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FINANCIAL SERVICES

WHITE PAPER

Session 5: What's New & Federal Budget Update

Contents

2020 BUDGET ANNOUNCEMENTS 5
Your Future, Your Super 5
YourSuper comparison tool 5
Benchmarking test on APRA funds 6

UPDATE ON 2018 BUDGET ANNOUNCEMENTS 6
TREASURY LAWS AMENDMENT (2018 SUPERANNUATION MEASURES NO.1) BILL 2019 6
Extending Non-Arm's Length Income rules to expenses 8
Non-Arm's Length Expenditure comprises: 8
Law Companion Ruling 2019/D3, examples provided by ATO: 9
Including unpaid LRBA amounts in a member's Total Superannuation Balance 11

UPDATE ON 2019 BUDGET ANNOUNCEMENTS 12
SUPERANNUATION LEGISLATION AMENDMENT (2020 MEASURES NO. 1) REGULATIONS 202012
Increase in work test age 12
Spouse Contribution 13
TREASURY LAWS AMENDMENT (2019 MEASURES NO.3) BILL 2019 14
Death Benefit Rollovers 14
Debit value of Capped Defined Benefit Income Streams – TBAR 14
Guidance Note 2019/1 Transition to Retirement Income Streams 16
Investment Strategy diversification 17
Salary Sacrifice Integrity 17
Retirement Incomes Review 18

ATO RULINGS & GUIDANCE STATEMENTS 18
SMSF REGULATORS BULLETIN – 2020/1 18
Practical Compliance Guideline PCG 2020/5 – Non-Arm's Length Expenditure (NALE) 19
SPR 2020/D1 – Superannuation Industry (Supervision) In-house Asset Determination – Intermediary Limited Recourse Borrowing Arrangement Determination 2020 20

CASES 21
EPOA appointed to act did not cease on death of the member Dawson v Dawson (2019) NSWSC 826 21

SMSF Trustee’s Discretion on Paying Death Benefit Wareham v Marsella [2020] VSCA 92 22

Validity of Binding Death Benefit Nominations Hill v Zuda Pty Ltd ATF the Holly Superannuation Fund [2020] WASCA 87 23

Payment of Death Benefits to Widow Vasey v Henry [2019] NSWSC 996................................ 24

Reinstatement of Trust Sutton v NRS(J) Pty Ltd [2020] NSWSC 826... 25

Seeking Damages for failed investment advice Various v Moylan Retirement Solutions Pty Ltd [2020] NSWSC 359 25

WHAT’S STILL TO COME? 26

6 Member Funds 26

Exempt Current Pension Income (ECPI) Changes 26

Bring forward rule for member’s aged 65-67 27

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2020 BUDGET ANNOUNCEMENTS

The 2020 Federal Budget focused predominantly on jobs. In respect to Superannuation, the Budget responded to recommendations from the Hayne Royal Commission in 2018 regarding poor performance and fund transparency.

While a lot of these announcements do not impact SMSF specifically – Trustees should clearly be on notice around their objectives and costs of the sector – and how this correlates to results for Fund members.

Your Future, Your Super

Stapling of superannuation accounts to an individual

Existing superannuation accounts will be 'stapled' to an individual (i.e. their superannuation account will follow them) that will avoid the creation of a new superannuation account when the individual changes employers.

This means employers can pay superannuation guarantee into the individuals existing superannuation account (where they have one) and they have not been advised by the employee. They can obtain their new employee's superannuation details from the ATO. This avoids a new default fund being setup for them, potentially culminating in many different accounts for the individual.

This is of course unless the individual selects for their superannuation to be paid elsewhere. A default fund will only be established where the employee does not have an existing superannuation account and where they have made no decision regarding a fund.

While this will also clearly impact SMSF members (ie the member account within an SMSF can be "stapled") – the leakage that occurred with multiple accounts was less within SMSFs as those members are more likely to have a greater engagement with their super.

Status: Proposed commencement of 1 July 2021.

YourSuper comparison tool

In an initiative to empower members, an online comparison tool will be created by the ATO to assist member's in deciding which super product best suits their needs. MySuper

products will be ranked by fees and investment returns enabling an informed choice to be made about their super. It will detail the members current superannuation accounts and prompt for them to be consolidated into one.
Status: Proposed commencement of 1 July 2021.

Benchmarking test on APRA funds

MySuper products will undertake an annual performance test on their net investment performance from 1 July 2021. Funds that fail two consecutive performance tests will not be permitted to accept new members until they have improved their performance (in a further annual test).

Benchmarking tests will be undertaken by APRA. Underperforming funds will be required to advise their members and will also be listed as underperforming on the YourSuper comparison tool. Annual performance testing will be extended to other superannuation products from 1 July 2022.

SMSF Trustees are not caught up in this benchmarking but the ATO's increased focus on investment strategies for SMSFs together with a "retirement income strategy" clearly point to a similar focus on returns for members in the SMSF sector also.

Improved transparency and accountability by strengthening obligations of trustees
An additional duty will be placed on superannuation trustees to act in the best financial interests of members.

Trustees will be required to demonstrate there was reasonable basis to support their actions being consistent with members' best financial interests. Members will be provided key information regarding how the trustee manages and spends their money, in advance of annual member meetings.

