



TriSuper Auditors

# SMSF Updates

October / November 2023

With **Joel Curry**, Director, TriSuper Auditors







# Let's get warmed up

- Concessional Contributions
- Non-Concessional Contributions
- Non-Arms Length Income (NALI)
- All Things Pension
- Asset Valuations
- Q & A

# CONCESSIONAL CONTRIBUTIONS (CC)

## Who can make CCs?

- No restriction at any age on mandated contributions

## Personal and Salary Sacrifice CCs

Age	2022 FY	2023 FY onwards
Under 65	Yes	Yes
65-66	Yes	Yes
67-74	Work test	Work test *

\* work test still required to be met to claim personal super contribution

One year once of exemption from work test available

- Total Super balance must be less than \$300,000 at start of year.
- Satisfied work test in prior financial year.

# How much?

- 2022 FY onward \$27,500
- Reserving?
- Catch up CC's
- **What if you go over?**

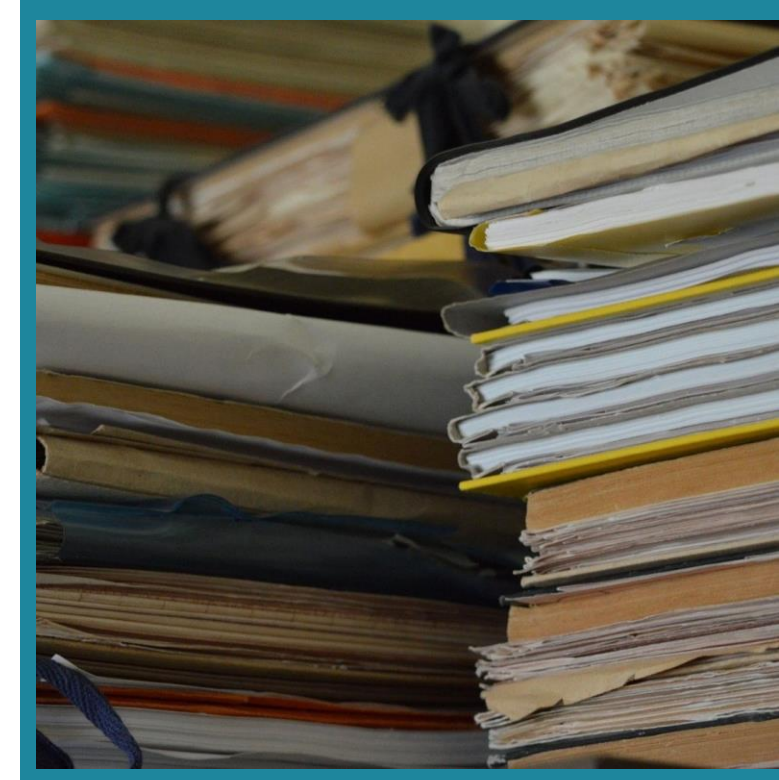




# Reserving Strategy

- How does it work?
- Paperwork, paperwork, Tax Determination 2013/22
- Discrete contributions only ?
- Caught by Div 293? – in the year allocated.
- How does a SMSF report?

<https://www.ato.gov.au/forms/request-to-adjust-concessional-contributions/>



# Catch-up Concessional Contributions

- Total Super balance must be less than \$500,000 at end of prior year
- Caught by Div 293? - yes
- Could be used in conjunction with reserve strategy
- Can carry forward unused cap amounts for five years
- Check ATO portal for current position.

# Age 75+

Can only contribute:

- **Mandated contributions**
  - Contributions made by an employer under a law or industrial agreement for the benefit of a fund member.
  - They include super guarantee contributions.
- **Downsizer**
- **Salary Sacrifice?**



# Division 293



- Often a surprise
- Interaction with Catch-up Contributions
- Additional 15% on CC's in excess of \$250K threshold.
- Does not included excess CC's.
- How do you pay?



