ASSESSING THE THRESHOLD OF THE DIVISION 293 CONTRIBUTIONS TAX

Hayden Grant* and Laura de Zwaan#

Abstract

There has been sustained criticism in recent years over the equity of Australia's superannuation system tax concessions. While some tax concessions are considered necessary to incentivise retirement savings, the system post-2007 gave a greater benefit to those in higher tax brackets – people who would most likely save for their retirement regardless. The perceived inequity has prompted several reforms, including the introduction of the Division 293 tax. This tax, effective from the 2012-2013 income year, levies an additional 15 per cent contributions tax on high-income individuals. When originally introduced, the threshold for high-income was set at $300,000 per year, however recent legislative amendments have reduced this threshold to $250,000, and the Australian Labor Party has put forward a proposal to lower it even further to $200,000.

The purpose of this paper is to evaluate proposed thresholds for the additional 15 per cent tax on high-income earner concessional superannuation contributions contained in Division 293 of the *Income Tax Assessment Act 1997* (Cth). We then investigate the effects of applying the Division 293 tax at different thresholds on the amount and distribution of contributions tax concessions. Finally, we determine at which threshold the Division 293 tax should be applied to best satisfy the proposed purpose of superannuation.

I. INTRODUCTION

Australia's retirement savings system, referred to as 'Superannuation', is one of the highest ranked systems in the world.[1] This is largely due to the early establishment of the system in 1992, and to its compulsory nature. Employer contributions to a superannuation fund on behalf of an employee are mandatory for most workers, and currently set at 9.5 per cent of an employee's gross earnings. These mandatory contributions are taxed at a flat rate of 15 per cent, lower than most marginal income tax rates, and thus they are termed 'concessional contributions.' Given the low tax rate, these contributions are capped at $25,000 per year in order to cap the tax benefit; however, individuals can choose to make voluntary contributions to their superannuation account from their after-tax pay. Given these monies have been subject to income tax, they are termed 'non-concessional,' and while they may not receive a tax concession on entry to the superannuation system, the investment earnings receive concessional treatment within the superannuation fund. Thus, there is an incentive for those who are able to, to contribute non-concessional contributions.

There has been sustained criticism in recent years over the equity of Australia's superannuation tax concessions. Given the flat tax rate of 15 per cent within the superannuation system, higher

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* Former Research Student, School of Accountancy, QUT Business School, Queensland University of Technology.

Lecturer, Department of Accounting, Finance and Economics, Griffith Business School, Griffith University.

[1] Australian Centre for Financial Studies, *Melbourne Mercer Global Pension Index* (Oct 2017) https://australiancentre.com.au/wp-content/uploads/2017/10/2017_MMGPI_Report.pdf.

income individuals receive a greater tax concession than those on lower incomes. The 'cost' of these concessions to the government, in terms of tax revenue foregone, has been valued as high as $33 billion[2], and $16 billion after accounting for the related reduced aged pension costs.[3] It should be noted that these costings were prior to many recent legislative amendments, effective from 1 July 2017, which have somewhat decreased the overall generosity of superannuation tax concessions.

While superannuation tax concessions are considered necessary to incentivise retirement savings, the current system arguably continues to give a greater benefit to those in higher tax brackets – people who would most likely save for their retirement regardless.[4] The inequity of the system attracted increasing negative media attention from 2007 after the introduction of Simpler Super.[5] This attention subsequently prompted several reforms, including the introduction of the Division 293 tax, effective from 1 July 2012. This tax levies an additional 15 per cent contributions tax on high-income individuals. When originally introduced, the threshold for high-income was set at $300,000 per year, however this has recently been reduced to $250,000, and the Australian Labor Party has put forward a proposal to lower it even further to $200,000.

The purpose of this paper is to evaluate the current threshold for the additional 15 per cent tax on high income earner concessional superannuation contributions (contained in Division 293 of the *Income Tax Assessment Act 1997*[6]) and compare it to other former and proposed 'high income' thresholds. In addition, we will examine the implementation of the Division 293 tax at those different thresholds against the proposed purpose of superannuation. Finally, we determine at which threshold the Division 293 tax should be applied to best satisfy the proposed purpose of superannuation.

This study makes a number of contributions to the policy debate on the issue of superannuation tax concessions. First, we establish a research-based threshold at which the Division 293 tax should apply. Of particular importance, it provides an analysis of the impacts of the Division 293 tax and what the effects would be of altering the threshold at which it applies. While there is published analysis where superannuation contribution concessions are broken down by income decile[7] and an overall estimate of the value of the Division 293 tax is known[8] along with an estimation of the impact on each decile of lowering the income threshold where it applies, the effects of altering the tax's threshold on average taxpayers in different income tax brackets have not been previously assessed. Finally, we examine and assess the Division 293 tax 'high income' threshold within the context of the government's proposed purpose of superannuation. Our findings will therefore be of interest to both policy-makers and industry.

The next section gives a background to the current issues with superannuation tax concessions and the introduction of the Division 293 tax. This is followed by a discussion on the purpose

2 The Federal Treasury, Tax Expenditures Statement 2016 (2017).

3 Ross Clare, Mythbusting Superannuation Tax Concessions (March 2016) The Association of Superannuation Funds of Australia < https://www.superannuation.asn.au/policy/reports>.

4 John Daley, Brendan Coates and Danielle Wood, Super Tax Targeting (Nov 2015) The Grattan Institute <http://grattan.edu.au/wp-content/uploads/2015/11/832-Super-tax-targeting.pdf>.

5 Simple Super was the introduction of many new reforms designed to make the superannuation system in Australia easier to understand, improve incentives, and provide greater flexibility for drawing down on superannuation in retirement.

6 Income Tax Assessment Act 1997 (Cth)

7 See The Federal Treasury, Distributional Analysis of Superannuation Taxation Concessions (2012) <https://treasury.gov.au/programs-and-initiatives-superannuation/distributional-analysis-of-superannuation-taxation-concessions/>; and John Daley, Brendan Coates and William Young, A better super system: Assessing the 2016 tax reforms (Sept 2016) <http://grattan.edu.au/wp-content/uploads/2016/09/876-A-better-super-system.pdf>.

8 John Daley et al. above n 7.

of superannuation. The methodology for assessing the Division 293 tax is then covered, followed by the analysis of different proposed thresholds and our conclusions.

