The Tax Summit

Session 18.1: Is super still a good investment fit for retirement?

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Contents

Session 18.1*

The proposed introduction of the Division 296 changes to super from 1 July 2025 may have a significant impact on the tax efficiency of investing through super or will it have that impact.

The questions this session may answer include:

- *Is it now time to consider alternative structures for retirement and succession planning? What are the options? How do they compare?*
- *How do you have discussions with clients around such a step, given interplay between financial advice and tax?*
- *Are there anti-avoidance risks?*

So, will super still be a good investment fit for retirement?

*In view of the proposed or possible introduction of Div 296 to the income tax legislation the heading has been tampered with.

1. Introduction

Remember when your superannuation used to feel like a tailor-made suit but now it feels like an off the rack version? It once did the job well but is now one that the economy can no longer afford, it's a bit tight in some places and baggy in others. If Division 296 does become law it won't be a 'one size fits all' approach as the outcome will differ from client to client.

Continual changes to government policy, tinkering by the regulators as well as tying advisers in knots has turned something that should be simple into a complex and complicated beast. In other words, it's replaced a tailor-made job with a ragged old coat and pants.

When superannuation is looked at in the cool light of day, it is nothing more than a tax structure that provides benefits to many Australians. After all, the tax concessions provided for superannuation are really the reward for deferring income and saving for retirement.

In my opinion, probably the most significant changes to super over the past 30 years have been:

- the taxing of funds and the introduction of prudential compliance standards in the 1990s,
- the tightening of contribution limits and the introduction of tax-free pensions in 2007, and
- further contribution capping and limiting amounts to commence pensions that can be used to gain tax exempt income from 2017.

We now face another significant step with super which is the potential introduction of Division 296 into the tax law. The effect of the proposed legislation is to tax increases in a member's balance on a year-by-year basis, including unrealised capital gains, on super balances greater than $3 million.

So, what's left?

Today's presentation proposes to give you some idea of whether super continues to be a good investment for retirement. In other words, does super as a tax structure provide the best way of providing for retirement or are there other ways of doing it? The answer to this question is the well-worn saying of, 'it just depends' on a person's circumstances.

My comments in this presentation are solely based on the proposed Division 296 which is currently in the parliament for debate. They are far from being the final word on how the legislation will operate subsequent to it receiving Royal Asset, if that eventually occurs.

If the proposed Div 296 legislation makes it into the law nothing will change for the vast bulk of Australians. They will continue to benefit from having part of their income set aside in an APRA fund or SMSF and invested to provide benefits on retirement or its equivalent. There will be others who need to consider their current situation, the potential changes posed by the introduction of Div 296 into the tax law and how their super benefits will be affected going forward.

Let's start by having a look at the potential impact of the Division 296 tax which is proposed to commence on 1 July next year and how it may change the tax efficiency of investing via superannuation. I'll make a comparison of the options available and consider situations of the interplay between financial advice and tax as well as the risks of one alternative over another. I'll then cover how long it could take anyone with a superannuation balance of less than $3 million to reach the cap.

2. The Division 296 proposal

In October 2023 the Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023 and the Superannuation (Better Targeted Superannuation Concessions) Imposition Bill were released for public consultation and introduced into the Parliament in November 2023.

On 7 December 2023 the Senate referred the bills to the Senate Economics Legislation Committee which handed down its report on 10 May 2024. The committee's recommendation was that the bills be passed as they stood and are currently in the House of Representatives awaiting debate[1].

In broad terms, the proposed Div 296 tax is:

- intended to apply from the 2025/26 financial year if a member's adjusted total superannuation balance is greater than $3 million (unindexed).
- calculated on the proportion of the member's adjusted total superannuation balance above $3 million at the end of each financial year,
- levied as a 15 per cent tax on the proportion of the growth in an individual's "superannuation earnings", including unrealised capital gains. The earnings is calculated as the increase in the member's total superannuation balance (TSB) at the commencement and adjusted TSB at the end of the relevant year of income commencing after 1 July 2025,
- not applied to reductions in the member's TSB at the end of the financial year. Negative earnings above the $3 million cap are quarantined and used to offset future earnings under the calculation of a person's superannuation earnings for a future year of income. The offset of losses does not result in a refund of any previous tax paid.
- proposed to be levied directly on the member and imposed separately to personal income tax and superannuation fund tax. The member may elect to pay the tax personally or have it paid from the balance in their superannuation fund or funds of which they belong, similar to Div 293 tax.

An individual's TSB as at the end of the relevant financial year will be used to determine whether a liability for the Div 296 tax arises. That liability occurs only if the individual's TSB is greater than $3 million and there are taxable superannuation earnings based on their adjusted TSB. To set the record straight and clarify any misconceptions, it is a misnomer to say that the combined tax payable on the fund's investment income in accumulation phase (15%) and the Div 296 tax (also 15%) will be 30% in aggregate[2].

