2010-2011-2012-2013

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TAX LAWS AMENDMENT (FAIRER TAXATION OF EXCESS CONCESSIONAL CONTRIBUTIONS) BILL 2013 AND SUPERANNUATION (EXCESS CONCESSIONAL CONTRIBUTIONS CHARGE) BILL 2013

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Minister for Employment and Workplace Relations and Minister for Financial Services and Superannuation, the Hon Bill Shorten MP)

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

Abbreviation	***Definition***
AWOTE	average weekly ordinary time earnings
Bill	*Tax Laws Amendment (Fairer Taxation of Excess Concessional Contributions) Bill 2013*
Commissioner	Commissioner of Taxation
GIC	general interest charge
ITAA 1997	*Income Tax Assessment Act 1997*
RSA	retirement savings account
SIC	shortfall interest charge
TAA 1953	*Taxation Administration Act 1953*

General outline and financial impact

Fairer taxation of excess concessional contributions

The *Tax Laws Amendment (Fairer Taxation of Excess Concessional Contributions) Bill 2013* (Bill) amends the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953* to establish a fairer system for the taxation of individuals with concessional contributions in excess of their annual cap. This Bill also allows individuals to elect to release an amount of excess concessional contributions from their superannuation interests. The *Superannuation (Excess Concessional Contributions Charge) Bill 2013* imposes a charge on taxpayers who have concessional contributions in excess of their annual cap to ensure that they do not receive an advantage over those taxpayers who do not exceed their annual cap.

Date of effect: These amendments apply in the 2013-14 income year (and the corresponding financial year) and later income (and financial) years.

Proposal announced: This measure was announced in the Deputy Prime Minister and Treasurer and the Minister for Financial Services and Superannuation's joint Media Release No. 020 of 5 April 2013, which included a number of reforms to superannuation.

Financial impact: The measure has a cost to revenue over the forward estimates of $10 million. This reflects that the loss of excess contributions tax revenue is offset by the new excess concessional contributions charge.

2012-13	***2013-14***	***2014-15***	***2015-16***	***2016-17***
Nil	Nil	–$10m	$5m	–$5m

Human rights implications: This Bill and the *Superannuation (Excess Concessional Contributions Charge) Bill 2013* do not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 1, paragraphs 1.97 to 1.107.

Compliance cost impact: This measure will have minor compliance costs for the superannuation industry as superannuation providers are likely to receive a limited number of additional release authorities in respect of their members' interests which they will generally be required to action.

However, the superannuation industry currently has systems in place to process release authorities for excess concessional contributions tax and the existing related refund measure. It is not anticipated that a significant number of individuals will elect to release amounts of their superannuation (through the Australian Taxation Office) from their funds as a result of this measure, as the number of individuals currently using release authorities is low.

Fairer taxation of excess concessional contributions

Outline of chapter

1.1 The *Tax Laws Amendment (Fairer Taxation of Excess Concessional Contributions) Bill 2013* (Bill) amends the *Income Tax Assessment Act 1997* (ITAA 1997) and the *Taxation Administration Act 1953* (TAA 1953) to establish a fairer system for the treatment of individuals with excess concessional contributions.

1.2 These amendments also allow individuals to elect to release an amount of these excess concessional contributions from their superannuation. Any released amounts proportionately reduce their non-concessional contributions.

1.3 The *Superannuation (Excess Concessional Contributions Charge) Bill 2013* imposes a charge to ensure that taxpayers who have concessional contributions in excess of their annual cap do not receive an advantage compared to taxpayers who have not exceeded their annual cap.

1.4 All references to legislative provisions in this Chapter are references to the ITAA 1997 unless otherwise stated.

Context of amendments

1.5 'Concessional contributions' are defined in section 292-25 of the ITAA 1997 as being, broadly, those contributions to complying superannuation plans which are included in the assessable income of a complying superannuation provider or retirement savings account (RSA) provider.

1.6 Concessional contributions generally include all employer contributions (including salary sacrificed amounts) and all personal contributions for which a deduction is allowed (generally only available to individuals who are self-employed or not employed).

1.7 Section 292-20 of the ITAA 1997 provides that an individual has excess concessional contributions if the amount of their concessional contributions (which includes contributions made on the individual's behalf) exceeds their concessional contributions cap for the financial year. The general concessional contribution cap is $25,000 in 2013-14. For future years, the cap generally increases at the rate of growth in Average Weekly Ordinary Time Earnings (AWOTE) (subject to a materiality threshold – see paragraph 292-20(2)(h) of the ITAA 1997).

1.8 Should the amendments in Schedule 1 of the *Tax and Superannuation Laws Amendment (Increased Concessional Contributions Cap and Other Measures) Bill 2013* receive Royal Assent, from 1 July 2013, the concessional cap for individuals aged 59 and over will be raised to $35,000 and from 1 July 2014, the concessional cap for individuals aged 49 and over will be increased to the same level.

1.9 Individuals must pay excess concessional contributions tax at a rate of 31.5 per cent on their excess concessional contributions (see section 5 of the *Superannuation (Excess Concessional Contributions Tax) Act 2007*). As these contributions are also included in the fund's assessable income and taxed at the superannuation provider's tax rate of 15 per cent, excess concessional contributions bear an effective tax rate of 46.5 per cent – equal to the highest effective marginal tax rate (including Medicare levy). Following Royal Assent to the *Superannuation (Excess Concessional Contributions Tax) Amendment (DisabilityCare Australia) Act 2013* the rate of excess concessional contributions tax increases to 32 per cent in 2014-15 (reflecting the corresponding increase in the Medicare levy), resulting in an effective marginal rate of 47 per cent.

1.10 As a result, individuals below the top marginal tax rate pay a higher tax rate than if they had received the excess amount as assessable salary, wages or business income and paid tax at their individual marginal rate. The cost of this higher rate can be significant.

1.11 In contrast, individuals on the top marginal tax rate effectively face no penalty and benefit from being able to defer the timing of their tax liability. Excess concessional contributions are taxed after the relevant financial year whereas salary, wages and business income are typically taxed in the income year they are earned under the pay as you go system.

