# EXPLANATORY STATEMENT

## Issued by authority of the Minister for Revenue and Financial Services

*Corporations Act 2001*
*Income Tax Assessment Act 1936*
*Income Tax Assessment Act 1997*
*Retirement Savings Accounts Act 1997*
*Superannuation (Government Co-contribution for Low Income Earners) Act 2003*
*Superannuation Industry (Supervision) Act 1993*
*Taxation Administration Act 1953*

*Treasury Laws Amendment (Fair and Sustainable Superannuation) Regulations 2017*

Section 1364 of the *Corporations Act 2001*, section 266 of the *Income Tax Assessment Act 1936*, section 909-1 of the *Income Tax Assessment Act 1997* (ITAA 1997), section 200 of the *Retirement Savings Accounts Act 1997*, section 55 of the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003,* section 353 of the *Superannuation Industry (Supervision) Act 1993* and section 18 of the *Taxation Administration Act 1953* (Authorising Acts) provide that the Governor-General may make regulations prescribing matters required or permitted by the Acts to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Acts.

The *Treasury Laws Amendment (Fair and Sustainable Superannuation) Regulations 2017* (the Regulations) amend a number of regulations to make consequential changes to give full effect to the Government's Superannuation Reform Package following the enactment of *Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016* (Amending Act).

The Superannuation reform package:

- makes the superannuation system fairer and fiscally sustainable by ensuring that the superannuation tax concessions are well targeted and affordable;
- enables more choice and flexibility to encourage and provide more opportunities for people to save for their retirement; and
- improves the integrity of the superannuation system to ensure that it is used for the purpose of providing income in retirement to substitute or supplement the age pension and not for tax minimisation and estate planning purposes.

The purpose of Schedule 1 to the Regulations is to make consequential changes to support the introduction of the transfer balance cap measure in the superannuation reform package. These changes apply to the *Corporations Regulations 2001, Income Tax Assessment Regulations 1997* (ITAR 1997)*, Retirement Savings Accounts Regulations 1997* (RSAR 1997) and the *Superannuation Industry (Supervision) Regulations 1994* (SISR 1994).

The purpose of Schedule 2 to the Regulations is to make a minor consequential change to the ITAR 1997 to ensure that, consistent with the changes introduced by the Amending Act, the concessional contribution rules in relation to constitutionally protected funds operate as intended.



Authorised Version Explanatory Statement registered 27/03/2017 to F2017L00321

The purpose of Schedule 3 to the Regulations is to make changes to the RSAR 1997 and SISR 1994 to remove the operating standard that prevents funds from accepting fund-capped or RSA-capped contributions. This standard is no longer required given the broader changes to the annual non-concessional contributions cap, its related eligibility and the bring forward cap rules.

The purpose of Schedule 4 to the Regulations is to amend the *Superannuation (Government Co-contribution for Low Income Earners) Regulations 2004* to specify the information that must be included in quarterly and annual reports to Parliament about the Low Income Superannuation Tax Offset (LISTO). Schedule 4 also amends the *Corporations Regulations 2001* to allow superannuation fund and retirement savings account providers to report payments of LISTO as separate items on the statements they provide to their members.

The purpose of Schedule 5 to the Regulations is to amend the ITAR 1997 to prescribe superannuation funds that have notified the Commissioner in the approved form as a class of superannuation fund for which some or all of a member's contributions will not be deductible.

The purpose of Schedule 6 to the Regulations is to amend the ITAR 1997 to improve the integrity of the superannuation system by removing an election for a payment to *not* be treated as a superannuation income stream benefit. This election currently provides individuals with a tax advantage by treating certain payments as superannuation lump sums rather than superannuation income stream benefits.

The purpose of Schedule 7 to the Regulations is to make amendments to the ITAR 1997 and SISR 1994 to remove items that become redundant following the repeal of the anti-detriment income tax deduction with effect on and from 1 July 2017 by Schedule 9 to the Amending Act.

The purpose of Schedule 8 to the Regulations is to update the *Income Tax Assessment (1936 Act) Regulation 2015*, the RSAR 1997, the SISR 1994 and the *Taxation Administration Regulations 1976* to:

- update cross-references to provisions concerning release authorities for the release of amounts from individuals' superannuation interests which were remade in the Amending Act.
- make minor technical amendments to update or remove references to Commonwealth departments where the departmental references contained in the regulations are no longer current.

The purpose of Schedule 9 to the Regulations is to amend the ITAR 1997 to update legislative references in the regulations, and to insert a definition of 'account-based annuity' following amendments made to the ITAA 1997 by Schedule 11 to the Amending Act.

The purpose of Schedule 10 to the Regulations is to provide for any specific application rules that apply in respect of the items contained in the other Schedules to the Regulations.

Details of the Regulations are set out in the Attachment.



Authorised Version Explanatory Statement registered 27/03/2017 to F2017L00321

Public consultation was generally undertaken on the Schedules to the Regulations as part of the consultation on the undertaken on the Government's Superannuation Reform Package. However public consultation was not undertaken in relation to Schedule 2 and Part 2 of Schedule 8 to the Regulations that updates or removes certain references on the basis that the changes are very minor and consequential in nature.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Authorising Acts do not specify any condition that must be met before the power to make the Regulations may be exercised.

Schedules 1, 2, 3, 5, 6, 7, 9 and 10 and Part 2 of Schedule 8 to the Regulations commence the day after its registration on the Federal Register of Legislation.

Schedule 4 to the Regulations commences on 2 July 2017.

Part 1 of Schedule 8 to the Regulations commences on 1 July 2018.



Authorised Version Explanatory Statement registered 27/03/2017 to F2017L00321

## Details of the Treasury Laws Amendment (Fair and Sustainable Superannuation) Regulations 2017

### Section 1 – Name of Regulation

This section provides that the title of the Regulations is the *Treasury Laws Amendment (Fair and Sustainable Superannuation) Regulations 2017* (the Regulations).

