

Technical Newsletter

Edition 5 | September 2024

SMSF
ASSOCIATION

The SMSF Association Quarterly Technical Newsletter provides a snapshot of some of the key legislative and technical developments relevant to the provision of strategic advice to clients who have chosen to have an SMSF in which to hold their superannuation.

17 SEPTEMBER

Legacy pension conversions and reserves:

Draft regulations released for consultation

The Treasury Laws Amendment (Self-managed superannuation funds – legacy retirement product conversions and reserves) Regulations 2024 ([draft regulations](#)) seek to relax the commutation restrictions for legacy retirement products **and** create a more flexible avenue for allocations from reserves.

To achieve this, the draft regulations will:

- enable individuals to exit legacy retirement products for up to 5 years,
- allow more flexible pathways to make allocations from a reserve, by:
 - providing that **where a reserve supported an income stream** that is ceased, and the reserve is allocated to the former recipient of that income stream, it will be exempt from both contribution caps, and
 - counting **other reserve allocations** towards an individual's non-concessional contributions – instead of their concessional contributions.

These draft regulations will apply to legacy lifetime, life expectancy and market-linked superannuation income stream products that commenced prior to 20 September 2007. They will also apply to legacy pensions that were commenced as a result of a conversion of an earlier legacy product that commenced prior to that date.

The relaxation of the commutation restrictions will enable members to exit legacy products with the resulting capital used to commence an account-based income stream, left in an accumulation interest account, or withdrawn from superannuation entirely. However, the commutation must occur in full within a designated 5-year grace period (beginning on the day the Regulations commence).

Submissions can be made up until 08 October 2024.



19 SEPTEMBER

Superannuation on Paid Parental Leave

The [Paid Parental Leave Amendment \(Adding superannuation for a more secure retirement\) Bill 2024](#), was passed by both houses of parliament.

As a result, eligible parents with babies born or adopted on or after 1 July 2025 will receive an additional payment, based on the Superannuation Guarantee (12 per cent of their Paid Parental Leave payment), as a contribution to their nominated superannuation fund.



9 SEPTEMBER

SMSF Auditor Outcomes: ATO

The ATO published the [SMSF auditor case outcomes](#) for the 2023/24 financial year.

During the 2023/24 financial year, the ATO referred 45 SMSF auditors to the Australian Securities & Investments Commission (ASIC) – compared to 41 for the 2022/23 financial year.

A further 51 auditors voluntarily de-registered in 2023/24 following the commencement of ATO compliance activity.

The key compliance issues included auditors who:

- breached the in-house audit independence requirements
- failed to perform adequate checks or gather sufficient audit evidence for:
 - market valuations,
 - existence of assets,
 - trustee declarations,
 - borrowings, and
 - arm's length transactions.

3 SEPTEMBER

Disqualified SMSF Trustees Register updated



The ATO released its [latest figures](#) on the number of disqualified SMSF trustees, revealing that 692 trustees were disqualified in 2023/24.

This marks a slight decrease from the 751 disqualifications in 2022/23.

Note: This includes all disqualifications processed to 30 June 2024 (15 revocations). The next update is expected in November 2024, for disqualification action taken to 30 September 2024.

29 AUGUST

Australian Prudential Regulation Authority: Quarterly Superannuation Statistics (June 2024 quarter).

Australian Prudential Regulation Authority (APRA) has released its Quarterly Superannuation Performance publication and the Quarterly MySuper Statistics report for the [June 2024 quarter](#).

According to these latest statistics, total superannuation assets increased by 0.4 per cent over the quarter to reach \$3.9 trillion as at June 2024.

These statistics also revealed that the SMSF sector now accounts for over \$990 billion of these total superannuation assets.

In the 12 months since the June 2023 quarter statistics were published, assets in the SMSF sector grew 7.5% per cent – up from \$921.2 billion.

Note: Data is provided by the ATO on SMSFs and may include estimates prior to actual data being received by the ATO.



