MACQUARIE

Contribution cap companion

An extensive guide to super contribution caps and more.

Macquarie Technical Advice Services

Contents

About the contribution cap companion

Financial services professionals should be familiar with the superannuation and tax rules relating to contributions and caps to ensure individuals receive the full benefit from their contribution strategies and do not incur any unnecessary or unexpected tax.

The contribution cap companion (CCC) is an extensive guide to super contribution caps and other contribution-related rules.

1. Contributions – what, when and how much?

While the 'what, when and how much' rules are straightforward for the vast majority of contributions, for some individuals they can actually have a critical bearing on whether or not a contribution cap will be breached. For example, a cap may be breached because:

1. a particular transaction has been assumed not to be a contribution but actually is
2. a contribution has been assumed to be made in one income year whereas it is actually made in another
3. an in-specie contribution has been undervalued, or valued at the wrong time
4. a contribution has been wrongly classified into one category of contribution for tax purposes when it is treated by the Australian Taxation Office (ATO) in another, causing it to be counted against the wrong cap and/or causing the individual to be ineligible for a deduction they intended to claim, or
5. a contribution made earlier (in the current income year or earlier income years) has been overlooked when calculating how much an individual can contribute without breaching the applicable contribution cap.

The following sections outline the ATO's general principles set out in **Tax Ruling TR 2010/1: Super contributions** (Ruling), and summarise the approach to key specific issues which may arise.

A number of the issues will typically only be relevant to self managed superannuation funds (SMSFs).

General principles

What is a contribution?

The Ruling states that an amount is a contribution if it increases the capital of a superannuation fund and is provided by a person whose purpose is to benefit one or more particular members of the fund or all of the members in general. However, amounts received or derived as income, profit or gain from investments (or realisation of investments) of the existing capital of the fund or account are not considered to be contributions. In addition, the proceeds of an insurance policy paid from an insurance company to a superannuation fund on the occurrence of an insured event under the terms of an insurance policy are not regarded as a contribution.

In regards to compensation payments, the ATO's view is that an amount received by a superannuation fund in respect of a right to seek compensation or a cause of action is generally not a contribution (see Fact Sheets **QC 59707**, **QC 59708** and **QC 59709**. However, where a compensation payment is directed to a superannuation fund but the fund does not have a right to seek compensation, the payment will be a contribution (see Fact Sheet **QC 59710**).

The Ruling explains the ATO's views on the ordinary meaning of the word 'contribution' as that term is not defined in the relevant tax legislation.

When is a contribution made?

As a general principle, regardless of how a contribution is made, it is taken to be made when the superannuation fund receives it. In many cases, such as when a contribution is made in cash, the timing of the receipt of the contribution is clear. However, if a contribution is made in-specie, the timing of receipt is not always so obvious. Outlined below are the different forms of contributions and the point in time when they are considered to be 'made', based on the ATO's views in the Ruling.

A further consideration is that despite a contribution being received by a super fund, it may not be allocated immediately to a particular member's account. The timing of that allocation is important for certain tax purposes. For further information, see **section 3**.

Specific rules

Transfer of funds – money etc.

What: Includes cash and electronic transfers of funds.

When: In the ATO's view electronic transfer of funds occurs when it is received by the fund, as typically evidenced by the fund's bank statement. For these payments the ATO generally rejects the view that the contribution is made as soon as the contributor has done everything necessary to effect the payment, focusing instead upon when the fund is in a position to use the funds.

In some cases a transfer between linked member and SMSF accounts at the same bank may facilitate immediately available funds, and if the transfer occurs on the weekend a computer print-out of the transfer may be used to establish time of contribution. This approach appears to be consistent with at least one private ruling (see Private Ruling no. 1012459213082).

Cheques and promissory notes

What: Includes bank cheques, personal cheques and similar negotiable instruments.

These will be taken to be a contribution of money except if:

1. the cheque or promissory note is dishonoured (in which case no contribution is made), or
2. the promissory note is made by an entity not related to, or associated with, the superannuation fund or member (see below).

When: Generally, the contribution is made when the cheque or promissory note is received by the trustee (unless later dishonoured). Exceptions:

1. If the cheque is post-dated, or if the promissory note is payable in the future, the contribution is made on the later of:
   - the day the cheque or note is received by the trustee, and
   - the date on which payment can be demanded.
2. If the cheque or note is made by a member of the fund or a related party of the member and the trustee does not demand payment within a few business days, the contribution may be taken to be made when payment of cash (or its electronic equivalent) actually occurs.

Property (for which no consideration is received)

What: Includes shares, real property, or units in a unit trust and certain promissory notes.

When: The contribution is made when either legal or (subject to certain conditions being met) beneficial ownership of the property passes from the contributor to the superannuation fund.

Where a system of formal registration exists (eg listed shares), the ATO accepts that the contribution is made when beneficial ownership passes to the superannuation fund (often before legal ownership changes) provided sufficient evidence of relevant transactions and events is retained. Relevant evidence would include minutes of trustee meetings on acceptance of the contribution, transfer forms and any other record of when the transfer took place.

Beneficial ownership of listed shares occurs when a properly executed off-market transfer is obtained by the superannuation fund in registrable form.

Beneficial ownership of real property occurs when the fund obtains a properly executed transfer that is in registrable form, together with any title deeds or other documents necessary for the fund to acquire legal ownership.

Borrowing arrangements: debt forgiveness and guarantees

What: A contribution is made if a loan to a fund is forgiven by the lender.

The ATO also confirms that it considers that a contribution is made if a guarantor pays a fund's loan obligation and the guarantor has no right of redemption against the fund, or foregoes that right.

When: In the case of forgiving a loan, the contribution is made when the lender executes a deed of release that relieves the fund from the loan obligation.

Where a guarantor pays a debt of a fund, the contribution is made:

- if the guarantor has no right of indemnity, on satisfying the fund's liability, or
- if the guarantor does have right of indemnity, when the guarantor takes formal steps to forgo their right (eg by executing a deed of release) or when the right expires.

Other forms of contributions

The ATO also considers that each of the following may count as contributions:

- **What:** An appointment of income or capital made by the trustee of a discretionary trust to a superannuation fund on the basis that a fund interest in a discretionary trust cannot be said to be an investment. The ATO considers that, in these cases, the purpose in appointing an amount of income or capital to the fund is to provide benefits to the members of the fund.

  Bear in mind that assessable income distributed from a trust to a SMSF on a discretionary basis is typically non-arms' length income and therefore taxed at 45 per cent.

  When: The contribution is made when the trustee of the trust makes its resolution to appoint the trust income or capital.

- **What:** Payment of fund liabilities. This includes a member or employer paying a fund debt.

  When: The contribution is made when the fund's liability is extinguished.

- **What:** Increasing the value of a fund asset (where the increase does not reflect a return on investment). This includes:
  - making an improvement (eg to real property)
  - shifting the value of interests (eg increasing distribution or voting rights on shares), or
  - a person gifts an asset to an entity in which the fund holds an interest.

  When: The contribution is made when the capital of the fund is increased because of the increase in value of the asset.

Services rendered to a superannuation fund

The Ruling includes an example of a SMSF trustee who is an accountant and prepares the fund accounts and tax returns each year without remuneration. The ATO does not consider this 'free' service to be a contribution. However, if services are provided to a fund for a fee and the fee is either paid by a third party or forgiven, a contribution will be taken to have been made to the fund.

Whenever a service is provided to a SMSF and the parties are not dealing at arm's length, consideration should be given to the non-arm's length income rules as this may result in additional tax being paid.

In-specie contributions – how and when are they valued?

The amount of an in-specie contribution is the market value of the asset at the time the contribution is received by the superannuation provider.

Where a person contributes an asset to a superannuation fund that provides consideration for the transfer of that asset, the contribution is the amount by which the market value exceeds the consideration paid by the super provider.

Cap trap: In the case of an off-market share transfer, there is a risk that the share price on the day the fund trustee receives the completed transfer form is higher than it was on the day the form was mailed by the contributor. If the valuation difference results in a cap breach, there may be grounds for the ATO exercising its discretion to disregard the excess amount. However, this is not reflected in the Ruling. So it may be prudent to leave a reasonable buffer between the expected value of in-specie contributions and the relevant contribution cap.

2. Contribution eligibility rules

Under superannuation and tax law, some conditions must be met before certain contributions can be made by a member.

Different requirements apply depending on the source of the contribution and the member's age as shown in the table below.

1. Age requirements

Contribution source/type	Age limit
Member	75[1]
Employer mandated[2]	None
Employer non-mandated	75[1]
Spouse/other	75[1]

Work test requirements have been removed

Prior to 1 July 2022, members aged between 67 and 75 had to meet a work test before being eligible to make or receive contributions. Since then, the work test has been removed, except for people aged 67 to 75[1] who wish to claim a deduction for a personal contribution, see page 16.

2. Tax file number quotation

In order to accept a contribution other than an employer contribution, the member's tax file number (TFN) must have been quoted to the fund. Note that while employer contributions can be accepted where a fund does not hold the member's TFN, additional tax may apply to the contribution, known as 'no-TFN contributions tax'.

Requirement for superannuation funds to return contributions

A superannuation fund that receives a contribution in a manner that is inconsistent with the requirements has 30 days from when the fund first became aware of the inconsistency to return the contribution. The ATO's view is that a fund is generally taken to be aware that the amount is inconsistent with the requirements when it receives the contribution.

However, a fund is not required to return a contribution if the contribution is subject to the TFN quotation requirement and the member's TFN is quoted to the fund within 30 days of receiving the contribution.

What if the 30 day period has expired?

The ATO's view is that a SMSF trustee is required to return the amount of a contribution accepted inconsistently with the contributions standards, even if more than 30 days has elapsed since the trustee became aware of the inconsistency.[3]

For further details on refunding excess contributions, see **section 10.**

1 Contributions can be accepted by the fund up to 28 days after the month in which the member turns age 75.
2 These include contributions that an employer makes to satisfy the requirements of a particular award, certified agreement or the SG provisions.
3 See the ATO's SMSF resources: Returning contributions.

3. Contribution caps and tax treatment

In addition to the contribution eligibility rules outlined in **section 2**, there are taxation rules which apply to the various types of superannuation contributions. In particular, different caps apply to different types of contributions and, for example, a contribution's type can be dictated by whether or not your client lodges a specified notice before certain deadlines.

Contribution caps at a glance

The table below outlines the contribution caps that apply to particular types of contributions.

Contribution type	Financial Year					
	2019/20	**2020/21**	**2021/22**	**2022/23**	**2023/24**	**2024/25**
Concessional contributions (CCs)						
Cap (annual)	$25,000		$27,500			$30,000[4]
Treatment of excess	• Amount in excess of cap is included in assessable income (taxed at marginal tax rates less a 15% offset) and may be withdrawn (net of 15% fund tax) • Excess CCs not withdrawn count towards NCC cap					
Non-concessional contributions (NCCs)						
Cap (annual)	$100,000 (4 x CC cap), or Nil if TSB[5] at 30 June of prior financial year is $1.6 million or more		$110,000 (4 x CC cap), or Nil if TSB[5] at 30 June of prior financial year is $1.7 million or more		$110,000 (4 x CC cap), or Nil if TSB[5] at 30 June of prior financial year is $1.9 million or more	$120,000 (4 x CC cap), or Nil if TSB[5] at 30 June of prior financial year is $1.9 million or more
	Individuals under age 67 at any time in a financial year may be eligible to bring-forward future years' NCC cap entitlement (see page 9)			Individuals under age 75 at any time in a financial year may be eligible to bring-forward future years' NCC cap entitlement (see page 9)		
	Contribution eligibility rules (see page 7) may limit acceptance of contribution					
Treatment of excess	• Amount in excess of cap and 85% of associated earnings can be withdrawn from super • Total associated earnings included in assessable income (taxed at marginal rates less 15% offset)					
	Excess NCCs not withdrawn taxed at 47%					
Downsizer contributions						
Cap (lifetime limit)	$300,000					
Treatment of excess	Excess counts towards NCC cap					
Personal injury contributions						
Cap	No cap applies. Contribution limited to amount of compensation or damages received for personal injury suffered by the individual					
CGT small business concession contributions						
Cap (lifetime limit)	$1,515,000	$1,565,000	$1,615,000	$1,650,000	$1,705,000	$1,780,000[6]
Treatment of excess	Excess counts towards NCC cap					
COVID-19 recontributions						
Cap	N/A		Limited to amounts released under the COVID-19 compassionate grounds condition of release in 2019/20 and 2020/21			

4 Cap is indexed annually with Average Weekly Ordinary Time Earnings (AWOTE) and rounded down to the nearest $2,500.
5 Total Superannuation Balance, see page 12 for further information.
6 Cap is indexed annually with AWOTE, and rounded down to the nearest $5,000.

