



Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997

No. 185, 1997

**An Act relating to the assessment and collection of
superannuation contributions tax on members of
constitutionally protected superannuation funds,
and for related purposes**

[Assented to 7 December 1997]

The Parliament of Australia enacts:

Part 1—Preliminary

1 Short title

This Act may be cited as the *Superannuation Contributions Tax
(Members of Constitutionally Protected Superannuation Funds)
Assessment and Collection Act 1997*.

Part 1 Preliminary

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2 Commencement

This Act commences on the day on which it receives the Royal Assent.

3 Act to bind Crown

- (1) This Act binds the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory, of the Northern Territory and of Norfolk Island.
- (2) Nothing in this Act permits the Crown to be prosecuted for an offence.

4 Extension to Norfolk Island

This Act extends to Norfolk Island.

5 Object of Act

The object of this Act is to provide for the assessment and collection of the superannuation contributions surcharge payable on surchargeable contributions for high-income members of constitutionally protected superannuation funds.

6 Outline of Act

The following is a simplified outline of this Act.

- If there are surchargeable contributions for a member for the 1996-97 financial year or a later financial year, the Commissioner will calculate the member's adjusted taxable income for the financial year.
- If the amount calculated is greater than the surcharge threshold amount, the Commissioner will calculate the rate of surcharge and make an assessment, directed to the member, of surcharge payable on the contributions. Only contributions paid, or relating to a time, after 7.30 pm on 20 August 1996 are subject to surcharge.
- If the contributions are held under a defined benefits superannuation scheme, the surcharge is payable on an amount calculated by reference to a notional surchargeable contributions factor determined for the member and the member's annual salary for the purposes of the scheme.

- If, after the assessment of surcharge, the member's adjusted taxable income is found to be different from the amount that was previously calculated or the surchargeable contributions are found to be different from the amount on which the assessment was based, the Commissioner may amend the assessment.
- The member is liable to pay the surcharge on the member's surchargeable contributions for a financial year, but the surcharge is not payable until benefits become payable.
- If liability for surcharge is increased as a result of an amendment of an assessment, interest is payable on the additional surcharge.
- The provisions in the *Taxation Administration Act 1953* for objecting against assessments of income tax apply to assessments of surcharge in so far as the assessments relate to the calculation of a member's adjusted taxable income.
- A late payment penalty applies if surcharge is not paid on time.
- The Commissioner may remit interest or late payment penalty: a refusal to remit is reviewable by the Administrative Appeals Tribunal.

7 Exclusion of certain members

This Act does not apply to a person who is a member because he or she is a judge of a court of a State at the commencement of this Act.

Part 2—Liability to surcharge

8 Superannuation contributions surcharge

Financial years to which surcharge applies

- (1) Superannuation contributions surcharge is payable on a member's surchargeable contributions for the financial year that began on 1 July 1996 or a later financial year.

No surcharge is payable unless adjusted taxable income is greater than surcharge threshold

- (2) Surcharge is not payable for a financial year unless the member's adjusted taxable income for the financial year is greater than the surcharge threshold for the financial year.

No surcharge is payable by residents of external Territories

- (3) Surcharge is not payable for a financial year if the person who would be liable to pay the surcharge is a Territory resident for the purposes of Division 1A of Part III of the Income Tax Assessment Act as it applies to the year of income that comprises that financial year.

9 Surchargeable contributions

Application

- (1) This section explains what are a member's surchargeable contributions for a financial year.

- In the case of members of accumulated benefits schemes, the surchargeable contributions are calculated by reference to amounts actually paid to the superannuation providers.
- In the case of members of defined benefits schemes, the surchargeable contributions are based on their respective annual salaries multiplied by a notional factor to equate the effective increase in the values of the benefits under the schemes in the financial year to the level of contributions to equivalent accumulated benefits schemes.

When amounts are paid to superannuation (accumulated benefits) provider

- (2) If:
- (a) either of the following applies:
 - (i) any amounts are paid for or by a member to a superannuation (accumulated benefits) provider for a financial year;
 - (ii) there is an allocated surplus amount in relation to a member in respect of a financial year after the 1996-97 financial year; and
 - (b) the constitutionally protected superannuation fund is a complying superannuation fund for the purposes of the year of income comprising the financial year.
- the member's *surchargeable contributions* for the financial year are the sum of:
- (c) so much of the amounts referred to in subparagraph (a)(i) as:
 - (i) would be taxable contributions under subparagraph 274(1)(a)(i) or (b)(ii) or paragraph 274(1)(e) of the Income Tax Assessment Act if the fund were not a constitutionally protected superannuation fund; or
 - (ii) are allowed as deductions to the member under section 82AAT of that Act; or
 - (iii) subject to subsection (3), are specified roll-over amounts that constitute amounts accrued after 20 August 1996 that are eligible termination payments under paragraph (a) of the definition of *eligible termination payment* in subsection 27A(1) of that Act and are rolled over on or after 1 July 1997; and
 - (d) any allocated surplus amounts referred to in subparagraph (a)(ii).
- (3) If an eligible termination payment within the meaning of subparagraph (2)(c)(iii) has been made or is made to or for a taxpayer after 20 August 1996 and before 20 August 2001, surcharge is payable only on the part of the eligible termination payment that is worked out using the formula:

$$\frac{\text{Post-20 August 1996 period}}{\text{Total period}} \times \text{Eligible termination payment}$$

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where:

post-20 August 1996 period means the number of days in the period of the taxpayer's employment for which the eligible termination payment was made that occurred after 20 August 1996.

total period means the number of days in the period of the taxpayer's employment for which the eligible termination payment was made.

