

8. Superannuation

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Summary

8.1 Superannuation laws contain a number of age-based rules regarding the accumulation of, and access to, superannuation. This chapter examines these restrictions and explores whether they affect mature age workforce participation. The ALRC outlines two main directions for potential reform. First, the ALRC proposes the removal of age-based rules restricting superannuation accumulation. The proposed reforms aim to address the messages these rules convey about retirement expectations. Secondly, the ALRC questions whether the age-based rules regarding access to superannuation benefits are appropriately set to facilitate mature age workforce participation—particularly given contemporary trends regarding increased longevity, improved health and the nature of work.

Superannuation: an overview

The superannuation system

8.2 The primary aim of the superannuation system is to ‘deliver private income to enhance the living standards of retired Australians’.¹ For many people, superannuation is one of the most significant forms of wealth.² Other policy aims of the superannuation system include:

- helping to address the challenges posed by Australia’s ageing population;³
- intergenerational equity—so that the increased costs of an ageing population are not ‘fully borne by the generation that will be working in several decades’ time when the dependency ratio is higher’;⁴ and
- income smoothing—‘to enable individuals to smooth their income over their lifetime, and thus maintain their standard of living once they retire’.⁵

8.3 The superannuation system broadly consists of two components: mandatory employer contributions to private superannuation savings (the ‘Superannuation Guarantee’), and voluntary contributions encouraged by preferential tax treatment. As noted in Chapter 1, mandatory and voluntary superannuation savings respectively constitute the second and third pillars of Australia’s three-pillar retirement income system.⁶

8.4 Superannuation is generally provided through a trust structure in which trustees hold funds on behalf of members. Trustees owe members statutory fiduciary duties under the *Superannuation Industry (Supervision) Act 1993* (Cth).⁷ Superannuation funds are governed by this Act, its regulations, trust deeds and governing rules. Superannuation funds are regulated by the Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA) and the Tax Commissioner.⁸

1 Super Systems Review Panel, *Super System Review* (2010), pt 1, 15.

2 Australian Government, *Stronger Super—Government Response to the Super System Review* (2010), 3.

3 The Treasury, *Towards Higher Retirement Incomes for Australians: A history of the Australian Retirement Income System since Federation* (2001), 83.

4 R Hanegbi, ‘Australia’s Superannuation System: A Critical Analysis’ (2010) 25 *Australian Tax Forum* 303, 312. See also The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 30. In the former article, Hanegbi challenges the assumptions on which this position is based.

5 FaHCSIA, *Australia’s Future Tax System: Pension Review Background Paper* (2008), 116. See also R Hanegbi, ‘Australia’s Superannuation System: A Critical Analysis’ (2010) 25 *Australian Tax Forum* 303, 312–313; The Treasury, *A More Flexible and Adaptable Retirement Income System* (2004), 2.

6 The third pillar also includes other forms of private long-term savings. The first pillar is the means-tested Age Pension. See, eg, The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 8–13.

7 *Superannuation Industry Supervision Act 1993* (Cth) s 52.

8 *Superannuation Industry Supervision Act 1993* (Cth) s 3(1).

8.5 Most Australians have their superannuation in a ‘defined contribution’ (also known as ‘accumulation’) fund.⁹ In these funds, a member’s superannuation benefits in retirement are based on the amount contributed by his or her employers, the amount contributed voluntarily by the member, and the amount earned by the superannuation fund in investing the contributions.¹⁰

8.6 There are a number of age-based rules in superannuation law. These rules restrict the accumulation of superannuation for older persons when they reach certain ages, and stipulate when members can access their superannuation. The former group of rules has the potential to ‘push’ older persons out of employment due to the messages conveyed about retirement expectations. The latter group of rules, by contrast, may constitute a ‘pull’ to early retirement if age settings are too low.

8.7 Some age and other restrictions may be necessary to ensure that tax concessions are targeted to best support the accumulation of superannuation over the course of a working life. As noted by the Law Council of Australia (LCA), age restrictions

allow people to benefit from their superannuation at an appropriate time to fund their living standards, while preventing them from accumulating assets in a tax advantaged environment for purposes other than funding their retirement (or providing for dependants in the case of early death).¹¹

8.8 In considering the role of superannuation in the context of barriers to mature age workforce participation, it is worth noting that the system is not yet ‘mature’. As stated in Australia’s Future Tax System Review (the Tax Review):

The retirement income system is still in transition and will not fully mature until the late 2030s when employees retire after a full working life (for modelling purposes, usually assumed to be 35 years) of compulsory superannuation contributions.¹²

8.9 The Superannuation Guarantee (SG) was introduced in 1992. Generally, this means that older cohorts have had less time to accrue retirement savings through the SG system than younger cohorts. The following examples roughly illustrate how this transitional period may affect people of different ages:

- a person who retires at age 65 years in 2012 will have received 20 years of SG contributions—less any period he or she has spent out of the paid workforce, for example, due to caring responsibilities;

9 ‘Types of super funds’, ASIC, *Moneysmart website* <www.moneysmart.gov.au> at 30 August 2012.

10 By contrast, ‘defined benefit’ funds pay benefits according to a formula based on factors such as years of service, age and salary. Certain defined benefit schemes may present particular barriers to work, as identified in the Issues Paper. The ALRC does not make proposals with respect to defined benefit schemes, as these barriers are generally embedded in the design of individual schemes. Further, defined benefit schemes are declining, with most closed to new members: Super Systems Review Panel, *Super System Review* (2010), pt 2, 176.

11 Law Council of Australia, *Submission 46*.

12 The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 24.

- a person who is aged 55 years in 2012, and retires at age 65 years in 2022, will have received 30 years of SG contributions—less any period out of the paid workforce; and
- a person who is aged 35 years in 2012, who started working in 1995, will have SG coverage during her entire working life—less any period out of the paid workforce.

8.10 Superannuation can be taxed at three stages: when it goes into the fund—the contributions stage; while it is in the fund—the earnings stage; and when it leaves the fund—the benefits stage.¹³ Taxation at the contribution and benefits stages is discussed in this chapter, as specific age-based rules apply at these stages.

8.11 Superannuation generally receives preferential tax treatment across these three stages. The Tax Review outlined the rationale for this treatment. This included that tax concessions on superannuation deliver a ‘more neutral overall tax treatment of deferred consumption relative to current consumption’¹⁴ and reflect the ‘social benefits of overcoming life cycle myopia’,¹⁵ that is, ‘people not saving adequately for retirement because it is too far in the future for them to adequately “see”, and so make adequate provision for their needs’.¹⁶

Assessment of superannuation

8.12 Australia’s retirement income system (including the superannuation system) is considered strong by world standards. It ranks second in the Melbourne Mercer Global Pension Index survey of 18 countries. This report describes Australia’s system as of ‘sound structure, with many good features’, though with some areas for improvement.¹⁷

8.13 Notwithstanding the strengths of Australia’s superannuation system, some commentators have criticised it on a number of grounds—including that it is inequitable. The Australia Institute states, for example, that tax concessions are designed so that ‘the more income a person earns the more taxpayer support they will receive’.¹⁸ It is also argued that a small portion of high income earners receive a substantial percentage of superannuation tax benefits.¹⁹ Lower income earners may

13 As discussed below, ‘non-concessional contributions’ do not receive concessional treatment at the contributions stage.

14 The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 3.

15 *Ibid.*, 19.

16 *Ibid.*, 10.

17 Australian Centre for Financial Studies, *Melbourne Mercer Global Pension Index* (2011) <www.mercer.com/articles/global-pension-index> at 17 September 2012, 5.

18 The Australia Institute, *Can the Taxpayer Afford ‘Self-funded Retirement’?: Policy Brief No 42* (2012), 3.

19 R Hanegbi, ‘Improving our Superannuation Regime: A post-Henry Review Look at Superannuation Taxation, Raising Superannuation Balances and Longevity Insurance’ (2010) 25 *Australian Tax Forum* 425, 441. For an alternative perspective see ASFA, *The Equity of Government Assistance for Retirement Income in Australia* (2012).

receive comparatively little benefit—and lowest income earners may receive no benefits.²⁰ The Australia Institute comments:

Despite Australia's superannuation system often being described as 'universal' in fact a substantial portion of the working age population does not make contributions to superannuation and, in turn, receive none of the \$30 billion available to 'boost retirement incomes'.²¹

8.14 This may particularly affect those who spend time out of the workforce, or work part time, to care for others. As noted by the National Welfare Rights Network (NWRN), 'carers for children with disabilities, or adult family members or older frail parents' have limited opportunities to accumulate superannuation.²² Women, in particular, do 'exceedingly poorly in the superannuation stakes'.²³ This can result from the gendered nature of care provision²⁴—'women who spend their lives caring for others are at the highest risk of spending their retirement having to care for themselves'.²⁵ Additionally, women's superannuation may be affected by 'domestic and family violence and divorce or separation' and the 'gender pay gap and women's lower earnings in general'.²⁶

8.15 Another criticism made of the superannuation system is that its justifications are weak, or that it does not meet its underpinning policy aims.²⁷ For example, it has been argued that the system fails to achieve its 'stated goal of taking pressure off the Commonwealth budget by reducing outlays on the age pension'.²⁸ The Australia Institute refers to the cost of superannuation concessions:

Australian taxpayers contributed \$30.2 billion to the private accounts of that portion of the population with superannuation [in] 2011–12. By 2015–16 this sum is projected by Treasury to rise to more than \$45 billion by which time it will be, by far, the single largest area of government expenditure. By 2015–16 the taxpayer contribution of \$45 billion to private superannuation balances will account for almost twice the \$24 billion projected to be spent on defence in that year.²⁹

20 The Australia Institute, *Can the Taxpayer Afford 'Self-funded Retirement'?: Policy Brief No 42* (2012), 3.
 21 Ibid, 3.
 22 National Welfare Rights Network, *Submission 50*. See also Australian Human Rights Commission, *Accumulating Poverty? Women's Experiences of Inequality Over the Lifecycle* (2009).
 23 National Welfare Rights Network, *Submission 50*.
 24 See Ch 1 for discussion of statistics regarding higher proportions of female care providers.
 25 The Australia Institute, *Can the Taxpayer Afford 'Self-funded Retirement'?: Policy Brief No 42* (2012), 14.
 26 Government of South Australia, *Submission 30*.
 27 See in particular R Hanegbi, 'Australia's Superannuation System: A Critical Analysis' (2010) 25 *Australian Tax Forum* 303.
 28 Richard Denniss, 'Super Rort for Wealthy', *Canberra Times* (Canberra), 4 February 2012, <www.canberratimes.com.au>.
 29 The Australia Institute, *Can the Taxpayer Afford 'Self-funded Retirement'?: Policy Brief No 42* (2012), 3.

8.16 Dr Richard Denniss of the Australia Institute also notes that:

A dollar spent on tax concessions for super simply does not lead to a dollar's reduction in the cost of providing the age pension, now or in the future. It doesn't even come close.³⁰

Reviews of superannuation

8.17 As discussed in Chapter 1, in 2008 and 2009 the Australian Government initiated two major reviews addressing superannuation: the Tax Review (chaired by Dr Ken Henry AC) and the Super Systems Review (chaired by Jeremy Cooper).

8.18 The Tax Review examined the retirement income system—including the superannuation system—as a key part of the tax-transfer system. It made a wide range of recommendations for significant reform of the superannuation system, particularly in relation to taxation arrangements.³¹ Some relevant recommendations are discussed in this chapter.

