CHARTERED ACCOUNTANTS
AUSTRALIA • NEW ZEALAND

23 February 2024

Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Delivered via Australian Parliament House online portal

Dear Sir/Madam

Inquiry into the *Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023* [Provisions] and the related *Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023*

Chartered Accountants Australia and New Zealand (CA ANZ) welcomes the opportunity to provide feedback on the above inquiry.

CA ANZ represents more than 136,000 financial professionals, supporting them to build value and make a difference to the businesses, organisations and communities in which they work and live.

Around the world, Chartered Accountants are known for their integrity, financial skills, adaptability and the rigour of their professional education and training. Further details about our organisation are provided at the back of this submission.

Better targetted superannuation concessions

We have many members who work with Self Managed Superannuation Funds (SMSFs) as tax agents, accountants, administrators, auditors and financial advisers. We also have many members who work with APRA regulated superannuation funds in a wide range of capacities including tax, finance, reporting and internal and external audit. Many of our members have money invested in SMSFs and APRA Regulated Superannuation Funds.

When preparing our feedback, we have sought the views of our diverse membership.

On balance CA ANZ does not support the Better Targeted Superannuation Concession policy contained in the *Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023* ("the BTSC and Other Measures Bill") and the related *Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023* for many reasons including:

- The complex design features of the policy which will add considerable administration costs for the whole superannuation system; it is our view that the cost assumptions contained in the explanatory memorandum considerably under-estimates the expenses incurred by individuals, super funds, accountants, lawyers, auditors and others involved in running all types of superannuation funds

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- It alters the tax mix for those already retired and those saving for retirement when certainty is essential; otherwise it is inevitable that many will be discouraged from making adequate contributions towards their retirement
- We question how much net revenue will be raised from this measure
- We believe there may be better solutions available to the government
- The current design of the policy taxes unrealised gains; our submission contains several examples which shows this is likely to cause many funds cash flow concerns
- The current policy design contains a mechanism that will see capital losses carried forward – 70 percent of our members in the taxation and superannuation sector told us that they did not agree with this policy[1]; as a result of this finding we suggest an alternative solution.

Our conclusion in relation to this new tax measure applies even though we are yet to see the associated regulations which will contain very important operational issues including how this tax measure will apply to members with a defined benefit interest.

However if the Senate Economics Legislation Committee intends to recommend that the Bill should be passed then it should also recommend important amendments to it.

Our **preferred amendment,** if the Bills subject to this inquiry are to be passed, is that the taxing point for the Better Targeted Superannuation Concession should occur only when benefit payments are made – this will dramatically reduce administration costs for this measure for the Australian Taxation Office, individuals and superannuation funds. It also removes the need to tax unrealised capital gains and keep track of carried forward capital losses.

If the above suggested solution is unacceptable then capital losses should be refundable.

Other suggested solutions that it would be acceptable to apply a deeming rate – we believe the Reserve Bank of Australia 90 day bank bill rate is worthy of consideration

For all the suggested solutions above we believe the following amendments must also be made:

- the $3 million threshold should be indexed each 1 July in line with average weekly ordinary times earnings
- The severe restrictions on how much money can be contributed to superannuation should be removed given that higher taxes apply for larger account balances

Other alternative solutions are:

- Force those with total superannuation assets of more than $10 million to withdraw the excess from the superannuation system
- Apply a consistent tax rate to the accumulation and pension phases as suggested by the Australia's Future Tax System Review[2].

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[1] https://www.charteredaccountantsanz.com/news-and-analysis/media-centre/press-releases/experts-agree-tax-reform-must-be-a-priority
[2] https://treasury.gov.au/review/the-australias-future-tax-system-review

Our detailed comments are contained in **Appendix A**.

Amedment of the *Payment Systems (Regulation) Act 1998* etc.

Our members regularly interact with, and analysis transactions through, Australia's payment system and we welcome updating the infrastructure to allow for multiple payment systems, a payment ecosystem. We are concerned with the proposal in Schedule 8 of the *Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023*, to empower the Minister to designate a special payment system separate, and possibly duplicating, a payment system of the Reserve Bank of Australia (RBA). We are concerned that this appears different to the recommendations in the Final report from the Review of the Australian Payments system, published in June 2021[3], that consumers and businesses be at the centre of policy design and implementation.

The proposed approach may result in a payments ecosystem that is complicated for consumers, businesses, and payment service providers to navigate. While we understand the current mandate of the RBA hinders its ability to regulate new and emerging payment methods, we support changing the RBAs mandate rather than adding a significant amount of legislation that will result in confusion for all participants.

We support empowering the Minister to take a leadership role and identify the need for a special payments system in the national interest. We suggest such leadership should be limited to identifying the need and the authority to direct the RBA to stand up a special payments system to address this need. This delineates the system from those that choose to participant in, or are captured by, a special payments system. Such an approach may lead to simplicity for consumers and businesses by harnessing the expertise of the RBA to stand up and regulate access to a payment system and leaves the regulation of participants, of all their activities, with the relevant regulatory bodies.

Please contact Tony Negline, Superannuation and Financial Services Leader on [redacted] or reach via email at [redacted] with any queries on this submission related to Better Targeted Superannuation Concessions or to organise a time to discuss in greater detail. If you have any queries related to the payment systems, please contact Jill Muir, Senior Policy Advocate- Business Reform on [redacted] or reach via email at [redacted]

Yours Sincerely,

Tony Negline CA
Superannuation and Financial Services Leader

3 https://treasury.gov.au/publication/p2021-198587

Appendix A

Superannuation is a long-term investment

People entering the workforce after leaving school today in their late teens, or university in their early twenties, can expect to have some superannuation investments for up to 70 years maybe longer.