1.12 Excess concessional contributions are included in an individual's non-concessional contributions. If an individual has excess non-concessional contributions, they may also bear excess non-concessional contributions tax.

1.13 If an individual has excess concessional contributions, they may seek a determination by the Commissioner of Taxation (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 object of the law.

1.14 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.

1.15 Where an individual's excess concessional contributions in a year are $10,000 or less, the individual also has the option to have 85 per cent of the excess concessional contributions refunded. Only 85 per cent can be refunded because generally 15 per cent of the excess concessional contributions must be paid to the Commissioner as the contribution is generally included in the assessable income of the superannuation provider.

1.16 The refunded excess concessional contributions are not subject to excess concessional contributions tax. Instead, the refunded excess concessional contributions are assessable income in the hands of the individual. They are subject to tax at the individual's marginal rate, with the individual receiving a tax offset for 15 per cent of the refunded excess concessional contributions to account for the tax paid by the superannuation provider.

1.17 This option is only available where an individual has not had excess concessional contributions in the 2011-12 financial year or later financial years.

Summary of new law

1.18 The Bill repeals the excess contributions tax in relation to excess concessional contributions and instead provides for excess concessional contributions to be included in an individual's assessable income and subject to a charge to account for the deferral of tax. This charge is imposed by the *Superannuation (Excess Concessional Contributions Charge) Bill 2013*.

1.19 Overall, approximately 100,000 people will be affected by this measure in 2013-14. Around 40,000 individuals will have a lower tax liability as a result of this measure (with an average reduction of around $1,100).

1.20 The Bill also provides for individuals to elect to release an amount of these excess concessional contributions from a superannuation interest. As a result of the amendments, these released amounts proportionately reduce the individual's non-concessional contributions.

1.21 These amendments ensure that individuals who make excess concessional contributions are only taxed on the contributions at their marginal tax rates and are in a broadly equivalent position to individuals who are considering making a non-concessional contribution.

Comparison of key features of new law and current law

New law	***Current law***
Tax on excess concessional contributions	
Excess concessional contributions are included in an individual's assessable income and taxed at their marginal tax rate. They are not subject to excess concessional contributions tax.	Excess concessional contributions are subject to contributions tax at a rate of 31.5 per cent. They are generally not included in an individual's assessable income. In limited circumstances, an individual's excess concessional contributions may be refunded. Refunded excess concessional contributions are not subject to excess concessional contributions tax and are included in an individual's assessable income.
Charge on excess concessional contributions	
An individual must pay excess concessional contributions charge on the increase in their tax liability that arises as a result of having excess concessional contributions for the relevant financial year. If applicable, this charge is subject to shortfall interest charge and general interest charge in the same way as the income tax liability to which the charge relates.	No excess concessional contributions charge exists.
Offset entitlement	
An individual is entitled to an offset equal to 15 per cent of their excess concessional contributions. The offset is not refundable.	Individuals are only entitled to an offset for refunded excess concessional contributions. The amount of the offset is equal to 15 per cent of the excess concessional contributions.

<table>
<tr><th>New law</th><th>Current law</th></tr>
<tr><td colspan="2">Refund of excess concessional contributions</td></tr>
<tr><td>Individuals are entitled to elect to have up to 85 per cent of their excess concessional contributions for a financial year released from superannuation.</td><td>Individuals may have their excess concessional contributions refunded. The contributions cease to be included as excess concessional contributions where:
• the excess concessional contributions for the financial year are $10,000 or less; and
• the individual has not previously had excess concessional contributions in any financial year from 1 July 2011.
85 per cent of the excess concessional contributions may be released from superannuation.</td></tr>
<tr><td colspan="2">Treatment of non-concessional contributions</td></tr>
<tr><td>Individuals’ non-concessional contributions include their excess concessional contributions.
An individual’s non-concessional contributions are reduced by 100/85 of the amount of any excess concessional contributions released from superannuation.</td><td>Individuals’ non-concessional contributions include their excess concessional contributions.
However, refunded excess concessional contributions are no longer excess concessional contributions.</td></tr>
</table>

Detailed explanation of new law

1.22 This Bill establishes a new tax regime for excess concessional contributions. It repeals the excess contributions tax to the extent it applied to excess concessional contributions and instead provides for excess concessional contributions to be included in individual’s assessable income and taxed at marginal tax rates.

1.23 This Bill also makes a number of other amendments to ensure individuals who make excess concessional contributions are placed in broadly the same positions as individuals who are considering making an equivalent voluntary non-concessional contribution.

Including excess concessional contributions in assessable income

1.24 From the 2013-14 income year, an individual's assessable income includes their excess concessional contributions for the corresponding financial year. ***[Schedule 1, Part 1, item 1, section 291-15]***

1.25 At the same time, the excess contributions tax is repealed in respect of excess concessional contributions. ***[Schedule 1, Part 4, items 38 to 41, 43 to 45, 48 to 49, 54 to 55, 63, 68, 71 and 74 to 76, sections 12-5, 13-1,26-74, 26-75, 292-5, 292-230, 292-235, 292-305, 292-310, 292-405, 292-420, 292-425, 292-465, 292-467 to 292-469 and 995-1 and Subdivisions 292-B and 292-D]***

1.26 Key concepts and provisions, including the definitions of concessional contributions, the concessional contributions cap and the special rules for determining the notional taxed contributions of defined benefit interests have been retained and moved into the new Division (or in some cases into the *Income Tax (Transitional Provisions) Act 1997)*. Where these concepts have relied upon regulations, specific provisions have been included to preserve the regulations following the amendments. This ensures that the concepts which are relevant to calculating excess concessional contributions are included in those parts of the tax law where they are first used. ***[Schedule 1, Parts 1 and 2, items 1, 38, 39, 111 to 118, sections 291-20, 291-25, 291-165, 291-170, 291-175 and Subdivisions 292-B and 292-D of the ITAA 1997 and sections 291-10 and 291-170 of the Income Tax (Transitional Provisions) Act 1997]***

