

5 August 2022

Director
Tax and Compliance Unit
Retirement, Advice and Investment Division
Treasury
Langton Cres
PARKES ACT 2600

Via email: superannuation@treasury.gov.au

Dear Sir/Madam

Treasury Laws Amendment (Measures for a later sitting) Bill 2022: Taxation of military superannuation benefits

CPA Australia and Chartered Accountants Australia and New Zealand (CA ANZ) welcome the opportunity to provide comments on the Exposure Draft *Treasury Laws Amendment (Measures for a later sitting) Bill 2022: Taxation of military superannuation benefits* consultation, presently underway at Treasury.

CPA Australia and CA ANZ represent over 300,000 professional accountants globally. Our members work in diverse roles across public practice, commerce, industry, government and academia throughout Australia and internationally.

CA ANZ and CPA Australia support the Exposure Draft Bill (the ED), as it resolves the uncertainty created by the Douglas decision in relation to existing defined benefit pensions paid due to invalidity. However, we take this opportunity to raise a policy question posed by both the decision in Douglas, as well as the ED.

This consultation considers Exposure Draft legislation to be introduced by the Government following the decision of the Full Federal Court in *Commissioner of Taxation v Douglas [2020] FCAFC 220* (the Douglas decision), which considered on appeal the status of invalidity payments made under the Military Superannuation and Benefits Scheme (MSBS) or the Defence Force Retirement and Death Benefits Scheme (DFRDBS). In short, the case found that benefits paid under pensions provided on or after 20 September 2007 are superannuation lump sum benefits and, where provided prior to that date, are superannuation income stream benefits.

The ED is intended to ensure that the Douglas decision only affects payments made from those schemes referred to in the previous paragraph. It does this by introducing a definition into the *Income Tax Assessment (1997 Act) Regulations 2021* (ITR97-2021) at regulation 307-70.02 to ensure that defined benefit pensions which fall within regulation 1.03 of the *Superannuation*

Industry (Supervision) Regulations 1993 (SIS Regs) paid from a defined benefit superannuation fund or an exempt public sector superannuation scheme (but are not invalidity pay or pensions paid from the MSBS or DFRDBS) are classed as complying superannuation income streams, where these are commenced on or after 20 September 2007.

In addition, the ED introduces a non-refundable tax offset to ensure that members of the DFRDBS or MSBS are not adversely affected by the impact of the Douglas decision, as well as recipients of spouse or children's pensions paid under the schemes.

We note that successive Government reviews, including the recent Retirement Income Review, have repeatedly underlined the importance of superannuation benefits paid as income streams rather than lump sums. We raise concerns that, even though the separate investment incentives obtained via taxation as well as otherwise (e.g., time in the market, concessional social security treatment etc) are designed to favour superannuation benefits taken as income streams, there still appears to be an opportunity to arbitrage between tax treatment for benefits paid as lump sums compared to income streams. Leaving aside the tax and other separate concessions designed to encourage investment, benefits paid to members of superannuation funds should avoid such opportunities for arbitrage. We note that in both the DFRDBS and MSBS most invalidity benefits paid to members of those schemes are paid as pension payments.

To be clear, we do not necessarily support the principle of tax parity at the point of the taking of benefits, but we do support measures designed to encourage the taking of superannuation benefits as income streams compared to lump sums. We note that parity already exists for members aged over 60 in fully funded arrangements and are aware that existing tax treatment for those aged under 60 is designed to reflect a number of historical practices created through taxation methods in the accumulation phase. However, the decision to ensure that parity is in place for recipients of invalidity benefits from MSBS or DFRDBS via the use of non-refundable tax offsets is likely to be of acute interest to members of other schemes where the option to take benefits as lump sums versus income streams arises.

Consequently, we consider that this is a missed opportunity to review the policy reasoning behind the taxation of payments from superannuation schemes.

Additionally, it is our considered view that the superannuation benefit payment provisions in the *Income Tax Assessment Act 1997* (ITAA97), ITR97-2021 and various parts of the SIS Regs – in particular Parts 1A (annuities and pensions) and Part 6 (payment standards) – do not align well and are in need of a significantly detailed review to remove these inconsistencies. The Douglas case came about because of these inconsistencies. Whilst the proposed non-refundable tax offset solves the problems identified in the Douglas decision, we believe it would be better to remove all inconsistencies at their source rather than use a “band-aid” solution.

Finally, we note that the intention is to change both the ITAA97 and the ITR97-2021 via an Act of Parliament. We understand the rationale for this proposal, including the possibility that these proposed amendments to ITR97-2021 may not be subject to a disallowance motion. However, it is our preference that the ITR97-2021 changes be made in their typical manner – that is via the Governor-General in Council – as this will make it easier to identify successive regulatory changes in future.

For further information in relation to our submission, please contact Richard Webb, Policy Advisor Financial Planning and Superannuation at CPA Australia at richard.webb@cpaaustralia.com.au or Tony Negline, Superannuation Leader at Chartered Accountants ANZ at Tony.Negline@charteredaccountantsanz.com.

Yours sincerely,

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