

LI 2023/18 - Explanatory statement -



Explanatory Statement

Taxation Administration (Remedial Power – Work Test for Personal Superannuation Contributions) Determination 2023

General outline of instrument

1. This instrument is made under section 370-5 in Schedule 1 to the *Taxation Administration Act 1953* (TAA).
2. The instrument modifies the operation of subsection 290-165(1A) of the *Income Tax Assessment Act 1997* (ITAA 1997), so that a person is able to meet the ‘work test’ in that section if they are an employee under the expanded meaning in section 15A of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and otherwise meet relevant criteria.
3. The modification ensures that all individuals aged 67 to 75 years who are employees under section 15A of the SIS Act, and who would have been eligible to claim a deduction for their personal superannuation contributions had the ‘work test’ not been relocated from the *Superannuation Industry (Supervision) Regulations 1994* (SISR) and *Retirement Savings Accounts Regulations 1997* (RSAR) to the ITAA 1997 in 2022, continue to be eligible to do so.
4. The modification ensures the previous eligibility criteria for deducting personal superannuation contributions is maintained, and provides certainty for affected individuals.
5. The instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.
6. Under subsection 33(3) of the *Acts Interpretation Act 1901* (AI Act), 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. The operation of subsection 33(3) of the AI Act is modified by section 370-15 in Schedule 1 to the TAA in the present context. Section 370-15 enables the Commissioner to repeal determinations made in the exercise of the Commissioner’s remedial power under section 370-5. Because section 370-15 provides an express repeal power for the Commissioner in this context, subsection 33(3) of the AI Act does not apply in relation to the *repeal, rescission or revocation* of a determination made under section 370-5. Subsection 33(3) of the AI Act does, however, apply in relation to the *amendment or variation* of such a determination.

Date of effect

7. Section 370-20 in Schedule 1 to the TAA provides that a determination made under section 370-5 in Schedule 1 to the TAA must not commence before the first day it is no longer liable to be disallowed, or to be taken to have been disallowed, under section 42 of the *Legislation Act 2003*. Therefore, this determination commences on the first day the determination is no longer liable to be disallowed, or to be taken to have been disallowed.
8. The instrument applies to personal superannuation contributions made on or after 1 July 2022.

Background

9. Until 1 July 2022 there was a 'work test' in the SISR and RSAR that operated to limit the personal superannuation contributions that a superannuation fund or retirement savings account provider could accept from individuals of a certain age. The test applied to contributions received in respect of a person aged between 67 and 28 days after the end of the month in which they turned 75 (persons aged 67 to 75).
10. This approach was changed in 2022. The *Treasury Laws Amendment (Enhancing Superannuation Outcomes for Australians and Helping Australian Businesses Invest) Act 2022* (the 2022 amendments) relocated the 'work test' to the ITAA 1997. The amendments came into effect on 1 April 2022, and apply to contributions made on or after 1 July 2022.
11. The relocated 'work test' is now contained in subsection 290-165(1A) of the ITAA 1997. It contains rules about how many hours a person of a relevant age must work to be eligible for deductions for their personal superannuation contributions. For persons aged 67 to 75 to claim a deduction, they must have been 'gainfully employed' for at least 40 hours in any period of 30 consecutive days during:
 - (a) the income year in which the contribution was made, or
 - (b) the previous income year, if particular other requirements (in subparagraphs 290-165(1A)(b)(ii) to 290-165(1A)(b)(iv)) are met.
12. The term 'gainfully employed' is defined in subsection 995-1(1) of the ITAA 1997 to mean 'employed or self-employed for gain or reward in any business, trade, profession, vocation, calling, occupation or employment'.
13. The 'work test' that previously existed in the SISR and the RSAR also relied on an identical definition of 'gainfully employed'. But a critical difference is that both the SIS Act and the *Retirement Savings Accounts Act 1997* (RSA Act) contain an expanded definition of employee. Subsections 15A(2) to 15A(10) of the SIS Act and subsections 19(2) to 19(10) of the RSA Act capture a range of persons as employees who may not otherwise be common law employees (such as company directors, constitutional or statutory office holders, parliamentarians and members of the Australian Defence Force).
14. By contrast, there is no definition of 'employee' in the ITAA 1997. It takes its ordinary common law meaning, and there may be some people who were previously able to claim deductions (because they fell within the expanded definition of employee in the SIS Act and the RSA Act) but are not 'gainfully employed' for the purposes of the ITAA 1997 because they are not common law employees or self-employed.
15. This instrument resolves this issue. It modifies the operation of subsection 290-165(1A) so that persons aged 67 to 75 who are an employee under subsections 15A(2) to 15A(10) of the SIS Act are capable of meeting the 'work test' if they meet relevant criteria. The modification provides certainty for these individuals by ensuring their eligibility to claim these deductions is unaffected by the 2022 amendments.

