

How your self-managed super fund is regulated

Explains how we work with you and others to regulate your self-managed super fund (SMSF).



OUR COMMITMENT TO YOU

We are committed to providing you with accurate, consistent and clear information to help you understand your rights and entitlements and meet your obligations.

If you follow our information in this publication and it turns out to be incorrect or misleading, and you fail to comply with the law as a result, we must still apply the law correctly. However, we will take the fact that you followed our information into account when deciding what action, if any, we should take.

If you make an honest mistake in trying to follow our information in this publication and you fail to comply with the law as a result, we will take the reason for the mistake into account in deciding what action to take.

If you feel that this publication does not fully cover your circumstances, or you are unsure how it applies to you, you can seek further assistance from us.

We regularly revise our publications to take account of any changes to the law, so make sure that you have the latest information. If you are unsure, you can check for more recent information on our website at www.ato.gov.au or contact us.

This publication was current at **June 2011**.

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COMMISSIONER'S FOREWORD

Australia's superannuation system is designed to help and encourage people to achieve a higher standard of living in retirement than what would be possible from the age pension alone.

Self-managed superannuation funds (SMSFs) are playing an increasingly important role in the superannuation system and as regulator we have a responsibility to achieve high levels of compliance by SMSFs with superannuation and tax laws.

Safeguarding retirement income should be an objective that is common to everyone in the superannuation industry, from trustees, approved auditors, professional and industry bodies, and of course government agencies such as us the Australian Taxation Office (ATO), Australian Securities & Investments Commission (ASIC) and Australian Prudential Regulation Authority (APRA).

The rules outlined in the superannuation legislation are there to ensure that trustees' desire for flexibility and control over their management of the fund is matched by an equally strong attention to protecting their asset base so it is able to provide members with financial security in their retirement.

In this booklet we outline how SMSFs are regulated and the role that we and other government agencies have. To emphasise that ensuring the integrity of the superannuation system is a shared responsibility we also touch on roles of trustees and superannuation professionals.

Superannuation is one of Australia's greatest success stories, and SMSFs play a big part in that story.



Michael D'Ascenzo

Michael D'Ascenzo
Commissioner of Taxation

WHY ARE SMSFs REGULATED?

SMSFs are regulated to safeguard retirement income for Australians who choose to manage their own super. However, the soundness of SMSF investment choices are matters outside our role.

⚠ Remember, there are risks associated with the investment choices you make.

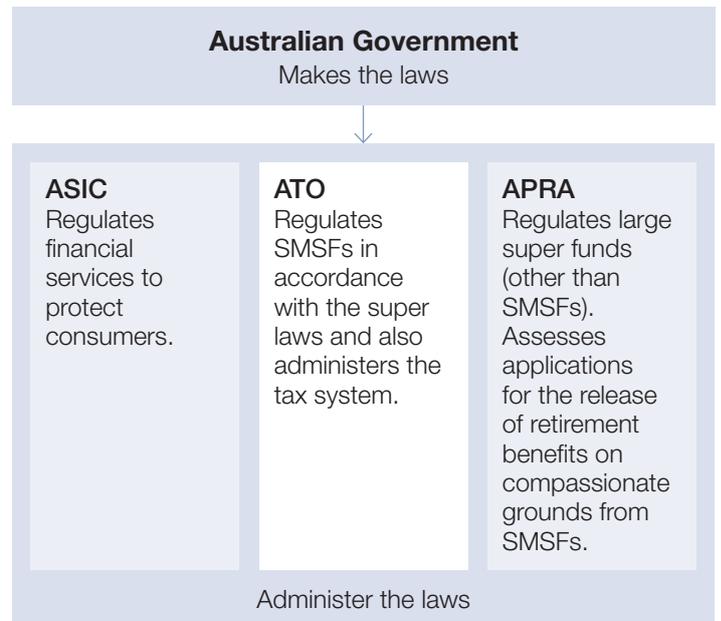
WHO REGULATES SMSFs?

The super system is regulated by three key government agencies:

- ATO (us)
- Australian Securities & Investments Commission (ASIC)
- Australian Prudential Regulation Authority (APRA).

SMSFs are one of the retirement saving options available within the super system.

We are a regulator of SMSFs. As a regulator, we are responsible for administering the super and tax laws relevant to SMSFs on behalf of the government.



