

Super Update

Edition 2

Below is a round-up of some superannuation changes and key developments that may be relevant to you, as trustee of your SMSF. It is important that you know what changes are coming, so you can effectively understand how they may affect you and the members of your SMSF.

We intend to regularly provide you with these updates as a way of helping you plan for your retirement and identify any opportunities that can assist you to grow your superannuation savings.

IMPORTANT REMINDERS

Transfer Balance Account Reporting

From 1 July 2023, SMSF trustees will be required to report Transfer Balance Cap events to the ATO no later than 28 days following the end of the quarter in which the event occurred – even if the member's total super balance is less than \$1 million.

Further, all unreported events that occur before 30 September 2023 must be reported by 28 October 2023.

Minimum pension requirement – account-based pensions

SMSFs paying account-based pensions, including market linked pensions, are required to pay at least a minimum amount each year.

When calculating the minimum payment requirements for account-based pensions, using a member's pension balance at 1 July 2023, the 50% reduction that has applied in recent years will no longer apply.

The 50% reduction in the minimum pension drawdown rate will not apply to pension payments for the 2023-24 financial year.

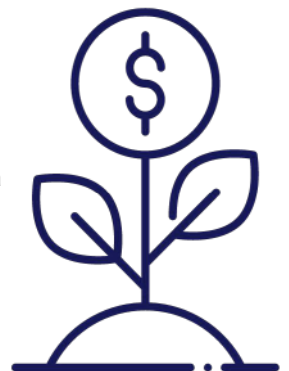
Limited Recourse Borrowing Arrangement – Safe Harbour Interest rates

Generally speaking, SMSF trustees must ensure all investments are conducted on an arm's-length basis.

Where an SMSF borrows money from a related party under a Limited Recourse Borrowing Arrangement (LRBA), the ATO has previously provided guidance on what is required to ensure such a loan is on arm's length terms for tax purposes.

As part of that guidance, the ATO provided some safe harbour loan terms. For SMSF trustees relying on these safe harbour terms, the interest rate to be charged in 2023-24 has increased to:

- Real property: 8.85%
- Listed shares or units: 10.85%



Rollovers – SuperStream

From 1 July 2023, all rollovers to and from an SMSF, now require a fund trustee to have a rollover enabled Electronic Service Address (ESA) to execute the rollover using SuperStream.

SMSF auditors will be required to report a rollover as a breach of the SuperStream standards if it has been actioned without an active rollover enabled ESA from 1 July 2023.

Previously, limited temporary relief had been provided to SMSFs by the ATO, to allow certain rollovers to be processed outside of SuperStream without trustees incurring any penalties. However this relief ended on 30 June 2023.

Increase in value of penalty units

Under the SMSF penalty regime, various breaches will give rise to penalties that are expressed in terms of penalty units.

Where an infringement occurs on or after 1 July 2023, the value of each penalty unit has increased to \$313 (up from \$275).



4 JULY 2023

Valuation of fund assets

The ATO has issued a reminder to SMSF trustees that, as part of preparing their fund's accounts, statements, and SMSF Annual Return they are required to value the fund assets at market value.

To support this, the ATO's [SMSF valuation guidelines](#) provide a useful resource to fund trustees.

21 JUNE 2023

Re-structuring market linked pensions

SMSF members are usually able to restructure existing market-linked pensions by stopping an existing, and starting a new, pension.

In some cases, this may result in some individuals receiving an excess transfer balance determination from the ATO – for exceeding their Transfer Balance Cap. The good news is that members can now commute the excess amount from their otherwise non-commutable market linked pension without breaching the pension standards.

However, the ATO has made it abundantly clear that where an SMSF trustee is seeking to remove an excess transfer balance amount from a market-linked pension, they cannot commute any of the capital supporting a restructured market linked pension (MLP) until a commutation authority has been issued by the Commissioner.

This means a member must wait for at least 60 days from when they are issued with an excess transfer balance determination. This legislated 60-day election period cannot be shortened. [In our experience](#), a member should then expect to wait at least another 28 days before the ATO will issue a commutation authority.



Non-arm's length expenses (NALE) – Draft legislation

Following the earlier release of a consultation paper, and a period of industry consultation, the Government released [Treasury Laws Amendment \(Measures for Consultation\) Bill 2023: Non-arm's length expense rules for superannuation funds](#).

