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THE SUPER PLAYBOOK 2025

THE CATCH WITH CONTRIBUTIONS

STUART SHEARY

Agenda

- Maximising contributions
- Work test and cases
- Contributions and anti-avoidance
- Some final considerations

Contribution history

Maximising contributions

- Angela and Gerard sell their investment property with a large capital gain.
- After the 50% discount they **each** have assessable income of $350,000.
- This is their only income for the financial year.
- They are ages 68 and 75 respectively
- How much can they each contribute to super?

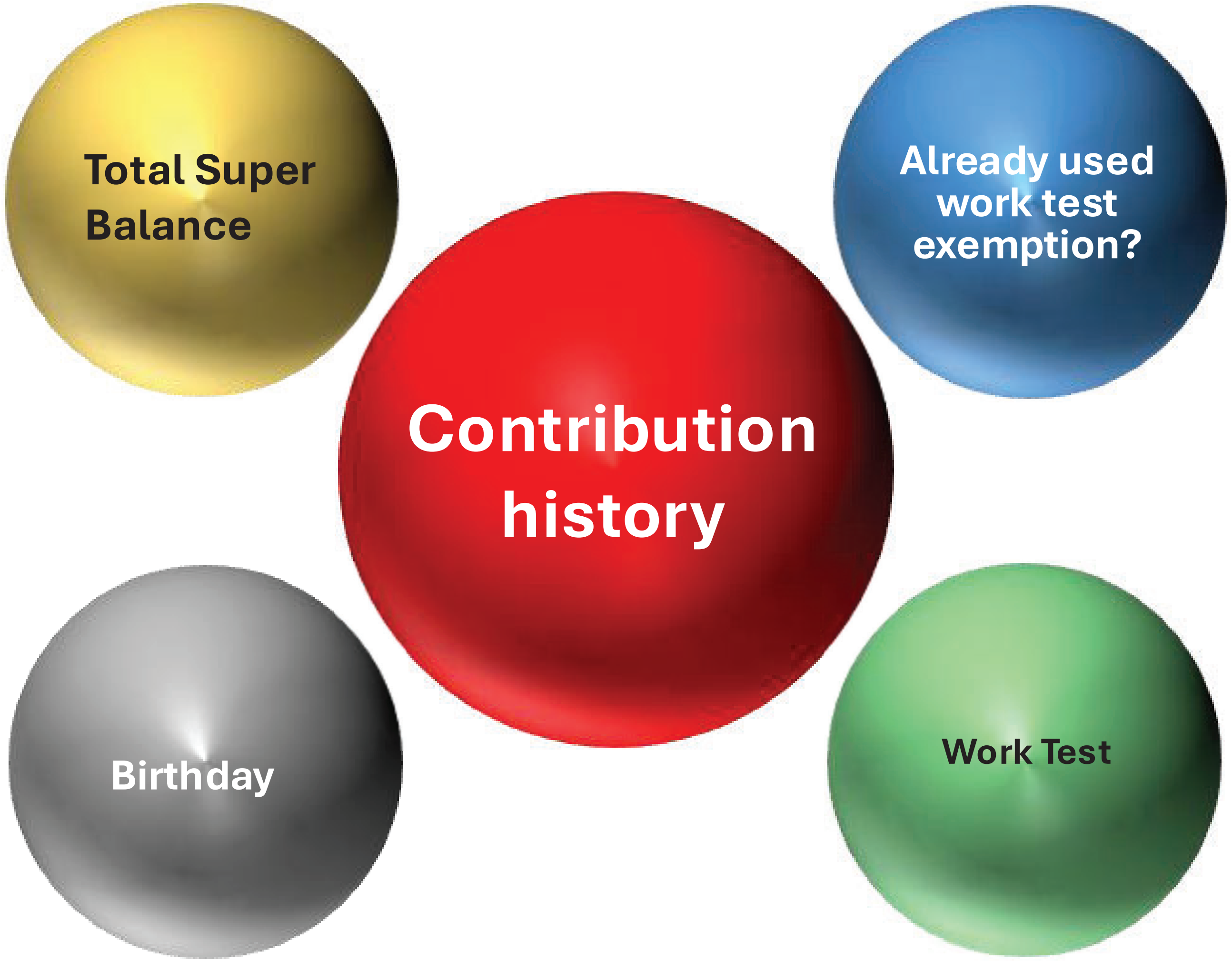
More information: contribution history

Angela

- Not in an NCC bring-forward period
- Has $80,000 in unused carry-forward concessional contributions

Gerard

- Made $150,000 NCC two years ago – in a three-year bring-forward period (ends 30 June this FY)
- Has $90,000 in unused carry-forward concessional contributions



More information: Total Super Balance (TSB)

