The Tax Institute

16 January 2026

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

By email: superannaution@treasury.gov.au

Dear Director,

Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2025

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

- exposure draft Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2025 (**draft Bill**);
- exposure draft Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2025 (**Imposition Bill**);
- accompanying explanatory memorandum (**draft EM**); and
- additional guidance paper titled 'Better Targeted Superannuation Concessions' (**Guidance Paper**).

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.

Proposed Division 296 introduces an additional 15% tax on earnings on superannuation balances above $3 million and a further 10% tax on earnings on balances above $10 million. The initial proposal for Division 296 was met with considerable criticism from tax professionals and the general public, primarily because the relevant superannuation balances were not indexed, and the measure proposed to tax unrealised capital gains, among other related issues.

We welcomed the Treasurer's announcement on 13 October 2025 of new approaches to the proposed measure, taking into account alternative solutions to address the significant concerns raised regarding the original design.

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However, the release of the draft Bill, Imposition Bill, and explanatory materials just before the holiday season, has meant that approximately half of the consultation period has taken place over a time when most businesses were completely shut and many professionals are still away and unavailable. This has not left adequate time for stakeholders to comprehensively respond and raises questions about the overall effectiveness of the consultation process.

We note that we had raised this issue when the Better Targeted Superannuation Concessions Consultation Paper was released in 2023 was open for consultation for only two weeks, and the earlier draft Bill, Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023 and explanatory materials were open for consultation from 3 October 2023 to 18 October 2023 (again, only two weeks). This pattern of short consultation periods appears to be a recurring trend despite continual requests from stakeholders for adequate consultation periods.

Rushed consultation undermines confidence in the process and, increases the risk of poor policy outcomes and unintended consequences, potentially compromising the integrity of the tax system and adversely affecting the broader community. The previous Division 296 proposal was clear evidence of this.

We trust that collectively we can learn from these experiences and work towards a better approach to consultation and the design of new measures.

In this submission, while we provide our observations on the technical aspects of the draft Bill, we note that many fundamental aspects of the proposed tax remain contingent on yet-to-be-determined regulations. Several elements in the current draft Bill appear inequitable, discriminate among different kinds of superannuation funds, and result in double taxation. We are of the view that the issues outlined below should be addressed before the draft Bill is introduced in Parliament. We strongly advise against rushing this measure through Parliament simply to achieve a target date without adequate consideration and resolution of outstanding concerns.

We also recommend a post-implementation review of the Division 296 tax between 12 months and 24 months of its operation, to verify whether the law is operating as intended, and is effectively and efficiently meeting the Government's objectives of improving equity and the fiscal sustainability of the superannuation system. A post-implementation review should also assist to uncover any issues that arise in practice following enactment of the measure.

Our detailed response and recommendations to improve the draft Bill and the draft EM are contained in **Appendix A**.

Our submission is intended to be a starting point for further consultation. We consider it essential to maintain an ongoing dialogue among the Treasury, the Australian Taxation Office (**ATO**) and the tax profession on the draft Bill for Division 296 tax, and on ways to improve them. Such an open and collaborative process will help ensure the Division 296 tax is fair and not unduly burdensome for taxpayers.

To this end, we would be pleased to continue to work with the Treasury and the ATO on the proposed reforms. Please contact our Tax Counsel, John Storey, at (03) 9603 2003 to arrange a time to workshop the issues further or discuss any aspect of our submission.

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.

Yours faithfully,

Julie Abdalla	**Tim Sandow**
Head of Tax & Legal	President

APPENDIX A

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

Structured settlement contributions

Structured settlements are explicitly recognised as exceptions under section 296-25 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**) and the recipients of such settlements are excluded from the proposed Division 296 tax. We agree with this proposal but consider that it should be extended to recipients of Total and Permanent Disability (**TPD**) and terminal illness benefits.

Section 296-65 of the ITAA 1997 may permit specific contributions and withdrawals to be excluded through regulations. However, this is limited to defined benefits and interests outlined in the regulations that do not adhere to the general rule for determining 'relevant superannuation earnings', which adopts an alternative total superannuation balance (**TSB**) formula. We are of the view that recipients of TPD and terminal illness benefits should be treated under the same Division 296 exception as structured settlements, and that this should apply irrespective of whether they originate from a small or large superannuation fund.

