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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TREASURY LAWS AMENDMENT (BETTER TARGETED SUPERANNUATION CONCESSIONS)
BILL 2023
SUPERANNUATION (BETTER TARGETED SUPERANNUATION CONCESSIONS) IMPOSITION
BILL 2023

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

Abbreviation	Definition
ACT	Australian Capital Territory
APRA	Australian Prudential Regulation Authority
ATO	Australian Taxation Office
Bill	Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023
Commissioner	Commissioner of Taxation
Division 293 tax	Division 293 tax as defined subsection in 995-1(1) of the <i>Income Tax Assessment Act 1997</i>
Imposition Bill	Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
SMSF	Self-Managed Superannuation Fund
TAA 1953	<i>Taxation Administration Act 1953</i>
TSB	Total Superannuation Balance

Chapter 1: Better targeted superannuation concessions

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Outline of chapter

- 1.1 The Bill and the Imposition Bill reduce the tax concessions available to individuals with TSBs exceeding \$3 million. From the 2025-26 income year onwards, the headline concessional tax rates applying to superannuation earnings are:
 - up to 15 per cent on earnings on superannuation balances below \$3 million; and
 - up to an overall 30 per cent on a percentage of earnings equal to the percentage of superannuation balances above \$3 million.
- 1.2 The Bills reduce the tax concessions by imposing a tax of 15 per cent on certain earnings based on the percentage of the TSB exceeding the \$3 million threshold. The tax is imposed directly on the individual and is separate from the tax arrangements of the superannuation fund or scheme.
- 1.3 Balances in Australian superannuation accounts will be included for the purposes of calculating an individual's TSB and earnings. This includes APRA-regulated funds, SMSFs and exempt public sector schemes. Special rules apply to certain Commonwealth judges and justices, certain State higher level office holders, and non-complying funds.
- 1.4 The Bill also amends the *Corporations Act 2001*, *Defence Force Retirement and Death Benefits Act 1973*, *Governor-General Act 1974*, *Income Tax Assessment Act 1979*, *Income Tax (Transitional*

Provisions) Act 1997, Judges' Pensions Act 1968, Parliamentary Contributory Superannuation Act 1948, Superannuation Act 1976 and 1970, as well as the Taxation Administration Act 1953.

1.5 In this chapter, unless stated otherwise:

- all legislative references are references to the ITAA 1997; and
- all Bill references are to the Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023.

Context of amendments

- 1.6 The Government is making Australia's world-class superannuation system more sustainable and fairer through a modest change to ensure generous superannuation tax breaks are better targeted. The Government is reducing tax concessions available to individuals with a TSB exceeding \$3 million.
- 1.7 The policy will commence on 1 July 2025 and apply from the 2025-26 income year onwards. Only individuals with a TSB in excess of \$3 million will be subject to the new arrangements.
- 1.8 Currently, income earned on superannuation balances is generally taxed at a headline rate of up to 15 per cent. This will continue for all superannuation accounts held by individuals with TSBs below \$3 million.
- 1.9 From the 2025-26 income year onwards, the overall tax rate applied to a percentage of future earnings equal to the percentage of an individual's TSB above \$3 million will be up to 30 per cent. This change is expected to apply to around 80,000 people, or approximately 0.5 per cent of Australians with a superannuation account in the 2025-26 income year.
- 1.10 This adjustment will apply prospectively and does not impose a limit on the size of superannuation account balances. Individuals with TSBs over \$3 million will receive less generous tax concessions on earnings.
- 1.11 The Bill is consistent with the Government's proposed objective of superannuation: 'The objective of superannuation is to preserve savings to deliver income for a dignified retirement, alongside government support, in an equitable and sustainable way.' It will still provide concessions to save for retirement through superannuation whilst improving the equity of the superannuation system and its fiscal sustainability over time through limiting the level of taxpayer support available to a small number of individuals with large balances.
- 1.12 For each income year from 2025-26, the Commissioner will calculate a Division 296 tax liability and notify individuals of their tax liability for a given income year. Division 296 tax will be levied at a rate of 15 per cent on a percentage of the individual's superannuation earnings equal to the percentage of their TSB above \$3 million. Division 296 tax will be levied directly on individuals and imposed separately to personal income tax and superannuation fund tax. Individuals will have the option of paying their tax liability by either releasing amounts from their superannuation or using amounts outside of the superannuation system. Tax associated with a Division 296 tax on defined benefit interest may be deferred.
- 1.13 Negative superannuation earnings from balances above \$3 million will be carried forward and used to reduce the amount of superannuation earnings subject to Division 296 tax in future income years.

Summary of new law

- 1.14 Division 296 tax is imposed at a rate of 15 per cent on a percentage of earnings equal to the percentage of superannuation balances that exceed \$3 million for an income year.
- 1.15 Special rules for working out Division 296 tax apply to:
- individuals with defined benefit interests;

- State higher level office holders with superannuation contributions to constitutionally protected funds and or other contributions made to non- constitutionally protected funds made on their behalf;
 - Commonwealth justices and judges in respect of defined benefit interest in a superannuation fund established under the *Judges' Pension Act 1969*; and
 - Territory Supreme Court Judges in respect of defined benefit interests in their judicial pension scheme.
- 1.16 The amount of Division 296 tax is assessed by the Commissioner of Taxation and is generally due and payable within 84 days of the Commissioner giving the notice of assessment. For defined benefit interests, Division 296 tax is generally deferred for payment until 21 days after the first benefit is paid from the interest. Individuals are able to have amounts released from certain superannuation interests to facilitate payment of this tax.

Detailed explanation of new law

Division 296 – Better targeted superannuation concessions

- 1.17 The Bill inserts new Division 296 in the ITAA 1997 which, together with the Imposition Bill, imposes a tax at a rate of 15 per cent for superannuation earnings corresponding to the percentage of an individual's superannuation balance that exceeds \$3 million for an income year for certain superannuation interests that are captured by the Bill.
[Schedule 1, item 15 of the Bill, sections 296-1, 296-5, 296-10 and 296-15 of the ITAA 1997, and sections 4 and 5 of the Imposition Bill]
- 1.18 This is referred to as 'Division 296 tax'. Division 296 tax law means:
- the ITAA 1997, so far as it relates to the Division 296 tax; and
 - any Act that imposes Division 296 tax; and
 - the TAA 1953, so far as it relates to the Division 296 tax; and
 - any other Act, so far as it relates to the Division 296 tax; and
 - regulations and other legislative instruments under an Act, so far as they relate to the Division 296 tax.

Calculating taxable superannuation earnings

- 1.19 An individual has taxable superannuation earnings for an income year if their TSB at the end of that year is greater than the large superannuation balance threshold (\$3 million) and the amount of their superannuation earnings for the year is greater than nil.
[Schedule 1, item 15, subsection 296-35(1) of the ITAA 1997]
- 1.20 Earnings on a TSB less than \$3 million will continue to be taxed at the concessional headline rate of 15 per cent and are not taxed under this Bill.

Example 1.1

Keny has a balance in his superannuation fund of \$150,000 on 30 June 2025. Keny's balance on 30 June 2026 is \$165,000.

As his TSB at the end of the income year is less than the large superannuation balance threshold of \$3 million, Keny will not have taxable superannuation earnings for Division 296 tax purposes under paragraph 296-35(1)(a).

- 1.21 The total amount of taxable superannuation earnings for an income year is worked out by first determining the percentage of the TSB at the end of the year that is above the large superannuation balance threshold according to the following formula:

$$\frac{\text{Your *total superannuation balance at the end of the year} - \text{The *large superannuation balance threshold}}{\text{Your *total superannuation balance at the end of the year}} \times 100$$

[Schedule 1, item 15, subsection 296-35(2) of the ITAA 1997]

- 1.22 The result of this formula is rounded to two decimal places. It ensures Division 296 tax will only be applied for the part of earnings corresponding to the percentage of an individual's TSB that is greater than \$3 million.
- 1.23 The percentage provided by the formula is then multiplied by the amount of superannuation earnings for the year to provide the amount of taxable superannuation earnings. This is achieved by applying the following formula:

$$\text{The percentage worked out under subsections (2) and (3)} \times \text{The amount of your *superannuation earnings for the year}$$

[Schedule 1, item 15, subsection 296-35(1) of the ITAA 1997]