Certain exemptions from the Division 296 tax apply to:

- minors in receipt of a superannuation income stream such as a death benefit pension following the death of a parent or other person of which the child is a dependant for superannuation purposes,
- anyone where a structured settlement payment (personal injury payment) has been made to superannuation. This applies regardless of whether the structured settlement amount was made in the relevant year of determining whether the Div 296 tax applies or in an earlier year,
- a person who died during the year in which the Div 296 is being determined. The only exception is where the deceased died on 30 June in the financial year.

There are three stages involved in determining whether Div 296 tax is to be levied on an individual. These are:

1. calculation of 'superannuation earnings' based on the individual's adjusted TSB at the end of the financial year,

[1] Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023
https://www.aph.gov.au/Parliamentary_Business/Chamber_documents/HoR/Divisions/details?id=2224

[2] The statement by the ATO in the following link, that the combined tax is 30% is not an accurate reflection of the operation of the proposed legislation:
https://www.ato.gov.au/about-ato/new-legislation/in-detail/superannuation/changes-to-the-superannuation-tax-breaks

2. calculating the proportion of earnings attributable to balances above $3 million, and
3. calculating the tax liability.

2.1 Stage 1

Calculate the 'superannuation earnings'

The member's 'superannuation earnings' for Div 296 purposes is calculated as the increase in their TSB on 30 June in the previous financial year which is adjusted for contributions and withdrawals during the relevant year of income. For the first year in which the legislation applies the adjusted TSB as at 30 June 2026 is the TSB at 30 June 2025 less 'contributions' plus 'withdrawals'.

The adjusted TSB is reduced by any concessional contributions, less the 15% tax payable, and non-concessional contributions made to the fund. Withdrawals, such as income stream payments or lump sums paid to the member are added back to the calculation. The calculation of superannuation earnings is:

Superannuation Earnings = Current year adjusted TSB – previous year TSB

If the previous year TSB is less than $3 million, then an amount of $3 million, referred to as the large balance superannuation threshold, is substituted as Div 296 tax is designed only to apply to adjusted TSBs that lie above that amount.

The adjusted TSB in the superannuation earnings formula is calculated as:

Adjusted TSB = TSB for the current financial year + lump sum and pension withdrawals for the year – any contributions for the year.

The information for calculating the adjusted TSB is sourced from the fund's annual returns. However, some information such as an individual's pension payment details and whether personal contributions have been claimed as tax deductions may need to be included.

The adjusted TSB includes amounts withdrawn from the fund by the member during the year which are added back to the TSB as at the end of the financial year and any contributions for the year are deducted from the TSB.

Adjusted Total Superannuation Balance – pension withdrawals for the year

The total of the following amounts paid from the individual's superannuation interests (accumulation and retirement phase balances) during the year are added back to the TSB at the end of the year of income:

- a superannuation benefit payment, such as a lump sum,
- superannuation benefits transferred via spousal contribution splitting,
- superannuation benefits transferred to another person via a family payment split,
- amounts withheld from an excess untaxed rollover amount,
- amounts released under a valid requested release authority (E.g. Division 293, excess NCC or first home super saver amount released),
- any amounts described by regulations. It should be noted that there are no draft regulations currently available.

Adjusted Total Superannuation Balance – contributions for the year

Contributions for the year equal the total of the following amounts received into the individual's superannuation fund(s) during the year:

- contributions made to the individual's superannuation fund. In the case of concessional contributions 85% of the amount is deducted from the TSB and for non-concessional contributions the whole of the amount is deducted,
- contributions spitting superannuation benefit payments made to a spouse's superannuation balance,
- family law superannuation payments made due to a payment split and added to the recipient's account,
- the TSB value of a superannuation death benefit interest when the individual becomes a retirement phase recipient of the death benefit,
- a death or total and permanent disability insurance payment or contingent beneficiary payment (with the exception of continuous disability payments such as a disability pension),
- any amounts allocated to the individual's superannuation plan that are captured within the meaning of concessional contributions under s291-25(3) such as certain transfers from reserves,
- a transfer from a foreign superannuation fund,
- the increase in TSB value of a superannuation interest as a result of a remuneration payment or compensation for loss as a result of fraud or dishonesty,
- any amounts prescribed by regulations.

2.2 Stage 2

Calculate the proportion of the earnings attributable to the balance above $3 million

This part of the calculation is to ensure the proportion of the increase in the TSB that lies above the $3 million cap is brought to tax. It is worked out by determining the percentage of the TSB at the end of the relevant year that is above the $3 million cap threshold as:

$$\frac{Individual's\ TSB\ at\ the\ end\ of\ the\ year - large\ superannuation\ balance\ threshold}{Invididual's\ TSB\ at\ the\ end\ of\ the\ year} \times 100$$

Note: The proportion is calculated using TSB (less LRBA amounts) and not the adjusted TSB which is used to calculate the superannuation earnings.