8.19 The Super Systems Review addressed the governance, efficiency, structure and operation of Australia's superannuation system. The review proposed ten recommendation packages aimed at creating member-orientated architecture for the superannuation industry.³² This included the creation of 'MySuper'—'a simple, low cost default superannuation product' and 'SuperStream'—measures to improve the 'back office' of superannuation, improving its productivity and ease of use.³³ The Australian Government's response to the review is the 'Stronger Super' package, and it is in the process of implementing the Stronger Super reforms.³⁴

Superannuation contributions

Types of superannuation contributions

8.20 The *Income Tax Assessment Act 1997* (Cth) refers to two categories of contributions. These are 'concessional contributions'³⁵ (also known as 'before-tax' or 'deducted' contributions) and 'non-concessional contributions'³⁶ (also known as 'after-tax' and 'undeducted' contributions). Concessional contributions include employer contributions—including mandatory and voluntary contributions, and most contributions made by self-employed persons.³⁷ Non-concessional contributions include members' personal contributions and contributions for a spouse.

30 Richard Denniss, 'Super Rort for Wealthy', *Canberra Times* (Canberra), 4 February 2012, <www.canberratimes.com.au>.

31 The Tax Review's recommendations about superannuation are contained in The Treasury, *Australia's Future Tax System: Final Report* (2010), pt 1, Recs 18–24 and The Treasury, *Australia's Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), collated at 2–4.

32 Super Systems Review Panel, *Super System Review* (2010), pt 2.

33 The Treasury, *Stronger Super* (2012) <www.strongersuper.treasury.gov.au> at 3 September 2012.

34 Australian Government, *Stronger Super—Government Response to the Super System Review* (2010). See also The Treasury, *Stronger Super* (2012) <www.strongersuper.treasury.gov.au> at 3 September 2012.

35 *Income Tax Assessment Act 1997* (Cth) ss 292-25, 292-165, 995-1.

36 *Ibid* ss 292-90, 292-165.

37 The 15% concessional tax rate applies to 'most contributions made by the self-employed': R Hanegbi, 'Australia's Superannuation System: A Critical Analysis' (2010) 25 *Australian Tax Forum* 303, 307.

8.21 A further type of superannuation contribution comprises government contributions and co-contributions under the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Cth).³⁸

Concessional contributions

Superannuation Guarantee and other mandatory employer contributions

8.22 Mandatory ('mandated') employer contributions include SG contributions as well as contributions made under an industrial agreement or award.³⁹ The SG contribution is currently equivalent to 9% of an employee's ordinary earnings.⁴⁰ Although SG contributions are made by the employer, the Tax Review noted that 'the incidence is likely to fall on the employee through lower real wages'.⁴¹ Employers are currently not required to pay SG contributions for employees 70 years and over.⁴²

8.23 Employers may fund SG contributions by making contributions under 'salary sacrifice' arrangements. In these arrangements, an employee agrees that an employer will pay a portion of salary or wages directly into superannuation—that is, from pre-tax income. The employee pays less income tax as a consequence, and the arrangement may also have tax benefits for the employer.

8.24 Amendments that commence on 1 July 2013 will change superannuation laws to gradually increase the minimum superannuation contribution rate from 9% to 12%. They will also remove the maximum age limit for an employee at which the SG no longer needs to be provided.⁴³ The Minister for Superannuation, the Hon Bill Shorten MP, stated that removing the age limit will 'provide an incentive for those older Australians who wish to remain in the workforce longer not to be discriminated against if they do so'.⁴⁴

8.25 A number of stakeholders to this Inquiry welcomed this reform.⁴⁵ For example, COTA Australia (COTA) stated that it would remove 'one of the more significant barriers to older people wanting to stay in employment'.⁴⁶ The LCA supported the measure on equity grounds—stating that it is 'difficult to identify a sound policy reason

38 These contributions are taxed similarly in the fund as non-concessional contributions but do not fall into this category: *Income Tax Assessment Act 1997* (Cth) s 292-90(2)(c)(i).

39 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 5.01(1).

40 *Superannuation Guarantee (Administration) Act 1992* (Cth) s 19(2).

41 The Treasury, *Australia's Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 9.

42 *Superannuation Guarantee (Administration) Act 1992* (Cth) s 27(1).

43 *Superannuation Guarantee (Administration) Amendment Act 2012* (Cth) s 2 and sch 1. The Act received royal assent on 29 March 2012.

44 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 2 November 2011, B Shorten—Assistant Treasurer and Minister for Financial Services and Superannuation), 12423.

45 COTA, *Submission 51*; Law Council of Australia, *Submission 46*; ACTU, *Submission 38*; Government of South Australia, *Submission 30*; National Seniors Australia, *Submission 27*. See also Media Entertainment & Arts Alliance, *Submission 33*; Olderworkers, *Submission 22*; My Longevity Pty Limited, *Submission 15*.

46 COTA, *Submission 51*.

for employers to have different obligations for remuneration of employees based solely on their age'.⁴⁷

8.26 However, the Australian Industry Group (AIG) raised a concern that removing the maximum SG age limit 'may raise costs of employment and have a detrimental impact on the incentive to employ older people'.⁴⁸ COTA similarly expressed concern that this may affect employers' willingness to employ older workers, suggesting this is 'something that will need to be monitored'.⁴⁹

Voluntary employer contributions

8.27 Employees may enter into arrangements with employers to deduct extra portions of money from their salary and pay it into their superannuation accounts. The *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SIS Regulations) restrict contributions to superannuation funds, other than mandatory employer contributions, based on the age of the fund member as follows:

- under 65 years—no restrictions;
- 65 to 75 years—contributions can be made when the member meets a work test: they must be 'gainfully employed' on at least a part-time basis, that is, at least 40 hours over a 30-day period in the financial year; and
- 75 years and over—contributions cannot be made.⁵⁰

8.28 There are therefore two limits on mature age workers who wish to make voluntary contributions: an absolute limit on those aged 75 years and over; and a conditional limit on those aged 65 to 75 years. The work test aims to ensure that persons in the latter age group can only make voluntary contributions when they 'maintain a bona fide link with the paid workforce'.⁵¹

Contributions by self-employed

8.29 Self-employed persons may, but are not required to, make superannuation contributions for themselves.⁵² Contributions by the self-employed are concessional when they claim a deduction for them, as discussed below.

47 Law Council of Australia, *Submission 46*.

48 Australian Industry Group, *Submission 37*.

49 COTA, *Submission 51*.

50 The rules are provided for in *Superannuation Industry (Supervision) Regulations 1994* (Cth) regs 7.01, 7.04. 'Gainful employment' is employment or self-employment 'for gain or reward in any business, trade, profession, vocation, calling, occupation or employment': reg 1.03

51 Explanatory Statement, *Superannuation Industry (Supervision) Regulations (Amendment) 1997* (Cth) Attachment B.

52 The Tax Review recommended against extending the SG for small business people. It stated that they may face higher 'costs of compulsion' than employees, and that '[m]any small business people have alternative strategies for saving for their retirement, often with different time profiles than those applying to employees': The Treasury, *Australia's Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 12.

Concessional contributions are tax deductible

8.30 Employers are currently entitled to income tax deductions for contributions made for employees under the age of 75 years, and for contributions mandated by industrial agreements or awards.⁵³ The self-employed may also claim a tax deduction for contributions made until they reach the age of 75 years.⁵⁴ Tax deductions may be claimed for both mandatory and voluntary contributions.⁵⁵

8.31 From 1 July 2013, employers will be able to claim tax deductions for SG contributions for employees aged 75 and over.⁵⁶ This aligns ‘the availability of an income tax deduction to an employer with the measure to remove the Superannuation Guarantee maximum age limit’.⁵⁷

8.32 The measure does not extend to remove the age limits on tax deductions for voluntary contributions for employees or for contributions for self-employed persons. This is consistent with SIS Regulations restriction on persons aged 75 years and over making voluntary contributions.

Contribution splitting

8.33 Members of a superannuation fund may apply to split certain concessional superannuation contributions with their spouse.⁵⁸ The *Superannuation Industry (Supervision) Act* defines ‘spouse’ to include a person:

- who is in a relationship with a member where the relationship is registered under certain state and territory laws (including registered same-sex relationships); and
- who lives with the member on a genuine domestic basis in a couple relationship.⁵⁹

8.34 Members cannot split their contributions for a spouse aged 65 years or older, or a retired spouse who has reached ‘preservation age’—that is, the age at which a person may access superannuation benefits when retired.⁶⁰ Maximum limits apply to the amount of superannuation that may be split, and the member is limited to one application per financial year.⁶¹

53 *Income Tax Assessment Act 1997* (Cth) ss 290-60(1), 290-80(1).

54 *Ibid* subdiv 290-C.

55 *Ibid* subdiv 290-A.

56 *Tax Laws Amendment (Stronger, Fairer, Simpler and Other Measures) Act 2012* (Cth) sch 5.

57 Revised Explanatory Memorandum, Tax Laws Amendment (Stronger, Fairer, Simpler and Other Measures) Bill 2011 (Cth), [5.5].

58 *Superannuation Industry (Supervision) Regulations 1994* (Cth) div 6.7. Non-concessional contributions made before 5 April 2007 can also be split: reg 6.41(3).

59 *Superannuation Industry (Supervision) Act 1993* (Cth) s 10.

60 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.44; APRA, *Prudential Practice Guide: SPG 270—Contribution and Benefit Accrual Standards for Regulated Superannuation Funds* (2012), [58]. As discussed below, preservation age is age 55 to 60 years, depending on year of birth.

61 *Superannuation Industry (Supervision) Regulations 1994* (Cth) regs 6.40, 6.44. Superannuation funds are not required to offer their members the option to split their superannuation contributions: *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.45.

Non-concessional contributions

Personal contributions

8.35 Individual fund members may make voluntary personal contributions to their superannuation funds from after-tax income or capital. Employees cannot claim a deduction for personal contributions.⁶² The age-based restrictions in the SIS Regulations apply to voluntary personal contributions.⁶³

Spouse contributions

8.36 A person may make a non-deductible superannuation contribution on behalf of a spouse, and may be eligible for a tax offset when the spouse is receiving low or no income (less than \$13,800 for the income year).⁶⁴ Spouse contributions can be made where the spouse is aged under 65 years, or has reached 65 but not yet 70 years and is gainfully employed on a part-time basis. Contributions cannot be made on behalf of a spouse aged 70 years and over.⁶⁵

Government contributions

Co-contributions

8.37 Low-income earners making personal after-tax superannuation contributions may be eligible for Australian Government co-contributions under the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Cth) and regulations. The purpose of government co-contributions is to help low-income earners save for retirement.⁶⁶ The co-contribution amount depends on the personal contribution amount and the individual's income.

8.38 In 2012–13, it is proposed that the maximum co-contribution amount will be \$500—reduced from a maximum of \$1,000 in 2011–12. It is also proposed that reductions will be made to the higher eligibility threshold and matching rate. These proposed changes are not yet law at the time of writing.⁶⁷ They are a consequence of the introduction of the Low Income Earners Government Contribution scheme (discussed below) on 1 July 2012.⁶⁸

62 See *Income Tax Assessment Act 1997* (Cth) subdiv 290-C.

63 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 7.04.

64 *Income Tax Assessment Act 1997* (Cth) s 290-230. The maximum rebate for the income year is \$540: *Income Tax Assessment Act 1997* (Cth) s 290-235(2). The *Income Tax Assessment Act 1997* definition of a spouse, applicable in this context, is generally consistent with the definition in the *Superannuation Industry (Supervision) Act: Income Tax Assessment Act 1997* (Cth) ss 290-230(3), 995-1(1).

65 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 7.04(1).

66 Explanatory Memorandum, *Superannuation (Government Co-Contribution for Low Income Earners) Bill 2003* (Cth), [1.4].

67 'Key superannuation rates and thresholds: Co-contribution rates and thresholds', 'Changes to super for individuals', ATO website <www.ato.gov.au> at 11 April 2012.