### Section 2 – Commencement

This section provides that each provision of the Regulations specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table, and that any other statement in column 2 has effect according to its terms.

Schedules 1, 2, 3, 5, 6, 7, 9 and 10 and Part 2 of Schedule 8 to the Regulations commence the day after its registration on the Federal Register of Legislation.

Schedule 4 to the Regulations commences on 2 July 2017.

Part 1 of Schedule 8 to the Regulations commences on 1 July 2018.

### Section 3 – Authority

This section provides that the Regulations are made under the *Corporations Act 2001, Income Tax Assessment Act 1936, Income Tax Assessment Act 1997, Retirement Savings Accounts Act 1997, Superannuation (Government Co-contribution for Low Income Earners) Act 2003, Superannuation Industry (Supervision) Act 1993 and Taxation Administration Act 1953.*

### Section 4 – Schedule

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

### Schedule 1 – Transfer balance cap

Schedule 1 to the *Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016* (Amending Act) introduced the transfer balance cap. This cap imposes a $1.6 million limit (subject to indexation) on the amount of capital that can be transferred into the retirement phase of superannuation in respect of an individual. It achieves this by identifying the value of a superannuation income stream (generally at the time at which it enters the retirement phase), and crediting that value towards the recipient's transfer balance account.

The main rules for the transfer balance cap are contained in Subdivision 294 of the *Income Tax Assessment Act 1997* (ITAA 1997) with related administrative provisions contained in Division 136 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953).

Schedule 1 to the Regulations amends the *Corporations Regulations 2001, Income Tax Assessment Regulations 1997* (ITAR 1997), *Retirement Savings Accounts Regulations 1997* (RSAR 1997) and the *Superannuation Industry (Supervision) Regulations 1994* (SISR 1994). These amendments support the introduction of the transfer balance cap through changes to:



Authorised Version Explanatory Statement registered 27/03/2017 to F2017L00321

- the product disclosure statement (PDS) obligations in the *Corporations Act 2001* for funds that comply with a commutation authority;
- update references in the regulations that provide for an exemption from obtaining an actuary's certificate in relation to segregated assets to reflect terminology changes introduced by the Amending Act;
- redefine the class of death benefits that are roll-over superannuation benefits;
- introduce the requirement that a death benefit pension or annuity that is paid to a dependant must also be in the retirement phase; and
- prevent commutations from satisfying the minimum draw-down requirements for superannuation income streams.

*Product disclosure statements*

Where an individual exceeds their transfer balance cap, one or more of their superannuation income stream providers may be issued with a commutation authority. Commutation authorities are issued under Subdivision 136-B of Schedule 1 to the TAA 1953 and require the superannuation provider to commute or partially commute a superannuation income stream that is paid to the individual. Any such commutation provides a 'debit' against the individual's transfer balance account and is used to reduce their excess transfer balance.

An amount that is commuted can be retained in the superannuation system. In certain circumstances, this may require the creation of a new accumulation phase interest for the individual.

Item 1 in Schedule 1 to the Regulations amends subregulation 7.9.04(1) of the *Corporations Regulations 2001* to expand the circumstances in which the general obligation to provide a PDS within a particular period is deferred. Subregulation 7.9.04(1) applies in respect of paragraph 1012F(b) of the *Corporations Act 2001* which states that in particular issue situations, a PDS must be given to a client within 3 months of the issue. The obligation to give a PDS is extinguished if the client ceases to be a member of the fund before the end of the 3 month period.

In addition to changing the period in which a PDS must be provided, issues specified under section 1012F are *not* 'restricted issues' for the purposes of section 1016A of the *Corporations Act 2001*. The consequence of the superannuation interest not being a restricted issue is that the application form requirements in subsection 1016A(2) of the *Corporations Act 2001* are not applicable and the timeframe for providing the PDS are governed by the more flexible conditions in section 1012F of the *Corporations Act 2001*.

These amendments facilitate creating new accumulation phase interests by expanding subregulation 7.9.04(1) to include superannuation interests issued by the trustee of a regulated superannuation fund as a result of complying with a commutation authority.

The changes introduced by item 1 apply in relation to superannuation interests issued on or after 1 July 2017, consistent with the time from which the rules for issuing commutation authorities under Subdivision 136-B apply (see item 1 of Schedule 10).

*Exception to the requirement to obtain an actuary's certificate*

Schedule 1 to the Regulations also makes minor changes to the existing rules in regulation 295-385.01 of the ITAR 1997 that prescribe superannuation income stream benefits for the purposes of the exception to the actuary certificate requirement for the



Authorised Version Explanatory Statement registered 27/03/2017 to F2017L00321

segregated method. These changes update the reference to 'superannuation income stream benefits' to 'retirement phase superannuation income stream benefit of a superannuation fund' (see item 2).

This means that in addition to being a superannuation income stream benefit, the benefit must also be in respect of an income stream that is in the retirement phase, and reflects the change to the earnings tax exemptions made by the Amending Act which introduced the 'retirement phase' concept. Item 3 makes further changes to the regulation to ensure that the deceased was a retirement phase recipient in respect of the prescribed income stream.

These changes made by items 2 and 3 apply to the 2017-18 income year and later income years, consistent with the application of the proportionate exemption in section 295-385 of the ITAA 1997 (see item 2 of Schedule 10).

*Death benefits that are roll-over superannuation benefits*

The Amending Act extended the types of superannuation benefits that are roll-over superannuation benefits under section 306-10 of the ITAA 1997. As a result, the requirement that a superannuation lump sum be a superannuation *member* benefit was expanded to include superannuation benefits generally (see section 306-10 of the ITAA 1997). This means that a roll-over superannuation benefit can now include a superannuation death benefit.