OUR ROLE

Our role as a regulator is to administer the relevant super laws for SMSFs. We aim to achieve high levels of compliance and to work with you to help you meet your obligations under the super and tax laws.

We help you understand your duties and responsibilities as a trustee under the law and make it as easy as possible for you to comply, for the future benefit of the members of your fund. We undertake activities to check compliance to safeguard retirement income, but we do not evaluate your investment choices. We are responsible for administering the super and income tax laws, but not for developing the law or related policy.

The way we administer the law includes:

- verifying whether a fund's primary purpose is to pay retirement benefits to its members
- providing information and forms to help you set up and manage your fund
- checking that you manage your fund in accordance with the super laws
- implementing and maintaining systems to check the laws are complied with
- taking enforcement action to correct matters when breaches of the law are detected
- checking that approved auditors perform their duties to the required standard.

If you make an honest mistake when trying to meet your obligations, we will work with you to correct it. Your individual circumstances will always be taken into consideration. However, trustees who fail to make a genuine effort to comply, or who set out to deliberately avoid meeting their legal obligations can face:

- losing their tax concessions
- being disqualified as a trustee
- administrative penalties
- being prosecuted.

Under the *Taxpayers' charter*, we provide you with information about your rights and obligations, as well as the service and standards you can expect from us.

If you feel you have been treated unfairly or unreasonably by us or another government department or agency and you cannot resolve the issue, you can refer the matter to the Commonwealth Ombudsman.

 For more information, visit www.ombudsman.gov.au

REGISTRATION PROCESS

The SMSF registration process prevents non-legitimate SMSFs from being listed on Super Fund Lookup (SFLU). It can take up to 14 days before an SMSF is shown on SFLU as a regulated fund.

Once a new SMSF is displayed on SFLU as a regulated fund, it will be given a status of 'Registered - status not determined'. This means the fund will be able to accept transfers, rollovers, directed termination payments and contributions. This status is allocated to all SMSFs which the ATO accepts as regulated on registration and will be updated after the fund lodges its first annual return and is assessed as being 'Complying' or 'Non-complying'.

WHAT OUR ROLE DOES AND DOES NOT INCLUDE

Under the law, we have specific responsibilities as a regulator of SMSFs and as administrator of tax laws. Therefore, there are some things we can do and some things we don't do.

	We can	We don't
Deciding whether an SMSF is right for you	<ul style="list-style-type: none"> ■ provide general information about SMSFs to help you decide if it is right for you 	<ul style="list-style-type: none"> ■ tell you if an SMSF is a sensible vehicle in your circumstances, to save for your retirement
Setting up an SMSF	<ul style="list-style-type: none"> ■ provide information about how to set up a fund and the role of the trustee ■ register your election for your fund to be regulated ■ provide your fund with a tax file number (TFN), Australian business number (ABN) and register your fund for GST (if applicable) ■ check that your fund is structured correctly under the law 	<ul style="list-style-type: none"> ■ advise you of the best structure for your fund ■ provide your fund with a trust deed ■ provide your fund with an investment strategy or investment advice (see 'Making investments' on page 5)

	We can	We don't
Accepting contributions and rollovers	<ul style="list-style-type: none"> ■ check if contributions and rollovers have been made in accordance with the super and tax laws 	
Making investments	<ul style="list-style-type: none"> ■ provide general information about: <ul style="list-style-type: none"> – investment restrictions you need to comply with – what your fund's investment strategy needs to consider ■ check that your fund's investments: <ul style="list-style-type: none"> – are consistent with your fund's investment strategy – comply with the super laws ■ provide you with specific advice about how the super laws apply to your situation. For example, whether your fund would fail to comply with specific provisions of the super laws if it invested in a particular transaction <div style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <p> While our advice is not binding, see 'Our commitment to you' on the inside front cover.</p> </div>	<ul style="list-style-type: none"> ■ provide you with: <ul style="list-style-type: none"> – financial advice or give an opinion about the soundness of your investment decisions, or – an investment strategy for your fund ■ tell you if your investment strategy meets the retirement needs of members
Paying benefits	<ul style="list-style-type: none"> ■ check that you are complying with the super laws when you pay out benefits to your fund's members ■ provide you with information about when you can access your retirement benefits ■ provide you with information about how benefit payments are taxed 	<ul style="list-style-type: none"> ■ tell you in what form the benefits should be paid (pension or lump sum)
Reporting and lodging	<ul style="list-style-type: none"> ■ confirm you have lodged your fund's annual returns and check they are accurate and complete ■ check you have paid your fund's supervisory levy ■ amend your fund's income tax assessment and require payment of any tax shortfall including interest where applicable ■ remit administrative penalties for late lodgment and false or misleading statements. Penalties are imposed by law 	