NCC bring-forward arrangements

The bring-forward arrangements allow individuals under age 75 at any time in a financial year to bring-forward future annual NCC cap entitlements by making NCCs in the relevant year of more than the annual cap.

Note that the contribution eligibility rules (see page 7) may limit the ability for the fund to accept the contributions in the year the individual turns 75.

Access to the bring-forward arrangements depends on the individual's TSB as at 30 June of the prior financial year.

The table below outlines an individual's NCC cap capacity depending on when the bring-forward arrangements were triggered.

Bring-forward triggered from …	Bring-forward NCC cap is …
1 July 2024 to 30 June 2025	Where member's TSB as at prior 30 June 2024 is: • less than $1.66 million, total NCCs in the 3-year period are capped at $360,000 (ie 3 x annual cap of $120,000) • $1.66 million to less than $1.78 million, total NCCs in the 2-year period are capped at $240,000 • $1.78 million to less than $1.9 million, bring forward is not available and total NCCs are limited to annual cap of $120,000. Bring forward applies from 1 July of first financial year where NCCs exceed $120,000.
1 July 2023 to 30 June 2024	Where member's TSB as at prior 30 June 2023 is: • less than $1.68 million, total NCCs in the 3-year period are capped at $330,000 • (ie 3 x annual cap of $110,000) • $1.68 million to less than $1.79 million, total NCCs in the 2-year period are capped at $220,000 • $1.79 million to less than $1.9 million, bring forward is not available and total NCCs are limited to annual cap of $110,000. Bring forward applies from 1 July of first financial year where NCCs exceed $110,000.
1 July 2021 to 30 June 2023	Where member's TSB as at prior 30 June is: • less than $1.48 million, total NCCs in the 3-year period are capped at $330,000 • (ie 3 x annual cap of $110,000) • $1.48 million to less than $1.59 million, total NCCs in the 2-year period are capped at $220,000 • $1.59 million to less than $1.7 million, bring forward is not available and total NCCs are limited to annual cap of $110,000. Bring forward applies from 1 July of first financial year where NCCs exceed $110,000.

Concessional contributions (CCs)

CCs are generally contributions that form part of the fund's assessable income. They are typically employer contributions, personal contributions claimed as a tax deduction (see **section 4)** and contributions made for the member's benefit by a (non-employer) third party other than spouse contributions and child contributions. Certain amounts are excluded from the CC cap including:

- the assessable portion of a transfer from a foreign superannuation fund which the member chooses to have taxed in the superannuation fund (see **section 7** for the specific requirements of this choice), and
- the untaxed element of a rollover superannuation benefit.

Generally an allocation from a reserve within a superannuation fund to a member is treated as a CC. However, a reserve allocation will not count towards the CC cap:

- where the amount allocated in the year is:
  - allocated in a fair and reasonable manner to an account for every member or relevant class of members in the super plan, and
  - within 5 per cent of the value of the member's interest in the plan at the time of allocation, or
- in certain circumstances where the reserve is used solely for the purpose of enabling the fund to discharge liabilities in respect of income stream benefits that are payable at the time.

Carry-forward unused concessional contributions cap

Individuals with unused CC cap capacity, may be able to carry forward the unused amount and use it to increase their CC cap in a later financial year. Where an individual's CCs otherwise exceed the standard CC cap for that year, their unused CC cap for up to five previous financial years can be applied to increase their CC cap. Note 2018/19 is the first financial year in which an individual's unused CC cap can be carried forward and 2019/20 is the first financial year in which their unused CC cap can be applied. Unused CC cap amounts from the 2018/19 year expired at the end of 2023/24 and unused amounts from the 2019/20 year will expire at the end of 2024/25.

To be eligible to apply their unused CC cap, an individual's TSB (see page 10) must be less than $500,000 as at the 30 June of the prior financial year.

The application of unused CC cap is illustrated by the following example.

Lisa, unused CC cap of $10,000

Lisa receives superannuation guarantee contributions of $17,500 in the 2023/24 financial year. If Lisa made no other CCs, her unused CC cap for 2023/24 will be $10,000.

In 2024/25, Lisa expects to receive a bonus of $15,000, and she would like to offset this income by making a personal deductible contribution to superannuation. If Lisa's employer also makes superannuation guarantee contributions of $20,000, her total CCs for the 2024/25 financial year will be $35,000, exceeding the standard CC cap by $5,000.

However, as Lisa's total superannuation balance as at 30 June 2025 was less than $500,000, $5,000 of her unused CC cap from 2023/24 is applied to increase her CC cap in 2024/25. Note that the amount of Lisa's unused 2023/24 CC cap that can be applied to 2024/25 is limited to the amount by which her CCs exceed the standard CC cap. The remaining $5,000 of Lisa's unused CC cap from 2023/24 can continue to be carried forward until 30 June 2029. Also, if Lisa had an unused CC cap from before 2023/24, the earliest portion of her unused CC cap would be used first.

Excess concessional contributions

Excess CCs are included in the member's personal assessable income and taxed at their marginal tax rates, less a 15 per cent offset reflecting the tax on the contribution paid by the superannuation fund. The intention is to ensure that members who make excess CCs are in a broadly equivalent position to members making NCCs. However, the tax component treatment of making excess CCs versus NCCs is different and may have a bearing on the decision of whether to receive a refund of excess CCs.

For excess CCs made prior to 2021/22, a charge known as the excess concessional contributions charge (ECCC) is payable on the amount of tax attributable to the member having excess CCs. The ECCC is charged at the 90-day bank accepted bill rate (published by the Reserve Bank) plus 3 per cent (this is the same as the ATO's shortfall interest charge rate). The charge will be calculated and compounded daily from the beginning of the income year in which the excess CCs were made. The ECCC was removed for excess contributions made in the 2021/22 and later financial years.

Dana, exceeds CC cap by $10,000

In 2024/25 Dana has CCs of $40,000. Assuming a CC cap of $30,000, she has excess CCs of $10,000. Dana's marginal tax rate is 32 per cent (including Medicare levy).

As a result of the excess CCs, her assessable income for the 2024/25 year will include an additional $10,000.

At her marginal rate, this will mean an additional tax of $3,200.

Dana will be entitled to a tax offset of $1,500 (15 per cent of $10,000) reflecting the tax payable by her superannuation fund on the $10,000.

This means her additional tax liability for the 2024/25 year will be $1,700.

The shortfall interest charge (SIC) may also apply on the difference between:

- the amount of income tax originally paid for the relevant year, and
- the amount of tax identified in an amended assessment which includes the excess CCs (less the 15 per cent offset) and the ECCC.

The general interest charge (GIC) will apply to any amount of income tax, ECCC or SIC that is not paid by the due date.

Income tests impact

The inclusion of excess CCs in assessable income may impact on entitlements to a range of benefits and concessions, including personal tax offsets, superannuation contribution concessions, Family Tax Benefits and Child Care Subsidy. Many of these benefits rely on income tests which also include reportable superannuation contributions (RSC) and/or reportable employer superannuation contributions (RESC). However, excess CCs are not counted as RSC or RESC to ensure these amounts are not included twice in the income test calculations.

The effect of excess CCs on the income tests which apply in relation to various types of superannuation contributions is outlined below. Note that the effect will be the same whether an excess CC is retained in a superannuation fund or refunded (see below).

- **Spouse contributions tax offset:** Excess CCs made on or after 1 July 2013 are included in assessable income but are excluded from the definition of RESC.
- **10 per cent test for Government contribution eligibility:** Excess CCs are included in assessable income but are excluded from the definition of RESC for the purposes of the 10 per cent test applying to the Government co-contribution and the low income superannuation tax offset (LISTO).

Refund of excess CCs

Individuals have the option of having up to 85 per cent of excess CCs (ie the amount net of superannuation fund tax) refunded. No limit otherwise applies on the amount of excess CCs that can be refunded and the option to refund is not limited to first time breaches.

The process of receiving a refund is illustrated below.

George, exceeds CC cap by $20,000

George exceeds the CC cap by $20,000 and receives a notice from the ATO stating he has excess CCs.

George has 60 days from the date of receipt of the notice to make an election to release up to 85 per cent of the excess CCs from superannuation. He still has the opportunity to apply to the ATO for discretion to disregard or reallocate excess contributions on the grounds of 'special circumstances' (see **section 11**).

Where George elects to have the excess CCs refunded:

- the ATO will issue a release authority to a superannuation fund that holds an interest for George for the amount of $17,000 (85 per cent of the excess contribution) – see section 11 for more information on release authorities
- the superannuation fund will have 10 business days from receiving the release authority to pay the ATO
  Note: Exceptions apply in some circumstances including in relation to defined benefit interests and where the individual has insufficient benefits in the fund. In these cases the fund will be required to either pay the maximum available amount and/or notify the ATO that it is not required to comply with the release authority
- the ATO must credit any amounts paid by the superannuation fund to George
- where this credit exceeds George's outstanding tax liabilities, the ATO must refund the excess to him. If there is an unreasonable delay between payment by the fund and payment to George, the ATO will be required to pay interest.

Excess CCs which are not refunded will count towards the individual's NCC cap. However, where the member chooses to have all or part of the excess contributions refunded, the amount that counts towards the NCC cap will be reduced by the grossed up value of the amount of CCs refunded.

It may be open to an individual to re-contribute an amount which represents a refund of an excess CC. If re-contributed as an NCC then the amount will generally add to the tax free component of the relevant superannuation interest, whereas the original excess CC would not.

Non-concessional contributions (NCCs)

NCCs are generally contributions that do not form part of the fund's assessable income. They are typically personal contributions that are not claimed as a tax deduction, child contributions (other than employer contributions) and spouse contributions. Certain amounts are excluded from the NCC cap including:

- government contributions
- 'Downsizer' contributions made on or after 1 July 2018 (see **section 7** for the specific details of these contributions, including notice and timing requirements).
- personal injury contributions (see **section 7** for the specific requirements of these contributions, including notice and timing requirements)
- CGT small business concession contributions (see **section 7** for the specific requirements of these contributions, including notice and timing requirements)
- COVID-19 re-contributions (see **section 7** for the specific requirements of these contributions, including notice and timing requirements), and
- rollover superannuation benefits.

Excess CCs are included in the NCC cap but (as noted earlier) the gross amount of excess CCs made from 1 July 2013 which are refunded are not included.

Total superannuation balance

A client's NCC cap (including operation of the bring forward arrangements) is dependent on their total superannuation balance (TSB). The interaction between the bring forward arrangements and TSB is outlined above in the **Contribution caps at a glance section**.

For contributions made in the 2024/25 year, where an individual's TSB equals or exceeds the general transfer balance cap[7] ($1.9 million in 2024/25) as at 30 June 2024, their NCC cap for the relevant financial year will be nil.

Note that an individual's TSB is reassessed each financial year, so their NCC cap is also reassessed each financial year. While a client's NCC cap in one financial year might be nil because of their TSB, this does not preclude them from making NCCs in a later financial year if their TSB is below the general transfer balance cap (assuming all other contribution acceptance rules are met).

