

# ***LCG 2016/D11 - Superannuation reform: concessional contributions - defined benefit interests and constitutionally protected funds***



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## **Superannuation reform: concessional contributions – defined benefit interests and constitutionally protected funds**

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### **Relying on this draft Guideline**

This draft Guideline describes how the Commissioner proposes to apply the amendments made by the [Treasury Laws Amendment \(Fair and Sustainable Superannuation\) Act 2016](#) (the Act).

If you rely on this draft Guideline in good faith, you will not have to pay any underpaid tax, penalties or interest in respect of matters covered by the draft Guideline if it does not correctly state how a relevant provision applies to you.

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### **What this draft Guideline is about**

1. This draft Guideline clarifies how the amendments to the calculation of concessional contributions and excess concessional contributions in the Act apply to contributions and amounts allocated by superannuation providers for the financial years commencing on or after 1 July 2017.
2. All legislative references are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise stated.

### **Concessional contributions – background**

3. There is a limit (concessional contributions cap) on the amount of concessional contributions you can have in a financial year.<sup>1</sup> For the 2017-2018 financial year, the concessional contributions cap will be reduced to \$25,000.<sup>2</sup> For the 2019-2020 and later financial years, your concessional contributions cap may be increased if you are eligible for carry forward concessional contributions.<sup>3</sup>
4. Where the amount of your concessional contributions for the financial year exceeds your concessional contributions cap for that year, an amount equal to the excess is included in your assessable income for that income year. You are also entitled to a tax offset equal to 15% of the excess concessional contributions.<sup>4</sup>

### **No defined benefit interests**

5. Where you have no superannuation interest that is a defined benefit interest<sup>5</sup>, the amount of your concessional contributions for a financial year for your superannuation interests (accumulation interests) is determined under section 291-25 and is the sum of:
  - (a) certain contributions made in the financial year to a complying superannuation plan in respect of you where the contribution is included in the assessable income of the superannuation provider.<sup>6</sup> For example, employer contributions (including salary sacrificed amounts) and personal contributions for which a deduction is allowed, and
  - (b) certain amounts allocated by a superannuation provider to your interest for the year that are allocated in accordance with the conditions specified in the *Income Tax Assessment Regulations 1997* (ITAR 1997).<sup>7</sup> For example, certain allocations from reserves.
6. Contributions made and amounts allocated prior to 1 July 2017 are specifically excluded from your concessional contributions if they are made or allocated to a superannuation interest in a constitutionally protected fund (CPF).<sup>8</sup> Contributions to a CPF are also excluded because CPFs are exempt from income tax and do not have assessable income.<sup>9</sup>

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<sup>1</sup> Subsection 291-20(2), subsection 291-20(4) and section 291-25.

<sup>2</sup> Subsection 291-20(2). The concessional contributions cap is indexed annually for growth in the annual rate of the Average Weekly Ordinary Time Earnings and the result is rounded down to the nearest multiple of \$2,500.

<sup>3</sup> Subsections 291-20(3) to (7). Further guidance is being prepared on the carry forward concessional contribution.

<sup>4</sup> Section 291-15.

<sup>5</sup> Broadly, an interest where all or part of the superannuation benefits paid from that interest are defined by reference to remuneration or average salary or a specified amount or specified conversion factor: section 291-175.

<sup>6</sup> Subsection 291-25(2).

<sup>7</sup> Subsection 291-25(3) and regulation 292-25.01 of the ITAR 1997.

<sup>8</sup> Subparagraph 291-25(2)(c)(iii).

<sup>9</sup> Item 5.3 of the Table in section 50-25.

7. The Act amends how concessional contributions are determined. Contributions made and amounts allocated after 1 July 2017 in respect of interests in a CPF will be included in your concessional contributions where the conditions of section 291-25 are satisfied. From 1 July 2017, the exclusions for contributions and amounts from concessional contributions for interests in CPFs will be removed. Contributions to CPFs will be included in your concessional contributions where the contribution would have otherwise been assessable income of the fund except for the income tax exemption of the superannuation fund. However, these contributions and amounts on their own cannot result in excess concessional contributions.<sup>10</sup> See Example 1 of this draft Guideline for an explanation.