	We can	We don't
Complying with the laws	<ul style="list-style-type: none"> ■ check that you have complied with the law by auditing your fund. If you haven't complied, we can take enforcement action that may include <ul style="list-style-type: none"> – accepting an undertaking from you to rectify the breach – disqualifying you as trustee – making your fund a non-complying fund – prosecuting in the most serious cases ■ check you have signed and retained a trustee declaration (if appointed on or after 1 July 2007) ■ target specific funds that present a risk of not complying with the law ■ check that your approved auditor conducts proper and adequate audits 	
Getting advice from us	<ul style="list-style-type: none"> ■ provide specific advice about how the tax laws apply to your situation. For example, whether your fund would fail to comply with the super laws if it invested in a particular financial product ■ provide information and advice about how the super laws apply ■ provide general rulings and determinations as guidance on our view of the law as the regulator of SMSFs – for example, the sole purpose test. <div style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <p>➤ While our advice is not binding, see 'Our commitment to you' on the inside front cover.</p> </div>	
Resolving disputes between trustees	<ul style="list-style-type: none"> ■ provide general advice about your options in resolving disputes ■ take action when you have not complied with the super laws 	<ul style="list-style-type: none"> ■ provide specific advice on how to resolve disputes between trustees.
Using SMSF professionals	<ul style="list-style-type: none"> ■ check that you have appointed an approved auditor to audit your fund for each income year ■ report approved auditors to their professional association where serious concerns are identified with their practices ■ disqualify approved auditors if warranted ■ provide general advice on the types of professionals you can consult and refer you to a professional association. 	<ul style="list-style-type: none"> ■ recommend a specific professional ■ intervene when you have a dispute with a professional. Note that in certain circumstances you may be able to refer to a professional regulating body, or a relevant government authority. <div style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <p>➤ For more information, see 'Role of SMSF professionals' on page 8.</p> </div>

ROLE OF ASIC

ASIC is the consumer protection regulator for financial services, including:

- investing
- super
- deposits
- insurance.

It regulates and enforces laws that promote honesty and fairness in financial products and services, financial markets, and Australian companies.

ASIC also licences financial advisers and regulates Australian companies, including companies that are corporate trustees of an SMSF.

➤ For more information about licensed financial advisers and free advice and safety checks relevant to your fund's investments, refer to the ASIC consumer website at www.moneysmart.gov.au

ROLE OF APRA

APRA is the regulator of super funds other than SMSFs.

It has only one role related to SMSFs that is, to assess applications for the release of funds to members on compassionate grounds.

➤ For more information about the wider roles of APRA, visit www.apra.gov.au

YOUR ROLE AS TRUSTEE

Your role as a trustee of an SMSF is an important one. You are responsible for managing your fund and making sure you comply with the super and tax laws.

As a trustee, your obligations include:

- making sure the sole purpose of the fund is to provide retirement benefits to the members
- preparing and implementing an investment strategy and making investment decisions with respect to super and tax laws
- accepting contributions and paying benefits (pension or lump sums) in accordance with super and tax laws
- ensuring an approved auditor is appointed for each income year
- undertaking administrative tasks such as lodging annual returns and record keeping
- making sure new trustees sign the *Trustee declaration* (NAT 71089).

All trustees are equally responsible for the decisions made for your fund.

➤ For more information about your duties and responsibilities as trustee, refer to *Running a self-managed super fund* (NAT 11032).

ROLE OF SMSF PROFESSIONALS

Under the super laws you **must** appoint an independent approved auditor to audit your fund's operations each year and in some circumstances an actuary.

You can also decide to use one or more SMSF professionals to help you to manage your fund, such as a tax agent, accountant, financial adviser, fund administrator or legal practitioner. If you do, it's important that you get good advice and choose a qualified professional that's right for you and your circumstances.

⚠ Remember, even if you use a professional, the ultimate responsibility for running the fund and making decisions still rests with you as trustee.

APPROVED AUDITORS

Approved auditors examine your fund's financial statements and assess your overall compliance with the super laws.

