



# AIST submission

**Response to Exposure Draft: Refund of Excess  
Concessional Contributions**

**January 2012**



Australian Institute of Superannuation Trustees

## Background

In the 2011-12 Budget, the Government announced the introduction of the refund of excess concessional contributions. This measure will give eligible individuals the option to have excess concessional contributions of up to \$10,000 taken out of their superannuation fund and assessed at their marginal income tax rate rather than incurring the excess contributions tax.

In August 2011, Treasury released a consultation paper which presented a broad overview and sought submissions on the proposed design and operation of the measure. The Australian Institute of Superannuation Trustees (AIST) lodged a submission<sup>1</sup> to Treasury during the consultation paper stage and we will make reference to this submission throughout this paper.

## AIST

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

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

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

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

## Contact

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## Note to this submission

Unless otherwise indicated, please note that all section and subsection numbers referred to throughout this submission refer to those used to number the proposed new or amended sections of the *Income Tax Assessment Act 1997* ("the Act", "the ITAA", "the Tax Act") as described in the Exposure Draft ("the ED") and not those of the ED itself, unless otherwise indicated.

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<sup>1</sup> AIST 2011, *AIST Submission: Response to Consultation Paper: Refund of Excess Concessional Contributions*, <http://tinyurl.com/7w58dxj>

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## 1 Executive Summary

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AIST broadly supports this proposal; however we believe that the following would improve the effectiveness of this position:

- We contend that the introduction of a 'Bring Forward Rule' for concessional contributions similar to non-concessional contributions would remove the need for this measure and allow greater flexibility for taxpayers and ATO to manage concessional contribution caps.
- We support the notion that an inadvertent breach of the concessional contributions cap of less than \$10,000 be made refundable, however this amount should be indexed to Average Weekly Ordinary Time Earnings (AWOTE) and we do not support this refund being made available where the cap has been breached due to a late payment or a mandated concessional contribution;
- We believe that this offer should be made on an ongoing basis.
- If this measure is adopted as a 'one-off' offer, we believe that taxpayers should be given the choice as to when to take up the offer. Thus, we do not believe that this offer should be withheld from taxpayers who have breached the concessional contribution cap in previous tax years or who have received the offer, regardless of whether they accepted or declined the offer; and
- We recommend that the EM include a list of conditions to clearly define who is ineligible to receive the offer.

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## 2 Our preferred solution

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

- *AIST Submission: Response to Consultation Paper: Refund of Excess Concessional Contributions (August 2011)*<sup>2</sup>
- *AIST Submission: Response to Treasury: Concessional Superannuation Contribution Caps for Individuals Aged 50 and over (March 2011)*<sup>3</sup>

In both responses, we recommended that the current Bring Forward Rule for non-concessional contributions be similarly applied to concessional contributions. This equates to people under the age of 65 being able to bring forward two (2) years worth of entitlements of concessional contributions allowing them to contribute a greater amount in a given financial year (i.e. \$150,000 for a person aged between 50 and 65). The benefit of applying this rule is that it will dramatically reduce the number of Australians breaching the caps and being charged excess contributions tax.

This rule would provide greater flexibility around the concessional contribution limits and mean that those who breach their caps (inadvertently or otherwise) would avoid being penalised, assuming they limit their contributions to the maximum amount over the next two (2) years and may exclude them from any indexed increases in the cap during this time. This means that once a person has triggered the bring-forward in a year, any indexation of the concessional contributions cap for the subsequent two years does not apply. This rule would effectively give qualifying people more time (an additional two years) to adjust their contributions before any penalties for breaching concessional caps would apply.

AIST also recommended that indexation be extended to additional amounts presently not indexed.

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<sup>2</sup> *Op. Cit.*

<sup>3</sup> <http://tinyurl.com/3c4fy8o>

## 3 Position

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

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

### 3.1 Proposed section 292-467: Refunded excess concessional contributions

AIST supports the operation of the measure in determining if a taxpayer is eligible to receive a refund, and in particular supports the change that allows the taxpayer greater choice in choosing when they want to utilise the refund option.

There is detail contained in the Explanatory Material (EM) that is not clearly documented in the Exposure Draft (ED), as well contradictory statements within the EM.

Paragraph 1.13 of the EM states, at the first dotpoint:

*“Once an individual has excess concessional contributions in any financial year from 2011-12, they are no longer eligible for the refund option in any subsequent year.”*

This contradicts paragraph 1.15 of the EM, at the third dotpoint:

*“A decision not to accept the offer will not result in the individual being entitled for a refund offer in a future year “*

AIST supports the intent contained in paragraph 1.15 whereby the taxpayer retains an ability to choose when to utilise the refund and is not effectively penalised if they choose not to accept the refund. That is, it will continue to be available for each applicable tax year until the taxpayer chooses to accept the offer.

AIST's proposed change to paragraph 1.13 would be as follows:

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

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

Paragraph 1.29 of the EM appears inconsistent with paragraph 1.15 and the intent of the policy. It states:

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

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

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

*“...However, the individual will remain eligible for the refund in any subsequent year based on compliance with 292-267 (1).”*

AIST believes that there is still confusion around who exactly is eligible to receive an offer from the Commissioner and recommends that a list be included in the EM that items the conditions which would make a taxpayer ineligible.

AIST also supports the remaining provisions of the ED.

### 3.3 Concerns related to the on-off nature of this payment

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

### 3.4 Status of breaches due to late or mandated contributions

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

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

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

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