in the concessional contributions cap sustainability measure by allowing people who are eligible to bring forward their unused concessional cap space amounts for up to five years. Allowing catch-up contributions ensures that those individuals that are unable to take advantage of their concessional caps each year (those on 'lumpy' or lower incomes) can benefit from making concessional contributions when they are in a financial position to do so.

14.395 Improving access to concessional contributions: this measure also offsets the reduction in the concessional contributions cap sustainability measure and compliments the allowing catch up contributions measure. Enabling individuals to claim a tax deduction for personal contributions, irrespective of their employment status, further helps those with lumpy incomes.

14.396 When looking at the complementary and offsetting nature of the concessional contribution measures with the lowering of the concessional cap measure, the inclusion of the catch-up contributions and access to concessional contributions measures in the broader suite of measures was considered to provide a higher net benefit.

14.397 Extension of the spouse tax offset: this measure improves the ability for families with a low income spouse to save for their retirement. 5,000 families may benefit from this measure at a negative impact on the underlying cash balance of \$10 million over the forward estimates.

14.398 Harmonisation of the age rules: this measure improves the ability for older individuals to add to their superannuation prior to or during their retirement. 40,000 individuals between 65 and 74 may benefit from this measure at a negative impact on the underlying cash balance of \$130 million over the forward estimates.

14.399 When looking at the spouse tax offset and harmonisation of age rules measures, it was recognised that both measures would increase flexibility and provide a net benefit. However, when considering the Government's broader fiscal strategy, the benefits associated with the harmonisation of the age rules measure were not considered to offset the associated revenue impact, when looking at the broader suite of measures.

As such, the harmonisation measure was removed from the recommended option.

14.400 The compliance costs and fiscal impact across the forward estimates period for the recommended option are outlined below.

Table 14.16 Regulatory Costs (recommended option)

Measure	Sustainability Measures					Flexibility Measures				Integrity Measures			Total
	1	2	3(a)	3(b)	4	1	2	3	5	1	2	3	
Implementation Costs	317.5	6.4	31.6	21.5	8.4	44.1	15.9	0.4	23	21.3	0.3	22.8	513.2
Ongoing Costs	16.4	1.6	1.4	2	0	28.4	4	0	0	0	-0.3	-8.2	45.3
Aggregate over 10 years	317.5	21.9	45.8	41.6	8.4	327.8	55.5	0.7	23	21.3	-2.7	-58.7	802.1
Cost per year	31.8	2.2	4.6	4.2	0.8	32.8	5.6	0.1	2.3	2.1	-0.3	-5.9	80.3

Where the measures are:

Sustainability Measures

- 1 — Better targeting superannuation concessions
- 2 — Reforming the taxation of non-concessional contributions
- 3(a) — Lower annual concessional contributions cap
- 3(b) — Adjusting Division 293 threshold
- 4 — Introduction of LISTO

Flexibility Measures

- 1 — Improving access to concessional contributions
- 2 — Allowing catch-up concessional contributions
- 3 — Extending the spouse tax offset
- 5 — Enhancing choice in retirement income products

Integrity Measures

- 1 — Improving the integrity of transition to retirement income streams
- 2 — Abolition of the anti-detriment provisions
- 3 — Streamlining administration

Table 14.17 Impact on underlying cash balance (recommended option)

Measure	Sustainability Measures				Flexibility Measures				Integrity Measures			Total
	1	2	3(a)	3(b)	4	1	2	3	5	1	2	
Underlying Cash Balance	1,846	200	2,343	-1,455	-850	-100	-10	0	470	350	0	2,794

14.401 Using the regulatory burden measurement framework, it has been estimated that the measure would increase compliance costs by \$80.3 million. This would be offset from elsewhere within the portfolio. For all reporting periods, Treasury has reported net compliance cost reductions and there is no reason why Treasury will not continue to deliver on its red tape reduction targets this year, in line with the Government’s regulatory reform agenda.