# SCG Increase

	SGC %
2021/2022	10
2022/2023	10.5
2023/2024	11
2024/2025	11.5
2025/2026	12

- ATO increasing audit activity due to Single Touch Payroll
- Consequences of late payment:
  - Interest / penalties
  - Non-deductibility

# NON-CONCESSIONAL CONTRIBUTIONS (NCC)

## Who can make NCCs?

Age at 1 July	2022 FY	2023 FY onwards
Under 65	Yes	Yes
65-66	Yes	Yes
67-74	Work test +	Yes *
75 +	No	No

\* work test not required from 2023 FY

+ note one year extension to work test above

# How much?

- From 2022 FY NC yearly Cap \$110,000
- Nil if total super balance > \$1.9M at end of prior year.



# Bring Forward Arrangements

- Maximum bring forward 3-year cap of \$330,000.
- 2023 FY ongoing – under 75 at 1 July 22
- Subject to Total Super Balance and age-based contribution rules.

TSB at end of prior year	NCC Cap for first year	Bring forward period
< \$1.68M	\$330,000	3 years
\$1.68M - \$1.79M	\$220,000	2 years
\$1.79M - \$1.9M	\$110,000	None, 1 year only
\$1.9M or more	nil	none





## What is not a NCC?

- Downsizer
- CGT Election Amounts
- Personal Injury Payments

# Downsizer Contributions

- Maximum contribution of \$300,000 per individual.
- The home must be in Australia, have been owned by you or your spouse for at least 10 years and the disposal must be exempt or partially exempt from capital gains tax (CGT).
- You have not previously made a downsizer contribution to your super from the sale of another home or from the part sale of your home.
- Contribution made with 90 days of receiving sale proceeds
- Age requirement reduced to 55 from 2023 FY onwards. No upper age limit.
- Not counted towards NCC Cap.

# What is your Total Super Balance ?

- Check ATO Portal
  
- Add:
  - Accumulation and Retirement Phase Values
  - Rollovers in transit
  - Outstanding LRBA amounts ??
  
- Less
  - Personal Injury Contributions
  
- Special rules for defined benefit interests.







OK, let's address the Chalmers in the room...



# Better Targeted (ie new tax) Super Concessions

## What do we know?

- Proposed tax on high balance super fund members.
- Commencing after the next election
- First year impacted 2026 FY
- Relax, plenty of time to plan...



# Current details: - Draft Legislation

- Will affect members > \$3M Total Super Balance (TSB) (ex LRBA)
- First testing date is 30 June 2026
- An additional 15% tax will apply to “earnings” for a financial year
- Applies to earnings on both accumulation and pension accounts
- Not just taxable income, all earnings realised or unrealised
- Payment options similar to Div 293 tax
- \$3M cap is not subject to indexation

# Calculation of earnings?

2026 earnings calculated as:

**Earnings = TSB<sub>30 June 2026</sub> *minus* TSB<sub>30 June 2025</sub>\* *plus* Withdrawals *minus* Net Contributions**

\*Adjusted to \$3M if less than \$3M

What is included as a withdrawal and net contribution:

- Pension payments
- Spouse splitting
- Family Law splits
- CC, NCC, CGT contributions, Insurance Payouts
- Reversionary pension commencements.



# EXAMPLE

Tom has a TSB at 30 June 2025 of \$3M.

