bO2 Corporate Essentials

Tax Smart Australia

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Tax Essentials
Superannuation
(Wealth Accumulation Tips)

DECEMBER 2021

THE NEWSLETTER
Tax Planning Opportunities for Everyday Business

MICHAEL'S CORNER
Article 014
Gig Workers Under the Health and Safety Spotlight

SPECIAL BONUS ISSUE
2021 Superannuation - (Wealth Accumulation Tips)

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TAX PLANNING OPPORTUNITIES FOR EVERYDAY BUSINESS

DGRS NEED TO REGISTER AS A CHARITY

Tax law has been amended so that from 14 December 2021, all non-government deductible gift recipients (DGRs) will need to register as a charity. This amendment does not apply to ancillary funds or DGRs specifically listed in tax law.

If your DGR is not already a registered charity. You will need to take steps to register with the Australian Charities and Not-for-profits Commission (ACNC).

Transitional arrangements are available to provide you with additional time to meet the new requirements. Check on the ATO website if your organisation is eligible for the following transitional periods:

- a 12-month transitional period to become a registered charity
- an additional three-year extension by application.

The ATO is willing to provide further guidance if you have questions about DGR endorsement, the transitional arrangements or what steps you need to take. You can phone the ATO on 1300 130 248 between 8.00 am and 6.00 pm, Monday to Friday.

MODERNISING BUSINESS REGISTERS

As part of its Digital Business Plan, the government has announced the full implementation of the Modernising Business Registers (MBR) program.

This program will:

- establish the new Australian Business Registry Services (ABRS)
- streamline how you register, view and maintain your business information with the government.

About the MBR program

The MBR program will establish a new and modern registry service, the ABRS.

The ABRS will:

- progressively roll out between 2021 and 2024
- bring together the Australian Business Register (ABR) and more than 30 Australian Securities and Investments Commission (ASIC) registers in one place
- introduce the director identification number (director ID) initiative.

The program aims to:

- make it easier for businesses to meet their registration obligations – giving them more time to focus on their customers and business operations
- make business information more trusted and valuable
- improve the efficiency of registry service transactions.

The ABRS high-level milestones are to:

- establish the foundations for the new registry service
- introduce director identification numbers
- transition the companies register to the new registry service
- transition the business names register to the new registry service
- transition Australian business numbers (ABN) to the new registry service
- transition the professional and historical registers to the new registry service.

What's changing

The new ABRS is now live and has information on the director ID requirement. From November 2021, you can use the ABRS to apply for your director ID.

To find out more, see Director identification number.

As the program rolls out, we'll keep you up-to-date with any changes that may affect you.

What's already changed

On 15 April 2021, ASIC registry staff moved to the ATO in a Machinery of Government (MoG) administrative change to help the Registrar.

This move was a staffing change only. It doesn't change your registry obligations, how you interact with the ASIC registers or the ABR at this time.

What's not changing

Registry data will continue only to be provided to other parties, including other areas of ASIC and the ATO:

- to maintain the registers
- if authorised by law.

The existing requirements for the collection, storage, integration and management of data will be upheld.

For now, how you register, search and get extracts of the registers and interact with the ABR and ASIC remains the same.

There will be a clear separation between registry functions and other functions of the ATO.

Director identification number

Director identification number (director ID) is a unique identifier you need to apply for once and keep forever.

You must apply for your director ID yourself so that your identity can be verified. No one can apply on your behalf.

Your authorised agent can't apply for a director ID for you. They can help you understand the new requirement and if you need to apply, and when.

The director ID application will be available from November 2021 at abrs.gov.au.

To log in to ABRS online, you'll need to use the myGovID app, set it to a Standard or Strong identity strength. If you haven't already, you can set up your myGovID now.

To find out more, see How to set up myGovID.

Administering the MBR program

On 4 April 2021, the Commissioner of Taxation was appointed as Registrar under the following:

- *Business Names Registration Act 2011*
- *Commonwealth Registers Act 2020*
- *Corporations Act 2001*
- *National Consumer Credit Protection Act 2009.*

The Registrar's role is to:

- lead and implement the MBR program
- perform statutory registry functions
- exercise powers under the relevant laws.

Initially, this will also include assisting ASIC in performing statutory registry functions and exercising its powers as a delegate of ASIC. At a later stage, the Registrar will assume primary responsibility for those functions under the law.

The ATO is rolling out the MBR program in partnership with:

- Treasury
- ASIC
- Department of Industry, Science, Energy and Resources
- Digital Transformation Agency.

ATO STATEMENT REGARDING PANDORA PAPERS

The ATO issued a media release on 4.10.2021. They stated they were aware of the International Consortium of Investigative Journalists (ICIJ) reporting they have released data referred to as the 'Pandora Papers'.

ATO Deputy Commissioner and Serious Financial Crime Taskforce (SFCT) Chief Will Day said that the ATO regularly receives information from various sources in their efforts to fight tax evasion and crime.

"While the information in data leaks is interesting, we don't rely on data leaks to do our job. We detect, investigate and deal with offshore tax evasion year-round," Mr Day said.

The ATO will be analysing the information to identify any possible Australian links.

"We are well connected locally and globally in our efforts to fight financial crime. We will certainly look at this data set and compare it with the data we already have to identify any potential connections," Mr Day said.

Mr Day said the ATO has strong international partnerships, treaties and agreements that enable a collaborative approach to identify and address international tax evasion and crime.

The ATO intelligence on tax evasion comes from a variety of sources, including the community, advisers, partner agencies and international bodies. Mr Day said it was important to remember that being included in a data leak doesn't automatically mean that there has been tax evasion or crime.

"There is a range of legitimate reasons that someone may have for an offshore bank account or structure. We know most Australians do the right thing. However, some attempt to hide their ownership interests or financial misdoings through offshore arrangements," Mr Day said.

Mr Day said staff from the ATO and their partner agencies form an impressive intelligence capability that uncovers crime.

"We have some of the best auditors, investigators, analysts and data scientists in the world who work together to sort the good from the bad, ensuring no stone is left unturned," Mr Day said.

"The message is clear for those who try to cheat the system – your secrets are no longer safe, and you can expect to feel serious consequences for your actions. No complicated money trail is too difficult for us to unravel."

"From the very first data leak, we responded quickly through the Joint International Taskforce on Shared Intelligence and Collaboration (JITSIC). JITSIC brings together 42 national tax administrations that have committed to more effective and efficient ways to deal with tax avoidance and evasion."

JITSIC member countries will continue to work together to pool resources and share intelligence to rapidly develop a more accurate picture of what the data is revealing.

This collaboration, coupled with the ATO's work through the Serious Financial Crime Taskforce and the Joint Chiefs of Global Tax Enforcement, means that the ATO will be able to respond to any so-called data leaks decisively.

The ATO encourages those who may have undeclared offshore income to contact them.

WORK-RELATED EXPENSES – ARE YOUR CLAIMS REASONABLE? OR ARE YOU PUTTING YOURSELF IN THE FIRING LINE?

When analysing deductions claimed by taxpayers in particular occupations and locations, the ATO uses a real-time comparison with what they term the taxpayer's 'nearest neighbour'.

From this real-time data comparison with other taxpayers in the same industry and location, the ATO actively prompts the taxpayer in real-time that their claims are out of the normal range, effectively allocating them the opportunity to consider, prior to final confirmation, whether their claim is valid.

When preparing their tax returns using MyTax in 2020, taxpayers were issued around 350,000 prompts, requesting them to check the figures they entered in MyTax. This being due to proposed deductions being significantly different to those of others in similar circumstances.

How did people deal with this warning?

1. Around a third immediately changed their deduction
2. Around a third made no change – this may be valid if they actually incurred the expenses and it related to them earning assessable income
3. **However, the final third progressively reduced their claim for a deduction to see when they dipped below the warning threshold. It really is putting you in the firing line for a tax audit!**

In reality, this may only involve the usual letter questioning the claim and requesting substantiation, but this is not smart. It is akin to saying, "I may not have incurred the expense... but what can I get away with?" It's far better, to be honest!

MJ AND IT PTY LTD v FEDERAL COMMISSIONER OF TAXATION [2021] AATA 3250 CASH FLOW BOOST SCHEME

A company was not entitled to the cash flow boost in respect of an amount paid to its sole director because it entered into a scheme to increase its entitlement to the cash flow boost.

In this AAT case, in agreeing with the ATO, it was held that the taxpayer company, in the final week of March 2020, had entered into a scheme for the sole or dominant purpose of accessing the cash flow boost stimulus measure by recording a single payment to its sole director for the March 2020 period.

Although the AAT accepted the taxpayer's argument that the director had constructively received the payment. But, after following the recording of the expense and the subsequent offset against the director's loan in the accounts, the AAT decided that various steps would not have occurred. Concluding that the March payment would not have happened if the parties were at arm's length or the cash flow boost did not exist.

It followed the taxpayer had the sole or dominant purpose of increasing the amount payable under the cash flow boost.

As a result, the company was only entitled to the cash flow boost in respect of PAYG amounts withheld from amounts paid to arm's-length employees.

PRIVATE COMPANY DIRECTORS: LODGE OR REVIEW YOUR RETURN

If you are a director of a private company and your tax returns aren't up to date, or you didn't report all your income, now is the time to speak to a trusted adviser and lodge a tax return or make a correction.

It is not uncommon in small businesses to clear out company profit to directors fees. While this may deal with company tax, the directors must disclose this income in their individual tax returns for this to be effective. We suspect that some discrepancies have come to light due to single touch payroll.

In fact, by matching data across a range of sources, the ATO has noticed that some directors of private companies received income but haven't lodged a tax return or disclosed all their income.

The ATO has commenced reviews on lodgment and correct reporting for these company directors and their connected entities.

When they find income that has not been disclosed, the ATO will work with taxpayers to get them back on track.

Suppose you make a voluntary disclosure to the ATO. You can generally expect a reduction in the penalties that would normally apply.

PERMANENT CHANGES TO ANNUAL GENERAL MEETINGS AND ELECTRONIC COMMUNICATIONS

On 20.10.2021, the Federal Government introduced into parliament a Bill to modernise the Corporations Act 2001 by permanently allowing companies to use technology to meet regulatory requirements under the legislation.

The Corporations Amendment (Meetings and Documents) Bill 2021 (the Bill) will allow companies and registered schemes to hold virtual meetings, distribute meeting-related materials and validly execute documents. These reforms build on recently renewed temporary relief, which will remain in place until 31 March 2022.

Specifically, the permanent reforms:

- ensure that meetings can be held physically, as a hybrid or, if expressly permitted by the entity's constitution, virtually, provided that members, as a whole, are given reasonable opportunity to participate in the meeting;
- ensure that companies and registered schemes can meet their obligations to send documents in hardcopy or softcopy and give members the flexibility to receive documents in their preferred format; and
- allow documents including deeds to be validly executed in technology-neutral and flexible manners, including by company agents.

These reforms will provide relief to around one million operating businesses and are estimated to deliver deregulatory savings of $450 million each year, averaged over 10 years. They will be reviewed two years after the legislation commences to ensure that they are operating as intended.

Importantly, the Bill ensures that companies can continue to meet their obligations amid the uncertainty of the COVID 19 pandemic.

TAX GAP HIT $34 BILLION JUST BEFORE PANDEMIC

The Commissioner of Taxation annual report for the year ended 30 June 2021 makes for some interesting reading. Almost $34 billion worth of tax was not paid in the year before the pandemic hit (30.6.2019), with a small business tax gap and individuals responsible for most of this.

ATO estimates reveal a 7.3 per cent gap between collected tax and what was expected to be brought in during 2018-19. About $33.5 billion, up by $32 billion from the prior year.

Most of this "tax gap" was attributed to small businesses ($12.5 billion) and individuals ($8.4 billion). A further $2.6 billion was missing from large corporate groups.

As yet, figures are not available for the tax gap during the pandemic. The ATO decided to be less aggressive in its compliance activities at the height of the crisis.

The ATO collected $11.5 billion in total revenue from 5.2 million compliance activities out of a target of $15 billion in the year ended 30.6.2021. In 2019-20 there were 3.9 million compliance activities with $ 13.7 billion in revenue raised.

In his annual address to the Tax Institute on 21.10.2021, ATO Commissioner Chris Jordan said compliance work was paused in 2020 amidst the impact of the COVID-19 outbreak.

The ATO intends to contact 500 tax agents under its "shadow economy" program. The program aims to approach tax professionals early if they are considered engaging in risky tax behaviour.

Unsurprisingly, The tax office's annual report says total revenue effects – an indicator that measures the impact of compliance activities – were below target for the first nine months of the 2020-2021 financial year due to the pandemic.

Lodgements by taxpayers and businesses for each category were lower on average during the pandemic than in typical years, and refunds were increased.

ATO WELCOMES ANNOUNCEMENT OF SETTLEMENT OF TAX DISPUTE

On 29.10.2021, the ATO welcomed the announcement from medical equipment company ResMed that they have settled their tax dispute for the equivalent of USD381.7 million and locked in future tax certainty.

The ATO has lauded this announcement as another example of the success of the Tax Avoidance Taskforce in strengthening the Australian Tax System.

Since its inception in 2016, the Tax Avoidance Taskforce has proven very successful. It contributes to the ATO collecting over $10 billion in additional tax from public and multinational businesses over that period and locking in future tax compliance.

Since the commencement of the task force, numerous taxpayers have publicly acknowledged finalising their tax affairs with the ATO, including Apple, BHP, Chevron, Facebook, Google, and Microsoft.

ENHANCING THE SUPER SYSTEM AND DRIVING BUSINESS INVESTMENT

On 27.10.2021, the Federal Government introduced into Parliament the *Treasury Laws Amendment (Enhancing superannuation outcomes for Australians and helping Australian businesses invest) Bill 2021*. The Bill will improve flexibility for Australians preparing for retirement, support more Australians to own their first home and help Australian businesses invest. The Bill also reduces costs and simplifies reporting for self-managed superannuation funds and small APRA regulated funds.

The government is delivering on a key commitment in the Women's Budget Statement by removing the $450 per month income threshold under which employees do not have to be paid the superannuation guarantee by their employer—eliminating structural discrimination that has been part of the superannuation system since 1992, improving equity in the superannuation system, and increasing women's economic security in retirement.

Recent reforms have paved the way for this important change. The introduction of Single Touch Payroll has made it easier for employers. And recent superannuation reforms, such as the Protecting Your Super package, have strengthened protections for small superannuation balances from high fees and insurance premiums.

The maximum amount of voluntary contributions that people are able to release under the First Home Super Saver Scheme (FHSSS) will increase from $30,000 to $50,000, empowering more Australians to save effectively for their first home deposit.

The eligibility age to make downsizer contributions into superannuation will reduce from 65 to 60 years, allowing more older Australians to consider downsizing to a home that better suits their needs. It is freeing up the stock of larger homes for younger families.

The Bill supports the repeal of the work test for non-concessional and salary sacrificed contributions which will be implemented through regulation changes the government intends to make before the end of the year. The legislation preserves the work test for personal deductible contributions made by individuals aged between 67 and 75. It will also make amendments necessary to allow eligible individuals to make non-concessional superannuation contributions under the bring-forward rule. This will improve flexibility for older Australians to contribute to their superannuation.

Australians will be able to take advantage of these changes from 1 July 2022.

In addition, the legislation reduces costs and simplifies reporting for superannuation funds and provides choice for fund trustees for the 2021 22 income year onwards. Trustees will now be able to use their preferred method of calculating exempt current pension income if the fund is fully in the retirement phase for part of the income year but not for the entire income year.

The government is extending the temporary full expensing measure by 12 months to 30 June 2023 to support business investment further and create more jobs.

As part of the 2020-21 Budget, the government introduced a time-limited investment incentive to support business investment and the economic recovery from COVID 19 by allowing businesses with aggregated annual turnover or total income of less than $5 billion to deduct the full cost of eligible assets, of any value, purchased after 7.30 pm AEDT on 6 October 2020 and first used or installed ready for use by 30 June 2022.

The legislation will extend the end date of temporary full expensing to 30 June 2023, providing eligible businesses with more time to access the incentive.

Temporary full expensing applies to around $320 billion worth of investment, and over 99 per cent of businesses, employing 11.5 million workers are eligible for this measure.

14TH PERSON CHARGED IN RELATION TO $20 MILLION FRAUD INVESTIGATION

On 28.9.2021, a man from Sydney's inner west became the 14th person to face charges relating to a deceptive $20 million fraud and money laundering operation.

The 54-year-old Earlwood man was set to appear before Downing Centre Local Court after being charged with recklessly dealing with the proceeds of crime to the value of $100,000 or more, contrary to section 400.4(2) of the Criminal Code (Cth). The maximum penalty for this offence is ten years imprisonment.

As part of Operation Bordelon, he was issued a court attendance notice by Australian Federal Police (AFP) investigators on Thursday, 9 September 2021, following a close evidence review by federal prosecutors at the Commonwealth Director of Public Prosecutions. Operation Bordelon is a Serious Financial Crime Taskforce (SFCT) joint agency operation into a criminal syndicate using labour-hire and payroll companies associated with the building and construction industry to defraud the Commonwealth.

It was alleged in court that the man received and possessed a total of $456,150 that was proceeds of an illegal scheme to siphon off money that should have been remitted to the ATO and that he was reckless as to the fact that the money was the proceeds of crime.

He allegedly used two personal bank accounts to receive money from five other corporate entities set up to facilitate the fraud scheme. It was also that alleged the man was the sole director and secretary of a corporate entity that received payments from another entity established by the syndicate to launder money illegally, diverted as part of the scheme.

AFP Detective Superintendent Matthew Ciantar said the growing list of people charged under Operation Bordelon highlighted the tenacity of AFP investigators and their ability to uncover the entire scope of criminal and offence committed by this syndicate.

According to Mr Ciantar

- The AFP understands that the sole purpose of organised crime is to make money. The best chance to inflict lasting damage on those seeking to accumulate significant wealth at the expense of the Australian community is to target their efforts to legitimise their proceeds of crime.
- The AFP issued a warning in August 2021 that anyone involved in this scheme should be worried as they would lay further charges if the evidence allowed. These new charges highlight commitment to ensuring serious criminal activity is brought to account. And it serves as another warning to others in the professional services industry seeking to facilitate organised crime activities.

ATO Deputy Commissioner and SFCT Chief Will Day said one of the common features of serious financial crime is businesses that may appear legitimate on the surface. Still, when you peel back the layers, you discover webs of criminal activity.

"Financial crimes cause real harm to people's livelihoods and line the pockets of criminals. The SFCT takes these matters extremely seriously, and this latest charge shows that we take firm action against those who think they won't be caught," he said.

bO2 READERS QUESTIONS AND ANSWERS.............

Question 1
Subject: GST registered provider for NDIS

My client is a registered provider for NDIS and has the GST concession as a NFP entity. Currently registered for GST

Major incomes are from government funding.

The question is whether this business can still claim a GST credit for expenses, such as rent and general business overhead expenses, for running a business.

ATO website does not really show specific examples on this case. Please provide a link if you find any.