Angela

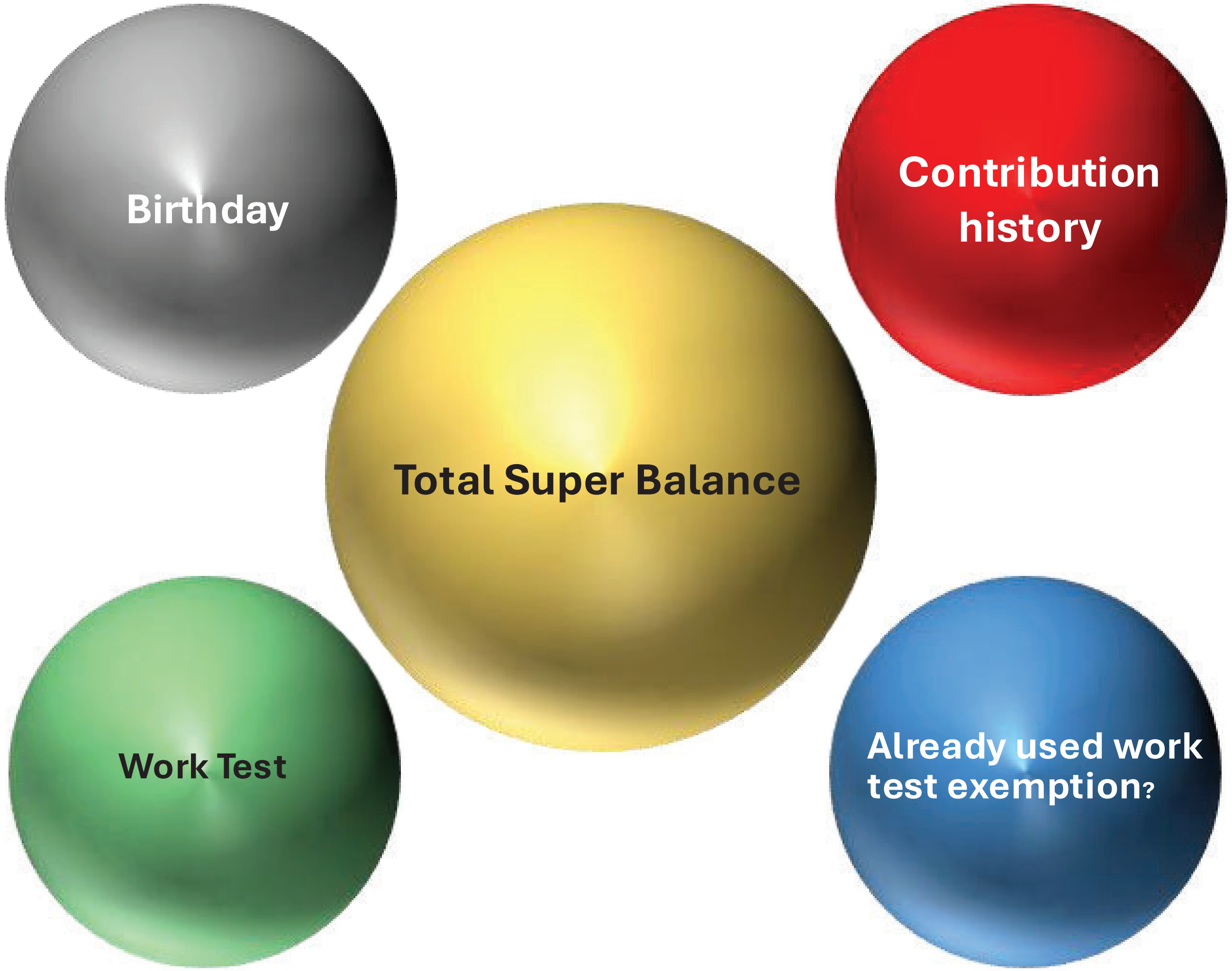
- TSB $390,000

Gerard

- TSB $250,000

Relevant thresholds

- TSB threshold work test exemption $300,000
- TSB threshold carry-forward concessionals $500,000
- Three-year bring forward < $1,760,000