1.27 The Commissioner also retains the discretion to disregard or reallocate excess concessional contributions upon the application of an individual. Consistent with the existing provisions, individuals are able to object to the Commissioner's decision concerning the exercise of this discretion under Part IVC of the TAA 1953. ***[Schedule 1, Part 1, item 1, sections 291-465 and 292-465 of the ITAA 1997]***

1.28 The grounds on which an individual may object to the Commissioner's exercise of this discretion are often likely to overlap with grounds for which the individual may wish to object to other taxation decisions, such as an income tax assessment. To simplify the review process in this situation, an individual may challenge the Commissioner's decision on the exercise of this discretion as part of a related objection, provided the objection is made in time and in the approved form. ***[Schedule 1, Part 1, 3 and 4, items 1, 2, 31, 32 and 68, sections 291-465 and 292-465 of the ITAA 1997 and section 14ZVB and paragraph 14ZW(1)(aac) of the TAA 1953]***

1.29 These changes ensure that individuals only pay tax on their excess concessional contributions at their marginal tax rate. Previously, where excess concessional contributions tax applied, it was at a fixed rate of 31.5 per cent. In combination with the income tax paid by the superannuation provider on the contribution, this meant that all excess contributions were effectively taxed at 46.5 per cent — the highest marginal rate. This resulted in a significant penalty for low and middle income earners who had excess concessional contributions.

1.30 Individuals are also entitled to a tax offset for 15 per cent of their excess concessional contributions for the financial year corresponding to the income year. This offset is not able to be refunded, carried forward or transferred. ***[Schedule 1, Part 1, item 1, section 291-15]***

1.31 The offset reduces an individual's tax liabilities to account for the tax payable on the contributions by the superannuation provider in respect of the excess concessional contributions.

1.32 Guide material in the ITAA 1997 has been included or updated to reflect changes in the treatment of concessional contributions that exceed the cap and the offset, as well as the relocation of provisions in the legislation. ***[Schedule 1, Parts 1, 3, 4 and 6, items 1, 19, 20, 42, 46, 88, 95 and 105, sections 10-5, 11-55, 280-15, 291-20, 291-1 to 291-10, 291-155, 291-460 and 292-5 of the ITAA 1997]***

Example 1.1: Income tax and excess concessional contributions

Terry has a concessional contributions cap of $25,000 for the 2014-15 financial year. His concessional contributions for the financial year total $50,000.

As a result, Terry has excess concessional contributions of $25,000.

All $25,000 of the excess concessional contributions are included in Terry's assessable income for 2014-15.

Terry is also entitled to a tax offset equal to 15 per cent of his excess concessional contributions — $3750.

Excess concessional contributions charge

1.33 As excess concessional contributions are included in assessable income and taxed at marginal rates, individuals could receive tax advantages where they have excess concessional contributions.

1.34 In particular, making excess concessional contributions ensures that this income is not taken into account under the pay as you go rules. It also allows the earnings from the contributions to be retained in the concessionally taxed superannuation environment, increasing the amount held in superannuation beyond that which would be possible for an individual who complied with the contributions caps.

1.35 To negate these benefits, individuals with excess concessional contributions must pay a charge — ***excess concessional contributions charge***. A definition of excess concessional contributions charge is inserted into the Dictionary. ***[Schedule 1, Parts 1 and 3, items 2 and 25, sections 95-5 and 95-10 of Schedule 1 to the TAA 1953 and section 995-1 of the ITAA 1997]***

1.36 The charge is payable on the amount of an individual's income tax liability for the income year that is attributable to the individual having excess concessional contributions. In determining this amount, it is necessary to take into account both the increase in the individual's income tax liability due to the inclusion of their excess concessional contributions and the reduction in their tax liability due to the availability of the excess concessional contributions tax offset. ***[Schedule 1, Part 2, item 2, section 95-15 of Schedule 1 to the TAA 1953]***

Example 1.2: Calculating the increase in tax liability

In 2013-14, Mary's taxable income is $80,000, which includes excess concessional contributions of $10,000. Mary's marginal tax rate is 32.5 per cent and she must also pay the Medicare levy of 1.5 per cent.

As a result of her excess concessional contributions, Mary's taxable income has increased by $10,000, on which she has paid income tax (including Medicare levy) at the her effective marginal rate (34 per cent), resulting in additional tax of $3,400.

However, Mary is also entitled to a tax offset equal to 15 per cent of her excess concessional contributions, decreasing her tax liability by $1,500.

The amount of Mary's tax liability that is attributable to her excess concessional contributions is:

$1,900 (3,400 – 1,500 = 1,900).

1.37 The excess concessional contributions charge begins to apply on the first day of the income year to which the excess concessional contributions are attributable. It ceases to apply on the day prior to the date on which a payment is due under an individual's first notice of assessment for the year (or would be due if the individual has no liability for a year). ***[Schedule 1, Parts 2 and 3, items 2 and 34, sections 95-10 and subsection 280-100(4) of Schedule 1 to the TAA 1953]***

1.38 Excess concessional contributions charge is payable at the same rate as the shortfall interest charge (SIC). SIC is based on the 90-day bank accepted bill (as published by the Reserve Bank of Australia) plus a

3 per cent uplift factor. Similar to the SIC, the excess contributions charge is calculated daily and compounds daily. ***[Schedule 1, Part 2, item 2, section 95-15 of Schedule 1 to the TAA 1953 and clauses 4 and 5 of the Superannuation (Excess Concessional Contributions Charge) Bill 2013]***

1.39 Unlike the SIC, the Commissioner does not have a discretion to remit the excess concessional contributions charge. Unlike the SIC or GIC, this charge applies over a largely fixed period and the actions of the Commissioner do not affect the period over which the charge is payable or the amount to which the charge applies.

