

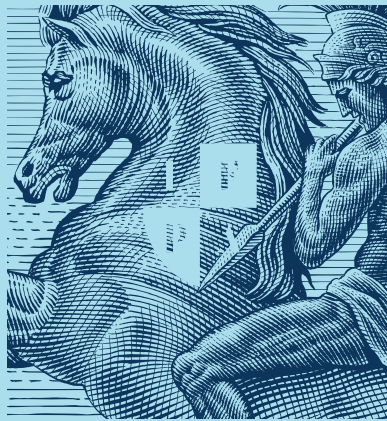


# Superannuation Discussion Group

April 2023



INSTITUTE OF  
FINANCIAL  
PROFESSIONALS  
AUSTRALIA



Published by the Institute of  
Financial Professionals Australia  
ABN 96 075 950 284  
Reg No: A0033789T

Each issue has been researched,  
authored, reviewed and  
produced by our SMSF expert,  
Gabriela Rusu and is presented  
by Natasha Panagis, our Head  
of Superannuation and Financial  
Services.

© Taxpayers Australia Limited  
T/A the Institute of Financial  
Professionals Australia

# Welcome to the Superannuation Discussion Group notes

Notes for Super Discussion Group sessions held in Sydney  
18 April 2023 and Melbourne 20 April 2023.

The Super Discussion Group notes (SDG) is a compilation  
of key case law, regulator updates and industry insights  
for you to easily stay abreast of the ever changing  
superannuation landscape.

This edition contains superannuation developments  
covering the period from Thursday 02 February till  
Wednesday 5 April 2023 (inclusive).

To aid your navigation, we have linked all resources and  
source materials within the SDG notes. If you require a  
greater in-depth understanding of an issue, just click on  
the link through to the additional materials.

We hope you enjoy this update.

Warm regards,

The Super Team at the Institute of Financial Professionals  
Australia

All information provided in this publication is of a general nature only and is not personal financial or investment advice. It does not take into account your particular objectives and circumstances. No person should act on the basis of this information without first obtaining and following the advice of a suitably qualified professional advisor. To the fullest extent permitted by law, no person involved in producing, distributing or providing the information in this publication (including the Institute of Financial Professionals Australia, each of its directors, councillors, employees and contractors and the editors or authors of the information) will be liable in any way for any loss or damage suffered by any person through the use of or access to this information. The Copyright is owned exclusively by the Institute of Financial Professionals Australia (ABN 96 075 950 284).

#### NOTICE FORBIDDING UNAUTHORISED REPRODUCTION

So long as no alterations are made unless approved, you are invited to reprint Editorials provided acknowledgment is given that the Association is the source. No other item covered by copyright may be reproduced or copied in any form (graphic, electronic or mechanical, or recorded on film or magnetic media) or placed in any computer or information transmission or retrieval system unless permission in writing is obtained from the Institute of Financial Professionals Australia. Permission to reproduce items covered by copyright will only be extended to members financial at time of request. Permission may be obtained by email to [info@ifpa.com.au](mailto:info@ifpa.com.au) or by phone (03) 8851 4555.

[info@ifpa.com.au](mailto:info@ifpa.com.au)

[www.ifpa.com.au](http://www.ifpa.com.au)

P: 03 8851 4555

F: 03 8851 4588



# About the Super Discussion Group notes

## Structure

### ATO activity

An update from the ATO on the latest super news and alerts that have occurred over the past two months that will be important to you and your clients.

### Legislation

A summary of relevant super Bills, Acts, Regulations and draft legislation to help you keep track of Government announcements.

### Bulletin board

A snapshot of important super items from other regulators (ie. APRA, ASIC) and other super related developments are some of the things you will find in this section.

Our traffic light system will help you determine whether the superannuation development has been finalised, is being progressed, or still at early discussion stage. If you only want to know if a measure has passed or an ATO pronouncement has been finalised — then just “Read the Green”.



**For legislation:** The Bill has passed both Houses of Parliament or received Royal Assent (ie enacted as law).

**For case law:** The decision has been delivered by the relevant Court or the Administrative Appeals Tribunal.

**For ATO pronouncements:** Issued in final form and can be relied upon as the Commissioner of Taxation’s position on, or interpretation of, an issue.



**For legislation:** The Bill has been introduced and is currently progressing through the Parliament. The measures have not yet been enacted. The Bill may be amended, or not pass through Parliament altogether.

**For ATO pronouncements:** Issued in draft form and under consultation. Can be relied on as the Commissioner’s position on, or interpretation of, an issue until issued in final form or otherwise withdrawn.



**For legislation:** Released in exposure draft form and subject to consultation. May be amended before being tabled in Parliament as a bill or scrapped altogether.

**For regulator updates or Treasury papers:** Issued in draft form or issued in final form as a recommendations paper. There is no certainty that the recommendations will be implemented.

## Glossary

**AAT:** Administrative Appeals Tribunal  
**AFS:** Australian Financial Services  
**APRA:** Australian Prudential Regulation Authority  
**ASIC:** Australian Securities & Investments Commission  
**ATO:** Australian Taxation Office  
**CGT:** Capital Gains Tax  
**Commissioner:** Commissioner of Taxation  
**Federal Court:** Federal Court of Australia  
**Full Court:** Full Court of the Federal Court of Australia  
**High Court:** High Court of Australia  
**ITAA97:** Income Tax Assessment Act 1997  
**ITAA36:** Income Tax Assessment Act 1936  
**ITAR97:** Income Tax Assessment Regulations 1997

**ITTPA:** Income Tax (Transitional Provisions) Act 1997  
**LCR:** Law Companion Ruling  
**PAYG:** Pay As You Go  
**RPIS:** Retirement Phase Income Stream  
**SG:** Superannuation Guarantee  
**SGAA92:** Superannuation Guarantee (Administration) Act 1992  
**SMSF:** Self Managed Superannuation Fund  
**SIS Act:** Superannuation Industry (Supervision) Act 1993  
**SIS Regs:** Superannuation Industry (Supervision) Regulations 1994  
**TBC:** Transfer Balance Cap  
**TSB:** Total Superannuation Balance



# Contents

About the Super Discussion Group notes .....	3
Structure.....	3
Glossary.....	3
<b>ATO ACTIVITY.....</b>	<b>5</b>
ATO updates guidance on death benefits.....	5
ATO updates guidance on general transfer balance cap indexation .....	9
ATO updates SMSF voluntary disclosure form.....	10
ATO flags superannuation guidance updates.....	11
ATO releases Practice Statement on rectification directions to SMSF trustees .....	14
ATO updates lost, unclaimed, multiple accounts and consolidations data .....	16
ATO updates SMSF trustee disqualification register for December quarter.....	17
ATO releases annual and quarterly SMSF statistical reports.....	18
ATO website updates.....	19
<b>LEGISLATION.....</b>	<b>20</b>
Status of superannuation matters @ 5 April 2023.....	20
<b>BULLETIN BOARD .....</b>	<b>28</b>
Consultation on change to concessional tax rate for super balances above \$3 million.....	28
Consultation on legislating the objective of superannuation .....	37
Our submission on legislating the objective of superannuation .....	39
Our submission on non-arm's length expense rules for superannuation funds .....	41
Final Report of Quality of Advice Review released .....	42
<i>Your Future, Your Super Review</i> outcomes released.....	43
Consultation on proposed improvements to Corporations and Financial Services Law.....	44
Review of the Regulatory Framework for managed investment schemes .....	45
AFCA opens consultation on proposed changes to its Rules and Operational Guidelines.....	47
ASIC launches court action against alleged greenwashing .....	49
SMSF auditors competency standards class order to sunset .....	51
Court cases highlight lost trust deed implications.....	52
Key superannuation rates and thresholds for 2023/24.....	54



# ATO ACTIVITY



## ATO updates guidance on death benefits

### What you need to know

The ATO has provided new guidance on the treatment of lump sum superannuation benefits requested by a member shortly before death but paid from their fund after death.

### Background

Where the payment of a benefit from a super fund was requested shortly before a member's death, but before the actual benefit being paid from the super fund, the fund trustee must assess whether the benefit is a member benefit or a death benefit to determine the correct tax outcome and, ultimately, apply the correct tax rate to the benefit payment.

Generally, a superannuation death benefit is a payment made to a dependant or to the trustee of a deceased estate after the member has died. Trustees should make this payment as soon as possible after the member's death.

The form of the benefit payment, and who it is paid to, will depend on the governing rules of the fund and the relevant requirements of the *SIS Regs*.

A superannuation death benefit can be paid to deceased's dependants for tax purposes (commonly referred to as tax-dependants) as either or both:

- a super income stream
- a lump sum.

A superannuation death benefit can only be paid to deceased's non-dependants for tax purposes (commonly referred to as non-tax dependants) as a lump sum.

A trustee of a regulated super fund can only pay super benefits according to the governing rules of the fund, including the:

- fund's trust deed
- relevant legislation.

The governing rules set out when benefits can be paid and who they can be paid to, including after a member's death. The governing rules of the fund must be read carefully to determine a member's benefit entitlements in the event of death.



## Death benefit or member benefit

If a member requested an amount to be paid from their fund before they died, but died before they received it, it may be a member benefit in some limited cases. Whether a payment is a member benefit or a death benefit must be determined by the facts and circumstances surrounding the payment.

According to the ATO's latest update, the trustee must assess (at the time of payment), whether it is a member or death benefit based on the facts known at the time, including:

- terms of the request from the member
- terms of the trust deed and any other governing rules
- knowledge at the time the payment is made (including whether they are aware that the member has died)
- the entity that the payment is being paid to
- circumstances and timing of the payment
- whether the payment is made because of and in line with the request made by the member.

### Example 1: SMSF paying a death benefit

Jack and Jill are spouses, and members and trustees of the Hill SMSF. Jack has a terminal medical condition. He makes a request to his SMSF for release of his super.

Before the benefit payment is made, Jack passes away. It is then paid to an account belonging to his legal personal representative, forming part of Jack's deceased estate.

At the time of payment Jill, as the surviving trustee, considered the above factors and determined that the payment is a death benefit. Notably:

- the terms of the trust deed of the Hill SMSF allow for release where a member meets a condition of release, including both the terminal medical and death conditions
- the trustee of the SMSF knew Jack had passed away before authorising the payment
- Jack's super benefits are being paid to his legal personal representative's account
- the payment is being made as soon as reasonably practicable to satisfy the compulsory cashing requirement that applies when a member dies, rather than in accordance with Jack's prior request.



### Example 2: APRA-regulated fund paying a member benefit

Satine is a member of an Australian Prudential Regulation Authority (APRA) regulated super fund. She has a terminal medical condition. Satine makes a request to her fund for release of her super benefits.

Before the benefit payment is made, Satine passes away. The trustee does not become aware of this until after the benefit is paid to the account in Satine's request.