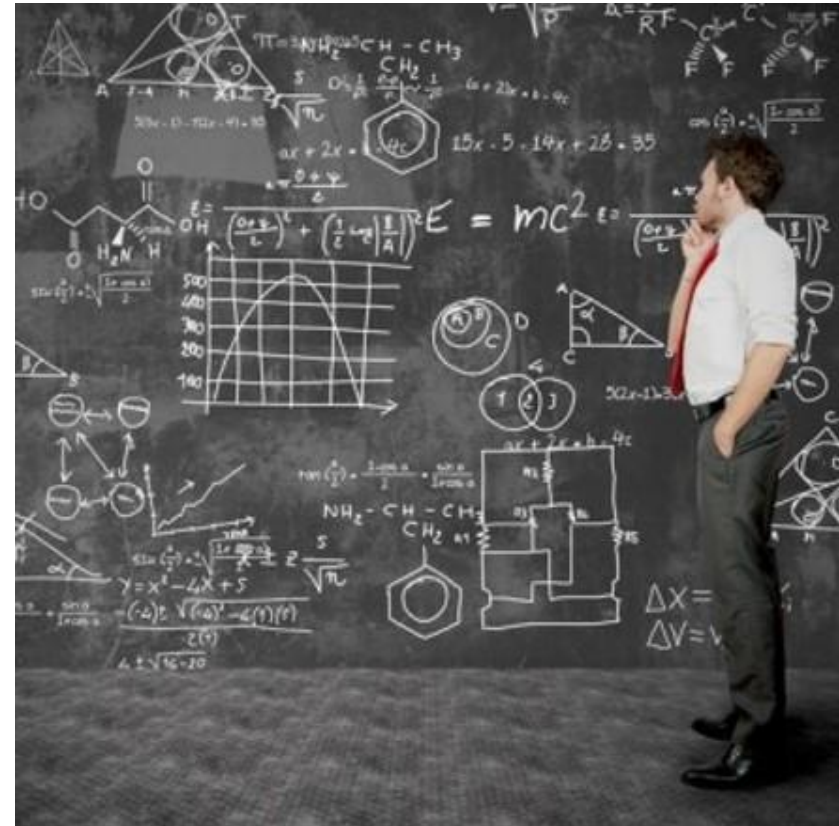
During 2026FY, he makes concessional contributions of \$20K and also takes a \$10K lump sum.

His TSB at 30 June 2026 is \$3.5M

**Earnings = \$3.5M - \$3M + \$10K - (\$20K x .85) = \$493K.**

## What if there is a loss?

Can be carried forward to future years.



# So how much of the earnings is taxed?

Answer:

Proportionate to the % of your TSB over \$3M.

In our example:

$$\text{Proportion} = (\$3.5\text{M} - \$3\text{M}) / \$3.5\text{M} = 14.3\%$$



## Tax payable?

$$\text{Tax liability} = 15\% \times \$493\text{K} \times 14.3\% = \$10,574.85$$

✓ Simple....

# ISSUES?

- Asset Valuations
- Tax on unrealised gains on non-liquid assets
- Applies to assets supporting account-based pensions
- Should I move my excess above \$3M out of super environment?
- If yes, where to?
- This may assist to reduce tax on death benefit payments to non-dependents
- It may never happen... starts post next election..

# The Good News..

- Who doesn't the measure apply to:
  - In the year you die
  - If you have ever contributed a personal injury payment
  - Child recipient of an income stream





Dude, that income is so NALI!



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# Non Arms-Length Income (NALI)

## SIS Issues – Section 109

- Has SMSF received less income or paid more in expenses when dealing with related parties?
- Lease income (direct / indirect)
- Interest
- Loan / lease agreements

# Income Tax Issues

- SMSF can pay top marginal rate on net income from assets where income is more or expenses less when dealing with related parties than would apply at arms length.
- Review LCR 2021/2 and PCG 2020/5
- NALI Examples
  - Excessive dividends from private company/trust investments
  - Excess Property Lease Income

# Income Tax Issues

- NALE Examples
  - Accountants Fees
  - Accountants preparing their own SMSF
  - Real estate agents not charging SMSF for agents' commissions.
- Draft Legislation to limit penalties on general expense NALE



# ALL THINGS PENSION

## Reduced Minimum Payments

Age (as at 1 July or commencement date)	2024FY onwards
Under 65	4%
65-74	5%
75-79	6%
80-84	7%
85-89	9%
90-94	11%
95 +	14%

- What if there is a shortfall?
- Pension or Lump Sum Commutation?
- Under 60 – PAYG Summary
- 10% limit for TRIS's.

# Indexed Transfer Balance Cap

- Pre-1 July 2021 – everyone had \$1.6M TBC
- Then we had individual TBC's somewhere between \$1.6M and \$1.7M
- 2024FY onward somewhere between \$1.6M and \$1.9M – easy isn't it...
- No automatic \$300K increase for those already in retirement phase
- Increase based on highest ever personal TB as a ratio to their TBC on that day x index increase
- Tax Agent Portal will hopefully provide current TBC.

