7 April 2026

Mr Lachlan Alvey
Acting Assistant Secretary, Tax and Transfers Branch, Retirement Income and Superannuation
The Treasury
Langton Crescent
Parkes ACT 2600

BY ELECTRONIC LODGEMENT

Dear Sir/Madam,

SMSF ASSOCIATION SUBMISSION –BUILDING A STRONGER AND FAIRER SUPER SYSTEM ACT 2026 – DRAFT REGULATIONS

The SMSF Association welcomes the opportunity to provide feedback in response to the Government's *Income Tax Assessment (1997 Act) Amendment (Building a Stronger and Fairer Super System and Other Measures) Regulations 2026* (Draft Regulations).

Post-death earnings attribution

Open ended attribution period

The Draft Regulations introduce an approach under which superannuation earnings derived in subsequent income years following the death of an in-scope member are included in the calculation of that member's total superannuation earnings in the year of death.

We note this policy position was not articulated in our previous discussions with Treasury, the primary legislation, nor the previously released 'Additional guidance on proposed regulations' paper, which was intended to provide insights into the proposed scope and operation of these Regulations.

This represents a material expansion of the regime that has not been subject to appropriate scrutiny.

The proposed approach is difficult to reconcile with the personal tax nature of Division 296. It introduces a level of complexity that is not aligned with established estate administration practices and, in practical terms, may prove unworkable.

While we acknowledge Treasury's objective of ensuring that gains realised after death are captured, the proposed design gives rise to significant administrative costs, complexity and unintended consequences.

In particular, the Draft Regulations effectively create an open-ended attribution period, whereby earnings realised in future income years are attributed back to the deceased member's year of death until such time as death benefits are finalised. This creates uncertainty in relation to:

- when a Division 296 liability crystallises;

- when an assessment will be issued; and
- the point from which penalties and interest may begin to apply.

These concerns are amplified where assessments may not be issued until several years after the member's death, creating a disconnect between the timing of the taxing event and the administration of the liability.

It is understood, from the Draft Regulations, that a Division 296 tax determination is intended to arise only once a death benefit for an in-scope member has been paid (or, in the case of a death benefit pension, once another person becomes the recipient of a retirement phase income stream). This creates a practical sequencing issue, as the liability arises only after the superannuation interest has effectively been paid.

In these circumstances, it remains unclear how an executor could elect for any resulting Division 296 tax liability to be paid from the deceased member's superannuation interest, given that those benefits may already have been distributed in accordance with the SIS requirements to pay death benefits "as soon as practicable". This creates a circular outcome, whereby the liability arises only after the superannuation interest has been paid, but at that point there may no longer be any capacity to fund the liability from within the superannuation system.

If this option is not available, an executor's ability to discharge the Division 296 liability may be materially constrained, particularly where estate assets have already been distributed. This creates a clear misalignment between the timing of the liability and access to the assets from which it arises.

These issues are compounded by the practical reality that most deceased estates are finalised within six to twelve months, whereas Division 296 assessments may be issued significantly later. This creates a real risk that a Division 296 liability will arise after the estate has been fully administered, exposing executors or beneficiaries to a tax liability without access to the assets from which it arose.

As noted in our submission on the draft legislation, the imposition of Division 296 tax on a deceased member's interest can also give rise to significant mismatches between those who benefit from the superannuation interest and those who bear the tax liability.

For example, the beneficiaries of the superannuation death benefit may differ from the beneficiaries of the estate, resulting in estate beneficiaries being exposed to a Division 296 liability despite not receiving the superannuation benefit and having no recourse to those assets.

The inclusion of post-death earnings further exacerbates these issues by extending both the quantum of the liability and the period over which it may arise.

While the SIS Act requires death benefits to be paid "as soon as practicable", there are many legitimate circumstances in which delays occur, including disputes between beneficiaries, delays in identifying beneficiaries, or administrative complexities within the fund. In these situations, the executor of a deceased estate – who may not be a trustee of the SMSF – has limited control over the timing of death benefit payments, yet remains exposed to a potentially increasing Division 296 tax liability over time.

Requiring executors to delay the finalisation of a deceased estate until superannuation death benefits are finalised would increase the costs, complexity and risks associated with administering deceased estates and may expose executors to additional tax and penalties arising from delays beyond their control. This outcome is difficult to reconcile with principles of sound tax administration.