It has long been acknowledged that tax concessions are offered for superannuation in order to encourage self-provision in retirement – "the most direct means of saving for retirement is through the system of occupational superannuation. The Government provides substantial tax concessions to encourage this form of saving."[4]

In the Prime Minister's and Treasurer's press conference of 28 February 2023, the Treasurer reiterated this point when he said, "the tax breaks for contributions to super and earnings from super are generous, and they should be, because they help people save more money for their retirement, which is what superannuation is for".[5]

It has often been said that the superannuation tax concessions have been provided as a form of compensation for not allowing a person to access their savings for many years and only then as retirement savings.

In addition, given superannuation is a long term investment, it is essential the tax and regulatory policy settings governing superannuation are stable and are not changed so that individuals are adversely impacted or lose confidence to use superannuation as a long-term savings vehicle.

Which taxpayers are targeted by this measure?

The Explanatory Memorandum for the BTSC and Other Measures Bill states that the purpose of the amendments is to make "Australia's world-class superannuation system more sustainable and fairer through a modest change to ensure generous superannuation tax breaks are better targeted." As a result, the government is "reducing tax concessions available to individuals with a TSB [total superannuation balance] exceeding $3 million".

When this announcement was made it was claimed that "17 people having over $100 million in their superannuation accounts, the (sic) individual who has over $400 million in his or her account, most Australians would agree that that's not what superannuation was for. It's for people's retirement incomes".[6]

Further in the same press conference the Prime Minister said, "if you knew there was someone out there who had $400 million in their superannuation account, I didn't, if you knew there were 17 people who had $100 million in their account, I didn't, and it's hard to argue that those levels is (sic) about actual retirement incomes, which is what superannuation is for"[7].

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[4] Reform of the Taxation of Superannuation, Economic Statement, Keating P.J., Commonwealth of Australia, May 1987
[5] Prime Minister Albanese and Treasurer Chalmers Press Conference - https://www.pm.gov.au/media/press-conference-canberra-act - accessed 12 April 2023
[6] Op cit
[7] Op cit

Why do these people have such large superannuation account balances?

There are three primary reasons:

1. Between the late 1980s and May 2006 the superannuation system permitted individuals to contribute any amount of personal after-tax contributions; before July 2007 such contributions were called undeducted contributions and are now called non-concessional contributions. As the amount of these contributions could have been unlimited, some individuals elected to make large personal after-tax contributions to superannuation
2. Some individuals have made significantly better investment returns from their superannuation fund investments than other investors over a considerable period of time
3. Others have inherited large superannuation account balances when their spouse died via being the deceased's reversionary pensioner

In some cases these above reasons may be interlinked with at least one of the other two stated reasons.

There is very little official publicly available data on the profile of people with large superannuation balances. However based on data published by Class Pty Ltd in September 2023[8], only 3% of members of the 186,000 SMSFs and almost 357,000 members on the Class administration platform are aged under 55 and have an account balance of more than $3 million at 30 June 2023. Of that dataset 35% of members with account balances above $3 million are aged more than 75.

Similar data for APRA regulated superannuation funds is not available however APRA data[9] shows that at 30 June 2023 there were about 174,000 member accounts – or 0.78% of all APRA fund member accounts – with more than $1 million. These ARPA statistics show that only 7% of these accounts are held by those aged under 55. Nine percent of these accounts were held by those aged at least age 75.

We therefore have good reason to believe that many of those people with larger account balances are older. Many are elderly, fully retired and made large undeducted contributions before May 2006.

Successive governments were warned over many years about the anomalies being created by unlimited undeducted contributions and the distortions that were being created. For some reason, no action was taken about this issue.

Also under *current* rules the only way to have a very large account balance is by earning significant investment returns over an extended period of time as the quantum of many different types of contributions has been strictly limited since May 2006.

In Attachment 1: *Impact Analysis – Better Targeted Superannuation Concessions* in the explanatory memorandum for the BTSC and Other Measures Bill repeats the finding of the Retirement Income Review that, "Based on life expectancy projections, around 30 per cent of these existing accounts [that is those with account balances of more than $10 million] are still likely to be in the superannuation system in two decades' time."

We do not dispute these findings as we do not have access to sufficient data for the superannuation system to determine its accuracy. In any case, this analysis is missing the very important impact of inflation. It is well known that inflation degrades the purchasing power of money. If inflation averages 3%[10] then over two decades the purchasing power will reduce by about 55%. For example, $10 million will be worth $5.5 million in today's money. Similarly, $5 million will be worth $2.75 million in today's money which is obviously below the proposed $3 million threshold in today's money.

[8] https://www.class.com.au/news/class-launches-2023-annual-benchmark-report/
[9] https://www.apra.gov.au/annual-superannuation-bulletin
[10] The mid-point in the Reserve Bank of Australia's target for annual inflation

Account balances must be paid on the death of the member

It is important to note under current rules the vast majority of very large account balances will have to be paid out as lump sums when a person dies.

In our view this policy should not be changed.

However, these people are a small cohort who legitimately used superannuation laws that existed in the past. For many of them their time left in the superannuation system is likely to be limited due to normal life expectancies for their ages – see our earlier discussion on this point.