Definition of Total Superannuation Balance

- 1.24 This measure reduces tax concessions available to individuals whose TSB exceeds \$3 million. The TSB concept is central to the scope of the Division 296 tax which will be applied to the percentage of earnings corresponding to balances above \$3 million. The earnings are calculated with reference to the difference in the TSB at the start and end of the income year, with adjustments for withdrawals and contributions.
- 1.25 Schedule 2 of the Bill amends the Act to give effect to this measure that all Australian superannuation interests are counted in an individual's TSB and introduces a new concept of TSB value. The concept has the meaning provided for in section 307-230A.
[Schedule 2, items 1, 2 and 3, section 307-205 and paragraphs 307-230(1)(a) and (b) of the ITAA 1997]
- 1.26 The TSB does not include superannuation interests in a foreign superannuation fund as these interests are not subject to the concessional tax treatment afforded to complying superannuation funds. Foreign superannuation fund is an existing defined term in subsection 995-1(1). Determining whether superannuation interests are not counted in the TSB because they are in a foreign superannuation fund, is done at that time as required to assess TSB. For the purposes of Division 296, an individual determines whether they exceed the \$3 million TSB threshold at the at end of an income year.
[Schedule 2, item 3, paragraph 307-230(1)(a) of the ITAA 1997]
- 1.27 These amendments require the determination of an individual's TSB with reference to the TSB value. The TSB value will be determined by a method or value prescribed in the regulations or otherwise the total amount of the superannuation benefits that would become payable if an individual had the right to cause the superannuation interest to cease at that time and the individual voluntary causes the superannuation interest to cease, colloquially known as the "withdrawal benefit". If a superannuation interest does not have a prescribed value or method of determining its value, the interests' amount is the amount determined using the "withdrawal benefit".
[Schedule 2, items 3 and 5, sections 307-230 and 307-230A of the ITAA 1997]
- 1.28 The changes to the TSB remove the link to transfer balance account. The original intention underpinning the link to the transfer balance account was to remove the requirement for certain income streams, such as defined benefit income streams, to be valued on an annual basis for the TSB, instead leveraging the existing transfer balance account value. The calculation of earnings for the Division 296 tax requires these valuations to be applied on an annual basis. The amendments to

the TSB streamline the definition of TSB to align with this annual valuation requirement.
[Schedule 2, items 1, 3 and 7, subsection 307-205(1) of the ITAA 1997]

- 1.29 The amendments do not change the treatment of structured settlement contributions. The TSB is reduced by the sum of a structured settlement contribution made at or before a time in respect of an individual. Structured settlement contribution is an existing defined term in the Act and has the meaning given by section 294-80.

[Schedule 2, item 4, subsection 307-230(2) of the ITAA 1997]

- 1.30 These amendments to the TSB apply beyond Division 296 and will applying in working out an individual's TSB for all other purposes from immediately before 1 July 2025 or on or after 1 July 2025.

[Schedule 2, Item 10 of the Bill]

- 1.31 For the purpose of Division 296, an LRBA amount under section 307-231 is to be disregarded. This amount is ordinarily included in a TSB under paragraph 307-230(1)(d). These amounts are excluded because they ensure that the tax is only calculated on net assets. This exclusion is only limited to Division 296 purposes and does not change how LRBAs are dealt with in the TSB under section 307-230 for other purposes.

[Schedule 1, item 15, section 296-505 of the ITAA 1997]

Total superannuation balance value

- 1.32 These amendments provide a regulation-making power to specify a value or a method determining a value of a superannuation interest. It is necessary to have the power to prescribe alternative valuation methods for different types of superannuation interests to take into account the unique features of different products and scheme arrangements. The methods and factors referenced in the regulations will be approved by legislative instrument by the Minister for the purpose of such regulations.

[Schedule 2, item 6, section 307-230A of the ITAA 1997]

Calculating superannuation earnings

- 1.33 An individual's superannuation earnings for an income year depends upon whether they have any transferrable negative superannuation earnings to apply or not. In the instance where an individual does not have any transferrable negative superannuation earnings, their superannuation earnings will be the amount determined as their basic superannuation earnings for the year. If they do have transferrable negative superannuation earnings, then they are directed to section 296-110, where they will calculate their superannuation earnings via that provision.

[Schedule 1 to the Bill, item 15, subsection 296-40(1) of the ITAA 1997]

- 1.34 The amount of an individual's basic superannuation earnings for an income year is determined by subtracting their previous balance, which is their TSB immediately before the start of the year, from their current adjusted balance, which is their adjusted TSB at the end of the year. The formula is depicted as so:

Current adjusted balance – Previous balance

[Schedule 1 to the Bill, item 15, subsection 296-40(2) of the ITAA 1997]

- 1.35 If an individual's current adjusted balance, or previous balance is below the large superannuation balance threshold of \$3 million, then it is to be substituted by the large superannuation balance threshold number of \$3 million.

[Schedule 1, item 15, paragraph 296-40(2)(b) of the ITAA 1997]

- 1.36 This calculation method allows the same methodology to apply to interests in both APRA-regulated funds and SMSFs. The formula also allows losses to be carried forward. It also ensures that individuals who drop below the threshold are able to have negative earnings recognised for future years (in the event that their balance grows again to exceed the threshold).

Calculating the adjusted total superannuation balance

1.37 An individual's adjusted TSB is worked out using the following formula:

$$\begin{array}{r} \text{Your *total} \\ \text{superannuation balance} \\ \text{at the end of the year} \end{array} + \begin{array}{r} \text{Your} \\ \text{withdrawals total} \\ \text{for the year} \end{array} - \begin{array}{r} \text{Your} \\ \text{contributions total} \\ \text{for the year} \end{array}$$

[Schedule 1, item 15, subsection 296-45 of the ITAA 1997]

1.38 The adjusted TSB reflects a modified closing superannuation balance after considering the effect of withdrawals and contributions which would otherwise overstate or understate the investment earnings generated within superannuation. References to withdrawals total for the year and contributions total for the year are not intended to represent a comprehensive adjustment for all cashflows throughout the year. Instead, they make provision for events that would otherwise skew the earnings calculation due to their direct impact on an individual's TSB at the end of the income year.

1.39 Withdrawals total equals the total of the following amounts paid from the individual's superannuation interests during the year:

- A superannuation benefit payment;
- Superannuation benefits transferred via spousal contribution-splitting;
- Superannuation benefits transferred to another person via a family payment split;
- Amounts withheld from an excess untaxed roll-over amount;
- Amounts released under a valid requested release authority;
- Any amounts prescribed by regulations.

[Schedule 1, item 15, section 296-50 of the ITAA 1997]

1.40 Where an amount released under a valid release authority relates to a first home super saver determination, the amount to be included in withdrawals total is given by the following formula:

$$\begin{array}{r} \text{Your *assessable FHSS} \\ \text{released amount for the year} \end{array} \times \frac{\begin{array}{r} \text{Your *FHSS releasable contributions amount} \end{array}}{\begin{array}{r} \text{Your *FHSS maximum release amount} \end{array}}$$

[Schedule 1, item 15, subsection 296-50(2) of the ITAA 1997]

1.41 To preserve the tax concessions for the associated earnings calculated under the first home super saver scheme, the amount to be included in withdrawals total reflects the value of the assessable FHSS released amount excluding the associated earnings.

1.42 Withdrawals total does not include any rollover superannuation benefits, payment made under a continuous disability policy, an amount that arises due to fraud or dishonesty, and payments of unclaimed superannuation benefits.

[Schedule 1, item 15, subsection 296-50(4) of the ITAA 1997]

1.43 Contributions total equals the total of the following amounts received into the individual's superannuation plan during the year:

- contributions made to the individuals superannuation plan (or 85% of the amount for concessional contributions);
- contributions-splitting superannuation benefits payments;
- family law superannuation payments made due to a payment split;
- the TSB value of a superannuation death benefit interest when the individual becomes a retirement phase recipient;
- a death or total and permanent disability insurance payment or contingent beneficiary payment (with the exception of continuous disability payments);

- any amounts allocated to the individual's superannuation plan that are captured within the meaning of concessional contributions under subsection 291-25(3);
- a transfer from a foreign superannuation fund;
- the increase in TSB value of a superannuation interest as a result of a remediation payment or compensation for loss as a result of fraud or dishonesty; and
- any amounts prescribed by regulations.

[Schedule 1, item 15, section 296-55 of the ITAA 1997]

1.44 To avoid double counting an amount, where a particular amount meets more than one category of contribution or withdrawal, that amount is included only once in the contribution total or withdrawal total calculation.

[Schedule 1, item 15, subsections 296-50(5) and 296-55(4) of the ITAA 1997]

1.45 With the exception of amounts transferred from a foreign superannuation fund into an Australian superannuation fund, contributions into and withdrawals from foreign superannuation funds are excluded from withdrawal total and contribution total calculations.

[Schedule 1, item 15, subsections 296-50(4) and 296-55(5) of the ITAA 1997]

1.46 Regulations may make modifications to the mechanisms for calculating contributions total and withdrawals total, including by prescribing amounts not to be included in contributions total or withdrawals total and by specifying circumstances where contributions total or withdrawals total are nil.