Status: Proposed commencement of 1 July 2021.

UPDATE ON 2018 BUDGET ANNOUNCEMENTS

TREASURY LAWS AMENDMENT (2018 SUPERANNUATION MEASURES NO.1) BILL 2019

Status: Received Royal Assent on 19 September 2019.

Ability to choose where Superannuation Guarantee is paid from (SG Opt Out).

Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill provides for individuals receiving a combined income of greater than $263,157 from multiple employers, being able to nominate the wages from certain employers to not be subject to compulsory Superannuation Guarantee (SG).
The purpose of this measure was to assist individuals to avoid excess contributions tax and shortfall charges when their concessional contributions in the year exceed $25,000. The new measure was also designed to combat the situation where there are multiple employers, even where the salary from each employer may be below $216,120 (the current annual maximum contribution base).

An employee can apply to the Commissioner of Taxation to be issued a shortfall exemption certificate to provide to one or more of their employers, that exempts them from paying superannuation guarantee for the employee.

The certificate will be issued where the Commissioner is satisfied the taxpayer is likely to exceed their concessional contribution cap for the financial year and where they will have more than one employer, of which at least one employer obligated to make superannuation guarantee contributions during a financial year.

Applications can be made by employees for current work arrangements only (it cannot be arranged for future employment). An application will need to be made at least 60 days prior to the quarter the exemption certificate will apply from and can only accommodate up to 4 quarters at a time.

An employer in receipt of such a certificate will not be liable for superannuation guarantee charges where they didn't make super guarantee contributions on the employee's behalf for the quarters covered by the certificate. It is important to note that an employer can choose to disregard the exemption notice.

An employee will need to receive superannuation guarantee contributions from one employer during those quarters.

Status: Applies from 1 January 2020.

This is an important measure to help high income earners avoid excess contribution charges. Ensuring these applications are made each year (noting the maximum four quarter approval at any time) will be crucial for advisers assisting their clients.

Extending Non-Arm's Length Income rules to expenses

s109 SIS Act provides an SMSF must deal with all parties on an arm's length basis. The terms of a transaction must not be more favourable to a party than those which it is reasonable to expect would apply if the trustee were dealing with other parties on an arm's length basis in the same circumstances.

Non-Arm's Length Income (NALI) applies where the fund has derived income from a scheme in which the parties were not dealing with each other at arm's length and where the fund received income greater than might have been expected to derive if the parties had been dealing on an arm's length basis. NALI is currently taxed at 47%. Its intention is for parties to not circumvent these rules by entering into schemes which may provide the fund a greater benefit; and hence, prevent the abuse of taxation concessions provided to complying funds.

Non -Arm's Length Income has been extended to include non-arm's length expenditure where the parties do not deal with each other on an arm's length basis (or where no expenditure has been incurred). s295-550 ITAA97 has been amended to reflect these changes to NALE.

Non-Arm's Length Expenditure comprises:

- There is a scheme in which the parties were not dealing with each other at arm's length;
- The fund incurs a loss, outgoing or expenditure of an amount in gaining or producing the income; and
- The amount of the loss, outgoing or expenditure is less than the amount that the fund might have been expected to incur had those parties been dealing with each other at arm's length in relation to the scheme.

Income will be NALI also where the fund does not incur a loss, outgoing or expenditure that the fund might have expected to incur if those parties had been dealing with each other at arm's length in relation to the scheme - where no expenditure has been incurred by the fund.

These new Non-Arm's Length Expense provisions will not apply to services provided by a trustee in their capacity as trustee, as trustees are prevented from charging for their services as trustee under the SIS Legislation.
Where a trustee's business, profession or employment may result in them having skills and knowledge that can assist in performing their duties as capacity as trustee, they may be acting in an individual capacity. That is, where the individual provides services to the

fund that they ordinarily perform daily in their profession/employment or are services that are usually obtained from a third party. In these instances, NALE is intended to apply and services should be supplied and charged to the fund at an arm's length, commercial value.

Important to determine the capacity in which the trustee is performing duties (either as trustee or as an individual) as to whether NALE will be applicable.

Law Companion Ruling 2019/D3, examples provided by ATO:

Example 1: Non-arm's length expenditure was incurred to acquire an asset (NALI)

During the 2019-20 income year, Armin holds commercial property with a market value of $800,000. During the income year, he sells the commercial property to himself acting as trustee of his SMSF for $200,000. The SMSF leases the property to a third party.

For the purposes of subsection 295-550(1), the scheme involves the SMSF acquiring the commercial property from Armin for an amount that is less than its market value. There is sufficient nexus between the non-arm's length expenditure incurred in acquiring that property and the rental income the SMSF derives from leasing the property for the rental income to be NALI. Further, there will be a sufficient nexus between the non-arm's length expenditure and any capital gain derived on the disposal of the property for the capital gain to be NALI.

Example 2: Non-arm's length expenditure incurred has a nexus to all income of the fund (NALI)

For the 2020-21 income year, Mikasa as trustee of her SMSF, engages an accounting firm, where she is a partner, to provide accounting services for the fund. The accounting firm does not charge the fund for those services.