II. BACKGROUND ON SUPERANNUATION TAX

Australia, like most other countries, has moved towards a system of self-provision for retirement income. Australia is unique though in that the system is mandatory for most of the population and has been in place since 1992. The mandatory nature of superannuation was considered necessary, given the aging population and associated future government spending that would have been required to support the Age Pension. In Australia, the Age Pension refers to a means-tested social security payment for those that are of qualifying age, currently 67 years of age for those born after 1957.[9] Superannuation has forced much of the population to save for retirement, thus reducing their reliance on the taxpayer-funded Age Pension.

In addition to superannuation being mandatory, the savings are also preserved, which limits access to the funds. A condition of release must be satisfied in order for benefits to be cashed out. The most common conditions of release are: reaching preservation age[10] and retiring, reaching age 65 (does not require retirement), or death, although there are other limited circumstances where benefits can be paid. To support the mandatory self-provision system and restricted access, a number of tax concessions exist which support the system in various ways. Tax concessions effectively compensate superannuation system members for having to lock away their savings until they satisfy a condition of release. In addition, the concessional treatment incentivises additional private saving, and helps to overcome inertia, financial myopia, loss aversion, and other cognitive biases.[11] It is argued that without tax incentives, many would not save sufficient amounts for their retirement, which would place excessive pressure on government spending, especially given the size of the aging population.

In Australia, the superannuation system currently uses a T, T, E model, which means monies are taxed upon entry to the system, earnings are taxed within the system, and withdrawals can be entirely exempt, provided they are taken after age 60.[12] The overall system is considered to be concessionally taxed though, as a flat-rate of 15 per cent is payable on contributions and earnings, which is lower than most marginal income tax rates.

Retirement saving tax concessions are generally evaluated using a tax expenditures theoretical framework.[13] This framework views concessions as a form of government spending rather than a reduction in revenues.[14] Tax expenditures are represented as two transactions between the government and taxpayer; the first transaction represents the amount of tax the government would normally receive under the ordinary tax rules, while the second transaction represents the government effectively making a payment to the taxpayer for the amount of the tax concession.[15] Treating superannuation concessions as tax expenditures is consistent with their treatment in the Treasury's Tax Expenditures Statement.[16]

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9 The qualifying age for those born before 1957 ranges from 65-67 depending on the year born.

10 Preservation age is currently 55 for those born before 1 July 1960, but increases progressively to 60 for those born after 30 June 1964.

11 Justin Van de Van, The Effects of Myopia on Pension Decisions (Jun 2010) NIESR Discussion Paper No. 356 <http://www.niesr.ac.uk/publications/effects-myopia-pension-decisions#.WTjOWeuGNEY>.

12 Superannuation benefits paid to a member over 60 from a taxed source are tax free.

13 Stanley Surrey, 'The United States Income Tax System--The Need for a Full Accounting', (1968) Journal of Accountancy 125, 57; and Kwang-Yeol Yoo and Alain de Serres, 'Tax Treatment of Private Pension Savings in OECD Countries and the Net Cost Per Unit of Contribution to Tax-favoured Schemes' (Oct 2004) OECD Economic Department Working Papers < http://dx.doi.org/10.1787/387535760801>.

14 William Neil Brooks, 'Policy Forum: The Case Against Boutique Tax Credits and Similar Tax Expenditures', (2016) Canadian Tax Journal 64, 65.

15 Ibid.

16 The Federal Treasury, above n 2.

Measuring tax expenditures can be somewhat contentious. There are three common methods used to measure their cost: Revenue forgone, outlay equivalent, and revenue gain.[17] Revenue forgone is a simple approach which values concessions as the reduction in tax revenue that would otherwise be received. Outlay equivalent measures how much it would cost the government to make a direct payment of equivalent monetary benefit. These first two approaches both assume behaviour does not change. Revenue gain measures how much revenue would increase if the concessions were removed, which does require estimating behavioural changes.[18] All three methods involve assumptions and are therefore open to criticisms.

Commonwealth Treasury uses both revenue forgone and revenue gain to estimate tax expenditures. Revenue forgone produces a costing of around $33 billion, while revenue gain is closer to $31 billion for the 2016-17 year. For superannuation, the revenue gain method produces a lower cost as it assumes removing concessions would result in less contributions to superannuation, and therefore lower expenditure.[19] Clare,[20] writing on behalf of the Association of Superannuation Funds of Australia (ASFA), noted that Treasury estimates do not include the savings made, or lack of expenditures, from the reduction in Age Pension payments of around $7 billion. In addition, there would likely be movement into other tax effective investments due to behavioural changes, estimated at around $7 billion. According to Clare this would put the cost of superannuation tax concessions at around $16 billion for the 2015-2016 tax year.[21] Regardless of the method employed, superannuation concessions form a significant tax expenditure for the Government.

While concessional tax treatment for superannuation is arguably necessary in some form, the system post 2007 favoured high-income earners.[22] Having a flat rate of 15 per cent on contributions and investment earnings gives a greater concession to those on higher marginal tax rates and effectively penalises the lowest income tax payers. The current system of taxing concessional contributions has been described as 'regressive' and lacking equity, as '2.5 million individuals receive little or no personal income tax benefit from their superannuation contributions'.[23]

In order to address this apparent inequity, the 2012-13 financial year saw the introduction of an additional tax on concessional contributions for 'very high' income earners (over $300,000 of income). This new tax, contained in Division 293 of the *Income Tax Assessment Act 1997* (Cth), is known as the Division 293 tax. The justification for this additional tax provided in the explanatory memorandum was that it would improve 'the fairness of the taxation system by ensuring the tax concession received by those individuals earning more than $300,000 is more closely aligned with the concession received by average income earners'.[24] The explanatory memorandum further explained this by comparing marginal tax rates to the 15 per cent tax rate on concessional contributions and stated that individuals in the highest income tax bracket 'effectively receive a 30 per cent tax concession (excluding the Medicare levy[25]) on their

17 Kwang-Yeol Yoo and Alain de Serres, above n 13.

18 The Federal Treasury, Tax Expenditures Statement 2009 (2010).

19 The Federal Treasury, above n 2, 119.

20 Ross Clare, above n 3.

21 Ibid.

22 David Ingles, The Great Superannuation Tax Concession Rort Research Paper No. 61 (February 2009) The Australia Institute <http://www.tai.org.au/system/files_force/super_tax_concessions_final_7.pdf>.

23 Kerrie Sadiq, 'Prescriptions for reform of Australia's superannuation tax concessions', (2012) Australian Tax Forum 27, 371, 383.

24 Explanatory Memorandum, Tax and Superannuation Laws Amendment (Increased Concessional Contributions Cap and Other Measures) Bill 2013; Superannuation (Sustaining the Superannuation Contribution Concession) Imposition Bill 2013 (Cth) 28.