Exercise of the Commissioner's remedial power (CRP) is appropriate in the circumstances

16. The Commissioner considers that the modification of subsection 290-165(1A) is not inconsistent with its intended purpose or object, and is otherwise reasonable. The Australian Taxation Office (ATO) consulted with the CRP Advisory Panel (which is comprised of private sector specialists, as well as representatives from the ATO and the Department of the Treasury) in reaching this view.
17. In ascertaining the intended purpose or object, consideration was given to:

- (a) the Explanatory Memorandum and Second Reading Speech to the Treasury Laws Amendment (Enhancing Superannuation Outcomes for Australians and Helping Australian Businesses Invest) Bill 2021, and
 - (b) Budget Paper No. 2 from the 2021-22 Commonwealth Budget.
- 18. These documents confirm that the policy intent of the 2022 amendments was:
 - (a) to relocate the 'work test' as it existed in the SISR and RSAR, to the ITAA 1997, and
 - (b) to preserve the 'work test' for deductible personal superannuation contributions made by individuals aged 67 to 75.
- 19. The modification is not inconsistent with the intended purpose of subsection 290-165(1A) because it means that affected individuals can continue to meet the 'work test' in that section, without altering the fundamental requirement for persons of a relevant age to work a certain number of hours to be able to claim deductions for their personal superannuation contributions.
- 20. Further, the Commissioner considers that the modification is reasonable because it aligns with the intended purpose of the provision, and would also:
 - (a) be beneficial for taxpayers, by ensuring that affected individuals can continue to claim deductions,
 - (b) allow affected taxpayers to choose whether it applied to them, because they can choose both whether or not to make contributions and whether to claim a deduction,
 - (c) have no broader operation, and
 - (d) provide certainty to relevant taxpayers and industry about the consequences of making personal superannuation contributions.

Compliance cost assessment

- 21. Minor – There will be no additional regulatory impacts as the instrument is minor and machinery in nature (OIA23-04896).

Budgetary impact

- 22. The Commissioner has received advice from the Department of the Treasury that the proposed exercise of the CRP would have a negligible budget impact.

Repeal of this instrument

- 23. This instrument will be repealed at the start of 1 July 2028, which is approximately five years after the expected commencement of this instrument.

Consultation

- 24. Subsection 17(1) of the *Legislation Act 2003* requires a rule-maker to be satisfied that appropriate and reasonably practicable consultation has been undertaken before they make a legislative instrument.
- 25. For this instrument, broad public consultation was undertaken between 19 April 2023 and 5 May 2023 inclusive.
- 26. The draft instrument and draft 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 publishers and

associations monitor these pages and include the details in the daily and weekly alerts and newsletters to their subscribers and members. This ensures advice of the draft is disseminated widely across the tax professional community, and that they are in an informed position to provide comments and feedback.

27. All comments received through this consultation were in support of the proposal.
28. In addition, targeted consultation on all prospective CRP candidates is undertaken with the CRP Advisory Panel, a body comprised of private sector specialists, Treasury and ATO representatives. The Panel supported the exercise of the CRP and provided feedback on the draft determination and explanatory statement.
29. The Board of Taxation was also consulted on the use of the CRP to resolve the issue, the draft determination and explanatory statement. The Board agreed that the modification is consistent with the objects of that provision, and reasonable having regard to the provision's intended purpose. Accordingly, the Board considered it would be appropriate to exercise the power.

Legislative references

Acts Interpretation Act 1901

Human Rights (Parliamentary Scrutiny) Act 2011

Income Tax Assessment Act 1997

Legislation Act 2003

Retirement Savings Accounts Act 1997

Retirement Savings Accounts Regulations 1997

Superannuation Industry (Supervision) Act 1993

Superannuation Industry (Supervision) Regulations 1994

Taxation Administration Act 1953

Treasury Laws Amendment (Enhancing Superannuation Outcomes for Australians and Helping Australian Businesses Invest) Act 2022

Statement of compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

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This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

This instrument is made under section 370-5 in Schedule 1 to the *Taxation Administration Act 1953*, known as the Commissioner's remedial power. It modifies the operation of subsection 290-165(1A) of the *Income Tax Assessment Act 1997* (ITAA 1997).

The effect of the modification is that individuals aged 67 to 75 years who are employees under the expanded definition of that term in section 15A of the *Superannuation Industry Supervision Act 1993*, and otherwise meet the 'work test' conditions in subsection 290-165(1A) of the ITAA 1997, remain eligible to claim a deduction for their personal superannuation contributions.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights because it is wholly beneficial for taxpayers and does not raise any human rights issues.