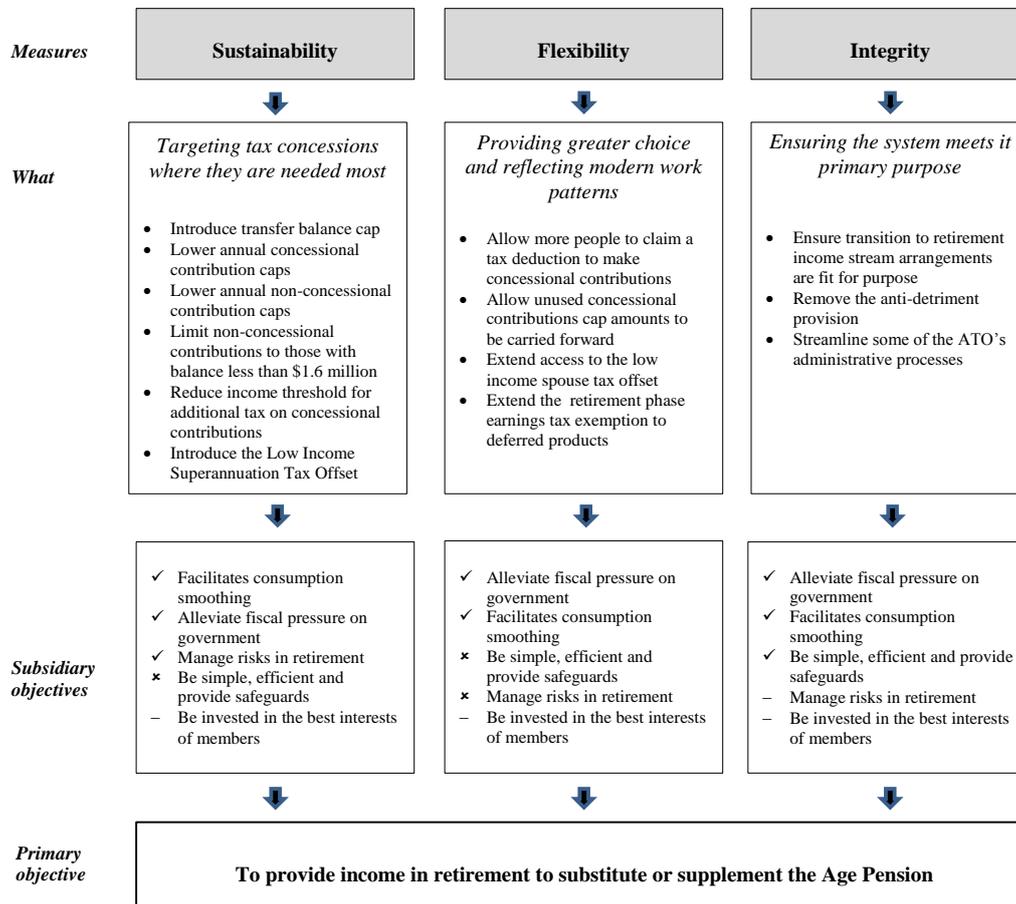
Table 14.18 Regulatory burden estimate (RBE) table

<i>Average annual regulatory costs (from business as usual)</i>				
Change in costs (\$ million)	Community organisations	Business	Individuals	Total change in cost
Total, by sector	\$80.3			\$80.3

14.402 When considering the costs, benefits and the broader fiscal context, for both stakeholders and the superannuation system as a whole, qualitative evidence indicates that the recommended option would be expected to deliver a net benefit.

14.403 As a package, these measures more closely align the superannuation system with the objective of the superannuation system (refer to diagram below). This is because these measures together have synergies that target sustainability, flexibility and integrity of the superannuation system in a way that no one measure can achieve.

Diagram 14.5 Recommended option (package of measures) and the objective of the superannuation system



14.404 By developing a package of changes following *Re:think*, the Government was able to listen to the concerns and suggestions of stakeholders and take these into account in developing its reforms. Implementing a package of reforms covering different aspects of the superannuation system reflects concerns raised in the submissions made during this process.

14.405 By implementing a balanced package of reforms now, the Government has also ruled out future piecemeal changes in response to *Re:think* that may have gradually eroded confidence in the system.

14.406 The decision to introduce a package of superannuation tax reforms (which was supported by the interim RIS) was made by Cabinet as a part of the 2016-17 Budget. The superannuation tax reforms have been shaped through consultation at all stages of development, to ensure

that the issues outlined in the problem section (sustainability, flexibility and integrity) are addressed, in line with the objective of the superannuation system. The final decision point which will be supported by this RIS is at the Government's decision on the final form of legislation to implement the superannuation tax reforms.

7. Implementation and evaluation / review

14.407 Legislation and regulation changes are required to implement the selected measure. Draft legislation and regulations were released for consultation.

14.408 When developing the legislation and regulation consideration was given to the interaction with, and technical aspects of the income tax law to ensure that the intended benefits of the recommended measures may be realised.

14.409 As part of the transitional arrangements for the transfer balance cap and the changes to transition to retirement income streams arrangements, capital gains tax relief will be offered to those affected by these changes. This relief seeks to ensure that only future capital gains are subject to taxation in respect of assets that shift from exempt pension phase back to accumulation phase as a result of these changes.

14.410 No significant challenges to implementation have been identified. Implementation will occur through individuals, financial professionals, superannuation providers and the ATO. In general, changes to policies and procedures will need to be implemented by superannuation providers and there is ongoing education and increases in record keeping for tax agents and financial advisors.

14.411 These changes occur within the context of the tax and superannuation system which is constantly changing. Superannuation providers, tax agents and financial advisors have processes in place to keep them abreast of changes and to adapt. These measures will be subsumed into this process.

