21 August 2026

Assistant Secretary
Individuals and Indirect Tax and Superannuation Division
The Treasury Langton
Crescent PARKES ACT 2600

BY ELECTRONIC LODGEMENT

Dear Sir/Madam,

SMSF ASSOCIATION SUBMISSION: CAPITAL GAINS TAX AND NEGATIVE GEARING – TRANCHE 2 LEGISLATION

The SMSF Association welcomes the opportunity to provide this submission in response to the Government's proposed amendments following recent reforms to the operation of capital gains tax and negative gearing across the four exposure drafts.

Broadly, we have concerns on the level of complexity introduced by these taxation reforms. The lack of administrative efficiency creates drag, and that loss of efficiency and simplicity adds significant cost to the system. Ordinary taxpayers will need the assistance of a registered tax agent to navigate and comply with these amendments.

In addition, elements of the proposed testamentary trust exemption from the 30% minimum tax on capital gains tax require greater clarity with regards to the treatment of superannuation death benefit proceeds. We would discourage reliance being placed on policy statements contained in explanatory materials, guidance and rulings later issued by the Commissioner of Taxation or the taxpayer's application to obtain a private ruling. Tax professionals and taxpayers alike need clarity and certainty on how these laws operate for investment and estate planning decisions made and documented today.

This suite of reforms included amendments tabled in the Senate to ban limited recourse borrowing arrangements (LRBA) for self managed superannuation funds (SMSF)[1]. Given the lack of consultation on the amendments to the Bill and the absence of an explanatory memorandum, essential amendments are now needed to remediate the unintended consequences of the new law and ensure alignment with the Government's policy to deliver new residential property.

We direct you to our detailed feedback on the exposure draft materials and related issues appended to this submission.

[1] *Treasury Laws Amendment (Tax Reform No. 1) Act 2026* (Cth) sch 5.

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If you have any questions about our submission, please do not hesitate to contact Tracey Scotchbrook, Head of Policy and Advocacy via email traceyscotchbrook@smsfassociation.com

Yours sincerely,

Peter Burgess

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.

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Testamentary trusts – superannuation death benefits and integrity provisions

The SMSF Association supports the proposed exemption from the minimum tax on capital gains for genuine testamentary trusts and deceased estates. This is an important recognition that testamentary trusts perform legitimate estate planning, asset protection and succession functions and should not be treated in the same manner as arrangements at which the minimum tax is directed.

However, we consider that proposed section 119-20 of the *Income Tax Assessment Act 1997* (ITAA 1997) requires further refinement in its interaction with superannuation death benefits. In particular, the proposed reliance on section 102AG of the *Income Tax Assessment Act 1936* (ITAA 1936) creates uncertainty and, in one case, an apparent difference in treatment depending upon the pathway by which a superannuation death benefit reaches a trust.

Superannuation death benefits paid through a deceased estate

Proposed paragraph 119-20(2)(b) provides that the testamentary trust exemption applies where the relevant capital gain relates to assessable income that is excepted trust income because of paragraph 102AG(2)(a) of the ITAA 1936.

Paragraph 102AG(2)(a), in conjunction with subsection 102AG(2AA), broadly confines the existing testamentary trust concession to income derived from property transferred to the trust from the deceased estate, and subsequent accumulations of income or capital from that property. This restriction was introduced to prevent assets unrelated to the deceased estate from being injected into a testamentary trust.

The interaction of these provisions with a superannuation death benefit paid to the deceased's legal personal representative (LPR) warrants clarification.

A superannuation death benefit is not ordinarily an asset legally owned by the deceased immediately before death. Nevertheless, it has an obvious and substantive connection with the deceased. It arises from the deceased member's superannuation interest and becomes payable as a consequence of the member's death. Where the death benefit is paid to the LPR, forms part of the deceased estate and is subsequently transferred to a testamentary trust in accordance with the deceased's will, the arrangement is materially different from the injection of unrelated property into a testamentary trust.

Importantly, subsection 102AG(2AA) does not expressly require the property subsequently transferred to the testamentary trust to have been owned outright by the deceased immediately before death. Paragraph 102AG(2AA)(b)(i) instead refers to property transferred to the trustee from the estate of the deceased person as a result of the relevant will, codicil, intestacy or court order.

The policy underlying subsection 102AG(2AA) also supports a distinction between superannuation death benefits attributable to the deceased member and genuinely extraneous property injected into the estate or testamentary trust. The explanatory material to the present Bill similarly explains that subsection 102AG(2AA) is intended to prevent assets “unrelated to the deceased estate” from being added to a testamentary trust.

