28 January 2022

The Honourable Michael Sukkar MP
The Treasury
Langton Crescent
PARKES ACT 2600

SELF-MANAGED INDEPENDENT SUPERANNUATION FUNDS ASSOCIATION

By email – prebudgetsubs@treasury.gov.au

Dear Sir,

2022-23 pre-budget submission

The Self-managed Independent Superannuation Funds Association (**SISFA**) is Australia's original self managed superannuation fund (**SMSF**) advocate, established in 1998 to represent the interests of trustees and industry to Government and the Regulators. SISFA's mission includes the encouragement of high professional standards through its professional membership and public education initiatives.

Tax and Super Australia (**TSA**) is a not-for-profit member based organisation that has assisted tax and superannuation professionals for over 100 years. With a subscriber base of approximately 13,000 including 4,000 members, the organisation has evolved to meet the challenges of Australia's modern tax and superannuation system and remains at the forefront of educating and empowering today's tax and superannuation professionals.

This joint submission is made by both SISFA and TSA (**The Joint Bodies**).

In these troubling times, The Joint Bodies believe there are number of measures that can be introduced by the Government that will reduce red tape and help stimulate economic activity. The Joint Bodies also believe there are number of bigger picture issues in the superannuation system that should be reviewed.

Non-arm's length income rules should be made proportionate

The non-arm's length income (**NALI**)[1] rules have been present in the superannuation system for many years. The consequences of triggering NALI are one of the most serious in the tax system (ie automatic tax at 45% on NALI[2] (this is a larger penalty than applies to Part IVA of the *Income Tax Assessment Act 1936*). Because of the serious consequences of their application, the administration of those laws has been on the basis that they were effectively treated as anti-avoidance provisions and only used for the most serious of cases.

It's the experience of The Joint Bodies' members that the administration of the NALI rules has been broadened in recent years. This has been brought into particular focus with the introduction of the non-arm's length expenditure rules and the Australian Taxation Office (ATO) release of Law Companion Ruling LCR 2021/2.

The Joint Bodies are also part of a larger industry group which is in ongoing consultation with the ATO and Treasury. One of the main aims of this larger working group is to amend the NALI rules to make NALI proportionate. The Joint Bodies believe that the upcoming budget is an ideal time to announce that the NALI rules will be fixed.

Rather than NALI applying blanketly to all income tainted by non-arm's length dealings, The Joint Bodies believe that NALI should apply proportionately. Examples of that application include:

[1] Section 295-550 ITAA
[2] Section 26(1)(b) *Income Tax Rates Act 1986* (Cth)

- If under non-arm's length dealings, a super fund acquires an asset for 10% below market value, then NALI should apply to 10% of the income and gains from that asset (ie not 100%);
- If a related party of a super fund fails to charge an arm's length fee of $10,000 in management fees for managing a super fund asset, then NALI should apply to $10,000 (ie not all of the income and gains from that asset).

Consolidating thresholds

The superannuation system currently has a significant number of different thresholds for various measures, including:

- General transfer balance cap ($1.7 million);[3]
- Total superannuation balance (**TSB**) (varies depending on the measure);[4]
- Disregarded small fund assets (TSB > $1.6 million);[5]
- Unused concessional cap carry forward (TSB < $500,000);[6]
- Bring forward rule for non-concessional contributions (up to $330,000 where TSB < $1.48 million);[7] and
- Extension of work test exemption (TSB < $300,000).[8]

The Joint Bodies believe that many of these thresholds should be consolidated to a single threshold of $1.6 million (as indexed).

Consistency of indexation of thresholds

There is inconsistency in the superannuation system in how various thresholds are indexed, including:

- Proportional indexation for personal transfer balance cap;[9]
- Indexation of general transfer balance cap in increments of $100,000, depending on CPI;[10] and
- General concessional contributions cap of $27,500, indexed in increments of $2,500 in line with average weekly ordinary time earnings (**AWOTE**).[11]

The Joint Bodies believe that many of these thresholds should be indexed under the same formula tied to AWOTE. In particular, The Joint Bodies believe the proportionate indexation of the transfer balance cap should be replaced with flat indexation.

Breaches of regulation 13.22D of the SIS Regs should be rectifiable

Under the current law, a unit trust or company that breaches regulation 13.22D of the SIS Regs causes the units or shares held by the super fund to be in-house assets. Unlike direct breaches of the SIS Act or SIS Regs by a super fund trustee, a breach of regulation 13.22D cannot be rectified.[12]

The Joint Bodies believe that rather than 'tainting' the unit trust irreversibly, the occurrence of a regulation 13.22D 'trigger event' should either:

- Be rectifiable within 12 months of the end of the financial year that the breach occurred; and/or
- The breach be subject to a penalty and rectification regime, as is the case for direct super fund trustee breaches of the SIS Act and SIS Regs.

