

EXPLANATORY STATEMENT

Select Legislative Instrument No. 6, 2014

Issued by authority of the Assistant Treasurer

Superannuation Guarantee (Administration) Act 1992; Income Tax Assessment Act 1997

Tax and Superannuation Laws Amendment (2014 Measures No. 1) Regulation 2014

Subsection 909-1(1) of the *Income Tax Assessment Act 1997* (ITAA 1997) and section 80 of the *Superannuation Guarantee (Administration) Act 1992* (SG Act) provide that the Governor-General may make regulations prescribing matters required or permitted by the relevant Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the relevant Act.

The purpose of the *Tax and Superannuation Laws Amendment (2014 Measures No. 1) Regulation 2014* (the Amending Regulation) is to:

- prescribe an interim method for calculating the amount of an individual's 'defined benefit contributions' for the purposes of Division 293 tax to enable the Commissioner of Taxation to determine an individual's liability for the 2012-13 financial year;
- update the lists of public sector superannuation schemes in the *Superannuation Guarantee (Administration) Regulations 1993* (SG Regulations); and
- prescribe the Australian Taxation Office (ATO) as an 'approved clearing house' for the purposes of the SG Regulations.

Interim method for calculating the amount of defined benefit contributions

The ITAA 1997 imposes tax on certain superannuation contributions of high income earners (Division 293 tax); broadly those whose adjusted taxable income and concessional tax superannuation contributions exceed \$300,000 in an income year. The tax is designed to ensure that the tax concession received by these individuals on superannuation contributions is more closely aligned with the concession received by average income earners.

A 'defined benefit' superannuation scheme provides retirement benefits based on factors other than contributions to the scheme, such as the individual's pre-retirement salary, and can be funded by means such as direct payments by an employer or the government. To calculate an individual's Division 293 tax liability where the individual has an interest in a defined benefit scheme, it is necessary to determine an individual's amount of 'defined benefit contributions'. The *Income Tax Assessment Regulations 1997* (the ITAA 1997 Regulations) do not yet provide a method for determining the amount of an individual's defined benefit contributions which are to be subject to Division 293 tax.

The Amending Regulation amends the ITAA 1997 Regulations to prescribe that the amount of an individual's defined benefit contributions is equal to their notional taxed contributions for that defined benefit interest for the 2012-13 financial year (the interim method).

Notional taxed contributions are an estimate, using prescribed assumptions, of the amount of concessional contributions that would have been paid into the superannuation fund if the relevant part of the interest were funded periodically over the period of membership of the fund. This is the same amount reported to the ATO by defined benefit funds for the purpose of determining the amount of an individual's concessional contributions for excess concessional contributions tax.

The interim method avoids the need for defined benefit funds to report both notional taxed contributions and another calculation of notional contributions for their members to the ATO for the 2012-13 financial year, thus reducing compliance costs for these funds. It is intended that further regulations will be put in place shortly to prescribe an on-going method to determine the amount of defined benefit contributions for subsequent financial years.

Lists of public sector superannuation schemes

Employers are required to provide their employees with a choice of superannuation fund, into which compulsory superannuation guarantee payments are made by the employer. Public sector superannuation schemes that are prescribed in the SG Regulations are taken to satisfy this requirement. The lists of prescribed schemes are updated periodically to reflect changes by Commonwealth, State and Territory Parliaments to ensure that those government employers continue to comply with the SG Act.

The Amending Regulation updates the lists by repealing listings that are spent or redundant, adding new listings and making minor corrections to listings where required.

Specifying the ATO as an 'approved clearing house'

Employers are required to make superannuation contributions to superannuation funds at a prescribed minimum level on behalf of their employees. Instead of making contributions to superannuation funds directly, certain employers can make a single payment to an 'approved clearing house', which then distributes the contributions to each employee's superannuation fund on behalf of the employer.

The SG Act provides that an 'approved clearing house' is a body specified in the SG Regulations. Currently, the Department of Human Services (DHS) is the only approved clearing house. The Amending Regulation prescribes the ATO as an approved clearing house for the purposes of the SG Act. This is consistent with the Government's election commitment to move the government clearing house function from the DHS to the ATO as the ATO is the Government's principal revenue collection agency responsible for administration of the superannuation guarantee laws. The movement of the function to the ATO will aid in reducing compliance costs for small business.

Consultation

Interim method for defined benefit contributions

Public consultation on a draft Regulation, specifying an on-going method to determine the amount of an individual's defined benefit contributions was undertaken between 31 May 2013 and 6 June 2013.

