



5 July 2023

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

By email: superannuation@treasury.gov.au

Dear Sir/Madam,

Re: Exposure Draft *Treasury Laws Amendment (Measures for Consultation) Bill 2023: Non-arm's length expense rules for superannuation funds* ('draft Bill')

The National Tax & Accountants' Association ('NTAA') commends the government for responding to the concerns raised by superannuation industry stakeholders regarding general non-arm's length expenses of superannuation funds. The NTAA also welcomes the opportunity to comment on the proposed change in the draft Bill.

The NTAA is a national non-profit association, which currently represents the interests of approximately 10,000 member firms, encompassing taxation accountants and superannuation professionals. We are, therefore, uniquely placed to provide practical feedback on the proposed amendments that are contained within the draft Bill.

The NTAA has a number of concerns around the proposed changes in the draft Bill, particularly as they affect Self Managed Superannuation Funds ('SMSFs'). These concerns are outlined below.

1. Uncertainty remains for the 2019 to 2023 income years

The NTAA is concerned that SMSFs remain exposed to the current 'general non-arm's length expenditure rules' for the 2019 to the 2023 income years (inclusive). The NTAA believes that this is inappropriate given the disproportionate outcomes that can arise under the current law in so far as general non-arm's length expenses are concerned.

We note that the Australian Taxation Office ('ATO') has provided a transitional compliance approach that covers this period. Broadly, the ATO has confirmed it will not allocate compliance resources to determine whether the NALI rules apply for the 2019 to 2023 income years with respect to general non-arm's length expenses. Refer to PCG 2020/5.

However, the ATO's compliance approach is only concerned with the allocation of the ATO's compliance resources and does not change the law. As such, this does not alleviate the audit risk to which SMSFs continue to be exposed during the above period.

For example, if a general non-arm's length expense issue were to come before the courts with respect to these income years, the ATO's compliance approach would provide no relief.

To that end, the NTAA submits that, in the interest of providing certainty for affected funds, the government should make further amendments to ensure that general non-arm's length expenses are excluded from the NALI rules for the 2019 to 2023 income years (inclusive).

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In the alternative, consideration should be given to ensuring that the amendments in the draft Bill apply retrospectively with effect from the 2019 income year (rather than having these amendments apply from the 2024 income year, as is currently proposed). This will limit the level of risk to which affected funds are exposed during the 2019 to 2023 income years.

2. Confusion regarding internal SMSF arrangements

Internal fund arrangements are basically arrangements in which services are provided to an SMSF by a trustee of the fund or a director of a corporate trustee of the fund in their capacity as trustee or director.

The NALI rules do not apply in respect of a superannuation entity's arrangements that are purely internal. This is because an entity's internal functions are not undertaken with another party on any terms, non-arm's length or otherwise. This is the view of the government (and the ATO). Refer to paragraph 3.33 of the Explanatory Memorandum accompanying *Treasury Laws Amendment (2018 Superannuation Measures No.1) Bill 2018* (and to paragraphs 40 to 48 of Law Companion Ruling ('LCR') 2021/2).

For example, an accountant who is an SMSF trustee may undertake bookkeeping activities for their fund for no charge in performing their trustee duties. This arrangement is outside the scope of the NALI rules even though the fund did not remunerate the trustee for the services provided.

A further example is a financial adviser who is an SMSF trustee and uses their knowledge to develop an investment strategy for their fund (in their capacity as trustee) for no charge.

Despite this approach, the NTAA is of the view that some of the examples provided in the Explanatory Memorandum accompanying the draft Bill provide misleading guidance.

In particular, some examples within the Explanatory Memorandum to the draft Bill highlight examples that fail to recognise that certain non-arm's length arrangements may be classified as internal SMSF arrangements that are outside the scope of the NALI rules. For example, in Example 1.1, the sole trustee, AI, is an accountant who provides "general accounting services" to his SMSF for no charge. It is concluded within the example that the NALI rules would apply to the provision of these free services. However, based on the current guidance provided by the ATO, the provision of general accounting services to an SMSF will often constitute an internal fund arrangement to which the NALI rules have no application (which would render the remainder of the example incorrect). A similar approach is taken in Example 1.3 in relation to investment advisory services provided to the SMSF by Stephanie.

