Bentleys
THINKING AHEAD

Bentleys Newcastle Pty Ltd
Level 1, 241 Denison Street
Broadmeadow NSW 2292
Australia
PO Box 411
Hamilton NSW 2303
Australia
ABN 16 116 184 617
T +61 2 4940 6100
F +61 2 4961 6810
bentleysnewcastle.com.au

18 October 2023

Director
Superannuation Tax Unit
Retirement, Advice and Investment Division
Treasury
Langton Crescent
PARKES ACT 2600

Dear Director

Submission re Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023

Introduction

My name is Kim Phillips and I am currently employed as the CAANZ Self-Managed Superannuation Fund (SMSF) Specialist at Bentleys Newcastle Pty Ltd. I have worked in the superannuation industry for 20+ years.

At Bentleys Newcastle Pty Ltd we provide accounting/administration services for approximately 175 SMSFs.

In all my years working in the superannuation space, this is the first time that I have prepared and lodged a submission to Treasury regarding proposed legislation as we, at Bentleys Newcastle Pty Ltd, believe that the Division 296 proposed legislation is not only inequitable for those affected, and likely to be affected in the future, but also increases the perception that saving for retirement using the superannuation system is too risky as the rules are constantly changing and you can be punished for following the rules along your superannuation journey from accumulation phase and then into retirement.

We believe that these constant changes to the superannuation system are devaluing the concept of saving for retirement due to increasing legislative risk.

It is ironic that at the same time as the Government is looking to legislate the Objective of Superannuation to ensure that superannuation is not accessed for reasons other than funding retirement by future governments, they are looking to reduce the retirement savings of those who have followed the rules in the past and punishing those who have made good investments in the past and into the future. Just because it only affects a small number of Australians does not make it fair!

Member of Allinial GLOBAL® An association of legally independent firms

A member of Bentleys, a network of independent advisory and accounting firms located throughout Australia, New Zealand and China that trade as Bentleys. All members of the Bentleys Network are affiliated only and are separate legal entities and not in Partnership. Liability limited by a scheme approved under Professional Standards Legislation. A member of Allinial Global - an association of independent accounting and consulting firms.

Advisors
Accountants
Auditors

When in retirement phase, due to the Transfer Balance Cap (TBC) capping how much can be in pension phase, these large superannuation balances which are the target of the proposed legislation already pay 15% tax on a large proportion of their superannuation earnings whereas those with smaller balances pay no tax on their Total Superannuation Balance (TSB) as their entire retirement savings will most likely be fully in pension phase.

Also, while no demographics have been published, our experience in the industry suggests that the majority of the Members affected by this change will be older and therefore these large balances are likely to pass out of the superannuation system in the near-term leaving legacy legislation that will continue to punish those who have done the right thing.

It seems inequitable that retail/industry funds are lauded for their excellent investment returns due to prudent investing whereas the Members of an SMSF are punished for investing their superannuation wisely and maximising the retirement income of their members.

Issues with the Division 296 legislation as drafted

- Earnings Calculation including Unrealised Gains
  - From the commentary available and the Treasury's own releases, it appears unrealised gains have been included in the calculation solely because retail and industry funds find it hard to calculate the unrealised gains and losses at an individual Member level.

    Many other recent changes to the superannuation system have meant that administrative software for SMSFs has had to undergo major and expensive development to comply so it seems illogical and inequitable that the systems of the other Funds do not have to undergo changes due to new legislative requirements.

    Frankly, it is also concerning that the reporting for Members of these Funds is not currently able to show the actual returns versus the unrealised gains/losses.
  - This is a dangerous precedent to set for all other taxpaying entities and individuals whereby tax is being levied before the revenues/capital gains are actually earned/realised and funds are available to pay any tax payable. Furthermore, this is totally unfair to the Members to have such an imposition and unprecedented anywhere else in the world.
  - From the draft legislation, it also appears there may be double taxation of the earnings associated with excess non-concessional contributions as they are included in the Member's taxable income and taxed at marginal tax rates but not added back in the proposed earnings calculation.
- Non-indexation of the $3 million cap
  - While it is estimated that this change will only apply to around 80,000 people in the 2025/2026 income year, not having the $3 million cap indexed may lead to many more superannuation Members being included in future years as those younger Members who have been in the superannuation system since first commencing work are caught. This is especially relevant given the current level of inflation, the recent increases in SGC and wage growth.