25 The Medicare levy is a levy imposed on individuals above certain income thresholds that is used the fund the universal health care system in Australia. The levy is currently set at 2% of taxable income.

superannuation contributions' whereas those with 'a marginal tax rate of 32.5 per cent (excluding the Medicare levy)' 'effectively receive a 17.5 per cent tax concession'.[26] This essentially provided greater benefits to those on higher incomes which the Division 293 tax was designed to counteract. This effect is summarised in Figure 1 below.

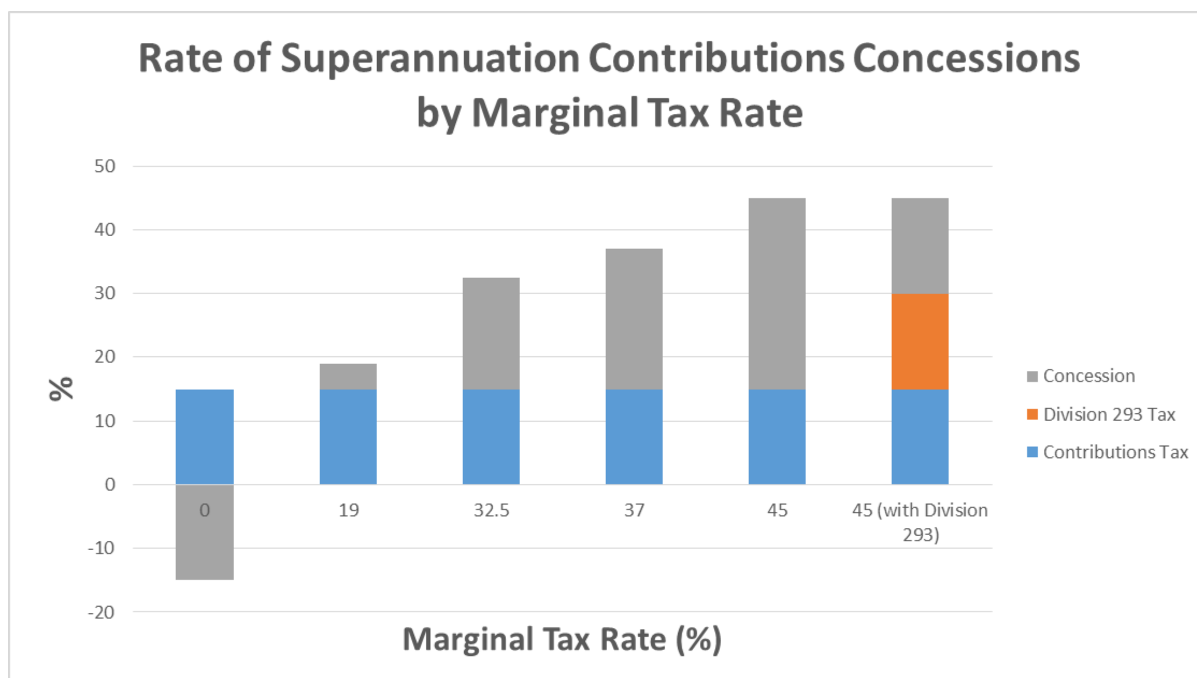

Figure 1: The rate of superannuation contributions tax concessions granted to taxpayers on each marginal tax rate (including the effects of Division 293 on these concessions)[27]

The purpose of Division 293 was to tax high income earners' concessional contributions at an additional 15 per cent on the amount by which their concessional contributions when combined with income exceeded $300,000.[28] The calculation of income for the purpose of Division 293 differs from ordinary taxable income as s. 293-20 of the *Income Tax Assessment Act 1997* uses a modified 'income for surcharge purposes' which includes concessional contributions instead of reportable superannuation contributions. 'Income for surcharge purposes' is a more stringent measure of income that prevents individuals from reducing their income below the Medicare levy surcharge threshold[29] through common measures to reduce assessable income, such as negative gearing. Income for surcharge purposes is defined in s. 995-1 of the *Income Tax Assessment Act 1997* as the sum of taxable income (with some adjustments for family trust distributions), reportable fringe benefits, reportable superannuation contributions (which are replaced with concessional contributions for Division 293 purposes), and net investment losses (from financial investments and rental property). Section 293-20 stated that the tax is applied on the amount by which this income exceeds $300,000, or the amount of concessional

26 Above n 24.

27 Taxpayers in the lowest income bracket were effectively penalised by the 15 per cent superannuation contributions tax when they would otherwise have not paid any tax. This inequity was first addressed through the Low Income Superannuation Contribution. As of July 2017 this has been replaced by a Low Income Superannuation Tax Offset.

28 Above n. 24.

29 The Medicare levy surcharge is an additional levy imposed on individuals who are over certain income thresholds and do not hold private health insurance. It is designed to incentivise individuals to hold private health insurance and use the private health system to help reduce demand on the public system. The surcharge levy is currently set at between 1% and 1.5%, depending on income level and whether the individual is single or has dependents. The Medicare levy surcharge is payable in addition to the Medicare levy.

contributions, whichever is lower. Taxpayers were therefore subject to Division 293 tax in some circumstances where their taxable income was below $300,000. In the 2015-2016 tax year, the division 293 tax was estimated to collect $475 million in tax revenue.[30]

When a person is subject to Division 293 tax, the Commissioner of Taxation has the power to issue a notice of assessment for the relevant amount under Division 155 of Schedule 1 to the *Tax Administration Act 1953*. Section 293-65 of the *Income Tax Assessment Act 1997* then causes payment of the tax to be due 21 days later; however a person has the option under Division 135 of Schedule 1 to the *Tax Administration Act* of giving a release authority (issued by the Commissioner of Taxation) to their superannuation fund within 120 days and having the tax paid from their superannuation account. To illustrate the operation of the Division 293 tax, an example calculation is shown in Table 1.