Eleven submissions were received. A number of these submissions, prepared from the perspective of defined benefit funds, raised concerns about the compliance cost of the approach adopted in the exposure draft being higher than the expected tax to be collected from affected individuals with defined benefit interests. In particular, that the proposed approach would require two actuarial calculations to be undertaken each year: one for the purposes of Division 293 tax; and one for the purpose of calculating the amount of an individual's concessional contributions. Concerns were also raised about insufficient lead time to implement and comply with the new methodology in respect of the 2012-13 financial year.

To address these concerns in the interim, this Amending Regulation specifies that the existing notional taxed contributions amount determined for concessional contributions purposes for the 2012-13 financial year is used to determine an individual's liability to Division 293 tax.

Further, consultation will be undertaken on a method to be used to determine defined benefit contributions for the 2013-14 financial year and subsequent financial years. The method will be similar to that used to determine an individual's notional taxed contributions but will not be limited to the individual's concessional contributions cap, will include an amount for unfunded benefits and will include an amount for defined benefit interests in constitutionally protected funds.

Lists of public sector superannuation schemes

All States and Territories were consulted on the Amending Regulation.

Specifying the ATO as an 'approved clearing house'

The ATO and DHS were consulted on the Amending Regulation. Public consultation was not undertaken as the changes are technical in nature.

Conditions and Commencement

The ITAA 1997 and the SG Act do not specify any conditions that need to be met before the power to make the Amending Regulation may be exercised.

The Amending Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Amending Regulation commences on the day after registration.

The amendments to the ITAA 1997 Regulations apply on and after 1 July 2012. The retrospective date of effect ensures that there is a method provided for determining defined benefit contributions for the 2012-13 financial year and is specifically permitted by subsection 293-115(6) of the ITAA 1997.

ATTACHMENT**Details of the *Tax and Superannuation Laws Amendment (2014 Measures No. 1) Regulation 2014*****Section 1 – Name of Regulation**

This section provides that the title of the Regulation is the *Tax and Superannuation Laws Amendment (2014 Measures No. 1) Regulation 2014* (the Amending Regulation).

Section 2 – Commencement

This section provides that the Regulation commences the day after it is registered.

Section 3 – Authority

This section provides that the Regulation is made under the *Income Tax Assessment Act 1997* (ITAA 1997) and the *Superannuation Guarantee (Administration) Act 1992* (SG Act).

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to the Regulation is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Amendments**Schedule 1 – Calculating defined benefit contributions**

The ITAA 1997 imposes tax on certain superannuation contributions of high income earners (Division 293 tax); broadly those whose adjusted taxable income and concessional tax superannuation contributions exceed \$300,000 in an income year. The tax is designed to ensure that the tax concession received by these individuals on superannuation contributions is more closely aligned with the concession received by average income earners.

A ‘defined benefit’ superannuation scheme provides retirement benefits based on factors other than contributions to the scheme, such as the individual’s pre-retirement salary, and can be funded by means such as direct payments by an employer or the government. To calculate an individual’s Division 293 tax liability where the individual has an interest in a defined benefit scheme, it is necessary to determine an individual’s amount of ‘defined benefit contributions’. The *Income Tax Assessment Regulations 1997* (the ITAA 1997 Regulations) do not yet provide a method for determining the amount of an individual’s defined benefit contributions.

The Amending Regulation amends the ITAA 1997 Regulations to prescribe the method that must be used to determine the amount of an individual’s defined benefit contributions for the 2012-13 financial year in respect of a defined benefit interest.

Regulation 293-115.01 of the ITAA 1997 Regulations sets out the method for determining defined benefit contributions for the 2012-13 financial year. The method is intended to be an interim arrangement for the 2012-13 financial year only. It is intended that an ongoing method would be prescribed for the 2013-14 and subsequent financial years.

The interim method provides that an individual's defined benefit contributions for a defined benefit interest for the 2012-13 financial year is equal to their notional taxed contributions for that interest for the 2012-13 financial year. Section 292-170 of the ITAA 1997 provides that an individual's notional taxed contributions for a financial year has the meaning in the regulations and sets out that regulations made for this purpose may prescribe a method for determining the amount of notional taxed contributions.

Subdivision 292-D of the ITAA 1997 Regulations sets out the meaning of notional taxed contributions, and Schedule 1A to the ITAA 1997 Regulations prescribes the method by which they are to be determined. Notional taxed contributions are an estimate, using prescribed assumptions, of the amount of concessional contributions that would have been paid into the superannuation fund if the relevant part of the interest was funded periodically over the period of membership of the fund.

As notional taxed contributions are already reported to the Australian Taxation Office (ATO) by defined benefit funds, the adoption of this amount as the amount of defined benefit contributions for the purposes of Division 293 tax means that funds will not have to report an additional amount for the 2012-13 financial year.