We have more to say about the tax consequences when large balances are paid out later in this submission.

Attachment 1: *Impact Analysis – Better Targeted Superannuation Concessions* in the explanatory memorandum for the BTSC and Other Measures Bill says, "the [Retirement Income] review found that a majority of individuals do not consume their retirement savings, with an average member leaving behind 90 per cent of their superannuation when they die". What this fails to mention is that this analysis is not taking into account of inflation. When the impact of inflation is taken into account then the value of the retirement savings is much lower. In addition, this analysis fails to take into account the fact that many retirees die before they reach their average life expectancy that they had at retirement. These people often retire with more than they retired with even after allowing for inflation. Why is this considered bad?

Restricting the maximum account balance a person can have in superannuation

When the 2007 superannuation system changes were announced, the then Treasurer said that individuals would no longer be penalised for having large amounts in superannuation to "encourage people to stay in the workforce" [11].

In the Prime Minister and Treasurer press conference quoted above the Treasurer echoed this comment:

> Now, we don't begrudge anyone who has made a lot of money, or saved a lot of money, or takes advantage of the tax breaks that are legitimately available to them. We want to make that clear. If you've done well in super, that's a good thing. We're not going out of our way to begrudge people who've done well for themselves. I think that's an important thing to note. And we're not coming after, we're not trying to diminish anyone's superannuation balance.

It is true that the current design of the Better Targeted Superannuation Concession, as detailed in the BTSC and Other Measures Bill, does not force anyone to reduce their overall superannuation investments.

However, in that same press conference, the Treasurer said, "the cost of these [superannuation] tax breaks is overwhelmingly skewed towards a small number of people with high balances, with balances well beyond what's required for a comfortable and a dignified retirement".[12]

In that press conference, reference was made to the recently released Tax Expenditures and Insights Statement (TEIS)[13]. The TEIS states that 30% of the total superannuation contribution concessions

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[11] Treasurer Press Conference 9 May 2006 - https://ministers.treasury.gov.au/ministers/peter-costello-1996/transcripts/budget-lock-press-conference-committee-room-2r1 - accessed 13 April 2023
[12] Prime Minister Albanese and Treasurer Chalmers Press Conference, ibid
[13] https://treasury.gov.au/publication/p2023-370286

went to individuals who were on the highest marginal tax rate and 39% of the superannuation earnings concessions went to people in the top income decile. The TEIS then goes onto make the obvious point:

> People in higher taxable income deciles receive a larger share of the benefit due to having larger superannuation balances and paying higher marginal tax rates, which makes the flat rate of tax on superannuation earnings more concessional. The share of the benefit for people in the lowest income decile, along with people who have not lodged personal income tax returns, are close to zero because on average they face a marginal personal income tax rate that is close to 15 per cent.

It is clear from the above quotes the government has a concern about very large superannuation balances. As the government does not want to "diminish anyone's superannuation balance", its preferred policy to deal with the perceived problem is to create an incredibly complex measure that will see **all** superannuation fund members pay more in administration fees and the overall system will be more costly for everyone including higher Australian Taxation Office administration costs.

Further the design of this policy taxes *unrealised* gains at an additional 15% each year. When these assets are disposed of they will incur an additional 10% tax if the asset is held for more than 12 months. This makes a total tax take of 25%.

This is higher than the 23.5% tax rate that would apply to the net capital gain for an individual who personally held an asset for more than 12 months who is being taxed at the highest individual marginal tax rate plus Medicare.

Many people who will face the additional superannuation taxes will be making a judgement as to whether they should keep their large superannuation balance in the system or invest in some other way.

With tax penalties to be applied to superannuation benefits why restrict superannuation contributions?

With larger superannuation benefits to face higher taxes then we question why superannuation contributions should remain heavily restricted especially non-concessional contributions. The government should make announcements about the increases in all contribution types as soon as possible.

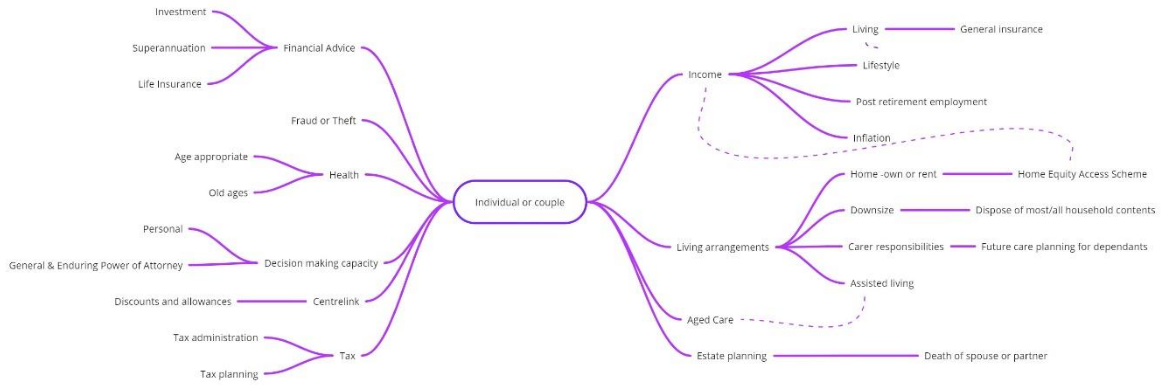
Inconsistent retirement policy settings

There are four important themes for retirement – where are person lives, how they fund their living and lifestyle costs, health care and finally aged care.