For the purposes of subsection 295-550(1), the scheme involves the SMSF acquiring the accounting services under a non-arm's length arrangement. The non-arm's length expenditure (being the nil amount incurred for the services) has a sufficient nexus with all of the ordinary and statutory income derived by the SMSF for the 2020-21 income year. As such, all of the SMSF's income for the 2020-21 income year is NALI.

Example 6: Internal arrangement within an SMSF – trustee provides services to the fund

Leonie is a trustee of an SMSF of which she is the sole member. She is a charted accountant and registered tax agent who is employed in an accounting and tax agent business. Leonie in her capacity as trustee, prepares the accounts and annual return for the fund. She does not use the equipment or assets of her employer, nor does she lodge the annual return using her tax agent registration. As she performs these duties or services as trustee of the SMSF, she does not charge the fund for this work. The non-arm's length expenditure provisions do not apply as the duties or services performed by Leonie are in her capacity as trustee rather than under an arrangement in which parties are dealing with one another on a non-arm's length basis.

Example 7: SMSF trustee carrying out duties in their individual capacity

Sharon is a trustee of an SMSF of which she is the sole member. She is a licensed real estate agent and runs a real estate business which includes property management services for rental properties. The SMSF holds a residential property which it leases for a commercial rate of rent. Sharon provides property management services to the SMSF as a licensed real estate agent. She utilises the equipment and assets of her business (including the business' website) in performing those services. Her actions are covered by the applicable insurance policies in respect of the business. Accordingly, Sharon provides property management services in her individual capacity to the SMSF with respect to the residential property. She charges the SMSF 50% of the price for her services that she would otherwise charge a non-related party.

For the purposes of subsection 295-550(1), the scheme involves the SMSF obtaining the services from Sharon and deriving the rental income. The price Sharon charges the SMSF constitutes a non-arm's length dealing between the SMSF and Sharon, which resulted in the SMSF incurring expenditure in gaining or producing rental income that was less than would otherwise be expected if those parties were dealing with each other at arm's length in relation to the scheme.

As such, there is sufficient nexus between the non-arm's length expenditure and the rental income derived from the residential property. The rental income will therefore be NALI for each income year the non-arm's length dealing remains in place.

Including unpaid LRBA amounts in a member's Total Superannuation Balance

Where an SMSF has entered into a Limited Recourse Borrowing Arrangement from 1 July 2018, member's may need to include the outstanding amount of the LRBA that is attributable to their benefit against their Total Superannuation Balance (TSB).

The measure applies to the following SMSF members, where:

- the Lender is an Associate of the SMSF (i.e. related party)
  - applicable to all member's whose superannuation interest is supported by the asset purchased under LRBA

OR

- the Member has met a full condition of release with nil cashing restriction *applicable to the member only*

LRBAs that have been re-financed post 1 July 2018 are excluded from this measure.
In essence, the member's TSB will reflect the total value of the asset, rather than net position (taking into account the loan payable).

This is a significant change as a TSB can impact a member's eligibility to contributions and certain other entitlements. It is reported to the ATO in the SMSF Annual Return.

Example

Kathy, 57 and is still working; and John, 64 and fully retired are both members of their SMSF. The fund comprised investments in cash and listed shares and was valued at $975,000. Total fund was split 45% to Kathy and 55% to John, based on their member balances.

The fund purchased a property for $1,600,000, using $480,000 cash and borrowed $1,120,000 from a banking institution.

The property purchase resulted in SMSF increasing its total assets to $2,095,000, with a liability of $1,120,000. The member's proportions remained unchanged.

John will be required to add his proportion of the unpaid LRBA to his total super balance as he has met a full condition of release with nil cashing restriction. $616,000 is added to his TSB, resulting in a total TSB of $1,152,250 being attributable to John. Which equates to John's proportionate share of the total assets (excluding the loan), being $1,152,250.

Kathy's TSB is $438,750 (it is not grossed up for her portion of the outstanding liability).

Status: Applies from 1 July 2018.

UPDATE ON 2019 BUDGET ANNOUNCEMENTS

SUPERANNUATION LEGISLATION AMENDMENT (2020 MEASURES NO. 1) REGULATIONS 2020

Status: Registered 29 May 2020

Increase in work test age

The Government proposed that from 1 July 2020, it will increase the work test age to 67, which will align itself with the age pension age. This change will mean that members who are aged 65 and 66 will be able to contribute into their superannuation fund, without having to satisfy a work test.
Greater flexibility and additional time is being provided to member's as they approach retirement to be able to make additional contributions into super to boost their retirement benefits.

Voluntary contributions could be either a concessional or non-concessional contribution.

For these additional provisions, the normal rules with respect to total superannuation balance (TSB) still need to be met (i.e. if over $1,600,000 TSB, no further non-concessional contributions can be made, or if TSB over $500,000, then the catch-up concessional provisions would not be able to be used).

Important note: Whilst all the other contribution rules apply to the extension of the work test, one that has not been extended to member's aged 65 and 66, is the 3 year bring forward rule.

Status: Applicable from 1 July 2020

What is not yet law: 3 year bring forward rule for member's aged 65-67 (Treasury Laws Amendment (More Flexible Superannuation) Bill 2020) is currently in front of the Senate. Once passed, slated to commence from 1 July 2020.

