

ASF Technical Seminar 2023

Legs & Regs update



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Today's session

Treasury consultations & finalised Bills

ATO updates

Other updates

Case Law

Treasury consultations & draft Bills





Legislative state of play

Item	Status
Legislating the objective of super	<ul style="list-style-type: none">• The Government released draft legislation for consultation on 1 September 2023 the Superannuation (Objective) Bill 2023 Exposure draft, and related material, is open for consultation until 29th September 2023.
Earnings tax proposal for TSB > \$3.0m	<ul style="list-style-type: none">• The Government has announced a measure to apply an additional 15% tax on earnings for individuals with a TSB > \$3.0m from 1 July 2025 (post next election).• A fact sheet and consultation paper have been published by the Treasurer to explain how the measure is intended to apply. The measure was included in the 2023/24 Federal Budget.
NALE amendment for SMSFs	<ul style="list-style-type: none">• Treasury release of a consultation paper in January to consider options to amend the NALI provisions relating to the potentially disproportionate and severe outcomes for breaches relating to general expenses.• The Government have settled on a two-times factor-based approach for SMSFs only, APRA funds are excluded from the rules.• Treasury Laws Amendment (Measures for Consultation) Bill 2023: Non-arm's length expenses rules for superannuation funds released 19th June

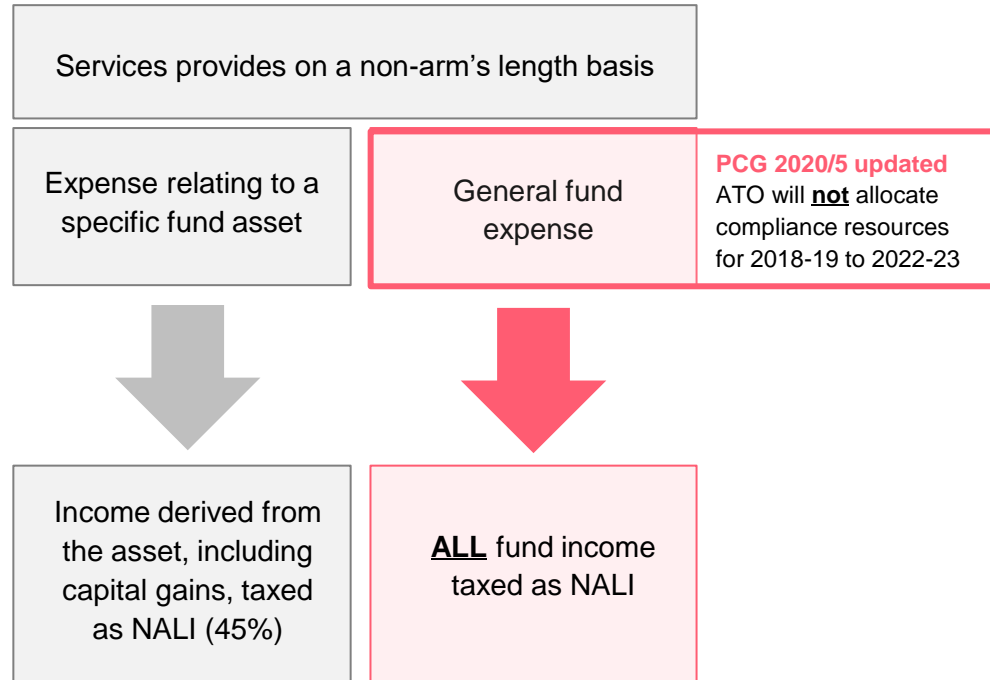


Treasury consultations & draft Bills

NALE Consultation

NALE Consultation

- In the Federal Budget, the Government finalised their response to the ongoing concerns on the NALE rules within s.295-550 of the ITAA 1997.
 - Follows a short Treasury consultation period in January 2023
- ATO's current views in LCR 2021/2 provide a severely disproportionate outcome for breaches relating to **general expenses** of the fund
 - stakeholder concerns raised, including onerous burden on compliance
- ATO advised in February 2023 that they **do not** intend to extend the current transitional relief (PCG 2020/5).