Higher health and aged care costs typically arise later in the person's life.

On the other hand satisfying housing and living and lifestyle costs are of great concern for everyone at or near retirement. And these remain of great concern throughout retirement.

We represent the labyrinth of decision making for a retiree in the following diagram:



As we have said in a previous Treasury submission:

> The Retirement Income Review found that those who own their own home have a higher standard of living in retirement than those who rent[14]. There are a number of reasons for this including the tax concessions that attach to home ownership including for many bequests, the exclusion of the family home from age and service pension assets tests and aged care assessment tests and also the lower ongoing housing costs homeowners often incur compared to retiree renters. These concessions apply to all Australians regardless of their circumstances.[15]

The explanatory memorandum for the BTSC and Other Measures Bill states that the purpose of these amendments is to "ensure generous tax breaks are better targeted". As we have previously stated to Treasury:

> Given one important retirement element (homeownership) is treated in the same way for all individuals, regardless of their circumstances, why must different rules apply to superannuation so that its tax concessions must be "targeted at where they are needed most"?[16]

We are not suggesting that the current policy settings applying to the family home should be changed. But the need for consistency in these equally important retirement policy areas should be obvious.

Simple solutions are at hand

Whilst we do not support this policy, we believe there are a range of solutions the government could consider that provide simpler and more effective solutions:

1. Imposing an additional 15% tax on all taxable component withdrawals for those with TSB greater than $3 million

   This would bring the total tax paid on these components total tax take would be 30% (15% taxable earnings and an additional 15% on exit).

   When you view our tax system from a distance you can see that 30% tax take seems to be the ideal tax rate. The is evidenced by the following:

[14] Retirement Income Review, Treasury, July 2020, p. 31
[15] https://www.charteredaccountantsanz.com/news-and-analysis/advocacy/policy-submissions/submission-on-legislating-the-objective-of-superannuation
[16] ibid

- From 1 July 2024, approximately 45% of individual taxpayers will have a marginal tax rate of 30%[17]
- Larger corporate taxpayers have a 30% tax rate (and large *resident* companies can pass on franking credits calculated by reference to the 30% rate)[18]
- Many untaxed lump sum superannuation benefits – typically paid via unfunded government superannuation schemes – are taxed at 30%[19]
- The current government proposed in 2017 to tax certain trust distributions at 30%[20] (we note that this policy did not form part of the government's 2022 election policies)

Under income tax law those with Total Superannuation Balances (TSB) above $3 million will be paying 15% on all assets other than those in a retirement phase pension. Those without a retirement phase pension will be paying 15% tax on earnings for their whole superannuation benefit.

We note that all earnings in the accumulation phase form part of an individual's Taxable Component.

An alternative to the complex calculation methodology proposed in the BTSC and Other Measures Bill would be to tax the proportion of the Taxable Component of any lump sum benefit above $3 million at 15% for lump sum withdrawals. (Proportionality could be calculated using a methodology similar to that in the BTSC and Other Measures Bill in proposed section 296-35.) This will mean that total tax paid on the Taxable Component will be 30% - 15% from fund earnings tax and 15% upon exit from the superannuation system.

Pension income payments should remain exempt from tax.

This is a much simpler solution.

In our view this new tax should be applied on all lump sum withdrawals except for those who have ever been in receipt of structured settlement contributions or personal injury benefits[21] or are receiving or have received permanent incapacity benefits. This would mean that the tax would apply proportionately as already explained to lump sums paid to individuals of all ages including those aged at least 60, all lump sum death benefits, terminal illness benefits and lump sums above the tax-free low rate cap for those aged under 60. However lump sum death benefits paid to non-dependants would not face an additional 15% tax on top of the 15% tax that already applies to *all* of the Taxable Component paid out for these types of benefit payments (not just the proportion above $3 million as proposed above).

There are a number of other design issues that would need to be worked through with this policy and we would be happy to speak to Treasury about them.

2. Refund capital losses – in a recent survey of our members[22] found that 70 per cent of our members did not approve of the carried forward nature of the current policy. Below we show some results of a model we built to test the incidence of this tax. When we allow capital losses to be refundable then we find that over time it produces more revenue for the government also produces a better outcome for the superannuation member.

   Permitting losses to be carried forward would likely mean that the collection mechanism for this tax

[17] https://www.pm.gov.au/media/tax-cuts-help-australians-cost-living and https://www.ato.gov.au/about-ato/research-and-statistics/in-detail/taxation-statistics/taxation-statistics-2020-21/statistics/individuals-statistics?anchor=IndividualsStatistics#Chart6Individuals
[18] https://www.ato.gov.au/Rates/Changes-to-company-tax-rates/
[19] https://www.ato.gov.au/rates/key-superannuation-rates-and-thresholds/?page=4#Superlumpsumtaxtable
[20] https://www.afr.com/politics/labor-to-raise-41b-from-taxing-discretionary-trust-distributions-at-30pc-20170730-gxlk7g
[21] Refer to Sec 292-95 of the *Income Tax Assessment Act 1997* (ITAA97)
[22] https://www.charteredaccountantsanz.com/news-and-analysis/media-centre/press-releases/experts-agree-tax-reform-must-be-a-priority

measure would have to change. We suggest the best approach would be to always have superannuation funds pay the tax (superannuation fund trustees must act fairly and reasonably between various member interests when performing their duties) and the refund should return to the superannuation fund (administrative mechanisms are currently in place to enable the efficient completion of these types of transactions).