Spouse Contribution

In addition to increasing the work test to age 67, the Government proposed increasing the spouse contribution age limit to 74, with those who are 65 and 66, no longer needing to satisfy a work test.

The current rules and the proposed rules for making a spouse contribution are as follows:

Current Rules	Proposed Rules
Spouse can be a de-facto, but not permanently separated spouses.	No change to current rules.
The spouse must be under the age of 65 years if not gainfully employed when the contribution is made.	The spouse will need to be under the age of 67 if not gainfully employed.
The spouse must be gainfully employed at least part-time if the spouse contribution is made when they are 65 years of age, but under age 70.	The spouse will need to be gainfully employed at least part-time if they are between 67 and 74 years of age.
No spouse contribution can be made, where the low income / non-working spouse is 70 years of age or older.	No spouse contribution can be made where the low income / non-working spouse is 74 years of age or older.
It does not matter what the age of the contributing spouse is.	No change to the current rules.
The contributor does not need to comply with the gainful employment rules.	No change to the current rules.

If the work test was satisfied, this measure would potentially allow for an additional $3,000 to be contributed on behalf of a spouse, of which an 18% tax offset could be claimed (totalling up to $540).

The Government noted in the Budget Papers, “aligning the work test with the eligibility age for the age pension, scheduled to reach 67 from 1 July 2023, and increasing the age limit for spouse contributions to 74 will give older Australians greater flexibility to save for retirement”.

This measure aligns with the cut-off for other voluntary superannuation contributions at 75 years of age.

Status: Applicable from 1 July 2020

TREASURY LAWS AMENDMENT (2019 MEASURES NO.3) BILL 2019

Status: Received Royal Assent on 22 June 2020

Death Benefit Rollovers

The introduction of this legislation was to implement a fix to unintended issues that arose resulting from rollovers of death benefits that included insurance proceeds.

Prior to this fix, rollovers of death benefits could incorrectly trigger the calculation of an untaxed element, which when received into the receiving superannuation fund, would trigger including this untaxed element in the fund's taxable income and it be taxed at 15%.

The fix ensures any untaxed element determined in accordance with s307-290 Income Tax Assessment Act 1997 is not included in the receiving fund's assessable income.

The ATO initially stated the transferring fund is still required to apply s307-290 ITAA97 to determine if there is an untaxed element in the lump sum being rolled over where they have claimed or will claim, deductions for premiums of certain types of insurance.

Where a dependant beneficiary rolls over a death benefit, it is the ATO's view that 'there is insufficient connection between any deductions claimed by the transferring fund and any lump sum benefits paid by the receiving fund from the dependant beneficiary's new pension interest, for s307-290 ITAA97 to apply to those subsequent payments'.

However, the ATO has just announced that any untaxed element would not need to be reported to the receiving fund, as it would be ignored by them for tax and tax component purposes. It is instead reported as a taxable component.

Status: Applicable retrospective from 1 July 2017

Debit value of Capped Defined Benefit Income Streams – TBAR

There has been much controversy surrounding the unintentional consequences resulting from calculations provided under the Income Tax Assessment Act 1997 for a commutation of a defined benefit. A commutation of a capped defined benefit income stream will have a nil value recorded as a debit against the member's transfer balance cap (TBC). Thereby, not freeing up TBC space for the member to re-commence another type of defined benefit income stream, without breaching their TBC.

The issue of nil debit value arises as the commutation is required to be calculated by reference to the first benefit the individual is entitled to receive after the commutation occurs. However, for a full commutation of such benefits, results in no benefit after commutation.

The new calculation to determine the debit value for TBC purposes, on the commutation of the members capped defined benefit pension is:

- Original special value of capped defined benefit income stream
  Less:
- Amount of any debits in respect of the income stream prior to the commutation;
- The total amount of superannuation income stream benefits the member was entitled to receive before the start of the financial year in which the commutation takes place; and
- The greater of:
  - Sum of superannuation income stream benefits paid during the financial year in which the commutation takes place; or
  - The minimum amount required to be paid during the financial year in which the commutation takes place.

The debit value calculation for TBC purposes may not result in fully clearing the original credit of this defined benefit pension. Be careful an excess is not created on re-starting a capped defined benefit income stream (Market Linked Income Stream) as there may be some residual in the member's TBC.

Pension payments do not impact a member's TBC where they are in receipt of account based pensions, so such treatment of pension payments in the calculation of the debit value are inconsistent and conflicting.

Example

Neville is currently in receipt of a lifetime complying under SIS Reg 1.06(2)). At 30 June 2017, it had a special value of $1,116,880 reported as a credit against the member's TBC. Its capital value at 30 June 2020 was $1,276,135.

In order to change its terms and convert it to a Market Linked Income Stream (MLIS), the debit value is calculated as follows:

Original special value	$1,116,880
Less: debits against TBC	Nil
Less: pension payments (FY18 & FY19)	($140,936)
Less: pension minimum FY20	($72,056)
	$903,888

Neville's TBAR will be as follows:

	DR	CR	Balance
Original LCP		$1,116,880	$1,116,880
Commutation LCP	$903,888		$212,992
Commencement MLIS (capital value)		$1,276,135	$1,489,127

The example shows that Neville's Transfer Balance Account (TBA) is not fully cleared from the commutation of his lifetime complying pension. In Neville's case he is able to commence a MLIS as the full capital value fits into his TBC of $1,600,000. However, this may not always be the case.

