Carthills
TAILORED ACCOUNTING
Personal . Commercial . Strategic

Illegal *early* *SMSF access* on ATO's radar

Since the Albanese Government announced its intention to double the tax on investment earnings for super account balances over $3 million, there has been lots of talk about taking money out of self managed superannuation funds (SMSFs) to avoid the tax hikes.

As SMSF trustees have more control of their super assets compared to those invested in a large superannuation fund, accessing your money, and moving it out of the super system can sound like an attractive idea.

But as good as it might sound, gaining early access to your super savings is illegal and it is an activity the Australian Taxation Office is increasingly keen to stamp out.

Trustee disqualifications rise

According to ATO assistant commissioner Justin Micale, nearly 300 SMSF trustees have been disqualified for illegally accessing their retirement savings in the first half of 2022-23, more than in the entire 2021-22 financial year. The ATO crackdown has seen $2 million in administrative penalties issued and an additional $4 million in tax collected.[i]

Illegal early release is one of the major areas of focus for the ATO's SMSF enforcement team. "We are seeing an increasing number of trustees taking advantage of their direct access to their superannuation bank account and they are using these savings to pay for items such as business debts, holidays, renovations and new cars," Micale told an SMSF industry conference.[ii]

In an attempt to stamp out early access, the ATO is checking funds that fail to lodge annual returns, while SMSF auditors are being encouraged to report SMSF loans or breaches of the payment standards – even if the money is repaid to the fund.

Further checks are being made as part of the ATO's SMSF registration program, which aims to risk assess individuals entering the SMSF system and scrutinise those registering funds for the wrong reasons. In 2021-22, this program prevented over $170 million from leaving the super system illegally.

Legally accessing your retirement savings

The ATO scrutiny is part of a broader campaign to remind SMSF trustees of their responsibility to ensure if they access their super early, they do it within the super laws.

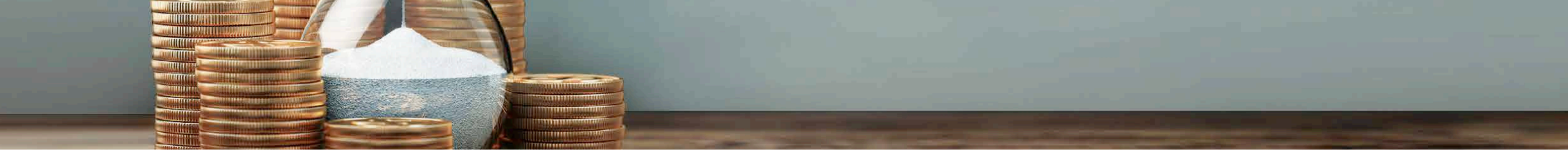
Generally, you can only access your super when you reach your preservation age and retire, or turn 65 even if you are still working. For anyone born after 30 June 1964, the preservation age is age 60.

To access your super legally, you must satisfy a condition of release. There are only very limited circumstances where you can legally access your super early and the eligibility requirements often relate to specific expenses or terminal illness.

It is illegal to access your super for any reason other than when it is allowed by the superannuation law.

Illegal early access schemes

Currently, a spate of illegal early access schemes are encouraging trustees to withdraw their super early to pay for personal expenses such as credit card debt, holidays, or buying property.



According to the ATO, promoters of these schemes usually charge high fees and commissions and request identity documents. This often leads to identity theft (which involves using your personal details to commit fraud or other crimes) and can take years to clear up. Your super savings could even be stolen.

The best way to protect yourself from illegal access schemes is to halt any involvement with a scheme or the person approaching you. Do not sign any documents or provide your personal details and contact the ATO immediately.

Protecting your SMSF

Keeping your fund details updated with the ATO is one of the best ways to help reduce the risk of fraud and illegal access to your SMSF.

Trustees should ensure their SMSF's membership details are recorded correctly and the ATO is notified of any changes. This includes details such as the fund's bank account, electronic service address, trustees, members and contact details.

Regular updates ensure that, when someone initiates a rollover request from an SMSF the ATO's SMSF Verification System (SVS) can verify the fund and member details. If the receiving SMSF does not have a 'registered' or 'complying' status, it won't be able to receive the rollover.

To further reduce the risk of fraud, the ATO sends trustees emails and text alerts when changes are supplied about key details relating to a fund.

Early access penalties for SMSF trustees

SMSF trustees who allow super to be withdrawn early face serious financial and personal consequences:

- Additional income tax. Amounts illegally accessed will be included as income in your tax return even if returned to the SMSF.
- Tax shortfall penalties and interest charges on illegally withdrawn amounts.
- Imposition of additional penalties. In serious cases, if you set up an SMSF and knowingly illegally access your super early you could face a fine of up to $340,000 and a jail term of up to five years.
- Deductions disallowed. Any fees or commissions paid to an early access scheme promoter are not tax deductible.
- Amounts returned count as contributions. SMSF reimbursements are considered new contributions and could see you exceed your annual contributions cap, leading to additional tax.
- Penalties for false statements. Fraudulent documents provided to the ATO or SMSF may result in penalties for making misleading statements.
- Disqualification from acting as a trustee. Ineligibility means you can no longer act as a SMSF trustee and may have an adverse impact on you professionally or financially.
- Listing on an online register. If you are disqualified, your name is published in both the Commonwealth Government Notices Gazette and the ATO's trustee disqualification register.

Proposed legal changes could result in illegally accessed super being taxed at 45 per cent, regardless of your marginal tax rate.

If you need help understanding the super and tax rules governing your SMSF, call our office today.

i https://www.afr.com/policy/tax-and-super/ato-disqualifies-hundreds-over-self-managed-super-scams-20230113-p5ccd4

ii https://www.ato.gov.au/Media-centre/Speeches/Other/SMSF-compliance---What-s-on-the-Regulator-s-radar-/

Carthills
TAILORED ACCOUNTING
Personal . Commercial . Strategic

Carthills Tailored Accounting

Level 1, 2072 Logan Road
Upper Mount Gravatt QLD 4122

P 07 3849 6392
E advice@carthills.com.au
W www.carthills.com.au