Despite the value of the deceased's superannuation interests, a deceased estate may not have the capacity to meet any resulting Division 296 liability. As noted previously, the executor or administrator may not be in control of, or entitled to receive, the superannuation interests. This may give rise to situations where liabilities are effectively uncollectable, including the potential for the estate to become insolvent, resulting in reduced, or nil Division 296 tax being recovered.

More broadly this raises questions as to whether the modified treatment of deceased individuals under the Draft Regulations may give rise to liabilities that are effectively uncollectable, undermining the practical operation of the regime and its ability to deliver intended revenue outcomes.

This is particularly concerning given the additional layers of complexity and costs imposed on trustees and executors to comply with the regime, despite there being no assurance that the resulting liabilities can be effectively recovered.

Recommendation

The treatment of superannuation interests on death should be aligned with existing principles governing the provision of death benefits and the administration of deceased estates.

Such an approach would improve certainty, reduce administrative complexity, and better align Division 296 with the broader superannuation and estate administration framework.

Death benefits – Form and timing differences

The operation of Draft Regulation 296-70.04 highlights inconsistency with substantially identical superannuation savings at the time of death resulting in different Division 296 outcomes depending, solely on the form and timing of death benefit arrangements.

In particular, subsection 296-70.04(2)(b) provides that earnings may continue to be attributed in later income years until the earlier of:

> *"(i) the time that all superannuation death benefits have been paid or distributed from the interest; or*
> *(ii) the time when, because of the deceased individual's death, another person becomes a retirement phase recipient of a superannuation income stream supported by the relevant interest."*

This distinction is significant. Under paragraph (b)(i), attribution continues until all death benefits have been paid, whereas under paragraph (b)(ii), attribution ceases once a retirement phase income stream commences, without requiring that all death benefits support that income stream.

In practice, this may give rise to different outcomes especially as in-scope members are expected to have balances in excess of the transfer balance cap and therefore hold a combination of retirement phase and accumulation interests.

For example, where a member has a reversionary pension, the beneficiary automatically becomes the recipient of the death benefit income stream on death. In these circumstances, the deceased member's Division 296 earnings effectively stop accruing at the date of death. Any accumulation interests will continue to accrue Division 296 earnings until those benefits are paid.

In contrast, where no reversionary pension is in place, any existing pension will cease on death. What was previously the deceased member's pension interest will merge with any accumulation interests they have so that the deceased has a single accumulation interest. Division 296 earnings will then continue to accrue on the merged interest until such time as a retirement phase income stream commences or all benefits are paid.

Accordingly, the timing of the death benefit income stream becomes critical. Two members with otherwise identical superannuation interests at the time of death may be subject to materially different Division 296 outcomes depending solely on whether a reversionary pension was in place or on how quickly a retirement phase income stream is established.

This outcome is difficult to reconcile with a regime intended to operate as a personal tax, as it results in different liabilities arising from administrative timing differences rather than any difference in a person's total superannuation interests.

This difference may drive behaviour that is influenced by tax considerations, rather than outcomes that are appropriately aligned with the sole purpose test and the provision of retirement and death benefits. This, in turn, places trustees in a conflicted position as they seek to balance their fiduciary duties, including acting in the best interests of beneficiaries, with the operation of the Division 296 regime.

This is particularly concerning in the context of death benefits, which are already a highly contested and frequently litigated area. The introduction of additional tax-driven considerations is likely to increase the risk of disputes, especially if beneficiaries are adversely affected by the resulting Division 296 outcomes.

These outcomes may also be exacerbated by the nature of the fund's underlying investments. Funds with liquid assets (such as listed securities or cash) may be able to finalise the cashing of death benefits relatively quickly, whereas funds holding illiquid or lumpy assets (including property or related party investments) may require significantly longer timeframes to unwind. As a result, members may be disadvantaged based on long-term investment decisions, permitted by a regulatory environment, where Division 296 did not exist.

Recommendation

Consider amendments to ensure equitable Division 296 outcomes, such that substantially identical superannuation interests at death are subject to consistent tax treatment, regardless of the form and timing of death benefit arrangements.

This issue should be considered in conjunction with the broader concerns outlined above in relation to post-death attribution of earnings. Taken together, these issues reinforce the need for serious consideration to be given to an approach under which Division 296 earnings are limited to the period up to the member's death.

Actuarial Certificate Requirements

Actuarial certificate - Exemption

The Draft Regulations provide that the amount attributable to a superannuation interest must be determined wholly by reference to an actuary's certificate, unless:

- a single individual is the only member of the fund for the whole of the fund year; or
- the Division 296 fund earnings for the fund for the year are nil.

