16 January 2026

Mr Lachlan Alvey
Acting Assistant Secretary, Tax and Transfers Branch, Retirement Income and Superannuation Division
Treasury
Langton Place
Canberra ACT 2600

Submitted via Treasury online portal

Dear Mr Alvey

Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2025

Thank you for the opportunity to provide this submission in response to the draft bills for the government's Better Targeted Super Concessions policy.

We also thank Treasury for the opportunity to participate in recent industry consultation meetings, including the meeting held earlier this week.

In our view, the practical changes to the policy announced by Government in October 2025 provide a more appropriate method of calculating superannuation earnings. However, our submission highlights several matters which require further consideration.

We understand the intent of the policy is to reduce the taxation concessions available to individuals who have large superannuation balances. We also understand the need to balance simplicity and equity and how the pursuit of simplicity can often give rise to niche or small cohorts of individuals who may encounter some level of unfairness.

In our view, the draft bills could be improved to better strike this right balance. Our submission identifies several examples of unintended consequences and unfair outcomes which are not highly unusual or unlikely scenarios. The imposition of Division 296 tax on individuals who may not be the beneficiaries of the superannuation benefit which gave rise to the Division 296 liability, and inappropriate amounts of Division 296 earnings being attributed to in-scope members, are some examples.

Adjustments are required to ensure these, and other instances of unfair outcomes and unintended consequences are minimised.

Our submission also outlines a proposed change to the CGT adjustment provisions to simplify their application.

We acknowledge the decision impact analysis is yet to be released. However, it is clear the changes announced by the Government in October 2025 will result in substantial increases in

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implementation and ongoing costs for the superannuation industry - costs which will ultimately be borne by all superannuation fund members, and not just those who are in scope.

These costs raise serious concerns about the ongoing sustainability of Division 296 considering the expected revenue gain to Government.

Our view remains there are other more cost-effective and less complex alternatives that should be considered by Government.

If you have any questions about our submission, please do not hesitate to contact us.

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.

TSB reference amount

Insurance proceeds

Whilst individuals who have made a structured settlement contribution are excluded from Division 296, there is no similar concession for individuals who have received TPD insurance proceeds via superannuation. Like structured settlement contributions, these proceeds usually represent large payments to provide funds for ongoing medical and care expenses.

It is our view that either, impacted individuals be excluded from Division 296 altogether, or that an adjustment be made to their TSB value to reflect the amount of insurance proceeds received.

Similar situations can also arise following the death of an insured member in the fund. That is, the proceeds of a life insurance policy owned by the trustee(s) of the fund, which are allocated to the deceased member's account, can often result in a large increase in the deceased member's balance. If the death benefit is not subsequently paid to beneficiaries before the end of the income year, it could result in a Division 296 tax liability which would otherwise not have arisen had the life insurance proceeds not been received.

We do not believe this is an appropriate outcome. To avoid these unintended situations from arising, a deceased member's TSB should be adjusted by the amount of life insurance proceeds received.

TSB integrity measure

There will be various situations in which the proposed use of the greater of the TSB opening and closing values will create potentially unintended consequences. For example, members suffering losses outside of their control (e.g. Shield and First Guardian) would have their Division 296 tax liability calculated based on balances which have simply disappeared.

In addition, post 1 July 2027, an individual who has a temporary spike in their TSB at the "wrong" time (i.e. toward the end of the financial year) will potentially be penalised for that twice (i.e. the year in which the spike occurs and the following year).