### **One or more defined benefit interests**

8. Where you have one or more superannuation interests that are defined benefit interests, the amount of your concessional contributions for a financial year commencing on or after 1 July 2017 is determined under Subdivision 291-C.<sup>11</sup> In this circumstance your concessional contributions is the sum of:

- (a) contributions and amounts that relate to superannuation interests other than defined benefit interests (accumulation interests), where those contributions and amounts would, as outlined in paragraph 5 of this draft Guideline, be included in the amount of your concessional contributions under section 291-25<sup>12</sup>
- (b) notional taxed contributions<sup>13</sup> for the financial year in respect of each of your defined benefit interests<sup>14</sup>, and
- (c) the amount by which your defined benefit contributions<sup>15</sup> for the financial year exceeds the notional taxed contributions for the financial year in respect of each of your defined benefit interests.<sup>16</sup>

### **Notional taxed contributions**

9. Your notional taxed contributions are determined under Subdivision 291-C of the ITAA 1997 and Subdivision 292-D, and Schedule 1A to the ITAR 1997 only applies to the extent that the defined benefit interest is 'funded'. A defined benefit interest is funded to the extent that it is sourced from contributions made into the fund or earnings from those contributions. The amount of your notional taxed contributions is an estimate of the amount of concessional contributions that would be required to be paid to the fund in respect of you in that year to fund the expected final benefits from that interest. The estimate is necessary as contributions made to the fund are not always attributable to particular members.

10. Transitional rules<sup>17</sup> (commonly referred to as 'grandfathering') apply to defined benefit interests held on 5 September 2006 or 12 May 2009 if certain conditions are met. Where these conditions are met, the transitional rules apply to modify the amount of notional taxed contributions so that it is equal to your concessional contributions cap.

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<sup>10</sup> Subsection 291-370(1).

<sup>11</sup> Subsection 291-160(1).

<sup>12</sup> Paragraph 291-165(1)(a).

<sup>13</sup> Subdivision 291-C and Subdivision 292-D and Schedule 1A to the ITAR 1997.

<sup>14</sup> Paragraph 291-165(1)(b).

<sup>15</sup> Sections 293-115, 293-150 and 293-195 as modified by subsection 291-165(2).

<sup>16</sup> Paragraph 291-165(1)(c).

<sup>17</sup> Subdivision 291-C of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997).

11. If you held defined benefit interests in CPFs, you did not have an amount of notional taxed contributions for financial years before 1 July 2017.<sup>18</sup> This exclusion will be removed for financial years commencing on or after 1 July 2017 so notional taxed contributions are required to be calculated for defined benefit interests in CPFs. The grandfathering transitional rules described in paragraph 10 of this draft Guideline will not apply for defined benefit interests in CPFs.<sup>19</sup>

#### **Defined benefit contributions less notional taxed contributions**

12. For financial years commencing on or after 1 July 2017, an additional amount is included in an individual's concessional contributions to ensure the amount of concessional contributions better reflects the full amount of accrued benefits (funded and unfunded) for the defined benefit interest for the financial year. The additional amount included in your concessional contributions is the amount by which the defined benefit contributions for the interest exceed the notional taxed contributions for the interest.<sup>20</sup> For schemes that are unfunded or partially unfunded, your defined benefit contributions will typically be greater than your notional taxed contributions and therefore you will have an additional amount to include in your concessional contributions. See Examples 4, 5 and 7 of this draft Guideline. The provisions also apply to defined benefit interests in CPFs.