# Transfer Balance Reporting

- From 1 July 2023, most events need to be reports 28 days after the end of a quarter
- Common events you need to report:
  - Commencement/Ceasing of retirement phase income stream
  - Reversionary death benefit income streams
  - Lump sum commutations from income streams

# Transfer Balance Reporting

- You don't report:
  - Pension payments
  - Death of a member
  - A income stream ends as it has been exhausted
  - A transition to retirement income stream



# Legacy Lifetime / Complying Pensions

Under proposed legislation (now scrapped)

Existing SMSF holders of market-linked, life-expectancy and lifetime products will be able to convert their product and move their funds into an accumulation superannuation account.

They will then be able to:

- start a new contemporary product, subject to their transfer balance cap, or
- receive the amount as a lump sum superannuation benefit.

# Exempt Pension Income

As announced in the 2019-20 Federal Budget, superannuation funds will be able to choose their preferred method of calculating exempt current pension income (ECPI) in certain circumstances.

- Starts from 2021/22 year.
- Trustees can choose to use the proportionate method even where a fund was full segregated for part of the year.
- Can still continue to use split method.



# ASSET VALUATIONS

## **Why are we (auditors) concerned?**

- Recent record movements in real estate
- Litigation
- Sticky / Illiquid Assets
- Six member funds
- Trustee / Member access

## **Why is the ATO concerned?**

- Minimum pensions
- Starting balances for pensions / TBC avoidance/schemes
- Total Super Balances
- Sale / purchase from related parties
- Proposed Div 296

# What will we auditors ask for?

## ATO Valuation Guidelines

- Real property pg9
  - rule of thumb every three years ?
  - Commercial v Residential
  - Objective & Supportable data
- Private Companies / Trusts
  - Full set of financials
  - Valuation of assets within entities
  - Liquidity issues
  - Expect more Part A qualifications?



# What will we auditors ask for?

## ATO Valuation Guidelines

- Precious Metals / Jewellery / Collectibles
  - Proof of existence
  - Yearly valuation?
  
- Cryptocurrency
  - Declaration of Trusts





# Related Company / Trust Investment

- Allowed in certain cases
- Pre – 99 Trusts
- Reg 13.22c / 13.22d
- Serious implications for falling foul of Reg 13.22d

# Our Ageing Client Base

- Time to wind up SMSF?
  - Avoid death taxes
  - Large balances building up
- How do we deal with illiquid assets / property?
- Bring in new members to pass down assets to next generation?
- Incapacitated members
  - Enduring Power of Attorneys
- Reversionary / Non – Reversionary Pensions
- Binding Death Nominations – enforceable?
- If no BDN, who decides where death benefit paid?
- Review Trust Deeds

# Q&A

“I’ll take that as a comment...”



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# PROPERTY Update 2023

Joel Curry, Director, TriSuper Auditors

# How can I use my SMSF to buy a property with a relative or business partner?

**Assumptions:** the other party and myself are committing/borrowing an equal 50%

Some upfront questions:

- Is the other party related?
- Will borrowing be required?
- Do you want the other party to be a member in your SMSF?
- Will the property be “business real property”?
- Do you wish to lease the property to a related party?



# Who is a related party?

Generally:

- Relatives: a parent, grandparent, sibling, uncle, aunt, nephew, niece, lineal descendant or adopted child of the member or of his or her spouse; a spouse of the forementioned.
- Another member of the Fund
- An entity that is controlled by one (or a combined group of the above)
- Control of a Trust/Company – more than 50%.

A non-relative business partner is generally not deemed to be related (unless in a tax partnership).

# How does borrowing restrict options?

Where both parties are related

- Borrowing restrictions may be limited to a joint SMSF / LRBA arrangement.
- SMSF can not invest in related trust or company which has borrowings.
- 50% control threshold - trusts/companies



# Happy Smiley SMSF Families



- Joint SIS compliance obligations
- Duty of care Trustee obligations  
(investment/insurance strategies)
- What if we break up or die?

# What is “business real property”?

Section 66 SIS definition

**“ ...any freehold or leasehold interest of the entity in real property...  
where the real property is used wholly and exclusively in one or more businesses  
(whether carried on by the entity or not)....”**

**Also impacts ability for a SMSF to purchase property from a related party**



# Primary Production – expanded definition:

Section 66.

