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Dear Director

Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023

We refer to Treasury's Exposure Draft *Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023 ("ED")* and accompanying *Explanatory Materials* ("EM") which propose an additional impost of 15% tax for individuals whose superannuation balances exceed $3 million from 1 July 2025 ("proposed Div 296 Tax").

We thank you for the opportunity to provide our submissions on the ED and EM and we set out a summary of our submissions below and detailed submissions in the attached Appendix.

We have provided our submissions from our perspective as a leading accounting and tax advisor and a valued partner of the Australian Taxation Office (ATO) through its Key Agent Program. We represent the interests of many individuals who be impacted by the introduction of the proposed Div 296 tax upon commencement, and many more of our clients will be impacted in the future.

Summary of submissions:

1. Concerns in respect of the formulas contained within the ED, including:
    1.1. Unprecedented taxation of unrealised gains
    1.2. Failure to allow for indexation of the relevant total superannuation balance
    1.3. The impact of compulsory minimum pension drawdowns
2. Failure to provide a mechanism outside of existing conditions of release for individuals to withdraw an amount in excess of $3 million
3. Concerns regarding the practical application of the proposed Div 296 tax, including:
    3.1. Present inaccessibility to the relevant information
    3.2. How the ATO will receive the information

We thank you in advance for your consideration of our submissions.

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Please contact Simon Gow (simon.gow@au.gt.com or 08 9480 2000) if you wish to discuss this matter further.

Yours sincerely

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APPENDIX

Submission 1: Concerns in respect of the formulas contained within the ED

1.1: Unprecedented taxing of unrealised gains

It is proposed in section 296-40 of the ED that the amount of basic superannuation earnings for an income year is worked out using the formula: *Current adjusted total superannuation balance – previous total superannuation balance.* Throughout this submission paper we reference these components as "adjusted TSB" and "TSB".

We submit the following concerns and make the following comments regarding the outlined formula:

- Taxing of unrealised gains is inconsistent with the existing taxation law, whereby the taxing point generally occurs upon disposal of the asset
- Taxing unrealised gains will crystallise a tax liability for the individual who does not enjoy the same benefit of a corresponding cash inflow that typically arises in tandem with tax liabilities on realised gains which can be used to settle this liability
- In some instances, the value attributed to an asset for the purposes of the annual required market revaluation is somewhat arbitrary as the true value is indeterminable until a willing buyer is identified and sale negotiations are underway
- Australian family businesses will be heavily impacted under this measure where their self-managed superannuation fund holds the business real property on which their business operates, including agricultural land
    - These businesses are an integral part of the Australian economy, accounting for a large number of Australian businesses.
    - Many self-managed superannuation funds in the 1990s-2000s were setup with a common strategy being to own business premises used in a related business, and over many years to today the value of the property has risen resulting in members of the fund having balances above $3 million.
    - In its present form, it is anticipated that tax proposed Div 296 tax will place undue cashflow pressure on families in instances where the most substantial asset held in the self-managed superannuation fund is property, such as their business premises, leaving insufficient cashflow at either the individual or fund level to settle the resulting assessments.
    - This is likely to lead to forced disposal of property simply to settle liabilities arising under the proposed Div 296 tax.
- The proposed formula is likely to result in double taxation whereby the same gain is subject firstly to tax at up to 15% as part of the earnings calculation for TSBs in excess of $3 million, and secondly at 15% (or 10% net of CGT discount) when the relevant fund asset is ultimately disposed of
- The ED provides no mechanism for the recoupment of tax paid on unrealised gains that are subsequently reversed
    - A simplistic example, which assumes no withdrawals or contributions, outlining the impact of the proposed calculation to one individual is shown below:

Year Ended	TSB	Basic superannuation earnings/(loss)
30 June 2025	$3,000,000	N/A
30 June 2026	$3,200,000	$200,000
30 June 2027	$4,000,000	$800,000
30 June 2028	$2,800,000	($1,200,000)

        - In this example, a proportion of the basic superannuation earnings of $200,000 and $800,000 in 2026 and 2027, respectively, will be subject to the proposed Div 296 tax
        - There is no allowance made for the individual to claw back any part of the tax paid against the loss resulting in 2028

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- We note that section 296-105 of the ED provides for a reduction in current year superannuation earnings by prior year losses, however, we submit that there will be instances where the loss may never be utilised against future earnings, for instance, where the asset value continues to decline, or declines over a long period of time (in instances like the GFC) and is particularly problematic if this coincides with retirement or death, so there isn't real opportunity to recoup losses in the future.

It is submitted for the purpose of calculating the relevant basic superannuation earnings that the ATO should contact the individual's superannuation fund(s) where it is noted they have a TSB above $3m, to request the fund report actual taxable fund earnings applicable to a member in a given financial year.

Requesting taxable earnings accruing to the member in this way in the relevant year alleviates the arbitrary calculation as proposed in section 296-40 of the ED that includes unrealised gains that may never eventuate. This method would then remain consistent with current tax treatment of taxing gains generally only when realised, rather than being arbitrarily applied on notional unrealised gains.

