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Mr Lachlan Alvey
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Treasury
Langton Place
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Submitted via Treasury online portal

Dear Mr Alvey

Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2025

Chartered Accountants Australia and New Zealand, CPA Australia and the Institute of Public Accountants (“the joint bodies”) welcome the opportunity to comment on the consultation for the exposure draft legislation Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2025 (the “BTSC Bill”) and the Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2025 (the “Imposition Bill”) (together, the “draft Bills”), related explanatory materials and additional guidance (“the material”).

As you are aware the consultation period for the material has taken place during the traditional Christmas and New Year business shutdown in Australia. Nevertheless, we have endeavoured to study the material in detail and consider its consequences. Given the complexity of the proposed legislation, and its related but yet to be seen regulations, we have good reason to believe that unintended and currently unforeseen adverse consequences could arise. It will be essential for government to promptly amend the law to remove these faulty, missing or defective elements as soon as they are identified in order to ensure the implemented law reflects the intended operation of the measure and interacts harmoniously with the other areas of the retirement savings ecosystem.

The joint bodies have a significant number of members who work with self managed superannuation funds (SMSFs) as tax agents, accountants, administrators, auditors and financial advisers. Many members of the joint bodies work with APRA regulated superannuation funds in a wide range of capacities including tax, finance, reporting, and internal and external audit.

When preparing our feedback, the joint bodies have sought the views of our diverse memberships.

The joint bodies note that there is not collective support for the Better Targeted Superannuation Tax Concession (BTSC) policy contained in the draft Bills due to several significant concerns, including:



- The complex design features of the policy will add considerable administration and system costs for the whole superannuation system, a cost that will be paid for by all members of the system including those who will never pay Division 296 tax
- It alters the tax mix for those already retired and those saving for retirement when certainty is essential; otherwise, it is inevitable that many will be discouraged from making adequate contributions towards their retirement
- We question how much net revenue will be raised from this measure when all costs have been considered
- We believe there may be better solutions available to the government
- The policy seeks to address a legacy issue which is substantially limited in the future through use of various contribution caps and limits, including the transfer balance cap (TBC) and total superannuation balance (TSB) limits. Nevertheless, we provide the following feedback on the draft Bills.

Specific Issues

1. Requirement for small superannuation funds to obtain an actuarial certificate to perform “relevant calculations and provide the attribution share”

The Additional Guidance published as part of this consultation claims that the requirement to obtain an actuarial certificate “is consistent with the approach to calculating a small fund’s [exempt current pension income] ECPI under the proportionate method, and most small funds within the scope of BTSC, would already engage with an actuary each year for this purpose.” Further the Additional Guidance states that this is “an important integrity measure”.

We believe the requirement to use an actuary to provide this information via a certificate is unnecessary for small superannuation funds without one or more members with only accumulation monies and/or account-based pensions, which currently are not required to obtain an actuarial certificate. The *Income Tax Assessment Act 1997* (“ITAA97”) does not currently require such funds to obtain an actuarial certificate for ECPI purposes in these circumstances. The proposed requirement would impose further administrative cost on these funds. If necessary, and in time, the Australian Taxation Office (ATO) could provide administrative guidance negating the need for an actuary to be involved in these circumstances.

An associated issue with using the proportionate approach to determine a member’s “attribution share” is that a member of a small super fund may have no beneficial interest in specific assets yet may have income or realised capital gains allocated to them for Div 296 purposes. Some funds use segregation of assets to specific members which differs from the standard pooled approach where all members share proportionally in the fund’s overall investment returns. Trustees are required to act fairly between all fund beneficiaries, and

allocating income to members in segregated funds from non-beneficially held assets is inconsistent with trustee covenants and common law obligations.

2. *Franking credits and other tax offsets*

Paragraph 1.65 of the Explanatory Memorandum states that, “tax offsets [such as franking credits] do not reduce Division 296 fund earnings as these do not form part of the income that a superannuation fund’s concessional tax rates are applied to – offsets are fully used by a fund after applying their tax rates to determine their tax.”

This is an unfair outcome which ignores the purpose of franking credits. The purpose of such credits is to adjust the tax rate applying to dividends and other distributions (for example from trust or managed investment scheme distributions) to the tax rate applying to the relevant taxpayer. Dividend income attributable to retirement phase income streams will result in a full refund of any attached franking credits as all income is exempt income. Similarly, franked dividend or distribution income attributable to non-retirement phase income streams may give rise to a partial refund of any attached franking credits as all income is intended to be taxed at the applicable 15% rate.

The current methodology for franking credits was established to achieve the already stated objective – adjust the tax paid by companies on the relevant dividends to the tax rate applying to the relevant taxpayer.

The Appendix to this submission contains a case study that shows the unfairness of the current policy setting for those receiving dividends with attached franking credits.

The proposed policy setting penalises super funds that have non-retirement phase income stream assets by seeking to use the current process in an unacceptable manner.

The payment of refunded franking credit and other offsets are not payments “in kind” as stated in the explanatory memorandum (see par 1.65). In the case of franking credits, these are often effectively a return of an overpayment of income tax.