OTHER

Guidance Note 2019/1 Transition to Retirement Income Streams

A member in receipt of a TRIS, who then satisfies a condition of release with a nil cashing restriction, will see their TRIS will become a TRIS in 'Retirement phase'.

For TRIS' in retirement phase (akin to an Account Based Pension), the earnings attributable to such pensions will be exempt from tax (ECPI claimed) and the TRIS will become attributable towards the member's Transfer Balance Cap (TBC). The 10% maximum restriction is also removed once in retirement phase.

The ATO advised that 'a TRIS does not convert into any other form of superannuation income stream when it moves into the retirement phase. It will continue to satisfy the definition of a TRIS and will only be 'converted' to another kind of superannuation income stream if it is ceased and a new superannuation income stream is commenced'.

Hence, once a TRIS, always a TRIS; even in Retirement phase.

TRIS' will either be in retirement phase or they will not.

The easy rule of thumb being – retirement phase removes the 10% maximum, the TRIS balance them counts towards the members Transfer Balance Cap (so the TRIS can then only be a maximum of $1,600,000, and the earnings from the TRIS become ECPI.

Investment Strategy diversification

In accordance with Section 52B of the SIS Act, and Regulation 4.09, trustees of a self-managed superannuation fund are required to formulate, review regularly and give effect to an investment strategy, that has regard to the whole of the circumstances of the fund.

Earlier this year the ATO wrote to approximately 18,000 trustees where they held concerns that the fund held 90% or more of its assets in one asset, or a single asset class. The ATO highlighted the fund may be at risk of not satisfying the diversification requirements in the fund's investment strategy.

The ATO or the SIS legislation does not prohibit a single asset class or investing in a single asset, however, ensuring trustees have given adequate consideration to diversification, needs and requirements of all members and the risks associated with the lack of diversification. Investment ranges of 0-100% are also not a valid strategy.
Furthermore, the ATO specified trustees should be reviewing their investment strategy at least annually. Such review should be documented together with any decisions made arising from the review.

Administrative penalties could apply where the trustee has not adequately considered and documented diversification in the fund's investment strategy. Auditors will be reviewing a funds investment strategy to ensure one was in place for the fund for the financial year and that it satisfied all requirements of Regulation 4.09, as well as ensuring it had been reviewed during the financial year.

Salary Sacrifice Integrity

Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019

Status: Received Royal Assent on 28 October 2019

Employers that have employees who salary sacrifice part of their salary into super must base Superannuation Guarantee contributions on the employee's pre-salary sacrificed salary. This measure prevents an employer from reducing their SG obligations by reducing the employee's base salary by any amount's salary sacrificed.

SG contributions must now be paid on salary sacrificed amounts. Previously, an employer could reduce their SG obligations.

An integrity measure, ensuring an employee receives their full SG contributions, regardless of whether they decide to salary sacrifice.

Status: Applies from 1 January 2020

Retirement Incomes Review

The Federal Treasurer made announcements in September 2019 for a review of the retirement income system, based on the Productivity Commission report: Superannuation: Assessing Efficiency and Competitiveness.

The review will analyse the current state of the system and how it will perform in the future as Australia's population ages. The report will examine incentives for an individual's self-funded retirement, fiscal sustainability of the system, the role of the 3 pillars of the retirement income system and the level of support needing to be provided to different cohorts over time.
At present the Government has not released the findings of this review, preventing industry reform to take place that will enable all Australians to be able to access affordable and high quality financial advice.

ATO RULINGS & GUIDANCE STATEMENTS

SMSF REGULATORS BULLETIN – 2020/1

The Bulletin published by the ATO details its concerns in respect to SMSFs and property development, resulting from an increase in the number of SMSFs entering into these type of arrangements (with either related or unrelated parties). They are concerned that some arrangements breach regulatory requirements.

They are concerned, in particular, where these arrangements are undertaken as a joint venture, a partnership or through an ungeared related unit trust or company.

Property development is a permissible investment under the SIS Act, however, it can be complex in nature and the ATO wishes to ensure that where trustees wish to enter into these types of arrangements that they are not breaching the requirements of the SIS Act and Regulations.

Their concerns for these types of arrangements are where they are used to inappropriately divert income into a superannuation fund, or where SMSF assets are used to fund property development in a manner that is inappropriate and sometimes detrimental to retirement purposes of its members.

As these structures are complex in nature, inadvertent breaches can occur that can lead to serious contraventions of the SIS legislation.

Regulatory concerns that could arise include:

- whether the arrangement amounts to the SMSF being maintained for a purpose outside of those permitted by the sole purpose test;
- whether the SMSF continues to meet the relevant operating standards, including record keeping requirements, ensuring assets are appropriately valued and recorded at their market value, and keeping SMSF assets separate from members assets;
- whether the arrangement included the provisions of a loan or financial assistance (either directly or indirectly) to a member or their relative;
- whether the arrangement includes the SMSF acquiring assets from a related party;
- if the arrangement features the SMSF borrowing money, whether that borrowing fails to meet the requirements to be exempted from the prohibition on borrowing for a LRBA;
- whether the SMSF has contravened the in-house asset rules by exceeding the level of in-house assets allowed;
- whether payments out of the SMSF under the arrangement are in fact payments of benefits contravening the relevant payment standards (i.e. illegal early release of super);
- whether the SMSFs investments are made and maintained on an arm’s length basis and if they are not, whether the terms and conditions are not more favourable to the other party than would be expected in an arm’s length dealing.

