

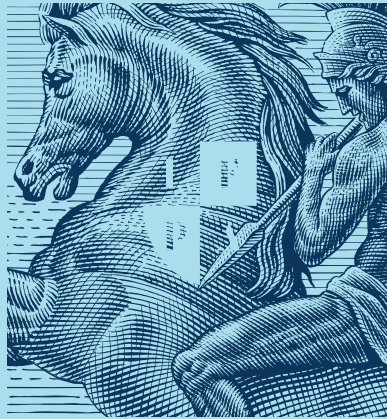
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Superannuation

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Each issue has been researched,
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Welcome to the Superannuation notes

Notes for Super sessions held in Sydney 14 February 2023
and Melbourne 16 February 2023.

The Super notes 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 Monday 28 November 2022 till
Wednesday 1 February 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



About the Super 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



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ATO ACTIVITY



ATO flags SMSF tax schemes involving asset protection

What you need to know

The ATO has flagged it is targeting certain retirement phase schemes using SMSFs to avoid tax as they may present a compliance risk for SMSFs

Schemes listed as an area of concern

The schemes the ATO are concerned with claim to protect SMSF assets from creditors by mortgaging them to an asset protection trust, commonly called a 'Vestey Trust'.

A Vestey Trust is a discretionary trust established by deed. It is claimed that the trust is set up to acquire the equity in the SMSF's assets through an equitable mortgage.

The arrangement also involves:

- the execution of a promissory note by the SMSF
- the lodgment of a caveat by the trust
- optional transfer of fund monies to a bank account in the name of the trust.

More specifically, the equitable mortgage is supported by the execution of a promissory note by the SMSF to the Vestey Trust. This recognises a debt is owed by the SMSF to the Vestey Trust. The mortgage is also supported by a caveat by the Vestey Trust over the SMSF's real property. The arrangement can also allow a transfer of the SMSF's cash holdings to a bank account in the name of the Vestey Trust.

If trustees of SMSFs enter into these schemes they may contravene one or more super laws, and penalties may apply.

Why schemes that involve a Vestey Trust may contravene super law

First, these schemes put funds at unnecessary risk because the super system already protects SMSF assets from creditors.

Second, the arrangement is a compliance risk and may contravene one or more super laws. For example, it may:

- result in the giving of a 'charge' over, or in relation to, a fund asset by the SMSF trustee
- involve the 'borrowing' of money by the SMSF trustee
- expose fund assets to unnecessary risk if it's not clear who owns them
- cause the fund to be maintained in a way that doesn't comply with the sole purpose test.



Finally, SMSF money cannot be used for costs related to asset protection arrangements entered into by members to protect their personal or business assets because these expenses are not incurred in running the SMSF.

Action items for SMSF trustees

If SMSF trustees are already involved in one of these schemes and think it contravenes the super laws, they should make a [voluntary disclosure](#) via the SMSF early engagement and voluntary disclosure service (the service).

The service provides a single-entry point for SMSF trustees and professionals to engage early with the ATO in relation to unrectified contraventions. Before using the service, SMSF trustees are expected to have developed a plan to rectify the contravention as soon as possible. The plan should be submitted to the ATO with their [SMSF regulatory contravention disclosure form](#).

If SMSF trustees voluntarily disclose unrectified contraventions before the ATO starts an audit, the disclosure will be taken into account when determining what [compliance action](#) the ATO needs to take.

If an SMSF trustee makes a disclosure about contraventions that occurred in previous years, they must lodge any outstanding SMSF annual returns.

Source: [ATO website QC 71220, 12 Jan 2023](#) and [ATO website QC 71175, 22 Dec 2022](#)



ATO provides updated guidance on TBAR reporting ahead of new time frames

What you need to know

The ATO has released updated guidance on working out the different methods for lodging a super transfer balance account report (TBAR) and how to correct one. It includes information on:

- [What events SMSFs must report by certain dates](#)
- [Valuing assets for reporting](#)
- [Reporting methods and lodgment](#)
- [Reporting a reversionary income stream](#)
- [Reporting an account as closed](#)
- [Consequences of late reporting](#)
- [Record keeping](#)
- [Correcting a report](#)
- [Amended reporting](#)

Background

From 1 July 2018, all SMSFs are required to report certain events to the ATO that affect their members' transfer balance accounts.

Up to 30 June 2023

SMSFs must report transfer balance cap (TBC) events on a quarterly or annual basis, depending on the size of the total superannuation balances (TSBs) of fund members (as explained below).

1. **Quarterly reporter** – SMSFs that have any members with a TSB of \$1 million or more on 30 June of the year before the first member starts their first retirement phase income stream (RPIS) must report events affecting their members' transfer balances within 28 days after the end of the quarter in which the event occurs.
2. **Annual reporter** – where all members of an SMSF have a TSB of less than \$1 million, the SMSF can report this information at the same time that its SMSF annual tax return is due.

There are two exceptions to the general reporting timeframe:

1. Where a member of an SMSF is commuting an RPIS in response to an excess transfer balance (ETB) determination. Where this is the case, the SMSF must report within 10 business days after the end of the month in which the commutation occurs, and
2. Where a response to a commutation authority is required to be provided to the ATO. In this case, the SMSF must report within 60 days of the date the ATO issues the commutation authority.



From 2023-24 onwards

From 1 July 2023, all SMSFs will be required to report quarterly, even if the members TSB is less than \$1 million. This means SMSFs must report the event that affects the members transfer balance within 28 days after the end of the quarter in which the event occurs.

All unreported events that occur before 30 September 2023 must be reported by 28 October 2023. This means SMSFs cannot report at the same time as their SMSF annual return (SAR) for the 2022-23 income year.

Furthermore, the obligation for SMSFs to report earlier will remain for:

- a commutation of an RPIS in response to an ETB determination (ie, within 10 business days after the end of the month in which the commutation occurred)
- responses to commutation authorities (ie, must be reported by the legislated due date, as specified in the notice).

If an individual who has exceeded their TBC is issued an ETB determination or commutation authority based on incomplete or incorrect information, the reporting must be corrected as soon as possible. This enables the ATO to revoke the determination or commutation authority.

Events SMSFs need to report

An SMSF must report events that affect a member's transfer balance account.

Common events are:

- details of when a member starts an RPIS, including death benefit income streams – details to be provided include:
 - type of income stream
 - the value
 - start date.

Where the death benefit income stream is paid to a reversionary beneficiary, the start date will be the date the member died, and the value will be the value of the income stream on the date of death of the member:

- details (including value) of commutations of RPISs, including commutation of a pension that occurs before it is rolled over to another fund.

Other events include:

- details of limited recourse borrowing arrangement (LRBA) payments (including the value and date of each relevant payment) if the LRBA was entered into on or after 1 July 2017 (or a pre-existing LRBA was re-financed on or after 1 July 2017) and the payment results in an increase in the value of the member's interest that supports their RPIS
- compliance with a commutation authority issued by the ATO
- details (including value) of personal injury (structured settlement) contributions.

If no event occurs, SMSFs have nothing to report.



Some exclusions from reporting

Events an SMSF does not need to report on a TBAR include:

- pension payments
- investment earnings and losses
- when an income stream ceases because the interest has been exhausted
- the death of a member
- information that individuals report to the ATO directly using a [Transfer balance event notification form](#) (NAT 74919) – this includes a:
 - family law payment split
 - debit event from fraud, dishonesty, or bankruptcy
 - structured settlement contributions made before 1 July 2007
- information other funds will report to the ATO such as a member's interest in an APRA fund.

Valuing assets for reporting

In line with the ATO's [valuation guidelines](#) for SMSFs, the trustee may choose to use a reasonable estimate of the value of an income stream to meet their TBAR obligations. This usually occurs when the member starts a pension part way through the year.

The ATO expects that, as part of choosing to start a pension, an individual will have a reasonable estimate of the value of that pension. In some instances, it may be wise to bring valuation practices forward.

If the trustee has used a reasonable estimate and the value of that income stream significantly changes, the trustee may correct the value initially reported to the ATO.

Reporting methods and lodgement

SMSFs can [lodge a TBAR](#) by:

- online form
- bulk data exchange (BDE)
- paper report.

Reporting a reversionary income stream

If a member dies and the [death benefit income stream](#) payable on their death is a reversionary income stream, SMSFs:

- do not need to report the death of a member for TBAR purposes
- do need to report the credit that arises in the transfer balance account of the reversionary beneficiary because they have started to receive this income stream.



