



LCG 2016/8DA - Superannuation reform: transitional CGT relief for complying superannuation funds and pooled superannuation trusts

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Superannuation reform: transitional CGT relief for complying superannuation funds and pooled superannuation trusts

Relying on this Guideline

This is a draft for consultation purposes only. When the final issues, it will have the following preamble:

This Guideline is a public ruling for the purposes of the *Taxation Administration Act 1953*.

This Guideline describes how the Commissioner will apply the CGT relief reforms in Schedule 1, Part 3 of the [Treasury Laws Amendment \(Fair and Sustainable Superannuation\) Act 2016](#) (the Act) and the amendments made by the [Treasury Laws Amendment \(2017 Measures No. 2\) Act 2017](#) to entities that rely on it in good faith.

If you rely on this Guideline in good faith, you will not have to pay any underpaid tax, penalties or interest in respect of matters covered by the Guideline if it does not correctly state how a relevant provision applies to you.

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What this Guideline is about

1. This Guideline provides guidance on the transitional CGT relief^{A1} available for trustees of complying superannuation funds and pooled superannuation trusts because of the transfer balance cap and transition-to-retirement reforms commencing on 1 July 2017 (the **CGT relief provisions**).
2. [Omitted.]

Context of the transitional CGT relief for funds

3. To prepare for the transfer balance cap reforms commencing on 1 July 2017, individuals may need to reduce amounts currently supporting superannuation income streams to comply with the new requirements. They might do this by withdrawing amounts from the superannuation environment, or by transferring value from the retirement phase to the accumulation phase.¹

^{A1} Sections 294-100 to 294-120 of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997).

¹ The Commissioner’s view is that a member (or a dependant beneficiary) ‘commutes’ a superannuation income stream if they consciously and validly exercise their right to exchange some or all of their entitlement to receive future superannuation income stream benefits for an entitlement to be paid a lump sum (Taxation Ruling TR 2013/5 *Income tax: when a superannuation income stream commences and ceases*, at

3A. The treatment of a transition-to-retirement income stream (**TRIS**), and similar superannuation income streams, has also been reformed. From 1 July 2017, these superannuation income streams will not be in the retirement phase unless a superannuation income stream benefit is currently payable from it and the recipient:

- is 65 years old or older, or
- has met a relevant condition of release with a nil cashing restriction (retirement, terminal medical condition, permanent incapacity) and they have notified the superannuation provider for the TRIS of that fact.²

From 1 July 2017, a fund will lose the income tax exemption for assets supporting TRISs and similar superannuation income streams that are not in the retirement phase from this time. A reference to a TRIS in this Guideline is to a TRIS that is not in the retirement phase unless otherwise stated.

4. Action members take in anticipation of the reforms could result in the capital value of a superannuation income stream interest being reduced. Consequently, superannuation funds using the segregated method may need to reallocate CGT assets they hold from their segregated current pension asset pool.³ Alternatively, the values used to calculate the proportion of exempt income that a complying superannuation fund or pooled superannuation trusts may be adjusted.^{3A}

5. The CGT relief provisions preserve the income tax exemption for capital gains accrued, but not yet realised, by complying superannuation funds and pooled superannuation trusts on CGT assets held throughout the pre-commencement period (see paragraph 7 of this Guideline). CGT relief is provided because a member reduces the value of their superannuation income stream before 1 July 2017 to comply with the start of the transfer balance cap reforms. CGT relief is also provided because of the changed treatment of TRISs from 1 July 2017.

5A. The effect of the exempt current pension income provisions is preserved for the entire value of superannuation income stream interests until:

- (i) immediately before the time a CGT asset ceased being a segregated current pension asset of a complying superannuation fund either:
 - (a) during the pre-commencement period, or
 - (b) at the start of 1 July 2017 because the asset supported a TRIS, or
- (ii) 30 June 2017- for complying superannuation funds that continued using the proportionate method in the pre-commencement period, or for pooled superannuation trusts.^{3B}

6. The relevant law is contained in sections 294-100 to 294-130 of the IT(TP)A 1997.^{3C} CGT relief is not available for a life insurance company because comparable relief is already available under Division 320 of the ITAA 1997.

7. CGT relief only applies to certain CGT assets held by a trustee throughout the '**pre-commencement period**'. The pre-commencement period is the period starting on the

paragraph 110). The lump sum can be retained in the superannuation system as an accumulation interest, or paid out of the superannuation system.

² Subsection 307-80(3) of the *Income Tax Assessment Act 1997* (ITAA 1997).

³ The segregated current pension asset pool supports superannuation income streams (subsections 295-385(3) and 295-385(4) of the ITAA 1997). The segregated non-current asset pool supports accumulation interests (subsection 295-395(2)).

^{3A} Section 295-390 of the ITAA 1997.

^{3B} Sections 295-390 and 295-400 of the ITAA 1997.

^{3C} The relevant law was introduced by the *Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016*. It was subsequently amended by the *Treasury Laws Amendment (2017 Measures No. 2) Act 2017* (amending Act).

start of 9 November 2016 (the day the Bill implementing the transfer balance cap and TRIS changes was tabled in the House of Representatives⁴) to just before 1 July 2017.

8. The CGT relief provisions do not need to apply in situations where there is an actual disposal during the pre-commencement period of CGT assets used to support superannuation income streams.⁵ For example, such assets might be realised to support a partial commutation of a superannuation income stream from the superannuation environment. CGT relief is not required in this case because gains on such assets would already be exempt to the extent that current exemption rules apply.⁶ Whether or not the disposal was action taken in response to the reforms commencing does not affect the application of the current pension income exemption rules.

Object of the CGT relief provisions

9. The object of the CGT relief provisions is to provide temporary relief from certain capital gains that might arise as a result of individuals complying with the transfer balance cap, or TRIS reforms, commencing.⁷ In respect of the transfer balance cap amendments, the use of the term ‘as a result of’ in the object clause indicates that CGT relief is connected with actions an individual takes so as to comply with the reforms starting. In the case of the TRIS reforms, the CGT relief provisions seek to preserve the exemption for unrealised gains that accrued during the period when, if the relevant assets had been disposed of, the gains would have been exempt in the fund.

10. When interpreting the CGT relief provisions, an interpretation that best achieves this object is to be preferred.⁸ In a self-assessment environment, this means that the onus is on a fund’s trustee to ensure that any of the following choices it makes is consistent with this object:

- (i) for complying superannuation funds – the choice to reset the cost base of a CGT asset to its market value when the asset ceases being a segregated current pension asset either during the pre-commencement period, or at the start of 1 July 2017 because it supports a TRIS. To qualify, the fund must have held the asset throughout that period⁹, and
- (ii) for complying superannuation funds or pooled superannuation trusts – the choice to reset the cost base for an unsegregated CGT asset to its market value on 30 June 2017, where the trustee holds the asset throughout the pre-commencement period.¹⁰

11. The mechanism used to reset the cost base of a CGT asset to its market value is to deem a sale, followed by an immediate repurchase of the asset. The deeming only applies for the purposes of the CGT provisions in Parts 3-1 and 3-3 of the ITAA 1997 (the **CGT regime**). This leads to a capital gain or loss arising at the time of the deemed sale. That gain or loss is entirely disregarded for segregated current pension assets. Capital gains are partly disregarded for unsegregated assets held by complying superannuation funds

⁴ The measure was contained in Schedule 1, Part 3 of the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 (the Bill). It was introduced into the House of Representatives on 9 November 2016. The Bill became Act No 81 of 2016 on assent on 29 November 2016. Also, refer to s 294-105 of the IT(TP)A 1997. The amending Act made no change to the definition of the pre-commencement period.

⁵ This is the effect of paragraphs 294-110(1)(c), 294-115(1)(c) and 294-125(1)(c) of the IT(TP)A 1997, which require an asset to have been held throughout the pre-commencement period for the CGT relief provisions to apply.

⁶ The exemption rules are in Subdivision 295-F of the ITAA 1997, as it applied before 1 July 2017.