Answer

If your client is registered for GST, you need to consider....

Many supplies under the NDIS are GST free, but some are not.

It is possible to claim input tax credits (ITC) on GST free supplies.

Regarding expenditure - if the outgoing has been incurred in earning the NDIS income, an ITC may be claimed.

You need an eligible tax invoice to claim an ITC.

As these are general principles, the ATO has not provided examples specific to the NDIS.

Refer to the ATO Community Page, which has some discussion on the NDIS topics.

Question 2
Subject: 2021 pension and late penalties

In Manual 2021, I cannot find an explanation of how the pension amount should be calculated. I would also like to know what penalties there are if the pension is not paid on time?

I had a problem paying the 2021 pension before 30 June, and I wondered whether I could appeal to someone for leniency. It could have been a Covid-19 staff problem.

My SMSF asked XXX Share Investments to sell its shares in ZZZ on 17 May. They have still not done that. 3 apologies have been received, but no cash. So, no pension could be paid.

Then I transferred the shares off-market, but now my accountant says I have to put the money back. He said the pension had to be paid in cash. The share price has crashed. I received a welcome letter from ZZZ, but their website shows that the super fund owns the shares. Maybe everyone is short-staffed because of the pandemic?

Answer

It was the task of your Accountant or SMSF administrator to advise you in writing on pension options well before 30.6.2021.

Usually, a minimum and maximum amount apply, and the fund member receives a pension prior to 30 June.

As you would be aware, income on assets in pension mode is tax-exempt, providing the pension has been properly paid for the year.

Due to Covid-19, for 30.6.2020 – 30.6.2022 inclusive, the rate on minimum pension drawdowns have been reduced by 50%, meaning a pension as little as 2% on the level of relevant SMSF assets could be paid.

We don't have the full circumstances, and you should have an open and frank discussion with your accountant to resolve this.

There are some wider issues at play here - and some real care and attention is called for:

- If a SMSF fails to meet the minimum pension requirements in an income year. The super income stream will be taken to have ceased at the start of that income year for income tax purposes.
- From the start of the income year, the account is no longer supporting a super income stream. Any payments made during the year will be lump sums for both income tax and SIS Regulations purposes.
- If you comply with the minimum pension rules in this current year, this results in the payment of a new pension. The trustee will need to revalue assets at market value and recalculate the minimum pension required at the start of the new pension.

Question 3
Subject: CGT Calculation Unit Trust

Just wondering if you could assist please with a CGT calculation for a commercial property owned by a unit trust.

It is a commercial property from which my clients run their business. They lease it to their trading entity, another unit trust. They will continue to lease the premises from the new owners.

I understand that there are some anomalies in calculating the CGT for Unit Trusts.

The Unit Trust has a corporate trustee, and the two unitholders are Discretionary Trusts holding 10 units each @ $1-.

From my calculations below (not published by bO2 to protect privacy), you can see a gross gain of $ 604,965 which will be split between each discretionary trust, i.e., $302,482 CGT each before any CGT concessions. I just need to know what they are entitled to, how it all works in the unit trust, flowing the funds out to their discretionary trust and the beneficiaries.

Answer

While we have not reviewed source data, your calculations on the CGT event A1 appear to be correct. Next, you must work out the CGT event A1 gain at the discretionary trust and individual level.

In addition, we draw your attention to capital gains tax event E4.

E4 only applies if some or all the payment to unitholders is non-assessable income previously sheltered from tax by the CGT active asset discount, the building allowance under Division 43, or a return of capital.

Broadly, CGT Event E4 operates to write down the cost base that the recipient unit holder has in their units in the trust (a nominal $10) by the amount of the distribution. And to the extent there is an excess, the recipient unit holder makes a capital gain.

The conditions for eligibility are outlined on page 54 of our annual publication. The steps to work out CGT event E4 are outlined in the following:

Cash paid by the unit trust

- Less amount included as the trust distribution
- Less amount sheltered by CGT active asset discount
- Less amount sheltered by Div43 building allowance
- Less cost base of the units

= Amount subject to CGT event E4

If the CGT Small Business Concessions apply, CGT Event E4 may be reduced by the CGT active asset discount.

If the units are active assets and the 90% significant individual test can be met. The E4 gain may be further reduced by using the Retirement Concession to effectively eliminate the capital gain.

As each relevant individual has a lifetime limit of $500k for the retirement concession. The use of the concession must be carefully considered if significant small business capital gains are expected to occur in the future when the business is eventually sold.

If the “significant individuals” are less than 55 years of age, this amount must be contributed to superannuation. Those over 55 effectively have a choice, and there is no requirement that the funds go into super.

Question 4
Subject: 3-way cash flow

I wondered if anyone could provide me with a template for a 3-way cash flow recently requested by my client’s Bank.

Answer

We suggest you google.... cash flow statement www.business.gov.au/-/media/Business-information/Template

Question 5
Subject: Purchased Leave

I would like to know how purchased leave works. Could you please help with this?

Specifically, I would like to know how purchased leave is taxed. Is it taxed when taken or when the initial deduction is made?

I would also like to know how superannuation works when an employee purchases leave and if any additional leave is accrued on the purchased leave when taken?

Answer

When an employee purchases leave, the amount is taken out of their pay before tax is applied.

It is when they take the leave that tax is withheld.

Purchased annual leave paid on termination is taxed the same way as non-purchased annual leave on termination.

The Superannuation Guarantee (SG) amounts would be based on reduced salary.

For example, if purchasing four weeks of annual leave meant that the total salary paid reduced from $100,000 to $92,300, SG would be payable on a maximum of $92,300.

The only time that SG might be payable on a higher amount than your received salary is when you salary sacrifice super contributions.

Whilst the above relates to SG obligations, you should also check your employment agreement as it might allow for a more generous outcome.

Question 6
Subject: CGT on the transfer of interest

I note the rollover provisions relating to the transfer of an asset under relationship breakdown, i.e., the party receiving the asset is liable for CGT if/when eventually sold. The cost base being that of the other party.

However, what is the situation when under the “divorce” agreement, the property recipient pays an agreed price for the 1/2 share of the jointly owned rental property. I.e... is the party disposing of the property liable for CGT on “sale” of 1/2 share of the property?

Example:

- Rental property cost $305,000; half share $157,000
- Agreed settlement amount $315,000
- net gain $158,000
- The original cost base to be further adjusted for Div43 deductions claimed

Subject to div43 adjustment, is the disposing party subject to CGT on the transfer of 50% interest?

Just to confirm...in this case, although the spouse received $315k for her half interest in the rental property, she doesn’t have to declare any capital gain? This falls to the husband when /if he eventually disposed of the property...and his cost base is not increased by the $315k he paid?

Answer

If the asset is transferred under a relationship breakdown rollover. The recipient or person receiving the asset does not pay CGT until they dispose of it.

The cost base is the amount originally paid for the asset (with adjustments), which is the essence of the rollover.

The fact that there may have been a value assigned to the asset at the time of the final allocation of all distributable assets is irrelevant.

The question is:

1. Was this a rollover pursuant to binding orders of the Family Court? If yes, then our advice stands?
2. Did the husband and wife, separate to the family law financial settlement, have a simple sale of the wife’s interest without reference to the above?

Furthermore, (2) above means the former wife was willing to accept and disclose a CGT liability in her tax return while actually receiving $315k from the sale of her interest in the property?

This plainly has not occurred.

This is a rollover, and while the former husband would no doubt like a higher cost base, this is not possible.

Question 7
Subject: SMSF Question

I need to clarify the following scenario.

If you have a Self-managed Super Fund, are you able to use any of the funds in providing a deposit for a house (First Home Buyer)?

Answer

If we are talking about existing funds in super, the answer is no... But we mention in passing the First Home Super Saving (FHSS) scheme, which is open to all eligible participants whether or not they have a SMSF.

Currently, under the FHSS scheme, you can apply to have a maximum of $15,000 of your voluntary contributions from any one financial year included in your eligible contributions to be released. Up to a total of $30,000 of contributions over all years. You will also receive an amount of earnings that relate to those contributions.

From 1.7.2022 the $30,000 maximum will increase to $50,000.

Question 8
Subject: staff refusing to vaccinate

In NSW, the public health order has been updated for early childhood workers to have both vaccines by 8 November.

I have one staff member that isn’t getting it and has no intentions of getting it.

I am just wondering what I do. Do I need to write a letter of termination? Or does she write a letter of resignation?

Is it even classed as termination?

Answer

Suppose the government mandates the public health order for early childhood workers to have both vaccines by 8 November, and you refuse to comply. In that case, the employer can terminate employment for not meeting the inherent requirements of the role.

There is case law out there to support the employer's decision, but of course, there is still a process to follow.

Do you have access to or have already acquired a written policy on mandated vaccinations in your workplace?

If not, you can obtain one, for a fee, directly from our Human Resources & Industrial Relations team.

If you don't wish to purchase, that's fine, but you will still need some form of protection.

Question 9
Subject: Deductibility of payments due to scams

Could you please advise whether payments by a business as a result of a scam are tax deductible?

My client is a farming partnership and receives invoices by email.

Several of the invoices were intercepted by scammers advising of a change of banking details on the invoices.

The changed invoices were then received by my client and paid into the changed bank accounts.

After a month or two, my client received phone calls from the suppliers querying why the accounts had not been paid and only then realised that the payments went to scammers.

My client then paid the amount again to the suppliers. My question is – is the payments to the scammer's tax deductible? My research indicates that it may be deductible over 5 years under Sec 40 -880 (2) of the ITAA 1997.

Answer

There needs to be a clear distinction drawn between investors and those in business.

Clearly, your client is conducting a business.

If the source of the funds that the payments were made from were assessable income then we believe the amounts will be deductible under the general provisions.

A loss is deductible under the general provisions if it was incurred in gaining or producing assessable income or was incurred in carrying on a business for the purpose of producing such income.

The loss cannot be capital or of a capital nature (section 8-1 of the ITAA 1997).

We also direct you section 25.45 of ITAA 1997 but suggest this relates more to losses due to fraud by employees and/or agents.

Question 10
Subject: GST on House and Land Packages

My client has purchased several blocks of land. Some with GST, some without.

They are registered for GST.

Their business is property development; they contract to the builder to build the house and sell it to people.

Hence a house and land package. I.e., they purchased one block for $143,000 incl. GST. The block is a standard size house block for the area.

They are just about to sign a contract to build the house and sell the land for $630,000. The house is a 4-bedroom standard house.

Should the sale have GST on it? I believe it should, as there is no reason it shouldn't.

I also came across this piece from the ATO.

https://www.ato.gov.au/business/gst/in-detail/your-industry/property/gst-and-residential-property/?anchor=Sellinganewresidentialproperty#Sellinganewresidentialproperty

Answer

GST is definitely payable on the sale. Since 1.7.2018, it has been the responsibility of the solicitor acting for the purchaser to forward 7% of the selling price to the ATO.

When doing the BAS, the developer later adjusts this figure upwards or downwards when doing the precise calculations.

Question 11
Subject: Annual Leave - Leave Loading

I have an educator who is on leave without pay until the end of the year. They have requested two weeks of their annual leave.

I am going to pay it. Do I have to pay leave loading on these two weeks?

Do you have a template letter that I can give to the employee to sign off on regarding this agreement?

Answer

Yes, you will have to pay leave loading.

You can find the leave application forms in your HR/IR Toolpacks #2 Downloads in the secure portal on our website.

Question 12
Subject: GST on Land Sale

The client is getting old and wants to sell the land they own. It is approx. 30 acres on the edge of town.

They are not registered for GST, and no business has been carried on, on the land. Meaning not having any cows, etc., on the land.

They have owned the land for several decades.

Do they have to register for GST and sell the land with GST added to the sale price?

I believe they don't have to register or charge GST because they aren't in the business of land selling etc. i.e., not made in the course of the furtherance of an enterprise that he carries on (sec 9-5(b)).

Answer

As we may not have the full facts and circumstances, we will only give general advice.

While you may be correct, this requires further consideration, and we direct you to Miscellaneous Tax Ruling 2006/1.

Refer to paras 271-287 Examples of subdivisions which are enterprises.

Then to paras 288-305 examples of subdivisions that are not enterprises.

This will give you more guidance, but you could request a private ruling if you are still in any doubt.

Question 13
Subject: Transfer of Livestock on Cessation of a Partnership

Just requiring verification of transfer of livestock on Cessation of a Partnership, 4 Partners in equal shares. The livestock is transferred to 2 Sons in equal shares, and they will trade individually going forward.

Can I use the election and transfer the livestock at book value, i.e. 3661 Sheep at $21966?

Also, can you please very the correct Notice of Election, previously Sub-Section 36AAA(8) of Income Tax Assessment Act 1936

Answer

While section 36 AAA(8) has been replaced, we cannot find its equivalent in the 1997 act.

We believe the sheep can be transferred at book value. The election should simply state the facts and be kept on file.

Further, we refer you to section 70-100 of ITAA 1997 which states you can use the same methods available to value closing stock or "book value" as you refer to it.

This section does not mention any need for any formal election.

However, like yourself, we recall that being a requirement in the past.

Question 14
Subject: Sale of Shares

Could I have your thoughts/comments on my client's position? He has sold all his shares to another Company that will assume the running of the business in which he and 2 others were the operators/employees/directors. They have also sold all their shares, like my client.

My client's shares sold [600,000 units] were acquired [for $900] upon incorporation some 10 years ago and were sold for $450,000 per a Contract dated 30 June 2021.

The purchaser of the shares required payment to be over three instalments – one early July 2021 [$240,000]with the others on 30 June 2022 [$105,000]and 30 June 2023 [$105,000].

I can add that the small business aggregated turnover is less than $2 million and that the net assets do not exceed $6 million. And furthermore, the 15-year exemption does not apply, with the shares bought when the Company started some 10 years ago.

I am not familiar with cases like these, but I understand I should be reviewing certain Tax Concessions like Sale of Business as well as Active Asset Provisions, Small Business Retirement Exemption as well as Capital Gains Tax.

Also, I rang the ATO, who quickly questioned whether shares were active assets or not.

Are you able to elucidate on why the ATO asked me this, please?

Answer

Of key importance here is meeting the eligibility conditions common to all 4 small business CGT concessions.

The ATO wanted to establish whether the shares were "active assets" - they clearly are if they are shares in a company that actively conducted a business.

Next, if we confirm that your client as an individual owns the shares. it is necessary to establish if he is a "significant individual."

Broadly this means owning 20% or more of the Company.

As you mentioned previously as being the case, your client must be either a small business entity with an aggregated turnover of less than $2 million, or meet the maximum net asset value test of $6 million.

As your client is selling shares in a company, they must meet further conditions:

1. You either:
   - carried on a business just before the CGT event
   - meet the maximum net asset value test
2. Just before the CGT event, either:
   - you were a CGT concession stakeholder in the Company or trust
   - the CGT concession stakeholders in the Company or trust had a total small business participation percentage of at least 90% (the 90% test) in you.
3. The Company or trust, when applying the modified connected entity rule in determining entities controlled by it, must either:
   - be a small business entity for the income year
   - meet the maximum net asset value test.
4. Your shares or interest must meet the modified active asset test.

   The four business CGT exemptions are:
   - Small business 15-year exemption
   - Small business 50% active asset reduction
   - Small business retirement exemption
   - Small business rollover

A capital gain can potentially be reduced to zero by applying multiple small business CGT concessions. Care needs to be taken in applying the concessions in the correct order along with any capital losses and the general CGT discount.

Applying the concessions in the correct order, in this case, would mean:

- Active asset 50% discount
- Individual 50% discount on the above balance
- The remaining 25% could be dealt with by the retirement concession

If your client is less than 55, then this means 25% of the taxable capital gain needs to be placed in a complying superannuation fund to get the retirement concession.

There is no superannuation tax on this contribution.

If over 55, your client can choose whether he places the funds in super to access the concession.

As the retirement concession is limited to $500k per lifetime, it is important to access all available concessions in the “right order” to preserve this concession.

Question 15
Subject: Super member investment

This question is about my client.

They belong to the APSS superannuation fund with a member saving account and defined benefits.

The trustee has decided to change strategy and next year 2022 and merge with Sun Super.

Will the change and the merger impact member investments as their savings are invested in conservative investment options and are 68 years old?

Answer

Thank you for this question.

This crosses the line into giving financial advice, which is something we legally cannot do.

These observations relate only to the APSS member conservative savings account as mentioned in the notification letter.

“The trustees are gradually moving to more liquid asset classes in public market assets.”

“The trustees believe these adjustments **are in the members’ best interests** whilst continuing to abide by the fund’s **(conservative)** investment objectives.”

If there are any taxation issues your client would like to clear up, we would be happy to do so.

Question 16
Subject: LSL to cover Sick Leave

I have a staff member who has been employed for nine years as of May this year.

He has no personal leave. Can he use his long service leave entitlements to cover his sick leave? He was away for surgery for five days.

Answer

If workers require more time off work than they have accrued in personal leave, they can access any other accrued paid leave, such as annual or long service leave, to cover absences due to illness or injury.

Michael's Corner

Article 014

GIG WORKERS UNDER THE HEALTH AND SAFETY SPOTLIGHT

While COVID-19 has created opportunities for the gig economy, it has also helped bring some challenges to light.

According to Safe Work Australia, gig economy platforms need to be aware of employers' general obligations under workers' compensation law.

The gig economy in Australia

The gig economy is a growing part of Australia's workforce, with over 100 platforms currently operating in person, remotely or online within Australia.

The most common platforms are transport (ride sharing) and food delivery. Other platforms service odd jobs, one-off domestic tasks, care services, professional services like web design, graphic design, coding, photography, translation and clerical or administrative work.

On 02 November 2021, Safe Work Australia (SWA) published a fact sheet about workers' compensation and the gig economy. Their purpose is to encourage gig workers to enquire into their workers' compensation entitlements and inform platforms of their obligations under workers' compensation laws.

Broad overview

- The gig economy is also called the platform economy, share economy, and on-demand work.
- Participants (gig workers) in the gig economy are engaged by or access work through an app or website (the platform).
- The app or website is produced and managed by the platform owner.
- Gig workers undertake a short-term service or provide a product to a customer, called the end-user.
- The different working arrangements within the gig economy mean that gig workers may not be employed by the platform owner.
- Workers' compensation is a form of insurance to protect both the employer and the worker if a worker is injured at work.

Workers' compensation and the gig economy

Workers' compensation coverage for gig workers will depend on the rules of the particular Commonwealth, state, or territory workers' compensation jurisdiction you work in.

All employers must have workers' compensation insurance for their workers. Whether a platform owner is an employer under workers' compensation law will depend on the working arrangements and the relevant workers' compensation scheme rules.

Workers' compensation schemes in Australia will consider a range of factors to decide if a gig worker is employed by the platform and eligible for workers' compensation insurance coverage. Schemes may consider certain factors such as:

- Control over whether to take on work
- Ability to choose working hours
- Provision of tools and equipment
- Arrangements for payment of income
- Who has responsibility for the cost of fixing any faults or repairing damage?
- Can work be delegated, or is a worker required to do the work personally?

