SUBMISSION

Submission to Treasury — Better targeted superannuation concessions: draft regulations

26 April 2024

The Association of Superannuation Funds of Australia Limited
Level 11, 77 Castlereagh Street
Sydney NSW 2000

PO Box 1485
Sydney NSW 2001

T +61 2 9264 9300
1800 812 798 (outside Sydney)
F 1300 926 484
W www.superannuation.asn.au

ABN 29 002 786 290 CAN 002 786 290

File: 2024/21

Retirement, Advice and Investment Division

Treasury

Langton Cresent

PARKES ACT 2600

Via email: superannuation@treasury.gov.au

26 April 2024

Dear Sir/Madam

Better targeted superannuation concessions: draft regulations

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to the Treasury consultation on the Treasury Laws Amendment (Measures for Future Instruments) Instrument 2023: Better Targeted Superannuation Concessions (draft regulations).

About ASFA

ASFA has been operating since 1962 as the peak policy, research and advocacy body for Australia's superannuation industry. ASFA represents the APRA regulated superannuation industry with over 100 organisations as members from corporate, industry, retail and public sector funds, and service providers.

We develop policy positions through collaboration with our diverse membership base and use our deep technical expertise and research capabilities to assist in advancing outcomes for Australians.

*****

If you have any queries or comments in relation to the content of our submission, please contact Ross Clare, by email rclare@superannuation.asn.au.

Yours sincerely

James Koval

Head of Policy and Advocacy

Summary comments

ASFA welcomes the opportunity to comment on the exposure draft regulations.

ASFA supports the intent of the current proposal regarding superannuation balances over $3 million as a measure to improve equity and long-term sustainability of the superannuation system.

Our world class system, with the current settings, delivers better retirement outcomes for the majority of Australians. However, ASFA and our members have longstanding views regarding the need to ensure the tax concessions underpinning the system are distributed equitably. We have for many years called for reforms limiting the tax concessions that flow to those on high incomes and/or those with very high superannuation balances. This should include individuals in defined benefit superannuation arrangements prior to retirement and those receiving a pension in retirement in circumstances where their superannuation interest has a capital value of over $3 million.

The existing tax treatment of defined benefit pension payments was last reviewed when the Total Benefit Cap was introduced in regard to superannuation retirement income payments from 1 July 2017. The explanatory memorandum for the relevant legislation stated that "(d)efined benefit lifetime pensions and certain other superannuation income streams with commutation restrictions are subject to broadly commensurate taxation treatment. An equivalent outcome to the operation of the transfer balance cap is achieved, albeit in a different manner, recognising that commutation restrictions make it impractical for individuals to reduce an excess amount". On the basis that the taxation treatment was commensurate then to the tax treatment of accumulation based accounts, then commensurate changes to the tax treatment of defined benefit pensions are needed relative to the changes being made for individuals with account balances over $3 million.

For those currently receiving a defined benefit pension only those with what could be regarded as very large pensions will be affected, particularly at later ages. Even for a defined benefit pension which is indexed to wages (which applies to certain parliamentarians and judges), the valuation factor under existing Family Law regulations at age 80 for a single male is 7.4407. If there is no other superannuation interest, such an individual could receive an annual pension of $403,000 a year and not be affected by Division 296. For those with a pension indexed to CPI an even higher pension would be possible without payment of any additional tax. It is equitable for such individuals to pay an additional amount of tax attributable to their assessed superannuation interest which is over $3 million.

Our submission goes to the elements of the proposed regulations that impact on equity and/or are operational in nature. We are suggesting amendments to ensure the proposed Division 296 tax can be administered as efficiently as possible, to avoid imposing a cost burden on superannuation funds that would indirectly be borne by fund members whose Total Superannuation Balances are below the threshold at which the tax will apply. Existing reporting frameworks should be used wherever possible and valuation methods should be simplified where possible to limit the requirement for funds to undertake potentially complex system and reporting changes.

We also propose amendments to bring about greater equity in the application of the Division 296 tax to members of defined benefit funds.

Recommendations

1. The same valuation should be used for males and females who are the same age and have the same benefit salary or life pension.

2. The valuation factor should not be higher for individuals who have a spouse and funds should not be required to collect information on the marital status of members.
3. Transitional arrangements should be put in place so that Total Superannuation Balance calculations for 30 June 2025 using the new method should only be used for the purposes of the Division 296 tax.
4. Existing reporting arrangements be used wherever possible to ensure the measures do not impose a significant and costly increase in the overall compliance burden for the superannuation industry.

