

Superannuation under review

Currently, the Government has underway three separate reviews, each of which may influence the future for superannuation and self managed superannuation funds (SMSFs). These reviews are considering whether the system for retirement savings needs to be overhauled in relation to the tax concessions and the way that superannuation funds operate and behave. The three reviews are:

- Australia's Future Tax System Review Panel (known as the Henry Review) which is undertaking a comprehensive review of Australia's tax system with a view to create a tax structure that will position Australia to deal with the demographic, social, economic and environmental challenges of the 21st century;
- the Superannuation System Review (known as the Cooper Review) which is examining and analysing the current superannuation framework for improvements in the areas of governance, efficiency, operation and structures; and
- the Joint Parliamentary Committee on Corporations and Financial Services (the Ripoll Inquiry) which considered financial products and services and the roles of financial advisers, commission arrangements, licensing and marketing in the recent product and service provider collapses.

Henry Review

In December 2009, Ken Henry and Australia's Future Tax System Review team delivered their final report to the Treasurer. The Government has said it will consider the review and release it in early 2010, along with an initial response.

In the interim report released with the 2009 Federal budget, while supporting Australia's current retirement income system, the following changes were recommended:

- maintaining the superannuation guarantee at 9%, not extending the superannuation guarantee to the self-employed and retaining the \$450 per month threshold;
- gradually increasing the Age Pension age to 67 years;
- gradually aligning the age at which people can access their superannuation savings (preservation age) with the increased Age Pension age;
- improved incentives to work beyond retirement age;
- maintaining tax assistance to superannuation but improving the fairness of concessions for contributions, including by broadening access to them, and considering whether the current cap is appropriate.
- improving the awareness and engagement of individuals with the retirement income system.

The main thrust of this review seems to be one of equity in relation to access to options and the value of the tax concessions. From a superannuation perspective it will review the tax status of superannuation and pensions.

Cooper Review

The Cooper review chaired by Jeremy Cooper is taking an in depth look into Superannuation with the Review focused on achieving an outcome that is in the best interests of members and which maximises retirement incomes for Australians. The review was commenced in May 2009 and will present its final submission to the Government by 30 June 2010.

It will be giving considerable attention to SMSFs as part of its third phase with a report due in April-May 2010. For SMSFs there will be a range of aspects to be addressed, starting with the appropriateness and competency of the participants.

The review released in December 2009 "A Statistical Summary Of Self-Managed Superannuation Funds" which is available at www.supersystemreview.gov.au.

Ripoll Inquiry

The Ripoll inquiry chaired by Bernie Ripoll was launched to inquire into the underlying issues associated with financial services collapses such as Storm Financial, Opes Prime and others. The inquiry was launched in February 2009 and reported in November 2009.

The Ripoll Committee has made 11 recommendations for the Government to consider in addressing some of the deficiencies it believes has led to inappropriate behaviour and conflicted practices in the financial advice industry. The report has made clear that payments which cause conflicts of interest are to be ceased. This will cover commissions, volume overrides and marketing allowances.

Conclusion

The Government is currently considering the recommendations made by the Ripoll and Henry Reports. It is expected its response will be delivered in conjunction with the response to the Cooper Review.

As a result, it is unlikely that any legislative change will occur in the short term. We will keep clients posted on the outcomes from these reviews in future SuperNews.

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Superannuation Contributions 2009-10

Caution – Concessional Contributions Limits have reduced this financial year

The Government in the last Federal Budget halved the concessional contributions cap from the previous limit \$50,000 to \$25,000 per annum, with effect from the 2009-10 financial year. A reduction from \$100,000 to \$50,000 per annum also applies to the transitional concessional contributions cap (applicable to individuals aged 50 and over for the 2009-10, 2010-11 and 2011-12 financial years) from \$100,000 to \$50,000 per annum.

Punitive taxation applies where the contribution caps are breached so care must be taken to ensure contributions to an SMSF are within the caps. We have seen a number of instances where the contribution caps have been breached in the funds we administer. The ATO has recently commenced to issue Excess Contribution Tax Assessments.

The amount of contributions that can be made to superannuation on behalf of an individual depends on a member's age and the contribution caps.

The contribution eligibility rules are illustrated in the table below.

