The Tax Institute

16 April 2026

Director
Retirement, Advice and Investment Division
Treasury
Langton Cres
Parkes ACT 2600

By email: superannuation@treasury.gov.au

Dear Director,

Building a Stronger and Fairer Super System Act 2026 – Draft Regulations

The Tax Institute welcomes the opportunity to make a submission to the Treasury in respect of its consultation on the:

- exposure draft Income Tax Assessment (1997 Act) Amendment (Building a Stronger and Fairer Super System and Other Measures) Regulations 2026 (**draft Regulations**); and
- accompanying explanatory memorandum (**draft EM**).

In the development of this submission, we have closely consulted with our National Superannuation Technical Committee to prepare a considered response that represents the views of the broader membership of The Tax Institute.

Consultation timeframes

The draft Regulations and draft EM have been released for consultation for only three weeks, including the Easter break, significantly limiting the time available for stakeholders to analyse the material and prepare comprehensive feedback.

This continues the pattern of limited consultation periods in the development of the Division 296 measure.

- The Better Targeted Superannuation Concessions Consultation Paper (2023) was open for consultation for only two weeks.
- The Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023 and explanatory materials were also subject to a two-week consultation window.

Level 21, 60 Margaret Street
Sydney NSW 2000

T 1300 829 338
E tti@taxinstitute.com.au

taxinstitute.com.au

- The Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2025, Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2025 and explanatory materials for Division 296 were released immediately before the Christmas holiday period on 19 December 2025 and concluded on 16 January 2026, when many businesses were closed and stakeholders were unavailable to provide feedback.

Despite repeated requests from industry and stakeholders for adequate consultation periods, these limited timeframes persist.

Short consultation periods increase the likelihood of unintended consequences, reduce confidence in the policy development process, and risk producing measures that do not reflect the operational realities faced by funds, administrators, advisers and members. The significant concerns raised regarding the original Division 296 design, which ultimately led to a revised approach, illustrate the importance of allowing sufficient time for technical analysis and meaningful stakeholder engagement.

We strongly recommend that future consultations, particularly where measures are complex, high-impact, or system-wide in their application, provide appropriate timeframes to ensure well-considered and durable policy outcomes.

Summary of key technical issues

The Tax Institute acknowledges the Government's policy objective underlying Division 296, namely, to strengthen the integrity of the superannuation system by imposing an additional tax on earnings attributable to very large superannuation balances. We support integrity measures where they are clear, proportionate and capable of being administered effectively.

However, we have identified a number of areas where the current design and proposed administration of Division 296 raise practical implementation challenges. These areas would benefit from further refinement, including:

- the application of Division 296 following the death of an individual;
- simplifying the cost base reset methodology to improve workability for funds, particularly SMSFs;
- allowing capital losses to be carried forward for Division 296 purposes, consistent with established CGT principles;
- addressing the differential treatment of SMSFs and large APRA-regulated funds in the recognition of capital gains to ensure neutrality and equity for members;
- reducing the compliance burden associated with family law valuations for defined benefit interests by allowing the use of existing, readily available valuation measures; and
- managing the impact of fund-level amendments on member assessments, particularly where amendments occur several years later or affect deceased estates.

In particular, the interaction between Division 296 and the administration of deceased estates would benefit from additional clarity to ensure liabilities can be identified and managed in a timely and fair manner, without delaying death benefit payments or exposing legal personal representatives (**LPRs**) to unintended personal risk.

Taken together, these issues are not matters of policy intent, but of implementation and administrability. With targeted legislative or regulatory refinements, Division 296 can operate more smoothly, provide greater certainty to funds and individuals, and better align with the realities of superannuation administration, while still achieving the policy intent.

We discuss each of these issues in detail and provide our recommendations in **Appendix A**.

The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all.

We welcome the opportunity to work with Treasury and the Government to refine these aspects of Division 296, and ensure the regime achieves its objectives in a manner that is fair, practical and sustainable.