Practical Compliance Guideline PCG 2020/5 – Non-Arm’s Length Expenditure (NALE)

This guideline outlines the ATO’s compliance approach with respect to a superannuation fund incurring non arm’s length expenditure during the financial years 2019, 2020 and 2021.

A transitional measure and issued in response to LCR 2018/D10 (withdrawn) and subsequent LCR 2019/D3 that detail the amendments to s295-550 ITAA97 – that is, where the parties do not deal with each other at arm's length and the fund incurs NALE (or no expenditure) in gaining or producing ordinary or statutory income.

The ATO advised they will not allocate compliance resources to determine whether the NALI provisions apply to a complying superannuation fund during these financial years, where the fund incurred NALE (detailed in para 9 to 12 LCR 2019/D3) of a general nature that has sufficient nexus to all ordinary and/or statutory income derived by the fund. For example, fees for accounting services.

This compliance approach was prompted after receiving consultation feedback in relation to LCR 2018/D10 on the issue of when non-arm's length expenditure will have a sufficient nexus with income derived by the fund for the NALI provisions to apply.
This compliance approach does not apply where the fund incurred NALE that directly related to the fund deriving ordinary or statutory income from a particular investment of the fund. For example, expenditure relating to the acquisition of an income producing asset.

Status: Applies in respect to financial years 2018-19; 2019-20 and 2020-21.

SPR 2020/D1 – Superannuation Industry (Supervision) In-house Asset Determination – Intermediary Limited Recourse Borrowing Arrangement Determination 2020

Where SMSFs have entered into an intermediary LRBA, this determination seeks to ensure the asset is not classified as an in-house asset of the fund.

An intermediary LRBA involves the trustee of the holding trust borrowing money, as principal, from a lender to acquire a single acquirable asset. The SMSF maintains the holding trustee's borrowing; resulting in the SMSF having an indirect borrowing via the holding trustee.

Where the LRBA meets certain requirements, the determination seeks to exclude the investment in the holding trust as an in-house asset.

An intermediary LRBA must meet the following requirements:

(1) a holding trust is established with members of a fund being the only trustees or shareholders and directors of the corporate trustee (Holding Trustee);

(2) the trustee of the fund is a beneficiary of the holding trust;

(3) the Holding Trustee holds an acquirable asset (Asset) on trust for the trustee of the fund, who is beneficially entitled to the Asset;

(4) the Asset is a single acquirable asset (as referred to in subsection 67A(1)) that the trustee of the fund is allowed to acquire under the *Superannuation Industry (Supervision) Act 1993;*

(5) the Holding Trustee enters into a borrowing as principal with a lender with the borrowing secured by a mortgage over the Asset;

(6) the contract or deed or borrowing, referred to in paragraph (5), between the Holding Trustee and the lender may not limit the lenders right of recourse, under the contract or deed, to only the Asset in the event of default;

(7) the lender may require that personal guarantees are given as part of the Intermediary (LRBA);

(8) the arrangement is established by a legally binding deed(s) under which the trustee of the fund and the Holding Trustee agree, for:

(i) the trustee of the fund to maintain all borrowing obligations entered into by the Holding Trustee in respect of the borrowing referred to in paragraph (5);
(ii) the trustee of the fund is absolutely entitled to any income derived from the Asset, less fees, costs, charges and expenses incidental to the acquisition, holding or management of the asset;

(iii) the trustee of the fund has the right to acquire the legal title of the Asset on completion of the borrowing referred to in paragraph (5);

(iv) the rights of the Holding Trustee or any Guarantors against the trustee of the fund in connection with default on the borrowing referred to in paragraph (5) is limited to the Asset.

(9) The documentation referred to in paragraph (8) in connection to the borrowing referred to in paragraph (5), is disclosed to the lender at the time of the borrowing.

CASES

EPOA appointed to act did not cease on death of the member Dawson v Dawson (2019) NSWSC 826

In this case, the deceased's son (Tony Dawson) held an enduring power of attorney on behalf of his father, Peter Dawson. Tony Dawson was appointed as a trustee of the fund,

in his father's stead, prior to his death. Tony Dawson acted as co-trustee with the other member, Estelle Dawson (stepmother).

Tony Dawson was not executor of his father's estate. The executor and trustee signed a deed of confirmation to ratify the appointment of the executor (Mr Holland) as a trustee in place of Peter Dawson, who held EPOA on behalf of his late father, to satisfy the requirements of the SIS Act. The deed of confirmation of appointment was retrospective from the date of the member's death.

This was disputed by Tony Dawson who claimed he remained a trustee after his father's death and the executor was not a trustee of the fund.

The court determined that Tony Dawson was appointed as trustee in his individual capacity, and not as attorney for the deceased. It was confirmed the son's appointment did not cease on his father's death when the power of attorney ended.