NALE proposed amendments

- Treasury Laws Amendment (Measures for Consultation) Bill 2023: Non-arm's length expenses rules for superannuation funds – released 19th June
- Maximum amount of fund income taxable at NALI rate would be **2 times** the level of the general expenditure breach (90%, or 2 x 45%)
 - Exempting large APRA regulated funds from the NALI provisions for both general and specific expenses of the fund.
 - Treasury consultation initially proposed 5 times!
 - Fund income taxable as NALI will exclude contributions.
 - Exempting expenditure that occurred on or after 1 July 2023 (specific expenses still 1 July 2018)
- Calculated as the difference between:
 - The amount that would have been charged as an arm's length expense; and
 - The amount that was actually charged to the fund.
- Where the product of the **2x breach** is **greater** than all fund income, then all fund income will be taxed at 45%

SMSF using an accounting service



Example

- An SMSF uses his brother's accountancy service, which would usually cost \$5,000 if provided under an arm's length arrangement. As his brother charges the SMSF \$0 for these services, this is a non-arm's length arrangement.
- The SMSF's income (after relevant expenses) in the 2023-24 financial year is \$100,000, ordinarily subject to a 15% applicable tax rate.
 - The income includes \$15,000 concessional contributions
- Under the **current NALI rules**, there is a sufficient nexus between the accounting services expense and all of the fund's income. The total income in the financial year would be taxed as NALI, at the highest MTR of 45%, or \$45,000.