1.40 The charge is payable on the day on which an individual is liable to pay the tax due under their first notice of assessment that includes an amount of tax on which the individual is liable to pay the charge (the original date). ***[Schedule 1, Part 2, item 2, section 95-20 of Schedule 1 to the TAA 1953]***

1.41 However, an individual is not required to pay excess concessional contributions charge until the Commissioner has provided notice of their excess concessional contributions charge for the income year (this notice will also include notice of the individual's excess concessional contributions for that income year). Once notice is provided, the charge becomes due and payable from the original date – the day on which an individual is liable to pay the tax due under their first notice of assessment that includes an amount of tax on which the individual is liable to pay the charge. ***[Schedule 1, Part 2, item 2, section 95-20 of Schedule 1 to the TAA 1953]***

1.42 Additionally, if the Commissioner amends the determination of an individual's excess concessional contributions charge, any additional charge is only due and payable 21 days after the Commissioner provides notice of the amended determination. ***[Schedule 1, Part 2, item 2, subsection 95-20(2) of Schedule 1 to the TAA 1953]***

1.43 Excess concessional contributions charge is not directly subject to SIC. However, when determining the SIC for a shortfall that results from an individual having excess concessional contributions, the amount of the shortfall must be increased by the amount of excess concessional contributions charge payable as a result of the excess concessional contributions. ***[Schedule 1, Part 2, items 2, 33 and 34, section 95-25 and subsections 250-10(2) and 280-100(4) of Schedule 1 to the TAA 1953]***

1.44 This approach ensures SIC applies appropriately while avoiding subjecting an individual to multiple SIC liabilities at the same time.

1.45 The excess concessional contributions charge is subject to the general interest charge (GIC). ***[Schedule 1, Part 2, item 2, sections 95-25]***

1.46 The excess contributions charge is a tax-related liability. However, it is not a penalty and applies regardless of any fault or culpability. Unlike the SIC or GIC, excess concessional contributions charge is not a deductible expense. ***[Schedule 1, Part 2, item 33, subsection 250-10(2) of Schedule 1 to the TAA 1953]***

Example 1.3: Period of application of excess concessional contributions charge, SIC and GIC

Matthew lodges his income tax return for the 2014-15 income year on 31 August 2015 and pays his outstanding tax liability in respect of this return on 21 September 2015.

Later, on 30 November 2015, the Commissioner determines Matthew has excess concessional contributions for the 2014-15 financial year. The Commissioner amends Matthew's income tax assessment and provides Matthew with notice of his determination that Matthew has excess concessional contributions and the amended assessment. Matthew receives this notice on 30 November 2015.

As Matthew has excess concessional contributions in the 2014-15 financial year, he is also liable for excess concessional contributions charge. This charge applies for the period beginning on the first day of the 2014-15 financial year until the date when he was first due to pay his income tax liability for 2014-15 – 21 September 2015.

Matthew is also liable for SIC on the shortfall between the amount he originally paid and the amount of tax identified in his amended assessment. He must pay SIC on the value of the shortfall for the period beginning from the day his liability under his original tax assessment was payable – 21 September 2015 – and ending on the day when he pays his liability under the amended assessment or no later than 21 December 2015 (the date when this payment is due).

All of this shortfall is due to the same amount of excess concessional contributions that resulted in Matthew being liable for excess concessional contributions charge. As a result, when determining the amount of SIC he must pay, the amount of the shortfall is increased by the amount of his excess concessional contributions charge liability.

Matthew must pay the additional amounts of income tax and excess concessional contributions charge, as well as the amount of SIC, within 21 days of receiving notice of liability — 21 December 2015. If Matthew does not pay in time he must pay GIC on any unpaid amount of income tax, excess concessional contributions charge or SIC.

Imposition of excess concessional contributions charge

1.47 For constitutional reasons, a separate Bill imposes liability for excess contributions charge. ***[Superannuation (Excess Concessional Contributions Charge) Bill 2013]***

Notice and review rights

1.48 If a taxpayer has excess concessional contributions in a financial year the Commissioner must make a determination identifying the amount of these contributions and the amount of the excess contributions charge. ***[Schedule 1, Part 2, item 2, section 97-5 of Schedule 1 to the TAA 1953]***

1.49 The Commissioner must provide the individual with notice of this determination (the ***excess concessional contributions determination***). This notice may be included together with any other notice provided by the Commissioner, such as a notice of assessment for income tax. ***[Schedule 1, Part 2, items 2 and 25, section 97-5 of Schedule 1 to the TAA 1953 and section 995-1 of the ITAA 1997]***

1.50 Notice of an excess concessional contributions determination is treated as prima facie evidence of the matters in the determination. ***[Schedule 1, Part 2, item 2, subsection 97-5(5) of Schedule 1 to the TAA 1953]***

1.51 An individual may object to an excess concessional contributions determination under Part IVC of the TAA 1953. ***[Schedule 1, Part 2, item 2, section 97-10 of Schedule 1 to the TAA 1953]***

1.52 The grounds on which an individual could object to an excess concessional contributions determination may overlap with the grounds on which they may object to an income tax assessment relating to the Commissioner's decision about the exercise of the discretion to disregard or reallocate excess concessional contributions.

1.53 This Bill amends the TAA 1953 to provide that an objection to one of these taxation decisions is considered to be an objection to all of these decisions to the extent that the grounds for the objection could be grounds for objection to the other taxation decisions. This ensures that there is no ambiguity about the authority of courts and tribunals to provide appropriate remedies where the grounds for an objection raises issues that overlap across these related taxation decisions. It also ensures that individuals cannot seek to make separate objections to each decision raising the same ground or grounds. ***[Schedule 1, Part 3, item 31, section 14ZVB and paragraph 14ZW(1)(aac) of Schedule 1 to the TAA 1953]***

1.54 The period in which an individual may object to this determination is the same as the period for which the individual could object to their income tax assessment on the same ground. This means that the objection must be made by the later of:

- either two or four years after the notice of the individual's original assessment for the income year; or
- 60 days after the notice of any amended assessment where the grounds for objection relate to the particular that was amended.

