

NTLG Superannuation Sub Committee minutes for 8 May 2006

Meeting details

Venue: Conference Room – Ground Floor

Moonee Ponds, Melbourne

(Meeting commenced at 9.30am and finished at 2.30 pm)

Chair: Stuart Forsyth



Please note: National Tax Liaison Group Superannuation Sub Committee agendas, minutes and related papers are not binding on the ATO or any of the other bodies referred to in these papers. While every effort is made to accurately record views expressed, the wording necessarily represents a summary of statements of general position only, and care should be taken in interpreting those statements. These papers reflect the position at the date of release (unless otherwise noted) and readers should note that the position on any issue may subsequently change.

Attendees

Name	Representing	Name	Representing
Andrew Allan	ATO	Tony Keir	ASFA
Helen Brady	IFSA	Andrew Lee	ATO
Stuart Forsyth	ATO	Robert Jeremiah	SISFA
Peter McGinty	NTAA	Kevin Nichols	SPAA
Emma Haines	ATO	Susan Orchard	ICAA
Merrie Hennessy	APRA	Michael Perry	TA
Philip Russell	ASIC	David Shirlow	IFSA
Liz Goddard	TIA	Mary Simmons	ATO

Apologies

Name	Representing	Name	Representing
Robert Hodge	ASFA	Reece Agland	NIA
Andrea Slattery	SPAA	David Kettlestring	ATMA
Michael Davison	CPAA	Jennifer Batrouney S.C.	LCA
Deborah Wixted	IFSA	Martin Heffron	TIA

Secretariat

Guest Speakers:

Professional bodies represented at the National Tax Liaison Group Superannuation Sub Committee

Association of Super Funds Australia	ASFA
Australian Securities & Investments Commission	ASIC
Association of Taxation and Management Accountants	ATMA
Australian Prudential Regulation Authority	APRA
CPA Australia	CPAA
Institute of Chartered Accountants in Australia	ICAA
Investment and Financial Services Association	IFSA
Law Council of Australia	LCA
National Institute of Accountants	NIA
National Tax and Accountants Association	NTAA
Small Independent Superannuation Funds Australia	SISFA
SMSF Professionals Association of Australia	SPAA
Taxation Institute of Australia	TIA
Taxpayers Australia TIA	TA

Agenda Summary

1. Acceptance of minutes from the 8 February 2006 meeting
2. Procedures for distribution of draft Minutes
3. Update on recently published and withdrawn Rulings, Practice Statements and ATOIDs
4. Action Items from the Previous Meeting
5. Technical Issues Raised By Members for this Meeting
6. Transition to retirement, salary sacrifice and deductions for personal superannuation contributions strategies discussion
7. RBL interpretive work
8. Regulator's determination re: section 66 SIS Act and marriage breakdown
9. New Superannuation Rulings
10. Other Business
11. Post meeting phone hook up
12. Proposed Date For The Next Meeting

[Attachment 1](#)

Agenda item 3: Update on recently published and withdrawn Rulings, Practice Statements and ATOIDs

[Attachment 2](#)

Agenda item 4: Action items from the previous meeting (Action Item NTLGSSC0602/04)

Summary of Attachments

[Attachment 1:](#)

New and Withdrawn ATOID'S, Rulings, Litigation,

[Attachment 2:](#)

List of Action Items

Action Item NTLGSSC0510/04: ICAA to formalise comments on product rulings and include a copy of any examples in the submission and send it to secretariat.

Action Item NTLGSSC0605/01: Members to provide Tax Office with questions to be resolved regarding the in house assets test leading up to 2009 as the basis for the formation of a working party at the next meeting.

Action Item NTLGSSC0605/02: Tax Office to refer the issue of the interaction of the operation of the \$10 rounding rule and the 10% tolerance used to determine the amount of a market linked income stream to the Superannuation Consultative Committee.

Action Item NTLGSSC0605/03: NTLG Superannuation subcommittee secretariat to refer the issue of PAYG reporting requirements to the Superannuation Consultative Committee for their information.

Action Item NTLGSSC0605/04: NTAA to provide more specific examples of in specie distributions from a unit trust that are causing problems so that a more detailed response can be provided.

Action Item NTLGSSC0605/05: Tax Office and APRA to resolve the differences in wording between the interpretation of 'retirement' in the documents 'Superannuation Contributions Splitting Application – Instructions' and APRA Circular I.A.1.

Action Item NTLGSSC0605/06: ICAA to provide further details and examples that illustrate the alternative approaches that have been debated within the superannuation industry as to the need to revalue assets for benefit/RBL purposes.

Action Item NTLGSSC0605/07: Members to provide feedback to the Tax Office on the hypothetical scenarios around transition to retirement, salary sacrifice and additional super contributions.

Action Item NTLGSSC0605/08: Members to provide comments on reversionary pension discussion paper by 9 June.

Agenda items

1. Acceptance of minutes from the 8 February 2006 meeting

The Minutes were accepted without amendment.

2. Procedures for distribution of draft Minutes

It was agreed that draft Minutes would in future be circulated to members prior to publication, with a 48 hours turnaround for comments. It was agreed not to wait until the Minutes had been accepted at the next meeting to publish them.

3. Update on recently published and withdrawn Rulings, Practice Statements and ATOIDs

A list of recently published and withdrawn Rulings, Practice Statements and ATOIDs was provided to the Sub Committee. See [Attachment 1](#).

The Tax Office indicated that this list may also be used to record appeal cases that are on the public record.

4. Action Items from the Previous Meeting

Action Item NTLGSSC0510/01: Tax Office to advise whether a pension may be paid by an in specie transfer of assets.

Complete

Tax Office response: The Tax Office agrees with the view expressed by APRA in Circular No. I.C.2 which states "a benefit is cashed when the beneficiary accepts the money (or, in the case of lump sums only, other assets representing the benefit), banks a cheque which is subsequently honoured or receives a credit by way of an electronic transfer from a fund in payment of benefits".

We believe the statement reflects the ordinary meaning of the word "cashed", which according to the relevant Macquarie Dictionary is "to give or obtain cash for (a cheque etc)". Therefore, there is a presumption arising from the use of that word "cashed" that a benefit, whether given in the form of a pension or lump sum will be paid in money (or money equivalent such as a cheque or electronic funds transfer). The Tax Office accepts that the definition of "lump sum" in regulation 6.01 modifies the ordinary meaning of "cashed" where a benefit is paid as a lump sum. In that case, an asset may be provided (subject to the cashing restrictions on the payment of lump sums in Schedule 1 to the Regulations). However, there is no equivalent modification relevant to the payment of pensions.