SMSF using an accounting service



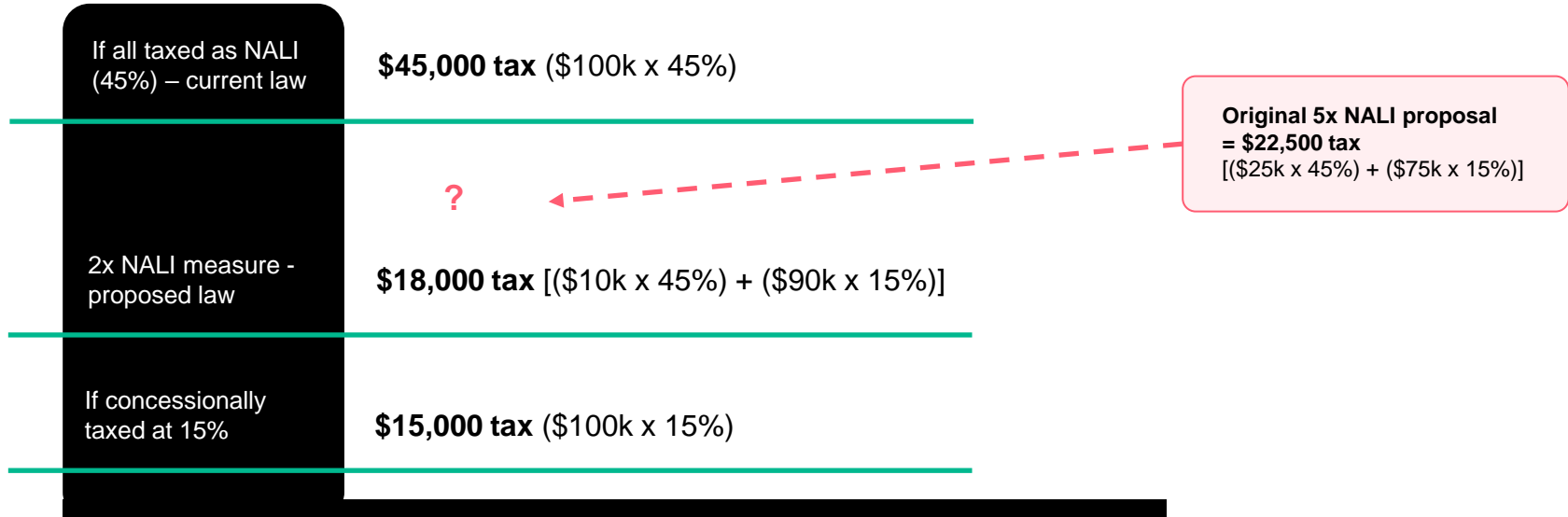
Example

- Under the proposed amendments, the income ‘tainted’ as NALI would be limited by the market value of the accounting service, since no fee was charged to the fund.
- The amount of income would be calculated by applying a 2x factor on the difference between the:
 - market value of accounting service; and
 - Actual fee charged.
- **The trustee would pay tax at a rate of 45% on \$10,000, and a 15% tax rate on the remaining \$90,000 of income, resulting in \$18,000 in tax (after-tax income of \$82,000).**
- By comparison, under an arm’s length arrangement (i.e. fund paid \$5k for the accounting services), the SMSF would pay \$14,250 in tax (\$95,000 taxable income x 15%).



Why 2 times?

Good question... Example, where SMSF derives \$100,000 of assessable income for the financial year (2023-24)



SMSF using an accounting service (lower fund income)



Example 1B

- As in our prior example, the SMSF trustee uses his brother's accountancy service that would usually cost \$5,000, but charges \$0. The SMSF's income (after relevant expenses) for the 2023-24 financial year is \$20,000 (including \$15k of concessional contribution).
- Under the proposed amendments, the trustee would pay tax at a rate of 45% on all fund income (excl. contributions), as 2 times the NALE breach is greater than the total income taxable as NALI.
- To work this out, the comparison is the lessor of:
 1. $\$5,000 \times 2 \times 45\% = \$4,500$ in tax; or
 2. $\$5,000^{\wedge} \times 45\% = \$2,250$ in tax

\wedge ($\$20,000 - \$15,000$ CCs) = \$5,000 taxable as NALI
- **The SMSF would pay \$4,500 in tax (vs. up to \$6,750) for the 2023-24 financial year, as would occur under the current NALI provisions (2), being NALI of \$2,250 + contributions tax of \$2,250.**



Treasury consultations & draft Bills

First Home Super Saver Scheme

Treasury Laws Amendment (2023 Measures No. 3) Bill 2023

First Home Super Saver Scheme

- In addition to the previously legislated change of the withdrawal limit from \$30,000 to \$50,000, the following changes have been proposed:
 - Individuals' ability to amend or revoke FHSSS application
 - Individuals have up to 90 days to request a release authority after they enter into a contract to purchase or construct a new home (previously 14 days)
 - Commencement date by proclamation
- Legislation passed both Houses 6 September 2023



ATO updates





Regulatory state of play

Item	Status
TR 2013/5 – when a super income stream commences & ceases	<ul style="list-style-type: none">• Still under review – super reform impact on superannuation income stream benefits as well as reversionary pension – ATO expect to complete Sep 2023
TR 2010/1 – Income tax: super contributions	<ul style="list-style-type: none">• Still under review – draft updated ruling incorporates changes as a result of NALI and removal of maximum earnings test for personal deductible contributions.
TD 2021/D6 - Commissioner's discretion under ss.304-10(4) of the ITAA 1997	<ul style="list-style-type: none">• In May 2023 ATO advised finalisation of this determination (and PS LA 2021/D3) has been placed on hold subject to industry feedback and other priorities.
TR 2023/D1 – how the non-arm's length income and capital gains tax provisions interact to determine the amount of statutory income that is non-arm's length income	<ul style="list-style-type: none">• Finalisation date is listed as TBA – consultation closed 28 July



