



Explanatory Statement

Superannuation Industry (Supervision) Self-Managed Superannuation Funds (COVID-19 Rental Income Deferrals – In-House Asset Exclusion) Determination 2022

General outline of instrument

1. This instrument is made under paragraph 71(1)(f) of the *Superannuation Industry (Supervision) Act 1993* (SISA).
2. This instrument provides that an asset of a self-managed superannuation fund (SMSF) is not taken to be an in-house asset for the 2021–22 income year and future income years where the SMSF, during the 2021–22 income year:
 - (a) acquires an asset held by the fund by allowing a related party to defer the payment of rent under a lease agreement (on arm's length terms) to ease the financial impact of the coronavirus known as COVID-19, or
 - (b) holds an asset that is an interest in a company or unit trust which would not otherwise be an in-house asset under paragraph 71(1)(j) of the SISA and regulation 13.22B or regulation 13.22C of the *Superannuation Industry (Supervision) Regulations 1994* (SISR), and that company or unit trust allows a tenant to defer the payment of rent under a lease (on arm's length terms) to ease the financial impact of COVID-19.
3. The instrument is a legislative instrument for the purposes of the *Legislation Act 2003* (LA).
4. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Date of effect

5. This instrument commences on the day after it is registered on the Federal Register of Legislation.
6. Under subsection 12(2) of the LA this instrument does not adversely affect the rights or liabilities of any person other than the Commonwealth.

What is the effect of this instrument

7. The effect of this instrument is that assets covered by this instrument are taken not to be in-house assets of the SMSF in the 2021–22 income year in which there was an agreement on arm's length terms that the payment of rent owed could be deferred or any future income years.

Compliance cost assessment

8. Compliance cost impact: Minor – There will be no additional regulatory impacts as the instrument is minor and machinery in nature.

Background

9. This instrument provides that deferral of the payment of rent owed under a lease (on arm's length terms as described in paragraphs 15 to 19 of this Statement) during the 2021–22 income year, does not result in an in-house asset or cause the SMSF to lose its in-house asset exemption in relation to an interest in a company or unit trust under paragraph 71(1)(j) of the SISA and regulation 13.22B or regulation 13.22C of the SISR. In the absence of this instrument, the deferral of rent would be taken to be a loan as defined in the SISA triggering the application of the in-house asset rules.

10. The definition of 'loan' in subsection 10(1) of the SISA includes the provision of credit or any other form of financial accommodation, whether or not enforceable or intended to be enforceable by legal proceedings. This definition therefore covers financial accommodation arrangements where a creditor grants a deferral of payment of rent owed by a tenant: see paragraph 11 of SMSFR 2009/4 *Self Managed Superannuation Funds: the meaning of 'asset', 'loan', 'investment in', 'lease' and 'lease arrangement' in the definition of an 'in-house asset' in the Superannuation Industry (Supervision) Act 1993*.

11. Where a trustee of an SMSF agrees to allow a deferral of the payment of rent owed under a lease (on arm's length terms) from a related party, the deferral results in the trustee acquiring or holding an in-house asset that is not covered by any of the exemptions in subsection 71(1) of the SISA. When the value of an SMSF's in-house asset investments exceeds 5% of the total value of its assets, the trustee of the SMSF is required to prepare and implement a written plan to dispose of assets equivalent in value to the excess by the end of the following year of income: section 82 of the SISA. It also means that the SMSF trustee cannot acquire any other assets that would be taken to be in-house assets: section 83 of the SISA. There are penalties for not complying with the in-house asset rules.

12. The restrictions that apply to in-house assets do not apply to an investment by an SMSF in a unit trust or company if it specified in regulations 13.22B or 13.22C not to be an in-house asset under paragraph 71(1)(j). These entities are often referred to as a non-g geared company or unit trust. However, regulations 13.22B or 13.22C will cease to apply if any of the events in regulation 13.22D of the SISR occur, including the company or unit trust providing a loan to another entity: subparagraph 13.22D(1)(b)(ii).

13. Where a company or unit trust covered by regulations 13.22B or 13.22C allows a tenant to defer payment of rent under a lease (on arm's length terms) due to the income impacts of COVID-19, the company or unit trust will have made a loan as defined. Accordingly, the SMSF investment in the company or unit trust will become an in-house asset for the current and all future income years. This will mean that the SMSF will need to dispose of the investment where the value exceeds the 5% threshold.

