Tax Laws Amendment (Fairer Taxation of Excess Concessional Contributions) Bill 2013 [and] Superannuation (Excess Concessional Contributions Charge) Bill 2013

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Economics Section

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Tax Laws Amendment (Fairer Taxation of Excess Concessional Contributions) Bill 2013 [and] Superannuation (Excess Concessional Contributions Charge) Bill 2013

Date introduced: 19 June 2013

House: House of Representatives

Portfolio: Treasury

Commencement: The Superannuation (Excess Concessional Contributions Charge) Bill 2013 commences on Royal Assent. The Tax Laws Amendment (Fairer Taxation of Excess Concessional Contributions) Bill 2013 commences on various dates as set out in item 2 of that Bill.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page for the Tax Laws Amendment (Fairer Taxation of Excess Concessional Contributions) Bill 2013 and Superannuation (Excess Concessional Contributions Charge) Bill 2013, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose of the Bill

The purpose of the Tax Laws Amendment (Fairer Taxation of Excess Concessional Contributions) Bill 2013 (TLA Bill) is to amend a number of tax and superannuation laws to repeal the existing excess concessional contributions tax arrangements and implement alternate arrangements that provide for taxation of these amounts at an individual’s marginal tax rate plus an interest charge.

The Superannuation (Excess Concessional Contributions Charge) Bill 2013 (SECCC Bill) sets out the formulae to calculate the interest charge and imposes the charge payable.

Structure of the Bill

The TLA Bill consists of seven parts:

• Part 1 includes substantive amendments to the Income Tax Assessment Act 1997 (ITAA 1997) to establish the broad elements required to apply tax at an individual’s marginal tax rate to concessional contributions in excess of the 2013–14 cap of $25 000 (indexed for future years) and to amend the Taxation Administration Act 1953 (TAA 1953) to establish administrative arrangements relating to the imposition of an interest charge on excess concessional contributions amounts


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Parts 4 and 5 amend the ITAA 1997, the ITTP 1997, the TAA 1953, the TIOEPA 1983 and repeal the *Superannuation (Excess Concessional Contributions Tax) Act 2007* to remove provisions relating to excess concessional contributions tax.

Part 6 amends the ITAA 1997, the ITTP 1997, the *Superannuation Laws Amendment (MySuper Capital Gains Tax Relief and Other Measures) Act 2013* and the TAA 1953 but are contingent on the passage or commencement of other legislation.

Part 7 provides for the application of the key measures to the 2013–14 income year (and the corresponding financial year) and later income (and financial) years. It also includes transitional measures so that the existing arrangements continue to apply for the 2012–13 and prior financial years, despite the repeal of the provisions.

The SECCC Bill sets out the formulae to calculate the daily charge payable on excess concessional contributions and imposes the charge.

**Background**

**Current arrangements**

Concessional contributions are essentially those superannuation contributions made by employers (which are deductible for the employer) for a member of a superannuation fund that are taxed at 15 per cent rather than the tax payer’s marginal tax rate. Non-concessional contributions are generally those made to a superannuation fund from after-tax income.

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5. The text of the *Superannuation Laws Amendment (MySuper Capital Gains Tax Relief and Other Measures) Bill 2013*, as passed by the Parliament on 24 June 2013, can be viewed at [http://parlinfo.aph.gov.au/parlinfo/search/display/display.w3p;query=id%3A%22legislation%2Fbills%2Fr5079_aspassed%2F0000%22](http://parlinfo.aph.gov.au/parlinfo/search/display/display.w3p;query=id%3A%22legislation%2Fbills%2Fr5079_aspassed%2F0000%22) This Bill passed both Houses of the Parliament on 24 June 2013, but at the time of writing this Bills Digest had not received Royal Assent.
Caps on the amount of concessional and non-concessional contributions were first introduced in 2007 as part of the Howard Government’s ‘Simpler Super’ changes. The caps replaced a regime that included unlimited after-tax personal contributions and age-based concessional contribution limits of $15,260 for a contributor aged under 35, $42,385 for a contributor aged 35–49 and $105,113 for a contributor aged over 49.