Our comments above should be read in conjunction with our comments in our submission to the earlier draft Bill, Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023.

Indexation of thresholds

Proposed sections 296-30 and 296-35 of the draft Bill establish the thresholds for superannuation balances for the 2026-27 income year, setting the large superannuation balance threshold at $3 million and the very large superannuation balance threshold at $10 million. The draft EM at paragraph 1.30 indicates that the indexation of these thresholds aligns with the existing process for the general transfer balance cap (**TBC**). However, paragraph 1.32 acknowledges that while the indexation for the large and very large superannuation balance thresholds, as well as the general transfer balance cap, is derived from the same Consumer Price Index, they may not be indexed at the same time due to differing indexation increments. This could potentially cause confusion to taxpayers. The Tax Institute recommends a more straightforward approach is adopted. This could be achieved by applying 1.5 times the TBC for the large superannuation balance threshold and 5 times for the very large superannuation balance threshold.

Death

The proposed section 296-1 of the *Income Tax (Transitional Provisions) Act 1997* (Cth) (**Transitional Act**) deals with the application of the Division 296 tax. Proposed subparagraph 296-1(3), provides that a taxpayer is not liable to pay Division 296 tax for the 2026-27 income year if they die before the last day of that year (i.e., before 30 June 2027). This represents a further narrowing of the approach in the earlier draft Bill, the Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023, which had been introduced in the Parliament. The earlier draft Bill's proposed section 296-30 offered an ongoing exemption in respect of death from Division 296 tax, rather than limiting it to the initial year of operation.

We consider that the exemption should apply to any year, not just 2027, provided the individual dies before the Division 296 assessment for that year is issued and the tax payment due date has passed. This exemption should remain in effect until the superannuation interest is transferred to the appropriate beneficiary, as some death benefits can take considerable time to determine entitlements and, in the event of a legal dispute, the final payment of a death benefit could take years.

Further, we are of the view that limiting the exemption from Division 296 tax solely to individuals who die before 30 June is unfair. The exemption should extend to those who die on 30 June as well, in the first year and equally in future years.

In essence, we consider that a deceased estate should not incur Division 296 tax unless the payment due date occurred prior to death, as the deceased individual can no longer benefit from their superannuation account and should therefore not be subject to taxation. Typically, the account balance would be distributed among the death benefit dependents, who we consider should be granted a 12-month period to address any excess above the $3 million or $10 million cap, similar to the allowances for TBC excess under Table item 2, subsection 294-25 (1) of the ITAA 1997.

Division 296 earnings

Proposed section 296-55 of the ITAA 1997 provides the formula for calculating the Division 296 fund earnings for an income year. These earnings are then attributed to individual members in accordance with proposed section 296-60, which refers to yet unpublished regulations to determine the relevant attribution. We consider that a simple division of the fund-level tax position among all members is neither fair nor reasonable, and that a more flexible approach is warranted. For instance, transactions involving reserves, suspense accounts, and provisions within the superannuation fund and member accounts occur frequently, and these accounts generate income that should not be attributed to any individual member. Consequently, this income ought to be excluded from the relevant income calculation for Division 296 tax. An example of this is the use of contribution holidays to satisfy the Superannuation Guarantee for member accounts, which is not accounted for in the deductions from assessable contributions under Division 296 income.

Regarding Exempt Current Pension Income (**ECPI**) adjustments as outlined in the proposed section 296-55, ECPI is included in Division 296 income but is subsequently reduced by deductions that would otherwise be made under section 8-1 of the ITAA 1997 if the ECPI were not exempt income. However, this provision is limited to deductions under section 8-1. We see no justification for this limitation, as numerous other deduction provisions in the Income Tax Assessment Acts also affect the deductible portion of expenses or losses related to ECPI, such as Taxation of Financial Arrangements (**TOFA**)foreign exchange losses. Given that the fundamental principle of the Division 296 net income calculation assumes ECPI to be assessable, it would be more straightforward to articulate this principle directly rather than enumerating every applicable deduction provision.

Further, we are unclear as to the rationale for quarantining a net ECPI loss by setting it to nil in the Division 296 net income calculation for those years. ECPI net losses should be allowed to be offset against the accumulation phase net income for the purposes of the Division 296 net income calculation. At a minimum, it should be clarified that ECPI losses can be carried forward to later years. Further, any overall fund calculated net loss for Division 296 should be carried forward and applied against income in later years.