(Proposed s 296-35(2))

2.3 Stage 3

Calculate Tax Liability

The 'tax liability' is then determined by multiplying both 'earnings' and 'proportion of earnings' as calculated above in Steps 1 and 2 by the 15% tax rate:

$$Div\ 296\ Liability = 15\% \times Taxable\ Superannuation\ Earnings\ (Earnings \times Proportion\ of\ Earnings)$$

(Proposed s 296-35(1))

2.3.1 Case Studies

The case studies of Stephen and Toni that follow illustrate the calculation of Div 296 tax and any adjustments to the individual's TSB that are required.

Case Study – Stephen

- Stephen is 65 and has a total superannuation balance of $4 million as at 30 June 2025,

- On 30 June 2026 Steven's balance is $4.5 million,
- He has made no withdrawals and no contribution to superannuation

Steven's calculated earnings are:

$$Earnings = TSB_{Current\ financial\ year} - TSB_{Previous\ Financial\ Year} + Withdrawals - Net\ Contributions$$

Steven's earnings equals $4.5 million - $4 million = $500,000 as he has not made any withdrawals or contributions.

The proportion of Steven's earnings above $3 million is:

$$\frac{Individual's\ TSB\ at\ the\ end\ of\ the\ year - the\ large\ superannuation\ balance\ threshold}{Invididual's\ TSB\ at\ the\ end\ of\ the\ year} \times 100$$

Where:

$$\frac{(\$4.5\ million\ - \$3\ million)}{\$4.5\ million} = 33\%$$

Tax liability for the 2025-26 year is:

$$Div\ 296\ Liability = 15\% \times Taxable\ Superannuation\ Earnings\ (Earnings \times Proportion\ of\ Earnings)$$

Where:

$$15\% \times \$500{,}000 \times 33\% = \$24{,}750$$

Effective tax rate of Div 296 tax on the fund's total assets:

$$\frac{\$24{,}750}{\$4{,}500{,}000} = .55\%$$

Case Study – Toni

Toni's case study provides 3 possible scenarios which illustrate the impact of Div 296 tax where increasing amounts are withdrawn from the fund:

Scenario 1:

Toni withdraws an income stream in retirement phase and makes concessional contributions.

Scenario 2:

Toni withdraws an income stream in retirement phase, a lump sum of $500,000 for the year and makes concessional contributions.

Scenario 3

Toni withdraws an income stream in retirement phase, a lump sum $1 million for the year and makes concessional contributions.

Toni's circumstances

- Toni is age 66 and has a TSB on 30 June 2025 of $5 million,
- On 30 June 2026 Toni's TSB is $5.3 million,

- During the 2025-26 financial year she withdraws a pension of $200,000 during the year,
- Made a concessional contribution of $20,000 during the year, $17,000 net of tax,
- For purposes of Scenario 2 Toni withdraws a lump sum of $500,000,
- For purposes of Scenario 3 Toni withdraws a lump sum of $1 million

Scenario 1

Toni's calculated earnings in scenario 1 are:

$$Earnings = TSB_{Current\ financial\ year} - TSB_{Previous\ Financial\ Year} + Withdrawals - Net\ Contributions$$

Toni's earnings equals $5.3 million - $5 million + $200,000 - $17,000 = $483,000 in view of withdrawals and contributions that have been made.

The proportion of Toni's earnings above $3 million is:

$$\frac{\boldsymbol{Individual's\ TSB\ at\ the\ end\ of\ the\ year - the\ superannuation\ balance\ threshold}}{\boldsymbol{Invididual's\ TSB\ at\ the\ end\ of\ the\ relevant\ year}} \times \mathbf{100}$$

Where:

$$\frac{(\$5.3\ million - \$3\ million)}{\$5.3\ million} = 43\%$$

Tax liability for the 2025-26 year is:

$$Div\ 296\ Liability = 15\% \times Taxable\ Superannuation\ Earnings\ (Earnings \times Proportion\ of\ Earnings)$$

Where:

$$15\% \times \$483{,}000 \times 43\% = \$31{,}441$$

Effective tax rate of Div 296 tax on the fund's total assets on 30 June 2026:

$$\frac{\$31{,}441}{\$5{,}300{,}000} = 0.593\%$$

Scenario 1 Summary

TSB 30 June 2025	TSB 30 June 2026	Pension	Lump sum	Concessional Contribution after 15% tax	Adjusted TSB as at 30 June 2026
$5,000,000	$5,300,000	$200,000	0	$17,000	$5,483,000

Proportion of superannuation earnings > $3 million	Div 296 tax liability	Effective tax rate on the fund's total assets on 30 June 2026

43%	$31,441	0.593%

Scenario 2

Toni withdraws an additional lump sum of $500,000

Toni's calculated earnings in scenario 2 are:

$$Earnings = TSB_{Current\ financial\ year} - TSB_{Previous\ Financial\ Year} + Withdrawals - Net\ Contributions$$

Toni's earnings equals $4.8 million - $5 million + $200,000 + $500,000 - $17,000 = $483,000 in view of withdrawals and contributions that have been made.