Defined benefits superannuation scheme

- (4) The *surchargeable contributions* for a financial year of a member of a defined benefits superannuation scheme are taken to be the amount worked out using the formula:

Annual salary × Notional surchargeable contributions factor

where:

annual salary means:

- (a) if paragraph (b) does not apply—the amount that is the member's annual salary for the financial year; or
- (b) if another amount is taken to be the member's annual salary for the purposes of the scheme as it applies to the member for the financial year—that other amount.

notional surchargeable contributions factor means the notional surchargeable contributions factor applying to the member for the financial year.

Transitional provision for 1996-97 financial year

- (5) For the 1996-97 financial year, a member's *surchargeable contributions* are:
- (a) if any amounts were paid for or by the member to a superannuation (accumulated benefits) provider for the financial year or there is an allocated surplus amount in relation to the member in respect of the financial year—the part of so much of those amounts that would otherwise be the member's surchargeable contributions as was paid to the provider or allocated for the member's benefit after 7.30 pm by legal time in the Australian Capital Territory on 20 August 1996; or

- (b) if the member is a member of a defined benefits superannuation scheme—so much of the amounts that would otherwise be the member's surchargeable contributions as is certified by an eligible actuary, according to Australian actuarial practice, to relate to the part of the financial year that started immediately after 7.30 pm by legal time in the Australian Capital Territory on 20 August 1996.

10 Surcharge threshold

Surcharge threshold for 1996-97 financial year

- (1) The *surcharge threshold* for the 1996-97 financial year is \$70,000.

Surcharge threshold for later financial year

- (2) The *surcharge threshold* for a later financial year is the amount calculated using the formula:

Previous surcharge threshold × Indexation factor

where:

previous surcharge threshold means the surcharge threshold for the financial year immediately before the financial year for which the surcharge threshold is being calculated.

indexation factor means the number calculated under subsections (4) and (5) for the financial year for which the surcharge threshold is being calculated.

Rounding off of amount of surcharge threshold

- (3) If an amount worked out for the purposes of subsection (2) is an amount of dollars and cents:
- (a) if the number of cents is less than 50—the amount is to be rounded down to the nearest whole dollar; or
 - (b) otherwise—the amount is to be rounded up to the nearest whole dollar.

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Indexation factor

- (4) The *indexation factor* for a financial year is the number, calculated to 3 decimal places, using the formula:

$$\frac{\text{Index number for last quarter in current March year}}{\text{Index number for last quarter in previous March year}}$$

where:

index number, for a quarter, means the estimate of full-time adult average weekly ordinary time earnings for the middle month of the quarter published by the Australian Statistician.

current March year means the period of 12 months ending on 31 March immediately before the financial year for which the surcharge threshold is being calculated.

previous March year means the period of 12 months immediately before the current March year.

Rounding up of indexation factor

- (5) If the number calculated under subsection (4) for a financial year would, if it were worked out to 4 decimal places, end with a number greater than 4, the number so calculated is increased by 0.001.

Change in index numbers

- (6) If at any time, whether before or after the commencement of this Act, the Australian Statistician has published or publishes an index number for a quarter in substitution for an index number previously published for the quarter, the publication of the later index number is to be disregarded.

Surcharge threshold to be published

- (7) The Commissioner must publish before, or as soon as practicable after, the start of the 1997-98 financial year, and before the start of each later financial year, the surcharge threshold for the financial year.

Note: For the purposes of this section, *Australian Statistician* means the Australian Statistician referred to in subsection 5(2) of the *Australian Bureau of Statistics Act 1975*.

11 Member liable to pay surcharge

The superannuation contributions surcharge on a member's surchargeable contributions for a financial year is payable by the member.

Part 3—Assessment and collection of surcharge

12 Superannuation providers to give statements

Application

- (1) This section applies in respect of every member.

Superannuation provider to give statement to Commissioner at end of financial year

- (2) Each superannuation provider must, after the end of each financial year but not later than the notification date for the financial year or such later date (if any) as the Commissioner allows, give the Commissioner, in respect of each person who, at the end of the financial year, was a member of the constitutionally protected superannuation fund of which the provider was the trustee, a statement setting out:

- (a) the member's name, the address of the member's place of residence or place of business or employment, the date of the member's birth and, if given to the provider in connection with the operation or the possible future operation of this Act, the member's tax file number; and
- (b) the particulars referred to in subsection (5); and
- (c) any other matters required by the regulations.

Superannuation provider that pays out contributed amounts to the member

- (3) If, after 7.30 pm by legal time in the Australian Capital Territory on 20 August 1996, any of the contributed amounts in relation to the member were or are paid by a superannuation provider to the member, the provider must, not later than the notification date for the financial year in which the payment was or is made or such later date (if any) as the Commissioner allows, give the Commissioner a statement setting out:
- (a) the member's name, the address of the member's place of residence or place of business or employment, the date of the member's birth and, if given to the provider in connection with the operation or the possible future operation of this Act, the member's tax file number; and

- (b) the particulars referred to in subsection (5); and
- (c) the date of the payment; and
- (d) any other information required by the regulations.

Information to be given to member

- (4) A superannuation provider who is required to give a statement to the Commissioner under subsection (2) or (3) must, not later than 12 months after the statement is given, give to the member the particulars referred to in subsection (5) that are required to be included in the statement.

Particulars to be included in statements

- (5) The particulars that are required to be given in a statement under paragraph (2)(c) or (3)(b) are the total of the contributed amounts (if any) in relation to the member for the financial year and:
 - (a) if the statement is given by a superannuation (accumulated benefits) provider:
 - (i) the total of so much of those contributed amounts as are referred to in subparagraph 9(2)(c)(i); and
 - (ii) the total of so much of those contributed amounts as are specified roll-over amounts referred to in subparagraph 9(2)(c)(iii); and
 - (iii) the total of the allocated surplus amounts referred to in paragraph 9(2)(d); or
 - (b) if the statement is given by a superannuation (defined benefits) provider—the amount, calculated under subsection 9(4), of the member’s surchargeable contributions for the financial year.

