



Proposed superannuation measures announced in 2017/18 Federal Budget

The principal measures regarding superannuation just announced in the 2017/18 Federal Budget can be summarised as follows:

- ◆ The Government will **encourage home ownership** by allowing first homebuyers to 'build a deposit' inside their superannuation fund.

More particularly, voluntary superannuation contributions of up to \$15,000 per year, and \$30,000 in total, can be contributed by first homebuyers from **1 July 2017**. The contribution must be within existing concessional and non-concessional caps. These contributions can then be withdrawn, along with deemed earnings, for a first home deposit, from **1 July 2018 onwards**.

- ◆ **From 1 July 2017**, the Government will improve the integrity of the superannuation system by including the use of **limited recourse borrowing arrangements (LRBA)** in a member's total superannuation balance and transfer balance cap.

The concept of total superannuation balance is used to limit the ability of a fund member to make non-concessional contributions (NCCs) into superannuation and the transfer balance rules are designed to limit the value that a fund member is able to transfer into the tax-exempt pension phase to \$1.6 million.

This means that the outstanding balance of a LRBA will be included in a member's annual total superannuation balance and the repayment of the principal and interest of a LRBA from a member's accumulation account will be a credit in the member's transfer balance account.

- ◆ **From 1 July 2018**, the Government will allow a person aged 65 or over to make a NCC of up to \$300,000 from the proceeds of selling their home. These NCCs will be in addition to those currently permitted under existing rules and caps and they will be exempt from the existing age test, work test and the \$1.6 million balance test for making NCCs.

This measure will apply to sales of a principal residence owned for the past ten or more years and both members of a couple will be able to take advantage of this measure for the same home.

- ◆ The Government will extend the current tax relief for **merging superannuation funds** until 1 July 2020.

Since December 2008, tax relief has been available for superannuation funds to transfer capital and revenue losses to a new merged fund, and to defer taxation consequences on gains and losses from revenue and capital assets. This tax relief was due to lapse on 1 July 2017.

Note that the above measures are subject to the passing of legislation.

Is the lease of an asset from a related party an 'acquisition of an asset'?

An interesting question is whether an SMSF can lease an asset from a related party, or would this constitute an acquisition of an asset (being a leasehold interest) from a related party that would

contravene S.66 of the Superannuation Industry (Supervision) (SIS) Act 1993?



The term 'asset' is defined in S.10(1) of the SIS Act to mean 'any form of property', and it is the Commissioner's view in SMSFR 2010/1 that this phrase has a very wide meaning.

Also, in SMSFR 2009/1, the ATO considers the meaning of 'business real property' and states (at paragraph 70) that "...Nowadays, leasehold interests are treated for most purposes as real property."

Therefore, a lease of land (or another asset) is likely to come within the meaning of 'any form of property', and if an SMSF leases an asset from a related party, the SMSF will be acquiring an asset from that related party, which may contravene S.66.

However, there are two possible exceptions that may be useful for an SMSF in this situation:

- ◆ if the asset is 'business real property' of the related party acquired at market value, then the acquisition should not be prohibited (refer S.66(2)(b)). SMSFR 2009/1 makes it clear that a leasehold interest is specifically included in the definition of business real property in S.66(5); or
- ◆ if the asset is an in-house asset (refer S.66(2A)(a)(i)). S.71(1) defines an 'in-house asset' to include "an asset of the fund subject to a lease or lease arrangement between a trustee of the fund and a related party of the fund", which means that the lease can also be made by the related party to the SMSF. Therefore, if an SMSF is leasing an asset from a related party, it will be an in-house asset (unless it is a lease of business real property), and the acquisition of the lease should not be prohibited under S.66 **provided that** the lease of the asset is at market value and it does not cause the SMSF to breach the 5% in-house asset limit.

Detailed advice should be sought as required in relation to the above and the other investment and compliance rules for superannuation funds that need to be considered.

Commission-only salesperson not an employee

In a recent private binding ruling, the ATO held that a worker selling and installing products on a commission-only basis was an independent contractor rather than an employee. Therefore, the employer did not have to pay 9.5% in superannuation contributions on the commissions paid to the salesperson. (Refer ATO private binding ruling No 1013103814672)

This private binding ruling involved a worker selling and installing products on behalf of a principal. The worker would generate commissions based on the amount by which the sale price to the customer exceeded the base price set by the principal. The worker would only receive payment if they sold products.

The worker had their own business as an individual sole trader with an ABN. They provided services to at least one other business and could carry on other forms of business or employment. The worker set their own hours of work and was not supervised. The principal did not provide any training and the worker did not carry out physical work. The principal did not require the worker to attend meetings and did not schedule tasks. The insurance provided by the principal was limited to the product sold by the worker and the installation, and the worker was responsible for all other insurances.

The worker could engage the services of other parties to sell the principal's products, although the principal provided the worker with t-shirts and business cards with a company logo, and reimbursed the worker for interstate travel expenses.

The ATO decided that the worker was **not** an employee for superannuation guarantee purposes, and that, on balance, the relationship was one of principal and independent contractor. In this regard, the ATO noted that nearly all the common law factors (including terms of engagement, control test, integration test, results test, delegation and risk) were more in favour of the relationship being one of principal and independent contractor.

The ATO also found that the worker was not an employee under the expanded definition of that term, as the relationship was not a contract "wholly or principally" for the worker's labour.



However, it is important to recognise the exceptional circumstances in this private ruling that may limit any broader application.

SMSF commutation requests to stay within new pension cap

The ATO recently released Practical Compliance Guideline **PCG 2017/5** outlining the circumstances in which the ATO will not conduct compliance reviews for pension commutation requests made before 1 July 2017 by a member of a SMSF to avoid exceeding the \$1.6m pension transfer balance cap.

As noted in this Guideline, SMSF members may need to take action before 1 July 2017 to ensure they do not exceed the \$1.6m transfer balance cap by requesting the trustee to internally commute some or all of their income streams as an accumulation interest within the SMSF, or as a withdrawal from the SMSF as a lump sum.

This Guideline also acknowledges that an SMSF member may not know by 30 June 2017, the precise value of the superannuation interests that support their superannuation income streams. Therefore, a member may make a request, which is subsequently accepted by the trustee of the SMSF, to commute their income streams by the amount that exceeds \$1.6m on 30 June.

As stated in this Guideline, the ATO will not conduct a compliance review where the commutation request and acceptance:

- ◆ **are both made in writing before 1 July 2017** - the agreement by the trustee may be documented as a trustee resolution;
- ◆ specifies a methodology that allows the precise quantum of the amount commuted to be calculated (such amount may be ascertained at a later point in time);

- ◆ specifies the superannuation income stream(s) to be commuted (and the order of priority in which the commutations will occur where the request covers more than one income stream); and
- ◆ does not conflict with a similar agreement to commute that the member has with a trustee of a different superannuation fund.

The agreement to commute cannot be subsequently revoked, and the amount of the commutation must be reflected in the SMSF's financial accounts for the year ended 30 June 2017, no later than the due date of the SMSF's annual return.

The Guideline also states that this concessional compliance approach will not apply in certain circumstances, e.g., where the request is dependent on the later exercise of a discretion by either the member or trustee of the SMSF.