If you would like to discuss any of the above, please contact our Tax Counsel, John Storey, at (03) 9603 2003.

Yours faithfully,

Julie Abdalla
Head of Tax & Legal

Tim Sandow
President

APPENDIX A

We set out below our detailed comments and recommendations for your consideration.

Division 296 and deceased individuals

A central concern relates to the operation of Division 296 in circumstances where an individual has died. Situations may arise where liabilities accrue before death but are assessed after death, or where earnings are modified to attribute amounts to the deceased for periods following death. These outcomes create uncertainty for LPRs, trustees and beneficiaries, particularly in relation to:

- the practical ability to action release authorities after death;
- the interaction between personal tax liabilities and the payment of death benefits;
- the timing of assessments relative to estate administration; and
- the exposure of LPRs to potential personal liability where liabilities cannot be determined within a reasonable timeframe.

The Tax Institute considers that greater clarity and refinement in this area would support timely estate administration and reduce unnecessary risk for all parties involved.

Pre-death liabilities assessed after death

There are circumstances where a Division 296 liability may relate to a period prior to an individual's death but is assessed only after death, due to the timing of fund reporting and ATO assessment processes.

For example**:**

- a Division 296 liability accrues during the 2026–27 income year;
- the individual dies in January 2028;
- the SMSF return is lodged in May 2028; and
- the Commissioner issues an assessment in July 2028.

In these circumstances, it is unclear:

- whether a LPR can lawfully action a release authority in respect of a deceased member; and
- how a fund trustee could comply if the deceased's superannuation interest has already been paid out as a death benefit.

Given the personal nature of a Division 296 liability, trustees cannot practically factor unknown future assessments into death benefit payments. Additional clarity or amendment is required to address these timing mismatches.

Liabilities arising in respect of periods after death

Further uncertainty arises where Division 296 is applied to earnings referable to periods after death.

Once an individual has died, they no longer have a superannuation interest and will typically have a nil total superannuation balance in subsequent years. It is therefore unclear how post-death earnings can continue to be attributed to the deceased for Division 296 purposes, particularly where:

- reversionary pensions commence immediately; or
- death benefits are otherwise paid out in full.

This creates a fundamental disconnect between the conceptual design of Division 296 and the legal reality of superannuation interests on death.

Release authorities and estates

Where a release authority is not actioned, the Commissioner may issue the authority directly to the relevant fund. In practice, however, this may occur after all benefits have been paid out, leaving no remaining amount against which the authority can be satisfied.

In such circumstances, it would be helpful for the Government to clarify:

- how outstanding liabilities are intended to be managed;
- whether interest is expected to continue accruing; and
- whether administrative write-off or alternative collection mechanisms are contemplated.

Providing clarity would reduce uncertainty for estates and assist LPRs in finalising distributions with confidence.

Interaction with ATO Practical Compliance Guideline PCG 2018/4

We note that Practical Compliance Guideline PCG 2018/4: *Income Tax – liability of a legal personal representative of a deceased person* (**PCG 2018/4**) provides comfort to LPRs in certain circumstances, but its scope is limited and does not extend to:

- SMSF members;
- discretionary trust beneficiaries; and
- individuals with assets exceeding $10 million.

At paragraph 57, the PCG 2018/4 specifies that:

> In the absence of fraud or evasion, the Commissioner cannot seek to recover estate assets that have been distributed to beneficiaries in order to satisfy outstanding tax-related liabilities of a deceased person. In Deputy Commissioner of Taxation (NSW) v Brown[18], the High Court held that the liability of any person to pay a debt for unpaid income tax is conditional upon the right of the Commissioner to assess that person and upon the correlative right of that person to appeal against the assessment (which right the beneficiaries did not possess).

These principles are directly relevant to Division 296, where assessments may be routinely issued well after death and after benefit payments have been made. Alignment between Division 296 and existing principles of estate administration would improve fairness and certainty.