Superannuation provider to give statement to Commissioner when benefit becomes payable

- (6) If a lump sum, or a pension, becomes payable by a superannuation provider for the benefit of a member, the provider must give the Commissioner a statement setting out:
 - (a) the member’s name, the address of the member’s place of residence or place of business or employment, the date of the member’s birth and, if given to the provider in connection with the operation or the possible future operation of this Act, the member’s tax file number; and

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- (b) the date on which the lump sum or pension became payable; and
- (c) the particulars in relation to the benefits referred to in paragraph 15(6)(b); and
- (d) any other information required by the regulations.

Particulars to be included in statement under subsection (6)

- (7) The statement required to be given by a superannuation provider to the Commissioner under subsection (6) is to be given before:
 - (a) if the provider is informed by the member, on or before the tenth day of the month after the month (the *payment month*) in which the lump sum was paid or the pension began to be paid, that:
 - (i) the member had applied to the Commissioner for the issue of a tax file number; and
 - (ii) the Commissioner had neither granted nor refused the application;the end of the 14th day of the second month after the payment month; or
 - (b) otherwise—the end of the 14th day of the month after the payment month;or before the end of such further period as the Commissioner allows.

13 Giving of information in certain form

Notice stating how information to be given

- (1) The Commissioner may, by notice published in the *Gazette*, set out the way in which information to be contained in a statement under section 12 is to be given.

Date of effect of notice

- (2) The notice has effect on and after the day stated in the notice.

Superannuation provider to comply with notice

- (3) If any of the information that a superannuation provider is required to give under section 12 is kept by or on behalf of the provider by a data processing device, the provider must give the information in a way set out in the notice.

Exemption

- (4) The Commissioner may, by writing, exempt a superannuation provider from subsection (3).

Disallowable instrument

- (5) An exemption under subsection (4) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

14 Assessment of liability to pay surcharge

Commissioner to assess surcharge

- (1) For each financial year for which there are surchargeable contributions for a member, the Commissioner must:
- (a) calculate the member's adjusted taxable income; and
 - (b) if the adjusted taxable income is greater than the surcharge threshold:
 - (i) calculate the surchargeable contributions; and
 - (ii) calculate the rate of surcharge that applies to the member; and
 - (iii) make an assessment, directed to the member, of any surcharge payable.

Information to be included in an assessment

- (2) An assessment of surcharge must set out the member's adjusted taxable income for the financial year, the amount of surchargeable contributions and the amount of surcharge payable.

Copy of assessment to be given to member

- (3) When an assessment (including an amended assessment) is made, the Commissioner must give it to the member.

Nil assessment

- (4) If the Commissioner calculates that no surcharge is payable on a member's surchargeable contributions for a financial year, the calculation is taken, for the purposes of this Act other than subsection (3), to be an assessment on which a nil amount of surcharge was due and payable.

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15 When surcharge will become payable

Explanation of section

- (1) This section makes provision for the deferment of the liability of a member of a constitutionally protected superannuation fund to pay surcharge, and for interest to accrue on the deferred amount.

Accounts to be kept

- (2) The Commissioner is to keep a surcharge debt account for each member of a constitutionally protected superannuation fund.

Account to be debited for surcharge

- (3) The Commissioner is to debit the account for surcharge assessed to be payable on the member's surchargeable contributions.

Interest to be debited

- (4) If the member's account is in debit at the end of a financial year, the Commissioner is to debit the account for interest on the amount by which the account is in debit, calculated at the Treasury bond rate for the last day of the financial year for bonds with a 10 year term.

Rate of interest

- (5) The **Treasury bond rate** for the last day of a financial year for bonds with a 10 year term is:
 - (a) if any Treasury bonds with that term were issued on that day—the annual yield on those bonds; or
 - (b) otherwise—the annual yield on Treasury bonds with that term, as published by the Reserve Bank of Australia for that day.

Payment to be made when benefit becomes payable

- (6) When a lump sum, or a pension, becomes payable by a superannuation provider for the benefit of a member whose surcharge debt account is in debit, the member is liable to pay to the Commissioner the lesser of:
 - (a) the amount by which the account is in debit; or
 - (b) 15% of the employer-financed component of that part of the benefits payable to the member that accrued after 20 August 1996.

- (7) If a member becomes liable to pay an amount to the Commissioner under subsection (6), the Commissioner must give the member a notice stating that the member is liable to pay the amount. The notice must contain the date on which it is issued.
- (8) The amount is payable within 3 months after the date of issue of the notice or within such further period as the Commissioner allows and the notice is to state that the amount is so payable. Payment of the amount results in a nil balance in the account.

Surcharge debt may be reduced

- (9) The member may make payments to the Commissioner for the purpose of reducing the amount by which the surcharge debt account is in debit.

What happens if debt reduced

- (10) If a member makes a payment under subsection (9), the Commissioner is to:
 - (a) acknowledge receipt of the payment to the member; and
 - (b) credit the payment to the surcharge debt account; and
 - (c) notify the member of the revised balance of the surcharge debt account.