We welcome the exclusion from the requirement to obtain an actuary's certificate for single member small superannuation funds, consistent with our feedback provided during consultation on the draft bill.

However, further clarification is required regarding which SMSFs are required to obtain an actuary's certificate for the purposes of Division 296 tax.

Under the current drafting, SMSFs with more than one member will generally be required to obtain an actuarial certificate where the fund has positive earnings, regardless of whether any member is in-scope for Division 296 tax.

However, the Explanatory Statement (ES) indicates a broader exception, stating that:

> *"An exception to the requirement to have an actuary's certificate applies if … the small superannuation fund has no members in-scope for Division 296 tax (since they will not be required to report an amount, there is no need to obtain an actuary's certificate)."*

The concept of "no members in-scope" is not equivalent to Division 296 fund earnings being nil.

This creates a disconnect between the regulatory requirement and the policy intent described in the Explanatory Statement and introduces uncertainty as to whether SMSFs with no members in-scope for Division 296 tax are required to obtain an actuarial certificate.

This may lead to inconsistent interpretation and application across the industry.

Recommendation

Align the Draft Regulations and Explanatory Statement to provide clarity on when an actuarial certificate is required for SMSFs for Division 296 purposes.

Actuarial certificate - Scope

The Draft Regulations require the attribution of Division 296 earnings for SMSFs to be determined by reference to an actuary's certificate.

It is unclear whether Treasury intends for such certificates to specify the relevant member proportion(s) or certify the specific dollar amount(s) of earnings to be attributed to each member.

A percentage-based approach would appear most consistent with existing actuarial processes, with the resulting attribution percentage(s) being applied to Division 296 earnings calculated by the fund.

Recommendation

We seek clarity as to whether the actuarial certificate is intended to determine allocation percentages or attributed dollar amounts.

Special Attribution of Earnings for SMSF Members

<u>Distorted attribution outcomes – Unallocated reserves</u>
Unallocated reserves do not form part of any member's superannuation interest. Notwithstanding this, earnings generated from those reserves are included in Division 296 fund earnings under section 296-60 of the ITAA.

Under Draft Regulation 296-65.03, these earnings would then be allocated to members pursuant to an actuary's certificate, based on members' proportional total superannuation balance (TSB) values.

This will result in members being assessed for Division 296 tax on earnings derived from fund assets to which they have no present entitlement, creating a clear misalignment between a member's personal tax liabilities and their actual superannuation interests.

This outcome is particularly concerning given that earnings on assets supporting unallocated reserves are already subject to tax at the fund level. Further, any subsequent allocation of reserve amounts to members is constrained by contribution caps, with amounts exceeding prescribed limits subject to excess contributions tax.

Example

Steven and Patricia are members of an SMSF. Steven is in-scope for Division 296 tax purposes, while Patricia is not. Their member balances are outlined below, and it has been assumed, for ease of illustration, that the superannuation earnings (for the purposes of Section 296-60) equate to 10%. The fund also has an unallocated reserve i.e. a reserve not associated with discharging pension liabilities.

	Balances	***Super Earnings (assumed 10%) Sec 296-60 ITAA***	***Relevant Superannuation Earnings Regulation: 296-65.03***
Steven	*$4,000,000*	*$400,000*	*$4m / $6m = 66.7% = $466,667*
Patricia	*$2,000,000*	*$200,000*	*$2m / $6m = 33.3% = $233,333*
Unallocated Reserve	*$1,000,000*	*$100,000**	
Totals	***$7,000,000***	***$700,000***	

**Earnings derived by assets held in the unallocated reserve are attributed to members for Division 296 purposes, despite not forming part of any member's interest.*

Based on the above, Steven's TSB Proportion will be 25%, i.e. (($4m - $3m) / $4m). As such, he will be liable to Division 296 tax of $17,500 – calculated as ($466,667 x 25% x 15%).

Steven will be taxed on $66,667 of attributed earnings from assets he is not presently entitled to and that he may never receive or benefit from.

Recommendation

The Government should consider aligning the earnings calculation and attribution frameworks so that Division 296 outcomes reflect members' actual superannuation interests and do not give rise to unintended distortions.