1.55 Consistent with other tax decisions subject to the objection process set out in the TAA 1953, these decisions are not subject to the general review provisions under the *Administrative Decisions (Judicial Review) Act 1977*. ***[Schedule 1, Part 3, item 16, paragraph(e) of Schedule 1 to Administrative Decisions (Judicial Review) Act 1977]***

Electing to release excess concessional contributions

1.56 Upon receipt of a notice of excess concessional contributions determination, an individual is entitled to elect to release up to 85 per cent of the amount of their excess concessional contributions for that financial year from their superannuation. ***[Schedule 1, Parts 1 and 3, items 2 and 24, section 96-5 of Schedule 1 to the TAA 1953 and section 303-15 of the ITAA 1997]***

1.57 The choice of how much to release (up to the 85 per cent limit) is entirely at the discretion of the individual.

1.58 An amount released as a result of this election is not assessable income or exempt income. ***[Schedule 1, Part 3, item 24, section 303-15 of the ITAA 1997]***

1.59 This provision replaces the existing limited provisions for the release of excess concessional contributions with a general and flexible entitlement. Individuals may choose how much of their excess concessional contributions they wish to release based on their particular circumstances. The amount released is capped at 85 per cent as the remaining 15 per cent represents the income tax liability that the superannuation provider incurred when it received the contribution.

1.60 The election to release must be made by the individual within 21 days of receiving the excess concessional contributions notice, or such further time as the Commissioner may allow. If the Commissioner issues an amended excess concessional contributions notice, this extends the period in which the election can be made until 21 days after the issue of the amended notice. ***[Schedule 1, Part 1, item 2, subsection 96-5(4) of Schedule 1 to the TAA 1953]***

1.61 The election must be made in the approved form, and specify the amount to be released and the superannuation interest or interests from which the amount is to be released. ***[Schedule 1, Part 1, item 2, subsection 96-5(4) of Schedule 1 to the TAA 1953]***

1.62 Once made, the election cannot be revoked. Amounts released may only be returned to superannuation by making further concessional or non-concessional contributions. ***[Schedule 1, Part 1, item 2, subsection 96-15(7) of Schedule 1 to the TAA 1953]***

1.63 It is also not possible to seek to vary the amount or the superannuation interests nominated in the election. However, if the Commissioner is not able to obtain the requested amount from the nominated superannuation interest, the individual has the option to nominate another superannuation interest or interests. ***[Schedule 1, Part 1, item 2, subsections 96-15(5) and (6) of Schedule 1 to the TAA 1953]***

1.64 Upon receipt of a valid election to release, the Commissioner must provide a release authority (or release authorities) in respect of the specified amount (or amounts) to the relevant superannuation provider (or providers). ***[Schedule 1, Part 1, item 2, sections 96-10 and 96-15 of Schedule 1 to the TAA 1953]***

1.65 Generally, a superannuation provider must pay the lesser of:

- the amounts specified in the release authority; and
- the total of the amounts that can be released from the specified superannuation interests (the maximum available release amount);

to the Commissioner within seven days of receiving the release authority.

[Schedule 1, Part 1, items 2 and 25, section 96-20 and 96-35 of Schedule 1 to the TAA 1953 and subsection 995-1 of the ITAA 1997]

1.66 Consistent with the existing arrangements for release authorities for excess concessional contributions tax, superannuation providers who do not comply with a release authority are subject to an administrative penalty of 20 penalty units. ***[Schedule 1, Parts 1 and 3, items 2 and 35, section 96-20 and subsection 288-95(3) of Schedule 1 to the TAA 1953]***

1.67 Generally issuing and acting upon a release authority will not involve any acquisition of property by the Commonwealth. However, for the avoidance of doubt and consistent with other release authority provisions, the Bill provides for the payment of compensation should the operation of the release authority provisions result in an acquisition of property. ***[Schedule 1, Part 1, item 2, section 96-45 of Schedule 1 to the TAA 1953]***

1.68 However, for certain interests, termed voluntary release interests, the superannuation provider is not obliged to comply with the release authority, but instead may choose whether or not to release the specified amount. An interest is a voluntary release interest if it is a:

- defined benefit interest;
- superannuation interest in a non-complying superannuation fund; or
- superannuation interest that supports a superannuation income stream.

[Schedule 1, Part 1, item 2, sections 96-20 and 96-25 of Schedule 1 to the TAA 1953]

1.69 A superannuation provider that receives a release authority must notify the Commissioner within seven days of:

- any amounts they have paid; and
- if they are not required to make a payment or may make a lower payment, that they are not required to comply in full with the release authority.

[Schedule 1, Part 1, item 2, sections 96-20 and 96-35 of Schedule 1 to the TAA 1953]

1.70 The notice must be provided in the approved form. The Commissioner must notify the individual if a superannuation provider notifies the Commissioner that they have not released the full amount specified. ***[Schedule 1, Part 1, item 2, sections 96-35 and 96-45 of Schedule 1 to the TAA 1953]***

1.71 The proportioning rule (which requires superannuation benefits to be treated as made from particular components of a superannuation interest in proportion to the overall composition of the interest) does not apply to these amounts. This is consistent with the general rule applying to payments in respect of release authorities. ***[Schedule 1, Part 1, item 2, section 96-60 of Schedule 1 to the TAA 1953]***

1.72 Similar to the existing treatment of refunded excess concessional contributions, the Commissioner must credit any amounts paid by superannuation providers to the individual. ***[Schedule 1, Part 1, item 2, section 96-50 of Schedule 1 to the TAA 1953]***

1.73 To the extent that the amount released exceeds the individual's outstanding tax liabilities, the Commissioner must refund the excess to the individual. If there is an unreasonable delay between an amount being paid by the superannuation provider and the excess being refunded to the individual, the Commissioner must pay interest. Consequential amendments are made to the *Taxation (Interest on Overpayments and Early Payments) Act 1983* to ensure that there are not overlapping interest regimes in operation. ***[Schedule 1, Parts 1 and 3, items 2 and 37, sections 96-50 and 96-55 of Schedule 1 to the TAA 1953 and subsection 3(1) (paragraph (a) of the definition of income tax crediting amount) in the Taxation (Interest on Overpayments and Early Payments) Act 1983]***

Example 1.4: Electing to release amounts

The Commissioner makes a determination that Luke has excess concessional contributions of $1,500 in the 2014-15 financial year. He amends Luke's income tax assessment accordingly, resulting in an increase in Luke's tax liability of $225 plus an additional $20 of SIC.

Luke receives notice of this determination and his amended assessment on 18 November 2015. Luke is entitled to elect to release up to 85 per cent of his excess concessional contributions – $1,275 – by notifying the Commissioner within 21 days (or such further time as the Commissioner may allow).