68 B Shorten, 'Superannuation Measures as Part of the Mid-Year Economic and Fiscal Outlook' (Press Release, 29 November 2011).

8.39 Persons aged 71 years and over are ineligible for government co-contributions.⁶⁹ This affects workers who are aged 71 but under 75 years (as noted above, persons 75 years and over cannot make voluntary contributions to their superannuation funds).

Low Income Earners Government Contribution

8.40 In addition to the co-contribution scheme, the Australian Government has introduced the Low Income Earners Government Contribution.⁷⁰ This will provide workers earning less than \$37,000 a year with a superannuation contribution of up to \$500 annually.⁷¹ This measure is aimed at improving the fairness of the SG system⁷²—particularly in relation to tax concessions:

Currently, 3.6 million low-income Australians, including around 2.1 million women get no (or minimal) tax benefit from contributing to superannuation, due to the fact that the 15 per cent superannuation contribution tax is above or equivalent to their income tax rate.⁷³

8.41 This measure will ‘effectively return the tax on the superannuation contributions made to their fund’.⁷⁴ In contrast with the co-contribution scheme, no age test will apply to the Low Income Earners Government Contribution.

Removing age restrictions on contributions?

8.42 Age-based restrictions on contributions may constitute barriers to accumulating superannuation for mature age persons. A question for this Inquiry is whether they also constitute a barrier to mature age workforce participation. In the Issues Paper, the ALRC asked if the various age limits affected mature age participation in the workforce, and if changes should be made.⁷⁵ This section outlines stakeholder responses and proposes reforms removing age limits on contributions.

8.43 The age limits regarding superannuation contributions are summarised in the table below. The SG age limit has not been included, given that the Australian Government has legislated for its removal.

69 *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Cth) s 6(1). This restriction is intended to limit the cost of superannuation tax concessions: The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 32.

70 This measure is provided for in the *Tax Laws Amendment (Stronger, Fairer, Simpler and Other Measures) Act 2012* (Cth), which received royal assent on 29 March 2012.

71 *Ibid* sch 4. The income figure relates to adjusted taxable income.

72 Australian Government, *Tax Policy Statement: Stronger Fairer Simpler—A Tax Plan for our Super* (2010), 13.

73 *Debates*, House of Representatives, 2 November 2011, 12417 (B Shorten—Assistant Treasurer and Minister for Financial Services and Superannuation), 12418.

74 Australian Government, *Tax Policy Statement: Stronger Fairer Simpler—A Tax Plan for our Super* (2010), 2. Taxation and superannuation contributions are discussed in more detail below.

75 Issues Paper, Questions 11–13.

Category	Statute or regulation	Age restriction
Voluntary contributions	<i>Superannuation Industry (Supervision) Regulations 1994</i> (Cth)	Members cannot: (a) make voluntary contributions from age 65 until age 75 unless they meet a work test; or (b) make voluntary contributions from age 75.
Income tax deductions for voluntary contributions	<i>Income Tax (Assessment) Act 1997</i> (Cth)	Deductions cannot be claimed by: (a) employers for voluntary contributions made for employees aged 75 years and over; or (b) self-employed workers for contributions made when they are aged 75 years and over.
Contribution splitting	<i>Superannuation Industry (Supervision) Regulations 1994</i> (Cth)	Members cannot: (a) split contributions for a spouse aged 65 and over; or (b) split contributions for a retired spouse of preservation age and over.
Spouse contributions	<i>Superannuation Industry (Supervision) Regulations 1994</i> (Cth)	Members cannot: (a) make spouse contributions for a spouse aged 70 and over; or (b) make contributions for a spouse aged 65 but under 70 unless the spouse meets a work test.
Government co-contributions	<i>Superannuation (Government Co-contribution for Low Income Earners) Act 2003</i> (Cth)	The Australian Government will not make co-contributions for persons aged 71 years and over.

Limits on voluntary contributions

8.44 The Tax Review recommended that the restriction on persons aged 75 and over from making voluntary contributions should be removed—but that a work test should continue to apply for persons age 65 years and over.⁷⁶ The ALRC agrees with the recommendation of the Tax Review as it may encourage mature age workforce participation, as discussed below.

⁷⁶ The Treasury, *Australia's Future Tax System: Final Report* (2010), pt 2, vol 1, rec 20.

8.45 Most stakeholders who responded to this issue considered that the 75-year age limit should be removed.⁷⁷ A number of stakeholders argued that the 75-year age limit on voluntary contributions constituted a workforce disincentive.⁷⁸

8.46 Stakeholders gave a range of arguments for this reform, beyond improving mature age workforce participation. While the aim of this Inquiry is to consider reforms to remove barriers to work for mature age persons, it is worth noting other potential benefits that may flow from the removal of the 75-year age limit on contributions. Stakeholders argued that the age limit should be removed:

- as it restricts the ability of mature age workers to save for their retirement—particularly affecting ‘people on low incomes who may wish to work longer to build their superannuation level and women who may have returned to the workforce after long absences’;⁷⁹
- for equity reasons, with one stakeholder arguing that the age limit is discriminatory;⁸⁰
- as mature age workers should have choices in this regard—if ‘they choose to input into superannuation then they should be able to do so’;⁸¹ and
- for consistency—as the SG age limit has been lifted, so too should the 75-year age limit on voluntary contributions.⁸²

8.47 The ALRC considers that removing the 75-year age limit on voluntary contributions may correct undesirable messages about retirement age expectations conveyed by the existing restriction. Importantly, this reform will also introduce consistency in the treatment of voluntary and SG contributions—and consistency in message across these laws.

77 COTA, *Submission 51*; National Welfare Rights Network, *Submission 50*; Australian Industry Group, *Submission 37*; National Seniors Australia, *Submission 27*; Olderworkers, *Submission 22*; Association of Independent Retirees, *Submission 17*; R Spencer, *Submission 08*; L Gabor, *Submission 05*. NWRN argued that Treasury should analyse the changes to determine ‘which groups of older people would benefit from these reforms’: National Welfare Rights Network, *Submission 50*. The Brotherhood of St Laurence considered that ‘an individual’s ability to make voluntary contributions should depend primarily on the balance in their superannuation accounts, rather than their age’: Brotherhood of St Laurence, *Submission 54*. LCA and ACCI conditionally supported removing the 75-year age limit: Law Council of Australia, *Submission 46*; Australian Chamber of Commerce and Industry, *Submission 44*.

78 COTA, *Submission 51*; Australian Chamber of Commerce and Industry, *Submission 44*; National Seniors Australia, *Submission 27*; Association of Independent Retirees, *Submission 17*. For example, ACCI stated that removing the age limit enhances the likelihood of mature age workers ‘returning to work or extending their involvement in paid work’. See also: J Willis, *Submission 42*.

79 National Seniors Australia, *Submission 27*. See also: COTA, *Submission 51*.

80 COTA, *Submission 51*. See also Law Council of Australia, *Submission 46*; My Longevity Pty Limited, *Submission 15*.

81 Olderworkers, *Submission 22*. See also Australian Chamber of Commerce and Industry, *Submission 44*.

82 Law Council of Australia, *Submission 46*.

8.48 In relation to the work test that applies from the age of 65 years, stakeholders had mixed views. Opposition to the work test was expressed most strongly by the Government of South Australia and the Association of Independent Retirees (AIR).⁸³ The Government of South Australia argued that the ability to make voluntary contributions should be guaranteed at all ages, ‘irrespective of work patterns’. It added that to

deny workers this right not only acts as a disincentive and goes against government policy to support people to stay in work longer and be self funded in retirement, it also arguably constitutes discrimination on the basis of age.⁸⁴

8.49 AIR noted that ‘the interest of many retired people in work is to supplement their income, not to meet basic living necessities’. It commented that many people do not have interest in, or opportunities for, work as required by the work test. AIR observed that retirees may work in ways not accommodated by the work test—on a short-term basis, or otherwise less than 40 hours in 30 days. It gave examples such as working at polling booths during elections, emergency work in teaching or nursing, or standing in for a family member.⁸⁵

8.50 In contrast, the LCA considered that age-based restrictions on superannuation accumulation are ‘an appropriate component of superannuation regulation’, and that the work test ‘is an appropriate basis for framing the restrictions’.⁸⁶ The LCA supported retaining the work test for persons aged over 65 years, as did the Australian Institute of Superannuation Trustees (AIST) and AIG. These stakeholders considered that the 75-year age limit should be removed if the existing work test were extended to apply to this older cohort.⁸⁷

8.51 The position of the LCA, AIST and AIG reflect the Tax Review recommendation on this issue, which was explicitly endorsed by the LCA. In making this recommendation, the Tax Review stated that the 75-year age limit is unnecessary if other age-based restrictions on accessing superannuation tax concessions are retained. These restrictions include contribution caps (discussed below) and the work test. It noted that restrictions are consistent with ‘the primary purpose of the retirement income system, which is to smooth income over a person’s lifetime rather than be a concessional estate planning vehicle’.⁸⁸

8.52 In line with the Tax Review recommendation, the ALRC considers that the work test should be retained and extended to persons age 75 years and over. This gives workers who wish to continue to accumulate superannuation an incentive to continue to participate in the workforce at a minimum level. Further, imposing a work test on

83 Government of South Australia, *Submission 30*; Association of Independent Retirees, *Submission 17*. See also COTA, *Submission 51*; J Willis, *Submission 42*; National Seniors Australia, *Submission 27*; R Spencer, *Submission 08*; L Gabor, *Submission 05*.

84 Government of South Australia, *Submission 30*.

85 Association of Independent Retirees, *Submission 17*.

86 Law Council of Australia, *Submission 46*.

87 Australian Institute of Superannuation Trustees, *Submission 47*; Law Council of Australia, *Submission 46*; Australian Industry Group, *Submission 37*.

88 The Treasury, *Australia’s Future Tax System: Final Report* (2010), pt 2, vol 1, 115–116.

older workers facilitates the primary policy purpose of superannuation as a retirement income vehicle. As noted by the Australian Government in 2004:

removing the work test for people aged over 65 is inconsistent with superannuation's intended role as [a] retirement vehicle. Without a work test people could abuse the taxation concessions provided to superannuation.⁸⁹

8.53 It noted that retaining the work test is necessary for the 'integrity' of the superannuation system.⁹⁰

8.54 The ALRC considers that retaining the work test for persons aged 65 years and over is therefore logical, particularly given the proposed removal of the 75-year age limit for voluntary contributions.

8.55 Further, to ensure that the intended policy purpose of superannuation is not undermined—given the proposed removal of the 75-year age limit—the ALRC is considering whether the work test should be amended. A minimum of 40 hours over a 30-day period in a financial year may not be sufficient to ensure the intended bona fide link with the workforce. The ALRC is interested in stakeholder comment in this regard.

8.56 The ALRC also seeks comment regarding any other changes that should be made to the work test. For example, the Superannuated Commonwealth Officers Association (SCOA) suggested that a work test could be introduced at the earlier age of 55 years. It noted that the work test encourages workforce participation only from age 65, so that persons under this age who wish to contribute to superannuation have less incentive to keep working.⁹¹

Proposal 8–1 Regulation 7.04(1) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) restricts superannuation funds from accepting voluntary contributions for members of superannuation funds:

- (a) aged 75 years and over; and
- (b) aged 65 years until 75 years, unless they meet a work test, that is, where they are gainfully employed on at least a part-time basis during the financial year.

The Australian Government should amend reg 7.04(1) to remove the restriction on voluntary contributions for members aged 75 years and over, and to extend the work test to these members.