16 Amendment of assessment if tax file number quoted or found out after assessment

Application

- (1) This section applies if:
 - (a) an assessment of surcharge on a member's contributions for a financial year has been made; and
 - (b) the member did not, before the assessment was made, quote his or her tax file number to the Commissioner in connection with the operation or the possible future operation of this Act and the Commissioner did not know the tax file number when the assessment was made; and
 - (c) the assessed amount was more than it would have been if the member had quoted the tax file number to the Commissioner; and

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- (d) after the assessment was made:
 - (i) the member quoted the tax file number to the Commissioner in connection with the operation or the possible future operation of this Act; or
 - (ii) the Commissioner found out the tax file number.

Amendment of assessment

- (2) The Commissioner must amend the assessment to reduce the amount of surcharge to the amount that would have been payable if the Commissioner had known the tax file number when the assessment was made.

17 Amendment of assessments

Application

- (1) This section applies if, after the making of an assessment of surcharge on a member's surchargeable contributions for a financial year:
 - (a) the member's adjusted taxable income for the financial year is increased or reduced and the increase or reduction affects the member's liability to pay the surcharge; or
 - (b) the amount of the contributions is greater or less than the amount that was taken to be the amount of the contributions for the purposes of the assessment; or
 - (c) the Commissioner is required or permitted under any other provision of this Act to amend the assessment.

Additional application

- (2) This section also applies if:
 - (a) under an assessment of surcharge on a member's surchargeable contributions for a financial year, the rate of surcharge that applies to the member on particular surchargeable contributions for the financial year was assessed to be nil because paragraph 5(4)(e) of the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act 1997* applied to the member; and
 - (b) the rate of surcharge that applies to the member on those contributions for that financial year is afterwards determined to be greater than nil.

Commissioner may amend assessment

- (3) The Commissioner may amend the assessment to take account of any matter referred to in paragraph (1)(a), (b) or (c) or the matters referred to in subsection (2).

Amendment increasing surcharge

- (4) If, as a result of the amendment of the assessment, the amount of surcharge is increased:
- (a) if neither a lump sum, nor a pension, has become payable by the relevant superannuation provider for the benefit of the member—the Commissioner must debit the member's surcharge debt account for the amount of the increase; or
 - (b) otherwise—the amount of the increase is payable by the member within 3 months after the day on which the assessment is amended or within such further period as the Commissioner allows.

Amendment reducing surcharge

- (5) If, as a result of the amendment of the assessment, the amount of surcharge is reduced:
- (a) if neither a lump sum, nor a pension, has become payable by the relevant superannuation provider for the benefit of the member and the member's surcharge debt account is in debit—the Commissioner must credit the account with the amount by which the surcharge is reduced; or
 - (b) otherwise:
 - (i) the amount by which the surcharge is reduced is to be applied in reduction of any liability of the member under this Act; and
 - (ii) any amount remaining is to be repaid to the member.

18 Liability to pay interest to Commonwealth if liability increased by an amendment of an assessment

Liability to pay interest

- (1) If an amendment of an assessment increasing a member's liability to pay surcharge is made, the member must pay interest to the Commonwealth, calculated in accordance with subsection (2), on the amount of the increase.

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Calculation of interest

- (2) Interest payable by a member under subsection (1) as a result of an amended assessment of surcharge on the member's surchargeable contributions for a financial year is to be calculated:
- (a) for the period:
 - (i) starting on 15 June in the financial year; and
 - (ii) ending on the day on which the amended assessment is made; and
 - (b) at such annual rate or rates of interest as are provided for by section 214A of the Income Tax Assessment Act.

Amendment of nil assessment

- (3) If:
- (a) the Commissioner has calculated that no surcharge is payable by a member on the member's surchargeable contributions for a financial year; and
 - (b) the Commissioner afterwards makes an assessment of surcharge payable by the member on those contributions for the financial year;
- the assessment referred to in paragraph (b) is taken to be an amended assessment.

Interest less than 50 cents

- (4) If the amount of interest that would be payable under subsection (1) by a member on the member's surchargeable contributions is less than 50 cents, the interest is not payable.

Notice of interest to be given

- (5) If a member is liable to pay interest under this section, the following provisions have effect:
- (a) the Commissioner must notify the member of:
 - (i) the period for which the member is liable to pay the interest; and
 - (ii) the amount of the interest;
 - (b) if neither a lump sum, nor a pension, has become payable by the relevant superannuation provider for the benefit of the member—the Commissioner must debit the member's surchargeable debt account for the amount of the interest;

- (c) if a lump sum, or a pension, has become payable for the benefit of the member—the amount of the interest is payable by the member within one month after the day on which the member was notified of that amount.

Commissioner may remit interest

- (6) The Commissioner may remit the whole or part of any interest payable under this section.

Note: A refusal to remit interest is reviewable by the Administrative Appeals Tribunal (see section 25).

19 Tax file numbers

Commissioner may use any tax file numbers for purposes of this Act

The Commissioner may use for the purposes of this Act a tax file number that has been provided for any other purpose under a law relating to taxation or superannuation.

20 Objections against assessments

If:

- (a) an assessment of surcharge on a member's surchargeable contributions is made; and
(b) the member is dissatisfied with the assessment in so far as it is based on the calculation of the member's adjusted taxable income;

the member may object against it in respect of that calculation in the way set out in Part IVC of the *Taxation Administration Act 1953*.

Part 4—Recovery of unpaid surcharge, interest or late payment penalty

21 Penalty for non-payment of surcharge

Penalty for non-payment

- (1) If an amount of surcharge, or amount of penalty payable under a previous application of this subsection, that is payable by a person remains unpaid after the time when it became due and payable, the person is liable to pay to the Commonwealth a penalty on the unpaid amount at such annual rate or rates as are provided for interest payments by section 214A of the Income Tax Assessment Act.