Despite this, neither the proposed legislation nor the explanatory material expressly confirms the treatment of a superannuation death benefit paid to an LPR after death. Given the frequency with which superannuation death benefits are directed to an estate as part of conventional estate planning, taxpayers should not be required to obtain private rulings or rely upon broader statements of legislative purpose to establish the tax treatment of such an ordinary arrangement. Further, the existence of favourable private rulings does not provide an adequate substitute for clear legislation, particularly for an issue affecting a common class of estate planning arrangements.

The Association therefore recommends that the legislation expressly confirm that, for the purposes of section 119-20, property transferred to a testamentary trust from a deceased estate can include a superannuation death benefit received by the LPR as a consequence of the deceased member's death. Similar clarification should be considered for life insurance proceeds payable to the estate.

Greater clarity and certainty can be achieved by either:

- Amending and clarifying the language in section 102AG(2AA) itself so that it is sufficiently clear that a superannuation death benefit (and related insurance proceeds) received by an LPR and subsequently transferred to a testamentary trust is covered; or
- Revising the proposed provision at section 119-20 so that, for its purposes, the relevant section 102AG condition is treated as satisfied in those circumstances.

At a minimum, the explanatory material should also include a clear example confirming that where a superannuation death benefit is paid to an LPR, becomes property of the deceased estate and is subsequently transferred to a testamentary trust pursuant to the deceased's will, the fact that the death benefit was received by the estate only after death does not, of itself, prevent the resulting trust income and capital gains from satisfying the exemption.

Superannuation death benefits paid directly to a trustee

There is a related but distinct issue with the proposed reliance exclusively on paragraph 102AG(2)(a).

The existing excepted trust income provisions expressly recognise certain property transferred directly to a trustee as a consequence of a person's death. In particular, subparagraph 102AG(2)(c)(v) applies, subject to the other requirements of section 102AG including subsection 102AG(2A), to income derived from the investment of property transferred to a trustee for the benefit of a beneficiary directly as the result of the death of a person and out of a provident, benefit, superannuation or retirement fund.

Proposed paragraph 119-20(2)(b), however, is confined to income that is excepted trust income because of paragraph 102AG(2)(a). It does not extend to income that qualifies as excepted trust income because of paragraph 102AG(2)(c).

This distinction may produce different CGT minimum-tax outcomes according to the pathway by which a death benefit reaches a trust. Subject to satisfying the relevant statutory requirements, a superannuation death benefit paid to the LPR and subsequently transferred from the deceased estate to a testamentary trust may fall within paragraph 102AG(2)(a), whereas property transferred directly from a superannuation fund to a trustee for the benefit of a beneficiary may instead fall within subparagraph 102AG(2)(c)(v) and therefore be outside proposed section 119-20(2).

It is not apparent from the explanatory material whether this difference is intentional.

The Association recommends that Treasury reconsider this distinction. At a minimum, the explanatory material should identify the intended treatment of death-benefit arrangements falling within subparagraph 102AG(2)(c)(v) and explain the policy basis for any different treatment.

If the policy intention is that genuine death-benefit trust arrangements should receive equivalent treatment, proposed section 119-20 should be amended to accommodate income qualifying under subparagraph 102AG(2)(c)(v), subject to the existing safeguards applying under section 102AG and any additional integrity requirements considered necessary.

Treasury may also wish to consider the corresponding death-related provisions in subparagraphs 102AG(2)(c)(iv) and (vi), dealing respectively with life insurance proceeds and amounts paid directly as a result of death by an employer, to ensure consistent treatment of economically comparable death benefits.

Such an amendment could be appropriately targeted so that it does not extend the exemption to trusts having no genuine testamentary or death-benefit character.

Purpose-based integrity provisions

The Association supports appropriately targeted integrity measures to ensure that the testamentary trust exemption cannot be accessed by contrived arrangements involving the injection of unrelated property.

We are concerned, however, that proposed subsections 119-20(5) and (6), together with subsection 119-20(7), may extend materially beyond that policy objective.

Proposed subsection 119-20(5) applies where assessable income is derived directly or indirectly under or as a result of a scheme entered into or carried out for a purpose, or purposes including a purpose, of securing the application of the testamentary trust or deceased estate exemption. Subsection 119-20(7) disregards only a purpose that is "merely incidental". The relevant tax purpose therefore need not be the sole or dominant purpose of the arrangement.

