

**1 August 2023**

Mr Kendrick Yim  
Australian Taxation Office  
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**By email:** [Kendrick.yim@ato.gov.au](mailto:Kendrick.yim@ato.gov.au)

Dear Mr Yim

**Australian Taxation Office's Draft Tax Determination TD 2023/D1**

1. This submission concerning the ATO's Draft Tax Determination TD 2023/D1 is made by the Taxation Committee of the Business Law Section of the Law Council of Australia (the **Committee**).
2. We welcome the opportunity to provide feedback on the ATO's Draft Tax Determination TD 2023/D1 (the **Draft Determination**) concerning the interaction between the non-arm's length income (**NALI**) and capital gains tax (**CGT**) provisions in determining the amount of statutory income that is NALI.

***Issue to be addressed***

3. Following the release of the Draft Determination, it has become evident that the administration of the s 295–550 NALI provision does not accord with its policy intent and continues to create confusion.
4. Practitioners in the superannuation industry have long held the belief that, where a capital gain arises within the context of a non-arm's length dealing, one must only treat as NALI the net capital gain that relates to that particular CGT asset. However, the Commissioner's view is that a NALI capital gain can taint other capital gains incurred by a superannuation fund in the same income year. This would seem to result in an unintended consequence—that NALI may apply where a taxpayer disposes of a property at arms-length in certain circumstances (for instance, see example three (paragraph 26) in the Draft Determination, where a \$1,000,000 arms-length capital gain would effectively be taxed at 45per cent).
5. Rather than merely addressing the mischief at which the NALI rules were directed—undue income sheltering and transactions that do not properly reflect the true market value of an asset—the ATO's proposed treatment will have the effect of imposing an unfair tax liability on what is otherwise a genuine arm's length capital gain. This was surely never Parliament's intention.

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6. The Draft Determination addresses multiple 'alternative views' of the NALI-CGT, provisions (namely, section 295-550 and section 102-5), highlighting the reality that the legislative provisions do not interact in a coherent way. The preferred approach in the Draft Determination, as previously stated, fails to comprehend that, in arriving at a calculation of the non-arm's length component to be taxed (adopting the section 102-5 method statement), an arms-length capital gain can nonetheless be subject to the NALI provisions.

### ***The need for legislative action***

7. With the above in mind, it is apparent that the NALI-CGT conundrum should be resolved definitively through legislative action. Treasury is already in the process of amending the section 295-550 non-arm's length expense rules (**NALE**) and, to date, has been positively receptive to concerns surrounding the disproportionate tax treatment of general and specific expenses made by self-managed and small APRA-regulated superannuation funds.
8. Ultimately, the Commissioner's Draft Determination highlights the multiple interpretations surrounding NALI and CGT that continue to persist. Clearer legislation, which avoids the application of penalty tax rates to a genuine arm's length capital gains and reflects the policy objectives to which section 295-550 was always directed, would better address these complexities.

### **Conclusion and further contact**

9. The Committee would be pleased to discuss any aspect of this submission.
10. Please contact the chair of the Committee, Mr Justin Byrne, at [justin.byrne@qldbar.asn.au](mailto:justin.byrne@qldbar.asn.au) if you would like to do so.

Yours sincerely,



**Philip Argy**  
**Chairman**  
**Business Law Section**