When reporting the credit for the reversionary beneficiary, SMSF trustees should:

- complete the member details for the reversionary beneficiary who is receiving the income stream, not the deceased member
- clearly indicate they are reporting a reversionary income stream
- report the date of death of the member as the effective date
- report the [value of the income stream](#) on the day the member died (trustees may choose to use a reasonable estimate to do this).

The ATO will apply the credit to the member's transfer balance account 12 months after the death of the original member.

Between reporting the event to the ATO and the credit being applied to the member's account, the reversionary beneficiary will be able to see the value of the credit and when it will be applied in ATO online. This will help them understand what action they may need to take to ensure they don't exceed their TBC when the credit is applied.

Example: reversionary income stream

Alex and Robyn both have pensions in an SMSF.

Alex dies on 4 February 2020 and his pension reverts to his spouse, Robyn. The value of the pension at the time of Alex's death is \$1.267 million.

Robyn already has a credit in her transfer balance account of \$800,000 from her life pension in the SMSF.

On 28 April 2020, the SMSF lodges a TBAR reporting:

- Robyn's details, as she is the reversionary beneficiary
- the \$1.267 million value of the credit that will arise in Robyn's transfer balance account on 4 February 2021
- an effective date of 4 February 2020 (Alex's date of death)
- the income stream is reversionary.

Robyn will be able to view the reversionary income stream in her transfer balance account once it is reported by the fund, with the credit being included on 4 February 2021. This will help Robyn understand what she needs to do to avoid exceeding her personal TBC of \$1.6 million.

On 1 February 2021, Robyn commutes \$467,000 from her life pension.

If the SMSF does not report this to the ATO before 4 February 2021, the ATO will send Robyn an ETB determination.

For more detail, see [LCR 2017/3](#) *Superannuation reform: Superannuation death benefits and the transfer balance cap*.

Reporting an account as closed

When lodging a TBAR to report that a member has commuted their pension in full, it is important to report the account as closed when they are:

- rolling over in full to another fund



- commuting in full to avoid exceeding their personal TBC before the credit arising from a capped defined benefit income stream is applied to their account.

If the pension account has not been reported as closed, The ATO may send the SMSF a commutation authority for the pension account.

This can mean it will take longer before the excess is rectified and the member will pay more ETB tax.

Consequences of late reporting

SMSFs are encouraged to lodge their transfer balance reporting as soon as possible to avoid adverse consequences.

If an SMSF does not lodge a TBAR by the required date, the member's transfer balance account will be adversely affected. They may need to commute more money to rectify any excess and pay more ETB tax. There may also be reverse workflow for the trustee.

If the SMSF is late reporting a commutation made after the ATO issued an ETB determination to the member, the ATO may send a commutation authority to their fund. This puts the member at risk of having the excess amount removed from retirement phase twice.

An SMSF may be subject to compliance action and penalties if they do not [lodge on time or respond to a commissioner commutation authority](#). Non-compliance with a commutation authority may result in denying exempt current pension income (ECPI) claims.

Record keeping

Trustees have an obligation to ensure:

- their TBAR reporting is true and correct
- the commencement and commutation of RPIs is supported by contemporaneous fund records
- payments to members have been correctly characterised at the time the payment was requested so trustees and auditors can ensure the minimum pension payment standards have been met (this is especially important where pension payments have been made from an income stream that has also been commuted in full or in part during the year)
- their TBAR reporting for the commencement and commutation of RPIs also aligns with their ECPI claim for a year
- relevant documentation is clearly passed on to their auditor.

Correcting reporting errors

SMSFs that have made an error in their TBAR reporting will need to cancel the original event. If necessary, a second report with the correct information will need to be lodged.

To cancel the original event, an SMSF needs to:

- lodge a new form exactly how they originally reported it, including the incorrectly reported information
- use the additional field to indicate the form is being lodged as a cancellation of a previous form.



This enables the ATO to match their cancellation request to the original lodgment.

SMSFs that previously cancelled a report and want to undo the cancellation should not try to cancel a cancellation request. They are required to send the ATO a new report containing the original information.

Note: SMSFs that need to re-report must ensure they lodge the cancellation first before sending the correction to avoid duplication.

Amended reporting

TBAR re-reporting by SMSF trustees will be monitored. The ATO may request evidence of relevant documents and calculations to substantiate the TBAR amendment.

Source: [ATO website QC 57301, 09 Jan 2023](#) and [ATO website QC 57300, 09 Jan 2023](#)



ATO updates SMSF registration process

What you need to know

The ATO has made a change to the SMSF registration process which removes the ability to add the SMSFs bank account details to the online and paper Application for an ABN registration for a SMSF.

Key aspects

New SMSFs will now need to provide the ATO with their bank account details after they have registered through:

- their Registered tax agent
- Online Services for business
- calling the ATO on 13 10 20.

This is another step the ATO has taken to reduce the risk of fraud in the super system to help protect members' retirement savings.

Action items for new SMSF trustees or tax agents who set up SMSFs

New SMSF trustees or tax agents who set up SMSFs on behalf of their clients need to ensure they notify the ATO of the [SMSF's bank account details](#) prior to members requesting a rollover. If they do not, the rollover cannot be processed.

They also need to ensure they have registered for an [electronic service address](#) (ESA – see below) and provide these details to the ATO before their member requests a rollover otherwise they will experience delays.

Electronic service address

To receive [SuperStream](#) data, an SMSF needs an electronic service address (ESA).

An ESA is an alias that represents the uniform resource locator (URL) or internet protocol (IP) address of a messaging provider. It ensures all technical requirements for interacting electronically across the super network are met. An email address is not an ESA.

SMSF trustees can get an ESA from an SMSF messaging provider or through their SMSF intermediary such as their SMSF administrator, tax agent, accountant or some banks. Many of these options are no cost or low cost.

Once they have obtained or updated their ESA, they need to notify the ATO.



For further information on ESA, visit www.ato.gov.au/Super/SuperStream/Self-managed-super-funds/Electronic-service-address/ (QC 47549).

Source: [ATO website QC 71074, 13 Dec 2022](#)



ATO website updates

[Factsheet on illegal early access to super](#) (QC 71253, 20 Jan 2023) – the ATO has released a factsheet [Accessing your super early may be illegal](#) highlighting what a fund member needs to know about accessing their super early and what to do if they get approached by a ‘promoter’ who wants to help them set up an SMSF for the purpose of illegally accessing their super.

[Limited recourse borrowing arrangements \(LRBAs\)](#) (QC 20439, 7 Dec 2022) – updated information on LRBAs. It also confirms that SMSFs that have an intermediary LRBA in place must include a member’s share of the outstanding balance of the LRBA at 30 June each income year in their [TSB](#) when specific criteria are met, in the same way the TSB provisions apply to an ordinary LRBA.

[Help and support for SMSFs](#) (QC 71219, 12 Jan 2023) – information and detailed guides to help SMSF trustees at various stages of their SMSF lifecycle.

[ASIC annual review fee and company deregistrations](#) (QC 71066, 12 Dec 2022) – reminder for SMSF trustees to pay an annual ASIC review fee if their SMSF has a corporate trustee. If they fail to pay their fees on time, they run the risk of their company being deregistered by ASIC. Unless a replacement trustee is appointed prior to the deregistration of the corporate trustee, there is a risk that their SMSF will be in breach of superannuation law.

[Trustee disqualification register updated](#) (QC 71070, 12 Dec 2022) – the ATO has recently updated its trustee disqualification register for the September 2022 quarter. As a result of an increased compliance focus, the ATO disqualified 261 trustees during the September quarter of 2022. This is more than the amount the ATO disqualified for the entire 2022 financial year.

[Appointing an SMSF auditor](#) (QC 71069, 12 Dec 2022) – reminder for SMSF trustees to appoint an approved SMSF auditor to audit their fund no later than 45 days before they need to lodge their SMSF annual return (SAR).

[ATO guidance on SMSF auditor independence requirements](#) (QC 65083, 25 Nov 2022) – information for SMSF auditors to help them understand and comply with the prescribed independence requirements set out in the [APES 110 Code of Ethics](#).

[Completing the auditor/actuary contravention report](#) (QC 17603, 19 Jan 2023) – information for SMSF auditors on how to complete an Auditor/actuary contravention report (NAT 11239) including reporting criteria and examples.