The terms of the trust deed allow for release where a member meets a condition of release under Schedule 1 of the SIS Regs) with a nil cashing restriction.

At the time of payment, the trustee considers the above factors and determines that the payment is a member benefit. Notably, the trustee:

- is not aware that Satine has passed away
- makes the payment to Satine's personal bank account and expects she is alive to personally receive it
- makes the payment in line with Satine's request to release money and not any other requirement.

For guidance on their specific circumstances, trustees can apply for a [private binding ruling \(PBR\)](#). Obtaining a personal PBR is highly recommended where it may be questionable as to whether the benefit is a member benefit or a death benefit.

## Key points to note

The latest ATO update indicates that it is important for a trustee to ascertain whether or not they had knowledge, at the time of the payment, that the member was deceased. This means that a lump sum paid from an SMSF to a deceased member will typically be a death benefit, even if requested by the member before they died. This is because, the surviving trustees of an SMSF are likely to be aware of the death of one of the fund members/trustees at the time the payment is made.

The latest ATO update is contrary to several PBRs issued in recent years, where the ATO concluded the payment of a benefit requested before the member died but paid after their death was a member benefit in the circumstances considered by the PBR. Also note that the issue about whether or not the trustee was aware the member had passed away before the benefit was paid did not appear to be taken into account by the ATO in previous PBRs examining this matter.

Importantly, SMSF trustees should not rely on previous private PBRs that concluded the payment of a benefit requested before the member died was a member benefit. Some of these PBRs are listed in the table below. Also, SMSF trustees should not set up open ended arrangements to facilitate that shift within their fund (ie, use undated documents requesting the payment of their benefits in the case of potential death).



PBR number*	Outcome (Member benefit or Death benefit)
1052002906874	Member benefit
1051914995135	Member benefit
1051918109946	Member benefit
1051598540809	Member benefit
1051754180223	Member benefit
1051525346142	Member benefit
1051437446368	Member benefit

\*Note: taxpayers should not rely on a private ruling that has been issue to a different taxpayer.

Source: [ATO website QC 45254, 10 Feb 2023](#)



## ATO updates guidance on general transfer balance cap indexation

### What you need to know

[Indexation of the general transfer balance cap](#) (TBC) is due to occur on 1 July 2023. The cap will increase by \$200,000 to \$1.9 million.

No single TBC will apply to all individuals. Individuals will have a personal TBC between \$1.6 and \$1.9 million. If an individual already has a TBC, the only place they can view their personal TBC is in ATO online services through myGov.

An individual who already had a transfer balance account and at any time met or exceeded their personal TBC will not be entitled to indexation and their personal TBC will remain the same.

Individuals who start their first retirement phase income stream from 1 July 2023 will have a TBC of \$1.9 million.

Indexation of the general TBC will also lead to changes in a number of other caps and limits in the super system including the [defined benefit cap](#) that will increase to \$118,750.

### Background

The general TBC is reviewed each financial year and indexation occurs in line with the consumer price index in \$100,000 increments.

The first tranche of indexation of the general TBC occurred on 1 July 2021. Before 1 July 2021, all individuals with a transfer balance account had a personal TBC of \$1.6 million.

On 1 July 2021, the general TBC increased to \$1.7 million.

### Key aspects

The ATO will calculate each individual's personal TBC based on the information reported to and processed by the ATO as at close of business 30 June 2023. If pre – 1 July 2023 events are reported after that date, there may be significant consequences for the individual. The ATO will reconsider if there was an entitlement to proportional indexation and apply this new information to their account.

To help members have a clear understanding of their position, all events which occurred in the 2022–23 income year or earlier should be reported to the ATO as soon as possible.

**Source:** [ATO website, QC 71324, 13 Feb 2023](#) and [ATO website, QC 71310, 08 Feb 2023](#)



## ATO updates SMSF voluntary disclosure form

### What you need to know

The ATO has updated its [SMSF regulatory contravention disclosure form](#) for SMSF trustees and professionals to make the signature requirements clearer and explain what to do when reporting unrectified regulatory contraventions.

Previously, the form only needed to be signed by tax agents and other authorised contacts on behalf of the SMSF. Now all voluntary disclosure forms must be signed by at least one trustee or director of the corporate trustee to comply with tax whistleblower laws.

The information deals with the following matters: when to use this form; when not to use this form; getting the form; completing the form; supporting documentation; and submitting the form.

### Background

SMSF trustees and professionals should use this form if they want to voluntarily disclose regulatory contraventions that have not been rectified. This allows them to engage with the ATO early.

Submitting a [voluntary disclosure](#) is a great way to show the ATO that SMSF trustees take contraventions seriously and they are putting a plan in place to rectify the issue.

The ATO will take all voluntary disclosures into account when considering what actions should be taken when contraventions have occurred.

### Key aspects

The ATO is no longer able to accept voluntary disclosures if they:

- are submitted without a completed form
- are submitted on older versions of the form
- aren't signed by at least one trustee or director of the corporate trustee.

Source: [ATO website QC 71874, 27 Mar 2023](#)



## ATO flags superannuation guidance updates

### What you need to know

In early March, the ATO announced it is in the process of developing advice and guidance on the following SMSF and general superannuation issues:

No	Issue	Title	Purpose/Details	Expected completion
1.	Superannuation income stream	Addendum to TR 2013/5  Income tax: when a superannuation income stream commences and ceases	<a href="#">TR 2013/5</a> has been impacted by the legislative amendments flowing from the 2016 Budget announcement of the TBC, which limits the superannuation interests that a person can have in retirement phase.  The Addendum will update the legislative references in the Ruling as a result of these amendments, as well as address other amendments – including to the definition of superannuation income stream benefit.	Mid 2023
2.	SMSFs – rectification directions	Final Law Administration Practice Statement  Rectification direction for contraventions to the SIS Act	This Practice Statement will provide guidance to ATO staff on the relevant matters to be considered when deciding whether to give a trustee or a director of a body corporate that is a trustee of an SMSF a written rectification direction under section 159 of the SIS Act.	Published as PS LA 2023/1 on 29/03/2023 (see below)
3.	SMSFs – education directions	Final Law Administration Practice Statement  Education direction for contraventions of the SIS Act	This Practice Statement will provide guidance to ATO staff on the relevant matters to be considered when deciding whether to give a trustee or a director of a body corporate that is a trustee of a self-managed super fund a written education direction under section 160 of the SIS Act.	Early 2024



No	Issue	Title	Purpose/Details	Expected completion
4.	Super benefits in breach of super rules*  * Also refer to the February 2022 SDG Notes, pages 11 - 12 for more information.	Final Law Administration Practice Statement  Exercising the Commissioner's discretion where superannuation benefits are received in breach of legislative requirements	This Practice Statement will provide guidelines on the Commissioner's discretion as set out in subsection 304-10(4) of the ITAA97, which may be applied where superannuation benefits are received in breach of legislative requirements.	Mid 2023
		Final Taxation Determination  Income tax: how will a superannuation benefit be treated for income tax purposes where the Commissioner determines it would be unreasonable for it to be included in an individual's assessable income under subsection 304-10(4) of the ITAA97?	This Determination will set out the Commissioner's view on the income tax treatment of a superannuation benefit received by an individual otherwise than in accordance with the payment standards prescribed under subsection 31(1) of the SIS Act, where the Commissioner exercises the discretion contained in subsection 304-10(4) of the ITAA97.	
5.	Non-arm's length expenditure (NALE)*  *Also refer to our submission on NALE rules in the Bulletin Board section	Update to TR 2010/1  Income tax: superannuation contributions	The final update to TR 2010/1 will explain the interaction between the non-arm's length income provisions and the rules concerning superannuation contributions.	Late 2023



No	Issue	Title	Purpose/Details	Expected completion
6.	Ordinary meaning of the term 'employee'		Review of various products, which currently provide guidance on the meaning of the term 'employee', to reflect the direction provided in the High Court decision in <i>Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd</i> [2022] HCA 1 (see <a href="#">ATO website QC 50320</a> for further information)	Various: Mid/Late 2023

Source: [ATO website QC 50320, 02 Mar 2023](#)



## ATO releases Practice Statement on rectification directions to SMSF trustees

### What you need to know

The ATO has released the Practice Statement Law Administration [PS LA 2023/1](#) which provides ATO staff with guidance on the relevant matters to be considered when deciding whether to give a trustee (or a director of a corporate trustee) of an SMSF a rectification direction for contravening the SIS Act.

### What is a rectification direction?

A rectification direction is a written notice the ATO gives to a person and within a stated period requires them to:

- take specified action to rectify the contravention such as repay a loan or borrowing, dispose of an asset or lodge a return, and
- provide the ATO evidence showing they have complied with the direction.

The term 'rectify' includes putting in place managerial or administrative arrangements that could reasonably be expected to ensure there will be no further contraventions of a similar kind. Therefore, a rectification direction may also require establishing preventative measures and controls so that a contravention is not repeated. It may also require corrective action.

### Key aspects

This Practice Statement explains that a rectification direction can be given where there is a reasonable belief that a person has, on or after 1 July 2014, contravened a provision of the SIS Act (other than Pt 3B) or the SIS Regs.

A rectification direction can only be given to a person who is:

- an individual trustee of an SMSF, or
- a director of a body corporate that is trustee of an SMSF.

When deciding whether to give a rectification direction, the general principles and case specific factors should be considered. Case specific factors include all of the following:

- any financial detriment that might reasonably be expected to be suffered by the fund as a result of the person complying with the direction
- the nature and seriousness of the person's contravention, and
- any other relevant circumstance (eg, whether proactive steps had been taken to rectify a contravention before the regulator commenced action).



This Practice Statement also:

- provides guidance on timeframes for compliance with a rectification direction, stating that a period of up to six months will generally be sufficient to rectify most contraventions, with up to 12 months in extreme cases.
- clarifies whether:
  - a rectification direction can be revoked or varied after it has been given
  - an administrative penalty applies if a person fails to comply with a rectification direction
  - a person can object to the decision to give a rectification direction or to not vary a direction.
- confirms that any costs associated in complying with a rectification direction will need to be taken into account when weighing up the expected financial detriment to the SMSF to comply with a rectification direction. In considering whether to issue a rectification direction, the ATO will need to consider all costs imposed on the SMSF trustee(s) to ensure that the cost of rectification is not disproportionate to the contravention.

## Date of effect

PS LA 2023/1 takes effect from 30 March 2023.

**Source:** [ATO website, PS LA 2023/1 - Self-managed superannuation funds - rectification directions for contraventions of the Superannuation Industry \(Supervision\) Act 1993, 30 Mar 2023](#)



## ATO updates lost, unclaimed, multiple accounts and consolidations data

### What you need to know

The ATO has updated its super data up to 30 June 2022 which includes the number and value of accounts for both lost (fund-held) and unclaimed (ATO-held) super.