This includes checking that:

- your fund's investments comply with the super laws and the fund's investment strategy
- the purpose of your fund is to provide retirement benefits to its members
- any contributions and benefit payments (pension or lump sum) made comply with the super rules
- you have met your lodgment and administrative obligations, such as keeping appropriate records to explain the operations of the fund.

You must have an auditor's report before you lodge your fund's SMSF annual return. To meet this deadline, allow sufficient time for your auditor to conduct the audit. If they identify certain breaches of the super laws or have concerns about your fund's financial position, they will also notify us.

⚠ Complaints about an auditor relevant to the conduct of SMSF audits can be referred to the professional association that your auditor is a member of and/or to us.

ACTUARIES

You may be required to appoint an actuary and obtain an actuarial certificate if your fund begins to pay a pension to a member. You do not need an actuary certificate if you are paying:

- an account based pension
- an allocated pension
- a market-linked pension
- an annuity purchased through a life insurance company.

An actuary can determine your fund's annual return on investments and its ability to pay a pension to a member. The actuary can also determine the amount of the fund's assets that are being used to provide the benefit so the relevant assets and associated income qualify for tax exemptions.

⚠ Complaints about actuaries can be referred to the Institute of Actuaries of Australia.

➔ For more information about actuary certificates, refer to *Running a self-managed super fund* (NAT 11032).

TAX AGENTS

Tax agents can help you manage your fund's tax affairs. As a trustee, you can use a tax agent to complete and lodge your fund's annual returns and provide you with taxation advice in relation to your fund.

They can also help you understand your obligations under the tax laws and represent you in your dealings with us.

Generally, only a registered tax agent can charge a fee for providing these services. Tax agents must be registered under the *Income Tax Assessment Act 1936*.

⚠ Complaints about tax agents can be referred to the Tax Practitioners Board.

➔ You can check that your tax agent is registered by visiting the Tax Practitioners Board website at www.tpb.gov.au

ACCOUNTANTS

As a trustee, you need to keep accurate accounting records that explain your fund's transactions and financial position. An accountant can help you with this and prepare the fund's annual statement of financial position and operating statement. Often, your fund's accountant will also be your fund's tax agent and can assist you in the administration of your fund.

⚠ Complaints about accountants can be referred to your accountant's professional association.

FINANCIAL ADVISERS

A financial adviser can provide you with advice that is tailored to your fund, its objectives and the needs of the fund's members. They can help you prepare, review and update your fund's investment strategy and advise you on the types of investments you should consider, and what is allowed under the law.

➔ You can check your financial adviser is appropriately licensed or authorised to provide such advice at www.asic.gov.au

⚠ Complaints about licensed financial advisers can be made to the adviser's professional association or ASIC.

FUND ADMINISTRATORS

A fund administrator can help you manage the day-to-day running of your fund, and meet your annual reporting and administrative obligations.

The services of a fund administrator vary but typically include a range of accounting, financial, taxation, and record-keeping services. They are not usually licensed to provide financial advice.

⚠ Depending on the services provided by your administrator and whether they are members of a professional body or licensed to provide financial advice, you may be able to lodge complaints about them to their professional association or ASIC.

LEGAL PRACTITIONERS

As a trustee, you can use a legal practitioner to prepare, review and update your fund's trust deed. They can advise you whether certain actions are allowed under the law and represent you in legal proceedings. You can also seek their advice on such things as the legal implications of relationship breakdown, divorce, estate planning or disputes between trustees.

⚠ Complaints about legal practitioners can be referred to the Law Society.

RESOLVING PROBLEMS

The case studies below illustrate important issues you may face when running your fund. They will help you understand our role in these situations and how we work with other government agencies and SMSF professionals.

➤ For more information about the issues in these case studies, including the rules relating to investments:

- visit www.ato.gov.au
- refer to *Running a self-managed super fund* (NAT 11032).

CASE STUDY 1: WHAT IF MY AUDITOR TELLS ME I'VE DONE SOMETHING WRONG?

If your fund's auditor advises that you haven't complied with all your obligations, you should take immediate steps to address any identified problems. If you are not sure what you need to do to comply, contact us or seek professional advice.

EXAMPLE

The Blank super fund's auditor notified the fund's trustees that they had not complied with the super laws as they borrowed \$10,000 to invest in shares and used a fund asset as security for the loan. The auditor informed the trustees of the breach and advised they had to repay the loan immediately. The fund's auditor also lodged an *Auditor/actuary contravention report* (ACR) notifying the ATO of the matter.

