<u>The Tax Institute</u>

Ms Julie Abdalla, Senior Counsel, Tax and Legal; and

Mrs Elizabeth Westover, National Superannuation Technical Committee

Questions: (Senator Dean Smith):

How has the Treasury responded to TTI's comments regarding the treatment of disability, medical and related insurance payments? Is the Treasury alive to those matters? **(taken on notice)**

How has the Treasury responded to the deferral mechanism recommended in the TTI submission? What level of engagement and interest has the Treasury shown? **(taken on notice)**

Response (provided Tuesday 23 April 2024):

We did not receive a response from Treasury regarding either of these matters, or indeed any of the issues put forward in our submission to the Treasury dated 19 October 2023, a copy of which is attached.

Until we heard Treasury's responses to Senator Smith's questions yesterday, it was not clear to us whether Treasury had considered these issues, or whether there was any appetite to accommodate our recommendations. As the Committee would be aware, they were not reflected in the draft Bill.

We do not agree with the reasoning put forward by the Treasury in distinguishing structured settlement payments from total and permanent disability (TPD) proceeds or terminal medical condition (TMC) payments, simply because they are distinguished in relation to the transfer balance cap. Given that all of these categories of payments ultimately relate to compensation for loss or serious injury, or terminal illness, we consider that it is not inconsistent with the policy of the proposed measure to treat them equally. We would expect that alignment across the treatment of these payments would not be a significant cost to revenue but would have a significant impact on the recipients of such payments. We also note other differences between the transfer balance cap and the proposed measure, namely that the transfer balance cap is subject to indexation whereas the proposed measure is not. It is, in our view, inadequate to cherry-pick certain aspects on the basis of consistency, while disregarding others, particularly where they may impact Australians in difficult life circumstances.

In relation to the deferral mechanism we had proposed, Senator Smith asked the Treasury why they considered it was not suitable. The Treasury's response suggested that an ability to defer would be a type of tax concession and referred to the 84-day period in which an affected taxpayer must pay their liability as providing flexibility. While we acknowledge that a deferral may be in a way concessionary, given the various concerns we have raised throughout our submission, including the potential for taxpayers to have to liquidate assets to pay their Division 296 liability, an 84-day period is, in our view, insufficient.

The Treasury acknowledged that the 84-day period was an arbitrary choice, and we would urge the Committee to recommend a longer period to alleviate the pressure on affected taxpayers.

If it would assist the Committee to provide any further information about the treatment of TPD, TMC and related insurance payments, the deferral mechanism, or any other aspects of the proposed measure, please do let me know.

19 October 2023

Director
Tax and Transfers Branch
Retirement, Advice and Investment Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: superannuation@treasury.gov.au

Dear Director

Better targeted superannuation concessions

The Tax Institute welcomes the opportunity to make a submission to the Treasury in relation to the exposure drafts of the Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023 (**draft Bill**), Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023 (**draft Imposition Bill**), and accompanying explanatory materials (**draft EM**).

In the development of this submission, we have closely consulted with our National Superannuation Technical Committee to prepare a considered response that represents the views of the broader membership of The Tax Institute.

The draft Bill proposes to insert new Division 296 into the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**) to give effect to the Government's announcement to introduce an additional 15% tax on earnings on superannuation balances above $3 million. We acknowledge the Government's decision to impose a higher rate of tax on a subset of taxpayers. Our comments in this submission are aimed at ensuring the underlying policy is appropriately designed and implemented to achieve the intended policy objective and within the principles of good law design.

If implemented as proposed, Division 296 will tax unrealised capital gains, an approach that is inconsistent with Australia's current approach of taxing realised capital gains under the capital gains tax (**CGT**) regime. Consistent with our submission regarding the earlier consultation paper (released on 31 March 2023), we continue to have concerns that Division 296 will set an undesirable and inappropriate precedent for future tax proposals in this regard. We note that the taxation of unrealised gains has historically only been used in the context of anti-avoidance provisions and should not be a feature in the design of this, or future, general taxation measures.

The taxation of unrealised gains is rife with issues, such as cash flow misalignment and increased compliance costs for taxpayers. The Tax Institute is of the view that if this aspect of the measure is to proceed, it should not be treated as an acceptable precedent for future tax reform proposals of any kind. In our view, there are other preferable alternatives to the proposed approach. For example, in the case of self-managed superannuation funds (**SMSFs**), it may be possible to introduce an alternative calculation based on an SMSF's actual taxable income for some members to minimise the mechanism of taxing unrealised gains.

