16 October 2023

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

By email: superannuation@treasury.gov.au

Dear Sir/Madam,

Re: Draft *Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023* and *Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023* ('exposure draft legislation')

The National Tax and Accountants' Association Ltd ('NTAA') welcomes the opportunity to provide comments on the Government's exposure draft legislation. The exposure draft legislation addresses the Government's intention to impose a 15% additional tax ('Division 296 tax') on certain individuals with a total superannuation balance ('TSB') exceeding $3 million from 1 July 2025.

The NTAA is a national member-based organisation that represents the interests of around 10,000 member firms, including taxation accountants and superannuation professionals. For many years, the NTAA has been dedicated to helping and providing support to these professionals by:

- providing a tax and superannuation consulting service through a national tax hotline;
- developing and running nationwide tax and superannuation seminars; and
- liaising with Treasury, and participating in ATO tax forums and consultative groups.

The NTAA acknowledges that the exposure draft legislation makes a number of positive changes to the Division 296 tax as originally announced by the Government and outlined in its initial consultation paper: *Better targeted superannuation concessions*. These changes include:

- the exclusion of certain LRBA amounts when working out an individual's TSB for the purposes of proposed Division 296;
- adjusting an individual's 'superannuation earnings' for the income year in which they become a recipient of a death benefit pension interest, by the value of that pension interest; and
- adjusting an individual's superannuation earnings for an income year by the amount of a family law superannuation payment made during the year due to a payment split.

However, despite these changes, the NTAA believes the exposure draft legislation fails to address a number of **key concerns** associated with the proposed Division 296 tax, which are outlined below.

1. **The proposed Division 296 tax and unrealised capital gains**

The proposed methodology for calculating an individual's superannuation earnings for an income year under proposed S.296-40(2) will result in the inclusion of unrealised capital gains in an individual's superannuation earnings for the income year. This means that a proportion of unrealised capital gains for an income year will be subject to the proposed Division 296 tax where a liability arises for that year.

The NTAA has the following concerns regarding the inclusion of unrealised capital gains under the exposure draft legislation:

(a) Taxing unrealised capital gains is inconsistent with the existing tax law, which only taxes realised capital gains (e.g., on the disposal of a CGT asset).

(b) Where a proportion of unrealised capital gains for an income year is subject to the proposed Division 296 tax, this will occur without any application of the general CGT discount.

(c) Taxing a proportion of unrealised capital gains will create a tax liability at the individual level, without a corresponding inflow of cash to assist in paying for such a liability. This could create significant cash flow issues for many individuals with a Division 296 tax liability.

    Furthermore, where an individual in these circumstances seeks to make a withdrawal from an SMSF in order to pay for their Division 296 tax liability, an SMSF with insufficient cash flow may be forced to sell off assets in order to fund such a liability. This could prove to be extremely problematic where an SMSF's investments largely or solely comprise real property.

(d) There is currently no mechanism by which a capital gain triggered on the disposal of a fund asset can be reduced on the basis that unrealised gains in relation to that asset have previously been taxed at 15% under proposed Division 296. This means that the same gain in respect of a fund's asset can potentially be taxed twice, as follows:

    - Firstly, at 15% as part of the superannuation earnings calculation for an income year under proposed Division 296; and
    - Secondly, at 15% (or at 10% for a discount gain) when the fund's asset is eventually disposed of (i.e., where the asset was held by the trustee to support accumulation phase interests).

The NTAA urges the Government to amend the proposed methodology for calculating an individual's superannuation earnings for an income year so that unrealised capital gains for an income year are not subject to Division 296 tax. Alternatively, the existing proposal should be amended to allow a realised capital gain in respect of a fund's asset to be appropriately reduced when the asset is eventually disposed of, to avoid the same capital gain being subject to double taxation.

2. **Non-indexation of the $3 million TSB threshold**

The exposure draft legislation does not provide for the $3 million TSB threshold (referred to as the 'large superannuation balance threshold') to be indexed. This is consistent with the Government's initial consultation paper regarding the proposed Division 296 tax.