The proportion of Toni's earnings above $3 million is:

$$\frac{\boldsymbol{Individual's\ TSB\ at\ the\ end\ of\ the\ year - the\ superannuation\ balance\ threshold}}{\boldsymbol{Invididual's\ TSB\ at\ the\ end\ of\ the\ relevant\ year}} \times \mathbf{100}$$

Where:

$$\frac{(\$4.8\ million - \$3\ million)}{\$4.8\ million} = 37.50\%$$

Tax liability for the 2025-26 year is:

$$Div\ 296\ Liability = 15\% \times Taxable\ Superannuation\ Earnings\ (Earnings \times Proportion\ of\ Earnings)$$

Where:

$$15\% \times \$483{,}000 \times 37.50\% = \$27{,}169$$

Effective tax rate of Div 296 tax on the fund's total assets:

$$\frac{\$27{,}169}{\$4{,}800{,}000} = .566\%$$

Scenario 2 Summary

TSB 30 June 2025	TSB 30 June 2026	Pension	Lump sum	Concessional Contribution after 15% tax	Adjusted TSB as at 30 June 2026
$5,000,000	$4,800,000	$200,000	$500,000	$17,000	$5,483,000

Proportion of superannuation earnings > $3 million	Div 296 tax liability	Effective tax rate on the fund's total assets on 30 June 2026

37.50%	$27,169	0.566%

Scenario 3

Toni withdraws an additional lump sum of $1 million

Toni's calculated earnings in scenario 3 are:

$$Earnings = TSB_{Current\ financial\ year} - TSB_{Previous\ Financial\ Year} + Withdrawals - Net\ Contributions$$

Toni's earnings equals $4.3 million - $5 million + $200,000 + $1 million - $17,000 = $483,000 in view of withdrawals and contributions that have been made.

The proportion of Toni's earnings above $3 million is:

$$\frac{\boldsymbol{Individual's\ TSB\ at\ the\ end\ of\ the\ year - the\ superannuation\ balance\ threshold}}{\boldsymbol{Invididual's\ TSB\ at\ the\ end\ of\ the\ relevant\ year}} \times \mathbf{100}$$

Where:

$$\frac{(\$4.3\ million - \$3\ million)}{\$4.3\ million} = 30.23\%$$

Tax liability for the 2025-26 year is:

$$Div\ 296\ Liability = 15\% \times Taxable\ Superannuation\ Earnings\ (Earnings \times Proportion\ of\ Earnings)$$

Where:

$$15\% \times \$483{,}000 \times 30.23\% = \$21{,}903$$

Effective tax rate of Div 296 tax on the fund's total assets:

$$\frac{\$21{,}903}{\$4{,}300{,}000} = .509\%$$

Scenario 3 Summary

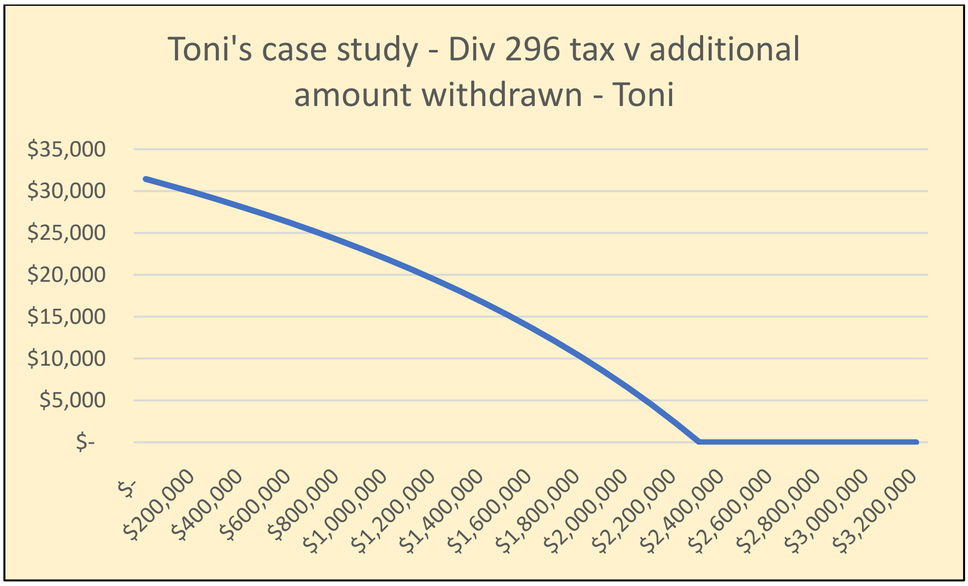
TSB 30 June 2025	TSB 30 June 2026	Pension	Lump sum	Concessional Contribution after 15% tax	Adjusted TSB as at 30 June 2026
$5,000,000	$4,300,000	$200,000	$1,000,000	$17,000	$5,483,000

Proportion of superannuation earnings > $3 million	Div 296 tax liability	Effective tax rate on the fund's total

		assets on 30 June 2026
30.23%	$21,903	0.509%

Could Toni's Div 296 tax be reduced to $0?