[Schedule 1, item 15, section 296-60 of the ITAA 1997]

Carrying forward negative superannuation earnings to future income years

1.47 Subject to the rules in Subdivision 296-C, if an individual has basic superannuation earnings that are less than nil in an income year, they may be carried forward and offset against a Division 296 tax liability in future years. Basic superannuation earnings are obtained by subtracting their previous balance from their current adjusted balance. The amount of superannuation earnings can be a positive or negative amount.

[Schedule 1, item 15, section 296-40 and subdivision 296-C of the ITAA 1997]

1.48 An individual will have transferrable negative superannuation earnings for an income year if the amount of basic superannuation earnings worked out under section 296-40 for the year are less than nil and the TSB immediately before the start of the year is greater than the large superannuation balance threshold.

[Schedule 1, item 15, subsections 296-105(1) and 296-40(2) of the ITAA 1997]

1.49 An individual has unapplied transferrable negative superannuation earnings for an income year, equal to the amount of the last year in which that individual had transferrable negative superannuation earnings. Transferrable negative earnings are expressed as a positive amount.

[Schedule 1, item 15, subsection 296-105(2) of the ITAA 1997]

1.50 However, an individual will not have unapplied transferrable negative superannuation earnings if they have previously used up all of their previous transferrable negative superannuation earnings under section 296-110.

[Schedule 1, item 15, subsection 296-105(3) of the ITAA 1997]

1.51 If an individual has unapplied transferrable negative superannuation earnings for an income year and have either a TSB greater than \$3 million immediately before the start or at the end of that same income year, they are eligible to recalculate their superannuation earnings by applying their unapplied transferrable negative superannuation earnings.

[Schedule 1, item 15, section 296-110 of the ITAA 1997]

1.52 The recalculation will involve subtracting an individual's unapplied transferrable negative superannuation earnings from their basic superannuation earnings as demonstrated by the formula below:

The amount of your
*basic superannuation earnings for the year

–

The amount of your
*unapplied transferrable negative
superannuation earnings for the year

[Schedule 1, item 15, subsection 296-110(2) of the ITAA 1997]

- 1.53 Section 296-110 applies even if an individual's basic superannuation earnings for the year may be less than nil, or their superannuation earnings for the year are less than nil. Therefore, it is possible for an individual to increase the amount of their transferrable negative earnings amount if they experience successive years of negative basic superannuation earnings amounts above the \$3 million threshold. Similarly, an individual may have a larger amount of unapplied transferrable negative superannuation earnings than positive basic superannuation earnings, which would ultimately result in transferrable negative earnings for the year.

[Schedule 1, item 15, subsection 296-110(2) of the ITAA 1997]

Example 1.2

Jess has a TSB of \$4 million on 30 June 2025, and \$4.5 million at 30 June 2026.

Jess receives concessional contributions to superannuation of \$27,500 in the 2025-26 income year, including \$9,500 in salary sacrifice contributions.

For Division 296 tax purposes, her total contributions for the year are \$23,375 after correcting for the 15 per cent tax paid by her superannuation fund on these concessional contributions as under subsection 296-55(2) (85 per cent x \$27,500).

Jess's adjusted TSB at the end of the year is calculated to be \$4,476,625 by deducting her total contributions of \$23,375 from her end of year TSB of \$4.5 million as under section 296-45.

Jess's basic superannuation earnings for Division 296 tax in the 2025-26 income year are calculated as \$476,625 by subtracting her previous TSB from her adjusted current TSB under subsection 296-40(2) (\$4,476,625 - \$4 million).

As Jess does not have unapplied transferrable negative superannuation earnings under paragraph 296-110(1)(b), under paragraph 296-40(1)(a) her superannuation earnings for the 2025-26 income year will be her \$476,625 in basic superannuation earnings.

As her TSB at the end of the year is greater than the large superannuation balance threshold of \$3 million and her superannuation earnings for 2025-26 are greater than nil, Jess will have taxable superannuation earnings for Division 296 tax purposes under subsection 296-35(1).

The percentage of Jess's superannuation earnings above the \$3 million threshold is calculated as 33.33 per cent, by calculating the percentage of her TSB at the end of the year over \$3 million rounded to 2 decimal places under subsections 296-35(2)-(3) (((\$4.5 million - \$3 million)/\$4.5 million).

Jess's taxable superannuation earnings for Division 296 tax are calculated as \$158,859 by multiplying her superannuation earnings by the percentage of the earnings above the threshold under subsection 296-35(1) (33.33 per cent x \$476,625).

This taxable superannuation earnings amount will be taxable at 15 per cent. Jess will have a Division 296 tax liability of \$23,829 for the 2025-26 income year (\$158,859 x 15 per cent).

Example 1.3

Melanie has three superannuation accounts with the following TSB values at 30 June 2025:

- A pension account in her SMSF with \$1 million

- A second pension account in her SMSF with \$700,000
- An accumulation account in an APRA-regulated fund with \$2 million

Melanie's TSB captures all her superannuation accounts. Her TSB on 30 June 2025 is \$3.7 million.

These superannuation accounts had the following balances at 30 June 2026:

- A pension account in her SMSF with \$950,000
- A second pension account in her SMSF with \$650,000
- An accumulation account in an APRA-regulated fund with \$2.5 million

Her TSB on 30 June 2026 is \$4.1 million.

In the 2025-26 income year Melanie receives benefit payments of \$250,000 from her two pension accounts and makes a \$300,000 downsizer contribution.

Melanie's adjusted TSB at the end of the year for Division 296 tax purposes is calculated to be \$4.05 million by adding her total withdrawals of \$250,000 and deducting her total contributions of \$300,000 from previous TSB of \$4.1 million as under section 296-45.

Melanie's basic superannuation earnings for the 2025-26 income year for Division 296 tax are calculated as \$350,000 by subtracting her previous TSB from her current adjusted TSB under subsection 296-40(2) (\$4.05 million minus \$3.7 million).

As Melanie does not have unapplied transferrable negative superannuation earnings under paragraph 296-110(1)(b), under paragraph 296-40(1)(a) her superannuation earnings for the 2025-26 income year will be her \$350,000 in basic superannuation earnings.

As her TSB at the end of the year is greater than the large superannuation balance threshold of \$3 million and her superannuation earnings for 2025-26 are greater than nil, Melanie will have taxable superannuation earnings for Division 296 tax purposes under subsection 296-35(1).

The percentage of Melanie's superannuation earnings above the \$3 million threshold is calculated as 26.83 per cent, by calculating the percentage of her TSB at the end of the year over \$3 million rounded to 2 decimal places under subsections 296-35(2)-(3) $((\$4.1 \text{ million} - \$3 \text{ million})/\$4.1 \text{ million})$.

Melanie's taxable superannuation earnings for Division 296 tax are calculated as \$93,905 by multiplying her superannuation earnings by the percentage of the earnings above the threshold under subsection 296-35(1) (26.83 per cent x \$350,000).

This taxable superannuation earnings amount will be taxable at 15 per cent. Melanie will have a Division 296 tax liability of \$14,086 for the 2025-26 income year ($\$93,905 \times 15 \text{ per cent}$).

Example 1.4

MG has a TSB on 30 June 2025 of \$2.8 million. MG's TSB is \$3.2 million on 30 June 2026.

MG's adjusted TSB at the end of the year for Division 296 tax purposes is calculated to be \$3.2 million as under section 296-45, as there are no contributions or withdrawals to his fund in the 2025-26 income year.

As MG's TSB immediately before the start of the year is less than \$3 million, for the basic superannuation earnings calculation his previous TSB will be the \$3 million threshold instead of his TSB of \$2.8 million immediately before the start of the year to ensure that the calculation in subsection 296-40(2) only captures the earnings for the part of his TSB

over \$3 million. MG's basic superannuation earnings for the 2025-26 income year for Division 296 tax are calculated as \$200,000 by subtracting \$3 million from his current adjusted TSB under subsection 296-40(2) (\$3.2 million - \$3.0 million).

As MG does not have unapplied transferrable negative superannuation earnings under paragraph 296-110(1)(b), under paragraph 296-40(1)(a) his superannuation earnings for the 2025-26 income year will be his \$200,000 in basic superannuation earnings.

As his TSB at the end of the year is greater than the large superannuation balance threshold of \$3 million and his superannuation earnings for 2025-26 are greater than nil, MG will have taxable superannuation earnings for Division 296 tax purposes under subsection 296-35(1).

The percentage of MG's superannuation earnings above the \$3 million threshold is calculated as 6.25 per cent, by calculating the percentage of his TSB at the end of the year over \$3 million rounded to 2 decimal places under subsections 296-35(2)-(3) $((\$3.2 \text{ million} - \$3 \text{ million})/\$3.2 \text{ million})$.