Modified earnings for deceased individuals

The current modification attributing post-death earnings to a deceased individual is particularly challenging to administer, especially for SMSFs. It may require:

- additional actuarial certificates;
- further annual fund returns; and
- delays in death benefit payments until liabilities are finalised.

Given that a deceased individual will have a nil total superannuation balance in subsequent years, we consider that this modification adds complexity without commensurate integrity benefits.

Taken together, the above issues indicate that the operation of Division 296 on death is highly complex and impractical. In particular:

- Division 296 liabilities may be unknown at the time death benefits are required to be paid;
- liabilities may arise in respect of periods when the individual was alive, yet assessed only after death; and
- trustees cannot withhold benefits in anticipation of an unknown personal tax liability.

We are concerned this may result in either delays to death benefit payments or, alternatively, unrecoverable liabilities that undermine confidence in the regime.

Recommendation

We recommend that ideally Division 296 liabilities should cease on death, including liabilities that relate to income years in which the individual was alive but remain unassessed at the time of death. While we recognise the integrity objective of preventing post-death manipulation of fund assets, the current approach creates significant practical difficulties that outweigh its benefits.

If Division 296 is to be applied post death, we recommend further targeted consultation with industry and estate practitioners to develop an approach that appropriately addresses post-death risks without imposing unmanageable compliance burdens on estates, trustees, and beneficiaries of the current approach.

5-year CGT phase-in versus cost base reset

As outlined in our January 2026 submission on the Division 296 exposure draft, operating a two-tier system for recognising capital gains under Division 296, one for SMSFs and another for large APRA-regulated funds, undermines neutrality and creates an uneven playing field.

This issue is most acute for 'wrap' type platforms and master funds that track member-specific or investment-option cost bases but also affects other funds.

Recommendation

We recommend that:

- all funds be allowed to choose either the 5-year CGT phase-in or the cost base reset approach; and
- integrity measures be adopted to prevent both methods being used simultaneously (for example, through pre-30 June 2026 wash sales of segregated pension assets i.e. selling and rebuying the same asset).

Defined benefit income calculations – family law valuations

Family law valuations are mathematically complex. Preparing annual family law valuations especially for Division 296 income calculations will be a relatively costly burden for small corporate plans with only a few defined benefit members. A legislative measure that only affects such a small portion of the population should not be disproportionately expensive to implement. Even for lump sum only defined benefits with a withdrawal value under $1.5m, the family law value would still need to be calculated under the current proposed draft 296 Regulations to confirm the value is within the 10% margin.

Recommendation

We recommend a simpler, more practical valuation framework be permitted for Division 296 purposes, using existing and readily available data already reported by funds and regulators.

Specifically, we recommend that:

- Growth (accumulation) phase

  For the duration of the defined benefit growth phase, the vested benefit value (already calculated and reported to APRA) be used for Division 296 purposes in all cases.

  This value is already well understood, reliable, and available regardless of whether the ultimate benefit is expected to be paid as a pension or lump sum, including where plans are closed.

  Alternative approach:

  As an alternative, where a benefit transitions to retirement phase, the valuation at the year of retirement phase commencement could reference the general transfer balance cap (**TBC**) multiplied by the applicable defined benefit factor. For example, using the FY27 general TBC of $2.1 million, would imply a pension valuation factor of 21.

- Pension phase

  When a defined benefit pension commences, the existing and well-established annualised pension ×16 transfer balance value should be used.

  This value should then be amortised over the pension phase using the age-based drawdown factors already prescribed in Schedule 7 of the Superannuation Industry (Supervision) Regulations (1994) (**SIS Regulations**) namely:

  - under 65: 4%
  - ages 65–74: 5%
  - ages 75–79: 6%
  - ages 80–84: 7%
  - ages 85–89: 9%
  - ages 90–94: 11%
  - age 95 and over: 14%

The above approaches would:

- align Division 296 more closely with existing superannuation frameworks and terminology;
- eliminate the need for bespoke family law valuations;
- materially reduce compliance costs for small plans; and
- remain sufficiently robust and defensible for integrity purposes.