The court stated: 'When a legal personal representative, such as a person holding a power of attorney, is appointed a trustee of an SMSF, they act in their personal capacity as trustee rather than as an attorney for the member'.
The fund's trust deed also indicated Tony Dawson was appointed in his personal capacity and the deed did not indicate that the trustee's appointment ended on death of the member (at which time the EPOA ended).

The court found Tony Dawson's appointment as trustee did not cease and he was in fact a trustee of the fund, together with his stepmother. The appointment of the executor was found to be invalid as there was no vacancy created for the executor to be appointed as trustee. Tony Dawson was found to still hold office in that capacity under the deed.

SMSF Trustee's Discretion on Paying Death Benefit
Wareham v Marsella [2020] VSCA 92

The decision of the above case is perhaps one of the more controversial decisions of recent years as it relates to an SMSF Trustee "discretion" on payment of a death benefit. In Marsella, the dispute was between the deceased's daughter (who was the surviving SMSF trustee) and the deceased's second husband. The Victorian Supreme Court found that the decision of the surviving trustee (i.e. the daughter) to pay all the deceased's benefits to herself, was made without real and genuine consideration of the interests of all potential beneficiaries and was therefore set aside. The Court also removed the daughter and the subsequent co-trustee (who was her husband) as trustees of the SMSF.

The Court decision was made even though the daughter (as SMSF trustee) had the absolute discretion to pay the death benefits to any of the dependants (including herself). The court found Mrs Wareham did not exercise her discretion on payment of the death benefit by giving real and genuine consideration to all potential beneficiaries and acting in good faith under the powers conferred on her as executor.

The court stated Mrs Wareham 'acted in the context of uncertainty, misapprehensions as to the identity of a beneficiary, her duties as trustee, and her position of conflict. As such, she was not in a position to give real and genuine consideration to the interests of the dependents. This conclusion is supported by the outcome of the exercise of discretion'.

On appeal it was argued that the trustee had not failed to give real and genuine consideration to the exercise of discretion in payment of the death benefit. Ten grounds were cited, mainly involving the failure to give real and genuine consideration to the interests of all beneficiaries who may benefit in the exercise of discretion on payment of the death benefit and the court removing Mrs Wareham and her husband as trustees of the fund. The appeal was dismissed by the court of appeal and confirmed the original decision.
Conflicts of interest will no doubt continue to arise in an SMSF (particularly in blended family situations) where one person could potentially be acting in many different capacities - as trustee, executor and beneficiary. This creates a conflict of interest that needs to be properly considered and documented to show they acted in good faith and gave real and genuine consideration to all potential beneficiaries in applying their discretion in the payment of a death benefit. Specialist SMSF advice should be sought on valid BDBNs, payment of death benefits and documentation, particularly where discretion on the payment of a death benefit needs to be exercised.

This case highlights that appropriate planning and having effective documentation in place would help provide clarity in these situations and help prevent these disputes.

As advisers we have a duty of care to our clients to continually emphasise the importance of effective documentation, including the importance of a valid binding death benefit nomination being put in place and planning as it relates to the payment of a death benefit, and in a broader context – the distribution of their entire Estate, to ensure the benefits are maximised for the potential beneficiaries.

Validity of Binding Death Benefit Nominations
Hill v Zuda Pty Ltd ATF the Holly Superannuation Fund [2020] WASCA 87

The deceased's only child brought proceedings around the validity of her deceased's father's binding death benefit nomination that was in place at the time of his death. The deceased's nomination directed superannuation benefits to his de facto partner, whom was his executor.

The deceased's child claimed the BDBN was invalid as it did not comply with the requirements of the SIS Act and SIS Regulations. She wanted her father's superannuation benefits paid through to his estate, as she was a beneficiary.

s59(1A) SIS Act allows members of a superannuation fund to direct the trustee how they wish their benefit to be paid on death. SIS Regulation 6.17A prescribes the form of the BDBN. As the deceased's BDBN did not comply with the SIS Regulation, its validity was questioned.

However, s59 (1A) SIS Act does not apply to SMSFs; and consequently, SIS Regulation 6.17 also does not apply.

It is the fund's governing rules that determine what types of binding death benefit nominations a member can put in place.

Court ruled the deceased BDBN was valid and dismissed the case. Appeal in progress.

Payment of Death Benefits to Widow
Vasey v Henry [2019] NSWSC 996

The deceased's 3 daughters sought orders for further provision for their proper maintenance, education or advancement in life out of the estate of their father.

The deceased's widow, Ms Henry provided evidence showing the deceased had nominated her as the sole beneficiary of his superannuation benefits, held with Australian Super. The deceased had little to no assets in his estate. He owned a property jointly with his spouse, that passed directly to her by survivorship. Property was subsequently sold and proceeds used by Ms Henry to purchase another property for herself and the balance put into super.

Years earlier, Ms Henry and the deceased sought advice to pay off personal debts owed by the deceased. On advice, Ms Henry retired and accessed her superannuation benefits to pay off these debts.
The court heard the deceased had already provided for his first wife, the daughter's mother, by way of marital property settlement and agreed with the little that remained

that it be provided to his wife as the two enjoyed a loving relationship in which she provided support and comfort during his illness.