On 20 November 2015, he elects to release $750 from his superannuation interest held by ABC Superannuation.

The Commissioner issues a release authority to ABC Superannuation on 21 November 2015, identifying the relevant interest and the requested amount. On 25 November 2015, ABC Superannuation pays $500 to the Commissioner. ABC Superannuation notifies the Commissioner of the payment and that the payment was $250 less than the $750 identified in the release authority as this $500 was the maximum available release amount.

The Commissioner credits the $500 to Luke. After accounting for his outstanding liabilities of $245, Luke is entitled to a refund of $255.

The Commissioner also notifies Luke that ABC Superannuation has not released the full amount he identified in his election. Luke is entitled to nominate a further superannuation interest from which to release the remaining $250. He provides a further election identifying his interest in XYZ Superannuation on 13 December 2015.

The Commissioner issues a release authority to XYZ Superannuation and XYZ Superannuation pays $250 to the Commissioner on 19 December 2015.

The Commissioner credits the $250 to Luke. As Luke has no further outstanding tax debts, he is entitled to a refund of the full $250.

In total, Luke has released $750 from his superannuation interests, receiving $505 after meeting his tax liabilities of $245.

Non-concessional contributions and excess concessional contributions

1.74 Following the amendments, an individual's non-concessional contributions continue to include their excess concessional contributions.

1.75 However, if an individual elects to release an amount of their excess concessional contributions, the amount of their excess concessional contributions is reduced for the purpose of determining their non-concessional contributions. ***[Schedule 1, Part 3, item 23, subsection 292-90(1A) of the ITAA 1997]***

1.76 The amount of the reduction is equal to 100/85 of the amount released (or the amount released divided by 85 per cent).

1.77 As a result, if an individual chooses to release the full 85 per cent of their excess concessional contributions for a financial year, their excess concessional contributions have no impact upon their non-concessional contributions.

1.78 This ensures that an individual always has the option to avoid being in a position where their excess concessional contributions result in them having excess non-concessional contributions. In addition, the release may prevent the automatic bring forward provisions for those aged under 65 years in certain circumstances.

Example 1.5: Non concessional contributions and releasing superannuation

In 2014-15, Lucy has excess concessional contributions of $10,000. With the inclusion of these excess concessional contributions, she has non-concessional contributions for the financial year of $155,000. Lucy's non-concessional contributions cap for the 2014-15 financial year is $150,000, so she has excess non-concessional contributions of $5,000.

Lucy elects to release $4,500 of her excess concessional contributions from superannuation. This reduces her non-concessional contributions by just under $5295:

4500 ÷ 85% = 100*4500/85 = $5,294.12 (to the nearest cent).

As a result, Lucy's non-concessional contributions are $149,705.88. She no longer has excess non-concessional contributions.

Application and transitional provisions

Application

1.79 These amendments apply to the 2013-14 income year (and the corresponding financial year) and later income (and financial) years. ***[Schedule 1, Part 7, items 110 and 111, section 291-10 of the Income Tax (Transitional Provisions) Act 1997 and Subclause 2(1)]***

1.80 However, a number of the consequential amendments to other legislation are contingent on the passage or commencement of other legislation, including the *Superannuation Legislation Amendment (New Zealand Arrangement) Act 2012*, 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*.

1.81 Most of these consequential amendments commence on the later of the start of the day this Bill receives Royal Assent or immediately after the other relevant legislation commences. However, these provisions do not commence at all if the other legislation does not commence. ***[Subclause 2(1), items 3 to 10 in the table]***

1.82 There are two exceptions:

- First, the consequential amendments to the special rules for concessional caps for individuals aged 49 and over and aged 59 and over commence on the later of the day immediately after the commencement of the *Tax and Superannuation Laws Amendment (Increased Concessional Contributions Cap and Other Measures) Bill 2013* and the day this Bill receives Royal Assent. However, these consequential amendments are contingent and do not commence at all if the other Bill does not commence. ***[Subclause 2(1), item 7 in the table]***

- Secondly, one of the affected amendments being made by the *Superannuation Laws Amendment (MySuper Capital Gains Tax Relief and Other Measures) Bill 2013* commences on 2 July 2019. The consequential amendment to this provision commences immediately after the time specified for the commencement of item 19 of Schedule 1 to that Bill. However, the amendment does not commence at all if section 2 of that Bill does not commence. ***[Subclause 2(1), item 9 in the table]***

Transitional provisions

1.83 The Bill includes savings provisions to ensure the continuing application of the excess concessional contributions tax system for the 2012-13 and prior financial years, despite the repeal of the provisions. ***[Schedule 1, Part 7, items 112 to 114 and 119]***

1.84 The Bill also contains savings provisions in respect of regulations and determinations made in the exercise of the Commissioner’s discretion to disregard or reallocate excess concessional contributions, made under sections previously located in Division 292 that have now been repealed and replaced with an equivalent section in the new Division. The effect of these savings provisions is to treat these regulations as if they had been made under the new equivalent section. As a result the old regulations will continue to apply in the same way they did previously despite the repeal of the old sections. ***[Schedule 1, Part 7, items 115 to 119]***

1.85 The savings provisions apply in relation to regulations concerning excess concessional contributions that:

- were in force immediately before the commencement of the provisions; and
- were made under:
  - subsection 292-25(3) of the ITAA 1997, which sets out conditions under which amounts allocated by a superannuation provider concerning a superannuation plan are concessional contributions; or
  - section 292-170 of the ITAA 1997, which sets out what are notional taxed contributions for defined benefit interests.

Consequential amendments

1.86 Consequential amendments to the ITAA 1997, the TAA 1953 and other Commonwealth Acts are made to give effect to the measure to tax excess concessional contributions at marginal rates rather than imposing excess concessional contributions tax.

