Understanding tax schemes

How we identify and stop tax avoidance.

Tax schemes

Understand unlawful tax schemes and their warning signs so you don't get caught and face significant penalties.

Promoter penalty laws

Promoter penalty laws are in place to deter the promotion of tax avoidance and tax evasion schemes.

Tax schemes to watch out for

How to recognise tax schemes that concern us and the red flags associated with them.

Tax professionals: Protecting your clients and practice

How to protect your clients and practice from tax avoidance and evasion schemes and manage promoter penalty risks.

Report schemes and promoters

How to report tax avoidance or tax evasion schemes and promoters confidentially to the ATO.

SMSF schemes

Describes schemes targeting Australians to inappropriately use an SMSF.

In detail

Detailed information about areas of tax planning we are focussing on.

QC 101347

Tax schemes

Understand unlawful tax schemes and their warning signs so you don't get caught and face significant penalties.

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What tax and super schemes are

You have the right to arrange your financial affairs to keep your tax to a minimum. This is often referred to as tax planning or tax-effective investing. Tax planning is legitimate when you do it within the terms of the laws, including the laws about tax avoidance. However, tax and super schemes that are unlawful will attract our attention.

Unlawful tax and super schemes

Unlawful tax and super schemes usually involve the deliberate exploitation of our tax and superannuation systems. These include tax avoidance and tax evasion schemes. We take these schemes seriously and will take action. Involvement in a scheme can risk your original investment. You might also have to pay back tax, with interest and penalties.

Some advisers will look for new ways to exploit the law or changes in the law. They will promote schemes to people and promise benefits that aren't legally available.

Schemes may also target self-managed super funds (SMSFs) to channel money inappropriately through SMSFs either to:

- avoid paying tax
- encourage early access of super before a condition of release is met.

Tax and super schemes range from mass-marketed arrangements advertised to the public, to boutique or specialised arrangements tailored for specific taxpayer circumstances. Some are marketed to individuals and others to large private group and public companies.

Typical signs

These schemes typically involve:

- reducing a participant's taxable income
- increasing their deductions against their income
- increasing offsets
- inflating refunds
- avoiding tax and other obligations entirely.

A scheme may include complex transactions or distort the way funds are used to avoid tax or other obligations. It may also structure arrangements to:

- incorrectly classify revenue as capital
- exploit concessional tax rates
- obscure the source of funds or the relationships between parties
- illegally release super funds early
- inappropriately move funds through several entities, such as a series of trusts or around an existing or new SMSF, to avoid or minimise tax that would otherwise be payable.

Warning signs to look for

Anyone can be a promoter of an unlawful tax or super scheme, including accountants, lawyers, financial advisers, telemarketers and salespeople in shopping centres.

Be wary of the warning signs and of promoters that:

- offer zero-risk guarantees for their product
- refer you to a particular adviser or expert (they may claim the adviser has specific knowledge about the arrangement and the promised tax benefits)
- ask you to maintain secrecy to protect the arrangement from rival firms
- charge a fee or commission based on tax saved
- discourage you from obtaining independent advice
- do not have a Product Disclosure Statement (PDS) or prospectus for the product
- offer advice about illegal phoenixing or liquidation of companies
- offer early access to super before a condition of release is met.

Structure of schemes

The way an arrangement is structured can indicate it might be an unlawful tax or super scheme.

Be careful of any arrangement that involves:

- deferring income to a later tax period so the tax is paid in a later period

- not declaring income or hiding income (for example, in an offshore location such as a tax haven)
- changing the nature of the income so less tax is paid (for example, changing capital expenses into revenue expenses)
- changing private expenses into business expenses so they can be claimed against income
- creating an entitlement to a tax offset or credit that wouldn't otherwise have been available
- moving income to a trust or partnership to split it among people in a lower tax bracket so less tax is paid
- inflating or artificially creating deductions
- moving taxable income to an entity that is tax exempt or has a lower tax rate (such as a charity, company or super fund)
- setting up a business for the sole purpose of obtaining tax benefits when there is no business purpose to the arrangement.

Financing schemes

Many unlawful tax and super schemes are promoted with mechanisms to meet your financing needs. The following mechanisms maybe warning signs:

- 'round robin' financing, where the funds are passed through various entities and usually back to the initial entity, for example, the promoter lending you the money to invest in the product
- 'non-recourse' loans that you don't have to repay if the investment goes bad. The lender has no recourse under the terms of the loan to pursue the debt if you fail to repay it.
- complex financing arrangements involving limited recourse loans where your liability is limited to your share in the investment
- investments that are primarily funded through tax deductions, for example, by including substantial interest prepayments in a financial year
- investing super in an unrelated trust that then on lends the funds to SMSF members.

Don't take a promoter's guarantee that there is no risk in participating in an arrangement. Always check before you commit to an arrangement.

We have more information available about our **current areas of concern**, as well as other **arrangements of concern**.

How to check your arrangement is legitimate

It is important that you make sure your arrangement to reduce tax is legitimate and lawful. Check with us through our **early engagement advice service**.

Before entering into any agreement, you may wish to seek independent advice from an adviser who has no connection to the seller or the arrangement.

You can also:

- check **taxpayer alerts** to see whether we have concerns about the arrangement
- check that a tax agent who is advising you is a registered tax agent at the Tax Practitioners Board
- ask about other qualifications your adviser holds, such as current memberships with professional associations like CPA Australia, Chartered Accountants ANZ or Institute of Public Accountants
- check whether the person advising you to set up an SMSF is a licensed financial adviser. You can do this on the Australian Securities & Investments Commission (ASIC) website Moneysmart
- check **public rulings**, **private rulings** or **oral rulings**. If we have already issued a ruling for the arrangement it provides you with certainty, as long as the arrangement being described or implemented is exactly as described in the ruling.
- **apply for a private ruling** to cover your own circumstances if you are not sure about the tax consequences of an arrangement you are considering

- make sure you receive a product disclosure statement (PDS). A PDS sets out important information about an arrangement. You and your adviser should carefully review the PDS before making any decisions.
- check the person or organisation offering you the arrangement is an Australian Financial Services (AFS) licence holder or the director, employee or an authorised representative of an AFS licence holder. If they offer you financial products and advice and don't hold a valid licence issued by ASIC, they could be operating illegally and your investment may not be protected if things go wrong. You can find out more at ASIC's Moneysmart website.

How tax professionals can protect their clients and practice

Tax professionals are well positioned to recognise potential tax and super schemes. If you encounter an arrangement that appears suspicious, let us know.

If you have clients who are caught up in a tax or super scheme, encourage them to talk to us. This allows us to work together to resolve any problems.

Read more about how you can **protect your clients and practice** from tax and super schemes.

Promoter penalty laws

We have laws in place to deter the promotion and implementation of tax and super schemes. The **promoter penalty laws** are concerned with arrangements:

- that avoid or evade tax
- where the benefit claimed isn't available under the tax laws
- that are promoted on the basis of conforming with a public, private or oral ruling but the arrangement is materially different from that described in the ruling
- that are implemented in a way that is materially different to what is described in a public, private or oral ruling that the arrangement is promoted as having conformed with

- that promote early access to super before a condition of release is met.

We actively monitor adviser behaviour and take action against potential promoters through application of the promoter penalty laws. We take action against:

- alleged promoters of tax and super schemes
- misrepresentations of conformity to ATO rulings
- promoters of illegal early access to super.

This is regardless of the firm's size, occupation, position in their organisation or standing in the tax community.

How to report a scheme

If you think you're involved in a scheme, we can help you. If you tell us about your involvement before we start to investigate, you could be eligible for a reduction in penalties.

You can **report a tax or super scheme** confidentially.

Media releases

- **Online tax schemes on the rise** – ATO media release, 30 January 2024
- **$13.6 million in penalties handed down for false R&D claims** – ATO media release, 16 December 2025
- **ATO lodges application in Federal Court against former EY tax partner** – ATO media release, 1 November 2023
- **Largest promoter penalty in R&D history handed down** – ATO media release, 15 February 2021

QC 33635

Promoter penalty laws

Promoter penalty laws are in place to deter the promotion of tax avoidance and tax evasion schemes.

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Overview

Advisers who are involved in the design, marketing and implementation of schemes that claim to provide tax advantages should consider the promoter penalty laws.

The promoter penalty laws are concerned with the promotion of arrangements that are designed to reduce tax or increase refunds, where the benefits claimed aren't available under the tax laws. These are called tax exploitation schemes.

The promoter penalty laws are also concerned with:

- the misuse of rulings involving the promotion and implementation of arrangements which incorrectly claimed to be consistent with rulings that have been issued by the ATO
- super schemes that encourage early access to super before a condition of release is met.

The arrangements that the promoter penalty laws are concerned with are referred to as unlawful tax and super schemes.

The promoter penalty laws aren't intended to obstruct tax advisers and intermediaries from merely providing advice to their clients.

We actively monitor adviser behaviour and take action against potential promoters through application of the promoter penalty laws. Under the promoter penalty laws we can either seek an:

- order from the Federal Court that an entity pay a civil penalty
- injunction from the Federal Court to restrain an entity from engaging in a particular conduct.

Understanding promoter penalty laws

The promoter penalty laws are contained in Division 290 of Schedule 1 to the *Taxation Administration Act 1953* (TAA) and section 68B of the *Superannuation Industry (Supervision) Act 1993* (SISA).

Division 290 of Schedule 1 to the TAA contains the rules about the promotion of tax exploitation schemes and the misuse of rulings.

Section 68B of SISA applies to promotion of payments that are not in accordance with the payment standards, generally resulting in illegal early access to super.

Promoter penalty laws concerning tax exploitation schemes and misuse of ATO rulings

The promoter penalty laws in Division 290 of Schedule 1 to the TAA were introduced to deter the promotion of tax exploitation schemes.

These laws also deter the promotion and implementation of schemes that are materially different to the rulings they are claimed to conform with.

The promoter penalty laws are not restricted to widely offered schemes. They can even apply where there is only one client in an arrangement. The promoter penalty laws can also apply to schemes that haven't been implemented.

