

**Are non-complying funds and unregulated superannuation funds the same? Or do they refer to different types of funds? If so, please explain the difference.**

In general, a regulated superannuation fund is a fund that meets certain eligibility criteria and that makes an irrevocable election to be regulated under the *Superannuation Industry (Supervision) Act 1993* in order to become eligible for tax concessions. This means that a superannuation fund can decide to not to be a 'regulated superannuation fund'. By default this means it will be a non-complying superannuation fund.

However, a complying fund may also become a non-complying superannuation fund if it contravenes certain SIS rules. The effect of a complying fund becoming a non-complying fund is that the assets of the fund are taxed at the top marginal rate, plus any income in the year is taxed at the top marginal rate. Generally only a SMSF will be made non-complying as all the members must generally be involved in the contravention.

The following link provides background information via a link to a circular on the APRA website that deals with an *Election to become a regulated superannuation fund for funds regulated by APRA*. It notes that it can also be used as background information by self managed funds (and it provides a link to the ATO website for SMSF matters). Paras 6, 7, and 11 deals with non-complying superannuation funds. Paragraph 10 also has some information about the tax implications of complying or not complying.

The link to the circular on the APRA website is here:

<http://www.apra.gov.au/Superannuation/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=1735>

For the purposes of the exemption provided by section 116 of the Bankruptcy Act, the test is only whether the fund is a regulated superannuation fund.

**What is the rationale for the different treatment of non complying/unregulated superannuation funds and regulated superannuation funds? Why doesn't the same rule apply to both types of funds, ie there must be an 'intention to defeat creditors' under the Bill in relation to regulated funds but the same rule doesn't apply under section 116 of the Bankruptcy Act?**

Section 116 of the Bankruptcy Act deals with property divisible among a bankrupt's creditors. Subsection 116(2) provides exemptions to divisible property. One such exemption is the interest of a bankrupt in a regulated superannuation fund (within the meaning of the *Superannuation Industry (Supervision) Act 1993*). This exemption was introduced in 1993 to reflect the introduction of the SIS scheme for regulating the superannuation industry. The exemption does not apply to a bankrupt's interest in a superannuation fund which is not a regulated superannuation fund for SIS purposes.

The exemption was introduced to ensure that appropriate retirement savings were protected in the event of bankruptcy and reflect the general scheme of superannuation reforms at the time aimed at encouraging a higher level of retirement savings. The limitation in section 116 to SIS-regulated superannuation funds ensures that only contributions which are made for legitimate retirement savings purposes are exempt. It would be inappropriate to extend this protection to unregulated funds because there could be no guarantee that the fund exists for legitimate retirement savings purposes.