

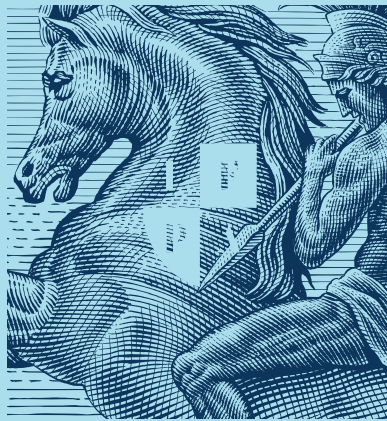


# Superannuation Notes

**AUGUST 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 Notes

Notes for Super Discussion Group sessions held in Sydney  
8 August 2023 and Melbourne 10 August 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 1 June till Wednesday 26  
July 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 Superannuation 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 status icon 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 look for the tick.



**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 releases draft determination on the interaction of NALI rules and CGT provisions .....	5
ATO issues Taxpayer Alert on NALI and property developments .....	10
ATO highlights schemes targeting SMSFs.....	16
ATO provides updated guidance on commutation authorities for market linked pension restructures .....	19
ATO issues reminder on minimum annual pension payment requirements .....	21
ATO updates SMSF disqualification register for March quarter.....	23
ATO improves access to technical support .....	24
ATO issues GIC and SIC rates .....	25
ATO website updates.....	26
<b>LEGISLATION.....</b>	<b>28</b>
Status of superannuation matters @ 26 July 2023.....	28
<b>BULLETIN BOARD .....</b>	<b>36</b>
APRA and ASIC review implementation of retirement income covenant.....	36
APRA releases final guidance on investment governance of super funds.....	38
APRA launches new statistical publication .....	39
ASIC continues to act against SMSF auditors .....	40
AAT upholds excess super balance determination.....	41
AAT finds no exceptional circumstances to reallocate excess contributions to another year.....	43
AAT upholds penalties imposed for late SG payments relating to amnesty quarters.....	45
Our submission on the NALE rules for super funds .....	47



# ATO ACTIVITY



## ATO releases draft determination on the interaction of NALI rules and CGT provisions

### What you need to know

The ATO has released the draft taxation determination [TD 2023/D1 \(\*Income tax: how the non-arm's length income and capital gains tax provisions interact to determine the amount of statutory income that is non-arm's length income\*\)](#), which outlines the ATO's views as to how the non-arm's length income (NALI) provisions in subdivision 295-H of the ITAA97 and the capital gains tax (CGT) provisions in section 102-5 of the ITAA97 interact in determining the amount of statutory income that is NALI where a capital gain arises as a result of non-arm's length dealings.

In particular, TD 2023/D1 provides guidance as to how to calculate the amount of statutory income that is NALI where a superannuation fund makes a capital gain as a result of non-arm's length dealings. The Draft also outlines various alternative views on how the NALI and CGT provisions interact and why these alternative views are not supported.

We expect further clarification to be provided by the ATO when the final determination is issued.

### Background

The statutory income of a superannuation fund that has made a capital gain is the superannuation fund's net capital gain calculated under subsection 102-5(1) of the ITAA97.

Subsection 295-550(1) of the ITAA97 refers to 'an amount of ordinary or statutory income' that is NALI as a result of a scheme in which the parties were not dealing with each other at arm's length in relation to the scheme.

Specifically, a capital gain made by a superannuation fund that arises as a result of a scheme – the parties to which were not dealing with each other at arm's length – is NALI under subsection 295-550(1) where one or more of the following applies:

- the amount of the capital gain is more than the amount the superannuation fund might have been expected to derive if the parties had been acting at arm's length in relation to the scheme (paragraph 295-550(1)(a))
- in gaining or producing the capital gain, non-arm's length expenditure (NALE) is incurred (including nil expenditure) in respect of a CGT asset that is less than the amount of a loss, outgoing or expenditure that the superannuation fund might have been expected to incur if those parties were dealing with each other at arm's length in relation to the scheme (paragraphs 295-550(1)(b) or (c)).



The amount of NALI is determined by reference to the amount of the non-arm's length capital gain, being the capital proceeds less the cost base arising from the scheme in which the parties were not dealing at arm's length, that gives rise to the application of subsection 295-550(1). This non-arm's length capital gain is subject to the relevant CGT market value substitution rules (if any) and is reduced by any attributable deductions to calculate the non-arm's length component under subsection 295-545(2).

However, in determining 'the amount' of statutory income that is NALI, the amount of NALI cannot exceed the superannuation fund's net capital gain as calculated under subsection 102-5(1) for the relevant income year. In circumstances where the non-arm's length capital gain made by the superannuation fund would otherwise exceed the superannuation fund's net capital gain, the amount of NALI equals the superannuation fund's net capital gain.

Under the method statement in section 102-5, a fund's net capital gain is broadly calculated by:

- Adding up all capital gains for that financial year
- Then subtracting capital losses (present year and then any prior year losses carried forward)
- Reducing by the discount percentage each amount of a discount capital gain remaining

The remaining amount is then the net capital gain.

By contrast, while the ATO considers this strict approach in TD 2023/D1, the ATO ends up rejecting this view and choosing a different approach (as outlined below).

## ATO's view expressed in TD 2023/D1

In TD 2023/D1, the ATO adopts the view that NALI is the lesser of the:

- Non-arm's length capital gain (note no reduction for discount percentage, capital losses, etc)
- Net capital gain.

In addition, Appendix 1 of this draft determination outlines the following method statement for superannuation funds to work out their tax payable under subsection 295-10(1):

### **Step 1**

For a superannuation fund, work out the no-TFN contributions income. Apply the applicable rates as set out in the *Income Tax Rates Act 1986* to that income.

### **Step 2**

Work out the entity's assessable income and deductions taking account of the special rules in this Division. The special rules modify some provisions of this Act. They also include amounts in assessable income, allow deductions and exempt amounts from income tax.

### **Step 3**

Work out the entity's taxable income as if its trustee:

- (a) were an Australian resident (except where paragraph (b) applies); or
- (b) for a non-complying superannuation fund that is a foreign superannuation fund for the income year – were not an Australian resident.

### **Step 4**

For a complying superannuation entity, work out the low tax component and non-arm's length component of the entity's taxable income.



### Step 5

Apply the applicable rates as set out in the *Income Tax Rates Act 1986* to:

- (a) if step 4 applies to the entity – the components worked out under that step; or
- (b) otherwise – the entity's taxable income.

### Step 6

Subtract the entity's tax offsets from the step 5 amount or, for a superannuation fund, from the sum of the fund's step 1 and step 5 amounts.

#### **Example 1 - non-arm's length expenditure incurred to acquire a CGT asset at below market value - paragraph 295-550(1)(b)**

Anya is the trustee of the Forja Self-Managed Super Fund (SMSF) which had the following income for the 2022-23 income year:

- \$500,000 arm's length capital gain
- \$2 million non-arm's length capital gain as a result of a CGT event happening to a CGT asset of the Forja SMSF. The CGT asset had been acquired by the Forja SMSF in the 2020-21 income year under a scheme where the parties to the scheme had not dealt with each other at arm's length such that paragraph 295-550(1)(b) applies. If the parties had dealt with each other at arm's length and paid arm's length consideration for the asset, the capital gain would have been \$1.3 million.
- other assessable income of \$883,333.33 – not a capital gain.

Forja SMSF had a current year capital loss of \$200,000 and no previous year net capital losses. Both capital gains are discount capital gains, but the small business concessions in Subdivisions 152-C, 152-D and 152-E do not apply.

The net capital gain reported was \$1,533,333.34, calculated using the method statement under subsection 102-5(1) (the CGT market value substitution rule in section 112-20 that modifies the cost base was not applied by the trustee):

$$\$2,500,000\ddagger - \$200,000\ddagger - \$766,666.66\text{\textcent} = \$1,533,333.34$$

Where:

- † is \$500,000 + \$2,000,000
- ‡ is the capital loss
- \textcent is the 33 1/3% discount percentage for SMSFs.

The net capital gain that should have been reported is \$1,066,666.67 (applying the relevant CGT market value substitution rule in section 112-20), calculated as follows:

$$\$1,800,000\ddagger - \$200,000\ddagger - \$533,333.33\text{\textcent} = \$1,066,666.67$$

Where:

- † is \$500,000 + \$1,300,000
- ‡ is the capital loss
- \textcent is the 33 1/3% discount percentage for SMSFs.



The expenditure incurred by the Forja SMSF in acquiring the asset is NALE as it is less than the expenditure the superannuation fund would have been expected to incur had it been dealing at arm's length with the entity from which it acquired the asset. There is a sufficient nexus between the expenditure incurred by the Forja SMSF in acquiring the asset and the capital gain made on the asset for paragraph 295-550(1)(b) to apply. While the non-arm's length capital gain as a result of a CGT event happening to the CGT asset was \$1.3 million, the amount of NALI calculated by reference to the non-arm's length capital gain cannot exceed Forja SMSF's net capital gain for the income year, being \$1,066,666.67. The amount of NALI is therefore \$1,066,666.67.

As such, the tax payable by the Forja SMSF under subsection 295-10(1) is calculated as follows:

**Step 1** – is not applicable.

**Step 2** – work out the entity's assessable income and deductions taking into account of the special rules in Division 295.

The assessable income is \$1,066,666.67 (net capital gain) plus \$883,333.33 (other income) = \$1,950,000. The deductions are nil.

**Step 3** – work out the entity's taxable income.

The taxable income is \$1,950,000 less nil deductions = \$1,950,000.

That is, \$1,066,666.67 net capital gain + \$883,333.33 other assessable income = \$1,950,000.