The promoter penalty laws apply to conduct both within and outside Australia that is 'prohibited conduct', unless an exclusion or exception applies.

Prohibited conduct means conduct that results in:

- any entity being a promoter of a tax exploitation scheme
- a scheme that has been promoted on the basis of conformity with a public, private or oral ruling being implemented in a way that is

materially different to the way it has been described in the ruling

A scheme will be implemented in a way that is materially different from the way it was described in a public, private or oral ruling, if it results in a different tax outcome for participants than the one described in the ruling.

A scheme will be a **tax exploitation scheme** if:

- at the time of promotion, it has the sole or dominant purpose of an entity gaining a scheme benefit
- the scheme benefit would not be legally available (and it is not reasonably arguable that the benefit is available).

A scheme is also a **tax exploitation scheme** if:

- the **multinational anti-avoidance law** or **diverted profits tax** provisions in Part IVA of *Income Tax Assessment Act 1936* (ITAA 1936) apply to the scheme
- obtaining a scheme benefit was a principal purpose of the scheme
- the scheme benefit would not be legally available (and it is not reasonably arguable that the benefit is available).

The definitions of tax exploitation scheme extends to treat promoted yet unimplemented schemes in the same way as implemented schemes.

A scheme will be a **super scheme** if payments from a regulated superannuation fund are not in accordance with the payment standards of the SISA.

An entity will be a **promoter** of **a tax exploitation scheme** if it:

- markets or encourages growth of the scheme, including schemes promoted but not implemented
- directly or indirectly receives a benefit in respect of marketing or encouragement
- causes another entity to be a promoter
- has a substantial role in respect of marketing and promotion.

Exclusions and exceptions

Exclusions and exceptions to the promoter penalty laws under Division 290 include:

- employees or other entities that have only minor involvement
- conduct that occurred by reasonable mistake or accident
- something outside an entity's control occurs and the entity had taken reasonable precautions. However, this doesn't include acts or defaults of their employees, agents, directors, partners and trustees.
- if more than 6 years have passed since the last relevant act of promotion or implementation, except where there is tax evasion.

For more information see:

- Public rulings
- Private rulings
- Oral rulings.

Promoter penalty laws concerning illegal early access of super

The promoter penalty laws in section 68B of SISA were introduced to deter and penalise persons who promote illegal early access of super schemes as a means of accessing super benefits before meeting a condition of release.

The promoter penalty laws apply to promotion of a scheme that has resulted, or is likely to result, in a payment being made from a regulated superannuation fund that is not in accordance with the prescribed payment standards.

A **scheme** means any:

- agreement, arrangement, understanding, promise or undertaking
  - whether express or implied
  - whether or not it's enforceable, or intended to be enforceable, by legal proceedings
- scheme, plan, proposal action, course of action or course of conduct, whether unilateral or otherwise.

Promotion in relation to a scheme includes:

- entering into the scheme

- inducing another person to enter into the scheme
- carrying out the scheme
- starting to carry out the scheme
- facilitating entry into, or the carrying out of, the scheme.

Exclusions and exceptions

Exclusions and exceptions to the promoter penalty laws under section 68B include:

- a reasonable mistake
- a reasonable reliance on information supplied by another person
- the act or default of another, or an accident or other cause beyond their control, where they took reasonable precautions and exercised due diligence to avoid the contravention
- a 6-year time limit.

Our practice statement **PS LA 2021/1** *Application of the promoter penalty laws* sets out the processes we follow when administering the promoter penalty laws.

Strengthening the promoter penalty laws

The Government announced a package of reforms on 6 August 2023 designed to strengthen the integrity of the taxation system and increase the powers of regulators.

As part of this package, the Treasury Laws Amendment (Tax Accountability and Fairness) Act 2024 made changes to the promoter penalty laws in Division 290 of Schedule to the TAA that apply from 1 July 2024. These changes improve the ability of the ATO to target promoters of tax exploitation schemes and seek the application of civil penalties. They include:

- extending the time limitation for the ATO to commence civil proceedings from 4 years to 6 years
- increasing the maximum penalties the Federal Court can impose for both body corporates and significant global entities (SGEs). Under the amendments, the maximum civil penalties for promoters of tax exploitation schemes increased to $780 million.

- changing the requirement that a promoter (or associate) receive consideration to the requirement that a promoter (or associate) receives a benefit, which can include benefits received that are less obvious, intangible, disguised and non-quantifiable
- extending the meaning of a tax exploitation scheme to include a scheme that has a principal purpose of obtaining a scheme benefit, and to which the **multinational anti-avoidance law** or **diverted profits tax** provisions apply
- extending the scope of promoter penalty laws to apply to all ATO rulings rather than only product rulings
- expanding the scope of prohibited conduct to include any conduct that results in a scheme that is materially different from that outlined in a public, private or oral ruling being promoted on the basis of conforming with the ruling (irrespective of whether the scheme is implemented or not).

Managing promoter penalty risks and corrective action

There are a range of sanctions and other corrective actions we could apply to manage promotor behaviour.

Penalties

Promoter penalties can apply to any entity. The promoter penalty legislation is aimed at dealing with those who market unlawful tax and super schemes.

Promotion of tax exploitation schemes and misuse of ATO rulings

We can apply to the Federal Court of Australia to request that a civil penalty be imposed on an entity that has contravened the promoter penalty laws.

Where the Court agrees to make the order, the Federal Court can impose the following **maximum penalties**:

- For a body corporate, partners in a partnership that is a **SGE**, or trustees of a trust that is a SGE, the greater of:
  - 50,000 penalty units

    - 3 times the value of the benefits received or receivable by the entity or its associates in respect of the scheme – whether directly or indirectly
    - 10% of the aggregated turnover of the entity for the most recent income year to end before the entity contravened, or began to contravene, the provision (to a maximum of 2.5 million penalty units).
- For all other entities, the greater of
    - 5,000 penalty units
    - 3 times the value of the benefits received or receivable by the entity or its associates in respect of the scheme – whether directly or indirectly.

Where a civil penalty has been imposed on a partnership, all partners in the partnership are jointly and severally liable for the penalty. Where a civil penalty has been imposed on one of the trustees of a trust, all trustees of the trust are jointly and severally liable for the penalty.

Promotion of illegal early release schemes

The maximum penalty the Federal Court can impose is 2,400 penalty units.

For the penalty unit amount, see **Penalty units**.

Other sanctions and corrective actions

Depending on a range of factors, we could also consider:

- voluntary self-correction for less significant non-compliance
- applicants for legally binding advice (public, private or oral rulings) providing additional promises or guarantees to mitigate taxation risks, including material differences in implementation of the relevant arrangement
- executing an enforceable voluntary undertaking
- applying to the Federal Court to seek an injunction.

Guidance on offering an enforceable voluntary undertaking

We'll determine the most appropriate response to any prohibited conduct based on a range of considerations, including the facts and circumstances of that conduct.

Offering us an enforceable voluntary undertaking may, in appropriate circumstances, be relevant to:

- a decision about whether proceedings should be initiated in the Federal Court
- certain decisions made by the Federal Court in respect of such proceedings.

When we accept an enforceable voluntary undertaking offer, it doesn't mean that we can't make an application to the Federal Court for a civil penalty or an injunction against the entity responsible for the prohibited conduct.

For example, even though we may have accepted an enforceable voluntary undertaking, we may form the view that the appropriate way to bring the conduct (or threat of future conduct) to an end is by applying to the Federal Court for an injunction.

We are unlikely to accept an offer that doesn't include meaningful undertakings relating to:

- the cessation of marketing or encouragement of the growth of a scheme or schemes
- actions designed to prevent future involvement in tax exploitation schemes.

Case studies

Read about case studies that demonstrate how promoter penalty laws were applied to keep promoters of tax avoidance schemes accountable.

Court cases

Read about the outcome of Federal Court cases concerning the promoter penalty laws:

- *Commissioner of Taxation v Bakarich & Ors (No 2)* [2024] FCA 1448
- *Commissioner of Taxation v Rowntree* [2020] FCA 1322

- *Commissioner of Taxation v Bogiatto* [2020] FCA 1139
- *Commissioner of Taxation v Pavihi* [2019] FCA 2056
- *Commissioner of Taxation v International Indigenous Football Foundation Australia Pty Ltd* [2018] FCA 528
- *Commissioner of Taxation v Arnold (No 2)* [2015] FCA 34
- *Commissioner of Taxation of the Commonwealth of Australia v Barossa Vines Ltd* [2014] FCA 20
- *Commissioner of Taxation v Ludekens* [2013] FCAFC 100.

Decision impact statements

The following Decision impact statements outline our views on the applications of the relevant court decisions.

- Decision Impact Statement – *Bogiatto* – published 4 February 2021
- Decision Impact Statement – *Ludekens* – published 7 May 2014
- Decision Impact Statement – *Barossa Vines Ltd* – published 31 March 2014.

Promoter penalty case studies

How promoter penalty laws apply to make promoters of tax avoidance and evasion schemes accountable.

QC 50070

Promoter penalty case studies

How promoter penalty laws apply to make promoters of tax avoidance and evasion schemes accountable.

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Promoters ordered to pay $13.6 million penalties for false R&D claims

In 2024, a business coach, a former tax agent and their related entities were ordered by the Federal Court to pay $13.6 million in penalties for their roles in promoting unlawful Research and Development tax incentive (R&DTI) tax schemes.

The joint investigation between the ATO and the Department of Industry, Science and Resources found the entities promoted the R&DTI schemes between 2014 and 2017. Our investigation identified approximately 138 taxpayers associated with R&DTI claims that were overinflated, inaccurate and unsubstantiated. As a result of our compliance action, over $14.5 million in tax shortfall, administrative penalties and charges were raised. With the identification of the promoter, we took action to seek penalties under the promoter penalties laws in relation to their conduct.

The significant penalties handed down by the Federal Court shows the seriousness of the conduct.

