



**NOVEMBER 2013**

## AIA 'Investor Update'

This November 'Investor Update' includes several SMSF related articles, and some general taxation information. Enjoy the read

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### Australian investors' optimism spikes, but caution remains.

Investors in Australia are feeling significantly more optimistic about prospects and outlook for the local share market. The **September Australian Investors' Sentiment Survey** by the Australian Investors Association (AIA) and FNArena, shows the general level of optimism on a medium term outlook has never been this high since January 2011, when the first Survey was held. No less than 65% of all respondents believe the share market will post further gains on a 6-12 months horizon. Only 22% of respondents see lower share prices by late next year. Two months ago, these percentages stood at 54% and 26% respectively.

#### Markets Higher in 6-12 Months Time?

	<b>Sep-13</b>	<b>July</b>	<b>May</b>	<b>March</b>	<b>Jan-13</b>
<b>Yes</b>	65	54	46	57	57
<b>No</b>	22	26	30	25	27
<b>Same</b>	13%	20%	24%	18%	16%

### Upcoming Events

[\[view events schedule\]](#)

Many committees have already set their plans for their 2014 events, and these are now posted on the AIA website.

## Planning for the 2014 Annual Conference has begun

**Sunday 3<sup>rd</sup> August  
to Wednesday 6<sup>th</sup> August  
2014**

**Put the dates into your diary  
now!**

**We wish all of our  
members and  
families a merry  
and safe Christmas.**

### Australian Investors' Optimism Spikes, but caution remains (Cont'd)

Overall optimism for the short-term outlook has also improved, with 43% now adopting a positive view though the largest group (46%) remains neutral short-term.

#### Current Sentiment:

	<u>Sep-13</u>	<u>July</u>	<u>May</u>	<u>March</u>	<u>Jan-13</u>
<b>Bullish</b>	43%	23%	32%	35%	45%
<b>Neutral</b>	46%	64%	57%	51%	49%
<b>Bearish</b>	11%	13%	11%	14%	6%

Portfolio compositions suggest cash positions are slowly being reduced in favour of equities, but with the emphasis on "slowly".

According to the latest Survey, on average investment portfolios still hold 18% in cash, which implies a return to the same level as in March this year, which marked the lowest level since January 2013. All other Surveys held in 2013 showed cash levels at 20%.

Average cash levels peaked at 26% in September 2011.

#### Average Investment Portfolio Allocations:

	<u>Sep-13</u>	<u>July</u>	<u>May</u>	<u>March</u>	<u>Jan-13</u>	<u>Sep-11</u>
<b>Equities</b>	51%	49%	51%	53%	50%	45%
<b>Property</b>	19%	19%	16%	17%	18%	17%
<b>Fixed Income</b>	12%	12%	12%	12%	12%	12%
<b>Cash</b>	18%	20%	20%	18%	20%	26%

According to Russel from Melbourne, "Low interest rates, rising consumer confidence, the election bedded down and an increased volume of new IPOs will continue to support this market."

Another respondent offered: "I am confident we are entering a Howard confidence like era such as we witnessed in 2003 on to 2007."

Simon from Sydney is "Looking forward to another Santa Claus rally later this year".

Others see plenty of reasons to remain cautious as Quantitative Easing by the Federal Reserve is still in place and central bankers in Europe and in Japan stick to money printing and ultra-loose policies, while the Australian domestic economy is weak.

Says Jane from Maroochydhore: "I am greatly concerned that America keeps pumping money into the economy. It

seems to be creating a false sense of optimism in the share market. I don't think it is a matter of "will the market" pull back, I think it is a matter of 'when'. While another respondent offers: "Not convinced about politicians' ability to manage economies – worldwide" Overall, confidence seems to have risen to levels last seen at the start of the calendar year when expectations were for a much better outlook on reduced global risks.

#### FNARENA/AIA Investor Confidence Index

<u>Sep-13</u>	<u>July</u>	<u>May</u>	<u>March</u>	<u>January</u>
61%	57.3%	58.4%	60.7%	61.4%

The Investor Sentiment Survey asked members at AIA and FNARENA how they felt about the market and how they were invested. The Survey will be repeated in two months (November 2013).

249 respondents participated through the AIA and 247 through FNARENA.