89 Explanatory Statement, *Superannuation Industry (Supervision) Amendment Regulations (No 4) 2004* (Cth)

90 Ibid.

91 Superannuated Commonwealth Officers Association, *Submission 14*. The LCA conversely suggested a potential *increase* to the age at which the work test applies, in the context of an alignment with any future increase to the unrestricted access age for superannuation benefits: Law Council of Australia, *Submission 46*. The unrestricted access age is discussed below.

Question 8–1 Regulations 7.04(1) and 7.01(3) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) stipulate a work test for members of superannuation funds aged 65 years and over who wish to make voluntary superannuation contributions. Members must be gainfully employed on at least a part-time basis during the financial year, that is, for a minimum of 40 hours over a consecutive 30-day period. What changes, if any, should be made to the work test? For example, should the minimum hours of work be increased and, if so, over what period?

Income tax deductions for voluntary contributions

8.57 The ALRC considers that the proposed reform to lift the 75-year age limit on voluntary contributions should prompt two consequential reforms:

- employers should be able to claim income tax deductions for voluntary contributions made for employees aged 75 and over; and
- self-employed workers should be able to claim income tax deductions for contributions made from the age of 75 years.

8.58 This would align the availability of the income tax deduction with the proposed measure to enable voluntary contributions for persons aged 75 years and over.

8.59 The Government of South Australia argued for the second reform proposed above. It considered that the reform should follow changes to enable employers to claim income tax deductions for SG contributions for employees aged 75 years and over. The Government of South Australia stated that, given

the large number of small businesses and family businesses in South Australia, which must also be reflected in other parts of the country, this limitation on self-employed appears inequitable and could serve to discourage small business.⁹²

8.60 The proposed reforms are necessary to ensure that, should the 75-year age limit on voluntary contributions be removed, voluntary contributions are as available to persons aged 75 years and over as to persons in other age groups. The benefits of removing the 75-year age limit on voluntary contributions will be significantly limited if employers do not offer workers of this age the option of making voluntary concessional contributions (that is, via salary sacrifice) because they cannot claim income tax deductions. Extending the deduction to the self-employed ensures fair and consistent treatment.⁹³

⁹² Government of South Australia, *Submission 30*.

⁹³ If the proposed reform is implemented, it is likely that further consequential amendments will be required to *Superannuation Industry (Supervision) Regulations 1994* (Cth) and other legislation. For example, as discussed below, reg 7.04(3) provides that superannuation funds may accept an amount of contributions no more than the non-concessional contributions cap for members of superannuation funds aged 65 to 75 years. This section will require amendment so it applies to members aged 65 years and over.

Proposal 8–2 Section 290-80 of the *Income Tax Assessment Act 1997* (Cth) provides that voluntary superannuation contributions made by employers for employees aged under 75 years are tax deductible. The Australian Government should amend s 290-80 to enable employers to claim deductions for voluntary contributions made for employees aged 75 years and over.

Proposal 8–3 Section 290-165(2) of the *Income Tax Assessment Act 1997* (Cth) provides that superannuation contributions made by self-employed, and substantially self-employed, workers aged under 75 years are tax deductible. The Australian Government should amend s 290-165(2) to enable these workers to claim deductions for contributions made at age 75 years and over.

Spouse contributions and contribution splitting

8.61 The ALRC’s preliminary view is that certain restrictions on spouse contributions and contribution splitting should be removed—that is:

- the 65-year age limit on spouses for contribution splitting; and
- the 70-year age limit on spouses for spouse contributions.

8.62 The following restrictions should be retained:

- the restriction on contribution splitting for retired spouses who have reached preservation age; and
- the condition that spouse contributions may only be made for spouses aged 65 years and over when they meet a work test.

8.63 In addition, the removal of the 65-year limit on contribution splitting should be conditional. The spouse should be required to meet a work test the same as, or similar to, the work test that applies for spouse contributions as well as for voluntary personal contributions. Further, any reforms to enhance the work test for voluntary personal contributions (see Question 8–1) should also apply to the work tests for both spouse contributions and the proposed work test for spouse contribution splitting.

8.64 These proposed reforms may be problematic in some respects, as discussed below. The ALRC welcomes stakeholder comment.

8.65 Key stakeholders differed in their responses regarding the age limits on spouse contributions and contribution splitting. The LCA argued that the age limits should be retained as they strike an ‘appropriate balance with the policy goal of providing the opportunity for couples to fund superannuation for a non-working spouse or under-funded spouse’.⁹⁴

94 Law Council of Australia, *Submission 46*.

8.66 Other key stakeholders considered that the age restrictions should be removed.⁹⁵ The Government of South Australia referred to gender disparity between the superannuation savings of men and women, noting that ‘women may have no superannuation at all were it not for contributions made on their behalf by their spouse’. It further commented that the restrictions are ‘arguably sexually discriminatory’.⁹⁶

8.67 While COTA supported removing the age limits, its comments may imply support for a work test. It argued that where people ‘continue to work then they should be able to continue to contribute to superannuation on the same basis as anyone else in the workforce and not be subjected to discrimination on the basis of age’.⁹⁷

8.68 The ALRC considers that the proposed reform—to remove age limitations on spouse contributions and contribution splitting but retain or impose work tests—balances the concerns of stakeholders and other competing objectives. This proposal introduces, or preserves, a workforce incentive for spouses; facilitates the policy intention of superannuation as a retirement income vehicle; and also removes age limits that send messages about retirement expectations.

8.69 However, some specific reservations about the proposal should be noted. First, AIST stated its understanding that

member splitting and spouse contributions are not commonly used and it is arguable that, for simplicity reasons, these could be removed altogether. These types of rules create confusion and complexity.⁹⁸

8.70 AIST considered that the age limits on spouse-related contributions ‘have very little effect on mature age participation’.⁹⁹ If the regulations regarding contribution splitting and spouse contributions are not commonly used or understood, removing the specified age restrictions contained in those regulations may have little effect in shaping retirement expectations.

8.71 Secondly, if the specified age restrictions are removed, this may encourage the use of provisions regarding contribution splitting and spouse contributions for tax purposes rather than for retirement savings. This is particularly pertinent for contribution splitting, as these contributions are concessional and are therefore taxed at 15% when entering a superannuation fund—rather than at a member’s personal tax rates. However, it is possible that spouse contributions may be made simply to attract the tax offset.

8.72 The way the proposed measures might increase possibilities for using spouse contributions and contribution splitting for tax minimisation is that, if the specified age limits are removed, a spouse aged 65 years or over will be able to access these

95 COTA, *Submission 51*; Australian Chamber of Commerce and Industry, *Submission 44*; Government of South Australia, *Submission 30*; Association of Independent Retirees, *Submission 17*. See also R Spencer, *Submission 08*; L Gabor, *Submission 05*.

96 Government of South Australia, *Submission 30*.

97 COTA, *Submission 51*.

98 Australian Institute of Superannuation Trustees, *Submission 47*.

99 *Ibid.*

contributions immediately. This is because the spouse has reached the unrestricted access age for superannuation benefits. Superannuation benefits are also tax-free at this age.¹⁰⁰

8.73 This may be of particular relevance when the member making contributions on behalf of his or her spouse is under 65 years old and is otherwise ineligible to access superannuation benefits. In relation to spouse contributions, this issue is one that exists in the current regulatory framework. That is because the spouse currently has unrestricted access to his or her superannuation benefits from age 65 years, and spouse contributions are conditionally permitted until the spouse is aged 70 years.

8.74 The ALRC is interested in responses to its proposed reforms that address these issues and comments about any other potential difficulties that may arise.

Proposal 8-4 Regulation 7.04(1) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) restricts superannuation funds from accepting spouse contributions when the spouse is:

- (a) aged 70 years or over; and
- (b) aged from 65 years until 70 years, unless he or she meets a work test, that is, being gainfully employed on at least a part-time basis during the financial year.

The Australian Government should amend reg 7.04(1) to enable a member of a superannuation fund to make contributions for a spouse aged 70 years or over, when the spouse meets the work test.

Proposal 8-5 Regulation 6.44(2) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) provides that an application for spouse contribution splitting is invalid if the member's spouse is aged 65 years or over, or has reached superannuation preservation age and retired. The Australian Government should amend reg 6.44(2) to remove the age restriction from age 65 years when the spouse meets a work test, that is, being gainfully employed on at least a part-time basis during the financial year.

Government co-contributions

8.75 The ALRC proposes that the 71-year age limit on government co-contributions for low-income earners should be removed. A number of key stakeholders indicated support for such an approach.¹⁰¹ Several stakeholders considered that this measure

¹⁰⁰ The unrestricted access age and the tax-free access age for superannuation benefits are discussed below.

¹⁰¹ Brotherhood of St Laurence, *Submission 54*; COTA, *Submission 51*; Australian Institute of Superannuation Trustees, *Submission 47*; Government of South Australia, *Submission 30*; Superannuated Commonwealth Officers Association, *Submission 14*. The Brotherhood of St Laurence considered that the co-contribution scheme should apply at least to age 75 years (as the age at which voluntary contributions are restricted).

would provide an incentive for mature age workers to remain in the workforce.¹⁰² The Government of South Australia noted that Australian Government policy is to

encourage people to remain in work as long as they are able to, and if a person is still working at and past the age of 71 years, they should not receive less benefit from Superannuation schemes than other low income earners.¹⁰³

8.76 A further point is that the Low Income Earners Government Contribution does not have an age limit (as discussed above) and ‘it would make sense to have both contributions applied on a consistent basis’.¹⁰⁴

8.77 The proposed removal of the 71-year age limit for government co-contributions would provide consistency across both schemes. More importantly, it would address the message about retirement expectations currently conveyed by the age-limit.

Proposal 8–6 Section 6(1)(e) of the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Cth) provides that government co-contributions are payable only for persons aged under 71 years. The Australian Government should repeal this restriction.

Taxing superannuation contributions

Tax rate on contributions

8.78 Concessional contributions are taxed at 15%.¹⁰⁵ This rate is substantially lower than the marginal tax rates applicable to the income of most full-time earners.¹⁰⁶ Non-concessional contributions are generally not taxed in the fund, as the member has already paid tax on them.

Contributions caps

8.79 There are restrictions, or ‘caps’, on the contributions that members can make each financial year before they must pay extra tax (‘excess contributions tax’). In effect, the caps limit superannuation contributions. The purpose of the caps is to:

- ensure that superannuation benefits result from contributions ‘that have been made gradually over the course of the person’s life’;¹⁰⁷

102 COTA, *Submission 51*; Australian Institute of Superannuation Trustees, *Submission 47*; Superannuated Commonwealth Officers Association, *Submission 14*. The LCA took a contrary view, submitting that the ‘cessation of Government co-contributions at a specified age is an appropriate restriction on accumulation’: Law Council of Australia, *Submission 46*.

103 Government of South Australia, *Submission 30*.

104 Australian Institute of Superannuation Trustees, *Submission 47*.

105 *Income Tax Assessment Act 1997* (Cth) s 295-160.

106 See R Hanegbi, ‘Improving our Superannuation Regime: A post-Henry Review Look at Superannuation Taxation, Raising Superannuation Balances and Longevity Insurance’ (2010) 25 *Australian Tax Forum* 425, 428.

107 *Income Tax Assessment Act 1997* (Cth) s 292-5.

- ensure that tax concessions for superannuation are fiscally sustainable and appropriately targeted;¹⁰⁸ and
- restrict the use of superannuation as a tax-minimising vehicle.¹⁰⁹

8.80 There are different caps for concessional and non-concessional contributions. Government contributions and co-contributions do not count towards the caps.

Concessional contributions cap

8.81 This section considers the cap on concessional contributions. The ALRC does not propose reforms in this area, as this is predominantly a retirement savings issue, rather than a mature age workforce participation issue. To the extent that the concessional contributions cap may have an effect on mature age workforce participation, that effect is likely to vary depending on individuals' circumstances and preferences.