If a scheme finds that a gig worker is, in fact, employed by a platform owner, the scheme may seek to recover insurance costs from the platform owner.

For gig workers who are hurt in the line of their work, access to workers' compensation may depend on whether they are an employee or independent contractors.

"It may be helpful to contact your platform owner to ask them to confirm your employment status in writing," the fact sheet said.

"Many workers in the gig economy are engaged by platforms as 'independent contractors.' Independent contractors are not usually covered by workers' compensation and instead have other types of income and injury insurances available to them."

Coverage for workers' compensation will depend on the type of work done and how the platform owner engages the worker. Workers' compensation schemes may consider certain factors such as:

- Does the worker have control over whether to take on work?
- Can they choose the hours that they work?
- Do they need to provide their own tools and equipment?
- How are they paid income?
- Are they responsible for the cost of fixing any faults or repairing damage?
- Are they required to do the work personally, or can they delegate the work to someone else?

"If you are unsure whether you are covered by workers' compensation, you should consider contacting the relevant workers' compensation authority (details below). Or obtaining independent advice to confirm whether you are entitled to workers' compensation coverage if injured," the fact sheet said.

"If you are not covered for workers' compensation, and the platform owner does not have an injury or accident policy. You will need to cover your own costs for medical and rehabilitation expenses."

What is workers' compensation insurance?

Workers' compensation is a form of insurance that provides support to workers injured at work. Support may include one-off lump sum payments, income replacement, medical and rehabilitation expenses.

There are separate workers' compensation schemes for workers in the Commonwealth and workers in each state and territory. Each scheme is established by legislation that sets out the coverage, eligibility criteria, entitlements, and obligations.

Other insurance options for gig workers

- Some platform owners provide personal injury and income protection insurance as well as compensation for family or dependents. You should talk to your platform owner/operator to find out if you have coverage. For example, if you are a delivery rider or driver, you may be covered by transport accident insurance.
- Suppose your platform does not cover you for workers' compensation or another type of insurance. In that case, you should consider taking out your own personal accident or illness insurance.

Do platform owners need workers' compensation insurance?

- For advice and assistance, please contact your relevant workers' compensation authority.

Advice may vary between jurisdictions – so it's important to contact the workers' compensation authority in your state or territory for more specific information.

Workers' compensation authorities contact information

NSW - State Insurance Regulatory Authority
Website: www.sira.nsw.gov.au
Website for Languages other than English:
https://www.sira.nsw.gov.au/languages
Email: contact@sira.nsw.gov.au
Phone: 13 10 50

Qld - Office of Industrial Relations
Website: www.worksafe.qld.gov.au
Website for Languages other than English:
https://www.qld.gov.au/help/languages
Email: https://www.worksafe.qld.gov.au/contact/general-enquiries
Phone: 1300 362 128

Vic – WorkSafe Victoria
Website: www.worksafe.vic.gov.au
Website for Language other than English:
https://www.worksafe.vic.gov.au/choose-your-language
Email: info@worksafe.vic.gov.au
Phone: 1800 136 089

ACT - WorkSafe ACT
Website: www.worksafe.act.gov.au
Website for Languages other than English:
https://www.worksafe.act.gov.au/languages
Email: worksafe@worksafe.act.gov.au
Phone: 13 22 81

SA – ReturnToWorkSA
Website: www.rtwsa.com
Website for Languages other than English:
https://www.rtwsa.com/community-languages
Email: info@rtwsa.com
Phone: 13 18 55

NT – NT WorkSafe
Website: www.worksafe.nt.gov.au
Email: datantworksafe@nt.gov.au
Phone: 1800 250 713

WA – WorkCover WA
Website: www.workcover.wa.gov.au
Website for Languages other than English:
https://www.workcover.wa.gov.au/languages/
Phone: 1300 794 744

Tas – WorkSafe Tasmania Website: www.worksafe.tas.gov.au Website for Languages other than English: https://www.worksafe.tas.gov.au/accessibility Email: wstinfo@justice.tas.gov.au Phone: (03) 6166 4600 (outside Tasmania) or 1300 366 322 within Tasmania)
Commonwealth - Comcare Website: www.comcare.gov.au Website for Languages other than English: https://www.comcare.gov.au/about/contact/contact-us Phone: 1300 366 979

Food for thought...

- Companies need to provide safeguards for people who generate income for them.
- Gig economy drivers experience fatigue, pressure to violate traffic regulations and distraction from their phones.
- Drivers have little health and safety training and experience occasional collisions and near misses on a daily basis.
- This unregulated area of work is contributing to road safety risks for the workers themselves and to others.
- Young people who work using two-wheeled vehicles seem particularly vulnerable to collisions

Please note that this is general advice for information only. Any application of legislation and/or Industrial Relations or contractual requirements may require professional advice to suit your individual circumstances. If you have a question for Michael's team, email us at info@bO2.com.au or sign-up for a Buzz Session...

Your Notes

Special Bonus Issue

2021 SUPERANNUATION (WEALTH ACCUMULATION TIPS)

WHAT'S NEW IN 2022

YOUR FUTURE, YOUR SUPER FEDERAL BUDGET 2021/22

- Key changes that apply from 1.7.2021
- Statutory Superannuation and the changing landscape – a warning for employers
- Change to age limits on superannuation contributions.
- The temporary reduction in minimum drawdown rates continues into 2021/22
- Laws passed to reunite Australians with their unpaid super.
- Tax planning opportunities with unused super contributions space
- Finalisation of Your Future, Your Super regulations
- Superannuation rates and caps updated.
- Despite earlier indications during COVID-19, the superannuation guarantee increases to 10% for the year ending 30 June 2022.
- SMSF's can now have up to six members.
- Non-arm's length income – an update to SMSF's
- SMSF's relaxing residency requirements
- Improvements to Pension Loans System (PLS)
- Extending access to the downsizer superannuation contribution.
- Removal of monthly $450 threshold for Superannuation Guarantee.
- New checklist for SMSF Trustees.

SUPERANNUATION

Self-managed Superannuation Funds — relaxing residency requirements

The Government will relax residency requirements for self-managed superannuation funds (SMSFs) and small APRA-regulated funds (SAFs). Extending the central control and management test safe harbour from two to five years for SMSFs and removing the active member test for both fund types. The measure will have effect from the start of the first financial year after Royal Assent of the enabling legislation, which the Government expects to have occurred prior to 1 July 2022.

This measure will allow SMSF and SAF members to continue contributing to their superannuation fund whilst temporarily overseas, ensuring parity with members of large APRA-regulated funds. This will provide SMSF and SAF members with the flexibility to keep and continue to contribute to their preferred fund while undertaking overseas work and education opportunities.

Contrary to some expectations…

It's important to note that the legislated increases to the superannuation guarantee were not amended in the Budget. Therefore, the rate of superannuation guarantee increased to 10% from 1.7.2021, as previously legislated.

In addition, the government did not announce an extension of the halving of the account-based pension minimums. As a result, the standard minimum drawdown requirements will apply from 1.7.2021.

SUPERANNUATION – MORE FLEXIBILITY FOR OLDER AUSTRALIANS

The 2021-22 Budget is giving older Australians, including self-funded retirees, greater flexibility to contribute to their superannuation and access their housing wealth if they choose to.

From 1 July 2022, individuals aged 67 to 74 will no longer be required to meet the work test when making or receiving non-concessional superannuation contributions or salary sacrificed contributions. These individuals will also be able to access the non-concessional bring forward arrangement, subject to meeting the relevant eligibility criteria.

The existing $1.7 million cap on lifetime superannuation contributions will continue to apply. The annual concessional and non-concessional caps will also continue to apply.

Access to concessional personal deductible contributions for individuals aged 67 to 74 will still be subject to meeting the work test.

This change builds on the Government's previous reforms to the age rules, further increasing the ability of older Australians to make contributions to their superannuation.

The bring-forward rule and removal of the work test

The Government has confirmed that people aged 67-74 making non-concessional contributions will still be subject to existing contributions caps.

Therefore, a client under age 67 at the start of the year and since turned 67 will be able to make a non-concessional contribution of up to $110,000 without first needing to satisfy the work test. Or (yet to be legislated), up to $330,000 under a proposal to extend the bring-forward rule to people under age 67.

Removal of $450 monthly income threshold

The Federal Government will remove the $450 minimum income threshold, meaning all workers will be entitled to receive employer super payments regardless of how much they earn.

The $450 monthly threshold prevents an estimated 300,000 workers, 63% of whom are female, from receiving mandatory employer super contributions.

Improving the Pension Loans Scheme

The Government is increasing the flexibility and attractiveness of the Pension Loans Scheme (PLS) for senior Australians.

From 1 July 2022, the Government will introduce a No Negative Equity Guarantee for PLS loans and allow people access to a capped advance payment in the form of a lump sum.

No Negative Equity Guarantee

A 'No Negative Equity Guarantee' will mean that borrowers under the PLS, or their estate, will not owe more than the market value of their property in the rare circumstances where their accrued PLS debt exceeds their property value. This brings the PLS in line with private-sector reverse mortgages.

Background on the PLS

The PLS is a voluntary, reverse mortgage type loan. It is available to assist older Australians who wish to boost their retirement income by unlocking equity in their real estate assets.

Through the PLS, people can receive additional regular fortnightly payments with the payments accruing as a debt secured against their Australian property.

The PLS allows a fortnightly loan of up to 150 per cent of the maximum rate of Age Pension, and an interest rate, currently set as 4.5 per cent, is charged.

Extending access to downsizer contributions

From 1 July 2022, the minimum age for the downsizer contribution will be lowered from 65 to 60. This will allow Australians nearing retirement to make a one-off post-tax contribution of up to $300,000 per person (or $600,000 per couple) when they sell their family home.

This improves the flexibility for Australians to contribute to their superannuation savings and may encourage people to downsize sooner and increase the supply of family homes.

Downsizer contributions can be made after the sale of a person's principal place of residence, held for a minimum of 10 years.

Downsizer contributions do not count towards the concessional and non-concessional contributions caps. People with balances over the transfer balance cap ($1.7 million from 1 July 2021) can also make a downsizer contribution. However, the downsizer amount will count towards that cap when savings are converted to the retirement phase.

Reducing the eligibility age for downsizer contributions to age 60 could allow an eligible couple in their early sixties to sell their home and contribute up to $1.26m to super in a year by each making a $300,000 downsizer and a $330,000 non-concessional contribution.

Preventing inadvertent concessional cap breaches

Individuals whose income exceeds $275,000 and with multiple employers are allowed to nominate that their wages from certain employers are not subject to the compulsory Superannuation Guarantee (SG) contributions. The employee could negotiate to receive additional income instead of the SG contributions from their employer.

Work Test

A work test applies to people aged 67 or older to determine whether they are entitled to contribute to superannuation, which broadly is at least 40 hours in any consecutive 30-day period. Note the changes from 1.7.2022.

Capping passive fees for low balance superannuation funds

The introduction of a 1.5 per cent semi-annual cap on administration and investment fees charged by superannuation funds on accounts with balances below $6,000.

If the balance of a member's superannuation account is less than $6,000. The maximum amount of these fees that can be deducted from the account in the following six-month period is 1.5 per cent of the balance.

Regulations will prescribe the dates on which trustees will be required to assess the balance of the account and thus eligibility for the cap. It is expected that these dates will be 30 June and 31 December.

Ban on exit fees and inactive superannuation funds

This will also expand the ATO's data matching process to proactively reunite inactive superannuation accounts with members' active accounts where possible. Superannuation accounts with a balance under $6,000 and inactive for a continuous period of 13 months will be required to be transferred to the ATO to help accommodate this measure.

FINALISATION OF YOUR FUTURE, YOUR SUPER REGULATIONS

On 5.8.2021, the Federal Government noted the registration of regulations to support the Your Future, Your Super reforms, which passed the Parliament on 17 June 2021.

The Your Future, Your Super reforms will ensure the superannuation system works harder for all Australians. Saving workers $17.9 billion over 10 years by p**utting strong downward pressure on fees, removing unnecessary waste and increasing accountability and transparency.**

The regulations:

- Ensure the final methodology applied for the annual performance test is further strengthened to incentivise underperforming products to reduce fees as soon as possible.
- Prescribe the definition of a 'stapled fund', including tie-breaker rules, where they have multiple existing funds, to determine which fund is an employee's stapled fund.
- Specify how products will be ranked on the online YourSuper comparison tool.
- Prescribe the information that must be included with the notice of an Annual Members' Meeting.
- Further, strengthen the prohibition on funds offering inducements to employers.

The final performance test methodology will see the administration fee component of the test based on the administration fee charged by the product over the most recent financial year, benchmarked against peers.

This approach for the performance test addresses historical anomalies, including those concerning millions of multiple unintended and inactive accounts. It will create a strong incentive for superannuation funds to reduce fees to avoid failing the test. This change will enable the reforms to deliver immediate benefits to consumers in the form of lower fees.

This builds on previous changes to strengthen the performance test. These include ensuring that administration fees are part of the performance test and adding Australian unlisted infrastructure and unlisted property as specific asset classes covered by the test.

The annual performance test will protect members from poor outcomes. If they fail the test, funds will be required to notify members, and persistently underperforming products will be prevented from taking on new members. Members will be notified by 1 October 2021 if their fund fails this test.

Portfolio Holdings Disclosure regulations will be finalised in the coming weeks following further consultation.

The newly registered regulations can be accessed on the Federal Register of Legislation.

The Your Future, Your Super reforms are the most significant since the introduction of compulsory superannuation in 1992. These reforms build on the Government's prior reforms, including consolidating 3.5 million unintended multiple accounts worth almost $4.7 billion, capping fees on low balance accounts, banning exit fees, and ensuring younger Australians do not pay unnecessary insurance premiums.

SELF-MANAGED SUPERANNUATION FUNDS ABR UPDATED TO ADD FIFTH AND SIXTH MEMBERS

On 13.8.2021, the Australian Business Register (ABR) was updated. You are now able to add a fifth or sixth member to your self-managed superannuation fund

(SMSF) instead of using the ATO interim process.

This follows legislation that came into effect on 1 July that allows you to have up to six members in your SMSF.

Before you create a fund or add additional members, it is important to remember that some State and Territory laws restrict the number of trustees a trust can have to less than six. As a SMSF is a type of trust, it is important that you seek professional advice to help understand if your SMSF is impacted by these restrictions.

The increase in the maximum number of members in a SMSF also has flow-on effects for other requirements, such as signing financial statements. The accounts and statements (an operating statement and a statement of financial position) of a SMSF must be signed by the required number of trustees or directors of the corporate trustee. This number will depend on the number of trustees or directors of the corporate trustee that your SMSF has. For the 2021–22 and later financial years, if there are:

- One or two directors or individual trustees, then all of them must sign the documents
- Three or more directors or individual trustees, then at least half of them must sign the documents.

PERSONAL SUPERANNUATION CONTRIBUTIONS

Individuals can now make a personal deductible superannuation contribution regardless of whether they are self-employed or not. Employed individuals should be able to review their payroll reports to determine the difference between the concessional limits and the employer contributions.

Note the concessional contributions cap is $27,500 for the 2021/22 income year.

In addition, individuals earning over $250,000 in taxable income should be mindful that Div293 tax will apply to concessional superannuation contributions. These additional contributions are taxed at 15% on top of the 15% contributions tax paid by the superannuation fund. The Div293 tax may be paid from an individual's own money or from their superannuation fund using a release authority.

CHECKLIST: 2021/22 tax planning opportunities for individuals

Use this checklist as a guide to 2021/22 year-end tax planning opportunities with a particular focus on superannuation.

Catch-up superannuation contributions

The current income year ending 30.6.2022 is only the third year in which individuals can carry forward unused concessional contribution limits for future use.

In order to make a catch-up superannuation contribution in the following year, an individual must have a total superannuation balance under $500,000 on 30 June 2022. When considering a catch-up contribution, always be mindful of Division 293 tax – see above.

An eligible individual may delay a personal deductible contribution in 2021/22 if they expect taxable income to be under $250,000 in income in 2021/2022 to avoid a Div293 liability.

Downsizing contributions

A person aged 65 years or older is able to make a contribution into superannuation of up to $300,000 from the proceeds of selling their main residence. This contribution is outside of non-concessional contribution rules.

To be eligible to make the contribution, they must have owned their main residence for at least 10 years. Also, the contribution is exempt from the age test, work test and the $1.6m total superannuation balance test.

First Home Super Saver Scheme

Voluntary contributions up to $15,000 can be made by an individual who has yet to purchase their first home into their superannuation account. The scheme allows the individual to withdraw this contribution plus earnings for a first home deposit.

Voluntary contributions made after 1 July 2018 may be used for withdrawal in the Scheme.

Spouse contribution

A $540 tax offset is available for after-tax contributions (up to $3,000) to a complying superannuation fund on behalf of a spouse (married or de facto) where the spouse's annual taxable income is less than $37,000. A maximum offset reduction is available where the spouse's income is between $37,000 and $40,000.

Note that from 1.7.2020, the age limit for spouse contributions increased from 69 to 74 years. The work test still has to be satisfied to be eligible for this measure.

Superannuation government co-contribution

For low income earners, subject to certain conditions, the government makes a co-contribution of up to $500 if a taxpayer makes after-tax contributions of at least $1,000. The co-contribution begins to phase out at a taxable income of $41,112 and is not available for taxable income above $56,112.

Individuals could also take advantage of increasing the amount that can be withdrawn under the First Home Super Saver Scheme. However, the co-contribution itself would not be included.

Insurance policies in super to become "opt-in"

From 1.7.2019, inactive Superannuation members need to "opt-in" with their life insurance and TPD providers to retain their current policies.

Inactive members are individuals who have not had a contribution or rollover into their account for 16 months. Since 1 July 2019, this applies to accounts without a contribution or rollover since 1 March 2018.

Prepayments

Subject to cash flow considerations, consider making deductible purchases by year's end to accelerate deductions. This particularly applies if the income in the following year is expected to be lower than in the current year.

In certain circumstances, an immediate deduction can be available for prepaid expenditure (e.g. interest on a loan relating to a rental property).

Nearing retirement

A taxpayer considering retiring near year end may find it worthwhile to defer discretionary income until after 30 June. In that subsequent year, their income will normally be smaller, and the marginal rate may therefore be less.

When considering the timing of retirement, keep in mind the restrictions on the concessional treatment of employment termination payments that apply.

REFORMS TO MAKE YOUR SUPER WORK HARDER FOR YOU

Super supports all Australians

Australia's compulsory superannuation system is essential to the retirement incomes of its 16 million members.

Structural flaws in the system are letting too many Australians down:

- Unnecessary fees and insurance premiums are paid on unintended multiple accounts, created when people change jobs and do not nominate a super fund. This results in a reduction in retirement savings.
- Australians are paying too much for their super, with the fees amongst the highest in the OECD. Australians pay $30 billion a year in super fees, which is more than what they pay for electricity and gas combined.
- There are too many underperforming products in the market, costing members millions in lost retirement savings.
- Funds lack accountability to their members for their conduct and the outcomes they deliver. There is inadequate transparency on how funds are spending members' money.

