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

Dear Sir/Madam,

Refund of excess concessional contributions – consultation paper

The Self Managed Super Fund Professionals' Association of Australia (SPAA) welcomes the opportunity to comment on the proposed design of the refund of excess concessional contributions (the refund).

SPAA is the peak professional body representing the self managed superannuation fund (SMSF) sector throughout Australia. SPAA represents professionals, irrespective of their personal membership and professional affiliations, who provide advice to individuals aspiring to higher levels of participation in the management of their superannuation savings. Membership of SPAA is principally accountants, auditors, lawyers, financial planners, actuaries and other professionals.

Comments on the proposed design of the refund measure

In SPAA's view, the severity of excess contributions tax coupled with limited options of rectification is the most significant issue confronting the Superannuation sector. While we acknowledge the need to deter people from making excess contributions, the tax applicable to excess non-concessional contributions is too penal given that the vast majority of excess contributions are made inadvertently.

SPAA acknowledges that the Government has begun to address the excess contributions problem, but believes the refund measure falls well short of a working solution to rectify the problem. For example, the measure provides no relief to individuals who inadvertently exceed their non-concessional contribution cap or individuals who on the first occasion inadvertently exceed their concessional cap by more than $10,000.

Furthermore, linking eligibility for the refund to a dollar threshold is likely to deny many taxpayers the option of a refund even though their circumstances are substantially the same as other taxpayers who are eligible for the refund. For example, an individual who exceeds their concessional cap by $10,000 will, assuming all other conditions are satisfied, be eligible for a refund while an individual who exceeds their concessional cap by $10,001 will not be eligible for a refund. It is difficult to defend the equity of the proposed refund measure in these circumstances.

SPAA is also concerned that limiting eligibility to a "once off" only breach of the concessional cap will deny many individuals who breach the concessional cap in multiple years, through no fault of their own, the option of a refund. As an employer's SG obligation has no regard for salary and wages paid to their employee by other employers, it is possible for some employees with multiple employers to receive total salary and wages in a financial year for SG purposes which will generate annual SG contributions in excess of $25,000. Employers are legally obligated to pay SG contributions on behalf of these employees despite the fact that their employer may incur excess contributions tax for some or all of the contribution.

Excess SG contributions would appear to be a particularly common scenario in the information technology, mining and medical professions where a person may undertake work as a contractor to a number of organisations as employees for SG purposes. It is also common for Company Directors to receive remuneration for their directorships which when added to their other salary and wages from other employers would generate SG contributions in excess of $25,000 per year.

Under the proposed refund proposal, in all of these scenarios and regardless of the amount of the excess contribution after the first year, the individual would only be entitled to a refund in the first year in which the excess of up to $10,000 occurs.

SPAA is also concerned about the proposal to deny individuals a refund in a particular financial year if they had exceeded the concessional cap by more than $10,000 in a previous financial year after the 2010/11 financial year. This seems unreasonable particularly in situations where as explained above, the excess concessional contribution may be beyond the control of the individual and their employer.

Additional measures

In previous submissions to Treasury, SPAA has outlined a number of different measures which could be introduced by Government to address the excess contributions tax problem. These measures include an annual SG opt-out option for employees with excess concessional contributions and a refunding mechanism for excess non-concessional contributions.

Earlier this year, SPAA along with a number of other industry associations also wrote to the Government calling for the concessional contribution cap to be increased to $35,000 for all individuals over age 50. This proposal was put forward as an alternative to the Government's proposed $50,000 concessional contribution cap for individual's over age 50 with a superannuation account balance under $500,000. It was also put forward on the assumption that the Government would commit to increasing the contribution caps to their pre July 2009 levels as soon as it is fiscally possible.

A summary of all of these measures is provided in Appendix A attached to this letter. It remains our view that measures such as these should also be considered by Government and if some or all of these measures were adopted it would address many of the shortcomings outlined above with the proposed refund measure. By reducing the number of individuals who exceed their contribution caps, these measures would also compliment the refund measure.