Meeting discussion

Members stated this approach may unnecessarily increase transaction costs for funds because it requires assets to be sold and cash paid to members who would be happy to accept the asset in payment of the pension.

The TIA indicated that it is preparing a submission for consideration by the Tax Office and Treasury on the matter. The matter may be reconsidered once that submission is made.

Action Item NTLGSSC0510/04: ICAA to formalise comments on product rulings and include a copy of any examples in the submission and send it to secretariat.

Still to be provided.

Action Item NTLGSSC0602/01: Tax Office to provide an update of their consideration of the post-death tax exemption issue at May 2006 meeting.

The Tax Office indicated that they still had further work to do on this issue. However, the Tax Office clarified that what was being considered was whether there were any practical administrative approaches that could minimise the administrative and compliance difficulties arising from a strict application of the provisions. The Tax Office was not reconsidering the interpretation of the law. The members indicated that they were not currently experiencing difficulties with this issue in the context of Tax Office audits.

Action Item NTLGSSC0602/02: Tax Office to advise at the May 2006 meeting whether it proposes to prepare a product to explain rebatable proportion calculations for pensions purchased with 100% undeducted contributions, and if so, to advise of progress.

Complete

It was agreed at the meeting that an interpretive product was not necessary; however a clarifying statement in the Minutes would be useful.

The Tax Office clarifies that where a pension is purchased with 100% undeducted contributions, it remains reportable for RBL purposes under section 140M ITAA 1936. Where the RBL amount of that pension is calculated as zero and the benefit is not in excess of the person's RBL in accordance with the formula in 140ZA(3) ITAA 1936 then the Commissioner will make a determination that the benefit is not in excess of the person's RBL and the rebatable proportion of that pension will be 1.

Action Item NTLGSSC0602/03: Tax Office to provide an update at the May 2006 meeting on progress of reversionary pension and RBL interpretive products development.

Complete: [See Agenda item 7](#): RBL interpretive work

Action Item NTLGSSC0602/04: The NTAA agreed to provide a more detailed submission to the Tax Office in respect of the issue of water rights as business real property.

Complete: Submission has been provided and is attached to these Minutes for the information of all members. The Tax Office will consider this submission in the context of developing a new product on business real property – see [agenda item 9](#) New Superannuation Rulings.

Action Item NTLGSSC0602/05: Tax Office will consider whether an unpaid trust distribution from a trust is to be treated as a reinvestment in the trust for the purposes of the in-house asset rules.

Complete

Where a trustee holds an unpaid trust distribution amount as a separate (bare) trust awaiting instruction from the beneficiary as to how the amount should be dealt with, the amount will not be treated as a reinvestment for the purposes of the in-house asset rules. The Tax Office will accept there is a separate bare trust for the unpaid distribution if it is clear that there is an independent and identifiable fund held quarantined from other fund assets. This may require a separate bank account.

However an unpaid trust distribution will be a reinvestment in the original trust for the purposes of the in-house asset rules where the unpaid trust distribution amount is dealt with or otherwise used by the trustee of the trust in the operations of that trust.

There were further issues relating to the in-house asset rules discussed, especially those leading up to the final date of 2009. Refer to Action Item [NTLGSSC0605/01](#).

Action Item NTLGSSC0602/06: Tax Office and APRA are to clarify the interaction of the operation of the \$10 rounding rule and the 10% tolerance used to determine the amount of a market linked income stream.

Complete

The Tax Office and APRA agree that clause 8 operates after the operation of clause 4, so that the 10% spread operates in relation to an amount that has already been rounded to the nearest 10 dollars. There are two reasons for this:

1. the different language employed in clauses 4 and 8 suggests that clause 4 is an inherent part of the calculation of an amount in accordance with clause 1, whereas clause 8 provides that an amount will be taken to have been calculated under clause 1 if it falls within the parameters identified in clause 8;
2. if there is any ambiguity regarding the interpretation of the provision, the Explanatory Statement can be relied upon. The Explanatory Statement is clear on the issue – an amount will be taken to have been calculated in accordance with Schedule 6 if it is within 10% of an amount determined under clauses 1 and 4.

The ES states:

'The provision allows flexibility in determining the payment amount for a year, provided the total payment is within the bounds of plus or minus 10 per cent of the rounded amount determined under clauses 1 and 4 of Schedule 6.'

The NTLG Superannuation Subcommittee secretariat has referred this issue to the Superannuation Consultative Committee to consider whether a practical administrative view could be adopted so that systems do not have to be changed if they have not been built to operate this way. Refer to Action Item [NTLGSSC0605/02](#).

Action Item NTLGSSC0602/07: Subject to confirmation within the Superannuation Business Line, the Tax Office will forward the matter of disclosure of private information by employees to employers to the TIMS Committee for consideration.

Complete: Issue referred to TIMS for consideration at TIMS meeting of 24 May 2006.

Action Item NTLGSSC0602/08: The Tax Office will forward the submission on SHAA release of funds to retired persons under age 65 to the TIMS Committee for consideration.

Complete: Issue referred to TIMS for consideration at TIMS meeting of 24 May 2006.

Action Item NTLGSSC0602/09: The Tax Office will forward details concerning the potential determination in relation to section 66 and marriage breakdown to the Sub Committee representatives for comment.

A draft legislative instrument and explanatory statement were circulated to representatives on 30 March 2006. See [Agenda item 8](#) - for discussion at meeting.

5. Technical Issues Raised By Members for this Meeting

5.1 PAYG reporting requirements for SMSFs - Susan Orchard (ICAA)

Where an SMSF pays a lump sum it is required to withhold tax on payments. However many payments are under the tax free threshold or are undeducted contributions. In the past the fund submitted the ETP & RBL notification & no further action was required. However, in the last 2 years the ATO has changed its policy to require these funds to register for PAYG and lodge annual PAYG & Quarterly IAS. This is 5 lodgements a year where there may not be any transactions. Funds should only need to register where tax is to be withheld & should be able to report where this is solely for a lump sum, so annual payment summary is the only requirement unless a lump sum is taken.

Tax Office response

Registration and quarterly and annual reporting for PAYG withholding are legislative requirements contained in Part 2-5 in Schedule 1 to the Taxation Administration Act 1953 (TAA 1953). There are administrative penalties for failure to register and failure to comply with the reporting requirements.