Table 1: Example calculation illustrating determination of Division 293 tax payable

Income information:	**$**
Taxable income	$200,000
Reportable fringe benefits	$30,000
Net financial investment loss	$10,000
Concessional contributions	$25,000
Total income for the Division 293 tax:	$265,000
Amount in excess of $250,000	$15,000
Concessional contributions	$25,000
The lesser amount of the above two is chosen	$15,000
15% of the above amount (tax payable)	$2,250

(Adapted from example calculations from the Australian Taxation Office, 2016)

While it is clear that the modified version of income for surcharge purposes is used to prevent people from manipulating their income to avoid the Division 293 tax,[31] there is no mention in the Explanatory Memorandum as to why a threshold of $300,000 was selected in the first place and the threshold itself appears to be an arbitrary number. The threshold was selected at the point of which an individual was considered 'high income' however it is far higher than the top marginal tax rate of $180,000. Setting the threshold so much higher than the top marginal rate can be therefore considered less effective, as those on incomes between $180,000 and $300,000 would still have received a much higher concession on superannuation contributions than those on other tax brackets. There would also be considerably less tax revenue generated from the higher threshold. In the 2016 Federal Budget,[32] it was proposed that the threshold for the Division 293 tax be lowered from $300,000 to $250,000.[33] It was estimated that only one per cent of taxpayers with superannuation contributions would be affected in the 2017-18

30 John Daley et al., above n 4.

31 Thomson Reuters, 'Super Contributions Tax of 30% for Incomes above $300,000: Draft Legislation Released', (3 May 2013) Weekly Tax Bulletin 18.

32 The Federal Budget is the financial plan for Australia, covering the economic and fiscal outlook, for the current year, the coming year, and three forward years. The Budget includes the estimated revenues and expenditures, and shows the impact of proposed changes in operations, such as changes to taxation policy.

33 Australian Government, Making a fairer and more sustainable Superannuation System Fact sheets and Q&As (2016) Budget 2016 < http://www.budget.gov.au/2016-17/content/glossies/tax_super/downloads/FS-Super/SFS-Combined-161209.pdf>.

financial year.[34] In contrast, the Australian Labor Party proposed lowering this threshold to $200,000.[35] There have also been proposals to lower the threshold to $180,000;[36] however, due to the way in which the Division 293 tax is calculated (as explained above), a $200,000 threshold proposed by the Australian Labor Party approximately aligns with the top marginal income tax rate of $180,000, whereas a threshold of $180,000 aligns with a taxable income lower than this.[37] During November 2016, the proposal to lower the threshold for the Division 293 tax from $300,000 to $250,000 (effective from 1 July 2017) was passed by the Parliament of Australia, alongside a number of other reforms from the 2016 Federal Budget.

Another forthcoming reform, also proposed in the 2016 Federal Budget but stemming from a recommendation from the Financial System Inquiry, is to legislate an objective for the superannuation system. The Superannuation (Objective) Bill, not currently passed by Parliament, contains a primary objective for superannuation 'to provide income in retirement to substitute or supplement the Age Pension'[38] – the same purpose recommended in 2014 by the Financial System Inquiry.[39] The aim of the objective is to provide a guide for policy-makers and other stakeholders on the purpose of superannuation, and 'provide a way in which competing superannuation proposals can be measured and a framework for evaluating the fairness, adequacy and sustainability of the superannuation system.'[40] In addition to the primary objective, there are five proposed subsidiary objectives as listed below:

- Facilitate consumption smoothing over the course of an individual's life;
- Manage risks in retirement;
- Be invested in the best interests of superannuation fund members;
- Alleviate fiscal pressures on Government from the retirement income system; and
- Be simple, efficient and provide safeguards.

Given the proposed primary and subsidiary objectives of superannuation, this study will analyse the impact of moving the threshold of the Division 293 tax with reference to the proposed objective.

III. METHODOLOGY

This study aims to determine the ideal threshold at which the additional 15 per cent tax on high income earner concessional superannuation contributions (contained in Division 293 of the *Income Tax Assessment Act 1997*) should be applied and how this would affect the Government's tax expenditures program. Statistics from the ATO[41] are used to inform assumptions about typical amounts of concessional contributions for various income levels. The data is drawn from a sample of tax return data representing two per cent of tax returns lodged in the 2013-14 income year, made publicly available by the ATO in 2016.[42] This source contains tax return details for 258,774 people (some altered for anonymity), including super contributions, taxable incomes, reportable fringe benefits, and other items. This information is then used to calculate the average amount of contribution concessions received by taxpayers at

34 Ibid.

35 Australian Labor Party, Making Superannuation Fairer (n.d.) <http://www.alp.org.au/making_superannuation_fairer_fact_sheet>

36 Joanna Mather, 'Four ways Malcolm Turnbull could change superannuation taxes explained', (16 March 2016) Australian Financial Review (online), < http://www.afr.com/news/policy/tax/four-ways-malcolm-turnbull-could-change-superannuation-taxes-explained-20160315-gnjyef>.

37 John Daley et al, above n 7.

38 Explanatory Memorandum, Superannuation (Objective) Bill 2016 (Cth) 27.

39 The Federal Treasury, Financial System Inquiry: Final Report (Nov 2014). <http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf>

40 The Federal Treasury, 'Objective of Superannuation Discussion Paper 9' (March 2016)

41 Australian Taxation Office, Taxation Statistics – Individual Sample Files (2015) <https://data.gov.au/dataset/taxation-statistics-individual-sample-files>.

42 Ibid.

each income tax bracket, before and after the Division 293 tax is taken into account.[43] This analysis is applied using the past threshold of $300,000, the newly legislated threshold of $250,000, the Australian Labor Party's proposed threshold of $200,000, and the top marginal income bracket of $180,000. Further analysis is then undertaken to explore the effects of altering the threshold at which the Division 293 tax is applied and the effects on the amount of concessions granted, as well as the income levels most affected. This is a similar method to that used by Knox[44] who calculated the level of retirement funding support provided by the Government to hypothetical individuals at differing incomes and superannuation guarantee rates.

IV. RESULTS AND ANALYSIS

The following section presents the results of the modelling using the ATO data resulting in a determination of the ideal threshold for the Division 293 tax. This involves the allocation of superannuation contributions tax concessions being compared to both a system without the Division 293 tax and a system with the Division 293 tax. For the purposes of this analysis, hypothetical tax brackets were created to allow for comparison. Table 2 shows the different tax brackets and the identifiers that will be used in the figures below. Note, this analysis uses the tax rates and proposed thresholds for the 2016-2017 tax year.[45]

Table 2: Effective Tax Brackets

Column #	Effective tax bracket
1	$0 - $18,200
2	$18,201 - $37,000
3	$37,001 - $80,000
4	$80,001 - $180,000
5	$180,001 - $200,000
6	$200,001 - $250,000
7	$250,001 - $300,000
8	>$300,001

The following graph (Figure 2) displays the distribution of superannuation contribution concessions between the average individual in each income bracket without the Division 293 tax. These figures are dollar values based on actual contributions made by the average taxpayer in each income bracket during the 2013-14 income year.[46] The income brackets, shown on the x-axis, represent the income tax brackets as labelled in Table 2.

