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**Media release**

**The Institute of Financial Professionals Australia reject the non-arm's length expense proposals for superannuation funds**

The Institute of Financial Professionals Australia do not believe that a factor-based approach which leads to an effective tax rate of 225% is the correct way to deal with a general expense breach. Head of Superannuation & Financial Services, Natasha Panagis, said other changes should be made to the law to deal with non-arm's length dealings.

"The five times multiple concept should not be legislated as the proposal is inappropriate, extremely disproportionate, too high a penalty and is not consistent with other areas of the tax law."

"The superannuation system already has sufficient regulatory tools to deal with non-arm's length dealings, such as treating the non-arm's length dealings as contributions (as per Taxation Ruling TR 2010/1), using the current tax penalty regime on top of a proportionate NALI tax assessment, abiding by the sole purpose test and the arm's length dealings rules (sections 62 and 109 of the SIS Act), and relying on the ATO to use its power to issue SIS Act penalties, rectification orders, disqualification of the SMSF trustees and/or making the SMSF non-compliant, to name a few."

Board Member and Chair of the Superannuation Technical and Policy Committee, Phil Broderick, says the 225% tax penalty is excessive and will still result in disproportionately severe outcomes for breaches of the NALI rules.

"The effective rate of 225% compares unfavourably not only to the penalty tax regime but also to other anti-avoidance measures including Part IVA of the ITAA 1936, the diverted profits tax (40%) and intentional disregard penalties (75%). It's even greater than one of the highest tax penalties being Part 7 penalties under the superannuation guarantee system for non-lodgement of superannuation guarantee statements (200%)".

"It is our strong view, that NALI and NALE should be made proportionate – that is, only the additional income (over and above an arm's length income) or the underpayment of expenses (ie, below the arm's length expense) should be subject to the NALI tax rate of 45% (plus penalties, as applicable)", says Broderick.

Broderick says another alternative measure could include legislating a de minimis threshold where the excessive amount (ie, the difference between an arm's length expense and the expense that was incurred) above this threshold is taxed at 45%, rather than taxing the entire difference at an effective tax rate of 225%.

"This solution would address the problem of funds having to spend disproportionate time and resources to identify the value of any minor undercharging or non-charging that may have occurred, regardless of the 225% penalty being proposed".

Panagis notes the NALI provisions provide no opportunity to rectify. "This sits at odds with, for example, the SMSF compliance rules where trustees are given the opportunity to rectify breaches brought to their attention in the annual audit. Similarly, with NALI, if a trustee makes an honest oversight, they should be given the opportunity to make good rather than having all of the fund's income taxed at 45% (or 225% if the proposal for general expenses is adopted)".

“It is also our view that NALE should not be retrospective”, says Panagis. “Having NALE apply on a retrospective basis (ie, as far back to when an asset was originally acquired) can make it extremely difficult for members to account for transactions that occurred many years ago.”

“It is disappointing that the consultation paper has failed to address a number of critical points that have been raised by the industry over almost five years of lobbying. Issues such as specific expenses were not addressed, the lack of clarity between duties undertaken in a trustee capacity versus an individual capacity remains unsolved, as well as many others.”

- ENDS -

#### **About Institute of Financial Professionals Australia**

The Institute of Financial Professionals Australia is a not-for-profit membership association (originally known as Taxpayers Australia, then more recently Tax & Super Australia) and has been serving members for over 100 years. With a membership and subscriber base of over 15,000 practitioners, our association is at the forefront of educating and advocating on behalf of independent tax, superannuation and financial services professionals.

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