

**SPECIAL POINTS
OF INTEREST:**

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'back-to-back' loans****SuperStream Reminder****SMSF TRUSTEE FINED FOR 'BACK-TO-BACK' LOANS**

An SMSF trustee was fined a total of \$37,500 by the Federal Court for borrowing money from his SMSF to prop up his ailing retail business. The case is a reminder of the penalties that SMSF trustees may incur if they do not comply with the superannuation laws.

Why did the taxpayer take his superannuation savings?

Mr and Mrs Lyons operated a retail business on the Sunshine Coast in Queensland that was in financial distress.

After setting up a new SMSF, Mr and Mrs Lyons rolled over their superannuation savings of \$193,459.44 from Q Super and the Rio Tinto Staff Fund into the new fund.

Once the new SMSF received the rollover benefit, the fund then commenced lending money to Mr Lyons in two stages (referred to as a 'back-to-back loan'):

1. An initial loan was made to Mr Lyon's brother-in-law (Mr Ellis).
2. Mr Ellis then transferred the money straight into the bank account for the Lyons' retail business.

Subsequently, the SMSF entered into a 'Debtors Factoring Agreement' with Mr Ellis to conceal the true nature of the loans. The loans (which totalled close to \$190,000) were ultimately irrecoverable.

Note, Mr Lyons had received misleading advice stating that it was possible for him to access his superannuation monies in this way.

TIP—The superannuation rules prohibit the fund from lending any money whatsoever to a member or relative.

How did the ATO detect the disguised loan?

The fund's auditor lodged an 'auditor contravention report' to inform the ATO

that the back-to-back loans made by the SMSF to Mr Lyons had breached the superannuation rules.

After receiving the contravention report, the ATO audited the fund, making it non-complying and liable to tax at 45%. The ATO took this heavy-handed approach because Mr Lyons accessed virtually all superannuation savings in the SMSF when he was not entitled to do so. The ATO considers this to be a very serious breach of the superannuation rules - particularly as Mr Lyons could not repay the loans.

But wasn't Mr Lyons experiencing hardship?

Yes, Mr Lyons was experiencing severe financial hardship, but this did not automatically permit him to access his superannuation savings before he met a 'condition of release'.

In order to withdraw his superannuation benefits under the 'severe financial hardship' condition of release, Mr Lyons required a letter from the Department of Human Services confirming that:

- he had received Commonwealth income support for a continuous period of 26 weeks; and
- he could not meet reasonable and immediate family living expenses.

In any event, the court noted that even if Mr Lyons satisfied the severe financial hardship conditions outlined above, he could only access superannuation benefits of up to \$10,000 in any 12 month period.

Decision of the Court

The court handed down a penalty to Mr Lyons of \$37,500 (including \$5,000 towards the ATO's legal costs). The court was lenient because Mr Lyons self-reported his breaches through his auditor, and he cooperated fully with the ATO. The penalty was also reduced because Mr Lyons relied on professional advice.



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“SuperStream does not apply to employers who only contribute superannuation to a related SMSF (i.e. very small family businesses).”



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SUPERSTREAM REMINDER

From 1 July 2015, most employers will be required to contribute superannuation for their employees under the new ‘SuperStream’ rules. With time running out, affected employers need to ensure they are ready to comply with the rules by this time.

How do the changes affect employers?

SuperStream is a government reform that standardises how employers contribute superannuation for their employees. The new SuperStream rules require employers to:

- make superannuation contributions electronically (instead of by cheque etc); and
- submit information about the contribution electronically using specific rules.

Employers must provide information about the superannuation contribution so that the fund knows which employees the payment relates to.

Generally speaking, all employers must send employee superannuation contributions via SuperStream from 1 July 2015.

However, the ATO has recommended that the earlier you begin implementing SuperStream, the lower the likelihood of facing any compliance issues.

TIP–SuperStream does not apply to employers who only contribute superannuation to a related SMSF (i.e. very small family businesses).

However, any employer who also contributes superannuation to external superannuation funds for other staff (e.g. a receptionist) **must comply** with the SuperStream rules.

Small Business Clearing House Service

Note, small businesses with less than 20 employees are eligible to use the Small Business Superannuation Clearing House Service.

TIP–The Federal Government has announced that it will extend the Small Business Clearing House Service to

employers with less than \$2 million in turnover from 1 July 2015.

SMSFs and SuperStream

As noted above, SuperStream may change how your SMSF receives superannuation contributions, and the way in which it receives information about the contribution. However, SuperStream will not impact on your SMSF if:

- your fund does not receive any employer contributions at all (e.g. all SMSF members are retired);
- your fund only receives non-concessional contributions (e.g. personal, after-tax contributions); and
- the only employer contributions received by your SMSF are from a related party employer (e.g. the family business).

TIP–The SuperStream changes do not apply in respect of rollovers to SMSFs.

What do I need to do as an SMSF trustee?

The main change to impact on your SMSF is that you generally need to provide the following e-commerce details to your employer:

- your SMSF’s ABN;
- SMSF bank account details. Hence, your fund cannot comply with SuperStream unless it has a bank account; and
- an electronic service address for your SMSF to receive information from your employer about the contributions made.

The electronic service address

An electronic service address provides a secure means for your employer to provide the contributions information to your fund. Your employer will send the following details to your electronic service address:

- employer details;
- employee details,
- the contribution type; and
- amount, and payment details.

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