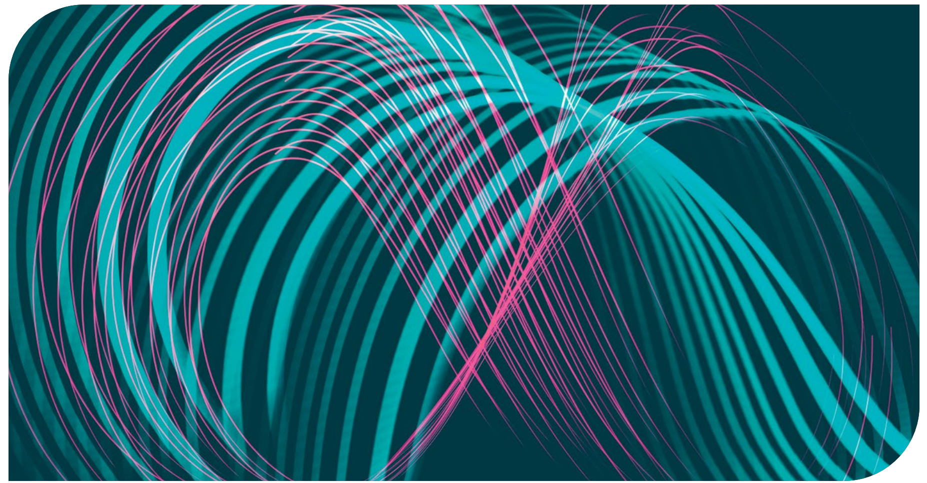
Nexia Australia

Superannuation Solutions

Edition 22



Welcome

Welcome to the latest edition of our Superannuation Solutions Newsletter.

In this edition we discuss employers requiring to make SG contributions to employees on 'payday', draft regulations enabling superfund members to exit legacy pensions, a breakdown of how and where the SMSF sector is growing and a case outlining potential penalties regarding the mismanagement of an SMSF.

We hope you find this newsletter informative. Should you have any questions in relation to how these changes may impact you, please contact one of our SMSF Specialists.

Important Dates

28 October 2024
Lodge any transfer balance account transactions between 1 July 2024 and 30 September 2024.

28 October 2024
Pay compulsory super contributions for the quarter ended 30 September 2024.

28 November 2024
Lodge super guarantee charge statement and pay super guarantee charge if compulsory contributions not made for the quarter ended 30 September 2024.

More details on payday super

In Editon 19 of our Super Solutions Newsletter we reported on the Federal Government's plans to introduce "payday super" from 1 July 2026. Payday super will replace the current SGC system under which super contributions relating to the wages and salary paid in a particular quarter are required to be paid by employers to super funds no later than the 28th day after the end of the quarter. The aim of payday super is to require SGC contributions to be paid much closer to the day when wages and salary are paid.

The proposal was first announced in the 2023-24 Federal Budget. Federal Treasury has now released a fact sheet providing more detail of how the system will operate.

From 1 July 2026, an employer will be required to make SG contributions on 'payday', which is the date that an employer makes an Ordinary Time Earnings (OTE) payment to an employee.

Each time OTE is paid, there will be a new 7 day 'due date' for contributions to arrive in the employees' superannuation fund. This is intended to provide time for the movement of funds through the payment system, including clearing houses. An employer will be liable for the new SG charge unless SG contributions are received by their employees' superannuation fund within 7 calendar days of payday.

The deadline of 7 calendar days rather than, say, 5 business days (to allow for weekends) may be significant. In the case of a long weekend, the deadline effectively allows only 4 business days for processing a super contribution. Over the 4 day Easter long weekend, only 3 business days.

There will be some limited exceptions to the 7 calendar day deadline:

- Contributions for OTE paid within the first two weeks of employment for a new employee will have their due date deferred until after the first two weeks of employment, and
- Small and irregular payments that occur outside the employee's ordinary pay cycle would not be considered a payday until the next regular OTE payment or 'payday' occurs.

Where employers fail to pay contributions in full and on time, they will be liable for an updated form of the SG charge.

All assessments of the updated SG charge will be made by the ATO. Assessments would be triggered where there is non-payment detected by the ATO, which could occur by voluntary disclosure of an employer, an employee notification or the ATO compliance activity. Additional interest and penalties apply if the assessed SG charge is not paid by the due date.

The components of the updated SGC charge will be:

Outstanding SGC shortfall	Currently required super contributions are calculated on the basis of OTE but the SGC shortfall is calculated using salary or wages. These can differ. Payments for overtime and termination payments for unused annual or long service leave are salary or wages, but not ordinary times earnings. Under the updated SGC, the calculation of the outstanding SGC shortfall will be brought into line with the calculation of super contributions and calculated using OTE.
Notional earnings	The SG shortfall will incur daily interest calculated at the general interest charge rate on a compounding basis, from the day after the due date. (The annual general interest charge rate is currently 11.36% for the September 2024 quarter).
Administrative uplift	An additional charge will be levied to reflect the cost of enforcement. This will be calculated as an uplift of the SG shortfall component of up to 60 per cent. This will be reduced when employers take action to voluntarily disclose when they have failed to pay contributions in full and on time.