#### Medicare Levy Increase to Fund National Disability Insurance Scheme

From 1 July 2014, the Medicare levy will increase from 1.5% to 2%. The money raised from the increase will be placed into a National Disability Insurance Scheme fund.

This increase will also mean consequential changes for legislation that reference the Medicare levy rate.

#### CGT Improvement Threshold for 2013/2014

If you make a capital improvement to a CGT asset you acquired before 20 September 1985, this improvement will be treated as a separate asset and will be subject to CGT if, at the time a CGT event happens to the original asset, the cost base of the capital improvement is;

- more than the improvement threshold for the year in which the event happens, and
- more than 5% of the amount of money and property you receive from the event.

If there is more than one capital improvement and they are related, they are treated as one separate CGT asset if the total of their cost bases is more than the threshold.

The Commissioner has determined that the CGT improvement threshold for the 2013/2014 is \$136,884 (up from \$134,200 for the previous year).

### Reduced Superannuation Concessions for High Income Earners

Individuals with very high incomes may soon be liable to pay Division 293 tax. The tax reduces the concession received by these individuals on their super contributions.

Although there are some exceptions, most high-income individuals will now have to pay an extra 15% tax on their 'taxable contributions' for an income year if their income for surcharge purposes, plus their low-tax contributions, are greater than the \$300,000 threshold. This change brings the tax benefit for concessional contributions of very high income earners into line with the concessions received by average income earners.

The ATO uses information reported on an individual's member contributions statement (MCS) or self-managed super fund (SMSF) annual return to determine the low-tax contributed amounts – these are contributions that are concessionally taxed within the super fund.

Division 293 tax will be applied from 1 July 2012. Assessments for the 2012–13 financial year are expected to be issued to affected individuals from January 2014.

### Changes to Tax on Excess Superannuation Contributions

Under changes to the super system announced by the government earlier this year, tax on excess super concessional contributions will be at an individual's marginal tax rate, plus an interest charge, rather than at the top marginal tax rate.

If you have excess concessional contributions on or after 1 July 2013, these will be included in their individual assessable income. Assessments may commence issuing from July 2014.

To help individuals pay the additional tax bill and charge, they may choose to release an amount up to 85% of your excess concessional contributions from your super fund.

The one-off refund of excess concessional contributions up to \$10,000 will now only apply to the 2011–12 and 2012–13 financial years. The refunded amount will be assessed at the individual's marginal tax rate.

### Increased Concessional Contributions Cap

For eligible individuals, the concessional contributions cap has been increased to \$35,000.

For the 2013–14 financial year, the increased cap applies to individuals aged 59 and over on 30 June 2013. For the 2014–15 financial year, the increased cap applies to individuals aged 49 and over on 30 June 2014.

This is only a temporary measure and the higher cap will cease when the general concessional cap reaches \$35,000 through indexation.

### Reminder - Private Health Insurance Rebate and Medicare Levy Surcharge

As in 2012/2013, the private health insurance rebate will be income tested for 2013/2014 – this means that if you earn too much income you may not be eligible to receive a private health insurance rebate. The income threshold tiers for 2013/2014 will be;

	New Income Thresholds			
	Unchanged	Tier 1	Tier 2	Tier 3
Taxpayers without private health insurance				
Singles	\$88,000 or less	\$88,001 - \$102,000	\$102,001 - \$136,000	\$136,001 +
Families	\$176,000 or less	\$176,001 - \$204,000	\$204,001 - \$272,000	\$272,001 +

For taxpayers with taxable income above the surcharge thresholds, and who do not have adequate private health insurance, the Medicare Levy Surcharge penalties will be as follows;

	Currently	Tier 1	Tier 2	Tier 3
Medicare Levy Surcharge	1%	1%	1.25%	1.5%

The reduced private health insurance rebates will be as follows;

Private Health Insurance rebate	Current Rebate	Rebate from 1		
		Tier 1	Tier 2	Tier 3
< 65 years	30%	20%	10%	Nil
65 69 years	35%	25%	15%	Nil

#### Reminder - Medical Expense Tax Offset

The government has proposed to phase out the net medical expenses tax offset, with transitional arrangements for those currently claiming the offset. From 1 July 2013, those taxpayers who claimed the offset in 2012-2013 will continue to be eligible for 2013-2014 if they have out-of-pocket medical expenses above the relevant thresholds. The 2012/2013 thresholds are as follows;