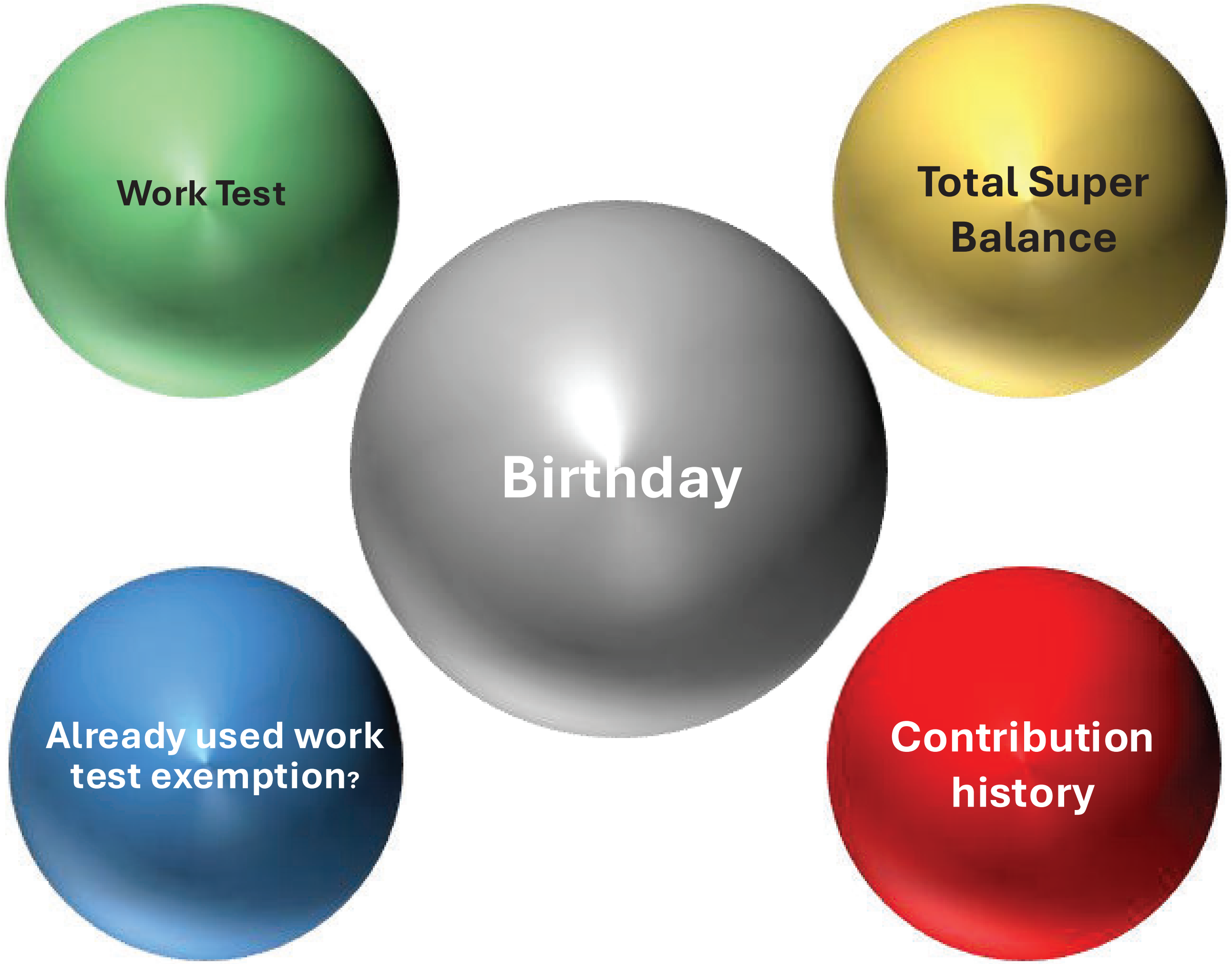
More information: date of birth

Angela

- Turned 68 on 26 April

Gerard

- Turned 75 on 1 May
- Assume today is 1 June



More information: work test

Angela

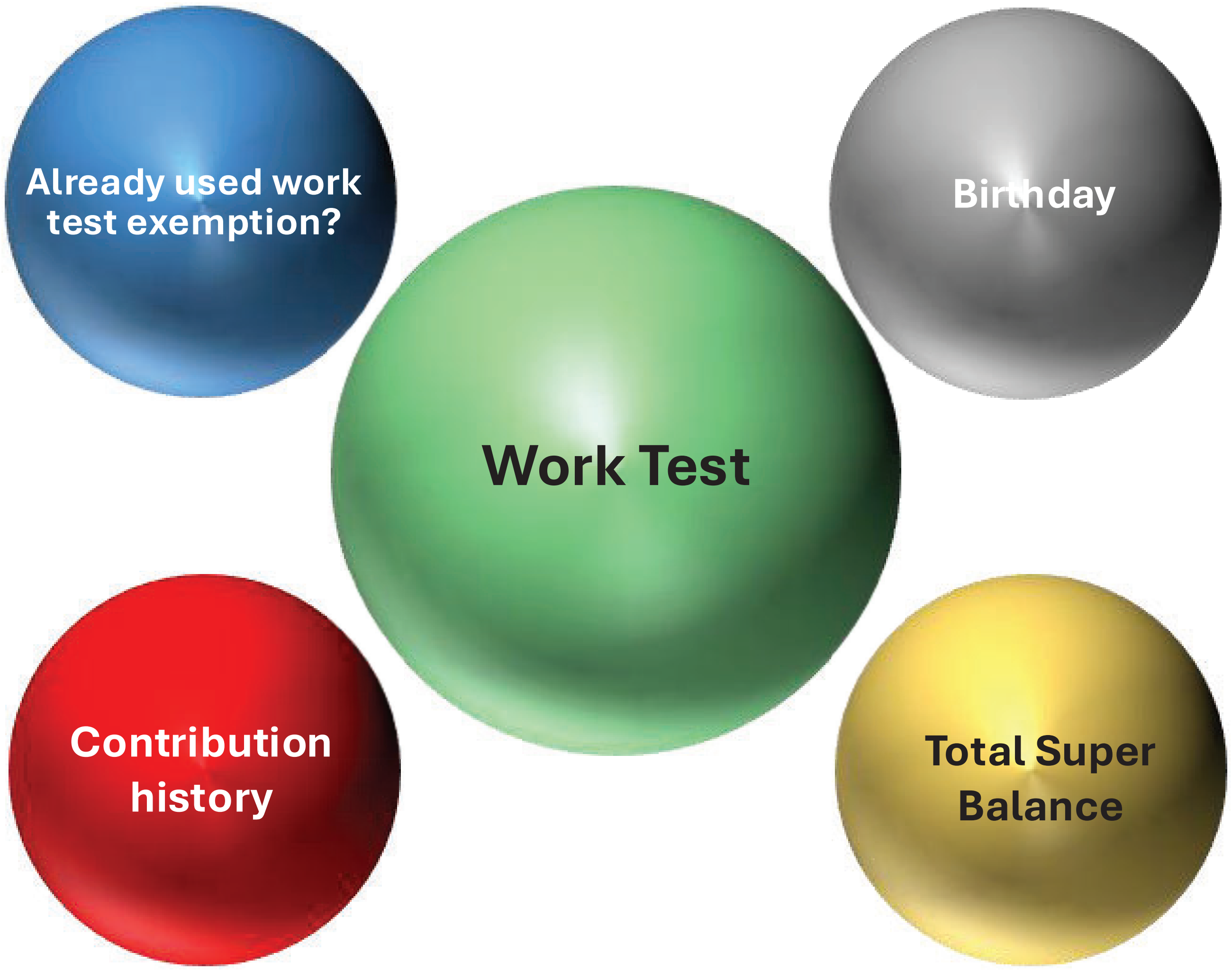
- Works 20 hours a week

Gerard

- Works 9 hours a week every week
- Worked 20 hours a week last FY

Work test

- 40 hours of gainful employment over 30 consecutive days
- Necessary to claim a deduction on personal super contributions for people between 67-75



