AIST submission

Response to House Standing Committee on Economics: Inquiry into the Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012

March 2012

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Australian Institute of Superannuation Trustees

Background

On Thursday, 1st March 2012 the *Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012* ("the Bill") was introduced and read in the House of Representatives. The Selection Committee referred the Bill to the House Standing Committee on Economics.

AIST will be commenting on Schedules 3, 4, 5 and 6 of the Bill and has made previous submissions to Treasury on the respective Exposure Drafts and Explanatory Memoranda.

AIST

The Australian Institute of Superannuation Trustees (AIST) is an independent, not-for-profit professional body whose mission is to protect the interests of Australia's $450 billion not-for-profit superannuation sector. AIST's members are the trustee directors and staff of industry, corporate and public-sector superannuation funds, who manage the superannuation accounts of two-thirds of the Australian workforce.

AIST is a registered training organisation and has recently expanded its education program to encompass the growing and changing needs of all members of the not-for-profit superannuation sector.

AIST offers a range of services including compliance and consulting services, events - both national and international - as well as member support. AIST also advocates on behalf of its members to relevant stakeholders.

AIST's services are designed to support members in their endeavour to improve the superannuation system and build a better retirement for all Australians.

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Note to this submission

This Bill amends various acts. Unless otherwise indicated, please note that all section and subsection numbers referred to throughout this submission refer to those used to number the proposed new or amended sections of the *Income Tax Assessment Act 1997* ("the Act", ITAA97) and not those of the bills themselves.

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1 Executive Summary

AIST broadly supports these proposals, with some proposed modifications.

Our submission relates specifically to Schedules 3, 4, 5 and 6 of the Bill. AIST will not be commenting on the remaining measures contained in the Bill.

AIST does not agree with the pausing of the concessional contributions cap, however, we understand the current fiscal constraints being experienced by the Government;

With regards to the refund of excess concessional contributions:

- We propose the introduction of a 'Bring Forward Rule' for concessional contributions similar to non-concessional contributions;
- We support the notion that an inadvertent breach of the concessional contributions cap of less than $10,000 be made refundable, but with some minor changes;
- We believe that this offer should be made on an ongoing basis; and
- If this measure is adopted as a 'one-off' offer, we believe that taxpayers should be given the choice as to when to take up the offer.

Disclosure of superannuation information is an important element in the implementation of SuperStream:

- The list of prescribed entities should be limited to regulated superannuation funds, public sector superannuation schemes, ADFs and RSA providers;
- Other entities (such as administrators) should be authorised to receive this information when they are acting as agents of a prescribed recipient;
- Providing information to a beneficiary about their superannuation interests should be the primary purpose for the disclosure of superannuation information;
- Tax file numbers should be explicitly excluded from the list of permitted superannuation information that can be disclosed;
- "Superannuation information" should be consistently defined at a regulatory, as well as a process level;
- There should be controls on the use of disclosed information to ensure that it is used in the best interests of members, and is in the public interest and;
- Where superannuation funds approach members to encourage consolidation, this should be in the form of directed disclosure requirements on such matters as fees and insurance.

AIST supports payslip reporting and our key recommendation is that the EM be amended to note forthcoming Regulations to require the reporting of actual contributions paid from 1 July 2013 (subject to there being no significant payroll costs at that time). This is consistent with the Government's policy announcement of September 2011 in the Stronger Super information pack.

AIST supports all other measures proposed in schedules 3, 4, 5 and 6

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2 Recommendations

2.1 Schedule 3 – Indexation of superannuation concessional contributions cap

Schedule 3 pauses the indexation of the superannuation concessional contributions cap for one year (2013-14) and takes affect from 1 July 2013. It was announced in the MYEFO and is estimated to result in a saving of $485M over the forward estimates period. It was expected that indexation would increase the general concessional contributions cap from $25,000 to $30,000 in 2013-14. This now means that the cap is now not expected to increase to $30,000 until 2014-15.

Furthermore, the increase in the higher concessional contributions cap for individuals aged 50 and over, and the non-concessional contributions cap will also effectively be paused in 2013-14.

Although AIST does not agree with the pausing of the concessional contributions cap, it understands the current fiscal constraints being experienced by the Government.

AIST recommends that indexation not be reset for the standard concessional contribution cap, as it has been in place for a number of years and resetting the indexation would disregard the accumulated increases in AWOTE. It is noted the concessional cap has not been indexed since it was initially introduced in 2007.

