

PCG 2019/D6 - Compliance approach for complying superannuation funds in respect of applying the non-arm's length income provisions to 'non-arm's length expenditure'

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Compliance approach for complying superannuation funds in respect of applying the non-arm's length income provisions to 'non-arm's length expenditure'

Relying on this draft Guideline

This Practical Compliance Guideline is a draft for consultation purposes only. When the final Guideline issues, it will have the following preamble:

This Practical Compliance Guideline sets out a practical administration approach to assist taxpayers in complying with relevant tax laws. Provided you follow this Guideline in good faith, the Commissioner will administer the law in accordance with this approach.

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What this draft Guideline is about

1. This draft Guideline¹ provides a transitional compliance approach for a complying superannuation entity concerning the application of the proposed amendments to section 295-550 of the *Income Tax Assessment Act 1997*² where a superannuation entity incurs certain non-arm's length expenditure (or where expenditure is not incurred) in gaining or producing ordinary or statutory income. A complying superannuation entity refers to a complying superannuation fund, a complying approved deposit fund or a pooled superannuation trust. For the purposes of readability, a reference in this Guideline to a 'complying superannuation fund' applies equally to a complying approved deposit fund and a pooled superannuation trust.

¹ All further references to 'this Guideline' refer to the Guideline as it will read when finalised. Note that this Guideline will not take effect until finalised.

² See Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2019.

Date of effect

2. When finalised, this Guideline is proposed to apply for the 2018–19 and 2019–20 income years. It will not apply to later income years.

Background

3. This Guideline should be read in conjunction with Draft Law Companion Ruling LCR 2019/D3 *Non-arm's length income – expenditure incurred under a non-arm's length arrangement*.

4. Section 295-550 of the *Income Tax Assessment Act 1997* sets out rules as to when a complying superannuation fund will derive non-arm's length income (NALI). The proposed amendments to section 295-550³ will result in a complying superannuation fund deriving NALI in circumstances where the entity incurs 'non-arm's length expenditure' as described in paragraphs 9 to 12 of LCR 2019/D3.⁴ The amendments apply in relation to income derived in the 2018–19 income year and later income years, regardless of whether the scheme was entered into before 1 July 2018.⁵

5. The ATO has previously issued Draft Law Companion Ruling LCR 2018/D10 *Non-arm's length income – expenditure incurred under a non-arm's length arrangement* when the proposed amendments were originally introduced. LCR 2018/D10 was withdrawn following Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018 having lapsed when the 45th Parliament was prorogued and the House of Representatives was dissolved on 11 April 2019.

6. As a result of consultation feedback received on LCR 2018/D10, the ATO has provided clarification on particular issues in LCR 2019/D3. One of these issues concerned when non-arm's length expenditure will have a sufficient nexus with income derived by the complying superannuation fund for the NALI provisions to apply. In particular, the Commissioner has set out the preliminary view that certain non-arm's length expenditure incurred by a complying superannuation fund may have a sufficient nexus to all ordinary and/or statutory income derived by the fund for that income to be NALI (for example, fees for accounting services).⁶ This can be contrasted to non-arm's length expenditure that has a more direct nexus to particular ordinary or statutory income derived by the fund (for example, expenditure relating to the acquisition of an income producing asset).

7. The ATO recognises that trustees of complying superannuation funds may not have realised that the proposed amendments will apply to non-arm's length expenditure of a general nature that has a sufficient nexus to all ordinary and/or statutory income derived by the fund in an income year, noting that it was not explicitly stated in LCR 2018/D10. It is also recognised that the proposed amendments apply in relation to the 2018–19 and later income years which may result in all income derived by a fund during the 2018–19 and 2019–20 income years being classified as NALI where it has incurred non-arm's length expenditure of a general nature. In these circumstances, the ATO considers it is appropriate to apply the transitional compliance approach outlined in paragraphs 9 and 10 of this Guideline.

8. It is expected that trustees of a complying superannuation fund that have incurred non-arm's length expenditure of a general nature that has a sufficient nexus with all ordinary and/or statutory income derived by the fund will alter their arrangements in order to ensure that the proposed amendments will not apply to their fund after the expiry of the ATO's transitional compliance approach.

³ See Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2019.

⁴ Further references in this Guideline to 'non-arm's length expenditure' has the same meaning as described in LCR 2019/D3.

⁵ See item 4 of Schedule 2 to the Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2019.

⁶ See Example 2 of LCR 2019/D3.

The ATO's transitional compliance approach

9. The ATO will not allocate compliance resources to determine whether the NALI provisions apply to a complying superannuation fund for the 2018–19 and 2019–20 income years where the fund incurred non-arm's length expenditure (as described in paragraphs 9 to 12 of LCR 2019/D3) of a general nature that has a sufficient nexus to all ordinary and/or statutory income derived by the fund in those respective income years (for example, non-arm's length expenditure on accounting services).

10. This transitional compliance approach does not apply where the fund incurred non-arm's length expenditure that directly related to the fund deriving particular ordinary or statutory income during the 2018–19 and 2019–20 income years.

Commissioner of Taxation

2 October 2019

Your comments

11. You are invited to comment on this draft Guideline, including the proposed date of effect. Please forward your comments to the contact officer by the due date.

12. A compendium of comments is prepared for the consideration of the relevant Public Advice and Guidance Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments may also be prepared to:

- provide responses to persons providing comments, and
- be published on **ato.gov.au**

Please advise if you do not want your comments included in the edited version of the compendium.

Due date: 15 November 2019

Contact officer details have been removed following publication of the final guideline.

References

ATOlaw topics	Superannuation ~~ Funds ~~ Taxable income ~~ Non-arm's-length components
Legislative references	ITAA 1997 ITAA 1997 295-550
Related Rulings/Determinations	LCR 2018/D10W LCR 2019/D3
Other references	Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2019
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