LEGISLATION



Status of superannuation matters @ 1 February 2023

Both the House of Representatives (HOR) and the Senate sat from the 21st to 30th November and 1st December 2022 (inclusive).



The table below summarises the status of proposed and enacted superannuation-related measures:

Legislation (Bills and Acts)	Status
<p>Increasing penalty unit</p> <ul style="list-style-type: none">• Bill: Crimes Amendment (Penalty Unit) Bill 2022• Start date: 1 January 2023• Key measure:<ul style="list-style-type: none">- Amends the <i>Crimes Act 1914</i> to increase the value of the penalty unit for Commonwealth criminal offences from \$222 to \$275 for offences committed on or after 1 January 2023. Indexed every three years to the CPI, with the next indexation to occur on 1 July 2023. <p>Note: This measure was approved and announced as part of the October 2022-23 Federal Budget.</p> <p>The Bill was referred to Senate Committee for inquiry and report by 21/11/22.</p>	 <p>Received Royal Assent on 12/12/2022</p> <p>Act No. 82 of 2022</p>
<p>Incentivising pensioners to downsize</p> <ul style="list-style-type: none">• Bill: Social Services and Other Legislation Amendment (Incentivising Pensioners to Downsize) Bill 2022• Start date: 1 January 2023• Key measures:<ul style="list-style-type: none">- Extend the existing assets test exemption for principal home sale proceeds which a person intends to use to purchase a new principal home from 12 months to 24 months (or up to 36 months by determination of the Secretary), and- Apply only the lower below threshold deeming rate (currently 0.25%) to these asset test exempt principal home sale proceeds when calculating deemed income. <p>Note: These measures were approved and announced as part of the October 2022-23 Federal Budget</p>	 <p>Received Royal Assent on 29/11/2022</p> <p>Act No. 62 of 2022</p>




Legislation (Bills and Acts)	Status
<p>Expanding eligibility for downsizer contributions</p> <ul style="list-style-type: none">• Bill: Treasury Laws Amendment (2022 Measures No. 2) Bill 2022• Start date: 1 January 2023• Key measures:<ul style="list-style-type: none">- Allow individuals aged 55 and above to make downsizer contributions to their superannuation plan from the proceeds of selling their main residence- Remove the \$250 non-deductible threshold for work-related self-education expenses (by repealing s82A of ITAA 1936). <p>The Superannuation Legislation Amendment (Broadening Contribution Rules) Regulations 2022 were registered on 30/9/22 to support the reduction in downsizer eligibility age.</p> <p>Note: This measure was approved and announced as part of the October 2022-23 Federal Budget</p>	 <p>Received Royal Assent on 12/12/2022</p> <p>Act No. 84 of 2022</p>
<p>Remaking sunset superannuation auditor imposition regulations</p> <ul style="list-style-type: none">• Regulations: Superannuation Auditor Registration Imposition Regulations 2022• Start date: 22 December 2022• Key measures:<ul style="list-style-type: none">- Remake and improve the operation of the Superannuation Auditor Registration Imposition Regulations 2012 (2012 Regulations) before they 'sunset' on 1 April 2023. These regulations prescribe fees that are payable to ASIC by SMSF auditors for regulatory services provided by ASIC, including:<ul style="list-style-type: none">- registration as an approved SMSF auditor- undertaking a competency examination- cancelling an SMSF auditor registration.- Update the amounts of the fees and the language about the method of indexation for ease of understanding. The current fee to register as an approved SMSF auditor will increase from \$1,927 to \$2,191, while the fee to apply for registration as an approved SMSF auditor to be cancelled will fall from \$899 to \$193.- Insert new provisions into the income tax law in respect of selective share cancellations to ensure these amendments are effective by aligning the income tax treatment across capital management activities for listed public companies. <p>Note: The Regulations broadly follow the structure and numbering of the 2012 Regulations.</p>	 <p>Date registered 21/12/2022</p>



Legislation (Bills and Acts)	Status
<p>Increasing financial adviser exam fees</p> <ul style="list-style-type: none">• Regulations: Corporations (Fees) Amendment (Exam Fees) Regulations 2022• Start date: 23 December 2022• Key measure: Increases the financial adviser exam fee from \$973 to \$1,500 to reflect changes in the cost to administer the exam.	 <p>Date registered 22/12/2022</p>
<p>Various Tax and Super measures introduced</p> <ul style="list-style-type: none">• Bill: Treasury Laws Amendment (2022 Measures No. 4) Bill 2022• Start date: various• Key measures: <p>Cryptocurrency not a foreign currency:</p> <ul style="list-style-type: none">- Ensure digital currencies (such as bitcoin) continue to be excluded from the income tax treatment of foreign currency. Start date: 1 July 2021 <p>Super fund financial reporting and auditing:</p> <ul style="list-style-type: none">- Require APRA-regulated super funds to prepare and lodge audited financial reports with ASIC.- 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>. Start date: 1 July 2023 <p>Taxation of military super benefits:</p> <ul style="list-style-type: none">• Amend various taxation laws to confirm the tax treatment of certain defined benefit pensions following the Full Federal Court decision in Douglas case (FCT v Douglas [2020] FCAFC 220*) and prevent any adverse income tax outcomes for certain veterans adversely impacted by the Douglas decision.• 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. <p>Start date: On the day after Royal Assent, applicable retrospectively from 1 July 2007</p> <p>*Refer to Tax & Super Australia SDG Notes – June 2021, pages 16 – 18 and SDG Notes – February 2022, pages 13 – 14 for more information about the Douglas case.</p>	 <p>Introduced into Senate on 01/12/2022</p> <p>Bill referred to Committee on 24/11/2022</p> <p>Report due 25/01/2023</p>



Legislation (Bills and Acts)	Status
<p>Aligning the financial and accounting obligations of superannuation funds with those of public companies</p> <ul style="list-style-type: none">• Bill: Treasury Laws Amendment (2022 Measures No. 4) Bill 2022• Start date: 1 July 2023• Key measure:<ul style="list-style-type: none">- Amends the <i>Corporations Act</i>, the <i>ASIC Act</i> and the <i>SIS Act</i> to extend and adapt the financial reporting and auditing requirements in Chapter 2M of the <i>Corporations Act</i> to apply to registrable superannuation entities. <p>Note: The proposal was announced on 12 August 2021 - coinciding with the public release of the exposure draft legislation.</p> <p>Increasing super fund transparency</p> <p>Meanwhile, the government will strengthen transparency requirements for superannuation funds so members can access clearer, more meaningful and more consistent information about their fund. The government will:</p> <ul style="list-style-type: none">- Launch an annual <i>Super Transparency Report</i>, a single source of granular, consistent information for members to compare the performance and expenditure of superannuation funds, and- Reform existing rules so that every reporting stream serves a distinct purpose, eliminating duplication and enhancing clarity. <p>Source: Assistant Treasurer media release, Increasing super fund transparency, 23 Nov 2022</p>	 <p>Introduced into Senate on 01/12/2022</p> <p>Bill referred to Committee on 24/11/2022</p> <p>Report due 25/01/2023</p>



BULLETIN BOARD



General TBC set to increase to \$1.9 million on 1 July 2023

What you need to know

Following the publication of the All Groups consumer price index (CPI) figure for the December 2022 quarter*, the general transfer balance cap (TBC) is set to increase from \$1.7 million to \$1.9 million on 1 July 2023.

**Note the CPI figure for the December 2022 was 130.8. The CPI figure had to be at least 130.7 to increase the general TBC by \$200,000.*

Source information: [Australian Bureau of Statistics website, Consumer Price Index, Australia, 25 Jan 2023](#)

Impact of indexation on an individual's personal TBC

If an individual starts a retirement phase income stream (RPIS) for the first time on or after 1 July 2023, they will have a personal TBC of \$1.9 million.

For everyone else, their personal TBC will be between \$1.6 and \$1.9 million, depending on their circumstances. The proportion of entitlement to the indexation of the general TBC is based on the highest ever balance of their transfer balance account. The ATO will use this information to calculate the proportional increase in their TBC and apply that new personal TBC to their affairs going forward. An individual can view all TBC information in ATO online. Proportional indexation is explained in more detail on the [ATO website QC 60627](#).

TBC indexation and non-concessional contributions

Indexation of the general TBC changes other caps and limits that may apply to individuals, if they make:

- non-concessional contributions to their super (including non-concessional contributions using the bring forward rules)
- a non-concessional contribution to their super and are eligible for a co-contribution
- a concessional contribution to super on behalf of their spouse and want to claim a tax offset.

