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Via email to **superannuation@treasury.gov.au**

Dear Adam,

Non-arm's length expense rules for superannuation funds

AustralianSuper welcomes the opportunity to provide a submission to the Government's consultation on the Exposure Draft of the *Treasury Laws Amendment (Measures for Consultation) Bill 2023: Non-arm's length expense rules for superannuation funds* and explanatory materials regarding the proposed amendments to the non-arm's length expense rules for superannuation funds.

AustralianSuper is Australia's leading superannuation fund and is run only to benefit members. Over 3 million Australians are members of AustralianSuper and we invest over $288 billion of their retirement savings on their behalf. Our purpose is to help members achieve their best financial position in retirement.

Our submission makes the following points:

- AustralianSuper is supportive of the Government's drafting of the legislation for providing a full exemption for large APRA-regulated funds from the non-arm's length expense rules. In our view, this is in line with the Government's announcement in the 2023-24 Federal Budget and the original policy intent of the rules, and significantly reduces unintended increase compliance costs that would otherwise be ultimately borne by members.
- The draft legislation should be revised so the full exemption for large APRA-regulated funds from the non-arm's length expense rules applies from the 2018-19 income year when the changes to the NALI provisions were first introduced, rather than prospectively from the 2023-24 year. The policy rationale for the exemption applies equally to these income years. The ATO's transitional compliance approach does not apply to expenditure incurred by funds under non-arm's length arrangements that directly relates to specific ordinary income or statutory income derived.
- AustralianSuper acknowledges and is supportive of the proposed exemption of expenditure incurred prior to the 2018-19 year when the revised NALI provisions were first given effect.
- AustralianSuper also supports the Government's proposed amendments to exclude contributions within a fund's income taxable from the non-arm's length expense provisions. The proposed amendments should also exclude contributions from the NALI provisions as they relate to income for large APRA regulated funds, therefore striking the right balance for these integrity provisions that apply for large APRA regulated funds. This is consistent with the policy rationale of preserving the concessionally taxed nature of contributions in the superannuation system that are safeguarded over the working life of members for their best retirement outcomes.

- AustralianSuper’s view is that wholly-owned entities of large APRA-regulated funds should also be excluded from the remaining NALI provisions as relates to income.

Exemption from the non-arm’s length expense provisions for large APRA-regulated funds

We welcome the exemption of large APRA-regulated funds from the non-arm’s length expense provisions as announced in the 2023-24 Federal Budget on 9 May 2023. This change is aligned with the original policy intent of the NALI provisions which is directed towards non-commercial related party arrangements that are designed to avoid contribution caps and other limits on contributions.

As noted in the original Discussion Paper, the NALI provisions are “*an integrity measure to prevent income from being diverted into superannuation funds to benefit from lower rates of tax compared to other entities, particularly the marginal rates applying to individual taxpayers*.” Similarly, the 2019 amendments were introduced with the express aim of “*ensur[ing] that superannuation funds can't circumvent the contribution caps by using non-arm's-length expenditure to inflate their overall income*.”[1]

As previously noted in our submission to the consultation on 21 February 2023, it is common for large APRA-regulated funds to transact with related parties, most commonly with their trustee companies and wholly-owned investment vehicles. These arrangements are always structured in accordance with a fund’s obligation to act in members’ best financial interests.

The intention of these arrangements is to reduce costs and pass on savings to members that contribute to their retirement outcomes in a competitive manner, rather than to obtain a tax benefit. Negating the need to effectively ‘transfer price’ these arrangements and providing clarity to the industry as to the resulting tax outcomes of both general expenditure and specific expenditure is very welcomed and addresses the disproportionate adverse tax outcome that would otherwise arise.

The exemption from the non-arm’s length expense provisions for large APRA-regulated funds reflects the lower risk of these funds circumventing the contribution caps. The exemption reduces compliance burden and costs which are ultimately be borne by members.

