# EXPOSURE DRAFT EXPLANATORY STATEMENT

*Corporations Act 2001*

*Income Tax Assessment Act 1936*

*Income Tax Assessment Act 1997*

*Retirement Savings Accounts Act 1997*

*Superannuation Industry (Supervision) Act 1993*

*Taxation Administration Act 1953*

*Treasury Laws Amendment (Fair and Sustainable Superannuation) Regulation 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*, section 200 of the *Retirement Savings Accounts Act 1997*, section 353 of the *Superannuation Industry (Supervision) Act 2003* 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) Regulation 2017* (the Regulation) amends a number of regulations to give effect to the Government’s Superannuation Reform Package. This package was legislated by the *Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016* (Amending Act)*.*

The purpose of Schedule 1 to the Regulation is to make consequential changes to regulations 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 Regulation 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 3 to the Regulation is to make changes to the RSAR 1997and SISR 1994 to remove the operating standard to not accept any 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.

The purpose of Schedule 4 to the Regulation is to make consequential changes to regulations as a result of the measure in the superannuation reform package (Schedule 10 to the Amending Act) to simplify and consolidate existing processes for the release of amounts from individuals’ superannuation interests using a release authority. The consequential changes to regulations are to SISR 1994, *Income Tax Assessment (1936 Act) Regulation 2015*, RSAR 1997, and the *Taxation Administration Regulations 1976*.

The purpose of Schedule 5 to the Regulation 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.

Details of the Regulation are set out in the Attachment.

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

Schedules 1, 2, 3 and 5 to the Regulation commence the day after its registration on the Federal Register of Legislation.

Schedule 4 to the Regulation commences on 1 July 2018.

### Attachment

**Details of the Treasury Laws Amendment (Fair and Sustainable Superannuation) Regulation 2016**

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Treasury Laws Amendment (Fair and Sustainable Superannuation) Regulation 2016* (the Regulation).

Section 2 – Commencement

This section provides that each provision of the Regulation 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 and 5 to the Regulation commence on the day after registration of the Regulation on the Federal Register of Legislation.

Schedule 4 to the Regulation commences on 1 July 2018.

Section 3 – Authority

This section provides that the Regulation is made under the *Corporations Act 2001, Income Tax Assessment Act 1997* (ITAA 1997)*, Retirement Savings Accounts Act 1997* (RSA Act 1997)*, Superannuation Industry (Supervision) Act 1993* (SIS Act 1993) *and Taxation Administration Act 1953* (TAA 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 item 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 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 ITAA 1997, with related administrative provisions contained in Division 136 of Schedule 1 to the TAA 1953.

Schedule 1 to the Regulationamends 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:

* the product disclosure statement (PDS) obligations in the *Corporations Act 2001* for funds that comply with a commutation authority;
* permit the commutation of certain superannuation income streams for the purpose of reducing an individual’s excess transfer balance;
* provide an exception to the requirement to obtain an actuary’s certificate in applying the earnings tax exemption in section 295-390 of the ITAA 1997 (the proportionate method);
* 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 in 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 Regulation 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 section 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 product disclosure statement 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 interest issued by the trustee of a regulated superannuation fund as a result of complying with a commutation authority.

These changes 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.

*Commutation of certain superannuation income streams*

As indicated above, the transfer balance cap imposes a limit on the amount of capital that is transferred into the retirement phase of superannuation in respect of an individual. Where the amount that is transferred to the retirement phase exceeds an individual’s transfer balance cap, one or more of their superannuation income streams needs to be commuted or partially commuted to reduce the amount of their excess. The commutation of a superannuation income stream can generally be initiated by an individual, or through a commutation authority issued by the Commissioner under Subdivision 136-B in Schedule 1 to the TAA 1953.

To be a superannuation income stream, it must be an annuity or pension for the purposes of the RSA Act 1997 or SIS Act 1993. The standards that govern when a superannuation income stream satisfies these requirements are contained in the RSAR 1997 and SISR 1994, respectively. Different standards set out different rules for various types of pensions and annuities, and included in a number of these standards are restrictions about commutation.