We consider that the above approaches are vastly simpler to understand and implement than the current proposal in the Division 296 Regulations, while still delivering reasonable and consistent valuation outcomes.

Amendments at the fund level

The Tax Institute notes that an amended Division 296 assessment arising from an amendment at the fund level may present significant administrative challenges in practice. Given that amendment periods may extend for up to four years, funds may be required to retrospectively identify affected members and re-perform attribution calculations across multiple income years. This creates a considerable compliance burden, particularly for large funds with significant membership bases.

Recommendation

To improve workability while maintaining the integrity of the regime, we recommend introducing a materiality threshold of 5%, such that amended Division 296 assessments are not issued to members where the change in Division 296 fund earnings is equal to or below this threshold. This approach would:

- avoid the issuance of amended assessments for immaterial amounts several years after the original assessment;
- reduce compliance costs for funds and administrative workload for the ATO; and
- reflect historical error-tolerance thresholds that have been accepted within the managed funds industry as an appropriate trigger for re-reporting.

We also recommend that no re-reporting or amended assessments be issued in respect of deceased individuals. This would avoid unnecessary distress for beneficiaries and LPRs and is consistent with principles of sound estate administration where individuals and their estates have no ongoing ability to influence fund-level calculation outcomes.

Consistent with our January 2026 submission, we further recommend that no interest, penalties or credit interest apply to amended Division 296 assessments, whether resulting in an additional liability or a refund. Members and LPRs have no control over:

- fund-level attribution methodologies;
- the timing of amendments; or
- the recalculation process leading to a revised assessment.

Accordingly, it would be unfair to impose interest charges or penalties on additional liabilities.

We also note that the current legislative framework is silent on whether credit interest would be payable by the ATO where a fund-level amendment produces a reduction in Division 296 fund earnings and a corresponding refund to the member or their deceased estate. The Tax Institute recommends this be clarified to ensure consistent and fair outcomes.

Cost base reset and treatment of capital losses

The current proposal allows the cost base of assets to be reset for Division 296 purposes by including only the first element of cost base, with subsequent elements added later. This approach is unnecessarily complex and unworkable in practice, particularly for SMSFs.

Further, the inability to carry forward capital losses for Division 296 purposes is unfair. Capital loss carry-forward is a fundamental feature of Australia's capital gains tax system and is already integrated in the Method Statement.

Recommendation

With regard to cost base reset, we recommend that:

- the cost base election be made at 30 June 2026; and
- the entire cost base be reset at that time, with no further adjustments required.

In relation to capital losses, we recommend that capital losses be permitted to be carried forward for Division 296 purposes to ensure consistency and fairness within the tax system.

Other matters previously raised

Several fairness and equity issues previously raised in our January 2026 submission remain unresolved. Feedback from our members indicates that addressing these matters in the draft Regulations would materially improve confidence in, and workability of, the Division 296 regime.

In particular, members have highlighted the following issues for consideration:

- Total and permanent disability (**TPD**) and terminal illness benefits

  Members consider that TPD and terminal illness benefits should be afforded the same Division 296 exception as structured settlements, noting the comparable policy considerations and the vulnerable circumstances in which these benefits arise.

- Foreign tax credits on exempt current pension income amounts

  Members have raised concerns about the potential for double taxation where Division 296 tax is imposed on earnings that include exempt current pension income (**ECPI**) on which foreign tax has already been paid by the fund. Members suggest that an appropriate foreign tax credit should be allowed against Division 296 tax to prevent inequitable outcomes.

- Credit interest on refunds to departed temporary residents

  Members recommend that where Division 296 tax is refunded to departed temporary residents, credit interest should be included, consistent with broader tax principles and to ensure equitable treatment.

- Rights to object, review and appeal Division 296 assessments

  Members strongly support the provision of clear rights for individuals to object to, seek review of, and appeal Division 296 assessments, particularly given that members and LPRs of deceased estates have no control over the underlying fund-level calculations or attribution processes that determine the assessment.