14.412 While these changes are significant in targeting the superannuation system towards the objective of providing income in retirement, they impact only a small number of individuals within the superannuation system. High wealth individuals that are mainly affected by these changes typically seek professional advice in managing their affairs or are financially savvy enough to manage these changes.

14.413 The success of these changes will be monitored through a variety of processes. These changes are designed to result in a reduction and targeting of superannuation tax concessions.

14.414 On an informal basis, Treasury maintains close relationships with key stakeholders and the general public that can provide feedback on the changes, which will then be fed into future advice on possible further superannuation changes. Treasury will formally measure the impacts of some of these changes. Additionally, data may also be obtained on an ad hoc basis on superannuation tax concessions and payments on a variety of parameters from the ATO in response to requests from the Government. This data and information will feed into Treasury's superannuation policy advice to the Government.

Appendix A

Short Form Regulation Impact Statement

The Treasury, Australian Tax Office (ATO)

OBPR Reference number: ID 20591

Name of proposal: Introduce a lifetime cap on non-concessional superannuation contributions.

Summary of the proposed policy and any options considered

This proposal will replace, from announcement, the current annual non-concessional contributions caps with a lifetime cap. The lifetime cap of \$500,000 will take into account all non-concessional contributions made after 1 July 2007. The cap will limit the access to superannuation tax concessions for wealthy individuals, improving integrity of the superannuation system and increasing revenue by around \$550 million across the forward estimates.

Where an individual exceeds the lifetime non-concessional cap prior to the announcement, they will not be required to remove the excess provided they were acting within the relevant caps at the time their contributions were made. Non-concessional contributions to defined benefit schemes will count towards the cap but will not be removed if they exceed the cap.

The Government also considered implementing this policy from 1 July 2016 to simplify reporting requirements on funds however this option was not progressed as it created an opportunity for individuals to take advantage of current tax arrangements by bringing forward their contributions undermining the policy and the fiscal savings.

What are the regulatory impacts associated with this proposal?

Funds will need to continue to report non-concessional contributions to the ATO on an annual basis and will need to provide an additional report in the first year of the measure so the ATO can identify contributions made after announcement. Certain defined benefit schemes will need to further separately identify and report to the ATO on an ongoing basis some non-concessional contributions between defined benefit and accumulation accounts.

The Government will consult with industry on the timing of these additional reporting requirements post announcement.

The ATO will also need to improve its record keeping to track (and communicate) individuals' remaining cap balance over each persons' lifetime. We expect the ATO to display individuals' remaining balance on their my.Gov web account. The ATO will also need to alter their systems to take into account the contributions of defined benefit members protected from removal.

What are the regulatory costs/savings associated with this proposal?

Individuals and Superannuation providers will need to be aware of the lifetime cap, which is a shift from the existing annual caps and will require education and awareness-raising by the ATO.

Individuals who breach the lifetime cap may complete a release authority to access these funds. Superannuation providers already have systems in place to store and process these forms.

Tax practitioners and tax advisers will need to become familiar with the change but it is expected to form part of routine updates. Tax advisers would now need to understand all of the contributions that their clients had made in their lifetime, not just the last three years.

The change in regulatory burden has been estimated by the Treasury to result in a medium overall compliance cost impact (comprising a medium implementation impact and a medium increase in ongoing compliance costs) in the range of \$2.8 million per year. Specific offsets have not been identified and offsetting regulatory savings within the Treasury portfolio will be settled at a later time.

Regulatory burden estimate (RBE) table

<i>Average annual regulatory costs (from business as usual)</i>				
Change in costs (\$ million)	Community organisations	Business	Individuals	Total change in cost
Total, by sector	\$2.8			\$2.8

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Superannuation (Objective) Bill 2016

