

### SPECIAL POINTS OF INTEREST:

1. Compassionate grounds can allow early access to super
2. New SMSF trustee penalties - what is the ATO's approach?

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## ACCESSING SUPER ON COMPASSIONATE GROUNDS

Although early access to your superannuation is not usually permitted, exceptions to this rule may apply. In this article, we discuss the rules that may allow access to superannuation early on compassionate grounds.

### Background

Preserved superannuation benefits generally cannot be accessed before a condition of release is met (e.g. attaining age 65). However, a superannuation fund may be permitted to release preserved benefits on specific 'compassionate grounds' where a member does not have the financial resources to meet certain expenses.

**INFO**—A superannuation fund **must not** release preserved superannuation benefits on 'compassionate grounds' **unless** the Department of Human Services (DHS) has authorised the release in writing and the release is permitted under the fund's governing rules.

The circumstances under which superannuation can be released on 'compassionate grounds' are outlined below.

#### A. Medical treatment

DHS could authorise your SMSF to release superannuation benefits to pay for medical treatment for you (or a dependant, such as your spouse).

The medical treatment must be to:

- treat a life threatening condition;
- alleviate acute or chronic pain; **or**
- alleviate an acute or chronic mental disturbance.

This exception also covers necessary medical transport related to the above.

**INFO**—Two medical practitioners (one must be a specialist) must certify that the above medical treatment (and transport, if applicable) is required.

#### B. Severely disabled

DHS is also permitted to authorise the release of superannuation to modify your family home or car if you (or your dependant) is severely disabled. The modifications must be to meet the special needs of the disabled individual.

#### C. Other exceptions

Additional compassionate grounds for the early release of superannuation include:

- payment of palliative care costs in the case of impending death (either yours or a dependant);
- payment of death, funeral or burial expenses for a dependant;
- to make loan payments to prevent your home from being sold by the lender (or stop foreclosure); or
- to meet other expenses consistent with these grounds.

**TIP**—Other limited conditions of release outside of the compassionate grounds may also allow early access of superannuation (e.g., severe financial hardship or terminal illness).

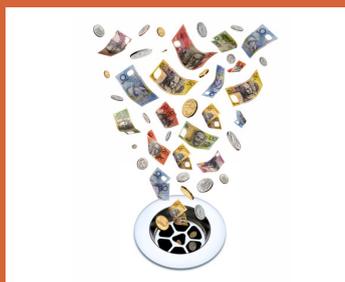
#### How much can be accessed?

Payment under the 'compassionate ground' condition of release must be:

- a single lump sum up to the amount DHS determines; and
- for housing loan payments, the amount (in a 12 month period) cannot exceed: 3 months repayments + 12 month's interest on the outstanding loan balance.

If you are under preservation age, the payments are generally taxable at 20% + Medicare + any temporary debt levy.

**INFO**—Applications to DHS for early superannuation release on compassionate grounds can be made via the DHS website.



“You must personally pay the administrative penalty – your fund cannot pay it for you.”

“The ATO will not simply issue a penalty notice because your SMSF auditor reports a contravention to the ATO.”

## ATO SHEDS LIGHT ON HOW IT APPLIES PENALTIES

As of 1 July 2014, the ATO has new powers to deal with trustees who contravene the superannuation laws. The ATO has now provided guidance on how it intends to apply these laws to trustee contraventions.

### Quick refresher on the new penalty rules

From 1 July 2014, the ATO can apply any or all of the following new compliance powers to SMSF trustees who break the rules:

- **Education** – make you complete an ATO-approved course. This may be appropriate if you breach the superannuation rules due to a lack of knowledge.
- **Correct the breach** – direct you to fix a contravention (usually within 6 months). You may also be required to change your SMSF administrative practices moving forward.
- **Monetary penalties** – the ATO will impose penalties on SMSF trustees for defined breaches of the superannuation laws e.g. lending money to a member or relative results in a penalty of \$10,200 (or \$10,800 for contraventions from 1 August 2015).

**TIP**–The ATO will not simply issue a penalty notice because your SMSF auditor reports a contravention to the ATO. Instead, the ATO have stated that they need to confirm the breach before issuing a penalty notice (e.g. by auditing the fund).

Some of the key messages from the ATO about its intentions to administer its new compliance powers are:

- the new powers supplement the ATO’s existing powers. For example, in addition to incurring new trustee penalties, you can still be disqualified from being an SMSF trustee if your actions are serious enough to warrant this.
- the ATO will be more open to considering remission requests over the next 18 months. However, trustees who continually breach the superannuation rules are on notice that they are unlikely to achieve more than one penalty remission.

**WARNING**–You must personally pay the administrative penalty – your fund cannot pay it for you. Also, individual trustees will generally have higher penalties than company trustees because each individual is penalised whereas company trustees only incur one penalty.

### ATO case studies

The following case studies have been adapted and simplified from ATO examples to illustrate how the new powers are expected to apply.

#### Case study 1

During the 2015 income year, an SMSF with \$750,000 of assets lent \$30,000 to a member to finance cash-flow shortages in their business. The member thought they could do this. This is a breach as the SMSF cannot lend money to a member or relative. The ATO’s approach is to:

- consider issuing an education direction to the trustees because they displayed a lack of knowledge;
- direct the trustees to rectify the breach because fund assets are at risk; and
- automatically issue an administrative penalty notice of \$10,200 to each trustee. The ATO may remit the penalty if the contravention is fixed.

#### Case study 2

An SMSF is audited by the ATO in 2013 for lending money to fund members. Despite the audit, the fund members again take out \$21,598 from the SMSF during the 2015 income year to buy a car (the fund has assets of \$324,369).

The ATO’s approach is to:

- not issue an education direction (as the members already knew such loans were prohibited);
- consider issuing a direction to rectify the breach; and
- issue an administrative penalty notice for \$10,200 to each trustee, with remission of the penalty unlikely due to the trustees breaching the law multiple times. The trustees may also be disqualified.

# BWA

ACCOUNTANTS +  
BUSINESS ADVISORS

B Woodland & Associates Pty Ltd

150 Union Street  
Windsor VIC 3181

Ph: 03 9510 2355

Fax: 03 9510 2455

info@bwoodland.com.au

www.bwoodland.com.au

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AUSTRALIA



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