22 AUGUST

ATO Update: Voluntary disclosure service

The ATO provided a reminder of the benefit of using the ATO's [voluntary disclosure service](#) – which enables fund trustees to inform the ATO early if a contravention has occurred.

Further, the ATO reminds fund trustees that it will take any voluntary disclosure into account when determining what actions will be taken regarding any contraventions reported by the fund's approved auditor.

21 AUGUST

Promoter penalty laws

ATO Updated Practice Statement Law Administration [PS LA 2021/1](#): “Application of the promoter penalty laws”.

This update underscores the ATO's powers as set out in section 68B (originally updated April 2021 to include Illegal Early Release (IER)).

For instance, among other changes, it reflects the broader definition of promoter. Previously a promoter was required to receive direct or indirect consideration. This concept inferred receipt of payment or a financial reward in respect of such marketing or encouragement of schemes.

And, while ‘indirect consideration’ includes in-kind payments and payments to third-party associates, the inference has been that the reward had to be quantifiable.

The ATO previously faced challenges in obtaining sufficient evidence that there had been receipt of a quantifiable reward, in exchange for promoting a scheme, especially where a payment was indirect or non-monetary.

Now, any form of benefit, whether direct, indirect, monetary, or in-kind, that a promoter receives for encouraging growth or interest in a tax exploitation scheme can trigger the application of promoter penalty laws.



22 JULY

ATO: New SMSF courses launched

The ATO released 2 new [education courses](#) for SMSF trustees to build their knowledge on “[setting up](#)” and “[winding up](#)” an SMSF.

These courses form part of a suite of education products aimed at supporting SMSF trustees with their regulatory and reporting obligations.

The ATO has also indicated that it will be launching the final course in the suite later in the year on “Running a self-managed super fund”.

17 JULY

NALI and CGT: Tax Determination

The ATO published the final version of [Tax Determination TD 2024/5](#), *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*.

This final determination includes only minor amendments from the previous draft released for consultation.

However, the ATO's view contained within this determination, which is in accordance with the law, confirms that arm's length capital gains will be tainted if there is also a non-arm's length capital gain realised in the same financial year.

10 JULY

NSW Supreme Court Case:

Neal v Brown [2024] NSWSC 841

The case of [Neal v Brown \[2024\] NSWSC 841](#) serves as a reminder of the need to carefully consider the non-tax considerations of making a ‘deathbed’ withdrawal – which is typically aimed at avoiding death benefit tax where beneficiaries are non-tax dependants.

In this case, among other things, the court had to determine whether certain amounts should be considered *superannuation and pension entitlements* of the deceased member – and therefore subject to certain specific provisions contained in his Will.

By way of brief background, the deceased was a member of two superannuation funds (neither of which was an SMSF).

The deceased member had signed his Will several days before his death and, on the same day that he signed his Will, he also instructed both his superannuation funds to withdraw all of his superannuation benefits into his personal accounts.

One of these withdrawal requests was processed and paid prior to his death. The other request took a little longer and, on the date of his death, was still held in his superannuation fund.

In accordance with his Will, all net monies from the deceased's *superannuation and pension entitlements*, were (broadly) to be received by the trustee into his estate – and subsequently distributed in equal shares to the deceased's children.

However, it was found that in relation to the superannuation benefits that had been cashed out, these could no longer be described as superannuation and pension entitlements at the date of death. Therefore, this amount formed part of the residual of the estate and could not be separately gifted under the specific clause intended to deal with his *superannuation and pension entitlements*.

On the other hand, in relation to the superannuation benefits that had not been paid out prior to his death, those superannuation benefits were considered to be *superannuation and pension entitlements* at the date of death – and could therefore be separately gifted under the specific clause intended to deal with his *superannuation and pension entitlements*.

26 JUNE

ATO income stream ruling: Updated

The ATO issued an addendum to its Tax Ruling [TR 2013/5](#), *Income tax: when a superannuation income stream commences and ceases*.