> ***Example***
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> *Sarah's TSB from the previous income year was $2.7m. A stock market rally just before the end of the income year saw her TSB at the end of the income year increase to $3.5m. Sarah is assessed for Division 296 based on the $3.5m balance.*
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> *Shortly after the commencement of the following income year there is a stock market correction which reduces her TSB below $3m. By the end of the income year her TSB has reduced to $2.5m. Sarah will still be subject to Division 296 tax because her TSB just before the start of the income year was $3.5. This is despite her TSB being less than the large superannuation balance threshold for the majority of the income year. The reduction in Sarah's TSB was not the result of any deliberate action taken by Sarah to avoid a Division 296 tax liability but rather was the result of investment market movements beyond her control.*

We understand the desire of Treasury to capture individuals who withdraw large amounts from superannuation in the same year in which their fund's Division 296 earnings are high (e.g. because assets have been realised) resulting in an artificial reduction in their taxable superannuation earnings. However, the proposed approach lacks equity and fairness. The TSB measure is imperfect but is the best available method using established tests and values. The method adopted should represent as close as possible a taxpayer's true position and not create artificial elements which give rise to unintended consequences.

We also question the additional cost and complexity of this measure versus the likely small increase in tax revenue. In the interest of increased simplicity, and to avoid unintended consequences, we recommend that a fixed TSB test time be used. At the very least, members who have not satisfied a full condition of release should not have their TSB determined as the greater of their TSB opening and closing values.

We note the amendments will provide a regulation-making power to specify a value or a method for determining a value of a superannuation interest. Should the Government proceed with this approach, the ATO Commissioner should be given the discretion to adjust a member's TSB calculation if the proposed approach would otherwise result in an outcome incongruent with the policy intent.

Deceased members

The potential imposition of Division 296 tax on a deceased member's interest gives rise to numerous practical complications.

For instance, in scenarios where the beneficiaries of the superannuation death benefit and the beneficiaries of the estate are not the same individuals, the beneficiaries of a deceased estate may incur a Division 296 tax liability even though they were not the beneficiaries of the superannuation death benefit – and have no recourse to the superannuation death benefit.

Other complexities will also arise as a Division 296 assessment notice may not be received by the executors of a deceased estate until 12 or more months after the end of the income year in which the member died.

Given most estates are finalised in 6 months or less, and the Division 296 tax assessment will be issued much later, many Division 296 tax assessments will arrive after the estate has been finalised and estate assets have been distributed to the deceased members' beneficiaries. In these situations, it is unclear what Treasury's expectations are in relation to collection of the Division 296 Tax liability.

Note: We understand there are established processes in place whereby the executor, before winding up the estate and lodging the deceased's final tax return and the estate's final tax return, can apply to the ATO for an estimate of any outstanding estate tax liabilities. However, given the long lead time for the reporting of superannuation fund data and ATO processes involved to identify in-scope members and obtain the necessary information to calculate a member's Division 296 tax liability, the ATO may not be aware of the Division 296 tax liability at that time.

Calculating total superannuation earnings

Franking credits and tax offsets

Paragraph 1.70 of the Exposure Draft Explanatory Materials refers to the fund's relevant taxable income as including grossed-up franking credits and foreign income tax offsets as they are considered a form of 'in kind earnings'.

We note the intent of this policy, as outlined in the summary and detailed explanation of the new law in the Exposure Draft Explanatory Materials, is to impose a tax at a rate of 15 per cent for superannuation earnings corresponding to the individual's TSB that exceeds the large superannuation balance threshold and 25 per cent for superannuation earnings corresponding to the individual's TSB that exceeds the very large superannuation balance threshold.

However, including the grossed-up amount of dividends received (i.e. the dividend received plus the franking credit) and foreign tax offsets as earnings inflates the true value of "actual" earnings and results in effective tax rates which, we feel, exceed those intended under this measure.

This outcome is particularly acute for pension funds which receive foreign income tax offsets as these funds do not receive the benefit of these offsets for ordinary income tax purposes.

Assessable contributions

We note the amount of "Assessable contributions" included in the formula in section 296-55 of the ITAA 1997 will be the amount worked out under subdivision 295-C of the ITAA 1997.

This subdivision makes no allowance for contributions, which for excess contributions cap purposes, the ATO has excluded or reallocated to another income year. The ATO may take this action in special circumstances to ensure the treatment of excess superannuation contributions is consistent with the objective of the legislation.