The legislation only requires registration where an amount has been withheld from a withholding payment (such as an eligible termination payment, pension or annuity). Once registered the issuing of activity statements will be triggered. SMSF would be advised to register for PAYG withholding just prior to when they would actually be required to withhold from a payment. SMSFs who will not have any future withholding obligations should contact the Tax Office to cancel their PAYG withholding registration.

SMSF are only required to report PAYG withholding amounts on their quarterly activity statements where they have made a withholding payment (that is, a payment of an ETP, pension or annuity) during the relevant quarter. This reporting would still be required even if the amount to withhold from that payment worked out to be nil (for example, if it were under the tax-free threshold). This requirement to report even where a nil amount was withheld is a specific inclusion in the legislation and the Commissioner does not

have discretion to vary this reporting requirement. If the SMSF made no withholding payments during the quarter then there is no requirement to complete the activity statement for that quarter.

However, an option that is available to an SMSF in respect of lodging quarterly activity statements is the Tax Office Business Self Help service on 13 72 26 (available 24 hours, seven days a week). This service allows the lodgement of a 'nil' activity statement over an Automated Telephony Service. The SMSF would require their ABN and document identification number (DIN) from the activity statement to use the automated service however it removes the need for the statement to be completed on paper and forwarded to the Tax Office

Action Item NTLGSSC0605/03: NTLG Superannuation subcommittee secretariat to refer the issue of PAYG reporting requirements to the Superannuation Consultative Committee for their information.

5.2 ATO administration of RBL reporting and s 140K - (TIA)

Section 140K of the Income Tax Assessment Act 1936 specifies the circumstances in which a previously received Eligible Termination Payment (ETP) or superannuation pension will be taken into account in determining whether a new benefit will be in excess of the recipient taxpayer's reasonable benefit limit.

Section 140K (c) states that if the previously received benefit was a superannuation pension (or an annuity), it will only be taken into account in determining whether the new benefit is in excess of the relevant RBL if the "commencement day" of the previous pension occurred before the day on which the new benefit is paid or pension commenced.

However, our understanding is that if two pensions were reported to the ATO as having been commenced on the same day, it is current ATO practice to treat one of the pensions as having a "commencement day" before the other. In this way the pension that is assumed to have the earlier "commencement day" is taken into account in determining whether the second pension is in excess of the recipient's RBL.

Would the ATO please confirm the above practice and advise on what basis this practice is considered to be consistent with s. 140K?

Would the ATO please provide guidance on how it decides which of the two pensions it treats as having the earlier commencement day?

Tax Office response

The clear underlying intent of these provisions is that each person is entitled to the relevant Reasonable Benefit Limit and that all applicable benefits should be taken into account. Our current practice is to treat one of the pensions with the same commencement time under s. 140J as a previous benefit of the other pension. We believe this is consistent with the intended objects or aim of the RBL division. On this basis it becomes necessary to identify one of the pensions as a benefit that is previously received. Our practice is designed to be consistent with the clear policy intent.

Benefits with the same payment day/commencement day will be determined in the order that gives the taxpayer the most favourable outcome. If the two pensions were pensions that did not meet the pension and annuity standards then they would be determined in the order they were reported.

Meeting discussion

Members indicated that there may cases where that outcome is not achieved in some cases simply because the relevant forms are processed separately. The Tax Office indicated this might be a matter to be input into on-going reviews of the administration of the RBL system.

5.3 SMSFs underpaying superannuation pensions Andrew Gardiner (NTAA)

Where an SMSF makes insufficient pension payments in an income year (i.e. below the minimum pension amount) will the ATO treat this as a breach of the SIS Act and Regulations that may lead to an auditor qualifying an audit report? Normally any payments that exceed the maximum pension payments are treated as an ETP in the hands of the member, but there is no guidance on the reverse situation. It appears that funds are simply making 'top up' payments in subsequent years as a method for rectifying the shortfall.

Tax Office response

The consequences of a superannuation fund paying an amount that is less than the minimum amount for an allocated pension, or the amount that is determined in relation to a market linked pension will depend upon the actual circumstances of the particular case. Any decision can only be made on a case-by-case basis.

Key considerations in making any decision are:

- what are the rules of the fund regarding the payment of benefits and the form in which or the type of benefit that may be paid under those rules;
- is there any contravention of the payment standards in Part 6 of the SIS Regulations;
- the underlying reasons for the failure to pay the required minimum amount or amount required for a market linked pension;
- is the failure merely a once-off occurrence (incidental behaviour) or is this failure to pay the required amount recurrent (systemic behaviour);
- regard has to be had to whether the failure to make the required amount of payments is due to insufficient cash flow or due to the nature of the investments held by the fund. The latter may well amount to a contravention of the covenants set out in section 52 of the SIS Act;
- whether there are other factors which may explain the reason for the underpayment;
- the covenants are not operating standards;
- the standards that are set out in subregulation 1.06(4) for allocated pensions and subregulation 1.06(8) for market linked pensions are not operating standards;
- does the payment of the amount(s) lead to the finding or conclusion that there is the payment of a pension according to common law.

5.4 In specie distributions from a unit trust to an SMSF - Andrew Gardiner (NTAA)

As a general proposition, an SMSF can invest in, and receive income distributions from, a related unit trust provided the restrictions contained in Division 13.3A of the Superannuation Industry (Supervision) Regulations ("SIS Regs") are satisfied.

However, an anomaly appears to arise in relation to in-specie distributions that are received by an SMSF from related trusts which are mentioned above.

In particular, it appears that the in-house assets rules apply where a related unit trust (which satisfies the conditions in Division 13.3A of the SIS Regs) makes an in-specie distribution to an SMSF unitholder. Such a situation appears to arise because the exclusions which apply under Division 13.3A only make reference to the SMSFs investment in the unit trust and no mention is made to any in-specie distributions being received from the aforementioned trust.

It is therefore possible for an SMSF to invest in a related unit trust which is excluded from the in-house asset rules, and receive in-specie distributions from the trust which would appear to breach the investment restrictions contained in S.66 of the SIS Act.

We therefore seek clarification on whether our interpretation is correct. If so, would the Government consider amending the regulations to overcome the abovementioned problem?

Tax Office response

This will depend on the type of in specie distribution that is made by the unit trust.

In-specie distribution of additional units in the related trust

In some cases the acquisition will be allowed. However, these cases will be limited to cases where the self-managed superannuation fund does not already own all of the units in the trust and the trustee of the trust issues additional units in the trust or where the self-managed superannuation fund reinvests its entitlement to the trust income in the trust.