The court ruled in favour of the widow, Ms Henry, in receiving his superannuation benefits. The deceased made substantial provision for his daughters during his lifetime, providing them material assistance in each gaining a university qualification. His daughters have sound employment prospects because of the assistance the deceased had been able to provide them, confirming they had received substantial assistance from the deceased and dismissed the case.

Reinstatement of Trust
Sutton v NRS(J) Pty Ltd [2020] NSWSC 826

In this case a Family Trust was reinstated based on a photocopy of the original Trust Deed; the original unable to be located. The Family Trust operated for many years, on the basis it was constituted. The court was asked to regularise the continued administration of the assets held in the trust on the terms of the trust. The photocopy of the original deed is the only evidence of it being constituted.

The court concluded under the NSW Trustee Act 1925, the trustees were able to treat the photocopy deed as the trust's constitution document.

This case is not related to SMSFs, however, as an SMSF is a type of trust, it will have implications for SMSFs in this situation.

Seeking Damages for failed investment advice
Various v Moylan Retirement Solutions Pty Ltd [2020] NSWSC 359

Moylan Retirement Solutions, an Australian Financial Services Licensee provided financial advice to the plaintiffs (4 separate groups of SMSF clients) over a 5-year period.

A series of investments were recommended in which the plaintiff's invested into. These loan investments and corporate investment vehicles were controlled by Mr Moylan. The investments into these entities were in turn applied to other investment vehicles which conducted property development and subdivision. The investments failed as a result of the global financial crisis. Moylan Retirement Solutions was deregistered, and its principal, Mr Moylan was made bankrupt.

The parties sued Moylan Retirement Solutions professional indemnity insurers on the basis Moylan Retirement Solutions had a liability to them over the failed investments.

Court ruled in favour of the defendant, noting the plaintiff's were innocent victims of Mr Moylan's calculated deception over several years and his conduct left them suffering grievous financial plight. The law however, does not provide them with a remedy against these particular insurer defendants.

WHAT'S STILL TO COME?

6 Member Funds

Treasury Laws Amendment (Self Managed Superannuation Funds) Bill 2020.

The Bill proposed to amend the SIS Act to increase the total number of members of an SMSF from 4 to 6. Per s17A SIS Act 1993, an SMSF could have no greater than 6 members. The increase in fund members would also apply to small APRA funds.

The increase in member numbers is intended to provide greater flexibility for large families and enable them to jointly manage their retirement savings.

Status: Introduced into Senate 2 September 2020. Yet to receive Royal Assent.

Exempt Current Pension Income (ECPI) Changes

The 2019 Federal budget proposed two changes to ECPI:

1. Choice of method to calculate ECPI where SMSFs have interests in accumulation and retirement phase superannuation interests during the financial year;
2. Remove the requirement to obtain an actuarial certificate when calculating ECPI using the proportionate method, where all SMSF members are fully in retirement phase for the whole financial year.

In September 2017, the ATO published "Confirmation of ATO view: SMSFs and tax-exemption on pension assets". It stipulated how the ATO expected a SMSF to calculate Exempt Current Pension Income for a given financial year. It reads as follows:

The ATO previously stipulated how they expected an SMSF to calculate ECPI for a given financial year:

"Self-managed super funds (SMSFs) will be required to use the segregated method to claim exempt current pension income (ECPI) on income earned in periods when the fund was solely supporting retirement phase income streams. Where a fund is wholly in pension phase for all or part of any income year, our position is that all of the fund's

assets are segregated current pension assets. An actuarial certificate will not be required to support the SMSF trustee's calculation of ECPI for the relevant period.

For any portion of an income year that an SMSF is not wholly in pension phase, for example its members have a mix of pension phase and accumulation phase interests for part of the year, and the SMSF's assets are not segregated, the SMSF trustee will be required to use the proportionate method to determine its ECPI for that period. They will also be required to obtain an actuarial certificate if they wish to claim ECPI in relation to income received by the fund during that part of the income year.

We acknowledge that there may be some industry practices that may not be in accordance with the ATO view of the law regarding the calculation of ECPI."

These changes are designed to reduce administration red tape and essentially revert back to the general industry approach of calculating ECPI where there is both accumulation and retirement phase superannuation interests during a financial year, to obtain an actuarial certificate that covers the whole year. However, the method that provides the fund with the best ECPI outcome should be considered.

Status: Legislation pending. Revised commencement date of 1 July 2021.

Bring forward rule for member's aged 65-67

The 2019 Federal budget proposed increasing the work test to age 67, to align with the age pension age. Resulting in members being able to contribute into their superannuation fund without having to satisfy a work test.

A new Bill: Treasury Laws Amendment (More Flexible Superannuation) Bill 2020 is currently in front of the Senate that will also increase the 3 year bring forward rule for member's aged 65-67, upon receiving Royal Assent.

Currently, a member aged 65 or 66 can make personal contributions (concessional or non-concessional) into their superannuation fund without having to meet the work test requirements, however, they can only do so utilising the annual cap of $100,000 that is currently in place for member's 65 and over.

Previously, the work test and 3 year bring forward rule applied to members under 65 years of age. This change will again align the work test cut off with the bring forward provisions.

Status: Proposed commencement of 1 July 2020. Legislation pending Royal Assent.