43 The calculations exclude individuals with no contributions to superannuation.

44 David Knox, 'The fairness and future of Australia's retirement income system', (2010) The Australian Economic Review 43, 302. doi: 10.1111/j.1467-8462.2010.00601.x

45 In 2016-2017 the concessional contribution cap was higher, being $30,000 and $35,000 for those over 49.

46 Australian Taxation Office, above n 41.

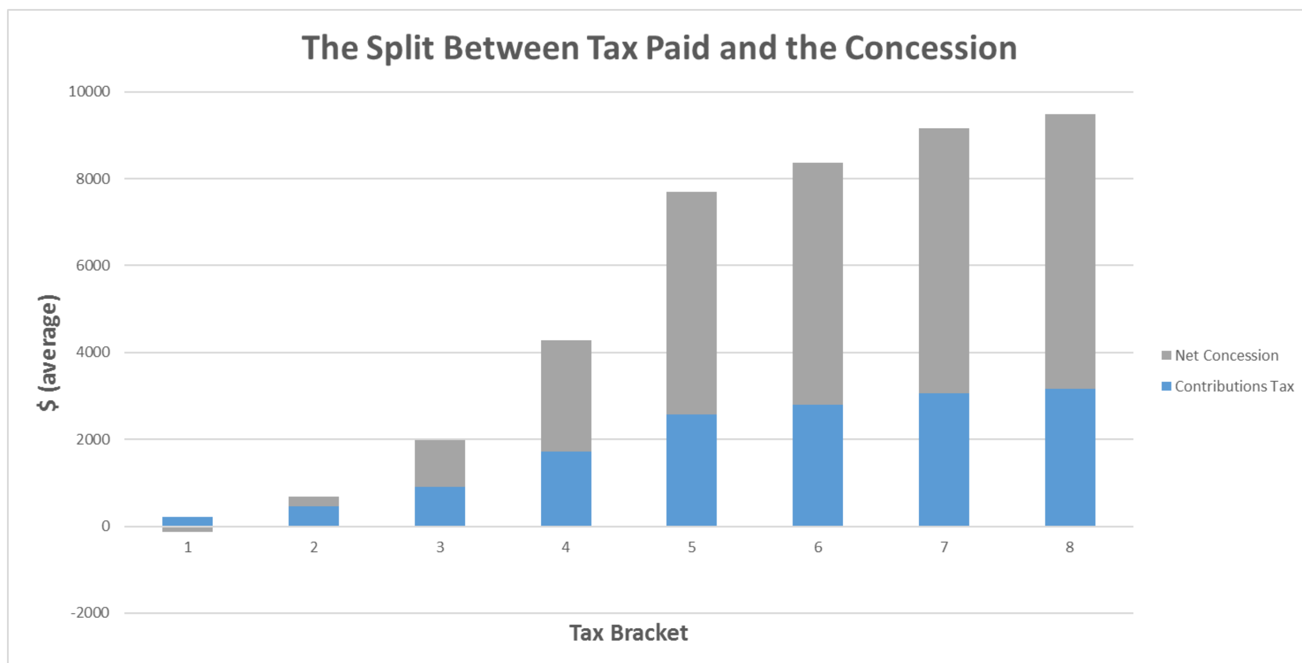

Figure 2: The split between the taxes paid and the concessions granted without the Division 293 tax

Figure 2 shows that as income increases, so does the amount of contribution concessions gained by the average taxpayer at those incomes. This figure clearly provides support for arguments presented on the over-subsidisation of high-income earners by the pre-existing system. In addition, it is clear that having no Division 293 tax does not promote the purpose of superannuation, as it appears to give generous concessions to high income individuals, those least likely to rely on the Age Pension in retirement. It follows from this that reducing the amount of tax concessions granted to the high-income earners would reduce unnecessary tax expenditures, without compromising the purpose of the superannuation system.

What follows is an analysis of the modelled effects of applying the Division 293 tax at different income thresholds so as to determine the ideal threshold for it to be applied at. As explained and used previously, this analysis uses ATO data to build actual averages of dollar amounts of superannuation contributions concessions received by the different income brackets. These dollar averages are then recalculated by changing the threshold at which the Division 293 tax is applied. The following four thresholds are analysed: $300,000; $250,000; $200,000; and $180,000. Table 3 below shows the average dollar amount of tax concessions received by each income bracket and at each Division 293 income threshold. Each of these thresholds are examined in detail in the following analysis, and, subsequently, the purpose of superannuation is considered in this context and a determination is made on the threshold that best promotes this purpose.

Table 3: Results – Average Net Concessions ($ value) Received by Taxpayers in Each Income Bracket

Column #		Division 293 Threshold			
	Income Bracket	**$180,000**	**$200,000**	**$250,000**	**$300,000**
1	**$0 to $18,200**	-$131.67	-$131.67	-$131.65	-$131.61
2	**$18,201 to $37,000**	$223.11	$223.18	$223.27	$223.27
3	**$37,001 to $80,000**	$1082.69	$1082.73	$1082.78	$1082.82
4	**$80,001 to $180,000**	$2445.77	$2531.87	$2555.57	$2556.96
5	**$180,001 to $200,000**	$2564.14	$3610.88	$5086.38	$5118.00
6	**$200,001 to $250,000**	$2787.41	$2787.41	$4905.38	$5502.62
7	**$250,001 to $300,000**	$3053.91	$3053.91	$3053.91	$4369.09
8	**$300,001 and over**	$3159.61	$3159.61	$3159.61	$3159.61

The above table, when viewed in addition to the following graphs, demonstrates that lowering the threshold for the application of Division 293 tax results in increasingly reduced concessions granted to taxpayers in the higher income brackets. The amount of concession granted becomes almost constant with each of the upper brackets when the threshold is below the range of the income bracket, indicating that reducing the Division 293 threshold beyond a certain point does not further penalise these high income earners. This is explained further in the following sections which analyse each of the four Division 293 thresholds.

Figure 3 below illustrates the distribution of contributions concessions between the average taxpayers in each income bracket, taking into account the Division 293 tax applied at the original threshold of $300,000. Figure 4 shows the same distribution, but with the threshold set at $250,000 – the new threshold from 1 July 2017.