Age	Member's Employer	
	Superannuation Guarantee	Voluntary
Under Age 65	Allowable	Allowable
Age 65 - 69	Allowable	Only if you have worked at least 40 hours in not more than 30 consecutive days in the financial year
Age 70 - 74	Not allowed	Only if you have worked at least 40 hours in not more than 30 consecutive days in the financial year
Age 75 and over	Not allowed	Not allowed

	Member
Under Age 65	Allowable
Age 65 - 69	Only if you have worked at least 40 hours in not more than 30 consecutive days in the financial year
Age 70 - 74	Only if you have worked at least 40 hours in not more than 30 consecutive days in the financial year
Age 75 and over	Not allowed

	Member's Spouse
Under Age 65	Allowable
Age 65 - 69	Only if you have worked at least 40 hours in not more than 30 consecutive days in the financial year
Age 70 - 74	Not allowed
Age 75 and over	Not allowed

The table below summarises the main types of concessional and non-concessional contributions and limits for 2009/10 year as well as the penalties for breaching the caps:

Type of Contribution	Consists of	Annual Limit 2009-10	Breach of Cap
Concessional Contributions	Employer contributions (includes superannuation guarantee and salary sacrifice) Personal contributions where a tax deduction is claimed Certain amounts allocated from a reserve unless the allocation meets the exemptions	\$25,000 if aged under 50 \$50,000 if aged 50 or over on 30 June 2010	Additional tax of 31.5% applies to amounts in excess of the cap in addition to the contributions tax of 15%, making total tax of 46.5% These amounts also count towards the non concessional cap and if that cap is breached can be taxed twice.
Non-concessional Contributions	Personal contributions for which the individual does not claim a tax deduction Contributions made by a spouse Amounts in excess of the concessional contribution cap	\$150,000 Members under age 65 at any time in the financial year may contribute up to \$450,000 by bringing forward up to two future years' entitlements	Tax of 46.5% applies to amounts in excess of the cap

Personal injury contributions may also be permitted.

In addition certain payments made into superannuation are also treated as contributions. Previously they have generally been referred to as "rollovers". These include:

- Directed employer termination payments made into superannuation under the transitional \$1 million employer termination payment cap.

- Foreign termination payments transferred from overseas funds after a person has taken up residence in Australia.
- Capital gains and capital proceeds from disposal of small business active assets transferred into superannuation under the CGT small business lifetime cap of \$1.1 million.

Please contact our office if you need information on these types of contributions.

Can excess contribution problems be fixed?

We have seen a number of situations where clients have ended up with excess contributions. Unfortunately, Superannuation Law is rather complex and where a client discovers they have breached the cap the remedy may not be as simple as refunding the excess contributions. We would recommend where a client becomes aware of an excess contribution situation they contact our office.

As an example, an inadvertent breach of the cap could occur in the following situation.

Mike aged 66 years (who satisfies the work test for the 2009-10 year) makes a contribution of \$30,000 on 1 December 2009 and a further contribution of \$170,000 on 1 May 2010.

Mike intends to claim a personal tax deduction of \$50,000 (a deduction notice given and acknowledged by the fund trustee is required) which would result in his contributions being a concessional contribution of \$50,000 and a non-concessional contribution of \$150,000.

However, when Mike's Accountant prepares his personal tax return, due to his income Mike is only eligible to claim a tax deduction of \$30,000. As a result, non-concessional contributions would become \$170,000.

As due to his age Mike is not eligible to use the bring forward rules of \$450,000 he would now have excess non-concessional contributions of \$20,000 which would be taxed at 46.5%. A tax penalty of \$9,300 would apply.

The options that exist to deal with excess contribution situations, include the following:

Knowledge of the Caps

The best answer is prevention so understanding the caps is important. Each contribution to a fund should be monitored to ensure that excess contributions do not accidentally occur. If in doubt as to contribution levels contact your financial planner or adviser **before** making a contribution.

Returning excess contributions

Superannuation Law provides certain circumstances where excess non-concessional contributions must be returned (Superannuation Industry (Supervision) Regulation 7.04(3)). However, under the Commissioner's interpretation of the legislation, this option is only available for:

- if the member is 64 or less on 1 July of the financial year – a **single** non-concessional contribution totalling more than \$450,000; and
- if the member is 65 but less than 75 on 1 July of the financial year – a **single** non-concessional contribution totalling more than \$150,000.

In the example above as Mike had a single contribution in excess of \$150,000 the excess may be able to be refunded. However, if Mike's contributions for the year still totalled \$200,000 but consisted of a number of contributions deposits all less than \$150,000 a refund would not be possible.

As Regulation 7.04 does not apply to excess concessional contributions generally these cannot be refunded.

Commissioner's discretion

The Commissioner has the discretion to disregard or reallocate contributions if certain criteria are met (ITAA 1997 s 292-465). These criteria include:

- an excess contributions tax assessment has already been issued; and
- there are special circumstances .