**Step 4** – calculate the non-arm's length component.

The amount of the non-arm's length component is \$1,066,666.67:

$$\$1,066,666.67\uparrow - \text{nil}\ddagger = \$1,066,666.67$$

Where:

- $\uparrow$  is the NALI amount
- $\ddagger$  the capital losses and discount percentage are not 'deductions' for section 295-545 purposes

Calculate the low tax component:

The low tax component of the taxable income is \$883,333.33:

$$\$1,950,000\uparrow - \$1,066,666.67\ddagger = \$883,333.33$$

Where:

- $\uparrow$  is the taxable income
- $\ddagger$  is the non-arm's length component

**Step 5** – Apply the applicable rates as set out in the *Income Tax Rates Act 1986*.

The non-arm's length component of \$1,066,666.67 is taxed at the highest marginal rate (45%) and the low tax component of \$883,333.33 is taxed at 15%.

**Step 6** – is not applicable.



## IFPA comment

It is concerning that the draft ruling appears to be contrary to the industry's understanding of how the NALI provisions are intended to work. The current industry view is that where a capital gain arises because of non-arm's length dealings, only the net capital gain that relates to that particular CGT asset is treated as NALI. However, the ATO's view in draft TD 2023/D1 is that the NALI capital gain can taint other capital gains incurred by the fund in the same income year. As can be seen in the example above, the non-arm's length component for the Forja SMSF is \$1,066,666.67 which includes a \$500,000 arm's length capital gain. It is hoped the ATO amends its view before this determination is finalised as it is unfair to apply penalty tax rates to a genuine arm's length capital gain.

A full version of TD 2023/D1 is available [here](#).

## Consultation period

Comments are due by 28 July 2023.

Source: *TD 2023/D1 (Income tax: how the non-arm's length income and capital gains tax provisions interact to determine the amount of statutory income that is non-arm's length income)*



# Sign up for our weekly super & financial services update



This weekly newsletter has been created to provide you with the most relevant and essential updates on superannuation and financial services that have arisen throughout the week. Don't miss out on this valuable resource!

Scan code, click here or call (03) 8851 4555 to sign up





## ATO issues Taxpayer Alert on NALI and property developments

### What you need to know

The ATO has released the taxpayer alert [\*TA 2023/2 - Diverting profits of a property development project to a self-managed superannuation fund, through use of a special purpose vehicle, involving non-arm's length arrangements\*](#) which outlines arrangements that are of concern to the ATO. These arrangements involve SMSF trustees investing directly or indirectly, in a special purpose vehicle, which undertakes property development. The ATO's view expressed in TA 2023/2 is that non-arm's length dealings by any party, in respect of any step, in relation to a scheme, can give rise to NALI. The ATO's concerns also extend to any capital gains derived on the subsequent disposal of an SMSF's interest in the special purpose vehicle.

Taxpayers and advisers who enter into these types of arrangements are now subject to extra scrutiny by the ATO.

### Overview

The ATO is currently reviewing arrangements under which:

- one or more SMSFs have, or acquire, direct or indirect ownership of a special purpose vehicle (SPV) that undertakes a property development project, and
- because of the non-arm's length arrangements between the SPV and other entities, the SPV derives a profit that ultimately benefits the SMSFs which is more than what it would have been if all the parties had dealt with each other at arm's length.

The non-arm's length arrangements have the effect of shifting what would otherwise be the profits of the related entities (taxed at the corporate rate, for example) to the SMSFs, being concessional tax entities. If the SPV is a company, the SMSFs may also receive tax offset refunds in relation to the dividends received.

The ATO will consider whether the dividends and other income received by the SMSFs are NALI as defined in section 295-550 of the ITAA97, and the application of the regulatory requirements in the SIS Act and other relevant law in respect of these arrangements.

Trustees of SMSFs that are looking to participate in a property development should refer to the [\*SMSF Regulator's Bulletin Self-managed superannuation funds and property development\*](#) on how SMSF trustees can ensure they meet their income tax and regulatory obligations when participating in property development activities.

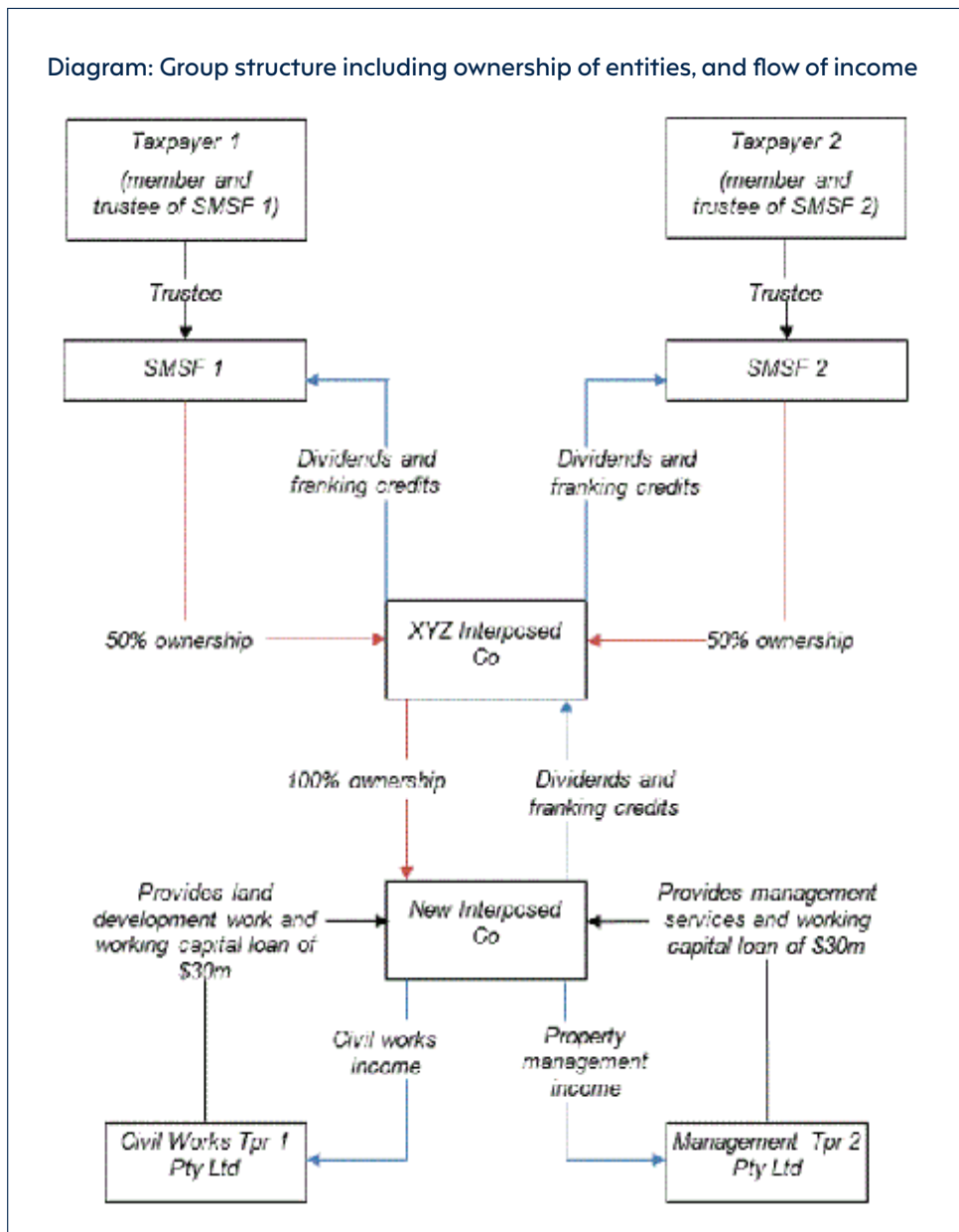


## Description

These arrangements typically display some or all of the following features:

- The controlling minds of one or more property development groups carry out a particular project by establishing an SPV for this purpose.
- The controlling minds are members of their respective SMSFs.
- Interests in the SPV can be directly or indirectly owned by the SMSFs and the SMSFs' interests can be acquired for either an arm's length or non-arm's length price.
- The SPV contracts with related entities, often within the controlling minds' property development groups (related entities), to carry out some or all of the property development project work. The price charged by the related entities is less than what would be expected in an arm's length arrangement and, as a result, the related entities derive a lower (or nil) profit than if they had dealt at arm's length.
- The related entities or SPV, or both, may also enter into loans to facilitate the property development project. The terms of the loans are not consistent with those that would be expected in an arm's length dealing (for example, the interest rate may be lower). In some instances, the loan terms may appear at arm's length but those terms are not followed or fully enforced.
- The SPV earns profits in respect of the property development project that are higher than what would have been expected if the SPV, SMSFs or the related entities had dealt with each other at arm's length. The SMSFs ultimately derive dividends or distributions in respect of the SPV's profits and they may also receive tax offset refunds in relation to any dividends received.

**Example: Non-arm's length income arrangement involving the diversion of profits of a property development project to 2 self-managed superannuation funds**



Taxpayer 1, an individual, is a member and trustee of SMSF 1 and also a shareholder, director and controlling mind of Civil Works Tpr 1 Pty Ltd which is engaged in property construction.

Taxpayer 2, an individual, is a member and trustee of SMSF 2 and a shareholder, director and controlling mind of Management Tpr 2 Pty Ltd which is engaged in the management of construction projects and providing finance.

A third-party land owner is seeking to engage a property developer to construct buildings on its land, for which the property developer will be paid a fixed portion of the sale proceeds of each developed property.