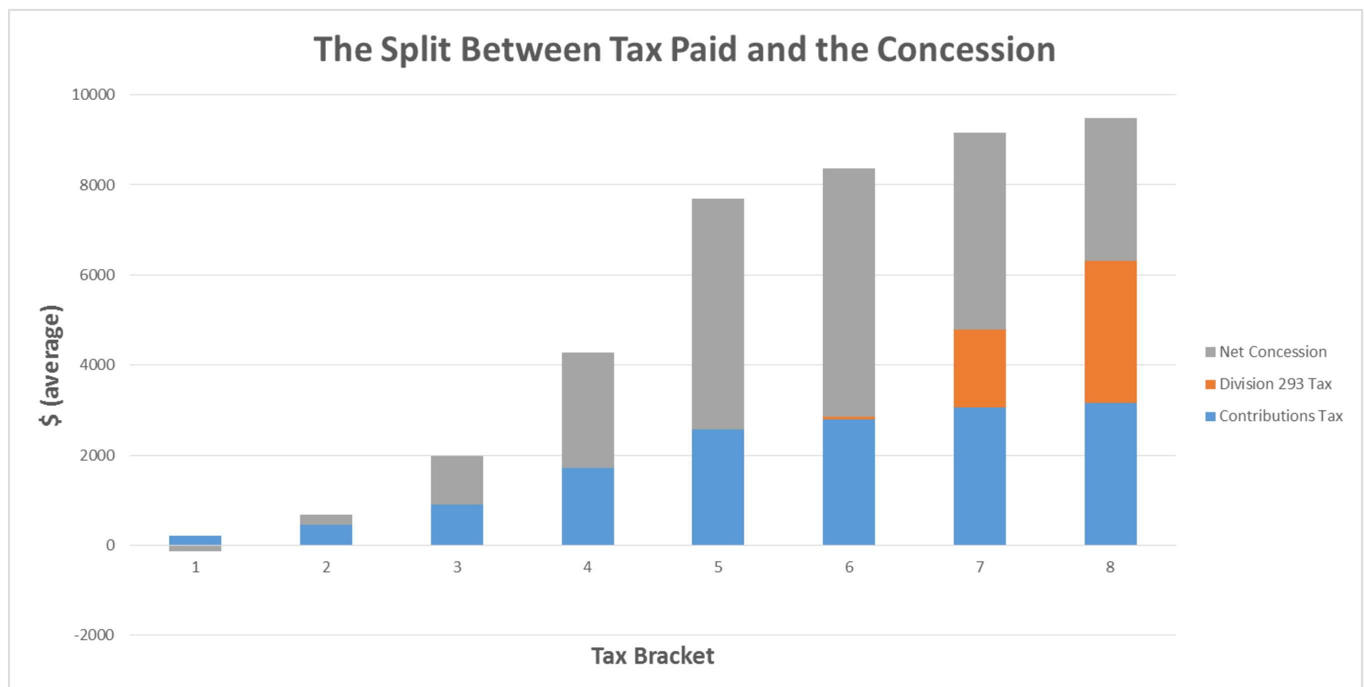

Figure 3: Split between tax and concession for a threshold of $300,000

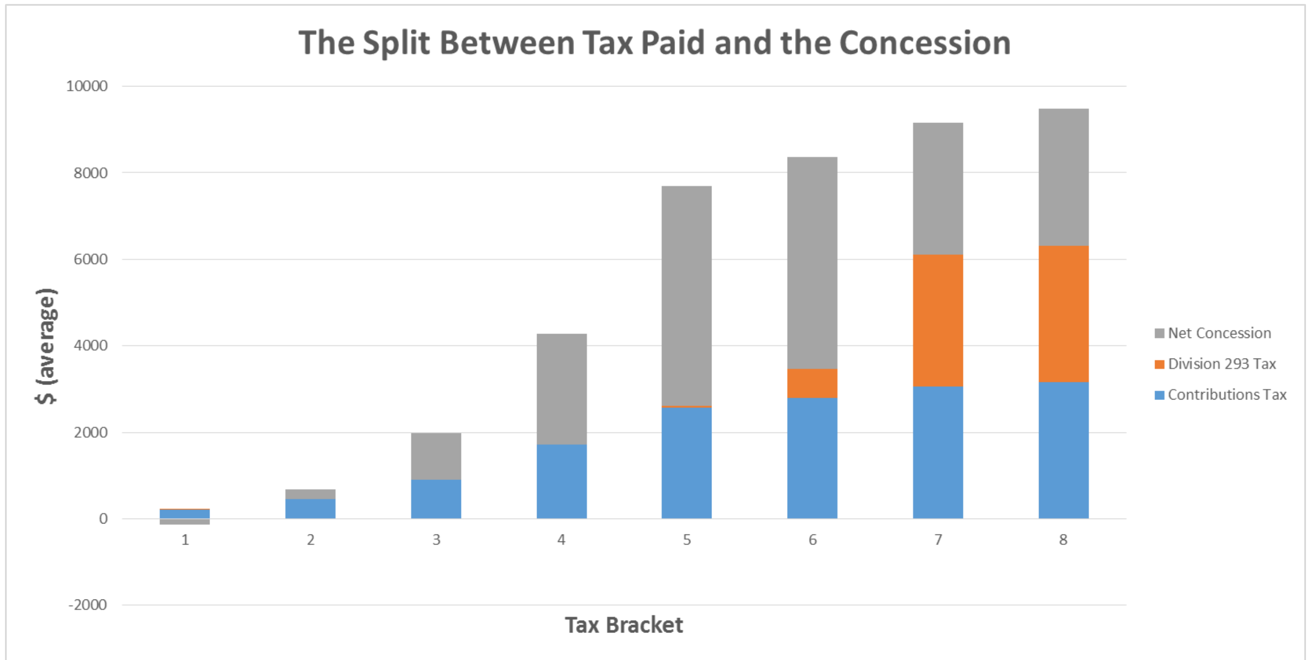

Figure 4: Split between tax and concession for a threshold of $250,000

As figures 3 and 4 show, the Division 293 tax greatly reduces the tax concessions granted to taxpayers in the two highest income brackets: $250,001-$300,000, and $300,000 and above (columns 7 and 8). However, While the Division 293 tax reduces concessions in columns 7 and 8, there are still considerable concessions in those brackets above $180,000 (columns 5 and 6).

Figures 5 and 6 below illustrate the distribution of concessions when the threshold is reduced to $200,000 and $180,000.