Your superannuation follows you

For the first time, you will keep your super fund when you change jobs, stopping the creation of unintended multiple super accounts and the erosion of your super balance.

A new super account will no longer be created automatically every time you start a new job.

Instead, your super will be 'stapled' to you so that you keep your current super fund when you change jobs. Your employer will pay your super to your existing superannuation fund if you have one unless you select another fund.

From 1 July 2021:

- Where an employee does not nominate an account at the time they start a new job. Employers will pay their superannuation contributions to their existing fund.
- Employers will obtain information about the employee's existing superannuation fund from the ATO.
- The employer will do this by logging onto ATO online services and entering the employee's details. Once an account has been selected, the employer will pay superannuation contributions into the employee's account.
- Suppose an employee does not have an existing superannuation account and does not make a decision regarding a fund. The employer will pay the employee's superannuation into their nominated default superannuation fund.

Benefits

There are 6 million multiple accounts held by 4.4 million people.

These multiple accounts mean $450 million in unnecessary fees are drained from the super accounts of millions of Australians each year.

This measure will result in 2.1 million fewer unintended multiple accounts over 10 years, saving workers about $2.8 billion by avoiding duplicate fees, insurance, and lost earnings across that time.

Empowering members

A new, interactive, online YourSuper comparison tool will help you decide which super product best meets your needs.

From 1 July 2021, the YourSuper tool has:

- Provided a table of simple super products (MySuper) ranked by fees and investment returns.
- Linked you to super fund websites where you can choose a MySuper product.
- Shown your current super accounts and prompt you to consider consolidating accounts if you have more than one.

This tool makes it easier for you to compare the fees and performance of super funds in the market. Creating more competition and making super funds work harder to manage your money.

Selecting a well-performing product rather than an underperforming one can significantly boost members' retirement incomes.

Using the YourSuper comparison tool to choose a well-performing fund means:

- A typical young Australian entering the workforce in their 20s could be around $87,000 better off at retirement.
- A typical Australian already in the workforce at age 50 could be around $60,000 better off at retirement.

The measure will result in $3.3 billion in higher member balances over a decade. Holding funds to account for underperformance, the Government is ensuring your hard-earned retirement savings are protected from underperforming super funds.

From 1 July 2021, MySuper products have been subject to an annual performance test.

If a fund was deemed to be underperforming, it had to inform its members of its underperformance by 1 October 2021. This requirement is now ongoing.

When funds inform their members about their underperformance, they will also be required to provide information about the YourSuper comparison tool.

Underperforming funds will be listed as underperforming on the YourSuper comparison tool until their performance improves.

Funds that fail two consecutive annual underperformance tests will not be permitted to accept new members. These funds will not be able to re-open to new members unless their performance improves.

By 1 July 2022, annual performance tests will be extended to other superannuation products.

How will you benefit?

Helping you switch your super from an underperforming fund to a better fund will significantly boost your retirement savings.

A typical Australian spending their working life in the worst-performing MySuper product would be up to $98,000 worse off at retirement.

Across the entire industry, holding underperforming funds to account will mean at least $10.7 billion more in retirement savings over 10 years.

Increasing accountability and transparency

The Government will ensure superannuation trustees are more accountable and transparent about how they manage their members' retirement savings.

From 1 July 2021:

- Super trustees have been required to comply with a new duty to act in members' best financial interests.
- Trustees must demonstrate that there was a reasonable basis to support their actions being consistent with members' best financial interests.
- Trustees must provide members with key information regarding managing and spending their money in advance of Annual Members' Meetings.

A temporary reduction in superannuation minimum drawdown rates remains available

Many retirees have seen a negative effect on the account balance of their superannuation pension or annuity due to the effect of COVID-19 on financial markets.

As a result, the government temporarily reduced super minimum drawdown requirements for 2019–20 and 2020–21 income years. This means the minimum annual payment you need to make to the following has been reduced by 50%:

- account-based pensions and annuities
- allocated pensions and annuities, and
- market-linked pensions and annuities.

As a self-managed super fund trustee, you must ensure the minimum drawdown rate is paid. However, you can choose to receive more than the temporarily reduced minimum drawdown rate.

Change to age limits on super contributions

As part of the Superannuation – improving flexibility for older Australians measure, from 1 July 2020, the draft regulations allow superannuation fund members to:

- make voluntary concessional and non-concessional super contributions without meeting the work test if they are younger than 67
- receive spouse contributions if they are 75 years old or younger.

Superannuation fund members must still meet all other eligibility criteria. They can use ATO online services to view some of these, including their total super balance, existing bring forward arrangements and unused concessional contributions.

Another change, enabling members younger than 67 (rather than 65) to bring-forward up to three years of non-concessional contributions, was passed by parliament in the Treasury Laws Amendment (More Flexible Superannuation) Bill 2020.

SMSF borrowings now count towards the $1.7 million transfer balance cap and $1.7 million total superannuation balance.

From 1.7.2017, the outstanding balance of an LRBA is included in a member's annual total superannuation balance. The repayment of the principal and interest from a member's accumulation account is recorded as a credit in the member's transfer balance account.

THE $1.7 MILLION TRANSFER BALANCE CAP

There is a $1.7 million cap on the total amount of superannuation that can be transferred into a tax free retirement account.

- The cap will index in $110,000 increments in line with the consumer price index, just as the Age Pension assets threshold does.
- Superannuation savings accumulated in excess of the cap can remain in an accumulation superannuation account, where the earnings will be taxed at 15 per cent.
- A proportionate method that measures the percentage of the cap utilised previously will determine how much cap space an individual has available at any single point in time.
  - For example, if an individual has previously used up 75 per cent of their cap, they will have access to 25 per cent of the current (Indexed) cap.
- When calculating cap space, subsequent fluctuations in retirement accounts due to earnings growth or pension payments are not considered.

Consequences for breaching the cap

Individuals who breach the cap:

- will be required to remove the excess capital from their retirement phase account, and
- are liable to pay tax on the notional earnings attributable to the excess capital.

The amount removed from the retirement phase can be transferred into an accumulation account, where the earnings will be concessionally taxed at 15 per cent or withdrawn from superannuation.

Individuals can also apply to the Commissioner of Taxation to replenish their transfer balance cap space for anomalous situations that cause their retirement balance to be depleted, such as fraud, bankruptcy, or family law splits.

Example – Jason

Jason is 60 and plans to retire during the 2021-22 financial year. Jason expects he will have an accumulated superannuation balance of less than $1.7 million. This measure does not affect Jason.

Example – Agnes

Agnes 62 retires on 1 November 2021. Her accumulated superannuation balance is $2 million.

Agnes can transfer $1.7 million into a retirement income account. The remaining $300,000 can remain in an accumulation account where earnings will be taxed at 15 per cent. Alternatively, Agnes may choose to remove this excess amount from superannuation.

While Agnes will not have the ability to make additional contributions into her retirement account. Her balance will be allowed to fluctuate due to earnings growth or drawdown of pension payments.

DEATH BENEFITS AND THE $1.7 MILLION TRANSFER BALANCE CAP

Since 1.7.2017, a 'transfer balance cap' has applied to the value of pensions that can be transferred to retirement phase. This includes those already in place at 1.7.2017. The general transfer balance cap is set at $1.7 million for the 2021/22 financial year. It limits the tax exemption on investments that support pensions in the fund. The cap is indexed to changes in CPI and increased in increments of $100,000.

Superannuation death benefits are paid to beneficiaries as income streams count against their personal transfer balance cap. Death benefits paid as lump sums withdrawn for superannuation are not measured against the $1.7 million transfer balance cap.

Depending on the circumstances, benefits payable on the death of a member are required to be paid either as reversionary pensions, death benefit pensions or lump sums. The beneficiary must ensure that the value of pensions already measured against their - transfer balance cap plus the value of any death benefit pensions - does not exceed their transfer balance cap.

Suppose the beneficiary is paid a reversionary pension. They have up to 12 months to commute (convert to a lump sum) all or part of the pension to ensure the aggregate value of all pensions come within the cap. Any excess death benefits are required to be paid out of the fund as a lump sum.

A beneficiary may have the option to commence a death benefit pension under the fund's trust deed. The amount of a death benefit pension at commencement is counted against the transfer balance cap. An adjustment will be required if an excess arises to bring the total value of the pensions to come within the cap.

Any death benefit lump sums, including those that may arise from the commutation of a reversionary or death benefit pension, must be withdrawn from superannuation.

It is now possible to rollover death benefit entitlements to other funds without restriction.

Once the amount has been rolled over, it will continue to be recognised as a death benefit superannuation interest. So, it must be used immediately to commence an income stream from the recipient fund or cashed out as a lump sum. This allows a beneficiary to rollover a death benefit pension to a fund of their choice, including a SMSF. The rollover retains the concessional tax treatment associated with a superannuation income stream death benefit. That is, any taxable death benefit pension qualifies for a tax offset equal to 15% of its taxable component.

Death benefit strategies

Strategies that can be used to keep the total value of pensions within the member's transfer balance cap (where they are entitled to a death benefit) include:

- Commuting the death benefit pension to a lump sum or partial lump sum and withdrawing it from superannuation.
- Continuing with the death benefit pension and commuting any existing pensions to a lump sum payable out of the fund.
- Continuing with the death benefit pension and transferring the balance of any existing pensions to accumulation phase.

As the efficacy of these strategies will depend on the individual's circumstances, it is essential you seek professional advice before implementing any of them.

STRATEGIES TO REDUCE YOUR TOTAL SUPERANNUATION BALANCE

Having covered the $1.7 million limit, we see a strong incentive for an individual to carefully manage their Total Superannuation Balance (TSB) over time. The TSB determines a fund member's superannuation rights and entitlements, such as eligibility to contribute after-tax amounts to super without an excess arising. Usually, the focus on the TSB will be towards the end of the financial year.

Key components (not exhaustive) of an individual's TSB include:

- The accumulation phase values of their superannuation interests that are not in retirement phase.
- The amount of their transfer balance or modified transfer balance account – this generally captures the net realisable value of most types of pensions in retirement phase.
- Any rollover superannuation benefit that has not already been included under the above steps; and
- Reductions for any structured settlement contributions.

So, what are the steps that may be taken?

1. Subject to the preservation requirements, payments of pensions and lump-sum amounts are both outgoings that can lower an individual's TSB. Where full conditions of release have not been met, then there are limits on transition to retirement pensions of 10% maximum payment.

2. Close to financial year end, consider paying the following expenses prior to 30 June:
   - Accounting fees to prepare and lodge the annual return for the SMSF.
   - Audit and actuarial services.
   - Investment-related expenses such as brokerage and bank fees.
   - The SMSF supervisory levy.
   - Annual review fees for a corporate trustee.
   - Operating expenses, including management and administration fees.

The key here is that these expenses should be legitimate, arm's length and not artificial or contrived.

They must meet:

- the sole purpose test
- the payment standards; and
- the prohibition on providing financial assistance to members and relatives.

3. Consider applying tax effect accounting. Essentially this is the recognition of deferred tax liabilities where there is reasonable certainty that a future tax liability may arise for the SMSF. This application can potentially reduce the value of a SMSF's "net assets".
4. Contributions splitting between spouses can also reduce an individual's TSB – refer to Div 6.7 of the SISR. Normally the maximum splittable amount for a given financial year is the lesser of:
   - 85% of the concessional contributions
   - the current concessional contributions cap.

This is a complex area of law, and it is recommended that expert advice be obtained. In turn, advisers should be aware of the need for an Australian Financial Services Licence (Corporations Act 2001) and tax advice obligations under the Tax Agents Services Act 2009.

BRIEF SUMMARY OF SUPERANNUATION RATES AND THRESHOLDS FOR 2021 - 2022

- **Concessional Contributions Cap** – the cap increases to $27,500 for the 2021/22 year.

Concessional contributions are contributions that you or your employer make to your super. These are contributions that are claimed as a tax deduction. Sometimes referred to as employer or before-tax contributions.

- **Non-Concessional Contributions Cap** – the cap for 2021/22 has increased to $110,000.

Non-concessional contributions are contributions you or your spouse make to your super from your after-tax income. They are also referred to as personal or after-tax voluntary contributions. Anyone who has super worth over $1.7 million is not eligible to make non-concessional contributions to super.

- **Superannuation Guarantee (SG)** – the SG rate has increased to 10%, with the maximum super contribution base for 2021/22 increasing to $58,920 per quarter.

SG contributions are the compulsory contributions that most employees are eligible to receive, paid by their employer to super on their behalf.

- **Superannuation Co-Contribution –** the maximum co-contribution entitlement for the 2021/22 year remains at $500. The lower income threshold (for full entitlement) increases to $41,112, and the higher income threshold (cut-off for eligibility) increases to $56,112.

The super co-contribution is designed to help lower-income earners save for their retirement by providing a government top-up where an eligible person makes a personal contribution to super.

- **Superannuation Benefits Caps** – the low rate cap amount for 2021/22 is now $225,000.

The low rate cap is the amount that is able to be withdrawn tax free over a lifetime for people that have reached their preservation age (see below) but not yet 60 (when super withdrawals become entirely tax free) – please note other eligibility criteria apply for making a withdrawal.

- **Preservation Age** – to meet preservation age during 2021/22, your date of birth must be 30 June 1962 or earlier.

Super is preserved for your retirement and has government-placed restrictions on when it can be accessed. Some conditions for accessing super rely on a person firstly reaching their preservation age.

- **Capital Gains Tax (CGT) Cap Amount** – the CGT cap amount for 2020/21 is $1,615,000.

The CGT cap is the lifetime super contribution limit for proceeds from the disposal of eligible small business assets.

SUPPORTING AUSTRALIANS TO SAVE FOR THEIR RETIREMENT BY INTRODUCING THE LOW INCOME SUPERANNUATION TAX OFFSET (LISTO)

The Government has introduced a Low Income Superannuation Tax Offset to replace the Low Income Superannuation Contribution. This provides continued support for the accumulation of superannuation for low income earners and ensures they do not pay more tax on their superannuation contributions than on their take-home pay.

The issue

The superannuation system is designed to encourage Australians to save for their retirement. This is why superannuation is taxed at a lower rate than income outside of super. However, for low income earners, the 15 per cent tax on superannuation contributions means they pay more tax on their contributions than on their other income.

The details

From 1 July 2017, the Government has introduced the Low Income Superannuation Tax Offset (LISTO).

This non-refundable tax offset means that those with an adjusted taxable income up to $37,000 receive a refund into their superannuation account of the tax paid on their concessional superannuation contributions, up to a cap of $500.

In effect, this means that most low income earners pay no tax on their superannuation contributions.

Low income earners, who are disproportionately women, benefit from the Low Income Superannuation Tax Offset. This is important because women, on average, have lower superannuation balances than men, despite having higher life expectancies.

When introduced, it was expected that around 3.1 million people (almost two-thirds of whom are women) will benefit from the Low Income Superannuation Tax Offset.

The Low Income Superannuation Tax Offset (LISTO) effectively avoids the situation where low income earners pay more tax on savings placed into superannuation than on income earned outside of superannuation.

Implementation

The Australian Taxation Office determines a person's eligibility for the Low Income Superannuation Tax Offset and advises their superannuation fund annually. The fund contributes the Low Income Superannuation Tax Offset to the member's account.

Example - Katherine

In the 2020-21 financial year, Katherine worked part-time as a nurse and earned $35,000. Her employer made superannuation contributions of $3,325 on her behalf.

Katherine is eligible for the Low Income Superannuation Tax Offset. She receives $498.75 of Low Income Superannuation Tax Offset in her account.

Katherine would have received the same amount of Low income Superannuation Contribution.

THE SPOUSE TAX OFFSET

The current 18 per cent tax offset of up to $540 is available for any individual, whether married or de facto, contributing to a recipient spouse whose income is up to $37,000. The offset is gradually reduced for income above this level and completely phases out at income above $40,000.

No tax offset is available when the spouse receiving the contribution has exceeded their non-concessional contributions cap.

Example – Anne and Terry

Anne earns $37,500 per year. Her husband Terry wishes to make a superannuation contribution on Anne's behalf.

Under the former arrangements, Terry would not be eligible for a tax offset as Anne's income is too high. There is no incentive for Terry to make a contribution on behalf of Anne.

Under the new arrangements, Terry would be eligible to receive a tax offset.

As Anne earns more than $37,000 per year, Terry will not receive the maximum tax offset of $540. Instead, the offset is calculated as 18 per cent of the lesser of:

- $3,000 reduced by every dollar over $37,000 that Anne earns; or
- the value of spouse contributions.

For example, Terry makes $3,000 of contributions, and Anne earns $500 over the $37,000 threshold. Terry receives a tax offset of $450: 18 per cent of $2,500 as this is less than the value of the spouse contributions ($3,000).

If Anne were to earn more than $40,000, there would be no tax offset.

Social Security Income Test

For individuals receiving a defined benefit pension from superannuation. From 1 January 2016, The Social Security Income Test was amended to exclude a maximum of 10% of actual pension payments drawn from the assessment.

Pension work bonus

The Pension Work Bonus allows pensioners to earn up to $316 each fortnight (from 1.7.2021) without reducing their Age Pension. It will be expanded to allow pensioners to earn an extra $50 a fortnight ($1,300 a year) without reducing their pension payments.

The Pension Work Bonus will also be expanded to self-employed people who will be able to earn up to $12,428 a year.

The Government expects 88,000 people to take up the option to work more due to these changes.

Allowing retirees to make voluntary contributions in the first year of retirement

Retirees aged between 65 and 74 with a superannuation balance below $300,000 will be allowed to make voluntary super contributions for the first year where they no longer meet the work test requirements.

Currently, the work test restricts the ability to make voluntary superannuation contributions for those aged 65-74 to individuals who self-report as working a minimum of 40 hours in any 30-day period in the financial year. Note this will change from 1.7.2022.

The work test exemption will apply from 1 July 2019 and is intended to give recent retirees additional flexibility to get their financial affairs in order in the transition to retirement.

Existing contribution cap rules will continue to apply to contributions made under the work test exemption.

Developing framework for comprehensive income retirement products

The Government has proposed introducing a retirement income covenant requiring superannuation trustees to formulate a retirement strategy. It will require trustees to offer Comprehensive Income Products for Retirement.

Providers of retirement income products are now required to report simplified, standardised metrics in product disclosure to assist consumer decision making.

From 1 July 2019, new Age Pension means testing rules have been introduced for pooled lifetime income streams. The rules will assess a fixed 60 per cent of all pooled lifetime product payments as income, and 60 per cent of the product's purchase price as assets until 84, or a minimum of 5 years, and then 30 per cent for the rest of the person's life.

SUPERANNUATION CONTRIBUTIONS

Contributions Caps

Concessional contributions

Concessional contributions are contributions that are made into your super fund before tax. They are taxed at a rate of 15% in your super fund.