There will be additional interest and penalties after assessment of SG charge by ATO:

General Interest Charge	Following assessment, interest will continue to accrue on any outstanding SG shortfall and notional earnings amounts, on a daily compounding basis calculated at the general interest charge rate. The general interest charge will also apply to any outstanding administrative uplift penalty that remains unpaid from the time of assessment.
SG charge payment penalty	Additional penalties will apply to employers that have been assessed for the SG charge and do not pay the amount in full within 28 days of the notice of assessment. This will total up to 50 per cent of the outstanding unpaid SG charge amount.

In a major change to the current system, the SG charge will be tax-deductible, ensuring the income tax consequences for paying employees' superannuation are consistent. As is currently the case, penalties and interest after assessment of SG charge by the ATO will not be deductible.

It will be important for employers to ensure they have the correct governance and systems in place to ensure their workers receive their full legal entitlements, including salary, wages and SG, on time.

The factsheet also advises that the ATO's Small Business Superannuation Clearing House will be retired from 1 July 2026.

Recognising Late Contributions

If contributions are not received in an employee's superannuation account within 7 days, the employer will be liable to pay the SG charge, even ahead of the ATO issuing an assessment. An employer can make missed contributions as soon as possible to minimise their liability and penalties.

The approach to correcting late contributions will be simplified. Contributions will now automatically count towards the earliest possible payday that has not yet been assessed for SG charge, and which still has an outstanding SG shortfall. There will be no need to make an election.

Compliance

Employers will be required to report in single touch payroll both the OTE and the total superannuation liability for an employee, ensuring the SG can be correctly identified. The ATO aims to match employer Single Touch Payroll (STP) data and superannuation fund reporting.

It remains to be seen whether SMSFs can be compelled to report the receipt of contributions promptly. Previous studies have shown that the three biggest SMSF platforms - Class, BGL and Super Concepts – between them account for about 67% of registered SMSFs. This implies that up to one third of all SMSFs are still maintained in forms like Excel spreadsheets or even on paper.

Further details will emerge as the necessary legislation is drafted.

If you have any questions on this topic, please contact your Nexia advisor.

Draft regulations released on exiting legacy pensions

Federal Treasury has released exposure draft regulations to enable super fund members who hold legacy pensions to exit these products over a 5 year period, and to provide more flexible rules for dealing with reserves in SMSFs. These changes were first announced in the 2021-22 Federal Budget, and super fund members who hold these products have been waiting for details to announced since May 2022.

The draft regulations apply to legacy lifetime, life expectancy and market-linked superannuation income stream products that commenced prior to 20 September 2007 or were commenced as a result of a conversion of an earlier legacy product that commenced prior to that date. This will allow individuals to exit products that are no longer suitable for their circumstances.

Lifetime and life-expectancy products are significantly less flexibility than more modern account based super pensions. Although market-linked income streams have similarities to account based pensions, all these legacy products have broadly equivalent commutation restrictions. In practice, this means that the only way to voluntarily exit these products, prior to death or the expiry of the term of the pension, is to convert to another legacy product.

The draft regulations also improve the options available for allocations from reserves in SMSFs. Under the current rules, unless reserves are allocated to members in small amounts (less than 5% of each member's balance each year), they generally count against the receiving member's concessional contributions cap, so any excess over the cap will be subject to additional tax. Until now, this has prevented members who hold legacy pensions supported by reserves from exiting the pension, as unwinding the reserve would cause contribution cap or additional tax problems.

Under the proposed new rules, where a legacy pension is ceased and the supporting reserve is allocated to the former recipient of that income stream, the allocation will be exempt from both the concessional and non-concessional contribution caps. In the case of other reserve allocations, amounts exceeding the 5% rule will be allocated against the member's non-concessional contributions cap rather than their concessional contributions cap. In many cases this will ease or eliminate the potential adverse consequences of unwinding a reserve. In the 2024-25 year the concessional contributions cap is $30,000 and the non-concessional contributions cap is $120,000.

The proposed changes are very welcome given how long these legacy pensions have been a problem, although clients should delay taking any definite action as these are not yet law.

Please contact your Nexia advisor if you are affected by the proposed changes or have any other questions on this issue.

Is there an ideal size for SMSFs?

The SMSF sector continues to grow.