Provided that the requirements of Division 13.3A SIS Regulations are satisfied in such a case the exception in subparagraph 66(2A)(a)(iv) of the SIS Act will apply to the acquisition. That exception applies to an asset that is taken not to be an in house asset under paragraph 71(i)(j) which in turn links with Division 13.3A.

In-specie distribution of a unit trust's other assets

In this instance the general acquisition rules apply and the acquisition could only take place if unit was covered by an exemption in section 66 of the SIS Act.

Action Item NTLGSSC0605/04: NTAA to provide more specific examples of in specie distributions from a unit trust that are causing problems so that a more detailed response can be provided.

5.5 SMSFs conducting a business – property development and share trading Liz Goddard (TIA)

What is the ATO's general attitude on property development? In the view of the ATO, how far can an SMSF go in acquiring land, sub-dividing etc to build on and still retain its status as a complying fund? Would the size of the development make a difference (eg a 10 unit development, 30, 50 units)?

Is there an issue for the sole purpose test for an SMSF that gets into a significant amount of share trading?

Tax Office response

The ATO does not have a general attitude to property development as such; however SIS Act issues may arise depending on how the development occurs. The issues that may arise concern provisions such as section 66, acquisition of an asset from a related party, sections 82 and 83, excessive in house assets and section 109, investments of the fund not being at arm's length.

5.6 Business real property - Liz Goddard (TIA)

The business real property paper has never been finalised, and the TIA would appreciate an update on its status. There are many instances where vacant land is being developed into business real property. What use will the ATO accept in this regard? What would be the ATO's attitude to: a factory site being used for storage, or to a factory being built on the vacant land?

Tax Office response

The draft Circular on business real property will not be finalised. In relation to vacant land the draft stated:

'Vacant land

It is hard to envisage many business uses vacant land could be put to, other than where the land is the subject of an entity's business or perhaps in certain primary production activities.

Where an entity in primary production business (for example, dairy farming) agists their animals on land and the land is not used for non-business purposes, the land will qualify as business real property. The

reasoning being the real property (land) is being used wholly and exclusively in a business, which does not necessarily have to be a business carried on by the entity owning or possessing the real property.

For vacant land to be business real property in other circumstances, the fund must be able to demonstrate a sole and exclusive business use which the vacant land is being put to, to the exclusion of all other activities.'

5.7 ATO definition of retirement Susan Orchard (ICAA), Helen Brady (IFSA)

The ATO's interpretation of retirement for those aged over 60 would appear to be a lot stricter than APRA's. The ATO seem to be saying in their document (ATO Superannuation Contributions Splitting Application – Instructions) that once you have ceased a gainful employment relationship over age 60 you have 'retired' for SIS purposes and cannot therefore receive a contribution split. APRA circular I.A.1 states that contribution splitting will be fine for a spouse who is over their preservation age if, at the time the application is made, the spouse is:

- currently employed more than 10 hours per week; or
- not currently employed but has not yet decided that they will never work more than 10 hours per week again; or
- has never been employed more than 10 hours per week (presumably because people in this position can never access their super under the 'retirement' condition)

This seems to be a fundamental difference.

Tax Office response

Update as at 23 June 2006: The ATO accepts that the view as set out in APRA circular No. I.A.1 is consistent with the policy intent behind 'contributions splitting' and will administer this measure in accordance with the APRA view.

Action Item 0605/05: Tax Office and APRA to resolve the differences in wording.

5.8 RBL reporting for partial commutations - Robert Hodge (ASFA)

ASFA members have reported that the ATO is requiring funds who report a partial commutation to also report the residual pension as akin to the commencement of a new pension. There are concerns that this may lead to an anomalous situation giving rise to an excessive component for RBL purposes.

Background material

Consider the following scenario, in respect of the required reporting to the ATO for RBL purposes.

17/12/98 - Rollover into SF, to commence an allocated pension, all pre/post components, \$400,000

18/5/00 - Commutation drawn of \$10,000 (the then market value of the balance remaining in the pension a/c was \$600,000)

17/4/01 - Commutation drawn of \$8,000 (the then market value of the balance remaining in the pension a/c was \$650,000)

The original pension product continued as per normal, after each of the two partial commutations (i.e. there was no internal rollover or change in the rules of the ongoing pension). This means, in ASFA's view, the present pension being drawn is being paid from the original pension balance of \$400,000.

However, the ATO is requiring that (for example) the 17/4/01 commutation be reported as a commutation of \$8000 and also as the commencement of a pension with a purchase price of \$650,000, which is in excess of the lump sum RBL.

Issue

ASFA is concerned that if the ATO enforces their reporting requirement it could result in a very small commutation triggering an excess benefit assessment, even though the original pension balance was within the member's RBL and there has been no full commutation.

ASFA understands, and accepts, that it is intended that an RBL excessive component may emerge where there is a full commutation and rollover to new pension. However we do not believe that it was intended that an excessive component could arise within the same pension as a result of small commutations. It is ASFA's understanding that a partial commutation does not result in a new pension being created.

Furthermore, it is ASFA's understanding that very few funds are preparing RBL reports for partial commutations in the manner suggested by the ATO.

If the ATO are going to apply their specifications in this way, and it has the potential to give rise to an excessive component, this needs to be communicated clearly to all funds by the ATO, so that all of the industry adopts a consistent approach. Additionally, financial planners need to be advised of this. Planners are currently telling fund pensioners that it is ok to obtain a small lump sum in this way.

Questions

1. When the RBL data is received by the ATO in the above situation will this give rise to an excessive component for RBL purposes or does the ATO have processes in place that recognises that this is really the continuation of an existing pension?
2. Does the reporting requirement and the ATO process correctly interpret the relevant law?

Tax Office response

The Tax Office confirms that when a residual pension is reported the amount is not counted against the RBL. The Tax Office agrees that the law does not require reporting in these circumstances, but accepts that Tax Office practice has been to require it.

5.9 Reporting - Helen Brady (IFSA)

Confirm that the ATO has no intention to require additional or specific reporting in respect of contributions splitting (in line with this, ATO to advise whether the MCS specifications and standard rollover form will be changed to reflect the current law reducing reporting items related to contributions or whether they have requested or anticipate that the law will be changed to continue to require the same data as originally specified for combined surcharge and co-cont purposes).