[3] Section 294-35(3) *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**)
[4] Section 307-230 ITAA 1997
[5] Section 295-387 ITAA 1997
[6] Section 291-20(3) ITAA 1997
[7] Section 292-85(3) ITAA 1997
[8] Regulation 7.04(1A) *Superannuation Industry (Supervision) Regulations 1994* (Cth) (**SIS Regs**) – noting that the work test is set to be removed for individuals age 67 to 74 from 1 July 2022, except when claiming a deduction for personal contributions
[9] Section 294-40 ITAA 1997
[10] Sections 960-265, 960-280(1) and 960-285(7) ITAA 1997
[11] Sections 291-20(2) and 960-285(7) ITAA 1997
[12] Regulation 13.22D(3) SIS Regs

Fixes to the binding death benefit nomination system

The Joint Bodies believe the death benefit settings of the super system should be reviewed (see below). However, in the meantime, The Joint Bodies believe that changes should be made to the binding death benefit nomination (BDBN). These include:

- BDBNs should not lapse after 3 years[13] – like a will, they should apply until they are revoked or replaced;
- "Informal" BDBNs should be allowed – like a will, if a BDBN does not meet the strict requirements, it should nonetheless be binding if it shows a clear intention to deal with super benefits. The case law in this area shows many BDBNs failing on minor technicalities due to an emphasis on the importance of form over substance.

Superannuation guarantee – quick fixes

As noted below, in The Joint Bodies' view, the super guarantee system requires a major review. In the meantime, The Joint Bodies believe that the following quick fixes should be implemented:

- Missing the due date for super guarantee contributions (ie 28 days after the end of the relevant quarter) imposes a disproportionate double penalty on employers particularly on those how make contributions just a few days late. That is, they trigger the super guarantee charge and are denied a deduction. The Joint Bodies suggests that while the super guarantee charge trigger point could be retained for contributions made after the 28th day of the quarter, that the super guarantee charge could be deductible if:
    - The super guarantee charge is paid by the 28th day of the second month after the end of the quarter (ie the same date the super guarantee charge statement is due); and
    - The Commissioner of Taxation be given the discretion to allow the charge to be deductible if the employer has reasonable attempts to comply with its super guarantee obligations.
- That superannuation contributions made to approved clearing houses be treated as being made on the date the contribution is made to the clearing house (ie not when the clearing house transfers the amount to the super fund).
- That all employers have access to use the ATO's clearing house facility.
- That if contributions are returned from a super fund or a clearing house back to an employer through no fault of the employer or because of an unintended error by the employer, that the employer can recontribute that amount within 28 days of it being returned without triggering super guarantee charge on those returned contributions.
- That the expanded definition of employees under section 12(3) of *the Superannuation Guarantee (Administration) Act 1992* that covers contractors have the same exclusions to that regime as contained in the States' Payroll Tax Acts – for example, see section 32(2) of the Victorian Payroll Tax Act 2007. This would give more certainty for businesses and contractors and would reduce red tape by having a consistent regime across super guarantee and payroll tax.
- Allowing bona fide contractors to contract out of the super guarantee system.

Remove the auto non-compliance for breaching section 17A and failing to be an Australian super fund

Under the current legislative settings, if a self managed superannuation fund (SMSF) breaches section 17A of the Superannuation Industry (Supervision) Act 1993 (SIS Act) or otherwise fails to satisfy the definition of an Australian Superannuation Fund, the SMSF is automatically made non-compliant and is issued with a tax penalty that is equal to almost half the value of its assets. This is to be contrasted with other breaches of the SIS Act where the ATO has a discretion as to whether to make the SMSF non-compliant.

[13] Regulation 6.17A(7) SIS Regs and section 59(1A) SIS Act

The Joint Bodies believe the auto non-compliance for breaching section 17A, and failing to be an Australian superannuation fund, should be replaced with the ATO discretion that applies to other SIS Act breaches.

Streamline the personal deduction process

The current administrative process required to claim a tax deduction for personal super contributions is unnecessarily complex. In particular, the requirement to first notify the fund via an approved form of an intent to claim a deduction is administratively burdensome.

The Joint Bodies believe this process should be streamlined to make it easier for super fund members to claim a deduction for personal super contributions.