Exemption for large APRA-regulated funds should apply from the commencement of the non-arm’s length expenditure provisions

The draft legislation should be revised so the exemption for large APRA-regulated funds from the non-arm’s length expense provisions applies from the 2018-19 year on income derived and expenses incurred from 1 July 2018, when the extension of the NALI provisions to non-arm’s length expenditure first applied. The exemption should apply consistently across the tax years in order to address any compliance risks. On the current drafting of the provisions, large APRA-regulated funds will continue to face unnecessary risk and uncertainty in relation to income years from 2018-19 to 2022-23. The policy rationale for excluding these funds from the NALI expense provisions from the 2023-24 income year onwards equally applies to those income years.

In addition, as the consultation paper noted, the Australian Taxation Office (ATO) announced that it would not allocate compliance resources to determine whether the NALI/NALE provisions apply to all the income of a complying superannuation fund where it incurs non-arm's length expenditure of a general nature (see PCG 2020/5). The transitional approach applies to the 2018-19, 2019-20, 2020-21, 2021-22 and 2022-23 financial years and is aimed at providing greater certainty about the ATO’s administrative approach following

[1] Assistant Treasurer, Second Reading Speech to the Treasury Laws Amendment (2018 Superannuation Measures No 1) Bill 2019.

concerns raised by the superannuation industry. The transitional approach does not apply where the fund incurred non-arm's length expenditure that related to particular ordinary income or statutory income.

In the light of the ATO's announced compliance approach, it is appropriate to apply the exemption to these income years. Legislating an application date for the 2018-19 year and future years removes this ambiguity and the potential risk for a significantly adverse outcome to arise for large APRA-regulated funds in relation to the 2018-19 to 2022-23 income years inclusive.

Exemption for expenditure from the amended NALI provisions

AustralianSuper acknowledges and is supportive of the exemption for expenditure from the revised NALI provisions that occurred prior to the 2018-19 year. This is consistent with the Government's announcement in the Federal Budget 2023-24 and removes the ambiguity in the current legislation.

Exclusion of contributions from fund income taxable as NALI

The exposure draft excludes contributions from the fund income taxable as NALI under the NALI expense provisions in relation to SMSFs and superannuation funds with up to 6 members.

The draft explanatory memorandum references the overarching policy of providing concessional tax status for contributions and therefore excluding contributions from income taxable under the NALI provisions: "…*to ensure that assessable contributions and related deductions are always part of the low tax component. Assessable contributions are subject to other taxing provisions, and it is not intended they also potentially be subject to higher rates of tax under the non-arm's length income provisions.*"

This policy imperative also applies to contributions made to large APRA regulated funds. Whilst large APRA regulated funds are exempt from the NALI rules related to non-arm's length expenses, the remaining NALI rules relating to income derived on a non-arm's length basis continue to apply.

It is AustralianSuper's view that contributions should also be excluded from the NALI income provisions as they apply to large APRA-regulated funds. This would enable the integrity measure of the NALI rules to continue to apply to large APRA-regulated funds in a targeted manner without giving rise to a disproportionate adverse tax outcome.

Exemption for wholly-owned entities of large APRA-regulated funds from the non-arm's length income provisions

As noted above, it is common for large APRA-regulated funds to transact with related parties, most commonly with their trustee companies and wholly-owned investment vehicles. Accordingly, it is AustralianSuper's view that wholly-owned entities of large APRA-regulated funds should be excluded from the application of the remaining NALI provisions as they relate to income.

This would be welcomed as it is aligned with the original policy intent of the NALI provisions and removes the ambiguity and the potential risk for a significantly adverse outcome to arise for arrangements with wholly-owned investment entities of large APRA-regulated funds.

Conclusion

Thank you again for the opportunity to provide a submission to this exposure draft legislation and draft explanatory materials. We would be pleased to discuss this, or any other matter raised in this submission with you further at your convenience.

If you have any questions or would like to arrange a discussion, please contact Gina Maio, Head of Tax at **gmaio@australiansuper.com** or Nick Coates, Acting Head of Government Relations and Public Policy at **ncoates@australiansuper.com**.

Yours sincerely

Peter Curtis
Chief Operating Officer