1.2: Failure to provide for indexation of the relevant large superannuation balance threshold

On introduction of the proposed Div 296 tax on 1 July 2025, the government anticipates that this measure will affect around 80,000 people, being those with balances in excess of the "large superannuation balance threshold", set at $3 million in the ED. However, we submit that given there is no mechanism provided in the ED for indexation of this threshold, which we note is wholly inconsistent with other key superannuation caps and thresholds, the fixed threshold will result in significantly more individuals being affected by this measure over time due to inflation.

We submit that the relevant TSB threshold should be indexed, in keeping with other current superannuation caps and thresholds, such as the general transfer balance cap. With indexation applying to the latter, but not the former threshold, the amount that individuals are eligible to hold in tax-free retirement phase increases, along with the associated minimum pension withdrawal, which is then added back in the proposed additional tax calculation. Over time, and with no provision for indexation, this is likely to serve as a disincentive for individuals to save for their own retirement, placing a heavier burden on Australia's retirement system.

1.3: The impact of compulsory minimum pension drawdowns

It is proposed under section 296-45 of the ED that an individual's adjusted TSB is to be calculated using the following formula: *Your total superannuation balance at the end of the year* + *Your withdrawals total for the year* – *Your contributions total for the year.*

The inclusion of withdrawals made, including those required in line with minimum pension requirements, in this calculation serves to increase the amount of earnings for that year, resulting in a higher additional tax liability. We submit that this approach will serve to disadvantage those individuals who presently hold balances in retirement phase, as they are obligated to withdraw a compulsory minimum amount on an annual basis.

It is submitted that the exclusions outlined within s296-50(4) of the ED be expanded to include withdrawals required to comply with minimum pension requirements.

Submission 2: Failure to provide a mechanism outside of existing conditions of release for individuals to withdraw an amount in excess of $3 million

In its present form, an individual's liability to the proposed Div 296 tax is determined by reference to a TSB of $3 million or greater as at 30 June 2026. There is currently no mechanism within the ED allowing individuals who expect to exceed this balance to reduce their balances via withdrawals prior to the additional tax impost outside of the existing conditions of release. In this regard, these individuals are left with no choice but to pay a Div 296 tax assessment.

It is anticipated that many individuals with balances in excess of $3 million will not yet have:

- Reached preservation age and retired;
- Reached aged 60 and ceased an employment arrangement; or
- Be aged over 65.

There also remains a number of individuals who hold legacy lifetime pensions that cannot be commuted.

To ensure that the proposed Div 296 tax does not unduly disadvantage such individuals it is submitted that the cashing restrictions contained within the *Superannuation Industry (Supervision) Regulations 1994* be expanded to provide for a once off withdrawal by individuals who do not satisfy other conditions of release. This would

provide impacted individuals with an opportunity to restructure their superannuation balances in line with other superannuation fund members who have met a condition of release.

In tandem with this expansion, a further exclusion would be required to be inserted at section 296-50(4) of the ED in order to ensure any once off withdrawal is not captured within the calculation of an individual's adjusted total superannuation balance.

We further submit that these withdrawals be treated as non-assessable income of the individual, irrespective of their age and that realised gains or losses crystallised by the superannuation fund as part of facilitating these withdrawals be disregarded.

Submission 3: Concerns regarding the practical application of the proposed Div 296 tax

3.1: Present inaccessibility to the relevant information

Many Australians hold their superannuation balances across multiple funds, both in industry, retail and self-managed superannuation funds, for the purposes of access to a wider range of investments and insurance benefits. In these instances, the individuals may not be aware that their TSB exceeds the adjusted threshold, nor do many of them have the ability to easily track their withdrawals and contributions across multiple funds for the purposes of calculating their adjusted TSB. Additionally, many also hold Defined Benefit superannuation balances, which are difficult to determine a value for at a point in time, making it difficult for these individuals to accurately plan for Div 296 tax assessments.

Whilst this information is made available to individuals via myGov, it is noted that this service is not utilised by the entirety of the population. Further, from a tax agent perspective, only the tax agent who is engaged by the individual has access to this data, therefore, tax agents who act only for a self-managed superannuation fund but not the underlying members, and their financial advisers, are not able to efficiently confirm the member's total superannuation balance without seeking external confirmation.

It will become even more critical for tax agents and financial advisers to have efficient and reliable access to the data relevant in calculation of their client's exposure to the proposed Div 296 tax, so that they are able to provide timely advice on its impact and any associated recommendations.

3.2: How the ATO will receive the relevant information

Whilst the ED provides the formulas for calculation of the respective components underlying the proposed Div 296 tax liability, it, nor the EM, goes so far as to detail what underlying information the ATO will be reliant upon in undertaking this calculation. In addition, we question at what point in time this calculation will be undertaken by the ATO and assessments issued, and whether this will place a heavier burden on tax agents to report final balances, in respect of self-managed superannuation funds, within a shortened time frame.

We note the ED in its current form will likely add significant administrative burden on ATO systems, and limitations on the availability of timely and accurate data may result in incorrect or delayed assessments, and the associated uncertainty for the affected individuals. This will also add additional administrative burden on affected members, their funds, and their tax agents due to the currently proposed mechanism for assessing individuals, and an additional indirect cost to all taxpayers to monitor and determine if the proposed Div 296 tax applies.