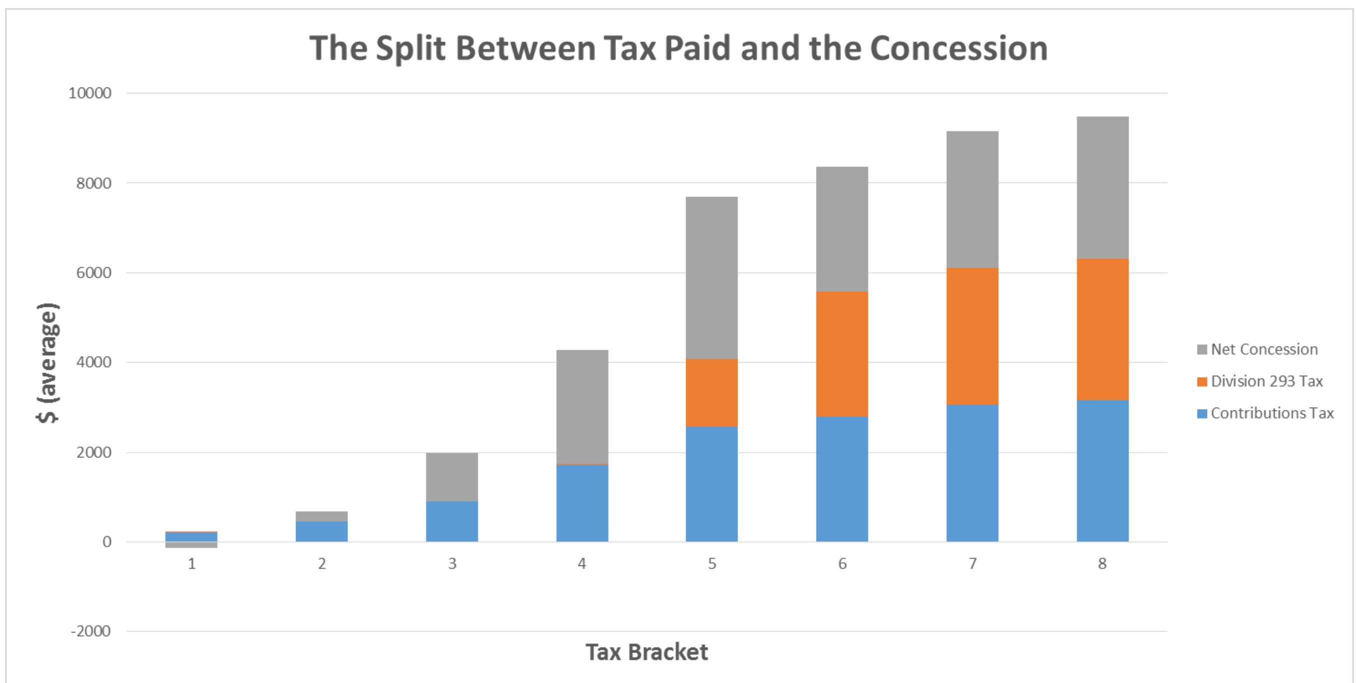

Figure 5: Split between tax and concession for a threshold of $200,000

In Figure 5, the simulation shows a significant increase in the amount of Division 293 tax paid by taxpayers in the $180,001-$200,000 bracket and the $200,001-$250,000 bracket. As with

the previous scenario, the split between the top two income brackets is proportionally very similar, however there is no longer a large, abrupt, decrease in the amount of concessions granted between the $200,001-$250,000 bracket and the $250,001-$300,000 bracket. This results in an overall smoother phase-in of the amount of Division 293 tax paid and therefore the amount of retirement income forgone is also smoother as the income brackets increase. Taxpayers in the $180,000 income level are impacted even though the threshold is set at $200,000 due to the differences between how income is calculated for Division 293 purposes and income tax purposes.[47] Therefore, using a threshold of $200,000 approximately equates to an income level of $180,000, those considered 'high income' by the personal income tax brackets. Further, at a threshold of $200,000, this reduction in concessions only affects those earning above $180,000 and does not penalise taxpayers on lower income brackets. As mentioned previously, high income individuals are more likely to provide for their own retirement regardless of tax incentives, so concessions at this level are unnecessary to promote saving in order to supplement or substitute the Age Pension. Therefore, a Division 293 threshold of $200,000 better promotes the purpose of superannuation than a threshold of either $250,000 or $300,000.

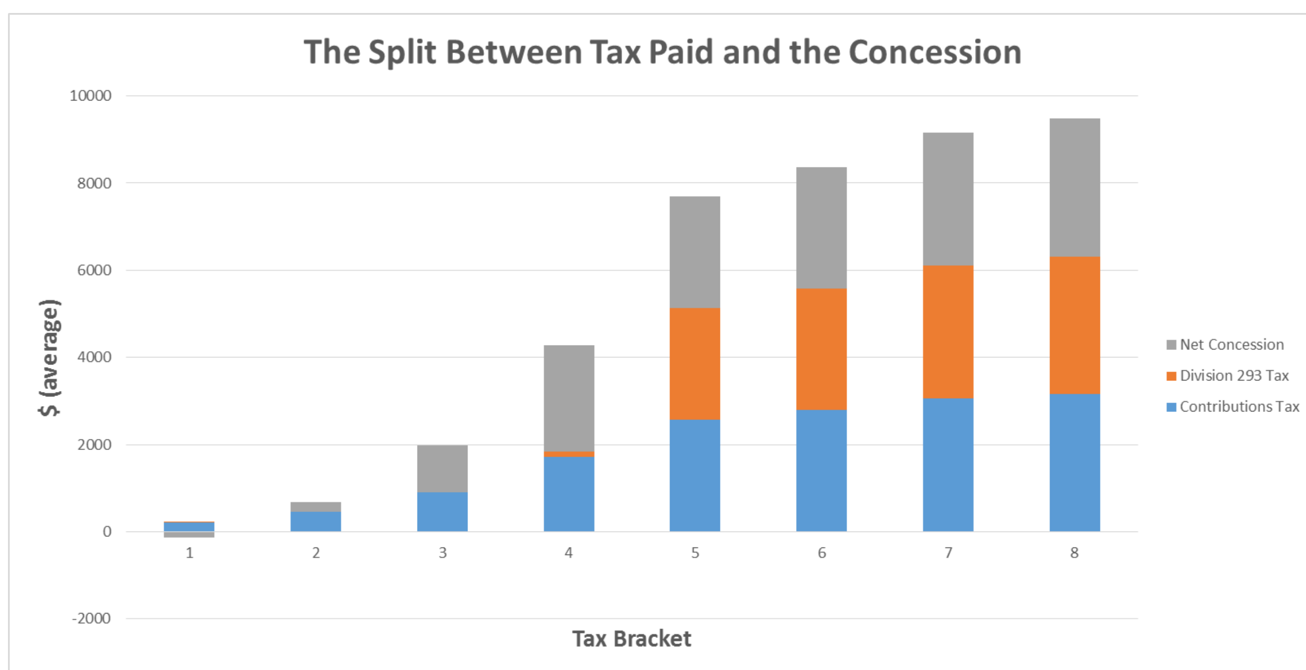

Figure 6: Split between tax and concession for a threshold of $180,000

While the threshold of $180,000 nominally corresponds to the start of the highest marginal tax bracket, given that income for Division 293 purposes is calculated differently as the threshold set at this level effectively results in the tax applying before the top marginal income tax rate is reached. Figure 6 illustrates that a small proportion of taxpayers in the $80,001 - $180,000 tax bracket will be subject to Division 293 tax at an $180,000 threshold. However, as Figure 6 above shows, having the threshold at this level does capture all of those in the >$180,000 income bracket. Additionally, this threshold has the smoothest build-up of Division 293 tax payable between the $180,000 - $200,000 bracket and the top $300,000 and over bracket. It appears that the top four income brackets all pay on average two dollars of tax for every one dollar of concession at this threshold