Family Status	Taxable Income Threshold	What can you claim?
Single (single at 30 June 2013 and no dependent children)	\$84,000 or less	20% of net medical expenses over \$2,120
	Above \$84,000	10% of net medical expenses over \$5,000
Family (with a spouse at 30 June 2013, or dependent children at any time during the year or both)	\$168,000 or less	20% of net medical expenses over \$2,120
	Above \$168,000	10% of net medical expenses over \$5,000

#### SMSF trustees — disqualified due to dishonest conduct

By Daniel Butler ([dbutler@dbalawyers.com.au](mailto:dbutler@dbalawyers.com.au)), Director DBA Lawyers

Many do not realise the extent of the provisions in the *Superannuation Industry (Supervision) Act 1993* (Cth) ('SISA') that deal with disqualified person. These can result in a person inadvertently acting as trustee of a self-managed superannuation fund ('SMSF') while actually disqualified. Doing so exposes these trustees to significant penalties. We explore some of the nuances of the disqualified person provisions and offer some practical steps to ensure advisers are aware of the risks and ensure

their clients do not act as SMSF trustees while disqualified.

#### Certain persons disqualified from acting as trustees

The SISA prohibits certain 'disqualified' persons from acting as trustees of SMSFs. Under s 120 of the SISA, we consider an individual who has been convicted of an offence involving dishonest conduct is therefore disqualified from being a trustee of an SMSF.

This prohibition also precludes such individuals from acting as directors of corporate trustees of SMSFs. For simplicity, I will simply refer to a trustee from now on which also includes a reference to a director of a corporate trustee.

#### What does 'dishonest' mean?

The term 'dishonest' is not defined in the SISA and therefore takes on its ordinary meaning. The *Criminal Code Act 1995* (Cth) provides an interpretation, albeit in a different context, defining dishonesty by reference to the 'standards of ordinary people'.

In the cases relating to superannuation, there has been little commentary, other than a recognition that offences involving theft or deception for personal gain will almost inevitably be dishonest (refer to *N2000867 v Australian Prudential Regulation Authority* [2001] AATA 979; *AAT Case 60/96* 96 ATC 560; *VBS v Commissioner of Taxation* [2005] AATA 1303; *VCA v Australian Prudential Regulation Authority* [2008] AATA 580).

Shoplifting would clearly fall within the context of dishonest conduct. Indeed, the explanatory memorandum to the SISA in respect of s 120 includes an example that confirms someone convicted of a minor shoplifting offence some 20 years ago is disqualified.

However, there are obviously a whole range of offences that need to be considered that may fall within the realm of dishonest conduct and, if so, the person would be disqualified. The difficulty in practice is to determine whether some offences fall within the realm of dishonesty without undertaking considerable and in depth legal research; especially as some offences may fall within a grey or uncertain area.

#### Example

An adviser is called by a concerned parent who asks whether her child who has just been caught on public transport without a valid ticket should do anything other than pay the \$150 cost of the fine or fight it in court? The adviser then learns that this parent has only recently

undertaken their estate planning on the basis that their two children would one day take control of the family SMSF following the death of their parents. If on close analysis of the legislation, the offence involved one where the child had intent to ride on public transport without a ticket, then that child may be forever precluded from becoming an SMSF member. On the other hand, the legislation may require intent and therefore would not result in disqualification. However, this analysis on its own may give rise to a substantial legal cost to undertake hours and hours of research by an experienced lawyer costing thousands of dollars. Many parents therefore simply pay such fines without thinking any further.

Accordingly, advisers should be alert to the range of possible offences which may on their face not appear to disqualify a person but on a detailed analysis of the law may have the potential to result in disqualification. For instance, drug related offences may not necessarily result in disqualification but being a drug dealer is generally considered to be 'discreditable, at variance with straightforward or honourable dealing'. Research into the nature and type of conviction may result in certain drug related offences leading to disqualification.

Interestingly, however, someone who commits murder is not disqualified.

From this brief analysis, it is clear the law here is complex and extremely difficult to administer in practice. Indeed, this area of the law needs reform in order to clarify what falls within the (disqualification) net. Advisers and SMSF trustees should not be put at risk by offences which are not within a prescribed 'net' of convictions.

Until the law is reformed, advisers, especially auditors need to be vigilant or potentially face liability for claims by disqualified persons who should not be SMSF trustees that get hit with penalties.