This draft legislation contains several changes that seek to amend the Non-arm's length income (NALI) provisions to address the potential for disproportionately severe outcomes for breaches relating to general expenses.

Perhaps of most significance for SMSFs, the proposed amendments would result in the maximum amount of income taxable at the highest marginal rate being two times the level of the general expenditure breach – calculated as 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. The Government had previously proposed that this be set to five times. These measures are not yet law.

15 JUNE 2023

Property development – ATO Taxpayer Alert

The ATO issued Taxpayer Alert [\(TA\) 2023/2](#) which deals with "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."

Outlined in this Taxpayer Alert are arrangements of concern to the ATO which broadly involve SMSF trustees investing, directly or indirectly, in a special purpose vehicle which undertakes property development.

The Alert outlines the ATO's view that non-arm's length dealings by any party, in respect of any step, in relation to a scheme, can give rise to Non-arm's length income (NALI). This extends to any capital gains derived on the subsequent disposal of an SMSF's interest in the special purpose vehicle.

The ATO's concerns generally revolve around the lack of commerciality and the inappropriate diversion of profits from property development projects to an SMSF.

14 JUNE 2023

First Home Super Saver Scheme (FHSSS) – Improved flexibility

The FHSSS allows an individual to withdraw up to \$50,000 of voluntary contributions (plus associated earnings/less tax) from their super fund to assist with the purchase of a new home. The maximum amount of contributions an individual can make each year, that will be counted towards the FHSSS, is currently \$15,000 p.a.

The Government has introduced [Treasury Laws Amendment \(2023 Measures No. 3\) Bill 2023](#), to improve the flexibility of the FHSSS.

Accordingly, under this new bill, once legislated:

- individuals will be able to amend or revoke their application to the ATO to release super under the FHSSS. Under the current law, this is not permitted.
- individuals will have more time to request a release authority after they have entered into a contract to buy or construct a home, from 14 days to 90 days.



Illegal Early Access to Super

The ATO published a reminder that cases of illegal early access to super will not go unpunished. To highlight this warning, the ATO cited a recent AAT Case, [WZWK and Commissioner of Taxation \(Taxation\) \[2023\] AATA 872](#).

The taxpayer in this case was found to have breached the superannuation payment standards by illegally making payments from the SMSF to himself as a member – which did not meet a condition of release.

The Administrative Appeals Tribunal (AAT) affirmed the ATO Commissioners earlier decision to amend the individual taxpayer's personal income tax assessments, impose tax shortfall penalties and disqualify the trustee due to not being a fit and proper person following an ATO audit which uncovered illegal early release of superannuation benefits.

This resulted in the taxpayer owing around \$413,000 in additional tax and over \$179,000 in tax shortfall penalties because they had made false and misleading statements in their income tax returns.

24 MAY 2023

ATO Statistics – SMSF quarterly statistical report (March 2023)

The ATO issued its [quarterly statistical report](#) which provides a number of interesting insights, including:

- Total SMSFs: 606,217
- Total SMSF members: 1,136,234
- Total estimated SMSF assets: \$889.5 billion
- The top asset types held by SMSFs (by value):
 - listed shares (29%)
 - cash and term deposits (15%).
- 53% of SMSF members are male and 47% are female
- 87% of SMSF members are 45 years or older.



5 MAY 2023

Validity of Binding Death Benefit Nomination (BDBN)

Among other things, in the case of [Williams v Williams & Anor \[2023\] QSC 90](#) the court was asked to consider whether a Binding Death Benefit Nomination (BDBN) was valid.

Broadly, in this case, a deceased member's BDBN had been executed by the deceased member (i.e. executed by himself, albeit in his capacity as a fund trustee).

The relevant provisions in the fund's trust deed required that the trustees be given written notice of a BDBN. However, the second trustee (i.e. the deceased member's son) was not given written notice.

And as such, it was held that the BDBN was not valid.

The findings from this case provides yet another reminder of the importance of precisely following the terms of a fund's governing rules, to ensure than any BDBNs made by fund members are valid.

Navigating your way through the evolving superannuation rules can be very complex, especially in the lead up to a member's retirement. If you have any questions, require assistance, or would like to discuss any of the above changes, please feel free to give me a call to arrange a time to discuss.

The contents of this Super Update are taken to be correct at the time of publication on 16 August 2023.

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