It is our view that this process will alter the operation of capital markets. It is too early to be definite about the impact of any adjustments super fund trustees will make to their investing decisions, but it is our reasonable expectation that the impact could, on balance, be negative to capital markets.

The same principle that we have outlined for franking credits should apply to the rebate available in Sec 160AAB of the *Income Tax Assessment Act 1936*. and other similar tax offsets.

In financial accounting terms, such net rebates and tax offset amounts are income and only that net amount should therefore comprise “income” to be counted under proposed Sec 296-55 and 296-60 in the BTSC Bill and these should be adjusted accordingly.

3. *Notional pension income*

We note proposed paragraph Sec 296-55(1)(a) permits exempt pension income under Sec 205-385 and 295-300 of the ITAA97 to be reduced by deductions that would be permitted under Sec 8-1 of that Act.

We also note that proposed paragraphs Sec 296-55(1)(a) and (b) do not allow this exempt income to be less than nil.

We consider both concepts to be unfair because they should be calculated in the same way as superannuation fund income that is taxed at 15%. We believe all other deductions, such as those incurred under Sec 25-5 of the ITAA97, should be permitted and exempt pension income should be allowed to be less than nil.

4. *Special circumstances for proposed Sec 296-40 and 296-55*

For most people the formulae proposed in Sections 296-40 and 296-55 will produce acceptable outcomes assuming our suggested changes are made.

However, there is an important cohort of individuals who will have an unfair outcome under either or both of these sections.

For example it would be fundamentally unfair for a taxpayer to be liable for Div 296 tax in relation to income derived by the superannuation fund during a particular income year where the taxpayer may not have had a TSB exceeding \$3 million for most of the year or since the end of the previous year, or where the TSB has decreased during the year, due to market movements or other genuine reasons other than avoidance of Div 296 tax.

The Commissioner of Taxation (“the CoT”) should have a discretion similar to that which applies in Subdivision 291-D of the ITAA97. This sub-division allows the CoT to have assessable contributions permanently excluded as taxable concessional contributions or allocated to one or more other financial years. The CoT has published Practice Statement Law Administration Guide PS LA 2008/1¹ to assist his staff to apply this area of the law. This concession is used in a wide variety of cases including when an employer is correcting salary and wage and compulsory superannuation contributions underpayments over multiple years.

Similar principles should apply to proposed sections 296-40 and 296-55 (and any related regulations) – that is a taxpayer should be permitted to apply to the CoT to have an element of the formulae adjusted.

Consideration should also be given to the need for a similar concession to the formulae in proposed Sec 296-65.

¹ <https://www.ato.gov.au/law/view/document?docid=PSR/PS20081/NAT/ATO/00001>

5. Assessable contributions

We believe that contributions that are excess non-concessional contributions as determined by Division 292 of the ITAA97 should also be excluded as contributions for proposed Section 296-55.

It is possible for employers who contribute to defined benefit superannuation funds to be permitted by the fund's actuary to be exempt from requirements to make superannuation contributions. Such arrangements are often referred to as a "contribution holiday". These typically occur when a superannuation fund has assets significantly greater than beneficiary entitlements. Each year the fund actuary assesses whether the "holiday" should continue or cease. Once the holiday is over, employer contributions recommence. When such holidays are in place no employer assessable contributions are made to the fund. In such years a notional amount should be counted under proposed Sec 296-55.

6. CGT concession in proposed Subdivision 296-B of the Income Tax (Transitional Provisions) Act 1997 ("IT(TP)A97")

While we welcome this proposed concession, we consider it requires further amendment for it to work effectively.

Our views are based on the experience of the joint bodies' members in implementing a similar concession found in Subdivision 294-B of the *Income Tax (Transitional Provisions) Act 1997*.

We suggest the following changes:

- Where a superannuation fund makes a choice to utilise the proposed CGT concession, the choice applies to every asset that the fund owns as at 30 June 2026. This is unfair as it potentially penalises any trustee with any assets that have a notional market value capital loss at that date.

In addition, the currently proposed approach will result in additional unnecessary compliance costs to a superannuation fund and its beneficiaries where a trustee is obliged to obtain — and retain — market valuations for every asset even where the trustee would prefer not to make the choice for some assets.

We believe that the choice should be available on an asset-by-asset basis. That is, trustees should be permitted to decide which assets to apply or not apply this concession.

In addition, the currently proposed approach may result in additional compliance costs to the detriment of the fund and its beneficiaries where a trustee is obliged to obtain — and retain — market valuations for every asset even where the trustee would prefer not to make the choice for some assets.

- The proposed CGT concession can be used by any superannuation fund including funds without any members that have a TSB greater than the "large superannuation balance

threshold” as defined by proposed Sec 296-30 of the ITAA97. Further the concession must be irrevocably applied for before the fund submits its annual return for the 2026/27 financial year. In addition, proposed Sec 296-55 of the IT(TP)A97 imposes record keeping obligations on small superannuation funds which choose to apply the concession.