Trio penalised over $9.4 million for promotion of emission trading schemes

In 2020, the Federal Court ordered a trio of advisers to pay $9.4 million in civil penalties for promoting tax exploitation schemes.

Our investigation found that a solicitor, a financial planner and a tax agent promoted a scheme in which they marketed Emission Reduction Purchase Agreements to clients on the wrongful basis of claiming a full deduction on credits that didn't exist. Roughly 200 individuals and businesses used this scheme.

The trio charged their clients a 15% non-refundable deposit as a fee. In return, they promised an immediate reduction to their clients' taxable income and a consequential tax saving that far exceeded their initial deposit.

The solicitor who was central to the creation, operation and marketing of the schemes was ordered to pay $7.75 million, while the financial planner was penalised $1.455 million and the tax agent (who has appealed the decision), was ordered to pay $210,000.

The penalties handed down reflects the seriousness of the conduct and the scale of the scheme.

$22.68 million promoter penalty for promotion of R&D schemes

In 2020, the Federal Court ordered an adviser and entities associated with him, to pay $22.68 million in penalties for engaging in conduct that resulted in them or other entities being promoters of tax exploitation schemes.

This is the largest civil penalty that has been imposed under the promoter penalty laws.

ATO's investigations into the adviser's activities began in late 2015 and uncovered the adviser's promotion of arrangements for his clients to lodge overstated and unsubstantiated Research and Development Tax Incentive claims. In total, $45.5 million of research and development tax offset refunds were paid to the adviser's clients.

$4.25 million penalty for promotion of boutique R&D schemes

In 2018, the Federal Court ordered a Queensland company to pay a $4.25 million penalty for its promotion of tax exploitation schemes.

We started promoter penalty proceedings against a company and its Director, for encouraging their clients to lodge overstated or ineligible claims for refundable research and development (R&D) tax offsets.

We identified that their clients had issues in relation to their claims for R&D tax offsets, which included:

- an inability to show R&D expenses had been incurred
- ordinary business expenses claimed as R&D expenses
- R&D expenditure incurred with related parties, but not paid or not paid in the relevant year
- invoices for goods or services associated with R&D activities provided by related parties, but charged at inflated prices
- an inability to demonstrate a nexus between the expenditure and eligible R&D activities.

The Federal Court found that both the company and its director had breached the promoter penalty laws for 10 schemes that wrongfully resulted in 8 clients receiving more than $3 million of R&D tax offsets that they were not entitled to.

This case shows that the promoter penalty laws can apply to arrangements tailored and marketed to individual clients, as well as to mass-marketed tax schemes.

$1.5 million penalty for charity donation scheme

A $1.5 million penalty was issued to a Canadian adviser and his related companies for their role in a tax exploitation scheme involving donations of pharmaceuticals to charities in Africa.

In 2015, the Federal Court determined the adviser, as well as his companies, engaged in conduct that resulted in them being a promoter of a tax exploitation scheme.

The scheme involved the purchasing and donation of AIDS treatment pharmaceuticals to a charity based in Kenya. Under the arrangements, purchasers paid just 7.5% of the price of the treatments but claimed tax deductions of 100%.

The adviser brought the scheme to Australia in 2009 and 2010, marketing it to a number of financial advisers as well as directly to investors.

Participants would buy at least 10 ‘donation units’ priced at $2,000 each where each unit consists of 10 ‘treatment kits’ and pay 7.5% of the purchase price (or $150 per unit) immediately. The $1,850 balance was payable in 50 years' time, with a nominal interest rate of 0.108% per annum paid in advance.

An invoice for the full cost of the treatment kits allowed purchasers to claim a tax deduction for the full $2,000 amount, despite having paid only a fraction of that amount. Thus, the minimum purchase of 10 donation units would result in a deduction of $20,000 despite participants having outlaid less than $2,000 – as was highlighted in the adviser’s marketing of the scheme.

While it’s believed treatment kits were actually delivered to the nominated charity, it came at a high cost to investors and Australian taxpayers. Experts consulted during the trial estimated that the price at which the $2,000 treatment kits could be purchased on the open market in Kenya would be, at highest, just over $4.

The adviser, a Canadian citizen, previously engaged in similar schemes in Canada, which resulted in the Canada Revenue Agency revoking the registration of an entity involved in the schemes.

First use of promoter penalty laws upheld on appeal

In the first use of promoter penalty laws, the Full Federal Court upheld our view on appeal, finding two financial advisers were promoters of a tax exploitation scheme and ordered a $180,000 penalty.

The advisers had both been involved in a plan to acquire $20 million worth of woodlots in a forestry managed investment scheme, and to sell further woodlots to secondary investors. Under the plan, loan obligations were intended to be met by investing profits from commissions, GST refunds, as well as income tax refunds from secondary investors.

Following an appeal, in 2013 the Federal Court found that both advisers’ activities were a tax exploitation scheme as defined under the *Taxation Administration Act 1953*. This is because it was reasonable to conclude they had entered into the scheme for the sole or dominant purpose of getting a scheme benefit. The advisers were also found to be promoters as they had marketed the scheme and received consideration in respect of that marketing.

The result was also important in confirming that the Commissioner does not need to prove an 'alternative postulate' before alleging a scheme benefit. What is required is what the entity was proposing to do and why and does not involve alternative positions. This conclusion makes it clear that the promoter penalty laws can apply in situations where a scheme has not been implemented or where promotion has occurred without success.

Penalty and ban for promoter of illegal early access to super

The Federal Court imposed a $220,000 penalty and a 7-year ban for the promoter of an illegal early release of super scheme involving self-managed super funds (SMSFs), in contravention of section 68B of the *Superannuation Industry (Supervision) Act 1993* (SISA).

The ATO, as regulator of the SMSF sector, started legal action against the New South Wales woman in 2018.

She had set up, or intended to set up, 35 SMSFs on behalf of 68 individuals between 2016 and 2018. She then helped the individuals, who were not yet legally entitled to access their super, to transfer their balances to the SMSF so they could withdraw it. This sometimes occurred on the same day.

Participants in the scheme reportedly used the money to fund a number of personal expenses including home renovations and stamp duty.

After seeking an initial injunction that placed restrictions on the scheme’s facilitator, we filed an application in the Federal Court seeking declaratory relief, a final injunction and payment of a civil penalty.

The case marks the first time we've used the SISA to put a stop to a promoter of an illegal early release of super scheme. Further, it indicates that the court may impose a strong penalty for promoters of these sorts of arrangements.

Super is money set aside to provide for your retirement. Withdrawing your super early without meeting a condition of release can result in long-term financial damage. This can leave people with little or no super for their retirement as well as a significant tax bill on the amount withdrawn.

QC 66614

Tax schemes to watch out for

How to recognise tax schemes that concern us and the red flags associated with them.

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On this page

What are tax and super schemes

Some advisers will look for new ways to exploit the law or changes in the law. They will promote schemes to people and promise benefits that aren't legally available.

Some tax advisers may attempt to promote tax and super schemes by inappropriately claiming their schemes are supported by ATO rulings.

Schemes may target Australians planning for their retirement by advising them to send money inappropriately through their self-managed super funds (SMSFs).

Other schemes promise access to superannuation assets even though a condition of release hasn't been met.

Tax and super schemes range from mass-marketed schemes advertised to the public, to boutique or specialised schemes tailored for specific taxpayer circumstances. Some are marketed to individuals and others to large private group and public companies.

They include tax avoidance, tax evasion and super schemes, and typically involve one or more of the following:

- reducing a participant's taxable income
- increasing their deductions against their income
- increasing offsets
- inflating refunds
- avoiding tax and other obligations entirely
- accessing super benefits before meeting a condition of release.

Tax and super schemes may include complex transactions or may distort the way funds are used to avoid tax or other obligations. They may also structure arrangements to:

- incorrectly classify revenue as capital
- exploit concessional tax rates
- obscure the source of funds or the relationships between parties
- illegally release super funds early
- inappropriately move funds through several entities, such as a series of trusts including SMSFs, to avoid or minimise tax that would otherwise be payable.

Arrangements of concern

When we identify an arrangement that represents a high risk to the tax or superannuation systems, we may issue a taxpayer alert. We issue taxpayer alerts to:

- provide an early warning that an activity or arrangement is of concern to us
- set out what we are currently doing about the arrangement
- assist you to make informed decisions about your tax affairs
- prevent widespread adoption or promotion of higher-risk arrangements.

Some of the taxpayer alerts we have issued in relation to arrangements of concern include:

- TA 2024/1 *Early stage investor tax offset claimed using circular financing arrangements*
- TA 2023/5 *Research and development activities conducted overseas for foreign related entities*
- TA 2023/4 *Research and development activities delivered by associated entities*
- TA 2023/2 *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*
- TA 2023/1 *Interposition of a holding company to access company profits tax-free*
- TA 2022/1 *Parents benefitting from the trust entitlements of their children over 18 years of age*
- TA 2021/4 *Structured arrangements that avoid luxury car tax*
- TA 2021/2 *Disguising undeclared foreign income as gifts or loans from related overseas entities*
- TA 2021/1 *Retail sale of illicit alcohol*
- TA 2020/5 *Structured arrangements that provide imputation benefits on shares acquired where economic exposure is offset through use of derivative instruments*
- TA 2020/4 *Multiple entry consolidated groups avoiding capital gains tax through the transfer of assets to an eligible tier-1 company prior to divestment*
- TA 2020/2 *Mischaracterised arrangements and schemes connected with foreign investment into Australian entities*
- TA 2019/2 *Trusts avoiding CGT by exploiting restructure rollover*
- TA 2018/4 *Accrual deductions and deferral or avoidance of withholding tax*
- TA 2018/1 *Structured arrangements that provide imputation benefits on shares acquired on a limited risk basis around ex-dividend dates*

- TA 2017/5A *Addendum Claiming the Research and Development Tax Incentive for software development activities*
- TA 2017/5 *Claiming the Research and Development Tax Incentive for software development activities*
- TA 2017/4 *Claiming the Research and Development Tax Incentive for agricultural activities*
- TA 2017/3 *Claiming the Research and Development Tax Incentive for ordinary business activities*
- TA 2017/2 *Claiming the Research and Development Tax Incentive for construction activities*
- TA 2016/12 *Trust income reduction arrangements*
- TA 2016/11 *Restructure in response to the Multinational Anti avoidance Law (MAAL) involving foreign partnerships*
- TA 2016/9 *Thin capitalization - Incorrect calculation of the value of 'debt capital' treated wholly or partly as equity for accounting purposes*
- TA 2016/6 *Diverting personal services income to self-managed superannuation funds*
- TA 2016/5 *Purported tax-exempt non-profit 'foundations' used to evade or avoid taxation obligations*
- TA 2015/1 *Dividend stripping arrangements involving the transfer of private company shares to a self-managed superannuation fund*
- TA 2010/5 *The use of an unrelated trust to circumvent superannuation lending restrictions*.