For example, the total superannuation balance (TSB) threshold for making non-concessional contributions will increase (in line with TBC indexation) from \$1.7 million to \$1.9 million from 1 July 2023.



TBC indexation and capped defined benefit income streams

When the general TBC is indexed, the defined benefit income cap is also proportionally indexed. An individual's defined benefit income cap for a financial year is the general TBC for the corresponding financial year divided by 16.

For example, when the general TBC increases to \$1.9 million, there is a proportional increase in the defined benefit income cap from \$106,250 to \$118,750 (ie, \$1.9 million divided by 16) from 1 July 2023.

TBC indexation and child death benefit income streams

If an individual's only income stream is a child death benefit, their TBC increment will not change when the general TBC is indexed.

If an individual receives a child death benefit income stream and other RPISs, their:

- cap increment for the child death benefit income stream will not change.
- personal TBC for their other income streams may be indexed.

For more information on the impact of indexation refer to [ATO website QC 60627](#).



Consultation on non-arm's length income (NALI) rules for general expenses

What you need to know

On 24 January 2023, the government released a consultation paper considering potential changes to the non-arm's length income (NALI) provisions which apply to superannuation funds, where they relate to general expenses that have a sufficient nexus to all ordinary and statutory income derived by the fund.

Background

- The NALI provisions are an integrity measure to prevent income from being diverted into superannuation funds to benefit from lower rates of tax compared to other entities, particularly the marginal rates applying to individual taxpayers. The income of superannuation funds is generally subject to a concessional tax rate of 15%, with a one-third discount for capital gains tax, or 0% on fund earnings if they are on assets supporting a pension for an individual who has reached their preservation age, retired and started a retirement income stream.
- Where income is deemed to be derived from a non-arm's length transaction, it is taxed at the highest marginal rate of 45%. This ensures that any income derived from a non-arm's length arrangement does not receive the preferential tax treatment that superannuation income receives otherwise.
- At the 2017-18 Budget, the government announced changes to the definition of NALI. This measure expanded the definition of NALI to ensure that income from an asset where there are lower expenses (or no expenses) are captured by the provisions. Such arrangements are referred to as non-arm's length expenses (NALE).

However, the superannuation industry view is that the introduction of the NALE rules and the ATO's interpretation of these rules will have far reaching and harmful consequences. Many superannuation industry stakeholders have raised the potential for scenarios in which there are disproportionately severe outcomes for breaches of these rules, particularly those relating to general expenses of a fund. Stakeholders have also raised concerns the NALI provisions which relate to general expense arrangements place an onerous compliance burden on superannuation funds.

The proposed amendments outlined in the paper are intended to ensure the rules continue to operate in line with their original policy intent and provide a greater level of certainty to trustees ahead of the expiry of the transitional compliance approach (PCG 2020/5) on 30 June 2023. The proposed amendments will apply to general expenses that have a sufficient nexus to all ordinary and statutory income derived by the fund.

The consultation process and any comments received in relation to the potential amendments outlined in this paper will inform the development of future policy regarding the NALI provisions, particularly in relation to general expenses of a superannuation fund.



ATO's interpretation and compliance approach

- On 29 May 2020, the ATO published Practical Compliance Guidance (PCG) 2020/5 which established a transitional compliance approach to the NALI rule changes. As a result of consultation, the ATO recognised that trustees may not have been aware that the amendments would apply to NALE of a general nature which is linked to all income of the fund (also referred to as general expenses).
- Superannuation fund expenses can be divided into two broad categories: expenses of a general nature and expenses of a specific nature. General expenses are those that have a sufficient nexus to **all** ordinary and/or statutory income of a given fund, for example fees for accounting, auditing and actuarial services. Specific expenses are those that have a sufficient nexus to a specific asset held by a given fund, for example a maintenance expense on a property, which relates to a particular amount of income being derived by the fund.
- In PCG 2020/5 the ATO announced it would not allocate compliance resources to determine whether the NALI provisions applied to a complying superannuation fund for the 2018-19, 2019-20, 2020-21 income years where the fund incurred NALE of a general nature that has a sufficient nexus to all ordinary and/or statutory income derived by the fund in those respective income years. In April 2021, PCG 2020/5 was updated to include the 2021-22 income year.
- On 28 July 2021, the ATO released Law Companion Ruling (LCR) 2021/2 which provided details as to how the ATO intends to apply the updated NALI provisions with various examples. The ATO noted it is aware of the significant tax consequences that may result from the NALI rules and a wide variety of minor NALE breaches have the potential to result in disproportionate tax liabilities.
- LCR 2021/2 explained that where NALE incurred by a trustee of a superannuation fund is of a general nature, the relevant expenses can have a sufficient nexus to all of the income of a superannuation fund. This could result in all of a fund's income being classified as NALI and assessed at the highest marginal tax rate, currently 45%. LCR 2021/2 provided the following list of instances in which expenditure has a sufficient nexus to all income derived by the fund:
 - actuarial costs – except those incurred in complying with, or managing, the fund's income tax affairs and obligations which are ordinarily deductible under section 25-5 of the ITAA;
 - accountancy fees – except those incurred in complying with, or managing, the fund's income tax affairs and obligations which are ordinarily deductible under section 25-5 of the ITAA;
 - audit fees;
 - costs of complying with a 'regulatory provision' as defined in section 38A of the *Superannuation Industry (Supervision) Act 1993* (unless the cost is a capital expense);
 - trustee fees and premiums under an indemnity insurance policy;
 - costs in connection with the calculation and payment of benefits to members (but not the cost of the benefit itself); for example, interest on money borrowed to secure temporary finance for payment of benefits and medical costs in assessing invalidity benefit claims;
 - investment adviser fees and costs in providing pre-retirement services to members; and
 - other administrative costs incurred in managing the fund.
- The ATO's ongoing compliance approach (applying only in respect of general expenditure) outlined in LCR 2021/2 focusses on reviewing whether appropriate internal controls and processes are in place for large APRA-regulated superannuation funds and whether a reasonable attempt was taken to determine an arm's length expenditure amount in the case of SMSFs. The ATO's ongoing compliance approach supports SMSFs and large funds implementing the correct practices to avoid NALI applying.



- On 10 June 2022, the ATO released a further update to PCG 2020/5 which extended the transitional compliance approach to NALE of a general nature incurred in the 2022-23 income year. This transitional compliance approach only applies to general expenditure that is incurred on or before 30 June 2023.

Potential amendments

The potential amendments to the NALI provisions outlined in the consultation paper are as follows:

- SMSFs and small Australian Prudential Regulation Authority funds (SAFs) would be subject to a factor-based approach which would set an upper limit on the amount of fund income taxable as NALI due to a general expenses breach. The maximum amount of fund income taxable at the highest marginal rate would be 5 times the level of the general expenditure breach, calculated as the difference between the amount that would have been charged as an arm's length expense and the amount that was actually charged to the fund. Where the product of 5 times the breach is greater than all fund income, all fund income will be taxed at the highest marginal rate.
- Large APRAreregulated funds would be exempted from the NALI provisions for general expenses.
- Note these potential amendments would be intended to apply to general expenses which have a sufficient nexus to **all** ordinary and statutory income derived by the fund.
- Under this potential approach, the functioning of NALI provisions would only change for breaches due to schemes involving expenses of a general nature. This would be intended to mitigate the 'tainting effect' highlighted by industry stakeholders, where all income of the fund is potentially subject to the top marginal tax rate due to a relatively minor breach of the rules due to a general expense.
- According to the government, these potential changes are intended to ensure the rules continue to operate in line with their original policy intent and provide a greater level of certainty to trustees ahead of the expiry of the transitional compliance approach (PCG 2020/5) on 30 June 2023.
- For all funds, where a NALE is related to a specific asset, the current NALI rules would continue to apply, such that all the income of that asset will be NALI and subject to the highest marginal tax rate. This is in line with the original intent of the NALI provisions to disincentivise non-arm's length transactions that artificially inflate the earnings of the fund.

What will the proposed amendments for SMSFs and SAFs mean?

Under the potential amendments outlined above, where SMSFs and SAFs have breached the NALI provisions for general expenses that are linked to all fund income, the amount of fund income treated as NALI in relation to that breach would be subject to an upper limit.