The amendments included in Schedule 1 expand the existing exceptions to the restrictions on commutations to permit the commutation of certain superannuation income streams that are done for the purpose of reducing or avoiding an excess transfer balance. This means that if an individual identifies that they have an excess transfer balance, they can advise their fund to commute or partially commute a pension or annuity for the purposes of reducing the excess. Similarly, a fund that receives a commutation authority that is issued by the Commissioner can comply with the commutation authority on the basis that such authorities are issued to reduce an individual’s excess transfer balance.

The amendments also allow an individual to instruct their provider to commute superannuation income stream if they are aware that continuing to have the superannuation income stream paid to them would result in them having an excess transfer balance. An example of where this might occur is where a reversionary pension is paid to an individual. In such cases, the credit is applied 12 months after the time that the reversionary pension first became payable and the individual will be able to anticipate the amount that will be added to their transfer balance account for that interest. These amendments enable the individual to commute the reversionary pension, or another superannuation income stream, to prevent the credit from causing them to have an excess transfer balance (assuming the relevant income stream was otherwise prevented from being commuted). Individuals who rearrange their affairs in anticipation of the transfer balance cap applying will also be able to take advantage of the new exception.

The particulars of the new exceptions that apply to the pension and annuity standards are set out in the following table:

| **Item/s** | **Pension or annuity …** | **Exception for excess transfer balance included in …** |
| --- | --- | --- |
| *Retirement Savings Account Regulations 1997* | | |
| 7-8 | Subregulation 1.07(3A) | Subparagraph 1.07(3A)(e)(ix) |
| 12 | Subregulation 1.08(2) | Paragraph 1.08(2)(e) |
| 16 | Subregulation 4.01AA(2) | Paragraph 4.01AA(2)(e) |
| *Superannuation Industry (Supervision) Regulations 1994* | | |
| 20-21 | Subregulation 1.05(2) | Subparagraph 1.05(2)(f)(viii) |
| 22-23 | Subregulation 1.05(9) | Subparagraph 1.05(9)(h)(x) |
| 24-25 | Subregulation 1.05(10) | Subparagraph 1.05(10)(d)(ix) |
| 30-31 | Subregulation 1.06(2) | Subparagraph 1.06(2)(e)(viii) |
| 32-33 | Subregulation 1.06(7) | Subparagraph 1.06(7)(g)(x) |
| 34-35 | Subregulation 1.06(8) | Subparagraph 1.06(8)(d)(ix) |
| 43 | Regulation 6.01AA | Paragraph 6.01AA(2)(e) |
| 44 | Regulation 6.01AB | Paragraph 6.01AB(2)(e) |

In addition to permitting commutations of the above pension or annuities for the purposes of reducing or avoiding an excess transfer balance, the amendments limit the amount of a commutation that is allowed under the new exceptions.

Where an individual actually has an excess transfer balance, these limits are equal to the greater of the amount of the individual’s excess transfer balance and the ‘crystallised reduction amount’ stated in the excess transfer balance determination issued to the individual by the Commissioner under Subdivision 136-A in Schedule 1 to the TAA 1953. As per subsection 136-10 in Schedule 1 to the TAA 1953, the crystallised reduction amount is the amount of the excess transfer balance that is stated in the determination. This will generally be the same as an individual’s actual excess transfer balance, but could be different if the individual had already taken action to have a superannuation income stream commuted, or had commenced an additional superannuation income stream.

Where an individual does not have an excess transfer balance, the limits are equal to the amount of the expected excess transfer balance that the commutation is done to avoid.