For example, members could make an election as part of their individual tax return and the ATO notify the relevant super fund on behalf of the member. This would avoid unnecessary paperwork and reduce the number of errors with claiming deductions for personal contributions.

TBAR reporting should be annual for SMSFs

The ATO has recently indicated that they intend to move from the current regime where some SMSFs can lodge their transfer balance account reports (**TBAR**) annually to a regime where all SMSFs must report their TBARs quarterly.

The Joint Bodies do not believe that there is a need to move to a compulsory quarterly reporting framework. Rather, we suggest that there should be single set of *annual* reporting deadlines for all SMSFs, which will also assist with streamlining the reporting arrangements.

This would reduce red tape and allow SMSFs to complete all their reporting at once – eg tax return, financial statements and TBAR.

Considering around 93% of SMSFs only have one or two members, moving to a more frequent reporting regime will increase the SMSFs reporting and administrative obligations, remove flexibility and add more red tape for the majority of one to two member funds.

SMSFs that do not have specialist SMSF software to lodge a TBAR with the ATO will find it extremely difficult to keep on top of their TBAR compliance obligations and may cause additional penalties for late lodgement of a TBAR.

This may require SMSF trustees to seek advice from their accountant/tax agent on a more regular basis to help meet their reporting obligations, which will increase the cost of running an SMSF in the long run.

While it is acknowledged, that this could result in excess transfer balance tax assessments being delayed for some members, that could be alleviated by SMSFs voluntarily lodging TBARs early. In our view, the adverse outcome to a small cohort of members does not outweigh the additional administrative burden to many SMSFs.

Abolition of the work test for personal deductible contributions

The Joint Bodies welcome the measure which was announced as part of the 2021-22 federal Budget to abolish the work test for individuals between 67 to 74 years old. That is, from 1 July 2022, individuals who are between 67 to 74 years old will be able to make or receive personal contributions and salary sacrifice contributions without meeting the work test, subject to existing contribution caps.

We note however that individuals between 67 to 74 years old will still be required to meet the work test to claim a deduction for personal contributions. The Joint Bodies believe that this requirement should also be removed as part of the abolition of the work test.

Legacy pension amnesty should be extended

The Joint Bodies welcome the measures which were announced as part of the 2021-22 federal Budget to provide greater flexibility for recipients of legacy pensions, including:

- Exceptions to the commutation rules under the SIS Regs to allow commutation of certain legacy pensions in response to a commutation authority issued by the ATO;
- Ability for recipients of complying lifetime, market linked and life expectancy pensions to fully commute their income stream to a lump sum which they can then use to retain the amount in accumulation, commence an account-based pension or withdraw from super.

In relation to the second measure, while this is not yet law, The Joint Bodies understand that the ability to fully commute these income streams will only be available for a relatively short window, being two financial years.

The Joint Bodies believe this limit of two years is unnecessary and adds inflexibility to a measure which aims to improve flexibility for individuals. Accordingly, The Joint Bodies believe the ability for recipients of these income streams to fully commute the income stream should be ongoing (ie, not subject to a two-year window only).

Areas of the superannuation system that require review

The Joint Bodies believe there are a number of areas of the superannuation system that should be reviewed with a view of streamlining them and cutting red tape. They include:

- Tax settings – the taxation of superannuation is a complicated mess that has been amended in a piecemeal basis over many years.
- Death benefits – the death benefit system (including who it can be paid to and its tax settings) have hardly changed for decades. In The Joint Bodies' view it no longer meets the needs of modern society.
- Onshoring and offshoring issues – The interaction of the Australian superannuation system with foreign pension systems and the tax residency of Australian citizens is overly complex and no longer meets the needs of modern society. For example, when calculating the applicable fund earnings component of a lump sum received from a foreign superannuation fund, the terminology used in the legislation is not clear in all situations, creating incorrect tax outcomes in many instances. One simple fix would be to amend the start day rules within the current law when members receive multiple lumps.
- Superannuation guarantee – the super guarantee system is also overly complex and uncertain, in particular in its operation in relation to contractors. The current penalty system is harsh and is disproportionately impacting employers who do not fully understand their super guarantee obligations due to the overly complex rules and administrative requirements.
- Affordability and accessibility of financial advice – the current financial advice system is not fit for purpose and many super fund members and SMSF trustees are not able to access good affordable financial advice when they need it.

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If you have any questions in relation to this submission, please contact Phil Broderick on 03 9611 0163 or pbroderick@sladen.com.au or Natasha Panagis on 0423 810 565 or n.panagis@taxandsuperaustralia.com.au

Yours Faithfully,

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