MG's taxable superannuation earnings for Division 296 tax are calculated as \$12,500 by multiplying his superannuation earnings by the percentage of the earnings above the threshold under subsection 296-35(1) $(6.25 \text{ per cent} \times \$200,000)$.

This taxable superannuation earnings amount will be taxable at 15 per cent. MG will have a Division 296 tax liability of \$1,875 for the 2025-26 income year $(\$12,500 \times 15 \text{ per cent})$.

Example 1.5

Lin has a TSB on 30 June 2025 of \$2.8 million. Lin's TSB is \$3.2 million on 30 June 2026. In the 2025-26 income year Lin makes a \$300,000 downsizer contribution.

Lin's adjusted TSB at the end of the year for Division 296 tax purposes is calculated to be \$2.9 million after deducting his total contributions of \$300,000 from his end of year TSB of \$3.2 million as under section 296-45.

As Lin's adjusted TSB at the end of the year is less than \$3 million and his TSB immediately before the start of the year is less than \$3 million, Lin will have basic superannuation earnings for Division 296 tax purposes of nil for the 2025-26 income year under subsection 296-40(2) as both the current adjusted TSB and previous TSB will be the large superannuation balance threshold of \$3 million $(\$3 \text{ million} - \$3 \text{ million})$.

As Lin does not have unapplied transferrable negative superannuation earnings under paragraph 296-110(1)(b), under paragraph 296-40(1)(a) his superannuation earnings for the 2025-26 income year will be his basic superannuation earnings.

As Lin's superannuation earnings for 2025-26 are not greater than nil, Lin will not have taxable superannuation earnings for Division 296 tax purposes under subsection 296-35(1).

Example 1.6

Jamal has a TSB on 30 June 2025 of \$3.2 million. Jamal's TSB is \$2.8 million on 30 June 2026.

Jamal's adjusted TSB at the end of the year for Division 296 tax purposes is calculated to be \$2.8 million as under section 296-45, as there are no contributions or withdrawals to his fund in the 2025-26 income year.

As Jamal's adjusted TSB at the end of the year is less than \$3 million, for the basic superannuation earnings calculation the current adjusted TSB will be replaced with a \$3 million value to ensure that the earnings calculation in subsection 296-40(2) only captures the negative earnings for the part of his TSB over \$3 million. Jamal's basic superannuation earnings for the 2025-26 income year for Division 296 tax are calculated

as -\$200,000 by subtracting his previous TSB from the threshold of \$3 million under subsection 296-40(2) (\$3.0 million - \$3.2 million).

As Jamal does not have unapplied transferrable negative superannuation earnings under 296-110(b), under paragraph 296-40(1)(a) his superannuation earnings for the 2025-26 income year will be his basic superannuation earnings of -\$200,000.

As his TSB at the end of the year is less than the large superannuation balance threshold of \$3 million and his superannuation earnings for 2025-26 are less than nil, Jamal will not have taxable superannuation earnings for Division 296 tax purposes under subsection 296-35(1).

However, as Jamal's TSB immediately before the start of the year is greater than \$3m and he has superannuation earnings of less than nil, he will have a transferrable negative superannuation earning of \$200,000 for the 2025-26 income year under section 296-105. Superannuation earnings for Division 296 tax purposes he may incur in future income years will be reduced by this amount.

Example 1.7

Jacob has a TSB on 30 June 2025 of \$9.0 million. Jacob's TSB is \$8.0 million on 30 June 2026. Jacob makes \$150,000 in withdrawals from in the 2025-26 income year.

As per section 296-45, for the 2025-26 income year, Jacob's adjusted TSB for Division 296 tax purposes is calculated to be \$8.15 million. This figure is reached by reincluding his withdrawals to his end of year TSB (\$8.00 million + \$0.15 million).

Jacob has basic superannuation earnings for the 2025-26 income year for Division 296 tax of -\$850,000 after subtracting his previous TSB from his current adjusted TSB under subsection 296-40(2) (\$8.15 million - \$9.00 million).

As Jacob does not have unapplied transferrable negative superannuation earnings under paragraph 296-110(1)(b), under paragraph 296-40(1)(a) his superannuation earnings for the 2025-26 income year will be his basic superannuation earnings of -\$850,000.

As his superannuation earnings for 2025-26 are less than nil, Jacob will not have taxable superannuation earnings for Division 296 tax purposes under subsection 296-35(1).

However, as his Jacob has a TSB immediately before the start of the year is greater than \$3m and he has superannuation earnings of less than nil, he will have a transferrable negative superannuation earning of \$850,000 for the 2025-26 income year under section 296-105. Superannuation earnings for Division 296 tax purposes he may incur in future income years will be reduced by this amount.

Jacob's TSB is \$8.5 million on 30 June 2027. Jacob makes \$150,000 in withdrawals from in the 2026-27 income year.

As per section 296-45, for the 2026-27 income year, Jacob's adjusted TSB for Division 296 tax purposes is calculated to be \$8.65 million. This figure is reached by reincluding his withdrawals to his end of year TSB (\$8.50 million + \$0.15 million).

As Jacob has a TSB at the end of the year greater than \$3 million, a TSB immediately before the start of year greater than \$3 million and unapplied transferrable negative superannuation earnings, under paragraph 296-40(1)(b) his superannuation earnings for the 2025-26 income year will be calculated under section 296-110.

Jacob has basic superannuation earnings for the 2026-27 income year for Division 296 tax of \$650,000 after subtracting his previous TSB from his current adjusted TSB under section 296-40(2) (\$8.65 million - \$8.00 million). As under subsection 296-110(2) his superannuation earnings will be -\$200,000 after deducting \$850,000 of unapplied

transferrable negative superannuation earning from the last negative year 2025-26 (\$0.65 million - \$0.85 million).

As his superannuation earnings for 2025-26 are less than nil, Jacob will not have taxable superannuation earnings for Division 296 tax purposes under subsection 296-35(1).

However, as Jacob has a TSB immediately before the start of year greater than \$3 million and he has superannuation earnings of less than nil, he will have a transferrable negative superannuation earning of \$200,000 for the 2026-27 income year under section 296-105. Superannuation earnings for Division 296 tax purposes he may incur in future income years will be reduced by this amount.

Modifications to calculate withdrawals and contributions

- 1.54 The amendments provide a regulation making power that affect how the adjusted TSB is worked out, particularly how to work out the total withdrawals and contributions. The regulation-making power is necessary so that, amongst other things, commensurate treatment applies to defined benefit interests.

[Schedule 1, item 15, section 296-60 of the ITAA 1997]

- 1.55 The regulations will modify sections 296-50 and 296-55 so that superannuation interests are appropriately valued and the earnings calculated accurately so that individual are included or excluded from the scope of the Division 296 tax and to ensure the right amount of tax liability is calculated for every type of superannuation interest. Requiring such modifications to be prescribed by regulations provides opportunity to separately consider any necessary modification that may be required for particular interests, including defined benefit interests.

[Schedule 1, item 15, subsection 296-60(2) of the ITAA 1997]

When tax is payable – assessments

What is the amount of tax?

- 1.56 Division 296 tax applies at a rate of 15 per cent of an individual's taxable superannuation earnings on their superannuation interests with over \$3 million in value for an income year.

[Section 5 of the Imposition Bill]

Who is liable for the tax?

- 1.57 Generally, all individuals who have taxable superannuation earnings for an income year are liable to pay the Division 296 tax. However, the following exceptions apply:

- child recipients of superannuation income streams at the end of the income year;
- individuals who have a structured settlement contribution made in respect to them as a payment for a personal injury at the end of the income year, or any year prior; and
- individuals who have died before the last day of the income year.

[Schedule 1, item 15, sections 296-15 to 296-30 of the ITAA 1997]

- 1.58 Child recipients are to be exempted from Division 296 tax on the basis that these amounts are required by law to be cashed out when reaching age 25 at the latest (unless the child recipient is disabled). This is an existing concept in the legislation as these individuals already have modified arrangements for the Transfer Balance Cap (see section 294-175 of the ITAA 1997). Child recipients that have a permanent disability will continue to be excluded, even after reaching age 25. This reflects that these individuals may have had limited opportunity to earn income and accumulate their own superannuation.

- 1.59 Individuals who have had a structured settlement contribution made in respect to them are exempt recognising that these contributions are usually large payments that can provide the funds for

ongoing medical and care expenses resulting from serious injury and income loss. This is consistent with the treatment of structured settlement contributions under the Transfer Balance Cap provisions.

- 1.60 The superannuation earnings of a person will not be taxed in the event of their death before the end of the income year.

When is the tax payable?

- 1.61 Payment of a Division 296 tax is generally due 84 days after the Commissioner gives the individual a notice of assessment for the tax, except for amounts determined to be attributable to a defined benefit interest and thus deferred to a Division 296 tax debt account. The period of 84 days is longer than other such payment windows for similar forms of tax, such as Division 293 tax, but it allows additional time for individuals that may have less predictable sources of income.