Under current arrangements, an individual’s concessional contributions for 2012–13, regardless of an individual’s age, are capped at $25,000 and the non-concessional contributions cap is $150,000. It is proposed to increase the concessional contributions cap to $35,000 for individuals aged 50 and over from 1 July 2014 (and from 1 July 2013 for those aged 60 and over).

An excess contribution tax of 31.5 per cent applies if an individual breaches the cap. Combined with the 15 per cent tax levied on contributions to the fund an individual can, therefore, face a tax rate of 46.5 per cent on excess contributions. Concessional contributions are included in the non-concessional contributions to the extent that they are in excess of the concessional contributions cap for the year. The inclusion of these amounts in non-concessional contributions for the year can have the effect that some, or all, of the excess concessional contributions are taxed at 93 per cent.

If an individual has made concessional contributions in excess of the relevant cap, they may seek a determination by the Commissioner of Taxation (the Commissioner) that these contributions are disregarded or allocated to another year. However, the Commissioner may only make such a determination where both special circumstances apply and making the determination is consistent with the tax setting out the status and purpose of the digest.
with the object of the law.12 After making an excess concessional contributions tax assessment, the Commissioner must also provide a release authority to the individual. The release authority may be used to release an amount of their superannuation equal to, or less than, their liability for excess contributions tax.13

For excess contributions made from 1 July 2011, individuals who breach the excess concessional contributions cap by up to $10 000 in a year may be allowed a refund of excess contributions. Key features of this limited refund arrangement are:

- the Commissioner is satisfied that the individual has excess concessional contributions for a financial year
- the amount of the excess concessional contributions is $10 000 or less (not indexed)
- the individual does not have excess concessional contributions for an earlier financial year starting from 1 July 2011 and
- the individual has lodged an income tax return for the relevant income year within 12 months of the end of that year, or within such longer period as the Commissioner allows.14

Administration of excess concessional contributions tax arrangements

The Commissioner, through the Australian Taxation Office (ATO), is responsible for the administration of the excess concessional contributions tax arrangements.

In 2011–12, the ATO issued over 66 000 assessments for excess contributions tax, representing an increase of around 15 000 assessments from 2010–11. The total liability arising from these assessments in 2011–12 was around $174 million (table 1).

Table 1: Excess contributions tax assessments issued, 2010–11 to 2011–12

<table>
<thead>
<tr>
<th></th>
<th>2010–11</th>
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<th>2011–12</th>
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<tbody>
<tr>
<td></td>
<td>No.</td>
<td>$ million</td>
<td>No.</td>
<td>$ million</td>
</tr>
<tr>
<td>Concessional</td>
<td>47,085</td>
<td>72.1</td>
<td>64,424</td>
<td>170.7</td>
</tr>
<tr>
<td>Non-concessional</td>
<td>3,118</td>
<td>157.0</td>
<td>1,465</td>
<td>-1.9</td>
</tr>
<tr>
<td>Concessional and non-concessional</td>
<td>751</td>
<td>14.5</td>
<td>546</td>
<td>5.5</td>
</tr>
<tr>
<td>Total</td>
<td>50,954</td>
<td>243.6</td>
<td>66,435</td>
<td>174.3</td>
</tr>
</tbody>
</table>


In 2008–09 and 2009–10, around 25 per cent of the 94,000 taxpayers who exceeded the concessional contributions cap, had a marginal tax rate of 45 per cent. As previously noted, these taxpayers may not face any penalty on excess concessional contributions under current arrangements. 

**Compliance costs**

The administration of the contributions caps involved a direct administration cost for the ATO of around $39.9 million in 2010–11 and an estimated cost in 2011-12 of $50.4 million.

In addition to administration costs incurred by the ATO, individuals, their advisers and superannuation funds face costs in assessing compliance with the rules and in completing the required paperwork should an excess concessional contribution be identified. Estimates of the costs involved in the administration of the excess contributions tax arrangements for concessional contributions by individuals, their advisers and superannuation funds are not available.

**Policy development**

The proposed measure was announced by the Government on 5 April 2013. In making this announcement—which was part of broader superannuation changes—the Government noted that ‘[t]hese rules will ensure that individuals are taxed on excess concessional contributions in the same way as if they had received that money as salary or wages and had chosen to make a non-concessional contribution’.