We also recommend the Government consider making key changes to the draft Bill to better ensure equitable outcomes, including:

- indexing the proposed threshold of $3 million;
- introducing a loss carry-back mechanism to allow individuals to recognise unrealised losses as the proposed approach may result in some instances where taxpayers cannot use losses carried forward, or could be placed under significant hardship;
- amending the adjusted total superannuation balance (**ATSB**) to account for the disproportionate impact on SMSFs;
- allowing for payment of the Division 296 tax on unrealised gains to be deferred until the gain on the relevant asset(s) is realised by the superannuation fund — this would better align the operation of Division 296 with Australia's current approach to CGT;
- excluding amounts withdrawn to pay a superannuation tax liability being added back into the ATSB and therefore being subject to Division 296 tax;
- aligning the treatment of certain disability and injury payments with the proposed treatment of structured settlements; and
- undertaking further consultation on the appropriate treatment of proceeds and payments relating to family law splits.

We consider that taxpayers and their advisers should be readily able to access the data used by the Commissioner of Taxation (**Commissioner**) in determining the amount of the tax. This would allow advisers to easily verify the Commissioner's calculations and rely on the data when creating financial plans for clients. The administration of Division 296 would benefit from taxpayers being able to access an Australian Taxation Office (**ATO**) internal review mechanism that does not require taxpayers to object or seek a judicial review in the first instance where disputes arise regarding the Commissioner's calculations.

In relation to the consultation process itself, The Tax Institute is of the view that the consultation period provided for this measure does not allow stakeholders sufficient time to comprehensively consider the draft legislation and make a fully informed submission. Proposed Division 296 is a complex and significant change that requires time to thoroughly analyse. Short consultation periods may lead to the perception that the government's policy position is not adaptable to accommodate community concerns and feedback. We consider that it is imperative that a post-implementation review is undertaken to ensure that issues with the measure once enacted are identified and resolved in a timely manner.

Our detailed response is contained in **Appendix A**.

The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system f or the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all.

If you would like to discuss any of the above, please contact The Tax Institute's Senior Counsel – Tax & Legal, Julie Abdalla, on ([redacted].

Yours faithfully,

[redacted]

Scott Treatt

Chief Executive Officer

[redacted]

Paul Banister

National Council Member

APPENDIX A

We have set out below our detailed comments and observations for your consideration.

Taxation of unrealised gains

The draft Bill proposes to levy a tax on unrealised capital gains. We consider that the practical and financial impact of taxing a gain that is yet to be realised outweighs any perceived macroeconomic benefits and sets a dangerous precedent for our taxation and superannuation systems more broadly. The taxation of unrealised gains can place taxpayers under significant pressure due to the mismatch between the tax liability and the cash flow associated with the underlying asset.

Significant concerns arise when the individual does not have available funds to pay the Division 296 tax personally, and has no real choice but to elect to release funds from superannuation to pay the tax. Liquidity issues are a concern, particularly if the predominant investment is business real property or other illiquid assets. One example is substantial farmland that is vital to farmers operating their farming businesses, however there are many other similar scenarios where this would be problematic. Depending on timing and other external factors, a taxpayer may need to cause the fund to dispose of the asset at a lower price due to the forced nature of the sale. Impacted taxpayers may be required to significantly reduce their assets held in superannuation to fund the payment of the Division 296 tax. If the full or partial realisation of the asset(s) cannot occur, there may not be any available funds to pay the Division 296 tax liability. As a general principle, we consider that policy which causes individuals to have to move assets out of superannuation to fund a tax liability imposed by virtue of having such assets is contrary to the fundamental goal of superannuation, being to fund retirement.

Where a fund realises assets to meet the liability imposed by Division 296, substantial transaction costs such as CGT and transfer duty are likely to be incurred. These transaction costs and the resultant impact on the fund's investment strategy are likely to be disproportionate to the tax liability. Given these potentially significant transaction costs, it is, in our view, unreasonable to cause taxpayers to restructure their business and asset-holding arrangements that were set up based on the law that applied at the time, in order to fund the payment of a tax liability.

In the case of SMSFs, the majority have two members. In instances where one member has a balance above $3 million, and the other member has a balance below that threshold, both members will be impacted by the sale of a major asset to pay the relevant member's Division 296 liability. The impact is exacerbated where this is done at a fire sale price. This is an inequitable outcome, especially for the fund member whose balance is below the $3 million threshold.

