


Has your client actually retired? The five things everyone gets wrong, and everything you need to master this vital question

Bryce Figot  
Special Counsel, DBA Lawyers




---

---

---

---

---

---

---

---



#INC2019 

**Bryce Figot**

Bryce is recognised as one of Australia's leading SMSF lawyers. He has worked predominantly in the fields of tax and superannuation over the past 17 years and holds a Master of Laws from the University of Melbourne.

Bryce is a regular seminar presenter on tax and SMSF topics and has published extensively in these areas. Bryce regularly presents for the major professional bodies including the SMSF Association, CPA Australia, The Tax Institute, Chartered Accountants Australia and New Zealand and DBA Network.

Bryce is regularly quoted and published in the Australian Financial Review, the Herald Sun, CCH and LexisNexis publications, and elsewhere in the financial press. Bryce wrote the book *Complete Guide to SMSFs: Planning for Loss of Capacity and Death*, published by CCH Wolters Kluwer. Bryce is on the editorial panel of *LexisNexis' Australian Superannuation Law Bulletin*. He is a Senior Fellow at the University of Melbourne's Law School, where he is the subject coordinator of *Taxation of Superannuation*. Bryce is a Specialist SMSF Advisor™ as well as being a Chartered Tax Adviser.

---

---

---


---

---

---

---

---

#INC2019 

# Introduction

---

---

---

---

---

---

---

---

### Introduction



- Q: Which actor said this line in *Casablanca*: 'Play it again, Sam'?
- Q: Which character said this line in *The Empire Strikes Back*: 'Luke, I am your father'?
- Q: In Greek mythology, what does the titan Atlas hold on his shoulders?
- Q: In Mary Shelley's novel *Frankenstein; or, The Modern Prometheus*, there is a monster constructed from raw materials supplied by 'the dissecting room and the slaughter-house' — what is that monster's name?

---

---

---

---

---

---

---

---

### Introduction



- Just because everyone 'knows' the answer, it never hurts to double check the source ... you might be pleasantly surprised!
- The concept of 'retirement' in superannuation law is no different
- Let's:
  - recap why 'retirement' is **NOW** so critical
  - review the definition of 'retirement'
  - consider five case studies

---

---

---

---

---

---

---

---

# Why is retirement NOW so critical?




---

---

---

---

---

---

---

---

### Why is retirement **NOW** so critical?



- 'Retirement' historically has always been important because it:
  - is a condition of release with a 'nil' cashing restriction (SISR sch 1 item 101)
  - turns all benefits into unrestricted non-preserved benefits (SISR reg 6.12(1))
  - therefore allows withdrawals with no maximums, cf TRIS's 10% pa maximums
  - allows non-money (ie, *in specie*) lump sum withdrawals. Remember:
    - SISR allow lump sums to be paid as in specie (SISR reg 6.01(2))
    - ATO state that pensions payment can't be in specie (SMSFR 2008/2 [73])
- But why is it **NOW** so critical?



*Very relevant for Jack from the 2019 national conference case study  
 Jack wants to fund an investment opportunity he has become aware of. He is not able to finance it using conventional means and would like to access his super money. He suggests he resign as an employee of the finance business, although he would effectively continue to run the business. It would only be for a short period of time until he turns 65 in any event.*

---

---

---

---

---

---

---

---

---

---

### Why is retirement **NOW** so critical?



Gross oversimplification — apologies to the purists

- Of course, it is **NOW** so critical because:
  - Before 1 July 2017, an SMSF's income was exempt from income tax to the extent its assets were being used to pay ABPs or TRISs
  - Now, an SMSF's income is only tax exempt to the extent its assets are being used to pay ABPs or TRISs that are 'in the retirement phase'
  - Before 1 July 2017, there was basically no limit on how much you could have funding a pension
  - Now, your transfer balance account gets a transfer balance credit when you start to be a retirement phase recipient of a superannuation income stream

---

---

---

---

---

---

---

---

---

---

## Definition of retirement




---

---

---

---

---

---

---

---

---

---

## Definition of retirement



- Regulation 6.01(7) provides that the retirement of a person is taken to occur:
  - (a) in the case of a person who has reached a preservation age that is less than 60—if:
    - (i) an arrangement under which the member was gainfully employed has come to an end; and
    - (ii) the trustee is reasonably satisfied that the person intends never to again become gainfully employed, either on a full-time or a part-time basis; or
  - (b) in the case of a person who has attained the age of 60—an arrangement under which the member was gainfully employed has come to an end, and either of the following circumstances apply:
    - (i) the person attained that age on or before the ending of the employment; or
    - (ii) the trustee is reasonably satisfied that the person intends never to again become gainfully employed, either on a full-time or a part-time basis.