TSB is the sum of:

- accumulation phase interests, including transition to retirement pensions not in the retirement phase
- transfer balance account (excluding credits/debits relating to account based pensions, market linked pensions, transition to retirement pensions in retirement phase and personal injury contributions)
- current value of their account based pensions, market linked pensions and transition to retirement pensions in retirement phase
- rollovers in transit between funds
- if the individual is a member of an SMSF with a limited recourse borrowing arrangement, a portion of the outstanding loan balance where the loan is entered into on or after 1 July 2018 and the individual has met a full condition of release or the loan is with a related party of the fund
- less personal injury contributions.

Where an individual's NCC cap in a year is nil, any NCCs will be excessive and excess NCC arrangements will apply.

TSB is also used to determine eligibility for the carry forward of unused concessional contributions cap, the Government co-contribution and the spouse contribution tax offset.

Excess non-concessional contributions

Excess NCCs made on or after 1 July 2013, plus 85 per cent of the associated earnings, may be withdrawn from superannuation. The associated earnings will be calculated using an average of the General Interest Charge (GIC) rate and compounded daily from the beginning of the financial year in which the excess NCCs were made. Individuals will be notified of their excess NCCs and associated earnings by a determination issued by the ATO.

The determination will give the individual the option of refunding the excess (plus 85 per cent of the associated earnings) or leaving the excess NCCs in superannuation. If no election is made within 60 days, the ATO's default option is to issue a release authority to a superannuation account in the name of the individual as this option will attract the the least amount of tax.

If the excess NCCs (plus 85 per cent of the associated earnings) are released from superannuation, the full amount of associated earnings will be included in their assessable income for the year, however they will be entitled to a 15 per cent offset on this amount. The individual will be liable for any additional tax payable on the associated earnings.

7 This is a lifetime limit on the amount of superannuation benefits that can be transferred to the retirement phase to commence an income stream.

If the individual elects to retain the excess amount in superannuation, excess contributions tax (at the rate of 47 per cent in 2017/18 and later years) will generally be imposed on the excess amount. This tax must be paid from the individual's superannuation benefits.

Sarah exceeds the NCC cap by $20,000

Sarah receives an excess NCC determination from the ATO stating that she has excess NCCs of $20,000 in the 2023/24 financial year and associated earnings of $4,078 (calculated using the GIC for each of the four quarters in 2023/24 and a calculation period of 20 months).

Sarah can elect to withdraw her excess NCCs of $20,000 plus 85 per cent per cent of the $4,078 associated earnings. The associated earnings will be taxed at Sarah's marginal tax rate and she will be entitled to a 15 per cent tax offset of $612.
If Sarah's marginal tax rate was 45 per cent (plus Medicare levy), she would have to pay an extra $1,035 income tax (ie $1,917 tax on earnings less $612 tax offset) plus Medicare levy.

If Sarah elects not to withdraw her excess NCCs from superannuation, she will be required to pay excess NCC tax on the full $20,000, resulting in an excess NCC tax liability of $9,400 (ie 47 per cent of $20,000).

Refund of excess NCCs

The process of seeking a refund of excess NCCs is illustrated below with an example.

Alex exceeds NCC cap by $50,000

Alex exceeds the NCC cap in the 2023/24 year and receives a notice from the ATO dated 28 February 2025 stating he has excess NCCs of $50,000 and associated earnings of $10,213.

Alex has 60 days from the date the notice was issued to make an election to release the excess NCCs and 85 per cent of associated earnings from superannuation or leave the excess amount in his superannuation account and have the 47 per cent tax liability paid from superannuation. If Alex doesn't make an election, the ATO will issue a release authority to a superannuation account in Alex's name for the release of the excess NCCs plus associated earnings. He will still have the opportunity to apply to the ATO for discretion to disregard or reallocate excess contributions on the grounds of 'special circumstances' (see **section 11**).

Where Alex elects to have the excess NCCs and associated earnings refunded:

- the ATO will issue a release authority to a superannuation fund that holds an interest for Alex for the amount of $58,681 (ie excess NCCs plus $8,681 of associated earnings) – see **section 11** for more information on release authorities
- the superannuation fund will have 10 business days from receiving the release authority to pay the amount to the ATO
Note: Exceptions apply in some circumstances including in relation to defined benefit interests, and where the individual has insufficient benefits in the fund. In these cases the fund will be required to either pay the maximum available amount and/or notify the ATO that it is not required to comply with the release authority
- the ATO must credit any amounts paid by the superannuation fund to Alex
- where this credit exceeds Alex's outstanding tax liabilities, the ATO must refund the excess to him. If there is an unreasonable delay between payment by the fund and payment to Alex, the ATO will be required to pay interest.

Extra contributions tax for higher income earners (Division 293 tax)

An additional tax on CCs, known as Division 293 tax, applies to those earning annual income of more than $250,000 in a financial year. For those affected, certain CCs are subject to an additional tax of 15 per cent on top of the standard 15 per cent tax on CCs.

The tax is levied on, and payable by the individual, not the superannuation fund trustee, although the individual may apply for release of funds to pay the tax from their superannuation fund.

How is Division 293 tax calculated? (accumulation funds)

The following discussion assumes an individual only has superannuation interests which are not defined benefit interests.

Broadly, an individual's income for the purposes of the Division 293 tax is the sum of their:

- taxable income (less the taxable component of a superannuation lump sum which is taxed at 0 per cent ie the amount within the low rate cap and the assessable amount of a First Home Super Saver Scheme release amount)
- family trust distributions excluded from assessable income due to the payment of family trust distribution tax
- reportable fringe benefits total, and
- total net investment losses.

Add to this amount the individual's low tax contributions. These are broadly their CCs other than CCs which exceed their CC cap. (For certain State higher level office holders, certain contributions other than salary sacrificed amounts made for them to constitutionally protected funds are also excluded from the definition of low tax contributions).

If this sum exceeds $250,000, the lesser of the excess amount over $250,000 and the individual's low tax contributions is subject to Division 293 tax of 15 per cent.

While the tax will be levied on the individual, the individual will have the option of funding the payment of the tax from superannuation monies by way of a release authority. See **section 11** for further information on release authorities.

This can be illustrated by the following examples.

Susan

Susan's income for Division 293 tax purposes is $285,000 and her low tax contributions are $25,000. Susan is 48 years old.

As the sum of these amounts ($310,000) exceeds the $250,000 threshold, Susan is subject to Division 293 tax. The amount which is subject to the tax is the lesser of the excess ($60,000) and her low tax contributions ($25,000).

So Susan will be subject to Division 293 tax on $25,000. The tax will be $25,000 x 15% = $3,750.

Ashley

Ashley's CCs are $40,000 and he has taxable income (excluding excess CCs) of $240,000 for the year. He is 52 years old and has exceeded the CC cap by $12,500, so this amount will be treated as excess CCs. This amount will also be assessed against Ashley's NCC cap, but in this case will not cause Ashley to exceed the NCC cap. The excess CCs are excluded from the calculation of low tax contributions, so his low tax contributions are $27,500.

However, Ashley's excess CCs of $12,500 are included in his taxable income and therefore count as part of his income for Division 293 tax purposes. This is the case whether or not he chooses to have these excess CCs refunded.

The sum of Ashley's income and low tax contributions is $280,000. The amount which is subject to Division 293 tax is the lesser of the excess ($30,000) and his low tax contributions ($27,500). So Ashley will be subject to Division 293 tax on $27,500.

The tax will be $27,500 x 15% = $4,125.

It is worth noting that a similar result would have been produced if Ashley had not salary sacrificed the excess contributions but instead had received the equivalent amount as additional salary.

Contributions that are not immediately allocated

Contributions that a fund trustee receives from a member's employer are generally required to be allocated to the member within three business days of receiving the contribution and certain information about the member.

Where this requirement does not apply (eg in relation to personal contributions), a fund trustee may accept contributions into a reserve or suspense account, depending on the terms of the trust deed. The trustee will generally allocate them to member accounts within 28 days after the end of the month in which the trustee received the contribution.

However, where it is not reasonably practicable to allocate the contribution within this period, a longer period that is reasonable in the circumstances is permitted.

In the ATO's view, where the trustee chooses to allocate a contribution at a date later than the date the contribution is received, the contribution will count towards the applicable cap in the financial year in which it is allocated (see **TD 2013/22**).

In addition, for the purposes of Division 293 tax, relevant contributions are counted in 'low tax contributions' in the year of allocation, rather than the year they are made.

However, for other tax purposes, including tax deductibility and superannuation fund taxation, the contribution is considered to be made in line with the views in **TR 2010/1**. See **section 1** for further information.

4. Refresher on personal deductible contributions

Checklist – basic conditions for deductibility

The conditions for deducting a personal contribution made in a particular financial year are set down in Subdivision 290-C of the Income Tax Assessment Act 1997. Broadly, the main conditions are as follows:

1. **Purpose:** The member must have made personal contributions to a complying fund for the purpose of providing superannuation benefits.
2. **Age limits:** The member must be aged at least 18 years or more when they make the contribution (unless they are carrying on a business or engaging in employment-related activities) and the contribution must be made before the end of 28 days after the month in which the member turns 75.
3. **Deduction notice:** The member must give a valid notice, in the approved form, to the trustee of the fund within certain timeframes. Note: this is a key cap trap area – see further discussion under the heading '**Deduction notice requirements**' on page 17.
4. **Acknowledgement of notice**: The trustee of the fund must have acknowledged the notice.
5. **No tax loss:** A deduction claimed for a personal contribution cannot add to or create a tax loss. In other words, the deduction claimed in a particular income year is typically limited to the amount of taxable income that the individual would otherwise have for that year. **Note: this is a key cap trap area**.
6. **Work test:** From 1 July 2022, individuals who contribute from age 67 to age 75 (up to the end of 28 days after the month in which the member turns 75) will be required to meet a work test (or work test exemption) in order to claim a tax deduction for personal contributions. This will require the individual to be gainfully employed for at least 40 hours in 30 consecutive days in the year the contribution is made. The work test exemption applies if the individual met the work test in the prior financial year, their total superannuation balance was less than $300,000 at the prior 30 June and they have not previously used the work test exemption.

If the above conditions are met, a member can claim a deduction for their personal superannuation contributions.

However, there are some types of contributions that cannot be claimed as a tax deduction. These include:

- a contribution attributable to a capital gain disregarded by a member who is less than 55 under the CGT 'small business retirement exemption'
- a lump sum or transfer from a foreign super fund
- a contribution to a constitutionally protected fund or a defined benefit interest in a Commonwealth public sector super scheme
- a rollover of superannuation benefit
- downsizer contributions
- COVID-19 re-contributions.

Ensuring correct classification of a contribution

Cap trap: Classifying a contribution as an employer contribution will not have the same effect as classifying it as a personal deductible contribution. Misclassifying the contribution can be problematic, and in some cases cause excess contributions problems.

It is important to be aware that a contribution intended to be claimed as a tax deduction against an individual's own assessable income must be classified as a personal contribution, not an employer contribution. This is because, under tax law, an individual must provide their fund with a deduction notice with respect to that personal contribution in an ATO approved form and within certain timeframes to be eligible to claim a deduction personally.

So what can go wrong?

If an individual incorrectly classifies a contribution as an employer contribution (when it should be classified as a personal deductible contribution) the impacts may be as follows:

- the superannuation fund will record the amount as an employer contribution rather than a personal contribution and report to the ATO accordingly
- the superannuation fund will deduct 15 per cent and pay that to the ATO
- the ATO may double-count the contribution for cap purposes. If the individual makes a claim for a deduction in his or her own tax return the ATO will add the amount of employer contributions reported by the fund to the amount personally claimed by the individual. If the total exceeds the CC cap, the ATO may pursue the individual for excess contributions, and
- often the individual may omit to lodge a deduction notice in the required time frames, resulting in the notice being invalid and/or the claim for a deduction being disallowed. See '**What happens when a claim for a deduction is disallowed?**' on page 19.

