

SUBMISSION

Submission to Treasury —
*Treasury Laws
Amendment (Measures
for Consultation) Bill
2023: Non-arm's length
expense rules for
superannuation funds*

7 July 2023

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Via email: superannuation@treasury.gov.au

7 July 2023

Dear Sir/Madam

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

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to the Exposure Draft legislation *Treasury Laws Amendment (Measures for Consultation) Bill 2023: Non-arm's length expense rules for superannuation funds* released on 19 June 2023.

The submission has been prepared with the support of ASFA's Tax Specialist Advisory Committee, which consists of the heads of tax from many large superannuation funds, as well as superannuation tax professionals from the 'Big 4' accounting firms. Accordingly, this submission carries the weight of the large fund industry and its advisors.

About ASFA

ASFA is a non-profit, non-partisan national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its \$3.5 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing almost 90 per cent of the 17 million Australians with superannuation.

ASFA welcomes exemption for large APRA-regulated funds, including exempt public sector schemes

ASFA welcomes Treasury's consultation on the *Treasury Laws Amendment (Measures for Consultation) Bill 2023: Non-arm's Length Expense Rules for Superannuation Funds* to enact amendments to the non-arm's length income (NALI) provisions announced in the 2023-24 Budget.

The proposed amendments will exempt large APRA-regulated funds, including exempt public sector superannuation funds, from the non-arm's length income rules related to non-arm's length expenses (NALE). This exemption will be achieved by repealing the current sections 295-550(1)(b) and (c) and replacing these provisions with sections that apply only to SMSFs and small APRA-regulated funds.

ASFA strongly supports the exemption for large APRA-regulated funds, including exempt public sector superannuation funds, from the NALI rules related to NALE.

As noted in our submissions to earlier consultations on these issues, ASFA is firmly of the view that the integrity issues to which the NALE aspects of the NALI rules were directed do not – and indeed cannot – arise in large APRA-regulated funds. We welcome the acknowledgment in the draft explanatory memorandum that there is, for large funds, “a lower risk that these funds will gain a tax advantage by engaging in schemes with related parties to incur losses or outgoings at less than arm’s length”.

Further, ASFA supports the way the exemption has been drafted by repealing the current versions of sub-sections 295-550(1)(b) and (c) and (5)(b) and (c).

ASFA wishes to acknowledge the constructive consultation with industry that has helped to achieve this positive policy outcome on NALE.

Application of the proposed NALE changes

The current sub-sections 295-550(1)(b) and (c) and (5)(b) and (c) were introduced into the ITAA 1997 and applied to income derived in the 2018-2019 income year and following years – that is, from 1 July 2018.

Currently, if a superannuation fund incurs a loss, outgoing or expenditure of an amount that is less than the amount of a loss, outgoing or expenditure that might have been expected to be incurred if those parties were dealing with each other at arm’s length, then an amount of ordinary or statutory income could be treated as NALI. The same applies where there is no loss, outgoing or expenditure incurred.

ASFA and our members wish to ensure that once the Bill becomes law, the repeal of sub-sections 295-550(1)(b) and (c) and (5)(b) and (c) are effective such that a large APRA-regulated fund (and exempt public sector fund) cannot be treated as having NALI as a result of NALE. That is, to ensure that the NALE rules can never have any application to large APRA-regulated funds (and exempt public sector funds) and that the NALI rules apply as they did prior to the introduction of the NALE rules.

The operation of the Bill as currently drafted is that the amendments will apply with respect to the 2023-24 income year and future income years.

It is ASFA’s strong view that the repeal of the current sub-sections 295-550(1) (b) and (c) and (5)(b) and (c) should be **retrospective**, such that the repeal applies from 1 July 2018. The rationale for this view has been detailed in our prior submissions, and may be summarised as follows:

- The current contribution rules, including contribution caps, work well in a large fund environment to achieve the policy objectives of placing an upper limit on how amounts are contributed into the superannuation system (where they enjoy the benefit of a concessional tax environment).
- The introduction of the NALE rules (as they had the potential to apply to large funds) was not required, on the basis that the potential mischief that Treasury may have been concerned with was not possible in a large fund environment.

We note that the compliance concessions announced by the Australian Taxation Office relate only to general expenses incurred by a superannuation fund from 1 July 2018 to 30 June 2023. Accordingly, large funds still have a potential exposure to this issue for that period in the event the compliance concessions provided by the ATO are not maintained.

Treatment of wholly-owned entities

ASFA acknowledges that the proposed changes contained within the Exposure Draft legislation relate to the NALE aspect of these current rules.

We wish to take this opportunity to restate our policy position that the current NALI rules should also be amended to provide an exemption from the NALI rules for income received and capital gains arising from wholly-owned entities.

We have previously provided a number of examples, particularly in relation to wholly-owned service companies – for example, employment entities, administration companies, investment management companies – where ASFA considers that the NALI rules should not have application to these commercial arrangements. In these examples, the superannuation fund's objective is to 'ring fence' any commercial liabilities that may arise from conducting these activities from the investment assets of the fund.

Recognising that this is not part of the proposed exposure draft legislation, we would welcome the opportunity to make further submissions on this matter at your convenience.

If you have any queries or comments in relation to our submission, please contact Julia Stannard, Senior Policy Advisor, on (03) 9225 4027 or by email jstannard@superannuation.asn.au.

Yours sincerely

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