8.82 The 'concessional contributions cap' is indexed annually to average weekly ordinary time earnings and, in 2012–13, is set at \$25,000. Concessional contributions over this cap are taxed at an additional 31.5%.¹¹⁰

8.83 From 2007–8 to 2011–12, an increased transitional concessional contributions cap applied to contributions made by members aged 50 years and over. In 2011–12 this transitional cap was \$50,000. In certain previous years—namely 2007–08 and 2008–09—the transitional cap was \$100,000.¹¹¹

8.84 Until recently, it was expected that the \$50,000 concessional contributions cap would be retained for certain mature age persons. In the 2010–11 Budget, the Australian Government announced that, from 1 July 2012, the cap would continue for persons aged 50 years or over with superannuation balances below \$500,000.¹¹² However, in the 2012–13 Budget, the Australian Government announced that it will defer this measure for two years. This means that the general concessional contributions cap of \$25,000 will apply to all persons aged 50 years and over until 2014–15.¹¹³

8.85 The Australian Government's rationale for an increased cap is that it allows persons over 50 years 'to "catch up" on their superannuation contributions at the stage in their lives when they are most able to do so'; and that this should particularly assist

108 Australian Government, *A Plan to Simplify and Streamline Superannuation—Detailed Outline* (2006), 27, 30; Explanatory Memorandum, Tax Laws Amendment (Simplified Superannuation) Bill 2006 (Cth), [1.11].

109 Explanatory Memorandum, Tax Laws Amendment (Simplified Superannuation) Bill 2006 (Cth), [1.12].

110 *Income Tax Assessment Act 1997* (Cth) subdiv 292-B; *Superannuation (Excess Concessional Contributions Tax) Act 2007* (Cth) s 5.

111 *Income Tax (Transitional Provisions) Act 1997* (Cth) s 292-20.

112 Australian Government, *Budget 2010–11: Budget Paper No 1* (2010) <www.budget.gov.au> at 3 September 2012, Statement 1: Budget Overview. See also Australian Government, *Fact Sheet: Superannuation—Concessional Contributions Caps* (2011).

113 Australian Government, *Budget 2012–13: Budget Paper No 2 (2012)* <www.budget.gov.au> at 3 September 2012, pt 1: Revenue Measures.

those who have spent periods out of the workforce, for example, ‘women with broken work patterns’.¹¹⁴

8.86 Stakeholders supported the increased cap—or opposed its deferral—for reasons related to the adequacy of retirement savings.¹¹⁵ The LCA considered the higher caps an ‘equity issue’:

A flat cap for all age groups has the potential to significantly advantage people who have maintained constant full-time employment over their lifetime, compared to people with broken working patterns or periods of part-time employment.

The LCA noted that women are likely to fall into the latter groups.¹¹⁶

8.87 The ALRC has also heard accounts of women who had taken time out of the workforce to attend to caring responsibilities. Upon re-entering the workforce, and reaching a position where they can make substantial superannuation contributions to provide for their retirement, the cap has restricted them from boosting their retirement savings. This situation may be exacerbated for current mature age cohorts, given the superannuation system has not yet matured—as noted above. As a result, these women were less likely to benefit from superannuation accumulation earlier in their working lives.

8.88 The NWRN presented a different viewpoint, stating that while ‘there may be a few isolated examples’ of the scenario described above, ‘putting these larger amounts into super, so close to retirement, is probably not going to bring the financial benefits that come from superannuation funds growing over the longer term, as is intended’. It added:

People who can afford to put more than \$25,000 into their superannuation in a single year are not those who would generally be in need of extra support and are most likely to be able to obtain a retirement standard better than the average worker.¹¹⁷

8.89 Similarly, the Australian Council of Trade Unions (ACTU) stated that

A higher cap would likely only benefit those employees on higher incomes who are already more likely to remain in work, and who may already have multiple streams of retirement income.¹¹⁸

8.90 Stakeholders had different opinions about how the concessional contributions cap affected workforce participation.¹¹⁹ For example, the ACTU considered that the \$25,000 cap ‘is set at an appropriate level to encourage older workers to remain employed for longer and thereby increase their retirement savings’.¹²⁰ AIST considered

114 Australian Government, *Fact Sheet: Superannuation—Concessional Contributions Caps* (2011).

115 Law Council of Australia, *Submission 46*; Government of South Australia, *Submission 30*. See also: Australian Chamber of Commerce and Industry, *Submission 44*; Media Entertainment & Arts Alliance, *Submission 33*.

116 Law Council of Australia, *Submission 46*.

117 National Welfare Rights Network, *Submission 50*.

118 ACTU, *Submission 38*.

119 In the Issues Paper, the ALRC asked about the effects of the increased concessional contributions cap for persons aged 50 years and over on mature age participation in the workforce: Question 14.

120 ACTU, *Submission 38*.

that the increased contributions cap does not have an effect on workforce participation.¹²¹ In contrast, the Brotherhood of St Laurence stated that the higher cap is

likely to provide incentives to continue to work through allowing older workers to have a lower tax rate on a proportion of their income and to save a relatively higher proportion of their income in superannuation prior to retirement.¹²²

8.91 The cap may affect workers in different ways, depending on their individual preferences. As noted by the Melbourne Institute of Applied Economic and Social Research (the Melbourne Institute), a higher cap may encourage workers who wish to ‘maximise remaining lifetime income (or make a large bequest) to make considerable gains’—thus providing incentives for workforce participation.¹²³ Conversely, a higher cap can assist workers to reach their retirement savings targets earlier than a lower cap—thus facilitating earlier retirement where workers prefer leisure. The Melbourne Institute summarised the effects of an increased cap:

Earlier retirement became more expensive because the net returns from work and investing in superannuation increased. At the same time, extra after-tax income offered incentives for more leisure (full or partial retirement) and less work.¹²⁴

8.92 In economic terms, such conflicting behavioural consequences are described as the ‘substitution effect’ and the ‘income effect’.¹²⁵

8.93 While the setting of the concessional contributions cap is an important issue, it is primarily an issue about the adequacy of retirement savings, rather than mature age workforce participation. As noted by AIST, the cap ‘is more linked to adequacy and the affordability for the individual to save for retirement in a tax advantaged environment’.¹²⁶ The ALRC therefore does not make any proposals for change in this area.

Non-concessional contributions cap

8.94 This section discusses the non-concessional contributions cap and the related ‘bring-forward rule’. While the bring-forward rule is an age-based restriction, the ALRC does not propose reforms in this area. The rule is primarily an issue about retirement savings rather than workforce participation. In relation to workforce participation, the rule may have conflicting individual effects.

121 Australian Institute of Superannuation Trustees, *Submission 47*.

122 Brotherhood of St Laurence, *Submission 54*. See also: COTA, *Submission 51* and Superannuated Commonwealth Officers Association, *Submission 14*. However, COTA stated that it had seen ‘no evidence to suggest that the increased cap had any impact either way on workforce participation’ and awaited the effects of the deferral of the \$50,000 cap.

123 B Headey, J Freebairn and D Warren, *Dynamics of Mature Age Workforce Participation: Policy Effects and Continuing Trends, Final Report* (2010), Melbourne Institute of Applied Economic and Social Research, 53.

124 *Ibid.*, 53.

125 *Ibid.*, 53. See Ch 7 for a description of these effects.

126 Australian Institute of Superannuation Trustees, *Submission 47*.

8.95 The ‘non-concessional contributions cap’ is a multiple of the concessional contributions cap. For example, in 2012–13, the non-concessional contributions cap was \$150,000—six times the \$25,000 concessional contributions cap. Contributions over the non-concessional cap are taxed at 46.5%.¹²⁷

8.96 Persons under 65 years may bring forward two years’ entitlement for non-concessional contributions.¹²⁸ This is referred to as the bring-forward rule, under which non-concessional contributions of up to three times the non-concessional contributions cap in a year may be made—for example, up to \$450,000 in 2012–13. The full amount may be contributed in the first year. Alternatively, a contribution of less than the full amount in the first year may be made, followed by a contribution of the shortfall in the second year, the third year, or across both years.¹²⁹ The bring-forward rule is automatically triggered when a person under 65 years exceeds the non-concessional contributions cap.¹³⁰

8.97 Persons aged 63 or 64 years can use the bring-forward rule without meeting the work test imposed by reg 7.04(1) of the SIS Regulations in the following years of the three-year period (that is, when they reach 65 years, as discussed above). The bring-forward rule is therefore particularly important for those who are just about to retire and do not intend to continue working after the age of 65, as it can be used ‘as a last-minute dash into super before the gates close’.¹³¹ However, if the person did not make the full contribution in the first year, and wishes to contribute in the second or third year, he or she must satisfy the work test from age 65 years.

8.98 Several stakeholders argued that the bring-forward rule constitutes a disincentive to workforce participation.¹³² For example, SCOA stated that the rule is a disincentive to remain in the workforce past age 65 years:

as many employees like to make additional non-concessional contributions to a superannuation fund at the time they cease employment. This allows them to set up an adequate account based pension to fund their retirement.¹³³

8.99 However, the ‘income effect’ is also likely to apply. That is, if people are able to contribute large amounts to superannuation in one year (up to \$450,000) they may meet their retirement savings targets sooner, and retire earlier. In either case, the rule is likely to affect a small cohort of mature age persons: those who are in a position to contribute more than \$150,000 in non-concessional superannuation contributions in one year.

127 *Income Tax Assessment Act 1997* (Cth) subdiv 292-C; *Superannuation (Excess Non-concessional Contributions Tax) Act 2007* (Cth) s 5.

128 *Income Tax Assessment Act 1997* (Cth) s 292-85(3)–(4). Specifically, the person must be under 65 years at any time in the relevant financial year: s 292-85(3)(b).

129 *Ibid* s 292-85(4).

130 *Ibid* s 292-85(3).

131 The Bull, *How to Dump \$450,000 into your Super in One Year* <www.thebull.com.au> at 11 April 2012.

132 Australian Institute of Superannuation Trustees, *Submission 47*; National Seniors Australia, *Submission 27*; Superannuated Commonwealth Officers Association, *Submission 14*. In the Issues Paper, the ALRC asked about the effect of the bring forward rule on mature age workforce participation: Question 15.

133 Superannuated Commonwealth Officers Association, *Submission 14*. See also Australian Institute of Superannuation Trustees, *Submission 47*, National Seniors Australia, *Submission 27*.

8.100 As the bring-forward rule does not increase a person's overall cap entitlement—but only allows a person to use more of the cap in one year—it arguably affects substantially only mature age persons who do not work or intend to stop working. If persons continue to meet the work test after age 65 years, they will have the same entitlement over a three-year period as a person of any other age. In this way, the bring-forward rule may be viewed as a specific workforce incentive for persons aged 65 years and over who wish to add more than \$150,000 to their retirement savings.

8.101 Consequently, the ALRC does not make a proposal in relation to the bring-forward rule, as it is equally—and perhaps more—likely to operate as a workforce incentive than as a workforce disincentive, due to the application of the work test from the age of 65 years.

8.102 Stakeholders raised certain other concerns about the bring-forward rule. The LCA commented that:

persons aged 65 and over may be in a position, for the first time in their lives, to contribute substantial lump sums into superannuation. For example, they may be able to sell assets or perhaps the family home (in order to downsize), and thus be able to boost their retirement savings. Preventing the use of the 'bring forward' rule for these people may represent a missed opportunity in terms of the Government's goal of having individuals secure their own retirement incomes.¹³⁴

8.103 While this rule may in some cases limit the accumulation of superannuation for mature age persons, this issue is outside the ambit of this Inquiry.