It is possible for Toni's Div 296 tax to be reduced to $0, however, she would need to withdraw enough by 30 June 2026 so that her TSB at that time is no more than $3 million. The relationship between the amount of Div 296 tax payable and the additional lump sum Toni would need to draw from her superannuation can be illustrated in the following table:



Main Issues with Division 296

The operation of Div 296 and the manner in which the tax liability is calculated has a number of issues which need to be considered. These will determine whether superannuation continues to be as attractive as in the past. The two main concerns with Div 296 are:

- the taxation of the 'growth' element in a member's TSB over the year of income including the imposition of tax on unrealised capital gains on a year-by-year basis, and
- the lack of indexation of the 'large superannuation threshold'[3] of $3 million.

In addition to these main issues there is also:

- valuation of fund assets on a market value basis,
- discrimination in the flexibility to withdraw benefits for those who meet or don't meet a condition of release as part of the introduction of Div 296 tax,

[3] As proposed to be inserted in the ITAA'97 dictionary in s995-1 and proposed in s296-35(2)

- payment of the tax from the fund, especially SMSFs, which may have a significant proportion of the fund in illiquid assets,
- no notional CGT discount in calculating the adjusted TSB on assets that have been owned by the fund for greater than 12 months,
- No opportunity to equalise balances between spouses prior to the introduction of Div 296 tax,
- at the time the legislation was released in October 2023 it was estimated that 80,000 members would be impacted on an ongoing basis by the introduction of Div 296. If the proposed legislation commences on 1 July 2025 the number of members impacted by Div 296 tax is likely to increase beyond that estimate,
- there is no adjustment to losses carried forward if the member's adjusted TSB falls below the $3 million threshold, and.
- effective double tax on taxable capital gains and unrealised capital gains attributable to the adjusted TSB above the member's $3 million cap.

2.3.2 When will the $3 million cap become an issue?

It is difficult to predict when the impact of Div 296 tax will become an issue as it depends on the particular circumstances of the member involved. Those circumstances, not in any particular order, depend on:

- The member's current TSB and the adjusted TSB,
- The income and capital growth of fund assets,
- The amount of contributions made over time in respect of the member by their employer, the member and others,
- The rate of increase in the indexation of the contribution caps and the total superannuation balance cap.
- The amount withdrawn from the fund during the year as lump sums and pensions
- The member's age,
- The age of the member's spouse,
- Whether the member satisfies a condition of release,

Before alternative arrangements to superannuation are considered it is probably worthwhile to consider strategies which take advantage of the current superannuation rules to reduce or possibly eliminate the impact of Div 296.

2.3.3 Who will be impacted immediately by Div 296?

Members under age 60?

The main group of fund member's immediately impacted by Div 296 are those:

- those under age 60,
- not meeting a condition of release with a 'nil' cashing restriction, and
- have a TSB of more than the $3 million cap or will approach the cap amount within a relatively short period.

This group has little flexibility to reduce their TSB below the $3 million threshold and as a general proposition are locked into superannuation by the preservation rules until at least age 60. Access to superannuation prior to that age is available if certain limited conditions of release are satisfied, such as permanent disability.

It is possible for those under age 60 to make micro changes to their superannuation balances. However, these changes, such as splitting concessional contributions[4] to their spouse, have a limited impact on the person's TSB.

Member aged 60 or older?

There is a potential escape hatch for anyone 60 or older If Div 296 happens to become law and the individual wishes to reduce their liability. The immediate impact of Div 296 is most likely to be on anyone who is at least age 60, has superannuation earnings for the 2025-26 financial year and a TSB on 30 June 2026 of greater than the 'large superannuation threshold' of $3 million.

Anyone meeting a condition of release prior to the commencement of Div 296 with unrestricted non-preserved benefits may wish to use the flexibility to withdraw sufficient from the fund and stay below the $3 million cap. Conditions of release to gain access to benefits may include:

- meeting a condition of release of retirement for superannuation purposes,
- reaching age 65, or
- commencing a transition to retirement income stream (TRIS) from age 60.

However, an individual may require that adjustments occur prior to 30 June 2025 as they may think that the impact of the Div 296 tax can be eliminated for the 2025-26 financial year. However, the case study above shows that in some cases the Div 296 tax payable will depend on the individual's TSB on 30 June 2026 and not their adjusted TSB.

Anyone between the ages of 60 and 65 who does not meet a condition of release with a 'nil' cashing restriction may wish to commence a transition to retirement income stream (TRIS). The reason is that the balance of the TRIS is not measured against the individual's Transfer Balance Cap (TBC) until an individual has retired for superannuation purposes or reached age 65. Irrespective of the individual's balance in the fund, the whole balance may be used to commence a TRIS and provide them with an income stream of up to 10% of its opening balance for the financial year. However, care should be taken for those approaching a condition of release with a 'nil' cashing restriction such as age 65 because the TRIS then falls into retirement phase and is counted for purposes of the member's TBC.