13. 'Defined benefit contributions' is defined for the purposes of Division 293 tax in section 293-115 and the method for determining the amount is contained in Subdivision 293-DA, and Schedule 1A to the ITAR 1997. Modifications apply for the purposes of calculating defined benefit contributions for certain constitutionally protected State higher level office holders and for certain individuals' defined benefit interests established under the *Judges' Pension Act 1968*.<sup>21</sup> However, these modifications do not apply to the calculation of defined benefit contributions when working out the excess to be included in their concessional contributions.<sup>22</sup>

#### **Contributions and amounts that do not result in excess concessional contributions**

14. For financial years commencing on or after 1 July 2017, certain amounts that make up your concessional contributions do not, on their own, cause your concessional contributions to exceed your concessional contributions cap.<sup>23</sup> This means that where those concessional contributions exceed your concessional contributions cap (disregarding increases due to the carry forward of unused concessional cap space),<sup>24</sup> the sum of those contributions is taken to equal the concessional contributions cap and cannot create an excess.

15. Where the sum of the following amounts exceed your concessional contributions cap for a financial year, the sum of those amounts will be taken to be equal to your concessional contributions cap for that financial year:

- (a) contributions to (and other amounts in respect of) a CPF for the financial year that would be included in your concessional contributions for the financial year.<sup>25</sup> This includes all concessional contributions that relate to all interests in CPFs as determined under section 291-25 or section 291-165

<sup>18</sup> Subsection 291-160(2). This subsection is to be repealed from 1 July 2017.

<sup>19</sup> Subsection 291-170(6) of the IT(TP)A 1997.

<sup>20</sup> Paragraph 291-165(1)(c).

<sup>21</sup> Subsections 293-150(3) and 293-195(2) respectively.

<sup>22</sup> Subsection 291-165(2).

<sup>23</sup> Section 291-370.

<sup>24</sup> See note under subsection 291-370(1).

<sup>25</sup> Paragraph 291-370(1)(a) and subsection 291-370(2).

- (b) notional taxed contributions for the financial year where the grandfathering transitional rules apply, or would apply if the amount of notional taxed contributions exceeded your concessional contributions cap for the financial year.<sup>26</sup> This will not include any amount of your notional taxed contributions in respect of an interest in a CPF as the grandfathering transitional rules do not apply to CPFs.<sup>27</sup> All of your concessional contributions in respect of interests in CPFs are included under paragraph 15(a) of this draft Guideline, and
- (c) the amount by which your defined benefit contributions for the financial year exceed your notional taxed contributions for that financial year for each of your defined benefit interests to the extent the excess does not relate to an interest in a CPF.<sup>28</sup> All of your concessional contributions in respect of interests in CPFs are included under paragraph 15(a) of this draft Guideline.

16. Where the sum of the amounts listed in paragraph 15 of this draft Guideline is taken to be equal to your concessional contributions cap, any other amounts included in your concessional contributions will create excess concessional contributions for that financial year. The amount of excess concessional contributions for the financial year will be the amount by which those other amounts exceed your concessional contributions cap for that financial year.

#### **Example 1: CPF – no defined benefit interest**

17. *Jamie has an interest in a CPF that is not a defined benefit interest. During the 2016-17 financial year, Jamie's employer contributes \$30,000 to the CPF for Jamie. Jamie also makes a salary sacrifice contribution of \$20,000 to another superannuation fund which is not a CPF. For the 2016-17 financial year, Jamie's amount of concessional contributions is \$20,000 as the contribution made to the CPF is not included in Jamie's concessional contributions.*

18. *During the 2017-18 financial year, Jamie's employer again contributes \$30,000 to the CPF for Jamie. Jamie also makes a salary sacrifice contribution of \$20,000 to another superannuation fund which is not a CPF. For the 2017-18 financial year, Jamie's amount of concessional contributions would be \$50,000 (\$30,000 + \$20,000) subject to the modification explained in paragraph 19 of this draft Guideline, as contributions made to CPFs are included in concessional contributions from 1 July 2017.*