As at 30 June 2022, total lost (fund-held) and ATO-held super was \$16 billion for almost 6.9 million accounts.

- Lost super (Fund-held) includes both uncontactable and inactive accounts.
- [ATO-held super](#) includes USM and Special Holding Account (SHA).

### Key aspects

This year's release of data highlights updated information on the newer categories of Unclaimed Super Money (USM) - Inactive Low Balance Accounts, Eligible Rollover Funds and Trustee Voluntary Payments.

The number and value of unclaimed super has increased with the introduction of these new categories. We have also seen an increase in USM in the Former Temporary Residents (FTR) category.

The ATO will be raising community awareness about the updated data encouraging individuals to search for their lost or unclaimed super.

Members may contact their funds when trying to claim back their super. Reuniting unmatched USM will require individuals to ask their transferring fund for account details before they contact the ATO.

Where USM cannot be matched to an individual, the ATO will continue to explore opportunities to improve the matching process to enable more USM to be reunited.

For further detail and data refer to [Super data: multiple accounts, lost and unclaimed super](#).

Source: [ATO website QC 71749, 03 Mar 2023](#)



## ATO updates SMSF trustee disqualification register for December quarter

### What you need to know

The ATO has [advised](#) that it disqualified 130 individuals from being a trustee, or director of a corporate trustee, of an SMSF during the December 2022 quarter.

This brings the total number of disqualified individuals for the 2023 financial year to 389. In comparison, the ATO disqualified 88 individuals during the first half of the 2022 financial year.

### Background

As the regulator of SMSFs, the ATO can disqualify an individual from being a trustee (or director of a corporate trustee) of an SMSF if:

- they don't comply with the super law, or
- the ATO is concerned about their suitability to be a trustee.

The ATO maintains a [disqualified trustees register](#) of individuals who are disqualified from being an SMSF trustee. This register is updated quarterly and includes all individuals who have been disqualified. The register is publicly available and includes the individual's name, location, date of disqualification and details of the formal notice of disqualification that was published in the Commonwealth Government Gazette. This means SMSF auditors and other professionals can check to see if a trustee has been disqualified. For more information, visit the [ATO's website](#).

**Source:** [ATO website QC 71725, 13 Feb 2023](#)



## ATO releases annual and quarterly SMSF statistical reports

### What you need to know

The ATO has released the 13<sup>th</sup> edition of its [SMSF annual statistical report for 2020-2021](#) as well as the [SMSF quarterly statistical report for December 2022](#). These reports include key data on the SMSF sector.

### Highlights

- Over 603,000 SMSFs holding \$869 billion in assets, with more than 1.1 million SMSF members, as at 30 June 2022.
- SMSFs had assets of almost \$1.5 million on average in 2020–21, up 15% from the previous year and 25% over five years.
- 64% of SMSFs have existed for more than 10 years.
- 45% of SMSFs had assets between \$200,001 and \$1 million. This accounts for 17% of total of SMSF assets.
- The median age of SMSF members of newly established funds in 2020–21 was 46. The median age of all SMSF members was 62 as at 30 June 2022.
- The average member balance for females increased by 30% over the five years to 2020–21, while the average balance for males increased by 26% over the same period.

### Key aspects

The report for 2020–21 confirms the steady growth in the number of SMSFs, with over 27,700 new SMSFs established in 2020–21. This is higher than the average over the past 5 years, which saw the number of SMSFs established grow by around 24,000 each year or the equivalent of 2,000 new SMSFs every month.

The December 2022 quarterly statistics indicated a continuation of this trend.

Overall, SMSFs continue to be an integral part of the superannuation system, with the value of SMSF assets growing by \$25 billion from the 2021 to the 2022 financial year. SMSFs remain a significant part of the superannuation system collectively holding in excess of \$869 billion (approximately 26%) of the \$3.3 trillion in super assets under management.

**Source:** [ATO website QC 71754, 09 Mar 2023](#), [ATO website QC 71723, 22 Feb 2023](#) and [ATO website QC 71407, 20 Feb 2023](#)



## ATO website updates

[The dangers of illegal early access of superannuation \(QC 71953, 29 Mar 2023\)](#) – informing individuals that the ATO has recently updated its [illegal early access of super](#) web content which talks about the dangers of illegally accessing superannuation.

[Division 293 notice of assessment notices \(QC 71873, 27 Mar 2023\)](#) – reminding individuals that they may receive an additional tax on their super contributions, known as [Division 293 tax](#).

[Lodging SMSF annual return \(SAR\) through a tax professional? \(QC 71846, 21 Mar 2023\)](#) – information for SMSF trustees on what to do when lodging their SAR through a tax professional.

[March and April remittance and recovery processing schedule for SuperStream \(QC 71750, 21 Mar 2023\)](#) – Information about the ATO's superannuation remittance and recovery processing schedule for SuperStream for March and April 2023.

[Speech by Assistant Commissioner Justin Micale on SMSF compliance \(QC 70682, 07 Mar 2023\)](#) – provides an insight into what the regulator is seeing in the SMSF sector. It also covers the regulator's responsibilities and the areas of most concern for its SMSF enforcement team.

[Latest general interest charge \(GIC\) rates \(QC 16145, 06 Mar 2023\)](#) – information on the latest general interest charge (GIC) rates for April 2023 to June 2023 and when GIC applies to late payments.

[Updated successor and intra fund transfer reporting protocol now available \(QC 71748, 03 Mar 2023\)](#) – provides technical guidance on a range of aspects to help funds manage change and reduce the impact to members, during and after a successor fund transfer (SFT) or an intra fund transfer (IFT).

[Compassionate release of super - eligibility criteria \(QC 71451, 23 Feb 2023\)](#) – information on eligibility for a compassionate release of super (and details of applications the ATO has received and approved).

[Treatment of military invalidity pensions following Douglas decision \(QC 64921, 27 Feb 2023\)](#) – reminder that veterans should work out if their military invalidity pension is affected by the *Douglas* decision\* and what it means for their tax. Veterans affected by this decision who haven't yet requested a review of their prior year tax returns will be contacted by the ATO to advise on their options.

\*Refer to:

*Tax & Super Australia/IFPA SDG Notes* – June 2021, pages 16 – 18

*SDG Notes* – February 2022, pages 13 – 14, *SDG notes* – December 2022, page 19

*SDG notes* – February 2023, page 18 for more information about the *Douglas* case.

[Updated information on applying for a private ruling \(QC 43593, 13 Feb 2023\)](#) – updated information on what to expect once a private ruling application has been lodged.

[Paying superannuation death benefits \(QC 45254, 10 Feb 2023\)](#) – information to assist trustees meet their responsibility when paying superannuation benefits after a member's death.

[Verifying or reporting a scam \(QC 40945, 01 Feb 2023\)](#) – information about checking or reporting an ATO impersonation scam. It provides material on some warning signs of phone, email and SMS tax scams.




# LEGISLATION


## Status of superannuation matters @ 5 April 2023

Both the House of Representatives (HOR) and the Senate are next scheduled to sit from the 9<sup>th</sup> to 11<sup>th</sup> April (inclusive).


The tables below summarise the status of proposed and enacted superannuation-related measures as well as the latest developments in company law that are likely to impact the superannuation sector:

Legislation (Bills and Acts)	Status
<p><b>Protecting worker entitlements/strengthening rights to super</b></p> <ul style="list-style-type: none"><li>• <b>Bill:</b> <a href="#">Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023</a></li><li>• <b>Start date:</b> on the day after Royal Assent.</li><li>• <b>Key measures:</b> The Bill will amend the <i>Fair Work Act 2009</i> and related legislation by:<ul style="list-style-type: none"><li>- providing greater certainty for the work status of migrant workers by dealing with the interaction between the <i>Fair Work Act</i> and the <i>Migration Act 1958</i></li><li>- providing stronger access to unpaid parental leave and complementing recent changes to the <i>Paid Parental Leave Act 2010</i></li><li>- inserting an entitlement to superannuation in the National Employment Standards (NES) by “improving the ability of employees to pursue unpaid superannuation as a workplace entitlement”</li><li>- clarifying the operation of Fair Work Commission workplace determinations and enterprise agreements</li><li>- expanding the circumstances in which employees can authorise employers to make valid deductions from payments due to employees, where the deductions are principally for the employee’s benefit</li><li>- ensuring that casual employees working in the black coal mining industry are treated no less favourably than permanent employees in the accrual, reporting and payment of long service leave entitlements under the <i>Coal Mining Industry (Long Service Leave Funding) Scheme</i>.</li></ul></li></ul>	 <p>Introduced into HOR on 29/03/2023</p> <p>Bill referred to Committee on 30/03/2023</p> <p>Report due 28/04/2023</p>




Legislation (Bills and Acts)	Status
<p><b>Establishing financial accountability regime</b></p> <ul style="list-style-type: none"><li>• <b>Bills:</b> <a href="#">Financial Accountability Regime Bill 2023</a> together with <a href="#">Financial Accountability Regime (Consequential Amendments) Bill 2023</a></li><li>• <b>Start date:</b> various</li><li>• <b>Key measure:</b><ul style="list-style-type: none"><li>- Aims to improve the operating culture of entities in banking, insurance and superannuation and increase transparency and accountability across these industries. The Consequential Amendments Bill will amend several Acts to support the Financial Accountability Regime, including the APRA Act and the <i>Insurance Act 1973</i>.</li></ul></li></ul> <p>The Financial Accountability Regime imposes four core sets of obligations applying to entities in the banking, insurance and superannuation industries, including deferred remuneration obligations—which require entities to defer at least 40% of the variable remuneration (for example, bonuses and incentive payments) of their directors and most senior and influential executives for a minimum of 4 years, and to reduce their variable remuneration for non-compliance with their accountability obligations.</p> <p>The <i>Financial Accountability Regime Bill 2023</i> will commence the day after Royal Assent. The regime will apply to the banking industry six months after commencement of the <i>Financial Accountability Regime Bill 2023</i> and to any new entrants beyond that, from the time they become an ADI or a non-operating holding company. The regime will apply to the insurance and superannuation industries 18 months after commencement of the <i>Financial Accountability Regime Bill 2023</i>, and to any new entrants beyond that, from the time they become licensed.</p> <p><b>Note:</b></p> <ul style="list-style-type: none"><li>• The Financial Accountability Regime will be jointly administered by APRA and ASIC.</li><li>• The above measure was originally contained in a package of 2021 Bills, which had lapsed when parliament was prorogued on 11 April 2022.</li></ul>	 <p>Introduced into Senate on 22/03/2023</p>