Prior to those amendments, superannuation benefits that were paid to dependant spouses in certain circumstances were treated as superannuation member benefits, meaning that lump sums paid to a dependant spouse could be rolled-over. These rules were contained in former subsections 307-5(3), (3A) and (3B) of the ITAA 1997 and in regulation 306-10.01 of the ITAR 1997 (which excludes superannuation death benefits that are *not* paid to the spouse of the deceased).

Item 4 in Schedule 1 to the Regulations amends regulation 306-10.01 to ensure that superannuation death benefits paid to individuals who are not dependant beneficiaries are not roll-over superannuation benefits under section 306-10 of the Act.

To achieve this, the amended regulation specifies that superannuation death benefits are generally prevented from being a superannuation roll-over benefit unless they are a benefit that is paid to a person covered by subregulation 6.21(2A) of the SISR 1994 or subregulation 4.24(3A) the RSAR 1997 (see paragraph 306-10.01(a)). These rules apply where a member dies on or after 1 July 2007, or where specific conditions were met at the time of the member's death. The persons covered by these subregulations are individuals who are a dependant of a deceased (which can include a spouse or child of the deceased). In addition to this general requirement, if the dependant is a child, they must be either under 18 years of age, a financially dependent child under 25 years of age, or a child with a disability described by subsection 8(1) of the *Disability Services Act 1986*.

The amended regulation continues to prescribe benefits to which section 303-10 of the ITAA 1997 or section 303-10 of the *Income Tax (Transitional Provisions) Act 1997* apply. These sections relate to superannuation lump sum member benefits paid to members that have a terminal medical condition.

Section 390-10 of Schedule 1 to the TAA 1953 broadly requires that where an individual's superannuation interest is rolled over, the superannuation provider that originally held the interest must provide the receiving superannuation provider with a statement containing particulars about the interest and the individual. This statement



Authorised Version Explanatory Statement registered 27/03/2017 to F2017L00321

must be made in the approved form. Following these changes, the approved form requirements for roll-over superannuation benefit statements will be updated as soon as practicable to ensure that death benefits that are rolled over are notified to the receiving and continue to receive death benefit treatment.

Although not directly amended by these changes, the expansion of benefits that can be superannuation roll-over benefits means that a broader range of benefits to which subregulation 6.21(3) of the SISR 1994 and subregulation 4.24(4) of the RSAR 1997 can apply will be able to be rolled-over without facing the more onerous tax consequences. Those regulations provide that for the purposes of the compulsory cashing rules in subregulation 6.21(1) of the SISR 1994 and subregulations 4.24(1) and (3) of the RSAR 1997, a benefit can be rolled-over if the roll-over is done to facilitate the immediate cashing of the benefit (this can be done as a lump sum or as a pension or annuity that satisfies the cashing rules). The changes to the types of superannuation death benefits that are treated as roll-over superannuation benefits under section 306-10 of the ITAA 1997 better aligns the tax treatment of those benefits with the cashing and roll-over rules in regulation 6.21 of the SISR 1994 and 4.24 of the RSAR 1997.

The change made by item 4 applies in relation to superannuation benefits that are paid on or after 1 July 2017, that is the time that the changes to the roll-over benefit rules in section 306-10 of the ITAA 1997 apply (see item 2 of Schedule 10).

*Death benefit pension or annuity*

Items 10, 11, 22 and 23 in Schedule 1 to the Regulations also introduce an additional requirement that a death benefit that is cashed as one or more pensions or annuities must also be a superannuation income stream that is in the retirement phase. To achieve this, those items amend paragraphs 4.24(3)(b)(i) and (ii) of the RSAR 1997 and 6.21(2)(b)(i) and (ii) of the SISR 1994.

The Amending Act introduced the concept of a superannuation income stream being in the 'retirement phase'. Following these changes, an entity can only claim an earnings tax exemption in respect of a superannuation income stream that is in the retirement phase. In most cases, a superannuation income stream will be in the retirement phase when a superannuation income stream benefit is payable from it (see subsection 307-80(1)). However there are different rules for deferred superannuation income streams. Furthermore, transition to retirement income streams cannot be in the retirement phase.

Amending the compulsory cashing rules in respect of pensions and annuities to include a requirement that they also be in the retirement phase means that the only income streams that can be paid to a dependant beneficiary of a deceased member are those for which an entity can claim an earnings tax exemption. If a pension or annuity that is paid to a dependant ceases to be in the retirement phase, the interests supporting the income stream must be cashed out as a lump sum, or rolled-over and paid as a new pension or annuity that is in the retirement phase.

An example is where a death benefits pension is paid to a dependant spouse who has already reached the limit of their transfer balance cap because of their own superannuation interests. If the provider of the pension refuses to comply with a commutation authority that is issued under Subdivision 136-B in Schedule 1 to the TAA 1953 in respect of the superannuation income stream, the income stream would cease to be in the retirement phase (see subsection 307-80(4) of the ITAA 1997). If this were to occur, the provider would no longer be entitled to an earnings tax



Authorised Version Explanatory Statement registered 27/03/2017 to F2017L00321

exemption in respect of a superannuation income stream. These amendments ensure that the pension would also cease to satisfy the compulsory cashing rules in subparagraphs 4.24(3)(b)(i) and (ii) of the RSAR 1997 and 6.21(2)(b)(i) and (ii) of the SISR 1994, meaning that the provider would also be required to cash the relevant benefits in another form.

The changes made by items 10, 11, 22 and 23 apply on and after 1 July 2017, consistent with the time from which application of the retirement phase concept and the transfer balance cap (see items 3 and 4 of Schedule 10).