When late payment penalty becomes due and payable

- (2) Late payment penalty on an amount of surcharge is due and payable on the day after the day on which the amount of surcharge became due and payable.
- (3) Late payment penalty on an amount of penalty payable under subsection (1) is due and payable on the day after the day on which that amount of penalty became due and payable.

Judgment for payment

- (4) If judgment is given by, or entered in, a court for the payment of:
 - (a) an amount of surcharge or late payment penalty; or
 - (b) an amount that includes an amount of surcharge or late payment penalty;

the amount of surcharge or late payment penalty is not taken, for the purposes of subsection (1), to have ceased to be due and payable merely because of the giving or entering of the judgment.

Commissioner's right to sue not affected

- (5) This section does not prevent the Commissioner from suing for the recovery of any unpaid surcharge or late payment penalty at any time after it becomes due and payable.

Commissioner may remit penalty

- (6) The Commissioner may remit the whole or part of an amount of late payment penalty.

Note: A refusal to remit late payment penalty is reviewable by the Administrative Appeals Tribunal (see section 25).

22 Recovery of unpaid amounts

The following may be recovered by the Commonwealth as debts due to the Commonwealth:

- (a) surcharge that is due and payable;
- (b) interest that is due and payable;
- (c) late payment penalty that is due and payable.

23 Payment of surcharge, interest or late payment penalty

Surcharge, interest and late payment penalty are payable to the Commissioner.

24 Application of payments

If:

- (a) 2 or more debts are due to the Commonwealth under this Part; and
 - (b) an amount is paid to the Commissioner on account of one or more of the debts; and
 - (c) the total amount of the debts exceeds the amount paid;
- the following provisions have effect:
- (d) the Commissioner may apply the amount paid in partial discharge of the total amount of the debts; and
 - (e) the Commonwealth may recover the balance.

25 Review of decision not to remit interest or late payment penalty

Application of section

- (1) This section applies if the Commissioner decides not to remit the whole or part of any interest or late payment penalty.

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Request to reconsider decision

- (2) The person liable to pay the interest or penalty may, within 21 days after the day on which the person receives notice of the decision, or within any further period that the Commissioner allows, request the Commissioner to reconsider the decision.

Reasons for request to be stated

- (3) The request is to set out the reasons for making it.

Commissioner to reconsider decision

- (4) On receipt of the request, the Commissioner must reconsider the decision and may confirm or revoke the decision or vary the decision in any way.

Reconsideration not completed within 21 days

- (5) If the Commissioner does not confirm, revoke or vary the decision within 21 days after the day on which the Commissioner received the request, the Commissioner is taken, at the end of that period, to have confirmed the decision.

Notice of reconsideration

- (6) If the Commissioner confirms, revokes or varies a decision within the period referred to in subsection (5), the Commissioner must tell the person the result of the reconsideration and the reasons for confirming, varying or revoking the decision, as the case may be.

Application for review of decision

- (7) Applications may be made to the Administrative Appeals Tribunal for review of decisions of the Commissioner that have been confirmed or varied.

Manner of applying for review

- (8) If a decision is taken, because of subsection (5), to be confirmed, section 29 of the *Administrative Appeals Tribunal Act 1975* applies as if the prescribed time for making application for review of the decision was the period starting on the day on which the decision is taken to be confirmed and ending on the 28th day after that day.

Operation of decision that is subject to review

- (9) If a request is made under subsection (2) for the reconsideration of a decision, section 41 of the *Administrative Appeals Tribunal Act 1975* applies as if the making of the request were the making of an application to the Administrative Appeals Tribunal for a review of the decision.

Hearing of review to be in private

- (10) The hearing of a proceeding before the Administrative Appeals Tribunal that relates to a decision referred to in subsection (7) is to take place in private and the Tribunal may, by order:
- (a) give directions as to the persons who may be present; and
 - (b) give directions of a kind referred to in paragraph 35(2)(b) or (c) of the *Administrative Appeals Tribunal Act 1975*.

Part 5—Administration

26 General administration of Act

The Commissioner has the general administration of this Act.

27 Annual report

After the end of each financial year, the Commissioner must give the Treasurer a report on the working of this Act during the year for presentation to the Parliament.

28 Secrecy

Definitions

(1) In this section:

court includes any tribunal, authority or person having power to require the production of documents or the answering of questions.

person to whom this section applies means a person who is or has been:

- (a) the Commissioner, a Second Commissioner or a Deputy Commissioner; or
- (b) an officer or employee of the branch of the Australian Public Service under the direct control of the Commissioner; or
- (c) otherwise appointed or employed by, or a provider of services for, the Commonwealth.

produce includes permit access to.

protected document means a document that:

- (a) contains information about a person; and
- (b) is obtained or made by a person to whom this section applies in the course of, or because of, the person's duties under or in relation to this Act.

protected information means information that:

- (a) concerns a person; and
- (b) is disclosed to, or obtained by, a person to whom this section applies in the course of, or because of, the person's duties under or in relation to this Act.

Information may be recorded or divulged only for purposes of Act

- (2) A person to whom this section applies must not:
- (a) make a record of any protected information; or
 - (b) whether directly or indirectly, divulge or communicate to a person any protected information about another person; unless the record is made, or the information is divulged or communicated:
 - (c) under or for the purposes of this Act; or
 - (d) in the performance of duties, as a person to whom this section applies, under or in relation to this Act.

Penalty: Imprisonment for 2 years.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: Subsection 4B(2) of the *Crimes Act 1914* allows a court to impose in respect of an offence an appropriate fine instead of, or in addition to, a term of imprisonment. The maximum fine that a court can impose on an individual is worked out by multiplying the maximum term of imprisonment (in months) by 5, and then multiplying the resulting number by the amount of a penalty unit. The amount of a penalty unit is stated in section 4AA of that Act. If a body corporate is convicted of an offence, subsection 4B(3) of that Act allows a court to impose a fine that is not greater than 5 times the maximum fine that could be imposed by the court on an individual convicted of the same offence.