3. Deemed earnings – apply a deemed earning rate for superannuation fund earnings with the deemed earning rate determined by the Australian Government Actuary and applying to earnings on revenue account only. We believe a suitable rate would be Reserve Bank of Australia's 90 day bill rate. Our modelling shows that the Shortfall Interest Charge[23] and General Interest Charge[24] rates to be excessive.

4. Forcing those with a TSB above a specific threshold – say $10 million – to compulsorily withdraw their monies from superannuation. Such a policy could not apply to anyone in receipt of structured settlement contributions, personal injury orders or total and permanent disablement benefits.

   In effect those who have account balances of more than $10 million would be required to withdraw that money from the superannuation system. They should be required to do this over a three year period or longer if the ATO approves. Any benefits should be tax-free to the recipient and Capital Gains Tax should not have to be paid by the superannuation fund when disposing of an asset in order to make this benefit payment.

   There are other policy issues that would need to be thought about in relation to this policy proposal. For example, there is an argument for saying that those already with a high superannuation balance should be quarantined from a compulsory withdrawal requirement.

   And if such a policy were to be introduced it should only take effect after a reasonable transition period.

   We would be happy to talk to Treasury about this policy.

5. Apply a consistent tax rate in superannuation for both accumulation and pension monies. This policy was first proposed by the Australia's Future Tax System Review[25].

Specific Comments Concerning the BTSC and Other Measures Bill

Total Superannuation Balance (TSB)

A person will potentially be liable for the proposed additional superannuation tax if their TSB is at least $3 million on 30 June 2026 and for later financial years.

Indexation of $3 million threshold

The BTSC and Other Measures Bill contains no mechanism for the $3 million TSB threshold to be indexed.

We note that the *adjusted taxable income* threshold for the 30% higher superannuation contribution tax is $250,000 and is also not indexed[26]. And the income thresholds for personal income tax are also not indexed.

Adjustments to all these thresholds, both increases and decreases, effectively become the policy of a government at any point in time.

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[23] https://www.ato.gov.au/tax-rates-and-codes/shortfall-interest-charge-rates
[24] https://www.ato.gov.au/tax-rates-and-codes/general-interest-charge-rates
[25] https://treasury.gov.au/review/the-australias-future-tax-system-review/final-report
[26] Refer Division 293 of the ITAA97

For many years most superannuation thresholds have been indexed – typically they have been indexed by annual positive movements average weekly ordinary time earnings. With effect from 2017 the government elected to index the General Transfer Balance Cap by the consumer price index[27].

Below we provide examples that demonstrates why not indexing the $3 million threshold is unfair.

Consequently, we believe that to ensure simplicity in the superannuation system the government should index the $3 million threshold by positive movements in the average weekly ordinary time earnings. A similar change should be made to the $250,000 higher superannuation contributions tax threshold as well as the General Transfer Balance Cap.

Permitting those not retired to withdraw large account balances from superannuation

We note that this policy will apply to all individuals with a TSB of at least $3 million including those who have not retired and have not met a relevant Condition of Release[28] such as reaching preservation age and being permanently retired or being aged at least 65.

As noted above we believe those with larger superannuation account balances are typically older and fully retired. However, there will currently be a small cohort of individuals who are yet to retire who have a TSB of at least $3 million who are not in receipt of structured settlement or personal injury order contributions or total and permanent disablement benefits. It is our expectation that many of the individuals who fall into this category achieved their larger TSB via higher investment returns over an extended period of time.

These individuals, and other individuals in a similar position in future, should be given permission to withdraw their superannuation balance so that their TSB falls below $3 million over a 12 month period, or longer if the ATO approves. Such withdrawals should be tax-free and a super fund should not incur Capital Gains Tax when it disposes of any assets in order to make this benefit payment.

It has been said that such withdrawals may not be permitted because of the constitutional powers used to regulate superannuation.

The constitutional powers that regulate superannuation were explained in the following way when the then government announced its intention to increase the regulatory oversight of the superannuation sector:

> … as a condition of a superannuation fund … receiving taxation concessions, it must have a responsible entity, generally the trustee(s), and:
>
> - the responsible entity must be a corporation within the meaning of the Constitution s51(xx); or
> - the concessionally taxed scheme must have as its substantial or dominant purpose, the provision of old-age pensions within the meaning of the Constitution s51 (xxiii)[29]

In other words, since the *Superannuation Industry (Supervision) Act* and related legislation was put in place the Commonwealth Government's ability to regulate superannuation has relied on a mixture of the taxation, corporations and old age pensions powers. The corporations power is used to regulate corporate trustees and the old age pension power is used to regulate super funds with individual trustees.

A solution to the reliance on the old age pensions power might be to restrict withdrawals from superannuation before retirement to those funds with a corporate trustee. We believe those funds

[27] Refer Sec 294-35 of the ITAA97
[28] Refer Part 6 of the *Superannuation Industry (Supervision) Regulations*
[29] Strengthening Super Security – New Prudential Arrangements for Superannuation, Commonwealth Government, October 1992

wishing to access this concession that have individual trustees will seek to change their trustee arrangements. The government should put in place mechanisms to facilitate such a change.