Find more information about when we issue taxpayer alerts on Practice Statement Law Administration **PS LA 2008/15** *Taxpayer Alerts* and the taxpayer alerts page or see the **full list of taxpayer alerts**.

Learn about the behaviours, characteristics and tax issues that attract our attention.

Read our guide on how to report schemes and promoters confidentially to us.

Current areas of concern

Below are some areas where we have seen arrangements and schemes of concern:

- Early stage investor tax offset
- Dividend stripping arrangements
- Unit trust arrangements and unpaid present entitlements
- Unitisation
- Receiving payments or assets from foreign trusts
- Reimbursement agreements
- Private company benefits
- Research and development tax incentive
- Residential property purchased through illegal SMSF schemes
- SMSFs and schemes involving asset protection
- SMSFs and non-arm's length income (NALI)
- Financial products
- Employee benefit arrangements
- Lump sum payments received by healthcare practitioners
- Activities not correctly classified as a business
- Private use of assets or private pursuits in business
- Illegal early access to super
- Get your luxury car tax (LCT) right

Employee benefit arrangements of concern

The employee benefit arrangements designed to avoid tax that we're concerned about.

Financial products

How to review materials to know the tax treatment of financial

Unit trust arrangements

Learn about our concerns with arrangements involving unit trusts and unpaid present entitlements under Division 7A.

QC 33631

Employee benefit arrangements of concern

The employee benefit arrangements designed to avoid tax that we're concerned about.

Last updated 2 July 2025

On this page

Names of employer benefit arrangements

Employee benefit arrangements may also be called a number of names, including:

- employee bonus arrangements
- employee share trusts
- employee investment trust/plans
- employee incentive trust/plans

- employee savings plans
- employee entitlement funds
- employee reward schemes.

They do **not** include:

- complying employee share schemes, which are covered by former Division 13A of the *Income Tax Assessment Act 1936* or Division 83A of the *Income Tax Assessment Act 1997*
- employer contributions to complying super funds
- **approved worker entitlement funds** (an endorsed approved worker entitlement fund or entity is registered on the Australian Business Registrar).

Employee benefit trust arrangements

A typical employee benefits trust arrangement has the following features:

- An employer entity sets up an employee benefits trust.
- The employee may enter into an agreement to direct salary to be paid to the trust.
- The entity contributes to the trust for employees or other people nominated by the employees. Often this contribution is financed through a loan or overdraft.
- The trust invests these contributions on behalf of the employees or their nominees, often by loaning an amount equal to the contributions back to the employer entity or an associate of the employer entity or purchasing shares in the employer or associated entities.
- A selected employee or person may be invited to acquire an interest (for example, by taking up ordinary units) in the trust. This is generally financed by money borrowed from the trust.
- The holders of ordinary units are generally entitled to distributions of income in proportion to their holding.

Our concerns with employee benefit trusts

These arrangements are designed to defer or avoid tax on the employer company's profits. They are structured to purportedly provide a large tax deduction to the employer and avoid fringe benefits tax liability.

Our concerns are:

- the deduction claimed under section 8-1 of the *Income Tax Assessment Act 1997* for the contribution to the trust may be disallowed
- Part IVA of the *Income Tax Assessment Act 1936* may apply to cancel the deduction
- the amount contributed on behalf of employees may be assessable to the employee under section 6-5 of the *Income Tax Assessment Act 1997*
- Part IVA of the *Income Tax Assessment Act 1936* may apply to include the income that has been directed by the employee, as assessable income in the same income year the contribution is made to the trust
- where the contribution is made to benefit a specific employee, fringe benefit tax may be payable on the employer's contribution
- fringe benefits tax may apply to loans provided by the trustee of the employee benefits trust.

Employee share or incentive plans

An employee share or incentive plan scheme has the following characteristics:

- The employer entity establishes a special purpose company.
- Shares or membership interests are allocated to selected employees for a nominal amount in the special purpose company.
- The employer contributes a sum of money to the special purpose company, increasing the value of the employees' shares or membership interests.
- The special purpose company invests the contribution amounts on behalf of the employees, often lending the contribution back to the employer entity or their associate.

- Employee share or incentive arrangements are designed to provide the employer with an effective incentive plan for employees. However, the only employees who generally participate in such plans are the controllers of the employer's business.

Our concerns with employee share or incentive plans

These arrangements are designed to defer or avoid tax on the employer company's profits. They are structured to purportedly provide a large tax deduction to the employer and avoid a fringe benefits tax liability.

Our concerns are:

- the deduction claimed under section 8-1 of the *Income Tax Assessment Act 1997* in respect of the contribution to the company may be disallowed
- Part IVA of the *Income Tax Assessment Act 1936* may apply to cancel the deduction
- the amount contributed on behalf of employees may be assessable to the employee under section 6-5 of the *Income Tax Assessment Act 1997*
- Part IVA of the *Income Tax Assessment Act 1936* may apply to include the income that has been directed by the employee, as assessable income in the same income year the contribution is made to the trust
- where the contribution is made to benefit a specific employee, fringe benefit tax may be payable on the employer's contribution
- the deduction claimed under section 8-1 of the *Income Tax Assessment Act 1997* in respect of the value of the employer entity's contribution to the special purpose company may be disallowed
- deductions under section 8-1 of *Income Tax Assessment Act 1997* for adviser's fees may not be allowable.

Employee remuneration trusts

An employee remuneration trust (ERT) is an arrangement that has the following essential elements:

- it is established by an employer or an adviser of the employer for the purpose of providing remuneration or incentives to Australian resident employees
- it involves the establishment of a trust by or at the instruction of the employer
- the trustee of the trust
  - receives money or assets from the employer (or the employer's associate)
  - provides benefits to the employees (or their associates).

Our concerns with ERTs

In Taxation Ruling **TR 2018/7** *Income tax: employee remuneration trusts* we have established the view of the tax treatment of ERTs which will depend on the way the arrangement is implemented.

- If you are an employer, contributions you make to the trustee of an ERT are generally deductible if you have a genuine purpose for it being applied within a relatively short period towards remunerating employees (to the extent that the contribution is not capital or of a capital nature).
- As an employer, if you made a contribution to an ERT at the direction of, or on behalf of, your employee and that contribution is remuneration, you are required to withhold an amount from the contribution as a pay as you go withholding amount.
- Fringe benefits tax can apply to contributions made by an employer to the trustee of an ERT, to benefits provided by the trustee of the ERT and on loans provided by the trustee of the ERT to employees.
- Ongoing maintenance and management fees for running an ERT may be deductible.
- If you are an employee and you receive a benefit from the ERT, the benefit will be assessable to you if it is your remuneration and is not a fringe benefit. In some cases, a contribution may be made on your behalf to the trustee of an ERT as part of your remuneration (and not as a fringe benefit) – in these cases, that contribution will be assessable to you.

If a contribution is made by an employer to a trustee of an ERT, and that trustee is already a shareholder of the employer, the contribution may in some circumstances be deemed to be a dividend.

Tax consequences for an employer

As an employer, you should consider:

- your intention when making a contribution to an ERT
- your understanding of how it will be used by the trustee of the ERT.

Deductibility of contributions to an ERT

The following checklists will help you decide whether a contribution made to the trustee of an ERT is deductible.

Indicators that a contribution is deductible are that you:

- carry on a business
- make a contribution to the trustee of the ERT
- understand that the trustee of the ERT intends to use your payment to provide benefits directly to employees over a short period of time as a reward for their work.

Indicators that a contribution is **not** deductible are that:

- you are not carrying on a business or you don't have any employees
- you make a contribution to the trustee of an ERT and the people who are most likely to benefit from that contribution are the business owners, controllers or shareholders, not employees
- you understand that the trustee of the ERT is going to hold your contribution for a significant period of time (in excess of five years) before applying it to pay employees, if at all
- your contribution is going to be used primarily to provide loans or financing to your employees that will remain outstanding for a significant period of time (in excess of five years)
- your contribution is going to be used by the trust to buy the business' shares, options or other interests in the business without those interests then being transferred within a short period of time (within five years) to employees to hold for their own benefit

- your contribution is not going to be used to provide benefits to your employees as a reward for their work.

Purpose of making a contribution

Sometimes you will contribute money to an ERT and you understand and intend that the money will be used by the trustee of the ERT to do more than one thing. The trustee of the ERT may use the contribution to:

- make loans or provide other finance to your employees (financial advantage) and/or for the trustee of an ERT to acquire shares, options or securities in you (capital advantage)
- provide direct remuneration to your employees.

Where this is the case, the contribution will only be deductible to the extent it is used primarily to pay employees a reward for the work they have done or will do for you. The contribution should be apportioned on a fair and reasonable basis.

You may be entitled to a deduction even where you obtain a financial or capital advantage if your main purpose in making a contribution is to pay employees a reward for their work within a relatively short period, for example, if:

- contributions made to the ERT can be lent to your employees, but when the loan is repaid the funds are to be used to remunerate those employees, all within a relatively short period (generally within five years) from when the contribution was made
- any shares in you (as the employer company) acquired by the trustee of the ERT are to be transferred to your employees within a relatively short period, to be held by them.