Information may be divulged to persons performing duties under Acts administered by Commissioner

- (3) Subsection (2) does not prohibit the Commissioner, a Second Commissioner or a Deputy Commissioner, or a person authorised by the Commissioner, a Second Commissioner or a Deputy Commissioner, from divulging or communicating any protected information to a person performing, as a person to whom this section applies, duties under or in relation to an Act of which the Commissioner has the general administration, or under regulations made under such an Act, for the purpose of enabling the person to perform the duties.

Divulging of information to Minister

- (4) A person divulges or communicates protected information to a person in contravention of subsection (2) if the person divulges or communicates the information to a Minister.

Section 28

Court may not require information or documents

- (5) A person to whom this section applies is not required:
- (a) to divulge or communicate protected information to a court;
or
 - (b) to produce a protected document in court;
- except where it is necessary to do so for the purpose of carrying into effect the provisions of this Act.

Information may be divulged to persons performing duties under this Act

- (6) Nothing in this or any other Act of which the Commissioner has the general administration prohibits the Commissioner, a Second Commissioner or a Deputy Commissioner, or a person authorised by the Commissioner, a Second Commissioner or a Deputy Commissioner, from divulging or communicating any information to a person performing, as a person to whom this section applies, duties under or in relation to this Act for the purpose of enabling the person to perform the duties.

Information may be divulged to court for purposes of this Act

- (7) Nothing in this or any other Act of which the Commissioner has the general administration prohibits the Commissioner, a Second Commissioner, a Deputy Commissioner, or a person authorised by the Commissioner, a Second Commissioner or a Deputy Commissioner, from:
- (a) divulging or communicating to a court any information obtained under or for the purposes of such an Act; or
 - (b) producing in court a document obtained or made under or for the purposes of such an Act;
- where it is necessary to do so for the purpose of carrying into effect the provisions of this Act.

Information may be divulged to Insurance and Superannuation Commissioner

- (8) Nothing in this section prohibits the Commissioner, a Second Commissioner or a Deputy Commissioner, or a person authorised by the Commissioner, a Second Commissioner or a Deputy Commissioner, from divulging or communicating any protected information to the Insurance and Superannuation Commissioner, for the purpose of the administration of the *Superannuation Industry (Supervision) Act 1993*.

Note: In a prosecution for an offence against subsection (2), the defendant bears an evidential burden in relation to the matters in paragraphs (2)(c) and (d) and subsections (3), (6), (7) and (8) (see subsection 13.3(3) of the *Criminal Code*).

Oath or declaration of secrecy

- (9) A person to whom this section applies must, if and when required by the Commissioner, a Second Commissioner or a Deputy Commissioner to do so, make an oath or declaration, in a manner and form determined by the Commissioner in writing, to maintain secrecy in accordance with this section.

Part 6—Miscellaneous

29 Authorised officers

The Commissioner may, by writing, authorise a person who is an officer or employee within the meaning of the *Public Service Act 1922* to be an authorised officer for the purposes of a provision or provisions of this Part.

30 Prohibition of avoidance schemes

A superannuation provider or fund trustee must not enter into, commence to carry out, or carry out, a scheme if the superannuation provider or fund trustee entered into, commenced to carry out, or carried out, the scheme or any part of the scheme with the intention that the scheme would result, or be likely to result, in the avoidance of the surcharge, including through the use of allocated surplus amounts.

31 Evidence

Assessment to be evidence of correctness of calculations

- (1) The mere production of:
 - (a) an assessment; or
 - (b) a document signed by the Commissioner, a Second Commissioner or a Deputy Commissioner purporting to be a copy of an assessment;

is conclusive evidence of the due making of the assessment and, except in proceedings under Part IVC of the *Taxation Administration Act 1953* on a review or appeal relating to the assessment, that the amounts and all of the particulars of the assessment are correct.

Copies of documents

- (2) A document signed by the Commissioner, a Second Commissioner or a Deputy Commissioner purporting to be a copy of a document issued or given by the Commissioner, a Second Commissioner or a Deputy Commissioner is *prima facie* evidence that the second-mentioned document was so issued or given.

Copies of, or extracts from, assessments

- (3) A document signed by the Commissioner, a Second Commissioner or a Deputy Commissioner purporting to be a copy of, or an extract from, an assessment is evidence of the matter set out in the document to the same extent as the original assessment would be if it were produced.

Certificates

- (4) A certificate signed by the Commissioner, a Second Commissioner or a Deputy Commissioner certifying that an amount stated in the certificate was, on the day of the certificate, payable by a person as an amount of surcharge, interest or late payment penalty, is prima facie evidence of the matters stated in the certificate.

32 Access to premises etc.*Powers of authorised officers*

- (1) For the purposes of this Act, an authorised officer:
- (a) may, at any reasonable time, enter and remain on any land or premises; and
 - (b) is entitled to full and free access at any reasonable time to all documents; and
 - (c) may inspect, examine, make copies of, or take extracts from, any documents.

Proof of authority to be produced

- (2) An authorised officer is not entitled to enter or remain on any land or premises if, on being requested by the occupier of the land or premises for proof of authority, the officer does not produce a written authority signed by the Commissioner stating that the officer is authorised to exercise powers under this section.

Occupier to help authorised officer

- (3) The occupier of land or premises entered or proposed to be entered by an authorised officer under subsection (1) must provide the officer with all reasonable facilities and assistance that the occupier is reasonably capable of providing.