The trustees met to discuss the best way to repay the loan. The minutes of the meeting recorded that employer contributions for members were due to be paid within two months, and the proceeds could be used to pay out the loan. The trustees asked the auditor whether it was acceptable to wait until the contributions were received before making the payment as the fund did not have sufficient cash to repay immediately. The ATO advised the proposed repayment option was suitable rectification.

Some time after receiving the ACR, the ATO contacted the trustees who advised they had repaid the loan. The ATO asked for written evidence that they had rectified the breach. The trustees faxed copies of bank statements to the ATO showing the loan had been repaid within the period specified.

The trustees also provided written confirmation they would take appropriate steps to prevent future breaches of this nature.

In deciding how to deal with this matter, the ATO considered the trustees:

- willingness to co-operate
- active steps to address the situation.

CASE STUDY 2: WHAT IF SOMETHING HAPPENS TO THE OTHER TRUSTEES?

If something happens to one of your fund's trustees, your fund can be significantly affected. Examples include:

- permanent incapacity of a trustee
- death of a trustee.

EXAMPLE

Sonia and Owen had been operating their SMSF for many years. Owen was involved in a car accident and died. Although Sonia had accepted her responsibilities as a trustee she had generally relied on Owen to manage the fund's investments and the day-to-day running of their SMSF.

Sonia was not sure what to do about the fund. She contacted the ATO for some information about what the super laws required. Sonia also consulted the ATO website and a professional adviser.

From her research she understood that she had to:

- appoint a legal personal representative to act as trustee in Owen's place until the payment of death benefits started
- organise payment of death benefits.

She also had to decide whether to continue the fund or wind it up and roll the proceeds into a large fund. If she continued to operate as a single member fund, she had to:

- change the fund's structure to make sure it still met the definition of an SMSF, either by appointing a corporate trustee or another individual as trustee
- notify the ATO of any changes in trustees and members
- make sure any new trustees signed the trustee declaration stating they understood their obligations.

She was aware from her contact with the ATO that even if she decided to use an SMSF professional to help her, she would remain ultimately responsible for managing the fund. Any new trustees would be equally responsible and accountable for the decisions of the fund.

CASE STUDY 3: WHAT IF THERE IS A DISPUTE BETWEEN TRUSTEES?

If there is a dispute between trustees of the fund, it is generally the trustees' responsibility to work it out. Trustees and members of SMSFs cannot access the Superannuation Complaints Tribunal for assistance in resolving any disputes.

If you are unable to resolve a dispute, you can:

- leave the fund and roll your benefits into another fund, or
- seek legal advice if the actions of the other trustees have caused a loss or reduction to your retirement savings, or have breached super or tax laws.

In our role as a regulator, we only become involved where trustees fail to comply with the super or tax laws.

EXAMPLE

Bernard and Cathy are married and are the members and trustees of the Ber-Cat Super Fund. The fund held \$200,000 worth of assets in an interest-bearing cash account. Both members had \$100,000 in retirement savings in the fund.

Over time, Bernard and Cathy developed relationship problems and ceased communicating as trustees. Bernard withdrew \$150,000 from the fund and spent the money on personal items and holidays. Due to this, Cathy lost 50% of her retirement savings in the fund. Bernard failed to comply with the requirements of the super laws as he had withdrawn the money without meeting a condition of release.

The ATO was notified of Bernard's actions and his income tax return was amended to include the \$150,000 that was taxed at his marginal rate plus penalties. In reviewing this case the ATO took into account all the circumstances surrounding the breaches. After considering the compliance options available, including making the fund non-complying and taking civil prosecution action against Bernard, the ATO decided to disqualify him as trustee. This prevented him from becoming a trustee of any super fund. This was in addition to the tax penalty imposed on his individual return. To make the fund non-complying would have penalised Cathy as she would lose half of her remaining assets in the fund.

Cathy approached the Superannuation Complaints Tribunal and was informed they could not assist in any SMSF dispute resolution. She then contacted the ATO. The ATO advised they could not help her recover her money and she could not obtain compensation from the government under the super laws (an option available for APRA funds). However she could seek legal advice to pursue the matter.