Other benefits

Fringe benefits tax may apply to benefits that are provided by the trustee of an ERT to your employees. This may occur where the trustee of the ERT delivers non-cash benefits to the employee. For example, benefits such as shares in a company or units in a trust are provided to the employee in respect of employment.

Fringe benefits tax will apply where you, as an employer, pays amounts which have been salary sacrificed by an employee to the ERT as repayments of principal on an interest-free loan.

PAYG withholding

Where a contribution is made by you as an employer to the trustee of an ERT, you will be required to withhold an amount from that contribution where the contribution constitutes remuneration that is paid to an employee, or is applied or dealt with on the employee's behalf or as the employee directs. For more information, see PAYG withholding.

Interest expenses

If you are an employer and a contribution to an ERT is deductible to you, you are also likely to be entitled to a deduction for interest expenses incurred on borrowings to fund that contribution.

Your purpose in borrowing is the key factor in determining whether a deduction is allowable for the interest expense incurred regarding that borrowing. This purpose will be determined on an objective basis in consideration of all the facts of your particular case.

Taxation Ruling IT 2606 *Income tax: deduction for interest on borrowings to fund share acquisitions* provides guidance about what you need to consider when determining whether your interest expense is deductible to you. IT 2606 states that you need to consider whether there is a connection between the interest expense and the activities of your business or the earning of assessable income.

You may need to apportion your interest expense in line with Taxation Ruling TR 95/33 *Income tax: subsection 51(1) – relevance of subjective purpose, motive or intention in determining the deductibility of losses and outgoings* where your interest expense is much greater than the assessable income you earn in relation to that expense. This will be relevant where the interest expense is explained by reference to a purpose other than to earn assessable income.

Establishment fees

As an employer, you may need to pay fees to establish the ERT arrangement. These fees may be calculated according to a percentage of the contribution amount that is made to the ERT. These are usually paid to set up and establish the ERT arrangement. These fees are considered to be capital in nature and not deductible to you.

Ongoing maintenance fees

As an employer, ongoing maintenance and management fees that you incur in the upkeep of the ERT arrangement may be deductible to you.

These fees usually have the following features:

- smaller than the establishment fees
- set fees, calculated in relation to the services provided and not to the contribution size that you make to the ERT arrangement
- usually in respect of management or administration of the trust
- payable by you periodically – that is, annually, monthly.

Taxpayer alerts

You should check to see whether your employee benefit arrangement has features which are subject to a taxpayer alert. Taxpayer alerts are intended to be an early warning of our concerns about significant or emerging aggressive tax planning issues or arrangements.

Relevant taxpayer alerts include:

- TA 2007/2 *Employee Entitlement Fund*
- TA 2008/13 *Employee Savings Plan*
- TA 2008/14 *Salary Deferral Arrangements*
- TA 2009/18 *Discretionary Option Arrangement*
- TA 2011/5 *FBT Avoidance through an arrangement where an employer repays an employee's loan from a purported employee share trust*

More information

If you need more information about employee benefit arrangements, you can:

- speak to your tax adviser
- phone us on **1800 060 062**
- write to us at:
  Australian Taxation Office
  Locked Bag 9000
  ALBURY NSW 2640

You can also apply to us for a private ruling by:

- visiting Applying for a private ruling
- phoning us on **1800 060 062**.

QC 50095

Financial products

How to review materials to know the tax treatment of financial products before investing.

Last updated 13 September 2016

On this page

Managing tax uncertainty

Investors should carefully review any materials, such as product disclosure statements, that describe the tax treatment of financial products before deciding whether to invest in the product.

The majority of financial products offered to retail investors are simple and do not concern us. However, we have had concerns with a small number of products that promise to provide investors with tax benefits where those benefits may not be available to some or all investors who invest in the product.

Issues that concern us include advice that:

- suggests investors draw certain conclusions about positive tax outcomes from investing in certain products that most taxpayers would not receive in their individual circumstances – for example, statements like 'generally, deductions will be available, however for certain taxpayers a deduction will not be available'
- includes inappropriate caveats, such as when discussing the possible application of the anti-avoidance provisions to the arrangement, stating that 'no economic alternative to this transaction exists' – simply making this comment does not make it true, as many investments offer economic benefits that could be delivered in a variety of other ways.

We recommend that investors seek independent tax or legal advice about the tax consequences of investing in complex financial products from an adviser who is not involved in selling the product. Such tax advice should be separate from advice from a licensed financial planner about the benefits or risks of making the investment. Advice may include whether we have issued an ATO product ruling that states that a tax benefit is available.

Whether interest and borrowing costs can be claimed as a tax deduction

We have come across issues about the correct treatment of certain financial products and product features. An important question for such products is whether investors can claim tax deductions for interest and borrowing costs that they have incurred in order to fund their investment. Investors should not assume that they will be entitled to claim such expenses, even if the issuer of the product suggests that the costs are deductible for all or some investors – this is especially the case where the arrangement is highly complex and is not covered by an ATO product ruling that would provide certainty about the tax outcomes.

Depending on the investment product, there are several possible tax outcomes which depend upon the relevant product and its features. These tax outcomes include:

- The investment is subject to capital gains tax (CGT) – interest and borrowing expenses will be included in the cost base of the investment and, as a result, the interest incurred cannot be deducted. If that is the outcome then the interest and borrowing expenses will reduce any capital gain that arises when the investment matures.
- The investment is subject to both CGT and income tax under the ordinary rules. Dividends, distributions, coupons or any other income received during the life of the investment are subject to income tax under the ordinary rules, and any gain at maturity is subject to CGT. Deductions for interest or borrowing expenses may be limited to the amount of income received each year, especially where it can be shown that an investor could not reasonably expect to receive income (over the life of their investment) that exceeds the expenses incurred.
- An investment in a longer-term financial product that involves a profit-making scheme should be accounted for at maturity on a net basis as a profit-making scheme or undertaking. Investors in such products do not account for amounts that are received or paid during the life of their investment – instead, these amounts are netted off against one another when the investment ends. If amounts received are greater than amounts paid, then this amount will be reported as taxable income on the investor's tax return. If amounts received are less than amounts paid, then this amount can be deducted on the investor's tax return.
- An investment that generates income in excess of outgoings, or is reasonably expected to do so, means that interest and borrowing costs are fully deductible on revenue account in the relevant income year.

Deferred purchase agreements

A deferred purchase agreement (DPA) is an agreement where an investor agrees to purchase an asset (usually shares) at a future point in time. This is called the deliverable asset. The value of that asset at that future point in time is calculated by reference to another asset called a reference asset. An example reference asset is the ASX 200 index.

Certain DPA features may impact on the tax treatment of specific DPA products and arrangements if it is an attempt to exploit the revenue/capital distinction. Such features provide an indication – and may therefore support a conclusion – that an investment in such product will be accounted for as either a:

- capital investment and subject to CGT
- revenue investment and taxed accordingly.

Investors in DPAs that contain certain features that concern us may be subject to general anti-avoidance provisions in the tax laws.

Examples of the features in question

Capital gains tax (CGT)

Features that indicate that an investment in a DPA is subject to CGT are:

- The payment of distributions (coupons) where the coupon appears simply to be a return of an investor's initial investment – such as where the investment itself does not appear capable of generating any periodic return, even though coupon payments are guaranteed to be made to the investor.
- The remote possibility of investors receiving contingent coupons – especially when coupons are theoretically generated by extremely risky investments that are never likely to be realised – in order to attempt to justify deductions for interest and borrowing costs.
- Guaranteed coupon payments that are less than the interest that is paid by an investor in order to fund their investment. The question is whether interest on such products can only be deducted up to the amount of coupons that are paid to the investor.

For information about other features indicating a DPA is subject to CGT, see **TD 2008/22** *Income tax: capital gains: does CGT event C2 happen as a result of the satisfaction of an investor's rights under a Deferred Purchase Agreement warrant, an investment product offered by financial institutions, by the delivery of the Delivery Assets?*

Revenue asset

A feature that indicates that an investment is a DPA should be accounted for as a revenue asset is that the DPA has a term that is equal to or less than 12 months.

Anti-avoidance rules

DPA features of concern that may result in anti-avoidance rules applying to cancel tax benefits for investors are:

- reference assets that are the same as delivery assets – where such assets are shares that are expected to pay dividends – if this feature is designed to support an argument that the investment in the DPA is on revenue account
- coupon payments that appear to be a return of an investor's capital – such as where the underlying investment does not appear capable of generating any income, even though coupon payments are guaranteed. This feature would be a concern when it is concluded that its sole purpose is to support an argument that the investment is held on revenue account.
- the possibility of receiving contingent coupons, particularly when coupons are generated by extremely risky investments, and it is concluded that its sole purpose is to support an argument that the investment is held on revenue account
- for compulsory loans (limited or full recourse), whether the interest expense on such products can be deducted, particularly where the DPA in question also contains any of the above features
- whether the tax treatment of a DPA changes depending on the type of reference assets that determine the investor's return – again, on the basis that a change in reference assets is used to support a view that the DPA is held on revenue account. In all such cases, concerns arise when the investor would ordinarily hold a DPA that did not contain the feature, or features of concern, on capital account.

Commoditised products

Another area of focus is certain types of investments that would ordinarily be subject to CGT being bundled up in an investment structure using a trust in order to change the tax treatment of the investment. An example of such arrangements would be an investment in a unit trust where the trust itself invests in options.

For an ordinary investor, an investment in options will be subject to CGT. We have concerns when an issuer bundles up an investment in options into a unit trust and argues that the investment is on revenue account.

These products concern us because an investment in such products is often financed from borrowed funds. This gives rise to questions about whether interest and borrowing costs that an investor incurs to invest in such products are deductible or not, as well as potential application of the anti-avoidance rules of the tax law.

Products designed to circumvent franking credit trading provisions

We have had concerns about a small number of products and product features that appear to be designed to provide investors with the benefit of franking credits. The features of such products indicate that there is more than a merely incidental purpose of enabling the investor to obtain the benefit of franking credits from their investment. Specific concerns include:

- features (and products) that are structured to meet the minimum requirements of the holding period rules, yet otherwise affect (or change) an investor's risk of loss or opportunity for gain
- features where an investor transfers (including by way of a swap) their return on the equity interest that they hold and which generated the imputation benefit for a return that is based on a different (possibly non-equity) investment.