*Commutations cannot satisfy minimum draw-down requirements*

The amendments made by items 6 to 8 and 13 to 21 in Schedule 1 to the Regulations make changes to the minimum draw-down requirements in the annuity and pension standards in the RSAR 1997 and SISR 1994.

These changes are necessary because of the 'debit' rules introduced in respect of the transfer balance cap by the Amending Act. These rules provide an individual with a debit against their transfer balance account when they receive a superannuation lump sum because of the commutation of a superannuation income stream of which they are a retirement phase recipient (see item 1 of the table in subsection 294-80(1)). Debits are available in respect of partial or full commutations. Providing debits for partial commutations was done on the basis that consequential changes would be made to prevent partial commutations from also counting towards the minimum draw-down requirements in the annuity and pension standards in the RSAR 1997 and SISR 1994.

If partial commutations were to continue to count towards the minimum draw-down requirements and give rise to a debit in an individual's transfer balance account, the individual could ultimately refresh their retirement phase superannuation income streams by the value of their past minimum draw-downs without having additional amounts count towards their transfer balance cap (as any new credits would be neutralised by the debits). This outcome is inconsistent with the policy intent of the transfer balance cap which does not take into account earnings or losses on assets that are retirement phase interests, or amounts paid from the interests (including but not limited to minimum draw-down amounts). The same issue does not arise for full commutations because of the requirement that all minimum draw-down requirements must first be satisfied before a superannuation income stream can be fully commuted.

Under the existing annuity and pension standards, a number of superannuation income streams must have an amount paid from the superannuation income stream that is at least equal to the minimum draw-down amount (see for example subregulation 1.05(11A), which refers to the amount calculated under clause 1 of Schedule 7 to the SISR 1994). These rules currently include payments that are made under a payment split, but do not include amounts that are rolled-over.

The amendments introduced by these Regulations amend the exclusion in respect of roll-overs so that payments that are made by way of *commutation* cannot satisfy the minimum draw-down requirements. This more general requirement covers commutations that are done to remove a lump sum amount from the superannuation system and continues to exclude roll-overs (which are initiated by way of a commutation of an existing interest). Payments that are made under a payment split continue to count towards the minimum draw-down requirements in the amended regulations.



Authorised Version Explanatory Statement registered 27/03/2017 to F2017L00321

Although the partial commutation of a superannuation income stream will reduce the value of that income stream, the way in which a trustee calculates the minimum pension payments that must be made from the income stream will not be affected by the partial commutation. That is, the same amount of pension payments that were required to be made before the commutation must still be made after the commutation.

Where a commutation authority involving a partial commutation is issued in relation to superannuation income stream, trustees will need to determine whether the minimum pension payments will still be able to be met for the income year after they comply with the commutation authority. Where this is not the case, the trustee would be expected to make the minimum pensions payments before complying with the commutation authority, and then commute the remaining balance of the account to comply with the commutation authority.

In such cases, subsection 136-85(1) of Schedule 1 to the TAA 1953 would require that the trustee notify the Commissioner that they have commuted the maximum release amount for the superannuation interest that supported the superannuation income stream identified in the commutation authority (being the amount they are required to commute under paragraph 136-80(1)(b) of Schedule 1 to the *TAA 1953*).

The particulars of the annuity and pension standards that are amended to prevent commutations count as minimum draw-downs are set out in the following table:

| **Item/s** | **Pension or annuity …** | **Amendment to …** |
|---|---|---|
| *Retirement Savings Account Regulations 1997* | | |
| 6 | Subregulation 1.07(3D) | Paragraph 1.07(3D)(a) |
| 7 | Subregulation 1.08(2) | Paragraph 1.08(2)(ba) |
| 8 | Subregulation 1.08A(1) | Paragraph 1.08A(1)(c) |
| *Superannuation Industry (Supervision) Regulations 1994* | | |
| 13 | Paragraph 1.05(11A)(a) | Paragraph 1.05(11A)(a) |
| 14 | Subparagraph 1.05(11A)(b)(i) | Sub-subparagraph 1.05(11A)(b)(i)(B) |
| 15 | Subparagraph 1.05(11A)(b)(ii) | Sub-subparagraph 1.05(11A)(b)(ii)(D) |
| 16 | Paragraph 1.06(9A)(a) | Paragraph 1.06(9A)(a) |
| 17 | Subparagraph 1.06(9A)(b)(i) | Sub-subparagraph 1.06(9A)(b)(i)(B) |
| 18 | Subparagraph 1.06(9A)(b)(ii) | Sub-subparagraph 1.06(9A)(b)(ii)(C) |
| 19 | Subregulation 1.07A(1) | Paragraph 1.07A(2)(ba) |
| 20 | Subregulation 1.07C(1) | Paragraph 1.07C(2)(ba) |
| 21 | Subregulation 1.07D(1) | Paragraph 1.07D(1)(c) |



Authorised Version Explanatory Statement registered 27/03/2017 to F2017L00321

These changes made by the items covered by the above table apply on and after 1 July 2017, consistent with the application of the debit rules introduced by the transfer balance cap (see items 3 and 4 of Schedule 10).

*Consequential amendments*

Items 5 and 12 in Schedule 1 to the Regulations make consequential changes to the dictionaries in the RSAR 1997 and SISR 1994 to enable terms that are used in the amended regulations to take on their defined meaning in the ITAA 1997. These definitions are 'excess transfer balance', 'retirement phase', and 'superannuation income stream'.

Item 9 also repeals the definition of 'rolled over' in subregulation 1.08A(3) of the RSAR 1997 that applies for the purposes of regulation 1.08A of the RSAR 1997. This term is no longer required given the broader changes to the minimum draw-down requirements explained above.