With the introduction of the proposed measure, the accuracy of valuations of fund assets will become even more important, as these form the basis of the amount of an individual's total superannuation balance (**TSB**). Asset valuations can be expensive and imprecise, especially for assets that are difficult to value or the values of which are volatile. The impact of a valuation that values an asset at more than its eventual sale price can result in the raising of a Division 296 assessment on a value that may never eventuate or be realised. This may result in inequitable or unreasonable outcomes. In contrast, a valuation that values an asset at less than its eventual sale price could result in the Division 296 liability attributable to the actual gain realised on the sale of the asset being spread over multiple income years. This uncertainty will make it difficult for taxpayers to calculate their expected Division 296 liabilities and factor in the potential need to sell assets to meet future Division 296 liabilities.

We consider that the concept of taxing unrealised gains should not form part of this measure. However, if it is, then it should be confined (and quarantined) to this measure. It should not be used as a model for taxing other unrealised capital gains in the future. This principle can be achieved by clearly articulating this proposition in the objects provision in proposed section 296-5 of the draft Bill.

Alternate calculation methodologies for self-managed superannuation funds

We understand that one of the reasons for the approach proposed in the draft Bill is to ensure Division 296 tax is accurately calculated for individuals with multiple superannuation accounts.

We note that:

- as of June 2022, approximately 76% of people with superannuation accounts had only one account;[1] and
- although SMSFs may have up to 6 members, 69% of SMSFs are two-member funds and 24% are single-member funds.[2]

Feedback from our members suggests the proposed taxation of unrealised gains under Division 296 tax is expected to have a proportionately greater impact on SMSFs. The feedback also suggests that the concentration of members in single-member or two-member fund results in higher portfolio volatility at the member level, including the attribution of unrealised capital gains. Further, as most SMSFs are not required to prepare general purpose financial statements, member balances are generally not stated at 'net realisable value', unlike large APRA-regulated funds.

We consider that the capital adjustments detailed in section 296-55 of the draft Bill should include unrealised capital gains in SMSF accounts in the definition of contributions or as some other reduction of an individual's taxable superannuation earnings (**TSE**).

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[1] ATO, 'Trend towards single accounts', available here.

[2] ATO, 'Self-managed super funds: A statistical overview 2020–2021', available here.

Section 307-230A of the draft Bill proposes to provide a power to make a regulation that could specify a value or a method for determining the value of a superannuation interest. Given this, if an SMSF's unrealised gains cannot be prescribed as a capital adjustment in section 296-55 of the draft Bill, we are of the view that — as an alternative to excluding unrealised gains from the TSE calculation in the legislation — a legislative instrument in respect of SMSFs should be made to adjust the ATSB to ensure that unrealised capital gains are not captured in the formula. This would ensure the legislation better achieves the stated goal of sector neutrality.

Alternatively, we consider that the draft Bill should include an optional calculation for superannuants who have only one superannuation account, held in an SMSF. Under this alternative approach, these superannuants would be allowed to calculate their Division 296 liability based on their share of the SMSF's actual taxable income for the income year, which is readily calculated. Although this would result in a two-tiered approach whereby different calculations would apply across sections of the industry, we consider that this approach would reduce the potentially precedential impact of the taxation of unrealised gains under Division 296. As noted above, we consider that the majority of impacted funds will be SMSFs. As most superannuants only have one superannuation account, it is likely that a large portion of the taxpayers impacted by proposed Division 296 could use our proposed alternate methodology. This would limit the proposed approach of taxing unrealised gains to a smaller population of taxpayers.

Indexation of the threshold

The Tax Institute is of the view the proposed threshold of $3 million for the application of Division 296 should be subject to indexation. Indexing the threshold will ensure that the threshold reflects true market conditions and does not inappropriately expose more than 0.5% of all Australians to Division 296 tax (to which the Government's announcement on 28 February 2023 clearly indicates the measure is targeted).

We suggest that the indexation of the large superannuation balance threshold could be invoked in line with the indexation that applies to the TBC, once the TBC reaches $3 million. Aligning the TBC and the Division 296 threshold (once the general TBC is indexed to $3 million) would be consistent with the underlying policy of taxing earnings on balances above a prescribed threshold at a higher rate. It would also ensure there is greater consistency across superannuation caps, limits and thresholds.

As highlighted in our Case for Change (July 2021), there are issues concerning the complexity and cost of the current approach to the indexation of the TBC. However, the high number of caps, limits and thresholds are a feature of Australia's superannuation system, and we consider that opportunities to reduce the number of thresholds should be capitalised on where available.