⁷ Section 294-100 of the IT(TP)A 1997.

⁸ Section 15AA of the *Acts Interpretation Act 1901*.

⁹ Paragraph 294-110(1)(e) of the IT(TP)A 1997.

¹⁰ Paragraphs 294-115(1)(e) and 294-125(3)(a) of the IT(TP)A 1997. Refer to paragraph 55 of this Guideline for the exact time on 30 June 2017 of the deemed sale and repurchase under the proportionate method.

¹¹ [Omitted.]

(under the proportionate method), and pooled superannuation trusts, and may be deferred. Capital losses on unsegregated assets are recognised in accordance with current rules.¹²

12. It is reasonably likely that choices made by a trustee to maximise CGT relief under the provisions are related to the transfer balance cap or TRIS reforms commencing provided, where relevant, that any member transfers are made at arm's length by a trustee.¹³ To establish that CGT relief is exercised consistently with the object, the trustee may wish to revise the information they have available.

Making a valid choice and keeping records

13. CGT relief is not automatic. The trustee of a complying superannuation fund or pooled superannuation trust must choose for CGT relief to apply for a CGT asset in the approved form. The approved form for this purpose is the *Capital Gains Tax (CGT) Schedule 2017*.

14. The choice is irrevocable, and must be made on or before the day a trustee is 'required to lodge' their fund's or trust's 2016-17 income tax return.¹⁵

14A. The trustee of a complying superannuation fund or pooled superannuation trust is 'required to lodge' their fund's or trust's 2016-17 income tax return on or before 31 October 2017 (being the date specified in the relevant notice published annually by the Commissioner).^{15A} However, the Commissioner may exercise his discretionary power to defer their lodgment day (for example, under the Tax Agent Lodgment Program, or because of exceptional and unforeseen circumstances).^{15B} In this case, the trustee would be required to make a choice to apply CGT relief on or before the deferred lodgment date.

15. A choice in the approved form is only a valid choice if it is consistent with the object of the CGT relief provisions (see paragraphs 9 to 12 of this Guideline). By signing the relevant declaration in the approved form,¹⁶ a trustee is declaring that they are making a valid choice.

16. The choice is made on an asset-by-asset basis.¹⁷ It is not made on an asset-class basis (for example, a fund's defensive asset class).

17. A trustee will need to keep appropriate records for the assets subject to CGT relief, and the exempt portion of any deferred capital gain, in accordance with the record keeping requirements in the CGT regime.¹⁸ Records need to be maintained to ensure that capital

¹² That is, a current-year capital loss is recognised at Step 1 of the method statement in section 102-5 of the ITAA 1997. If there is a net capital gain remaining at Step 5, that amount is reduced by the exempt proportion under subsection 295-390(3) of the ITAA 1997 for the income year (or pursuant to section 295-400 in the case of pooled superannuation trusts), to determine the assessable amount. Any net capital loss at Step 5 is not proportioned before it is carried forward.

¹³ Explanatory Memorandum (EM) to the Bill, at paragraph 3.331.

¹⁴ [Omitted.]

¹⁵ Subsections 294-110(2), 294-115(2), 294-120(2), 294-125(2) and 294-130(2) of the IT(TP)A 1997.

^{15A} The relevant notice for the 2016–17 income year was made by way of legislative instrument on 11 May 2017 (refer to <https://www.legislation.gov.au/Details/F2017L00529>).

^{15B} The Commissioner may defer lodgment times under section 388-55 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953). Refer to <https://www.legislation.gov.au/Details/F2017L00529>, and Law Administration Practice Statement PS LA 2011/15 *Lodgment obligations, due dates and deferrals*, for further guidance. Note that late lodgment of a fund's or trust's 2015-16 income tax return may affect eligibility for a lodgment deferral for the 2016-17 income tax return under the Tax Agent Lodgment Program. For SMSFs, the lodgment day for the 2015-16 income tax return was deferred to 30 June 2017 (refer to <https://www.ato.gov.au/Media-centre/Media-releases/ATO-extends-due-date-for-2015-16-SMSF-returns/>)

¹⁶ Paragraph 388-50(1)(b) and section 388-75 of Schedule 1 to the TAA 1953.

¹⁷ The choice is made 'in respect of the asset' under subparagraphs 294-110(1)(e), 294-115(1)(e), 294-120(1)(c) and 294-125(1)(d) and 294-130(1)(c) of the IT(TP)A 1997. Refer to Taxation Determination TD 33 *Capital Gains: How do you identify individual shares within a holding of identical shares?* for guidance on how individual shares within a holding of identical shares may be identified.

¹⁸ Sections 121-20 and 121-25 of the ITAA 1997. Also refer to paragraphs 3.362 to 3.364 of the EM to the Bill.

gains or losses on the subsequent realisation of these assets can be accurately determined.

Which assets does CGT relief apply to?

18. Complying superannuation funds calculate their exempt current pension income using the segregated method^{18A} or proportionate method.^{18B} The CGT assets eligible for CGT relief depends on whether the fund, during the pre-commencement period, uses the segregated method,¹⁹ starts using the proportionate method, or continues using the proportionate method.²⁰

18A. Pooled superannuation trusts calculate their exempt current pension income using a different proportionate method or an alternative exemption method.^{20AA} Hence, separate rules apply to determine the CGT assets of a pooled superannuation trust that are eligible for CGT relief.^{20AB}

18B. These issues are discussed below.

Fund uses the segregated method throughout the pre-commencement period

19. A complying superannuation fund using the segregated method classifies its CGT assets as either segregated current pension assets or segregated non-current assets. Assessable income derived from segregated current pension assets is income tax exempt, while income derived from segregated non-current assets is generally assessable.

19A. Sometimes, all of a fund's assets are held 'solely' to meet liabilities it has to pay, for example, superannuation income stream benefits (including TRISs for the 2016-17 income year). That is, 100% of the fund's assets are used to support pension liabilities, and all of its assets are classified as segregated current pension assets.^{20A} In this case, CGT relief may be available under the segregated method if the conditions in paragraph 21 of this Guideline are satisfied.

20. An asset, commonly, stops being a segregated current pension asset when the fund ceases holding the asset 'solely' to meet liabilities it has in relation to superannuation income stream benefits payable at that time.²¹

21. CGT relief is available for such an asset provided:²²

- the CGT asset was a segregated current pension asset at the start of the pre-commencement period
- the CGT asset stopped being a segregated current pension asset of the fund at either:
 - (i) a time during the pre-commencement period, or
 - (ii) the start of 1 July 2017 because the asset was supporting a TRIS (either of these times is a 'cessation time')

^{18A} Sections 295-385 and 295-395 of the ITAA 1997.

^{18B} Section 295-390 of the ITAA 1997.

¹⁹ Sections 295-385 and 295-395 of the ITAA 1997.

²⁰ Section 295-390 of the ITAA 1997.

^{20AA} The proportionate method for pooled superannuation trusts is in subsections 295-400(1) and 295-400(2) of the ITAA 1997. The alternative exemption method for such trusts is in subsections 295-400(3) and 295-400(4) of the ITAA 1997.

^{20AB} Sections 294-125 and 294-130 of the IT(TP)A 1997.

^{20A} Subsections 295-385(3) and 295-385(4) of the ITAA 1997.

²¹ Subsections 295-385(3) and 295-385(4) of the ITAA 1997.

²² Sections 294-110(1) and 294-110(2) of the IT(TP)A 1997.

- the fund held the asset throughout the pre-commencement period (disregarding the deemed sale and repurchase of the asset by the fund because CGT relief applies)
- the fund is a complying superannuation fund from the start of the pre-commencement period until the cessation time, and
- the trustee chooses for CGT relief to apply to the asset (in the manner discussed in paragraphs 13 to 16 of this Guideline).

21A. Examples of circumstances in which an asset may cease being a segregated current pension asset during the pre-commencement period include where:

- a member transfers value back to the accumulation phase and the fund re-characterises an asset in that period as a segregated non-current asset to support the value transfer
- an individual discontinues their TRIS and transfers some or all of its value back to the accumulation phase during the pre-commencement period (an asset supporting that value transfer would cease being a segregated current pension asset), or
- a fund starts using the proportionate method during the pre-commencement period.