In these circumstances, the scope for both the ATO and the superannuation fund to resolve the individual's problem is limited.

Therefore, not only is it important to ensure that the deduction notice timeframes and conditions are met but also that the individual's superannuation fund is advised of the correct contribution type so that contributions are correctly treated and reported to the ATO.

Refer to **Case study 12** for a practical example of this Cap trap.

Deduction notice requirements

To claim a deduction for a contribution, a deduction notice for the contribution must be given in the approved form. While the ATO has developed a standard form for this purpose (**NAT 71121**), many superannuation funds use their own form.

Timing conditions

A deduction notice must be given before the earlier of:

1. the day the member lodges their tax return for the year in which the contributions were made, and
2. the end of the financial year after the year in which the contributions were made.

Notice invalidity conditions

In addition, a deduction notice covering a contribution will not be valid if:[8]

1. it is not in respect of the contribution
2. all or part of the contribution has been covered by an earlier notice
3. the individual is no longer a member of the fund (eg where the whole benefit is withdrawn or rolled over from the fund – see **Case study 1** in section 9 for an example illustrating this rule)
4. the trustee of the fund no longer holds the contribution (eg where part of an individual's account balance is withdrawn or rolled over) – discussed further below
5. the member has applied to split contributions with their spouse and their application has been accepted by the fund in respect of the contribution, or
6. the trustee of the fund has begun to pay a superannuation income stream based in whole or part on the contribution – discussed further on page 19.

When a fund no longer holds a contribution (notice invalidity condition 4)

The ATO takes a stringent view in relation to when a fund is considered to no longer hold a contribution.

This is best illustrated with an example.

Margaret, single contribution and single withdrawal

Margaret, who is 57, had a superannuation interest valued at $100,000 which included a tax free component (TFC) of $15,000. She made a $25,000 personal contribution in March 2023. Following the contribution, the value of her superannuation interest was $125,000 which included a TFC of $40,000.

In June 2023, Margaret withdraws a lump sum of $50,000 leaving her with an interest of $75,000. The $50,000 withdrawal is made up of $16,000 TFC and $34,000 taxable component. The TFC is calculated in accordance with the proportioning rule as follows:

$$\text{Lump sum withdrawal} \times \frac{\text{TFC of interest before withdrawal}}{\text{value of interest before withdrawal}}$$

$$= \$50{,}000 \times \frac{\$40{,}000}{\$125{,}000}$$

$$= \$16{,}000$$

Following the withdrawal, the TFC of the remaining superannuation interest is $24,000.

Margaret then lodges a notice in September 2023 advising that she intends to claim a deduction for the $25,000 contribution made in the 2022/23 income year.

However, the notice is not valid and cannot be accepted by the superannuation fund because the fund no longer holds the entire $25,000 contribution.

The ATO's view as reflected in **TR 2010/1** is that Margaret's notice would be limited to $15,000. That amount is worked out as follows:

$$\text{TFC of remaining interest} \times \frac{\text{Contribution}}{\text{TFC of interest before withdrawal}}$$

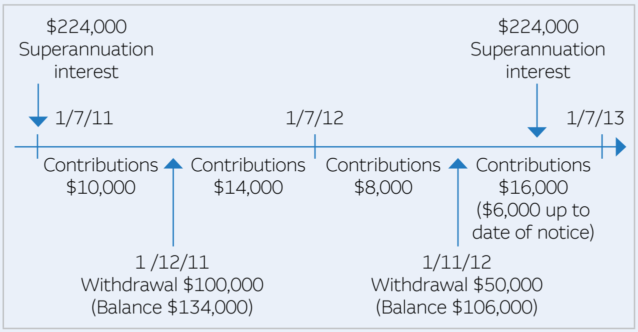
$$= \$24{,}000 \times \frac{\$25{,}000}{\$40{,}000}$$

$$= \$15{,}000$$

8 Relief from the deduction notice invalidity conditions is available to members of a fund that merges with another fund in certain circumstances. Where applicable, the relief allows a notice to be given to the continuing fund in the same circumstances as if the individual had remained a member of the original fund.

The following example (Example 10 in **TR 2010/1**) illustrates the complexity of the ATO's approach in cases where there are multiple withdrawals prior to a deduction notice being provided.

Mark, multiple contributions and multiple withdrawals



This example assumes no investment earnings or administration fees. All calculations have been rounded to the nearest dollar.

On 1 July 2011 Mark had a superannuation interest valued at $224,000 including a tax free component (TFC) of $74,000. Mark pays superannuation contributions of $2,000 on the 20th day of each month.

First withdrawal

On 1 December 2011 Mark withdraws $100,000. Prior to the withdrawal Mark's account balance was $234,000 including a TFC of $84,000 ($74,000 + $10,000 contributions). The balance after withdrawal is $134,000 including a TFC of $48,103.

The withdrawal affects the amount Mark can include in a valid deduction notice for the contributions made from 1 July 2011 until the withdrawal (1 December 2011) as only a proportion of these contributions are still held by the fund. The proportion of the $10,000 in contributions still held by the fund is:

$$\text{TFC of remaining interest} \times \frac{\text{Contribution}}{\text{TFC of interest before withdrawal}}$$

$$= \$48{,}103 \times \frac{\$10{,}000}{\$84{,}000}$$

$$= \$5{,}727$$

Second withdrawal

Mark makes a second withdrawal of $50,000 on 1 November 2012. Prior to the withdrawal Mark's account balance was $156,000 including a TFC of $70,103 ($48,103 + $14,000 + $8,000). The balance after withdrawal is $106,000 including a TFC of $47,634.

This second withdrawal also affects the amount Mark can include in a valid deduction notice for contributions made in the 2011/12 income year. Additionally, it affects the amount that can be included in a valid deduction notice for contributions made in the 2012/13 income year insofar as the contributions ($8,000) were made before the withdrawal.

Valid deduction for the 2011/12 income year

For the 2011/12 income year Mark had made contributions of $10,000 prior to the withdrawal on 1 December 2011. As calculated above, only $5,727 of those contributions remained in the fund after the first withdrawal. After the first withdrawal, further contributions of $14,000 were made in the 2011/12 income year. The proportion of the contributions made in the 2011/12 income year that are still in the fund after the second withdrawal and for which Mark could present a valid deduction notice for 2011/12 is:

$$\text{TFC of remaining interest} \times \frac{\text{Contribution}}{\text{TFC of interest before withdrawal}}$$

$$= \$\$47{,}634 \times \frac{\$5{,}727 + \$14{,}000}{\$70{,}103}$$

$$= \$13{,}404$$

Valid deduction for the 2012/13 income year

For the 2012/13 income year Mark had made contributions of $8,000 between 1 July 2012 and the second withdrawal on 1 November 2012. The proportions of these contributions which are still held by the fund after the second withdrawal and for which Mark could give a valid notice for 2012/13 are:

$$\text{TFC of remaining interest} \times \frac{\text{Contribution}}{\text{TFC of interest before withdrawal}}$$

$$= \$47{,}634 \times \frac{\$8{,}000}{\$70{,}103}$$

$$= \$5{,}436$$

On 10 February 2013 Mark presented a valid deduction notice for $13,404 for contributions made during the 2011/12 income year. These contributions cease to be part of the TFC and become part of the taxable component. The balance of Mark's interest is reduced by $2,011 (15 per cent of $13,404), being the tax payable by the fund on the contribution which is now assessable income of the fund. The balance of Mark's interest after presentation of the notice is $109,989 ($106,000 + $6,000 – $2,011), comprising a TFC of $40,230 ($47,634 + $6,000 – $13,404) and a taxable component of $69,759 ($109,989 – $40,230).

Provided Mark does not make another withdrawal before he presents a deduction notice for the 2012/13 income year a valid notice can be given to the fund for $21,436. This comprises the contributions made between 1 July 2012 and 1 November 2012 that remain in the fund after the withdrawal ($5,436) and contributions made between 1 November 2012 and 30 June 2013 ($16,000).

Source: TR 2010/1: Superannuation contributions.

See **Case study 4** in section 9 for another example of when a fund is considered to no longer hold a contribution.

The ATO's view means that individuals may not be able to claim deductions that they would otherwise be entitled to, simply because they have rolled over their benefits to another superannuation fund or withdrawn them as lump sums from the fund. It will be prudent to ensure deduction notices are lodged with the fund before the payment of any benefits.

When an income stream is based in whole or part on a contribution (notice invalidity condition 6)

The ATO's position in relation to when a contribution forms the basis in whole or part of a pension is also explained in **TR 2010/1**. The ATO's view is that a deduction notice in respect of a personal contribution is invalid if it is received after the contribution has been taken into account in determining the tax component proportions of an income stream that has commenced.

The ATO's position is of particular importance for individuals who are considering commencing a pension. It will be necessary for them to submit their deduction notice before the pension is commenced, even if only part of their account balance (ie as little as $1) is applied to commence the pension.

Case study 2 in section 9 demonstrates what the ATO's position means for a person who commences a pension with part of their accumulation account balance.

Varying an earlier deduction notice

A deduction notice cannot be revoked or withdrawn but it can be varied (subject to certain conditions) provided that the variation reduces the amount being claimed as a tax deduction. In other words, a member cannot increase the amount being claimed in respect of a contribution that has already been covered by an earlier notice.

In practice this rule means it may be prudent for individuals to delay the lodgment of their deduction notice until they know precisely how much they are able to claim (bearing in mind the time limits and assuming that they do not leave the fund or commence a pension in the mean time).

Like the original deduction notice, a variation of a previous notice must also be made in the approved form and within certain timeframes. The ATO's standard deduction notice form can be used for this purpose (but again, many superannuation funds will use their own form).

A variation of a previous notice is subject to restrictions that are similar to deduction notices themselves. That is, a variation can only be made before the earlier of:

1. the day the member lodges their tax return for the relevant year, and
2. the end of the financial year after the relevant year;

unless the ATO has disallowed a deduction and the variation reduces the amount specified in the earlier notice (by the amount disallowed).

A variation will not be effective under any circumstances, including where the ATO has disallowed the claim for a deduction, if:

1. the individual is no longer a member of the fund
2. the trustee no longer holds the contribution, or
3. the trustee of the fund has begun to pay a superannuation income stream based in whole or part on the contribution.

What happens when a claim for a deduction is disallowed?

A deduction may be disallowed by the ATO if one or more of the **basic conditions** are not met. For example, an individual may have made personal contributions and failed to provide their fund with a valid deduction notice within the relevant time frames. Alternatively, a deduction could be disallowed if the individual has insufficient taxable income.

In cases where a deduction is disallowed, the amount disallowed will be treated by the ATO as an NCC, subject to the NCC cap (instead of the CC cap[9]). If the member has otherwise contributed up to their NCC cap, this amount will be treated as an excess NCC.

In these cases, if the individual was to vary a previous deduction notice (assuming one was provided) the fund would reflect the amount disallowed as an NCC. This will typically involve the member's account being refunded the 15 per cent contributions tax that was previously deducted, effectively converting the amount to tax free component in the member's account.

If the member is unable to vary the deduction notice (for example, because they have commenced a pension or left the fund), the fund is unable to claim this tax back from the ATO (so the member typically would not receive this refund) or change the tax components of the member's account.

Case study 3 in section 9 illustrates the potential impact on individuals who commence a pension before varying their deduction notice.

9 However, there is an argument that the contribution should be treated as a CC on the basis that it was included in the superannuation fund's assessable income and assuming the notice is not varied.

5. Contributions to certain defined benefit schemes and untaxed superannuation funds

An individual's CCs for a financial year include:

- certain contributions to constitutionally protected funds (CPFs)
- 'notional taxed contributions' in respect of a defined benefit (DB) interest, and
- the amount (if any) by which certain DB contributions exceed notional taxed contributions.