More information: work test history

Angela

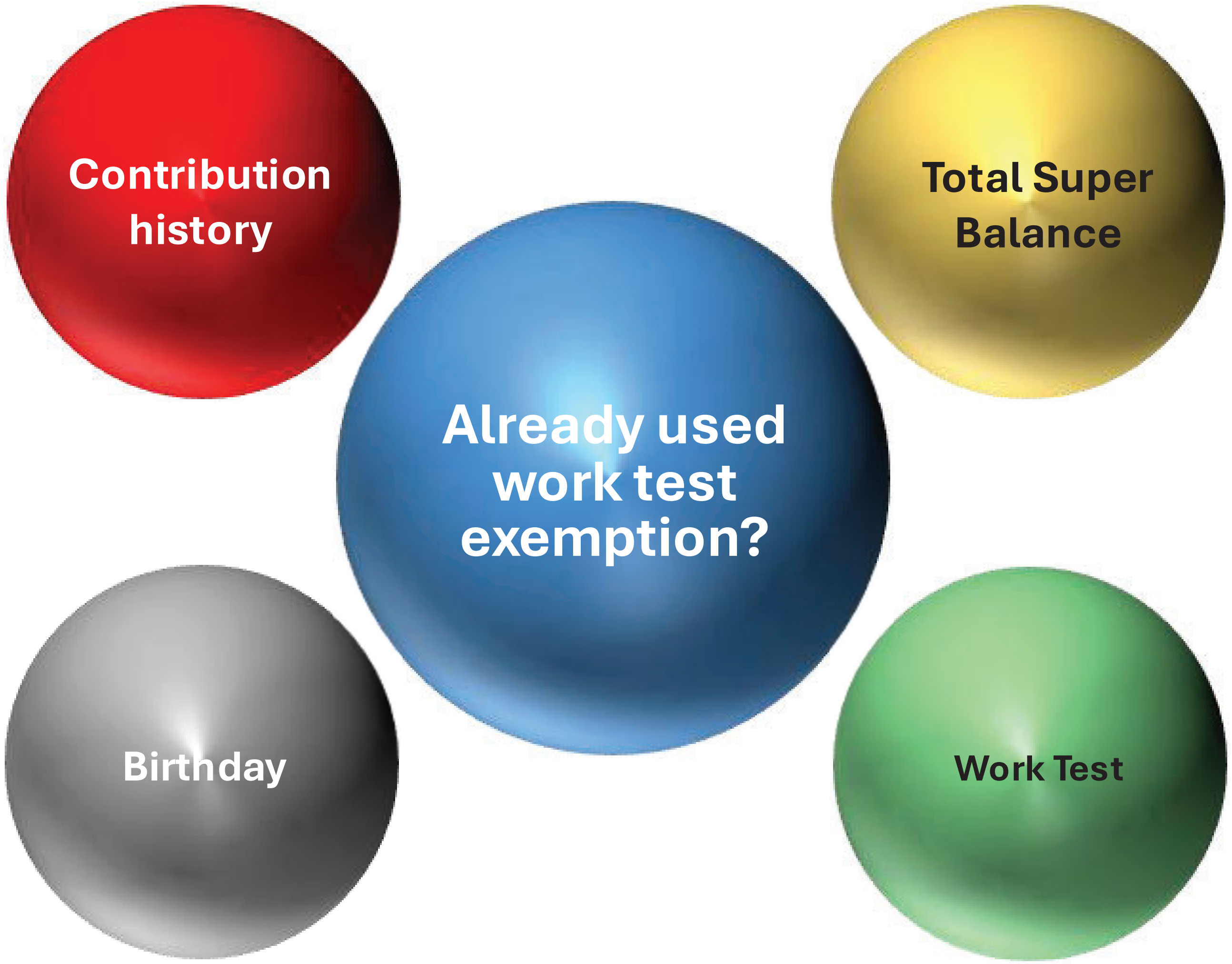
- Not applicable, satisfies work test

Gerard

- Never used the work test exemption

Work test exemption

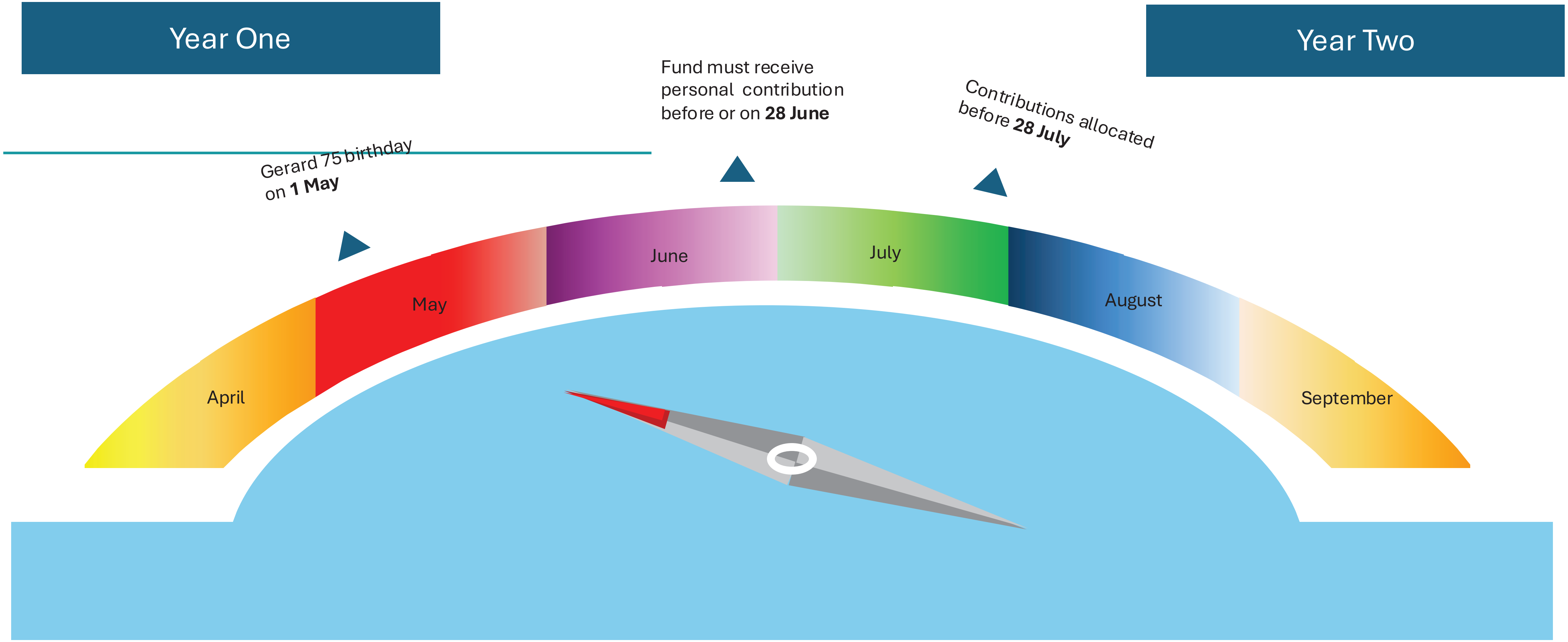
- Allows member, who satisfied work test in previous financial year and who has a TSB below $300,000 to satisfy work test



Contribution opportunities - Angela

- Angela (age 68)
- Satisfied work test – can claim a deduction on personal contributions
- Can make a PDC of up to $110,000 using carry-forward concessionals ($30K + $80K)
- Can make an NCC up to $360,000 under bring-forward rule