22. If the conditions described in paragraph 21 of this Guideline are satisfied, a fund using the segregated method may choose CGT relief for a CGT asset that supports value transferred by a member to the accumulation phase because of the transfer balance cap commencing. CGT relief may also be chosen for CGT assets that support TRISs during the pre-commencement period where those conditions are satisfied.

22A. In relation to TRISs, the transitional arrangements are intended to provide CGT relief by enabling complying superannuation funds to reset the cost base of CGT assets to their market value where those assets are re-allocated or re-apportioned from the current pension phase to the accumulation phase in order to comply with the new law. There are two main ways that CGT relief may be available for segregated current pension assets supporting a TRIS:

- Members of funds using the segregated method may receive TRISs during the 2016-17 income year that continue past 1 July 2017 and the TRISs will not be in the retirement phase from that date. That is, the value of the interest supporting the TRISs will not be transferred to the accumulation phase before 1 July 2017. The cessation time is extended to the start of 1 July 2017 for CGT assets supporting such TRISs, which reflects that CGT relief is intended to apply to this situation.^{22A} To determine if segregated current pension assets support TRISs during the pre-commencement period, an approach that applies the CGT relief to the proportion of the segregated current pension asset pool supporting TRIS interests is acceptable.^{22B}
- A member may discontinue all or part of their TRIS during the pre-commencement period by commuting value from the interest supporting the TRIS to an accumulation phase interest. CGT relief may be available for assets that cease to be segregated current pension assets during the pre-commencement period as a result of such a commutation.

22B. A member of a fund may decide to discontinue their TRIS, transfer the entire value supporting the TRIS back to the accumulation phase in order to add assets to increase the

^{22A} Subparagraph 294-110(1)(b)(ii) of the IT(TP)A 1997. All of the other conditions in paragraph 21 would also need to be satisfied for CGT relief to be available.

^{22B} Refer to the EM associated with the amending Act, at paragraph 1.141.

value of the original TRIS, and commence another TRIS within the pre-commencement period with a higher value. It is noted that capital cannot be added to an existing pension interest^{22C} so therefore, commutation of the original TRIS back to accumulation phase is required in order to facilitate the overall increase in capital of supporting a TRIS. In such a case, CGT relief will only be available to assets that were segregated current pension assets supporting the original TRIS, and relief will only apply when the original TRIS is discontinued (provided all of the other conditions in paragraph 21 of this Guideline are satisfied). Despite the new TRIS continuing past 1 July 2017, the additional assets that support the increase to the capital supporting the TRIS are not eligible for CGT relief because those assets were not segregated current pension assets at the start of the pre-commencement period.^{22D}

23. Sometimes, a member of a fund using the segregated method may need to transfer value back to the accumulation phase that is greater than the expected excess in their transfer balance account on 1 July 2017. This might be necessary where, for example, the market value of the asset supporting value to be transferred is greater than the member's expected excess, and the fund wants to remain segregated.²³ In these circumstances, a trustee can choose to apply CGT relief for assets that are reallocated to support the increased value of the member's accumulation phase interest.

24. In other words, for a fund using the segregated method to access CGT relief, it is not a condition that total member transfers made in anticipation of the transfer balance cap start date are equal in value to the expected excess in a member's transfer balance account on 1 July 2017.^{23A} The law also does not require the total deemed capital gains calculated under the CGT relief provisions to equal the sum of the expected excesses in all members' transfer balance accounts on 1 July 2017. Examples 1 and 2 illustrate these points.

24AA. A pooled superannuation trust is not entitled to CGT relief under the conditions for complying superannuation funds with segregated current pension assets in section 294-110 of the IT(TP)A 1997.^{23B} Instead, a pooled superannuation trust must meet the conditions in section 294-125 to qualify for CGT relief.

Example 1: CGT relief and the segregated method – retirement-phase interest aligned to the \$1.6m cap

24A. *Tina and Adam are members of their SMSF which has a corporate trustee. The SMSF is a complying superannuation fund that uses the segregated method for the 2016-17 income year.*

24B. *Tina receives a superannuation income stream from the fund. The value of the superannuation interest supporting her income stream is \$2.5m. Her income stream is supported by the following segregated current pension assets:*

	Cost base	Market value at the cessation time
Asset A	\$100,000	\$900,000
Asset B	\$300,000	\$400,000
Asset C	\$200,000	\$400,000
Asset D	\$50,000	\$500,000

^{22C} Subparagraph 1.06(1)(a)(i) of the *Superannuation Industry (Supervision) Regulations 1994*.

^{22D} Subparagraph 294-110(1)(a).

²³ If the member did not transfer value equivalent to the market value of the asset, back to the accumulation phase, the fund would need to start using the proportionate method.

^{23A} Note, however, the potential relevance of the general anti-avoidance rule (paragraph 42 of this Guideline and following) for arrangements entered into with a purpose of obtaining tax benefits.

^{23B} This is because the condition in paragraph 294-110(1)(d) of the IT(TP)A 1997 is not satisfied.

Asset E	\$280,000	\$300,000
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24C. *The trustee holds all of these assets throughout the pre-commencement period.*

24D. *Adam has an accumulation interest in the fund valued at \$1m. His interest is supported by a segregated non-current asset (F) with a market value of \$1m and cost base of \$500,000.*

24E. *On 1 June 2016, Tina transfers \$900,000 in value to the accumulation phase to reduce the value of her retirement phase interest, due to the impending commencement of the transfer balance cap reform.*

24F. *Assuming the fund remains segregated, the fund's trustee may give effect to the transfer by reclassifying the following assets as segregated non-current assets:*

- (i) Asset A only*
- (ii) assets B and D, or*
- (iii) assets C and D.*

24G. *For the 2016-17 income year, the trustee may choose to apply the CGT relief for segregated current pension assets to any of the assets in one of these three scenarios. There is no evidence that circumstances have been contrived to enable the trustee to choose for CGT relief to apply (refer to paragraphs 42 to 50C of this Guideline). Note, the fund could not use the segregated method for the 2017-18 income year because Tina's total superannuation balance exceeds \$1.6m on 30 June 2017 (refer to paragraphs 25 to 27 of this Guideline).*

Example 2: CGT relief and the segregated method – retirement-phase interest reduced to less than the \$1.6m cap

24H. *Assume the facts in Example 1, except that Tina transfers \$1.3m in value on 1 June 2016 from the retirement phase back to the accumulation phase. This will reduce the value of her retirement-phase interest to \$1.2m (that is, \$2.5m - \$1.3m).*

24I. *Assuming the fund remains segregated, the trustee may give effect to the transfer by reclassifying the following assets as segregated non-current assets:*

- (i) assets A and B*
- (ii) assets A and C, or*
- (iii) assets B, C and D.*

24J. *For the 2016-17 income year, the trustee may choose to apply the CGT relief for segregated current pension assets to any of the assets in one of these three scenarios. There is no evidence that circumstances have been contrived to enable the trustee to choose for CGT relief to apply (refer to paragraphs 42 to 50C of this Guideline). The fund could not use the segregated method for the 2017-18 income year because Tina's total superannuation balance exceeds \$1.6m on 30 June 2017 (refer to paragraphs 25 to 27 of this Guideline).*

Certain SMSFs and small-APRA funds may not be segregated from the 2017-18 income year

25. A complying superannuation fund is excluded from using the segregated method from the 2017-18 income year if, for an income year:²⁴

- the fund is either an SMSF, or a regulated superannuation fund that has fewer than 5 members (small-APRA funds), at any time during the year, and
- at any time during the year, there is at least one superannuation interest in the fund that is in the retirement phase, and
- all of the following apply:
 - a person has a ‘total superannuation balance’ exceeding \$1.6m just before the start of the year
 - the same person is the retirement phase recipient of a superannuation income stream just before the start of the year (whether from the fund or another provider), and
 - the same person has a superannuation interest in the fund at any time during the year.

