Technical Trends

A monthly update on topical legislative/planning technical issues

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Contents

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1. What's New

a) Budget super reforms to start 1 July 2022

Legislation, namely the Treasury Laws Amendment (Enhancing Superannuation Outcomes for Australians and Helping Australian Businesses Invest) Bill 2021, to implement a raft of super changes announced in last year's Budget has passed both houses of Parliament and has received Royal Assent providing the certainty we need.

Changes to the work test, non-concessional bring forward rules and downsizer contributions will commence on 1 July 2022.

Regulations covering specific aspects of the changes are yet to be released. These may clarify operational aspects of the Bill.

In summary, the measures in this Bill include:

Work test removed	You no longer have to be working to make non-concessional and salary sacrifice contributions up to age 75
Bring forward rules expanded	The ability to make non-concessional contributions greater than the annual cap expanded to 67-74 year olds
Downsizer contribution age reduced	Downsizer contributions can be made from age 60 instead of age 65
SG Contributions available to all eligible employees	Employees earning less than $450 per month will be eligible for Superannuation Guarantee contributions from their employers
More super available for first home buyers	You can release up to $50,000 plus associated earnings from your super to buy your first home under the First Home Super Saver Scheme

b) No change to general transfer balance cap for 2022/23

With the release of the December CPI, we now know that the general transfer balance cap for the 2022/23 year will remain at $1.7m. While it took four years for the transfer balance cap to increase from $1.6m to $1.7m, with the substantial increase in cost of living figures, there was a possibility that the cap could rise again in 2022/23 to $1.8m. The increase in CPI was not large enough to result in further indexation.

The general transfer balance cap not only determines the amount a client can move to retirement income streams where there is no tax on earnings, it also establishes the total super balance threshold used to determine if a client is eligible to make non-concessional contributions. With continued upward pressure on CPI figures, there is a possibility that the general transfer balance cap will be indexed to $1.8m in 2023/24.

c) Retirement income convenant legislation passed

The Corporate Collective Investment Vehicle Framework and Other Measures Bill 2021, which requires trustees of superannuation entities (excluding SMSFs) to develop a retirement income strategy for their members who are retired or are approaching retirement, has passed both houses of Parliament.

The existing legal obligations on super trustees is primarily focused on the accumulation phase. In the 2018-19 Budget, the Government announced a commitment to introduce a retirement income covenant to improve the retirement outcomes of Australians, by enabling choice and competition in the retirement phase.

The retirement income covenant requires super trustees to have a strategy to assist members to achieve the following three objectives:

- maximising their expected retirement income;
- managing expected risks to the sustainability and stability of their expected retirement income; and
- having flexible access to expected funds during retirement.

Trustees will be required to formulate their retirement income strategy to have publicly available from 1 July 2022 although they will not be required to have all components of their strategy by 1 July 2022 as implementation will be an ongoing process.

The Services Australia website provides a loan eligibility calculator and loan estimator to help clients determine if the Home Equity Access Scheme may be an option for them to meet any shortfall in their regular income. Click Home Equity Access Scheme for further details.

2. Dealing with super death benefits

This article is specifically directed at self-managed super funds (SMSFs) however it also has application to APRA regulated funds.

When a member of a SMSF passes away, the trust deed and superannuation law will dictate what happens to that member's benefit, be it in the accumulation phase, pension phase, or in both.

According to the Australian Taxation Office just on 70% of SMSF have two members. Often these funds will comprise of couples, be they husband and wife or life partners. Each member will also be a trustee of the fund or directors of a corporate trustee.

It is also quite common that if one member of the SMSF passes away their preference will be for their death benefit to pass to their surviving spouse. This may be confirmed by way of a valid binding death benefit nomination or by a reversionary pensioner nomination.

But this will not always be the case.

In the absence of a valid binding nomination, the trustees may intend to simply rely on the governing rules of the SMSF to allow the trustee of the fund to exercise their discretion and decide to whom, and in what form a deceased member's benefit will be paid.

When a member of a SMSF passes away, it is customary for their legal personal representative (i.e. the executor or administrator of their estate) to be appointed a trustee of the SMSF until such time as the deceased member's benefit has been cashed (as a lump sum or as a death benefit pension).

But as often is the case, what happens if the deceased's spouse is also their executor?