Taxpayer 1 and Taxpayer 2 agree to form new entities to undertake the property development project. Under the agreement:

- XYZ Interposed Co is created and owned 50% each by SMSF 1 and SMSF 2.
- New Interposed Co, a special purpose vehicle, is created and owned 100% by XYZ Interposed Co.
- New Interposed Co contracts with the third-party land owner to undertake the property development.
- New Interposed Co subcontracts all property development functions to Civil Works Tpr 1 Pty Ltd and property development project management functions to Management Tpr 2 Pty Ltd.
- Management Tpr 2 Pty Ltd and Civil Works Tpr 1 Pty Ltd each provide a working capital loan of \$30 million to New Interposed Co.

Ordinary shares are issued by XYZ Interposed Co to SMSF 1 and SMSF 2 for an arm's length price.

Ordinary shares in New Interposed Co are issued to XYZ Interposed Co, for a non-arm's length nominal price.

New Interposed Co sub-contracts the property construction function to, and obtains a loan of \$30 million from, Civil Works Tpr 1 Pty Ltd. Under the property construction function, Civil Works Tpr 1 Pty Ltd charges non-arm's length fixed fees that are below the fees that it would charge third parties for the same services. The loan by Civil Works Tpr 1 Pty Ltd to New Interposed Co is on non-arm's length terms, including no interest and no set repayments of principal and interest.

New Interposed Co sub-contracts the property development project management function to, and obtains a loan of \$30 million from, Management Tpr 2 Pty Ltd. Under the management contract, Management Tpr 2 Pty Ltd charges fixed fees which are at arm's length and consistent with fees it charges to third parties for the same services. The loan by Management Tpr 2 Pty Ltd to New Interposed Co is on non-arm's length terms, including no interest and no set repayments of principal and interest.

New Interposed Co receives its fixed portion of the proceeds from the sale of the developed properties over the duration of the property development project. New Interposed Co pays franked dividends sourced from the proceeds of these sales to XYZ Interposed Co. In turn, XYZ Interposed Co pays franked dividends to SMSF 1 and SMSF 2.

As a consequence of the arrangement, New Interposed Co earns profits in respect of the property development project that are more than what would have been expected if the New Interposed Co, the SMSFs or the other entities had dealt with each other at arm's length.

As a result of the scheme, some or all of the profits of New Interposed Co. are diverted to SMSF 1 and SMSF 2 through the payment of dividends from XYZ Interposed Co. The dividends received from XYZ Interposed Co are assessed at a 15% rate of tax or are exempt from tax if the shares in XYZ Interposed Co are supporting the payment of pensions to members of SMSF 1 or SMSF 2. SMSF 1 or SMSF 2 may also receive a refund of any excess franking credits associated with the dividends.



## ATO concerns

The ATO is concerned that some of the arrangements lack commerciality and result in diverting profits attributable to a property development project (that would otherwise be taxed at the corporate, or other applicable, rate) to an SMSF being a concessionally taxed entity. Depending on the facts, the ATO's concern also extends to any capital gain derived from the subsequent disposal of the SPV or other entity in which the SMSF has an indirect or direct interest.

A view has been expressed that as long as the SMSF is not directly involved in any non-arm's length dealing, the NALI provisions cannot apply. These views are not correct and have been addressed judicially. Non-arm's length dealings by any party in respect of any step in relation to the scheme, can give rise to NALI as defined in section 295-550 of the ITAA97.

In respect of the arrangement covered in this Alert, the ATO is concerned that:

- an examination is not being made in respect of each step in the scheme to ensure that they are all at arm's length. For example, while the SMSFs' acquisition of ordinary shares in XYZ Interposed Co are for an arm's length price, the fact that XYZ Interposed Co's acquisition of New Interposed Co shares was at a non-arm's length nominal price is one factor that may give rise to the application of the NALI provisions.
- shares in entities in which the SMSFs have a direct and indirect interest in (XYZ Interposed Co and New Interposed Co in the Example in this Alert) may not be purchased by the relevant entity at an arm's length price and this may give rise to NALI consequences. For example, as XYZ Interposed Co's interest in New Interposed Co was acquired at less than the arm's length market value, any dividends paid to the SMSFs that are sourced from a capital gain in respect of XYZ Interposed Co's disposal of New Interposed Co may be NALI.
- an entity (New Interposed Co in the example in this Alert) enters into an arrangement to sub-contract (Civil Works Tpr 1 Pty Ltd) the property construction function on non-arm's length terms to maximise the profits from the property development project, that ultimately benefits the SMSFs.
- an entity (New Interposed Co in the example in this Alert) borrows monies (from Civil Works Tpr 1 Pty Ltd and Management Tpr 2 Pty Ltd in the Example) on non-arm's length terms – including charging no interest, to maximise its profits from the property development project, that ultimately benefits the SMSFs.
- the SMSFs may be maintained for a purpose outside those permitted by the sole purpose test under section 62 of the SIS Act.
- the SMSFs may not continue to meet the relevant operating standards under the SIS Act, including record-keeping requirements, ensuring assets are appropriately valued and recorded at market value.
- the SMSFs may have breached other SIS Act requirements, such as the in-house asset and borrowing provisions.
- other risks may arise, as mentioned in SMSFRB 2020/1.

From the ATO's review of these arrangements, the ATO considers that the following consequences may arise:

- Dividends and franking credits received by the SMSFs (such as those from XYZ Interposed Co in the Example in this Alert) – that arise as a result of their direct or indirect interest in the SPV that undertakes the property development project (New Interposed Co in the Example) – are NALI, as defined in section 295-550 of the ITAA97, and taxed at the top marginal rate.
- Depending on the facts, capital gains, or income that flows to the SMSFs from those capital gains, that arise in respect of the disposal of entities in the scheme may have NALI consequences under section 295-550 of the ITAA97.



- The Commissioner may make a determination under Part IVA of the ITAA36 in relation to the imputation benefit or tax benefit arising under the arrangement.
- The Commissioner may, under section 126A of the SIS Act, disqualify a person from acting as a trustee or director of a corporate trustee of the SMSFs.
- The Commissioner may issue a notice of non-compliance under subsection 40(1) of the SIS Act to the SMSFs.

## ATO action

The ATO is currently reviewing these arrangements and are engaging with taxpayers who have entered into, or are considering entering into, these and similar arrangements.

Taxpayers and advisers who enter into these types of arrangements will be subject to increased scrutiny.

Arrangements entered into by an SMSF, or other entity in which the SMSF has a direct or indirect interest, should be subject to strong governance, care and diligence.

Penalties may apply to participants in, and promoters of, this type of arrangement. This includes serious penalties for promoters under Division 290 of Schedule 1 to the *Taxation Administration Act 1953*. Registered tax agents involved in the promotion of this type of arrangement may be referred to the Tax Practitioners Board to consider whether there has been a breach of the *Tax Agent Services Act 2009*.

### ⇒ Action items for SMSF trustees

If an SMSF trustee has entered, or is contemplating entering, into an arrangement of this type, the ATO encourages them to:

- phone or email the ATO using the contact details provided at the end of this Alert
- ask the ATO for its view through a [private ruling](#)
- seek independent professional advice
- make a [voluntary disclosure](#) to reduce penalties that may apply.

*Source: [TA 2023/2: Diverting profits of a property development project to a self-managed superannuation fund, through use of a special purpose vehicle, involving non-arm's length arrangements](#)*



## ATO highlights schemes targeting SMSFs

### What you need to know

The ATO has warned SMSF trustees to avoid the latest range of illegal early release and tax avoidance schemes involving SMSFs. These schemes include arrangements that encourage people to set up an SMSF and use their super benefits for personal purposes and to channel money inappropriately into their SMSF to avoid paying tax.

The ATO has also warned SMSF trustees that they may risk losing some or all of their retirement savings and receive serious penalties if they enter into such schemes and that they could also be disqualified as a trustee of their SMSF which could result in their fund being wound up.

The ATO has recommended tax professionals to report tax avoidance schemes that are marketed to them to protect their clients and their practice.

### Areas of concern

The latest schemes with arrangements of concern to the ATO involve:

1. The following schemes related to property:
  - **Related-party property development ventures** – Property development in associated joint venture structures that may result in substantial profits flowing to the SMSF. The related group entities provide most of the services and if not at arm's length market values, substantial profits may be attributed to the SMSF greatly out of proportion to the capital contributed. In May 2023, the ATO published a Taxpayer Alert (TA) on these types of arrangements and how the ATO is actively reviewing them. For more information on these schemes and why they concern the ATO see the [TA 2023/2: Diverting profits of a property development project to an SMSF, through use of a special purpose vehicle, involving non-arm's length arrangements](#) and the SMSF Regulator's Bulletin [SMSFRB 2020/1 Self-managed superannuation funds and property development](#).
  - **Residential property purchased in a member's name** – This is where an SMSF is set up to help members buy residential property in their personal name. These schemes often target first home buyers wanting to enter the property market.
  - **Legal life interest of property** – This happens when an SMSF member or other related entity grants a legal life interest over property to a SMSF. This means the rental income diverted to the SMSF is taxed at a lower rate without full ownership of the property ever transferring to the SMSF. For more information, see [Residential property purchased through illegal SMSF schemes](#).
2. **Non-concessional cap manipulation** – This happens where SMSF members deliberately exceed their non-concessional contributions cap to manipulate the taxable and non-taxable components of their superannuation account balances.