Where the sum of the above amounts otherwise exceed the CC cap, transitional arrangements apply to treat these amounts as being equal to the CC cap. Note that these transitional arrangements only apply to notional taxed contributions where special grandfathering rules (outlined below) also apply.

Additional contributions, for example via a salary sacrifice arrangement with an employer, are assessed against the CC cap.

DB superannuation schemes – funded

Most DB super schemes are funded arrangements where the sponsoring employer is required to make contributions from time to time based on actuarial advice regarding the scheme's capacity to meet its liabilities. These employer contributions are generally made on a pooled basis and are not allocated to specific members. Statutory formulae are used to calculate the annual level of 'notional taxed contribution' for each member. The annually calculated notional taxed contribution is independent of the amount (if any) the employer actually contributes to the scheme in a given year.

The level of notional taxed contribution is largely beyond the control of a member so concessional grandfathering rules apply. The grandfathering rules (in addition to those mentioned above) limit the amount of CCs to the member's CC cap where certain conditions are met and the amount would otherwise exceed the CC cap. Only the amount of notional taxed contributions in respect of the member's DB interest is capped.

The grandfathering rules operate where membership existed at 12 May 2009 (in relation to 2009/10 and later income years). Further requirements include limitations on benefit rate changes, changes to the calculation of superannuation salary, voluntary movements between benefit categories, and the trustee or employer sponsor exercising discretion to pay increased benefits.

To preserve the potential application of the funded DB super scheme grandfathering provisions, clients should be careful not to voluntarily change benefit categories or raise their superannuation salary above certain limits (50 per cent in 1 year, 75 per cent over 3 years) on a non-arms' length basis.

Certain DB scheme members may have an additional amount included in their CCs where their DB contributions exceed their notional taxed contributions. For funded DB schemes, a member's DB contributions are equal to their notional taxed contributions, prior to the application of the grandfathering rules for members who joined the scheme on or before 12 May 2009. If as a result of disregarding these grandfathering rules, the member's DB contributions exceed their notional taxed contributions, the excess amount will count towards their CC cap. Separate transitional arrangements (as mentioned above) apply to limit the amount of their DB contributions and notional taxed contributions to the CC cap.

See **Case study 8** in section 9 for an example of how the grandfathering rules operate.

DB superannuation schemes – unfunded

Some DB super schemes, or certain parts of them, are unfunded – that is, the ultimate member benefit is financed only as it becomes payable. Typically these schemes are run for government employees – examples include the Commonwealth Superannuation Scheme (CSS) and Public Sector Superannuation (PSS) Scheme.

Schemes like the CSS, PSS and certain military schemes typically have funded and unfunded components. Generally contributions in respect of the funded components are measured against either the client's NCC cap (employee after-tax contributions) or CC cap (employer funded contributions, eg 3 per cent employer productivity contributions in some circumstances).

DB schemes are required to calculate an estimate of the CCs necessary to support a member's accrued benefits in the unfunded component of the scheme. Statutory formulae are used to calculate the annual DB contributions and notional taxed contributions for each member. The member's notional taxed contributions and the difference between their DB contributions and notional taxed contributions will be included in their CCs for the year. This change also applies to DB interests in CPFs.

The special grandfathering rules that apply for notional taxed contributions for funded DB interests (outlined above) do not apply to unfunded DB interests.

Untaxed funds/CPFs

Constitutionally protected superannuation funds are generally State government operated schemes (established by State legislation) that are exempt from Federal taxation because of the general constitutional restriction on the Federal government taxing State governments.

In addition, schemes created for members of the judiciary are also constitutionally protected due to the doctrine of the separation of powers of judiciary from the government and legislature.

Contributions to a CPF are included as CCs for a member if the amount would, apart from the income tax exemption (noted above), have been assessable income to the fund. Transitional arrangements ensure that CCs to a CPF alone cannot result in excess CCs for a member.

Key planning point for clients with unfunded DB super scheme or CPF interests

In some cases members may be able to salary sacrifice to these schemes at levels greater than the standard CC cap. As each scheme and each pay office may have unique restrictions with regard to these issues, we recommend that you contact the scheme administrator and pay office for specific details.

6. Private investment company and trust contributions

TR 2010/1 describes the conditions for deductibility of contributions made for company directors.

Amongst other conditions, for an employer contribution to be deductible, the employee either must be:

1. a common law employee, in which case he or she must also satisfy an 'employment activity condition' – that is, the employee either must be:
   - engaged in producing assessable income of the employer, or
   - an Australian resident who is engaged in the employer's business, or
2. an employee within the expanded meaning of employee in the Superannuation Guarantee (Administration) Act 1992 (SGAA), in which case no employment activity condition needs to be satisfied.

   Contributions for a company director who is entitled to remuneration are deductible because the director will meet the SGAA definition.

However, where a company director is not entitled to remuneration in that capacity, they do not meet the SGAA definition (based on his or her directorship alone). In these cases the ATO takes the view that there is no scope to claim a deduction (even if the director satisfied an employment activity condition) because a director is not a common law employee.

In practice this is particularly relevant in relation to private investment companies or corporate trustees of private investment trusts where the relevant director is not also engaged as an employee. Typically it is not relevant for corporate trustees of SMSFs since directors of SMSFs typically cannot be remunerated.

A point of clarification in **TR 2010/1** is that the corporate trustee of a trust may be entitled to deduct a contribution made for a director against the **income earned by the company** (as opposed to the trust). A contribution for a director of the corporate trustee of a trust can only be deducted from the income of the trust if the director is a common law employee of the trust engaged in producing the assessable income of the trust or its business.

7. Refresher on 'special' super contributions

The table below briefly outlines the conditions (including notice requirements) that must be met in relation to certain types of super contributions that qualify for special tax treatment or certain exemptions from the contributions caps.

Explanation	Conditions	Timeframe for providing notice (in ATO approved form)
CGT small business concession contribution		
These are the sale proceeds of small business assets that qualify for either: • the CGT small business 15-year exemption, or • the CGT small business retirement exemption (which is subject to a $500,000 life time limit). If the conditions are met, these amounts can count towards the 'CGT cap' ($1.780 million lifetime limit in 2024/25). See **section 3** for information about the CGT cap. An individual under age 55 cannot claim a deduction for a contribution to the extent that it is attributable to a gain disregarded under the retirement exemption.	1. Contribution must be made to a complying fund. 2. Choice to apply CGT cap must be made in an ATO approved **CGT cap election form** and within certain timeframes. 3. For the 15-year exemption, the contribution must be equal to all or part of proceeds that qualify for the exemption. Special rules apply where: • the asset was a pre-CGT asset • there was no capital gain or loss, or • the 15-year holding period wasn't met due to permanent incapacity. 4. For the retirement exemption, the contribution must be equal to all or part of a gain that qualifies for CGT retirement exemption. A separate lifetime limit of $500,000 applies to amount of capital gains to which this exemption can apply. 5. Contribution must be made before the later of: • 30 days after receiving the proceeds, and • time the individual lodges tax return (or later time allowed by the ATO). Different timeframe requirements apply in the case of a payment of proceeds from a company or trust.	The CGT cap election form must be provided no later than the time the contribution is made. If the form is not provided until after the contribution has been made (even if the choice to apply the exemption is made later), the contribution will be treated as a regular personal contribution. **Case study 5** in section 9 illustrates the importance of submitting the required notice in time.
Personal injury contribution		
Individuals who receive a compensation payment or settlement for a personal injury they have suffered may be able to contribute the proceeds of the payment to superannuation and choose to have the contributions excluded from the NCC cap.	1. Contributions must arise from either: • a structured settlement payment • an order for a personal injury payment, or • a workers' compensation payment relating to a personal injury, taken as a lump sum. 2. Contribution must be made within 90 days of the later of: • the day the personal injury payment was received • the day an agreement for settlement of payment was entered into, or • the day on which an order for a payment was made. 3. Two legally qualified medical practitioners must have certified that, because of the personal injury, it is unlikely that the individual can ever be gainfully employed in a capacity for which they are reasonably qualified because of education, experience or training. 4. The choice to exclude all or part of the contribution from the NCC cap must be made in an ATO approved **Contributions for Personal Injury form**.	The form must be provided no later than the time the contribution is made. See **Case study 6** in section 9 for an example of a personal injury contribution.

<table>
<tr><th>Explanation</th><th>Conditions</th><th>Timeframe for providing notice (in ATO approved form)</th></tr>
<tr><td colspan="3">Overseas transfer</td></tr>
<tr><td>Part of a transfer from a foreign superannuation fund[10] (excluding transfers from New Zealand KiwiSaver schemes) may be included in assessable income, typically, where:
• the transfer occurs outside six months following the date that the individual became an Australian resident, and
• there has been growth in the valuation of the benefit since then.
Individuals may be able to elect to have an amount that would otherwise be included in their assessable income taxed in the fund at 15% (instead of their marginal rate).
Where this choice is made, the amount is exempt from the CC cap. The remainder of the transfer will count towards the NCC cap.</td><td>1. Lump sum must be paid from a foreign superannuation fund.
2. All of the lump sum must be paid into a complying superannuation fund.
3. After the transfer, the individual must not hold an interest in the transferring foreign fund.
4. The individual must make the choice in writing and in compliance with the income tax regulations. Currently there are no requirements specified in the regulations, but the ATO has issued a standard Choice to have your Australian fund pay tax on a foreign super transfer for this purpose.</td><td>No time limits are specified in the legislation but, in practice, the form will need to be given to the Australian superannuation fund before the end of the financial year in which the transfer is received so that the fund can account for the tax in the correct income year. It will also generally not be possible for a fund to give effect to an individual's choice if they have commenced a pension or ceased to be a member of the fund. In ATO ID 2012/27 the ATO confirms that a choice cannot be revoked or varied after it has been made.</td></tr>
<tr><td colspan="3">Downsizer contribution</td></tr>
<tr><td>Individuals may be able to use the capital proceeds from the sale of their main residence to make a 'downsizer' contribution.
Downsizer contributions can only be made in relation to the sale of one main residence.
The contribution is limited to the lesser of:
• $300,000 less any downsizer contributions already made by the individual or their spouse, and
• the actual capital proceeds less any downsizer contributions already made by the individual or their spouse
These limits apply to each member of a couple.
If the conditions are met, the contribution will be excluded from the NCC cap.
The individual cannot claim a tax deduction for these contributions.</td><td>1. Contribution must be equal to all or part of the capital proceeds from the disposal of a dwelling (other than a caravan, houseboat or other mobile home) located in Australia.
2. Contract for sale of dwelling must be entered into on or after 1 July 2018.
3. The individual or their spouse must:
• have owned the dwelling for at least 10 years
• be eligible for a full or partial main residence CGT exemption in respect of the dwelling.
4. Individual must be aged 55 or over at time of contribution.
5. Contribution must be made within 90 days (or later time allowed by the ATO) from change of ownership (ie generally when settlement occurs).
6. Choice to apply the downsizer contribution must be made using an ATO approved form Downsizer contribution into superannuation form.</td><td>The form must be provided no later than the time the contribution is made.</td></tr>
</table>

10 The ATO generally takes the view that a foreign fund is a 'superannuation fund' if it exclusively provides a narrow range of benefits, generally in relation to retirement, invalidity or death of the individual or otherwise as specified in Australian superannuation law.

Explanation	Conditions	Timeframe for providing notice (in ATO approved form)
COVID-19 re-contribution		
Individual's who have accessed their super under the COVID-19 compassionate grounds condition of release in 2019/20 and/or 2020/21 are able to contribute an amount back to super without these contributions counting towards the individual's NCC caps.	1. The amount of the contribution(s) is limited to the amount accessed in 2019/20 and/or 2020/21 under the COVID-19 compassionate grounds condition of release. 2. The contribution is made between 1 July 2021 and 30 June 2030 (inclusive) 3. The choice to exclude all or part of the contribution from the NCC cap must be made in the ATO approved **Notice of re-contributions of COVID-19 Early Release amounts**.	The form must be provided no later than the time the contribution is made.