14. Given the context of the COVID-19 pandemic and the long term effects of triggering an event under regulation 13.22D, the Commissioner believes it is appropriate to exercise his power as Regulator under paragraph 71(1)(f) to exclude the SMSF's investment from being an in-house asset where the deferral of rent is provided on arm's length terms and where none of the other events in regulation 13.22D are triggered during the 2021–22 income year. This also means that SMSF auditors will not be required to report a contravention to the ATO or to advise trustees of the contraventions which would otherwise result, in relation to the 2021–22 or future income years.

Arm's length terms

15. The determination will only apply where the landlord has acted in good faith and has agreed that the tenant can defer payment of rent on arm's length terms during the 2021–22 income year in order to ease the financial hardship caused by COVID-19.

16. The Commissioner appreciates that the [National Cabinet Mandatory Code of Conduct](#) is no longer in effect for the purposes of determining whether a rental deferral has been negotiated in good faith and on arm's length terms, and Code based State and Territory legislation may no longer apply.

17. However, the Commissioner recognises that SMSF trustees and related parties may still be offering rental relief to tenants during the 2021–22 income year, including as part of the transitional COVID-19 support measures provided by the States and Territories. Where this is the case, trustees and SMSF auditors can use those measures as a guide when establishing whether the arrangement has been offered on arm's length terms.

18. Regardless of the basis on which the rental deferral relief was provided there must be contemporaneous documentation reflecting the terms of the deferral agreement, including the terms for payment of the deferred amount agreed to by the landlord and the tenant to ensure the parties agreement is on arm's length terms and the lease remains enforceable. For the rental deferral arrangement to remain on arm's length terms, any deferred amounts should also be repaid by the tenant as soon as is practicable.

19. The exclusion only applies where a deferral of rental income under a lease (on arm's length terms and where no other events in regulation 13.22D are triggered) is allowed during the 2021–22 income year, being the income year during which tenants are likely to be adversely financially impacted by COVID-19.

Exemption from disallowance and sunseting regime

20. Part 4 of the LA provides for the sunseting of legislative instruments. However, paragraph 54(2)(b) of the LA provides that Part 4 of the LA does not apply if the legislative instrument is prescribed by regulation. Section 11 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (EOMR) provides a list of classes of instruments that are not subject to sunseting. Item 6 of the table in section 11 of the EOMR lists instruments (other than regulations) relating to superannuation. As a result, Part 4 of the LA does not apply to this instrument. Therefore, this instrument will not sunset.

21. Section 42 of the LA provides for the disallowance of legislative instruments. However, paragraph 44(2)(b) of the LA provides that section 42 does not apply to legislative instruments prescribed by regulation. Section 9 of the EOMR provides a list of classes of instruments that are not subject to disallowance. Item 3 of the table in section 9 of the EOMR lists instruments (other than regulations) relating to superannuation. As a result, this instrument is not a disallowable legislative instrument under section 42 of the LA.

Consultation

22. Subsection 17(1) of the LA requires that the rule-maker undertake an appropriate level of consultation that is reasonably practicable to undertake before making a legislative instrument.

23. For this instrument, broad public consultation was undertaken for a period of 4 weeks from 22 November 2021 to 17 December 2021.

24. The draft instrument and explanatory statement were published to the ATO Legal database. Publication was advertised via the 'What's new' page on that website, and via the 'Open Consultation' page on ato.gov.au. Major tax and superannuation professionals, publishers and associations monitor these pages and include the details in the daily and weekly alerts and newsletters to their subscribers and members.

25. In addition, an article was published in SMSF News and alerts on ato.gov.au on 24 November 2021, alerting SMSF trustees, approved SMSF auditors and tax professionals who subscribe to the service to the draft determination. The article was also included in the SMSF News monthly digest sent to over 235,000 subscribers on 30 November 2021.

26. Taking these steps has increased awareness of the draft determination, helped to ensure notification of the draft is disseminated widely across the tax and superannuation professional community, and that individuals are in an informed position to provide comments and feedback.

Outcome of consultation

27. No comments were received.

Legislative references

Acts Interpretation Act 1901

Human Rights (Parliamentary Scrutiny) Act 2011

Legislation Act 2003

Legislation (Exemptions and Other Matters) Regulation 2015

Superannuation Industry (Supervision) Act 1993

Superannuation Industry (Supervision) Regulations 1994

Statement of compatibility with Human Rights

As section 42 of the *Legislation Act 2003* does not apply to this instrument, a Statement of compatibility with Human Rights in respect of this instrument is not required under section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.