We acknowledge that similar purpose-based language presently appears in subsections 102AG(4) and (5). However, the proposed provisions will operate in the broader context of estate, succession and superannuation death-benefit planning, where the tax consequences of alternative structures are routinely and legitimately considered.

For example, an individual may consciously consider taxation consequences when deciding:

- whether a superannuation death benefit should be directed to their LPR;
- whether assets should pass into a testamentary trust;
- how a will should structure testamentary trusts for a spouse, children or other dependants;
- the ownership and beneficiary arrangements for life insurance; or

- the interaction between superannuation nominations, the deceased estate and testamentary trusts.

The deliberate consideration of the tax treatment Parliament has chosen to confer on a genuine testamentary trust should not, without more, transform conventional estate planning into an arrangement to which an integrity provision applies.

This is particularly important because the explanatory material describes the target of the provisions much more narrowly than the statutory language. Paragraphs 1.86 and 1.87 describe the integrity measures as excluding gains arising from “contrived arrangements”, while paragraph 1.88 states that the second rule is intended to be limited to “contrived schemes driven by this tax outcome”. Neither limitation is apparent on the face of proposed subsections 119-20(5) or (6).

Paragraph 1.88 does not fully resolve the concern. Its example concerns activities undertaken to increase the value of the estate left to heirs. It does not address the more common circumstance in which a taxpayer or adviser consciously selects an otherwise conventional estate or superannuation death-benefit structure partly because of the taxation consequences Parliament intends that structure to attract.

The Association recommends that the legislation contain an appropriate safe harbour for ordinary bona fide estate and succession planning. The integrity provisions should not apply merely because taxation consequences were taken into account when determining the terms of a will, establishing a testamentary trust, arranging the ownership of estate assets, or determining the appropriate destination of a superannuation death benefit or life insurance proceeds.

Such a safe harbour could be confined to arrangements having a genuine estate, succession or death-benefit purpose and where the relevant property has a substantive connection with the deceased, their estate, superannuation interest or life insurance arrangements. This would preserve the ability of the integrity provisions to address artificial injections of unrelated assets while providing taxpayers and advisers with confidence that conventional estate planning is not adversely affected.

Alternatively, consideration should be given to adopting a higher purpose threshold, such as a principal or dominant purpose of obtaining the exemption, particularly where the arrangement otherwise represents ordinary estate or succession planning.

In either case, the explanatory material should include practical examples dealing with common arrangements involving wills, testamentary trusts, superannuation death-benefit nominations and life insurance. Certainty is particularly important in this context because these arrangements are generally implemented well before the relevant taxing event and, following a person's death, may be incapable of being restructured.

Recommendations

The Association recommends that Treasury:

1. Expressly confirm that a superannuation death benefit paid to an LPR and subsequently transferred from the deceased estate to a testamentary trust is capable of satisfying the

proposed exemption notwithstanding that the death benefit was received by the estate after the member's death;

2. Reconsider the exclusion of excepted trust income arising under subparagraph 102AG(2)(c)(v), and clarify the intended treatment of qualifying superannuation death benefits transferred directly to a trustee for a beneficiary; and
3. Narrow or supplement the integrity provisions with an express safe harbour protecting bona fide estate, succession and superannuation death-benefit planning from the purpose-based rules merely because the taxation treatment of a testamentary trust was deliberately taken into account.

Technical Corrections

We bring to your attention, two minor drafting matters in the explanatory material:

1. Paragraphs 1.78 and 1.81 refer to s 102AG(2)(a) as a provision of the ITAA 1997, although s 102AG is in the ITAA 1936; and
2. Paragraph 1.83 also appears to contain a drafting error. Immediately following the discussion of the deceased-estate exemption, it refers again to a capital gain arising for a beneficiary of a “testamentary trust”. Context suggests that reference should be to a “deceased estate”.

CGT Apportioning Method

The Association has no specific comments on the exposure draft determination.

As a general comment, we are concerned by the high level of complexity and administrative cost being introduced into the capital gains tax regime. These calculations make CGT calculations complex for tax professionals and extremely challenging for ordinary taxpayers. Most ordinary taxpayers will need to engage the services of a registered tax agent to assist in the preparation and lodgement of their tax returns.

Negative Gearing (Tranche 2)

We welcome the proposed amendments to address the unintended consequences arising on the death of a spouse or co-owner of a property, and from family law property splitting arrangements.