26. Broadly, a member’s ‘total superannuation balance’ includes the sum of their accumulation and retirement-phase interests, and certain rollovers, in all of their funds.²⁵

27. This means that, from 1 July 2017, an SMSF or small-APRA fund could have a member with a transfer balance under the \$1.6m transfer balance cap, but who also has a total superannuation balance exceeding \$1.6m. If so, the fund could not use the segregated method to calculate the amount of its exempt income from the 2017-18 income year onwards while this situation continued. However, for the 2016-17 income year, such funds can still choose CGT relief using the segregated method, provided the eligibility requirements in paragraph 21 of this Guideline are satisfied.

Fund starts using the proportionate method in the pre-commencement period

27A. Under the proportionate method, the earnings tax exemption is determined by dividing the average value of a fund’s current pension liabilities for a year by the average value of its superannuation liabilities for the year. That proportion is then applied to the fund’s assessable income for the year (subject to some exclusions) to determine the exempt amount.

28. A complying superannuation fund that was using the segregated method might not be able to reclassify an asset as a segregated non-current asset to support value transferred to the accumulation phase during the pre-commencement period, and so would need to start using the proportionate method.

29. This could arise, for example, where a fund has a single asset supporting retirement-phase liabilities that must, because of a transfer made to reduce a member’s expected excess transfer balance on 1 July 2017, also support an accumulation phase interest.²⁶ It could also arise if a member of a fund with segregated assets transferred value to the accumulation phase which was less than the market value of the asset required to support the transfer.

²⁴ The fund’s assets will be treated as ‘disregarded small fund assets’, which are deemed not to be segregated current pension assets. Refer to subsection 295-385(7) and section 295-387 of the ITAA 1997.

²⁵ Section 307-230 of the ITAA 1997.

²⁶ As the asset is not being dealt with for the sole purpose of enabling the fund to discharge all or part of its liabilities in respect of superannuation income stream benefits, it cannot be a segregated current pension asset under subsections 295-385(3) or 295-385(4) of the ITAA 1997.

29A. A further example is where a fund is paying a superannuation income stream to one member and a TRIS to another, and all of the fund's assets are used to support those superannuation income stream benefits. If the member in receipt of the TRIS decides to cease receiving the TRIS during the pre-commencement period but maintains the remaining value in an accumulation interest in the fund, the fund may need to start using the proportionate method to calculate the income tax exemption.

29B. The CGT relief that is potentially available for funds that start using the proportionate method in the pre-commencement period is under section 294-110 of the IT(TP)A 1997. That is, the trustee can choose to apply CGT relief to any, or all, of the fund's CGT assets that meet the conditions in paragraph 21 of this Guideline.

29C. CGT relief is unavailable under section 294-115 of the IT(TP)A 1997 (refer to paragraph 38 of this Guideline) because the fund's CGT assets would have been segregated assets until the time during the pre-commencement period when the proportionate method started being used. Hence, the condition that a CGT asset must have been neither a segregated current pension asset, nor a segregated non-current asset, throughout the pre-commencement period will not be met.²⁷

30. Assets will cease being segregated current pension assets in the pre-commencement period when the fund gives effect to value transferred by a member during that period which results in the fund starting to have assets that support both accumulation and retirement-phase interests. This will be the cessation time.²⁸ Choosing CGT relief under section 294-110 of the IT(TP)A 1997 enables the fund to preserve the income tax exemption on capital gains accrued until that cessation time.

31. A fund might require an actuary's certificate to support its use of the proportionate method,²⁹ which would be a new compliance obligation for funds that previously only had segregated current pension assets under subsection 295-385(4) of the ITAA 1997.³⁰

Example 3: Choosing CGT relief when a fund starts using the proportionate method in the pre-commencement period

32. *Sue and Ben are both 67 and are the only members of their SMSF. The SMSF is a complying superannuation fund with a corporate trustee. They are both retired and do not meet the work test. The SMSF's assets are segregated current pension assets given its members are only receiving account-based pensions.*

33. *On 1 July 2017, Ben expects to have a transfer balance of \$1.8m and Sue a transfer balance of \$600,000. The SMSF has three assets supporting Sue and Ben's pensions, each with a market value of \$800,000 that are owned by the SMSF throughout the pre-commencement period.*

34. *Ben transfers \$200,000 to the accumulation phase in anticipation of the transfer balance cap start date. The trustee considers it undesirable to sell any of the SMSF's assets. None of the SMSF's assets can be classified as a segregated non-current asset to support the transfer. Therefore, to give effect to the transfer and to maximise the exemption period, the SMSF starts using the proportionate method on 30 June 2017.*

35. *In this example, the SMSF starts using the proportionate method for the 2016–17 year as a result of Ben complying with the start of the transfer balance cap reforms. CGT*

²⁷ Paragraph 294-115(1)(d) of the IT(TP)A 1997.

²⁸ The cessation time under subparagraph 294-110(1)(b)(i) of the IT(TP)A 1997.

²⁹ Subsections 295-385(3) and 295-390(4) of the ITAA 1997.

³⁰ As at the date of this revised Guideline, there were no regulations made, pursuant to subsection 295-390(7) of the ITAA 1997, removing the requirement to obtain an actuarial certificate in certain circumstances under the proportionate method. The *Treasury Laws Amendment (Fair and Sustainable Superannuation) Regulations 2017* (registered on 27 March 2017) did not proceed with a previously proposed regulation which would have had this effect.

relief is potentially available under section 294-110 (and not section 294-115) of the IT(TP)A 1997 (refer to paragraphs 29B and 29C of this Guideline). The trustee may choose CGT relief for any, or all, of its CGT assets because they all stopped being segregated current pension assets on 30 June 2017.^{30A} There is no evidence that circumstances have been contrived to enable the trustee to choose CGT relief to apply (refer to paragraphs 42 to 50C of this Guideline).

36. *CGT relief is still available even though the fund will, nonetheless, have to use the proportionate method from the 2017-18 year. This is because Ben has a total superannuation balance exceeding \$1.6m on 30 June 2017, and the other conditions referred to in paragraph 25 of this Guideline are satisfied.*

Fund continues using the proportionate method in the pre-commencement period

37. [Omitted.]

38. If a complying superannuation fund is using, and continues to use, the proportionate method throughout the pre-commencement period, it may choose CGT relief for a CGT asset provided:³²

- the fund is a complying superannuation fund throughout the pre-commencement period, and held the asset throughout that period
- for the 2016-17 income year, the average value of the fund's current pension liabilities divided by the average value of its superannuation liabilities exceeds zero (that is, the proportion in subsection 295-390(3) of the ITAA 1997 exceeds zero)
- throughout the pre-commencement period, the asset was not a segregated current pension asset or a segregated non-current asset, and
- the trustee chooses for CGT relief to apply to the asset (in the manner discussed in paragraphs 13 to 16 of this Guideline).

39. A trustee may choose to apply CGT relief to any, or all, of their fund's CGT assets that meet the conditions in paragraph 38 of this Guideline.

40. The law does not expressly restrict CGT relief under the proportionate method to those assets having a total market value on 30 June 2017 equal to the sum of the expected excesses in members' transfer balance accounts on 1 July 2017. Nor is CGT relief restricted to the total amounts members transferred back to the accumulation phase in anticipation of the transfer balance cap reforms commencing.^{32A}

41. The value of an interest supporting a TRIS does not need to be transferred to the accumulation phase for a fund to qualify for CGT relief where the fund continues to use the proportionate method in the pre-commencement period (and the conditions in paragraph 38 of this Guideline are met). Example 4 illustrates this point.

41AA. A member of a fund that uses the proportionate method, and continues to use the proportionate method post 1 July 2017, may discontinue their TRIS, transfer the value supporting it back to the accumulation phase in order to add assets to the original TRIS, and commence another TRIS with a larger value within the pre-commencement period. CGT relief may be available for all of the fund's assets provided the other conditions in paragraph 38 of this Guideline are satisfied. CGT relief will only apply once, immediately before 1 July 2017, and will not separately apply when the original TRIS is discontinued.