- Treatment of Total and Permanent Disability (TPD) payouts in the TSB calculation

    - While payouts for TPD will be excluded in the first year of receipt of the Member's adjusted TSB as a contribution, it will form part of the calculation in future years meaning that any earnings including capital gains from the TPD payout will be taxed in future years.

      This contrasts with Members who receive a structured settlement as this will be excluded from the proposed Division 296 regime forever.

      This does not appear fair given both are received for essentially the same issue, namely a permanently disabling injury.

- No tax refunds in years of negative earnings

    - It is unfair to carry forward the negative earnings as an adjustment against future positive earnings when it may never be used especially when Funds are near the end of their life and tax paid in previous years is never recouped.

      If Funds/Members are required to find the liquidity to pay the tax payable under Division 296 then the Government should also have to find that liquidity to refund tax in negative earnings years.

- Moving excess balances out for those Members who have not met a Condition of Release

    - For Members who have not met a condition of release, it is not fair or equitable that they are not able to withdraw part of their balance so they are not subject to the proposed legislation when they contributed and grew their balance in accordance with the rules at the time.

- Increased liquidity stress

    - As investments may need to be sold at inopportune times to fund the tax on unrealised gains, it may mean that Funds are making investment decisions which are not in the best interest of Members and their retirement interests.

    - Further, where the SMSF has a particularly lumpy asset e.g. business real property, the need to sell this asset to fund the Division 296 tax could have a dire effect on the net asset position of the Members of that SMSF. Whilst we understand that it is a requirement for all Trustees to consider diversification and liquidity as part of their investment strategy, there can be legitimate investment reasons why there is a lack of diversification or short-term liquidity. It should not be the case that these reasons are disregarded and the returns of the SMSF reduced due to the imposition of an unfair tax.

    - This will also make it more difficult to plan investments due to the volatility of the markets and the uncertainty as to whether additional Div 296 tax is payable when investment decisions are made.

Alternative Solutions

- An additional 15% tax on balances in excess of $3million, based on the portion of the Member's taxable actual realised earnings (excluding contributions).
  - We believe this to be a much fairer result, and software providers should have no real difficulty in providing this information for each Member in respect to Members of both SMSFs and other Superannuation Funds.
- Increasing the tax rate to 30% for the taxable portion of death benefit payments over a determined threshold.
  - This would make large intergenerational wealth transfers from superannuation less attractive and prompt the removal of excess benefits within Funds.
- Introducing 15% tax on the taxable portion of total lump sums taken in an income year after 60 over a determined threshold.
  - This would go hand in hand with the proposal above and discourage large withdrawals just prior to death to get around the tax on death benefit payments.
- Lifetime cap for non-concessional contributions
  - Capping the amount of after-tax income that can be contributed into the superannuation system may be one way to reduce the large balances that have historically been seen.

Conclusion

In summary, while we, like most superannuation professionals and Members, agree that the tax concessions afforded under the current superannuation system are very generous and should be reviewed on a regular basis to ensure that the system is not being used for purposes other than providing a comfortable income for retirement, we cannot agree that the proposed Division 296 legislation provides that mechanism in a fair and equitable manner for the reasons listed above which mainly relate to the inclusion of unrealised gains in the proposed earnings calculation.

Thank you for the opportunity to provide feedback on this proposed legislation and please do not hesitate to contact me should you require any clarification of the matters raised in this submission.

Yours sincerely

Bentleys Newcastle

Kim Phillips BComm, CA (SMSF Specialist), Dip FS (F.P.)

Associate Director