Renumbering and updating references to renumbered provisions

1.87 To reflect the movement of key concepts and special rules described in paragraph 1.26, cross-references to those provisions previously in Division 292 of the ITAA 1997 are replaced with references to the new provisions. Provisions in the *Income Tax (Transitional Provisions) Act 1997* have also been updated to reflect the new numbering in the ITAA 1997. ***[Schedule 1, Parts 2, 3 and 6, items 3 to 11, 13, 14, 36, 94, 97, 98 and 100, paragraph 332(4)(b) of the Fair Work Act 2009, note 2 to subsection 312-10(10), table item 9 in section 960-265, paragraphs 292-320(2)(b) and (c), definition of concessional contributions, concessional contributions cap, defined benefit interest, excess concessional contributions and notional taxed contributions in subsection 995-1(1) and subsection 293-30(5) of the ITAA 1997, sections 291-20 and 292-20 of the Income Tax (Transitional Provisions) Act 1997, item 19 of Schedule 1 (heading) to the Superannuation Laws Amendment (MySuper Capital Gains Tax Relief and Other Measures) Bill 2013, paragraphs 24B(1)(c) and (2)(d) of the Superannuation (Unclaimed Money and Lost Members) Act 1999, and paragraph 390-5(9A)(b) in Schedule 1 to the TAA 1953]***

Other consequential amendments

1.88 A number of definitions of terms that are no longer used, including excess contributions tax and excess concessional contributions tax are repealed. ***[Schedule 1, Part 4, items 74 to 76, 78, definitions of excess contributions tax, excess concessional contributions tax assessment, original excess contributions tax assessment day and excess concessional contributions tax in subsection 995-1(1) of the ITAA 1997]***

1.89 Excess concessional contributions is added to the table that lists provisions about assessable income that are not ordinary income, or that vary or replace rules that would otherwise apply for certain kinds of ordinary income, and refunded excess concessional contributions is removed from this table. Excess non-concessional contributions tax is added to the table that lists provisions about deductions, and excess contributions tax is removed from the list. The provision that prevented a deduction for excess contributions tax is replaced with a provision that prevents a deduction for excess non-concessional contributions tax. The tax offset for excess concessional contributions is added to the list of tax offsets and the (repealed) tax offset for refunded excess concessional contributions is removed. ***[Schedule 1, Parts 3, 4 and 6, items 16, 17, 38 to 40 and 88, table item headed 'superannuation' in section 10-5, table item headed 'excess contributions tax' in section 12-5, table item headed 'superannuation' in section 13-1 and section 26-75 of the ITAA 1997]***

1.90 The definition of reportable superannuation contributions is updated to reflect the repeal of the provision that formerly set out the conditions that had to be met for the Commissioner to make a determination to disregard excess concessional contributions and the consequences of that determination (formerly section 292-467 of the ITAA 1997). ***[Schedule 1, Part 3, item 26, definition of reportable superannuation contributions in subsection 995-1 of the ITAA 1997]***

1.91 References to refunded excess concessional contributions in income tests that also use the concept 'reportable employer superannuation contributions' are similarly updated to reflect the repeal of former section 292-467 of the ITAA 1997. References to determinations made under former section 292-467 of the ITAA 1997 are omitted or repealed, and references to tax offsets arising under that provision are updated or repealed. ***[Schedule 1, Parts 3, 4 and 6, items 18, 21 to 23, 27, 28, 85, 86, 93, 95 and 96, table item 14 in section 67-23, subsections 61-570(3), 290-160(3) and 290-230(5), and sections 293-35 and 293-110 of the ITAA 1997, subsections 6(3) and 8(1A) of the Superannuation (Government Co-contribution for Low Income Earners) Act 2003, paragraph 14ZW(1)(aac), subsection 280-100(4) of Schedule 1 to the TAA 1953 and paragraph (ca) of the definition of 'decision to which this Act applies', and paragraph (c) of the definition of 'income tax crediting amount' in subsection 3(1) of the Taxation (Interest on Overpayments and Early Payments) Act 1983]***

1.92 Payment of excess concessional contributions charge or SIC is inserted into the table that lists provisions which impose liability for GIC. ***[Schedule 1, Part 3, item 30, subsection 8AAB(4) (before table item 45) of the TAA 1953]***

1.93 Excess concessional contributions charge and amounts in accordance with an excess concessional contributions release authority are inserted into the table that lists tax-related liabilities. Excess concessional contributions tax is removed from that table. ***[Schedule 1, Parts 3 and 4, items 33 and 82, subsection 250-10(2) (table items 38A and before table item 136) in Schedule 1 to the TAA 1953]***

1.94 Definitions for excess concessional contributions charge, excess concessional contributions determination, and maximum available release amount are inserted into the Dictionary. Excess concessional contributions and excess concessional contributions determination are also defined for the purposes of the TAA 1953. ***[Schedule 1, Part 3, items 25 and 29, definition of excess concessional contributions charge, excess concessional contributions determination and maximum available release amount in subsection 995-1(1) of the ITAA 1997 and definition of excess concessional contributions and excess concessional contributions determination in subsection 2(1) of the TAA 1953]***

1.95 References to the term 'excess contributions' (either on its own, or as part of a related term) are replaced with references to excess non-concessional contributions, where the tax continues to apply to excess non-concessional contributions. This reflects that the tax applies only to excess non-concessional contributions. ***[Schedule 1, Parts 4, items 42, 46, 47, 50***

to 62, 64-66, 69, 70, 72 to 73, 76 to 82, 83, 84, 103, 106 to 109, table item 10 in section 960-265, heading to Division 292, headings to Subdivisions 292-E and 292-F, headings to section 292-385, note to subsection 292-410(1), definition of excess contributions tax assessment, excess non-concessional contributions tax assessment, original excess contributions tax assessment day and original excess non-concessional contributions tax assessment day in subsection 995-1(1), paragraphs 292-320(1)(a), 292-465(2)(b) and (9)(a), subsections 292-305(1) and (2), 292-310(1) -(3), and 292-315(1), sections 292-225, 292-240, 292-245, 292-250, 292-300, 292-325, 292-330, 292-380, 292-385, 292-390 and 292-395,subsections 292-415(1) and (3), and 304-15(3) of the ITAA 1997, heading to Division 292 of the Income Tax (Transitional Provisions) Act 1997 and cell at table item 15, column 3 of subsection 8AAB(4), heading to section 280-102A, section 280-102A, paragraph 280-105(1)(a) and table items 38BA and 37AB (column headed 'Topic') in subsection 250-10(2) in Schedule 1 to the TAA 1953]