Legacy pensions and related reserves

In the 2021 Federal Budget the then government proposed allowing those in so called "legacy pensions" to cease or be converted to an account based pension[30].

We strongly encourage the government to implement this policy as soon as possible especially if it intends to proceed with the policy contained in the BTSC and Other Measures Bill. As explained below we believe this will reduce complexity in the system and will assist in making the BTSC and Other Measures Bill proposed policy simpler to administer and reduce unintended consequences.

The policy should be permitted for all of these types of pensions paid in any type of superannuation fund.

Earnings formula

Earnings for this new tax measure are calculated as follows:

Adjusted TSB (current year) less TSB (previous year)

Where the Adjusted TSB (current year) allows for the following items:

- Withdrawals – these will be added to the current TSB.

  Withdrawals will include most amounts removed from superannuation including all amounts taken as lump sums and pension income payments. This will effectively see these benefit payments effectively taxed whereas at present they are received tax-free for most individuals.

  We believe such payments for those aged at least 60 should not be subject to this new tax regime.

  The BTSC and Other Measures Bill also includes all release authorities[31] as withdrawals including those amounts withdrawn to pay excess contributions tax. We believe these should be exempt.

  We are pleased that rollover superannuation benefits, payments from many disability insurance policies amounts due to fraud or dishonesty and unclaimed superannuation benefits have been specifically excluded.

- Contributions

  All contributions, net of contributions tax if relevant, will then be removed from the TSB formula.

Items sufficiently clear in the BTSC and Other Measures Bill

We believe the following items have been sufficiently clarified in the BTSC and Other Measures Bill:

- Structured settlement and personal injury contributions
- Death benefits – however a technical amendment should be proposed for Sec 296-30 in the BTSC and Other Measures Bill; the current wording does not cater for those who die on 30 June in a financial year
- Limited Recourse Borrowing Arrangements
- Amounts from reserves

[30] https://archive.budget.gov.au/2021-22/bp2/download/bp2_2021-22.pdf - see page 27
[31] https://www.ato.gov.au/super/apra-regulated-funds/managing-member-benefits/release-authorities/

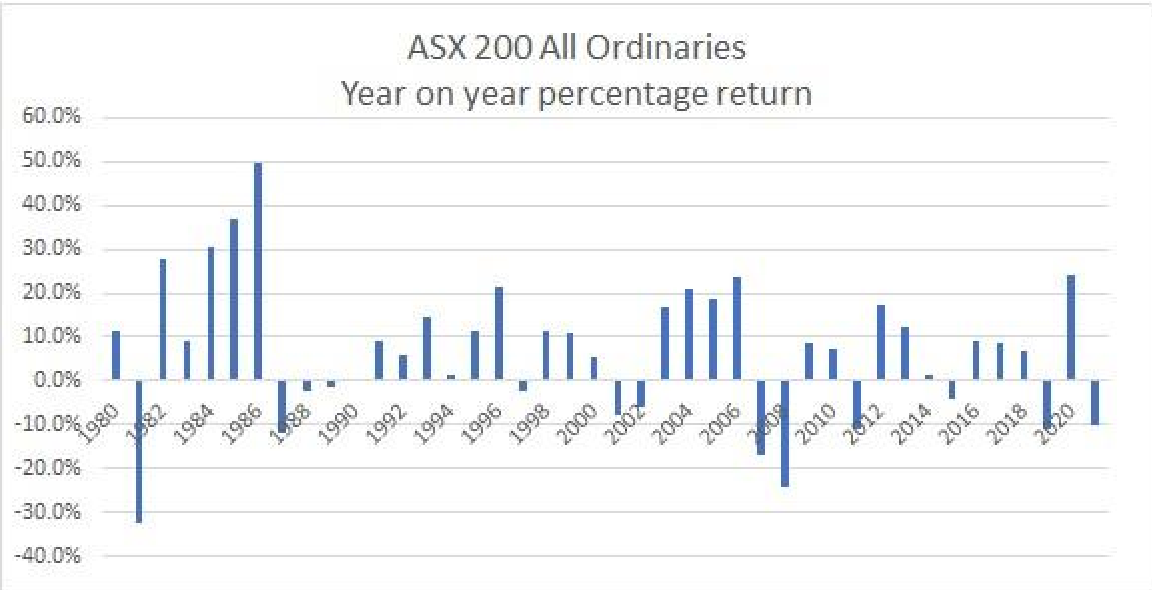
- Foreign superannuation funds
- Fraud, dishonesty, bankruptcy and compensation payments

Unrealised Gains

By its very definition the TSB includes the net market value of the underlying assets of an individual's superannuation account.

The earnings formula measures an individual's superannuation fund earnings by taking that person's TSB at two discreet points in time. This means that changes in the net market value of assets will be included even if these assets have not been disposed of.

Market values fluctuate from one year to the next. For example, the ASX 200 All Ordinaries Index has produced the following market value fluctuations between 1980 and 2022 (42 years):



It shows that in 13 years the market fell from one year to the next. That is, in 30 per cent of cases.