As per Paragraph 1.77 of the draft EM, recalculating net capital gains annually by incorporating ECPI gains and losses could be cumbersome, particularly if it requires reassessing the extent to which short-term (that is, less than 12 months) gains offset tax losses. We recommend that it be clarified that superannuation funds be permitted to assume, for the purposes of Division 296, that capital losses entirely offset any short-term gains first. This assumption reflects the typical scenario where taxpayers apply tax losses against short term gains first and eliminates the need for formal redetermination, thereby conserving resources and effort.

Pooled Superannuation Trusts offer multiple classes of units or investment options, which necessitate careful consideration in drafting the income allocation for investing superannuation funds to ensure fairness and reasonableness. Further work is required here before the draft Bill progresses.

Double taxation of foreign income tax offsets

Paragraph 1.65 of the draft EM states that when calculating a fund's taxable income or loss, it should include the gross-up for franking credits and foreign income tax offsets (**FITO**), as these are regarded as a type of 'in-kind earnings' meant to be included in the fund's earnings. The draft EM provides that tax offsets do not reduce Division 296 fund earnings, as they are not applied to the income to which a superannuation fund's concessional tax rates apply. Instead, offsets are fully utilised by the fund after tax rates are applied to determine the fund's tax liability.

We consider that the relevant income for Division 296 should not be grossed up for foreign income tax offsets that are disallowed in the superannuation fund under the FITO cap, as this could result in double taxation for the individual under Division 296 and potentially violate double tax treaty obligations. This issue should be clarified. Further, we are of the view that a credit should be allowed against Division 296 tax on relevant income that is ECPI for which foreign tax has been paid by the fund, to prevent further instances of double taxation.

Superannuation earnings for a superannuation interest

Proposed section 296-60 of the ITAA 1997 outlines the general rule for superannuation earnings for a given income year. This proposed section specifies that the relevant earnings for a superannuation interest are determined by the amount linked to that interest, derived from the Division 296 fund earnings. It is important to note that under proposed subparagraph 296-60(2)(a)(ii), pre-retirement defined benefits are not included in the general income attribution framework established by Division 296. However, retirement phase defined benefit pensions are included. There appears to be no clear rationale for this distinction.

Regulations

Proposed subsection 296-70(2) of the draft Bill provides that regulations may modify sections 296-60 or 296-65 in different ways, depending on specific factors relating to an 'individual'. This provision raises concerns, as it is generally unconventional for regulations to be tailored to individual cases. We consider that regulations should apply to a defined group of individuals rather than to specific persons. Utilising the ATO's discretionary powers, alongside private rulings, would be a more appropriate approach to address individual circumstances, consistent with established practice, for example, private company dividends distributed to superannuation funds.

Refund entitlement

Proposed section 296-190 outlines the criteria for refund eligibility. We consider that it is unfair for the Commonwealth to issue refunds of Division 296 tax to departed temporary residents without accruing interest, as this constitutes an unreasonable financial advantage for the government. Such individuals should be entitled to receive interest on their refunds.

Further, to streamline the process for those who may not be well-versed in Australian tax regulations, we propose that the Commonwealth should automatically issue the refund alongside the Departing Australia Superannuation Payment, eliminating the need for a separate request. Additionally, we note that the draft Bill does not contemplate the circumstances of individuals who choose to roll over their funds into KiwiSaver. Consideration should be given to this issue

Appeal Rights

We consider that the draft Bill should explicitly provide individuals with the right to object to, seek review of, and appeal Division 296 tax assessments. Without these provisions, the ATO may issue tax assessments against individuals that are based on information provided by or the actions of superannuation funds in respect of which an individual member has no control, leaving individuals unable to challenge them through established dispute resolution procedures. This raises concerns regarding administrative and procedural fairness. To mitigate this issue and decrease the likelihood of disputes, we recommend that the ATO implement a pre-populated Division 296 return for individuals, utilising information supplied by the superannuation fund.