Legislation (Bills and Acts)	Status
<p><b>Establishing financial services compensation scheme</b></p> <ul style="list-style-type: none"><li>• <b>Bills:</b> <a href="#">Treasury Laws Amendment (Financial Services Compensation Scheme of Last Resort) Bill 2023</a> together with <a href="#">Financial Services Compensation Scheme of Last Resort Levy Bill 2023</a> and <a href="#">Financial Services Compensation Scheme of Last Resort Levy (Collection) Bill 2023</a></li><li>• <b>Start date:</b> The establishment of the Compensation Scheme of Last Resort (CSLR) and the supporting levy framework will commence on the day these Acts receive Royal Assent. The operator of the scheme can begin to make compensation payments to eligible consumers after the commencement of the first levy period.</li><li>• <b>Key measure:</b><ul style="list-style-type: none"><li>- Seeks to establish a CSLR to provide compensation to a consumer where a determination issued by AFCA (relating to a financial product/service) remains unpaid.</li></ul><p>The scheme will be funded by a levy imposed on parts of the financial services industry. The CSLR aims to improve confidence in the financial system's external dispute resolution framework (administered by AFCA). Will operate with the <i>Financial Services Compensation Scheme of Last Resort Levy Bill 2023</i> and the <i>Financial Services Compensation Scheme of Last Resort Levy (Collection) Bill 2023</i>.</p></li></ul> <p><b>Note:</b> The above measure was originally contained in a package of 2021 Bills, which had lapsed when parliament was prorogued on 11 April 2022.</p>	 <p>Introduced into Senate on 22/03/2023</p>




Legislation (Bills and Acts)	Status
<p><b>Various Tax and Super measures (including reforms to TPB, off-market share buy-backs and franked distributions)</b></p> <ul style="list-style-type: none"><li>• <b>Bill:</b> <a href="#">Treasury Laws Amendment (2023 Measures No 1) Bill 2023</a></li><li>• <b>Start date:</b> various</li><li>• <b>Key measures:</b><ul style="list-style-type: none"><li>- align the tax treatment of off-market share buy-backs undertaken by listed public companies with the tax treatment of on-market share buy-backs. It also amends the income tax law in respect of selective share cancellations to ensure alignment of tax treatment across capital management activities for listed public companies. Date of effect: applicable to buy-backs and selective share cancellations undertaken by listed public companies that are first announced to the market after “Budget Time” (ie, after 25 October 2022)</li><li>- amend the ITAA97 to prevent certain distributions that are funded by capital raisings from being frankable. This ensures that arrangements cannot be put in place to release franking credits that would otherwise remain unused where they do not significantly change the financial position of the entity. Start date: applicable to distributions made on or after 15 September 2022.</li><li>- amend the <i>Corporations Act 2021</i> to allow: (a) ASIC to approve applications from one or more licensees to register on the Financial Advisers Register the same relevant provider; and (b) allow assisted decision-making to be used for any purpose for which ASIC may make decisions in the performance or exercise of ASIC’s functions or powers to register a relevant provider. Start date: from the day after Royal Assent.</li><li>- provide the Australian Accounting Standards Board (AASB) with functions to develop and formulate sustainability standards. It also empowers the Financial Reporting Council to provide strategic oversight and governance functions in relation to the AASB’s and the Auditing and Assurance Standards sustainability standards functions. Start date: from the day after Royal Assent.</li><li>- implements the following recommendations of the Tax Practitioners Board (TPB) Review: update and modernise the objects clause of the <i>Tax Agent Services Act 2009</i>; create financial independence for the TPB from the ATO; require tax practitioners to not employ or use a disqualified entity without the TPB’s approval, or enter an arrangement with a disqualified entity; convert to an annual registration period; and enable the Minister to supplement the existing Code of Professional Conduct to ensure that emerging or existing behaviours and practices by tax practitioners are properly addressed. Start date: various.</li></ul></li></ul>	 <p>Introduced into Senate on 09/03/2023</p> <p>Bill referred to Committee on 09/03/2023</p> <p>Report due 26/05/2023</p>




Legislation (Bills and Acts)	Status
<p><b>Permitting electronic signing</b></p> <ul style="list-style-type: none"><li>• <b>Bill:</b> <a href="#">Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2023</a></li><li>• <b>Start date:</b> on the day after Royal Assent</li><li>• <b>Key measures:</b><ul style="list-style-type: none"><li>- Amends the <i>Corporations Act 2021</i> to enable all documents under the Act to be signed electronically and for certain documents to be sent in either hard copy or electronic form, as well as electronic payments to be used.</li><li>- Amends the ASIC Act to enable certain regulatory bodies to hold virtual hearings and examinations.</li><li>- Also makes minor technical amendments.</li></ul></li></ul> <p>The amendments in this Bill build upon the flexible regulatory practices adopted by regulators before and during the COVID-19 pandemic by extending the range of documents that can be signed electronically and removing unnecessary barriers to the use of technology at hearings and examinations.</p> <p>Note: This Bill builds on a <a href="#">lapsed Bill</a>, which had lapsed when parliament was prorogued on 11 April 2022.</p>	 <p>Introduced into Senate on 07/02/2023</p> <p>Bill referred to Committee for inquiry and report by 03/03/2023</p> <p>Committee recommended the Bill be passed</p>

Legislation (Bills and Acts)	Status
<p><b>Various Tax and Super measures</b></p> <ul style="list-style-type: none"> <li>· <b>Bill:</b> <a href="#">Treasury Laws Amendment (2022 Measures No. 4) Bill 2022</a></li> <li>· <b>Start date:</b> various</li> <li>· <b>Key measures:</b></li> </ul> <p><b>Cryptocurrency not a foreign currency:</b></p> <ul style="list-style-type: none"> <li>- Ensure digital currencies (such as bitcoin) continue to be excluded from the income tax treatment of foreign currency.</li> <li>- Start date: 1 July 2021</li> </ul> <p>*Coalition Senators' recommendations include removing the schedule on the tax treatment of digital currency and reconsidered pending the outcome of Board of Taxation's Review of the Tax Treatment of Digital Assets and Transactions in Australia.</p> <p><b>Super fund financial reporting and auditing:</b></p> <ul style="list-style-type: none"> <li>- Require APRA-regulated super funds to prepare and lodge audited financial reports with ASIC.</li> <li>- Amend the requirements for auditors of registrable superannuation entity (RSE) licensees to ensure auditors of RSE licensees comply with duties and obligations under both the <i>Corporations Act 2001</i> and <i>SIS Act</i>.</li> <li>- Start date: 1 July 2023</li> </ul> <p><b>Taxation of military super benefits:</b></p> <ul style="list-style-type: none"> <li>- Amend various taxation laws to confirm the tax treatment of certain defined benefit pensions following the Full Federal Court decision in <i>Douglas</i> case (<i>FCT v Douglas</i> [2020] FCAFC 220*) and prevent any adverse income tax outcomes for certain veterans adversely impacted by the <i>Douglas</i> decision.</li> <li>- Provide a non-refundable (invalidity pension) tax offset for recipients of invalidity benefits paid in accordance with the Defence Force Retirement and Death Benefits Scheme (DFRDB) and Military Superannuation Benefits Scheme (MSB) to ensure that such military invalidity benefits, which commenced on or after 20 September 2007, are taxed as income streams rather than lump sums so that they do not pay additional income tax because of the <i>Douglas</i> decision.</li> <li>- Start date: On the day after Royal Assent, applicable retrospectively from 1 July 2007</li> </ul> <p>*Refer to <i>Tax &amp; Super Australia/IFPA SDG Notes – June 2021</i>, pages 16 – 18 and <i>SDG Notes – February 2022</i>, pages 13 – 14 for more information about the <i>Douglas</i> case.</p>	 <p>Before Senate</p> <p>Bill referred to Committee for inquiry and report by 03/03/2023</p> <p>Committee recommended the Bill be passed despite Coalition Senators' recommendations*</p>



Regulations (legislative instruments)	Status
<p><b>Director ID relief for resigned directors</b></p> <ul style="list-style-type: none"><li>• <u>Legislative instruments:</u><ul style="list-style-type: none"><li>- <a href="#">LI 2023/1 : Corporations (Eligible Officer Exclusion - non-individuals and resigned directors) Determination 2023</a>: applies to directors appointed under the <a href="#">Corporations Act 2001 (Corporations Act)</a></li><li>- <a href="#">LI 2023/2 : Corporations (Aboriginal and Torres Strait Islander) (Eligible Officer Exclusion - resigned directors) Determination 2023</a>: applies to directors of Indigenous corporations appointed under the <a href="#">Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act)</a></li></ul></li><li>• <b>Start dates:</b><ul style="list-style-type: none"><li>- 1 December 2022 for resigned directors under the <i>Corporations Act</i></li><li>- 1 December 2023 for resigned directors of Indigenous corporations under <i>CATSI Act</i>.</li></ul></li><li>• <b>Key measures:</b><ul style="list-style-type: none"><li>- <b>Resigned directors under <i>Corporations Act</i></b><p><i>LI 2023/1</i> relieves individuals who were directors on or before 31 October 2021 from having to obtain a director ID* by the due date (ie, 30 November 2022) if they have resigned or ceased as directors during the transitional application period (ie, between 4 April 2021 to 30 November 2022). Note this is conditional on the individual not being a director of any company as at 1 December 2022. If those individuals later become a director again (ie, on or after 1 December 2022), they will need to obtain a director ID prior to any subsequent appointments as a company director.</p></li><li>- <b>Resigned directors of Indigenous corporations (under <i>CATSI Act</i>)</b><p><i>LI 2023/2</i> relieves individuals who were directors of indigenous corporations on or before 31 October 2022 from having to obtain a director ID* by the due date (ie, 30 November 2023) if they have resigned or ceased as directors during the transitional application period (ie, between 4 April 2021 to 30 November 2023). Note this is conditional on the individual not being a director of any company as at 1 December 2023. If those individuals later become a director again (ie, on or after 1 December 2023), they will need to obtain a director ID prior to any subsequent appointments as a company director.</p></li></ul></li></ul> <p>*Refer to <i>Tax &amp; Super Australia/IFPA SDG Notes – October 2022</i>, pages 32 and <i>SDG Notes – February 2022</i>, pages 9 - 10 and 17 for more information about the Director ID regime.</p>	 <p>First instrument registered as F2023L00120 on 17/02/2023</p> <p>Second instrument registered as F2023L00121 on 17/02/2023</p>



Exposure draft legislation (Bills and Regulations)	Status
<p><b>Updating the performance test for superannuation in response to <i>Your Future, Your Super</i> review*</b></p> <ul style="list-style-type: none"><li>• <b>Exposure draft regulations:</b> <a href="#">Superannuation Performance Test Regulations 2023</a></li><li>• <b>Start date:</b> updates scheduled to be implemented prior to the August 2023 performance test.</li><li>• <b>Key measures:</b><ul style="list-style-type: none"><li>- amend the testing period, benchmarks and notification letter that trustees of failed products send to members. Key updates include prospectively increasing the testing period from eight to ten years to encourage longer term investment decisions; calibrating key benchmarks to ensure that funds are not unintentionally discouraged from investing in certain assets and adjustments to the notification letter that trustees of failed products send to members.</li><li>- provide minor technical changes to improve accuracy, reduce administrative burden for APRA</li><li>- ensure the test is fit for purpose when it is extended to trustee directed products this year.</li></ul></li></ul> <p>The government will also consider other changes that may be necessary to improve fund performance.</p> <p>Further detail is provided in the <a href="#">explanatory statement</a>.</p> <p>*Refer to 'Your Future, Your Super Review outcomes released' in the Bulletin Board section for further information</p>	 <p>Released for consultation on 04/04/2023</p> <p>Consultation period ends on 02/05/2023</p>



# BULLETIN BOARD



## Consultation on change to concessional tax rate for super balances above \$3 million

### What you need to know

The government has released a [consultation paper](#) seeking feedback on a proposal to reduce the superannuation tax concessions available to individuals whose total superannuation balances (TSB) exceed \$3 million.