8. Recording and reporting contributions

Financial services professionals may find it helpful to have a complete and up-to-date record of their clients' superannuation contributions and balances. Penalties may apply for breaches of contribution caps (for example, see **Case study 10 and Case study 12**). In some cases financial services professionals may be expected to compensate their clients for faulty advice which has led to breaches of contribution caps.

The onus falls on financial services professionals to **collect all data about contributions** made in the current income year and previous income years when advising on NCCs. This may often involve difficulties as many individuals and their employers contribute to a number of superannuation funds.

From 1 July 2017, financial services professionals also require information on a client's total superannuation balance. Individuals are able to check their total superannuation balance using ATO online services linked to their myGov account.

Obtaining the client's authority to access information may be crucial. Clients should be educated to understand the importance of fully disclosing all superannuation contributions made, including the type and timing of the contributions. Where applicable, financial services professionals should verify any information received with the particular superannuation funds involved. In situations where individuals are making personal contributions intended to be claimed as a tax deduction, financial services professionals may also wish to liaise with their tax advisers to confirm eligibility. See **section 4** for more on personal deductible contributions.

Additionally, it will be important for advisers to **accurately record and track superannuation contributions and total superannuation balance** based on information either provided by their clients or from other sources. An appropriate software application and disciplined business processes associated with clients (information available on the MyGov website) making superannuation contributions, perhaps based on the reports generated from the software application, may be appropriate.

9. Practical case studies of some typical cap traps

The case studies below put a number of the issues discussed earlier into a practical situation. We have outlined the issues involved including the tax consequences. In some cases where an individual has breached a contribution cap, certain solutions may be available depending on the circumstances.

CASE STUDY 1 – Disallowed deduction: insufficient income

Contributions made in 2022/23

Mike is 62 years old and occasionally undertakes some consulting work. On 10 August 2022 Mike decided to use the NCC cap 'bring-forward' arrangements and contribute $330,000 to his superannuation (he had not made use of these arrangements in the previous 2 years and his total superannuation balance on 30 June 2022 was less than $1.48 million). He made a further contribution of $27,500 on 20 January 2023 which he advised that he intended to claim as a tax deduction in a valid deduction notice.

His superannuation fund acknowledged receipt of his deduction notice.

In August 2023 Mike lodged his tax return for 2022/23. His accountant advised him that his taxable income for that year was $20,000 before factoring in the deduction for the personal superannuation contribution.

What issues does Mike face?

As noted in **section 4**, a deduction for personal superannuation contributions cannot create or add to a tax loss.

As Mike only had taxable income of $20,000 (before factoring in the deduction for the personal contribution), the maximum tax deduction he was allowed to claim was $20,000, not $27,500.

Mike also decided to make use of the 'bring-forward' arrangements by contributing $330,000. Unfortunately for Mike, as he was only able to claim a deduction for his personal contributions of $20,000, the remaining $7,500 that he intended to be a CC will be treated by the ATO as an NCC which exceeds the NCC cap. Mike can either elect to withdraw his excess NCCs (and 85 per cent of associated earnings) from super or leave the excess amount in his fund. If he elects not to withdraw the excess amount and associated earnings, he will be liable to pay excess NCC tax of $3,525 (47 per cent of $7,500).

Mike could vary his deduction notice downwards from $27,500 to $20,000 or below, and upon receipt of the variation notice the superannuation fund should refund the 15 per cent tax deducted on the amount no longer being claimed to his account. For example, should Mike vary the deduction notice from $27,500 to $20,000, his account should be credited with a refund of $1,125. In addition, the superannuation fund would alter the tax components of his account to reflect the $7,500 that is not being claimed as a deduction as tax free component.

Contributions made in 2023/24

On 1 January 2024 Mike retires. He decides to sell an asset realising a large capital gain. He intends to make a $27,500 personal contribution and claim it as a tax deduction to offset the capital gain. However, Mike does not submit a deduction notice for this amount when he makes the contribution. In addition he makes a personal NCC of $220,000.

As soon as these contributions were made he started an account-based pension with his super balance to help fund his retirement income requirements.

In June 2024 Mike remembers that he wants to lodge his 2024 tax return in August. He also remembers that he needs to give a deduction notice to his fund for the personal contribution made in January 2024.

What issues does Mike face?

A deduction notice for a contribution must be lodged and acknowledged before commencing an income stream based on all or part of the contribution. As Mike started an account-based pension prior to lodging the deduction notice, the fund was unable to process his notice and he was unable to claim the $27,500 as a tax deduction.

The contribution was therefore treated as an NCC.

In addition, Mike made NCCs of $220,000 resulting in total NCCs of $247,500 for the 2023/24 financial year.

By triggering the 3-year 'bring-forward' cap and using up the full $330,000 3-year cap in 2022/23, any additional NCCs Mike made up until 30 June 2025 will be excessive. Therefore, the $247,500 that Mike contributed in 2023/24 will be considered excess NCCs.

If Mike elects to retain the NCCs in the fund, they will be taxed at 47 per cent resulting in a liability of $116,325, effectively reducing his after tax contribution to $131,175. On the other hand, if Mike elects to have his excess NCCs (and 85 per cent of associated earnings) released, he will be required to pay tax on the associated earnings at his marginal rate, less a 15 per cent offset.

On top of this tax liability, Mike will not get the benefit of the tax deduction and will be unable to reduce the tax on the capital gain as originally intended.

For further information about the issues covered in this case study:

- refer to **section 3** for information about the contribution caps.
- refer to **section 4** for information about the conditions that must be met to claim a deduction (including notice requirements).

CASE STUDY 2 – Disallowed deduction: partial transfer to pension

In July 2023 Sam, aged 52, made a $27,500 personal contribution to a superannuation account. His account was valued at $372,500 just before the contribution was made, consisting of a $172,500 tax free component and $200,000 taxable component.

The $27,500 contribution was not accompanied by a deduction notice and therefore effectively increased the tax free component of his superannuation account. Following the contribution, Sam's superannuation account was valued at $400,000 ($200,000 tax free component and $200,000 taxable component).

Sam then commenced a pension with $200,000 from his accumulation account, the tax components of which were determined based on the proportions of tax free and taxable component at the time of commencement. The tax free component of the pension when it commenced was therefore $100,000 (50 per cent). Sam left the remaining $200,000 in his accumulation account.

When Sam completed his 2023/24 tax return, he realised that he could benefit from claiming a tax deduction for the $27,500 contribution and lodged a deduction notice for the contribution with his fund just before he lodged his tax return.

What issues does Sam face?

In the ATO's view (as reflected in **TR 2010/1: Superannuation contributions**), Sam's deduction notice for the $27,500 contribution was not valid. This is because the contribution was taken into account in determining the tax component proportions of the pension and, therefore, the ATO considered that the income stream was based in whole or part on the contribution.

The implication was that the $27,500 contribution that Sam made in July 2023 was an NCC, instead of a CC as Sam intended. This may have had contribution cap implications for Sam, depending on any additional contributions he made.

If Sam provided his deduction notice to the fund before starting his pension, then his deduction notice would have been valid. His fund would have deducted $4,125 (15 per cent tax) on the contribution (reflecting the contribution as a CC) and the pension would have commenced with a lower tax free component (and a higher taxable component).

For further information about the issues covered in this case study, refer to **section 4** which explains the conditions that must be met to claim a deduction (including notice requirements and issues associated with starting a pension).

CASE STUDY 3 – Varying a deduction notice for a personal contribution

Peter is aged 42 and not currently working. He made a personal contribution of $27,500 on 4 August 2023 and lodged a deduction notice in respect of the whole contribution stating that he intended to claim $20,000 of it as a tax deduction.

At the end of the 2023/24 financial year, when he completed his tax return, Peter realised he had more taxable income than expected and that it would be beneficial for him to claim the full $27,500 as a tax deduction rather than $20,000.

Can Peter vary his deduction notice?

Variations to a deduction notice can only reduce the amount being claimed as a tax deduction. In addition, a deduction notice is invalid if all or part of the contribution has been covered by an earlier notice. As a result Peter was unable to vary his deduction notice upwards or submit a new deduction notice for the remaining $7,500. However, if Peter's original notice was only in respect of $20,000 (not $27,500) stating that he intended to claim $20,000, he would have been able to lodge a new deduction notice for the remaining $7,500 as this amount would not have been covered by an earlier notice.

For further information about the requirements for deduction notices, refer to **section 4.**

CASE STUDY 4 – Deducting a personal contribution after a partial withdrawal

Jan is 60 years old. In January 2024 Jan made a personal contribution of $25,000 to a superannuation account that (before the contribution) had an account balance of $75,000 including a $45,000 tax free component.

In July 2024 Jan retires, and withdraws $25,000 from her superannuation account to fund the cost of a holiday. Assuming that Jan's account balance had not grown with investment earnings since making the contribution, the amount of the withdrawal reduced the tax free component of her account by $17,500.

In August 2024 Jan decides to lodge a deduction notice with the superannuation fund to claim a tax deduction for the full $25,000. Her account balance at this time was valued at $75,000 (comprising $52,500 tax free component and $22,500 taxable component, again, assuming no investment earnings investment earnings).

What are the implications for Jan?

In order for a deduction notice to be valid, the fund must hold the contribution at the time it is given to the fund. Based on the ATO's view in **TR 2010/1: Super contributions**, the amount of the original contribution of $25,000 still held by the fund is determined as follows:

$$\text{TFC of remaining interest} \times \frac{\text{Contribution}}{\text{TFC of interest before withdrawal}}$$

$$= \$52{,}500 \times \frac{\$25{,}000}{\$70{,}000}$$

$$= \$18{,}750$$

Therefore Jan could only lodge a deduction notice for $18,750.

Note: The requirement for the fund to hold the contribution means that the contribution (or part of it) hasn't been used up in cashing or rolling over a benefit. If, however, Jan contributed $25,000 and the value of the account reduced to $75,000 because of negative investment earnings (for example) instead of because of a benefit payment, then she would still be able to lodge an effective deduction notice for $25,000 as the fund would still be considered to hold the contribution.

For further information about the requirements for deduction notices, refer to **section 4**.

CASE STUDY 5 – CGT small business concession contribution

Alice ran a small successful house cleaning business and after running the business for over 20 years, she decided to retire. She found a buyer for her business and engaged a solicitor and accountant to help with the sale. Her accountant informed her that she was eligible for the CGT small business 15-year exemption and could make use of the 'CGT cap' instead of having the contributions counted towards her NCC cap.

Alice also has a residential investment property that she will be selling in 12 months' time. At this stage she plans to contribute the proceeds from the sale of the property to super as an NCC.

The sale of the business occurred in two equal tranches of $330,000, one completed on 30 October 2023 and the other on 31 March 2024.

On receipt of the first $330,000 tranche from the sale of her business, she contributed the proceeds to her superannuation fund in the form of a cheque drawn from her personal bank account. In the absence of any advice to the contrary, the superannuation fund accepted the contribution as a regular personal contribution.

What issues does Alice face and what are the potential tax implications?

For simplicity we will assume that:

- Alice satisfied all the conditions in order to qualify for the CGT small business 15-year exemption, and
- she didn't make any other personal contributions in the past two years.

Alice should have lodged a **Capital gains tax cap election form** (NAT 71161) at the time or before the contribution was made.

Without this form the superannuation fund is likely to treat the contribution as a regular personal NCC and, once it has been accepted, the fund cannot accept the ATO form and reclassify the contribution. The contribution will use up Alice's full 3-year 'bring-forward' NCC cap of $330,000 meaning she will be unable to make additional NCCs until 1 July 2026 without having excess NCCs. Alice intended to contribute the proceeds from the sale of her property to superannuation as an NCC in 12 months' time. She will now need to amend her strategy.