No draft legislation was released by the Government for public comment in relation to this measure.

**Committee consideration**

The Senate Selection of Bills Committee recommended that the Bills not be referred to a committee.

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17. W Swan (Treasurer) and B Shorten (Minister for Financial Services and Superannuation), *Reforms to make the superannuation system fairer*, joint media release, 5 April 2013, viewed 24 June 2013, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=id%3A%22media%2Fpressrel%2F2349570%22
18. Ibid.

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Senate Standing Committee for the Scrutiny of Bills

At the time of writing, the Senate Standing Committee for the Scrutiny of Bills had not commented on the Bills.

Parliamentary Joint Committee on Human Rights

The Parliamentary Joint Committee on Human Rights considers that the Bills are ‘unlikely to raise human rights concerns’.  

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bills’ compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bills are compatible.

Policy position of non-government parties

The Bills passed the House of Representatives on 20 June 2013. The Coalition indicated that it would support the Bills, noting that:

The coalition has been on record with our position on this policy for a very long time, particularly through our shadow spokesman, Senator Cormann. At present, people who inadvertently breach their concessional caps are hit with a top marginal rate of 46½ per cent irrespective of what their actual tax rate is on their income taken as take-home pay. The situation is even worse in relation to inadvertent breaches of non-concessional contribution caps. Non-concessional contributions are made in after-tax income, which has already been taxed by up to 46½ per cent. After the penalty is applied, even for inadvertent breaches of those non-concessional caps, the government effectively imposes a tax of up to 93 per cent. We have made the point that this is hyper-punitive, to say the least.

Position of major interest groups

The superannuation industry generally supports the measure proposed by the Bills. The following industry groups noted the following:

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21. The Statement of Compatibility with Human Rights can be found at page 25 of the Explanatory Memorandum to the Bills.
• Association of Superannuation Funds of Australia—‘We have been advocating this issue for a long time and wholeheartedly welcome this initiative as a simpler and fairer way to tax excess contributions’23
• Australian Institute of Superannuation Trustees—‘[T]he improvements in higher concessional caps and less punitive excess contributions tax will be of benefit to some members of not-for-profit funds’24
• Financial Services Council—‘We also support ... simplifying the excess contributions tax’25
• SMSF Professionals’ Association of Australia—‘[T]he excess concessional contributions regime is fundamentally unfair ... This is why SPAA supports the Government’s recently proposed changes to this regime and encourages it to expand its proposed refunding solution to excess non-concessional contributions too’.26

Financial implications

The Explanatory Memorandum notes that the financial impact of the proposed measure is a cost to revenue of $10 million over the forward estimates (table 2).27

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<tbody>
<tr>
<td>2012-13</td>
<td>Nil</td>
<td>Nil</td>
<td>-10</td>
<td>5</td>
<td>-5</td>
<td>-10</td>
</tr>
</tbody>
</table>

Source: Explanatory Memorandum, p. 3.

The cost of the measure over the forward estimates as outlined in the Explanatory Memorandum is significantly lower than the $55 million cost when the measure was announced on 5 April 2013—a cost that was also included in the 2013–14 Budget (table 3).28

27. Explanatory Memorandum, p. 3.
28. W Swan (Treasurer) and B Shorten (Minister for Financial Services and Superannuation), Reforms to make the superannuation system fairer, joint media release, op. cit.; Australian Government, Budget measures: budget paper

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<tbody>
<tr>
<td>Related expense</td>
<td>2.4</td>
<td>1.3</td>
<td>0.6</td>
<td>0.6</td>
<td>4.9</td>
<td></td>
</tr>
<tr>
<td>Total impact</td>
<td>-2.4</td>
<td>-16.3</td>
<td>-15.6</td>
<td>-25.6</td>
<td>-59.9</td>
<td></td>
</tr>
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Note: Excludes related capital of $0.3 million in 2013–14.