^{30A} The conditions in paragraph 21 are satisfied.

³¹ [Omitted.]

³² Subsections 294-115(1) and 294-115(2) of the IT(TP)A 1997.

^{32A} Note, however, the potential relevance of the general anti-avoidance rule (paragraph 42 of this Guideline and following) for arrangements entered into with a purpose of obtaining tax benefits.

Example 4: Continuing TRISs and CGT relief under the proportionate method

41A. Joe and Lin both turned 63 during the 2016-17 income year. They are the only members of their SMSF, which is a complying superannuation fund with a corporate trustee. The SMSF continues using the proportionate method for the 2016-17 income year.

41B. Joe has been receiving a TRIS from the SMSF since he turned 60. He does not transfer the value of the interest supporting his TRIS to the accumulation phase before 1 July 2017.

41C. Joe still works, and also makes contributions to an accumulation interest he has in the SMSF.

41D. Lin retired when she turned 61, and has been receiving an account-based pension from the SMSF since this time.

41E. The CGT assets supporting Joe and Lin's interests in the SMSF have been held by the trustee throughout the pre-commencement period.

41F. The trustee may choose to apply CGT relief to any, or all, of the SMSF's CGT assets for the 2016-17 year (under section 294-115 of the IT(TP)A 1997), as the conditions in paragraph 38 of this Guideline are satisfied. In addition, the trustee could choose to defer a portion of the deemed capital gain on the chosen assets (refer to paragraphs 87 to 103 of this Guideline). In this case, there is no evidence that circumstances have been contrived to enable the trustee to choose for CGT relief to apply to any of the SMSF's assets.

Pooled superannuation trusts

41G. A pooled superannuation trust may choose CGT relief for a CGT asset if all of the following conditions are satisfied:^{32B}

- the trust is a pooled superannuation trust throughout the pre-commencement period, and held the asset throughout that period
- for the 2016-17 income year, *either* of the following exceeds zero for the trust:
 - (i) the exempt income proportion under the proportionate method for such trusts,^{32C} being:
$$\frac{\text{(the average number of units in the trust during the income year that are segregated current pension assets of unitholders that are complying superannuation funds)}}{\text{(average number of units in the trust during the income year)}}$$
 - (ii) the exempt income percentage under the alternative exemption method, if chosen
the percentage of the trust's assessable income that would have been exempt income under the segregated or proportionate methods,^{32E} if it had been derived instead by the trust's unitholder's in proportion to their holdings

^{32B} Subsections 294-125(1) and 294-125(2) of the IT(TP)A 1997.

^{32C} Subsection 295-400(1) of the ITAA 1997

^{32E} Refer to sections 295-385 or 295-390 of the ITAA 1997 respectively

- the trustee chooses for CGT relief to apply to the asset (in the manner discussed in paragraphs 13 to 16 of this Guideline).

Application of the general anti-avoidance provisions

42. As already noted, the object of the CGT relief provisions is to provide transitional relief from certain capital gains arising in complying superannuation funds and pooled superannuation trusts because members need to comply with the transfer balance cap or TRIS reforms commencing.

43. Broadly speaking, schemes which do no more than that which is necessary to comply with those reforms will not be the subject of determinations under Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936) (Part IVA). Schemes which abuse the CGT relief are another matter.

44. Part IVA applies to a scheme if a tax benefit has been obtained in connection with the scheme and the main purpose of a person who participated in the scheme, or a part of it, was to enable a taxpayer to obtain that tax benefit.³³ The non-inclusion of an amount in a taxpayer's assessable income for an income year that, apart from the scheme, would or might reasonably be expected to be, included in their assessable income is a tax benefit.³⁴

45. However, where the non-inclusion of an amount in a taxpayer's assessable income is "attributable to" the making of an election or choice expressly provided by the income tax law, no tax benefit is obtained by the taxpayer, unless the scheme put the taxpayer in the position to make that election and a person who participated in the scheme did so with that purpose. Practically speaking, there is little or no difference between the purpose of obtaining a tax benefit and enabling oneself to make an election, since the point of making the election will be to enjoy the tax result which follows. Merely making the election, however, without having done anything to enable that to take place, cannot result in the taxpayer obtaining a tax benefit.

46. Accordingly, Part IVA will apply to schemes entered into or carried out for the purpose of enabling a taxpayer to make an election under paragraphs 294-110(1)(e) or 294-115(1)(e) of the IT(TP)A 1997, with a view to obtaining the resulting tax benefit.³⁶

47. The kinds of arrangements that the Commissioner will scrutinise carefully with a view to determining whether Part IVA applies will exhibit the following features:

- (i) they place the taxpayer in a position to make the choice
- (ii) they go further than is necessary to provide temporary relief from CGT because members comply with the reforms commencing, and
- (iii) they exhibit contrivance of manner, a lack of correspondence of form with substance, or other matters relevant under section 177D of the ITAA 1936, that point to the purpose of avoiding tax.

48. In relation to funds using the segregated method, two of the main requirements for making the choice are to have an existing segregated current pension asset pool, and to cause an existing segregated current pension asset to cease being one in the pre-commencement period. A scheme of concern involves causing an asset (with large unrealised capital gains) to form part of a fund's segregated current pension asset pool before the pre-commencement period, and then causing it to revert to accumulation phase during the pre-commencement period by making the choice; the question will then be the purposes for which these steps were undertaken. It would be appropriate to infer that this

³³ Section 177D of the ITAA 1936.

³⁴ Paragraph 177C(1)(a) of the ITAA 1936.

³⁵ [Omitted.]

³⁶ An election referred to in Part IVA includes a choice under either of these provisions.

scheme was carried out, firstly to enable the taxpayer to make the choice, and then to obtain a tax benefit in the form of omitted assessable income. Part IVA would then apply to the scheme.

49. This scheme is a species of so-called asset washing schemes.³⁷ Taxation Ruling TR 2008/1 *Income tax: application of Part IVA of the Income Tax Assessment Act 1936 to 'wash sale' arrangements* explains how Part IVA can apply to other kinds of wash sale schemes. In the schemes described by TR 2008/1, there is generally no change in the economic position of the taxpayer, apart from tax, that results from the scheme. This leaves the purpose of obtaining the tax benefit as the prevailing or only purpose of the participants in the scheme. Similarly, here, there will be little or no change in the economic position of the fund, apart from tax, resulting from the scheme. Once it is seen that a scheme goes further than is necessary to comply with the transfer balance cap or TRIS reforms commencing, because the scheme involves additional steps unnecessary for that purpose but necessary to obtain the tax benefit via the choice, it will generally follow that the proper inference is that the participants entered into and carried out the scheme to obtain a tax benefit through having put themselves in the position to make the choice.^{37AA}

50. Another example of an arrangement giving rise to Part IVA considerations involves accessing the CGT relief provisions to facilitate the swapping of assets between the segregated current pension asset and segregated non-current asset classes. Paragraphs 23 and 24 of this Guideline, and Examples 1 and 2, indicate that a fund is free to choose which assets are to be removed from the segregated current pension asset pool for CGT relief purposes in order to comply with the new rules. Those paragraphs also indicate that there may be circumstances where the value of assets removed could be greater than the amount by which the expected pension value exceeds the cap. Of itself, this is not likely to give rise to Part IVA considerations.

50A. However, the ATO would have concerns if a fund using the segregated method were to:

- (i) transfer assets out of the segregated current pension class in excess of what is necessary to comply with the new transfer balance cap, and
- (ii) as part of that arrangement, also transfer other fund assets into the segregated current pension asset class to maintain the pension at or near the level of the \$1.6 million cap.