As there are no notional taxed contributions for defined benefit interests in constitutionally protected funds, individuals with defined benefit interests in these funds have 'nil' defined benefit contributions for the 2012-13 financial year.

Subdivision 292-D of the Act also states that an individual's notional taxed contributions for a financial year in respect of a defined benefit interest are equal to their concessional contributions cap for the financial year if certain conditions are satisfied. As the amount of an individual's defined benefit contributions for the 2012-13 financial year is the individual's notional taxed contributions, if these provisions apply for the purposes of determining excess concessional contributions, they will also apply for defined benefit contributions.

The amendment made by item 1 of Schedule 1 applies for the 2012-13 financial year only. Subsection 293-115(6) of the ITAA 1997 provides that regulations made under section 293-115 may be take effect at any time on or after 1 July 2012.

Without a retrospective application date there would be no method provided for determining defined benefit contributions for the 2012-13 financial year and Division 293 tax could not operate in respect of defined benefit interests for the 2012-13 financial year.

Schedule 2 – Public Sector superannuation funds

To satisfy choice of fund requirements for the purposes of the SG Act, employers must provide their employees with a choice of superannuation fund to which the employer will make contributions on behalf of the employee. Subsection 32C(9) of the SG Act provides that contributions made under a Commonwealth, State or Territory law that is prescribed under the *Superannuation Guarantee (Administration) Regulations 1993* (SG Regulations) are taken to satisfy the choice of fund requirements. Certain public sector superannuation

schemes are administered under such laws. Regulation 9B of the SG Regulations currently provides that the Commonwealth, State and Territory laws mentioned in Schedule 2 are prescribed.

The Amending Regulation moves the lists of prescribed legislation from Schedule 2 to the SG Regulations to Regulation 9B. It also omits from the lists the references to State and Territory Acts and Regulations which are no longer required because they are spent or redundant, and adds new listings. The period during which contributions made under the prescribed Acts and Regulations will comply with the choice of fund requirements is also specified.

Victoria

The reference to the *Parliamentary Contributory Superannuation Act 1962* (Vic) is omitted because it is redundant, and the reference to the *Parliamentary Salaries and Superannuation Act 1968* (Vic) is added, applying from 1 July 2005.

Queensland

The reference to the *Local Government Act 1993* (Qld) is omitted because it is redundant, and reference to the *Local Government Act 2009* (Qld) is added, applying from 1 July 2010 (the date from which the *Local Government Act 2009* (Qld) applies).

Western Australia

Reference to the *Coal Industry Superannuation Act 1989* (WA) is added, applying from 1 July 2005.

South Australia

The reference to the *Southern State Superannuation Act 1994* (SA) is omitted because it is redundant. Reference to the *Southern State Superannuation Act 2009* (SA) is added, applying from 1 August 2009 (the date from which the *South State Superannuation Act 2009* (SA) applies).

Tasmania

The references to the following Acts are omitted because they are redundant:

- *Ambulance Service Act 1982* (Tas); and
- *Retirement Benefits (Parliamentary Superannuation) Regulations 2002* (Tas).

References to the following Acts and Regulations are added:

- *Public Sector Superannuation Reform Act 1999* (Tas), applying from 1 July 2005.
- *Retirement Benefits (Parliamentary Superannuation) Regulations 2012* (Tas), applying from 25 December 2012.
 - The schemes operating under the *Parliamentary Superannuation Act 1973* (Tas) and the *Parliamentary Retiring Benefits Act 1985* (Tas) moved to operating under the *Retirement Benefits (Parliamentary*

Superannuation) Regulations 2002 (Tas), effective 1 January 2003. These regulations became the *Retirement Benefits (Parliamentary Superannuation) Regulations 2012* (Tas), effective 25 December 2012.

Schedule 3 – Clearing houses

Under the SG Act, employers are required to make contributions to superannuation funds on behalf of employees. Instead of making contributions to superannuation funds directly, employers can make the payments to an approved clearing house, which then distributes the payments to the superannuation fund of the employee. Subsection 79A(3) of the SG Act provides that an approved clearing house means a body specified in the SG Regulations.

Regulation 7AE of the SG Regulations currently provides that the Department administered by the Minister administering the *Human Services (Medicare) Act 1973* (the Department of Human Services) is an approved clearing house.