After speaking with her SMSF professional, she concluded her options were to:

- carry on her SMSF as a single member fund by appointing either another individual trustee or a corporate trustee, or
- wind up the Ber-Cat Super fund and roll the remaining funds into a large fund.

If she decides to continue with the fund, she will make sure any new trustees sign the trustee declaration and use safeguards, such as joint bank account signatories, to protect the fund's assets. She now understands the importance of taking an active role in managing her fund.

CASE STUDY 4: WHAT HAPPENS IF MY INVESTMENTS DO NOT PERFORM?

As a regulator, we are not responsible for the investment choices you make and cannot give you investment advice. We only become involved if the investments you choose do not comply with the super or tax laws.

If your investments aren't performing well, you have to decide if you want to continue holding these investments or make other investment choices. In these circumstances you may decide to obtain advice from a financial adviser.

EXAMPLE

Bill and Penny are the trustees of an SMSF. After receiving a tip from a friend, they invested 75% of their fund's capital in XYZ Ltd shares. Soon afterwards XYZ Ltd encountered trading difficulties and became insolvent. As a result they only recouped a small portion of their investment. Unsure of what to do about the loss and whether they should continue running their fund, they contacted the ATO.

The ATO explained they could not give them financial advice on their investments and that it was their responsibility as trustees to invest prudently and according to the super laws.

Bill did some research and found that ASIC provided some useful information about choosing investments.

After speaking with their SMSF professional, Bill and Penny decided to continue running their fund but altered their investment strategy to making lower risk investments including term deposits and listed shares across a number of different industry types. They also agreed to review their strategy regularly.

SUPER TERMS EXPLAINED

AUDITOR/ACTUARY CONTRAVENTION REPORT (ACR)

An *Auditor/actuary contravention report* (NAT 11239) is used by approved auditors and actuaries to notify breaches of the super laws or concerns about an SMSF's financial situation to us.

COMPLYING FUND

A complying fund is a super fund that complies with the requirements of the super laws. Complying super funds are taxed concessionaly at 15%.

CONDITION OF RELEASE

A condition of release is a nominated event (specified in the super laws) that must be met before a member can be paid super benefits (pension or lump sum). They include events such as retirement, attaining age 65, permanent and temporary incapacity and compassionate grounds (applications will be assessed by APRA).

LEGAL PERSONAL REPRESENTATIVE

A legal personal representative is a person appointed to act as trustee on behalf of a:

- member under a legal disability (usually a member under 18 years old)
- member for whom they hold an enduring power of attorney, or
- deceased member (up until the time death benefits start to be payable from the fund).

However, an individual who has been disqualified cannot have a legal personal representative appointed to act as trustee.

NON-COMPLYING FUND

A non-complying fund is a fund that either did not elect to be regulated or, having elected to be regulated, has not complied with the super laws. For a previously complying fund to become non-complying, we are required to issue a notice of non-compliance to the trustees. This means that the fund will be subject to the higher rate of tax applicable to non-complying funds.

BINDING ADVICE

Binding advice commits us to apply the law in a stated way. It can be provided for tax laws, but there is no provision for binding advice under super laws. It can be provided as a private ruling about how a tax law applies or would apply to your circumstances, or a public ruling.

UNDERTAKING

An undertaking is a written agreement between the trustees of an SMSF and us, outlining the steps the trustees will take to rectify a breach of the super laws.

MORE INFORMATION

For more information about your role and responsibilities as a trustee, refer to *Running a self-managed super fund* (NAT 11032).

To keep up to date with the latest information about SMSFs, subscribe to our online newsletter – *SMSF News*. To subscribe, visit www.ato.gov.au and search for ‘SMSF News’.

To obtain a copy of our publications or for more information:

- visit our website at www.ato.gov.au
- phone us on **13 10 20**
- phone our publication ordering service on **1300 720 092**
- write to us at
Australian Taxation Office
PO Box 3100
PENRITH NSW 2740

If you do not speak English well and need help from us, phone the Translating and Interpreting Service on **13 14 50**.

If you are deaf, or have a hearing or speech impairment, phone us through the National relay Service (NRS) on the numbers listed below:

- TTY users, phone **13 36 77** and ask for the ATO number you need
- Speak and Listen (speech-to-speech relay) users, phone **1300 555 727** and ask for the ATO number you need
- internet relay users, connect to the NRS on www.relayservice.com.au and ask for the ATO number you need.