The most common types of concessional contributions are employer contributions, such as super guarantee and salary sacrifice contributions. Concessional contributions also include personal contributions made by the member for which the member claims an income tax deduction.

Concessional contributions are subject to a yearly cap. From 1 July 2021, the concessional contributions cap is $27,500 for all individuals regardless of age.

The general concessional cap is indexed to average weekly ordinary time earnings (AWOTE) in $5,000 increments.

Non-concessional contributions

Generally, non-concessional contributions are contributions made into your SMSF that are not included in the SMSF's assessable income.

Non-concessional contributions **include**:

- personal contributions made by the member for which no income tax deduction is claimed - this is the most common type of non-concessional contribution
- excess concessional contributions for the financial year that the member does not elect to remove from the superfund after the ATO send them an excess contributions determination will also count towards the member's non-concessional contributions cap.

Non-concessional contributions **do not include**:

- super co-contributions
- structured settlements
- orders for personal injury or capital gains tax (CGT) related payments that the member has validly elected to exclude from their non-concessional contributions.

If a member's non-concessional contributions exceed the cap, a tax of 47% is levied on the excess contributions. Individual members are personally liable for this tax. They must have their super fund release an amount of money equal to the tax.

From 1 July 2021, the non-concessional contributions cap will increase from $100,000 to $110,000. Members under 65 years of age may be able to make non-concessional contributions of up to three times the annual non-concessional contributions cap in a single year.

If eligible, when you make contributions greater than the annual cap, you automatically gain access to future year caps. This is known as the 'bring-forward' option.

Note: if an individual has triggered a bring-forward arrangement before 1 July 2021, they will not have access to any additional cap space as a result of the increase to the non-concessional cap.

Bring-forward arrangements

From the 2020-21, financial year members under 67 may be able to access a bring-forward arrangement as outlined in the table below.

Contribution and bring forward available to members under 67	
Total superannuation balance	Contribution and bring forward available
Less than $1.48 million	Access to $330,000 cap (over three years)
Greater than or equal to $1.48 million and less than $1.59 million	Access to $220,000 cap (over two years)
Greater than or equal to $1.59 million and less than $1.7 million	Access to $110,000 cap (no bring-forward period, general non-concessional contributions cap applies)
Greater than or equal to $1.7 million	Nil

TAX PLANNING OPPORTUNITIES WITH THE UNUSED SUPER CONTRIBUTIONS SPACE

Baby boomers are the envy of successive generations. Free education, security of employment, and superannuation concessions that were far more generous than now lead some to believe they have had a charmed life.

Many baby boomers (being those born between 1946 and 1960) have substantial amounts in superannuation and other assets.

They may have self-employed children who have not had the opportunity and/or the inclination to accumulate a significant amount in superannuation.

We have spoken in the past about the use of testamentary trusts in estate planning. The following strategy could also go part way to achieve a similar outcome with added tax benefits.

Whether we are dealing with a SMSF or managed funds... these are also funds in a trust. Since 1.7.2018, it has been possible to carry forward unused concessional super cap contributions for up to five years if your total superannuation fund balance was less than $500,000.

Consider Sam, who has a son Ian – he has worked as an independent building contractor his entire career and only has $200,000 in super.

Some builders have flourished in these trying times, and for the year ended 30.6.2022, Ian will have a taxable income of $225,000. He has not made any superannuation contributions for four years.

This means his unused concessional (tax deductible) cap balance is:

1.7.2018 – 30.6.2021 .... 3 x $25,000

1.7.2021 – 30.6.2022 .... $27,500

This means for the year ended 30.6.2022, Ian could make a tax-deductible contribution to superannuation for $102,500.

As part of his estate planning, his father Sam gifts Ian $102,500 to put into the fund, who is also very relieved to hear his tax bill for the year has been slashed by $43,575.

Sam also wants Ian to sharpen his focus on retirement savings. He views superannuation as a secure haven (asset protection), mindful that the building industry has commercial risks.

After a great outcome, Ian resolves to put funds aside each month as a direct debit into super.

Another scenario...

Leaving aside the generous father. With the same unused super space, consider a case in a booming property market where Ian has sold an investment property for a taxable capital gain of $200,000.

He is told that as he has owned the property longer than 12 months, the capital gains tax individual 50% discount applies.

Capital gain	$100,000
Less superannuation contributions	$102,500
Net tax deduction	($2,500)

If we assume Ian is on the highest marginal tax, he has effectively lowered his tax bill by $48,175 while taking responsible measures to secure his retirement.

RE-CONTRIBUTION OF COVID-19 EARLY RELEASE SUPER AMOUNTS

On 3.8.2021, the ATO announced that individuals can now re-contribute amounts they withdrew under the COVID-19 early release of the super program without counting towards their non-concessional contributions cap. These contributions can be made between 1 July 2021 and 30 June 2030.

COVID-19 re-contribution amounts are not a new type of contribution. They are a personal contribution that we will exclude from an individual's non-concessional contribution cap.

Individuals can make COVID-19 re-contribution amounts to any fund of their choice where the fund rules allow.

What you need to do

Individuals can use the approved form from the ATO website to make a COVID-19 re-contribution. If you require assistance with this, contact them. Superannuation funds may choose to design their own Notice of re-contribution of COVID-19 early release amounts approved form for members, as outlined in the CRT Alert 008/2021.

Once a super fund receives a completed approved form from their member, they will:

- Check the COVID-19 re-contribution amount. An amount cannot be accepted where it exceeds $20,000. They may confirm with the member if the correct figure has been provided.
- Provide the ATO with the information from the approved forms the fund received on a monthly basis – they are not required to provide nil lodgement reports.

There is no change for the superannuation fund when accepting and reporting personal contribution amounts that a member treats as a COVID-19 re-contribution.

There is further information on the ATO website.

SMSF CHECKLISTS

The ATO has devised a handy checklist for SMSF trustees. Running a SMSF takes time and effort. There is a lot to do and keep track of at every stage of your fund. Use these checklists to help you manage your fund and meet your SMSF obligations.

Setting up a SMSF

Have you:

- considered appointing professionals to help you set up your SMSF? YES/NO
- chosen individual trustees or a corporate trustee? YES/NO
- appointed your trustees or directors? YES/NO
- created the trust and trust deed? YES/NO
- checked your fund is an Australian super fund? YES/NO
- registered your fund? YES/NO
- set up a bank account? YES/NO
- got an electronic service address? YES/NO
- prepared an exit strategy? YES/NO

Investment strategy for SMSF

Have you:

- prepared an investment strategy? YES/NO
- considered all circumstances of the fund, including risk, diversity, liquidity and member's circumstances? YES/NO
- considered insurance for members? YES/NO
- confirmed all fund investments comply with the super laws and are allowed under the trust deed? YES/NO
- made provision to regularly review the investment strategy? YES/NO
- documented any decision about the investment strategy? YES/NO

Reporting obligations for SMSF trustees

Have you:

- valued the funds' assets at their market value at 30 June? YES/NO
- paid any minimum annual income stream payments required under super laws? YES/NO
- obtained an actuarial certificate if required? YES/NO
- prepared the fund's end of year financial accounts and statements? YES/NO
- appointed an approved SMSF auditor, not more than 45 days before the SMSF annual return is due? YES/NO
- lodged your SMSF annual return by the due date? YES/NO
- lodged your transfer balance account reports if required? YES/NO

- reviewed the fund's investment strategy and documented the review? YES/NO
- maintained all fund records as required under super laws? YES/NO

Ongoing SMSF compliance obligations

Have you ensured:

- the fund has an investment strategy that is regularly reviewed? YES/NO
- all fund money and assets are held separately from money and assets held by trustees or directors personally or by a related employer? YES/NO
- all fund investments comply with the super laws? YES/NO
- all contributions and rollovers received by the fund are allowed under the super laws? YES/NO
- all benefit payments made by the fund have been made in accordance with the super laws? YES/NO
- the proper and accurate records have been maintained for the required timeframes? YES/NO

Steps to consider when starting to pay an income stream

Have you:

- considered getting advice from a SMSF professional? YES/NO
- checked your SMSF trust deed allows the payment of the income stream? YES/NO
- confirmed the member has met a condition of release? YES/NO
- obtained an actuarial certificate if required? YES/NO
- valued the assets that support the income stream at market value? YES/NO
- determined the minimum annual payment under super law (and the maximum annual amount for a transition to retirement income stream)? YES/NO
- registered for PAYG withholding if required? YES/NO
- determined your event-based reporting timeframe if required? YES/NO

Steps to consider when winding up a SMSF

Have you:

- checked the trust deed for information on winding up the fund? YES/NO
- paid out or rolled over all your super benefits using SuperStream (leaving a sufficient amount to pay final tax or expenses if required)? YES/NO
- appointed an approved SMSF auditor to complete the final audit? YES/NO
- completed and lodged the final SMSF annual return (including wind up details)? YES/NO
- lodged your transfer balance account report if required? YES/NO
- paid any outstanding tax? YES/NO
- closed the fund's bank account after the ATO confirms the fund's ABN is cancelled? YES/NO

SUPERANNUATION – WHERE DOES AN EMPLOYEE STAND?

If you're an employee, you are typically entitled to compulsory superannuation (super) contributions from your employer. These super guarantee contributions must be a minimum amount based on the current super guarantee rate (currently 10%) of your ordinary earnings, up to the 'maximum contribution base'.

Generally, you're entitled to super guarantee contributions from an employer if you're both:

- 18 years old or over
- paid $450 or more (before tax) in a month. (This threshold will be removed on 1.7.2022)

It doesn't matter whether you're full-time, part-time or casual, or if you're a temporary resident of Australia.

If you're under 18 years old, you must meet the above conditions and work more than 30 hours per week to be entitled to super contributions.

Your employer is **not** required to make super contributions if you're:

- paid to do work of a private or domestic nature for 30 hours or less each week
- a non-Australian resident, and you're paid to do work outside Australia
- an Australian resident paid by a non-resident employer for work done outside Australia
- a senior foreign executive on a certain class of visa
- temporarily working in Australia for an overseas employer and are covered by the super provisions of a bilateral social security agreement.

Choosing a super fund

Most people can choose the super fund they want their employer contributions paid into. You may also be able to choose how your savings are invested. Some fund investment strategies offer higher returns with higher risks. In comparison, others offer greater security for your money but with lower returns. The YourSuper comparison tool will help you compare MySuper products and choose a super fund that meets your needs.

If you're eligible to choose a fund, you can do so using the Superannuation standard choice form. Your employer may give you the form when you start employment by:

- requesting you complete it using ATO online services
- giving you a pre-filled form (paper or PDF)
- downloading the form from our website.

If you have started a new job after 1 November 2021 and don't choose a super fund. In that case, your employer may contact the ATO to request details of an existing super account of yours to pay your super into (known as a stapled super fund). If you have not chosen and do not have a stapled super fund, your employer can contribute to their nominated default fund for you.

You're generally eligible to choose a super fund for your super guarantee contributions if:

- you're employed under an award or registered agreement that doesn't require super support
- you're employed under an enterprise agreement or workplace determination made on or after 1 January 2021
- you're not employed under any award or registered agreement (including contractors paid principally for their labour).

You're not eligible to choose the super fund you want your super guarantee contributions paid into if:

- your super is paid under a state award or registered agreement
- your super is paid under certain workplace agreements made before 1 January 2021 that require super support, including some Australian workplace agreements (AWA)
- you're a federal or state public sector employee, excluded from super choice by law or regulations
- you're in a particular type of defined benefit fund or have already reached a certain level of benefit in that super fund.

Even if you are not eligible to choose the super fund you want your super guarantee contributions paid into. From 1 November 2021, your employer may still need to contact the ATO to request details of your stapled super fund.

Types of funds

There are five basic types of funds:

- Industry funds
  - sometimes open to everyone
  - you can join if you work in a particular industry or under a particular industrial award, and your employer signs up with the fund
- Retail funds
  - run by financial institutions
  - open to everyone
- Public sector funds
  - generally open to Commonwealth, state and territory government employees
  - public sector employers may offer defined benefit funds and constitutionally protected funds (CPFs) to their members
- Corporate funds
  - generally only open to people working for a particular employer or corporation
  - may offer defined benefit funds to their members
- Self-managed super funds (SMSFs)
  - work like any other super fund, but the responsibility of managing them (including their investment decisions and legal responsibilities) rests solely with the trustee (you)
  - establishing and operating a SMSF is a major financial decision. You should first discuss your personal circumstances with a qualified professional.

EARLY RELEASE SCHEMES

There are now new penalties for unlawful payments from superannuation funds.

These relate to the promotion of early release schemes designed to obtain the early illegal release of superannuation benefits.

STATUTORY SUPERANNUATION – THE CHANGING LANDSCAPE AND A WARNING FOR EMPLOYERS

The Superannuation Guarantee has been with us for nearly 30 years. In its early years, it was estimated up to 30% of employers were behind in payments. On occasion, their argument was that they were providing employment and could not always afford to pay their staff's super. So much has changed – the ATO can now check an employer's compliance in real-time and their accounts. Since 1.7.2012, Directors can be held personally liable for unpaid staff super.

Increasing community awareness around the importance of super and widespread community disapproval of workers not being paid award minimum wages have markedly changed the narrative.

We have all heard of the term "wages theft". Now, in a recent News Ltd article, this term has been extended to superannuation.

It stated more than 1500 fines were sent to businesses in 2019 for stealing superannuation from Australian workers.

The ATO fronted a parliamentary inquiry investigating wage theft on 18.9.2020. Unsurprisingly this extended to superannuation.

Employers that do not meet their superannuation obligations can face penalties of up to 200 per cent of the unpaid contribution.

ATO spokesman John Ford told the committee it handed down the maximum fine nine times after audits during 2019.

A charge of between 150-199% was used 92 times, and fines between 149-200 per cent of the amount were issued 206 times.

A lower charge of between 99-150% of the contribution was used 1222 times.

More than 2233 director penalties notices involving 1572 companies were also issued by the ATO after bosses failed to pay the money in full by the due date.

At least $146 million in superannuation was not paid by the directors, with only $20.6 million recovered to date.

Workers made 35,400 reports of noncompliance in 2019-20, with the employer non-compliant 75% of the time.

The last analysis of unpaid and stolen super undertaken in 2016-17 showed workers were robbed of $2.3 billion worth of payments.

An ATO pilot program conducted in 2019, which matched small business payroll data with payments from superannuation funds, identified 2600 employers underpaid workers or were late.

Treasury officials are in talks with the Attorney-General's Department about including wage theft and superannuation guarantee in the employment standards. But revealed progress had also been delayed during the coronavirus pandemic.

When the COVID-19 pandemic eases, we expect audit activity to pick up on unpaid super. It is an issue that has to be addressed by all employers.

CONTRACTORS AND THE SUPERANNUATION GUARANTEE CHARGE

Note that contractors are generally considered employees for SG purposes if the contract is wholly or principally for labour. In Superannuation Guarantee Ruling SGR 2005/1, the ATO indicates that a contract will be considered wholly and principally for labour (and the contractor is, therefore, an employee for SG purposes) where the contractor:

- Is remunerated (wholly or principally) for their labour or skills; and
- Must perform the contractual work personally (i.e. there is no right of delegation); and
- Is not paid to achieve a result.

For further guidance on the treatment of contractors, refer to SGR 2005/1, available at www.law.ato.gov.au. The ATO has also developed an employee/contractor decision tool, available at www.ato.gov.au.

ESTATE PLANNING AND RECENT SUPERANNUATION CHANGES

In recent years testamentary trusts have come to the fore as a vehicle to preserve family wealth for future generations.

Testamentary trusts are established in Wills and are activated when the will-maker dies. As well as providing asset protection for vulnerable beneficiaries, testamentary discretionary trusts are known for their tax advantages.

Testamentary discretionary trusts provide considerable flexibility to minimise tax by reason of:

- The ability to make distributions to minors using the full adult taxpayer tax free threshold, currently $18,200 and then lower marginal rates of tax.

- The flexibility to decide which person among a class of beneficiaries should receive a distribution and the amount of that distribution with a focus on beneficiaries in the lowest marginal tax rates.
- Flexibility in determining which beneficiaries receive different classes of income, e.g. capital gains, franked dividends, again intending to minimise tax.

SELF-MANAGED SUPERANNUATION FUNDS - WHAT EXPENSES ARE DEDUCTIBLE IN A (SMSF)?

Common fund expenses

When considering if it is appropriate for the fund to pay a particular expense, it is important to ensure the payment is in accordance with a properly formulated investment strategy, allowed under your trust deed and the super laws.

Operating expenses

A SMSF's operating expenses are mostly deductible under the general deduction provision (section 8-1 of the Income Tax Assessment Act 1997 (ITAA 1997)). Except to the extent they relate to the gaining of non-assessable income (such as exempt current pension income) or are capital in nature.

The following are examples of the types of operating expenses that are typically deductible under the general deduction provision:

Management and administration fees

These are costs associated with the fund's daily running, such as preparing trustees' minutes, stationery, and postage fees. Such costs must be apportioned if the fund earns both assessable and non-assessable income.

No apportionment is necessary for costs wholly incurred in collecting and processing contributions. For example, costs associated with obtaining an electronic service address (alias) to meet the data standards requirements.

A SMSF may incur other more specific management and administrative costs in running a fund that are dealt with under other headings.

Audit fees

A SMSF is required by the super laws to ensure that an approved SMSF auditor is appointed to give the trustee(s) a report of the operations of the entity for each year of income.

Audit expenditure related to meeting obligations under super laws is deductible. But must be apportioned if the SMSF gains or produces both assessable and non-assessable income.

The administrative penalties that can be levied on a trustee under the super laws are not deductible to the fund as they are incurred by the fund's trustee (or director of the corporate trustee) and must not be paid or reimbursed from the assets of the SMSF.

ASIC annual fee

ASIC charges an annual fee to special purpose companies; whose sole purpose is to act as a trustee of a regulated superannuation fund. While the vast majority of SMSFs operate under an individual trustee structure, many choose to use a corporate trustee arrangement.

Corporate trustees pay an initial ASIC registration fee but are also required to pay an annual fee. The ASIC annual fee is payable where a SMSF has a corporate trustee. As such, this expense is deductible by the fund.

Investment-related expenses

The exact nature of the investment-related expenses is critical in determining deductibility. Examples of deductible investment-related expenses include:

- interest expenses
- ongoing management fees or retainers paid to investment advisers
- costs of servicing and managing an investment portfolio such as bank fees, rental property expenses, brokerage fees
- the cost of advice to change the mix of investments, whether by the original or a new investment adviser, provided it does not amount to a new financial plan.

Suppose the investment-related advice covers other matters or relates in part to investments that do not produce assessable income. In that case, only a proportion of the fee is deductible.

Example 1 - The trustees of a SMSF approach a financial adviser with the aim to put in place a long term financial strategy incorporating the need to have sufficient liquidity to pay super income stream benefits, lump-sum payments and continue with investments that in the long term will provide super or death benefits for the members.

