

23 January, 2012



**The Institute of  
Chartered Accountants  
in Australia**

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

By email: [recc@treasury.gov.au](mailto:recc@treasury.gov.au)

Dear Sir,

**Submission on Exposure Draft – Refund of Excess Concessional Contributions**

The Institute of Chartered Accountants in Australia (the Institute) is the professional body representing Chartered Accountants in Australia. Our reach extends to around 70,000 of today's and tomorrow's business leaders, representing more than 57,000 Chartered Accountants and 13,000 of Australia's best accounting graduates currently enrolled in our world-class Chartered Accountants postgraduate program.

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The Institute would like to take this opportunity to make the following comments on the Exposure Draft – Refund of Excess Concessional Contributions

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## **Excess Contributions Tax**

While this submission will specifically address the issues contained in the Exposure Draft legislation for the refund of limited amounts of excess concessional contributions, the Institute takes this opportunity to reiterate its considerable concerns around excess contributions tax legislation and the increased complexity that this new legislation adds to an inequitable and complicated tax regime.

We appreciate that the policy driving the amendments contained in this exposure draft are designed to provide some relief to those Australians who have inadvertently made (or have inadvertently had made for them) superannuation contributions in excess of their concessional contribution cap and would otherwise be subjected to excess contributions tax. However, we believe that the availability of the relief is so limited that it does little to truly address the inequities of the excess contributions tax regime. We believe that this regime urgently requires a significant overhaul to enable the refund of all excess contributions. Such measures are required for equity, simplicity and to move towards restoration of confidence of Australians in the superannuation system.

The exposure draft for refund of excess concessional contributions is detailed and complicated. We believe it is too restrictive and contains measures that do not go to the heart of the policy intent to provide relief to Australians inadvertently making excessive contributions.



## **Specific comments**

### **Section 292-420 Release authorities for refunded excess concessional contributions**

#### **Section 292-420(4) and (6) Obligations of superannuation providers**

In the above section of the exposure draft, the obligations of a superannuation provider upon receipt of a release authority is to pay and issue a statement to the Commissioner within 30 days of the issue of that release authority.

To allow an adequate and reasonable time frame for superannuation providers to process a release authority from, the legislation should be amended to allow 30 days from the *receipt* of the release authority rather than the issuance. This would allow for circumstances in which there has been a delay in delivery of a release authority to a superannuation provider that would otherwise impose an unreasonable administrative burden on them. It would also be consistent with the time frames for payment of release authorities under the existing Section 292-415 which refers to 30 days from receipt of a release authority.

#### **Section 292-420(5) Obligations of superannuation providers**

The Institute is concerned that the exclusion of those who have commenced an income stream from the ability to receive a refund of excess concessional contributions under these new provisions may result in an unfair outcome for those people affected. A person who has commenced an income stream in most circumstances has the ability to partially commute an income stream in order to access a lump sum payment. They should continue to have this ability to commute an amount for the purposes of refunding an excess concessional contribution. When making a decision as to whether or not they accept an offer by the Commissioner, they could be advised of the need to commute an amount should they have already commenced an income stream. They should not be denied access to a refund because of an income stream being paid. This is a particularly relevant situation considering that a significant amount of time may have passed between making a contribution and the Commissioner making such an offer to refund.

We would also question whether the application of Section 292-467 would be denied to a person making an excess concessional contribution in a future year where they had previously had excess concessional contributions but could not receive a refund due to an income stream being paid. This could potentially create an unreasonable and inequitable outcome for that person.

#### **Section 292-420(7) Entitlements to credits**

The Institute supports the Commissioner's right to withhold from an excess concessional contribution refund any tax that would otherwise be required to satisfy a tax obligation arising from an amendment to a person's individual tax return as a result of the inclusion of the excess contribution in their assessable income. However, we do not believe that the balance of the refund should be able to be utilised to offset other tax debts or government payments of an individual. Had the excess concessional contribution not been made, the individual would have received this as 'cash in hand'. Furthermore, but for the decision to include the Commissioner as the conduit for processing refunds, the Commissioner would not have access to these monies.



The policy intent of this legislation is to provide relief for those taxpayers who have excess concessional contributions. We do not believe that the Commissioner's ability to withhold the entire amount as a credit is consistent with the policy intent.

The definition of a credit within the Taxation Administration Act 1953 includes amounts that the Commissioner is required to pay to a taxpayer as a result of a taxation law. Prima facie, the excess contributions may satisfy this definition, however we believe that this is arguable as to whether the Commissioner's payment to a taxpayer of the refund (less tax implications) is indeed intended to be included in the provisions of the Act or whether the Commissioner was simply a minder of those monies and is obliged to pass them on to the relevant individual.

To avoid any potential differences of interpretation and to be consistent with the policy intent of this legislation, we believe that the definition of a credit contained in the Taxation Administration Act 1953 should be amended to specifically exclude amounts that are otherwise refundable to the relevant individual, ie, the refunded contribution less any tax liability directly attributable to the contribution being assessed in that individual's personal income tax return.

#### **Section 292-468 Variations etc. of refunded excess concessional contributions determinations**

Section 292-468(2) of the exposure draft gives the Commissioner the ability to revoke a determination, where excess contributions are found to be zero or greater than \$10,000, any time before receiving a payment. In practical terms, a fund may have processed a release authority and issued a refund at the same time the Commissioner is in the process of revoking the determination. The legislation or explanatory memorandum should either clarify what will happen in such a scenario or reconsider the timing for the Commissioner's ability to revoke a determination. If the amount has technically left the fund, does it then become a new contribution if it goes back to the fund? A superannuation benefit will have been paid, albeit the determination for a refund was revoked by the Commissioner.

Similarly, Section 292-468(3) gives the Commissioner the ability to vary a determination before payment where the excess concessional contributions are not greater than \$10,000. Under these provisions, a varied amount may need to be given back to the superannuation provider. How will they treat it? It should not constitute a contribution to the fund.

The Institute is further concerned that the Commissioner lacks the ability to revoke a determination after payment where contributions are later found to be greater than \$10,000. This may create a circumstance in which subsequent amendments to returns may result in a refund having been issued to a person who ultimately is not entitled to receive such a refund.



**Other comments**

The Institute seeks clarity on the following issue:

Will an individual be eligible for the refund of excess concessional contributions where their current superannuation fund is not the holder of the excess amounts? That is, where they have moved superannuation providers subsequent to making the excess contributions, will the new fund be able to facilitate a refund?