This reform is intended to bring the headline tax rate to 30%, up from 15%, for earnings corresponding to the proportion of an individual's TSB that is greater than \$3 million. Earnings relating to assets below the \$3 million threshold will continue to be taxed at 15% or 0% if held in a retirement pension account.

The measure is proposed to commence on 1 July 2025, meaning the first test date will be 30 June 2026.

The proposal was originally announced by the government on 28 February 2023.

### Who is in scope?

The threshold for determining whether an individual is in scope is \$3 million. The threshold applies to individuals of all ages, even if an individual is not eligible to access their superannuation benefits (i.e. under preservation age or under 65 and still working).

In practice this means if on 30 June 2026 an individual's TSB is less than \$3 million, they will not be impacted. If however on 30 June 2026 an individual's TSB is more than \$3 million, they will be subject to additional tax on calculated earnings.

Individuals can identify whether they will be subject to the new tax by reference to their TSB at the end of each financial year. The ATO calculates all individuals' TSBs annually using information provided by superannuation funds. If an individual has more than one superannuation account, their TSB represents the combined value of all accounts as at 30 June each year. Individuals can check their TSB through ATO online services which can be accessed via myGov.

As all superannuation funds, including SMSFs, already report the required information to calculate TSBs, this avoids imposing additional reporting obligations on funds and members. SMSFs with unlisted assets, such as real property, already report market valuations for these assets on an annual basis for the purposes of calculating the TSB. This measure will not require additional valuation reporting by SMSFs.

The \$3 million threshold will not be indexed. This is similar to other thresholds in the superannuation law, such as the Division 293 threshold or the low-income superannuation tax offset.

The threshold applies to individuals. It is not shared between spouses or family members, or between other individuals who have interests in the same fund, such as in a SMSF.

**Example – Balance not affected by changes**

Debbie has a balance in her superannuation fund of \$150,000 at 30 June 2025, which is the average superannuation balance.

Debbie's balance at 30 June 2026 is \$165,000.

The proposed changes will not apply to Debbie because her TSB is less than \$3 million.

**Example – SMSF balance more than \$3 million, shared across two members**

Joe and Sally are both members of the same SMSF. They have no other superannuation accounts.

The investments in the SMSF are shared between both members.

The total value of their investments in the SMSF at 30 June 2026 is \$3.2 million. Of this, \$2 million is allocated to Joe's accounts and \$1.2 million is allocated to Sally's accounts.

Joe's TSB is therefore \$2 million. Sally's TSB is \$1.2 million.

Neither Joe nor Sally has a TSB more than \$3 million. Neither of them will be impacted by the changes.

**Example – Balance across multiple accounts more than \$3 million**

Melanie is 62 and has three superannuation accounts with the following balances at 30 June 2026:

- A pension account in her SMSF with \$1 million
- A second pension account in her SMSF with \$700,000
- An accumulation account in an APRA-regulated fund with \$2 million

Melanie's TSB captures all of her superannuation accounts.

Her TSB on 30 June 2026 is \$3.7 million. As this is more than \$3 million, Melanie will be required to pay additional tax.

The tax will only be applied to the earnings on her superannuation balance over \$3 million.

Melanie's superannuation balance over \$3 million is \$700,000 (\$3.7 million - \$3 million). The earnings from \$700,000 will attract additional tax.



## Calculating tax liability

Once it has been determined that an individual's TSB exceeds the \$3 million threshold for a year, earnings relating to the part of their TSB over \$3 million will attract an additional 15% tax.

The calculation involves three steps.

### Step 1. Calculate the earnings

Under the first step, earnings in relation to an individual's total superannuation interests are calculated as the difference between their TSB for the current year (adjusted for withdrawals and contributions) and their TSB from the previous financial year.

$$\text{Earnings} = (\text{TSB Current Financial Year} + \text{Withdrawals} - \text{Net Contributions}) - \text{TSB Previous Financial Year}$$

For example, on 30 June 2025, Sarah's TSB is \$5.5 million. On 30 June 2026, Sarah's TSB increases to \$6 million. Sarah makes a withdrawal of \$150,000 during the year. Sarah's calculated earnings are \$650,000 ( $[\$6 \text{ million} + \$150,000] - \$5.5 \text{ million}$ ).

If the calculated earnings in the first step are negative, this amount is carried forward and can be used to offset future earnings for this purpose. In this case, no further calculations would be required.

### Step 2. Calculate the proportion of earnings over \$3 million

Under the second step, earnings are then attributed to superannuation balances of more than \$3 million on a proportional basis. The proportion is equal to the proportion of the TSB over \$3 million.

$$\text{Proportion of Earnings} = \frac{\text{TSB Current Financial Year} - \$3 \text{ million}}{\text{TSB Current Financial Year}}$$

For example, Sarah's TSB on 30 June 2026 is \$6 million. The proportion of her TSB more than \$3 million is 50% ( $[\$6 \text{ million} - \$3 \text{ million}] \div \$6 \text{ million}$ ). In this case 50% of the calculated earnings from step 1 will attract the additional tax.

### Step 3. Calculate how much additional tax is to be paid

Finally, a flat tax rate of 15% is applied to the proportion of earnings attributable to an individual's balance over \$3 million.

$$\text{Tax Liability} = 15\% \times \text{Earnings} \times \text{Proportion of Earnings}$$

For example, Sarah's calculated earnings are \$650,000, however only 50% of these earnings are attributed to her TSB more than \$3 million and attract the additional 15% tax.

Sarah's tax liability is \$48,750 ( $15\% \times \$650,000 \times 50\%$ ).

## Calculating earnings

Note the proposed earnings calculation under Step 1 above involves three key components:

1. TSB – An individual's TSB is the total value of accumulation phase and retirement phase interests plus in-transit rollovers and certain outstanding limited recourse borrowing arrangements (LRBA)



less structured-settlement contributions.

2. Withdrawals – This is intended to capture amounts which have been removed from superannuation and are not reflected in the closing TSB.
3. Net Contributions – This is intended to capture amounts that were added to superannuation and are reflected in the closing TSB, net of any contributions tax.

Some modifications to these inputs may be required for the purposes of calculating earnings where the reliance on the TSB in specific circumstances generates unintended outcomes.

It is also important to note that the proposed method of calculating earnings captures both realised and unrealised gains (as a member's TSB includes the market value of the investments on 30 June). In some cases, the earnings that are calculated for a year will be negative. Negative earnings will be able to be carried forward and used to offset future earnings. Further details about negative earnings are provided below.

#### Example – Calculating earnings

Esther's TSB at 30 June 2025 is \$3.5 million. On 30 June 2026 her TSB has increased to \$4 million. She makes no contributions or withdrawals during the 2025-26 financial year.

Esther's earnings are calculated by subtracting her TSB from the previous financial year from her current TSB.

$$\text{Earnings} = \$4 \text{ million} - \$3.5 \text{ million} = \$500,000.$$

#### Example – Calculating earnings with a withdrawal

Carlos is 69 and retired. He has a TSB of \$9 million on 30 June 2025, which grows to \$10 million on 30 June 2026. He draws down \$150,000 during the year and makes no additional contributions to the fund.

Carlos's earnings are calculated by adding back the value of his withdrawals to his closing TSB and then taking the difference between his opening and closing TSB.

$$\begin{aligned} \text{Earnings} &= (\text{TSB Current Financial Year} + \text{Withdrawals} - \text{Net Contributions}) \\ &\quad - \text{TSB Previous Financial Year} \end{aligned}$$

$$\text{Earnings} = (\$10 \text{ million} + \$150,000) - \$9 \text{ million} = \$1.15 \text{ million}$$

#### Example – Calculating earnings with a contribution

Amanda is 48 and working full-time on a salary of \$150,000. She has no other income. Amanda has a TSB of \$4 million at 30 June 2025, which grows to \$4.5 million at 30 June 2026. Amanda makes total concessional contributions to superannuation of \$27,500. These contributions are taxed at 15%. Her after-tax (net) contributions are \$23,375 (85% x \$27,500).

Amanda's earnings are calculated by subtracting the value of her contributions after tax, from her closing TSB, then taking the difference between her opening and closing TSB.

$$\begin{aligned} \text{Earnings} &= (\text{TSB Current Financial Year} + \text{Withdrawals} - \text{Net Contributions}) \\ &\quad - \text{TSB Previous Financial Year} \end{aligned}$$

$$\text{Earnings} = (\$4.5 \text{ million} - \$23,375) - \$4 \text{ million} = \$476,625$$



## Adjustments where previous TSB is less than \$3 million

It is necessary to adjust the calculation where an individual's previous year TSB is less than \$3 million. This may occur where an individual becomes liable for the additional tax because their TSB has grown and exceeded the \$3 million threshold for the first time. The adjustment is required to ensure that the additional tax is only applied to earnings in superannuation from the part of the TSB more than \$3 million.

If an individual's TSB from the previous financial year is less than \$3 million and their TSB for the current financial year (after adjusting for withdrawals and contributions) is more than \$3 million, the previous financial year's TSB will be adjusted to equal \$3 million for the purposes of calculating earnings. This approach ensures that any growth in the fund that occurs below the \$3 million threshold is not counted as earnings.

No adjustments are required where both balances are less than \$3 million as in such cases individuals will not be within scope of the additional tax.

### Example – Calculating earnings where opening balance is below \$3 million

Tim has an SMSF with a TSB on 30 June 2025 of \$2.8 million. He makes \$10,000 of concessional contributions to his superannuation fund over the 2025-26 financial year. After the 15% contributions tax, Tim's net contributions are \$8,500. Tim has some strong investments in his SMSF and his TSB increases to \$3.2 million by 30 June 2026.