### **Penalties**

There is a real risk of significant penalties for a disqualified person acting as a trustee of an SMSF. Section 126K of the SISA provides several penalties for a disqualified individual acting as trustee of an SMSF. Individuals who are or become a disqualified person and act as trustee of an SMSF face criminal and civil penalties of two years in prison or a \$10,200 penalty. Further, trustees of SMSFs who become a disqualified person must immediately inform the ATO or face a penalty of \$8,500.

Thus, a detailed investigation should not be deferred or swept under the carpet thinking the risk will simply fade away in time. This is also an offence involving strict

liability (ie, no intention to contravene needs to be proved).

### **Past and overseas offences**

In particular, the SISA extends the definition of dishonesty to anyone convicted at any time under a law of the Commonwealth, a State, a Territory, or a foreign country. As such, there is potential that no matter where a conviction was recorded, or when it was recorded (including before the SISA came into force in late 1992), the conviction will be relevant to determining whether the person is a disqualified person.

### **Spent convictions**

Spent convictions are available under certain state, and federal and overseas legislation that generally prohibit the disclosure of offences in some circumstances. In some cases, a conviction that is more than 10 years old may no longer require disclosure. However, the SISA expressly excludes the law on spent convictions, and accordingly, spent convictions are still relevant for determining whether a person is a disqualified. One tribunal decision involved an overseas equivalent of a spent conviction that was held to be covered by the SISA (see the discussion of *AAT Case 60/96* below).

### **Case study — AAT Case 60/96**

In *AAT Case 60/96* 96 ATC 560 the Administrative Appeals Tribunal affirmed the disqualification of a trustee who had been convicted and paid a monetary fine in the United Kingdom in 1969 due to fraudulent insurance claims. It was argued that the convictions were covered by the *Rehabilitation of Offenders Act 1974* (UK) that operates in, broadly, a similar fashion to spent convictions.

The tribunal confirmed offences involving dishonest conduct committed prior to SISA and overseas were otherwise covered even though the offence was a spent conviction under UK legislation. This was despite the person being only 21 years old at the time, receiving minor punishment and having had an exemplary record over decades as a successful investment manager and chairman of managed funds.

### **Waiver of status as a disqualified person**

The SISA provides limited scope to apply for a waiver of disqualified person status. An application can be made to the ATO or the Federal Court. Different requirements apply to these applications. For example, very strict timeframes are placed on applications to the ATO and the offence can not be one of 'serious' dishonest conduct being one that can result in greater than two years imprisonment.



While the ATO may overlook certain minor offences it is unlikely to look favourably on anyone convicted of fraudulent social security/Centrelink, tax and similar claims.

The ability to apply to the Federal Court is less restrained though brings its own considerations as to cost and the likelihood of success.

#### Steps for advisers

Advisers should be alert to the above issues for both providing quality service as well as minimising any risk of providing inaccurate or negligent advice. Practical measures may include a 'best practice' checklist that compels trustees to consider these issues for each newly established SMSF. Ongoing compliance is also important such as an annual certification that the trustee has not been convicted of dishonest conduct. Advisers should also consider these issues in relation to estate and succession planning. They should consider if all proposed, current and future successor trustees, eg, spouse and children, have been vetted to ensure they are not disqualified persons.

A police check can be undertaken to overcome a person's possible oversight of a prior conviction that took place many years ago. Typically, a state and federal police check is required and if the person is from an overseas country with a similar process, an overseas police check could also be undertaken. Auditors particularly may like to obtain such clearances.

Finally, DBA Lawyers provide assistance in respect to a wide range of legal aspects to SMSFs. Further, we draft our SMSF documentation with the above in mind regularly prompting advisers and potential trustees to consider whether they may be a disqualified person.

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This article is for general information only and should not be relied upon without first seeking advice from an appropriately qualified professional.

Note: DBA Lawyers hold SMSF CPD training at venues all around Australia and online. For more details or to register, visit [www.dbanetwork.com.au](http://www.dbanetwork.com.au) or call Marie on 03 9092 9400.

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**Australian Investors Association Ltd**  
PO Box 7439  
Gold Coast MC QLD 9726  
Tel 1300 555 061  
Fax 07 5538 8376  
Email [aia@investors.asn.au](mailto:aia@investors.asn.au)