---

---

---

---

---

---

---

---

---

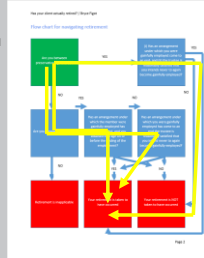
---

## Definition of retirement



There are three ways you can retire:

- Method 1 (relevant if aged between preservation age and 60):** (i) An arrangement under which you were gainfully employed has come to an end; and (ii) the trustee is reasonably satisfied that you intend never to again become gainfully employed
- Method 2 (relevant if aged between 60 and 65):** An arrangement under which you were gainfully employed has come to an end and the trustee is reasonably satisfied that you intend never to again become gainfully employed
- Method 3 (relevant if aged between 60 and 65):** An arrangement under which you were gainfully employed has come to an end, and you attained age 60 on or before the ending of the employment




---

---

---

---

---

---

---

---

---

---

## Definition of retirement



- This raises several questions:
- Q1:** What does 'gainfully employed' mean? It means 'employed or self-employed for gain or reward in any business, trade, profession, vocation, calling, occupation or employment' (SISR reg 1.03(1))
- Q2:** What does 'preservation age' mean? You've got to be very careful. If someone is going to turn 57 this calendar year, what is their preservation age?

---

---

---

---

---


---

---

---

---

---

#INC2019 

# Important warning!

---

---

---


---

---

---

---

---

#INC2019 

## Important warning!

Before applying any of what you are about to see to a real client, ATO input should be sought!  
'Botching' these rules can have significant negative implications

---

---

---


---

---

---

---

---

#INC2019 

# Case study 1

---

---

---

---

---

---

---

---

### Case study 1



#INC2019



- Recall Jack:
  - Jack [currently age 64] wants to fund an investment opportunity he has become aware of. He is not able to finance it using conventional means and would like to access his super money.
  - He suggests he resign as an employee of the finance business, although he would effectively continue to run the business.
  - It would only be for a short period of time until he turns 65 in any event.
  - [Business appears to be run via a company; 'Jack retained his personal shares in his business, Better Than Gold Financial Services (BTGFS), a company...']
- What's the best guidance we have from the ATO?
- See <https://www.ato.gov.au/super/self-managed-super-funds/in-detail/smsf-resources/smsf-case-studies/establishing-whether-gainful-employment-has-ceased/>

---

---

---

---

---

---

---

---

---

---

### Case study 1

#INC2019



- In ATO example:
  - Charlie is between preservation age and 60
  - Family discretionary trust carries on a smash repairs business (Crackle)
  - Charlie has been an employee of Crackle for nearly 20 years
  - Charlie ceases his employment with Crackle
  - He is paid out any accumulated leave entitlements owed to him
  - Charlie no longer has an employment contract with Crackle
  - Trustee is satisfied he never intends to be gainfully employed
  - However, after Charlie's employment has ceased, Charlie continues to perform substantive duties for Crackle (much the same as when he was an employee)
  - Charlie receives distributions of trust income from Crackle.

---

---

---

---

---

---

---

---

---

---

### Case study 1

#INC2019



ATO suggests it's not retirement, stating:

*Although Charlie's employment contract was terminated and he has been paid his leave entitlements, the fact he continues to assist Crackle, performing essentially the same duties he did as an employee, warrants further consideration. Based on the facts available, the Commissioner cannot be certain Charlie has satisfied the retirement condition of release*

However, might there be another approach?

Remember (albeit from a different legislative context): 'no contract of employment is to be implied merely from the fact that one person performs work for or provides services to another. Modern commercial life abounds with arrangements for the performance of work or services for others by persons who are not employees' (Davies and ATO [2009] AATA 297)

---

---

---

---

---

---

---

---

---

---

### Case study 1



Is it possible to say that:

- Charlie is not an employee of Crackle and Jack is not an employee of BTGFS? What extra facts might suggest Charlie/Jack not an employee?
  - no written employment contract
  - no regular wage (instead drew money on an *ad hoc* basis)
  - never reported any drawing from business at item 1 of income tax return — instead reported as trust distributions or dividends
  - never had any PAYG income tax or super payments on their behalf
  - and remember the ever helpful s 251A(6) of Corps Act 2001 (ie, whatever you state in properly made resolutions is a legally accepted fact 'unless the contrary is proved')
- Charlie/Jack do not intend to work for anyone other than Crackle or BTGFS?
- Charlie/Jack had other jobs years earlier before they worked in Crackle or BTGFS?