Penalty: 10 penalty units.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Section 33

- (4) The object of subsection (3) is to enable authorised officers to exercise effectively their powers under this section.

33 Obtaining information and evidence

Power of Commissioner to obtain information or documents

- (1) The Commissioner may, for the purposes of this Act, by written notice, require a person:
- (a) to give to the Commissioner, within a reasonable period, and in a reasonable manner, stated in the notice, any information that the Commissioner requires; and
 - (b) to attend before the Commissioner, or an authorised officer, at a reasonable time and place stated in the notice, and answer questions; and
 - (c) to produce to the Commissioner, at a reasonable time and place stated in the notice, any documents in the custody or under the control of the person.

Power to require information on oath or affirmation

- (2) The Commissioner may require the information or answers to be verified or given on oath or affirmation, and either orally or in writing, and for that purpose the Commissioner or an authorised officer may administer an oath or affirmation.

Nature of oath or affirmation

- (3) The oath to be taken or affirmation to be made by a person is an oath or affirmation that the information or answers the person will give will be true.

Expenses of attendance

- (4) The regulations are to prescribe scales of expenses to be allowed to persons required to attend under this section.

34 Records to be kept and retained by superannuation provider

Superannuation provider to keep records

- (1) A superannuation provider must keep records that record and explain all transactions and other acts engaged in by the provider, or required to be engaged in by the provider, under this Act.

How records to be kept

- (2) The records must be kept:
- (a) in writing in the English language or so as to enable the records to be readily accessible and convertible into writing in the English language; and
 - (b) so that any liability under this Act of a member of a constitutionally protected superannuation fund of which the provider is the trustee can be readily worked out.

Period for retention of records

- (3) A superannuation provider who has possession of any records kept or obtained under or for the purposes of this Act must retain them until the end of 5 years after they were prepared or obtained, or the completion of the transactions or acts to which those records relate, whichever is the later.

When records need not be kept

- (4) This section does not require a superannuation provider to retain records if the Commissioner has notified the provider that the retention of the records is not required.

35 Commissioner may collect money from person who owes money to a member

- (1) This section allows the Commissioner to collect money from a person who owes money to a member who has a surcharge debt.
- (2) The Commissioner may direct a person (the *third party*) who owes, or may later owe, money (the *available money*) to the member to pay some or all of the available money to the Commissioner in accordance with the direction. The Commissioner must send a copy of the direction to the member to the last place of address known to the Commissioner.
- (3) The direction cannot require an amount to be paid to the Commissioner at a time before it becomes owing by the third party to the member.

Section 35

- (4) The third party must comply with the direction, so far as the third party is able to do so.

Penalty: 20 penalty units.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

- (5) If a person is convicted of an offence in relation to a refusal or failure of the third party to comply with subsection (4), the court may (in addition to imposing a penalty on the convicted person) order the convicted person to pay to the Commissioner an amount up to the amount involved in the refusal or failure of the third party.
- (6) Any payment made by the third party under this section is taken to have been made with the authority of the member and of all other persons concerned, and the third party is indemnified for the payment.
- (7) If the whole of the surcharge debt of the member is discharged before any payment is made by the third party, the Commissioner must immediately give notice to the third party of that fact.
- (8) The third party is taken to owe money to the member if:
- (a) money is due or accruing by the third party to the member; or
 - (b) the third party holds money for or on account of the member; or
 - (c) the third party holds money on account of some other person for payment to the member; or
 - (d) the third party has authority from some other person to pay money to the member;
- whether or not the payment of the money to the member is dependent on a pre-condition that has not been fulfilled.
- (9) For the purposes of this section, money that has been paid by a person to a building society for the issue of withdrawable shares in the capital of the society, but has not been repaid, is taken to be:
- (a) if the money is repayable on demand—money due by the building society to the person; or
 - (b) if the money is not repayable on demand—money that may become due by the building society to the person.

(10) In this section:

building society means a society registered or incorporated as a building society, co-operative housing society or other similar society under the law in force in a State or Territory.

person includes:

- (a) the Commonwealth, a State or a Territory; and
- (b) a public authority of the Commonwealth or of a State or Territory, whether or not the authority is incorporated.

surcharge debt means any of the following amounts payable by a person (whether or not the amount has become due for payment):

- (a) superannuation contributions surcharge;
- (b) interest;
- (c) late payment penalty;
- (d) a judgment debt, or costs, for surcharge, interest or late payment penalty;
- (e) a fine, or costs, that a court has imposed for an offence against this Act;
- (f) an amount that a court has ordered the person to pay to the Commissioner, following conviction of the person for an offence against this Act.

36 Application of the *Criminal Code*

Chapter 2 of the *Criminal Code* applies to all offences against this Act.

37 Regulations

The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act;

and, in particular, prescribing:

- (c) how statements are to be given to the Commissioner; and
- (d) penalties not exceeding a fine of 5 penalty units, for offences against the regulations.

Part 7—Interpretation

38 Definitions

In this Act, unless the contrary intention applies:

adjusted taxable income of a member for a financial year means the sum of:

- (a) the member's taxable income of the year of income comprising the financial year less any amounts included in the member's assessable income of that year of income:
 - (i) that were eligible termination payments for the purposes of Subdivision AA of Division 2 of Part III of the Income Tax Assessment Act (other than amounts that were such payments because of paragraph (a) of the definition of *eligible termination payment* in subsection 27A(1) of that Act); or
 - (ii) that were so included under section 26AC, or under subsection 26AD(2), (3) or (4), of the Income Tax Assessment Act in respect of a bona fide redundancy amount, an early retirement scheme amount or an invalidity amount as defined in section 159S of that Act; and
- (b) the member's surchargeable contributions for the financial year.

allocated surplus amount, in relation to a member in relation to a financial year, means an amount that is allocated by the relevant superannuation (accumulated benefits) provider for the benefit of the member in respect of the financial year (other than an amount paid for or by the member to the provider) to the extent to which the allocated amount exceeds an amount that, in the opinion of an eligible actuary according to Australian actuarial practice, is reasonable having regard to:

- (a) the amounts paid by or for the member to the provider; and
- (b) the relevant constitutionally protected superannuation fund's investment earnings relating to the member's interest in the fund; and
- (c) any other relevant matters.

assessment means an assessment of superannuation contributions surcharge.

authorised officer means an officer or employee within the meaning of the *Public Service Act 1922* who has been authorised in writing by the Commissioner for the purposes of the provision in which the expression occurs.