3. Dividend stripping – This happens when shareholders in a private company transfer ownership of their shares to a related SMSF. The company can then pay franked dividends to the SMSF and strip profits from the company in a tax-free or concessionally taxed form. For more information, see [TA 2015/1: Dividend stripping arrangements involving the transfer of private company shares to a self-managed superannuation fund](#)
4. The following schemes related to limited recourse borrowing arrangements (LRBA):
  - LRBA and arm's length dealings – SMSF trustees undertaking LRBA and related party lending arrangements that are not consistent with a genuine arm's length dealing.
  - LRBA and intra-group lending arrangements – Any lending arrangements which involve an SMSF, directly via an LRBA or indirectly through an associated entity that can benefit an SMSF needs to be on terms that are the same as those commercially available to people in the same or similar lending circumstances.
5. Personal services income where an individual (with an SMSF often in pension phase) diverts income earned from personal services to the SMSF to be concessionally taxed or treated as exempt from tax. For more information, see [TA 2016/6: Diverting personal services income to self-managed superannuation funds](#).
6. Mezzanine Lending such as lending by the SMSF with complex intra-group lending arrangements that provides finance and asset protection. The intra-group entities assume the risk, however the SMSF receives all of the profit from the arrangement.
7. Asset protection schemes such as arrangements that claim to protect SMSF assets from creditors by mortgaging them to an asset protection trust (known as a 'Vestey Trust') present a compliance risk. For more information, see [SMSFs and schemes involving asset protection](#).
8. Asset valuations – Where asset valuations are not fit for purpose and are being applied to the intra-group transfer of assets. The assets are being transferred to the SMSF at lower values than they're actually worth.
9. Improper use of multiple SMSFs – Having multiple SMSF's ordinarily does not raise compliance issues, but the establishment of additional SMSFs intended to manipulate tax outcomes would. For example:
  - switching each of the respective funds between accumulation and retirement phase
  - rolling over potentially tainted NALI funds into a new SMSF to avoid possible reviews and amendments by the ATO.
10. Inappropriate use of reserves – Many existing reserves in SMSFs arose legitimately from legacy pensions that are no longer available. As a result, there are very limited appropriate circumstances where new reserves could be established and maintained in SMSFs. Structures using reserves designed to bypass super balance and transfer balance cap measures will attract the ATO's scrutiny. For more information, see SMSF Regulator's Bulletin [SMSFRB 2018/1: The use of reserves by self-managed superannuation funds](#).



## How to recognise a scheme

Schemes have some common features. For example, they:

- are artificial or contrived arrangements with complex structures around an existing or new SMSF
- involve seemingly unnecessary steps or transactions
- are designed to give the taxpayer minimal or zero tax or even a tax refund
- aim to bring forward a tax benefit
- invariably sound 'too good to be true' and they generally are.

Source: [ATO website QC 49657, 30 Jun 2023](#)



## ATO provides updated guidance on commutation authorities for market linked pension restructures

### What you need to know

The ATO has updated its website to remind SMSF trustees who are seeking to restructure a [market-linked pension](#) that meets the specific circumstances set out in the [law change on 5 April 2022](#) to wait on a commutation authority to be issued before they can remove any excess transfer balance amount.

Commuting a market linked pension without a commutation authority jeopardises the SMSF's entitlement to exempt current pension income (ECPI) on the earnings associated with the pension. In addition, if the commuted amount is taken as a lump sum benefit, the payment will be in breach of the payment standards which may result in the member being assessed for early release of superannuation benefits.

### Background

A commutation of a market linked pension to remove any excess transfer balance amount can only occur after the ATO has issued a commutation authority to the fund. This occurs after the member has been issued with an excess transfer balance determination by the ATO. It won't happen until 60 days has passed as this is a legislative requirement that allows time for the member to make an election.

The ATO may issue a commutation authority within a reasonable time after the 60 days has elapsed. This may be a further 28 to 30 days.

It may take longer, if either:

- the TBAR or determination is amended
- an objection is lodged
- the member has elected to extend the election due date in the default commutation notice.

### Law change commencing 5 April 2022

The [Treasury Laws Amendment \(Allowing Commutation of Certain Income Streams\) Regulations 2022](#) was registered on 4 April 2022 and commenced on 5 April 2022.

The regulations include changes to *the SIS Regs* and the *Tax Administration Act 1953* that allow super funds to:

- change the timing of certain debit and credit events in a member's transfer balance account
- commute excess transfer balance amounts for certain income streams in response to a Commissioner's commutation authority.



For more information see:

- [Transfer balance cap reporting](#)
- [Updated guidance – market linked pensions \(MLP\)](#)

Source: [ATO website QC 72887, 21 Jun 2023](#) and [ATO website QC 70085, 15](#)



## ATO issues reminder on minimum annual pension payment requirements

### What you need to know

The ATO has reminded SMSF trustees that they must pay a minimum amount each year by 30 June to a member who is receiving a pension that commenced on or after 20 September 2007. These are mainly account based pensions.

If the minimum payment is not made by 30 June, this can result in adverse taxation consequences for the member.

Importantly, the ATO has reminded trustees that for the 2023–24 financial year the 50% reduction in the minimum pension drawdown rate (that applied in response to COVID in the 2019–20, 2020–21, 2021–22 and 2022–23 financial years) will no longer apply.

### Background

SMSFs must pay a minimum amount each year to a member from their pension account.

The minimum annual payment amount is worked out by multiplying the member's pension account balance by a percentage factor. The amount is rounded to the nearest 10 whole dollars. If the amount ends in an exact five dollars, it is rounded up to the next 10 whole dollars.

The following table shows the relevant minimum percentage factor based on the member's age.

Age	2007–08 income year	2008–09 to 2010–11 income years (inclusive)	2011–12 and 2012–13 income years (inclusive)	2013–14 to 2018–19 income years (inclusive)	2019–20 to 2022–23 income years (inclusive)	2023–24 income year
Under 65	4.0%	2.0%	3.0%	4.0%	2.0%	4.0%
65–74	5.0%	2.5%	3.75%	5.0%	2.5%	5.0%
75–79	6.0%	3.0%	4.5%	6.0%	3.0%	6.0%
80–84	7.0%	3.5%	5.25%	7.0%	3.5%	7.0%
85–89	9.0%	4.5%	6.75%	9.0%	4.5%	9.0%
90–94	11.0%	5.5%	8.25%	11.0%	5.5%	11.0%
95 or more	14.0%	7.0%	10.5%	14.0%	7.0%	14.0%



The member's age is determined at either:

- 1 July in the financial year in which the payment is made, or
- the commencement day of the pension or annuity, if that is the year in which it commences.

Account balance means one of the following:

- the pension account balance on 1 July in the financial year in which the payment is made
- the balance on the pension commencement day, if the pension commenced during the financial year
- the amount of the withdrawal benefit, if the amount of the pension account balance is less than the withdrawal benefit that the member would be entitled to if the pension were to be fully commuted.

Where the pension commences after 1 July, the minimum payment amount for the first year is calculated proportionately to the number of days remaining in the financial year, starting from the commencement day.

To calculate the minimum payment amount, multiply the minimum annual payment amount by the remaining number of days in the financial year and divide by 365 (or 366 in a leap year). This is expressed as:

$$\text{Minimum payment amount} = \text{minimum annual payment amount} \\ \times (\text{remaining number of days} \div 365 \text{ (or 366)}).$$

If the pension commences on or after 1 June in a financial year, no minimum payment is required to be made for that financial year.

### ⇒ Action items for SMSF trustees

SMSF trustees must ensure all members receiving an account based pension are paid their minimum pension amount by 30 June.

SMSF trustees can learn more about how to calculate their member's minimum pension payment by visiting [minimum pension standards](#).

Source: [ATO website QC 72885, 21 Jun 2023](#)



## ATO updates SMSF disqualification register for March quarter

### What you need to know

The ATO has [advised](#) that it disqualified 201 individuals from being a trustee, or director of a corporate trustee, of an SMSF during the March 2023 quarter.

As a result of an increased ATO compliance focus, a total of 588 disqualified trustees have been added to the ATO's register for the first three quarters of the 2022–23 financial year. This is a significant increase when compared to the last financial year when 251 disqualified trustees were added to the register.

### 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 a 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](#).

### ⇒ Action items for disqualified trustees

A disqualified trustee, or director of a corporate trustee, of an SMSF must remove themselves from the position of trustee/director as it is an offence if they continue to act as trustee or director of a corporate trustee of their SMSF. They are also unable to set up a new SMSF.

**Source:** [ATO website QC 72852, 15 Jun 2023](#)



## ATO improves access to technical support

### What you need to know

From 30 June 2023, the [Technical Help Desk](#) (THD) website has moved to [ato.gov.au](https://ato.gov.au). The new [Troubleshooting common errors and issues](#) page will provide tax professionals and their clients a single point of entry for resolving common errors and technical issues when accessing ATO online services. Improvements include clear and simplified self-help content which will save tax agents and taxpayers time and the option to ask the ATO's online virtual assistant 'Alex' for help. The old webchat, email, and ticketing support options are no longer available.

The current Technical Help Desk phone number will remain in operation until Friday 17 November 2023. From Monday 20 November, callers will be directed to self-help content on [ato.gov.au](https://ato.gov.au). If a client is unable to resolve their query, they can contact the ATO and speak to an ATO customer service representative. The Technical Help Desk phone service will support users to familiarise themselves with the new self-help option.

Source: [ATO website QC 72791, 9 Jun 2023](#)



## ATO issues GIC and SIC rates

### What you need to know

The ATO has issued the [general interest charge \(GIC\) rates](#) and [shortfall interest charge \(SIC\) rates](#) for the period from 1 July to 30 September 2023 (as shown in the table below).

Quarter	GIC		SIC	
	GIC annual rate	GIC daily rate	SIC annual rate	SIC daily rate
July – September 2023	10.90%	0.02986301%	6.90%	0.01890411%

The interest rate on overpayments, early payments and delayed refund interest is 3.90%.

### Background

The ATO applies the GIC rate to late or unpaid tax liabilities or excessive shortfalls in income tax instalments that were incorrectly varied or estimated.