8.104 ACCI raised a further issue—the detrimental financial impact of breaches of the cap (that is, due to excess contributions tax).¹³⁵ However, an existing law appears to address this issue. To 'help prevent a person from inadvertently contributing more than the non-concessional contributions cap',¹³⁶ the SIS Regulations limit the amount of non-concessional contributions that superannuation funds can accept. For persons aged 64 years or less, the maximum contribution amount is three times the non-concessional cap. For persons aged 65 to 75 years, the limit is the non-concessional contributions cap.¹³⁷

Superannuation benefits

Release of superannuation benefits

8.105 The SIS Regulations provide conditions for the release of superannuation benefits—that is, when, and in what form, benefits may be accessed by superannuation fund members. Generally—and subject to the superannuation fund's governing rules—members may access benefits as a lump sum, an income stream, or a combination of both.

134 Law Council of Australia, *Submission 46*.

135 Australian Chamber of Commerce and Industry, *Submission 44*.

136 *Explanatory Statement, Superannuation Industry (Supervision) Amendment Regulations (No 1) 2007* (Cth) item 80.

137 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 7.04(3).

When can members access superannuation?

8.106 *At age 65.* There are no restrictions on the way persons 65 years and over may access their superannuation benefits.¹³⁸

8.107 *At ‘preservation age’ if retired.* The preservation age ranges from 55 to 60 years, depending on year of birth:

- (a) for a person born before 1 July 1960—55 years; or
- (b) for a person born during the year 1 July 1960 to 30 June 1961—56 years; or
- (c) for a person born during the year 1 July 1961 to 30 June 1962—57 years; or
- (d) for a person born during the year 1 July 1962 to 30 June 1963—58 years; or
- (e) for a person born during the year 1 July 1963 to 30 June 1964—59 years; or
- (f) for a person born after 30 June 1964—60 years.¹³⁹

8.108 Accordingly, the preservation age is ‘legislated to increase from 55 to 60 between the years 2015 and 2025’.¹⁴⁰

8.109 A person of, or over, the preservation age is considered retired when an arrangement under which he or she was ‘gainfully employed’ has ended and the superannuation fund trustee is ‘reasonably satisfied’ that the person does not intend to become gainfully employed again either part time or full time; or he or she has reached the age of 60 years before or on retiring.¹⁴¹

8.110 There are no restrictions on the way members of, or over, the preservation age can access their superannuation when they retire.¹⁴²

8.111 *Under the Transition to Retirement rules.* These rules enable members who are of, or over, preservation age to access their superannuation before they retire. Members may only take superannuation benefits as a non-commutable income stream (that is, an income stream that cannot be converted into a lump sum).¹⁴³ No more than 10% of the account balance may be paid each year.¹⁴⁴ Members can continue working in any capacity while receiving superannuation benefits under the Transition to Retirement (TTR) rules, as no work test applies.¹⁴⁵

138 Ibid sch 1 item 106.

139 Ibid reg 6.01.

140 Australian Government, *A Plan to Simplify and Streamline Superannuation—Detailed Outline* (2006), x.

141 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.01(7).

142 Ibid sch 1 item 101.

143 Ibid regs 1.05(11A)(a); 1.06 (9A)(a); 6.01; sch 1 item 110.

144 Ibid reg 6.01. This reflects the underlying policy that the rules are ‘not intended to provide people with a vehicle to dissipate their superannuation savings excessively before retirement’: Explanatory Statement, *Superannuation Industry (Supervision) Amendment Regulations (No 2) 2005* (Cth).

145 ATO, *Transition to Retirement—Information for Superannuation Professionals* (2006).

8.112 *Early access.* The *Superannuation Act 1976* (Cth) and SIS Regulations provide limited grounds for the early release of benefits, including severe financial hardship and certain compassionate grounds.¹⁴⁶

Taxing superannuation benefits

8.113 The tax rate on superannuation benefits depends on a member's age, whether benefits are taken in lump sum or income stream form, and whether the superannuation fund is exempt from paying tax on contributions and earnings.¹⁴⁷ Benefits from non-concessional contributions (including spouse contributions) and government contributions and co-contributions are tax-free regardless of these factors.¹⁴⁸

8.114 In most cases, persons aged 60 years and over are not required to pay tax when they receive superannuation benefits—irrespective of whether benefits are disbursed as lump sums or income streams.¹⁴⁹

8.115 Persons who have reached preservation age but who are under 60 years old can generally withdraw lump-sum amounts up to a 'low rate cap' amount of superannuation tax-free.¹⁵⁰ The low rate cap is a lifetime limit. In 2012–13 it is \$175,000.¹⁵¹ Amounts above the low cap rate are taxed up to 15% (plus Medicare levy).¹⁵² Benefits paid as an income stream to persons in this age bracket are assessable income taxed at marginal rates (plus Medicare levy) less a 15% offset.¹⁵³ The Tax Review considered that the taxation of benefits for this age group should not change.¹⁵⁴

Transition to Retirement rules: a workforce incentive?

8.116 The ALRC proposes that the Australian Government should initiate a review the TTR rules in light of evidence that they do not meet their underlying policy objective. The objective of the TTR rules is to 'encourage people to retain a connection with the workforce for a longer period' by providing flexibility in the rules to access

146 *Superannuation Act 1976* (Cth) s 79B; *Superannuation Industry (Supervision) Regulations 1994* (Cth) regs 6.01, 6.19A.

147 Most superannuation funds are taxed on their contributions and earnings: R Hanegbi, 'Improving our Superannuation Regime: A post-Henry Review Look at Superannuation Taxation, Raising Superannuation Balances and Longevity Insurance' (2010) 25 *Australian Tax Forum* 425, 431; 'Key factors that affect how your super payout is taxed', ATO website <www.ato.gov.au> at 11 April 2012. Funds that are more likely to be untaxed include 'certain public sector funds or schemes, such as government funds for public servants' ATO website <www.ato.gov.au> at 11 April 2012.

148 *Income Tax Assessment Act 1997* (Cth) s 307-135; subdiv 307D. *Tax Laws Amendment (Stronger, Fairer, Simpler and Other Measures) Act 2012* (Cth) s 12B.

149 *Income Tax Assessment Act 1997* (Cth) s 301-10. Disbursements to members over 60 years from untaxed funds are taxed, albeit at a lower rate than those under 60 years. *Income Tax Assessment Act 1997* (Cth) subdiv 301-C.

150 *Income Tax Assessment Act 1997* (Cth) s 301-20.

151 *Ibid* s 307-345; 'Low cap rate amount', ATO website <www.ato.gov.au> at 11 April 2012.

152 *Income Tax Assessment Act 1997* (Cth) s 301-20.

153 *Ibid* s 301-25.

154 The Treasury, *Australia's Future Tax System: Final Report* (2010), pt 2, vol 1, 117.

superannuation benefits.¹⁵⁵ This objective is consistent with this Inquiry's framing principles of participation and self-agency.¹⁵⁶

8.117 By way of background, prior to the introduction of the rules in 2005, workers under 65 years of age generally had to retire before accessing any superannuation benefits. In 2004, the Australian Government noted that this may have led 'people deciding to retire prematurely just so they can access their superannuation'.¹⁵⁷ Accordingly, the TTR rules to some extent were designed to address this incentive for early retirement.

8.118 The Australian Government also noted that the pre-2005 laws did not 'adequately cater for more flexible workplace arrangements where people may choose to reduce their work hours as they get older'.¹⁵⁸ The TTR rules were intended to facilitate continued employment by providing flexibility—enabling preservation-age persons to reduce work hours and supplement their income with a superannuation income stream.

8.119 A number of stakeholders supported the TTR rules, and a couple also considered them a workforce incentive for mature age persons.¹⁵⁹ However, in a 2010 report commissioned by the Department of Education, Employment and Workplace Relations, the Melbourne Institute analysed the effect of the TTR reforms. The Melbourne Institute concluded that the TTR rules had 'no significant effect' on the workforce participation' of mature age men and women.¹⁶⁰

8.120 Mature age workers do not necessarily use the TTR rules in accordance with their initial design to facilitate continued employment through flexible work. There is a second way to use the rules—by working full-time and increasing superannuation savings. This is an accepted use of the rules—for example, it is described on ASIC's Moneysmart website as a way to boost superannuation.¹⁶¹

8.121 This use of the TTR rules operates as follows. The TTR income stream enables preservation-age workers:

to salary sacrifice more of their remuneration package into superannuation, with the TTR pension income replacing the salary income they would have received if they did not salary sacrifice. Here, the person's current lifestyle and cashflow can remain the

155 The Treasury, *Transition to Retirement Consultation Paper*, 2004, 4.

156 See Ch 1.

157 The Treasury, *A More Flexible and Adaptable Retirement Income System* (2004), 10.

158 Ibid, 10.

159 Australian Institute of Superannuation Trustees, *Submission 47*; Australian Chamber of Commerce and Industry, *Submission 44*; Australian Industry Group, *Submission 37*; National Seniors Australia, *Submission 27*. See also Law Council of Australia, *Submission 46*. In the Issues Paper, the ALRC asked whether the TTR rules encourage continued mature age workforce participation and if any changes should be made to the rules: Question 17.

160 B Headey, J Freebairn and D Warren, *Dynamics of Mature Age Workforce Participation: Policy Effects and Continuing Trends, Final Report* (2010), Melbourne Institute of Applied Economic and Social Research, 83–85.

161 'Transition to retirement', ASIC, *Moneysmart website* <www.moneysmart.gov.au> at 30 August 2012.

same and, in effect, the super pension withdrawals can fund superannuation contributions.¹⁶²

8.122 For those who have met their concessional cap through salary sacrificing, it can sometimes be tax effective to fund non-concessional contributions in this way.¹⁶³ However this use of the TTR rules is limited by the caps on superannuation contributions.

8.123 The above strategy can be utilised by persons who do not intend to retire, but are interested in benefiting from the concessional tax treatment applied to superannuation. Stakeholders were divided in the way they perceived this use of the TTR rules. For example, AIST considered that this strategy provides workers with

a tax effective way of saving more for retirement. It allows many pre-retirees a crucial few years to catch up, particularly post [global financial crisis].¹⁶⁴

8.124 The Australian Chamber of Commerce and Industry and AIST considered this use of the rules an incentive for workforce participation.¹⁶⁵

8.125 On the other hand, COTA characterised ‘churning of salaries through such schemes’ as manipulation of the TTR rules for tax concessions. It considered that more stringent tests need to be applied for the TTR rules to be effective in keeping mature age workers in the workforce.¹⁶⁶ The Australia Institute has commented similarly on the TTR rules, noting it is a key way that superannuation is popularly utilised as a tax-planning and tax-avoidance vehicle.¹⁶⁷

8.126 Given its Terms of Reference, the ALRC’s primary concern regarding the TTR rules is that they may not meet their policy objective of encouraging continued mature age participation in the workforce. The rules should be reviewed, with a view to their redesign, so they may effectively facilitate this policy objective.

8.127 Such a review of the TTR rules is predominantly an economic project. Consequently the ALRC is not best placed to conduct this review. The ALRC proposes that the Australian Government should initiate a separate review into this issue. The review should consider:

- the use of the rules in practice;
- the relationship to the setting of the concessional contributions cap;
- eligibility criteria for the rules; and

162 D Shirlow, ‘Bringing the use of TTR pensions closer to home’ (2011) (4) *CCH Australian Superannuation News*.

163 Ibid.

164 Australian Institute of Superannuation Trustees, *Submission 47*. See also Australian Chamber of Commerce and Industry, *Submission 44*.

165 Australian Institute of Superannuation Trustees, *Submission 47*; Australian Chamber of Commerce and Industry, *Submission 44*.