Under Subdivision 291-D of the ITAA 1997, "special circumstances" are unusual or out of the ordinary factors that lead to an unjust, unreasonable or otherwise inappropriate outcome. In assessing whether "special circumstances" exist, the ATO must consider:

- whether the contribution(s) would be more appropriately allocated to another financial year,
- whether it was reasonably foreseeable that the individual would have excess contributions at the time the contribution was made
- the extent to which the individual had control over the contribution being made, and
- any other relevant factors.

We consider a similar provision is needed in Division 296 to avoid situations where a taxable contribution is included in the fund's Division 296 fund earnings for an income year if it would be more appropriate to allocate it to another income year. This should extend, for example, to historical cases of unpaid or underpaid SG contributions.

Error in example 1.6

We note there is an error in example 1.6 of the Exposure Draft Explanatory Materials. In this example, the fund's ECPI should be $186,480 (rather than $216,667), as assessable contributions are to be deducted from assessable income when calculating ECPI.

Net ECPI

Paragraph 1.70 of the Exposure Draft Explanatory Materials, refers to net ECPI as the amount of exempt income under sections 295-385 and 295-390 of the ITAA 1997, reduced by expenses attributable to the exempt income that would have been deductible under section 8-1 if the income was not exempt.

It is not clear why only expenses deductible under section 8-1 are "added back".

In our view, expenses which are also partially deductible under other provisions should also be added back to return the fund to the same position it would have been in had the fund not been entitled to ECPI. Examples of such expenses include depreciation, capital works and LRBA borrowing costs.

An adjustment is also required for traditional security losses on segregated pension assets. Under ITAA 1936 s.70B(2A)(b) these losses are not deductible but, in our view, should be "added back" for the purpose of the net ECPI element of Division 296 fund earnings.

Further, in our view, a modification is also required where a fund has expenses which are fully deductible regardless of ECPI and the fund's net ECPI calculation would otherwise give a negative result. Examples of such expenses would include life insurance premiums, LIC deductions, SIS levy, actuarial fees and traditional security losses under ITAA 1936 s.70B(2).

Small superannuation fund attribution rule

Requirement to obtain an actuarial certificate

We note small funds will be required to obtain an actuarial certificate to perform the relevant calculations and provide the attribution share.

However, this requirement to obtain an actuarial certificate should not apply to single member funds. In this circumstance, the risk of selectively attributing specific fund assets to in-scope members in the fund does not exist.

This is consistent with the current exemption to the requirement to obtain an actuarial certificate for small funds calculating ECPI under the proportionate method where all members in the fund are in the retirement phase.

Attribution methodology

The additional guidance on proposed regulations, outlines the methodology to be used by small funds to proportion earnings to a member of the fund. The guidance states that the methodology will be based on the member's time-weighted share of the fund over the relevant income year. We note this is the same approach used by the fund's actuary when calculating ECPI under the proportionate method.

While we acknowledge the efficiency benefits of using the same approach to attribute earnings to members for Division 296 purposes, it is worth noting that this approach will give rise, on occasions, to unfair member outcomes. For example, a member who joins the fund part way through the income year may have their Division 296 earnings substantially increased by capital gains realised by the fund earlier in the income year and before the member joined the fund.

Similarly, when a member leaves the fund, any resulting capital gains realised by the fund will increase the Division 296 earnings of the remaining members and not the departing member to the same extent.

SMSFs with defined benefit pension interests

For an in-scope SMSF member with a defined benefit pension interest, the attribution of their fund earnings will comprise both earnings calculated using the TSB value formula approach in s296-65 for defined benefit pension interests as well as earnings calculated by an actuary for all other interests.

This appears overly complicated and cumbersome. Given an actuary will be required to calculate earnings for all other interests held by the member in the fund, consideration should be given to allowing the actuary to perform a single calculation of attributed earnings for all interests held by the member including any defined benefit pension interests.