The SIC can be applied by the ATO (rather than the GIC) to all understated tax assessments from the due date for payment until the day before the SIC notice is issued. This shortfall amount usually arises where a taxpayer's tax return is amended and their tax liability increases.

Both the GIC and SIC rates are determined by a formula in the *Taxation Administration Act 1953* which relies on the 90-day bank bill rate rather than the RBA cash rate.

Source: [ATO website QC 16145, 05 Jun 2023](#)



## ATO website updates

- [First Home Super Saver scheme data](#) (QC 73068, 25 Jul 2023) – shows collective data from the first home super saver (FHSS) scheme since its commencement in July 2018. It includes information on the following matters: usage of the FHSS scheme; average FHSS processing time as well as FHSS age, location and income demographics.
- [Valuing fund assets for SMSF annual return](#) (QC 72968, 04 Jul 2023) – reminder for SMSF trustees to value their SMSF annual return (SAR) each income year. The market value needs to be calculated as at 30 June and is the amount someone could be reasonably expected to pay if the asset was for sale.
- [Proportional indexation of transfer balance caps](#) (QC 72769, 07 Jun 2023) – reminder the general transfer balance cap (TBC) will be indexed on 1 July 2023. As a result of indexation, individuals will have a personal TBC between \$1.6 million and \$1.9 million based on the highest ever balance of their transfer balance account between 1 July 2017 and 30 June 2023.
- [Holding professionals to a higher standard](#) (QC 72772, 07 Jun 2023) – reiterates the ATO will continue to hold tax professionals to a higher standard when it comes to complying with income tax and super laws when managing a SMSF. This follows the AAT decision in [WZWK and Commissioner of Taxation \(Taxation\) \[2023\] AATA 872 \(26 April 2023\)](#)\* to amend tax assessments, impose tax shortfall penalties and disqualify a trustee (who was also a tax professional) following an ATO audit.  
  
\*Refer to IFPA SDG Notes – June 2023, pages 35 – 37 for more information about the WZWK case.
- [The super guarantee rate is increasing](#) (QC 72737, 31 May 2023) – reminder for small businesses with employees or eligible contractors to update their payroll and accounting systems to reflect the new SG rate of 11% from 1 July 2023.



# Property masterclass webinar

3-part series | Presented by Ken Mansell



**18 August:** The capital/revenue distinction for property developers in a falling property market

In an economic environment of rising interest rates and declining property values, the intended purpose of a property development (ie sell or rent?) can often change midway through the project. This webinar will explore the capital v revenue taxation issues arising from the change of purpose.

**25 August:** GST issues for property developers in a falling property market – change of purpose, five years and adjustments

In the same challenging economic environment, a change of purpose of a property development (ie sell or rent?) may have significant GST consequences. This webinar will take a deep dive into what those consequences may be.

**1 September:** GST Margin Scheme

For every property developer, the margin scheme is their number one GST issue. In this session we will consider some of the issues that advisors can get wrong, including:

- Increasing adjustments
- Amalgamated land
- Acquisition of land through a deceased estate
- Non-monetary consideration

To register, scan code  
or call (03) 8851 4555  
or go to [www.ifpa.com.au](http://www.ifpa.com.au)






# LEGISLATION


## Status of superannuation matters @ 26 July 2023

Both the House of Representatives (HOR) and the Senate are next scheduled to sit from 31<sup>st</sup> July to 3<sup>rd</sup> August and from 7<sup>th</sup> August to 10<sup>th</sup> August 2023 (inclusive).

The tables below summarise the status of proposed and enacted superannuation-related measures:

Legislation (Bills and Acts)	Status
<p><b>VARIOUS TAX AND SUPER MEASURES</b></p> <ul style="list-style-type: none"><li>• <b>Bill:</b> <i>Treasury Laws Amendment (2022 Measures No. 4) Bill 2022</i></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 [2020] FCAFC 220*</i>) 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: 24 June 2023 (the day after Royal Assent), applicable retrospectively from 1 July 2007.</li></ul> <p>*Refer to Tax &amp; Super Australia/IFPA <i>SDG Notes – June 2021</i>, pages 16 – 18; <i>SDG Notes – February 2022</i>, pages 13 – 14 and <i>SDG Notes – June 2023</i>, page 19 for more information about the <i>Douglas</i> case.</p>	 <p>Received Royal Assent on 23/6/2023 Act No. 29 of 2023</p>




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> <i>Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023</i></li><li>• <b>Start date:</b> 1 July 2023 (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 FW Act and the Migration Act 1958.</li><li>- providing stronger access to unpaid parental leave and complementing recent changes to the Paid Parental Leave Act 2010.</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”. These provisions would introduce a requirement for employers to make contributions to a superannuation fund for the benefit of an employee so as to avoid liability to pay the superannuation guarantee charge under the <i>Superannuation Guarantee Charge Act 1992</i> (SGC Act) in relation to the employee. The Bill would also make a consequential amendment to section 149B of the FW Act to ensure alignment between new Division 10A to Part 2-2 of the <i>Fair Work Act 2009</i> (FW Act) and the terms relating to superannuation in modern awards.</li><li>- clarifying the operation of FW 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 Coal Mining Industry (Long Service Leave Funding) Scheme.</li></ul></li></ul>	 <p>Received Royal Assent on 30/6/2023 Act No. 43 of 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> <u><a href="#">Treasury Laws Amendment (Financial Services Compensation Scheme of Last Resort) Bill 2023</a></u> together with <u><a href="#">Financial Services Compensation Scheme of Last Resort Levy Bill 2023</a></u> and <u><a href="#">Financial Services Compensation Scheme of Last Resort Levy (Collection) Bill 2023</a></u></li><li>• <b>Start date:</b> 3 July 2023 (ie, on the day these Acts received Royal Assent).</li><li>• <b>Key measure:</b><ul style="list-style-type: none"><li>- to establish a compensation scheme of last resort (CSLR) to provide compensation to a consumer where a determination issued by the Australian Financial Complaints Authority (AFCA) (relating to a financial product/service) remains unpaid.</li></ul></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> <p>The Government has indicated that these Bills implement one of the last outstanding recommendations from the Hayne Royal Commission, ensuring that victims of financial misconduct will finally have access to redress and compensation. It further said that the CSLR will facilitate compensation of up to \$150,000 to consumers who have an unpaid determination from the AFCA relating to personal financial advice, credit intermediation, securities dealing and/or credit provision.</p> <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 data-bbox="1203 309 1310 416"></p> <p data-bbox="1145 443 1369 591">Received Royal Assent on 3/7/2023 Acts No. 44, 45 and 46 of 2023</p>





Legislation (Bills and Acts)	Status
<p><b>Improving the education and qualifications framework for financial advisers &amp; making technical changes the FHSSS legislation to provide greater flexibility to correct errors</b></p> <ul style="list-style-type: none"><li>• <b>Bill:</b> <i>Treasury Laws Amendment (2023 Measures No. 3) Bill 2023</i></li><li>• <b>Start date:</b> various</li><li>• <b>Key measures:</b><ul style="list-style-type: none"><li>- improves the education and qualifications framework for financial advisers and recognises the experience of long-serving advisers.</li><li>- makes technical changes to the first home super saver scheme (FHSSS) legislation to allow greater flexibility for first home buyers accessing this scheme:<ul style="list-style-type: none"><li>• to increase the discretion of the Commissioner to amend and revoke FHSSS applications</li><li>• to allow individuals to withdraw or amend their applications prior to them receiving a FHSSS amount, and allowing those who withdraw to re-apply for FHSSS releases in the future</li><li>• to allow the Commissioner to return the released FHSSS money to super funds, provided that the money has not yet been released to the individual</li><li>• to clarify that the money returned to super funds is treated as funds' non-assessable non-exempt income and does not count towards the individual's contribution caps.</li></ul></li></ul></li><li>• <b>Start date:</b> will apply retrospectively to FHSSS applications made from 1 July 2018.</li></ul>	 <p>Introduced into HOR on 14/6/2023</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> Treasury Laws Amendment (2023 Measures No 1) Bill 2023</li> <li>• <b>Start date:</b> various</li> <li>• <b>Key measures:</b> <ul style="list-style-type: none"> <li>- <b>Schedule 1 – Registration of providers and assisted decision making:</b> 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. <b>Start date:</b> from the day after Royal Assent.</li> <li>- <b>Schedule 2 – Sustainability standards:</b> 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. <b>Start date:</b> from the day after Royal Assent.</li> <li>- <b>Schedule 3 – Government response to the Review of the Tax Practitioners Board (TPB):</b> implements the following recommendations of the 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. <b>Start date:</b> various.</li> <li>- <b>Schedule 4 – Off-market share buy-backs:</b> 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. <b>Date of effect:</b> 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>- <b>Schedule 5 – Franked distributions funded by capital raisings:</b> 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. <b>Start date:</b> applicable to distributions made on or after 15 September 2022. Also see Committee's recommendations below.</li> </ul> </li> </ul> <p><b>*Committee's recommendations include:</b></p> <ul style="list-style-type: none"> <li>- Reviewing the proposed franking credit changes contained in schedule 5 of the Bill. The Government was recommended to consider opportunities to clarify this schedule to ensure it appropriately targets the identified behaviour and addresses feedback provided to the committee.</li> <li>- Passing schedules 1,2,3 and 4 unamended.</li> </ul>	<div data-bbox="1198 304 1313 416" data-label="Image"> </div> <p>Introduced into Senate on 9/3/2023</p> <p>Bill referred to Committee on 9/3/2023</p> <p>Committee reported on 2 June 2023 and made recommendations* to Senate</p>