“real property used in one or more primary production businesses does not cease to be used wholly and exclusively in that business or those businesses only because:

- (a) an area of the real property, not exceeding 2 hectares, contains a dwelling used primarily for domestic or private purposes; and
- (b) the area is also used primarily for domestic or private purposes;

provided that the use for domestic or private purposes referred to in paragraphs (a) and (b) is not the predominant use of the real property.”



# Leasing the property to a related or associated party

- Only *business real property* can be leased to related entities.
- Commercial lease agreement on arm's length terms required.





# Related Parties / No Borrowings

- Reg 13.22c (non-g geared) Trust/Company
- Tenants in common (two SMSFs, or one SMSF and an individual etc)
- SMSF (joint members of same SMSF)
- If non-business property, can only lease to non-related parties



# Related Parties / Borrowings

- SMSF (joint members) with LRBA
- If non-business property, can only lease to non-related parties



# Unrelated Party / No Borrowings

- Trust / Company
- Tenants in common
- SMSF (Joint members)
- If business real property, can be leased to related party on arm's length terms.



# Unrelated Party / Borrowings

- Trust / Company (no greater than 50% ownership)
- SMSF (Joint members) with LRBA
- If business real property, can be leased to related party on arm's length terms.



# But hang on – I heard this guy say I could.....

- SMSF LRBA borrowing as tenants in common
- Related Party LRBA to buy units in a Reg13.22c trust
- Unrelated Trust leasing residential property to a family member....

HMM.....







# Farming with SMSFs

**Members / Related Parties can live on the farm.**

Section 66.

“real property used in one or more primary production businesses does not cease to be used wholly and exclusively in that business or those businesses only because:

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# Predominant use?

- TR 97/11 outlines ATO view on when a primary production business is carried on
- SMSFR 2009/1 – ATO scenario examples of predominant use

Only relevant where leased to related parties.

# Other things to consider – Related Lessee

- Formal lease agreement on market rates (including any residential component).
- Reminder, only real property can be leased.
  - Review SMSFR 2009/1 – What is business real property?



# SMSFR 2009/1 – Fun facts!

## What *cannot* be leased to related parties:

- Demountable buildings (unless permanently fixed to land)
- Plant and Machinery
- Water Licenses – arrangements in place prior to change in state laws can continue
- Livestock
- Crops?



# How's your Latin?



Still from Monty Python's "Life of Brian"

# Fructus naturales or Fructus industriales?

**Fructus of Nature** (Perennials) are seen to form part of the land and can be leased to related parties:

- Grass
- Fruit Trees

As opposed to **Fructus of Industry** (annuals):

- produced by industry through sowing and cultivation, including most vegetables, corn, wheat, rye, oats and other grain crops.



# Can the SMSF run the business itself?

**Is there anything to stop the Fund (who currently owns the land) from conducting the business itself rather than leasing the property to the related entity?**

There is no specific prohibition on a SMSF running a business.

However, there is a lot to tick off before you begin:



# Can the SMSF run the business itself?

## Considerations of the proposed business:

- is it permitted by the fund's trust deed;
- satisfies the sole purpose test;
- in accordance with the fund's investment strategy;
- does not constitute a loan or financial assistance to a member or member's relative;
- does not involve a borrowing by the SMSF (with limited exceptions);
- does not involve allowing a charge over fund assets or member benefits;
- is not an acquisition from a related party (with limited exceptions);
- is made and maintained on an arm's length basis.



# Can the SMSF run the business itself?

Considerations of the proposed business:

- Can the Trustees be remunerated for working in the business
  - is appropriately qualified, and holds all necessary licences,
  
  - the remuneration is no more favourable to the trustee than would apply if the trustee were dealing with the relevant other party at arm's length
  
- NALI issues

# What are we seeing?

- ✓ Farm Stays
- ✓ Purchasing livestock
- ✓ Planting of Perennials
- ✓ Biodiversity / Carbon Credit Schemes

Should the SMSF lease or operate?





and  
breathe



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