Regulatory state of play

Item	Status
PSLA 2023/1 – SMSFs: rectification directions for contraventions of the SIS Act 1993	<ul style="list-style-type: none">• ATO released final Practice Statement on rectification directions for SMSF trustees.
LI 2023/18 - Taxation Administration (Remedial Power - Work Test for Personal Superannuation Contributions) Determination 2023	<ul style="list-style-type: none">• Registered 22 May 2023 – extend definition of employee
TA 2023/1 – Diverting profits of a property development project to a self-managed superannuation fund, through use of a special purpose vehicle, involving non-arm's length arrangements	<ul style="list-style-type: none">• Released 15 June 2023



ATO Updates

Rates & thresholds 2023-24

Increases in rates & thresholds

Contributions	Threshold 2023-24
Concessional contributions	\$27,500 (remains unchanged)
SG Rate	11% (increase 0.5%)
Maximum contribution base	\$62,270 income per quarter = \$6,850 concessional <ul style="list-style-type: none">• \$249,080 income p.a.• \$27,400 mandated contributions p.a.



- Individuals with multiple employers can apply to opt out of receiving superannuation guarantee (SG) from some of their employers. Must receive SG from at least one employer.
- Can apply for an SG employer shortfall exemption certificate – valid for up to 4 quarters.
- Individual, not employer, must apply at least 60 days before the first quarter the exemption is sought – too late for 1 July. 1 October applications must be received 2 August.
- [Super Guarantee opt-out form \(NAT 75067\)](#)

ATO Reference: [Super guarantee opt out for high income earners with multiple employers \(QC 60265\)](#)



Increases in rates & thresholds

Contributions	Threshold 2023-24	Age	Minimum pension payment 2023-24
General Transfer Balance Cap	\$1.9 million (up from \$1.7m)	Under 65	4%
		65-74	5%
		75-79	6%
		80-84	7%
		85-89	9%
		90-94	11%
		95 or more	14%
TSB thresholds for NCCs	<ul style="list-style-type: none">• \$1.9m and above – ineligible• \$1.79m - \$1.9m - \$110,000 (1x NCC cap)• \$1.68m - \$1.79m - \$220,000 (2x NCC cap)• Below \$1.68m - \$330,000 (3x NCC cap)		



TBAR single reporting framework



Streamlining TBAR requirements for SMSFs

- The ATO previously announced from 1 July 2023, **all** SMSFs will move to quarterly reporting for transfer balance events.
- Other reporting timeframes will remain in existence – commutation for ETB determination (10 days), commutation authorities (by legislated due date on notice).



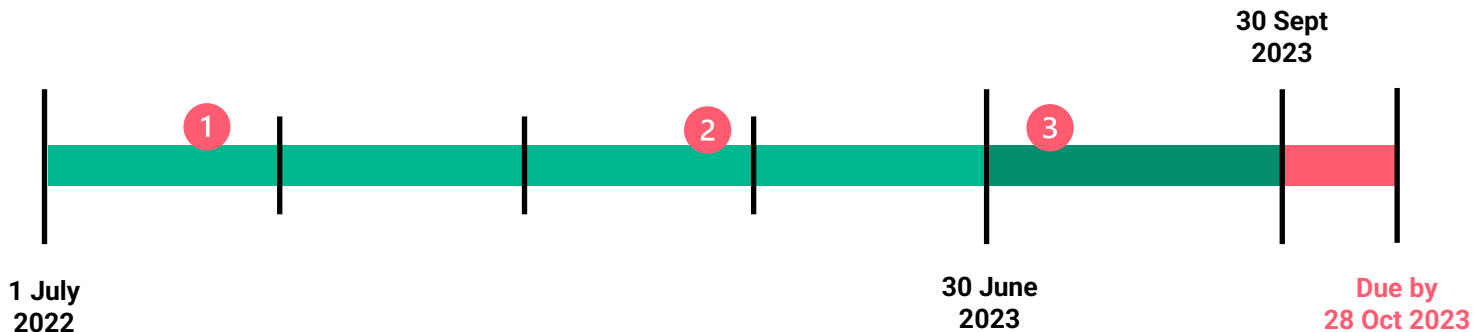
TBAR amendments

As a result of the streamlining of the TBAR requirements for SMSFs, from 1 July 2023:

- The \$1 million total super balance (TSB) threshold will be **removed**; and
- will require all SMSFs to report 28 days after the end of the quarter in which the event occurred (even where they were previously allowed to report annually).