Case Study – Dina

Consider Dina who is age 60. She does not meet a condition of release with a 'nil' cashing restriction and has not retired for superannuation purposes. She expects that her TSB on 30 June 2025 is likely to be $3.2 million.

Prior to the commencement of the 2025-26 financial year, she decides to commence a TRIS with the total of her fund balance as at 1 June 2025. She withdraws the maximum TRIS which is equal to her balance in the fund and an income stream equal to 10% of that balance ($320,000) without any pro rating of the amount withdrawn. As at 30 June 2025 her TSB is $2,880,000. If Dina's adjusted TSB remained under the $3 million cap as at 30 June 2026 she would not be subject to Div 296 tax. This would also be possible if Dina withdrew an amount during the 2025-26 financial year and on 30 June 2026 her TSB.

As another possible alternative, Dina could commence a part-time casual job and cease working in that job. The cessation of the job after Dina has reached age 60 will mean she meets a condition of release of retirement. She has ceased gainful employment after reaching age 60 for purposes of reg 6.01(7) of the Superannuation Industry (Supervision) Regulations 1994 (SISR). This allows her to withdraw a lump sum or commence an allocated pension which will be subject to her TBC, which is currently $1.9 million.

[4] Regs 6.0 to 6.4 of the SIS Regulations

If Dina decided to delay commencement of the pension until the 2025-26 financial year, the amount withdrawn would be added back to her TSB. If that meant that the adjusted TSB was greater than the $3 million cap then she may be liable to Div 296 tax for the 2025-26 financial year if her TSB on 30 June 2026 is also greater than $3 million. Even if her TSB on 30 June 2026 was greater than $3 million it is possible that commencing the pension during the year may reduce her Div 296 liability as in the earlier case study of Toni.

One issue that arises with the withdrawal of a pension or lump sum from the fund is answering the question, 'What will the member do with the amount received if they don't need it to live on?' There is no end to the possible answers which could include investing it, buying a new residence, an overseas trip or even putting it under the bed.

2.3.4 Using of a version of the Recontribution Strategy

The 'recontribution strategy' has been used for many years with the aim of reducing the taxable component of a benefit paid from the fund. These days it is used primarily to reduce the taxable component of a death benefit lump sum paid to an adult child of the deceased.

An individual can use the recontribution strategy to withdraw a lump sum incorporating a taxable component and recontributes the amount, subject to the contribution caps, back to their accumulation account as a non-concessional contribution. The non-concessional contribution will form part of the tax-free component of a death benefit paid to the adult child.

Since the abolition of the work test for contributions for anyone between 67 and 75 from 1 July 2022 the recontribution strategy has experienced a revival. It is now possible to recycle benefits to increase the tax-free component for anyone who is the under age 75 limit by making non-concessional contributions to the fund if they have a TSB of less than the TSB cap, currently $1.9 million.

A variation of the recontribution strategy is possible for purposes of Div 296 if one member of a couple has greater than $3 million and the other member of the couple (spouse) has a TSB of less than the current cap, $1.9 million. The variation would be for the individual to withdraw a lump sum from their superannuation balance and make a non-concessional contribution to their spouse's superannuation account. An alternative would be for the member to gift the amount withdrawn to their spouse and for the spouse to make a non-concessional contribution to superannuation.

Depending on the spouse's superannuation balance it may be possible for them to access the bring forward rule and make a non-concessional contribution of up to $360,000 at any time during a fixed three-year period. This could occur if the spouse has a total superannuation balance for the financial year of no more than $1.66 million and would prevent any further non-concessional contributions being made for the subsequent two financial years. After that, it may be possible for the member to make further withdrawals and for their spouse to make further non-concessional contributions. This would ultimately depend on the indexation of non-concessional contributions, the relevant TSB cap and the spouse's TSB at the time.

Case Study - Geoff

Geoff, who is 63 and retired, has a total superannuation balance of $2.8 million as at 30 June 2024. He is concerned that the balance may increase to more than $3 million by 30 June 2025. Geoff's wife, Lorraine is age 61 and has no superannuation but receives income from investments and has a part-time job from which she earns $80,000.

Geoff decides to withdraw $381,900 from his superannuation fund which will give him some breathing space if the Div 296 tax is introduced on 1 July 2025 and his fund performs well. The amount Geoff withdraws will allow Lorraine to make a non-concessional contribution of $360,000 by using the bring forward rule for non-concessional contributions and a deductible concessional contribution of $21,800 after taking into account the Superannuation Guarantee contribution made to the fund by Lorraine's employer which is $9,200 (11.5% of $80,000).

In future years, Geoff may decide to withdraw further amounts that allows Lorraine to make further concessional and non-concessional contributions to super if she qualifies.