2.2 Schedule 4 – Refund of excess concessional contributions

AIST has previously made submissions that recommend an alternative solution to the proposed measure:

- AIST Submission: Response to Consultation Paper: Refund of Excess Concessional Contributions (August 2011)[1]; and
- AIST Submission: Response to Treasury: Concessional Superannuation Contribution Caps for Individuals Aged 50 and over (March 2011)[2].

In both responses, we recommended that the current Bring Forward Rule for non-concessional contributions be similarly applied to concessional contributions. This equates to people under the age of 65 being able to bring forward two (2) years worth of entitlements of concessional contributions allowing them to contribute a greater amount in a given financial year (i.e. $150,000 for a person aged between 50 and 65).

The benefit of applying this rule is that it will dramatically reduce the number of Australians breaching the caps and being charged excess contributions tax.

This rule would provide greater flexibility around the concessional contribution limits and mean that those who breach their caps (inadvertently or otherwise) would avoid being penalised, assuming they limit their contributions to the maximum amount over the next two (2) years and may exclude them from any indexed increases in the cap during this time. This means that once a person has triggered the bring-forward in a

[1] *Op. Cit.*

[2] http://tinyurl.com/3c4fy8o

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year, any indexation of the concessional contributions cap for the subsequent two years does not apply. This rule would effectively give qualifying people more time (an additional two years) to adjust their contributions before any penalties for breaching concessional caps would apply.

Notwithstanding our preference for a Bring Forward Rule for concessional contributions, AIST broadly supports the measure and support the changes made from the August 2011 Consultation Paper. However, we remain concerned about the 'one-off' offering of the refund and that the cut off amount of $10,000 is not indexed.

As a further improvement of the measure, AIST recommends that the refund option be offered on an ongoing basis.

2.2.1 Proposed section 292-467: Refunded excess concessional contributions

AIST supports the idea that the taxpayer retains an ability to choose when to utilise the refund and is not effectively penalised if they choose not to accept the refund. That is, it will continue to be available for each applicable tax year until the taxpayer chooses to accept the offer.

AIST's proposed change to paragraph 4.26 of the EM would be as follows:

> *Once an individual has <u>accepted an offer by the Commissioner</u> in any financial year from 2011-12, they are no longer eligible for the refund option in any subsequent year.*

2.2.2 Proposed section 292-468: Variations etc of refunded excess concessional contributions determinations

Paragraph 4.44 states:

> *If the correct amount of excess concessional contributions is greater than $10,000, the revocation of the determination will mean the Commissioner can make an ECT assessment for the correct amount. Further, the individual will not be eligible for the refund in any subsequent year.*

This means that if a taxpayer makes excess contributions over the $10,000 limit then they also lose their "one-off" refund opportunity. AIST acknowledges that position is consistent with the August 2011 Consultation paper (section 17.2); however we reiterate that this removes any taxpayer choice and consider it to be unnecessarily draconian. We have provided more information below.

AIST proposes that the subsection be altered along the lines of:

> *...However, the individual will remain eligible for the refund in any subsequent year based on compliance with 292-467 (1).*

2.2.3 Concerns related to the on-off nature of this payment

Notwithstanding the above, we wish to draw your attention to the fact that breaches can occur in any tax year, and we do not consider it to be good policy to disallow future offers to be made to taxpayers on the basis of prior real breaches of the concessional contributions cap. It is our preferred outcome that if offers of refunds are to be made, then this must continue into the future and must be made available for all applicable tax years, not just the first one.

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2.2.4 Status of breaches due to late or mandated contributions

Consistent with our views below, we recommend that allowance should not be made for the return of amounts that are in breach of the cap purely because of late payment, and particularly where these late payments are mandated concessional contributions. Whilst we're aware that this is outside the scope of this submission, we believe that this situation should be raised as an example of an unintended consequence of contribution caps and exempted.

The primary historical reason for superannuation is as a form of 'forced retirement savings'. The reason for the existence of the superannuation guarantee, and over-SG award requirements, is to ensure that money that would otherwise be received by a taxpayer as cash is mandatorily diverted into superannuation. That is, the taxpayer has no option to receive these amounts as cash.