Regulations and determinations (legislative instruments)	Status
<p><b>APRA Supervisory levy made – increase in fees</b></p> <ul style="list-style-type: none"><li>• <b>Regulations:</b> <u><a href="#">Australian Prudential Regulation Authority Supervisory Levies Determination 2023</a></u></li><li>• <b>Start date:</b> 1 July 2023</li><li>• <b>Key measure:</b><ul style="list-style-type: none"><li>- ensures the recovery, from industries that are prudentially regulated by the Australian Prudential Regulation Authority, of the costs incurred in connection with supporting the integrity and efficiency of markets in which leviable bodies operate and promoting the interests of consumers in the financial system for the 2023-24 financial year.</li></ul></li></ul> <p>Note: As a result of these changes, it has been reported that financial advisors and licensed accountants will face an increase in their ASIC levy of over \$3000.</p>	 <p>Registered as F2023L00907 on 3/6/2023</p>
<p><b>Taxation of military superannuation benefits following the Douglas decision*</b></p> <ul style="list-style-type: none"><li>• <b>Regulations:</b> <u><a href="#">Treasury Laws Amendment (Military Superannuation Benefits) Regulations 2023</a></u></li><li>• <b>Start date:</b> 24 June 2023 (applicable retrospectively from 1 July 2007)</li><li>• <b>Key measure:</b><ul style="list-style-type: none"><li>- amends the <i>Income Tax Assessment Regulations 2021</i> and the <i>SIS Regulations 1994</i> to make consequential amendments to tax and superannuation laws to provide that certain military invalidity benefits are treated as super lump sum benefits while other defined military benefits are treated as superannuation income streams.</li></ul></li></ul> <p>These regulations complement the ‘<i>Taxation of military superannuation benefits</i>’ measure that was introduced into Parliament on 23 November 2022 as Schedule 9 to <u><a href="#">Treasury Laws Amendment (2022 Measures No. 4) Bill 2022</a></u> (the Bill), which was assented on 23 June 2023.</p> <p>*Refer to Tax &amp; Super Australia/IFPA SDG Notes – June 2021, pages 16 – 18; SDG Notes – February 2022, pages 13 – 14 and SDG Notes – June 2023, page 19 for more information about the Douglas case.</p>	 <p>Registered as F2023L00846 on 23/6/2023</p>



Regulations and determinations (legislative instruments)	Status
<p><b>Financial Services Compensation Scheme of Last Resort instruments</b></p> <ul style="list-style-type: none"><li>The following regulations have been made to support the Financial Services Compensation Scheme of Last Resort regime: <u><i>Financial Services Compensation Scheme of Last Resort Levy Regulations 2023</i></u> and <u><i>Corporations Amendment (Financial Services Compensation Scheme of Last Resort) Regulations 2023</i></u></li><li><b>Start date:</b> various</li><li><b>Key measure:</b><ul style="list-style-type: none"><li>The first instrument will support the <i>Financial Services Compensation Scheme of Last Resort Levy Act 2023</i> to create the levy framework required to fund the compensation scheme of last resort by, among other things, setting out the general conditions for the imposition of the relevant levies and prescribe sub-sectors that are required to pay the annual levy for the relevant periods. Start date: 8 July 2023.</li><li>The second instrument will amend the <i>Corporations Regulations 2001</i> to support the amendments made by the <i>Treasury Laws Amendment (Financial Services Compensation Scheme of Last Resort) Act 2023 (the Act)</i>, which deals with corporate reporting requirement in relation to the imposition of the levy. Start date: 7 July 2023.</li></ul></li></ul>	 <p>The first instrument registered as F2023L00989 on 7/7/2023</p> <p>The second instrument registered as F2023L00988 on 6/7/2023</p>
<p><b>Regulations to improve transparency of superannuation system</b></p> <ul style="list-style-type: none"><li><b>Regulations:</b> <u><i>Treasury Laws Amendment (Financial Reporting and Auditing of Registrable Superannuation Entities) Regulations 2023</i></u></li><li><b>Start date:</b> 8 July 2023</li><li><b>Key measure:</b><ul style="list-style-type: none"><li>amends the <i>Corporations Regulations 2001</i> and <i>SIS Regs</i> to prescribe requirements for the preparation, lodgement, disclosure and publication of information and documents by registrable superannuation entities (RSE) to improve the compliance and transparency of the superannuation sector.</li></ul></li></ul> <p>Public consultation on the draft regulations took place between 11/4/2023 and 5/5/2023. Following this consultation process, Treasury incorporated certain, more minor, amendments to the proposed regulations, including a proposed amendment to reduce the compliance burden on superannuation funds when it comes to providing fund information.</p> <p><b>Note:</b> These requirements do not apply to SMSFs.</p>	 <p>Registered as F2023L00990 on 7/7/2023</p>



Exposure draft legislation (Bills and Regulations)	Status
<p><b>Draft legislation to amend NALI provisions which apply to expenditure incurred by superannuation funds, referred to as the non-arm's length expense (NALE) rules</b></p> <ul style="list-style-type: none"> <li>• <b>Exposure draft regulations:</b> <u>Treasury Laws Amendment (Measures for Consultation) Bill 2023: Non-arm's length expense rules for superannuation funds</u></li> <li>• <b>Start date:</b> The amendments will apply to income derived in the 2023–24 income year or a later income year, and to expenses incurred or expected to have been incurred on or after 1 July 2023.</li> <li>• <b>Key measures:</b> Consistent with the measure announced in the 2023–24 Federal Budget, this Bill contains amendments to the ITAA97 which: <ul style="list-style-type: none"> <li>- limit application of the NALE rules to SMSFs and small APRA regulated funds (SAFs).</li> <li>- distinguish between specific and general expenses for the purposes of NALE rules for both general and specific expenses of the fund.</li> <li>- set the amount of income taxable as NALI from a general expense breach by an SMSF or SAF as twice 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. In addition, fund income taxable as NALI will be limited to taxable income of the fund less contributions and related deductions.</li> <li>- limit potential income of the fund taxable as NALI to the fund's taxable income less contributions and related deductions.</li> <li>- exempt expenses which were incurred, or might have been expected to be incurred before the 2018-19 income year.</li> </ul> </li> </ul> <p><b>Note:</b> The NALI provisions had been originally enacted by the <u>Treasury Laws Amendment (2018 Superannuation Measures No 1) Act 2019</u> and applied to the 2018-19 and later income years.</p> <p>Although the legislative changes to the NALE rules contained in this Bill are an improvement to the initial proposal to tax NALE at a rate of 225%* (ie, a five times multiple), SMSFs and SAFs will still be taxed on a general expense NALE at an effective rate of 90% (ie, a two times multiple) on the undercharging/ non-charging amount of NALE.</p> <p>*On 22 February 2023, IFPA provided its submission on the Government's initial proposal to tax NALE at an effective tax rate of 225% (see IFPA SDG Notes – April 2023, page 41). Also refer to IFPA SDG Notes – February 2023, pages 22-26 for more information about this initial proposal.</p>	 <p>Released for consultation on 19/7/2023</p> <p>Consultation period ended on 7/7/2023</p>



# BULLETIN BOARD



## APRA and ASIC review implementation of retirement income covenant

### What you need to know

APRA has published an [information report](#) which sets out the findings of a recent thematic review of the implementation of the retirement income covenant ('the covenant') by a sample of 15 registrable superannuation entity (RSE) licensees.

### Background

The fundamental purpose of the superannuation system is to provide income to the Australian community in retirement. However, evidence shows that the majority of the Australian community do not make the most of their superannuation assets in retirement. As highlighted by the Retirement Income Review, many people die with the bulk of the wealth they had at retirement intact.

To address this issue, the SIS Act was amended in 2022 to include a retirement income covenant. The covenant requires RSE licensees to have a strategy to assist members in or approaching retirement.

The covenant is principles-based, providing RSE licensees with the flexibility to decide how best to assist their members to meet their retirement income needs – which may include helping members to access products and solutions outside their RSE.

Aligned with the ultimate purpose of the covenant, the strategies put in place by RSE licensees are expected to improve how the Australian community use their superannuation in retirement.

### About this report

During the 2022–23 financial year, APRA and ASIC jointly reviewed how RSE licensees were implementing their new obligations under the covenant.

The thematic review considered how RSE licensees:

- identify and understand members' needs in retirement
- assist members with information, financial advice and product offerings, and
- execute and oversee their retirement income strategy, and assess whether the intended outcomes are being achieved.

APRA and ASIC undertook this thematic review in the first year since the introduction of the covenant to share early learnings and experience across the industry, call out areas where industry needs to accelerate its implementation efforts and encourage innovation by RSE licensees.



In this report APRA and ASIC have outlined their findings and included examples of better practices. They have also highlighted priority actions for RSE licensees. APRA and ASIC expect all RSE licensees to consider the findings and examples of better practices outlined in this report. They should address, with urgency, the gaps in their approach.

## Key findings

APRA and ASIC observed that RSE licensees were focusing most of their efforts on expanding the assistance and support available to members in or approaching retirement (see summary of findings on page 6 of the [information report](#)). However, APRA and ASIC found variability in the quality of approach taken – overall, there was a lack of progress and insufficient urgency from RSE licensees in embracing the retirement income covenant to improve members' retirement outcomes.

**Source:** [APRA website, Information report - Implementation of the retirement income covenant: Findings from the joint APRA and ASIC thematic review, 19 July 2023](#)



## APRA releases final guidance on investment governance of super funds

### What you need to know

APRA has released final guidance on investment governance of superannuation funds. The updated guidance is designed to assist trustees in meeting their obligations under the strengthened [Prudential Standard SPS 530 Investment Governance \(SPS 530\)](#), which came into force on 1 January 2023.

### Key aspects

ASIC expects a registrable superannuation entity (RSE) licensee to undertake valuations on at least a quarterly basis.