This update was intended to ensure alignment between the contents of the ruling and legislative changes that have occurred since this ruling was originally published – such as the introduction of the transfer balance cap regime and the definition of a retirement phase income stream.

However, one notable update to this ruling is that the ATO has explicitly differentiated between an income stream ceasing for tax purposes versus superannuation purposes, where a pension ceases due to failing to meet the relevant pension standard.

For example, in the event of a minimum pension underpayment, the Commissioner now requires a commutation of the superannuation income stream before a new income stream can commence and meet the requirements of a retirement phase income stream. The new Ruling may also have implications for SMSF trustees and the management of retirement phase income streams, particularly the maintenance of an income stream as a 'separate superannuation interest'.

We are actively engaging with the ATO to clarify if these changes necessitate adjustments to longstanding industry practices and we will provide an update, as soon as possible.

25 JUNE

NALE Bill: Now law

The [Treasury Laws Amendment \(Support for Small Business and Charities and Other Measures\) Bill 2023](#) was finally passed by both Houses – and subsequently received Royal Assent on 28 June 2024.

The passage of this Bill introduces amendments to the non-arm's length expense (NALE) rules applicable to "general expenses" into law – with effect from 1 July 2018.

Primarily, this means that where NALE arises with respect to a "general expense" the amount of NALE will be calculated as twice the difference between an arm's length and non-arm's length expense, including where the entity did not incur any expense.

Note: This new legislation does not impact on the NALE rules as they apply to "specific" expenses.



20 JUNE

Self-managed superannuation fund independent auditor's report

The ATO released changes to the SMSF independent auditor's report (IAR) (NAT 11466) reflecting updates to the quality management requirements previously released by the Auditing and Assurance Standards Board.

The ATO notes that Part B of the IAR was changed for the reporting period starting 1 July 2024 as Auditing Standard ASQC 1 *had been superseded on 15 December 2022 by Auditing Standard ASQM 1: Quality Management for Firms that Perform Audits or Reviews of Financial Reports and Other Financial Information, or Other Assurance or Related Services engagements.*

The new IAR is available directly from the ATO's website and is to be used for all audits completed on or after 1 July 2024. This includes audits completed on or after this date, regardless of the income year they apply to.

However, when using this report for earlier reporting periods, auditors are reminded to make sure they comply with the auditing standards and legislation that applied to that earlier period.

7 JUNE

LRBA: PCG 2016/5 – 'Safe harbour' interest rates increased



With the release of the May 2024 Indicator lending rates by the Reserve Bank of Australia (RBA), the interest rate applicable to a related party loan (for SMSF trustees relying on the PCG 2016/5 Safe Harbour provisions to establish that a related party loan is consistent with arm's-length dealings), will increase from 1 July 2024.

The applicable interest rates, based on the nature of the acquired asset, are as follows:

- Real Property: 9.35%
- Listed shares or units: 11.35%

Importantly, the interest rate charged is only one of several requirements that must be met for the Safe Harbour to apply.

29 MAY

ATO Update:

Personal superannuation contributions

The ATO reminded SMSF members seeking to claim a tax deduction for personal super contributions that they must receive a written acknowledgment, confirming that the fund trustee(s) has received their notice of intent form **prior** to claiming a tax deduction for contributions in their tax return.

21 MAY

ATO Statistics – SMSF quarterly statistical report (March 2024)

The ATO published its SMSF quarterly statistical report for the March 2024 quarter.

Some of the key highlights from this latest statistical report include that:

- At the end of the March 2024 quarter, it was estimated there were 616,400 SMSFs, with 1,148,481 members.
- The total estimated SMSF assets were \$932.9 billion.
- The top asset types held by SMSFs (by value) were:
 - Listed shares (29% of total estimated SMSF assets)
 - Cash and term deposits (16%)
- 53% of SMSF members are male and 47% are female – consistent with March 2023.
- 87% of SMSF members are 45 years or older – consistent with March 2023.