[Schedule 1, item 15, section 296-205 of the ITAA 1997]

- 1.62 Should any amendments be made to an individual's assessment by the Commissioner, that individual will also be given 84 days to pay any additional assessed Division 296 tax after being given notice of the amendment.

[Schedule 1, item 15, section 296-210 of the ITAA 1997]

Making assessments

- 1.63 The Commissioner can make an assessment of an amount of Division 296 tax payable for an income year as an assessable amount. An individual cannot give the Commissioner a notice under section 155-30 of Schedule 1 to the TAA 1953 in respect of a delayed assessment because there is no self-assessment of Division 296 tax.

[Schedule 1, items 62 to 64, paragraph 155-5(2)(fa), note in subsection 155-15(1) and paragraph 155-30(3)(aa) of Schedule 1 to the TAA 1953]

Interest Charges

Division 296 general interest charge

- 1.64 The Bill introduces a Division 296 general interest charge rate. This new general interest charge is worked out by adding three percentage points to the base interest rate for that day and dividing that total by the number of days in the calendar year. The base interest rate is detailed under subsections 8AAD(2) to (4) of the TAA 1953.

[Schedule 1, items 44 and 50, subsections 2(1) and 8AAD(1A) of the TAA 1953]

- 1.65 This Division-specific general interest charge uses the same calculation method as the shortfall interest charge and is applied to any outstanding liabilities relating to Division 296 which remain unpaid by the due date and are not deferred to a Division 296 debt account. The lower interest charge on unpaid Division 296 liabilities ensures that it allows relevant taxpayers to have a rate of interest charged that are broadly similar to market rates. This means that the rate of interest does not penalise taxpayers in the very rare circumstance that they do not have liquidity within or outside of superannuation to meet the tax liability. While this provides significant additional payment flexibility for individuals, it maintains the real value of the tax liability over time to ensure it is not abused by taxpayers to reduce the tax they are required to pay.

- 1.66 Assessed Division 296 tax that is not deferred to a debt account is due and payable 84 days after the notice of assessment or amended assessment is given to an individual by the Commissioner. The Division 296 general interest charge applies to an amount of assessed Division 296 tax, shortfall interest charge or general interest charge for each day they remain unpaid. The Commissioner may remit the general interest charge under the existing remission guidelines. General interest charge is calculated in accordance with Part IIA of the TAA 1953.

[Schedule 1, item 15, section 296-215 of the ITAA 1997]

- 1.67 Debt account discharge liabilities are payable 21 days after the day when the end benefit for the relevant interest is paid. Amounts that remain unpaid after that time attract the general interest

charge for each day they are unpaid. The Commissioner may remit the general interest charge under existing remission guidelines. The general interest charge is calculated in accordance with Part IIA of the TAA 1953. Amounts that remain unpaid from a deferred Division 296 debt account are not eligible for the Division-specific general interest charge.

[Schedule 1, item 58, sections 134-115 and 120 of Schedule 1 to the TAA 1953]

Shortfall interest charge

- 1.68 Shortfall interest charge applies where an amount of Division 296 tax becomes due and payable because of an amended assessment for an income year.
[Schedule 1, item 63, section 280-102BA of Schedule 1 to the TAA 1953]
- 1.69 Shortfall interest charge applies to the amount of an assessment for each day from the date that the first assessment of Division 296 tax was payable and ending on the day the amended notice of assessment was given by the Commissioner.
[Schedule 1, item 63, subsection 280-102BA(3) of Schedule 1 to the TAA 1953]
- 1.70 Shortfall interest charge is due and payable 21 days after the day on which the Commissioner gives the individual notice of the charge. Shortfall interest charge is calculated in accordance with the general rules in Division 280 of Schedule 1 to the TAA 1953.
[Schedule 1, item 15, notes 2 and 3 in section 296-215 of the ITAA 1997]
- 1.71 Where an amended assessment reduces a liability and a later amended assessment reinstates all or part of that liability, shortfall interest charge applies to the amount that is reinstated, from the due and payable date of the earlier amended assessment.
[Schedule 1, item 70, subsection 280-102BA(4) of Schedule 1 to the TAA 1953]
- 1.72 Shortfall interest charge does not apply to an amount of Division 296 tax arising as a result of an amended assessment that is deferred to a debt account. This is because the amount has not become due and payable.
[Schedule 1, item 70, subsection 280-102BA(2) of Schedule 1 to the TAA 1953]
- 1.73 The Commissioner must give an individual a notice stating the amount of the shortfall interest charge liability. This amount can be included in another notice that the Commissioner gives to the individual such as the notice of the amended assessment. The notice serves as prima facie evidence of the shortfall interest charge liability.
- 1.74 An individual can seek to have shortfall interest charge that has been imposed remitted in whole or part. The Commissioner has established guidelines setting out factors to be taken into account in deciding if shortfall interest charge should be remitted.
[Schedule 1, item 72, subsection 280-110(1) of Schedule 1 to the TAA 1953]
- 1.75 An individual may object to a remission decision by the Commissioner. Where an unremitted amount of shortfall interest charge exceeds 20 per cent of the tax shortfall, the objection, review and appeal rights in Part IVC of the TAA 1953 are available to the individual. The rights include a right to object to the merits of a decision made by the Commissioner, a right to have the Administrative Appeals Tribunal review the objection decision and a right to appeal the decision to the Federal Court.
[Schedule 1, item 73, section 280-170 of Schedule 1 to the TAA 1953]

Refunding temporary residents who depart Australia

- 1.76 Departing temporary residents who receive a departing Australia superannuation payment are entitled to a refund of Division 296 tax that they have paid. This treatment reflects that any concessional tax treatment applied to their superannuation interests is removed by a final withholding tax at the time of receiving a payment under the *Superannuation (Departing Australia Superannuation Payments Tax) Act 2007*.

- 1.77 Individuals are entitled to a refund of Division 296 tax if they:
- made a payment of any of the following:
 - assessed Division 296 tax;
 - a voluntary payment to reduce the amount by which a debt account is in debit; or
 - the debt account discharge liability; and
 - received a departing Australia superannuation payment; and
 - applied to the Commissioner in the approved form for the refund.
- [Schedule 1, item 15, section 296-400 of the ITAA 1997]***
- 1.78 Broadly, under section 301-170 of the ITAA 1997 and section 12-305 of Schedule 1 to the TAA 1953, a departing Australia superannuation payment is payable to an individual who held a temporary visa, has a superannuation interest with a superannuation provider, and at least six months have passed since the individual ceased to hold the visa and left Australia. A refund is not available for assessed Division 296 tax for a period when an individual is an Australian resident (but not a temporary resident) of Australia.
- [Schedule 1, item 15, subsection 296-405(3) of the ITAA 1997; Regulation 6.20 A of the Superannuation Industry (Supervision) Regulations 1994]***
- 1.79 The amount of the refund is the sum of the following payments that an individual has made:
- Assessed Division 296 tax;
 - a voluntary payment to reduce the amount by which a debt account is in debit; and
 - the debt account discharge liability.
- [Schedule 1, item 15, subsection 296-405(1) of the ITAA 1997]***
- 1.80 An individual is not entitled to a refund of the amounts of the above payments to the extent the individual has already received the refund in respect of those payments for an income year. Accordingly, the amount of refund is reduced by the amount that has already been paid by the Commissioner.
- [Schedule 1, item 15, subsection 296-405(2) of the ITAA 1997]***
- 1.81 Entitlement to a refund allows the Commissioner to release an individual from all current and future Division 296 tax liabilities (other than a liability in respect of a period when the individual is not a temporary resident). In particular, the Commissioner may extinguish any unpaid Division 296 tax that is due and payable, and also the amount by which a debt account is in debit.
- [Schedule 1, item 15, paragraph 296-420(1)(a) of the ITAA 1997]***
- 1.82 A departing temporary resident who receives a departing Australia superannuation payment who has not paid any Division 296 tax but has a liability for Division 296 tax (including defined benefit tax deferred to a debt account) may also be released from all current and future Division 296 tax liabilities where they would have been entitled to a refund had they made a payment. There is no requirement for taxpayers in this situation to apply to the Commissioner using an approved form to be released from liability for Division 296 tax.
- [Schedule 1, item 15, paragraph 296-420(1)(b) of the ITAA 1997]***
- 1.83 However, the liability will not be released to the extent that the Division 296 tax liability is attributable to a period when an individual is an Australian resident (but not a temporary resident) of Australia.
- [Schedule 1, item 15, paragraph 296-420(1)(b) and subsection 296-405(3) of the ITAA 1997]***