The Association has no further comment in relation to this exposure draft.

Parity for LRBAs and Family Law Property Law Splitting Arrangements

Similar concessions are needed for residential property held in an SMSF is transferred under consent orders to facilitate a family law split. The property, subject to a limited recourse borrowing arrangement in Fund A may require a new arrangement to be established as part of the transfer of property to Fund B. Such arrangements should expressly qualify for grandfathering under the amended LRBA rules and not be classified as a new arrangement.

We would welcome the opportunity to further discuss and work with Treasury on the necessary amendments.

LRBAs - 'Business real property' definition not fit for purpose

While not the subject of these exposure drafts, urgent legislative fixes are needed. An amendment to the Bill saw amendments to LRBA packaged with the *Treasury Laws Amendment (Tax Reform No. 1) Act 2026* (Cth) alongside the CGT and negative gearing amendments, the subjects of these exposure drafts.

The term business real property (BRP) was designed to provide clarity on exceptions to the related party acquisition rules[2] and the in-house asset rules[3] which also involves certain related party arrangements. The BRP definition is not fit for purpose for use in the LRBA provisions. BRP is a precise and specific definition that does not refer to or consider the zoning of the property. What constitutes BRP is substantially a fact-based determination requiring the property to be wholly and exclusively used in a business and looks at the nature of the connection between the use and a business.

Timing of the application of the BRP test is critical. It is applied at the time of acquisition, and in some cases, it is a continuous test applying throughout the holding period.

The LRBA amendments do not address circumstances where the fund acquires property not used in a business at the time of its acquisition, but it is intended to be used in a business post-acquisition. Examples include:

- Vacant land for use in the business. This can be idle or newly developed land acquired for use in business as storage, parking, or primary production activities. Any commercial or rural zoning alone would not render the property BRP.
- Newly constructed commercial property which has not as yet been used by a business.
- Residential property that may be used as BRP once acquired. This is common for doctor's surgeries and other professional and medical businesses. Such acquisitions and changes of use arise from zoning changes.

The above are just a few examples of property used in a business, acquired on market from unrelated arms-length parties, that would fail to meet the definition of BRP. This outcome would appear to be a distortion and an unintended consequence of the LRBA amendments.

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[2] *Superannuation Industry (Supervision) Act 1993* (Cth) s 66 – Acquisitions of certain assets from members of regulated superannuation funds prohibited; s 66(2) – Exception – acquisition of business real property and listed securities.

[3] *Superannuation Industry (Supervision) Act 1993* (Cth) pt 8 [Strictly limits investments or prohibits investments in in-house assets]; s 71(1) – Meaning of an in-house asset… an asset of the fund that is a loan to or an investment in a related party of the fund; s 71(1)(g) – but does not include … a lease or a lease arrangement … if through out the term of the lease … the property is business real property (within the meaning of subsection 66(5)) of the fund.

The Commissioner of Taxation's ruling on BRP ruling[4] does not provide sufficient comfort to investors seeking to acquire property for use in their business, that does not meet the strict definition of BRP. The ruling is aged and needs modernisation to ensure it operates effectively in a contemporary setting. However, any review or update is unlikely to provide a remedy or relief for SMSF trustees seeking to acquire property that falls outside the strict BRP definition given the purpose of the ruling. Further, trustees do not have the luxury of time and cannot wait for an updated ATO ruling. They need an urgent and commonsense legislative solution.

New Residential Dwelling and Negative Gearing Activity Exemptions

SMSFs and LRBA investment in new residential dwellings

We urge Government to align SMSF LRBAs to its housing policy objectives and retain SMSF LRBAs where the secured asset is a newly constructed residential property, including genuine off-the-plan apartments, townhouses and house-and-land dwellings that add to net housing supply.

Existing compliance obligations ensure that residential property held by an SMSF can only be held as a genuine, unrelated investment. The property cannot be used, occupied or leased to a member, trustee or a related party. There is an opportunity for SMSFs to help support housing supply through this important capital investment. It also brings policy alignment to the Government's policy objectives to actively create new housing supply.

Further, discussions on SMSFs and LRBAs can be found in the final section of this submission.

Anti-avoidance Provisions

We support the inclusion of anti-avoidance measures that ensure the integrity of the tax system and that ensure that measures operate as intended. However, the drafting of proposed section 5(10) of the ITAA 1997 appears broad and risks capturing genuine investment activity and projects.