19. *Jamie's concessional contributions cap for the 2017-18 financial year is \$25,000. As the amount of concessional contributions in relation to Jamie's interest in CPFs (\$30,000) cannot create an excess and is greater than Jamie's concessional contributions cap for the financial year, the amount of those concessional contributions are taken to be equal to his concessional contributions cap. Therefore, Jamie has excess concessional contributions of \$20,000 (\$45,000 modified concessional contributions – \$25,000 concessional contributions cap) for the 2017-18 financial year.*

#### **Example 2: CPF – defined benefit interest (partially funded)**

20. *Kayla has a defined benefit interest in a CPF. During the 2016-17 financial year, Kayla has no notional taxed contributions for the CPF as there are no notional taxed contributions for CPFs for that financial year. Kayla makes a salary sacrifice contribution of \$15,000 to another superannuation fund which is not a CPF. For the 2016-17 financial year Kayla's amount of concessional contributions is \$15,000.*

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<sup>26</sup> Paragraph 291-370(1)(b).

<sup>27</sup> Subsection 291-170(6) of the IT(TP)A 1997.

<sup>28</sup> Paragraph 291-370(1)(c).

21. During the 2017-18 financial year, on the advice of an actuary, the superannuation provider of the CPF calculates Kayla's notional taxed contributions as \$30,000 and her defined benefit contributions as \$35,000 for that financial year. (The grandfathering transitional rules that limit the amount of notional taxed contributions to the amount of an individual's cap do not apply to interests in CPFs). Kayla also makes a deductible personal superannuation contribution of \$15,000 to another superannuation fund (which is not a CPF) for which she has claimed a deduction.<sup>29</sup> Subject to the modification explained in paragraph 22 of this draft Guideline, Kayla's amount of concessional contributions for the 2017-18 financial year would be \$50,000 ( $\$15,000 + \$30,000 + (\$35,000 - \$30,000)$ ).

22. Kayla's concessional contributions cap for the 2017-18 financial year is \$25,000. As the amount of concessional contributions in relation to Kayla's interest in the CPF of \$35,000 ( $\$30,000 + (\$35,000 - \$30,000)$ ) cannot create an excess and is greater than Kayla's concessional contributions cap for the financial year, the amount of those concessional contributions is equal to her concessional contributions cap. Therefore, Kayla has excess concessional contributions of \$15,000 ( $\$40,000$  modified concessional contributions –  $\$25,000$  concessional contributions cap) for the 2017-18 financial year.

**Example 3: CPF – concessional contributions for CPF interests less than concessional contributions cap**

23. Jordan has a defined benefit interest in a CPF. On the advice of an actuary the superannuation provider of the CPF calculates Jordan's notional taxed contributions as \$18,000 and his defined benefit contributions as \$22,000 for the 2017-18 financial year. Jordan also makes a salary sacrifice contribution of \$10,000 to another superannuation fund which is not a CPF. Subject to the modification explained in paragraph 24 of this draft Guideline, Jordan's concessional contributions for the 2017-18 financial year would be \$32,000 ( $\$10,000 + \$18,000 + (\$22,000 - \$18,000)$ ).

24. Jordan's concessional contributions cap for the 2017-18 financial year is \$25,000. As the amount of concessional contributions in relation to Jordan's interest in the CPF ( $\$18,000 + (\$22,000 - \$18,000)$ ) is not greater than Jordan's concessional contributions cap for the financial year the amount of those concessional contributions is not treated as being equal to his concessional contributions cap. Therefore, there is no modification to Jordan's concessional contributions and he has excess concessional contributions of \$7,000 ( $\$32,000 - \$25,000$ ) for the 2017-18 financial year.