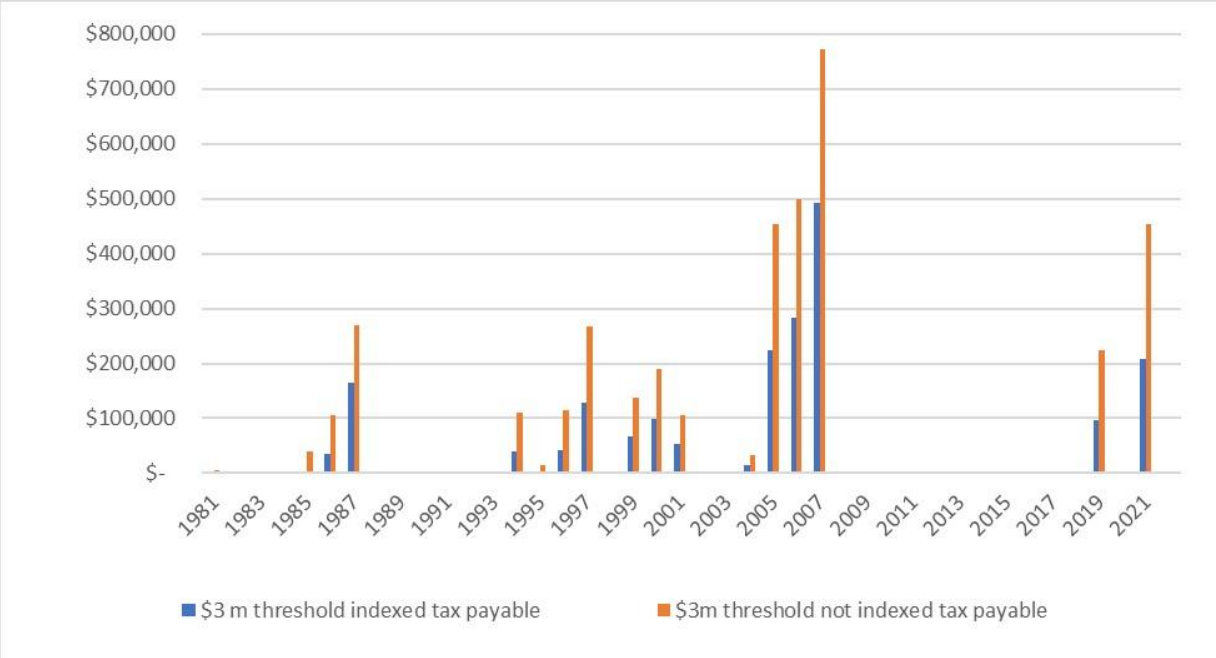
As a result we do not support the proposal to tax unrealised gains.

We have modelled $3 million invested for this 42 year period of time. We have assumed the fund has earned no other income, received no contributions, incurred no expenses or taxes and had no withdrawals. The results are in Attachment One to this submission.

From this example, we see that total net change in market value – under this policy deemed to be assessable income – is $27.8 million (including gains and losses when the balance was less than $3 million) with $3.8 million in tax paid under this proposed measure. This equates to a tax rate of 13.65%.

However if the $3 million threshold is indexed by movements in Average Weekly Earnings at the end of each financial year using data on the ATO website[32] then $1.95 million in tax is paid. The equates to a tax rate of 6.89%. We note that under this concept the $3 million threshold would have increased to $20.7 million over the 42 year period.

The timing of tax payments is shown in the following graph:



We strongly encourage the government to reverse this policy announcement and index the $3 million threshold by average weekly ordinary time earnings.

Early Stage Investor Incentives

The inclusion of unrealised gains has the potential to eliminate or make redundant the tax concessions for early stage investors[33]. We consider this to be a retrograde step. Any unrealised or realised gains from such investments should be specifically exempt from this new tax measure.

Carried forward losses

The policy provides that market value losses can be carried forward indefinitely.

If the government intends to tax unrealised gains then for consistency it should also provide a tax refund for unrealised losses.

It is possible for assets to increase considerably in value and then to fall sharply – as is demonstrated in the data in Attachment One.

Under the current policy design some investors may have to pay this additional tax because of large

[32] https://www.ato.gov.au/rates/key-superannuation-rates-and-thresholds/?anchor=AverageweeklyordinarytimeearningsAWOTE#AverageweeklyordinarytimeearningsAWOTE
[33] https://www.ato.gov.au/Business/Tax-incentives-for-innovation/

market value increases only to find that they then receive a carried forward loss when the value of the underlying asset falls but never recovers to its previous level.

A good recent example is the listed business Afterpay which was formerly listed on the Australian Stock Exchange. It was initially floated for $1 per share during its initial public offering. At one point it traded for over $160 per share and was purchased by another entity for $66.47 per share.

A superannuation fund that purchased $20,000 of these shares would have seen their market value increase to over $3.2 million only to see it fall to just over $1.3 million.

In these cases the carried forward losses may never be able to be used yet this new tax may have been payable.

In our above table the difference between losses and gains over the 42 years is a market gain of $27.8 million with this new tax being payable in 16 of the 42 years.

That is, the tax payments occur in lumpy periods. Over this period, the median amount of the tax payable was over $210,000 and the median was over $126,000.

Overall this makes retirement planning extremely difficult.

Consequently we believe this proposed tax is not simple to understand, to plan for or to implement.

Additional superannuation fund reporting

Based on the elements that will be used to calculate the tax liability for this measure, there will need to be changes to the reporting that superannuation funds must send to the ATO. From a practical perspective it would be better for superannuation funds to only have to provide this information for those who are impacted. However this may not be possible for privacy reasons. As a result we believe that changes will have to be made for all superannuation fund reporting to the ATO. This is a less than ideal solution given the additional implementation costs that funds will incur.

