15th December 2025

Mr Andrew Mills
Acting Chair
The Board of Taxation
C/ – The Treasury
Langton Cresent
Parkes Act 2600

Email: taxboard@taxboard.gov.au

Dear Mr Mills

SMSF ASSOCIATION SUBMISSION: RED TAPE REDUCTION REVIEW

The SMSF Association welcomes the opportunity to provide this submission to the Board of Taxation *Red Tape Reduction Review*.

We welcome the opportunity to contribute to the review to reduce red tape in the tax system and strongly support the Government pursuing ways to achieve this to ease the compliance burden on businesses and in turn, improve economic activity.

Regulatory costs to comply with Commonwealth regulation have soared in recent years and is estimated to now equate to 5.8% of GDP or $160 billion a year.[1] Inefficiencies, complexity and uncertainty in the taxation system contribute to this alarming figure.

The SMSF Association believes there are technical amendments that could be implemented in the short-term to address unintended consequences or reduce regulatory complexity and in-turn cost. This includes, for example, a technical amendment to Division 293 of the *Income Tax Assessment Act 1997* to stop taxpayers who receive lump sum superannuation payments due to employer non-compliance with salary and superannuation obligations being penalised.

Other important measures include providing qualified tax relevant providers access to the ATO portal to enable them to provide timely and importantly compliant advice to their individual and business clients and providing long awaited clarification on how the small business CGT rollover concessions can be applied lawfully for in-specie contributions.

[1] AICD $160 billion and counting: The cost of Commonwealth regulatory complexity November 2025

While it is imperative that mechanisms are explored to reduce regulatory red tape in the immediate future to ease the regulatory burden on individuals and business, it is also important that proposed or future tax policies do not add further complexity going forward.

Given productivity is a primary focus of the Government, which includes the Government getting the policy settings right[2], we encourage the Government to be mindful of these priorities in designing and implementing its future tax policies. This includes the pending implementation of payday super and the proposed Division 296 Better Targeted Superannuation Concessions.

Our detailed responses to the consultation paper are contained in the Attachment.

If you have any questions about our submission, please do not hesitate to contact Keddie Waller, Policy Manager via email keddiewaller@smsfassociation.com

Yours sincerely,

Peter Burgess
Chief Executive Officer

ABOUT THE SMSF ASSOCIATION

The SMSF Association is the peak body representing the self-managed superannuation fund (SMSF) sector which is comprised of over 1.1 million SMSF members and a diverse range of financial professionals. The SMSF Association continues to build integrity through professional and education standards for practitioners who service the SMSF sector. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial advisers, tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them with access to independent education materials to assist them in the running of their SMSF.

[2] https://alp.org.au/news/treasurer-jim-chalmers-economic-reform-in-our-second-term/

ATTACHMENT

Division 293 tax on concessional contributions by high-income earners

A technical amendment to Division 293 of the *Income Tax Assessment Act 1997* is needed to address the unintended legislative gap that penalises taxpayers who receive lump sum superannuation payments due to employer non-compliance with salary and superannuation obligations.

Currently, Division 293 imposes an additional 15% tax on super contributions when combined income and concessional contributions exceed $250,000, without discretion to reallocate or disregard lump sum payments caused by employer errors.

To address this issue, there are two probable solutions:

1. Amend Division 293 to provide the Commissioner of Taxation with discretion similar to section 291-465, allowing reallocation of contributions to the relevant financial years. We note the recent publication from the ATO that states it currently would be unsuitable to use these relief powers in such circumstances, as it is inconsistent with the purpose of the provision[3].
2. Introduce a concession akin to the lump sum payments in arrears tax offset under Subdivision AB of Division 17 of the *Income Tax Assessment Act 1936*.

Either of these amendments would align Division 293 with existing fairness mechanisms, prevent taxpayers from being unfairly penalised, and address the inconsistency between Divisions 291 and 293. Further, the proposed changes would have minimal revenue impact and, but benefit impacted taxpayers.

Recommendation: Further consultation with industry be held to determine the most appropriate technical amendment to address the current unintended legislative gap that penalises taxpayers who receive lump sum superannuation payments due to employer non-compliance with salary and superannuation obligations.

Non-arm's Length Expenditure Capital Gains Tax – Technical Issues

The view's expressed by the Commissioner of Taxation in Taxation Determination TD 2024/5[4] on the alignment of the NALI/NALE[5] provisions with the calculation, treatment, and classification of capital gains[6] as statutory income[7], require further clarification.

[3] When the Commissioner's remedial power was unable to be used to modify the superannuation law
[4] Australian Taxation Office, *Income tax: how the non-arm's length income and capital gains tax provisions interact to determine the amount of statutory income that is non-arm's length income* (TD 2024/5, 17 July 2024).
[5] *Income Tax Assessment Act 1997* (Cth) s295-550.
[6] *Income Tax Assessment Act 1997* (Cth) s 102-5. Capital gains tax- Method statement.
[7] *Income Tax Assessment Act 1997* (Cth) s295-10. Tax payable by superannuation entities – Method statement

The industry's interpretation of TD 2024/5 (i.e. that the current law risks tainting arm's length capital gains that occur in the same year as one that is not at arm's length) appears to be at odds with the ATO's "informally advised" position.