A fee paid to an investment adviser to draw up an investment strategy for the fund, in these circumstances, would be a capital outlay even if some of the existing investments are maintained as part of the plan. This is because the fee is for advice that relates to drawing up a new investment strategy. The character of the outgoing is not altered because the existing investments fit in with this new strategy. It is still an outgoing of capital.

> Example 2 - The trustees of a fund decide to seek the advice of an investment adviser. This advice is regarding what listed securities they should invest in (as specified in the fund's investment strategy are permitted by its governing rules).
>
> The cost of the advice on what listed securities to invest in is deductible. This is because it is part of the ongoing maintenance of the current investment strategy and not part of a new investment strategy or plan.

Tax-related expenses

A specific deduction is allowable under section 25-5 of the ITAA 1997 for an expense incurred in managing a fund's tax affairs or complying with a Commonwealth tax law obligation imposed on the trustee.

You cannot deduct capital expenditure under this section. However, an expense is not a capital expense merely because the tax affair relates to a matter of a capital nature. For example, the cost of applying for a private ruling on whether you can depreciate an item of property may be deductible under this section.

The following are examples of deductible tax-related expenses incurred in managing a SMSF's income tax affairs and complying with income tax laws:

- costs relating to the preparation and lodgement of the SMSF's annual return, including the preparation of financial statements
- actuarial costs incurred in satisfying income tax obligations, such as determining the amount of tax-exempt income (or exempt current pension income).

Statutory fees and levies

A SMSF is also liable to pay a supervisory levy under the Superannuation (Self-managed Superannuation Funds) Supervisory Levy Imposition Act 1991. The levy is a flat amount and deductible under section 25-5 of the ITAA 1997.

With respect to the costs incurred in preparing and lodging the SMSF's annual return, a possible interpretation of the relevant laws would necessitate apportionment between income tax and super-related expenses. Given that the return is one approved form covering both income tax and super law requirements. The ATO is of the view that it would be an impost for SMSFs to have to apportion between the two types of expenses and have taken the approach of allowing in full as a deduction the expenses incurred in preparing and lodging the return.

A tax-related expense does not need to be apportioned on account of a SMSF deriving both non-assessable and assessable income unless the expenditure is in relation to audit fees paid by the fund. Audit expenditure related to meeting obligations under super laws is deductible under the general deduction provisions. It must be apportioned if the SMSF gains or produces both assessable and non-assessable income.

Legal expenses

Some legal expenses are covered by specific deduction provisions (for example, legal expenses incurred in complying with income tax obligations under section 25-5 of the ITAA 1997).

Legal expenses that are not covered by a specific provision are generally deductible under the general deduction provision. This is excepted to the extent that they are incurred in deriving non-assessable income or are capital, private or domestic in nature.

Example - Borrowing Expenses – Capital in Nature

A SMSF engages a legal firm to set up a trust to hold an asset that the fund intends to acquire under a limited recourse borrowing arrangement (LRBA) (as required by the super law).

Section 25-25 of the ITAA 1997 is a specific deduction provision that enables a taxpayer to deduct expenses incurred for borrowing money to the extent that the money is used to produce assessable income.

Borrowing expenses that can generally be claimed under this specific provision include:

- loan establishment fees
- obtaining relevant valuations
- costs of documenting guarantees required by the lender
- lender's mortgage insurance
- fees for property and title search fees, costs for preparing and filing mortgage documents, etc.

The costs in establishing a trust for an LRBA are not considered to be borrowing expenses because they are incurred for establishing the arrangement through which the borrowing occurs, not for the borrowing itself. Therefore, the SMSF cannot claim a deduction for its legal expenses in setting up the trust under section 25-25 of the ITAA 1997.

Also, the SMSF cannot claim these costs as a deduction under the general deduction provision because they are capital in nature.

Trust Deed Amendments

Trust deed amendment costs incurred in establishing a trust, executing a new deed for an existing fund, and amending a deed to enlarge or significantly alter the scope of the trust's activities. Generally are not deductible as they are capital in nature.

Trust deed amendments required to facilitate the ongoing operations of the super fund are generally deductible under the general deduction provision. Suppose a fund amends a trust deed to keep it up to date with changes to the super law. In that case, the expense in doing this will be deductible under the general deduction provision. Unless the amendment results in enduring changes to the SMSF's structure or function or creates a new asset.

Example 1 - A SMSF is a two-member fund comprising a couple who are also the individual trustees of the fund. One of the members dies at a time before either member has retired. The surviving member decides to continue the SMSF with a corporate trustee of which they are the sole director.

The fund incurs legal expenses of $1,000 to amend the trust deed so the corporate trustee can be appointed. Making changes to the trust deed of the SMSF to permit the appointment of a corporate trustee relates to the structure of the SMSF, and the expenses are capital in nature. The legal expenses incurred in amending the trust deed are not deductible under section 8-1 of the ITAA 1997.

Example 2 - The trustees of a SMSF decide that the fund's trust deed is out of date. It refers to super law provisions that have been repealed and contact addresses for the trustees that are no longer current.

The trustees decide to engage a legal firm to update the deed. The firm charges $500. As the changes to the trust deed are an ordinary incident of the fund's day-to-day running and are not capital in nature, the $500 charged by the legal firm is deductible to the fund.

Example 3 - The trustees of a SMSF decide that, as part of a properly formulated investment strategy, they will borrow money to purchase an apartment under an LRBA.

The trust deed of the SMSF, as it currently stands, does not permit the trustees to borrow money. The trustees engage a legal firm to amend the trust deed so that it permits the trustees to borrow money under an LRBA.

The costs incurred in engaging the law firm to change the trust deed are not deductible. This is because the addition of borrowing powers is an enduring change to the function of the SMSF.

Death, total and permanent disability, terminal illness, and income protection insurance premiums

A specific deduction is available to the trustee of a complying super fund in relation to insurance premiums paid for insurance policies that are for current or contingent liabilities to provide death or disability benefits.

A deduction is available in relation to the insurance premiums to provide for the following types of death or disability benefits:

- super death benefits
- terminal medical condition benefits
- disability super benefits
- benefits provided due to temporary inability to engage in gainful employment for a specified period.

The amount that can be claimed by the fund is set out in the relevant income tax laws. There is no apportionment required for these expenses between those related to assessable and non-assessable income.

Collectables and artwork

Special rules apply to SMSF investments in collectable and personal use assets, such as artwork. These rules were introduced on 1 July 2011 to cover aspects such as storage and insurance.

Insurance costs for artwork and other collectables are deductible to the SMSF, provided the items are insured in the fund's name within seven days of acquisition. The receipt for the expense is in the name of the fund. For example, you cannot insure the item as part of a trustee's home and contents insurance.

Storage costs for artwork and collectables are also deductible to the fund provided that these items are stored following the Superannuation Industry (Supervisions) Regulations 1994. In particular, the trustees must make and keep records of the reasons for deciding where to store the item number.

When you can claim

As a general rule, the trustee can claim the fund's expenses in the year the trustee incurs them. Deductions for the decline in value of certain depreciating assets (such as plant and equipment) are claimed over the asset's effective life rather than at the time the trustee incurs the expenditure.

Trustees should retain any invoices and/or receipts evidencing the fund's expenses. Invoices and receipts must be in the name of the SMSF, and wherever possible, the expense should be paid directly from the fund's bank account.

Deductibility of expenses

As a general rule, the deductibility of expenses incurred by a super fund is determined under section 8-1 of the Income Tax Assessment Act 1997 (also known as the general deduction provision). Unless a specific deduction provision applies. For example, tax-related expenses are deductible under section 25-5 of the ITAA 1997.

Suppose an expense is deductible under the general deduction provision, and the fund has both accumulation and pension members. In that case, the expense may need to be apportioned to determine the amount that the fund can deduct.

If an expense is deductible under one of the specific deduction provisions. The wording of that provision will indicate whether the expense must be apportioned and on what basis.

Specific deductions

The following is a list of some of the specific deduction provisions that apply to SMSFs. Some can be claimed in full, while others will require apportionment:

- Expenditure incurred to the extent that it is for managing the tax affairs of the SMSF or complying with an obligation imposed on the SMSF which relates to its tax affairs, for example, the SMSF Supervisory Levy (section 25-5 of the ITAA 1997)
- Death, total and permanent disability, terminal illness, and income protection premiums to the extent specified in the relevant law (section 295-465 of the ITAA 1997)

General deductions

In the absence of a specific deduction provision, and subject to exclusions discussed below, a loss or outgoing incurred by a super fund is deductible under section 8-1 of the ITAA 1997 (the general deduction provision) to the extent that:

- it is incurred in gaining or producing assessable income
- it is necessarily incurred in carrying on a business to gain or produce assessable income.

Ordinary incidental expenses of the operations of the SMSF that gain or produce its assessable income fall under this general deduction provision. Unless a specific provision could also apply and is more appropriate in the circumstances). This can include expenses such as:

- management and administration fees
- audit fees
- subscriptions and attending seminars
- ongoing investment-related expenses.

Is a super fund carrying on a business?

The investment activities of SMSF trustees must be conducted in accordance with the trustees' duty to preserve and grow the fund for its members. In that context, the investment activities of most SMSFs would not be characterised as activities in carrying on a business (as compared to similar activities conducted by a trading company).

However, the activities of some SMSFs in dealing in shares and other investments may amount to the carrying on of a business having regard to factors such as the scale of the activities and the manner in which they are conducted.

Exclusions

Under the general deduction provision, a SMSF cannot deduct a loss or outgoing to the extent that:

- it is a loss or outgoing of capital or of a capital nature
- it is a loss or outgoing of a private or domestic nature
- it is incurred in relation to gaining or producing income of the fund that is not assessable income, such as exempt current pension income
- the income tax laws prevent the fund from deducting it.

You cannot claim more than one deduction for the same expenditure. Suppose two or more tax provisions allow you deductions for the same expenditure. In that case, you can deduct only under the most appropriate provision.

Apportionment

General deductions

Where an expense is deductible under the general deduction, the expenditure is deductible only to the extent to which it is incurred in producing the fund's assessable income.

Distinctly identified part

Where the expense is incurred partly in gaining or producing assessable income and partly in gaining or producing non-assessable income, such as exempt current pension income, and the fund can identify a distinct and severable part devoted to gaining or producing assessable income. Then this is the part that the fund should claim as a deduction under the general deduction provision.

Example - The trustee of the SMSF appoints a property managing company in respect of three investment properties held by the fund. One of those properties is a holiday rental home and is managed by the company's regional office. The holiday rental property is also a segregated current pension asset of the fund. The income derived from this asset is exempt. The company charges the fund $2,000 for its services, but the invoice identifies $500 of that amount as being the costs incurred by the regional office for managing the holiday rental home.

The amount of $500 can be distinctly identified as a cost incurred in gaining the fund's exempt income. In contrast, the remaining $1,500 can be distinctly identified as a cost incurred in gaining the fund's assessable income. The fund may claim the amount of expenditure related to the assessable income, being $1,500, as a deduction.

Estimating an expense

Many expenses cannot be divided into distinct and severable parts in this way, for example, paying an approved SMSF auditor to provide an annual report for the fund. This is an expense that does not relate in any particular way to either the fund's assessable or non-assessable income.

In such a case, the fund has to estimate how much of that expense was incurred in producing the fund's assessable income fairly and reasonably.

It is not possible to prescribe a single method for apportioning the expenditure of a super fund. Taxation Ruling TR 93/17 provides a number of examples, providing guidance on what the Commissioner may accept as a method producing a fair and reasonable outcome.

Example 1 - The trustee of the SMSF incurs audit expenses of $1,500 for providing the SMSF with a report in accordance with its regulatory obligations. The fund has unsegregated assets and therefore obtains an actuarial certificate each year to determine the exempt current pension income of the fund.

The percentage specified by the actuary in the relevant year is that 70% of the value of fund assets is held to support current pension liabilities. The remaining 30% of the value of fund assets is held to provide for assessable income in the fund.

The trustee decides that this percentage is a fair and reasonable method for apportioning the audit expenses.

The expenditure claimed as having been incurred in gaining assessable income is $450 (being $1,500 x 30%).

Example 2 - The trustee of the SMSF incurs audit expenses of $1,500 for providing the SMSF with a report in accordance with its regulatory obligations. The SMSF earned $60,000 in assessable and $100,000 in non-assessable income.

The trustees of the fund have decided that the following method is a fair and reasonable way to apportion these expenses:

- Audit expense x assessable income/total income
- $1,500 x $60,000/$160,000.

This results in an amount of $562 for audit expenses that can be claimed as a deduction by the SMSF.

Example 3 - A SMSF has both pension and accumulation members and does not segregate its assets.

The trustees obtain an actuary's certificate to determine the proportion of the fund's income exempt from current pension income. The actuary certifies that 40% of the fund's income is exempt.

The trustees of a SMSF engage an accounting firm to undertake the administrative functions of the fund. The accounting firm charges a fixed upfront fee of $1,500 per annum for the following services:

- preparation of annual financial statements
- preparation and lodgement of the fund's annual return
- arranging for the annual audit of the fund
- preparing member benefits statements
- preparation of reports on the fund's investments.

The fixed fee of $1,500 is not calculated according to the cost of each particular service. The expense, therefore, cannot be easily divided into distinct and severable parts.

The trustees decide that it would be fair and reasonable to use the exempt income percentage as certified on the actuary's certificate to determine the proportion of the accountant's fee that is deductible.

This is calculated as follows:

- Expense x assessable income %
- $1,500 x (100% - 40%) = $900

This results in a portion of $900 of the $1,500 fee that can be claimed as a deduction by the SMSF.

Capital versus revenue expenses

An expense incurred in establishing or making enduring changes to a super fund's structure or function is capital in nature. It is not deductible under the general deduction provision. For example, the costs of establishing a SMSF are capital in nature. An expense incurred in acquiring a capital asset is also usually capital in nature. Refer to the example under trust deed amendments.

On the other hand, an expense incurred in making changes to the internal organisation or the day-to-day running of the fund is not considered capital in nature. Providing such changes do not result in an advantage of a lasting character. If a super fund is carrying on a business. In that case, it may be entitled to deduct certain capital expenses under the specific deduction provision, section 40-880 of the ITAA 1997. Refer to Is a super fund carrying on a business?

Section 8-1 of the ITAA 1997 does not allow a deduction for capital expenditure, private or domestic, or expenditure incurred in gaining or producing exempt income.

Example - One of the members in a two-member fund with individual trustees dies. Once the death benefit has been paid from the fund, a decision is made to change the SMSF to a single member fund with a corporate trustee.

In addition to the usual fund expenses incurred in running the fund, the following additional expenses are incurred:

- legal expenses to amend the trust deed to change the fund to a single member fund with the corporate trustee – $300
- Australian Securities and Investments Commission (ASIC) fees associated with setting up the corporate trustee.

The SMSF will not be able to claim either of these amounts. The legal expenses of $300 are of a capital nature as they are incurred in making enduring changes to the structure of the fund. ASIC fees incurred in setting up the corporate trustee are also capital in nature and, in any event, are not considered to be expenses incurred by the fund.

CORPORATE VERSUS INDIVIDUAL TRUSTEE

It is obvious that ASIC, the ATO and advisers generally prefer corporate trustees for a SMSF. The following explains the reasons why...

Continuous succession

A company has an indefinite lifespan, allowing succession to control more certain on death or incapacity. Timely action can be taken on death to ensure the Trustee/Member rules are satisfied. A sole individual Trustee/Member SMSF – means there is no separation of legal and beneficial ownership. SMSF rules do not permit this.

Asset Protection

Companies have limited liability and provide some protection where a party sues the Trustee for damages. If an individual Trustee incurs any liability, their personal assets are also exposed.

Change in members

On admission or cessation of membership, that person becomes, or ceases to be, a director/shareholder of the company. Meaning, the title to all assets remains in the Company's name. When a member joins or leaves a fund, that person must become, or cease to be, an individual Trustee. As trust assets must be held in all Trustees names, the title to all assets is to be transferred to the new Trustees'.

Penalties

The administrative penalty regime only applies to a company once for each infringement. A penalty can be imposed on each individual trustee for each contravention. Thus, having two individual trustees can double the administrative penalty that would otherwise apply to a corporate trustee.

Sole member Fund

A SMSF can have one individual as both the sole member and the sole director. A sole member SMSF must still have two individual Trustees.

Estate planning

A company offers greater flexibility for estate planning, as the trustee does not change as a result of the death of a member. The death of a member means unwelcomed administrative work at a time when people are grieving.

EARLY RELEASE OF SUPERANNUATION ON COMPASSIONATE GROUNDS TRANSFERRED TO THE ATO

On 1 July 2018, responsibility for the administration of the early release of superannuation benefits on compassionate grounds was transferred from the Department of Human Services (DHS) to the Australian Taxation Office (ATO).

SUPER AND DIVORCE

Due to recent changes, dividing superannuation has become easier. Super splitting laws treat super as a different type of property which allows separating couples to value their super and split payments between them.

One important development is that the law includes de facto couples (including same-sex couples) in this regime.

Depending on how much agreement there is between the parties, couples may:

- Enter into a formal agreement to split the member and spouse's super. A formal written agreement involves certificates confirming both parties have had formal legal advice. Once both agree, there is no need to go to court. This becomes a binding document which the super fund trustee must act on; or
- Seek consent orders to split the super; or
- Seek a court order to split the super.

While there is no legal requirement to obtain a valuation of the fund, it is sensible to do so, particularly in the case of defined benefit funds. The court is required to value the super interest of both parties if a court order is sought.

What the agreement must say...

The laws state the superannuation agreement must specify:

- the base amount
- the method for calculating the base amount; and
- a percentage that is to apply to all splittable payments made in respect of the base amount.

Generally, only super accrued up to the time of separation is split and percentage shares used for super still in its growth phase (opposed to the payment phase where amounts can be specified).

Where an agreement specifies a dollar amount. The non-working spouse is generally entitled to that amount adjusted for the fund's performance.

The laws apply to married or formerly married couples who had not finalised settlement of their property arrangements by a court order under section 79 of the Family Law Act, or an agreement approved by a court under section 87 of that Act before the laws commenced 28 December 2002 and de facto couples in most states and territories, whose relationship broke down on or after 1 March 2009 (and South Australian de facto couples, where their relationship broke down on or after 1 July 2010).

Points to Note...

- You cannot access the super until you reach a condition of release, such as retirement.
- The non-member spouse can specify where they would like their entitlement to be rolled over to.
- You require legal advice and a legally binding agreement for the trustee to be bound by its terms.

The Government now taxes excess concessional contributions at the individual's marginal tax rate, plus an interest charge. This is due to recognising that tax on excess concessional contributions is collected later than personal income tax.

The Government has also confirmed that individuals with income greater than $250,000 will be subject to a 30 per cent rate of tax on certain non-excessive concessional contributions rather than the 15 per cent rate.

The imposition of an additional interest charge is to curtail strategies for those on the highest marginal tax rate, deliberately making excess concessional contributions.

Currently, an individual on the 47 per cent marginal tax rate (including Medicare) is subject to the same rate of tax on personal income as excess contributions but benefits by a timing arbitrage on the latter. This is due to the collection of PAYG income tax compared to the tax of excess concessional contributions. Additional interest charges would appear to remove this benefit.