Tax Office response

No, there is currently no requirement for a fund that is rolling over any amounts as a contributions splitting ETP or for the fund receiving it to report to the Tax Office any details about a contributions splitting ETP.

The Minister for Revenue and Assistant Treasurer announced amendments to the law in his Media Release of 3 February 2006 to require superannuation funds to report superannuation contributions by employers. The Tax Office understands that the information to be provided will be consistent with that previously reportable under the superannuation surcharge legislation.

5.10 Holding assets in the name of trustees - David Shirlow (IFSA)

In relation to holding assets (especially real property) in the name of the trustees of an SMSF (without reference to the trusteeship of the particular fund) – the Commissioner’s position appears to be that if the fund name does not appear on the registration of ownership of real estate, for example, then there should be a caveat lodged over the title. Surely if it is clear that fund assets have been used to acquire the property, the decisions relating to the acquisition have been appropriately documented and perhaps the contract refers to the trusteeship (in other words, there is sufficient supporting evidence that the property is a fund asset) there is no basis upon which to require a caveat to be lodged?

Meeting discussion

At the meeting members highlighted some practical difficulties with such a strict approach by the Regulator.

Tax Office response

The Tax Office’s statements in this area arose because there had been cases where liquidators and trustees in bankruptcy had sold superannuation fund assets in the liquidation or bankruptcy of the trustees of certain funds. The Tax Office’s statements are designed to ensure that trustees have sufficient evidence of the ownership of fund assets. The references to caveats and declarations of trust should be seen as examples of the evidence required, not the only evidence acceptable to the Tax Office.

5.11 In house assets and 52(2)(d) - Susan Orchard (ICAA)

There is some concern that an in house asset may lead to a breach of section 52(2)(d). This would arise as although the asset may be held in the name of the fund it is effectively controlled by a related party i.e. in the case of artwork. We require guidance as to when the ATO would consider a breach of 52(2)(d) in relation to in house assets.

Meeting discussion

The ICAA clarified that there was concern that simply having an in house asset itself would be a breach of paragraph 52(2)(d) of the Superannuation Industry (Supervision) Act 1993 by considering that the trustee was mingling assets of the fund with others.

Tax Office response

The Tax Office confirmed that having an in house asset would not be seen as an automatic breach of 52(2)(d).

5.12 Valuations of assets for benefit/RBL purposes - Susan Orchard (ICAA)

Where a fund invests in a unit trust (either arms length or non-arms length) which carries its assets at historical cost, is the fund required to consider the current market value of its assets when valuing for benefit/RBL purposes? One argument is that the revaluation must occur in order to comply with TD 2000/29 if it does not value its investment in the unit trust at market value. The opposing argument is that the unrealised appreciation/devaluation in the value of the assets of the related trust would be quarantined from the RBL calculation. This is based on an analysis of the interaction between the SIS Act, ITAA and accounting standards, and all available interpretive guidance.

We require unambiguous authoritative guidance in relation to this matter as there is a risk that advisers telling clients to revalue underlying trusts would be subjected to litigation where there is significant tax paid by the client and a later decision is that revaluation is unnecessary.

Tax Office response

For RBL purposes Schedule 2B of the Income Tax Regulations 1936 sets out what must be reported to the Commissioner. Amongst other things, the amount of an ETP paid, or the amount of an ETP rolled over to

purchase an allocated pension must be reported. If the ETP is not paid in cash, section 21 of the ITAA 1936 would operate to provide that the money value of the consideration will be deemed to have been paid or given. As well, TD 2000/29 makes it clear that where a fund holds assets that provide for the payment of a pension the assets must be valued at their net market value on the commencement day of the pension.

Meeting discussion

There are conflicting views within the superannuation industry as to whether there is an obligation to adopt a market valuation of a non-cash benefit paid using an asset held in the fund's accounts at historic cost. For example, it has been suggested that a trustee may not be acting in the best interests of a member of a fund if valuing the benefit provided resulted in a member exceeding their RBL. Further, if a market valuation is always required, there may be practical difficulties in valuing assets, particularly where an asset provided to a member does not have an easily identifiable market value as can happen with, for example, units in some unit trusts.

Action Item NTLGSSC 0605/06: ICAA to provide further details and examples that illustrate the alternative approaches that have been debated within the superannuation industry as to the need to revalue assets for benefit/RBL purposes.

6. Transition to retirement, salary sacrifice and deductions for personal superannuation contributions strategies discussion

The Tax Office has been asked whether the anti-avoidance rules would apply to strategies that involve commencing a transition to retirement pension, salary sacrificing 100% of salary and claiming a deduction for additional personal contributions. The Tax Office provided some hypothetical worked examples for discussion with the members to ensure that the Tax Office's consideration of the issues is based on realistic scenarios. The members were asked to provide feedback on these examples.

Action Item NTLG SSC 0605/07: Members to provide feedback to the Tax Office on the hypothetical scenarios around transition to retirement, salary sacrifice and additional super contributions.

Please refer to [Agenda Item 11](#): Post meeting hook up for an update.

7.RBL interpretive work

The Tax Office provided a list of potential interpretive products related to RBL issues for comment. Members were asked to participate in setting a forward program of work on RBL interpretive products including helping identify products that were necessary and helping to prioritise potential products.

IFSA provided comments stating that it would be a concern if the issues identified were to be researched exhaustively afresh by the Tax Office leading to a considerable delay in release of product. They also commented that their preference would be for the Tax Office to start drafting product on these issues on the basis of views it has already expressed (with the assistance of industry if required) given that the Tax Office has expressed views on these issues in the past.

The Tax Office also provided members with a discussion paper on the meaning of 'reversionary pension' which is expected to form the basis of a Taxation Determination. There was discussion at the meeting about how the proposed definition accorded with current industry practice and some concerns were raised that the discussion paper didn't represent current industry views.

Members were asked to provide comments within a month and following this the Tax Office would organise a phone hook up in 6 weeks with those who have commented to discuss.

Action Item NTLGSSC 0605/08: Members to provide comments on reversionary pension discussion paper by 9 June.

Please refer to [Agenda Item 11](#): Post meeting hook up for an update.

8. Regulator's determination re: section 66 SIS Act and marriage breakdown

The Tax Office provided a draft Regulator's Determination in relation to the application of section 66 of the Superannuation Industry (Supervision) Act 1993 to acquisitions by trustees of self-managed superannuation funds in cases of marriage breakdown for discussion and comment by the members. The draft Determination had previously been circulated to a smaller group of members for their comment.