The maximum amount of fund income which would be assessable as NALI in relation to a particular general expenses breach would be calculated by applying a factor of 5 to the difference between the amount that would have been charged as an arm's length expense and the amount that was actually charged to the fund. This would partially break the link between the general expenses breach, and the income of the fund as a whole for the purposes of NALI.

At the current highest marginal tax rate of 45%, a maximum effective tax rate of 225% (5 multiplied by 45%) would be applied to the general expenditure breach.

It is expected that trustees would determine an arm's length price when applying this calculation method. Where a breach has been identified, the ATO may request information from a fund to support the suitability of the identified arm's length price. Consistent with the current approach to valuations, a



valuation would need to be based on objective and supportable data (see the [ATO website](#) for further information).

These potential amendments would be intended to maintain the disincentive for SMSFs and SAFs to use non-arm's length arrangements to circumvent the superannuation contribution caps through related party dealings, as funds would be demonstrably better off in complying with the NALI rules (see Example 1A below). They would be intended to ensure any adverse tax outcomes for SMSFs and SAFs where a general expenses breach occurs are broadly proportional to the level of artificial benefit created by the breach of the NALI provisions and that the rules continue to disincentivise such behaviour.

Retaining a significant tax penalty under this potential approach would address tax integrity risks for smaller funds as members have the capacity to control or influence the general expense arrangements of the fund in a way which could directly inflate their superannuation balance, including through non-arm's length arrangements. While the tax integrity risks for SAFs (which are required to be overseen by APRA-licensed trustees) may be less significant than those of SMSFs, applying the amendments consistently between these fund types is justified as members of both SAFs and SMSFs may have capacity to influence arrangements for general fund services. While the SMSF industry has welcomed the consultation on NALI provisions, there are concerns the proposal may still result in disproportionate outcomes for SMSFs.

Example 1A: SMSF using an accountancy service

An SMSF trustee uses his brother's accountancy services, which would usually cost \$5,000 if provided under an arm's length arrangement. As his brother charges the SMSF \$0 for these services, this is a non-arm's length arrangement.

The SMSF's income (after relevant expenses) in the 2023-24 financial year is \$100,000. The applicable rate of tax on this income would have otherwise been 15%.

Under the current NALI rules, there is a sufficient nexus between the accounting services expense and all income of the SMSF. The SMSF's total income in the financial year would be taxed at the highest marginal tax rate of 45%. The SMSF would pay \$45,000 in tax in 2023-24, resulting in \$55,000 in after-tax income.

Under the potential amendments, the income 'tainted' as NALI would be limited by the market value of the accounting service, since no fee was charged to the SMSF. The amount of income would be calculated by applying a factor of 5 on the difference between the market value of the accounting service and the actual fee charged to the fund. The trustee would pay tax at a rate of 45% on \$25,000 of fund income, and at a rate of 15% on the remaining \$75,000 of income. The SMSF would pay \$22,500 in tax in 2023-24 and have after-tax income of \$77,500.

In comparison, if the fund had incurred an expense for the accountancy services as per its usual cost of \$5,000, the SMSF would pay \$14,250 in tax (i.e., 15% of \$95,000) and have after-tax income of \$80,750.

Example 1B: SMSF using an accountancy service (lower fund income)

As in Example 1A, the SMSF trustee uses his brother's accounting services that would usually cost \$5,000, but the brother charges \$0. The SMSF's income (after relevant expenses) in the 2023-24 financial year is \$20,000.

Under the potential amendments, the trustee would pay tax at a rate of 45% on all the income of the fund, as 5 times the NALI breach is greater than the total income of the SMSF. The SMSF would pay \$9,000 in tax for the 2023-24 financial year (i.e., 45% of \$20,000), as would occur under the current NALI provisions.

**Example 2: SMSF acquires an asset at non-arm's length price**

Pippa holds commercial property with a market value of \$1,000,000. During the 2020-21 income year, Pippa sells the commercial property to her SMSF for \$200,000. The SMSF leases the property to a third party and earns net rental income of \$50,000 in 2020-21.

Under the current rules there is a sufficient nexus between the non-arm's length expenditure incurred in acquiring the property and the rental income the SMSF derives from leasing the property. The SMSF would pay tax on the rental income at 45%. Tax payable on the net rental income from the property in 2020-21 would be \$22,500. Any capital gain derived from sale of the property would also be treated as NALI. The transitional compliance approach contained in PCG 2020/5 would not apply in this case as the expense is not of a general nature.

Under the potential amendments, this scenario would not be impacted as the NALE is not a general expense with a sufficient nexus to all the income of the fund. The income treated as NALI would remain the same, as under the current rules, as the current NALI rules will continue to apply to NALE breaches relating to specific assets and income sources. The SMSF would pay the same total tax as under the current rules.

Consultation process

The closing date for submissions is 21 February 2023. Our Association, along with the other Joint Bodies, will continue to lobby and work with the government, Treasury and the ATO to ensure the superannuation industry ends up with a practical solution.

Source: [Treasury website, Non-arm's length expense rules for superannuation funds, 24 January 2023](#)



Consultation on access to offender's superannuation for victims and survivors of child sexual abuse

What you need to know

On 19 January 2023, the government released a [discussion paper](#) outlining two draft proposals to allow victims and survivors of child sexual abuse to access the superannuation of their offender for unpaid compensation orders.

These proposals seek to support victims and survivors in accessing redress by preventing child sexual abuse offenders from shielding their assets in the superannuation system.

- The first proposal would allow victims and survivors to release 'additional' contributions from an offender or the offender's spouse's superannuation to satisfy an unpaid compensation order.
- The second proposal aims to improve transparency and reduce the cost and complexity of pursuing compensation by providing visibility of superannuation accounts to ascertain the value of the 'additional' contributions made by an offender.

Background

The purpose of this discussion paper is to seek views on two complementary proposals that would provide for the release of an offender's superannuation for the purposes of satisfying unpaid compensation orders. These mechanisms would be available exclusively to victims and survivors of child sexual abuse in criminal or civil compensation proceedings.

Responses to this discussion paper will help inform the government's consideration of options to prevent child sexual abuse offenders from shielding their assets in the superannuation system.

Currently, there are three avenues through which a victim or survivor of crime can seek compensation:

1. State and territory compensation schemes – where the state or territory, rather than the offender, pays compensation directly to a victim or survivor of crime,
2. Compensation or reparation orders handed down as part of, or subsequent to, the sentencing process in a criminal proceeding – requiring the offender to pay the victim or survivor, and
3. Civil action pursued by the victim or survivor against an offender or alleged offender for damages – requiring the offender to pay the victim or survivor.

Across all the avenues outlined above, the offender's superannuation assets are not available to the victim or survivor. Superannuation trustees are unable to pay preserved benefits except in specified situations (including paying out the proceeds of crime) under Division 6.3 of the SIS Regs. Consequently, offenders subject to criminal or civil proceedings relating to child sexual abuse, or those anticipating such proceedings, may be incentivised to voluntarily make large personal contributions to their or their spouse's superannuation accounts to shield assets from potential compensation orders. Such contributions will be referred to as 'additional' contributions for the purposes of this discussion paper.



The government is particularly concerned that, where they are personally liable for a compensation order, offenders have an incentive under the existing framework to shield assets in the superannuation system and deny victims and survivors access to redress in doing so. In recent years, there have been a number of high-profile reports of convicted child sexual abuse offenders deliberately hiding millions of dollars' worth of assets in superannuation accounts to defeat compensation claims. This can delay or prevent victims' and survivors' access to compensation and further add to their emotional distress. This paper's proposals aim to canvass reforms that directly address such practices.

Key aspects

Proposal one: Accessing superannuation for unpaid compensation orders

The first proposal aims to prevent convicted child sexual abuse offenders from using superannuation to shield assets from victims and survivors where the offender is personally liable for the payment of court-ordered compensation. This proposal would provide for a court-ordered early release mechanism facilitated by the ATO.

By applying to the appropriate court, victims and survivors of child sexual abuse could be awarded an amount from their offender's 'additional' contributions for the purposes of satisfying unpaid compensation orders.

Under the proposal, victims and survivors would receive payment from the offender's 'additional' contributions to ensure superannuation cannot be used to avoid paying compensation.

Under proposal one, once a compensation order awarded to a child sexual abuse victim or survivor has remained unpaid for 12 months, the victim or survivor could commence legal proceedings to access compensation. The compensation available to the victim or survivor would be based on the value of the offender's 'additional' superannuation contributions made to their own superannuation account and that of their spouse.