Loss carry-back

Proposed Subdivision 296-C of the draft Bill allows negative superannuation earnings (i.e. losses) to be carried forward. However, as these are quarantined to the Division 296 tax, there will be situations where the losses are never utilised. The proposed approach may be perceived to lack tax symmetry, given that it proposes taxing unrealised gains but not allow taxpayers to recognise unrealised losses.

Not allowing taxpayers to recognise their losses would result in particularly inequitable outcomes where:

- an individual is assessed for Division 296 tax but does not have the cash flow to make the payment personally, nor does the superannuation fund have the cash flow to action a release authority (this would occur where the fund holds illiquid assets and is not able to release equity through an asset disposal);
- an individual with an illiquid asset portfolio created before this measure was announced is unable to meet the tax demands and is required to sell the assets;
- assets of a superannuation fund are overvalued due to a sudden change in market conditions following the end of an income year (such as a share portfolio losing value during an unexpected market crash or recession) — this would result in a large unrealised loss for Division 296 purposes that may not be utilised if subsequent cumulative gains do not exceed the loss[3]; and
- an individual with a balance above $3 million becomes liable to a Division 296 tax liability, then the fund makes a loss that results in the individual having negative superannuation earnings in a later income year, then they die without having had the opportunity to utilise the loss – not allowing a loss carry-back in these circumstances will effectively mean that these taxpayers can never utilise their losses.

The Tax Institute is of the view that the Government should consider allowing refunds of Division 296 tax paid in prior income years to the extent the taxpayer has 'unapplied transferrable negative earnings' for the relevant income year. Allowing a refund of previous Division 296 tax paid will promote a fairer, more efficient and effective tax. Under our suggested approach, taxpayers would be able to utilise their current year's losses only to the extent they have paid Division 296 tax in a prior income year. This running account approach would ensure that taxpayers can realise their losses in a timely manner, and remove any unintended timing consequences resulting from the movement in asset values that can oscillate above and below the threshold across the demarcation of the end of an income year. Alternatively, superannuants should be provided with a refundable credit that recognises the unrealised loss made by the member for the year in which the loss arose.

We consider that there is an inherent inequity when a member who has previously been subject to Division 296 tax in an income year, subsequently has unapplied transferrable negative earnings in the income year before they die. If an annual refundable credit mechanism (for a year in which an unrealised loss arises) is not adopted as part of the policy design, a refundable credit should be made available to a member upon their death, so any unapplied transferrable negative earnings are not permanently lost. We note that this is a complex issue and the short consultation period prohibits a more detailed consideration. We would welcome the opportunity to discuss this further with you before the proposed measure progresses.

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3 An example of where this likely to occur is where a superannuant is in retirement phase and is not in a position to contribute capital into the fund by way of contributions. In such a case, the subsequent earnings of the fund may be insufficient to apply the carry-forward loss.

Deferral mechanism

As noted above, feedback from our members raises concerns about the liquidity and cash flow management implications placed on individuals who will be subject to Division 296 tax. Although individuals will have some flexibility in how they fund the payment of the tax liability, for some taxpayers, the annual liability will be potentially tens of thousands of dollars. This will impose a significant financial burden on impacted individuals to source the funds to pay the tax.

The taxation of unrealised gains means that an individual's TSE will generally be higher than would be expected if the tax was applied only to the portion of earnings represented by the fund's actual taxable income. Further, funds with a low number of high-value assets (such as real property) may struggle from an economic perspective to sell a major asset so the fund can release funds to enable the individual to pay their Division 296 liability, and re-invest the proceeds in an asset that aligns with the trustee's existing investment strategy.

We consider that taxpayers should be provided with an option to defer the payment of the Division 296 up to a maximum period of five years. A deferral mechanism would ensure that those individuals without sufficient liquid assets in their superannuation fund would be largely able to maintain their current investment plans while also meeting their new obligations under the draft Bill. It would also result in a fairer, more efficient and effective tax.

We note that proposed new section 296-215 of the ITAA 1997 and new subsection 8AAD(1A) of the *Superannuation Act 1990* (Cth) provide for a reduced general interest charge (**GIC**) rate applicable to Division 296 amendments that remain unpaid. This may be perceived as effectively allowing taxpayers more time to pay their Division 296 liability (with an appropriate rate of GIC to reflect the late payment). We would expect taxpayers to be exposed to this GIC where they face liquidity issues that prevent them from paying their liability on time. However, the draft Bill does not provide a formal deferral mechanism or limit the Australian Taxation Office's (**ATO's**) debt recovery action in respect of an unpaid Division 296 tax liability. The draft Bill also does not set out the criteria for when the reduced GIC rate applies. We consider that the proposed framework could easily be adjusted to incorporate a deferral mechanism and limit the ATO's debt recovery powers in this regard. This would ensure equitable outcomes for affected taxpayers, particularly those who encounter financial hardship due to the imposition of the Division 296 liability.