Paying the new tax liability

We expect that some superannuation funds, and individuals, may struggle to pay the tax liability as their fund may lack sufficient cash flow. This may arise when the market value of an asset increases unexpectedly compared to the income that the asset typically earns.

This is likely to arise with different types of real estate especially commercial, retail and rural properties. Many small to medium enterprises – for example, farmers, tradesmen and women, pharmacists, medical doctors and surgeons – hold their business premises in a superannuation fund or related entity under the long-standing business real property exception to the in-house asset rules in the superannuation law. This will have a large impact on this critical sector of the economy and is an **unacceptable** outcome.

But as seen in our example it can also occur with broadly held listed Australian companies.

We note that the intention is to permit the assessed tax payable under this proposed policy to be paid by an individual member or their super fund(s) by making amendments to Division 131 of the *Taxation Administration Act 1953* (TAA) and introducing Division 134 into the TAA.

We suggest that the ATO should be given sufficient flexibility to permit individuals and superannuation funds time to pay their liability under this proposed policy over a period of time.

More than 50% of the total tax payable in the case study used in this submission are payable in only four financial years. That is, it is highly likely that the tax will be payable in larger amounts.

The correlation between the value of assets and the tax payable is 0.298. This indicates that the amount of tax payable bears low reference to account balance movements.

Even when our example is expanded to assume that dividends and related franking credits after all tax impacts have been considered are reinvested, we find that more than 60% is payable in 7 financial years with a correlation of 0.301 – a small improvement on the non-indexed option mentioned above.

There is a need for the tax debt to be waived in “special circumstances” so as to avoid minor breaches leading to disproportionate outcomes.

Attachment One

Financial Year End	ASX 200 All Ordinaries Index	Percentage change (%)	Example change in Total Superannuation Balance	"Earnings"	Profit/Carried fwd losses	Proportion of earnings subject to tax	Amount of Tax
1980	629		3,000,000				
1981	700	11.3%	3,338,633	338,633	338,633	0.1014	5,152
1982	473	-32.4%	2,255,962				
1983	605	27.9%	2,885,533				
1984	659	8.9%	3,143,084	143,084	143,084	0.0455	977
1985	861	30.7%	4,106,518	963,434	963,434	0.2695	38,940
1986	1,180	37.0%	5,627,981	1,521,463	1,521,463	0.4669	106,567
1987	1,764	49.5%	8,413,355	2,785,374	2,785,374	0.6434	268,826
1988	1,555	-11.8%	7,416,534	- 996,820			
1989	1,521	-2.2%	7,254,372	- 162,162			
1990	1,500	-1.4%	7,154,213	- 100,159			
1991	1,506	0.4%	7,182,830	28,617	-1,230,525		
1992	1,644	9.2%	7,841,017	658,188	-572,337		
1993	1,738	5.7%	8,289,348	448,331	-124,006		
1994	1,989	14.4%	9,486,486	1,197,138	1,073,132	0.6838	110,065
1995	2,017	1.4%	9,620,032	133,545	133,545	0.6882	13,785
1996	2,242	11.2%	10,693,164	1,073,132	1,073,132	0.7194	115,809
1997	2,726	21.6%	13,001,590	2,308,426	2,308,426	0.7693	266,367
1998	2,668	-2.1%	12,724,960	- 276,630	-276,630		
1999	2,969	11.3%	14,160,572	1,435,612	1,158,983	0.7881	137,017
2000	3,298	11.1%	15,729,730	1,569,157	1,569,157	0.8093	190,483
2001	3,478	5.5%	16,588,235	858,506	858,506	0.8191	105,487
2002	3,209	-7.7%	15,305,246	- 1,282,989			
2003	3,024	-5.8%	14,422,893	- 882,353	-2,165,342		
2004	3,534	16.9%	16,855,326	2,432,432	267,091	0.8220	32,933
2005	4,277	21.0%	20,399,046	3,543,720	3,543,720	0.8529	453,384
2006	5,073	18.6%	24,195,548	3,796,502	3,796,502	0.8760	498,866
2007	6,274	23.7%	29,923,688	5,728,140	5,728,140	0.8997	773,080
2008	5,215	-16.9%	24,872,814	- 5,050,874			
2009	3,955	-24.2%	18,863,275	- 6,009,539	-11,060,413		
2010	4,302	8.8%	20,518,283	1,655,008	-9,405,405		
2011	4,608	7.1%	21,977,742	1,459,459	-7,945,946		
2012	4,095	-11.1%	19,531,002	- 2,446,741	-10,392,687		
2013	4,803	17.3%	22,907,790	3,376,789	-7,015,898		
2014	5,396	12.3%	25,736,089	2,828,299	-4,187,599		
2015	5,459	1.2%	26,036,566	300,477	-3,887,122		
2016	5,233	-4.1%	24,958,665	- 1,077,901	-4,965,024		
2017	5,712	9.2%	27,243,243	2,284,579	-2,680,445		
2018	6,195	8.5%	29,546,900	2,303,657	-376,789		

2019	6,619	6.8%	31,569,157	2,022,258	1,645,469	0.9050	223,365
2020	5,898	-10.9%	28,130,366	- 3,438,792	-3,438,792		
2021	7,313	24.0%	34,879,173	6,748,808	3,310,016	0.9140	453,798
2022	6,568	-10.2%	31,325,914	- 3,553,259	-3,553,259		

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