1.96 A minor amendment is also made to repeal a redundant provision that relates to excess concessional contributions. This provision is redundant because the payments it refers to cannot be made after 30 June 2012 ***[Schedule 1, Part 2, item 12, section 292-25 of the Income Tax (Transitional Provisions) Act 1997]***

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

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

1.97 The *Tax Laws Amendment (Fairer Taxation of Excess Concessional Contributions) Bill 2013* (the Bill) and the *Superannuation (Excess Concessional Contributions Charge) Bill 2013* are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

1.98 Currently, concessional contributions, such as employer contributions and salary sacrificed amounts, that are in excess of the annual cap (currently $25,000 for most individuals and $35,000 for individuals aged 59 or over in 2013-14) are effectively taxed at the top marginal tax rate (46.5 per cent) rather than the normal rate of 15 per cent that applies to concessional contributions. This is a severe penalty for individuals who are not taxed at the top marginal tax rate.

1.99 In contrast, individuals on the top marginal rate effectively face no penalty and benefit from being able to defer the timing of their taxation. Excess contributions tax is collected after the financial year in which contributions are made.

1.100 The Bill amends the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953* to repeal the excess concessional contributions tax and enable an individual's excess concessional contributions to be included in their assessable income and taxed at their marginal rates.

1.101 Individuals may choose to pay the liability from their own sources, or use their superannuation monies.

1.102 A non-refundable tax offset of 15 per cent is provided to individuals to account for the income tax paid by the fund.

1.103 Individuals who exceed their concessional cap are also liable to a new interest charge—the excess concessional contributions charge—which is designed to account for the income tax that would otherwise have been paid earlier on these amounts had they been taken as salary, wages or profits, and aims to discourage individuals from using excess concessional contributions as a way to avoid paying tax. This charge is imposed by the *Superannuation (Excess Concessional Contributions Charge) Bill 2013*.

1.104 The changes contained in the Bill and the *Superannuation (Excess Concessional Contributions Charge) Bill 2013* benefit individuals with low and middle incomes. For these individuals, the benefit from having their excess concessional contributions taxed at their marginal tax rate is greater than the cost of paying the charge. Individuals at the highest marginal rate of tax may be disadvantaged as the amount of tax they pay on their excess concessional contributions will not change and they will now be subject to the charge.

1.105 However, the impact on these individuals is likely to be minimal, as to be in a position to be disadvantaged they must be earning sufficient income to be paying tax at the highest marginal tax rate (in excess of $180,000 in 2013-14), while the average charge that is payable is $600. Despite this, some individuals paying tax at the top marginal rate in this position will benefit due to the increased flexibility provided by the amendments.

Human rights implications

1.106 This Bill and the *Superannuation (Excess Concessional Contributions Charge) Bill 2013* do not engage any of the applicable rights or freedoms.

Conclusion

1.107 This Bill and the *Superannuation (Excess Concessional Contributions Charge) Bill 2013* are compatible with human rights as they do not raise any human rights issues.

Minister for Superannuation and Financial Services, the Hon Bill Shorten

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Tax Laws Amendment (Fairer Taxation of Excess Concessional Contributions) Bill 2013

Schedule 1: Fairer taxation of excess concessional contributions

Bill reference	*Paragraph number*
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Part 1, item 2, subsection 96-5(4) of Schedule 1 to the TAA 1953	1.60, 1.61
Part 1, item 2, sections 96-10 and 96-15 of Schedule 1 to the TAA 1953	1.64
Part 1, item 2, subsections 96-15(5) and (6) of Schedule 1 to the TAA 1953	1.63
Part 1, item 2, subsection 96-15(7) of Schedule 1 to the TAA 1953	1.62
Part 1, items 2 and 25, section 96-20 and 96-35 of Schedule 1 to the TAA 1953 and subsection 995-1 of the ITAA 1997	1.65
Part 1, item 2, sections 96-20 and 96-25 of Schedule 1 to the TAA 1953	1.68
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Bill reference	***Paragraph number***
Parts 2, 3 and 6, items 3 to 11, 13, 14, 36, 94, 97, 98 and 100, paragraph 332(4)(b) of the *Fair Work Act 2009*, note 2 to subsection 312-10(10), table item 9 in section 960-265, paragraphs 292-320(2)(b) and (c), definition of concessional contributions, concessional contributions cap, defined benefit interest, excess concessional contributions and notional taxed contributions in subsection 995-1(1) and subsection 293-30(5) of the ITAA 1997, sections 291-20 and 292-20 of the *Income Tax (Transitional Provisions) Act 1997*, item 19 of Schedule 1 (heading) to the Superannuation Laws Amendment (MySuper Capital Gains Tax Relief and Other Measures) Bill 2013, paragraphs 24B(1)(c) and (2)(d) of the Superannuation (Unclaimed Money and Lost Members) Act 1999, and paragraph 390-5(9A)(b) in Schedule 1 to the TAA 1953	1.87
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Bill reference	***Paragraph number***
Parts 3, 4 and 6, items 16, 17, 38 to 40 and 88, table item headed 'superannuation' in section 10-5, table item headed 'excess contributions tax' in section 12-5, table item headed 'superannuation' in section 13-1 and section 26-75 of the ITAA 1997	1.89
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Bill reference	***Paragraph number***
Part 4, items 74 to 76, 78, definitions of excess contributions tax, excess concessional contributions tax assessment, original excess contributions tax assessment day and excess concessional contributions tax in subsection 995-1(1) of the ITAA 1997	1.88
Part 7, items 110 and 111, section 291-10 of the *Income Tax (Transitional Provisions) Act 1997* and Subclause 2(1)	1.79
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Superannuation (Excess Concessional Contributions Charge) Bill 2013

Bill reference	***Paragraph number***
Part 2, item 2, section 95-15 of Schedule 1 to the TAA 1953 and clauses 4 and 5 of the Superannuation (Excess Concessional Contributions Charge) Bill 2013	1.38
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