47 Daley et al. above n 7.

The results indicate that no matter which of the Division 293 threshold is used, the $300,000 and over income bracket still pays the same amount of tax and receives the same amount of concession (on average a concession of $3,159.61 per person in that income bracket). This represents a third of the contributions that would otherwise have been paid as income tax being kept as tax concessions. Therefore, if these tax concessions are being expended on those who do not benefit greatly from it (compared to other income brackets), a method other than changing the Division 293 threshold may be appropriate for reducing these concessions. Additionally, the tax expenditure concept appears to be at odds with the granting of any superannuation tax concessions at all, with Surrey[48] arguing that direct expenditures (i.e. the aged pension) should be considered first as an option before resorting to tax expenditures (i.e. superannuation concessions) unless 'the advantages are clear and compelling' for that tax expenditure.[49] It may be that the ideal method of providing retirement income is a full direct expenditures model built around the Age Pension and without any tax concessions. Nevertheless, reducing the threshold for the application of the Division 293 tax does still promote the purpose of superannuation, as discussed in the following section.

V. DISCUSSION AND CONCLUSION

The findings of this study demonstrate that the income threshold at which Division 293 is applied should be reduced so that less tax concessions are granted beyond what is required to achieve full or partial retirement income independence. To determine the specific threshold at which it is best applied, a number of factors should be considered. In order to encourage and facilitate mandatory and voluntary saving for retirement, some level of tax concessions are considered necessary and should be granted. This will help promote saving and in turn reduce the future burden on government finances from the aged pension, in line with the proposed purpose of superannuation. However, the system must at the same time avoid unnecessary concessions, those concessions that are essentially wasted as they are not needed to incentivise certain behaviours. Therefore, the ideal Division 293 threshold must simultaneously avoid unnecessary concessions being granted while also reducing the aged pension payable by a meaningful amount. It follows that the ideal threshold must at a minimum, be set above the income level where the aged pension begins to phase out.

All four proposed thresholds considered in this analysis are above the $115,000 per year income level, a point at which Daley et al.[50] claim taxpayers are likely to save enough for retirement to not rely on the Age Pension. Therefore, all four thresholds considered still provide scope for individuals to save before reaching income levels relevant to Division 293. It follows that all four thresholds are compatible with the proposed subsidiary objective of alleviating 'fiscal pressures on the Government from the retirement income system'.[51]

However, regarding providing income in retirement, this will be promoted to different extents by the four thresholds. Theoretically, the tax expenditure concept requires that tax concessions be viewed as if they were direct expenditures to assess their merits.[52] When viewed in this light, it becomes apparent that spending a disproportionate amount of concessions on high-income earners does not meaningfully further the purpose of superannuation and is therefore considered unnecessary government expenditure. This comes at the expense of lower-income

48 Stanley Surrey, 'Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures', (1970) Harvard Law Review 83, 705.

49 Ibid, 734.

50 John Daley et al. above n 7.

51 Above n 38.

52 Richard Krever, 'Analysing Implicit Tax Expenditures', (2011) Melbourne University Law Review 35, 426.

earners who may benefit from having higher concessions which would further promote the purpose of superannuation by increasing their retirement incomes and reducing their reliance on the Age Pension. Additionally, Surrey[53] explained how unnecessary tax expenditures can lead to unnecessarily high tax rates, so by reducing high-income earner superannuation contribution concessions, the Division 293 tax may also enable lower taxes for low-income earners in the future. Therefore, the Division 293 tax does promote the purpose of superannuation in that it provides the possibility for higher retirement incomes for low-income earners.

The threshold of $180,000 is unambiguously the threshold that reduces unnecessary tax expenditures the most. At this threshold, all taxpayers in the >$180,000 income bracket are captured. Taxpayers with incomes of over $180,000 are considered 'high income' by the marginal tax rates, and the superannuation system should reflect this too. Therefore it is arguable that the Division 293 tax applied at this threshold reduces unnecessary tax concessions as it applies to all high income taxpayers.

However, implementing the threshold at the $180,000 income level impacts on individuals in the $80,000 - $180,000 income bracket – those who are not considered 'high income'. Given these individuals have less income, the additional tax may well reduce their superannuation savings[54] which is not in line with the proposed objective of the superannuation system to provide income in retirement to substitute or supplement the Age Pension.

Given this analysis and discussion, there is a definite case to be made for lowering the Division 293 income threshold below the current threshold of $250,000. In addition, there is a strong case for both of the other proposed thresholds. A threshold of $200,000 reduces unnecessary tax expenditures and only impacts taxpayers in the >$180,000 income bracket. A threshold of $180,000 would capture all taxpayers in the $180,000, those considered 'high income' and thus has merit in that regard. However, given a threshold of $180,000 would impact taxpayers who are not considered high income, we conclude that a threshold of $200,000 would be most appropriate and in line with the proposed objective of superannuation.

There are limitations to the analysis that should be acknowledged. First, this analysis considers the Division 293 tax independently of other concessions and gains over a taxpayer's lifetime. Future analysis could consider other factors such as the interaction between superannuation tax concessions and reduction in reliance on the Age Pension. Second, this analysis used the revenue forgone method to model the value of tax expenditures. This method does not consider the behavioural impacts of reducing tax concessions. This may mean the increased tax revenue from lowering the division 293 threshold is overstated. Finally, the source data is from 2013-2014, which at the time of writing was the most recent data available for analysis. Future research should examine the changes in patterns of concessions from the changes introduced in 2017 when the data becomes available in 2020.

53 Stanley Surrey, above n 48.

54 Taxpayers without the ability to pay the Division 293 tax will have to request the monies be released from their superannuation fund, thus reducing superannuation savings.