There were no further comments provided at the meeting about the determination circulated. However the ICAA stated that they had asked both Treasury and the Tax Office for a section 66 determination to enable a self-managed superannuation fund to acquire an asset from an APRA regulated fund that is being split into two or more self-managed superannuation funds due to the introduction of the licensing regime for APRA regulated funds. No determination was made.

The Tax Office indicated that a request for a determination arising from the licensing regime was being considered.

9. New Superannuation Rulings

The Tax Office advised the members that they had been given approval to start a new Rulings series for Regulatory Rulings in relation the self-managed superannuation funds. As part of this the Tax Office is also establishing a group of consultants to work with, however whether they will meet as a Rulings Panel, or will advise in another way is yet to be finalised. As these consultants will be expected to work in an advisory capacity and not a representative capacity, and also that managing conflicts of interest will be important, the Tax Office advised that it did not anticipate any cross over between this group of consultants and the NTLG subcommittee membership.

10. Other Business

82AAT notices and deceased estates

A query was raised by a member outside the NTLG forum and the meeting thought it appropriate to record the answer in the Minutes of the NTLG subcommittee.

Issue

Can a superannuation fund accept and acknowledge a notice from the legal personal representative of a member in the event that the member dies before providing such a notice; and as a result, treat contributions specified in the notice as taxable under s274 on the basis of that notice?

Tax Office Response: When superannuation benefits have not been paid to the estate, the legal personal representative can send and receive a notice to the trustee of the superannuation fund in order to claim a deduction for personal contributions made prior to the death of the member.

Other

- The TIA raised a query about the payment of lump sums by unincorporated trustees. This issue had been dealt with at item 4.9 in the Minutes of the subcommittee meeting of 8 February 2006.
- SISFA advised that it has sent a submission to Treasury concerning trustees of self-managed superannuation funds who become bankrupt.
- The Tax Office thanked members for providing comments out of session on draft Corporate Management Practice Statements on Committee Management.

- Pauline Nuske who is the secretariat for this subcommittee is performing other duties for a period, so until advised otherwise members should continue to contact Emma Haines.
- The Chair thanked Rose Abbate from the Tax Office for her assistance with organising this meeting.

11. Post meeting phone hook up

A phone hook up was held with members on 17 May 2006 to discuss the impact of the Budget announcements on the action items arising from this meeting and on the proposed next meeting date. Members were advised that Action Item NTLGSSS 0605/07 about commenting on certain transition to retirement hypothetical scenarios and Action Item NTLGSSC 0605/08 about commenting on the reversionary pension discussion paper should not be actioned by members at this stage.

Members were advised that commenting on the proposals arising from the Budget was a high priority for both external members and the Tax Office.

It was also proposed to adjust the originally proposed next meeting date (9 August 2006) as it clashed with the closing date for submissions on the Budget proposals. Members will be advised of new proposed next meeting date by the secretariat. Please refer to [Agenda Item 12](#) for more details on meeting dates.

12 Proposed Date For The Next Meeting

The meeting scheduled for Wednesday 9th August in Sydney will no longer go ahead given the cross over with the timeframes for budget consultation.

It was agreed that the working party on in-house asset issues (see Action Item NTLGSSC0602/05) would meet on the afternoon of Tuesday 8 August in Sydney. Details to be advised.

Update since phone hook up advised by email on 25/3/2006: Next NTLG subcommittee meeting to be held on Tuesday 12 September 2006 in Sydney office (100 Market Street, Sydney).

Attachment 1

[Agenda item 3](#): Update on recently published and withdrawn Rulings, Practice Statements and ATOIDs

Rulings

Draft	TR 2006/D1	25/1/2006	Income Tax: Special income derived by a complying superannuation fund
Withdrawn	SGR 94/3	12/4/2006	Superannuation Guarantee: Remission of additional superannuation guarantee charge.
	IT 2393	12/4/2006	Income Tax: Eligible Termination payment - arrangement to increase lump sum superannuation benefit

Determinations

Draft	TD 2006/D3	18/1/2006	Income Tax: Will the Commissioner exercise his discretion under subsection 27H(3) of the Income Tax Assessment Act 1936 in determining the deductible amount in relation to a superannuation pension or 'eligible annuity' split pursuant to an agreement or court order on marriage breakdown?
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	TD 2006/D4	18/1/2006	Income tax: Is a non-member spouse who is under 55 years of age entitled to a rebate under section 159SM or section 159SU of the Income Tax Assessment Act 1936 when a superannuation pension or 'eligible annuity' is split pursuant to an agreement or court order on marriage breakdown on a specified percentage basis?
Final	SGD 2005/2	16/11/2005	Superannuation Guarantee: Is a contribution to a complying superannuation fund or a retirement savings account for the benefit of an employee made when the employer makes the contribution to a clearing house?
	TD 2006/17	12/4/2006	UPP: Apportioning deductible amount for pension payable for part of year
Withdrawn	SGD 93/14	29/3/2006	Superannuation Guarantee: When are entertainers employees for Superannuation Guarantee purposes?

Practice Statements

Final	PS LA 2006/1	22/2/2006	Superannuation Guarantee: Remission of Part 7 penalty
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ATO Interpretive Decisions

Final	ATO ID 2006/63	24/2/2006	Superannuation Guarantee: Predecessor Fund
	ATO ID 2006/66	10/3/2006	Superannuation Guarantee: Ordinary Time Earnings (OTE) and payment of unused flex to non-ongoing employees
	ATO ID 2006/95	7/4/2006	Superannuation Guarantee: Notional earnings base
Withdrawn	ATO ID 2001/151	17/03/2006	Superannuation: Notional earnings base for the superannuation guarantee charge.
	ATO ID 2001/13	17/03/2006	Superannuation complying superannuation fund: Segregated pension assets - is actuary's certificate required?
	ATO ID 2001/146	17/03/2006	Superannuation Self managed superannuation funds
	ATO ID 2001/147	17/03/2006	Superannuation: Assignment of superannuation interests
	ATO ID 2001/591	17/03/2006	Superannuation Retirement income entities: Trustee structure
	ATO ID 2002/377	17/03/2006	Superannuation Retirement income entities: acquisition of assets from members
	ATO ID 2002/379	17/03/2006	Superannuation Retirement income entities: preserved benefit paid before reaching their preservation age
	ATO ID 2002/415	17/03/2006	Superannuation Retirement income entities: Superannuation fund assets held in incorrect name
	ATO ID 2002/416	17/03/2006	Superannuation Retirement income entities: Loan to a member
	ATO ID 2002/417	17/03/2006	Superannuation Retirement income entities:

		Contravention of covenant
ATO ID 2002/660	17/03/2006	Superannuation Retirement Income Entities: Excess distribution from a related unit trust
ATO ID 2002/670	17/03/2006	Superannuation Retirement income entities: Reinvestment of distributions from a related trust after 11 August 1999.
ATO ID 2002/734	17/03/2006	Superannuation Retirement income entities: Late lodgement of annual regulatory return
ATO ID 2002/977	17/03/2006	Superannuation Retirement income entities: Individual trustees of a self managed superannuation fund (SMSF) declared bankrupt
ATO ID 2003/155	17/03/2006	Superannuation Retirement income entities: Fund investment in unit trust - loan to employer sponsored by the unit trust
ATO ID 2005/104	17/03/2006	Superannuation Retirement income entities: Keeping the personal assets of a trustee separate from the assets of a self managed superannuation fund
ATO ID 2002/136	7/04/2006	Superannuation contributions: deductions & rebates: Deduction for personal superannuation contributions. Independent contractor not receiving superannuation support.
ATO ID 2001/39	7/04/2006	Superannuation: Personal Superannuation Contributions.
ATO ID 2001/54	7/04/2006	Income Tax: Deductions and expenses: Superannuation (Personal Contributions)
ATO ID 2002/149	7/04/2006	Superannuation contributions: Deductions & rebates: Deduction for personal superannuation contributions: Remission of tax shortfall penalty
ATO ID 2002/389	7/04/2006	Superannuation: Superannuation guarantee scheme: employment status

Attachment 2

Agenda item 4: Action items from the previous meeting (Action Item NTLGSSC0602/04)

NTAA submission: SMSFs and water rights

Issue to consider

The National Tax and Accountants' Association ("NTAA") is requesting a change in the Superannuation Industry (Supervision) Act 1993 or its associated regulations, which will allow an SMSF to either purchase a "water right" from a related party or lease a water right to a related party.

What is a water right?

It is important to provide background on the concept of a "water right" to fully appreciate the request being made by the NTAA.

In the past, landowners had a common law right to use water on their land. This right was not a separate asset from the land itself and therefore was transferred with the conveyance of the underlying land. Further, if the landowner needed additional water (e.g. to irrigate the land) they were unable to acquire statutory rights to access water above and beyond the water available from their land, such as rivers dams or underground bores.

However, common law rights have largely given way to State based laws that govern the issue of water access entitlements (WAEs) as well as regulating the use of water, and drafting the terms and conditions that WAE holders must abide by.

Generally, there are now statutory limits on the quantity of water that can be extracted by the WAE holder. These limits are referred to as a "water allocations."

Given that each State has individually legislated for the WAEs within its respective jurisdiction, there is now considerable disparity between the States on what this concept actually means. For example, the underlying concept of a WAE is referred to as "water share," "water allocation" and "water licence" depending on the particular state. Further, some WAEs are still attached to land and others are not. Some water allocations are based on area holdings, while others may be based on volumes of water. Some transfers of WAEs are permanent, some are temporary.

All things considered, this means that the lack of consistent concepts and expressions has caused considerable confusion in the market place.

Nevertheless, there are certain characteristics of WAEs that are consistent across all states and territories. More specifically, WAEs allow the holder to extract a designated amount of water from a nominated source or outlet and the entitlement normally has an annual limit that must be adhered to.

SMSFs purchasing primary production land

Recent information suggests that trustee(s) of SMSFs are increasingly acquiring primary production land as part of their investment strategy.

The NTAA understands that this increased willingness has been, at least partially, fuelled by amendments that were made to the investment rules for SMSFs in 1999.

More specifically, the definition of "business real property" contained in S.66 of the Superannuation (Industry) Supervision Act ("SIS") 1993 was amended in Superannuation Legislation Amendment Act (No 4) of 1999. The consequence of the amendment was that the definition of business real property contained in S.66 of the SIS Act was expanded at S.66(6) to include the following:

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

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

(b) the area is also used primarily for domestic or private purposes;

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

As such, many trustees of SMSFs started purchasing primary production land in their fund and renting it from the fund. The extended definition of business real property means the investment does not breach the investment rules contained under S.66 of the SIS Act (i.e., restricting the acquisition of assets from a related party of the fund) or the in-house asset rules under S.71 of the SIS Act even though the property may contain a dwelling that may be used "primarily" for domestic and private purposes.

After these amendments there have been many cases where primary production land has been acquired by SMSFs from related parties of the fund.

Alternatively, these amendments have brought about instances when the trustee(s) of SMSFs have acquired primary production land (whether or not from a related party – refer above) and leased or rented the property to a related party of the fund. Such an investment decision and business arrangement satisfies the investment rules in the SIS Act because the definition of an in-house asset in S.71 of the SIS Act specifically excludes business real property of the fund contained within S.66(5) and S.66(6) of the SIS Act.

As such, SMSFs are permitted to purchase primary production land and lease it to a related party without regard to the in-house asset rules.

Superannuation funds and water rights (WAEs)

A recent problem has arisen and it relates to SMSFs purchasing primary production land which meets the definition of business real property under S.66(5) and the extension contained in S.66(6).

In particular, SMSFs have been acquiring primary production land (including acquisitions from a related party) which includes a WAE, either because the WAE attached to the land or it was a commercially prudent decision to acquire the WAE with the land because it enhances the value of the land.

In recent times, the issue of whether or not WAEs can be a form of business real property has been raised. The Taxation Office has issued three interpretative decisions that broach this issue (ATO ID 2004/229, 2004/230 and 2004/231). In these statements, the Taxation Office has consistently taken the view that WAEs do not qualify as a form of business real property. This view has been expressed principally for the reason that the WAEs are (usually) severable from the land and thus they must be analysed separately for the purposes of the SIS Act. As a result, the Taxation Office view has been that WAEs do not represent “business real property” for the following reason:

“The term 'real property' is not defined either in the SISA or in the Superannuation Industry (Supervision) Regulations 1994. The Encyclopaedic Australian Legal Dictionary defines real property as 'land and interests in land', while the Macquarie Dictionary defines real property as 'tangible and immovable property such as land and houses, buildings or any such structures on the land'.

A water allocation or entitlement authorised by a water licence is an asset which is separate from the land. It can be traded and ownership transferred without any impact on the title of the land. The licence is not a fixture or a structure attached to the land. The water licence has a value in its own right and can be transferred through a sale or a lease. Accordingly, a water right is not business real property as defined in subsection 66(5) of the SISA.”