The next quarterly report is expected to publish, late September 2024

16 MAY

AAT Case:

Merchant and Commissioner of Taxation [2024] AATA 1102

The Administrative Appeals Tribunal (AAT) overturned the ATO Commissioner's earlier decision to disqualify Gordon Merchant, the founder of Billabong, from acting as an SMSF trustee.

Despite serious breaches of the Superannuation (Industry) Supervision Act (SISA), broadly relating to the SMSFs acquisition of shares from a controlled discretionary trust to realise a capital loss, the AAT found the risk of future non-compliance was low.

It was noted that the breaches resulted from a single course of conduct and, as the transaction was suggested by the SMSF's auditors, and that at no time was it suggested that the transaction risked breaching the provisions of the SISA, it was fair for the member to have thought that the transaction was lawful from a superannuation compliance perspective – Further emphasising that disqualification served no useful purpose in this case.

The Tribunal also noted that the ATO itself, on review, had deemed Mr Merchant to be a fit and proper person.

This case should not signal a shift in the ATO's focus on disqualification of SMSF trustees but rather highlights that while the ATO's enforcement actions are stringent, there remains room for individual assessment and appeal.

On 4 September, the ATO released a Decision Impact Statement following the outcome of this case, in which the commissioner accepts that:

"... when considering the Tribunal's holistic consideration of all the particular facts as they applied to the Applicant, the decision that the Applicant was unlikely to be a future compliance risk and setting aside the disqualification of the Applicant, was reasonably available to the Tribunal on the facts before it.

*As each case must to be decided on its particular circumstances, we take the view that **this decision has limited broader application** beyond the 'peculiar circumstances of this case'."*

14 MAY

2024-25 Federal Budget

The Government released it's 2024-25 Federal Budget, focused on easing costs of living pressures with 'no surprises' for the SMSF sector.

While perhaps disappointing, it was not entirely surprising that from an SMSF perspective, there was an absence of any notable new announcements likely to have a direct impact on the SMSF landscape.

10 MAY

Better targeted superannuation concessions (Division 296 Tax) – Senate Inquiry report handed down

Treasury Laws Amendment (Better targeted Superannuation Concessions and Other Measures) Bill 2023, if legislated, will introduce the new Division 296 Tax.

Following the completion of its senate inquiry, the responsible senate committee handed down its report on 10 May 2024.

Despite numerous submissions received from various industry bodies, associations, and individuals highlighting the unintended consequences of certain key measures in the bill, the 106-page report stated that:

"The committee strongly supports the reforms to superannuation tax concessions that will ensure they are fairer, more sustainable, and better targeted".

In response, The SMSF Association noted that the recommendation to proceed with the Bill without amendment ignores the considerable and unequivocal weight of evidence presented during the inquiry that this new tax will have many unintended consequences.



PREVIOUS SMSF ASSOCIATION TECHNICAL PUBLICATIONS

SMSF Association Technical publications issued since the last Technical Newsletter:

SMSF Association Technical publications issued since the last Technical Newsletter:

Issue date	Type	Link
24 June 2024	Technically Speaking: Re-visiting superannuation contribution fundamentals and opportunities	Click here.
28 May 2024	2024/25 Super Reference Guide	Click here.
14 May 2024	2024-25 Federal Budget Update	Click here.
4 April 2024	Technical Newsletter: Edition 4 (April 2024)	Click here.

The contents of this Technical Newsletter are taken to be correct at the time of publication on 26 September 2024.

Disclaimer: Technical Papers contain general advice only and are prepared without taking into account particular objectives, financial circumstances and needs. The information provided is not a substitute for legal, tax and financial product advice. Before making any decision based on this information, you should assess its relevance to the individual circumstances of your client. While the SMSF Association believes that the information provided is accurate, no warranty is given as to its accuracy and persons who rely on this information do so at their own risk. The information provided in this bulletin is not considered financial product advice for the purposes of the Corporations Act 2001. © SMSF Association