Paying a Division 296 tax liability

- 1.84 Individuals can choose how to pay their Division 296 tax liability. Individuals liable to pay a Division 296 tax will have the option of paying their tax liability either by releasing amounts from one or more of their superannuation interests or by paying the liability from outside of the superannuation system (e.g. cash) or a combination of the two. This will be the case for all individuals (other than those with a defined benefit interest) irrespective of whether they have met a condition of release.
- 1.85 The intention of this policy is to mirror and build upon existing administrative arrangements for the assessment and payment of tax liabilities under the TAA 1953. In particular, Part 3-20 of Schedule 1 to the TAA 1953 deals with administrative matters relating to superannuation.
- 1.86 The Bill amends Divisions 131 and 135 of Schedule 1 to the TAA 1953, to allow an individual to make a request for the release of superannuation money if they have received a notice of assessment of an amount of Division 296 tax payable for the income year that it corresponds to. An individual has 84 days to pay their Division 296 tax. However, they will have 60 days to elect to release a certain amount from one or more of their superannuation funds for the purposes of paying that tax (without incurring interest). If the individual chooses to do so, the Commissioner may issue a release authority to the superannuation providers that the individual has elected.
[Schedule 1, items 52, 53 and 59 to 61, paragraph 131-5(1)(ca), subsections 131-15(5), 135-10(1), 135-40(4) and section 135-97 of Schedule 1 to the TAA 1953]
- 1.87 If an individual holds multiple superannuation interests, then they can also choose which interest(s) to release the money from. If individuals choose to pay their new tax liability out of their superannuation interests, the new tax liability will be quarantined from any other liabilities or concessions. Where an individual has a Division 296 tax amount from a release authority that relates to a deferred Division 296 debt account for a particular superannuation interest, that amount is treated as a voluntary payment under section 134-70 in relation to that debt account and the individual is not entitled to a credit equal to that amount.
[Schedule 1, item 57, subsection 131-65(4) of Schedule 1 to the TAA 1953]
- 1.88 Payment of a Division 296 tax is not deductible.
[Schedule 1, item 14, section 26-99A of the ITAA 1997]

Example 1.8 Paying a tax liability

William receives a notice for \$120,750 of Division 296 tax liability from the ATO. He has the choice to pay this liability using amounts held outside superannuation, or to release money from his superannuation interest.

He elects to pay the amount from his superannuation interest within 60 days by completing the election form. The ATO issues a release authority of \$120,750 from William's superannuation fund.

Example 1.9 Paying a tax liability when there are multiple superannuation interests

Sally is 62 and has multiple superannuation interests with the following balances at 30 June 2026:

- A pension interest in her SMSF with \$1.8 million
- An accumulation interest in her SMSF with \$2.0 million
- An accumulation interest in an APRA-regulated fund with \$3.0 million.

Sally receives a notice from the ATO outlining calculated superannuation earnings of \$550,000 for the 2025-26 income year resulting in Division 296 tax payable of \$46,103.

Sally has the choice to pay the tax using amounts held outside superannuation or to release money from one or more of her superannuation interests. Sally elects to pay the amount

from her accumulation interest by completing the election form. The ATO requests the release of \$46,101 from the superannuation fund where Sally's accumulation interest is held in an APRA-regulated fund.

Interests in defined benefit schemes

Calculating Division 296 tax for defined benefit interests

- 1.89 If an individual has a defined benefit interest at the end of an income year, the defined benefit interest Division 296 tax is attributed to that interest for the corresponding income year. Where an individual has more than one defined benefit interest in this regard, their defined benefit Division 296 tax for that corresponding income year is attributed to the proportion of the TSB values of each interest at the end of that income year.
[Schedule 1, item 51, subsection 134-15(1) of Schedule 1 to the TAA 1953]
- 1.90 An individual's defined benefit Division 296 tax is worked out by multiplying the Division 296 tax for the year by the outcome of an individual's defined benefit interest value over their TSB at the end of the year. However, if the defined benefit interest worked out in this manner is nil, the assessed Division 296 tax for the income year will not include a defined benefit Division 296 tax that is attributable to the individual's relevant superannuation interests.
[Schedule 1, item 51, subsection 134-15(1) of Schedule 1 to the TAA 1953]

Debt deferral

- 1.91 The payment of a Division 296 tax that is attributed to a defined benefit interest from which no superannuation benefit has become payable, is deferred in recognition that members with defined benefit interests in the accumulation phase typically can't access their superannuation to pay tax debts. It is at this point the individual will typically pay tax on the benefits they receive.
[Schedule 1, item 51, sections 134-1 to 134-5 and 134-20 of Schedule 1 to the TAA 1953]
- 1.92 The Commissioner determines the amount of assessed Division 296 tax for an income year that is attributed to an individual's defined benefit superannuation interest. This amount is deferred to a Division 296 debt account for that superannuation interest. The Commissioner cannot make such a determination where an individual's Division 296 end benefit for that defined benefit superannuation interest has become payable to that individual. This is because the end benefit is the first superannuation benefit to become payable from the defined benefit interest and disregarding a benefit that is any of the following:
- a roll-over superannuation benefit paid to a complying superannuation plan that is a *successor fund;
 - a benefit that becomes payable under the condition of release specified in item 105 of the table in Schedule 1 to the *Superannuation Industry (Supervision) Regulations 1994* (about severe financial hardship);
 - a benefit that becomes payable under the condition of release specified in item 107 of that table (about compassionate ground);
 - a defined benefit specified by the Minister, by legislative instrument, as a condition of release specified in that table.
- 1.93 In making such determination, the Commissioner must do so as soon as practicable after making a relevant assessment or amending an assessment in relation to a defined benefit Division 296 tax. If a determination in this respect is amended and the superannuation interest is reduced as a result, the Commissioner must make a determination to that effect. This amount in this determination is known as a Division 296 deferral reversal for the relevant superannuation interest. The validity of such a determination is not affected by non-compliance of any other provisions of this. If an individual is dissatisfied with a determination made in relation to their assessed defined benefit Division 296 tax

liability or where a determination has not been made by the Commissioner, they may object to the decision.

[Schedule 1, item 58, sections 134-10 to 134-30 of Schedule 1 to the TAA 1953]

- 1.94 The Commissioner must keep a debt account for an individual's defined benefit superannuation interest if they have an assessed Division 296 tax for that particular superannuation interest. An individual can make voluntary payment of the Division 296 debt account.

[Schedule 1, item 58, sections 134-60 and 134-70 of Schedule 1 to the TAA 1953]

Excluded Earnings

Excluded superannuation earnings

- 1.95 Subdivision 296-E excludes from taxation earnings from superannuation interests:

- in a constitutionally protected fund held by individuals declared by the regulations to be an individual to whom paragraph 296-305(1)(a) applies; or
- in the superannuation fund established under the *Judges Pension Act 1968* held by a sitting Justice of the High Court or a sitting justice of a court created by the Parliament, where that person was appointed prior to 1 July 2025 and whilst they remain employed; or
- in a superannuation plan that is a non-complying fund at the end of the year.

- 1.96 Although these earnings are excluded from taxation, the value of interests is counted in an individuals' TSB under section 307-230 for the purpose of determining if they exceed the \$3 million threshold. If the sum of all superannuation interests including interests that are excluded exceed this threshold, the amount subject to the Division 296 tax will be the earnings less any loss from the excluded interests.

[Schedule 1, item 15, Subdivision 296-E of the ITAA 1997]

- 1.97 Subdivision 296-E does not limit section 6 of the Imposition Bill which ensures that Division 296 tax does not apply if the imposition of the tax on an individual exceeds the legislative power of the Commonwealth.

[Schedule 1, item 15, section 296-310 of the ITAA 1997, and section 6 of the Imposition Bill]

Excluded interests in constitutionally protected funds

- 1.98 In *Austin v Commonwealth* (2003) 215 CLR 185 and *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272, the High Court found that the Commonwealth could not impose the superannuation contributions tax (surcharge), under legislation enacted in 1997, on contributions or notional contributions made by State Government bodies to constitutionally protected funds on behalf of State office holders at the higher levels of government. In accordance with the High Court finding, Division 296 tax is not imposed on earnings from superannuation interests in constitutionally protected funds held by State high level office holders.
- 1.99 Although these earnings of such an individual are not subject of the tax, these superannuation interests will be counted in the individuals' TSB to determine if they exceed the \$3 million threshold, and if they do, the Division 296 tax is imposed only in respect of their earnings from other superannuation interests that are not protected.
- 1.100 A constitutionally protected fund is operated by some State governments for their employees. These funds do not pay income tax on contributions or earnings they receive.
- 1.101 These amendments achieve the result by providing special rules for calculating superannuation earnings of protected State higher level office holders in section 296-305.
- [Schedule 1, item 15, section 296-305 of the ITAA 1997]***
- 1.102 The exclusion of earnings for constitutionally protected funds applies to the class of individual declared by the regulations. As the High Court decisions have not provided a comprehensive list of

which individuals are State higher level office holders and it is subject to future court decision, this approach provides flexibility and ensures that any changes that may arise in the future can be readily addressed in the regulations. Additionally, an individual will be in this class of individuals for the year, if they are declared by the regulations at any time in the year.