As identified earlier, certain types of concessional contribution exist where one has the option to receive cash in lieu of the contribution being made, however this would not be the case for any form of late payment, nor would it be the case for mandated concessional contributions. SG and over-SG award contributions would not ordinarily be exchangeable for cash payments, and it is clear that even a one-off return of these contributions is contradictory to the intended mandatory nature of these payments.

To put this another way: We believe that allowing access to these monies is in breach of the intention of the sole purpose test and should not be allowed. Furthermore, we believe that it opens the system up to a potential rort.

2.3 Schedule 5 – Disclosure of superannuation information

This legislation will permit an eligible tax officer to disclose superannuation information to prescribed entities for prescribed purposes in permitted circumstances.

2.3.1 Prescribed entity

The list of prescribed entities authorised to receive superannuation information from the ATO should be limited to regulated superannuation funds, public sector superannuation schemes, ADFs and RSA providers.

It is AIST's view that this legislation is not consistent with the SuperStream legislation in its treatment of entities that provide administration services for superannuation entities. In the SuperStream legislation, superannuation entities and employers are required to comply with superannuation data and payment matter obligations. Administrators and other entities involved in the superannuation system are not subject to these obligations *per se*, as their involvement is limited to circumstances where they are acting as agents for superannuation entities.

The approach taken by the Government in its response to the report of the Super System Review (the Cooper Review) was to reject the Review's recommendation for the registration of administrators by APRA on the grounds that it would diminish the ultimate responsibility of superannuation trustees for the operation of their fund.

It is submitted that this approach should be followed in this legislation. That is, administrators (in their own right) should be deleted from the list of approved recipients. This will ensure that that the ultimate responsibility for compliance with this measure rests with the ATO and superannuation entities, and not with an unregulated third party.

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If this recommendation is accepted, administrators and other entities acting as agents for superannuation entities will be able to receive disclosed superannuation information when they are acting as agents. Superannuation entities may also contract other third party entities for the purposes of assisting beneficiaries in a manner consistent with the prescribed purposes, and they would also be able to receive information from an eligible tax officer when they acting as agents for a superannuation entity.

2.3.2 Eligible purpose

In the first instance, a beneficiary may simply want to know about some or all of the superannuation interests to which they are entitled. Making and acting on a choice are decisions made once they have been informed.

Therefore, it is submitted that purpose (c) of the proposed addition to schedule 1 of proposed subsection 365-65(3) in of this legislation be renumbered as purpose (a), and that the other purposes be renumbered accordingly.

2.3.3 Superannuation information

Neither this legislation nor the *Superannuation Industry (Supervision) Act 1993* ("the SIS Act") defines superannuation information. Therefore, on the face of it, all protected information held by the ATO in relation to the superannuation interests of a beneficiary may be released pursuant to this legislation.

Unless tax file numbers are excluded from eligible superannuation information, this appears to be in conflict with TFN law and the National Privacy Principles. To avoid any doubt about this, this legislation should explicitly identify that the tax file number of a beneficiary is not superannuation information to be released pursuant to this legislation.

It is noted that while TFN is identified as an abbreviation "used throughout this explanatory memorandum", in fact, it is not used at all.

The legislation should define superannuation information, or alternately provide an exhaustive list of the protected information that may be disclosed. Various prescribed processes prescribe superannuation information required for those processes (e.g., MCS reporting), but for some processes (e.g., rollover requests) additional information is, not necessarily correctly, required.

Throughout the Stronger Super implementation process, the standardisation of requirements should be a key consideration. In this case, this recommendation is made in the light of activities being undertaken by the SuperStream Working Group and the ATO to introduce consistent data formats, streamline transactions by removing unnecessary data items, and likely changes in the reporting responsibility in the MCS. There should be consistency between "superannuation information" provided by the ATO, and "superannuation information" provided to the ATO.

The superannuation information provided by the ATO should include information obtained through the Member Identity Validation Service.

2.3.4 Use of disclosed information

This legislation will allow superannuation funds to use SuperMatch "*to obtain information about all their members' superannuation interests that are known to the ATO*", that is, a major extension to the existing scope of SuperMatch.

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This is supported by AIST as one of a package of measures announced by the Government to encourage superannuation account consolidation. However, the extension of SuperMatch beyond lost accounts and amounts held by the ATO qualitatively changes the nature of the exercise. Where the exercise is limited to lost accounts and ATO monies, the primary impact of consolidation in most cases is to reduce account-keeping fees paid by a member, or to transfer monies to an account where it can earn interest.