The particulars of the limits on amounts that can be commuted to reduce an excess transfer balance are set out in the following table.

|  |  |  |
| --- | --- | --- |
| **Item/s** | **Pension or annuity …** | **Limit include in …** |
| *Retirement Savings Account Regulations 1997* | | |
| 10 | Subregulation 1.07(3A) | Subregulation 1.07(5) |
| 13 | Subregulation 1.08(2) | Subregulation 1.08(4) |
| 16 | Subregulation 4.01AA(2) | Paragraph 4.01AA(2)(e) |
| *Superannuation Industry (Supervision) Regulations 1994* | | |
| 29 | Subregulations 1.05(2)(9) & (10) | Subregulation 1.05(11C) |
| 39 | Subregulations 1.06(2)(7) & (8) | Subregulation 1.06(9D) |
| 43 | Regulation 6.01AA | Paragraph 6.01AA(2)(e) |
| 44 | Regulation 6.01AB | Paragraph 6.01AB(2)(e) |

Limiting the amount that can be commuted recognises that the reason for extending the exceptions to the restrictions on commuting the pensions and annuities referred to in the above table is to reduce or avoid an excess transfer balance. If there was no restriction on the amount that could be commuted under the new exception, the amount of a superannuation income stream that could be commuted could exceed the excess (or the potential excess).

These changes apply on and after the time the Regulation commences. Applying the changes from this time enables individual’s to use the exceptions to avoid having an excess transfer balance when the transfer balance cap comes into effect on 1 July 2017.

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

Item 4 in Schedule 1 to the Regulation prescribes particular superannuation income stream benefits for the purposes of subsection 295-390(7) of the ITAA 1997.

The Amending Act made changes to prevent self-managed super funds and APRA regulated funds with less than 5 members from using the exemption in section 295‑385 of the ITAA 1997 (the ‘segregated’ method) if any member of the fund has a total superannuation balance of more than $1.6 million (see section 295‑387 of the ITAA 1997). These changes were introduced for integrity reasons to ensure that funds are unable to circumvent the transfer balance cap by periodically reallocating assets as segregated assets (the income of which receive a full earnings tax exemption). Funds that are unable to use the segregated method are still permitted to use the exemption in section 295-390 of the ITAA 1997 (the ‘proportionate method’).

In recognition of the fact that more funds will be required to use the proportionate method, item 4 in Schedule 1 to the Regulation prescribes a number of superannuation income stream benefits to provide an exemption from the requirement to obtain an actuary’s certificate in applying the proportionate method. This requirement stipulates that in working out the proportion of particular liabilities that are currently payable, a fund must obtain an actuary’s certificate certifying that particular liabilities are equal to the fund assets, as well as expected earnings on those assets and future contributions (see subsections 295-390(4) and (5)).

As a result of these amendments, superannuation income stream benefits that are ‘retirement phase superannuation income stream benefits’ are prescribed for the purposes of subsection 295-390(7) of the ITAA 1997 (see paragraph 295-390.01(a) of the ITAR 1997) if they are, within the meaning of the SISR 1994, payable from allocated pensions, market linked pensions, or account-based pensions.

The amendments also prescribe death benefits paid to a beneficiary from a pension of these kinds that was paid to the deceased prior to their death (see paragraph 295.390.01(b) of the ITAR 1997). In order for such benefits to be prescribed, the deceased must have been a retirement phase recipient in respect of the interest.

Provided that all of a fund’s currently payable liabilities are in respect of allocated pensions, market linked pensions or account-based pensions (or a death benefit pension based on any of these), the fund will not need to obtain an actuary’s certificate. For this requirement to be satisfied, the amount of the fund’s currently payable liabilities are worked out in applying the formula in the proportionate method must be equal to the sum total of all of its pension phase account balances. A fund will not be eligible for the exemption from obtaining an actuary’s certificate if any part of its currently payable liabilities relate to other things (for example, another type of superannuation income stream).

The types of superannuation income streams that are prescribed are consistent with those that are already prescribed for the segregation method. This means that funds that are required to shift from the segregated method to the proportionate method will be able to claim an exemption from the requirement to obtain an actuary’s certificate that is similar to the exemption that applies to the segregated method.

The Regulations also make some 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 segregated method. Consistent with the approach taken in item 4, 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. 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 rules 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.

*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 5 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 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* applies. These sections relate to superannuation lump sum member benefits paid to members that have a terminal medical condition.

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 subregulations 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.

These changes apply in relation to superannuation benefits that are paid on or after 1 July 2017, consistent with the application of the changes to the roll-over benefit rules in section 306-10 of the ITAA 1997.