**Schedule 2 – Concessional contributions**

Schedule 2 to the Regulations removes the exception for constitutionally protected funds (CPFs) in paragraph 292-25.01(3)(c) of the *Income Tax Assessment Regulations* (ITAR) *1997*. Contributions made to a CPF were previously excluded from counting towards an individual's concessional contributions cap. CPF members had an advantage in being able to receive or accrue any amount of employer contributions, other contributions and amounts to such funds without affecting their ability to have concessional contributions made to other superannuation interests. Changes in the Superannuation Reform Package provide more equal treatment of contributions to CPFs, by counting them from 1 July 2017 towards an individual's concessional contributions cap. Amending the Regulation to reflect this change made in Schedule 2 to the Amending Act ensures the law operates as intended.

Schedule 2 to the Regulations also makes minor technical amendments to move the prior Subdivision 292-B of the ITAR 1997 into the new Division 291. This change reflects the amendments that were made to the ITAA 1997 in 2013 by the *Tax Laws Amendment (Fairer Taxation of Excess Concessional Contributions) Act 2013*.

The amendments made by items 8 and 9 of Schedule 2 to remove the exception for CPFs apply in relation to the financial year starting on 1 July 2017 and later financial years, consistent with the changes to the concessional contribution rules introduced by item 1 of Schedule 2 to the Amending Act (see item 2 of Schedule 10).

**Schedule 3 – Non-concessional contributions**

Schedule 3 to the Regulations removes the RSA-capped contribution limit in subregulation 5.03(3) of the RSAR 1997 and the fund-capped contribution limit in subregulation 7.04(3) of the SISR 1994. For contributions made in respect of individuals who are less than 65 years old, the rules prevent an RSA provider or a regulated superannuation fund from accepting a contribution that is greater than three times the amount of the non-concessional contributions cap. This limit is based on the maximum amount of a non-concessional contribution that can be made in relation to an individual under the three-year bring-forward rule. For contributions made in respect of individuals who are between 65 and 75 years old, the rules prevent an RSA provider or a regulated superannuation fund from accepting a contribution that is greater than the amount of the non-concessional contributions cap. This limit reflects the fact that such individuals do not have access to the bring-forward rule.



Authorised Version Explanatory Statement registered 27/03/2017 to F2017L00321

These limits were introduced when the non-concessional contributions cap regime was first implemented. At that time, the option to release non-concessional contributions that exceeded the non-concessional contributions cap did not exist, meaning that individuals who breached their non-concessional cap were automatically liable to excess non-concessional contributions tax. The RSA-capped and fund-capped rules were designed to prevent inadvertent breaches of the non-concessional contributions cap by placing an onus on the funds not to accept amounts above the annual non-concessional cap or bring forward cap (depending on an individual's age).

However, the changes to the non-concessional contributions cap introduced by the Amending Act, and in particular the eligibility conditions in respect of an individual's total superannuation balance, now mean that it is no longer practical to set a single value for the RSA-capped or fund-capped contribution limits. This is because an individual's cap (including any bring forward cap) is no longer based solely on the individual's age, but varies depending on the individual's total superannuation balance.

For the RSA-capped and fund-capped contributions to have ongoing relevance, they would need to be based on information obtained in respect of an individual member's circumstances. However, this would place an inappropriate burden on RSA providers and funds, especially given that it is now possible for individuals to release non-concessional contributions that exceed their non-concessional contributions cap. The more appropriate approach is for the individuals themselves to have primary responsibility for determining whether a non-concessional contribution that is made in respect of them is within their non-concessional contributions cap.

Consistent with that approach, the Regulations remove the RSA-capped contribution limit in subregulation 5.03(3) of the RSAR 1997 and the fund-capped contribution limit in subregulation 7.04(3) of the SISR 1994 (see items 2 and 9 in Schedule 3).

Items 1, 3-5, 7, and 9-11 in Schedule 3 to the Regulations make consequential changes to regulations 5.03 of the RSAR 1997 and 7.04 of the SISR 1994 to remove references to the limits, while items 6 and 12 in the Regulations remove associated definitions.

Item 13 in Schedule 3 to the Regulations also repeals subregulations 12A.08(6) and (7) of the SISR 1994. These subregulations extended the fund-capped contribution limit to amounts received by a complying superannuation fund from a KiwiSaver Scheme. These rules are no longer required given the broader repeal of the fund-capped contribution limit.

The amendments made by Schedule 3 to the Regulations apply for the financial year starting on 1 July 2017 and later financial years, consistent with the changes to the non-concessional contributions cap made by the Amending Act (see items 3 and 4 of Schedule 10).

**Schedule 4 – Low Income Superannuation Tax Offset**

The purpose of Schedule 4 to the Regulations is to amend the:

- *Superannuation (Government Co-contribution for Low Income Earners) Regulations 2004* (Co-contribution Regulations) to specify the information that must be included in quarterly and annual reports to Parliament about the Low Income Superannuation Tax Offset (LISTO); and



Authorised Version Explanatory Statement registered 27/03/2017 to F2017L00321

- *Corporations Regulations 2001* to allow superannuation fund and retirement savings account providers to report payments of LISTO as separate items on the statements they provide to their members.

The measure forms part of the Government's Superannuation Reform Package announced in the 2016-17 Budget.

The Regulations specify the information that the Commissioner of Taxation (Commissioner) must report to the Minister for presentation to Parliament on a quarterly and annual basis (Parliamentary reporting requirements). Information to be reported includes:

- the number of beneficiaries of the LISTO (reported quarterly and annually) including:
  - by categories based on whether beneficiaries have lodged income tax returns (reported annually); and
  - by $1,000 bands of adjusted taxable income (reported annually);
- the total amount of LISTO paid by the Commissioner (reported quarterly and annually) including breaking it down into categories based on whether beneficiaries have lodged income tax returns (reported annually); and
- the total amount of LISTO recovered as overpaid amounts (reported quarterly and annually).