Difficulty arises as taxation considerations will inherently feature alongside a range of commercial factors in the assessment of a viability of a property development or project.

We would expect that any arrangements must consider the operation of existing Part IVA anti-avoidance provisions contained in the ITAA 1936. The new provision must set a clear benchmark on what is considered to be anti-avoidance activity. It must be unambiguous. Guidance in the explanatory memorandum will be essential and should be supported by practical, real-world cameos to illustrate inappropriate scheme arrangements.

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[4] Australian Taxation Office, *Self Managed Superannuation Funds: business real property for the purposes of the Superannuation Industry (Supervision) Act 1993* (SMSFR 2009/1, 28 January 2009) : Minor technical amendments (15 November 2023) following *Treasury Laws Amendment (Self Managed Superannuation Funds) Act 2021* increased the maximum number of allowable members from 4 to 6 from 1 July 2021. No substantive amendments or revisions have been applied to this ruling since its original publication.

SMSFs, LRBAs and New Residential Property Investment

Claims that LRBAs pose systemic risk to retirement savings have persisted but have consistently been debunked. Reports from both the Council of Financial Regulators[5] and the Productivity Commission[6] have consistently shown that no systematic risk could be found. Continued monitoring and reporting to Government has consistently been recommended and we support this approach.

We agree that LRBAs are not suitable for everyone and concur they may pose a significant risk to some individuals. The inappropriate use, promotion, or sale of LRBAs (as with any other financial products across the financial services ecosystem) should be addressed under the existing regulatory frameworks and powers conferred upon regulators. Not through sudden and unexpected policy changes, which detrimentally impact legitimate investors and investment activities.

The impacts of this policy shift are not limited solely to the SMSF sector. It has a direct impact on small business owners seeking to invest prudently, provide stability for their business and their retirement income in the future. The viability of projects that supply new housing into the market are directly impacted, and that impact is already being felt.

SMSF assets acquired using a LRBA equated to up to 6.7 per cent[7] of the total value of all SMSF sector assets. Residential property represented 57 per cent of that portion. In real terms, that equates to around 3.8 per cent of all SMSF sector assets.

SMSFs do not hold sufficient market share to actively distort residential property prices. The total residential property investment by SMSFs, both with and without a LRBA, represents just 0.8 per cent of the total Australian residential property market. Further, the long-term investment horizon provides stable, long-term rentals. A supply of good quality residential properties and stable rental markets are as important as access for new home buyers and families as owner occupiers.

While only a small percentage of SMSFs are invested in LRBAs for residential property investment, that is not a justification for poor policy design and outcomes.

SMSFs provide essential base capital funding commitments for many off the plan developments. This role cannot be overlooked and is vital in a housing market where additional supply is urgently needed. It secures bank finance and ensures that the development project as a whole can proceed.

Industry evidence indicates SMSF purchasers can represent 30-60 per cent of investor-led off-the-plan sales, with one major developer reporting 50-60 per cent across various projects.[8] Industry data shows there is a three times multiplier effect from the loss of pre-sales and with industry data also showing there were over 6,500 SMSFs established in FY2024 with an LRBA to purchase

[5] Council of Financial Regulators and ATO, *Leverage and Risk in the Superannuation System* (Report to Government, February 2019); Council of Financial Regulators, *Leverage and Risk in The Superannuation System* (Report to Government, September 2022.

[6] Productivity Commission, *Superannuation: Assessing Efficiency and Competitiveness* (Final Report, 21 December 2018): Finding 10.4

[7] Australian Taxation Office, *Self-managed super funds: A statistical overview 2023-24* (statistical report, 16 June 2026) tbl 6: SMSF asset allocations.

[8] UDIA: Scenario analysis against the National Housing Accord.

residential property, the construction of almost 20,000 new dwelling each year may now be at risk of delay or may not proceed at all.

Those SMSFs who already have LRBA arrangements in place are not impacted by the transitional arrangements but are not immune from the impacts of these changes. There is a very high risk that lenders will start to exit residential LRBA lending or close their books, preventing trustees from refinancing existing arrangements. As a result, trustees may become locked into an arrangement that in the future is no longer fit for purpose, but they will have no ability to switch providers.

We urge Government to align SMSF LRBAs to its housing policy objectives and retain SMSF LRBAs where the secured asset is a newly constructed residential property, including genuine off-the-plan apartments, townhouses and house-and-land dwellings that add to net housing supply.