<u>Distorted attribution outcomes – Changes in SMSF membership</u>

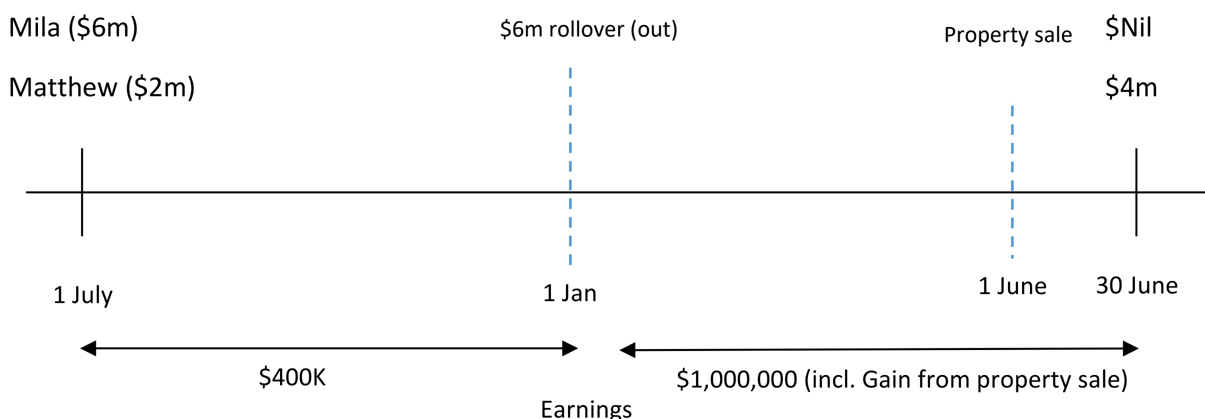
Division 296 earnings are calculated at the fund level (section 296-60 of the ITAA) and then attributed to members based on their relative interests over the course of the year (as per Draft Regulation 296-65.03). However, this approach can produce distorted outcomes where there are changes in membership during the year.

In particular, members who join or leave a fund part-way through the year will be attributed earnings for periods during which they were not a member, had no interest in the fund, and had no control or influence over decisions made by the fund trustee(s) during these periods.

This outcome appears inconsistent with the personal nature of Division 296 tax, which is intended to tax individuals based on their superannuation interest(s).

Example

Mila and Matthew are members of an SMSF. On 1 January, following a relationship breakdown, Mila rolls her entire member balance over to another fund. In June, Matthew, as the sole remaining member decides to sell a property investment held in the fund, realising a large capital gain.



Mila average balance = $3m ⟹ 50% attribution ⟹ Relevant Earnings $700K

Matthew average balance = $3m ⟹ 50% attribution ⟹ Relevant Earnings $700K

In this example, Mila is attributed 50% of the fund's relevant superannuation earnings, including earnings arising in the second half of the year when they were no longer a member of the SMSF. This outcome is particularly harsh where, as in this scenario, the remaining member chooses to realise a large capital gain after the departing member has exited the fund.

In this scenario, Mila will be taxed on earnings arising from decisions over which she has no control, and in respect of assets in which she no longer holds an interest.

Conversely, Matthew benefits from only being attributed 50% of earnings, despite being the sole member of the fund at the time those gains were realised.

Recommendation

Align Division 296 outcomes with the personal nature of the tax to ensure individuals are only taxed on earnings attributable to periods in which they held an interest in a fund.

<u>Negative Earnings – Consistent treatment for all superannuation interests</u>

The Note included in Draft Regulation 296-65.02, expressly states that the relevant superannuation earnings of a superannuation fund (other than a small superannuation fund) may be negative:

> *"Note: An amount determined in accordance with this section may be negative."*

There is no equivalent note inserted at Draft Regulation 296-65.03 – which relates to interests in small superannuation funds.

Subsection 296-60(7) of the Act provides that Division 296 fund earnings are taken to be nil where they would otherwise be negative.

> *"The Division 296 fund earnings for an income year for an entity is nil if, apart from this subsection, it would be negative."*

This is confirmed by the accompanying EM to *Treasury Laws Amendment (Building a Stronger & Fairer Super System) Bill 2026* at clause 1.65:

> *"If a superannuation entity's Division 296 fund earnings would be negative, it is taken to be nil. This provision clarifies that there will be no negative earnings or loss amounts carried forward by the entity, specifically for Division 296 purposes."*

The interaction between these provisions is not clearly articulated, creating uncertainty as to when negative earnings outcomes are intended to arise.

Recommendation

Adjustments are required to ensure losses are treated in a comparable manner across all types of superannuation interests.

<u>Negative Earnings – Ability to offset positive and negative earnings across interests</u>

Further to the discussion above, where an in-scope individual has multiple superannuation interests, it is our view that negative relevant superannuation earnings from any of these superannuation interests should be allowed to offset positive relevant superannuation earnings from other superannuation interests when determining their total superannuation earnings for Division 296 tax purposes for the relevant year.