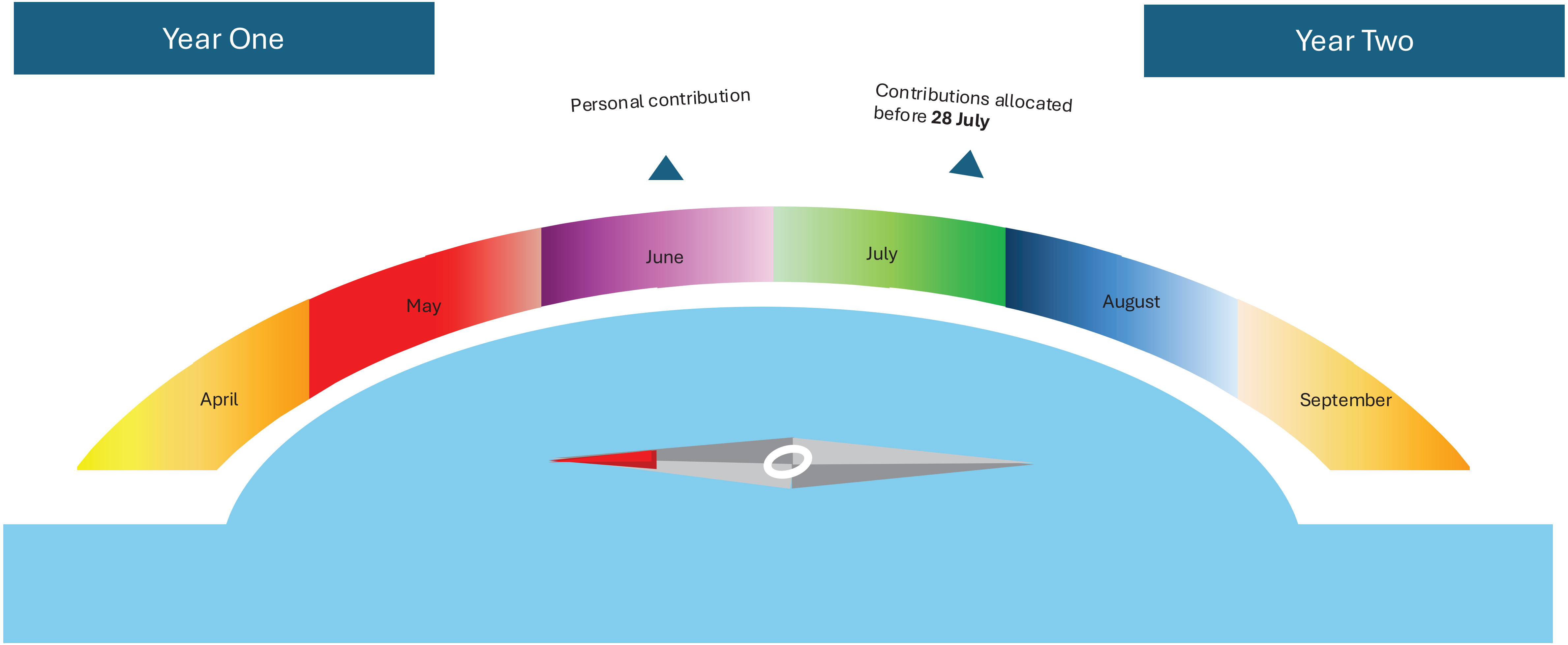
Angela's contributions	Amount
Concessional contributions	
Current year cap	$30,000
Carry-forward amount	$80,000
Total concessional contributions	**$110,000**
Non-concessional contribution	**$360,000**
Total	**$470,000**


Year One
Year Two
Fund must receive
personal contribution
before or on **28 June**
Contributions allocated
before **28 July**
Gerard 75 birthday
on **1 May**
April
May
June
July
August
September

Contribution opportunities - Gerard

- In a three year bring-forward period (ends 30 June this FY)
- Remaining NCC cap $180,000 ($330,000 – $150,000)
- Satisfies work test exemption and can claim a deduction on personal contributions
- Can make a PDC of up to $120,000 using carry-forward concessionals ($30K + $90K)
- If the couple have an SMSF should they consider contribution reserving?

Gerard's contributions	Amount
Concessional contributions	
Current year cap	$30,000
Carry-forward amount	$90,000
Total concessional contributions	**$120,000**
Non-concessional contribution	**$180,000**
Total	**$300,000**



Year One
Year Two
Personal contribution
Contributions allocated before **28 July**
April
May
June
July
August
September

Contribution reserve

- Contributions must be allocated by 28th day of following month (SISR s7.08(2)
- SMSF deed must allow for the reserving
- Document allocation process – minute decision to reserve, minute decision to allocate
- *Request to adjust concessional contributions* (using NAT 74851)
- NCCs (no formal way to notify ATO) write to the ATO requesting the reallocation, expect excess determination
- Still counts towards TSB at 30 June

Div 293 and contribution reserving

Angela had $350,000 in assessable income.

If Angela uses carry-forward concessional contributions to make a $110,000 personal deductible super contribution will she be liable for Div 293 tax?

If Angela used a contribution reserve and allocated the contribution to the following financial year when her assessable income is nil, will she be liable for Div 293 tax?

Div. 293 tax applies to the lesser of:

- 'Div. 293 income' ***less*** $250,000, and
- Low tax contributions (non-excessive CCs).

Taxable income

Net financial investment & property loss

Low tax contributions

Some F/T distributions (where tax has been paid)

Reportable fringe benefits

Div 293 and contribution reserving

Angela had $350,000 in assessable income.

If Angela uses carry-forward concessional contributions to make a $110,000 personal deductible super contribution will she be liable for Div 293 tax?

If Angela used a contribution reserve and allocated the contribution to the following financial year when her assessable income is nil, will she be liable for Div 293 tax?

Angela will have to pay Div 293 in both scenarios

Angela will have to pay Div 293 in the first but not second scenario

Angela will have to pay Div 293 in the neither scenario

Work test

Members between 67 and 75 years of age, must have been **gainfully employed** for at least 40 hours in any 30-day period in a financial year to be eligible to claim a deduction on personal contributions.

Work test does not apply on eligibility to make non-concessional contributions

"gainfully employed" *means employed or self - employed for gain or reward in any business, trade, profession, vocation, calling, occupation or employment (SISR 1.03)*

Gainful employment assumes:

- member employed or self-employed, and
- member received gain or reward in return for personal exertion

Indicators of a business	Indicators of no business
A significant commercial activity	No purpose or intention to carry on a business
Purpose and intention of the taxpayer	No intention to make a profit from the activity
Intention to make a profit	The activity is inherently unprofitable
Activity is or will be profitable	Little repetition or regularity of activity
Repetition and regularity of activity	Activity carried on in an ad hoc manner
Activity consistent to that of the ordinary trade	Activity not consistent with that of the ordinary trade
Activity organized and carried on in a businesslike manner and systematically records are kept	Activity not organized or carried on in the manner as the normal business activity – records not kept
Size and scale of the activity	Small size and scale
Not a hobby, recreation or sporting activity	A hobby, recreation or sporting activity
A business plan exists	There is no business plan
Commercial sales of product	Sale of products to relatives and friends