Under the transitional legislative provisions that repeal the Low Income Superannuation Contribution (LISC), the LISC Parliamentary reporting requirements cease to apply from 1 July 2017 and therefore the LISC regulation that deals with LISC Parliamentary reporting also becomes redundant from this time. Accordingly, the Regulations repeals the LISC Parliamentary reporting requirements.

The Regulations also make consequential amendments to the *Corporations Regulations 2001*. Superannuation funds and retirement savings account providers are required to report Government co-contributions, which include LISTO, on periodic statements they provide to their members. The Regulations ensure that they are able to separately identify LISTO amounts on those statements. The transitional provisions for the repeal of the LISC in the *Minerals Resource Rent Tax Repeal and Other Measures Act 2014* allow the Commissioner to make determinations and pay out LISC up to and including 30 June 2019 for entitlements that arise prior to 1 July 2017. For this reason, for the purpose of reporting on periodic statements, the Regulations identify the LISC and the LISTO separately.

**Schedule 5 – Deducting personal superannuation contributions**

Schedule 5 to the Amending Act made a number of amendments to the tax and superannuation law. Broadly, these amendments removed a requirement that individuals could only deduct personal contributions to their superannuation interests if their remuneration from employment or similar activities made up less than ten per cent of the total of their assessable income, reportable fringe benefits and reportable employer superannuation contributions. At the same time, the amendments also prevented individuals from being able to deduct some categories of contributions at all. These categories included:

- all contributions made to superannuation funds of a type specified in the regulations (subparagraph 291-155(1)(a)(iii) of the ITAA 1997); and



Authorised Version Explanatory Statement registered 27/03/2017 to F2017L00321

- all contributions of a type specified in the regulations to funds of a type specified in the regulations (paragraph 291-155(1)(b) of the ITAA 1997) .

Item 1 of Schedule 5 to the Regulations amends the ITAR 1997 to insert regulation 290-155.01 to specify that individuals will not be able to deduct personal contributions to a superannuation fund that:

- provides defined benefit interests; and
- elects to be a fund to which this rule applied before the start of that financial year by notifying the Commissioner in the approved form; and
- has not withdrawn this notification prior to the start of the financial year.

Item 2 of Schedule 5 to the Regulations amends the ITAR 1997 to insert regulation 290-155.05 to specify that individuals will not be able to deduct personal contributions to a defined benefit interest in a superannuation fund that:

- notified the Commissioner in the approved form that it wished to be a fund to which this rule applied before the start of that financial year; and
- has not subsequently withdrawn this notification prior to the start of the financial year.

The effect of these rules is to allow superannuation funds in which one or more members hold a defined benefit interest to choose for either all contributions to the superannuation fund, or contributions to defined benefit interests in the superannuation fund to be non-deductible.

Generally, it does not impose a significant or unexpected burden on superannuation funds if members choose to deduct personal contributions they make to the fund. However, certain defined benefit funds only open to employees have been able to operate on the basis that personal contributions by the member would not be deductible prior to the recent amendments. Once the changes made by Schedule 5 to the Amending Act apply this will no longer be the case. The cost and required changes for these funds to accept deductible personal contributions may be significant.

These amendments ensure that funds that would face undue costs if members became able to deduct personal contributions to the fund as a result of the changes, can avoid these costs by making an election in the approved form.

For many superannuation funds the issues they face are specific to personal contributions to defined benefit interests in the fund. Therefore, the amendments provide the flexibility for superannuation funds to have the restriction apply either to all personal contributions to the superannuation fund or only to personal contributions to defined benefit interests.

Preventing individuals from deducting personal contributions can have a significant effect on their tax position. Accordingly, the restriction (and the withdrawal of the restriction) only applies in relation to contributions made in financial years after the financial year in which the election is made. This ensures that individuals do not face retrospective changes to their tax position.



Authorised Version Explanatory Statement registered 27/03/2017 to F2017L00321

The amendments made by Schedule 5 apply to contributions to superannuation made in the 2017-18 income year and later income years (see item 2 of Schedule 10). This is consistent with the application of the amendments made by Schedule 5 to the Amending Act.

**Schedule 6 – Innovative income streams and integrity**

Schedule 6 to the Regulations amend the ITAR 1997 to remove the ability for individuals to elect to treat certain payments as superannuation lump sums.

Currently, regulation 995-1.03 of the ITAR 1997 provides that a person can elect to not treat a payment from a superannuation income stream that meets certain conditions as a superannuation income stream benefit.

If a person makes an election to not treat a payment as a superannuation income stream benefit then the payment is a superannuation lump sum. This is because section 307-65 of the ITAA 1997 defines a superannuation lump sum as a superannuation benefit that is not a superannuation income stream benefit.

Whether a superannuation benefit is a superannuation lump sum or a superannuation income stream is significant because there are different tax consequences for each. For example, under the current law, a person who has reached preservation age but is under 60 years of age could commence a transition to retirement income stream and elect under regulation 995-1.03 of the ITAR 1997 to not treat the payment received as a superannuation income stream benefit (making the payment a superannuation lump sum). The person would then be able to receive superannuation lump sums tax-free, up to the low rate cap to the extent it is taxable component (which is $195,000 in the 2016-17 income year). If no election was made the payment would be a superannuation income stream benefit and the person would receive the income taxed at their marginal tax rate less a 15 per cent tax offset.

Item 2 of Schedule 6 to the Regulations repeals regulation 995-1.03 to remove this election. Item 1 of Schedule 6 to the Regulations makes a consequential amendment to paragraph (a) of the definition of 'superannuation income stream benefit' in subregulation 995-1.01(2) of the ITAR 1997 to remove a reference to regulation 995-1.03 of the ITAR 1997.

The amendments made by Schedule 6 apply to payments from an interest that supports a superannuation income stream made on or after 1 July 2017 (see item 2 of Schedule 10).