50B. An arrangement of this nature would raise questions about whether the steps beyond those necessary to comply with the new transfer balance cap rules were for the purpose of obtaining tax benefits. It could be expected that the ATO would scrutinise such arrangements closely and seek explanations for any actions that involve the exchange of assets between classes.^{37A}

50C. There may be other ways in which the CGT relief provided by these changes could be abused. Where arrangements of this nature come to the Commissioner's attention, further guidance may be issued. A particular question raised during consultation on the CGT relief provisions concerned the relevance of commencing a pension (including a TRIS) after 9 November 2016 to the availability of CGT relief under the proportionate method. Generally speaking, merely starting a pension during the pre-commencement period would not be of concern to the ATO from a Part IVA perspective. However, a

³⁷ EM to the Bill, at paragraph 3.330.

^{37AA} For the avoidance of doubt, the actions contemplated in paragraphs 22B and 41AA, where a TRIS is discontinued in order to add to the assets already supporting the TRIS and a new TRIS commenced within the pre-commencement period do not of themselves exhibit contrivance of the kind that might attract the application of Part IVA.

^{37A} From 1 July 2017, the potential for asset washing practices may be curtailed for some SMSFs and small APRA-funds that will not be able to use the segregated method from that time (refer to paragraphs 25 to 27 of this Guideline).

commutation of the pension shortly after its commencement might be scrutinised more closely if the purpose of such action appeared consistent with obtaining a tax benefit.

Effect of the deemed sale and repurchase

51. If CGT relief is chosen, there is a deemed sale by a trustee of the relevant CGT asset for market value consideration. The sale occurs (except for pooled superannuation trusts):

- (i) immediately before the cessation time (refer to paragraph 21 of this Guideline) for an asset that ceased being a segregated current pension asset either:
 - (a) in the pre-commencement period, or^{37B}
 - (b) at the start of 1 July 2017 because it supports a TRIS. This means that for CGT assets supporting TRISs continuing past 1 July 2017, the deemed sale occurs at the end of, but still on, 30 June 2017,^{37C} or
- (ii) ‘immediately before’ 1 July 2017, for funds continuing to use the proportionate method in the pre-commencement period. The deemed sale time in this circumstance is at the end of, but still on, 30 June 2017.³⁸ (Note that the circumstances described in paragraphs 22B and 41AA of this Guideline may alter this general case.)

51A. For pooled superannuation trusts, the deemed disposal time is immediately before 1 July 2017, which is at the end of, but still on, 30 June 2017.^{38A}

52. [Omitted.]

53. The sale is also treated as being ‘for’ market value ‘consideration’, so value is deemed to be provided by another entity in connection with the sale.

54. The effect of the deemed sale is that the trustee ceases, for an instant in time, being the owner of the asset for the purposes of the CGT regime. This means that the trustee is deemed to have disposed of the relevant CGT asset at the applicable sale time, and CGT event A1 will be triggered.⁴⁰

54A. In calculating the deemed capital gain or loss, all amounts included in the CGT asset’s cost base (or reduced cost base) before the repurchase time are taken into account. This includes, for example, the incidental costs incurred by the fund to originally acquire the asset.

55. The trustee is deemed to have purchased the asset again for market value consideration. The time of the repurchase is:

- (i) at the cessation time, for an asset that ceased being a segregated current pension asset either:

^{37B} Subparagraph 294-110(1)(b)(i) and paragraph 294-110(3)(a) of the IT(TP)A 1997.

^{37C} Subparagraph 294-110(1)(b)(ii) and paragraph 294-110(3)(a) of the IT(TP)A 1997. The very end of 30 June 2017 is ‘immediately before’ the cessation time that occurs at the start of 1 July 2017 for CGT assets supporting continuing TRISs. The effect is that any exempt, deemed capital gain or loss arises in the 2016-17 income year. Refer to paragraph 1.143 of the EM associated with the amending Act.

³⁸ Paragraphs 294-115(3)(a) and 294-125(3)(a) of the IT(TP)A 1997. The effect is that any deemed capital gain or loss arises in the 2016-17 income year, unless deferred in the case of a capital gain. Also refer to paragraph 3.345 of the EM to the Bill.

^{38A} Section 294-125(3)(a) of the IT(TP)A 1997.

³⁹ [Omitted.]

⁴⁰ Section 104-10 of the ITAA 1997 and the EM to the Bill at paragraph 3.324.

- (a) in the pre-commencement period^{40A}, or
- (b) at the start of 1 July 2017 because it supports a TRIS.

This means that for CGT assets supporting TRISs continuing past 1 July 2017, the deemed repurchase occurs on 1 July 2017,^{40B} or

- (ii) ‘just after’ the deemed sale time, where the fund uses the proportionate method in the pre-commencement period, or for pooled superannuation trusts. The deemed repurchase time in this circumstance is still on 30 June 2017.⁴¹

56. It is also legally impossible for an entity to purchase an asset from itself. The deemed repurchase will involve a change in ownership of the relevant CGT asset from the other entity back to the complying superannuation fund or pooled superannuation trust at the repurchase time. The repurchase is also treated as being ‘for’ market value ‘consideration’, so the trustee is taken to have provided value to the other entity in connection with the repurchase.

57. For the purposes of the CGT regime, the repurchase of the asset is taken to have been at market value.^{41A} Any other costs that are incurred subsequently which go to the other elements of the cost base or reduced cost base for that asset are taken into account at the time of a subsequent CGT event.

Effect of deeming on the CGT discount period

58. The deemed repurchase results in the complying superannuation fund or pooled superannuation trust becoming the owner of the asset ‘again’ at the repurchase time, for the purposes of the CGT regime.⁴² To qualify for the CGT discount on the eventual realisation of the asset, a fund or trust will need to have owned the asset for at least 12 months starting from the deemed repurchase time.⁴³

Deeming cannot be ‘unwound’

59. The future financial performance of an asset will influence a trustee’s decision to choose CGT relief. Obviously, gauging the future performance of an asset is an inexact science and is acknowledged as one of the practical difficulties in deciding whether to apply the provisions to an asset.

60. An effect of a valid choice for CGT relief being irrevocable⁴⁴ is that the deemed sale and repurchase of an asset cannot be reversed. This is especially relevant for trustees where an asset’s future performance turns out to be unexpectedly unfavourable. A trustee may not have chosen CGT ‘relief’ had that outcome been known when the choice was made. The law does not provide a mechanism to ‘unwind’ CGT relief in this situation.

^{40A} Subparagraph 294-110(1)(b)(i) and subparagraph 294-110(3)(b)(i) of the IT(TP)A 1997

^{40B} Subparagraph 294-110(1)(b)(ii) and paragraph 294-110(3)(b) of the IT(TP)A 1997. Refer to paragraph 1.144 of the EM associated with the amending Act.

⁴¹ Paragraph 294-115(3)(b) of the IT(TP)A 1997. For funds using the proportionate method, the deemed sale happens ‘just before’ 1 July 2017. This is on 30 June 2017. The repurchase occurs ‘just after’ that time, which is still on 30 June 2017 (and not on 1 July 2017). Refer to the EM to the Bill, at paragraphs 3.344 and 3.345.

^{41A} Paragraphs 294-110(3)(b), 294-115(3)(b) and 294-125(3)(b) of the IT(TP)A 1997.

⁴² Subsections 109-5(1) and 109-5(2) of the ITAA 1997.

⁴³ Section 115-25 of the ITAA 1997.

⁴⁴ Paragraphs 294-110(2)(c), 294-115(2)(c) and 294-120(2)(c) of the IT(TP)A 1997.

Effect of resetting an asset's cost base to its market value

61. Although CGT relief applies to certain CGT assets held by a trustee throughout the pre-commencement period, if chosen, CGT relief results in a permanent modification to an asset's cost base/reduced cost base.

62. Choosing to apply CGT relief might sometimes result in a capital loss arising on the deemed sale of a CGT asset, as the asset's market value at that time may be less than its reduced cost base. Trustees may not be inclined to choose CGT relief for assets with unrealised capital losses⁴⁶, but it is conceivable that in some situations they might.