<i>Bill reference</i>	<i>Paragraph number</i>
Items 1 and 9, subsection 307-80(2) and the definition of 'deferred superannuation income stream' in subsection 995-1(1)	10.31
Item 1, subsection 307-80(3)	10.37
Item 1, subsection 307-80(4)	10.38
Item 1, subsection 307-80(4) of the ITAA 1997	3.191
Items 1 and 9, subsection 307-75(1) and the definition of 'retirement phase superannuation income stream benefit (or RP superannuation income stream benefit)' in subsection 995-1(1)	10.40
Items 1 and 9, subsection 307-75(2) and the definition of 'retirement phase superannuation income stream benefit (or RP superannuation income stream benefit)' in subsection 995-1(1)	10.41
Item 1, sections 307-75 and 307-80 of the ITAA 1997	3.35
Items 1 and 9, subsection 307-80(1) and paragraph (a) of the definition of 'retirement phase' in subsection 995-1(1)	10.30
Item 1, subsection 307-80(3) and (4)	10.44
Items 2, 3, 4, 7 and 9, section 307-205, subsection 307-205(2), section 307-230 and the definitions of 'account-based annuity', 'accumulation phase value', 'total superannuation balance', 'transfer balance' and 'transfer balance account' in subsection 995-1(1)	5.16
Items 2, 3, 4, 7 and 9, section 307-205, subsection 307-205(2), paragraph 307-230(1)(a) and the definitions of 'accumulation phase value' and 'total superannuation balance' in subsection 995-1(1)	5.17
Item 3, paragraph 307-205(2)(a)	5.20
Items 4 and 9, paragraph 307-230(1)(b) and subsections 307-230(2), (3) and (4) and the definition of 'total superannuation balance' and 'transfer balance' and 'transfer balance account' in subsection 995-1(1)	5.21
Item 4, paragraph 307-230(1)(b)	5.23
Item 4, subsections 307-230(3) and (4)	5.24, 5.26
Items 4 and 7, paragraph 307-230(4)(d) and the definition of 'account-based annuity' in subsection 995-1(1)	5.27
Item 4, subparagraph 307-230(2)(b)(i)	5.29

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Item 4, paragraph 307-230(2)(a) and subparagraph 307-230(2)(b)(ii)	5.32
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Item 6, column 3 of item 2 in the table in section 960-285	4.26
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Item 6, subsection 960-285(7) table item 2	5.8
Item 6, subsection 960-285(7) table item 3	5.13
Item 6, subsection 960-285(4) of the ITAA 1997	3.52
Item 6, section 960-285 of the ITAA 1997	3.48
Item 6, subsections 960-285(1), (2), (3) and (5) of the ITAA 1997	3.50
Item 7, subsection 995-1(1) (definitions of ‘assessed excess transfer balance tax’, ‘capped defined benefit income stream’, ‘child recipient’, ‘crystallised reduction amount’, ‘debit value’, ‘defined benefit income’, ‘defined benefit income cap’, ‘default commutation notice’, ‘excess transfer balance’, ‘excess transfer balance determination’, ‘excess transfer balance earnings’, ‘excess transfer balance period’, ‘excess transfer balance tax’, ‘general transfer balance cap’, ‘member spouse’, ‘retirement phase recipient’, ‘rounding amount’, ‘special value’, ‘superannuation income stream provider’, ‘transfer balance’, ‘transfer balance account’, ‘transfer balance cap’, ‘transfer balance credit’ and ‘transfer balance debit’) of the ITAA 1997	3.307
Item 8, the definition of ‘complying superannuation life insurance policy’ in subsection 995-1(1)	10.46
Item 9, paragraph (b) of the definition of ‘retirement phase’ in subsection 995-1(1)	10.29
Item 9, subsection 995-1(1)	5.33
Item 9	3.312, 3.313
Item 9, the definition of ‘deferred superannuation income stream’ in subsection 995-1(1)	10.32

Schedule 1: Transfer balance cap

<i>Bill reference</i>	<i>Paragraph number</i>
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Item 1, subsection 294-25(2) of the ITAA 1997	3.69
Item 1, paragraph (gab) in Schedule 1 to the Administrative Decisions (Judicial Review) Act 1977	3.164
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<i>Bill reference</i>	<i>Paragraph number</i>
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Item 4, subsection 294-235(2) of the ITAA 1997	3.65
Item 4, section 294-10 and subsection 294-15(1) of the ITAA 1997	3.27
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Item 4, paragraph (b) of column 3 in item 2 of the table in subsection 294-25(1) of the ITAA 1997	3.80
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Item 4, items 3 and 4 in the table in subsection 294-80(1), and sections 294-85 and 294-90 of the ITAA 1997	3.117
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Superannuation (Objective) Bill 2016; Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016; Superannuation (Excess Transfer Balance Tax) Imposition Bill 2016

<i>Bill reference</i>	<i>Paragraph number</i>
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Item 4, subsection 294-135(3) of the ITAA 1997	3.227
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<i>Bill reference</i>	<i>Paragraph number</i>
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<i>Bill reference</i>	<i>Paragraph number</i>
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Schedule 9: Anti-detriment provisions

<i>Bill reference</i>	<i>Paragraph number</i>
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Item 3, section 320-107	11.11
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Schedule 10: Administration and consequential

<i>Bill reference</i>	<i>Paragraph number</i>
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Item 1, subsection 131-5(3)	12.47
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Item 1, section 131-15	12.52
Item 1, section 131-20	12.53
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Item 2, subparagraph (c)(i) of new definition 'available early release authority amount' in subsection 79A(1) of the Superannuation Act 1976	12.110
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Superannuation (Objective) Bill 2016; Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016; Superannuation (Excess Transfer Balance Tax) Imposition Bill 2016

<i>Bill reference</i>	<i>Paragraph number</i>
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