We would be pleased to provide you with any further information in support of our submission.

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Mrs. Andrea Slattery
Chief Executive Officer

Mr. Peter Burgess
Technical Director

Yours sincerely

Andrea Slattery
CEO

Appendix A

Summary of SPAA's excess contributions tax submissions

1. Refunding excess non-concessional contributions

Key points:

- The provisions of SIS Regulation 7.04 should be amended to enable the voluntary refunding of the excessive portion of non-concessional contribution back to the member. Amended SIS Regulation 7.04 would require a member to request the refund by providing the fund with a prescribed form and sufficient documentary evidence which enables the trustees to form an opinion that the amount being refunded is the excess portion of a non-concessional contribution.

- A mandatory rate of excess contributions tax should apply to refunded excess non-concessional contributions calculated from the date the excess contribution was received by the fund to the date the excess contribution was refunded to the member. The mandatory rate of excess contributions tax would be based on a proxy for the rate of investment earnings derived on the excess portion of the non-concessional contribution while it remained in the fund. This proxy rate of interest would at least be set at a sufficient level to ensure members receive no monetary gain from making an excess non-concessional contribution. However, it should not exceed a level which could reasonably be considered to act as a deterrent against making excess non-concessional contributions.

2. Excess contributions tax and SG contributions

Key points:

- The *Superannuation Guarantee (Administration) Act 1992* be amended to allow employees to elect in writing that their employer not be liable to the SG charge. This election would be required to be accompanied by documents showing that the employee's concessional contribution cap would be exceeded if the SG contribution was made. The election would be required to be made for each financial year and would remain in force for the entire financial year unless revoked by the employee.

- Instances of inadvertent concessional contribution cap breaches could be reduced by allowing the Commissioner to allocate SG contributions to the previous financial year on the proviso that the previous year's SG contribution has been allocated to the member's superannuation account by 28 August in the financial year the SG contribution is received and or allocated by the superannuation fund.

- To remove uncertainty, the exercise of the Commissioner discretion in these situations should be made less ambiguous and clearer in the ITAA 1997.

3. $35,000 concessional contribution cap for individuals over 50

Key points:

- As an alternative to the proposed $500,000 threshold regime, SPAA recommends increasing the concessional contribution cap for all individuals over the age of 50 to $35,000. This measure would apply from 1 July 2012, following the completion of the current transitional arrangements for individuals over age 50.

- This $35,000 cap would be coupled with a Government commitment to restore the concessional contribution cap for all individuals over 50 to $50,000. This could be achieved over time by increasing the concessional contribution cap for individuals over age 50 to $50,000 in incremental amounts in a manner consistent with the Government's fiscal strategy, or by no less than the annual rate of inflation.

- Adopting an increased standard concessional contribution of $35,000 for all individuals over age 50, is a simple measure which will avoid many of the complexities, inefficiencies and additional costs inherit in the Government's $500,000 threshold proposal. While we acknowledge that such a measure will not address all instances of inadvertent concessional cap breaches, in our view it will go a long way to reducing the number of concessional cap breaches for individuals over age 50. Based on our own observations, the current relatively low concessional contribution cap is a major reason why so many individuals breach their concessional cap.

- We acknowledge the budgetary cost of our proposal. However, the cost to revenue of increasing the concessional cap by $10,000 to $35,000 would be partially offset by the cost savings associated with not increasing the cap to $50,000 for all individuals over age 50 with a balance less than $500,000.

- We appreciate the revenue cost of increasing the standard concessional cap of $25,000 by $10,000 for all individuals over 50 is unlikely to be fully offset by the costs savings outlined above. However, the aim of our proposal is to avoid the extensive administrative and equity shortcomings of the $500,000 threshold proposal. Although we are not in a position to assess the revenue "breakeven" point, we would suggest that in any case the Government should give consideration to a modest increase in revenue cost acknowledging the strong appeal of the longer term administrative / communications efficiency gains that this approach would produce.