*Death benefit pension or annuity*

Items 17, 18, 45 and 46 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, and 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 exemption in respect of a superannuation income stream. These amendments ensure that the pension would also cease to satisfy the compulsory cashing rules in paragraphs 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.

These changes apply on and after 1 July 2017, consistent with the time from which application of the retirement phase concept and the transfer balance cap.

*Commutations cannot satisfy minimum draw-down requirements*

The amendments made by items 9, 11, 14, 26-28, 36-38, and 40-42 in Schedule 1 to the Regulation 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 retirement phase interests, or amounts paid from the interest (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.

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* | | |
| 9 | Subregulation 1.07(3D) | Paragraph 1.07(3D)(a) |
| 11 | Subregulation 1.08(2) | Paragraph 1.08(2)(ba) |
| 14 | Subregulation 1.08A(1) | Paragraph 1.08A(1)(c) |
| *Superannuation Industry (Supervision) Regulations 1994* | | |
| 26 | Paragraph 1.05(11A)(a) | Paragraph 1.05(11A)(a) |
| 27 | Subparagraph 1.05(11A)(b)(i) | Sub-subparagraph 1.05(11A)(b)(i)(B) |
| 28 | Subparagraph 1.05(11A)(b)(ii) | Sub-subparagraph 1.05(11A)(b)(ii)(D) |
| 36 | Paragraph 1.06(9A)(a) | Paragraph 1.06(9A)(a) |
| 37 | Subparagraph 1.06(9A)(b)(i) | Sub-subparagraph 1.06(9A)(b)(i)(B) |
| 38 | Subparagraph 1.06(9A)(b)(ii) | Sub-subparagraph 1.06(9A)(b)(ii)(C) |
| 40 | Subregulation 1.07A(1) | Paragraph 1.07A(2)(ba) |
| 41 | Subregulation 1.07C(1) | Paragraph 1.07C(2)(ba) |
| 42 | Subregulation 1.07D(1) | Paragraph 1.07D(1)(c) |

These changes apply on and after 1 July 2017, consistent with the application of the debit rules introduced by the transfer balance cap.

*Consequential amendments*

Items 6 and 19 in Schedule 1 to the Regulation 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 15 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 – Deducting personal superannuation contributions

Schedule 5 to the AmendingAct 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
* 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 2 to the Regulation 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 1 of Schedule 2 to the Regulation also 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.

Item 2 of Schedule 6 to the Regulation provides that the amendments made by Schedule 2 apply to contributions to superannuation made in the 2017-18 income year and later income years. This is consistent with the application of the amendments made by Schedule 5 to the Amending Act.

**Schedule 3 – Non-concessional contributions**

Schedule 3 to the Regulation 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.

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 contribution 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.

In order 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 Regulation 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 (see items 2 and 9 in Schedule 3).

Items 1, 3-5, 7, and 9-11 in Schedule 3 to the Regulation 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 Regulation 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 Regulation 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.

**Schedule 4 – Release authorities**

Schedule 4 to the Regulationmakes technical amendments to the *Income Tax Assessment (1936 Act) Regulation 2015,* RSAR 1997, SISR 1994 and the *Taxation Administration Regulations 1976* (TAA Regulations). The changes ensure that references to provisions concerning release authorities for the release of amounts from individual’s superannuation interests are consistent with the Amending Act.

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 4 to the Regulation make consequential amendments to the SISR 1994 and RSAR 1997 to ensure that they reflect the new release authority provisions and changes to the conditions of release.

**Schedule 5 – Total superannuation balance**

Schedule 5 to the Regulation amends the ITAR 1997 to update cross-references to an enabling provision in the ITAA 1997 in the regulations 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 5 to the Regulation 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.

Item 1 of Schedule 5 to the Regulation was previously released for consultation as Schedule 4 to the *Treasury Laws Amendment (Fair and Sustainable Superannuation) Regulation 2016*, as part of tranche two of the Superannuation Reform Package.

Schedule 5 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 5 to the Regulation 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.