Are these extra facts relevant? Quite possibly! Assume they all apply here

Documentation and other evidence are vital!

---

---

---

---

---

---

---

---

### Case study 1



So, I think there's a fair argument (with the additional facts) that:

- on consideration of **all additional facts**, Charlie isn't employed by Crackle and Jack isn't employed by BTGFS. Recall the definition of 'gainfully employed', namely 'employed or self-employed for gain or reward in any business, trade, profession, vocation, calling, occupation or employment'
- trustee can be satisfied that:
  - Charlie doesn't intend to become an employee of anyone in the future
  - Jack doesn't intend to become an employee of anyone in the future

---

---

---

---

---

---

---

---

### Case study 1



Similarly, I think there's a fair argument (with the additional facts) that:

- Charlie satisfies method 1 of retirement (relevant because aged between preservation age and 60)**, namely:
  - an arrangement under which Charlie was gainfully employed has come to an end (ie, whatever Charlie did before Crackle)
  - the trustee is reasonably satisfied that Charlie intend never to again become gainfully employed (ie, Charlie isn't going to work other than for Crackle)
- Jack satisfies method 2 of retirement (relevant because aged between 60 and 65)**, namely:
  - an arrangement under which he was gainfully employed has come to an end (ie, whatever Jack did before BTGFS)
  - the trustee is reasonably satisfied that Jack intends never to again become gainfully employed (ie, Jack isn't going to work other than for BTGFS, which isn't employment and thus does not constitute 'gainfully employed')

---

---

---

---

---

---

---

---

### Case study 1

What might the ATO say?

(Recall the definition of 'gainfully employed', namely 'employed or **self-employed** for gain or reward in any business, trade, profession, vocation, calling, occupation or employment')

Recall my important warning: Before applying any of this to a real client, ATO input should be sought!



---

---

---

---

---

---

---

---

### Case study 2



---

---

---

---

---

---

---

---

### Case study 2



(From the 2019 National Conference case studies)

- Recall Robbie:
  - Jack's brother Robbie is 62 years old. Robbie is a political analyst with one of the major political parties
- What if:
  - in the lead up to the 2018 festive season Robbie required more money to pay for gifts, a family holiday and other once off expenses
  - Robbie commences driving with Uber
  - in the month of November 2018 Robbie spent 40 hours (10 hours each weekend) actively driving passengers and driving to jobs
  - in the month of December 2018 Robbie spent 35 hours actively driving passengers and driving to jobs
  - overall Robbie finds the experience as an Uber driver to be negative and after December 2018, determines he will not work as an Uber driver again — he deactivates his Uber account and deletes the app?

---

---

---

---

---

---

---

---



## Case study 2



- **Could Robbie have satisfied method 3 (relevant because aged between 60 and 65),** namely, has an arrangement under which he was gainfully employed come to an end, and he attained age 60 on or before the ending of the employment?
- Naturally, Robbie is still employed as a political analyst, so the gainful employment would have to be driving for Uber
- Can driving for Uber constitute gainful employment? Well...
  - ... it is real work for gain or reward in a business, trade, ... or occupation...
  - ... for superannuation law purposes, it must either constitute employment by Uber or self employment
  - ... the Fair Work Commission has held that Uber driving does not constitute employment (<https://www.fwc.gov.au/documents/decisionssigned/html/2017fwc6610.htm>)
  - ... therefore, I think it constitutes self employment (and thus gainful employment)

---

---

---

---

---

---

---

---

---

---

## Case study 2



What might the ATO say?

Recall my important warning: Before applying any of this to a real client, ATO input should be sought!

Also, for this sort of circumstance in particular:

- Clients always ask us about babysitting instead of Uber — why is babysitting unlikely to be sufficient?
- Recall SISR reg 6.15 and APRA SPG 280 — Payment Standards:
  - Where a member has reached the age of 60, is in two or more employment arrangements at the same time, and ceases one of these employment arrangements, this is a valid condition of release in respect of all preserved and restricted non-preserved benefits accumulated up until that time*
  - However, it is APRA's view that this will not change the character of any preserved or restricted non-preserved benefits that accrue after the condition of release has occurred*

---

---

---

---

---

---

---

---

---

---

## Case study 3




---

---

---

---

---

---

---

---

---

---

(from the 2019 National Conference case studies)

### Case study 3



- Continue the same facts from case study 2, but also...
  - Robbie was receiving a TRIS
  - Robbie notifies the SMSF trustee in writing of his 'retirement'
- Can the SMSF now be eligible for the income tax exemption (ie, is the TRIS now 'in the retirement phase')?
- What might the ATO say?
- Recall earlier important warning: Before applying any of this to a real client, ATO input should be sought!