- 1.103 Consistent with other regulation making powers in these amendments, the regulation making power to prescribe individuals who are constitutionally protected State higher level office holders allows regulations to apply from 1 July 2025.

[Schedule 1, item 15, table item 1 in subsection 296-305(1) of the ITAA 1997]

- 1.104 Although this constitutional protection may not extend to earnings from superannuation interests in respect of non-mandatory contributions to constitutionally protected funds on behalf of such individuals made by an employer (or associate) as part of a salary package arrangement, these amendments exclude all interests in a constitutionally protected fund held by a State higher level office holders due to undue administrative burdens that this would impose.

[Schedule 1, item 15, section 296-305 of the ITAA 1997]

Excluded interests of Commonwealth justices and judges

- 1.105 Section 72(iii) of the Constitution requires justices and judges of the High Court, and of other courts created by the Parliament, to receive such remuneration as determined by the Parliament and prevents the remuneration being reduced during their period in office.
- 1.106 The imposition of the Division 296 tax may in effect constitute diminution of judicial remuneration in cases where certain defined benefit pension entitlements form part of their remuneration.
- 1.107 Accordingly, these amendments do not impose Division 296 tax on the earnings in respect of a defined benefit interest in a superannuation fund established under the *Judges' Pension Act 1968* of a sitting Commonwealth justice, where that person was appointed prior to 1 July 2025 and whilst they remain employed. This is achieved by not counting these excluded earnings when determining the taxable superannuation earnings of a sitting justice of the High Court or a sitting justice or judge of a court created by Parliament.

[Schedule 1, item 15, sections 296-35 and 296-305 of the ITAA 1997]

- 1.108 While there may in some cases be constitutional restrictions on taxing defined benefit interest in a superannuation fund established under the *Judges' Pension Act 1968*, no such limitations apply to other superannuation interest held by Commonwealth justices and judges. Accordingly, earnings from other superannuation interests that are not excluded may be subject of the tax. Additionally, the constitutional restrictions do not apply to retired Commonwealth justices and judges, which means earnings from all their superannuation interests are in scope of the Division 296 tax.
- 1.109 In determining whether or not a Commonwealth justice or judge has taxable superannuation earnings, all the interests of the individual are counted towards the individuals' TSB. If that exceeds the \$3 million threshold, the excluded interests are not counted when assessing an individual's taxable superannuation earnings. The method for doing so is contained in section 296-305.

[Schedule 1, item 15, table item 2 in subsection 296-305(1) of the ITAA 1997]

ACT Supreme Court Judges interests are included

- 1.110 For the avoidance of doubt with respect to the interaction of Division 296 with the *Australian Capital Territory (Self-Territory) Act 1988*, this Division has effect despite subsection 73(3A) of that Act. This means that earnings from all interests of ACT Supreme Court judges including earnings from interests in the judicial pension scheme are within scope of this tax and such earnings are not excluded.

[Schedule 1, item 15, section 296-510 of the ITAA 1997]

Excluded interests in non-complying Australian superannuation funds

- 1.111 A non-complying superannuation fund is an existing defined term in subsection 995-1(1) of the Act. Non-complying Australian superannuation funds are funds that do not meet the definition of a

complying superannuation fund within section 45 of the *Superannuation Industry (Supervision) Act 1993*.

- 1.112 Where an individual holds an interest in a superannuation fund that is non-complying by the end of the year, earnings from that interest are excluded from superannuation earnings for the purpose of the Division 296 tax.

[Schedule 1, item 15, table item 3 in subsection 296-305 of the ITAA 1997]

- 1.113 Interests in a non-complying fund are not subject to the new Division 296 tax as the funds are already taxed on assessable income at the highest marginal tax rate and do not qualify for earnings tax concessions. However, interests in a non-complying fund are counted towards an individual's TSB for the purposes of determining if total TSB is greater than the \$3 million large superannuation balance threshold.

Calculating an individual's superannuation earnings with interests in excluded superannuation interests

- 1.114 Subdivision 296-E sets out the means of determining an individual's superannuation earnings for the year if they have an interest in an excluded interest at the end of the income year.

- 1.115 Additionally, this subdivision only applies if an individual's basic superannuation earnings for the year, as worked out under subsection 296-40(2), are positive. This is to ensure that no positive earnings from excluded interests are taxed but all negative earnings above the large superannuation balance threshold, including those from an excluded interest, will be captured as transferrable negative superannuation earnings.

[Schedule 1, item 15, paragraph 296-305(1)(c) of the ITAA 1997]

- 1.116 If an individual's basic superannuation earnings are positive, and they hold an excluded interest, an additional calculation for their basic superannuation earnings must be performed. This additional calculation is provided under subsection 296-305(3).

[Schedule 1, item 15, subsection 296-305(2) and (3) of the ITAA 1997]

- 1.117 This additional calculation is where an individual's basic superannuation earnings are calculated disregarding any excluded superannuation plans mentioned in 296-305(1). This calculation is similar to subsection 296-40(2) however, does not allow for the substitution of the threshold. The intention of this is to ensure that the Division 296 tax is appropriately applied to the earnings in non-excluded interests that arise when an individual's TSB is above the threshold as a result of their excluded interests. This calculation is outlined under subsection 296-305(3).

[Schedule 1, item 15, subsection 296-305(3) of the ITAA 1997]

- 1.118 When determining the value of excluded superannuation plans, they are to be adjusted for any withdrawals and contributions during the year, as well as any assessable FHSS release amounts. After having performed this additional calculation, two outcomes can occur.

[Schedule 1, item 15, subsection 296-305(4) of the ITAA 1997]

- 1.119 The first, is that the additional calculation under subsection 296-305(3) produces a number that is greater than nil. In that instance, the amount which is lesser between the amount obtained through the additional calculation, or the amount worked out under subsection 296-40(2), will be that individual's basic superannuation earnings for the purposes of that year.

[Schedule 1, item 15, paragraph 296-305(2)(a), of the ITAA 1997]

- 1.120 The second, is that the additional calculation produces a number that is equal to, or less than nil. In that instance, an individual's basic superannuation earnings for the year would be nil.

[Schedule 1, item 15, paragraph 296-305(2)(b), of the ITAA 1997]

- 1.121 To reaffirm, nothing in this subdivision limits section 6 of the Imposition Bill, which provides that the Division 296 tax is not imposed in relation to a person if the imposition would exceed the legislative power of the Commonwealth.

[Schedule 1, item 15, section 296-310 of the ITAA 1997]

Example 1.10

On 30 June 2025 Tara has a TSB of \$4.2 million of which \$1.1 million is from her interest in a constitutionally protected fund and \$3.1 million is held in another superannuation fund. The following year on 30 June 2026, Tara has a TSB of \$4.5 million of which her constitutionally protected fund interest is \$1.2 million and her balance in another superannuation fund is \$3.3 million.

As Tara makes no contributions or withdrawals from her superannuation interests, her adjusted TSB at the end of an income year will be equal to her TSB of \$4.5 million as under section 296-45.

Tara's basic superannuation earnings for Division 296 tax in the 2025-26 income year are calculated as \$300,000 by subtracting her previous TSB from her current adjusted TSB under subsection 296-40(2) (\$4.5 million - \$4.2 million).

As Tara has an interest in a constitutionally protected fund for which earnings are excluded from Division 296 tax, and her basic superannuation earnings under subsection 296-40(2) are positive, Subdivision 296-E applies to her. Therefore, as per subsection 296-305(3), she must determine the amount that would be her basic superannuation earnings if it were to disregard all interests in her excluded superannuation plans.

Tara's basic superannuation earnings that disregard her excluded superannuation plans will be calculated as \$200,000. This is obtained by deducting her previous non-excluded TSB her current non-excluded adjusted TSB under subsection 296-305(3) (\$3.3 million - \$3.1 million).

Therefore, as her basic superannuation earnings under subsection 296-40(2) were \$300,000 and her basic superannuation earnings under 296-305(3) were greater than nil, as per paragraph 296-305(2)(a), the lesser amount of \$200,000 will be the amount that is taken to be her basic superannuation earnings for the year.

As Tara does not have unapplied transferrable negative superannuation earnings under paragraph 296-110(1)(b), under paragraph 296-40(1)(a) her superannuation earnings for the 2025-26 income year will be her basic superannuation earnings of \$200,000.