Ceasing Pensions

A member receiving a pension and feel 'financially unstable' should consider rolling it back into accumulation mode. This will ensure their super interests are fully protected (subject to the clawback provisions) in the event they become bankrupt.

SELF-MANAGED SUPER FUNDS CAN STILL INVEST IN COLLECTIBLES AND PERSONAL USE ASSETS

Self-managed Superannuation Funds (SMSF) will continue to be allowed to invest in collectibles and personal use assets like artwork or stamps, provided they are held in accordance with tightened legislative standards.

The Government has tightened the rules so people cannot claim they are, for example, 'collecting' high-end sports cars, paying tax and then actually driving around in those vehicles.

The rules ensure these investments do not give rise to a personal benefit for SMSF trustees but rather are held for the purpose of providing retirement benefits.

SENIOR AUSTRALIANS AND SUPER

From 1 July 2013, the upper age limit for compulsory super was removed.

TAX TIP - ACCESSING TWO CONTRIBUTIONS CAPS IN ONE INCOME YEAR

Here we are dealing with excess contributions.

- This can easily happen, given the contributions cap is only $27,500 for the 2022 income year.
- Mistakes are easily made when salary sacrificing a performance bonus at year ends when not taking into account statutory super (10%).
- Further, those with multiple employers also run into this problem.
- In former Interpretative Decision ID 2013/22, the ATO confirmed that a contribution is counted towards the cap in the year in which it is **allocated**.

Essentially this means a Super Fund that receives an excess contribution for a member in...say June 2022 can defer allocating the contribution to the member up until 28th July 2022. In many instances, this will overcome the problem.

Always seek specialist advice before going down this path.

The ATO does require a form to be lodged, which serves to notify it that a member of a SMSF has made a concessional contribution in one financial year (year 1). But, the SMSF did not allocate this to the member until the next financial year (year 2).

Most SMSFs use provisions in their trust deeds concerning contribution reserves to enable this strategy commonly referred to as a “contribution reserving strategy”. This is to allow contributions to be recognised for income tax deductibility and other purposes in year 1 while not being counted towards their concessional contributions cap until year 2.

Provided all the associated legal requirements are met, the ATO says this is a valid strategy under the tax and super laws according to the view outline in former TD 2013/22.

The form “Request to adjust concessional contributions” NAT 7485 may be accessed from the ATO website.

This form should be lodged before or at the same time as both the fund’s annual return and the member’s own individual tax return. By following this recommendation, members will generally avoid needing to deal with incorrect assessments.

The trustees will need to keep records to support statements on this form. These include:

- A resolution by trustees in year 1 in accordance with the SMSF’s governing rules not to allocate the contribution when it is made but to accept it into a reserve.
- Evidence of receipt of the contribution by the SMSF.
- A resolution by trustees to allocate the contribution from the reserve in year 2.
- Documentation in relation to any deductible personal contributions (notices and acknowledgements).
- This form does not apply to non-concessional contributions.

We also draw your attention to SMSF Regulator’s Bulletin SMSFRB 2018/1 and the warnings contained therein. Proceed carefully, as ID2013/22 has been withdrawn

THE WITHDRAWAL AND RE-CONTRIBUTION STRATEGY IS STILL WORTHWHILE

This strategy aims to increase the tax free component of a superannuation sum by withdrawing the taxable component, then re-contributing this amount back into the Fund as a non-concessional contribution, increasing the tax free component of the members’ funds.

This was very popular prior to 30 June 2007 when the laws changed to make a pension paid from a super fund generally tax free to those aged over 60 years.

However, this strategy is still very important for those less than 60 as they will still pay some tax on their pension withdrawals or on lump sums above the thresholds (currently $180,000) on their taxable component.

There is also an estate planning issue for those over 60, given the ultimate recipient of a lump sum benefit is often a non-dependant, such as an adult child, for income tax purposes.

This is because non-dependants generally pay tax on the taxable component of a lump sum death benefit.

Also, potential future legislative changes cannot be ignored – it is always a good defensive strategy for superannuation interests to be “non- taxable”.

CONTRIBUTION SPLITTING

The role of contribution splitting

Up to 1.7.2017, contribution splitting to a spouse had assumed less importance in superannuation planning. An effective long-term contribution splitting strategy can significantly increase a couple’s combined wealth and capacity to make super contributions. By using this strategy, eligible couples may be able to:

- even up the superannuation balances of two members of the couple; and
- allow superannuation to be concentrated in the name of someone who will reach preservation age first (to maximise access). Or reach age pension age last (to minimise assets tested assets and maximise age pension entitlements).

The fact that only concessional contributions can be split in this way – and these are limited to $27,500 pa – meant spouse contribution splitting could only have a modest impact.

Other general benefits

In addition to the above, some other benefits that may be provided by contribution splitting include:

- providing a hedge against possible future legislative changes to superannuation and tax, and
- the ability to utilise the low income cap of both members of the couple if lump sum withdrawals are made between preservation age and under age 60.

The changes to carry forward unused concessional contributions for up to 5 years for use in a future year means potentially very large amounts of concessional contributions will be made from time to time. It is time to re-visit the contribution splitting rules.

Basic Conditions for spouse contribution splitting

It is only concessional contributions that may be split.

While reserve allocations may count towards the concessional contributions cap, they cannot be split unless they have been used by an employer to meet SG obligations.

Note this does not include a transfer from any other fund [SIS Reg 6.41(2)(a)] (including a foreign superannuation fund).

Where the contributions have been made personally. They can only be split after the relevant notices have been exchanged between the trustee and contributing member. Until that occurs, the contributions are regarded as non-concessional contributions.

Contributions must **not** be:

- Part of a defined benefit (but could be part of an accumulation account account-based pension, transition to retirement income stream); or
- Part of an interest subject to a family law splitting order or flag.

The lesser of the following may be split:

- 85% of the concessional contributions for the year; and
- The concessional contributions cap (including any additional amounts available because of the carry forward rules).

The recipient must be the spouse (known as the "receiving spouse"). Normal definitions apply – includes same-sex, de facto etc.

At the time the application to split is made. The receiving spouse:

- Must be under 65; or
- If over preservation age, must not have met the retirement definition at the time of the application to split contributions (could be disabled, suffering from a terminal medical condition etc.).

Aside from the usual contribution acceptance rules, there are no additional requirements for the member by whom or for who the contributions were made. The above applies to the receiving spouse only.

Application to split contributions can only be made:

- During the financial year, that immediately follows the year the fund received the contributions. (e.g. an application can be made any time during 2020/21 for a contribution received by the fund in 2109/20); or
- During the financial year the contribution is made. If the member's entire benefit is to be rolled over, transferred, or cashed in that year.

The transfer of a contribution splitting amount from the contributing member's account to the receiving spouse's superannuation account is treated as consisting entirely of a taxable component from the contributing member's account. This means that:

- The normal proportioning rule for benefits from an accumulation account does not apply
- It will not give rise to any tax free component for the receiving spouse; and
- Suppose the split amount comes from a pension account held by the contributing member. In that case, the tax free proportion of that pension account is not re-calculated after the split.

The contribution splitting amount must be preserved in the name of the receiving spouse even if the contributing spouse had met a full condition of release. It will become unrestricted non-preserved when the receiving spouse meets a relevant condition of release.

THE RENEWED APPEAL OF PROPERTY

For many SMSF trustees still shell shocked from the last share market meltdown, property is looking like a far more attractive prospect than shares – particularly because it is possible to borrow within a SMSF.

These borrowing rules potentially lift the biggest obstacle on SMSFs investing in property; the lack of sufficient cash to buy a property outright.

Most people buying investment property do so to fund their retirement. However, only a small minority buy property through their SMSF.

On average, a property held within super for 20 years will be 35 per cent more profitable than one held in an individual's own name. Even though the set-up costs are higher, the tax benefits of margin lending are reduced – at least in the first two years. And annual interest costs are generally 1 percentage point higher for SMSF loans.

Those on the highest marginal tax must earn $1.89 for every dollar of net profit they receive, whereas, inside a SMSF, only $1.18 must be earned.

Properties held in a SMSF attract just 15 per cent tax on rental income instead of being taxed at the individual's marginal tax rate. If the property is held until the pension phase, it can be sold with no capital gains tax incurred.

Although properties sold on their depreciation benefits may be less profitable in the short term because of the lower value of the tax deductions within the low tax environment of the SMSF. People in their 40s to 50s may consider using their SMSF to buy property to build strong and consistent growth in a tax-effective environment. These matters need to be carefully considered and discussed with a reputable financial adviser.

However, a trustee should always consider the superannuation fund's investment strategy.

Subsection 52(2) (f) of the SIS Act requires a superannuation fund trustee to formulate an investment strategy:

(f)To formulate and give effect to an investment strategy that has regard to the whole of the circumstances of the entity including, but not limited to, the following:

i. The risk involved in making, holding, and realising the likely return from the entity's investments regarding its objectives and expected cash flow requirements.

ii. The composition of the entity's investments as a whole, including the extent to which the investments are diverse or involve the entity being exposed to risks from inadequate diversification.

iii. The liquidity of the entity's investments having regard to its expected cash flow requirements.

iv. The ability of the entity to discharge the existing and prospective liabilities.

The above considerations are incorporated in the 'operating standards' contained in Regulation 4.09 of the SIS Regulations.

Normally the above requirements are contained in SMSF annual trustee minutes or embedded in the notes to the annual financial statements, and therein, the problem lies. Too often, the investment strategy is viewed as only a compliance afterthought at the end of the financial year and after the investment decisions are taken.

Although technically, the letter of the law may have been adhered to. It should be noted the above investment standards are there to protect the fund members and their retirement savings.

Of course, in SMSF's the trustees and the fund members are essentially one and the same. However, there is a real danger in a "get rich quick" mentality.

Really, all SMSF Trustees should consider subsection 52(2)f of the SIS Act each time they make an investment decision. And prepare a minute outlining the investment decision and how it complies with 52(2)f.

It is suggested this is a form of self-discipline that could have saved them from some losses if taken in the recent past by SMSF trustees.

PERSONAL DEBT AND SUPERANNUATION

In general, superannuation cannot be accessed until genuine retirement. The ATO has recently issued many warnings about illegal early access schemes and has successfully prosecuted several trustees.

Recently a SMSF lost its complying status as a result of using superannuation monies to support a related business. The Administrative Appeals Tribunal upheld the ATO's decision to make a fund non-complying. The husband and wife trustees had difficulties funding their business and instead arranged for their SMSF to make loans to support the business. The loans were in breach of the 5 per cent in-house asset rule reported by the fund's auditor. Although undertakings were made to repay the loans, this did not occur for a further two years.

There are, however, three situations where clients with debt difficulties may legitimately be able to use their superannuation prior to retirement:

1. **Unrestricted non-preserved (UNP) monies**
2. **Severe financial hardship**
3. **Compassionate grounds**

While legislation permits the release of benefits under these conditions, not all superannuation funds will permit releases on all these conditions. Most public offer funds will permit the release of UNP monies on groups specified by the Australian Prudential Regulation Authority (APRA). However, a significant number of funds do not allow severe financial hardship payments. The availability of these benefits in SMSFs will depend upon the terms of the fund's trust deed.

Unrestricted Non-Preserved Monies

It is worth reviewing clients' account balances to determine if they have any UNP monies. These may have arisen from voluntary contributions made prior to 1 July 1999 or from superannuation benefits rolled over from another fund where the rolled over amount has previously satisfied a condition of release.

Severe Financial Hardship

For clients aged below 55 years who wish to access their benefits on the grounds of severe financial hardship, two tests must be met before a trustee is able to release a benefit. The client must:

- Be in receipt of a Commonwealth income support payment continuously for the past 26 weeks (the objective test); and
- Satisfy the trustee that they are unable to meet reasonable and immediate family living expenses (the subjective test).

Compassionate Grounds

Preserved benefits and restricted non-preserved benefits may be released on specified compassionate grounds by the ATO where a client does not have a financial capacity to meet:

- Medical expenses and associated costs in difficult circumstances for a fund member or family member. This may include:
    - modifying your home or vehicle to accommodate your or your dependant's severe disability
    - palliative care for you or your dependant
    - expenses associated with the death, funeral or burial of your dependant.
- Payments to prevent foreclosure of a mortgage of the member's principal place of residence defined in the legislation as an amount in each 12-month period that does not exceed an amount equal to the sum of:
    (i) Three months' repayments; and
    (ii) 12 months' interest on the outstanding balance of the loan.

When applying to the ATO, it is necessary to complete the relevant form available from the ATO website and to provide a written statement from the mortgagee that:

(a) Payment of an amount is overdue; and

(b) If the person fails to pay the amount, the mortgagee will:

(i) Foreclose the mortgage on the person's principal place of residence or

(ii) Exercise its express or statutory power of sale over the persons' principal place of residence.

The statement must also include information to calculate the amount of three months' repayments and 12 months' interest. The temporary COVID-19 conditions for early release, only available in 2020, have been well documented.

DEATH BENEFITS

- All lump-sum death benefits paid to dependants are tax free.
- Lump sums paid to non-dependants will be taxed at 15% for the taxable component- taxed element and 30% for the untaxed element. The tax free component is always tax free.
- Death Benefits can be paid to dependants in the form of lump sum and/or pension. Whereas non-dependants can only receive death benefits in a lump sum.
- Special rules will apply to the taxation of pension death benefits paid to dependants depending upon the age of the deceased and beneficiary. If the deceased or beneficiary is 60 or over, the pension death benefits with the taxable component- taxed element are tax free. The untaxed element is taxed at marginal tax rate less 10% tax offset. Where both the deceased and the beneficiary are under 60, the pension death benefits with taxable component – taxed element are taxed at marginal tax rate less 15% tax offset. The untaxed element is taxed at marginal tax rate without offset.

Payments Prior to Death

Consider a person over 60 who has:

- Assets in super and has met a condition of release
- Has no dependants
- Is terminally ill.

In this instance, consideration should be given to getting assets out of the super fund to avoid the taxes outlined earlier.

THE SIMPLEST SOLUTION IS TO LEAVE YOUR SUPER TO YOUR ESTATE AND PUT A SUPERANNUATION TESTAMENTARY TRUST IN YOUR WILL

Whether a person is a 'dependent' for tax purposes is a question of fact. Every case is judged on the facts. However, from experience, we know that you can pass on your money tax free by:

- Speaking to your accountant and financial planner. Make sure your super gets into your Will.
- Putting a Superannuation Testamentary Trust into your Will. This protects your super from the Super Death Tax.
- Having your Tax Dependents in your Superannuation Testamentary Trust to receive the capital amount. If you are worth under $10M, then paying your grandchild's private school fees of $20,000 every second year would generally make that grandchild your dependent. The trust capital does not need to be paid out for 80 years from the date of your death. In the meantime, your children direct the income from the superannuation to themselves. If there is any money left after 80 years, it goes to your grandchild (or their family if dead).
- In summary, the Tax Dependent is decided at the moment of your death. Let us say it is one of your grandchildren. In 80 years, that grandchild gets the capital. In the meantime, the income is not subject to the Superannuation Death Tax. The income is distributed as per your children's direction as controllers of the Superannuation Testamentary Trust. Only the capital left in 80 years from the date of your death goes to that grandchild.

BASIC ESTATE PLANNING NEEDS

- Do you have a valid Will that is regularly reviewed?
- Have you considered a Power of Attorney where a person grants another person the power to make certain decisions on their behalf, such as buying or selling properties?
- Consideration should be given to an Enduring Power of Attorney that lets someone act on your behalf if you lose the ability to make decisions for yourself. If you don't have one in place. In the unfortunate event of not having the "capacity" to maintain your affairs, control of your assets may pass to a government body such as The Office of the Protective Commissioner.
- Binding nominations are effective choices as to which beneficiaries receive your superannuation entitlements and in what proportions. Note if these nominations are not kept up to date, you could find your super money is distributed in the way you had not preferred.

You should have a financial plan that considers tax effectiveness. The rules that apply to different assets, such as the tax treatment of a family home compared to shares or investment property, must be considered.

SALARY SACRIFICE - SUPERANNUATION CONTRIBUTION

Here we acknowledge the change in legislation from 1.7.2017, which allows individuals a personal tax deduction for superannuation contributions up to $27,500 per annum less any employer contributions.

Salary sacrifice still remains valid given its enforced savings nature throughout the year towards the end of a financial year. Many people want to contribute to super but simply do not have any funds available.

The Consequences of Salary Sacrifice Contributions Are as Follows:

- The salary sacrifice contribution is subject to 15% contribution tax.
- The salary sacrifice contributions and earnings on them are subject to preservation, which means the earliest most individuals (born prior to 1 July 1960) can access them is permanent retirement from the workforce at age 55. There is a "phase-in" (1960–1964) regarding preservation, meaning a person born after 30 June 1964 has a preservation age of 60.
- If the ultimate benefit is taken as an income stream and the recipient is age 60 or more, the income stream is tax free.
- Employers may restrict the amount that can be salary sacrificed up to the age-based tax deduction limits for superannuation contributions.

Salary sacrifice contributions **may be inappropriate** in the following situations:

- Where individuals require the extra cash flow to meet their living expenses (including the repayment of non-tax-deductible debt).
- Where individuals have planned capital expenditure such as home renovations in the immediate future (say within 18 months) and require the cash flow to meet that expenditure. It does not usually make sense to pay more interest than necessary on a non-tax-deductible bank loan.
- Individuals on the lowest marginal rate of tax.

Salary sacrifice contributions **are most appropriate** for individuals who are on the highest marginal tax rate.

Salary sacrifice contributions **may also be appropriate** for individuals who do not fall into either of the above categories. Still, it will depend on the particular circumstances.

The ongoing advantage of salary sacrifice contributions is that the money will be invested in the tax-effective superannuation environment where investment earnings on the contributions are taxed at 15%. For individuals on the higher marginal rates of tax, this will generally be more tax effective than investing in their own name, where the investment earnings will be taxed at more than 15%.

Structure of Salary Sacrifice Arrangements

Salary sacrifice arrangements that are not properly structured may be subject to ATO scrutiny. There is a danger these arrangements would be deemed to constitute tax avoidance. For instance, an invalid salary sacrifice arrangement would be one where the gross salary is paid to the employee directly, and the employee redirects that gross salary into the superannuation fund.

Taxation Ruling TR 2001/10 issued by the ATO outlines the Commissioner's views on the consequences for employees and employers using salary sacrifice arrangements. The ATO's view is that a valid arrangement is one where an employee forgoes future or prospective entitlements to salary or wages (providing all relevant administrative procedures are adhered to). Conversely, retrospective salary arrangements are not valid, and such payments would be considered the employee's income.

A retrospective salary sacrifice arrangement involves an employee directing a present entitlement to salary or wages be paid in a form other than salary or wages. Note that an employee is considered to have a present entitlement to salary or wages for services performed over a period even if the employee is not paid until a later period. For instance, an employee who will be paid on 30 August cannot on 25 August stipulate that their salary be salary sacrificed. This is because services have already been rendered for the period. The fact that the salary has not yet been paid is irrelevant. The ruling should be consulted for those wanting more details.