Tim's earnings are calculated by subtracting the value of his contributions after tax, from his closing TSB, then taking the difference between his opening and closing TSB. As Tim's opening TSB is less than \$3 million, for the earnings calculation this will be replaced with a \$3 million value. This is to ensure that the earnings calculation only captures the earnings for the part of his TSB over \$3million.

$$\text{Earnings} = (\text{TSB Current Financial Year} + \text{Withdrawals} - \text{Net Contributions}) - \text{TSB Previous Financial Year}$$

$$\text{Earnings} = (\$3.2 \text{ million} - \$8,500) - \$3 \text{ million} = \$191,500$$

## Negative earnings

Investment losses or fund expenses could cause an individual's TSB to be less at the end of a financial year than it was at the end of the previous financial year. Reductions of this kind are recognised in the earnings calculation and will mean that individual has negative earnings for the financial year. Where this occurs, the amount of the negative earnings will be able to be used to offset positive earnings in future years. This will be done on a gross basis (that is, before proportioning of earnings occurs).

Negative earnings can be applied against any future positive earning, would not expire and could be applied over multiple years. Capital losses that are reflected in negative earnings can be used to offset any future positive earnings that relate to income, including rent and interest.

**Example – Negative earnings****2025-26 Financial Year**

Consider the alternative scenario where Carlos's TSB on 30 June 2026 falls from \$9 million to \$8 million. He still draws down \$150,000.

His earnings are calculated as  $(\$8 \text{ million} + \$150,000) - \$9 \text{ million} = -\$850,000$ . Carlos has negative earnings for the year of \$850,000 and is not required to pay any additional tax.

**2026-27 Financial Year**

By 30 June 2027, Carlos' balance has recovered to \$8.5 million and he has made a further \$150,000 in withdrawals.

His earnings for the second year are calculated as  $(\$8.5 \text{ million} + \$150,000) - \$8 \text{ million} = \$650,000$ .

Carlos carries forward his loss of \$850,000 from the previous financial year. He uses this to offset the \$650,000 earnings from the 2026-27 financial year. Carlos does not pay any tax in the 2026-27 financial year. His residual loss of \$200,000 is carried forward for future years.

## Adjustments where current TSB is less than \$3 million

Similar to the adjustments where a previous year TSB is less than \$3 million, an adjustment would be made where the current TSB (after factoring in withdrawals and net contributions) is less than \$3 million. This may occur where investment losses cause an individual's balance to fall below the threshold.

In this case the current financial year's TSB will be adjusted to equal \$3 million for the purposes of calculating earnings. Making this adjustment to closing balances ensures that individuals who drop below the threshold are able to have negative earnings recognised for future years (in the event that their balance grows again to exceed the threshold).

## How will the tax be levied?

Consistent with the approach taken for excess contributions and Division 293 tax, individuals would have the option of paying their liability either by releasing amounts from one or more of their superannuation interests or by paying the liability from funds held outside of superannuation.

It is noted that in managing a superannuation fund's liquidity, including for both SMSFs and APRA-regulated funds, trustees must understand and comply with requirements in the superannuation laws. This includes the requirement to formulate, review regularly and give effect to an investment strategy which takes into account diversification of assets in the fund and the liquidity of the fund's investments, having regard to its expected cash flow requirements and the ability of the fund to discharge existing and prospective liabilities.

**Example – Paying a tax liability**

Continuing with the example of Carlos (positive earnings scenario), the 15% tax is applied to his calculated earnings of \$805,000. This results in tax payable of \$120,750.

Carlos receives the notice of his tax liability from the ATO. He has the choice to pay this amount using amounts in his personal name or release money from his superannuation account. He elects to pay the amount from his superannuation account by completing the election form. The ATO requests the release of \$120,750 from Carlos' superannuation fund.



### Example – Paying a tax liability when there are multiple accounts

Recall the example of Melanie who is 62 and has multiple superannuation accounts with the following balances at 30 June 2026:

- A pension account in her SMSF with \$1 million
- A second pension account in her SMSF with \$700,000
- An accumulation account in an APRA-regulated fund with \$2 million.

Melanie receives a notice from the ATO outlining calculated earnings of \$370,000 resulting in tax payable of \$55,500.

Melanie has the choice to pay the tax using amounts in her personal name or release money from one or more of her superannuation accounts. Melanie elects to pay the amount from her accumulation account by completing the election form. The ATO requests the release of \$55,500 from the superannuation fund where Melanie's accumulation account is held.

## Defined benefit interests

The government intends for broadly commensurate treatment to apply to defined benefit interests relative to non-defined benefit interests. This will require modifications to the general approach outlined above as defined benefit interests have different characteristics to defined contribution schemes.

There are broadly two key areas to resolve. Firstly, how defined benefit interests are valued for the purposes of the \$3 million threshold and secondly, an approach to broadly commensurately tax defined benefit interests in line with the additional tax on earnings in accumulation interests.

As a starting point, the value of defined benefit interests should be counted towards an individual's TSB, which is then tested against the \$3 million threshold. Even where the value of their defined benefit interests is less than the proposed \$3 million threshold, an individual may also hold other superannuation interests (for example in an accumulation account with another superannuation fund).

To ensure commensurate treatment is provided in the most appropriate way, the government will consult closely with those funds that have defined benefit interests (for example, State public sector schemes and providers of corporate schemes).

For further information refer to the [consultation paper](#).

## Constitutionally protected persons

Constitutionally Protected Funds (CPF) are not able to be subjected to tax directly due to constitutional limitations. This applies whether the CPF is a defined benefit arrangement or a non-defined benefit arrangement. Certain individuals who are members of CPFs may also be subject to further constitutional protections from amounts relating to their CPF interests. As such, modifications to preserve this tax-exempt status may be required. This group is generally referred to as 'constitutionally protected persons'.

Regardless of any modifications in respect of the CPF interests of constitutionally persons, such interests will still need to be counted as part of their TSB. This is necessary to ensure that earnings on any other superannuation interest that such a person holds outside of their CPF are appropriately in scope of proposed tax.



## Reporting process for funds

The proposed approach is intended to leverage existing reporting requirements to minimise the regulatory impact on superannuation funds and members. It is expected some additional reporting by superannuation funds may be required to support the ATO in calculating the tax liabilities. This would be expected to include reporting on benefit payments by APRA-regulated funds noting SMSFs already report benefit payments at the member level on an annual basis.

Where additional information is required, it is proposed the ATO would receive this information directly from superannuation trustees. This could be done through changes to the general reporting requirements, specific requests for information by the ATO, or a combination of both. Targeted reporting obligations are preferred to ensure that the costs of complying with the new proposal are not borne by all superannuation members. Where a superannuation fund has no members with a TSB greater than \$3 million, they will not be impacted by this proposal.

The specific changes to reporting requirements will depend on the methodology for calculating earnings.

## Consultation questions

The consultation questions outlined within the paper are:

1. Do you consider any further modifications are required to the TSB calculation for the purposes of estimating earnings? If so, what modifications should be applied?
2. What types of outflows (withdrawals) should be adjusted for and how?
3. What types of inflows (net contributions) should be adjusted for and how?
4. Do you have an alternative to the proposed method of calculating earnings on balances above \$3 million? What are the benefits and disadvantages of any alternatives proposed including a consideration of compliance costs, complexity and sector neutrality?
5. What changes to reporting requirements by superannuation funds would be required to support the proposed calculation or any alternative calculation methods?
6. Do you consider any modifications are required to the proposed proportioning method? If so, what modifications should be applied?
7. Do you have an alternative to the proposed proportioning method? What are the benefits and disadvantages to any alternatives, including a consideration of compliance costs, complexity and sector neutrality?
8. Does the proposed methodology for determining the tax liability create any unintended consequences?
9. Do the proposed options for paying liabilities create any unintended consequences?
10. Do the existing valuation methods for defined benefit interests in the pre-pension phase (under the existing TSB definition) work appropriately for the purpose of calculating superannuation balances over \$3 million?
11. Do the existing valuation methods for defined benefit interests in the pension phase provide the appropriate value for calculating earnings under the proposed reforms?
12. Are there any alternative valuation methods that should be considered for either pre-pension or pension phase defined benefit interests?



13. Are there any preferred options in providing commensurate treatment for defined benefit interests?
14. What are the benefits and disadvantages to any alternatives?
15. What would be the most effective method for collecting the required information? What are the benefits and disadvantages for the method identified, including a consideration of compliance costs, complexity and sector neutrality?

## Consultation process

The closing date for submissions is 17 April 2023.

Source: [Treasury website, Better targeted superannuation concessions, 31 Mar 2023](#)



## Consultation on legislating the objective of superannuation

### What you need to know

The government has released a [consultation paper](#) that seeks feedback on framing an objective of superannuation, and the benefits of the objective and its practical application.

The objective of superannuation is a foundational issue, and the Government recognises that there are a broad range of views on how this should be framed. This consultation paper provides context about the history of Australia's superannuation system, the rationale for enshrining the objective of superannuation in law and provides alternatives to the suggested sentence structure of the objective. It also sets out the government's proposed definition of objective and how a legislated objective could improve accountability and transparency in policy development.

### Summary

Australia's superannuation system provides broader benefits to the economy and financial system. The government states that for these broad benefits of superannuation to be maximised and for superannuation to best support higher living standards for Australians over time, it is critical for there to be a clear, shared understanding of the objective of superannuation.

The government also states that legislating an objective of superannuation will provide stability and confidence to policy makers, regulators, industry, and the community that changes to superannuation policy will be aligned with the purpose of the superannuation system. It will also ensure members and funds have a shared understanding of the purpose of superannuation throughout both the accumulation and retirement phases. For the retirement phase, an objective can support a greater focus for funds on how income is provided in retirement and encourage individuals to think about their superannuation as an asset to be drawn down on.

Legislating an objective of superannuation is intended to complement the long-standing legal and regulatory obligations of trustees of superannuation funds to have in place investment strategies that deliver the best outcomes for their members.

### Proposed objective

This consultation paper is seeking feedback on the following proposed objective:

*The objective of superannuation is to deliver income for a dignified retirement, alongside government support, in an equitable and sustainable way.*



## Practical application

It is proposed that the objective of superannuation would be established in legislation. This is to ensure the stability of the objective and provide certainty to regulators, policy makers, and Government of the longevity of the objective.

The location of the objective in legislation could be in a new stand-alone Act or in existing superannuation legislation, such as the *SIS Act*.

The objective would be forward-looking and could be used as a common yardstick to consider prospective policy changes to the superannuation system. For example, how a proposed policy does or does not meet the legislated objective could be raised as part of consultation on policy or draft legislation.

It is not intended to impact regulatory supervision activities and while aligned with, it would be separate from, trustees' fiduciary duties such as the best financial interests duty and the sole purpose test. As the objective is not intended to guide the regulation of trustees' conduct, it would not change trustee obligations.

## Accountability

It is envisaged that existing policy development and parliamentary scrutiny processes would provide checks and balances ensuring that changes to the superannuation system are compatible with the objective.