Where an RSE licensee chooses to undertake valuations less frequently, APRA expects the RSE licensee would demonstrate how it has determined that the valuation frequency is appropriate. Factors that would inform valuation frequency include, but are not limited to, the frequency with which member transactions are permitted, how valuation data is incorporated in unit prices/crediting rates, access to valuation information and costs.

An RSE licensee would consider triggers that would warrant more frequent valuations including market volatility and the external operating environment, including changes in Government policy settings.

APRA expects an RSE licensee would ensure that all valuations are received within a timeframe that supports active oversight and timely implementation of valuation changes. For example, an RSE licensee would seek to ensure that valuations are received in line with, and ahead of, common performance measurement periods, such as end of calendar quarters.

APRA expects an RSE licensee would determine the circumstances in which valuations would be reported to the Board and management.

**Source:** [APRA website, Media release, 20 July 2023](#)



## APRA launches new statistical publication

### What you need to know

APRA has [announced](#) that it has launched a new statistical publication to provide greater transparency across the superannuation industry.

The Quarterly Superannuation Product Statistics publication lists all superannuation products offered by each APRA-regulated superannuation fund. The publication also contains granular information on fees and costs, investment performance, investment strategy and asset allocation for a range of products and investment options.

### Key aspects

The inaugural issue of the publication shows:

- the details and structure of 1,161 superannuation products as at 31 March 2023. This includes roughly 164,000 investment options offered through these products, of which around 124,000 are available to members to invest in directly, such as shares or term deposits.
- key performance metrics for 69 MySuper products and 681 multi-sector investment options available through non-platform choice products in the accumulation phase. These choice options cover around \$330 billion of members' funds (49% of the accumulation choice product segment).

APRA has also released the March edition of the Quarterly Superannuation Industry publication, which presents industry level data on products and member demographics.

Both publications are available on the APRA website at [Quarterly Superannuation Industry publication](#) and [Quarterly Superannuation Product Statistics](#).

**Source:** [ATO website, APRA's new super publication puts product-level data in focus, 30 June 2023](#)



## ASIC continues to act against SMSF auditors

### What you need to know

ASIC has [advised](#) that it has acted against eight SMSF auditors for breaches of their obligations. This included breaches of auditing and assurance standards, independence requirements, registration conditions, or because ASIC was satisfied the individual was not a fit and proper person to remain registered.

From 1 April 2023 to 30 June 2023, ASIC also:

- disqualified five SMSF auditors, and
- imposed additional conditions on three SMSF auditors.

This is in addition to the cancellation of 413 SMSF auditors ([22-121MR](#), [23-012MR](#) and [23-150MR](#)) as part of ASIC's recent compliance program.

### Background

Approved SMSF auditors are registered with ASIC under the SIS Act.

ASIC and the ATO work closely together as co-regulators of SMSF auditors. The ATO monitors SMSF auditor conduct and can refer matters to ASIC. ASIC also monitors the SMSF auditor population for non-compliance and is empowered to disqualify, suspend, cancel or impose additional conditions on the registration of SMSF auditors.

ASIC may make an order disqualifying or suspending a person from being an approved SMSF auditor, under section 130F of the SIS Act, if the person:

- has failed to carry out or perform adequately and properly the duties and functions of an auditor, or
- is not a fit and proper person to be an approved SMSF auditor.

A disqualified SMSF auditor is placed on ASIC's public banned and disqualified register at [connectonline.asic.gov.au](http://connectonline.asic.gov.au) and is not eligible to reapply for registration.

ASIC may impose conditions on an SMSF auditor's registration under section 128D of the SIS Act or may cancel the registration of an SMSF auditor under section 128E of the SIS Act, for non-compliance with conditions or failing to lodge annual statements in the required timeframe. SMSF auditors have the right to appeal decisions ASIC makes in relation to them under the SIS Act. They may request that ASIC reconsider a decision it has made against them. If the decision is confirmed or varied the SMSF auditor may apply to the Administrative Appeals Tribunal for further review of the decision.

Further information can be found on ASIC's website and in [Regulatory Guide 243](#) *Registration of self-managed superannuation fund auditors*.

SMSF trustees and members can check whether their auditor is registered, suspended or has conditions imposed on their registration by searching ASIC's [SMSF Auditor register](#).

**Source:** [ASIC website, Media release \(195MR\), 21 July 2023](#)



## AAT upholds excess super balance determination

### What you need to know

The AAT has rejected a complex Constitutional argument that the making of an “excess balance determination” and the issuing of a “default commutation notice” by the Commissioner amounted to the acquisition of property by the Commonwealth on “unjust terms”.

### Facts

In the case of [Stern v FCT \[2023\] AATA 2010](#), the applicant (Mr Stern), a barrister, was in receipt of two different capped defined benefits pension schemes after retiring from his previous employment. The Commissioner determined that his transfer balance (\$3.45 million) as at December 2017 exceeded the \$1.6 million transfer balance cap that existed at the time. The transfer balance cap is designed to limit the amount that can be transferred to the retirement phase of superannuation, where the fund earnings are exempt.

The Commissioner then made an excess balance determination under s 136-10 Schedule 1 TAA 1953 and issued a “default commutation notice” obliging one of the funds to pay out the pension entitlement to the pension holder by way of a lump sum for the excess amount. Taking a significant sum out of the tax preferred superannuation environment had an adverse tax impact on the applicant, who argued that the Commissioner’s actions amounted to the acquisition of property by the Commonwealth on unjust terms, and therefore in breach of s 51(xxxi) of the Constitution.

Mr Stern argued that the Commissioner should have consulted with him about his preference regarding commutation, including which of the two funds should be impacted, or incurring excess transfer benefits tax.

### Constitutional argument

The AAT held that, while a pension is the property of the pension holder, the commutation of a pension right (which is paid out to the pension holder as a lump sum) does not deprive the pension holder of their property and does not amount to the acquisition of property by the Commonwealth. The Constitutional argument was not accepted by the tribunal.

### Alternative argument

The applicant also argued that both of his defined benefits pension schemes should be excluded from the excess transfer balance calculation under Division 294 as both were subject to commutation restrictions. If so, that would have meant that he had no excess transfer balance at all.



The AAT observed, however, that Division 294 provides for a modified calculation of the excess transfer balance in cases involving the receipt of a capped defined benefit income stream. Those provisions would have no work to do if the exclusion of all such income streams applied as submitted by the applicant. That could surely not have been the intended outcome and the tribunal declined to adopt the applicant's suggested interpretation:

*"... the plain meaning of s 294-140(3) is not ambiguous and does not lead to a result that is absurd or anomalous, particularly when understood in the larger context of the legislative scheme. The interpretation proposed by the taxpayer is impossible to square with the plain text of the provision." [at 67]*

**Source:** [Stern v FCT \[2023\] AATA 2010, 4 July 2023](#)



## AAT finds no exceptional circumstances to reallocate excess contributions to another year

### What you need to know

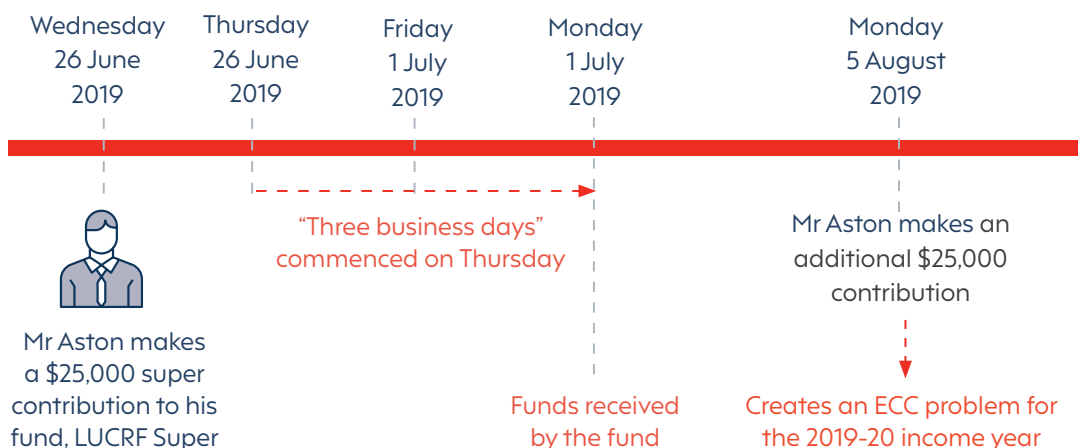
The Administrative Appeals Tribunal (AAT) has declined to exercise its discretion to reallocate a \$25,000 superannuation contribution received by the applicant's super fund on 1 July 2019 to the year ended 30 June 2019, resulting in the inclusion of the excess concessional contributions amount in the applicant's assessable income for the 2019-20 year of income.

### Facts

In the case of *Aston and FCT [2023] AATA 1848*, Mr Aston runs his own business, but has worked for one of the major banks for 20 years, giving him more than a passing familiarity with the funds clearance process.

Just after midday on Wednesday 26 June 2019, Mr Aston initiated a \$25,000 super contribution on his own behalf to his fund, LUCRF Super, by way of a direct debit through a Westpac owned clearing house, QuickSuper. Based on information available on various web pages, it should have been apparent to him (but it may not have been at the time) that the payment initiated by him on 26 June would take up to three business days to be received by LUCRF Super. Importantly, the three business days started on Thursday 27 June, meaning that the funds were not received by the fund until Monday 1 July 2019. A contribution is 'made' when it is received by the super fund – not when a member initiates the payment.

### MR ASTON'S FUNDS CLEARANCE ISSUE



A contribution is "made" when it is received by the super fund, not when a member initiates the payment.