Proposal two: Providing visibility of superannuation accounts

The second proposal aims to improve transparency and reduce the cost and complexity of pursuing compensation by providing visibility of offenders' 'additional' contribution balances. Under the proposal, victims or survivors would be able to submit a superannuation information request to the appropriate court which could then request that the ATO disclose specific information regarding the offender's or their spouse's superannuation accounts. This disclosure could then inform the victim's or survivor's decision to pursue further proceedings.

Under proposal two, before undertaking to obtain access to the offender's superannuation, victims and survivors would have the option of submitting a superannuation information request form to the relevant court. That request could ascertain the total value of 'additional' superannuation contributions made by the offender in the 'deeming period' established in proposal one.

Tax treatment of released superannuation

To provide the greatest possible likelihood of the full value of the compensation order being paid, the intention is to make compensation amounts tax-free on release, in the hands of the victim or survivor and to the greatest extent possible before that point.

In order to achieve this objective, released amounts would be treated as non-assessable, non-exempt (NANE) income when paid to the victim or survivor. The government also considers it preferable to



apply the same tax-free treatment at the point of release from the offender's or the offender's spouse's superannuation account(s).

As a preliminary position, it has been noted that releasing an offender's superannuation for the purpose of compensation under proposal one can be distinguished from other existing early release mechanisms which can attract taxation. This is due to the proposal releasing funds for the benefit of a third party – the victim or survivor – rather than the benefit of the superannuation account holder – ostensibly the offender or their spouse.

It is important to note that the release of the relevant funds from the offender's superannuation account should not be considered an 'unwinding' of a contribution. Rather, the aim is to enable an amount equivalent to the deemed 'additional' contributions to be released from the offender's superannuation to allow compensation to be paid. The alternative to nil tax treatment for the initial release would be to require the offender to pay standard tax rates. Ordinarily, money released from superannuation accounts prior to the applicant reaching preservation age is taxed at the lower of either the marginal rate of the recipient or 22%. In cases where the payment comes from an untaxed source, the tax rate on the released amount may increase to 32%.

Treatment of concessional contributions

While an offender's non-concessional (after-tax) personal superannuation contributions would contribute in full to the calculation of the compensation accessible by the victim or survivor, it is anticipated that personal contributions that are taxed at the fund level will contribute on a post-tax basis. That is, where an offender has made a personal contribution that is later deemed 'additional', and that personal contribution was taxed at the fund level (by virtue of it being, for example, a contribution for which a deduction was claimed) only the post-tax value of the 'additional' contributions would count toward the sum the victim or survivor could be paid from the offender's superannuation account. In practice, this means that where an offender makes a contribution of \$100,000 to their superannuation account that is later deemed to be an 'additional' contribution, the amount available to the victim or survivor should they pursue compensation from the offender under this proposal would be \$85,000 (\$100,000 less contributions tax of 15%).

Offsetting of debts

Existing early release mechanisms are often subject to the offsetting rules that apply for debts to the Commonwealth found at Division 3 of Part IIB of the *Tax Administration Act 1953* (TAA). These rules ensure that where a person applies for the early release of their superannuation, the released funds are first used to settle any existing Commonwealth debts associated with that person. Depending on the approach the proposal takes in paying the victim or survivor the funds released from the offender's superannuation account, these rules may apply by default and would need to be switched off for amounts released under this policy to ensure maximum compensation flows through to the victim.

Bankruptcy proceedings

Bankruptcy proceedings may currently allow victims and survivors to 'claw-back' superannuation contributions that an offender has made to avoid compensation orders and other creditors. However, requiring victims and survivors to pursue compensation through bankruptcy proceedings creates additional legal costs, splits the assets among other creditors, and may expose victims and survivors to further trauma.



Once an offender declares bankruptcy, the *Bankruptcy Act* generally dictates that all recovery action must cease and creditors must provide proof of their debt to the trustee of the bankrupt estate to be paid a dividend. The *Bankruptcy Act* also dictates the order of priority in which payments out of the bankrupt estate must be made. Bankruptcy proceedings operate on the premise that almost all unsecured debts rank equally. Creditors share in whatever is recovered by the trustee of the bankrupt estate on a prorated basis.

Even if a victim or survivor successfully proves their debt as a creditor of the bankrupt estate, they may receive very little return on the debt. In all bankruptcy administrations during the 2020-21 Financial Year, creditors only received an average of 1.63 cents per dollar owed. Whether or not any dividend is paid to the victim or survivor, the compensation debt is extinguished on the offender's discharge from bankruptcy.

Potential changes to the *Bankruptcy Act*

Allowing victims and survivors access to their offender's superannuation could be complemented by targeted changes to the *Bankruptcy Act* which prevent bankruptcy being used by offenders to extinguish compensation orders. An amendment could be made to the *Bankruptcy Act* to allow victims and survivors to take part in bankruptcy proceedings and be paid a dividend (if one is payable in the administration) while continuing to be able to pursue the balance of the compensation debt against the offender after their discharge from bankruptcy. This would include the right to bankrupt the offender again.

Under proposal one, if they receive a release order from the ATO, the offender's superannuation fund trustee would be required to check the National Personal Insolvency Index (NPII) to determine whether the relevant member is bankrupt or has had bankruptcy proceedings commenced against them. If so, the superannuation fund trustee would be prohibited from complying with release orders made by a court until the offender's parallel bankruptcy is finalised. This would effectively mean that the process to obtain an early release order cannot commence until the bankruptcy is discharged or annulled. These provisions would ensure that the offender's 'out of character' contributions could be used to satisfy the bankruptcy creditors (including the victim or survivor) on an equitable basis in accordance with the *Bankruptcy Act*.

Once the offender's bankruptcy ends, the proposed amendments to the *Bankruptcy Act* would allow the victim's compensation debt to survive. Debt that survives bankruptcy can be enforced after discharge or annulment and proceedings could begin again on the amount owing. The proposal has no specific limit on the period in which the victim or survivor can reinstitute bankruptcy proceedings via new compensatory proceedings after the original bankruptcy is discharged, beyond those already provided for in the relevant bankruptcy legislation. We note that subsection 41(3) of the *Bankruptcy Act* currently prohibits a bankruptcy notice from being issued on a judgement or order that is older than six years.

Family law proceedings

As is the case with bankruptcy proceedings, the government considers that concurrent family law property settlement proceedings (which often involve superannuation assets) should always be completed prior to a victim's application for superannuation access being heard by another court.

During the 2018 consultation period, stakeholders generally supported prioritising the finalisation of family law processes over access to superannuation by victims and survivors of child sexual abuse. It was argued that family law processes should be completed first so that victims and survivors are compensated by the offender, not their former spouse or dependants.



It is important that family law property settlements provide financial certainty for separated couples and their dependants. Section 81 of the *Family Law Act 1975* (Cth) (the Family Law Act) requires the court to finally determine the financial relationships between the parties to the relationship and avoid further proceedings between them when making family law property settlement orders.

As such, the default position for the first proposal is to exclude superannuation funds subject to family law proceedings from compensatory proceedings until the relevant family law matter is finalised.

In cases where a family law property settlement occurs after a victim or survivor has been compensated from an offender's superannuation, the released superannuation could not be reclaimed from the victim or survivor. However, the total value of the unpaid compensation order could be taken into consideration by the court as it determines the property allocation between an offender and former partner, if the court considers that it is just and equitable to do so.

Interaction with family law proceedings that conclude prior to compensatory proceedings

The total value of an offender's 'additional' contributions would not be affected by a superannuation split as a result of family law property settlement immediately prior to a court issuing a release order to satisfy compensation debt. That is, where an offender is deemed to have made \$100,000 worth of 'additional' contributions over the 'deeming period', that would not be halved to \$50,000 in the event of a 50/50 superannuation split in a family law decision.

Finally, victims and survivors would not be eligible to be paid from an offender's former spouse's account after the finalisation of family law property proceedings, even if that account was paid contributions that were later deemed to be 'additional' per the definition under proposal one. To preserve the 'clean break' of finances intended by family law proceedings, it would not be appropriate to allow access to a former spouse's superannuation interests on the basis of an offender's liability after a family law settlement.

Consultation process

The closing date for submissions is 16 February 2023.

Source: [Treasury website, Access to offenders' superannuation for victims and survivors of child sexual abuse, 19 January 2023](#)



Compliance approach to late applications for Director ID

What you need to know

On 30 November 2022, the Australian Business Registry Services (ABRS) registrar Chris Jordan confirmed that ABRS will not apply compliance resources to determine whether directors met their director ID obligations by 30 November 2022 if they applied for a director ID by 14 December 2022.