It is our view that an individual's total superannuation earnings (as defined by Section 296-55(1) ITAA) should reflect that individual's aggregated earnings across all funds.

The inability to use negative relevant superannuation earnings from one superannuation interest to offset positive relevant superannuation earnings from another superannuation interest will unfairly penalise those with multiple superannuation interests. This can lead to outcomes where an individual incurs a Division 296 liability that is not a true reflection of their net superannuation earnings across their superannuation interests, for the relevant year.

While it is understood that the policy intent is not to allow negative earnings to be carried forward, the current approach goes further by preventing offsetting within the same income year, resulting in an asymmetrical outcome that is inconsistent with the personal nature of the tax.

Example

Troy (an in-scope individual) holds two superannuation interests.

During the same income year:

- *his relevant superannuation earnings for Fund 1 (a large APRA-regulated fund) are $45,000; and*
- *his relevant superannuation earnings for Fund 2 (an SMSF) are ($15,000).*

If the loss on Fund 2 cannot be offset against the gain on Fund 1, Troy's Total Superannuation Earnings for the year will be calculated as $45,000, rather than $30,000 (being his net earnings across both interests).

Accordingly, to ensure Total Superannuation Earnings reflects an individual's net position for the income year, losses arising in one superannuation interest should be able to offset gains arising in another superannuation interest (for the same individual and the same income year).

Recommendation

Allow individuals to offset positive and negative relevant superannuation earnings across all their superannuation interests within the same income year.

This would ensure that Division 296 tax operates as a genuine personal tax on an individual's net relevant superannuation earnings for the year, while remaining fully consistent with the Government's policy intent that any losses are confined to the income year in which they arise and cannot be carried forward to future years.

<u>Treatment of defined benefit interests</u>

Small funds with both accumulation and defined benefit members will typically be required to determine and apportion relevant superannuation earnings for Division 296 tax purposes using a combination of two separate methods.

That is, fund trustees will be required to:

- obtain an actuary's certificate to apportion earnings from accumulation interests (as per Section 296-65(5) ITAA and Draft Regulation 296-65.03); and
- apply a separate formula to determine relevant superannuation earnings for prescribed defined benefit interest(s) (as per Section 296-70(1) ITAA).

Firstly, it is unclear how Treasury envisages these two methods will interact with one another in practice, and secondly how they are to be applied concurrently without giving rise to unintended consequences.

For example, we are cognisant of the important role that reserves play in supporting defined benefit interests within an SMSF. However, as these pension interests will broadly be valued in accordance with their 'family law value' (Section 296-70 ITAA), this may not fully reflect the assets (including reserves) supporting those interests in a fund. As a result, we are concerned that earnings derived by these pension reserves may inadvertently be included in the relevant superannuation earnings of accumulation members within the same fund.

In effect, the current attribution methodology for accumulation interests applies to a broader pool of fund assets than is reflected in the value of superannuation interests used in the allocation formula.

This issue is further highlighted where materially different Division 296 outcomes can arise depending solely on whether superannuation interests are held within a single SMSF or across separate funds, even where those interests are otherwise identical.

Example

An individual holds a $2 million accumulation interest and a defined benefit interest with a family law value of $500,000, supported by $1 million of fund assets.

If both interests are held within the same SMSF (total assets $3 million), and fund earnings are $150,000, the accumulation interest may be attributed 80% of earnings ($120,000), based on a $2.5 million denominator when applying the formula in Draft Reg 296-65.03(2).

However, if the defined benefit interest were held in a separate fund, the accumulation member would only be attributed earnings on their $2 million interest (i.e. $100,000).

Despite no difference in superannuation interests, an accumulation member is attributed an additional $20,000 of earnings solely because their interests are held within the same SMSF.

Recommendation

We seek clear guidance, including a practical worked example in the Explanatory Statement, which clearly illustrates how Division 296 earnings should be calculated and attributed in funds with both accumulation and defined benefit interests.

The Government should consider adjustments to better align Division 296 outcomes with members' respective interests and ensure consistent and equitable treatment regardless of fund structure. In particular, adjustments should be made to ensure that earnings derived from assets supporting defined benefit pension interests (including reserves) are not inappropriately attributed to accumulation members in a fund.

If you have any questions about our submission, please do not hesitate to contact us. We thank you again for the opportunity to provide this submission.

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 1.2 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.