It emerged during the hearing that using EFT instead of a direct debit would almost certainly have had the funds in the hands of the fund by 30 June, but Mr Aston assumed the three days started on Wednesday 26 June and expected the super fund to receive his contribution by Friday 28 June, which was still cutting it uncomfortably fine.

To make matters worse, and without confirming with LUCRF Super that his previous contribution had squeezed into the 2018-19 year of income, Mr Aston then made an additional \$25,000 contribution on 5 August 2019, thereby creating an ECC problem for the 2019-20 income year, all because his late June 2019 contribution had missed the 2018-19 income year by just one day.

Mr Aston then threw himself on the Commissioner's mercy, such as it is, by asking him to exercise his discretion under s 291-465(1)(b) to reallocate the 1 July contribution from 2019-20 to 2018-19 due to the existence of special circumstances. He didn't find much joy there, the Commissioner declining to reallocate to contribution to the earlier year and disallowing his objection.

## Decision

Unfortunately for Mr Aston, there is already a clutch of earlier AAT decisions where the Commissioner's decision not to exercise his reallocation discretion has been upheld on the basis that there was nothing particularly unusual in the taxpayer's case:

*"... the Applicant's circumstances when considered as a whole, while unfortunate, are not unusual, uncommon, or markedly different from the usual run of cases where payments are made in close proximity to cut-off dates but do not arrive on the intended day. While the situation was new to the Applicant, it is the circumstances that must be special not the individuals experience of them." [at 53]*

Ultimately, it was the applicant's decision to make his contribution so close to the cut-off date and not being as well across the funds clearance process as he might have been that has created the problem, and there is nothing particularly special or unusual about misunderstanding the way the system works.

## IFPA comment

A harsh outcome perhaps, but one that could have been avoided by not making his contribution so close to the end of the financial year and confirming with the fund when it received the payment before making his August 2019 contribution.

**Source:** [\*Aston and FCT \[2023\] AATA 1848, 28 June 2023\*](#)



## AAT upholds penalties imposed for late SG payments relating to amnesty quarters

### What you need to know

The AAT has affirmed that there were no exceptional circumstances which prevented a taxpayer company from disclosing its SG shortfall which in turn may have led to a reduction penalties below 100%.

### Facts

In the case of *Geelong Turf Company Pty Ltd and FCT [2023] AATA 1718*, the taxpayer company operated a landscaping business and applied to the Tribunal for a review of a decision by the Commissioner to disallow further remission of Part 7 penalties below 100% in respect of superannuation amnesty quarters.

To recap, the Part 7 penalty is an additional SGC penalty imposed under Part 7 of the SGAA when an employer (when required to) fails to provide: an SG statement for a quarter, or information relevant to assessing the employer's liability to pay the SGC for a quarter.

The Part 7 penalty arises in two situations:

- where an employer lodges an SG statement for a quarter after the due date, or
- where the ATO make a default assessment of the employer's liability for the SGC because:
  - an employer has not lodged an SG statement for a quarter, and
  - the ATO are of the opinion the employer is liable to pay the SGC for the quarter.

The Part 7 penalty is automatically imposed on an employer by law. The Part 7 penalty imposed is equal to double the SGC payable by the employer for the quarter (that is, 200% of the SGC). No Part 7 penalty is imposed if an employer lodges an SG statement on or before the lodgment due date, including an extended due date. A part 7 penalty is not a penalty on the employer for failing to meet their SG obligations. Rather, it is a penalty imposed on the employer for not promptly disclosing to the Commissioner where they have an SG shortfall.

For his part, the Commissioner claims that the Part 7 amnesty quarters were appropriately remitted to 100% (down from 200%) and for a further remission below that there must be 'exceptional circumstances' made out by the taxpayer which it failed to make out.

The taxpayer thought otherwise, arguing that exceptional circumstance were in play as follows:

- Although the taxpayer's initial accountant understood the SGC rules, she fell terminally ill, and the replacement accountant through a lack of knowledge caused the company's SG shortfalls before being replaced by another accountant.
- The taxpayer was suffering mental and physical health problems during the relevant period, partly as a result of his business making no profit.



All told, the sole issue for determination by the Tribunal was whether, for the purposes of s 62(5) of the SGAA, exceptional circumstances existed which prevented the Company from disclosing information relevant to the amount of the Company's SG shortfall for the Amnesty Quarters **either** during the period from 24 May 2018 to 7 September 2020 (**Amnesty Period**), or prior to the Company being notified in early 2020 of the examination of the Company's SG compliance (whichever is earlier).

## Decision

Ultimately, the Tribunal, standing in the shoes of the Commissioner, was not satisfied that there were exceptional circumstances that prevented the Company, as the employer, from disclosing to the Commissioner the information relevant to the amount of the Company's SG shortfall for the following reasons.

First, 'exceptional circumstances' is a very high bar as noted at paragraph 41 of the ruling:

*To constitute "exceptional circumstances" there needs to be something especially unusual or uncommon or unprecedented that distinguishes the circumstances from ordinary or common situations. This is because, read in context, the circumstances must be so unusual or uncommon as to justify different treatment from usual cases.*

Second, the taxpayer's health troubles did not prevent him from meeting the business's lodgment obligations in relation to income tax and Business Activity Statements during the same period. Thus, it was stretching credulity to argue that such issues prevented the business from complying with its SGC obligations.

That the taxpayer had limited knowledge of tax and accounting matters is not exceptional and indeed is part of the reason why taxpayers engage professionals such as tax agents in the first place.

Finally, the company continued to have SG shortfalls post the former allegedly incompetent accountant's engagement, thereby indicating that the company's failure to disclose the relevant information was a systemic failure and not directly tied to that accountant's incompetence.

## IFPA comment

Part 7 penalties of up to 200% of the SGC can be crippling for a business, and is another important reason why SG contributions should be made on time and in full.

Source: [Geelong Turf Company Pty Ltd and FCT \[2023\] AATA 1718, 20 June 2023](#).



## Our submission on the NALE rules for super funds

### What you need to know

On 7 July 2023, the Institute of Financial Professionals Australia (IFPA) provided its submission on draft legislation (the exposure draft) released on 19 June 2023 regarding the non-arm's length expense (NALE) rules for superannuation funds.

Although the proposed legislative changes to the NALE rules are an improvement to the initial proposal to tax NALE at a rate of 225% (ie, a five times multiple), we continue to oppose the concept of a multiple. We believe that a two times multiple approach which leads to an effective tax rate of 90% is not the correct way to deal with a general expense breach. Our view is that other changes should be made to the law to deal with non-arm's length dealings.

### Background

On 21 February 2023, the Institute of Financial Professionals Australia put forward a submission on the NALE rules for superannuation funds to the government for its consideration. That submission remains substantially the same (see Appendix A to our submission) but with additional items, including:

- The two times multiple should not be legislated.
- Exempting large APRA-regulated funds from the NALE regime is unjust.
- There must be consistency between general and specific expenses and NALi/NALE should be proportionate
- The proposed legislation is overly complex.
- The examples in the exposure draft explanatory memorandum lack diversity and important details.

### Closing comments

The exposure draft explanatory memorandum, as well as other guidance (ie, LCR 2021/2 and the previous Treasury NALE consultation papers) imply that the SIS Act is not an appropriate regulatory tool to deal with non-arm's length dealings.

In our view, the purpose of the SIS Act is to regulate behaviour whereas the ITAA97 is designed to extract an appropriate level of tax from a taxpayer. Aside from having to abide by the sole purpose test, we believe the SIS Act already prohibits trustees from entering into non-arm's length dealings by virtue of section 109, which requires that investments must be made and maintained on arm's length basis.

As mentioned in our February 2023 submission, an alternative option to deal with a NALE breach would be to repeal the NALE rules so the law (295-550 ITAA97) is brought back to its pre 1 July 2018 terms, and instead capture non-arm's length dealings via the contribution rules (as per Taxation Ruling TR 2010/1) and slightly amend section 109 of the SIS Act to prevent superannuation funds entering into non-arm's length transactions (ie, amend to capture NALE).

Our submission and proposed range of alternative measures can be read [here](#).

# Aged Care Masterclass

You are invited to a special masterclass series on aged care, tailored specifically for accountants who understand the complexities of aged care legislation and the considerable costs involved, as well as the stress it can bring to families.

At the Institute of Financial Professionals Australia, we recognise the vital role accountants play in building trusted relationships with their clients and supporting them in making strategic financial decisions. Aged care decisions are no exception. When clients and their families face the daunting task of navigating the aged care system and making informed choices, they often turn to their accountant for guidance.

This masterclass series aims to equip you with the knowledge and tools necessary to provide expert advice and support to your clients in the realm of aged care. Through this series, you will gain valuable insights into the complexities of aged care legislation, understanding the financial implications involved, and learning how to assist your clients in accessing the appropriate services.

By participating in these masterclasses, you will enhance your expertise in aged care, enabling you to provide comprehensive guidance and support to your clients during this critical time. You will have the opportunity to connect with industry experts, share insights, and expand your professional network.

We encourage you to take advantage of this valuable opportunity to deepen your understanding of aged care and strengthen your ability to support your clients during this challenging period.

## Details

### Masterclass 1 - 16 August

The need for good aged care advice

### Masterclass 2 - 23 August

How to get aged care business ready

### Masterclass 3 - 30 August

Aged accommodation choices

### Masterclass 4 - 6 September

Residential aged care

### Masterclass 5 - 13 September

Aged care conversations with clients

**Where:** Zoom

**Time:** 11:00am-12:00pm AEST

**Points:** 1 CPD point

**Cost:** Individual sessions

Members \$99 | Non-members \$132

All 5 sessions

Members \$400 | Non-members \$550



More details and booking: [ifpa.com.au/events](https://ifpa.com.au/events) or call 03 8851 4555