Timing of event reporting



- As part of the **transition** to quarterly TBAR reporting, certain 'annual' reporter events will be due by 28 October 2023, not the due date of the SMSF Annual Return.
- Events (1), (2) & (3) for a current 'annual' TBAR purposes are **all** due by 28 October 2023.
- If current 'quarterly' TBAR, no change to existing requirements of 28 days after the end of the quarter to report the event.



ATO Updates

Increase in 'safe harbour' LRBA interest rate



Benchmark adjustments for LRBAs

Need to ensure that any related party borrowing (non-bank lender) benchmarks to the ATO's safe harbour terms (PCG 2016/5)

PCG 2016/5	Details
Interest Rate	<p><u>Real Property</u></p> <ul style="list-style-type: none">• 2022-23: 5.35%• 2023-24: 8.85% <p>RBA published rate in May 2023 for standard variable housing loans for investors</p> <p><u>Listed Shares</u></p> <ul style="list-style-type: none">• 2022-23: 7.35%• 2023-24: 10.85% <p>RBA published rate in May 2023 for standard variable housing loans for investors (plus 2%)</p>

Benchmark LRBA interest rate increase

Questions to ask to determine NALI would apply to the income derived for the income year?

- Does the LVR meet the 'safe harbour' in PCG 2016/5 or does the fund have an external loan offer document to support a higher LVR?
- Is the level of income insufficient to meet the monthly repayments of principal and interest – based upon the 'safe harbour' or where externally supported?



TD 2016/16 focuses on whether when benchmarking with a hypothetical borrowing arrangement it would be earnings accretive, taking into account the weekly rental and any future capital gains.





ATO Updates

Extending definition of employee

Expanded definition of employee

- ATO released a Draft Legislative Instrument, LI 2023/D11, on 19th April 2023.
- Final version registered on 22 May 2023, [LI 2023/18](#)
- Expands the definition of employee to include employee under SIS Act (93).
- Ensures deductibility of personal contributions rules remains the same as pre-1 July 2022
 - **Significant** for Company Directors



Why was this necessary?

Effective from 1 July 2022 individuals are only eligible to claim a personal deduction for contributions made during the period from day of 67th birthday to 28 days following end of month in which they turn 75, where they met the work test:

- The work test requirements moved from SIS Regulations to Income Tax Act (s290-165)
 - Gainful employment = 40 hours in 30 consecutive days
- ITAA 97 doesn't define the term employee
 - Common law definition applies
- SIS Act definition was more expansive so LI 2023/D11 indicates that the expanded definition applies for deductibility



Winding up an SMSF - SuperStream rollovers



SuperStream rollover – SMSF windup

- ATO have extended the time before ABN is cancelled following a wind up to 28 days.
- This provides additional time to ensure fund can perform final rollover under SuperStream requirements following the receipt of final tax refund.
- Previously funds would need to request the ATO to reinstate the ABN which further delayed the rollover.
- **NOTE:** Temporary relief to use paper rollover forms ceases on 30 June 2023 ([QC 72223](#))
 - Relief previously applied to funds experiencing issues getting ESA who apply to the ATO
 - Number of ESAs increased, and number of applications decreased





ATO Updates

Benefits paid after death

Death benefit or member benefit?

- ATO has updated their website ([QC 45254](#)) to provide further guidance on their expectations about the timing issues of a benefit payment and its treatment as a death benefit of member benefit.
- Each case is determined by its own facts and circumstances – follow the fund's deed and relevant laws for guidance
- Governing rules set out '*when*' and '*who*' is can be paid to, including after a member's death



What will the ATO consider?