## Consultation questions

The consultation questions outlined in the paper are:

1. What do you see as the practical benefits or risks associated with legislating an objective of Australia's superannuation system?
2. Does the proposed objective meet your understanding of the objective of the superannuation system in Australia?
3. Is the proposed approach to enshrining the objective in legislation appropriate? Are there any alternative ways the objective could be enshrined?
4. What are the practical costs and benefits of any alternative accountability mechanisms to the one proposed?

## Consultation process

Submissions closed on 31 March 2023.

**Source:** [Treasury website, Legislating the objective of superannuation, 20 Feb 2023](#)



## Our submission on legislating the objective of superannuation

### What you need to know

On 28 March 2023, the Institute of Financial Professionals Australia (IFPA) submitted its submission on legislating the objective of superannuation.

Our association does not support legislating the objective of superannuation.

### Key issues highlighted in our submission

The following is a summary of the key issues raised and does not reflect the full content of our submission.

While we fully support consistency in future policy making around superannuation, which should broadly be aimed at providing income/benefits for individuals and their dependents in retirement, we do not support legislating the objective of superannuation as proposed in the consultation paper.

We do not believe legislating the objective will achieve any real purpose. The proposed objective would not in any way be binding on current or future policy makers / governments. The consultation paper notes that:

*“Legislating an objective of superannuation will provide stability and confidence to policy makers, regulators, industry, and the community that changes to superannuation policy will be aligned with the purpose of the superannuation system.”*

However, there is no accompanying legislative architecture that compels future governments to have any regard to the proposed objective, or even make compulsory a statement of compatibility around how any new superannuation legislation aligns with the new objective. Statements of compatibility will at least ensure that governments turn their mind to how any new legislation aligns with the objective of superannuation, and justify how this is the case. In short, this would provide at least some form of accountability.

Further, the proposed legislation of enshrining an objective is not binding. That said, we query whether the current parliament can even constitutionally bind a future parliament. This further supports the futile nature of the proposed purpose.

All told, we do not believe the proposed objective will achieve the above purpose (that future changes to the law will align with the legislated purpose of superannuation) and therefore question the utility of the exercise in the first place.

Legislating the proposed objective comes with risk. The proposed objective is in our view loaded with terms that are open to interpretation or manipulation by future governments. For example, a ‘dignified retirement’ means different things to different people depending on the lifestyle to which they are accustomed. Further, whether the superannuation system is ‘sustainable’ may be subject to the broader budgetary and fiscal position of the Commonwealth at any given time. If an objective is to be legislated, it should be tightly drafted, and less open to interpretation than the objective proposed.



We note that when legislating an objective of superannuation was first proposed, it was initially intended as a shield to protect superannuation against tinkering. We fear the objective might be used as a sword if policy makers so that once an individual reached the level that the government thinks is enough superannuation for a 'dignified retirement', then anything above that is fair game. This can be seen by the government's newly proposed tax on superannuation balances above \$3 million.

We believe the answer to what the purpose of superannuation is for already exists by way of the sole purpose test. In our view, the core objective of superannuation is better captured by the sole purpose test which simply requires that superannuation funds are maintained for the purpose of providing retirement benefits to its members, or to their dependents if a member dies before retirement.

As the sole purpose test already exists, it could be revisited to tighten up existing preservation rules if access to superannuation is currently thought to be 'too easy'. This will ensure we have a more targeted measure that stops access to early access schemes.

It is also our view that formulating an objective in isolation without factoring in the three key pillars of the retirement income system is flawed. Any legislated superannuation objective aimed at influencing policy makers moving forward, must be considered in the context of the overall retirement income system encompassing the other pillars – it should not be formulated in isolation.

Our full submission can be read [here](#).

In addition to the above, note that on 31 March 2023, our association along with two other associations also wrote to Treasury on legislating the objective of superannuation. The Joint Bodies do not support the government's proposed objective or the need to legislate it.

The Joint Bodies making this request were:

- Chartered Accountants Australia & New Zealand
- Institute of Financial Professionals Australia (IFPA)
- Institute of Public Accountants

The joint submission can be read [here](#).

**Source:** [IFPA submission on the consultation paper: legislating the objective of superannuation and IFPA media release, 28 Mar 2023.](#)



## Our submission on non-arm's length expense rules for superannuation funds

### What you need to know

On 21 February 2023, the Institute of Financial Professionals Australia (IFPA) submitted its submission on the non-arm's length expense (NALE) rules for superannuation funds.

Our association does not support the government's proposed solution to address NALE breaches and proposes alternative measures.

We believe that a factor-based approach which leads to an effective tax rate of 225% is not the correct way to deal with a general expense breach and should not be legislated as the proposal is inappropriate, extremely disproportionate, too high a penalty and is not consistent with other areas of the tax law. Our view is that other changes should be made to the law to deal with non-arm's length dealings.

### Recommended/suggested legislative changes

The key changes that we are advocating for include:

- Removing the factor-based approach which leads to an effective tax rate of 225%
- NALI and NALE rules should be made proportionate
- Applying a de minimis rule
- Allowing trustees the opportunity to rectify unintended errors
- NALE should not be retrospective.

The full submission detailing our proposed range of alternative measures can be read [here](#).

**Source:** [IFPA submission on non-arm's length expense rules for superannuation funds, 21 Feb 2023](#)



## Final Report of Quality of Advice Review released

### What you need to know

On 8 February 2023, the government released for public consultation its [final report](#) of the Quality of Advice (QOA) Review.

In releasing the QOA review, the government said that it wants to see an industry with strong professional standards that's accessible for more Australians.

The final report has been welcomed by industry associations but dismissed by many consumer groups. Concerns have also been raised that the report does not recommend any changes to the current Australian financial services (AFS) licensing regime that applies to SMSF services provided by accountants, failing to address the role accountants can play in financial planning.

### Purpose of the review

The purpose of the QOA Review is to improve the accessibility and affordability of quality financial advice.

### Background

Consistent with specific recommendations in the final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, the then government agreed to undertake a review on the effectiveness of measures to improve the quality of financial advice.

The QOA Review commenced on 11 March 2022, when the former government released the terms of reference for the review and announced the appointment of Ms Michelle Levy as the independent reviewer.

### Recommendations

The report contains a total of 22 recommendations across 13 areas for changes to the regulatory framework that apply to the provision of financial advice, including the controversial proposal to replace the 'best interests' duty with an obligation to provide 'good advice'. The 'good advice' duty would mean advisers would have a statutory fiduciary duty to act in the best interests of their clients when they give advice, which would align with the legal protections in the Australian Consumer Law. It's worth noting that six of the 22 recommendations are related to the direct provision of advice to consumers.

For a complete list of all recommendations, refer to the [final report](#).

**Source:** [Treasury website, Quality of Advice Review - Final Report, 8 Feb 2023](#)



## Your Future, Your Super Review outcomes released

### What you need to know

The government has [responded](#) to the outcomes of the [review of the Your Future, Your Super laws](#) (the review) and released [exposure draft regulations](#) to update the annual superannuation performance test following the results of the review (also see the *Legislation* section for further information).

### Purpose of the review

The purpose of the review was to identify any unintended consequences of these laws which might be leading to poor outcomes for members.

### Key aspects

The review considered whether there have been any unintended consequences and implementation issues arising from any of the four elements of the *Your Future, Your Super* measures:

- Performance test
- YourSuper comparison tool
- Stapling
- Best financial interests duty.

The feedback from stakeholders was primarily focused on the annual superannuation performance test which is intended to hold trustees to account to maximise returns to members. The Government will address several unintended consequences of the test identified in the review.

Furthermore, the government has confirmed it is committed to stapling, the eradication of unintended duplicate accounts, and will work with Treasury, the regulators and stakeholders to deliver on its goal.

**Source:** [Assistant Treasurer, Media release, Your Future, Your Super review outcomes, 4 April 2023](#) and [Treasury website, Review of Your Future, Your Super Measures, Consultation Paper](#)



## Consultation on proposed improvements to Corporations and Financial Services Law

### What you need to know

On 6 March 2023, the government released for consultation [two sets of exposure draft regulations](#) (the Regulations) to help reduce the complexity of Australia's corporations and financial services laws, by making Treasury portfolio regulations more adaptive, efficient, and navigable within existing policy settings.

### Background

The draft regulations support the regulatory stewardship of Treasury portfolio legislation. The government pursues regular improvement and maintenance opportunities under this program to ensure Treasury laws remain current and fit-for-purpose.

### Key aspects

The Regulations contribute to implementing recommendations from the Australian Law Reform Commission's (ALRC's) Interim Reports [A](#) and [B](#) from its Review of the Legislative Framework for Corporations and Financial Services Regulation ([ALRC's Review](#)).

The Regulations make consequential changes required due to the Amendment Act's:

- expanding section 9 of the *Corporations Act* to create a single glossary; and
- removing redundant definitions.

In addition to the consequential amendments, the Regulations make other improvements to simplify the Corporations Regulations relating to the use of definitions. These include clarifying the meaning of defined terms, using consistent headings for definitions sections and other minor amendments to improve navigability and make the Corporations Regulations easier to read.

### Consultation process

Submissions closed on 3 April 2023.

**Source:** [Treasury website, Additional improvements to Corporations and Financial Services Law, 06 Mar 2023](#)



## Review of the Regulatory Framework for managed investment schemes

### What you need to know

The government has [announced](#) that Treasury will review the managed investment schemes (MIS) regulatory framework.

Treasury will release a public consultation paper by mid-year and consult with industry before reporting findings to government by early 2024.

### Background

The regulatory framework for MIS was introduced more than twenty years ago. Since that point, there have been a number of significant scheme failures (including the Sterling Income Trust, Trio Capital and Timbercorp), which have resulted in significant waste of public funds.

The review will examine whether the regulatory framework is fit-for-purpose, identify potential gaps, and consider what enhancements can be made to reduce undue financial risk for investors.

### Key aspects

The review will consider reform options, focusing on:

- whether the thresholds that determine whether an investor is a retail or wholesale client remain appropriate
- whether certain MIS investments should be able to be marketed and sold to retail investors
- the various roles and obligations of responsible entities and whether the governance, compliance and risk management frameworks for MIS are appropriate; and
- interactions between Commonwealth and State laws when regulating real estate investments by MIS (including issues arising in relation to the failure of the Sterling Income Trust).

Treasury will also consider:

- whether 'investor rights' for people who invest in MIS are appropriate
- liquidity requirements for MIS; and
- whether an insolvency regime is required for MIS

The review will not consider:

- whether MIS should be brought within the scope of the Compensation Scheme of Last Resort (CSLR)
- litigation funding schemes
- time-sharing schemes
- issues relating to the tax treatment of MIS and investors



- any changes to the corporate collective investment vehicle regime; and
- the rights and obligations of custodians.