Salary sacrifice arrangements that follow the guidelines below are likely to be considered valid and in accordance with the Tax Office's approval:

- The employer initiates the arrangement in conjunction with the employee's consent.
- The employer documents the arrangement as an offer.
- The employee signs an acknowledgement agreeing to accept the offer of the superannuation and salary arrangement made by the employer; and
- Arrangements are then put in place on a prospective basis.

MOVING ASSETS INTO SUPER PRE-RETIREMENT

There are many good reasons to set up your own self-managed super fund (SMSF) or invest via a public offer discretionary master trust. Broad choices of managed and direct investments are available, and you can decide when assets are bought and sold.

Another key benefit is that you can usually transfer the ownership of certain assets directly into your fund. By making what is known as 'in specie' super contribution, you can take advantage of the low tax rate on investment earnings and make your retirement savings work harder.

If you own an asset outside super, you pay tax on the investment earnings at your marginal rate (which could be as high as 47%). However, suppose you transfer the ownership of certain assets into super. In that case, the investment earnings will only be taxed at a maximum rate of 15% - a tax saving of up to 32% pa.

Admittedly, the change in ownership of the asset may mean that capital gains tax (CGT) is payable. Nevertheless, the long-term benefits of a lower tax rate on investment earnings may more than compensate for any potential CGT liability.

You may also be able to minimise your CGT liability if you have any accumulated capital losses, or you are eligible to claim your super contributions as a tax deduction.

ACCESSING SUPERANNUATION BEFORE RETIREMENT

From 1 July 2005, a person who has reached their preservation age has been able to access their superannuation benefits. In the form of a non-commutable income stream, without having to retire or leave their current employment. Also, an account-based pension taken under these provisions can be stopped at any time and restarted at a later date. These measures are designed to cater for more flexible working arrangements towards the end of a person's working life. This is an investment product that provides the investor with an income stream without the facility to cash out lump sums.

The following case study shows the benefits of working part-time, as opposed to entering full-time retirement.

> ***Case Study*** - Paul is a single 58-year-old. He currently has a full-time position earning $50,000 gross per year. However, cannot work full-time for health reasons, but would like to continue to work 2 – 3 days per week. He understands that the income from part-time work of say $25,000 per year (before tax) is insufficient to meet his income needs of $35,000 per annum. Paul currently has $350,000 in super, and it is all preserved.
>
> As Paul is over 55 years of age, he has the flexibility to semi-retire and still meets his income needs. The longer he can continue to earn an income from employment without drawing down on his investments, the better his long-term retirement position can be.
>
> Paul could continue to work part-time and receive an income of $25,000 per annum before tax. He could invest $350,000 from his super into a non-commutable account-based pension and draw the minimum income of $14,000 in the first year at age 58. Although he cannot currently make lump sum withdrawals from this pension, he will be able to access the capital when he retires or turns 65.

ACCESSING SUPERANNUATION AFTER RETIREMENT

"Preservation age" is the age a super fund member can gain access to benefits they have accumulated in a superannuation fund or retirement savings account. Provided that the member has permanently retired from the workforce. Depending on a taxpayer's date of birth, this age is between 55 and 60.

Since 1 July 2005, the Transition to Retirement rules has proven popular as a means of swapping a current employment income stream with a more tax-effective pension. For taxpayers winding down their employment, the transitional pension enables a "top up" to their income levels.

An added advantage is that members are able to access the lower tax rates in a super fund (earnings on segregated assets supporting current pension liabilities) earlier in time than waiting for full retirement.

This strategy should be considered by anyone who is not otherwise able to access the maximum deductible contribution each year. Here we are dealing with someone with insufficient income to support living expenses and the maximum contribution level.
The recommended course of action is to salary sacrifice employment income up to the maximum contribution limit. Thus obtaining the maximum benefits of superannuation while topping up their living requirements with a tax-effective income stream from the fund.

As discussed above, the tax-exempt status on income assets (within the SF) financing the transition to retirement pension was removed from 1 July 2017. Hence, the normal earnings rate of 15% will apply.

PURCHASE LIFE AND TPD INSURANCE TAX-EFFECTIVELY

Many people take out insurance via a personal policy in their own name. However, you should consider the benefits of insuring through a super fund if any of the following apply to you:

- Are you able to make salary sacrifice contributions?
- Are you eligible for a Government co-contribution?
- Do you have a low income spouse?
- Self-employed?

By holding life and total and permanent disability (TPD) insurance through super, you may be able to reduce the effective cost of your premiums – in some cases by up to 47%. When you consider the potential tax savings, it is also possible to purchase a higher level of cover compared to insuring outside super.

The same tax deductions and offsets when investing in super also apply to insurance purchased through a super fund.

- **If you are eligible to make salary sacrifice contributions.** You may be able to purchase insurance through a super fund with pre-tax dollars.

- **If you are employed, earn less than $56,112 p/a and make personal after-tax (non-concessional) super contributions.** You may be eligible to receive a Government co-contribution that could help you cover the cost of insurance.

- **If you make super contributions on behalf of a low income spouse.** You may be able to claim a tax offset of up to $540 pa that could be put towards insurance premiums for you or your spouse.

These tax outcomes can make it significantly cheaper to insure through a super fund. All you need to do is nominate how your contributions should be allocated between your super investments and your insurance policy.

Where Will You Super Go When You Die?

When it comes to allocating superannuation benefits from a deceased estate, your Will won't always provide the final word. Setting up a valid, binding nomination can ensure you determine who receives your superannuation.

Many people assume their Will controls how their estate will be divided when they die. While this is true for assets like property and cash, the same rules do not necessarily apply when deciding what happens to your superannuation.

Special rules control how super fund Trustees are allowed to distribute superannuation from a deceased estate and how that money will be taxed.

Knowing how these rules work, including the use of binding and non-binding nominations, can help make things easier for those who will be financially affected by your death.

When you join a super fund, you will be asked to nominate who you want your death benefit paid to, either as a 'non-binding' or 'binding' nomination.

Non-Binding Nominations Give the Trustee Final Say

A non-binding nomination is a preferred nomination only. The Trustee will take into consideration any nomination you make. Still, a non-binding nomination gives the Trustee final discretion in deciding who will receive your superannuation benefit when you die.

Binding Nominations Give the Final Say

A binding nomination allows you to decide which of your dependents receive your benefit when you die and how much of the benefit they receive. Binding nominations ensure you decide how your superannuation is distributed rather than the Trustee. The nomination requires two witnesses' signatures and is only valid for three years from the date it is made. For many funds, a binding nomination will revert to non-binding after a three-year period if the nomination is not confirmed and no new nomination is made.

Ensuring Your Binding Nomination Is Valid

To ensure your binding nomination meets the requirements of the Trustee, you should:

- Only nominate dependents or a Legal Personal Representative as beneficiaries

- Formerly you had to review and update your nominations every three years.

However, ...

Tips on How to Make Allocation of Your Superannuation Easier

It only takes a few simple steps to make things easier for everyone if you are a member of a super fund when you die:

1. Nominate who you want to receive your death benefit.

2. Keep your nomination up to date, especially if your wishes or personal situation changes (for example, you re-marry) for binding nominations. This can stop people from arguing that your nomination is no longer useful or relevant.

3. Let your fund know if you have several dependants. You can explain your wishes for each of them, which is far more helpful than giving your fund no guidance at all.

4. Explain your wishes to your dependants to help prevent any disputes after you die.

5. Talk matters over with people who may need to prove their financial dependence on you. It can help to give them easy access to relevant financial records or written agreements about the support you were giving them in the case they need to prove their claim.

6. Renew your binding nominations every three years.

Saving on Capital Gains Tax in a SMSF

Be aware of the potential to save on CGT by realising capital gains after your SMSF starts a pension, rather than while still in the accumulation phase.

All super funds pay tax on their investment earnings at a concessional rate of 15 per cent. Like individual investors, they are entitled to a CGT discount if their investments are held for 12 months or more. For Super funds, the discount means they are only taxed on two-thirds of any realised capital gains, which translates into an effective CGT rate of 10 per cent. However, pension funds pay no tax at all on their earnings. So, if you defer an asset disposal until you are in the pension phase, your capital gain is tax free. For the many SMSFs that buy and hold assets for long periods, this can translate into significant savings.

If you do not have a SMSF, it is worth noting a number of 'wrap' style super accounts can offer a tax free transition from super savings to pension. This is because these 'wrap' style arrangements attribute the savings to individual members rather than pooling them together.

PROPERTY DEVELOPMENTS IN SMSFs

Advisors often field calls from SMSF Trustees seeking to invest in property to make a short term and more substantial gain than a passive investor.

SMSF trustees may increase the value of their property by repairs, improvements and development undertaken by the members or related parties themselves. However, it is crucial that every property investment and related party activity must be carefully documented and managed.

However, it should be noted a SMSF should generally not acquire any assets such as materials or property from fund members or associates.

Section 66(1) of the SIS Act stipulates a SMSF trustee must not acquire assets from a member or related party of the fund unless the property is business real property.

Consequently, it could be an issue if a member or related party pays for goods and materials used in the improvement or construction of a property.

Under the "doctrine of fixtures", if a fund member affixes something to a SMSF's land, that thing becomes part of the land.

The ATO has confirmed where the materials are "not insignificant" in value and function, the materials will be considered an acquisition by a superannuation fund trustee (SMSFR 2010/1 [19]).

This could result in a contravention of section 66 of the SIS Act with substantial penalties.

The SMSF trustees should acquire required materials directly from an unrelated supplier and pay for them from the SMSF's own bank account.

Alternatively, the materials could be acquired by the member or related party via an agency or bare trust arrangement that recognises the SMSF trustee as the party acquiring the materials.

It is possible for a SMSF to authorise a related party builder to operate a special bank account under an agency agreement or bare trust to acquire materials. Specialist advice should be obtained in structuring such an arrangement.

Arm's length requirements

A SMSF should deal with other parties on arm's length terms. This rule requires parties that are not at arm's length to make sure their dealings are.

Consider whether a prudent, arm's length person, acting with due regard to their own commercial interests, have done it *(APRA v Derstepanian (2005).*

When related parties are dealing with a SMSF, it is easy to forget that the fund must avoid any contraventions. And document transactions with related parties with sufficient supporting evidence reflecting arm's length terms. This is done by obtaining quotes from third parties and gathering suitable evidence.

The ATO considers the impact of other non-commercial terms and the risk of those loans giving rise to non-arm's length income as well.

Exercise caution in this area and seek specialist advice.

This is thrown into sharper focus given the announcements regarding arm's length terms in the May 2017 Budget.

Partial Considerations

There are also a number of practical hurdles that need to be satisfied before a SMSF undertakes property development (even if it is not a business). Every document including contracts, specifications and resolutions must be reviewed to ensure there is no contravention of any superannuation law.

Ensure the SMSF is authorised to undertake a property investment or development, especially if it is likely to constitute a business. It is possible the SMSF deed and investment strategy may need to be revised.

Property development involves significant legal and financial risks. Cost overruns are not uncommon with renovation, building and construction projects.

It is essential the cash flow and liquidity of a SMSF can manage these risks, which may result in large sums of additional money being required to complete a development.

Limited recourse borrowing SMSFs are prohibited from borrowing money to finance improvements or develop an activity. This form of borrowing only allows borrowing for acquisition and certain repairs.

Property development can also give rise to other "general" legal risks, such as tradesmen suffering an injury.

It is recommended all SMSFs should have a sole-purpose corporate trustee, especially those undertaking any property investment.

Charge over assets

A SMSF must generally not give a charge over a fund asset. Many building contracts, however, provide for a charge over the land and property being worked on.

SMSFs should thoroughly inspect each relevant document, notably standard building contracts and take care to exclude any mortgage, lien, or other encumbrance.

Trustee remuneration

Note a SMSF trustee must not receive remuneration for services performed in their role as trustee (section 17A of the act). One must consider when a trustee's services should cease?

It is considered that building and construction would not fall within the ambit of a typical trustee service. Thus, this provides scope for payment.

However, since 2012, a SMSF has been allowed to provide remuneration where the trustee or a director of a corporate trustee provides services to a fund. Provided the trustee or director has the requisite qualifications and licence, carries on a business. Or generally provides the same services to the public and charges an arm's length rate for their services (section 17B of SISA).

Once again, be certain you meet all the terms and conditions.

Structures

A number of structures can be used for property development by a SMSF.

SMSF solely undertakes the development

Here the SMSF buys/owns the property and undertakes the development itself. Subject to the usual limits, additional contributions can be used to top up any extra funding required.

One risk with this structure is that borrowing is prohibited unless it meets the strict requirements of sections 67A and 67B of the act. Note that borrowing to fund improvements is expressly prohibited.

Joint Ventures

A SMSF could consider a joint venture with a builder to develop land owned by a SMSF and then share the output.

One scenario would be the SMSF purchases vacant land. Then under the terms of joint venture arrangement, a builder builds townhouses on that land. Upon completion by both the SMSF and builder, share the output.

The main advantage for SMSFs is they can use equity beyond that in the SMSF. This overcomes liquidity issues as the builder pays for the costs of developing the land.

As always, the SMSF must consider contraventions of SISA, including the arm's length test and related party dealings if the builder is a related party.

Intermediary

A SMSF may invest in units of a unit trust (geared), which will buy and develop the property. This structure allows multiple investors (including multiple SMSFs) to purchase property.

Note, if the unit trust is not a related trust, then the trustee of the unit trust can borrow to fund any shortfalls during construction when developing the property.

The trust itself is the one developing the property. Therefore, legal risks associated with the development are quarantined at the unit trust level.

Development Agreement

It is possible for a SMSF with landholdings to enter a development agreement with a related or independent third party.

These are similar to unincorporated joint ventures and are used to develop property where the landowner does not have the necessary cash resources – consider a farmer and encroaching suburbia.

Here the landowner enters an agreement with a developer. The landowner retains full legal and beneficial ownership of the land at all times during the development. The developer agrees to fully fund the development and only be remunerated from the profits generated from the eventual sale of the completed development.

From the landowner's viewpoint, the main benefits of such a transaction are that the landowner receives funding and expertise and will only be liable to pay a commission if the transaction is successful.

Because the landowner retains ownership of the property at all times until a sale is ultimately consummated with an end-user of a particular lot, further land tax savings can also result.

Further, from the developer's perspective, the agreement can also bring with it some positives. For instance, entering such an agreement to develop a property will save the developer from paying for the upfront cost of the land and any stamp duty and related transaction costs on the "acquisition" of the property.

The above is not an exhaustive analysis. SMSF trustees need to follow the letter of the law and take specialist advice.

CONCERNS FROM ATO ON PROPERTY DEVELOPMENT AND SMSFs

The ATO notes in SMSFRB 2020/1 an increase in the number of trustees entering into arrangements (either with related or unrelated parties) involving buying and then developing property that is subsequently sold or leased.

SMSFRB 2020/1 indicates that these arrangements must be carefully approached to ensure compliance with SISA and SIS regulations. For example, could investments of this sort be viewed as having a collateral purpose not within the sole purpose test, or if it crosses a line regarding the in-house asset's rules?

The ATO has concerns where the investment activity involves joint venture arrangements, partnerships or investments through an ungeared related unit trust or company.

The nature of property development can sometimes allow and structure obscure income being inappropriately diverted into the concessionally treated SMSF. This may be in a manner contrary to proper retirement outcomes.

Trustees need to be aware of issues that could affect the compliance status of their SMSF. Some of these issues, such as ensuring proper arm's length dealings, include but are not limited to:

- the purchase of land or other assets
- the value of services provided
- the terms (including the use of personal or related party guarantees) of any borrowing arrangements of the SMSF or other entities involved in the development, and
- the return on investment and income or capital entitlements.

The ATO is taking an active interest in property developments undertaken by SMSFs. Manipulating the transfer balance account by deliberately undervaluing interests in a development is another concern when a fund enters retirement phase, and the asset counts towards the cap.

Any Trustees contemplating undertaking property development in a SMSF should carefully review SMSFRB 2020/1, which has listed several areas that a trustee's needs to be aware of. The ATO has published a table of these issues (with links to the appropriate paragraph number within the SMSFRB.

In-house assets	20
Ungeared related companies or unit trusts	24
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GUIDANCE FOR SMSFs ON FRACTIONAL PROPERTY INVESTMENT

In November 2019, the ATO published guidance confirming their approach to the sole purpose test for fractional property investment products. Such as the DomaCom Fund that was the subject of the Full Federal Court decision in Aussiegolfa Pty Ltd (Trustee) v Commissioner of Taxation [2018] FCAFC 122.

As indicated in their Decision Impact Statement on the case. Self-managed Super Fund (SMSF) trustees could potentially contravene the sole purpose test by investing in a Sub-Fund of the DomaCom Fund if the facts and circumstances indicate that the SMSF was maintained for the collateral purpose of providing accommodation to a related party. This is consistent with long-standing views held by the ATO as outlined in SMSF Ruling 2008/2.

To address this, DomaCom Ltd (DomaCom) have updated their product requirements to include a 'Sole Purpose Test Declaration' and make it available to their SMSF trustee investors.

By signing this declaration, the trustee undertakes to avoid behaviour that would give the ATO concern relating to an infringement of the sole purpose test.

The ATO will not apply compliance resources to scrutinise the sole purpose test where a trustee investing in DomaCom's fund signs this declaration and there is no evidence that their actions contradict it.

The ATO welcomes others offering similar fractional investment products who consider their product's sole purpose test implications to talk with them to explore a similar approach. This supports their continued commitment to providing practical and administrative certainty to SMSF trustees.

NEW ACCOUNTING STANDARD AASB 2020-2 APPLIES FROM 1 JULY 2021

An amended accounting standard has been released by the Australian Accounting Standards Board (AASB). AASB 2020-2 came into effect from 1 July 2021.

This changes the reporting requirements of certain for-profit private sector entities. Some entities can no longer self-assess financial reporting requirements and prepare special purpose financial statements (SPFS) if their trust deeds were created or amended on or after 1 July 2021 and require preparation of financial statements that comply with Australian Accounting Standards (AAS).

These entities will now need to prepare Tier 2 general purpose financial statements (GPFS) that comply with all recognition and measurement requirements in AAS and minimum simplified disclosures.

This change means new SMSFs set up after 1 July 2021 who wish to prepare SPFS will need to ensure they don't have a clause in their trust deeds that require their financial statements to be prepared according to the AAS. Similarly, existing SMFSs that intend to change their trust deed after 1 July 2021 should remove such a clause if they wish to continue preparing SPFS.

Most SMSF trust deeds refer to the financial statements being prepared in accordance with the super laws. They do not refer to the AAS, so this should not become an issue for the majority of SMSFs.

The AASB has published a key facts document that explains the impacts of AASB 2020-2. This will assist the industry in navigating any impacts of the new financial reporting requirements.

Your Notes

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