When Alice received the second tranche she should have supplied the correct form with the contribution. If this did not occur, the amount contributed would be treated as an excess NCC.

For further information about CGT small business concession contributions, see **section 7**.

CASE STUDY 6 – Personal injury contributions

Bobby fell off his motorbike breaking numerous bones and injuring himself such that he is unlikely to be able to work again.

Bobby was awarded damages of $1.8 million.

Bobby's sister Cindy mentioned that he may be able to contribute these proceeds to superannuation and qualify for a special exemption from the NCC cap.

After completing a small amount of research Bobby contributed the whole amount to super.

What steps should Bobby take to ensure there are no adverse ramifications?

If the relevant conditions in relation to compensation payments resulting from personal injury are satisfied, the contribution will not count towards the NCC cap.

Bobby needs to send a completed **Contributions for personal injury form** (NAT 71162) to the fund at the time, or before, the contribution is made.

Other conditions also apply including a requirement for the contribution to be made within certain timeframes and the need for Bobby to obtain certificates from two legally qualified medical practitioners which meet specific requirements. These certificates do not need to be sent to the superannuation fund but should be retained by Bobby for his tax records.

For further information about personal injury contributions, see **section 7**.

CASE STUDY 7 – ATO discretion for excess NCCs: foreign super transfers

Carol's career took her offshore for many years. During this time she accrued benefits in two separate foreign pension schemes.

Carol moved back to Australia to retire in the 2023/24 financial year. She decided to transfer her foreign pension scheme benefits to an Australian superannuation fund within six months of her becoming an Australian tax resident.

In Carol's particular circumstances, none of the transfer is required to be included in her assessable income and the transfer will be treated as an NCC when received by her fund. Carol understands that there are tax penalties if the NCC cap is exceeded. She hasn't made contributions to an Australian fund in the past two financial years and is eligible to use the 'bring-forward' arrangements.

She instructed her foreign schemes to each pay an amount that, based on the exchange rates prevailing at the time, would not exceed a combined total of $330,000. However, in the period between Carol providing her instructions and the payment being made, the exchange rates changed by more than Carol anticipated and the amount transferred was valued at $340,000.

What steps can Carol take?

Carol will have excess NCCs in 2023/24 of $10,000. If she elects to withdraw the excess NCCs and 85 per cent of the associated earnings from her fund, she will be taxed on the associated earnings at her marginal rate, less a 15 per cent offset.

If Carol elects to retain the excess in her super fund, she will receive a tax assessment from the ATO for excess NCCs of $4,700.

Carol may consider applying to the ATO to have the excess contributions disregarded. The ATO may consider exercising its discretion based on the fact that the exchange rate fluctuations were beyond Carol's control, and not reasonably foreseeable. Example 9 in the ATO's **Practice Statement Law Administration 2008/1** describes a similar situation to Carol's. There are a number of issues that the ATO would consider, including:

- how much exchange rate fluctuation was allowed for and the extent to which it may have been foreseeable (including whether the change was excessive compared with recent fluctuations), and
- whether Carol could determine the date of the payment.

For further information about the contribution caps, see **section 3**. For further information about the ATO's discretion to disregard or reallocate contributions, see **section 11**.

CASE STUDY 8 – Member of a funded DB super scheme

Joan's notional taxed contributions for 2023/24 are $30,500. However, the defined benefit grandfathering provisions apply to limit the amount counted towards Joan's CC cap to $27,500.

As she is a member of a funded DB scheme, Joan's defined benefit contributions equal her notional taxed contributions (before applying the grandfathering rules).

Joan also makes additional annual salary sacrifice contributions of $8,000 in the same financial year.

Joan's CCs in 2023/24 are $38,500, which is the sum of her:

- salary sacrifice contributions of $8,000
- grandfathered notional taxed contributions of $27,500, and
- the amount by which her defined benefit contributions exceed her notional taxed contributions which equates to $3,000 (ie $30,500 less $27,500).

The contributions to Joan's DB scheme of $30,500 (ie $27,500 + ($30,500 - $27,500)) exceed her CC cap of $27,500. Additional grandfathering rules apply to treat the amount of the contributions to Joan's DB scheme as being equal to her CC cap. As Joan's CC cap has been exhausted by the contributions to her DB scheme, her salary sacrifice contributions of $8,000 will be excessive. Joan will receive an excess contributions determination from the ATO.

The above case study is based on example 6 in ATO Law Companion Ruling **LCG 2016/11** Superannuation reform: concessional contributions – defined benefit interests and constitutionally protected funds.

For further information about contributions made to defined benefit funds, see **section 5**.

CASE STUDY 9 – Deductibility of personal contributions after benefits are rolled over

Rosemary, a financial adviser, had her first meeting with Basil, a self employed herb farmer on 28 June. Due to the bumper season and high levels of income, Rosemary advised that Basil should make a personal CC to super before the end of the financial year (in 2 days' time).

Rosemary determined the quickest way to do this would be to open an account with a retail superannuation fund and deposit the funds immediately. This would be a short-term solution and the detail, including the amount Basil would claim as a tax deduction (and hence include in a deduction notice), would be dealt with once a full assessment of Basil's income tax position was complete.

To Rosemary and Basil's relief, the contribution was made in time on 30 June. Rosemary went on to provide detailed advice to Basil and recommended the amount he should claim as a deduction be determined when Basil's financial statements are completed by his accountant. In the meantime Rosemary considered a long-term investment strategy for Basil's super and recommended he set up a self managed superannuation fund (SMSF) and invest his super in growth investments as soon as possible. Rosemary organised for the rollover of the balance of Basil's retail superannuation account to the SMSF. Shortly after implementation, Basil's accountant advised that he should claim $27,500 (ie his full CC cap) as a deduction. Basil then completed the deduction notice for the contribution.

What issues do Rosemary and Basil face?

In the haste of getting Basil's investment plan implemented Rosemary simply neglected to consider the need to provide the notice to the fund that received the contribution. As the balance of the retail superannuation account was rolled over, it was too late to lodge a deduction notice as Basil was no longer a member of this fund and the fund no longer held the contribution. As the contribution wasn't made to the SMSF, the new fund was also unable to accept a notice for the contribution. Therefore none of Basil's contribution could be claimed as a tax deduction and the full amount would be treated by the ATO as an NCC, counting towards the NCC cap. Depending on the amounts of personal NCCs that Basil otherwise made, there is the potential for Basil to be left with excess NCCs.

For further information about the contribution caps, see **section 3**. For further information about how the ATO determines whether an individual has excess contributions, see **section 11**.

CASE STUDY 10 – Inadvertently triggering the bring-forward rule

Jess inherited $500,000. She thought it appropriate to obtain some financial advice in relation to the investment of the inheritance, and completed the fact find provided by her adviser.

Jess's adviser recommended NCCs with the following intended consequences:

- an NCC in June 2024 of $110,000 (ie up to the NCC cap in 2023/24), and
- an NCC in July 2024 of $360,000, making use of the NCC 'bring-forward' arrangements that apply in 2024/25.

Unfortunately Jess omitted to mention in the fact find that her employer, as well as paying her superannuation guarantee payment to her employer superannuation fund, had been contributing $40 per fortnight ($1,040 per annum) in the 2023/24 year from after-tax dollars – this was a strategy put in place some years before to obtain the Government co-contribution.

What are the implications for Jess?

The extra $1,040 of NCC of which Jess's adviser was not aware results in total NCCs in 2023/24 of $111,040. This amount exceeds the annual NCC cap, therefore the 3-year 'bring- forward' cap is triggered. As $111,040 is measured against the cap of $330,000, $218,960 of the NCC cap remains available until 30 June 2026.

The July 2024 contribution of $360,000 exceeds Jess' remaining NCC capacity by $141,040. This could result in excess contributions tax of $66,289 if the excess amount and 85 per cent of associated earnings is not released.

This case study illustrates how important it can be to have a complete understanding of an individual's contribution history, no matter how insignificant each contribution may appear.

For further information about the contribution caps, including the 'bring-forward' arrangements for NCCs, see **section 3**.

CASE STUDY 11 – Late SG received in the next financial year

Joe, aged 50, works full time for ABC Ltd. ABC Ltd makes SG and salary sacrifice contributions on a quarterly basis just before the end of each quarter. So for example, Joe's employer super contributions for the January to March quarter would be made just before the end of March.

Joe had an effective salary sacrifice agreement with ABC Ltd to make employer contributions (including SG and salary sacrifice contributions) of $27,500 for 2023/24 and $30,000 for 2024/25.

In May 2024, ABC Ltd outsourced its payroll function to XYZ Ltd. As part of its service, XYZ Ltd provided ABC Ltd with a superannuation clearing house service so that all super contributions for ABC Ltd's employees would be paid to XYZ Ltd, which would then have the responsibility of paying the contributions to the employees' chosen superannuation funds.

As a result of using the clearing house service, Joe's contributions for the April 2024 to June 2024 quarter weren't received by his fund until 1 July 2024, instead of 30 June 2024 which, based on past quarters, is when Joe expected them to be received. This meant that Joe's CCs for the 2023/24 year were $20,625 instead of $27,500 as intended.

Unless Joe amends his salary sacrifice agreement with his employer for the remainder of the 2024/25 financial year, his contributions for 2024/25 will be $36,875 (instead of $30,000), which is in excess of the CC cap by $6,875.

What should Joe do?

Joe may consider applying to the ATO for Administratively Binding Advice.

This will enable Joe to seek a view from the ATO on whether or not the ATO would exercise its discretion to disregard or reallocate the $6,875 contribution to the 2023/24 year. If the advice is favourable, it will give Joe some level of comfort that he can continue with his current salary sacrifice agreement for the remainder of the 2024/25 year without exceeding his CC cap.

There are a number of pieces of Administratively Binding Advice dealing with circumstances similar to Joe's in which the ATO has made a decision to reallocate contributions to a different financial year, thereby removing the excess contributions problem.[14] These typically involve situations where it was not reasonably foreseeable that the contribution would be made in the subsequent year. However, there are a number of AAT decisions on excess contributions which relate to the timing of employer contributions which uphold the ATO's decision not to exercise discretion to disregard or reallocate excess contributions as there were no special circumstances (see **section 11**).

If the ATO does not exercise its discretion to disregard or reallocate Joe's $6,875 contribution, the excess amount will be included in Joe's assessable income for the year and taxed at marginal rates, less a 15 per cent offset. The excess concessional contributions charge will also be payable on the amount of tax attributable to the excess CCs.

For further information about applying for Administratively Binding Advice, see **section 11**.

11 See for example, Private Rulings 90195, 90197, 90198 and 90199.

CASE STUDY 12 – Deducting a personal contribution incorrectly classified as an employer contribution

Albert, aged 57, is a partner in a small IT business.

In June 2024 Albert made a contribution to his fund of $27,500 intended to be claimed as a tax deduction against the income he earns from his business (which is personally assessable to him). Albert mistakenly advises the fund that the payment is an employer contribution.

What issues may Albert face?

Where an individual wishes to claim a deduction to offset his or her own assessable income, the contribution must be a personal contribution and the individual will be required to provide a deduction notice to the fund.

In this case, if the error is identified before Albert lodges his tax return for the 2024 year and before 30 June 2025, he may ask his superannuation fund to reclassify the contribution as a personal contribution.

Provided that Albert's fund still holds the relevant contribution, he is a member of the fund, he has not commenced a pension using all or part of his account balance and the contribution has not been split to his spouse, Albert would be able to lodge a valid deduction notice for the contribution. This will ensure the contribution is correctly reflected by the fund as a personal CC as Albert intended.

However, if the error is not identified until after Albert has lodged his tax return claiming the amount of the contribution, he may receive a notice from the ATO that he has excess CCs as a result of double counting. This may occur where the ATO calculates Albert's CCs to be the sum of the amount of employer contributions reported by the fund and the amount of personal contributions claimed by Albert in his tax return.