Members switching funds

If an in-scope member leaves one fund and joins another fund during the income year, it is not clear how the ATO will collate their taxable superannuation earnings. Presumably, the ATO will use data provided by superannuation funds from the previous income year to identify members who have moved funds during the income year and then request the member's attributable earnings from their previous fund?

Although it is unlikely to be a common occurrence, consideration will need to be given to how the ATO will collate the taxable superannuation earnings of in-scope members who join a fund and then leave that fund during the same income year.

CGT adjustments for small super funds

We applaud the Government for introducing CGT adjustment provisions to ensure that the Division 296 tax will not be applied to earnings accrued prior to its commencement.

However, we note that the proposed cost base adjustment method for small superannuation funds will require a small superannuation fund to choose to adjust the cost base of the fund's CGT assets that it held on 30 June 2026 to the market value of those assets on that day, with the choice being ***applied to all CGT assets*** held by the fund on 30 June 2026.

SMSF trustees typically hold multiple assets. It is highly likely that at any point on or before 30 June 2026, the market value of some of these assets will exceed their cost base, while for other assets the asset's market value will be less than its cost base.

Requiring that the fund trustee's cost base adjustment choice be applied to all CGT assets held by the trustee will result in unfair outcomes where a particular fund asset's market value at 30 June 2026 is less than its cost base – but its cost base for Division 296 tax purposes is adjusted in accordance with these provisions.

> ***Example***
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> *Consider the ABC Super Fund. At 30 June 2026, Asset 1 has a market value of $3,500,000 (CGT cost base of $2,000,000). Asset 2 has a market value of $250,000 (CGT cost base of $500,000).*
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> *Following the trustee's choice to adjust the cost base for Division 296 Tax purposes, the cost bases are adjusted to $3,500,000 and $250,000 respectively.*
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> *In the 2027-28 year, the ABC fund sells Asset 2 for $350,000. This sale price is well below the asset's CGT cost base resulting in a loss for CGT purposes.*
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> *However, even though the fund has realised a loss on the sale of this asset, for Division 296 tax purposes the disposal of Asset 2 will result in a gain of $100,000 which is incongruous with the fund's actual economic outcome.*

In our view, to improve the fairness of these CGT adjustment provisions, the proposed cost base adjustment method for small superannuation funds should provide that the cost base (for Division 296 purposes) be adjusted, at 30 June 2026, to the greater of:

- The asset's market value at 30 June 2026, or
- The asset's CGT cost base.

This approach further simplifies the proposed CGT adjustment provisions by removing the need for an election to be made – reducing the regulatory burden on all participants across the small superannuation fund sector.

> ***Example – Updated to reflect our proposed CGT adjustment***

Consider the ABC Super Fund. At 30 June 2026, Asset 1 has a market value of $3,500,000 (CGT cost base of $2,000,000). Asset 2 has a market value of $250,000 (CGT cost base of $500,000).

In the 2027-28 year, the ABC Super Fund sells Asset 2 for $350,000. This sale price is well below the asset's CGT cost base resulting in a loss for CGT purposes.

To calculate the ABC Super Fund's superannuation earnings for the 2027-28 year, the fund trustees determine Asset 2's cost base (for Division 296 purposes) as, the greater of:

- *$250,000 (Asset 2 market value at 30 June 2026), or*
- *$500,000 (Asset 2 CGT Cost base).*

By locking in the higher cost base of $500,000 for Division 296 tax purposes, the disposal of Asset 2 will not result in any gain.

Note: The adjusted cost base (for Division 296 purposes) of Asset 1 would be $3,500,000 – being the greater of its market value at 30 June 2026 and its cost base.

It is also worth noting that some SMSFs still have pre-2017 deferred gain amounts. These funds are liable to pay tax on these amounts when the relevant asset is sold. In the year of sale, the deferred gain amount is included in the fund's normal CGT calculations (but without discounting and with no ECPI).

In our view, these amounts should be excluded from Division 296 fund earnings as the CGT event which gave rise to the gain occurred in 2017 (i.e. pre-30 June 2026).