Whilst penalties or offences can apply, the community can expect ABRS to take a reasonable compliance approach to support people to apply.

Late applications still open for directors who missed the director ID deadline and extension

Directors who missed the original 30 November 2022 deadline and the 14 December 2022 extension will need to request an extension of time to complete their director ID application. Visit the [ABRS website](#) for more information.

Despite the application deadline having passed, there is no change in the application process and the quickest way to apply for a director ID is online and via the myGovID app on a smart device. The ATO has indicated it will take a reasonable approach to those directors who try to do the right thing.

Background

The director ID is a unique 15-digit identifier that that is a requirement for all directors.

All directors of companies (including a director of an SMSF corporate trustee), registered Australian bodies and registered foreign companies must apply for a director ID – it is not optional.

Directors will apply for a director ID once and keep the number forever. The director ID regime is administered by ABRS and managed by the ATO.

Directors of corporations under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, or CATSI Act have an additional 12 months to 30 November 2023 to apply for a director ID.

More information about director IDs including who must apply is available on the [ABRS website](#).

How to apply for a director ID

The fastest way to apply for a director ID is online at [abrs.gov.au](#) and via the myGovID app on a smart device. The director ID will be issued instantly once the application is complete.

The steps involved the application process are explained on the [ABRS website](#).

It is free to apply, and directors must apply themselves as they are required to verify their identity. This identification process will help prevent the use of false and fraudulent director identities.



Directors of SMSF corporate trustees must use information from their personal documents, not their SMSF documents. They may need to contact their agent to request this information.

Source: [ATO website QC 71076, 13 Dec 2022](#) and [ATO website, QC 70986, 30 Nov 2022](#)



ASIC updates its SMSF advice guidance

What you need to know

ASIC has updated its guidance on SMSF advice, dropping its previous reference to a \$500,000 minimum balance threshold required to establish an SMSF.

The updated guidance is contained in [Information Sheet 274 \(INFO 274\) Tips for giving self-managed superannuation fund advice](#). This information sheet is designed to help Australian financial services (AFS) licensees and their representatives to comply with their legal obligations when providing personal advice about SMSFs, including a range of factors to consider when advising a client to withdraw their superannuation from a fund regulated by APRA to set up an SMSF.

Background

In 2022, ASIC undertook a review of its guidance on SMSF advice. This included its statements about SMSF balances as well the performance comparisons of SMSFs compared to APRA-regulated funds.

As part of this review, ASIC engaged with industry participants. The new INFO 274, incorporates feedback from industry including that ASIC guidance on SMSF advice should be simplified. INFO 274 consolidates and replaces two previous information sheets, which have been withdrawn:

- Information Sheet 205 [Advice on self-managed superannuation funds: Disclosure of risks](#) (INFO 205) and
- Information Sheet 206 [Advice on self-managed superannuation funds: Disclosure of costs](#) (INFO 206).

Key aspects

INFO 274 covers the following topics:

- [obligations when giving SMSF advice](#)
- [using professional judgement to assess whether an SMSF is suitable for a client](#)
- [considering the risks of an SMSF compared to an APRA-regulated superannuation fund](#) (including that a client is responsible for their SMSF)
- [providing appropriate advice that considers the costs of an SMSF and how much they would need to set up an SMSF](#), and
- [considering a suitable trustee structure, investment strategy, the need for ongoing financial advice, and an exit strategy](#).



Date of effect

The Standard will commence operation on 1 January 2023 on a voluntary compliance basis, with full mandatory compliance to commence from 1 July 2023 in line with the mandatory commencement date of and to complement the protections in the new Life Insurance Code of Practice.

Source: [FSC media release, Release of FSC Standard on claims handling for superannuation funds, 15 December 2022](#)

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Key changes

ASIC made a number of key changes to the INFO 274, including:

- removing previous guidance about a \$500,000 minimum balance threshold as an indicator of the “appropriateness of advice” to establish an SMSF (see below for more information)
- highlighting the risks involved with an SMSF and the importance of seeking professional advice
- referring to the need for financial advisers to explain to clients the potential implications and consequences of non-compliance with superannuation, corporations and taxation laws
- ensuring any comparisons between SMSFs and APRA-regulated funds remain relevant and up to date.

SMSF balances and the removal of the \$500,000 threshold

ASIC indicated that superannuation balance, whether high or low, is only one factor a financial adviser should consider when determining whether an SMSF is suitable for a client. Other important factors include the risks and costs associated with setting up and/or switching to an SMSF, investment strategies, diversification, liquidity, asset choice, trustee responsibility and time-commitment and the potential benefits of professional advice when deciding to set up and/or switch to an SMSF.

ASIC stated it had removed its reference to a \$500,000 minimum balance threshold required to establish an SMSF in the new guidance because “balance alone was not the driving indicator of suitability”. ASIC also provided two new case studies in an attachment to INFO 274 to illustrate this.

Financial advisers may also consider resources available on the ATO’s website about setting up and running an SMSF when determining whether an SMSF would be suitable for their client.

Source: [Information Sheet 274 \(INFO 274\) Tips for giving self-managed superannuation fund advice](#) and [ASIC media release, ASIC updates guidance on SMSF advice, 8 December 2022](#)



ASIC cancels registration of SMSF auditors for failing to lodge annual statements

What you need to know

ASIC has [advised](#) that it cancelled the registration of 374 SMSF auditors who failed to lodge their annual statements.

ASIC compliance program

As part of its current compliance program, ASIC communicated to over 1,400 SMSF auditors that they had outstanding annual statements. Most of these auditors subsequently lodged their statements.

Those SMSF auditors still with outstanding annual statements were advised on 3 August 2022 that ASIC was considering cancelling their registration. Notice of cancellation was sent to these auditors on 23 January 2023, following their continued non-compliance.

Based on data obtained from the ATO, the cancelled SMSF auditors had not performed a significant number of SMSF audits in the past two to three years.

Background

Since 1 July 2013, the SIS Act requires all auditors of SMSFs to be registered with ASIC. This is to ensure that all SMSF auditors meet at least base standards of competency and expertise.

Annually, SMSF auditors must (under s128G of the SIS Act) lodge a statement with ASIC within 30 days of the anniversary of their registration. These statements collect important compliance information.

SMSF auditors need to ensure they complete and lodge their annual statements as required, or they risk cancellation of their registration. They also need to ensure their contact details are kept up to date. Lodgements of annual statements and updates to contact details can be completed via the [ASIC Regulatory Portal](#).

A cancelled SMSF auditor may reapply for registration in the future.

SMSF auditors may request that ASIC review a decision it has made against them under the SIS Act. If the decision is confirmed or varied, the SMSF auditor may apply to the Administrative Appeals Tribunal (AAT) for further review of the decision.

ASIC last undertook a SMSF auditor annual statements compliance program in 2018 ([18-120MR](#)), which resulted in the cancellation of 117 SMSF auditors.

Source: [ASIC website, 23-012MR ASIC cancels registration of 374 SMSF auditors, 31 Jan 2023](#)



AAT to be replaced with a new federal administrative review body

What you need to know

The government has announced that it will abolish the Administrative Appeals Tribunal (AAT) and replace it with a new federal administrative review body.

At the same time, as part of this reform, the government has also developed new [AAT Appointment Guidelines](#). Under the Guidelines, all vacancies must be advertised and applicants will be assessed against clear criteria by an appropriately constituted panel.

Purpose of the reform

This reform is designed to ensure Australia's system of administrative review is:

- user-focused
- efficient
- accessible
- independent
- fair.

Impact on cases currently before the AAT

Matters currently before the AAT will be unaffected – they will continue to be heard as the reform progresses. Many cases currently before the AAT will be decided or finalised before the new federal administrative review body is established. Any remaining cases will transition to the new review body.

Taxpayers that have already applied to the AAT for review of a decision do not need to submit a new application.

Consultation process

Consultation with stakeholders on the design of the new body will be undertaken in the coming months.

Source: [Attorney-General media release, Albanese Government to abolish Administrative Appeals Tribunal, 16 Dec 2022](#) and [Attorney-General's department website, A new system of federal administrative review](#)



ASIC warns superannuation trustees to improve complaints handling

What you need to know

ASIC has [warned](#) that superannuation trustees are on notice to improve their internal dispute resolution systems after a targeted review of trustee compliance with the enforceable complaints handling requirements found that some trustees had sub-standard arrangements for managing complaints.