There are two key concerns with this approach, as follows:

- By 1 July 2025, the Government expects that more than 99.5% of individuals with a superannuation account will be unaffected by the proposed Division 296 tax. However, the non-indexation of the $3 million TSB threshold will result in many more individuals being affected by this measure over time (i.e., depending on the annual rate of inflation after the proposed measure is introduced).
- The non-indexation of the $3 million TSB threshold is inconsistent with many existing superannuation thresholds that are indexed. This includes the general transfer balance cap, which limits the total amount an individual can transfer into the tax-free retirement phase over their lifetime (e.g., by commencing one or more retirement phase pensions). The general transfer balance cap was set at $1.6 million when it was first introduced on 1 July 2017, and has since been indexed to $1.7 million on 1 July 2021 and to $1.9 million on 1 July 2023.

The NTAA urges the Government to provide for the indexation of the $3 million TSB threshold, consistent with the general transfer balance cap, as both effectively reduce the tax concessions available for earnings that relate to superannuation balances above a certain threshold.

3. **Adding back minimum pension withdrawals to an individual’s closing TSB for an income year when calculating superannuation earnings for the year**

When calculating an individual’s superannuation earnings for an income year, the exposure draft legislation requires any superannuation benefit withdrawals made during the year to be added back to the individual’s closing TSB for the year (i.e., as part of the individual’s ‘withdrawals total’ under proposed S.296-50). This has the effect of increasing the individual’s superannuation earnings amount for that year, resulting in a higher Division 296 tax liability.

This approach can be disadvantageous for individuals in pension phase who are compelled to draw down a minimum annual pension amount under the pension standards in the *Superannuation Industry (Supervision) Regulations 1994*. This is because, although minimum annual pension withdrawals are compulsory for individuals in pension phase, they will still be added back to an individual’s closing TSB for an income year when calculating their superannuation earnings on which Division 296 tax is based.

The NTAA strongly recommends that the Government amends the proposed definition of ‘withdrawals total’ in S.296-50 to ensure that minimum annual pension withdrawals are excluded from this definition so that they are not added back to an individual’s closing TSB for an income year.

4. **Providing individuals with the option to restructure their superannuation balances**

The exposure draft legislation fails to provide individuals with larger superannuation balances who do not otherwise satisfy a condition of release (e.g., ‘retirement’) the opportunity to withdraw part of their superannuation balance and invest such a withdrawal outside of superannuation.

Many of these individuals would have accumulated large superannuation balances over the years on the basis of the existing superannuation concessions available to complying super funds. Therefore, to impose an additional 15% tax on these individuals without allowing them to restructure their superannuation balances (especially leading up to 1 July 2025) would be disadvantageous.

To ensure the proposed Division 296 tax does not disadvantage individuals in these circumstances, the NTAA submits that the law also be amended to allow such individuals a period within which they can restructure their superannuation balances, as follows:

- A new condition of release should be introduced to allow individuals who cannot otherwise satisfy a condition of release to withdraw part or all of their excess super balances (i.e., above $3 million).
- Any such withdrawals should be tax-free to the individual, irrespective of their age.
- Any asset disposals in a fund to facilitate such withdrawals should be exempt from CGT.

5. **The proposed Division 296 tax creates uncertainty for investing in superannuation**

Overall, the NTAA believes that the Government’s proposed Division 296 tax could create uncertainty for Australians when it comes to making decisions about future investments in superannuation. This is because individuals usually invest in superannuation for the long-term and, therefore, changes that have the effect of reducing superannuation tax concessions create uncertainty about the scope for further tax changes being made to the superannuation system.

This has the potential to divert investment behaviour away from the superannuation environment, thereby reducing the incentive for Australians to work towards funding their own retirement. In this regard, the NTAA has received feedback from its members that many individuals are already losing confidence in Australia’s superannuation system. This could ultimately place greater financial pressures on consolidated revenue and future government budgets.

Yours faithfully,

Geoff Boxer
Chief Executive Office