166 COTA, *Submission 51*.

167 The Australia Institute, *Can the Taxpayer Afford ‘Self-funded Retirement’?: Policy Brief No 42* (2012), 13.

- comparable international schemes.

8.128 A further issue raised in the Issues Paper is that access to the TTR rules may be restricted.¹⁶⁸ Superannuation funds do not all offer the income stream products that enable members to use this option. In these circumstances, members may need to change superannuation funds if they wish to use the TTR rules. However, stakeholders did not raise this as a specific barrier to access. The LCA noted that the portability requirements—whereby superannuation funds are obliged to transfer or rollover members' benefits to another fund on request—should, in principle, provide sufficient access to the TTR rules.¹⁶⁹

8.129 There may be certain other barriers to the TTR rules. First, some employers do not offer salary sacrifice. Consequently, their employees will not have access to the TTR rules.¹⁷⁰ Secondly, the ALRC has heard that the TTR rules are more accessible to higher-income workers (who can afford to salary sacrifice) and those with higher superannuation balances than other workers. Thirdly, mature age workers may be unaware of the TTR rules,¹⁷¹ and this may affect accessibility. The ALRC therefore considers that the proposed review should also examine whether mature age workers have sufficient access to the TTR rules.

Proposal 8–7 The 'Transition to Retirement' rules were introduced into the *Superannuation Industry (Supervision) Regulations 1994* (Cth) to encourage continued mature age workforce participation. Research has suggested that the rules may not meet this policy objective in practice. The Australian Government should initiate a review of the Transition to Retirement rules to determine what changes, if any, are required to ensure that the rules meet their policy objective. The review should consider matters including:

- the use of the rules in practice;
- whether there is sufficient and widespread access to the scheme;
- the relationship to the setting of the concessional superannuation contributions cap;
- eligibility criteria; and
- comparable international schemes.

168 The ALRC asked whether, in practice, persons of preservation age have sufficient access to the TTR rules, and what measures could improve accessibility: Question 18.

169 Law Council of Australia, *Submission 46*. See also Australian Institute of Superannuation Trustees, *Submission 47*. The portability requirements are set out in the *Superannuation Industry (Supervision) Regulations 1994* (Cth) regs 6.33–6.35.

170 Australian Institute of Superannuation Trustees, *Submission 47*.

171 National Seniors Australia, *Submission 27*. See also Law Council of Australia, *Submission 46*.

Raising access ages

8.130 In summary, there are three key age settings for access to superannuation benefits:

- preservation age at 55 to 60 years (depending on date of birth), when people can access superannuation benefits at retirement or under the TTR rules;
- the tax-free access age at 60 years; and
- the unrestricted access age at 65 years.

8.131 Another age setting relevant to the discussion is the Age Pension eligibility age. This is set at 65 years. From 2017 to 2023, the Age Pension age will incrementally increase to 67 years.¹⁷²

8.132 The ALRC is interested in comment on whether the age settings to access superannuation benefits should be increased beyond the legislated increase to the preservation age. In particular, the ALRC seeks submissions on whether the preservation age should be increased to age 62 or 67 years (noting the latter age setting would displace the unrestricted access age at 65 years). A change to the preservation age may have particular consequences for the TTR rules and tax-free superannuation access, as discussed below. The ALRC also seeks comment as to whether the tax-free access age should be raised, as an alternative to raising the preservation age.

Preservation age

8.133 The preservation age rules may encourage people to leave the workforce as soon as they can access their superannuation—although the TTR rules were introduced to ameliorate this effect. Preservation age settings that are too low may also constitute a disincentive to mature age workplace participation due to the message they send about retirement expectations.¹⁷³

8.134 The Tax Review recommended that the preservation age be increased to 67 years. This aligns with the increase to the Age Pension age, which was also recommended by the Tax Review. The recommendation implies the convergence of the preservation age and the unrestricted access age at 67 years and, potentially, upwards of 67 years—subject to further review by 2020, also recommended in the Tax Review.¹⁷⁴

8.135 A preservation age setting that is lower than the Age Pension age enables mature age persons to access retirement income—and consequently retire—prior to reaching the Age Pension age. When the gradual increases to both age settings have been completed, there will be a seven-year gap between them—with the preservation age at

172 *Social Security Act 1991* (Cth) ss 23(5A), 23(5D).

173 See The Treasury, *Australia's Future Tax System: Final Report* (2010), pt 2, vol 1, 131. In the Issues Paper, the ALRC asked if existing age settings to access superannuation provide incentives for retirement, and whether changes should be made: Question 16.

174 The Treasury, *Australia's Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 17.

60 years (from 2025) and the Age Pension age at 67 years (from 2023). One reason for the increase to the preservation age—legislated in 1998¹⁷⁵—was to reduce the gap between it and the Age Pension age.¹⁷⁶ However, the changes to the Age Pension age—legislated in 2009¹⁷⁷—mean that this gap will be increased by 2 years, that is, from the intended five-year gap to a seven-year gap. The Grattan Institute has commented that

Many workers retire before reaching the pension age and start using their superannuation. ... The ability to use superannuation like this weakens the incentive to continue to work until the pension age.¹⁷⁸

8.136 Raising the preservation age may therefore be expected to increase mature age workforce participation.¹⁷⁹ The OECD states that

financial incentives embedded in both public pensions and in other formal and informal early retirement schemes play an important role in determining retirement decisions... These decisions will be influenced by the age at which (early) retirement benefits can be first accessed.¹⁸⁰

8.137 The OECD identifies Australia's superannuation system as an 'early retirement' scheme.¹⁸¹

8.138 However, raising the preservation age will increase mature age workforce participation less by encouraging mature age persons to work and more by compelling them to do so. This is because they will be unable to access their retirement income until they reach the increased preservation age. Given the Inquiry's framing principles of independence and self-agency—both of which encompass the principle of choice, this is an important consideration.¹⁸² As noted by the LCA, raising the preservation age 'may force people who would otherwise have retired before then to continue working, even if they have sufficient superannuation to retire earlier'. It argued that this does 'not recognise legitimate retirement expectations'.¹⁸³

8.139 Such limitations on choices about work may particularly affect those engaged in hard physical labour who may not want, or be able, to extend their working lives—for

175 *Superannuation Industry (Supervision) Regulations (Amendment) 1998* (Cth) item 4.3.

176 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 13 May 1997, 3393 (P Costello—Treasurer)

177 *Social Security and Other Legislation Amendment (Pension Reform and Other 2009 Budget Measures) Act 2009* (Cth) sch 11. The Age Pension age for women has been incrementally increasing from age 60 years since 1995 and will reach age 65 years from 1 July 2013: *Social Security Act 1991* (Cth) ss 23(5A)–(5D).

178 J Daley, *Game-changers: Economic Reform Priorities for Australia: Grattan Institute Report No 2012–5* (2012), 54.

179 *Ibid.*, 50. The Grattan Institute identifies raising the preservation age as one of two key policy changes that would increase mature age workforce participation.

180 *Ibid.*, 53, quoting OECD, *Live Longer, Work Longer* (2006).

181 OECD, *Pensions at a Glance 2011: Retirement-Income Systems in OECD and G20 Countries* (2011), 112.

182 See Ch 1.

183 Law Council of Australia, *Submission 46*. The ACTU and the Government of South Australia expressed similar concerns about restricting individual choice in this way: ACTU, *Submission 38*; Government of South Australia, *Submission 30*.

example, ‘blue-collar’ and ‘pink-collar’ workers such as construction workers and nurses respectively. The Government of South Australia noted that construction workers ‘are considered “mature aged” at the age of 40 years due to the physical demands of the job’.¹⁸⁴ Construction and Building Industry Super (Cbus) noted that, in its experience, the ‘dominant factor influencing the supply of labour by older construction workers’ is their

capacity to continue to meet the physical demands of the work. Put simply, increasing ... the preservation age will be unlikely to boost participation by older workers.¹⁸⁵

8.140 Stakeholders also raised the relative importance of demand and supply factors in determining mature age workforce participation. COTA commented that

If we can get changes to employer attitudes to older workers that mean people can reasonably expect to be able to get and retain a job up to 67 then there would be a case to revisit the preservation age.¹⁸⁶

8.141 In the absence of such change, COTA expressed concern that raising the preservation age would consign mature age persons to ‘live on Newstart Allowance and other lower levels of income support for long periods if they lose their jobs’.¹⁸⁷ Similarly, National Seniors—referring to Australian Bureau of Statistics (ABS) data indicating that the share of long-term unemployed in Australia increased significantly with age—stated:

Unless these barriers are addressed effectively and older workers are able to obtain and retain employment as easily as younger workers, there is a real risk that raising the preservation age will simply lead to a ballooning of the unemployment figures and a greater drain on the social security system, rather than to increased workforce participation.¹⁸⁸

8.142 Nonetheless, the ALRC considers that there are some strong arguments for raising the preservation age—most importantly, for the purposes of this Inquiry, that lower age settings reduce workforce participation rates.¹⁸⁹

8.143 Arguments supporting an increased preservation age relate to systemic benefits and the public interest. The Tax Review noted that responding to increasing longevity by increasing the preservation age would ‘enhance the acceptability, adequacy and sustainability of the retirement income system’.¹⁹⁰ It anticipated a ‘moderation of total pension costs’¹⁹¹ and a lesser ‘tax burden on those who work’.¹⁹² The Grattan Institute

184 Government of South Australia, *Submission 30*.

185 Cbus, *Submission 41*.

186 COTA, *Submission 51*. See also Olderworkers, *Submission 22*.

187 COTA, *Submission 51*.

188 National Seniors Australia, *Submission 27*. The LCA and SCOA made a similar point: Law Council of Australia, *Submission 46*; Superannuated Commonwealth Officers Association, *Submission 14*.

189 See The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 37.

190 *Ibid.*, 35.

191 *Ibid.*, 35.

192 *Ibid.*, 37.

argued that increasing the preservation age would ‘reduce intergenerational unfairness’.¹⁹³

8.144 Increasing the preservation age may assist individuals—in addition to reducing potential costs to the Australia Government—by facilitating access to sufficient private retirement funds and reducing the likelihood of exhausting these savings.¹⁹⁴ Further, and relevant to the focus of this Inquiry, it is easier for mature age persons to continue working than to withdraw from the workforce and later seek to re-enter when their retirement savings are diminished. As found by the Grattan Institute:

Aligning incentives for older people to stay in work seems to be more important than helping them find it. Measures to encourage people to work for longer in life are likely to have the greatest impact on older age workforce participation.¹⁹⁵

8.145 An increase to preservation age settings may also ensure that superannuation laws respond to the contemporary reality of increasing life expectancy and ‘healthy life expectancy’—that is, the extent to which additional years are lived in good health.¹⁹⁶ According to the Australian Institute of Health and Welfare, healthy life expectancy is

increasing for older Australians: in 2009, at age 65, females could expect to live a further 16.1 years without requiring assistance with core activities, and males could expect another 15.2 years without requiring assistance.¹⁹⁷

8.146 It is also arguably a legitimate response to another contemporary reality—‘the shift of employment away from blue-collar work to professional and paraprofessional jobs’.¹⁹⁸ Clearly, however, blue- and pink-collar workers are an important and continuing component of the modern workforce, despite more general trends. To address the circumstances of these workers—who may be unable to continue working into their 60s—the Grattan Institute has suggested they be allowed access to superannuation benefits (or the Age Pension) when they have worked in a nominated industry or meet eligibility conditions for the Disability Support Pension.¹⁹⁹

193 J Daley, *Game-changers: Economic Reform Priorities for Australia: Grattan Institute Report No 2012–5* (2012), 50.

194 As noted by the Tax Review, allowing superannuation savings to finance early retirement ‘reduc[es] the amount of savings available to fund retirement’, and is ‘inconsistent with the need to consider ways to reduce the risk of people outliving their savings due to increasing life expectancies’. The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 37; see also: 38.

