



4 February 2022

Ms Sharon Russell  
Australian Taxation Office  
GPO Box 9990  
SYDNEY NSW 2001

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Dear Ms Russell,

**SMSF ASSOCIATION SUBMISSION – PS LA 2021/D3 & TD 2021/D6**

The SMSF Association welcomes the opportunity to provide this submission in response to the Australian Taxation Office’s draft Practice Statement Law Administration PS LA 2021/D3 and draft Taxation Determination TD 2021/D6 and the exercising of Commissioner discretion under subsection 304-10(4) of the *Income Tax Assessment Act 1997* (“ITAA97”).

***TD 2021/D6***

- 1.1 The example included is of little value as it covers a very specific but limited set of circumstances in the context of an APRA fund member. The determination would benefit from the inclusion of examples to assist SMSFs better understand how the Commissioner may exercise his discretion.
- 1.2 We note the retrospective application of the draft determination. Given the nature and intent of what is proposed, and subject to our overall feedback, we do not think that retrospective application is unreasonable.

***PS LA 2021/D3***

- 2.1 In considering the meaning of “unreasonable” in the context of ITAA97 section 304-10(4), we ask that the Commissioner considers other tax consequences which flow from the breach. This aligns with the Tribunal’s decision in *Wainwright and Commissioner of Taxation (Taxation)* [2019] AATA 333 (5 March 2019), where Senior Member Walsh considered the meaning of ‘unreasonable’ in the context of section 304-10(4) at (37) deciding that:

*... the Tribunal considers that it may be “unreasonable” to include a superannuation benefit paid in breach of the legislative requirements in a persons’ assessable income (with the result that it is taxed at marginal tax rates) in circumstances where, for example:*

*(i) This would be in addition to other taxation consequences which flow from the breach. For example, a superannuation fund no longer gets the benefit of an exemption or becomes non-compliant for the relevant tax year); and/or ...*

- 2.2 In considering other taxation consequences, we request that the Commissioner consider the interaction with [PS LA 2020/3](#) and the imposition of administration penalties under subsection



166(1) of the *Superannuation Industry (Supervision) Act 1993* to ensure that multiple penalties do not arise from a single course of action.

2.3 We request that the Commissioner consider the interaction with TR 2013/5. For example, where an SMSF trustee underpays a death benefit income stream, the pension will cease in accordance with TR 2013/5 as at the start of the relevant income year. This means any withdrawals throughout the relevant year will be treated as lump sum payments rather than pension payments. This is at risk of an inadvertent breach of the death benefit cashing restrictions in *Superannuation Industry (Supervision) Regulations 1994*, Regulation 6.21 where more than 2 lump sums withdrawals are made. The operation of TR 2013/5 should also be considered in the context of imposing 'unreasonable' tax consequences, mentioned earlier.

2.4 We request that the Commissioner reconsider his view in relation to "attempted rectification". Trustee behaviour which demonstrates a willingness to rectify, should be considered a relevant factor, otherwise the consequences can be unintended or unjust. For example, treating a rectification as a contribution has the potential to apply multiple layers of tax and penalties.

2.5 For completeness, a taxpayer's right to review the Commissioner's decision to not exercise the discretion under ITAA97 section 304-10 should be addressed.

2.6 For consistency, the Draft PS LA does not apply to ADFs, although paragraph 7 of TD 2021/D6 confirms that the ATO view would also apply to ADFs

If you have any questions about our submission, please do not hesitate to contact us, and we thank you again for the opportunity to provide this submission.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Peter Burgess', written over a faint circular stamp or watermark.

Peter Burgess  
Deputy CEO/Director of Policy and Education  
SMSF Association



### **ABOUT THE SMSF ASSOCIATION**

The SMSF Association is the peak body representing SMSF sector which is comprised of over 1.1 million SMSF members who have more than \$700 billion of funds under management and a diverse range of financial professionals servicing SMSFs. The SMSF Association continues to build integrity through professional and education standards for advisors and education standards for trustees. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial planners and other professionals such as tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them access to independent education materials to assist them in the running of their SMSF.