Should the Industry's position prevail, an urgent legislative solution is required to remediate this outcome, and to allow for the apportionment of capital gains, separately recognising the proportion of the net assessable capital gains that are not arm's length income.

Recommendation: The ATO should provide further clarification on how the NALI and CGT provisions interact when an arm's length capital gain occurs in the same income year as a non-arm's length capital gain. If necessary, a legislative solution should be sought to ensure an appropriate appointment of capital gains that is not NALI.

Payday Super

The SMSF Association supports the objective of the Payday super reforms, which will commence for all businesses on 1 July 2026. However, these reforms will introduce new legislative concepts, a new penalty regime for non-compliance and require extensive changes to third-party platforms including superannuation clearing houses to enable businesses to comply with their new obligations.

This reform also coincides with the Small Business Superannuation Clearing House closing, requiring approximately 250,000 employers to source a new clearing house in the coming months.

We are also concerned that the scale of reforms, the closing of the Small Business Superannuation Clearing House and the truncated timeframes disproportionately burden small business.

The SMSF Association recently was part of a joint industry submission[8] to the ATO on its draft *Practical Compliance Guideline PCG 2025/D5 Payday Super* – the first year ATO compliance approach. The submission made 12 important recommendations, including that the proposed compliance approach should apply for the first 24 not 12 months from the commencement of the reforms on 1 July 2026. We believe these recommendations are integral to support the successful implementation of Payday Super and reduce the red tape tax burden on business.

Recommendation: The 12 recommendations made in the joint industry submission and the approach outlined in raft Practical Guideline PCG 2025/D5, be adopted or actioned by the ATO..

Qualified Tax Relevant Provider Access to Client Tax Reports

In 2024 Treasury's released *Review of Tax Regulator Secrecy Exceptions* consultation paper, which included a discussion on access to certain ATO-held information by financial advisers who are 'qualified tax relevant providers' providing tax (financial) advice.

[8] https://www.smsfassociation.com/advocacy/joint-submission-draft-practical-compliance-guideline-pcg-2025-d5-payday-super-first-year-ato-compliance-approach?at_context=2874

A 'tax (financial) advice service' is defined in section 90-15 of the Tax Agent Services Act[9] as:

(1) A tax (financial) advice service is a tax agent service … provided by a financial services licensee or a representative of a financial services licensee in the course of giving advice of a kind usually given by a financial services licensee or a representative of a financial services licensee to the extent that:
a) the service relates to:

(i) ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under a taxation law, or

(ii) advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a taxation law, and

b) the service is provided in circumstances where the entity can reasonably be expected to rely on the service for either or both of the following purposes:

(i) to satisfy liabilities or obligations that arise, or could arise, under a taxation law,

(ii) (ii) to claim entitlements that arise, or could arise, under a taxation law.

These elements of the definition mirror the definition of a 'tax agent service.'[10] The key difference between the two classes of tax services is the express exclusion in the definition of a tax (financial) service of preparing tax returns or statements in the nature of a return.[11]

Of crucial importance here is the direct correlation for the provision of tax advice and the reliance a client can place on that advice for both classes of tax advice.

Notably, the ATO has also now issued new guidance on the tax deductibility of financial advice fees[12]. A deduction for taxation advice can only be claimed where the advice relates to the client's tax affairs[13] and is provided by a recognised tax adviser[14].

We believe that parity is needed for all tax professionals, to ensure that each cohort has access to information essential in the provision of timely and accurate and therefore compliant advice to their clients.

Recommendation: We recommend policy and legislative reforms to provide qualified tax relevant providers access to the ATO portal to enable them to appropriately advise and service their clients.

[9] *Tax Agent Services At 2009* (Cth).
[10] *Tax Agent Services At 2009* (Cth), s 90-5.
[11] *Tax Agent Services Act 2009* (Cth), s 90-15(3).
[12] Australian Taxation Office, *Income Tax: Deductions for financial advice fees paid by individuals who are not carrying on an investment business* (TD 2024/7, 25 September 2024).
[13] *Income Tax Assessment Act 1997* (Cth), s 25-5(1)(a).
[14] *Income Tax Assessment Act 1997* (Cth), s 25-5(2)(e), s 995-1: '*recognised tax adviser':* (c) a qualified tax relevant provider (within the meaning of the *Corporations Act 2001*).

Small Business CGT Concessions for In-Specie Contributions

For more than a decade there has been uncertainty regarding the use of in-specie contributions when applying the small business retirement exemption (or 15-year exemption), particularly where the contribution is intended to be covered under section 292-100 and applied against the CGT cap in s 292-105.

This is because for the in-specie transfer to occur, the CGT event, the choice to apply the exemption, and the contribution must all occur simultaneously. However, the legislation does not expressly state if these events occurring simultaneity is actually permitted.