Use of CGT small business concessions to create wealth for retirement

Rather than making or limiting contributions to super, some small business owners may consider using the small business CGT concessions to accumulate wealth for retirement outside the superannuation environment. The benefit of the CGT small business retirement concessions allows the owner of a small business to transfer sufficient to super and keep their TSB under the Div 296 limit.

The small business CGT retirement concession consists of two components, the small business retirement exemption and the 15-year exemption. The retirement exemption provides a lifetime limit of $500,000 for taxable capital gains on small business active assets which are made for superannuation purposes. The 15-year exemption allows the proceeds from the disposal of active business assets to be made to superannuation after age 55 in connection with retirement or at any age if they are disabled.

The combined amount of the two components qualifying for the CGT retirement exemption is limited to a cap of $1.78 million which is indexed. Amounts paid to super under the small business concession are treated as non-concessional contributions and not counted against the non-concessional contributions cap.

Anyone 55 or older who qualifies under the CGT small business concession has the option of paying the amount to a superannuation fund or personally retaining the proceeds. The payment to superannuation must be made within the time permitted and prior to reaching the age 75 limit.

For anyone under age 55 the capital gain claimed under the $500,000 lifetime limit is required to be made to a superannuation fund and is subject to preservation.

2.3.5 Compliance risks with some strategies

There are other strategies that could be used to assist in reducing an individual's TSB. However, they carry with them a level of compliance risk. The following strategies are just two which carry compliance risk, however, if the Div 296 legislation does become law there will be others that no doubt will see the light of day.

Valuation of fund investments

One challenge is the valuation of the assets of an SMSF when calculating an individual's TSB and adjusted TSB. The provisions of ss 35AE to 35D of the SIS Act and reg 8.01 to 8.03 of the SIS Regulations require the fund's accounts to have investments valued on a market value basis. Determining the market value of an asset can provide a level of flexibility for some trustees, particularly for investments which do not have a market value that is readily available. Examples would include real estate, especially real estate developments, shares in private companies, units in private unit trusts, artworks and collectables etc. The only time some of these investments really have market value is at the time they are sold to an independent third party.

Using a market value that is on the 'low side' may minimise an individual's TSB, however, it could result in the fund taking risks for purposes of the non-arm's length income rules. For example, where real estate has been acquired for less than its market value or the value reflected in the accounts is not acceptable it is possible that s 295-550 of the Income Tax Assessment Act 1997 (ITAA'97) could apply.

In regard to the valuation of fund assets the ATO has contacted around 16,000 SMSFs where the values of real estate have not changed for some time. Considering the current climate for real estate, particularly in the capital cities, it would be reasonable to expect that the values have increased over the past few years.

Reserving strategies

For some, the use of a reserve which is used to hold the fund's income and then distribute it to member's account in an attempt to reduce their TSB may sound attractive. However, unless fund reserves are used in accordance with the ATO's guidelines published in SMSF Regulator's Bulletin SMSFRB 2018/1[5].

As a general rule reserves in SMSFs in the ATO's opinion should be restricted to funds which have defined benefit pensions[6]. However, where they are used for other purposes para 4 of the Bulletin has indicated that it may bring into question the fund meeting the sole purpose test under s 62 of the SIS Act and whether there is a scheme in existence for purposes of Part IVA of the Income Tax Assessment Act 1936.

Whether the fund uses reserving strategies is a matter for the trustees and their advisers. However, they should not be confused with funds that use unallocated contributions accounts as permitted by reg. 7.08 of the SIS Regulations and Taxation Determination 2013/22[7].

2.4 Use of alternative structures

Whether it is worthwhile to use other tax structures for retirement as an alternative to superannuation is always debatable in view of changes to government policy and the continual tightening of the rules. The ultimate decision depends on the circumstances of an individual. In many cases the reason for someone having superannuation may have little to do with tax and may come down to the ability to control death benefits or protection of some fund assets from creditors.

However, let's have a look at the introduction of Div 296 from the taxation point of view and compare the various structures that could be used to make similar investments.

Case Study – Murray

Murray Rivers is age 55, self-employed as a sole trader and has a superannuation balance of $2.9 million as at 30 June 2025. For the 2025-26 financial year he intends to maximise the concessional contributions to the fund of $30,000 and make a downsizer contribution of $300,000. He expects that if he was to make the contributions to super that the balance on 30 June 2026 would be:

	$
Balance on 30 June 2025	2,900,000

[5] https://www.ato.gov.au/law/view/view.htm?docid=%22SRB/SRB20181/NAT/ATO

[6] https://www.ato.gov.au/law/view/document?LocID=%22aid%2Faid201522%22&PiT=99991231235958

[7] https://www.ato.gov.au/law/view/pdf/pbr/td2013-022.pdf

Concessional contribution after tax	25,500
Downsizer contribution	300,000
Income on investments including realised capital gains after tax	74,000
Unrealised capital gains	203,000
Total superannuation balance 30 June 2026	3,502,500