We consider that these concepts taken together effectively require all superannuation funds to incur compliance expenses on a concession that may never be required. A superannuation fund trustee cannot foresee future asset values of their investments or the superannuation profile of future members and therefore cannot predict that proposed Division 296 tax will never apply to a particular member including to those members with a modest value at 30 June 2026. Trustees are required to act prudently so most trustees will likely seek to use the proposed CGT concession.

That said, a large cohort of trustees will never have to use the altered cost base for Division 296 purposes. So why are they having to perform a task, and incur additional costs, that may have no economic benefit?

Trustees should apply the concession to assets after the asset has been disposed of in a future year. (At that point only trustees who have Division 296 impacted members would seek to use the CGT concession meaning that all other trustees would not have completed work that is never practically used.) Substantiation at this point can be confirmed in the same way as it is under normal CGT rules. In any event all assets of all superannuation funds must be value using net market value at the end of a financial year so a fund will have these records.

We agree that the trustee’s decision should be irrevocable.

- Deferred notional gains as defined in sub-sections 294-115(4) and (5) of the IT(TP)A97 should be specifically excluded from the capital gain proceeds when the asset is disposed of for the purposes of determining “relevant taxable income or loss” under proposed Sec 295-55 as those deferred gains occurred before July 2016.
- Proposed four year time-frame for larger APRA regulated superannuation funds – we consider that this time period will be sufficient for most superannuation funds. However there will be some funds that are disadvantaged by it. Therefore the law should permit the CoT to adjust the period of time and the percentages applied on an application by a fund which can demonstrate special circumstances.

7. *Re-submission of Division 296 data due to fund income tax return re-submission*

Paragraphs 1.126 to 1.128 of the draft explanatory memorandum for the draft Bills states that if one or more superannuation funds submit revised income tax annual returns to the CoT then the ATO may have cause to request revised data from those funds for the purposes of re-calculating any Division 296 tax liability. Large APRA regulated superannuation funds often need to revise their annual income tax return information. The

requests for revised Division 296 data on a constant basis has the potential to incur considerable administration costs which will be paid by all members of the superannuation fund, including those who may never be liable for the tax. We ask that such requests should only be for a specified de-minimis amount.

Should you wish to discuss any of the comments below further, please do not hesitate to contact Tony Negline via email at tony.negline@charteredaccountantsanz.com.

Yours sincerely,



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Appendix

Suppose a company has sales during a year of \$1,000 and that it costs it \$900 to make those sales. Its profit for the year will therefore be \$100. The company pays 30% tax on profit made, i.e. \$30 - its net profit after tax is therefore \$70. The company will have a Franking Account balance of \$30.

If the company's directors decide to distribute some profit to the shareholders, those shareholders must include the dividend paid plus the franking credit in their taxable income if the directors elect to attach the franking credit to the dividend payment. In the example assume that all of the net profit earned by the company will be paid out as a dividend with an attached franking credit.

Suppose that a superannuation fund owns half the shares issued in our company carrying rights to a dividend distribution which means the superannuation fund will receive half the dividends.

Finally assume that an employer has made a \$100 contribution to the superannuation fund and also that the fund has no administration expenses.

The superannuation fund will therefore have income for tax purposes of \$150. This is worked out by adding the dividend (\$35), the imputation credit (\$15) and the employer contribution (\$100). The superannuation fund owns 50% of the shares and is therefore entitled to 50% of the distributed dividend and 50% of the attached franking credit.

In general superannuation funds pay a 15% tax rate if the fund assets are not supporting a pension. Our fund therefore owes \$22.50 tax. \$15 of this tax owing has already been paid – it was paid by the company.

To work out how much tax the superannuation fund has to physically pay the ATO we need to reduce the amount owing by the tax already paid by the company.

The net tax payable is therefore \$7.50 (\$22.50 - \$15).

<i>Company Tax</i>	
Sales	\$1,000
Allowable Deductions	\$900
Net Profit Before Tax	\$100
Income Tax on Net Profit (30%)	\$30
Net Profit After Tax	\$70
Dividend Distributed	\$70
<i>Superannuation Fund Tax</i>	
Dividend	\$35
Franking Credit	\$15
Employer Contribution	\$100
Assessable Income	\$150
Allowable Deductions	\$0
Taxable income	\$150
Income Tax (15%)	\$22.50
Franking Credit	\$15
Net Tax Payable from super fund bank account	\$7.50
Net tax payable on dividend by super fund	\$5.25

In this case study the super fund income for Division 296 purposes for the dividend will be **\$50**.

Now let's change the example and assume that the company paid a dividend which was unfranked as they did not have sufficient franking credits to frank the dividend. The outcome is as follows:

<i>Superannuation Fund Tax</i>	
Dividend	\$35
Franking Credit	\$0
Employer Contribution	\$100
Assessable Income	\$135
Allowable Deductions	\$0
Taxable income	\$135
Income Tax (15%)	\$20.50
Franking Credit	\$0
Net Tax Payable from super fund bank account	\$20.50
Net tax payable on dividend by super fund	\$5.25

In this case study the super fund income for Division 296 purposes for the dividend will be **\$35**.