In its Quarterly Superannuation Performance Statistics for the year to 30 June 2024, the Australian Prudential Regulatory Authority (APRA) shows that total assets held by SMSFs rose from $921.2 billion to $990.4 billion in the year ended 30 June 2024. The number of SMSFs rose from 598,564 to 625,609 during the year. This represents average assets held per SMSF of $1.58.

This single number can be broken down by looking at the distribution of total assets across SMSFs. The ATO in its Self-managed super fund statistical report - March 2024 provides a breakdown of the size of SMSFs as at 30 June 2022 (the latest data available).

Asset Ranges	% of SMSFs at 30 June 2022
$0 to $200,000	13.9
>$200,000 to $500,000	19.1
>$500,000 to $1m	25.4
>$1m to $2m	22.0
>$2m to $5m	15.2
>$5m to $20m	4.2
>$20m	0.2
	= 100.0

One remarkable statistic is that almost one third of SMSFs (33%) have total assets of less than or equal to $500,000. Although the single most important factor motivating most people to establish an SMSF is probably the desire to take control of the management of their own retirement savings, for small balances it is usually more financially viable to invest in an APRA regulated fund. The Productivity Commission suggested in 2018 that $500,000 was a reasonable minimum for SMSFs. ASIC took up the same threshold in 2019 in guidance to investment advisors recommending the establishment of SMSFs for clients.

This has been challenged by research undertaken by the International Centre for Financial Services at the University of Adelaide, commissioned by the SMSF Association. This research, based on analysing the results of more than 50% of the SMSF population, indicated that a threshold of $200,000 for the establishment of an SMSF was more appropriate.

But even so, almost 14% of SMSFs have total assets less than the revised threshold of $200,000. Does this indicate that the trustees of these funds are willing to incur a higher level of running costs in order to have personal control of their retirement savings, or are they simply lacking advice in this area?

The above table also shows that almost 50% of SMSFs have total assets between $500,000 and $2m. This is perhaps the "sweet spot" for SMSFs, representing the typical retirement savings of average people.

Larger SMSFs seem to often attract undesirable political attention, such the current Federal Government's proposal to impose an additional tax on members with total super balances than $3m. Many of these larger balances are simply the result of members taking advantage of special contribution concessions which were provided by governments in earlier years. Also, because they represent such a small portion of the SMSF population, governments might see them as an easy target. At the time of writing the fate of the new tax is unknown, but many in the Senate cross bench have come to understand the potential consequences of taxing unrealised gains, which is a feature of the new tax as it is currently proposed.

ATO's decision to disqualify an SMSF trustee overturned

In the recent case of *Merchant v Commissioner of Taxation* the Administrative Appeals Tribunal (AAT) an appeal has overturned the ATO's decision to disqualify an SMSF trustee.

Mr Merchant was the sole trustee of the Gordon Merchant Superannuation Fund and also controlled a number of other entities including the Merchant Family Trust. The fund acquired some listed securities from the family trust at market value. The ATO acted to disqualify Mr Merchant as an SMSF trustee, arguing that the predominant purpose of the acquisition was to crystalise a capital loss in the family trust which would be used to offset a later capital gain caused by the sale by the family trust of shares in a company controlled by Mr Merchant.

The ATO asserted that in acquiring the listed securities, the fund did not give effect to its investment strategy, Mr Merchant had no genuine purpose of investing for the fund, there was no evidence the Mr Merchant had turned his mind to a number of matters as required by the fund's investment strategy, and the fund had effectively provided financial assistance to the family trust. The ATO also concluded that Mr Merchant was not a fit and proper person to act as a trustee. The ATO later abandoned this last point.

Mr Merchant applied for the ATO to review its decision. When the ATO upheld its decision Mr Merchant appealed to the AAT.

Despite finding that there had been serious contraventions of the super law, the AAT set aside Mr Merchant's disqualification. It found that future non-compliance was unlikely, because:

- Mr Merchant was a fit and proper person
- Mr Merchant had given undertakings to mitigate the future risk of non-compliance
- Mr Merchant was only likely to be a trustee of his own super fund, and he did not need protecting from himself, and
- There was no useful purpose served by disqualification in this instance.

It seems that the AAT viewed disqualification not as a penalty but as a mechanism to prevent future breaches, which was not necessary in this case.

The ATO has released a decision impacting statement in relation to the case. The ATO accepts the AAT's decision as appropriate within the "peculiar circumstances of this case", but emphasizes that the decision does not displace the principle that the primary responsibility for operating an SMSF rests with the individual trustees or the directors of the corporate trustee. While the ATO accepts that mistakes can be made by trustees in the management of a fund's affairs, what is important is that the trustee demonstrates a willingness to comply with their obligations.

Clients should bear in mind that the rules around the management of an SMSF are complex and breaches can involve significant penalties. Your Nexia advisor would be pleased to provide you with any advice or assistance you might need.

Nexia Australia

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Contact us

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