The difference between the financial impact when the policy was announced and that outlined in the Explanatory Memorandum were attributed to two main changes to the original policy:

- the 15 per cent tax offset that applies to refunded excess concessional contributions was originally to be refundable (rather than non-refundable as is provided in the TLA Bill)
- the interest charge was to apply from 1 July of the year following the year in which the contribution was made (rather than applying from 1 July of the year in which the contribution is made). 29

**Key issues and provisions**

**TLA Bill**

The Bill proposes to abolish the existing arrangements relating to the taxation of excess concessional contributions and the limited refund arrangements for breaches of less than $10 000 for income years commencing 2013–14. In its place would be arrangements that provide for the taxation of any excess concessional contributions at an individual’s marginal tax rate and the payment of an interest charge. Individuals would also have the option to take out up to 85 per cent of excess amounts.

The main issue in setting a concessional contributions cap, associated rules and penalties is to balance three factors:

- the need for incentives to discourage contributions beyond the set limits

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allowing for some flexibility in assessing overpayments so that inadvertent breaches are not harshly punished and
minimising the compliance costs and administrative complexity for individuals, superannuation funds and the ATO.

As concessional contributions to superannuation are taxed at 15 per cent, the main reason for setting a concessional contributions cap is to place an upper limit on the value of the tax concession received by taxpayers so that higher income earners do not receive an excessive advantage.

However, with the penalty for excess concessional contributions (31.5 per cent plus the 15 per cent already levied) being equal to the highest marginal tax rate (46.5 per cent), an effective financial penalty is imposed only on those who do not pay income tax at the highest marginal rate.

The Explanatory Memorandum notes that around 100 000 people would be affected by the measure in 2013–14. Of these, around 40 000 people would be better off as they would currently face an effective tax rate of 46.5 per cent on excess concessional contributions rather than being taxed at their (lower) marginal tax rate. The remaining 60 000 people, although facing the same effective tax rate on excess concessional contributions, would be worse off under the proposed arrangements as they would pay an additional ‘interest charge’ on excess amounts.

**Item 1** of the TLA Bill amends the ITAA 1997 to insert *proposed Division 291—Excess concessional contributions* which contains the relevant definitions of *concessional contributions* for a financial year and *excess concessional contributions* for a financial year.

A person’s *concessional contributions* for a financial year are, essentially, the total of:

- each contribution made in the financial year to a complying superannuation plan in respect of the person which is included in the assessable income of the superannuation provider in relation to the plan or, by way of a roll-over superannuation benefit, in the assessable income of a complying superannuation fund or RSA provider and
- an amount in a complying superannuation plan which is allocated by the superannuation provider in respect of the person.\(^{31}\)

A person’s *excess concessional contributions* for a financial year are the person’s concessional contributions for the year which exceed his, or her, concessional contributions cap for the year. The concessional contributions cap is $25 000 for the 2013-14 financial year.\(^{32}\) That amount is to be indexed annually in respect of the 2014-15 financial year or a later financial year.\(^{33}\) The current provisions relating to the temporary higher $35 000 age based cap for those aged 50 or more are retained in the ITTPA 1997.

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32. This amount is currently set out in section 292-20 of the ITAA 1997 which is to be repealed by **Item 44** of the TLA Bill.
Proposed section 291-15 of the ITAA provides for **excess concessional contributions** to be included in an individual’s assessable income for the year in which it is paid\(^{34}\) and for a non-refundable tax offset equal to 15 per cent of the excess concessional contributions.\(^{35}\) The effect of these changes is to provide that excess contributions are taxed at the individual’s marginal rate. The 15 per cent tax offset recognises that contributions tax of 15 per cent has already been withheld on contributed amounts.

Proposed sections 291-155 to 291-175 of the ITAA 1997 modify the meaning of **concessional contributions** relating to defined benefits interests. According to the Explanatory Memorandum, these provisions have been moved into the new Division so that ‘concepts which are relevant to calculating excess concessional contributions are included in those parts of the tax law where they are first used’.\(^{36}\)

The Commissioner retains the discretion to disregard, or allocate to another financial year, all or part of a person’s concessional contributions in relation to a financial year for the purpose of working out that person’s excess concessional contributions.\(^{37}\)

Item 2 of the TLA Bill amends the TAA 1953 to insert **proposed Part 2-35** that provides the administrative arrangements for the imposition of a charge—the **excess concessional contributions charge**—on amounts that are excess concessional contributions and included in assessable income.