63. A deemed capital loss may be utilised in the 2016-17 year by complying superannuation funds (that continue using the proportionate method in the pre-commencement period) or pooled superannuation trusts, if a trustee also has capital gains available, otherwise it is carried forward to a future income year.⁴⁷

64. Also, a capital loss on the actual realisation of an asset that is subject to CGT relief can only arise in the 2017-18 income year, or a following year, as a result of its reduced cost base being reset. This is because the asset needs to be held throughout the pre-commencement period to qualify for a step up in its reduced cost base.⁴⁸

Deemed sale and repurchase only relevant for CGT purposes

65. The market value of a CGT asset on a deemed sale and repurchase under the CGT relief provisions is determined exclusive of GST.⁴⁹ This is because the deeming only applies for the purposes of the CGT regime;⁵⁰ it does not apply for GST purposes to deem a supply to have been made. So, any deemed sale could not be a GST taxable supply.

66. Likewise, the deemed sale and repurchase for CGT purposes does not:

- affect a trustee's capital allowance or capital works deductions, or the cost of its assets for such purposes, or
- break the continuity of the 45-day or 90-day holding periods (as applicable) that a trustee might need to satisfy to claim imputation benefits, if CGT relief is chosen for a share or an interest in a share.^{50A}

Options available to a fund when considering CGT relief

67. The options available to complying superannuation funds when considering CGT relief depend on whether a CGT asset stops being a segregated current pension asset at the cessation time (refer to paragraph 21 of this Guideline), or the fund continues using the proportionate method in the pre-commencement period.

68. As already noted, a fund might start having to use the proportionate method in the pre-commencement period because a member complies with the transfer balance cap or TRIS reforms commencing. In this situation, the fund may choose the CGT relief that applies for assets that stop being segregated current pension assets.

68A The options available to pooled superannuation trusts when considering CGT relief are the same as those applying to complying superannuation funds that continue using

⁴⁵ [Omitted.]

⁴⁶ For example, where the capital loss is disregarded because it relates to the deemed disposal of a segregated current pension asset (under section 118-320 of the ITAA 1997).

⁴⁷ Sections 102-5 to 102-15 of the ITAA 1997.

⁴⁸ Paragraphs 294-110(1)(c) and 294-115(1)(c) of the IT(TP)A 1997.

⁴⁹ Section 960-405 of the ITAA 1997 also supports this conclusion.

⁵⁰ Subsections 294-110(3) and 294-115(3) of the IT(TP)A 1997.

^{50A} Paragraphs 207-145(1)(a) and 207-150(1)(a) of the ITAA 1997, and Division 1A of former Part IIIA of the ITAA 1936.

the proportionate method in the pre-commencement period. However, the capital gains arising, if CGT relief is chosen, may differ for each entity. This is because complying superannuation funds that continue using the proportionate method, and pooled superannuation trusts, may have different *relevant exempt proportions* for an income year.

68B For the purposes of paragraphs 38 to 41G of this Guideline, the '**relevant exempt proportion**' for an income year is:

- (i) for a complying superannuation fund – its exempt proportion under subsection 295-390(3) of the ITAA 1997 for the year (that is, the average value of the fund's current pension liabilities, divided by the average value of its superannuation liabilities, for the year), or
- (ii) for a pooled superannuation trust – the exempt proportion under subsection 295-400(1) of the ITAA 1997, or the exempt percentage (if chosen) under subsection 295-400(4) of the ITAA 1997, for the year (refer to paragraph 41 G of this Guideline for an outline of how to calculate these amounts).

Asset stops being a segregated current pension asset of a complying superannuation fund at the cessation time

69. If the conditions in paragraph 21 of this Guideline are satisfied, a fund has two options available for a CGT asset that stops being a segregated current pension asset in the pre-commencement period.

Option one: trustee chooses to apply CGT relief⁵¹

70. The trustee can choose for CGT relief to apply.

71. This results in a deemed sale of the CGT asset for its market value immediately before the time the asset stopped being a segregated current pension asset either:

- (i) In the pre-commencement period, or
- (ii) At the start of 1 July 2107 because the asset supports a TRIS.

Either of these times is a '**cessation time**'. CGT event A1 happens as a result of the deemed sale at the time of the sale.

72. Any capital gain or loss resulting from the deemed sale is disregarded for the 2016-17 income year.⁵²

73. The fund is deemed to have repurchased the asset at the cessation time. This means that the acquisition date of the asset, and hence the start of the CGT discount period, is reset to the day of the cessation time (refer to paragraph 21 of this Guideline). Another effect of resetting the acquisition date is that the indexation method is no longer available when calculating capital gains on assets originally acquired before 11.45am Australian Eastern Standard Time on 21 September 1999.

74. The CGT asset's cost base/reduced cost base is reset to the asset's market value at the deemed repurchase time.

75. CGT relief may have been chosen because the CGT asset was allocated to the fund's segregated non-current asset pool at the cessation time. When a CGT event subsequently happens to such an asset, only the capital gain or loss accrued on the asset from the cessation time to the event time is recognised at Step 1 of the method statement in section 102-5 of the ITAA 1997 (**method statement**) (assuming the asset is also a

⁵¹ Refer to Example 3.60 in the EM to the Bill for additional practical guidance.

⁵² Section 118-320 of the ITAA 1997.

segregated non-current asset at the event time). Any net capital gain remaining at Step 5 will be assessable income for the CGT event year, and a net capital loss is carried forward.

76. Alternatively, CGT relief may have been chosen because the fund started having to use the proportionate method in the pre-commencement period. When a CGT event subsequently happens to the asset, the capital gain or loss accrued on the asset from the cessation time to the event time is also recognised at Step 1 of the method statement (assuming the proportionate method is also used for the CGT event year). But, if there is a net capital gain remaining at Step 5, that amount is reduced by the fund's *relevant exempt proportion* under subsection 295-390(3) of the ITAA 1997⁵³ for the CGT event year (refer to paragraph 68B of this Guideline), to determine the assessable amount for that year. There is no provision in the law for a net capital loss of a fund using the proportionate method at Step 5 to be proportioned before it is carried forward.

Option two: trustee chooses not to apply CGT relief

77. The fund may choose not to apply the CGT relief provisions when the CGT asset stops being a segregated current pension asset. This option also applies if no valid choice is made for an asset.^{53A}

78. In this case, there is no deemed sale and repurchase of the CGT asset. The CGT asset's original cost base and acquisition time are preserved. Any capital gain or capital loss is determined under existing rules when a CGT event subsequently happens to the asset.

79. If the asset was allocated to the segregated non-current asset pool (and remained there), the entire capital gain or capital loss accrued on the asset from when it was originally acquired to the CGT event time is recognised at Step 1 of the method statement. Any net capital gain remaining at Step 5 will be assessable income for the CGT event year, and a net capital loss is carried forward.

80. If the fund starts having to use the proportionate method in the pre-commencement period, the only difference from paragraph 79 of this Guideline is that the Step 5 amount is reduced by the fund's *relevant exempt proportion* for the CGT event year, to determine the assessable amount for that year. Any net capital loss is not proportioned at Step 5 before it is carried forward.

Complying superannuation fund continues using the proportionate method in the pre-commencement period, or pooled superannuation trust

81. A complying superannuation fund that continues using the proportionate method throughout the pre-commencement period, or a pooled superannuation trust has three options available when choosing to apply CGT relief. To qualify, the trustee must satisfy the conditions in paragraphs 38 or 41G of this Guideline, as applicable.

Option one: trustee chooses to apply CGT relief, but chooses not to defer any capital gain⁵⁴

82. A trustee could choose to apply CGT relief to a CGT asset and to recognise any capital gain or loss in the 2016-17 income year.

83. The asset is deemed to be sold 'immediately before' 1 July 2017 (the deemed sale time) for its market value. This is on 30 June 2017, and CGT event A1 happens at that

⁵³ The exempt proportion under this provision for an income year is the: average value of a fund's current pension liabilities for the year, divided by the average value of its superannuation liabilities for the year.

^{53A} Refer to paragraphs 13 to 16 of this Guideline.