Investors are entitled to franking credits where they are exposed to a sufficient risk of loss or opportunities for gain when they invest in shares, as franking credits are generated from at-risk investments in equity. However, when taxpayers have invested in products that are specifically designed to reduce that risk, or when the investor has a more than incidental purpose of gaining the benefit of franking credits when they invest in a financial product, then franking credits may not be available under the law. In such circumstances the Commissioner of Taxation can cancel such franking credits under the anti-avoidance rules.

We have issued a taxpayer alert about these sorts of arrangements – TA 2012/3 *Structured financial products that exploit franking credits and other tax benefits*.

Tax treatment of early exit or walk away features and product failures

Certain tax issues may arise where a financial product fails, is wound up prematurely, or an investor withdraws their investment before maturity. Many tax benefits that are available to investors in financial products arise because an investor's purpose of investing in such products is to hold their investment until maturity. However, where this purpose is not present, such tax benefits (such as deductions for interest) that investors believe they are entitled to may not be available. Examples include when:

- a product has been designed with the objective intention of it being wound up before maturity. If an investor did not have a purpose of holding their investment till maturity, then the relevant tax benefits may no longer be available under either the ordinary tax law provisions or the anti-avoidance rules.
- an issuer fails to undertake critical steps or transactions in implementing a product. If it is clear that these steps or transactions have not been undertaken, then the relevant tax benefits may not be available under either the ordinary tax law or the anti-avoidance rules.

These situations should be contrasted with those where an investment product fails because of the insolvency of an entity responsible for implementing the product.

Capital protected and capital guaranteed financial products that use notional finance

In some cases, advisers and product manufacturers may have encouraged retail investors to claim tax deductions on internally geared products that do not have an ATO product ruling. When the main economic rationale for a product or product feature appears to be tax deductibility, there is a risk that we may view the product as a tax avoidance scheme, particularly if investors could achieve a similar benefit (apart from the tax deduction) by purchasing other financial instruments such as call options.

On 1 May 2013, the Australian Securities & Investment Commission (ASIC) released its Report 340 *'Capital protected' and 'capital* *guaranteed' retail structured products*. We share the concerns ASIC has raised in this report and state that tax deductions may not be available for investors who invest in certain products referred to in the report.

An example of these concerns is capital guaranteed products that are bundled together with a notional loan where it is argued that the investment is funded from this notional loan. Potential risks arise in products where it appears no actual finance or financial accommodation is provided to investors who invest in these products. In these cases, deductions may not be available for the notional interest expense that the investor has incurred in order to invest in such products. Such expenses would form part of the cost base of the investment.

Investors in products that promote the availability of tax benefits of the type referred to above should ask the product issuer, or the entity who is marketing the product, whether the ATO has issued a product ruling that states that the tax benefit in question is available. If no such ruling has been obtained then an investor should consider whether the investment in question is suitable for their needs.

Implementation issues

We have had concerns about certain financial products that appear to have been implemented in a manner that is inconsistent with relevant documentation, including product disclosure statements where these are required by law. Examples include arrangements:

- where the substance of the transaction differs from its legal form
- that are accounted for in a manner that is inconsistent with transaction documents.

Where arrangements are not implemented in a manner that is consistent with relevant documentation, or are implemented incorrectly, issues that will arise include whether:

- the tax benefits that the product promised to investors are available at law
- all, or part, of the purported arrangements or transactions are a sham

- promoter penalty law applies to entities that promoted the arrangement where the tax benefits are not reasonably arguable under the law
- promoter penalty law applies to entities involved in implementing an arrangement that is marketed on the basis of conformance with an ATO product ruling even though the arrangement is materially different to that described in the product ruling.

QC 26266

Unit trust arrangements and unpaid present entitlements

Learn about our concerns with arrangements involving unit trusts and unpaid present entitlements under Division 7A.

Last updated 2 July 2025

On this page

Unpaid present entitlement unitisation arrangements

We currently have concerns about a number of arrangements involving unpaid present entitlements (UPEs) and unit trusts that may have implications under Division 7A of the *Income Tax Assessment Act 1936* (ITAA 1936).

We have identified cases where a private group seeks to extinguish unpaid present entitlements or avoid obligations under Division 7A by implementing an arrangement where a private company subscribes for units in a unit trust. The unit trust may then provide payments or loans to other entities within the private group.

These arrangements have attracted our attention, as they may give rise to various income tax consequences, such as the application of:

- Division 7A of the ITAA 1936
- Section 100A of the ITAA 1936
- Part IVA of the ITAA 1936.

Unpaid present entitlements

Division 7A may apply where there is a UPE – for example, where a private company is a beneficiary of a trust and is made presently entitled to income of the trust, but does not receive payment of the distribution.

The following arrangements or situations are attracting our attention:

- Private companies include assessable trust distributions, but do not receive payment of the distribution from the trust before the earlier of the due date for lodgment or the lodgment date of the trust's tax return for the year in which the loan was made.
- A complying loan agreement has not been put in place.
- Failure to put the funds on a sub-trust for the sole benefit of the private company beneficiary.
- Failure to repay loans or sub-trust investments at the conclusion of the term specified in the original agreement.
- Arrangements purporting to extinguish the UPE of the private company beneficiary.
- Non-lodgment of returns and activity statements.

If you have entered into, or are considering, such an arrangement, we recommend you phone the ATO Tip-off hotline on **1800 060 062** to discuss the arrangement.

For more information and legal guidance, see:

- Private company benefits – Trust entitlements
- TR 2010/3 *Income tax: Division 7A loans: trust entitlements* (withdrawn)
- PS LA 2010/4 *Division 7A: trust entitlements* (withdrawn)

- TD 2022/11 *Income tax: Division 7A: when will an unpaid present entitlement or amount held on sub-trust become the provision of 'financial accommodation'?*
- TR 2022/4 *Income tax: section 100A reimbursement agreements*
- PCG 2022/2 *Section 100A reimbursement agreements – ATO compliance approach*.

Lump sum payments received by healthcare practitioners

See how to fix common mistakes if you're a healthcare practitioner receiving a lump sum payment from a medical centre.

QC 54321

Lump sum payments received by healthcare practitioners

See how to fix common mistakes if you're a healthcare practitioner receiving a lump sum payment from a medical centre.

Last updated 2 July 2025

On this page

If you are a healthcare practitioner (such as a doctor, dentist, physical therapist, radiologist or pharmacist) and you get a lump sum payment from a healthcare centre operator, it's probably not a capital gain. It's more likely to be ordinary income.

Most healthcare practitioners try to do the right thing and pay the correct amount of tax. We want to help you by providing guidance on what to look out for and where to go for help.

Lump sum arrangements

In the healthcare services industry, it is now common for some practitioners to operate from healthcare centres run by third parties. This frequently occurs without any stated partnership or employment relationship between the third party and the practitioner.

The third parties that run these centres generally encourage practitioners to start work or continue to work from their centres. They may offer lump sum payments for this purpose and there is nothing wrong with that. Our concerns relate to the tax treatment of the lump sum payments by the practitioner.

Our concerns may affect you if your arrangements have most or all of the following features:

- A healthcare centre operator provides you with fully equipped consulting rooms, administrative services, clerical staff and facilities as necessary for you to provide healthcare services. The agreements entered into typically state that there is no employment relationship between you and the operator.
- In return for these facilities and services, you are required to pay the operator an agreed percentage of the receipts for the healthcare services you provide.
- You are required to provide healthcare services from the healthcare centre for an agreed minimum period of time, minimum weekly working hours and working patterns.
- You are required to use your best endeavours to grow and promote the interests of the healthcare centre.
- The operator pays you a lump sum payment. The payment is:
  - described as being consideration for a restraint imposed, for goodwill, or for other terms or conditions, or for a combination of the three

  - ordinarily made when you enter into the agreement or start to provide healthcare services to patients from the healthcare centre (whichever is the later) or whenever the agreements relating to the provision of healthcare services are renewed.

Whilst these are common features, any other arrangements that relate to a lump sum payment for your ongoing provision of healthcare services from a medical centre may still be of concern to us.

Our concerns

We are concerned that you may treat this lump sum payment incorrectly for tax purposes.

We have seen some practitioners who have received these lump sums mistakenly treating the payments as a capital gain. They have then applied the small business CGT concessions to reduce the capital gain, in many instances reducing it to nil.

We are of the view that generally these lump sum payments are not capital receipts but are income. The lump sum will typically be ordinary income of the practitioner for providing services to their patients from the healthcare centre. The result is that practitioners are required to include the full amount of the lump sum payment in their assessable income. This is in accordance with section 6-5 of the *Income Tax Assessment Act 1997*.

We formed our view because:

- the lump sum payment is an inducement for the practitioner to enter into the agreements to provide healthcare services from the healthcare centre
- the lump sum is fundamentally connected to the practitioner's provision of those services
- in the alternative, the lump sum payment represents a profit or gain from an isolated transaction in the course of the practitioner providing healthcare services
- the mere fact the payment is a one-off lump sum, or expressed to be principally consideration for the restraint imposed, for the goodwill or for the other terms or conditions, does not define it as having the character of a capital receipt

- there is no transfer of goodwill as
  - the third party operating the healthcare centre does not acquire the right to provide healthcare services from the practitioner
  - the practitioner does not cease to provide healthcare services.

The whole of the lump sum payment is assessable as ordinary income in the hands of the practitioner.

What you need to do

If you are considering any arrangements that relate to a lump sum payment for commencing or providing ongoing healthcare services, you should note that we:

- have concerns with those payments being mistakenly treated as capital gains
- are looking closely at these arrangements to determine if they are compliant with income tax laws and whether the anti-avoidance provisions may apply.