The **excess concessional contributions charge** is imposed by the SECCC Bill. (See discussion below under the heading SECCC Bill.)

Other administrative arrangements relating to the imposition of the excess concessional contributions charge include:

- allowing an individual to make an irrevocable election to release up to 85 per cent of excess concessional contributions for a financial year from a superannuation interest\(^{38}\)
- the processes for applying for a release of these funds from the Commissioner and the issuing of a release authority by the Commissioner to the relevant superannuation fund\(^{39}\) and
- the obligations of a superannuation fund to comply with a release authority.\(^{40}\)

Consequential amendments are made to a number of taxation and superannuation laws to effect the changed taxation treatment of excess concessional contributions (**Schedule 1, Parts 2, 3, 4 and 5**).\(^{41}\)

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\(^{34}\) Proposed paragraph 291-15(a) of the ITAA 1997.
\(^{35}\) Proposed paragraph 291-15(b) of the ITAA 1997.
\(^{36}\) Explanatory Memorandum, p. 10.
\(^{37}\) Proposed section 291-465 of the ITAA.
\(^{38}\) Proposed section 96-5 of the TAA 1953.
\(^{39}\) Proposed section 96-10 of the TAA 1953.
\(^{40}\) Proposed section 96-20 of the TAA 1953.

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Part 6 of the TLA Bill amends the ITAA 1997, the ITTP 1997, the Superannuation Laws Amendment (MySuper Capital Gains Tax Relief and Other Measures) Act 2013 and the TAA 1953 but the commencement of these provisions is contingent on the passage or commencement of other legislation.42

Part 7 of the TLA Bill provides for the application of the key measures to the 2013–14 income year (and the corresponding financial year) and later income (and financial) years (item 110). It also includes transitional measures so that the existing arrangements continue to apply for the 2012–13 and prior financial years, despite the repeal of the provisions.

SECCC Bill

The SECCC Bill commences on the day of Royal Assent.

Item 3 of the SECCC Bill imposes the excess concessional contributions charge, which is calculated as the monthly average yield of a 90-day Bank Accepted Bills published by the Reserve Bank of Australia (RBA) for specified months plus a specified margin of three percentage points. This formulation of the charge is equivalent to the ‘shortfall interest charge’ that is imposed on a range of other taxes, including income tax and minerals and petroleum resource rent taxes.43

The formulae used to calculate the excess concessional contributions charge results in a rate that largely mirrors changes in interest rates that apply to bank on-line savings accounts and three-month term deposit (figure 1).

41. The provisions of Parts 1–5 of Schedule 1 of the TLA Bill commence on Royal Assent.
42. The two contingent Bills—the Tax and Superannuation Laws Amendment (Increased Concessional Contributions Cap and Other Measures) Bill 2013 and the Superannuation Laws Amendment (MySuper Capital Gains Tax Relief and Other Measures) Bill 2013 passed the Parliament on 24 June 2013. The Superannuation Legislation Amendment (New Zealand Arrangement) Act 2012 (which provides for the portability of certain retirement savings between Australia and New Zealand) will commence on 1 July 2013, which is the day the Arrangement between the Government of Australia and the Government of New Zealand on Trans–Tasman Retirement Savings Portability, signed at Brisbane on 16 July 2009, comes into force for Australia.
43. The ‘shortfall interest charge’ is applied under Subdivision 280-B of Schedule 1 of the TAA 1953 on amended income tax assessments for the Minerals Resource Rent Tax, the Petroleum Resource Rent Tax and excess superannuation contributions tax.
While the additional charge that applies to revised assessments appears to provide some disincentive to make concessional contributions in excess of the cap, such amounts only represent the opportunity cost of holding such a sum of money and investing it in a relatively risk-free investment. As such, the proposed charge does not provide any significant disincentive to avoid excess concessional contributions, except for the efforts required to comply with tax liabilities once these are assessed by the Commissioner.