Adjusted TSB = 3,502,500 - $25,500 - $300,000

= $3,177,000

Superannuation income = 3,177,000 – 2,900,000

= $277,000

Proportion of earnings above $3,000,000 = ((3,177,000 – 3,000,000)/3,177,000) x 100

= 14.35%

Division 296 payable = 15% x 277,000 x 14.35%

= $5,961

Total Tax Payable		
Superannuation Fund		
Tax on concessional contribution	(15% x $30,000)	$4,500
Tax on fund income	$74,000 x 15% less franking credits of $1,000	$10,100
		$14,600

Tax payable by fund		
Tax payable by Murray		
Div 296 tax (calculated above)		$5,961
Tax benefit from tax deduction for concessional contributions (47%)		$14,100
No Div 293 tax as Murray earns less than $250,000 adjusted income		
Tax benefit to Murray after Div 296 tax		$9,139
Total tax benefit (tax payable by fund less tax benefit to Murray)	$14,600 - $9,139	$4,461

2.5 Personal Tax

As an individual

If Murray decided to invest $300,000 from personal savings and $30,000 from his assessable income on which he has paid personal tax of 47%, he would be left with $315,900. If the investment earned $9,477 (approximately 3%) of the amount invested, less franking credits of $1,000, he would pay tax of $3,454 (47% x $9,477 - $1000)

Investing jointly

If Murray decided to invest the net amount of $315,900 jointly with his spouse then the amount of tax payable would depend on the income of his spouse. However, if they were both on the same personal tax bracket there would be no change in the aggregate amount of tax payable.

Investing via a trust

If Murray decided to invest the net amount in a trust of which his family were all beneficiaries then the aggregate amount of tax payable would depend on the tax bracket of each beneficiary. It is possible that the tax payable could be low, however, even if it resulted in a refund of $1,000 which is all of the franking credits, it would still be lower than the tax benefit provided by superannuation.

Investing via a company

If Murray decided to lend the net amount to a private company the interest received on the loan would be taxable to him at 47%. Depending on the interest rate payable it could result in a better net outcome to Murray compared to superannuation but it may involve greater risk.

If Murray used the net amount to purchase shares in a private company any dividends paid would be taxable to him less any franking credits of up to 30%. However, the net tax payable on the dividends would be 17%, including Medicare.

2.6 How long does it take to get to $3 million?

It could take someone with significantly less than $3 million in superannuation a while before they end up being subject to Division 296. After they have exceeded the $3 million cap the Div 296 tax payable may still not provide a significant incentive to consider withdrawing amounts from super if that is possible and using another investment vehicle.

As indicated previously, there are many factors to take into account when estimating whether a person's benefit will reach the large superannuation threshold of $3 million. The two main factors that are likely to influence a member's TSB are the amount of concessional and non-concessional contributions made to the fund and the fund's investment performance, including unrealised capital gains, during the relevant period.

To estimate how long it will take for a person to reach the $3 million cap let's consider a few scenarios where a person has nothing in superannuation, another where the person has $1 million in super and a third with $2 million in super. It is assumed that CPI and Average Weekly Ordinary Time Earnings (AWOTE) increases are both about 3% p.a. long term and the net annual rate of return of the fund's long-term earnings is about 7% after tax. It is also assumed that the standard maximum concessional and non-concessional contributions, as estimated, are made to the fund when possible in respect of the individual.

The assumptions will show that a relatively aggressive funding of superannuation benefits will take some time before the $3 million threshold is reached. In reality, where the fund's long-term earnings is less than 7% after tax and CPI as well as AWOTE does not increase at the rate of 3% long term, the $3 million threshold may not be attained until a much later time.

For someone with no current superannuation balance, which is possible, and based on the above assumptions it may take approximately 17 years to reach $3 million. This assumes that contributions are made using the estimated thresholds for concessional and non-concessional contributions without using carry forward or bring forward contributions. If carry forward or bring forward contributions are included in the calculation the $3 million threshold is likely to be reached one or two years earlier.

Anyone with a current superannuation balance of say $1 million or even $2 million and taking into account the above assumptions, it may take up to 13 or 14 years before a member's TSB will exceed the $3 million threshold. The reason it will take approximately the same time to reach $3 million is that once a person's TSB exceeds the current threshold of $1.9 million (indexed) it is not possible to make non-concessional contributions to super.

Using the above assumptions, consider a situation where someone aged 45 or older who currently has $1 million or $2 million in super. On that basis it will take at least 13 or 14 years to reach the $3 million threshold as they will be nearing age 60 or older before Div 296 may have an impact. If preservation age does not change and a condition of release with a 'nil' cashing restriction is satisfied at age 60, it is possible to remain below the threshold by withdrawing lump sums or commencing allocated or transition to retirement income streams.

2.7 Conclusion

Despite the proposed introduction of Div 296, superannuation will still have a place in a person’s retirement savings although at a possible increased cost to a member with a balance of greater than $3 million.

Graeme Colley

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