These examples highlight the practical difficulty many trustees and trustee directors face when determining the capacity in which their services are being provided to their SMSFs.

In fact, NTAA members have repeatedly expressed their frustration with the lack of clarity on determining when accounting services have gone beyond an internal SMSF arrangement and may be exposed to the NALI rules.

The NTAA therefore strongly recommends that amendments be made to exclude the application of the NALI rules where services of a general nature are provided to an SMSF by a fund trustee or a director of the fund's corporate trustee. The NALI rules would continue to apply to arrangements designed to exploit the tax concessions afforded to SMSFs, with respect to arrangements where an SMSF engages another party to provide services of a general nature on a non-arm's length basis.

It is critical to note that these services are generally provided to SMSFs by fund trustees or directors of a fund's corporate trustee for the primary intention of reducing costs and passing savings on to members. These services are not provided as a mechanism to exploit the tax concessions afforded to complying SMSFs. Excluding such arrangements from the NALI rules provides more equitable treatment for SMSFs, given the proposal to exclude large APRA-regulated funds from the NALI provisions for general expenses.

In the absence of making this change, the NTAA alternatively recommends that the examples in the Explanatory Memorandum accompanying the draft Bill be amended to clarify the capacity in which services are provided by a trustee or director to an SMSF. For example, in relation to Example 1.1, the NTAA recommends that this example be updated to clarify the capacity in which AI provides accounting services to the SMSF. If the provision of the services is not an internal fund arrangement, this fact, and the reason for this conclusion, should be clearly stated.

3. The tension between regulatory requirements and the ITAA 1997

There is continuing uncertainty regarding the interaction between S.17A and S.17B of the *Superannuation Industry (Supervision) Act 1993* ('SIS Act') and the NALI rules.

Specifically, if it is determined that an SMSF trustee or director of the trustee company provides services to their fund in their capacity as an individual rather than in their capacity as a trustee or director, this will breach the NALI rules if the fund is not charged a market value fee for services provided.

However, if a market value fee (or any fee for that matter) is paid, this may cause the trustee to breach S.17A of the SIS Act (also refer to S.17B). This provision only permits a fund to remunerate a trustee in very limited situations. For example, among other requirements, S.17B requires a trustee to perform the duties or services in the ordinary course of a business carried on by the trustee of performing similar duties or services for the public.

Therefore, based on the information within the Explanatory Memorandum to the draft Bill, it is possible for an SMSF trustee (or director of a corporate trustee of the fund) to be compelled to charge for services provided to the fund to avoid the NALI rules, although charging for these services may result in a breach to S.17A of the SIS Act.

In other words, the tension in the law in this regard creates an **unresolvable compliance** issue for SMSFs.

However, note that the NTAA's recommended approach at 3. above (i.e., to exclude the application of the NALI rules where services of a general nature are provided to an SMSF by a fund trustee or a director of the fund's corporate trustee) would resolve this matter.

The NTAA would argue that no policy reason exists for the law to deny qualified persons the opportunity to provide services to their SMSF in their capacity as an individual.

In the absence of excluding general services provided by trustees and directors from the NALI rules, the NTAA believes it would be appropriate to amend the law to ensure compliance with the regulatory requirements. In particular, S.17A and S.17B of the SIS Act should be amended to allow an SMSF to provide arm's length remuneration to a trustee or director in circumstances where the remuneration is provided to avoid the application of the NALI rules.

Should you wish to discuss the issues raised above further, please contact Siobhan Simpson on 03 9209 9999 (or via email at siobhan.simpson@ntaa.com.au).

Yours faithfully,



Geoff Boxer
Chief Executive Officer