**Example 4: Defined benefit interest (partially unfunded) where the grandfathering transitional rules do not apply**

25. Amy has a defined benefit interest in a superannuation fund that is not a CPF. On the advice of an actuary the superannuation provider calculates Amy's notional taxed contributions as \$26,000 and her defined benefit contributions as \$32,000 for the 2017-18 financial year. The grandfathering transitional rules that limit the amount of notional taxed contributions to the amount of an individual's cap do not apply to the defined benefit interest. Amy also makes a deductible personal superannuation contribution of \$5,000 to another superannuation fund (which is not a CPF) for which she has claimed a deduction.<sup>30</sup> Subject to the modification explained in paragraph 26 of this draft Guideline, Amy's amount of concessional contributions for the 2017-18 financial year would be \$37,000 ( $\$5,000 + \$26,000 + (\$32,000 - \$26,000)$ ).

26. Amy's concessional contributions cap for the 2017-18 financial year is \$25,000. As the sum of Amy's concessional contributions that cannot create an excess is \$6,000 and is not greater than Amy's concessional contributions cap for the financial year the amount of

<sup>29</sup> Section 290-150 as to be modified by Schedule 5 of the Act.

<sup>30</sup> Section 290-150 as to be modified by Schedule 5 to the Act.

those concessional contributions is not treated as being equal to her concessional contributions cap. Therefore, there is no modification to Amy's concessional contributions and she has excess concessional contributions of \$12,000 ( $\$37,000 - \$25,000$ ) for the 2017-18 financial year.

**Example 5: Defined benefit interest (partially unfunded) where the grandfathering transitional rules apply**

27. Charles has a defined benefit interest in a superannuation fund that is not a CPF. On the advice of an actuary the superannuation provider calculates Charles' notional taxed contributions as \$28,000 and his defined benefit contributions as \$35,000 for the 2017-18 financial year. Charles' concessional contributions cap for the 2017-18 financial year is \$25,000. The grandfathering transitional rules that limit the amount of notional taxed contributions to the amount of an individual's cap apply to limit the notional taxed contributions to \$25,000. Charles also makes a salary sacrifice contribution of \$7,000 to another superannuation fund which is not a CPF. Subject to the modification explained in paragraph 28 of this draft Guideline, Charles' amount of concessional contributions for the 2017-18 financial year would be \$42,000 ( $\$7,000 + \$25,000 + (\$35,000 - \$25,000)$ ).

28. As the sum of Charles' concessional contributions that cannot create an excess is \$35,000 ( $\$25,000 + (\$35,000 - \$25,000)$ ) and is greater than his concessional contributions cap for the financial year, the amount of those concessional contributions is treated as being equal to his concessional contributions cap. Therefore, Charles has excess concessional contributions of \$7,000 ( $\$32,000$  modified concessional contributions – \$25,000 concessional contributions cap) for the 2017-18 financial year.

**Example 6: Defined benefit interest (fully funded) where the grandfathering transitional rules apply**

29. Joan has a defined benefit interest in a superannuation fund that is not a CPF. The superannuation fund is fully funded and the notional taxed contributions are equal to the defined benefit contributions. On the advice of an actuary the superannuation provider calculates Joan's notional taxed contributions and defined benefit contributions as \$28,000 for the 2017-18 financial year. Joan's concessional contributions cap for the 2017-18 financial year is \$25,000. The grandfathering transitional rules that limit the amount of notional taxed contributions to the amount of an individual's cap apply to limit the notional taxed contributions to \$25,000. Joan also makes a salary sacrifice contribution of \$8,000 to another superannuation fund which is not a CPF. Subject to the modification explained in paragraph 30 of this draft Guideline, Joan's amount of concessional contributions for the 2017-18 financial year would be \$36,000 ( $\$8,000 + \$25,000 + (\$28,000 - \$25,000)$ ).

30. As the sum of Joan's concessional contributions that cannot create an excess is \$28,000 ( $\$25,000 + (\$28,000 - \$25,000)$ ) and is greater than her concessional contributions cap for the financial year, the amount of those concessional contributions is treated as being equal to her concessional contributions cap. Therefore, Joan has excess concessional contributions of \$8,000 ( $\$33,000$  modified concessional contributions – \$25,000 concessional contributions cap) for the 2017-18 financial year.