The Amending Regulation provides that the Australian Taxation Office (ATO) is also an approved clearing house for the purposes of subsection 79A(3) of the SG Act. The ATO is the Government's principal revenue collection agency and is a body comprising the Commissioner of Taxation, Second Commissioners of Taxation, and officers or employees engaged to assist the Commissioner of Taxation in the performance of his duties.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Tax and Superannuation Laws Amendment (2014 Measures No. 1) Regulation 2014

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Tax and Superannuation Laws Amendment (2014 Measures No. 1) Regulation 2014* (the Amending Regulation):

- prescribes an interim method for calculating the amount of an individual's 'defined benefit contributions' for the purposes of Division 293 tax to enable the Commissioner to determine an individual's liability for the 2012-13 financial year;
- updates the lists of public sector superannuation schemes in the *Superannuation Guarantee (Administration) Regulations 1993* (SG Regulations); and
- prescribes the Australian Taxation Office (ATO) as an 'approved clearing house' for the purposes of the SG Regulations.

Interim method for defined benefit contributions

The *Income Tax Assessment Act 1997* (ITAA 1997) imposes a 15 per cent tax on the concessional tax superannuation contributions of high income earners (Division 293 tax); broadly those individuals whose income and concessional tax contributions exceed \$300,000. The tax is designed to ensure that the tax concession received by these individuals on superannuation contributions is more closely aligned with the concession received by average income earners.

The Amending Regulation amends the *Income Tax Assessment Regulations 1997* to set out the interim method to determine an individual's defined benefit contributions for the 2012-13 financial year to calculate an individual's liability to Division 293 tax. This effectively provides a mechanism to apply Division 293 tax to individuals with defined benefit interests. Further regulations will be put in place to prescribe a more comprehensive method to determine the amount of defined benefit contributions for the 2013-14 financial year and subsequent financial years.

The function of the Amending Regulation is simply to prescribe the methodology to give effect to policy arrangements established under the principal legislation.

Lists of public sector superannuation schemes

Employers are required to provide their employees with a choice of superannuation fund, into which compulsory superannuation guarantee payments are made by the employer. Public sector superannuation schemes that are prescribed in the Regulations are taken to satisfy this requirement. The lists of prescribed schemes are updated periodically to reflect changes by Commonwealth, State and Territory Parliaments to ensure that those government employers continue to comply with the SG Act.

The Amending Regulation updates the lists by repealing listings that are spent or redundant, adding new listings and making minor corrections to listings where required. This amendment is minor and machinery in nature. It gives effect to arrangements already in place.

Specifying the ATO as an 'approved clearing house'

Employers are required to make superannuation contributions to superannuation funds at a prescribed minimum level on behalf of their employees. Instead of making contributions to superannuation funds directly, certain employers can make a single payment to an 'approved clearing house', which then distributes the contributions to each employee's superannuation fund on behalf of the employer.

The Amending Regulation prescribes the ATO as an approved clearing house for the purposes of the SG Act. This will allow the ATO to administer a clearing house, which effectively replicates a function already in operation.

Human rights implications

The interim method for determining defined benefit contributions engages the Right to equality and non-discrimination.

The Amending Regulation provides that an individual's defined benefit contributions for a defined benefit interest for the 2012-13 financial year are equal to their notional taxed contributions for that interest for the financial year.

Defined benefit interests in constitutionally protected funds, defined benefit interests that are not fully funded and defined benefit interests that meet the criteria for limiting the amount of notional taxed contributions to the concessional contributions cap can have nil or capped notional taxed contributions under the excess contributions tax regime.

Using notional taxed contributions for Division 293 tax will result in preferential treatment for some individuals holding the above interests compared to individuals with other defined benefit interests.

The provision of preferential tax treatment to certain individuals based on the type of superannuation interest they hold engages Article 26 of the International Covenant on Civil and Political Rights. Article 26 guarantees equality before the law and equal protection of the law without any discrimination on a range of grounds. The objective of this limitation is to allow assessments of Division 293 tax for a past year—the 2012-13 financial year—to be issued by the Commissioner of Taxation.

The limitation is reasonable, proportionate and necessary for a single income year because:

- it will allow affected taxpayers to finalise their tax affairs for the 2012-13 financial year and provide them with certainty in the absence of a settled on-going methodology;
- it avoids the imposition of additional compliance costs on superannuation funds that would otherwise be incurred if funds were required to re-report or report additional information about their members' defined benefit interests for the 2012-13 financial year (the due date for funds that hold defined benefit superannuation interests to report their members' contributions for the 2012-13 financial year to the ATO was 31 October 2013); and,
- it is interim only and so allows time for adequate consultation on an approach which will avoid the preferential treatment of some individuals for the 2013-14 and later financial years.

Conclusion

This Regulation is compatible with human rights because to the extent that it may limit human rights, the limitation is reasonable, necessary and proportionate, and is aimed at achieving a legitimate purpose.