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Profitability

- Thomas is a successful barrister and purchases 3 hectares of land.
- He plants a variety of fruit trees
- Fire destroys many trees, and he replants
- Activity produces no income but earns income as a barrister
- Claims deductions on ‘business’ expenses
- ATO says it’s a hobby, Thomas says it’s a business

Running a business

- Held to be running a business
- Tree planting much greater than what it would be for domestic purposes
- Activity was more that a recreational pursuit or hobby
- Primary production business may exist despite no short-term prospect of making a profit
- Not important that little time spent in the 'business'

Thomas v FCT (1972)

System and organisation

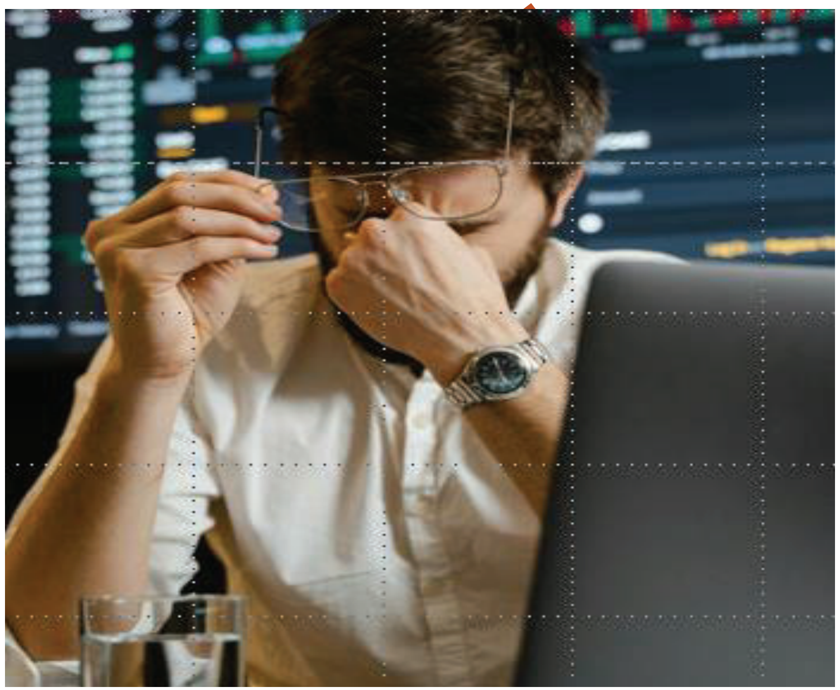
- Brendan (51) retires from public service job
- Spends a lot of time gambling on horses
- He does well and makes $3,780,000 in a year
- Relies on ‘experience’ and ‘instinct’ and has no betting system but keeps a notebook with details of race meetings, odds and bets placed
- No employees or an office
- ATO says it’s a business, Brendan says it’s a hobby

Not a business

- A pastime does not turn into a business because someone spends considerable time on it
- Activities not systematic or organised enough to be considered a business
- The presence of chance into gambling will usually preclude it from being a business

Babka V FCT (1989)

System and organisation



- Greg made hundreds of share trades over a two year period
- He lost $11,851
- Claimed he was running a business and losses should be deductible
- ATO says he is an ordinary investor, Greg says he was running a business

Running a business

- Business like manner
- Profit-making intention
- Followed a systematic approach

Greig v FCT (2020)

Size and operation

- John intends to make a profit breeding goats
- Purchases two Angora goats for $7,000
- Breeding process costs a further $5,000
- Produces four kids, sadly, one dies
- Activity produces no income only losses
- ATO says it’s a hobby, John says it’s a business

Running a business

- John had a profit-making intention
- Repetition and regularity in breeding activities
- Conducted the operations in a businesslike manner
  - Keeping of accounts, joining goat society, reading relevant journals and keeping informed about goat-breeding market

FCT v JR Walker (1985)

Anti-avoidance provisions

General anti-avoidance: Wash sales, super recontributions

Specific anti-avoidance provisions: Non-Arm's Length Income

General anti-avoidance provisions Part IVA

Three elements to general anti-avoidance rule (GAAR)

- Scheme s 177 A (1) *ITAA 1936*
- Tax Benefit s 177 C
  - 177CB lists the bases for identifying tax benefits
- Dominant Purpose
  - s 177 D(2) lists eight matters to be considered

Scheme - Any agreement, arrangement, understanding, promise or undertaking, formal or informal

Tax benefit – Includes any amount excluded from assessable income as well as allowable deduction or capital loss

Dominant purpose – Considers 8 factors such as the manner of the arrangement and its financial implications

Recontribution strategy

Estate planning purposes
Claiming a deduction on personal contributions
Tax benefit?
Dominant purpose?

David (age 71) and seriously ill

David (age 71) is seriously ill with $600,000 in super. Taxable/Tax-free components are 50/50 i.e. $300,000 each

He plans to leave his super to his adult daughter, Josephine, via a binding death benefit nomination

Withdraws $360,000 then recontributes the full amount back into super as an NCC

He now has $600,000 in super of which $480,000 is tax-free and $120,000 is taxable

Is this arrangement Part IVA

Yes

No

Maybe

Recontribution strategy: ATO commentary

- *Guidance on recontributions to superannuation* in August 2004
- Superannuation Technical Sub-committee held on 5 June 2007 and September 2010.
- *Pitts v Federal Commissioner of Taxation* (2017).
- All assumed death was not foreseen

2004

ATO webpage confirmed an ETP withdrawal and recontribution not Part IVA where purpose to increase tax-free component of pension. *(ATO page Guidance on recontributions to super)*

2007

'Unlikely the Commissioner would apply Part IVA to a re-contribution strategy given purpose of the simpler super amendments was to provide greater concessions and more flexibility' (ATO Super Tech Sub-committee)

2010

Difficult to apply Part IVA to a recontribution strategy involving individuals who are 60 or older and entitled to receive tax free super benefits. The purpose of a recontribution strategy is to reduce the tax payable by another person such as a non-dependent child who receives super benefits once member has died. In such a case it is very difficult to identify with certainty a tax benefit (ATO Super Tech Sub-committee)

2017

In AAT case the ATO acknowledged that the purpose of the recontribution strategy was to convert a 'taxable component' to 'tax free component' and did not allude to any anti-avoidance issues with the strategy. *(Pitt v Commissioner of taxation)*