**Source:** [Department of Treasury Media Release, the Hon Stephen Jones MP \(Assistant Treasury and Minister for Financial Services\), Review of the Regulatory Framework for managed investment schemes, 8 March 2023](#)



## AFCA opens consultation on proposed changes to its Rules and Operational Guidelines

### What you need to know

The Australian Financial Complaints Authority (AFCA) is opening [public consultation](#) on proposed changes to the rules that govern its work helping consumers and financial firms to resolve complaints.

### Background

AFCA operates a single external complaints resolution scheme (the 'AFCA scheme') for consumers and small businesses that have a complaint about a Financial Firm, as an alternative to tribunals and courts. AFCA considers complaints that previously would have been handled by the Financial Ombudsman Service, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal.

AFCA's Rules are approved by ASIC and explained in more detail in the [Operational Guidelines](#).

The proposed changes, and associated amendments to its Operational Guidelines, are largely designed to implement recommendations of the Treasury-led Independent Review of AFCA.

The aim is to ensure AFCA continues to deliver fair, independent, efficient and effective solutions for financial disputes.

### Summary of proposed changes

AFCA proposes changes to its Rules and Operational Guidelines in the following general areas, to address the Independent Review Report recommendations:

- The management of unreasonable and inappropriate conduct within the scheme, to strengthen AFCA's ability to deliver procedural fairness, to manage the conduct of fee paid representatives who engage with the scheme, and to build greater efficiency and timeliness in complaint handling.
- Dealing with complaints where an appropriate offer of settlement has been made or where issues in dispute have been previously settled.
- Excluding complaints lodged by professional or sophisticated investors unless exceptions apply.
- To enhance the visibility, accessibility and performance of the Forward Looking Review mechanism.
- Clarity about the effect of AFCA determinations and how the slip rule works to ensure greater transparency and understanding of AFCA's decision making. This is designed to ensure that complaints are finalised in a more timely and efficient manner.
- Minor changes to definitions and language to update certain areas of the Rules arising from legislative change, to give greater clarity and transparency of the scheme's operation overall. Minor changes to clarify AFCA's reporting and transparency obligations.



## Consultation process

The closing date for submissions is 22 May 2023.

Source: [AFCA website, AFCA opens consultation on proposed Rules changes, 27 Mar 2023](#)



## ASIC launches court action against alleged greenwashing

### What you need to know

ASIC has launched its first court action against alleged greenwashing conduct, commencing civil penalty proceedings in the Federal Court against Mercer Super (Mercer) for allegedly making misleading statements about the sustainable nature and characteristics of some of its superannuation investment options.

### What is greenwashing in investments?

According to ASIC, 'greenwashing' in relation to investments is the practice of misrepresenting the extent to which a financial product or investment strategy is environmentally friendly, sustainable or ethical.

ASIC has stated that greenwashing is a concern because it distorts relevant information that a current or prospective investor might require in order to make informed investment decisions. It can erode investor confidence in the market for sustainability-related products and poses a threat to a fair and efficient financial system.

### Background

Action against greenwashing is one of ASIC's 2023 Enforcement Priorities. ASIC has issued over \$140,000 in infringement notices in response to concerns about alleged greenwashing. The proposed action against Mercer is ASIC's first court action in this regard.

This proceeding is also the first time ASIC has commenced court action after legislative amendments, arising from the Financial Services Royal Commission, enhanced ASIC's powers to take action regarding a broader range of superannuation trustee conduct.

ASIC alleges Mercer made statements on its website about seven 'Sustainable Plus' investment options offered by the Mercer Super Trust, of which Mercer is the trustee. These statements marketed the Sustainable Plus options as suitable for members who 'are deeply committed to sustainability' because they excluded investments in companies involved in carbon intensive fossil fuels like thermal coal. Exclusions were also stated to apply to companies involved in alcohol production and gambling.

However, ASIC alleges members who took up the Sustainable Plus options had investments in companies involved in industries the website statements said were excluded (see the [ASIC's website](#) for further information).

In doing so, ASIC alleges Mercer made false and misleading statements and engaged in conduct that could mislead the public.

ASIC is seeking declarations and pecuniary penalties from the Court. ASIC also seeks injunctions preventing Mercer from continuing to make any of the alleged misleading statements on its website, and orders requiring Mercer to publicise any contraventions found by the court.

The date for the first case management hearing is yet to be scheduled by the Court.



**Source:** [ASIC website, Media Release, 23-043MR ASIC launches first Court proceedings alleging greenwashing, 28 Feb 2023](#) and [ASIC website, How to avoid greenwashing when offering or promoting sustainability-related products, Information sheet 271 \(INFO 271\)](#)



## SMSF auditors competency standards class order to sunset

### What you need to know

ASIC has proposed to allow class order [\[CO 12/1687\]](#) *Competency Standards for Approved SMSF Auditors* to expire ('sunset') on 1 April 2023.

ASIC has formed the view that the class order is no longer required and does not form a necessary and relevant part of the legislative framework. ASIC disqualifies and suspends SMSF auditors for not complying with auditing and independence standards as required by s128F of the SIS Act.

### Background

The class order is made under s128Q(1) of the SIS Act and sets out competency standards for approved SMSFs auditors. The competency standards require approved SMSF auditors to have knowledge of laws applying to those auditors.

Approved SMSF auditors must also comply with the auditing and assurance standards and independence requirements under s128F of the SIS Act.

### Making a submission

SMSF auditors adversely affected by the expiry of *CO 12/1687* or who had feedback in relation to it could make a submission by 10 March 2023.

**Source:** [ASIC website, 23-030MR ASIC will allow SMSF auditors competency standards class order to 'sunset', 17 Feb 2023](#)



## Court cases highlight lost trust deed implications

### What you need to know

The following two recent court cases handed down by the Supreme Court of Victoria and the Victorian Court of Appeal respectively have highlighted the importance of securing the safety of trust deeds:

- 1) [Ellasil Pty Ltd \[2023\] VSC 69](#) ('Ellasil')
- 2) [Vanta Pty Ltd v Mantovani \[2023\] VSCA 53](#) ('Vanta').

The *Ellasil* case involves the lost deed of an SMSF whereas the *Vanta* case involves the missing deed of a discretionary trust. While *Vanta* is not a superannuation case, the outcome for this case could also apply to SMSFs with lost trust deeds.

As is the case in every lost deed situation, the issues that arose in these recent court cases have highlighted the serious consequences that can flow from a failure of a trustee to maintain the full original trust deed. All of these issues would have been avoided had the trustee ensured that the original trust deed was kept securely and complied with.

SMSF trustees with lost trust deeds should strongly consider addressing this situation to avoid administrative problems and serious legal challenges. Trustees in this situation may seek prospective guidance from the relevant supreme court or adopt other viable options.

In addition to the above, note the case of *Ellasil* also involved an application by the corporate trustee of the SMSF (Ellasil Pty Ltd) seeking orders and directions as to the validity of death benefit nominations made by members of the fund. The *Ellasil* case has been discussed further below.

## Facts

In the case of *Ellasil*, the SMSF was first established in 1979 but the original fund trust deed (from 1979) could not be located. Subsequent amendments of the trust deed were however available. Other documents relating to the conduct and administration of the fund such as minutes of meetings, financial statements and a deed of appointment which purported to appoint Ellasil as a corporate trustee of the fund were also available.

Several other documents relating to the conduct and administration of the fund are also available. This includes minutes of meetings, financial statements and a deed of appointment dated 1 July 1996 which purports to appoint Ellasil as trustee of the fund. In addition, various death benefit nominations purportedly made by the members of the fund over the course of its operation are in evidence.

Broadly, in light of the unavailability of the original deed of trust to the fund and issues surrounding the subsequent deeds and death benefit nominations, Ellasil seeks orders and directions as to the validity of the deed which appoints it as trustee of the fund, and of the later deed of trust to the fund. It also seeks the Court's advice as to the validity of the death benefit nominations made by the members of the fund.



In terms of binding death benefit nominations (BDBNs), there were various undated nominations and dated nominations: a nomination dated 3 December 2006, a nomination dated 7 December 2006 and a nomination dated 11 August 2017 ('the 2017 BDBN').

## Decision

In *Ellasil*, the court concluded that:

- the original copy of the SMSF trust deed was lost;
- in or around 25 June 1979, a deed of trust establishing the fund was validly executed; and
- the 2015 deed of variation was able to be relied on by the trustee as the trust deed for the SMSF despite a number of questionable aspects to the validity of its purported adoption.

In *Ellasil*, the court had to rely on secondary evidence to prove firstly that there was in fact a trust deed that had validly established the SMSF.

The Court however expressed doubts as to the validity of the 2006 BDBNs as the deed in force at that time did not permit BDBNs. However, given that the 2015 deed was held to be effective and the 2017 BDBN was valid in accordance with that deed of variation and in favour of a permitted dependant, the trustee was justified in relying on it.

For further information, refer to the [full court decision](#).

**Source:** [Ellasil Pty Ltd \[2023\] VSC 69 \(24 Feb 2023\)](#) and [Vanta Pty Ltd v Mantovani \[2023\] VSCA 53 \(16 Mar 2023\)](#)



<https://tinyurl.com/ifpasignup>

# Subscribe to our free daily update



INSTITUTE OF  
FINANCIAL  
PROFESSIONALS  
AUSTRALIA



## Key superannuation rates and thresholds for 2023/24

### What you need to know

The latest [ABS "Average Weekly Earning" statistics](#) (AWOTE) have confirmed that the concessional (\$27,500) and non-concessional (\$110,000 or \$330,000 under the bring-forward rule) contributions caps will remain unchanged for the 2023/24 income year.

However, certain other super thresholds are set to increase from 1 July 2023. These include:

- the general transfer balance cap (TBC) will increase to \$1.9m
- the total superannuation balance (TSB) threshold for making non-concessional contributions (NCCs) will also increase to \$1.9m
- the small business lifetime CGT cap amount is \$1,705,000
- the government co-contribution 'lower income threshold' is \$43,445 and the 'higher income threshold' is \$58,445
- the super guarantee (SG) maximum contribution base is \$62,270 per quarter and the SG rate will increase to 11%
- the lump sum low rate cap is \$235,000 and the untaxed plan cap amount is \$1,705,000;
- the ETP cap amount is \$235,000
- the genuine redundancy and early retirement payments tax free base amount is \$11,985 and \$5,994 service amount.

As the general TBC is increasing to \$1.9m on 1 July 2023, this means the NCC bring forward thresholds for 2023/24 will be as follows:

TSB on 30 June 2023	Maximum NCC cap	Bring forward period
Less than \$1.68m	\$330,000	3 years
\$1.68m but less than \$1.79m	\$220,000	2 years
\$1.79m but less than \$1.9m	\$110,000	Nil
\$1.9m or more	Nil	Nil

Source: [ATO website QC 18123, 05 April 2023](#)



A series of 15 horizontal dotted lines spaced evenly down the page, providing a template for handwriting practice.