Exclusions from withdrawals total

Subsection 296-50(4) of the draft Bill lists amounts that are proposed to be excluded from the 'withdrawals total' as required in the calculation of section 296-45 of the draft Bill. We consider that subsection 296-50(4) of the draft Bill should also include amounts that are withdrawn from the total superannuation balance through a release request to pay a tax liability incurred as a result of:

- the application of Division 293 of the ITAA 1997;
- exceeding the concessional or non-concessional contributions cap; and
- the operation of Division 296.

Individuals who are subject to these tax liabilities can choose to release an amount from superannuation to fund the payment of the relevant tax. Amounts that an individual chooses to release from superannuation reduce the total available assets they can use to support a self-funded retirement.

The calculation of 'Your withdrawals total for the year' in subsection 296-50(4) of the draft Bill does not allow for the add-back of amounts withdrawn via a release authority. A withdrawal under a release authority is made possible by specific legislative provisions that apply additional tax at an individual level. We consider that treating a released amount as a capital adjustment to the ATSB when the purpose of the withdrawal is to pay a tax liability misaligns the conventional definitions of income and capital.

Further, The Tax Institute is of the view that taxpayers should not be penalised if they elect to pay any of these tax liabilities from the fund. Including the above amounts in subsection 296-50(4) of the draft Bill would result in a fairer outcome as the released funds are not being withdrawn by members to reduce their TSB or to fund their retirement in those cases.

Reflecting capital gains tax discount, concessions and exemptions

Capital gains may be subject to a range of discounts, concessions or exemptions when realised by a superannuation fund. For example, when a CGT asset that is held for at least 12 months is realised by the superannuation fund, the resulting capital gain is eligible for a one-third CGT discount. The Tax Institute is of the view that the proposed rate in Division 296 should recognise the availability of the CGT discount, concessions and exemptions at the superannuation fund level. It is an inequitable outcome for unrealised gains to not reflect reductions that are otherwise available to superannuation funds for realised gains, resulting in an inconsistent erosion of the CGT concessions.

Treatment of disability, medical and related insurance payments

Proposed paragraph 296-55(1)(c) of the draft Bill will exclude from the 'contributions total' contained in proposed section 295-45 of the draft Bill, payments received in a year:

- relating to a superannuant's total and permanent disability (**TPD**); and
- from insurance proceeds relating to a superannuant's permanent disability and terminal medical condition (**TMC**).

As a result, TPD and TMC payments are proposed to be excluded from the calculation of the ATSB and proposed Division 296 tax only in the year in which they are made. TPD and TMC payments will be subject to Division 296 tax in subsequent years, including any unrealised gains made on from those payments. On the other hand, structured settlement payments are excluded at all times and will not be subject to Division 296 tax at any stage.[4]

We consider that TPD and TMC payments should receive the same treatment as structured settlements. Broadly, individuals who receive qualifying structured settlements under section 292-95 of the ITAA 1997 receive compensation for personal injury where it is unlikely that they can ever be gainfully employed in a capacity for which they are reasonably qualified, given their education, experience or training. The compensation for a structured settlement must be paid as a result of a settlement deed or court order for personal injury, rather than under an insurance policy.

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[4] Draft Bill, section 295-25.

Similarly, individuals who receive a TPD payment need to deal with an insurer and qualify under the strict terms and conditions of the policy, and prove that they are totally and permanently disabled. It is generally unlikely that these individuals can ever be gainfully employed in a capacity for which they are reasonably qualified given their education, experience or training. Individuals who receive TMC payments generally have been determined to have less than 24 months to live and are required to obtain evidence from two medical professionals, one of whom is a specialist in the relevant medical field. Recipients of TMC payments will often also not be able to, or reasonably be expected to, work for the remainder of their lives. Individuals who receive TMC and TPD payments will likely use the payments to support their lives and as compensation for harm they have suffered. In principle, recipients of structured settlements will use their payments for similar reasons.