Withdrawal followed by PDC

- Jess (age 65) works full time but spends her income and has no spare cashflow.
- She withdraws $10,000 and recontributes it into her super fund within a short time and notifies her fund that she intends on claiming a deduction.
- In July the following year she claims $10,000 personal super contribution deduction which reduces her taxable income

Is this arrangement Part IVA

Yes

No

Maybe

Withdrawal followed by PDC

- Jess scenario is analogous to a case study published by the ATO in 2020 indicating Part IVA would apply where someone withdrew an amount under the COVID-19 release then recontributed the amount back into super and claimed a deduction
- In both scenarios a condition of release was satisfied

TROVE

Example: Withdrawing super to recontribute and gain a tax advantage

Jess, an airline pilot, is stood down by her employer when COVID-19 travel restrictions are put in place. Jess decides to apply for a COVID-19 early release of super, mainly for the purpose of recontributing the amount into her super fund in order to be entitled to personal super contribution tax deduction. Jess' financial situation is such that she does not need any additional financial support throughout COVID-19.

In May 2020 Jess applies for $10,000 in COVID-19 early release of super. When she receives the money, she recontributes it into her super fund within a short period of time and notifies her fund that she intends to claim a personal super contribution tax deduction. In July 2020, Jess submits her tax return claiming a $10,000 personal super contribution deduction which reduces her taxable income.

We determine that Part IVA applies as Jess entered into a scheme mainly for the purpose of obtaining a tax benefit. We issue Jess with a new notice of assessment reflecting the cancellation of the tax benefit and impose a penalty and interest charges.

This is a webpage snapshot as it appeared on
21 SEP 2020 12:55
View the live webpage
More snapshots...

Wash sale

Disposing of shares and realising a loss then reacquiring the asset shortly after

TR 2008/1 - *Income tax: application of Part IVA of the Income Tax Assessment Act 1936 to 'wash sale' arrangements*

In-specie contributions of shares to super

Dominant purpose?

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DAY 1

- Sold 3,000 shares in company A (and realises a capital loss)
- Sold 1,500 shares in company B (and realises a capital loss)
- Sold 1,500 shares in company C
- Sold 20,000 shares in company D

DAY 2

- Bought 2,000 shares in company A (for slightly more than previously sold
- Bought 5,000 shares in company E
- Bought 500 shares in company F

DAY 3

- Bought 1,000 shares in company B (for slightly less than previously sold)
- Bought 7,000 shares in company G

Not a wash sale - ATO private ruling Authorisation Number: 1012373453888.

Facts

- Taxpayer ‘expects’ to realise a large capital gain
- Receives tax advice considering implications of selling listed shares carrying losses

Facts

- Sells listed shares carrying loss to SMSF later in year
- Sells other shares later in the year and realises a capital gain
- Losses incurred earlier in year used to offset gains made later in year
- Taxpayer’s stated purpose to provide cashflow

Decision

- Wash sale
- Entered scheme for the dominant purpose of enabling entity to obtain a tax benefit (AAT)
- Full Federal Court held dominant purpose to obtain tax benefit

Wash sale - Merchant v Commissioner of Taxation (2025)

Merchant case

- In *Merchant v Commissioner of Taxation* (2025) a 'wash sale' was found to breach Part IVA
- As a background, in 2015 The Merchant Family Trust sold a large tranche of listed shares (off-market) to the Gordon Merchant Superannuation Fund at market price
- The sale resulted in the Merchant Family Trust realising a large capital loss which was used to offset capital gains made in the same financial
- Argued Primary Judge made an error in apply s 177D (2) – Dominant purpose
- Argued transaction had genuine commercial purpose and was not dominated by tax avoidance intent

Merchant case

Dominant purpose to avoid tax

- Documented taxation advice to ‘crystallise a capital loss which could be used against capital gain
- Share purchase inconsistent with investment strategy
- Stated need for cashflow was false
- Linked to sale of asset with capital gain

But (dissenting Judge noted)

- Question whether there could be a ‘reasonable expectation’ of tax benefit
- There were multiple other consequences of the BBG share sale, apart from crystallising capital losses
- Tax benefit alone does not make something anti-avoidance

Key take outs

Merchant case was about an SMSF purchasing listed shares from a related party, however, several issues raised also apply to in-specie contributions namely:

- Document the reason for the transfer
- Make sure the contribution complements the investment strategy
- Contribution should satisfy the sole purpose test

An in-specie contribution for the dominant purpose of a tax benefit may breach what SIS provision?

Subsection 34(1) – investment strategy

Subsection 62(1) – sole purpose test

Subsection 65(1) – financial assistance

Non-arm’s length income

Where an SMSF purchases an asset at less than market value and the parties are not dealing with each other at arm’s length, the fund incurs non-arm’s length expense (NALE).

Income, including capital gains, on a NALE asset can be classified as Non-Arm's Length Income (NALI) and taxed at the highest marginal tax rate.

Purchase of listed shares from related party

- During the income year, Russell (as trustee of his SMSF) purchases listed shares from a related entity for $500,000.
- The market value of the shares at the time of purchase is $900,000.
- The terms of the agreement specify the purchase price as $500,000, rather than $900,000.

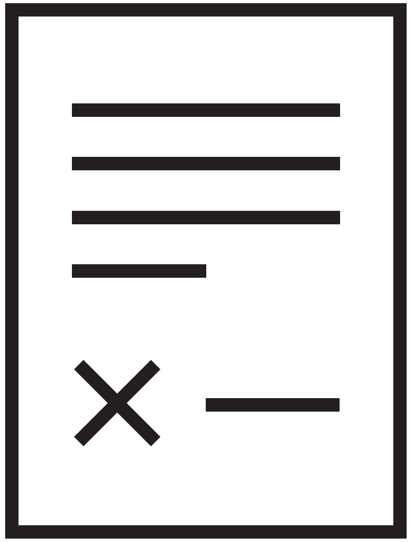
How will the difference between the market price and acquisition price be treated?

Market substitution rules mean the difference is treated as an NCC

The difference is not treated as a contribution, the SMSF has incurred NALE. Asset income subject to NALI.

The difference is treated as assessable income to the fund

Clearly document contributions



- If a trustee acquires an asset under a purchase contract for less than its market value, the difference between the purchase price and the asset's market value does not automatically constitute an in-specie contribution.
- The acquisition occurs through the terms of the contract rather than as an in-specie contribution.
- As the purchase or 'specific' expense was on a non-arm's length basis, it is said to NALE.