Other matters

Transitional Provisions

The existence of a two-tier capital gains reporting system under Division 296, which differentiates between self-managed superannuation funds (**SMSFs**) and large Australian Prudential Regulation Authority (**APRA**) regulated funds, creates an uneven playing field. This disparity can influence taxpayers' decisions, leading them to choose superannuation funds based on tax implications rather than their financial performance. Such arbitrary tax regulations that favour specific providers undermine informed financial decision-making.

SMSFs can opt in to adjust the cost base of all fund assets to their market value as at 30 June 2026 (**cost base adjustment method**), while large APRA funds are required to adjust their actual realised capital gains for the first four years (**factor method**). All funds should have the option to choose either approach to prevent potential detriment to members, particularly affecting wrap-style superannuation funds that manage specific assets with unique cost bases for each account, although this issue extends to master funds as well.

The four-year transition period to full capital gains tax (**CGT**) on accrued gains for large APRA funds, as outlined in section 296-60 of the Transitional Act, significantly underestimates the typical holding period for assets. In reality, many assets are held for much longer than this transitional timeframe. Notably, feedback from our members indicates that over half of the deferred tax liability for large APRA funds is linked to assets that have been held for more than five years.

Also, under section 296-50 of the Transitional Act, the decision to apply a market value reset for Division 296 purposes by SMSFs should not be contingent on the fund's tax return due date. Instead, this election should be made by the time the superannuation fund's tax return is lodged, in line with standard practice for other elections.

Further, as more Australians see their superannuation balances grow faster than indexation, more will exceed the annual Division 296 tax threshold. We consider that these individuals should not be subjected to Division 296 tax on gains that have accrued in their superannuation account but have not yet been realised by the year they reached the Division 296 tax threshold. Such gains accrued prior to the member having a fund balance above the requisite threshold, so taxing such gains could be perceived as retrospective. A more equitable approach would be to allow the cost base of assets in their superannuation accounts to be reset for Division 296 purposes on 1 July of the year they reach the threshold.

Without such a rule, there may be an inclination for individuals to engage in tax planning just before reaching the Division 296 tax threshold. For example, members may be encouraged to exit their existing superfund just before reaching the threshold, in favour of a wrap fund or SMSF, to resolve the issue. Such planning strategies would bring their own issues, for example, the difference between a segregated fund and a proportional fund regarding pension phase assets. A segregated fund will have the advantage of being able to sell and reacquire its ECPI assets before a member is subject to Division 296 to refresh its cost base without incurring tax, while a proportional fund lacks this option and faces disadvantages without relief similar to that provided in 2017 under section 294-115 of the Transitional Act.

Further, the CGT reset for Division 296 purposes should be applied on an asset-by-asset basis rather than to all CGT assets held by the fund as at 30 June 2026. The CGT reset in mid-2017 for the transfer balance cap changes applying from 1 July 2017 was based on an asset-by-asset reset under Subdivision 294-B of the Transitional Act. We recommend that trustees be given the choice to adjust the cost base on an asset-by-asset basis in line with the 2017 CGT reset.

Division 296 amended assessments

The draft EM at paragraph 1.134 provides that the shortfall interest charge applies to any amended assessment that results in a tax shortfall. However, it remains unclear whether interest on credit applies when an amended assessment results in a Division 296 tax refund. We recommend that the draft EM explicitly address the applicability of interest on credit in these scenarios.

Amendments at the fund level

Paragraph 1.127 of the draft EM states that where a superannuation entity has amended its tax return for an income year and it impacts their Division 296 fund earnings, this may in turn impact the relevant superannuation earnings attributed to individual superannuation interests for that income year.

While this appears logical in theory, it poses significant administrative challenges in practice. Compounding these difficulties are concerns about interest and penalties on amended assessments. It would be unfair for a member to have penalties or interest imposed on a Division 296 amended assessment when the member had no input into the calculation process and the shortfall was not the member's fault. If the trustee is at fault, it also raises issues of indemnification of members and the potential for disputes. Furthermore, it creates an uneven playing field, particularly for trustees who can utilise the alternative TSB formula.

We consider that penalties and interest should not apply at the member level for Division 296 amended assessments that are attributable to amendments of the fund's taxable income or the fund's calculation of the member's share of Division 296 fund earnings. At a minimum, introducing a materiality threshold would be prudent to prevent the issuance of amended assessments for trivial amounts when distributed among members.