In these circumstances, Albert would not be entitled to claim the deduction because a deduction notice was not lodged with the fund before he lodged his tax return for the relevant year. Albert may have been required to amend his tax return to reverse the deduction. This would then remove the problem of double counting but may give rise to some other issues:

- there may be scope for the fund to correct its records and amend its ATO reporting to reflect the contribution as a personal contribution
- however, the fund cannot treat the contribution as a personal CC without having received a valid deduction notice
- because Albert was not eligible to claim the deduction, he will effectively paid tax at his marginal rate
- as a result, the ATO will treat the contribution as a personal NCC. If Albert has otherwise maximised his NCCs, he may have an excess NCC problem. Further complications may arise if the individual is no longer a member of the fund that received the contributions, or if the individual has commenced receiving a pension.

For further information about the issues covered in this case study, refer to **section 4** which explains the conditions that must be met to claim a deduction.

CASE STUDY 13 – Bring-forward rule triggered and TSB subsequently exceeds transfer balance cap

Betty, aged 60, wins $330,000 in the lottery. She is thinking about retiring and decides to seek some advice as to how she should invest her winnings. She had $1.45 million (as at 30 June 2023) in her superannuation fund.

Betty's financial adviser is aware that Betty's total superannuation balance (TSB) may impact her ability to make NCCs.

Betty's TSB is less than $1.68 million as at 30 June 2023 meaning she is eligible to bring forward two future years' NCC cap entitlements to contribute a maximum of $330,000. Betty's adviser recommends she contribute all her lotto winning to superannuation as an NCC in 2023/24.

Betty neglected to tell her adviser she was planning to buy a campervan to do some travel and she decides to keep $100,000 of the lotto winnings for travel expenses. She makes an NCC of $230,000 in October 2023, triggering the bring-forward rule.

Twelve months later, Betty's dreams of travelling the countryside still haven't been realised. Remembering her adviser's previous recommendation, she contributes the remaining $100,000 to superannuation as an NCC in October 2024.

However, with investment earnings and employer super contributions, Betty's superannuation balance has grown to $1.91 million (as at 30 June 2024). While Betty previously had $100,000 remaining of her three-year bring-forward cap, as her TSB is now more than $1.9 million, her remaining NCC cap is reduced to nil. This means that she will have excess NCCs of $100,000 in 2024/25.

For further information about the contribution caps, including the bring-forward arrangements for NCCs, see **section 3**.

10. Ability for funds to return contributions

There are limited circumstances in which a superannuation fund is able to refund a member's contributions.

Returning contributions made in error: 'mistake'

Contributions that were made in error may be able to be returned to the contributor under the doctrine of restitution of mistaken payments. The basis of this doctrine is the general law, not superannuation law nor other legislation. Broadly, case law indicates that restitution is available where a payer mistakenly believes that a state of affairs exists that is not the actual state of affairs. The mistake must be in relation to a past or existing state of affairs, not a future state of affairs and it must have caused the payment.

The High Court decision of David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353 is the leading Australian case. The decisions in Personalised Transport Services Pty Ltd v AMP Superannuation Ltd & Anor [2006] NSWSC5 and Superannuation Complaints Tribunal (SCT) Determination D06-07\129 indicate that the remedy of restitution can apply in relation to superannuation contributions.

A number of legal commentators have expressed the view that the law of restitution on mistaken payments is broad enough to be applicable in circumstances where a mistake is made in relation to the tax consequences of a particular contribution which goes to the making of the contribution itself. However, the ATO takes a different view.

The ATO's position on the application of restitutionary remedies for excess contributions is set out in the **minutes of the December 2008 meeting** of the Superannuation Technical Sub-group of the ATO's National Tax Liaison Group, as follows:

The Commissioner considers that restitution will only be appropriate where the relevant mistake is causative of the contribution. For example, in the Personalised Transport case, although the contributing company intended to contribute to the relevant fund, it did so only because it believed it was obliged to do so by the superannuation guarantee legislation. This mistaken belief caused the contribution to be made. In the SCT determination, the Tribunal clearly accepted that the member did not intend to contribute to their fund at all.

It is the Commissioner's view that a mistake as to the consequences of a contribution will not be sufficient to found a claim for restitution. In this regard, we have considered authorities dealing with the circumstances in which equity will grant rescission or rectification of contracts for mistake. For example, in Baird v BCE Holdings Pty Ltd (1996) 40 NSWLR 377, the court held that there were no grounds for rescission or rectification where a party to a contract was mistaken as to the tax implications of an agreement. Such mistakes were not considered to go to the making of the agreement itself. Accordingly, the Commissioner does not accept that a contribution made 'in the reasonable belief that the contribution will not exceed the relevant contribution cap' would, in the absence of other factors, be the subject of a claim for restitution.

The Administrative Appeals Tribunal has noted its agreement with the ATO's view.[12]

The ATO has issued **ATO ID 2010/104: Excess contributions tax: restitution of a 'mistaken' contribution** which concerns a situation where a fund trustee returned an excess NCC in purported restitution of a payment made for 'mistake'. The member claimed to have made a mistake in making the contribution as he was unaware that the contribution counted towards the relevant NCC cap. In this situation the ATO decided that the full value of the member's contributions (including the amount that the fund returned) was included in the member's NCC cap as it considered that:

- the member had an intention to make the contribution
- the fund was the intended recipient of the contribution, and
- the member was not mistaken in the sense that he thought he was required to make the contribution.

Some legal advisers have been exploring a basis to return a contribution in circumstances where receipt into the fund by the trustee would contravene the fund's governing rules.

12 See AAT case [2011] AATA 839. Re Rinaldo and Commissioner of Taxation, AAT Ref 2010/3136, Hughes, G, 25 November 2011.

In this regard, the ATO issued **Taxpayer Alert 2010/2: Circumvention of excess contributions tax** on 29 March 2010 which outlined the ATO's concerns about arrangements where clauses are inserted into a SMSF trust deed which are intended to prevent the trustee from accepting excess contributions. However, the Taxpayer Alert has since been withdrawn. In the ATO's words:

Following a review of these arrangements, the ATO has concluded that some trust deed clauses may prevent a payment to a trustee of a superannuation fund from forming part of the fund and therefore from being a contribution for excess contributions tax and other purposes.

Whether a particular clause has that effect, and whether it applies to all or only some categories of payments, depends on the proper construction of the clause considered in the context of the surrounding provisions of the trust deed and the deed as a whole.

If a clause has the effect of preventing payments from being contributions, the payer is not entitled to the income tax deductions available for superannuation contributions. Such payments are likely to be subject to a separate trust. The beneficiary of the separate trust must account for income tax on the earnings of the trust in accordance with the income tax law. Failure to account for income tax in accordance with the clause and keep proper records may give rise to penalties and interest liabilities.

If the trustee does not take proper care to determine whether payments form part of the superannuation fund and wrongly intermingles payments that do not form part of the fund with assets of the fund, the trustee will breach its duties as trustee. This may be relevant to whether the trustee is a fit and proper person to act as trustee of a self managed superannuation fund.

For further information on the ATO's approach to fund rules of this nature see ATO Fact Sheet **Fund rules intended to prevent excess contributions tax**.

Refund of excess contributions

Individuals may elect to have their excess CCs and NCCs refunded. See **section 3** for further information.

11. Excess contributions and the ATO

How does the ATO determine whether an individual has excess contributions?

In working out whether an individual has excess contributions, the ATO uses information reported throughout the year by superannuation funds in addition to the individual's tax return.

Funds other than SMSFs are required to regularly report information about superannuation contributions and acknowledged valid deduction notices via the Member Account Transaction Service. This information must be reported by the fund within ten business days of allocating the contribution to the member's account or acknowledging the notice. SMSFs are required to include details of member contributions in their SMSF annual return, the due date of which varies depending on the circumstances of the SMSF.

The ATO uses reports from superannuation funds and information in the individual's income tax return to determine the amount of personal contributions counted towards the concessional cap (which are contributions claimed as a tax deduction). Personal contributions that are not or cannot be claimed as a tax deduction are counted towards the NCC cap. For further information about the implications of deductions being disallowed, see '**What happens when a claim for a deduction is disallowed?**' in section 4.

ATO discretion to disregard or reallocate excess contributions

As explained in **section 3**, the law allows a refund of excess contributions made from 1 Jul 2013. Nevertheless, there may be unusual circumstances that warrant an application for ATO discretion to have the excess contributions disregarded or reallocated to a different financial year. An application can be made can be made prior to the issuing of an excess contributions assessment or determination. The ATO can exercise this discretion only if it considers that:

- there are special circumstances, and
- exercising the discretion is consistent with the object of ensuring that the amount of concessionally taxed superannuation benefits that a person receives results from superannuation contributions that have been made gradually over the course of the person's life.

The ATO has issued **Practice Statement Law Administration 2008/1** (PS LA 2008/1) outlining the types of circumstances where the ATO will exercise their discretion to disregard or reallocate contributions.

Whether the ATO is likely to apply discretion to disregard an excess contribution or reallocate it to another year depends upon whether it considers that any special circumstances apply in relation to the contribution. As stated in section 3 of PS LA 2008/1, special circumstances 'is something unusual to take the case out of the ordinary course which results in an unfair, unintended or unjust outcome'.

Section 6 of PS LA 2008/1 sets out factors which, in isolation, would generally not amount to the existence of special circumstances as follows:

- **Financial consequences:** The Practice Statement indicates that the financial consequences that flow from an excess contribution are not, of themselves special circumstances.
- **Not knowing the law:** The Practice Statement indicates that where a person is mistaken or unaware of the consequences that flow from an excess contribution, this would not, on its own, amount to special circumstances.
- **Incorrect professional advice:** According to the Practice Statement the fact that a third party leads another person into error would not generally amount to special circumstances, unless there were other factors leading to the mistake.

The examples given in the Practice Statement centre on **lack of member control** (such as situations involving excessive currency exchange fluctuations that may not have been foreseen and late employer contributions).

Release authorities

Release authorities are issued by the ATO and allow a superannuation fund trustee to release certain amounts from a member's account. Specific conditions of release exist in superannuation law for this purpose. The release authority can be given to any superannuation fund that holds an interest (other than a defined benefit interest) for the individual.

Where an individual receives an excess contributions determination or notice of assessment for Division 293 tax, they have 60 days to make an election to release amounts from superannuation. Once a valid election is made, the ATO will issue a release authority to the individual's superannuation fund.

The superannuation fund then has 10 business days from receiving the release authority to pay the amount to the ATO. Where there are insufficient funds in the member's account, the fund is required to either pay the maximum available amount or notify the ATO that it is not required to comply with the release authority. See Section 3 for further details.

The table below outlines the different types of release authorities that may be issued by the ATO.

Type of release authority	Applies to individuals who...	Release amount
Excess contributions tax	exceed the NCC cap and do not elect to withdraw excess from superannuation	Excess NCC tax liability
Excess concessional contributions	exceed the CC cap and elect to withdraw the excess from superannuation	85% of excess CCs
Excess non-concessional contributions	exceed the NCC cap and elect to withdraw the excess from superannuation	Excess NCCs plus 85% of associated earnings
Division 293 tax	are liable for Division 293 tax	Amount of division 293 tax

Impact of payments out of super under a release authority

Tax components: The 'proportioning rule' does not apply to benefits paid out under a release authority (whether in relation to excess contributions tax, refunded excess contributions or Division 293 tax). If the payment is made from a superannuation interest in the accumulation phase, the effect of this is that the payment will not reduce the member's tax free component in the fund; the payment will instead effectively reduce the member's taxable component. However, if the payment is made from pension phase, there will be no change in the proportions of tax free and taxable components that were calculated at the time the pension commenced.

Preservation components: If the member has benefits that are unrestricted or restricted non-preserved, the superannuation law 'order of cashing' rule applies. This means that the payment must first come from the member's unrestricted non-preserved benefits, followed by restricted non-preserved benefits and then finally preserved benefits.

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