**Schedule 7 – Anti-detriment provisions**

Schedule 7 to the Regulations amends the ITAR 1997 and SISR 1994 to remove items that become redundant following the repeal of the anti-detriment income tax deduction by the Amending Act.

The anti-detriment income tax deduction was a deduction available to a complying superannuation fund, or approved deposit fund that pays an increased superannuation lump sum, because of the death of a member for the benefit of their spouse, former spouse or child, to compensate for income tax paid by the fund in respect of contributions made for the member during their lifetime.



Authorised Version Explanatory Statement registered 27/03/2017 to F2017L00321

The amendments to regulation 307-125.02 of the ITAR 1997 removes the references to the anti-detriment deduction in the regulation setting out an alternative method for section 307-125 of the ITAA 1997 that applies to determining the components of a superannuation benefit after the death of the recipient of a superannuation income stream.

The amendments to regulation 4.07C of the SISR 1994 remove the exclusion of an anti-detriment payment from the definition of insured benefit and the definition of anti-detriment payment that was associated with that exclusion.

The amendments in Schedule 7 apply to lump sums paid because of the death of a person that occurred on or after 1 July 2017, or that are otherwise paid on or after 1 July 2019 (see items 2 and 4 of Schedule 10). This is consistent with the application of the related amendments in Schedule 9 to the Amending Act.

**Schedule 8 – Administrative streamlining**

Schedule 10 to the Amending Act amends the tax law to simplify and consolidate the range of existing processes for the release of amounts from individuals' superannuation interests using a release authority (except release authorities relating to Division 293 debt account discharge liabilities). Items 1 to 21 of Schedule 8 (Part 1) to the Regulations make consequential amendments to the ITAR 1997, SISR 1994 and RSAR 1997 to ensure that they reflect the new release authority provisions and changes to the conditions of release.

Items 22 to 26 (Part 2) of Schedule 8 to the Regulations either updates the reference to the department with a generic definition to refer to the relevant Commonwealth departments or removes the reference to the name of the department where it is not required for the regulation to operate as intended. For example, the 'Department of Immigration and Citizenship' is now defined as the 'Department administered by the Minister administering the *Migration Act 1958'*. This approach relies on the core legislative functions of departments which change infrequently, rather than names at a particular time, which are subject to change on a regular basis. This minimises the need for future changes.

The amendments in items 2 to 21 of Part 1 of Schedule 8 to the Regulations apply in relation to release authorities given to superannuation providers on or after the day of commencement of that item.

**Schedule 9 – Total superannuation balance**

Schedule 9 to the Regulations amends the ITAR 1997 to update cross-references to an enabling provision in the ITAA 1997 that provide methods for valuing superannuation interests. The enabling provision was amended as part of the changes to introduce the concept of 'total superannuation balance' made by Schedule 11 to the Amending Act. These changes included inserting a new regulation-making power at subsection 307-205(2) of the ITAA 1997 to make regulations to specify a value or method for determining the accumulation phase value of an individual's superannuation interest.

As a result, paragraph 307-205(a) of the ITAA 1997 was renumbered as paragraph 307-205(1)(a) of the ITAA 1997. Paragraph 307-205(1)(a) of the ITAA 1997 allows for methods for the valuation of superannuation interests to be specified in the regulations. Item 1 of Schedule 9 to the Regulations updates subregulations 307-205.01(1) and 307-205.02(1) of the ITAR 1997 to ensure that they continue to correctly refer back to the enabling provision in the ITAA 1997.



Authorised Version Explanatory Statement registered 27/03/2017 to F2017L00321

Schedule 9 to the Regulation also amends the SISR 1994 to insert a definition of 'account-based annuity'. A definition of an account-based annuity was necessary following the introduction of the concept of 'total superannuation balance' made by Schedule 11 to the Amending Act.

Subsection 307-230(3) of the ITAA 1997 provides that an individual's total superannuation balance includes the balance of their transfer balance account adjusted to reflect the current value of any account-based superannuation interests in the retirement phase. Paragraphs 307-230(4)(d) and (e) of the ITAA 1997 refer to an account-based annuity and an account-based pension. While there is an existing definition of an account-based pension in subregulation 1.03(1) of the SISR 1994 there is no equivalent definition of an account-based annuity.

Item 2 of Schedule 9 to the Regulations amends subregulation 1.03(1) of the SISR 1994 to insert a definition of an account-based annuity. This is an annuity for which there is an account balance attributable to the annuitant and which meets the standards of subregulation 1.05(11A). The definition of an account-based annuity is similar to the existing definition of an account-based pension in subregulation 1.03(1) of the SISR 1994.

The term defined in item 2 of Schedule 9 applies in a provision of an Act, regulation or instrument in the same way as that provision applies (see item 4 of Schedule 10).

**Schedule 10 - Application**

Schedule 10 to the Regulations provides for any specific application rules that apply in respect of the items contained in the other Schedules to the Regulations. Reference to the application rules is made in the explanatory material for the schedule to which they relate.



Authorised Version Explanatory Statement registered 27/03/2017 to F2017L00321

**Statement of Compatibility with Human Rights**

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

**Treasury Laws Amendment (2016 Measures No. 3) Regulations 2017**

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**

This Legislative Instrument contains minor, technical and consequential amendments that are necessary to facilitate the changes introduced by the *Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016* (Amending Act).