**Example 7: Defined benefit interest where the defined benefit interest is eligible for the grandfathering transitional rules but those rules do not apply**

31. James has a defined benefit interest in a superannuation fund that is not a CPF. The defined benefit interest meets the requirements under the grandfathering transitional rules. On the advice of an actuary the superannuation provider calculates James' notional taxed contributions as \$19,000 and his defined benefit contributions as \$28,000 for the 2017-18 financial year. James' concessional contributions cap for the 2017-18 financial



year is \$25,000. The grandfathering transitional rules do not apply to modify James' notional taxed contributions because his notional taxed contributions are less than his concessional contributions cap. James also makes a salary sacrifice contribution of \$8,000 to another superannuation fund which is not a CPF. Subject to the modification explained in paragraph 32 of this draft Guideline, James' amount of concessional contributions for the 2017-18 financial year is \$36,000 ( $\$8,000 + \$19,000 + (\$28,000 - \$19,000)$ ).

32. As the sum of James' concessional contributions that cannot create an excess is \$28,000 ( $\$19,000 + (\$28,000 - \$19,000)$ ) and is greater than his concessional contributions cap for the financial year, the amount of those concessional contributions is treated as being equal to his concessional contributions cap. (James' notional taxed contributions are included in the concessional contributions that cannot create an excess because his defined benefit interest was eligible for the grandfathering transitional rules but those rules did not apply as James' notional taxed contributions were less than his concessional contributions cap).<sup>31</sup> Therefore, James has excess concessional contributions of \$8,000 ( $\$33,000$  modified concessional contributions -and-  $\$25,000$  concessional contributions cap) for the 2017-18 financial year.

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**Commissioner of Taxation**

9 December 2016

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<sup>31</sup> Subparagraph 291-370(1)(b)(ii).

### **Your comments**

33. You are invited to comment on this Draft Law Companion Guideline. Please forward your comments to the contact officer by the due date.

**Due date:** 23 January 2017  
**Contact officer:** Grahame Hager  
**Email address:** [SuperConsultation@ato.gov.au](mailto:SuperConsultation@ato.gov.au)  
**Telephone:** (02) 9374 8762

**References**

ATOlaw topic(s)	Superannuation ~~ Income tax - individuals (superannuation) ~~ Other
Legislative references	ITAA 1997 ITAA 1997 50-25 ITAA 1997 290-150 ITAA 1997 291-15 ITAA 1997 291-20(2) ITAA 1997 291-20(3) ITAA 1997 291-20(4) ITAA 1997 291-20(5) ITAA 1997 291-20(6) ITAA 1997 291-20(7) ITAA 1997 291-25 ITAA 1997 291-25(2) ITAA 1997 291-25(2)(c)(iii) ITAA 1997 291-25(3) ITAA 1997 Subdiv 291-C ITAA 1997 291-160(1) ITAA 1997 291-160(2) ITAA 1997 291-165 ITAA 1997 291-165(1)(a) ITAA 1997 291-165(1)(b) ITAA 1997 291-165(1)(c) ITAA 1997 291-165(2) ITAA 1997 291-175 ITAA 1997 291-370 ITAA 1997 291-370(1) ITAA 1997 291-370(1)(a) ITAA 1997 291-370(1)(b) ITAA 1997 291-370(1)(b)(ii) ITAA 1997 291-370(1)(c) ITAA 1997 291-370(2) ITAA 1997 Subdiv 292-D ITAA 1997 Div 293 ITAA 1997 Subdiv 293-DA ITAA 1997 293-115 ITAA 1997 293-150 ITAA 1997 293-150(3) ITAA 1997 293-195 ITAA 1997 293-195(2) IT(TP)A 1997 IT(TP)A 1997 Subdiv 291-C IT(TP)A 1997 291-170(6) ITAR 1997 ITAR 1997 Sch 1A ITAR 1997 292-25.01 Judges' Pension Act 1968 Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016
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