The extension of SuperMatch to cover all superannuation interests means that there are additional risks faced by a member to be considered together with the undoubted benefits of consolidation. In being asked to transfer their superannuation interests to another fund, a member should be made aware of the net returns, level of risk and insurance provided by the fund they are transferring to.

Even though they are already a member of the receiving fund, they may not have previously compared the respective benefits of the superannuation funds they belong to. These require appropriate levels of additional consumer protection.

AIST recommends that this legislation require directed disclosure of prescribed information in a prescribed format. The absence of such requirements may allow some predatory behaviour that is not in the best interests of members.

Further, the regulations should state that the interrogation of information received from the ATO (including aggregated data) beyond reporting on activity and the efficacy of the measure to achieve consolidations should be prohibited.

At the very least, the disclosure of information under this exemption must, in every instance, ensure that the disclosure fits the threshold requirement of being used solely to enable members to find and consolidate their superannuation interests.

The regulations should also provide for reports to Government on the efficacy of the measure to achieve consolidations, and whether the circumstances and use of disclosed information was appropriate, and operating in the public interest.

2.3.5 Implementation of legislation

This legislation is one of a number of measures proposed by the Government to encourage account consolidation. The regulations and consequent processes associated with this measure will need to ensure that it is implemented in a way that facilitates, rather than negatively impacts, on other account consolidation measures. For example, the operation of these measures around the time of scheduled large scale auto-consolidation will have to be carefully managed to ensure member confusion is minimised.

2.4 Schedule 6 – Giving information about superannuation contributions

2.4.1 Payslip information to be provided

This proposed requirement for payslip reporting of superannuation entitlements has been included as an element in the implementation of the SuperStream measures considered by the SuperStream Working Group.

This legislation creates a broad requirement to include superannuation information on payslips, with the detail of these requirements to be provided in regulations.

AIST supports the application of these requirements to all salary-related superannuation contributions.

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On the face of it, the requirement to give information in proposed subsection 336JA(2) of the SIS Act is very broad, and is in no way qualified. Subsection 336JA(2)(b) states that this information will be prescribed by the regulations but does not necessarily require that the requirements will be qualified or limited by regulation.

The Explanatory Memorandum states in paragraph 6.5 that regulations will be made requiring employers to report the date on which they *expect to make* their contribution.

This is consistent with *part* of the Government policy announcements on payslip reporting.

In the Government's Stronger Super Information Pack (September 2011) it states:

> *From 1 July 2012, employers will be required to report on payslips an 'expected payment on or before' date in addition to the current entitlement during the pay period. In many cases this will be the superannuation guarantee due date, or a due date under a workplace agreement or award. In some cases, however, where they remit contributions sooner, employers may choose to disclose an earlier date.*
>
> *This will provide up-to-date information to employees on when they can expect superannuation contributions and will allow them to follow up with their superannuation fund to confirm that payments have been made by the due date*.

However, while the Explanatory Memorandum goes on to note the Government's intention of also legislating further notification requirements for superannuation funds; it does not mention the second part of the payslip reporting policy announced in the Stronger Super Information Pack. That is:

> *From 1 July 2013, subject to there being no significant payroll system costs, payslip reporting of actual contributions paid rather than just accrued contributions will commence, including the provision of information about which fund the contributions are being paid into*.

AIST's key recommendation is that the Explanatory Memorandum be amended to note forthcoming Regulations to require the reporting of *actual* contributions paid from 1 July 2013 (subject to there being no significant payroll costs at that time). This will make the Explanatory Memorandum consistent with the Government's policy announcement of September 2011 in the Stronger Super information pack.

As payroll technologies develop, there may be the opportunity to further extend payslip reporting requirements, and the Explanatory Memorandum should be further amended to note that regulations may also prescribe further and increased information requirements, as software is developed.

2.4.2 Functions of Fair Work Ombudsman

The functions of the Fair Work Ombudsman should be extended to include reporting on compliance with the proposed section 336JA of the SIS Act.

2.4.3 Regulation impact

The impact should note that both the information required from (a) 1 July 2012 and (b) 1 July 2013 will require some modification of existing payroll software, and both stages of implementation should be subject to post-implementation review.

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