195 J Daley, *Game-changers: Economic Reform Priorities for Australia: Grattan Institute Report No 2012–5* (2012), 52.

196 Australian Institute of Health and Welfare, *Australia’s Health 2012* (2012) <www.aihw.gov.au> at 3 September 2012, 82.

197 *Ibid.*, 82.

198 P MacDonald, ‘Employment at Older Ages in Australia: determinants and trends’ in T Griffin and F Beddie (eds), *Older Workers: research readings* (2011) 25, 39. See also J Daley, *Game-changers: Economic Reform Priorities for Australia: Grattan Institute Report No 2012–5* (2012), 57; B Headey, J Freebairn and D Warren, *Dynamics of Mature Age Workforce Participation: Policy Effects and Continuing Trends, Final Report* (2010), Melbourne Institute of Applied Economic and Social Research, 11.

199 J Daley, *Game-changers: Economic Reform Priorities for Australia: Grattan Institute Report No 2012–5* (2012), 57.

8.147 Finally, delaying the age at which a person can access superannuation income is arguably justified, given that it is in the public interest of improving retirement savings outcomes for individuals. An important component of this argument is that superannuation cannot be conceived of as entirely ‘private’, due to the concessional tax treatment it attracts—at significant cost to the Australian Government.²⁰⁰ Indeed, as discussed above, concessional treatment of superannuation is offered in return for deferred consumption (or ‘preservation’)—and, as noted by Professor John Piggott, this may be considered the ‘implicit contract’ underpinning the superannuation system.²⁰¹

8.148 The ALRC seeks further stakeholder comment on whether the preservation age should be increased and, if so, on the appropriate age setting. There are two principled options regarding the latter issue. An age setting of 67 years, as recommended by the Tax Review, will align the preservation age with the Age Pension age. Alternatively, an age setting of 62 will maintain a five-year gap between preservation age and Age Pension age as the latter rises from 65 to 67 years.

8.149 The ALRC anticipates that any such reform would be implemented gradually over the medium term. Further, any changes to the age setting may be subject to further changes. As noted above, the Tax Review recommended further review of the preservation age setting by 2020.

Consequences of raising the preservation age

8.150 If the preservation age is raised to 67 years, two notable consequences will follow. First, the TTR rules will be displaced, because these rules apply in the gap between the preservation age and age 65 (the unrestricted access age). This would not be an immediate outcome, as the increase to the preservation age is likely to be incremental over a number of years.²⁰²

8.151 The displacement of the TTR rules may not be problematic—should the preservation age be increased, the TTR rules are likely to become unnecessary as a workforce incentive. However, improved TTR rules may be a desirable component of the superannuation system in the short to medium term—that is, until the preservation age increase aligns with the unrestricted access age. The Australian Government may also consider that improved TTR rules are worth retaining despite an increase to the preservation age.

8.152 Second, this potential reform would displace the 65-year age setting for unrestricted access to superannuation benefits. The Tax Review did not comment specifically on the unrestricted access age. In its submission, AIST stated that the age setting ‘provides motivation to retire’ and is ‘arguably out of date’ given increasing

200 For an example of this viewpoint, see R Gittins, ‘These Well-off Retirees’ Claims are a Bit Rich’, *Sydney Morning Herald (online)*, 15 August 2012, <www.smh.com.au>. Gittins argues against the notion that those persons receiving superannuation benefits (instead of the Age Pension) are ‘self-funded’.

201 J Piggott, *Correspondence*, 13 August 2012.

202 As noted above, the legislated increase to the preservation age from 55 to 60 years will not be completed until 2025.

longevity and the shift from ‘the industrial worker to the knowledge worker’.²⁰³ If the preservation age is increased to 67, the ALRC anticipates that the two age settings will converge and release of benefits will be permitted no earlier than 67—that is, there will not be an option for release at an earlier age when a person retires. The exception to this are the early release provisions that apply in the limited circumstances noted above.

8.153 The above consequences would not follow an increase to the preservation age to 62 years, as the gap—and the distinction—between preservation age and the unrestricted access age would be maintained.

Tax-free access age

8.154 The age setting for tax-free access to superannuation benefits is due to align with the preservation age when the latter rises to the age of 60 years in 2025. However, if the preservation age is further increased—as discussed above—this will introduce a gap between the tax-free access age and preservation age. This may not have a strong impact on workforce participation, given that mature age persons will be unable to take advantage of the tax-free treatment while under preservation age, except when they are eligible for early release of superannuation.

8.155 The Tax Review did not examine the tax-free access age, as its Terms of Reference directed that it reflect Australian Government policy to ‘preserve tax-free superannuation payments for the over 60s’.²⁰⁴ However, the Tax Review noted that the Australian Government ‘may wish to consider whether the age for tax-free superannuation should increase in line with future increases in the preservation age’.²⁰⁵

8.156 An alternative approach is to raise the tax-free access age while retaining the preservation age at 60 years (from 2025). For example, the tax-free access age could be increased from 60 years to:

- 62 years—to maintain the current five-year gap with the Age Pension age when the latter increases from 65 to 67 years;
- 65 years—to align with the unrestricted superannuation access age; or
- 67 years—to align with the Age Pension Age.

8.157 This may provide an incentive for persons who have reached preservation age to delay accessing superannuation benefits until they reach the tax-free access age—consequently remaining in the workforce for longer.

8.158 Raising the tax-free access age is a softer approach than raising the preservation age, as it allows mature age persons to access superannuation benefits at age 60 years (rather than, for example, 62 or 67 years) if they choose to do so. In other words, it

203 Australian Institute of Superannuation Trustees, *Submission 47*.

204 ‘Terms of Reference’, The Treasury, *Australia’s Future Tax System* <www.taxreview.treasury.gov.au> at 30 August 2012.

205 The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 17.

uses the ‘carrot’ of tax incentives rather than the ‘stick’ of raising the age at which a person can access their retirement savings.²⁰⁶ This may be more consistent with this Inquiry’s framing principles of independence and self-agency. Other alternatives to raising the preservation age are discussed below.

Alternatives to raising the preservation age

8.159 This section discusses, but does not propose, restricting lump-sum access to superannuation benefits. The Grattan Institute has stated that, given political resistance to increases to the preservation age, ‘second best’ alternatives might be considered:

These might include quarantining a significant proportion of superannuation balances until pension age, or only allowing withdrawal of a limited income stream (rather than a lump sum before reaching the pension age).²⁰⁷

8.160 In its submission to the Inquiry, AIST argued that the ability to withdraw tax-free lump sums of superannuation should be modified ‘with some minimum (either dollar or percentage of balance based) being compulsorily allocated to a retirement income product’.²⁰⁸

8.161 The issue of restricting lump-sum access was previously considered by the Tax Review. It did not recommend such a measure, stating that flexibility in the use of superannuation benefits enables people ‘to make decisions in their best interests and is likely to result in outcomes largely consistent with the broader objective of promoting retirement saving’.²⁰⁹

8.162 Further, the Tax Review noted that people ‘already draw down their assets in an orderly fashion’,²¹⁰ and that ‘evidence suggests that people make conservative decisions on how they use their assets in retirement’.²¹¹ Retirees’ use of lump sums has been captured in ABS statistics:

Many of those who received a lump sum payment used it to pay off or improve their existing home or purchase a new home (34% of men and 27% of women), to buy or pay off a motor vehicle (16% of men and 11% of women), or clear other outstanding debts (13% of men and 13% of women). Some reinvested their lump sum payment into a bank account, personal savings or other investment (23% of men and 20% of women), or an approved deposit fund, deferred annuity or other superannuation scheme (21% of men and 17% of women).²¹²

206 This terminology is used to describe tax incentives as opposed to raising preservation age in R Chomik and J Piggott, *Mature-Age Labour Force Participation: Trends, Barriers, Incentives, and Future Potential—Centre of Excellence in Population Ageing Research Briefing Paper 2012/01* (2012), 11.

207 J Daley, *Game-changers: Economic Reform Priorities for Australia: Grattan Institute Report No 2012–5* (2012), 54.

208 Australian Institute of Superannuation Trustees, *Submission 47*.

209 The Treasury, *Australia’s Future Tax System: The Retirement Income System—Report on Strategic Issues* (2009), 45.

210 The Treasury, *Australia’s Future Tax System: Final Report* (2010), pt 2, vol 1, 107.

211 *Ibid* pt 2 vol 1 p122. The Tax Review refers to Lim-Applegate et al, *Part rate pensioners: characteristics and changes* (2005), prepared for Australian Government.

212 Australian Bureau of Statistics, *Retirement and Retirement Intentions, Australia, July 2010 to June 2011, Cat No 6238.0* (2011), 7.

8.163 Given conservative use of assets in retirement, it would appear that lump sum access may not be substantially more likely to constitute a ‘pull’ into retirement than other forms of superannuation benefits. Further, restricting lump sum access may have adverse effects on mature age persons—limiting their ability to use superannuation benefits in a manner tailored for their personal retirement needs. Another potential adverse consequence is reflected in the Super Systems Review:

In countries with compulsory annuitisation, members ... can be locked into lower income streams if markets fall shortly before their retirement as the value of the annuity is based on the value of their lump sum and market conditions on retirement day. In contrast, Australians can continue to invest in growth assets after retirement and thus potentially benefit from subsequent market upswings.²¹³

8.164 Additionally, there is an impediment to measures restricting lump sum access. The retirement income product market is ‘under-developed’²¹⁴—an issue dealt with in both the Tax Review and the Super Systems Review.²¹⁵ The Tax Review considered this a ‘structural weakness’ in Australia’s retirement income system.²¹⁶ It found that the Australian Government should support the development of products that allow people to manage longevity risk, and better facilitate the private-sector provision of such products.²¹⁷

8.165 Given the above factors, the ALRC does not make a proposal to restrict lump-sum access to superannuation benefits. It may be appropriate to revisit this issue in the medium term if future mature age cohorts draw down their retirement assets less conservatively than current cohorts—assuming a more developed income product market in Australia.

Question 8–2 The Australian Government has legislated two key changes to the retirement income system: the superannuation preservation age will increase from 55 to 60 years between 2015 and 2025; and the Age Pension age will increase from 65 to 67 years between 2017 and 2023.

Should the preservation age be increased beyond 60 years? For example, to:

- (a) 62 years—maintaining the five-year gap between the Age Pension age and the preservation age; or
- (b) 67 years—aligning the preservation age with the Age Pension age?

213 Super Systems Review Panel, *Super System Review* (2010), pt 2, 196.

214 *Ibid.*, pt 2, 193.

215 *Ibid.*, pt 2, Ch 7; The Treasury, *Australia’s Future Tax System: Final Report* (2010), pt 2, vol 1, 117–127.

216 The Treasury, *Australia’s Future Tax System: Final Report* (2010), pt 2, vol 1, 95.

217 *Ibid.*, pt 2, vol 1, 95. See also Recs 21 and 22.

Question 8–3 The age for tax-free access to superannuation benefits is set at 60 years. Should this age setting be increased:

- (a) to align with any further increase to superannuation preservation age (that is, beyond 60 years); or
- (b) instead of any further increase to preservation age—for example, to:
 - (i) 62 years—maintaining the five-year gap between the Age Pension age and the tax-free superannuation access age;
 - (ii) 65 years—aligning the tax-free superannuation access age with the unrestricted superannuation access age; or
 - (iii) 67 years—aligning the tax-free superannuation access age with the Age Pension age?