Refer to ATO Interpretative Decision ATO ID 2004/229.

It is important to note that the NTAA is not challenging the analysis of the Taxation Office on the issues of WAEs and business real property.

Why is a change to business real property needed?

The NTAA is of the view that the above issues need to be considered from a slightly different perspective.

It is the NTAA's contention that the investment concessions associated with business real property (including the extension for dwellings located on primary production property) have not included WAEs because this issue has only recently come to light. That is, the NTAA believes that Parliament does not consider it necessary to include WAEs as part of the definition of business real property because, at the time, WAEs were not as prominent, nor were they regarded as an asset distinctly separate to the underlying land.

However, the ever increasing problems with Australia's drought coupled with the desire of many municipalities to conserve the use and allocation of water, have meant that WAEs are extremely valuable and an integral part of any primary production property.

It is also the NTAA's view that there is a lot of confusion about how the investment restrictions apply to WAEs. Anecdotal evidence suggests that many trustees of SMSFs are under the misunderstanding that WAEs are a part of primary production land and thus represent business real property. Consequently, many SMSF trustees believe that WAEs can be purchased by an SMSF from a member and that WAEs can be leased to a member without regard to the investment restrictions and the in-house asset rules.

It appears that some SMSF trustee(s) have mistakenly taken the view that because a WAE may be inseparable to the land (in states such as Victoria) it therefore takes on the underlying character of the land, being business real property. Although technically incorrect, the NTAA can understand how such a view has been formed by trustee(s) of some funds. By way of illustration, in the case of States such as Victoria, the existing Water Act legislation makes this a default outcome, as follows:

Sec 62(2AA) "on the transfer or conveyance of land on which water is taken under a registration licence, the registration licence is deemed to be transferred to the successor in title of that land."

Furthermore, it may also be a commercially prudent decision for an SMSF to acquire the WAE with the land or for an SMSF to obtain additional WAEs for primary production land because it enhances the value of the primary production land. It is conceded this is not a tax issue, per say, however it represents a significant consideration whenever primary production land is being acquired.

From a practical perspective, this problem appears to be an anomalous outcome when it is noted that the definition of business real property extends to a primary production property which contains a private residence.

In fact, the amendments referred to above that occurred to S.66(6) of the SIS Act appear to be more generous than the changes being proposed by the NTAA. The amendments that were made in 1999 (being the insertion of S.66(6)) recognised that people who worked on a farm generally lived there and that some land titles to primary production land included the main residence of the farmer. It would appear that the decision to amend the definition of business real property and include a main residence on primary production land was to, in part, accept that no significant commercial or legal mischief was being created when extending this definition.

Similarly, the NTAA submits that there is no commercial or legal mischief being created if SMSFs were able to acquire WAEs from related parties or to lease WAEs to related parties. It is considered that an SMSF should be able to acquire a WAE from a related party or to lease a WAE to a related party when the following conditions are met:

- The land is being used to carry on a business of primary production;
- The related party either owns primary production land or leases primary production land from the SMSF;
- One of the following apply:
 - The SMSF purchases a WAE from a related party and it is used in a primary production business; or
 - The SMSF leases the WAE to a related party that is used in a primary production business; and
- The related party of the fund cannot sub-lease the WAE that has been leased to them by the SMSF.

When the above conditions are fulfilled, all that is being achieved is that the value of the primary production land is being preserved by allowing the WAE to stay with the business real property.

Adjusting the investment rules to accommodate water rights (WAEs)

There are three approaches which could be taken to allow SMSFs to acquire WAEs from related parties or to lease WAEs to related parties:

1. Amend the definition of business real property in section 66 of the SIS Act to specifically include WAEs; or
2. Amend the SIS Act regulations for the purposes of paragraph 71(1)(f) of the SIS Act to allow WAEs to be a class of assets that are not in-house assets for the purposes of the SIS Act.
3. The Commissioner of Taxation makes a legislative determination under paragraph 71(1) (f) of the SIS Act to allow a trustee of an SMSF to lease a WAE to a related party in certain circumstances. Such a determination would also allow trustees to acquire WAEs from related parties by virtue of the general exclusion in subsection 66(2A) of the SIS Act.

Any of the above approaches would achieve the desired balance between the needs and objectives of an SMSF and the commercial needs of the primary production community. Any of the above approaches can be based on the conditions noted above.

It is acknowledged that amending the definition of business real property in the SIS Act is more complex, as it involves Parliament passing amending legislation. Amending the SIS regulations is easier than amending the SIS Act, but this is still a significant exercise. However, a legislative determination issued by the Commissioner of Taxation under paragraph 71(1)(f) would be administratively easier to achieve than either of the two abovementioned approaches. As discussed above, the determination should allow an SMSF to acquire a WAE from a related party or to lease a WAE to a related party when the following conditions are met:

- The land is being used to carry on a business of primary production;
- The related party either owns primary production land or leases primary production land from the SMSF;
- One of the following apply:
 - The SMSF purchases a WAE from a related party and it is used in a primary production business; or
 - The SMSF leases the WAE to a related party that is used in a primary production business; and
- The related party of the fund cannot sub-lease the WAE that has been leased to them by the SMSF.

When the above conditions are fulfilled, all that is being achieved is that the value of the primary production land is being preserved by allowing the WAE to stay with the business real property.

It is our understanding that such a legislative determination would also provide an exemption to the general prohibition in subsection 66(1) of the SIS Act by virtue of the operation of subsection 66(2A) and the general exclusion that applies for in-house assets as specified in that subsection.

The acquisition and/or leasing of the WAE in these circumstances is considered to be appropriate and consistent with the objects of the SIS Act. Further, from a policy perspective, the WAE issue is similar to the issue of primary production land which includes a private residential property. An amendment to S.66 of the SIS Act was made for primary production land that included a private residential property. Accordingly, the suggested legislative determination made pursuant to paragraph 71(1)(f) of the SIS Act will achieve some consistency between these similar issues.

In addition, some transitional or grandfathering provisions would be required, given that a number of SMSFs have already either acquired WAEs from related parties or leased WAEs to related parties. The NTAA recommends that the legislative determination be made fully retrospective. Further, if a WAE held by an SMSF does not comply with the conditions for the exemption under the legislative determination, the SMSF be given 12 months to comply the determination or dispose of the WAE.

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