As her TSB at the end of the year is greater than the large superannuation balance threshold of \$3 million and her superannuation earnings for 2025-26 are greater than nil, Tara will have taxable superannuation earnings for Division 296 tax purposes under subsection 296-35(1).

The percentage of Tara's superannuation earnings above the \$3 million threshold is calculated as 33.33 per cent, by calculating the percentage of her TSB at the end of the year over \$3 million rounded to 2 decimal places under subsections 296-35(2)-(3) (($\$4.5 \text{ million} - \3 million)/ $\$4.5 \text{ million}$).

Tara's taxable superannuation earnings for Division 296 tax are calculated as \$66,660 by multiplying her superannuation earnings by the percentage of the earnings above the threshold under subsection 296-35(1) (33.33 per cent x \$200,000).

This taxable superannuation earnings amount will be taxable at 15 per cent. Tara will have a Division 296 tax liability of \$9,999 for the 2025-26 income year ($\$66,660 \times 15 \text{ per cent}$).

Example 1.11

On 30 June 2025 Phil has a TSB of \$4.3 million of which \$1.2 million is from his interest in a non-complying fund and \$3.1 million is held in another superannuation fund. The following year on 30 June 2026, Phil has a TSB of \$4.4 million of which his non-complying fund interest is \$1.1 million and his balance in another superannuation fund is \$3.3 million.

As Phil makes no contributions or withdrawals from his superannuation interests, his adjusted TSB at the end of an income year will be equal to his TSB of \$4.4 million as under section 296-45.

Phil's basic superannuation earnings for Division 296 tax in the 2025-26 income year are calculated as \$100,000 by subtracting his previous TSB from his current adjusted TSB under subsection 296-40(2) (\$4.4 million - \$4.3 million).

As Phil has positive basic superannuation earnings under subsection 296-40(2), and has an interest in an excluded superannuation plan, Subdivision 296-E applies to him. Phil's basic superannuation earnings that disregard his excluded superannuation plans will be calculated as \$200,000 by deducting his previous non-excluded TSB without his non-complying fund interest from the current adjusted TSB without his non-complying fund (\$3.3 million - \$3.1 million).

As his basic superannuation earnings under subsection 296-40(2) were \$100,000, and his basic superannuation earnings under subsection 296-305(3) were \$200,000, as per paragraph 296-305(2)(a), the lesser amount of \$100,000 will be the amount that is taken to be his basic superannuation earnings for the year.

As Phil does not have unapplied transferrable negative superannuation earnings under subsection 296-105(3), under paragraph 296-40(1)(a) his superannuation earnings for the 2025-26 income year will be his basic superannuation earnings of \$100,000.

As his TSB at the end of the year is greater than the large superannuation balance threshold of \$3 million and his superannuation earnings for 2025-26 are greater than nil, Phil will have taxable superannuation earnings for Division 296 tax purposes under subsection 296-35(1).

The percentage of Phil's superannuation earnings above the \$3 million threshold is calculated as 31.82 per cent, by calculating the percentage of his TSB at the end of the year over \$3 million rounded to 2 decimal places under subsections 296-35(2)-(3) $((\$4.4 \text{ million} - \$3 \text{ million})/\$4.4 \text{ million})$.

Phil's taxable superannuation earnings for Division 296 tax are calculated as \$31,820 by multiplying his superannuation earnings by the percentage of the earnings above the threshold under subsection 296-35(1) (31.82 per cent x \$100,000).

This taxable superannuation earnings amount will be taxable at 15 percent. Phil will have a Division 296 tax liability of \$4,773 for the 2025-26 income year ($\$31,820 \times 15 \text{ per cent}$).

Example 1.12

On 30 June 2025 Charmaine has a TSB of \$3.4 million of which \$1.5 million is from her interest in a non-complying fund and \$1.9 million is held in another superannuation fund. The following year on 30 June 2026, Charmaine has a TSB of \$3.6 million of which her non-complying fund interest is \$1.9 million and her balance in another superannuation fund is \$1.7 million.

As Charmaine makes no contributions or withdrawals from her superannuation interests, her adjusted TSB at the end of the year will be equal to her TSB of \$3.6 million as under section 296-45.

Charmaine's basic superannuation earnings for the 2025-26 income year for Division 296 tax are calculated as \$200,000 by subtracting her previous TSB of \$3.4 million from her current adjusted TSB of \$3.6 million under subsection 296-40(2) (\$3.6 million - \$3.4 million). As Charmaine has positive basic superannuation earnings under subsection 296-40(2), and has an interest in an excluded superannuation plan, Subdivision 296-E applies to her.

Charmaine's basic superannuation earnings under subsection 296-305(3) that disregard her excluded superannuation plans will be calculated as -\$200,000 by deducting her previous TSB without her non-complying fund interest from the current adjusted TSB without her non-complying fund (\$1.7 million - \$1.9 million).

Therefore, as her basic superannuation earnings under subsection 296-40(2) were \$200,000, and her basic superannuation earnings under subsection 296-305(3) were -\$200,000, as per paragraph 296-305(2)(b), her basic superannuation earnings will be taken to be nil.

Constitutional requirements for bills imposing taxation

- 1.122 As per section 55 of the Constitution, a separate imposition bill imposes a liability of Division 296 tax on individuals with taxable superannuation earnings from an income year. Schedules 1 to 3 of the Bill make amendments to income tax, superannuation law, and the TAA 1953, which contain the rules to assess and calculate an amount that is subject of the tax and how that liability is paid.
[Section 4 of the Imposition Bill]
- 1.123 Division 296 tax does not apply if the imposition of the tax on an individual exceeds the legislative power of the Commonwealth. This ensures that the amendments cannot be made invalid as a result of seeking to impose Division 296 tax in circumstances which are not within the Commonwealth's legislative power under the Constitution. Individuals severed from the imposition of the Division 296 tax are severed for the entire income year rather than the particular period in which they were performing the role or held office. This is to ensure the administrability of the Bill in circumstances involving short-term and temporary appointments.
[Section 6 of the Imposition Bill]

Consequential and miscellaneous amendments

- 1.124 The Bill makes several consequential and miscellaneous amendments to the ITAA 1997, TAA 1953 and other Commonwealth laws to give effect to this measure. These amendments are generally minor or technical in nature and include wording changes to headings and other provisions to give effect to the amendments required by this measure.
[Schedule 1, item 9A, section 12-5 of the ITAA 1997; Schedule 3, item 1, note 3 to subsection 293-65(2) of the ITAA 1997]
- 1.125 Schedule 1 amends provisions that, amongst other things, permit an individual to request that they be paid a lump sum amount from their superannuation scheme to meet their debt account discharge liability, when a benefit becomes payable from one or more of the individual's defined benefit superannuation interests.
- 1.126 Schedule 1 makes amendments which allow this request to be made in respect of the superannuation schemes established under the *Corporations Act 2001*, *Governor-General Act 1974*, *Parliamentary Contributory Superannuation Act 1948*, *Superannuation Act 1976* and the *Superannuation Act 1990*. The amendments also provide that where such a request is made, the individual's superannuation benefits are reduced to take account of the payment. The amendments are drafted so that the provisions that apply in respect of the Division 293 tax, also apply in relation to a tax liability worked out under this Bill.
[Schedule 1, items 1, 7 to 8, 31 to 37, 38 to 41, 42 to 43]

Subdivision 293-H

- 1.127 Schedule 3 amends the ITAA 1997 clarifying for the avoidance of doubt that Division 293 has effect despite subsection 73(3A) of the *Australian Capital Territory (Self-Government) Act 1988*. This clarifies that Division 293 tax is imposed on the contributions in respect of defined benefit interest of ACT Supreme Court judges in their judicial pension scheme.
[Schedule 3, item 2, sections 293-245 to 293-250 of the ITAA 1997]

Commencement, application, and transitional provisions

- 1.128 The Bill and the Imposition Bill commence on the first 1 January, 1 April, 1 July or 1 October to occur after Royal Assent. However, if the Imposition Bill does not commence, neither does Schedule 1 to the Bill.
[Section 2 of the Bill, and section 2 of the Imposition Bill]

1.129 The amendments in section 296-15 dealing with liability for tax, applies to the 2025-2026 income year and later income years. This means that individuals who have a TSB greater than \$3 million at 30 June 2026 will be subject to the new tax on earnings from 1 July 2025 to 30 June 2026.

[Schedule 1, item 15, Subdivision 296-A, section 296-10 of the ITAA 1997]

1.130 The amendments in sections 307-205 and 307-230 made by Schedule 2 to the Bill apply in relation to working out a TSB is at a particular time if that time occurs:

- immediately before 1 July 2025; or
- on or after 1 July 2025.

[Schedule 2, item 8 of the Bill]