We are aware that some practitioners are using a private ruling that was issued to another taxpayer:

- You can only rely on a private ruling if **you** applied for it.
- From 2013, we have consistently issued private rulings on these or similar arrangements treating the whole of the lump sum payment as assessable ordinary income.

What we are doing

We are working to protect practitioners from treating these payments incorrectly and facing a later tax adjustment.

If you have already treated these lump sum payments as something other than ordinary income, we are offering to help you ensure you are in, or that that you get into, the correct tax position.

We:

- will continue to identify, examine and understand the types of payment arrangements being used in the industry by further engaging with healthcare centre operators. This may include obtaining details of which practitioners have received payment from the healthcare centre operators.

- have started targeted activities and examinations of healthcare practitioners who may have incorrectly treated these lump sum payments as capital gains
- are working to provide further advice and guidance to health practitioners to help them either self-identify these and emerging arrangements that concern us, or as an early warning for those who may be considering them.

Example: A new doctor joins the practice

Dr Lee has recently been approached by Medical Centre Z, a medical centre operator, with an offer to join a well-established healthcare centre.

Medical Centre Z's offer includes the payment of a lump sum connected to an agreement where Dr Lee is required to work 40 hours a week, Monday to Friday, providing healthcare services to patients attending the medical centre.

The medical centre provides Dr Lee with the use of their facilities and all the support services needed to run the practice so she can focus solely on what she loves best, working with patients. For the use of these facilities and services, the medical centre takes a percentage of her billable receipts.

Dr Lee is unsure how this payment will be treated for tax purposes. A friend suggests that the payment is a capital gain and she would be able to apply for CGT concessions. This doesn't seem quite right to her so she decides to talk to her accountant about the payment.

Her accountant confirms her thoughts; the payment is not a capital gain as it is essentially made for her agreeing to provide her healthcare services at the medical centre. Dr Lee needs to treat the payment as ordinary income and report it and pay tax on it accordingly. Her accountant advises her that had she tried to include the payment as a capital gain she would have underpaid her tax and been exposed to tax adjustments and potential penalties.

Where to go for help

If you have entered, or are planning to enter, into an arrangement of this type we encourage you to:

- seek independent professional advice
- ask us for a private ruling about your specific circumstances
- make a voluntary disclosure if you believe our concerns apply to you, which may reduce any penalties.

QC 51513

Tax professionals: Protecting your clients and practice

How to protect your clients and practice from tax avoidance and evasion schemes and manage promoter penalty risks.

Last updated 19 May 2025

On this page

Overview

We recognise the important role played by tax advisers and other tax professionals in the Australian tax and super system.

In our dealings with tax professionals, we adopt and maintain a collaborative approach. We want to have a strong relationship with you and a shared commitment to support and protect the community.

Tax professionals are well positioned to recognise potential unlawful tax and super schemes. If you encounter an arrangement that appears suspicious, let us know.

If you have clients who are caught up in an unlawful tax or super scheme, encourage them to talk to us. This allows us to work together to resolve any problems.

By reporting unlawful tax and super schemes as early as possible, you can prevent other people getting caught out and facing significant penalties. This also helps remove promoters of unlawful tax and super schemes from the profession.

Find out more on **how we'll work with you** to support voluntary compliance in our tax and super systems.

Your practice

If your practice has any of these indicators of suspect schemes, then we recommend you revaluate your approach and report this to us to mitigate your exposure to significant penalties.

Things to check:

- When buying a new business from another entity, check their processes and practices to assess the legality of any tax planning arrangements.
- Talk to your employees about their attitudes towards risk to make sure they align with the services you provide.
- Check for fees inappropriately paid to related parties and not the practice.
- Ensure you have strong governance and internal controls to protect against risk, including:
  - remuneration methods and fee structures
  - secondary oversight of tax advice services
  - the marketing materials you provide to potential clients.

We take strong actions under **promoter penalty laws** against tax professionals who encourage clients to implement unlawful arrangements.

It’s not worth being ordered to pay a civil penalty and the risks to you and your practice’s reputation.

Managing promoter penalty risks – good governance

Tax and super planning arrangements

If you provide tax and super planning advice to clients, you need to consider what level of risk you'll accept and what processes you have in place. This protects you and your practice from inadvertently breaching the promoter penalty laws.

You should be cautious about any arrangement you recommend.

You must:

- recognise when an arrangement may be an unlawful tax or super scheme
- know the potential risks for facilitating a scheme.

You shouldn't facilitate or advocate an unlawful tax or super scheme in any way.

You should seek to ensure that you have at least a reasonably arguable position for the tax position advised for any arrangements that you recommend to clients by:

- identifying accurate relevant and material facts (not just accept assumed or instructed facts without prudent questioning)
- analysing relevant legal authorities for points of law, including both
  - ordinary provisions and anti-avoidance rules
  - appropriately considering both positive and negative positions.

Understand the facts of arrangements that you are marketing or recommending to clients and others when you make use of public, private or oral rulings to support your advice.

The promoter penalty laws are not restricted to widely offered schemes. They can even apply where there's only one client in an arrangement.

The **promoter penalty laws** guide will help you understand the promoter penalty laws further.

Practice staff

The behaviour of your staff may increase your exposure to promoter penalty risks.

It's important to ensure staff give balanced and independent advice to clients. They also need to explain the tax risks and consequences of an arrangement.

Case study

Alex is a registered tax agent. He's provided tax planning advice for many years to Carl, a plumber with his own business.

This year, Alex tells Carl they have identified an area of the law where there is room to manoeuvre. Alex states they can design a structure for Carl, to minimise his tax, for an extra fee.

Alex has transitioned from merely providing advice to advocating an arrangement. If Alex is considered as having designed and sold a tax exploitation scheme, we may now consider Alex to be a promoter and exposed to promoter penalty laws.

Clients

Clients who have an appetite for high-risk arrangements and unlawful tax or super schemes may increase the level of risk to you and your firm.

You may need to reconsider your connection with any clients who:

- insist on entering arrangements where the risk is one you are not comfortable with
- won't take your advice and insist you make claims in their return that deliberately avoid or evade tax.

You should consider whether these connections are worth the potential penalties, and risks to your reputation and integrity.

If a client asks about involvement in a scheme

Your clients may ask you about minimising tax through tax-effective schemes or structures. They may ask you to complete a tax return based on advice they obtained from another adviser or scheme promoter.

You can help your clients avoid penalties or tax debts by explaining the difference between legitimate tax minimisation and abusive tax avoidance and evasion schemes. You can help protect your clients from losing their retirement savings and avoid serious penalties by explaining to your clients how an arrangement affects their SMSFs and whether they contravene the tax and super laws.

You should advise your clients that:

- it's their responsibility to take reasonable care in complying with their tax and super obligations
- if involved in an unlawful tax or super scheme, they may be liable for the tax they avoided, plus penalties and interest
- if involved in a super scheme they may risk losing some or their retirement savings
- as a professional registered tax agent, you have a responsibility to exclude any false or misleading claims from their return.

If you think a client may be involved in a scheme, either inadvertently or otherwise, you should encourage them to make a **voluntary disclosure** to us. This may help them to avoid or minimise potential penalties for any tax shortfalls.

For more information, see:

- **Report schemes and promoters**
- **Recognising, rejecting and reporting tax avoidance**
- **Schemes targeting SMSFs**
- **Making a tip-off**
- **Report fraud, phoenix, tax evasion, shadow economy activity, or unpaid super**

Report schemes and promoters

How to report tax avoidance or tax evasion schemes and promoters confidentially to the ATO.

Last updated 22 August 2024

On this page

Ways to report

You can report an unlawful tax or super scheme, and a promoter of these schemes confidentially by:

- completing the **tip-off form** on our website or in the **ATO app** 'contact us' section
- contacting us on **1800 060 062**.

Details to prepare

If possible, you should include the following information:

- details of the scheme
- name and contact details of the adviser, intermediary, facilitator or promoter
- any other relevant information, such as promotional material, cost of the scheme, tax advice provided.

What to do if you're offered a scheme

If you are offered an unlawful tax or super scheme, you should reject it and then report it to us. You should also contact us if you:

- think you are involved in an unlawful scheme

- have concerns about an investment scheme or a promoter.

Taxpayers who disclose their involvement in an unlawful scheme could be eligible for a reduction in penalties.

If you suspect that you have already entered into an unlawful tax or super scheme, please contact us to correct your position and mitigate your exposure to interest and penalties.

Find more information on **making a tip-off** and making **voluntary disclosures in the approved form.**

QC 33634

SMSF schemes

Describes schemes targeting Australians to inappropriately use an SMSF.

Last updated 6 March 2025

On this page

[Asset valuations]
[Multiple SMSFs]
[Inappropriate use of reserves]

An SMSF is a trust generally run for the sole purpose of providing retirement benefits to its members. Generally, it's illegal for anyone to benefit from the SMSF outside this arrangement.

Individuals are being targeted to start an SMSF for a range of inappropriate and illegal reasons, such as:

- to obtain a present day benefit for the individual or a different party
- to steal superannuation from the individual
- to convince someone to move their super from an APRA fund to an SMSF so that they can access their super before a condition of release is met
- to convince someone to invest their super money into a fraudulent investment.

You may risk losing some or all of your retirement savings and receive serious penalties if you enter into a scheme. You could also be disqualified as a trustee of your SMSF which could result in your fund being wound up.

Don't be tempted by 'too good to be true' schemes and risk your retirement savings. We encourage you to seek independent advice from a financial adviser who has no connection to the scheme before you commit to any arrangements.

You should consider how arrangements you enter affect your SMSF and whether they contravene the tax and super laws. A key issue in many SMSF's are transactions involving parties who are familiar to you and the consequences of not dealing on an **arm's length** basis.

Where you purchase business interests - whether they be property, a share in a business or similar structure, you should always check that your acquisition is at arm's length by obtaining an independent valuation at the time of the transfer.

How to recognise and avoid schemes

Anyone can be a promoter of an unlawful tax scheme. Recognise these **warning signs**, especially in the following arrangements:

- **illegal early release** schemes that encourage people to set up an SMSF and use their super benefits for personal purposes
- **tax avoidance schemes** encourage people to channel money inappropriately into their SMSF to avoid paying tax.