**Schedule 1**

**Overview of Schedule 1**

The purpose of Schedule 1 to the Legislative Instrument is to make consequential changes to support the introduction of the transfer balance cap measure in the superannuation reform package. These changes apply to the *Corporations Regulations 2001, Income Tax Assessment Regulations 1997, Retirement Savings Accounts Regulations 1997* and the *Superannuation Industry (Supervision) Regulations 1994.*

These amendments support the introduction of the transfer balance cap through changes to:

- the product disclosure statement (PDS) obligations in the *Corporations Act 2001* for funds that comply with a commutation authority. These changes expand the existing circumstances in which the obligation to provide a PDS is deferred, meaning that funds will have 3 months to issue a client with a PDS where they have complied with a direction issued by the Commissioner to commute a pension interest;
- update references in the regulations that provide for an exemption from obtaining an actuary's certificate in relation to segregated assets to reflect terminology changes introduced by the Amending Act;
- redefine the class of death benefits that are roll-over superannuation benefits so that more individuals that receive death benefits can have them treated as roll-overs;
- introduce the requirement that a death benefit pension or annuity that is paid to a dependant must also be in the retirement phase; and
- prevent commutations from satisfying the minimum draw-down requirements for superannuation income streams.

**Human rights implications**

Schedule 1 to the Legislative Instrument does not engage any of the applicable rights or freedoms.



Authorised Version Explanatory Statement registered 27/03/2017 to F2017L00321

**Conclusion**

Schedule 1 to the Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

**Schedule 2**

**Overview of Schedule 2**

The purpose of Schedule 2 to the Legislative Instrument is to make a minor consequential change to the ITAR 1997 to ensure that, consistent with the changes introduced by the Amending Act, the concessional contribution rules apply appropriately to constitutionally protected funds.

**Human rights implications**

Schedule 2 to the Legislative Instrument does not engage any of the applicable rights or freedoms.

**Conclusion**

Schedule 2 to the Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

**Schedule 3**

**Overview of Schedule 3**

The purpose of Schedule 3 to the Legislative Instruments is to remove the operating standard that prevents funds from accepting fund-capped or RSA-capped contributions. This standard is no longer required given the broader changes to the annual non-concessional contributions cap, its related eligibility and bring forward cap rules.

**Human rights implications**

Schedule 3 to the Legislative Instrument does not engage any of the applicable rights or freedoms.

**Conclusion**

Schedule 3 to the Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

**Schedule 4**

**Overview of Schedule 4**

The purpose of Schedule 4 to the Legislative Instruments is to amend the *Superannuation (Government Co-contribution for Low Income Earners) Regulations 2004* to specify the information that must be included in quarterly and annual reports to Parliament about the Low Income Superannuation Tax Offset (LISTO). Schedule 4 also amends the *Corporations Regulations 2001* to allow superannuation fund and



Authorised Version Explanatory Statement registered 27/03/2017 to F2017L00321

retirement savings account providers to report payments of LISTO as separate items on the statements they provide to their members.

**Human rights implications**

Schedule 4 to the Legislative Instrument does not engage any of the applicable rights or freedoms.

**Conclusion**

Schedule 4 to the Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

## Schedule 5

**Overview of Schedule 5**

The purpose of Schedule 5 to the Legislative Instruments is to prescribe superannuation funds that have notified the Commissioner in the approved form as a class of superannuation fund for which some or all of a member's contributions will not be deductible.

**Human rights implications**

Schedule 5 to the Legislative Instrument does not engage any of the applicable rights or freedoms.

**Conclusion**

Schedule 5 to the Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

## Schedule 6

**Overview of Schedule 6**

The purpose of Schedule 6 to the Legislative Instruments is to improve the integrity of the superannuation system by removing an election for a payment to *not* be treated as a superannuation income stream benefit. This election currently provides individuals with a tax advantage by treating certain payments as superannuation lump sums rather than superannuation income stream benefits.

**Human rights implications**

Schedule 6 to the Legislative Instrument does not engage any of the applicable rights or freedoms.

**Conclusion**

Schedule 6 to the Legislative Instrument is compatible with human rights as it does not raise any human rights issues.



Authorised Version Explanatory Statement registered 27/03/2017 to F2017L00321

**Schedule 7**

**Overview of Schedule 7**

The purpose of Schedule 7 to the Legislative Instruments is to remove items that become redundant following the repeal of the anti-detriment income tax deduction with effect on and from 1 July 2017 by Schedule 9 to the Amending Act.

**Human rights implications**

Schedule 7 to the Legislative Instrument does not engage any of the applicable rights or freedoms.

**Conclusion**

Schedule 7 to the Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

**Schedule 8**

**Overview of Schedule 8**

The purpose of Schedule 8 to the Legislative Instruments is to:

- update cross-references to provisions concerning release authorities for the release of amounts from individuals' superannuation interests which were remade in the Amending Act.
- make minor technical amendments to update or remove references to Commonwealth departments where the departmental references contained in the regulations are no longer current.

**Human rights implications**

Schedule 8 to the Legislative Instrument does not engage any of the applicable rights or freedoms.

**Conclusion**

Schedule 8 to the Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

**Schedule 9**

**Overview of Schedule 9**

The purpose of Schedule 9 to the Legislative Instruments is to update legislative references in the regulations, and to insert a definition of 'account-based annuity'. These changes are required to facilitate the definition of 'total superannuation balance' that was introduced by Schedule 11 to the Amending Act.

**Human rights implications**

Schedule 9 to the Legislative Instrument does not engage any of the applicable rights or freedoms.



Authorised Version Explanatory Statement registered 27/03/2017 to F2017L00321

**Conclusion**

Schedule 9 to the Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

## Schedule 10

**Overview of Schedule 10**

The purpose of Schedule 10 to the Legislative Instruments is to provide specific application rules for the various amendments contained in the other Schedules to the Legislative Instrument.

**Human rights implications**

Schedule 10 to the Legislative Instrument does not engage any of the applicable rights or freedoms.

**Conclusion**

Schedule 10 to the Legislative Instrument is compatible with human rights as it does not raise any human rights issues.



Authorised Version Explanatory Statement registered 27/03/2017 to F2017L00321