At the time of payment, the trustee must assess whether it is a member or death benefit based on the facts know at the time, including:

- terms of the request from the member
- terms of the trust deed and any other governing rules
- **knowledge** at the time the payment is made (including whether they are aware that the member has died)
- the entity that the payment is being paid to
- circumstances and timing of the payment
- whether the payment is made because of and in line with the request made by the member.

Benefits paid after death



Example

- Roger (84) is the sole member of his SMSF, with his daughter, Kim, acting as co-trustee.
- Roger is in receipt of multiple Account Based Pensions (including a reversionary pension), with combined balances of approx. \$1.2 million. The pension is made up of 80% taxable component (\$960,000).
- He has a BDBN in place to pay the benefits to his LPR, for the super benefits to be split equally amongst his children (3 adult kids)
- It is currently projected that \$144,000 of tax would be paid in respect to Roger's super death benefit on the taxable component. He has no ability to reduce this by re-contribution.
- Roger health has declined significantly (due to a terminal illness), so steps are taken to withdraw his benefits
- As Roger's LPR, Kim completes a request to fully commute the income streams and to take the benefits as a member lump sum. The process of liquidating the fund's assets to cash commences.

Benefits paid after death



Example

- Five days later, Roger passes away – however, the assets have not yet been fully crystallised into cash to enable the member payment. Once the sale proceeds were deposited into the fund’s bank account, the lump sum payments were made as soon as practicable to the deceased’s personal account.
- The fact that there had been an unconditional right to fully cash the pensions before Roger had died **and** that this had been exercised (i.e. serving notice on the trustees) demonstrates the legal right to payment.
- The fact that this discharging of the legal right occurs after Roger’s death is irrelevant, along with the trustee’s awareness of Roger’s death and the timing of the redemption for payment.
- **Result = Member benefit lump sum, not death benefit lump sum.**

Other updates





Other Updates

ASIC fee increases from 1 July 2023



Indexation of ASIC fees from 1 July 2023

Company Fees	Current Fee	From 1 July 2023
Application for registration as an Australian Company (proprietary company that has share capital)	\$538	\$576

Company Registered As	Current Fee	From 1 July 2023
A proprietary company (except a special purpose company)	\$290	\$310
A special purpose company (proprietary)*	\$59	\$63

Note: Option to pay a 10-year review fee of \$436 (up from \$407)

- saving of 30%+ based upon annual fee of \$63

Case law





WZWK & CoT [2023] AATA 872

- Case involves the Applicant, **WZWK**, and whether income tax assessments issued by the Respondent, the Commissioner of Taxation, were excessive – relating to payments made to the Applicant from their SMSF, prior to attaining preservation age.
- Further, whether Applicant should be disqualified from acting as trustee of the SMSF pursuant to section 126A of the Superannuation Industry (Supervision) Act 1993 – for not being a fit and proper person.
- WZWK was Sole Director of Corporate Trustee of SMSF, Registered Tax Agent (1988 – 2019), Approved SMSF Auditor, Chartered Accountant (1989 – 2021)

Column 1 Item	Column 2 Conditions of release	Column 3 Cashing restrictions
108	Termination of gainful employment with an employer who had, or any of whose associates had, at any time, contributed to the regulated superannuation fund in relation to the member	1. Preserved benefits: Non-commutable life pension or non-commutable life annuity 2. Restricted non-preserved benefits: Nil


WZWK & CoT [2023] AATA 872

- In 2008 – became director, general manager and shareholder of Company B
- In 2010 established a new SMSF – company B contributed \$20,000 to SMSF
- Ceased employment with Company B in October 2010
- Commenced receiving a ‘non-commutable lifetime pension’ from 1 October 2010 – age 47
- **From 2010/11 until 2015/16 drew over \$800,000 from SMSF**
- SMSF wound up in 2018/19
- ATO commenced audit in 2019
- ATO determined income fully assessable & Fund in breach of s62 (Sole Purpose Test), s65 (Financial Assistance), s66 (Related Party Acquisition) + other provisions





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Thank you!

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