Background

There are around 1 million persons with an interest in a Defined Benefit superannuation fund. Treasury estimates that around 10,000 of those (around 1 per cent) will be impacted to greater or less degree by the tax. Some will have other superannuation interests which will impact on the amount of tax that will be paid.

It is important that the costs of administration for the new tax not unduly burden funds and their fund members. There are a range of funds with significant numbers of defined benefit members with many of these funds also have members with only accumulation accounts. While the funds with defined benefit members are mostly Commonwealth and State public sector funds, there also are some corporate and industry funds with defined benefit members, sometimes due to fund mergers.

The draft regulations that have been circulated for consultation propose that the valuation methods used for Family Law split purposes be also used for the purposes of Division 296 valuation of defined benefit entitlements. ASFA considers that while the Family Law valuation methods are appropriate in the context of the splitting of property when a marriage or relationship ceases to exist, they need modification in the Division 296 context.

It also should be noted that the regulations setting out the Family Law valuation methods are currently subject to consultation: https://consultations.ag.gov.au/

The superannuation splitting framework under the proposed new Regulations is substantially the same as the current framework. However, as the existing Regulations were made in 2001, drafting changes are being proposed to modernise the language and to include new innovative retirement products. The consultation period for the Family Law regulations also closes on 26 April.

Draft Regulations

Use of valuation factors that vary by gender

The draft regulations propose that the Family Law valuation factors be used. This generally would lead to females with a life pension or a pension linked to life expectancy being assessed with a higher tax amount in the case of life pensions given their longer life expectancy.

Funds also may not have definitive information on the gender of the fund member. While gender information is an integral part of Family Law proceedings it does not have the same relevance in most instances for defined benefit pensions, which are paid at the same rate for males and females. As well, some individuals do not accept a binary definition of gender and/or do not declare their gender to a fund. Funds should not be required to ask all defined benefit members about their gender at birth, especially as only a very small proportion of those with a defined benefit interest will be subject to the Division 296.

ASFA considers that females and males at the same age and with the same benefit salary or life pension should pay the same amount of tax. Accordingly, the valuation factors in the Family Law regulations for males should be used for both females and males.

This could be achieved by applying the valuation factors developed for males to also be used for females, thereby reducing the complexity of administration and cost of implementation. An alternative approach would be to use an average of the male and female factors.

Use of valuation factors that vary with marital status

The Family Law valuation factors also lead to an increase in the valuation of the defined benefit interest if that interest has a reversionary pension entitlement attached to it and the person has a spouse. This is perfectly reasonable in the context of Family Law proceedings, where the presence (or absence) of a spouse is relatively clear. However, if there is a de facto spouse this can still involve some evidentiary considerations.

Funds should not be expected to ask each year whether a member with a defined benefit interest has a spouse in terms of the definition in the fund's trust deed. This would be intrusive and some members may choose not to reply. There also should not be additional taxation imposed on individuals whose life pension has a reversionary provision for their spouse. This arguably would amount to a tax on marriage.

Impact on other measures using Total Superannuation Balance and the need for transition arrangements

The Total Superannuation Balance (TSB) is used for a number of other determinations including:

- Carry-forward of unused concessional contributions
- Non-concessional contributions eligibility and the bring-forward of non-concessional contributions cap
- Government co-contribution
- Spouse contribution tax offset.

While there is good case for using the same TSB for these measures as is used for the Division 296, there is a need for transitional measures.

No Division 296 tax will be assessed until after 30 June 2026 TSBs are reported. Presumably it would be sufficient to report opening balances (as at 30 June 2025) at the same time. However, if this involved re-reporting of 30 June 2025 balances that were used to determine eligibility for the other measures referred to above, this would have unexpected and unreasonable impacts on at least some of the many individuals making use of those measures. In addition, not requiring the new valuation method to be used until after 30 June 2026 will assist in reducing administration costs for the measure. Given that the Family Law regulations relating to the valuation of superannuation interests are currently being reviewed, including the valuation factors to be used, preparing new valuation factors for TSB purposes shortly after 30 June 2025 would involve an unrealistically short implementation period.

ASFA recommends that 30 June 2025 TSB values prepared in line with the new methodology only be used for Section 296 purposes and that their calculation be undertaken at the same time as the calculation for 30 June 2026. However, from 30 June 2026 they could be used more generally.

If a successor fund transfer occurs between 1 July 2025 and 30 June 2026, then the original fund should provide the receiving fund with all information necessary to prepare a 30 June 2025 valuation.