⁵⁴ Refer to Example 3.61 in the EM to the Bill for additional practical guidance.

time. Any capital gain or loss is recognised at Step 1 of the method statement for the 2016-17 income year. If there is a net capital gain remaining at Step 5, that amount is reduced by the *relevant exempt proportion* for the 2016-17 income year (refer to paragraph 68B of this Guideline), to determine the assessable amount. Any net capital loss at Step 5 is not proportioned before it is carried forward.

84. The trustee is deemed to have repurchased the CGT asset ‘just after’ the deemed sale time on 30 June 2017, but still on that day. This means that the acquisition date of the asset, and hence the start of the CGT discount period, is reset to 30 June 2017. Another effect of resetting the acquisition date is that the indexation method is no longer available when calculating capital gains on assets originally acquired before 11.45am Australian Eastern Standard Time on 21 September 1999.

85. The CGT asset’s cost base/reduced cost base is reset and is equal to the asset’s market value as at 30 June 2017.

86. When a CGT event subsequently happens to the asset, the capital gain or loss accrued on the asset from the repurchase time on 30 June 2017 to the event time is also recognised at Step 1 of the method statement (assuming the proportionate method is also used for the CGT event year). Any net capital gain remaining at Step 5 is reduced by the *relevant exempt proportion* for the CGT event year (refer to paragraph 68B of this Guideline), to determine the assessable amount for that year. Any net capital loss at Step 5 is not proportioned before it is carried forward.

86A A pooled superannuation trust may have a *relevant exempt proportion* for the 2016–17 income year (refer to paragraph 68B of this Guideline) of 100% (for example, because all of the units owned by complying superannuation funds in the trust are segregated current pension assets of the funds at all times). In this case, the trustee of the pooled superannuation trust may choose option one for any deemed capital gains arising because CGT relief is chosen. The effect of making this choice for the 2016-17 income year is that no amount is included in the trust’s assessable income in respect of the deemed capital gain for that year. In addition, the trustee would not be required to make another choice to disregard and defer the deemed capital gain under s 294-130 of the IT(TP)A 1997, noting that such an additional choice would be redundant given that the deferred capital gain would be nil.

*Option two: trustee chooses to apply CGT relief, and chooses to defer a capital gain*⁵⁵

87. A trustee could choose to apply CGT relief to a CGT asset and also choose to defer recognising a capital gain until the income year the asset is realised.

88. A capital loss on the deemed sale of the asset cannot be deferred.

89. Choosing this option results in a deemed sale of the asset for its market value on 30 June 2017, and CGT event A1 happens at this time.

90. The capital gain from the deemed sale will be the asset’s market value on 30 June 2017, less the asset’s cost base. The amount that is deferred is discussed in paragraphs 92 to 98 of this Guideline.

91. Similar to option one, the trustee is deemed to have repurchased the CGT asset ‘just after’ the deemed sale on 30 June 2017 for its market value. The asset’s acquisition date and the CGT discount period are reset to 30 June 2017. The asset’s cost base is also reset to its market value on 30 June 2017. The indexation method will no longer be available for assets originally acquired before 11.45am Australian Eastern Standard Time on 21 September 1999.

⁵⁵ Refer to Examples 3.62 to 3.64 in the EM to the Bill for additional practical guidance.

91A. A trustee of a pooled superannuation trust with a *relevant exempt proportion* for the 2016–17 income year (refer to paragraph 68B of this Guideline) of 100% should choose option one, and not option two, for any deemed capital gains under the CGT relief provisions (refer to paragraph 86A of this Guideline).

Calculating the deferred capital gain

92. To calculate the deferred capital gain, the trustee applies the method statement for the 2016-17 income year with adjustments. The adjustments ensure that any CGT discount available for the CGT asset up to 30 June 2017 is recognised.⁵⁶

93. Calculating the deferred gain requires the trustee to initially hypothesise that the capital gain on the deemed sale is not going to be deferred.

94. The trustee also assumes that the deferred gain is its only capital gain for the 2016-17 year. The capital gain on the deemed sale is recognised, hypothetically, at Step 1 of the method statement.

95. The trustee further assumes it has no current year capital losses at Step 1 of the method statement, or any prior year capital losses at Step 2.

96. The CGT discount is applied at Step 3 of the method statement, provided the trustee acquired the asset before 1 July 2016.

97. The trustee reduces the net capital gain remaining at Step 5 of the method statement, for the *relevant exempt proportion* for the 2016-17 income year.

98. The resulting amount from this hypothetical application of the method statement is the trustee's deferred capital gain on the asset for the 2016-17 year.

Recognising the deferred capital gain

99. A deferred capital gain is recognised for the income year in which a 'realisation event'⁵⁷ happens to the asset. The realisation event must happen in the 2017-18 income year or a subsequent year.

100. A 'realisation event' is a subset of the CGT events listed in section 104-5 of the ITAA 1997. It involves those CGT events that result in a trustee ceasing to own the relevant CGT asset. Typically, a trustee will realise an asset by selling it to another entity, which will trigger CGT event A1 at the relevant disposal time. It is, of course, conceivable for other CGT events to apply. For example, CGT event C1 would apply if the asset was realised because it was lost or destroyed. CGT event E2 would apply if the trustee realised the asset by transferring it to another trust.

101. The capital gain or loss accrued on the asset from the repurchase time on 30 June 2017 until the realisation event time is recognised at Step 1 of the method statement for the realisation year (assuming the proportionate method is also used for that year). This capital gain may be a discount capital gain and reduced at Step 3, provided the asset is realised on or after 30 June 2018 (noting that the asset is deemed to have been repurchased by the trustee on 30 June 2017).

102. The trustee should add the deferred capital gain on assets from the 2016-17 year at Step 1 for the realisation year, but that amount is not a discount capital gain when applying the method statement for the realisation year.⁵⁸ The amount of capital gains included at Step 1 of the method statement is reduced by capital losses made in the

⁵⁶ Refer to subsections 294-120(4), 294-120(7), 294-130(4) and 294-130(7) of the IT(TP)A 1997.

⁵⁷ Subsections 294-120(5) and 294-130(5) of the IT(TP)A 1997.

⁵⁸ Subparagraph 294-120(5)(c) of the IT(TP)A 1997.

realisation year, and then carried forward capital losses from previous years under Step 2.^{58A}

103. The trustee reduces the net capital gain remaining at Step 5 of the method statement, for the *relevant exempt proportion* for the realisation year (refer to paragraph 68B of this Guideline). However, the trustee cannot reduce the Step 5 net capital gain to the extent that a net capital gain is increased, or is created, because the deferred capital gain was recognised for the year.⁵⁹

*Option three: trustee chooses not to apply CGT relief*⁶⁰

104. A trustee using the proportionate method may choose not to apply the CGT relief provisions for a qualifying CGT asset it has held throughout the pre-commencement period. This option also applies if no valid choice is made for an asset.⁶¹

105. In this case, there is no deemed sale and repurchase of the asset. The CGT asset's original cost base and acquisition time are preserved. Any capital gain or capital loss is determined under existing rules when a CGT event subsequently happens to the asset.

106. When the CGT asset is eventually realised, the entire capital gain or capital loss accrued on the asset from when it was originally acquired to the CGT event time is recognised at Step 1 of the method statement for the CGT event year. Any net capital gain remaining at Step 5 will be reduced by the *relevant exempt proportion* for the event year (refer to paragraph 68B of this Guideline) to determine the assessable amount for that year. Any net capital loss at Step 5 is not proportioned before it is carried forward.

Commissioner of Taxation

8 March 2017

^{58A} Method statement at subsection 102-5(1) of the ITAA 1997.

⁵⁹ Subsection 294-120(6) of the IT(TP)A 1997.

⁶⁰ Refer to Example 3.65 in the EM to the Bill for additional practical guidance.

⁶¹ Refer to paragraphs 13 to 16 of this Guideline.

Your comments

107. You are invited to comment on the draft changes to the Law Companion Guideline. Please forward your comments to the contact officer by the due date.

Draft update published: 28 September 2017
Due date: 27 October 2017
Contact officer: Stephen Lau
Email address: SuperConsultation@ato.gov.au
Telephone: (02) 9374 5038

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