Final points

Super still an attractive place to invest…sometimes

Maximise contributions sooner – caps are not growing (in practice)

Increasing focus on TSB – consider spouse splitting

Super v individual

Michael (age 80) is the sole member of his SMSF which invests entirely in property. The property was worth $5.5m at 30 June 2025.

At 30 June 2026 the SMSF has grown to $6m after capital growth ($300,000) and net rental income ($200,000).

Part of the SMSF is in ‘retirement phase’ with ECPI of 33.33%.

How does the tax position of the SMSF compare with that of an individual with the same portfolio?

	SMSF	Individual
Rental income	$222,222	$222,222
ECPI (1/3)	$74,074	n/a
Assessable income	$148,148	$222,222
Tax	**$22,222**	**$70,582**
Net rental income	*$200,000*	*$151,640*
Unrealised capital growth	*$300,000*	*$300,000*
Div 296 - Increase TSB	**$500,000**	**n/a**
50% ‘earnings’ subject to Div 296	**$250,000**	**n/a**
Div 296 (15%)	$37,500	n/a
Total tax	**$59,722**	**$70,582**
Tax saving in super		**$10,860**

Michael dies

Michael (age 80) is the sole member of an SMSF and dies on 1 July 2026.

The ECPI of the SMSF was 33.33%

The portfolio has $3,000,000 of unrealised capital gain.

The SMSF will pay a lump sum to an adult child (no pension).

How does the tax position of the SMSF compare with that of an individual with the same portfolio?

	SMSF	Estate option 1	Estate option 2
Property portfolio^	$5,800,000	$5,800,000	$5,800,000
Unrealised gain	$3,000,000	$3,000,000	n/a rollover
12 month CGT discount	$1,000,000	$1,500,000	
ECPI 1/3	$666,667		
Assessable gain	$1,333,333	$1,500,000	
Tax (CGT)	**$200,000**	**$641,138**	
Tax saving in super	**-**	**$441,138**	**($200,000)**

^Excludes cash

Estate option 1: Estate sells property

Estate option 2: Property transferred to beneficiary

Michael dies

Michael (age 80) the sole member of an SMSF and dies on 1 July 2026.

His member balance is $5,962,500 (after Division 296 tax) of which $2,000,000 is tax-free component.

The SMSF will pay a lump sum to an adult child (no pension).

How do the tax outcomes compare?

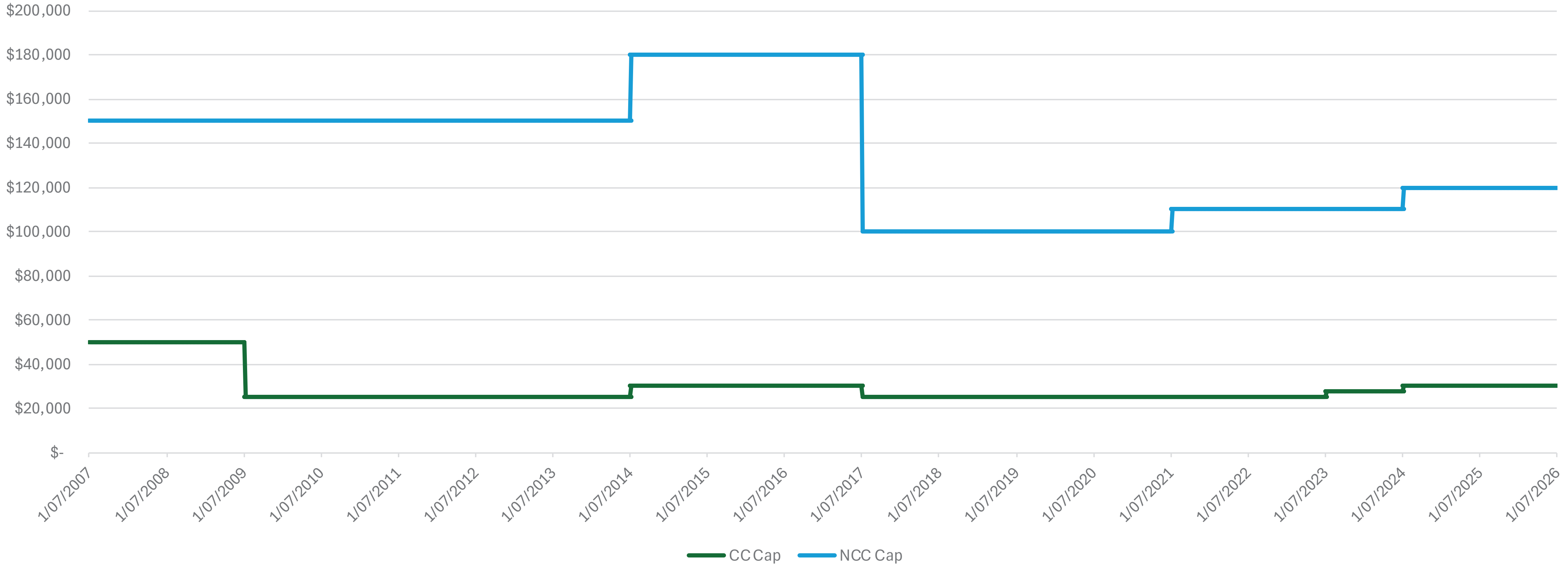
1 July	SMSF	Estate option 1	Estate option 2
Property	$5,800,000	$5,800,000	$5,800,000
Cash (net rental less div 296 tax paid)	$162,500	*$151,640*	*$151,640*
Less CGT on disposal of property	($200,000)	$641,138	-
Death benefit available	$5,762,500	-	-
Tax-free component	$2,000,000	-	-
Taxable component	$3,762,500	-	-
Tax on death benefit (@17%)	**$639,625**	**-**	**-**
Net super benefit to adult child	**$5,122,875**	**$5,310,502**	**$5,951,640^**

^carries large unrealised gain

Estate option 1: Estate sells property

Estate option 2: Property transferred to beneficiary

Contribution caps not keeping up with CPI



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TSB timeline – plan around TSB and consider spouse splitting

2017-18

- TSB cap on NCC
- Government Co-Contribution
- Segregation for ECPI purposes

2018-19

- Carry-forward

2019-20

- Work test exemption

2025-26

- Division 296

?

- ?

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THANK YOU