Commissioner means the Commissioner of Taxation.

complying superannuation fund has the meaning given by section 45 of the *Superannuation Industry (Supervision) Act 1993*.

constitutionally protected superannuation fund has the same meaning as **constitutionally protected fund** has in Part IX of the Income Tax Assessment Act.

contributed amounts, in relation to a member, means amounts paid for or by the member to a superannuation provider.

defined benefit member means a member entitled, on retirement or termination of his or her employment, to be paid a benefit defined, wholly or in part, by reference to either or both of the following:

- (a) the amount of:
 - (i) the member's salary at a particular date, being the date of the termination of the member's employment or of the member's retirement or an earlier date; or
 - (ii) the member's salary averaged over a period before retirement;
- (b) a stated amount.

defined benefits superannuation scheme means:

- (a) a public sector superannuation scheme that:
 - (i) is a regulated superannuation fund or an exempt public sector superannuation scheme; and
 - (ii) has at least one defined benefit member; or
- (b) a regulated superannuation fund (other than a public sector superannuation scheme):
 - (i) that has at least one defined benefit member; and
 - (ii) some or all of the contributions to which are not allocated to any individual member but are paid into and accumulated in a fund in the form of an aggregate amount.

Deputy Commissioner means the Deputy Commissioner of Taxation.

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eligible actuary means a Fellow or Accredited Member of the Institute of Actuaries of Australia.

eligible termination payment has the same meaning as in Subdivision AA of Division 2 of Part III of the Income Tax Assessment Act.

exempt public sector superannuation scheme has the same meaning as in section 10 of the *Superannuation Industry (Supervision) Act 1993*.

funded defined benefits superannuation scheme means a defined benefits superannuation scheme that is not an unfunded defined benefits superannuation scheme.

Income Tax Assessment Act means the *Income Tax Assessment Act 1936*.

interest means interest payable under section 18.

late payment penalty means penalty payable under section 21.

member means a member of a constitutionally protected superannuation fund.

notification date means:

- (a) for the 1996-97 financial year—15 December 1997; or
- (b) for a later financial year—31 October following the financial year.

notional surchargeable contributions factor, in relation to a superannuation (defined benefits) provider during a financial year, means the factor applying to the member for that year as certified by an eligible actuary according to Australian actuarial practice.

public sector superannuation scheme means a scheme for the payment of superannuation, retirement or death benefits, where the scheme is established:

- (a) by or under a law of a State; or
- (b) under the authority of:
 - (i) the government of a State; or
 - (ii) a municipal corporation, another local governing body, or a public authority, constituted by or under a law of a State.

regulated superannuation fund has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

Second Commissioner means the Second Commissioner of Taxation.

specified roll-over amount means an amount that is a specified roll-over amount for the purposes of Division 8 or 8A of Part III, or for the purposes of Part IX, of the Income Tax Assessment Act.

superannuation (accumulated benefits) provider means a superannuation provider that is not a superannuation (defined benefits) provider.

superannuation contributions surcharge or ***surcharge*** means the tax imposed by the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act 1997*.

superannuation contributions surcharge threshold or ***surcharge threshold*** has the meaning given by section 10.

superannuation (defined benefits) provider means a superannuation (funded defined benefits) provider or a superannuation (unfunded defined benefits) provider.

superannuation fund means a public sector superannuation scheme.

superannuation (funded defined benefits) provider means a superannuation provider who is the trustee of a constitutionally protected superannuation fund established for the purposes of a funded defined benefits superannuation scheme.

superannuation provider means a trustee of a constitutionally protected superannuation fund.

superannuation (unfunded defined benefits) provider means a superannuation provider who is the trustee of a constitutionally protected superannuation fund established for the purposes of a superannuation scheme that is an unfunded defined benefits superannuation scheme.

surcharge: see *superannuation contributions surcharge*.

surcharge threshold: see *superannuation contributions surcharge threshold*.

surchargeable contributions has the meaning given by section 9.

taxable income of a member for a year of income means the member's taxable income of that year of income as assessed under the Income Tax Assessment Act.

the 1996-97 financial year means the financial year starting on 1 July 1996.

the 1997-98 financial year means the financial year starting on 1 July 1997.

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trustee, in relation to a constitutionally protected superannuation fund, means:

- (a) if there is a trustee (within the ordinary meaning of that expression) of the fund—the trustee; or
- (b) otherwise—the person who manages the fund.

unfunded defined benefits superannuation scheme means a defined benefits superannuation scheme:

- (a) in respect of which no fund is established for the purposes of the scheme; or
- (b) under which all or some of the amounts that will be required for the payment of benefits are not paid into the fund established for the purposes of the scheme or are not so paid until the members become entitled to receive the benefits.

year of income means a year of income for the purposes of the Income Tax Assessment Act as that Act applies to individuals.

*[Minister's second reading speech made in—
House of Representatives on 2 October 1997
Senate on 22 October 1997]*