The spouse is appointed trustee of the fund in their capacity as legal personal representative.

If they are also a member and trustee in their own personal capacity, they will wear two hats as trustee – once in respect of their personal interest in the fund, and the other as legal personal representative.

Let's assume for a moment a member of a SMSF has passed away. Their intention was that their superannuation benefit would pass directly to their surviving spouse, rather than passing through to their estate. If a valid binding death benefit nomination or a reversionary nomination is in place, the outcome is clear. The trustees will be directed by the nomination.

However, in the absence of a valid death benefit or reversionary nomination, things become a little less clear, as has been highlighted in several cases that have been through the courts in recent years.

In the case of our example, we know the deceased's intention was for the death benefit to pass to their spouse. This would simply be a case of the surviving spouse exercising their discretion as trustee of the fund and directing the payment of the death benefit to themselves in their preferred form (lump sum, death benefit pension, or a combination of both).

But herein lies the problem.

Where the surviving spouse is both the trustee of the SMSF and executor of the estate, a conflict arises. They have a fiduciary duty to place the interests of the estate ahead of their own personal interests. To fulfil their fiduciary duty, they are obliged to direct the trustees of the SMSF to pay the death benefit to the deceased's estate for distribution in accordance with the terms of the will.

Provided the spouse is the sole beneficiary of the will, and it is not contested by others, the outcome will almost be the same. That is, the spouse will receive the superannuation death benefit as part of the distribution of the estate assets. However, the spouse will not be able to receive a death benefit pension, if that was their preferred option, unless they are otherwise able to recontribute their inheritance.

Any possibility of recontributing to super may be constrained by the beneficiary's age, total superannuation balance, contribution caps and, for younger beneficiaries, preservation rules.

In situations where a member of a SMSF intends for their benefit to pass to their spouse, who is also the executor of their will, consideration should be given to removing trustee discretion by having a valid binding death benefit nomination, or reversionary nomination in place to ensure the smooth passage of their superannuation benefits to their intended beneficiary.

As you can imagine, things will become even more complex when an SMSF's assets include (say) real property, and the intention is to retain the property within the superannuation environment.

While the focus of this article has been on SMSFs, the same principles apply to APRA regulated funds. Where a SIS dependant claims a deceased person's death benefit from an APRA regulated funds, and that person is also the deceased's executor, their duty as executor overrides their personal interest, as was highlighted in McIntosh v McIntosh [2014] QSC 99. If the Division 293 liability is deferred, the ATO will record this as a debt and interest is charged based on the long term Treasury bond rate.

Refer to the following link for additional reading, and an examination of selected cases. Even though the article is a couple of years old, it contains information all advisers working within the SMSF space should consider:

Can a surviving spouse claim their deceased spouse's super when they are also the executor of their estate? | Leading SMSF Law Firm (dbalawyers.com.au)

In closing, estate planning within the superannuation environment can be demanding. Advisers and their clients should seek relevant legal advice where appropriate.

3. Your questions answered

Question: Defined benefit pensions and the CSHC

My client receives a tax-free defined benefit pension of $80,000 per year from a taxed defined benefit scheme. How is this income assessed when applying for a Commonwealth Seniors Health Care Card?

Answer:

The short answer? It isn't counted at all as the defined benefit pension in this case is a tax-free pension received from a taxed source.

When considering a client's income for CSHC purposes, an adjusted taxable income definition is used EXCEPT for account based pensions (ABPs) purchased after 1 January 2015 or where an APB was held before 1 January 2015 however the client was not a CSHC holder – in which case the APB is deemed.

Adjusted taxable income for CSHC purposes includes:

- taxable income
- foreign income
- tax-exempt foreign income
- total net investment losses
- reportable fringe benefits
- reportable superannuation contributions
- certain tax-free Government pensions or benefits generally paid from Centrelink or DVA

Plus the deemed amount from account based income streams where the grandfathering rules outlined above do not apply.

In this scenario, the defined benefit pension is not included in adjusted taxable income as it is a taxed fund and the client is over 60. Additionally, defined benefit pensions are not classified as an account based income stream.

If the client was in receipt of a defined benefit pension from an untaxed source and the pension payments were taxable income, then this amount would be included in the adjusted taxable income definition and would count when determining eligibility to the CSHC.

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