The Commissioner has released material discussing what does and does not constitute special circumstances. However, the Commissioner considers that ignorance of the law and incorrect professional advice typically will not constitute special circumstances. The Commissioner seems to be likely to find that special circumstances will exist where something occurs that is beyond the control of the taxpayer and is unforeseeable.

Mistake

Where a contribution is made to a superannuation fund by mistake of fact or law, the law of mistake can provide a remedy to require the contribution to be returned and the contribution to be taken to have never happened

An example of mistake of law was where an employer made superannuation contributions due to the mistaken belief that it was legally obliged to do so. The New South Wales Supreme Court ordered the contributions to be returned (*Personalised Transport Services Pty Ltd v AMP Superannuation Ltd* [2006] NSWSC 5).

An example of a mistake of fact was where a person meant to pay their rent by internet banking but mistakenly paid the money to his superannuation fund's trustee instead. The Superannuation Complaints Tribunal ordered the money be returned (D06-07\129).

However, we understand the Commissioner does not accept that a contribution made "in the reasonable belief that the contribution will not exceed the relevant contribution cap" would in the absence of other factors be the subject of a claim for restitution.

Excess contributions can be subject to a very high effective tax rate. Although some options exist to address such contributions, the best answer is prevention. Advisers and Trustees need to monitor the total of all contributions on an ongoing basis. Before each contribution is made, they should confirm that no contributions cap will be accidentally exceeded.



ATO has stepped up rendering SMSF's non-complying

The past few years has seen a significant increase in the number of self managed superannuation funds (SMSFs) made non-complying by the ATO.

	2007	2008	2009
SMSFs made non-complying	5	24	99

The Government has indicated that the "increase in the number of compliance outcomes in recent years is primarily due to an increase in the number and intensity of compliance activities being undertaken by the ATO, rather than a deterioration in compliance behaviour".

A notice of non-compliance has devastating tax consequences as the fund loses its concessional tax treatment and its taxable income is taxed at a rate of 45% rather than the 15% rate for that of a complying fund.

Additionally if a SMSF is made a non-complying superannuation fund for a year of income and it was a complying superannuation fund for the previous year, the fund assessable income will include the total market value of its assets less any member contributions where a tax deduction has not been claimed. This is extremely punitive and can result in the loss of a significant proportion of fund assets.

A non-complying fund remains non-complying until it receives a notice of compliance with taxable income continuing to be taxed at 45% rate. However, assets are only treated as income in the first year of non-compliance.

A non-complying fund is not eligible for an exemption of income related to current pension liabilities.

General interest charge is also usually payable on the above. The interest accrued can be substantial where the ATO issues the notice of non-compliance in respect of a financial year that was long past.

For contributors to the fund there can be additional issues regarding the deductibility of contributions received by the fund, the satisfaction of Superannuation Guarantee obligations and non-eligibility for Government Co-contributions.

Timing of Deduction Notices for Personal Contributions

Where a tax deduction is required for personal contributions a deduction notice must be given in the approved form. The ATO has developed a standard form for this purpose (NAT 71121) although many superannuation funds use their own form.

Care must be taken with the timing of these notices as under current tax law to be eligible for a tax deduction for contributions and for the notice of intention to claim to be valid it should be given to the fund by the earlier of any of the following events:

- Submitting your personal tax return;
- 30 June of the year after you made the contributions (ie. If you make a personal contribution on say 1 October 2009 and wish to claim a tax deduction for it for the 2009-10 tax year, the Notice will need to be given by 30 June 2011);
- Your benefits leave the fund; or
- You commence a pension.

Once a notice of intention to claim is received by the fund trustee it should be acknowledged without delay or at the latest by 30 June of the year after the member made the contributions.

Where an SMSF is 100% in pension mode and additional personal concessional contributions are made to the fund with the intention to commence a further pension from those contributions (to ensure the fund continues to remain 100% pension) you may be denied a tax deduction if a completed form as at the date of the contributions is not available.

Timing of these notices is critical as the ATO may deny a deduction if the deduction notice is not valid.

As part of our fund administration service we do prepare these notices. However, there may be circumstances (such as commencing a pension) where earlier notices are required.

About Bastion Superannuation Solutions

Bastion Superannuation Solutions specialises in the provision of administration and compliance services to self managed superannuation fund trustees and advisers.

For further information on our range of services please see our web site.

Our range of services include:

- Self managed superannuation fund establishment
- Fund Administration including preparing financial accounts and maintaining member records
- Superannuation compliance and technical guidance
- Group Life Insurance Pool for superannuation fund members
- Assistance with updating self managed superannuation fund trust deeds

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