This issue was first raised back in June 2011 at ATO Industry working groups and at the time the ATO indicated, but did not confirm, the law may require a sequential ordering of events. Since this time the sector has tried to navigate how to approach what is an unclear, but important, policy setting.

This has included individual taxpayers seeking an ATO private ruling. However, these rulings have been inconsistent, including:

- earlier rulings, for example PBR 1013054081138, 2016, being rejected, and
- more recent rulings, for PBR 1051633073283, 2020 and 1052086167213, 2023, stating the legislation does not prevent the CGT event, choice and contribution occurring at the same time.

This inconsistency is resulting in both compliance risk and ongoing uncertainty for SMSF trustees, including importantly small business owners who at retirement are seeking to maximise their retirement benefits by contributing the capital gain from the sale of business real property as an in-specie contribution to their SMSF.

Small business owners and SMSF trustees face ongoing compliance risks, including uncertainty about whether in-specie transfers qualify for the CGT concessions, the possibility that contributions may be incorrectly treated as non-concessional rather than counted under the CGT cap, and a growing need for unnecessary structuring or reliance on private rulings due to the lack of clarity.

We believe there are workable solutions to address this issue, such as:

- the ATO adopting ATO ID 2010/217[15] as Practical Compliance, which separates the CGT event from the contribution, provides practical certainty, and reduces the compliance burden without requiring legislative amendment, or
- minor legislative amendment to confirm that the CGT event, the choice to apply the concession, and the required contribution may occur simultaneously, including where the contribution is made in-specie.

Either approach would resolve longstanding uncertainty, ensure consistent treatment across the small business CGT concessions, and support the Review's broader modernisation and simplification objectives

[15] ATO ID 2010/217

Recommendation: The ATO should adopt ATO ID 2010/217 or amend the legislation to provide certainty and ensure consistent treatment across the small business CGT concession.

Treatment of Lump Sum Withdrawals Following Pension Failure – Unnecessary Complexity and Red Tape

Under long-standing rules, an account-based pension (ABP) that fails to meet minimum standards ceases from the start of the financial year. All subsequent payments must be treated as lump sums.

While familiar to the sector, the 2021 amendments to regulation 307-200.05, brought into focus only through the updated ATO ruling, have introduced a significant and unexpected administrative burden. The amendments require trustees to recalculate the tax-free and taxable components for every "post-failure" withdrawal, even where the recalculation produces no different tax outcome, poses no revenue risk, and does not advance the policy intent of the proportioning rules.

This obligation is out of step with practical administration. It imposes repeated earnings allocations, valuations and component adjustments before each payment, increasing cost, audit friction, and the likelihood of inadvertent error, without any corresponding integrity benefit.

The ATO has acknowledged limits on its ability to offer alternative methods under s 307-125(5), noting any administrative solution must align with the proportioning rule's intent. However, the current legislative drafting compels disproportionate administrative effort for immaterial or identical tax results.

We believe the development of an ATO-administered safe harbour, within existing Commissioner powers, allowing trustees to apply a single proportioning calculation at 1 July for the full financial year where a pension fails.

Such an approach would significantly reduce red tape, preserve policy integrity, provide certainty for trustees and auditors, and deliver a measurable productivity improvement aligned with the Review's objectives. It offers a simple, risk-neutral and practical solution consistent with the Government's broader agenda to modernise tax administration and remove unnecessary regulatory burden.

Recommendation: Develop an ATO administered safe harbour allowing trustees to apply a single 1 July proportioning calculation for the entire year following a pension failure. This removes the need for repeated recalculations while maintaining the integrity of the proportioning rules.

Residency Rules for SMSFs and Small APRA Funds – Need for Modernisation

The residency rules in s 295-95 of the ITAA 1997 create unnecessary red tape for SMSF and small APRA fund members working temporarily overseas. The active member test prevents many Australians from contributing to their SMSF despite the fund being established in Australia and its central management and control (CM&C) remaining here.

Members are instead forced to contribute to a large APRA-regulated fund and later roll those contributions back - an inefficient and costly duplication that reduces retirement balances and unfairly disadvantages SMSF members.

The current two-year CM&C temporary absence rule is similarly outdated given modern overseas work arrangements, which routinely exceed this timeframe.

We acknowledge the former Government's announcement to reform the SMSF residency rules and note the current Government's confirmation that these measures remain part of their policy agenda. COVID-19 temporary concessions showed that trustees can operate effectively under more flexible residency settings, further supporting the case for permanent reform.

To modernise the law and reduce red tape, we urge the Government to proceed with finalising the previously announced residency reforms, specifically, to:

- remove the active member test; and
- extend the CM&C temporary absence rule from two to five years.

These changes would modernise the law, reduce unnecessary duplication and compliance costs, and provide certainty for Australians working overseas while maintaining the integrity of the superannuation system.

Recommendation: That the Government finalise the previously announced residency reforms.