---

---

---

---

---

---

---

---

### Case study 4




---

---

---

---

---

---

---

---

(NOT from the 2019 National Conference case studies)

### Case study 4



*'Love and hate aren't opposites: they are different sides of the same coin'* — Anon

*'The definition of retirement and the employment test for contribution purposes aren't opposites: they are different sides of the same coin'* — Bryce Figot

- Consider the following:
- John is 68 and does the same Uber driving as Robbie, namely:
  - in the month of November 2018 John spent 40 hours (10 hours each weekend) actively driving passengers and driving to jobs
  - in the month of December 2018 John spent 35 hours actively driving passengers and driving to jobs
- Can John now contribute to his SMSF?
- (Also, remember the [Treasury Laws Amendment \(Work Test Exemption\) Regulations 2018 \(Cth\)](https://www.dbalawyers.com.au/contributions/work-test-exemption-passes-without-bring-forward-rule-complications); see <https://www.dbalawyers.com.au/contributions/work-test-exemption-passes-without-bring-forward-rule-complications>.)

---

---

---


---

---

---

---

---

#NC2019 

# Case study 5

---

---

---


---

---

---

---

---

#NC2019 

## Case study 5

Consider the following: Mary is 62 years old, and an arrangement was in place in respect of her as described by ATO ID 2007/144 and paragraphs 60, 238–241 and 249 of TR 2010/1, namely:

- Mary is a director and shareholder of a private company
- The company derives its assessable income from passive investments it holds by way of a fixed investment portfolio. The investment activities undertaken by the company do not constitute a business
- Under the company's articles of association the directors are to be paid such remuneration as is from time to time determined by the company in general meeting
- In a general meeting each year, the company made a determination in accordance with its articles of association to pay directors' fees of \$100 to each director
- Each year the company has accordingly paid Mary \$100 of directors' fees
- However, this arrangement ceases in the current financial year

Could being paid to be a director constitute gainful employment?  
On its face no, but recall s 15A of the SISA

(NOT from the 2019 National Conference case studies)

---

---

---


---

---

---

---

---

#NC2019 

## Case study 5

- Section 15A(2) of the SISA provides: 'A person who is entitled to payment for the performance of duties as a member of the executive body ... of a body corporate is, in relation to those duties, an employee of the body corporate'
- What might the ATO think?

---

---

---

---

---

---

---

---

#INC2018 

# Conclusions

---

---

---


---

---

---

---


---

#INC2018 

## Conclusions

Remember there are three ways you can retire:

- **Method 1 (relevant if aged between preservation age and 60):** (i) An arrangement under which you were gainfully employed has come to an end; and (ii) the trustee is reasonably satisfied that you intend never to again become gainfully employed
- **Method 2 (relevant if aged between 60 and 65):** An arrangement under which you were gainfully employed has come to an end and the trustee is reasonably satisfied that you intend never to again become gainfully employed
- **Method 3 (relevant if aged between 60 and 65):** An arrangement under which you were gainfully employed has come to an end, and you attained age 60 on or before the ending of the employment




---

---

---


---

---

---

---

---

#INC2018 

## Conclusions

- Since 1 July 2017, determining whether retirement has occurred is more important than ever!
- **Conclusion 1:** I think there's a fair argument that a lot of work for a company or trust is not actually employment! Therefore a lot of people actively working have an argument that they might constitute retirement under either:
  - **Method 1** or
  - **Method 3**
- **Conclusion 2:** Uber driving can constitute gainful employment ... very relevant for constituting retirement under **Method 2**
- **Conclusion 3:** Uber driving can constitute convert a 'regular' TRIS into the 'retirement phase'
- **Conclusion 4:** Uber driving can satisfy gainful employment test (relevant for 65-74 year olds)

---

---

---

---

---

---

---

---

## Conclusions



- **Conclusion 5:** I think there's an argument to use the expanded definition of 'employment' in SISA s 15A but ...
- Watch out for anything contrived, artificial, unnatural (ie, sham and anything similar)
- Of course, before applying to a real client, seek ATO input first

---

---

---

---

---

---

---

---

## Disclaimer



These notes are a general guide only based on our view of the law as of 13 February 2019. They are no substitute for expert advice. Anyone seeking to rely on these notes should obtain expert advice to confirm particular issues especially as the law is subject to ongoing changes and substantial penalties can be imposed. We are not licensed to provide financial product advice under the *Corporations Act 2001* (Cth). Copyright resides in DBA Lawyers Pty Ltd unless another source is noted.

---

---

---

---

---

---

---

---