Report 751 *Disputes and deficiencies: A review of complaints handling by superannuation trustees* ([REP 751](#)) outlines ASIC's findings on compliance by a selection of trustees with the obligations in Regulatory Guide 271 Internal dispute resolution ([RG 271](#)).

Background

For REP 751, ASIC reviewed complaints handling by a selection of trustees covering a mix of industry, retail and corporate funds as well as a public sector fund. Each fund had at least 50,000 members and predominantly over \$10 billion in assets as at 30 June 2021.

Key concerns

ASIC said it saw examples of trustees' failure to comply with fundamental obligations, which could lead to poor outcomes, such as consumers abandoning a complaint rather than seeing it through.

Source: [ASIC media release, 22-347MR Superannuation trustees on notice to uplift complaints handling, 09 Dec 2022](#)



FSC releases standard for handling group life insurance claims in superannuation

What you need to know

The Financial Services Council (FSC) has released an [enforceable standard](#) for handling group life insurance claims in superannuation.

The new standard applies to FSC superannuation members who are trustees holding a public offer or extended public offer license to operate a Registerable Superannuation Entity (RSE) under the provisions of the SIS Act.

The new standard replaces existing voluntary guidance and sets out the minimum level of service consumers should expect to receive from their superannuation fund when making a claim on their life insurance.

Date of effect

The new standard will commence operation on 1 January 2023 on a voluntary compliance basis, with full mandatory compliance to commence from 1 July 2023 in line with the mandatory commencement date of and to complement the protections in the new Life Insurance Code of Practice.

Source: [FSC media release, Release of FSC Standard on claims handling for superannuation funds, 15 December 2022](#)



APRA releases updated MySuper Heatmap

What you need to know

APRA has released its [2022 MySuper Heatmap](#).

Background

The heatmap evaluates every MySuper product's performance in the areas of investment returns, fees and costs and long-term sustainability of member outcomes. To further enhance industry transparency and product comparison, the heatmap includes each product's result under the [Annual Performance Test](#).

Key findings

Key findings from the 2022 MySuper Heatmap include:

- Fees and costs have fallen for most MySuper products.
- 28 MySuper products have closed since APRA released the first heatmap in 2019.
- 350,000 fewer members are in MySuper products with "significantly poor" investment performance than in 2021. However, around 800,000 members' accounts remain in these underperforming products.
- Sustainability pressures exist across the industry, with most superannuation funds posting negative growth over the past three years across one or more of the heatmap's sustainability metrics.

Source: [APRA media release, APRA releases updated MySuper Heatmap, 15 Dec 2022](#)



APRA releases 2021-22 superannuation bulletin

What you need to know

APRA has released the annual superannuation bulletin for the 2021-22 financial year.

Background

The annual superannuation bulletin provides an overview of the superannuation industry, and is published on an annual basis.

These statistics contains information on funds and membership profile, key financial performance metrics, financial position, fees and expenses.

Bulletin highlights

For the year ending 30 June 2022, key highlights include:

- Total superannuation industry assets reached \$3.3 trillion comprising of:
 - \$2.3 trillion held by APRA regulated funds
 - \$0.9 trillion held by SMSFs
 - \$154 billion held by exempt public sector superannuation schemes
 - \$63 billion held by balance of life office statutory funds

Over the five years from June 2017 to June 2022:

- Total superannuation industry assets grew by 35.8% from \$2.5 trillion to \$3.3 trillion
- APRA regulated assets increase by 71.6% from \$1.6 trillion to \$2.3 trillion
- SMSF assets increased by 32.7% from \$655 billion to \$869 billion
- Number of SMSFs grew by 7.7% from 560 thousand to 603 thousand
- Number of APRA-regulated funds decreased by 29.3% from 2,163 to 1,530. The decrease of 633 APRA-regulated funds over this period comprised:
 - 69 entities with more than six members
 - 20 pooled superannuation trusts (PSTs)
 - 544 small APRA funds

Source: [APRA website, Annual superannuation bulletin, 31 Jan 2023](#)



ATO releases SMSF quarterly statistical report - September 2022

What you need to know

The ATO has released its September 2022 quarterly statistical report on the SMSF sector.

Report highlights

- There are 603,449 SMSFs.
- There are 1,127,384 members of SMSFs.
- The total estimated assets of SMSFs are \$865.2 billion.
- The top asset types held by SMSFs (by value) are:
 - listed shares (28% of total estimated SMSF assets)
 - cash and term deposits (16%).
- 53% of SMSF members are male and 47% are female.
- 87% of SMSF members are 45 years or older.

Read the [full report](#) for further statistics about:

- SMSF fund and member demographics
- estimates on SMSF asset holdings
- annual 'flows' in and out of SMSFs.

Source: [ATO website, QC 71020, 06 Dec 2022](#)



Our submission for the 2023-24 Federal Budget

What you need to know

On 24 January 2023, the Institute of Financial Professionals Australia (originally known as Taxpayers Australia, then Tax & Super Australia) submitted its 2023-24 pre-budget submission on a range of superannuation matters. We believe there are number of measures that can be introduced by the government that will reduce red tape and help stimulate economic activity. We also believe there are number of bigger picture issues in the superannuation system that should be reviewed.

Our 2023-24 pre-budget submission recommendations include:

- Superannuation balances should not be capped
- Non-arm's length income rules should be made proportionate
- Consistency of indexation of thresholds
- Retain the indexation of the general TBC
- Continued freeze on deeming rates
- Breaches of regulation 13.22D of the SIS Regs should be rectifiable
- Remove the auto non-compliance for breaching section 17A and failing to be an Australian superannuation fund
- Superannuation guarantee – quick fixes
- Protecting an individual's unused concessional contribution cap
- Abolition of the work test for personal deductible contributions
- Streamline the personal deduction process
- TBAR reporting should be annual for SMSFs
- Legacy pension amnesty should be extended
- Fixes to the binding death benefit nomination system
- Death benefit lump sums should not be limited to two payments
- Other areas of the superannuation system that require review

Our 2023-24 pre-budget submission can be found [here](#).



Court upholds AFCA decision on payment of super death benefit to estate

What you need to know

The Federal Court has upheld a decision to pay a death benefit to a deceased member's estate, rather than to a woman (the appellant) who claimed she was a de facto spouse of, or in an interdependency relationship with the deceased at the time of his death.

Facts

In the case of [Wan v BT Funds Management Limited \[2022\] FCA 302](#), the trustee of a super fund decided to pay a death benefit of \$881,111 to the estate of a deceased member rather than to the appellant who argued that she was a dependant of the deceased within the meaning of section 10 of the SIS Act. She also claimed that super fund trustees should favour dependants over an estate when deciding on the payment of the death benefit.

While the deceased had made a nomination for his estate to be the sole beneficiary of his death benefit, he had not put in place a binding death benefit nomination.

The fund trustee initially resolved to pay the death benefit to the appellant on the basis that she was a de facto spouse. However, following an objection made by the deceased's legal personal representative to the effect that the appellant was not a dependant of the deceased, the trustee instead resolved to pay 100% of the deceased's superannuation death benefit to his estate rather than to the appellant. The result of this was for the appellant to become entitled to approximately 33% of the deceased's superannuation death benefit by reason of the operation of his will, rather than the entire 100% of the benefit.

The appellant made a complaint to the Australian Financial Complaints Authority (AFCA). AFCA determined that the trustee's decision was fair and reasonable in all the circumstances and within its power because the appellant was not a "dependant" of the deceased as she was not a de facto spouse (as she and the deceased member were not living together on a genuine domestic basis as a couple at the date of the deceased member's death) or in an interdependency relationship with the deceased member.


The appellant submitted that AFCA misconstrued the definition of dependant by adopting a narrow interpretation of that status or relationship.

Decision

The Full Court dismissed the appeal, rejecting the appellant's submission that AFCA had failed to give proper consideration as to whether she was a "spouse" or in an "interdependency relationship" with the deceased.

The Full Court concluded that AFCA had made no legal error in its finding that the trustee's decision was within power and fair and reasonable in its effect, having regard to the interests of the applicant as well as to those interests of other parties joined to the complaint.

Source: [Wan v BT Funds Management Limited \[2022\] FCA 302, 29 November 2022](#) and Tax & Super Australia's June SDG notes, pages 31-32.



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