We consider that there should be no difference in treatment between TPD and TMC payments and structured settlements. It would be consistent from a policy perspective to also exclude TPD and TMC payments from the operation of Division 296 tax.

Family law adjustments

Proposed paragraph 296-55(1)(c) of the draft Bill excludes proceeds from family law splits being included in the recipient's 'contributions total' for the purposes of calculating the ATSB in proposed section 296-45. This will have the effect of excluding proceeds from family law splits from being subject to Division 296 tax in the year they are received. Conversely, proposed paragraph 296-50-(1)(c) will add payments made under family law splits back into the calculation of the ATSB by including them in the 'withdrawal total'. This is irrespective of the fact that individuals who make payments under a family law split are not able to use the proceeds to support their retirement.

The Tax Institute is of the view that further consideration is needed regarding whether this is an appropriate policy outcome. The law concerning family law splits is complex. Family law splits can be made for a number of different reasons and this outcome may be suitable for some, but not all, of the different categories of payments. This area is also undergoing change due to developments in the TBC, SuperStream and *Family Law Act 1971* (Cth). We recommend that further consultation is undertaken regarding this aspect. We would be pleased to assist regarding the appropriate tax treatment in such circumstances.

Availability of information

Paragraph 1.12 of the draft EM states that the Commissioner will calculate the Division 296 liability and notify impacted taxpayers each year. The Tax Institute is of the view that the data used by the Commissioner in this assessment should be made available to taxpayers and their advisers. This includes data that is used:

- in the inputs as required in proposed sections 296-35, 296-40, 296-45, and 296-50 of the draft Bill; and
- to determine the components of the inputs in the same subsections noted above, such as the components of a withdrawal in proposed section 296-45.

This data is needed to provide taxpayers and their advisers with a means to verify the Commissioner's calculations. Without this information, a significant cost and time burden will be imposed on taxpayers to verify the Division 296 liability. The information would also be of use to advisers who are engaged to provide taxpayers with accurate and timely investment and planning advice.

Review of decision

Taxpayers who disagree with the Commissioner's assessment of a Division 296 liability will need to seek a review of the decision under Part IVC of the *Taxation Administration Act 1953* (Cth) (**TAA**). This will require taxpayers to seek to resolve disputes regarding calculations through the objections process, and in some cases, seek a review of the Commissioner's decision by the tribunal or appeal the Commissioner's decision to the Federal Court. Feedback from our members suggests that taxpayers are generally unwilling or unable to go through the objections and review/appeal processes for numerous reasons, including:

- the significant costs associated with objections and judicial reviews;
- a perception that the Commissioner's decision is unlikely to be changed during the objections process, even if the taxpayer is of the view that they have a strong case;
- the time taken and potential delays associated with objections and reviews/appeals; and
- a lack of awareness of the objection and review/appeal process.

We consider that taxpayers and their advisers should be able to resolve potential disputes regarding a Division 296 assessment in a cost- and resource-efficient manner. Taxpayers should not be required to undergo a formal process in the first instance, especially since, in making a Division 296 assessment, the Commissioner is undertaking the initial assessment with information readily available only to the Commissioner. Taxpayers should be able to raise their concerns in the first instance with a specialised ATO team. Similar processes currently exist within the ATO for large taxpayers seeking an internal review,[5] or disputing a debt in the first instance.[6] The ATO should be provided with extra funding if necessary to ensure that it has sufficient resources to assist taxpayers in a timely manner. Further, making the information available to taxpayers and their advisers is likely to reduce potential disputes from arising, and streamline the dispute resolution process by allowing the parties to identify the cause of the disagreement more easily.

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5 See www.ato.gov.au/business/privately-owned-and-wealthy-groups/what-you-should-know/tailored-engagement/resolving-disputes/#Independentreview.

6 See www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/Disputes-policy/Debt-disputes/#Whatyoucandoifyouoweusmoney.

Post-implementation review

Australia’s superannuation regime is highly complex. Substantial amendments to the system require time for detailed consideration to ensure the changes operate as intended, without resulting in unintended consequences. The Tax Institute is of the view that the current consultation period of two weeks for the proposed changes is inadequate given the volume and complexity the exposure draft materials. This short consultation period may lead to the perception that the government’s policy position is not adaptable to accommodate community concerns and feedback. Due to the short consultation period, it is also likely that some key issues will be identified only after the legislation is enacted and becomes operational. We therefore consider it imperative that a post-implementation review is undertaken 12 months after the commencement of Division 296 to allow an opportunity for any issues that arise to be identified and addressed promptly.