Avoid making an investment that could result in illegal consequences, by:

- seeking financial advice in relation to setting up an SMSF and about investments
- recognising a potentially illegal scheme
- ensuring your advice is coming from an individual who is a registered financial advisor
- getting independent valuations appropriate to the type of asset you're investing in.

We also recommend tax professionals report tax avoidance schemes that are marketed to them to **protect their clients** and their practice.

Promoters

Some promoters will look for new ways to exploit the law or changes in the law. They will promote schemes to people and promise benefits that aren't legally available.

We actively monitor promoter behaviour and act against promoters through application of the promoter **penalty laws**.

How to recognise a scheme

Schemes have some common features, they:

- are artificial or contrived arrangements with complex structures around an existing or new SMSF
- involve seemingly unnecessary steps or transactions
- invariably sound 'too good to be true' and they generally are.

If you've been approached by a promoter

Be aware of individuals who do not hold a financial license and promote schemes in their own right or on behalf of a business that also does not hold a financial license. You should check the ASIC financial register to make sure the person or business you are dealing with has a financial license.

Make sure you are receiving ethical professional advice when undertaking retirement planning. You should seek a second opinion from a trusted, licensed and reputable expert, especially if you are in any doubt.

If you think you've been approached by a promoter or caught up in a scheme, **contact us** immediately so we can help you.

Be aware of these schemes

SMSF-related schemes of concern to be aware of:

- Property
- Illegal early access
- Non-concessional cap manipulation
- Dividend stripping
- Limited recourse borrowing arrangements (LRBA)
- Personal services income
- Mezzanine lending
- Asset protection schemes
- Asset valuations
- Multiple SMSFs
- Inappropriate use of reserves

Property

The following schemes relate to SMSFs and property.

Residential property purchased through illegal SMSF schemes

These schemes often target first home buyers wanting to enter the Australian property market to purchase a house and land package.

These schemes may be structured differently, but typically involve the:

- set up or use of an SMSF
- rollover of a member's super benefits from an existing fund to the SMSF
- SMSF investing in a property trust (an unrelated unit trust) for a fixed period and rate of return, being a contributory fund with other investors
- on-lending of money by the property trust to individuals to help them purchase real property, secured by mortgages over the property.

Once the investment is in place, the member gains access to money from a third-party entity to help finance the purchase of residential property under an arrangement commonly referred to as a 'loan'. Depending on the scheme, this money is used for:

- all or part of the deposit
- the balance of the purchase price
- costs related to the purchase.

In some cases, the money is also used to help consolidate the member's personal debts to help them secure a home loan.

In return for a high fee paid by the fund, the scheme promoter commonly helps by:

- establishing the SMSF and the property investment
- organising the purchase of the property, including the payment of the deposit and home loan.

These schemes are established and promoted to look like a genuine SMSF investment to help individuals purchase a home.

However, they often contravene one or more of the super laws, which may give us reason to view the SMSF as:

- a 'sham' and not a legitimate super fund
- providing a member with a current day benefit

- set up and maintained in a way that doesn’t comply with the sole purpose test.

The arrangement may also involve the:

- **illegal early access of super** benefits by members
- giving of financial assistance to a member using the resources of the fund
- provision of a 'loan' to a member to help them buy a home (if a genuine 'loan', will be an in-house asset of the fund).

To determine whether a scheme gives rise to a contravention of the super laws, we will take a 'look-through' approach and consider the arrangement as a whole.

If SMSF monies are used to help purchase a house for a member or a relative to live in through investments in other entities, this may be treated as illegal early access of super benefits. The amount may be included in the member's assessable income and taxed at their marginal rate, With the potential for tax shortfall penalties to also apply.

The trustee will have contravened one or more of the super laws and serious penalties may apply. The trustee may be:

- personally liable to pay an administrative penalty
- disqualified from acting as trustee.

If trustees are involved in a scheme like this, they should make a voluntary disclosure, see **SMSF early engagement and voluntary disclosure service**. We will take this into account when determining any penalties that may apply.

If you're approached by promoters or think you're involved in a scheme you can **report it** to us confidentially.

Related-party property development ventures

Property development in associated joint venture structures may result in substantial profits for the SMSF, especially if related group entities provide most of the services without adhering to arm's length market values. This results in profits disproportionately attributed to the SMSF compared to the capital contributed.

Whilst an SMSF can invest directly or indirectly in property development ventures, extreme care must be taken.

Some arrangements can result in significant income tax and superannuation regulatory risks, potentially including the application of the NALI provisions and breaches of regulatory rules about related party transactions.

In May 2023, we published a Taxpayer Alert (TA) on these types of arrangements and how we are actively reviewing them.

For more information, see:

- TA 2023/2 *Diverting profits of a property development project to an SMSF, through use of a special purpose vehicle, involving non-arm's length arrangements*.
- SMSF Regulator's Bulletin SMSFRB 2020/1 *Self-managed superannuation funds and property development*.

Residential property purchased in a member's name

This is where an SMSF is set up to help members buy residential property in their personal name. These schemes often target first home buyers wanting to enter the property market.

Legal life interest of property

This happens when an SMSF member or other related entity grants a legal life interest over commercial property to a SMSF. This means the rental income diverted to the SMSF is taxed at a lower rate without full ownership of the property ever transferring to the SMSF.

Illegal early access

Illegal early access schemes encourage you to withdraw your super before you're legally entitled to.

Beware of people promoting early access schemes. They might tell you they can help you set up a SMSF to withdraw your super and use it to pay for personal expenses.

Non-concessional cap manipulation

This occurs when SMSF members deliberately exceed their non-concessional contributions cap to manipulate the taxable and non-taxable components of their superannuation account balances.

Dividend stripping

When shareholders in a private company transfer ownership of their shares to a related SMSF, the company can pay franked dividends to the SMSF and strip profits from the company in a tax-free or concessionally taxed form.

For more information, see TA 2015/1 *Dividend stripping arrangements involving the transfer of private company shares to a self-managed superannuation fund*

Limited recourse borrowing arrangements (LRBA)

The following schemes relate to LRBAs.

LRBA and arm's length dealings

SMSF trustees undertaking LRBA and related party lending arrangements that are not consistent with a genuine arm's length dealing.

LRBA and intra-group lending arrangements

Any lending arrangements which involve an SMSF, whether directly via an LRBA or indirectly through an associated entity that can benefit an SMSF, must be on terms equivalent to those commercially available to people in similar lending circumstances.

Any variation of these terms may include but are not limited to:

- the risks being taken by the lender
- interest rates
- terms of repayment.

Increasing SMSF balances and profits to the SMSF through below-market value interest payments are of particular interest to the ATO when conducting reviews into Non-arm's length income matters.

Personal services income

This occurs when an individual (with an SMSF often in pension phase) diverts income earned from personal services to the SMSF to be concessionally taxed or treated as exempt from tax.

For more information, see TA 2016/6 *Diverting personal services income to self-managed superannuation funds*.

Mezzanine lending

Lending by the SMSF with complex intra-group lending arrangements that provides both finance and asset protection. While the intra-group entities bear the risk, the SMSF receives all of the profit from the arrangement.

Asset protection schemes

Arrangements that claim to protect SMSF assets from creditors by mortgaging them to an asset protection trust (known as a 'Vestey Trust') present a compliance risk.

A Vestey Trust is a discretionary trust established by deed. It is claimed that the trust is set up to acquire the equity in the SMSF's assets through an equitable mortgage.

The mortgage is supported by a promissory note executed by the SMSF to the Vestey Trust. This recognises a debt is owed by the SMSF to the Vestey Trust. The mortgage is also supported by a caveat by the Vestey Trust over the SMSF's real property. The arrangement can also allow a transfer of the SMSF's cash holdings to a bank account in the name of the Vestey Trust.

Some asset protection schemes concern us because:

- First, the arrangement is unnecessary because the super system already protects SMSF assets from creditors.
- Second, the arrangement is a compliance risk and may contravene one or more super laws. For example, it may:
  - result in the giving of a 'charge' over, or in relation to, a fund asset by the SMSF trustee
  - involve the 'borrowing' of money by the SMSF trustee

  - expose fund assets to unnecessary risk if it's not clear who owns them
  - cause the fund to be maintained in a way that doesn't comply with the sole purpose test.
- Finally, SMSF money cannot be used for costs related to asset protection arrangements entered into by members to protect their personal or business assets because these expenses are not incurred in running the SMSF.

If the arrangement contravenes the super laws, penalties may apply.

If trustees are involved in a scheme like this, they should **make a voluntary disclosure**. We will take this into account when determining our compliance action.

Asset valuations

Where asset valuations are not fit for purpose and are being applied to the intra-group transfer of assets. The assets are being transferred to the SMSF at lower values than they're worth.

Multiple SMSFs

Improper use of multiple SMSFs can become a compliance issue when additional funds are established to manipulate tax outcomes. For example:

- switching the respective funds between accumulation and retirement phase
- rolling over potentially tainted NALI funds into a new SMSF to avoid possible reviews and amendments by us.

Inappropriate use of reserves

Many existing reserves in SMSFs arose legitimately from legacy pensions that are no longer available. Consequently, there are limited appropriate circumstances where new reserves could be established and maintained in SMSFs. Structures using reserves designed to bypass super balance and transfer balance cap measures will attract our scrutiny.

For more information, see SMSF Regulator's Bulletin **SMSFRB 2018/1** *The use of reserves by self-managed superannuation funds*.

QC 49657

Our commitment to you

We are committed to providing you with accurate, consistent and clear information to help you understand your rights and entitlements and meet your obligations.

If you follow our information and it turns out to be incorrect, or it is misleading and you make a mistake as a result, we will take that into account when determining what action, if any, we should take.

Some of the information on this website applies to a specific financial year. This is clearly marked. Make sure you have the information for the right year before making decisions based on that information.

If you feel that our information does not fully cover your circumstances, or you are unsure how it applies to you, contact us or seek professional advice.