

### Preamble and Web Site

There have been so many changes to Super Funds' legislation that I thought it worthwhile to provide you with a separate report on this years changes etc. This report also appears on my web site at [www.wdb.com.au](http://www.wdb.com.au) which you should regularly check for changes that may affect you.

### Personal Super Contributions Deduction Denied

The AAT has refused a taxpayer's claim for a deduction for personal superannuation contributions after ruling that he did not satisfy the 'maximum earnings as employee condition'.

Following a work accident in 2004, the taxpayer was unable to work and received workers' compensation payments until he retired on grounds of invalidity on 12 July 2007. The taxpayer received a lump sum payment upon his retirement. During the 2007/08 income year, the taxpayer made personal contributions to two superannuation funds.

The Tribunal found that the taxpayer was engaged in the relevant activity of holding an office for the 12 days in July 2007. While the taxpayer said he was not engaged in any activity because he was unable to work, the Tribunal stated that a person could hold office that does not require any activity.

As a result, the Tribunal agreed that the 10% test for the maximum earnings as employee was not satisfied, as the taxpayer's lump sum payment (which was attributable to those activities) clearly exceeded 10% of his assessable income for the 2007/08 income year.

### SMSF Trustees with Enduring Power of Attorney

The Tax Office has released a Ruling explaining the Commissioner's views on how a person who holds an enduring power of attorney in respect of a member of a self-managed superannuation fund (SMSF) can be a trustee in place of the member (or a director of the corporate trustee) for the purposes of the superannuation legislation.

The Tax Office considers that a legal personal representative (LPR) does not become a trustee of the fund (or a director of the corporate trustee) merely by virtue of holding an enduring power of attorney. Rather, the LPR must be appointed as a trustee of the SMSF in accordance with the trust deed, the superannuation legislation and any other relevant legislation.

Furthermore, the Tax Office says a member must cease to be a trustee of the SMSF or a director of the corporate trustee, except where the LPR is appointed as an alternate director. Provided that the alternate director can only exercise the powers of a director where the main director does not, the Ruling says it is not necessary that the member resign as a director of the SMSF in these circumstances to satisfy the superannuation legislation.

### SMSF Trauma Insurance Policies

The Tax Office has also released a Determination in which it sets out the circumstances where a trustee of an SMSF can purchase a trauma insurance policy in respect of a member and still satisfy the superannuation legislation, in particular the sole purpose test.

To briefly explain, the sole purpose test requires an SMSF to be maintained solely for at least one core purpose (eg the provision of benefits for a member on or after the member's retirement) and, also possibly, at least one ancillary purpose (eg the provision of benefits for a member on or after the member's death).

The Commissioner says any benefits payable under a trauma insurance policy must be payable to a trustee of the SMSF and become part of the assets of the SMSF, at least until the relevant member can satisfy a condition of release. If an SMSF trustee purchases a trauma insurance policy that provides for benefits payable under the policy to be paid directly to someone other than a trustee of the SMSF (eg the insured member or member's relative), the Tax Office says this would contravene the sole purpose test.

### Cooper Super Review Makes 177

#### Recommendations: Prelim Report on SMSFs

The Super System Review has released its preliminary report, Self-Managed Super Solutions, which contains a host of recommendations. While the Government has not responded to the recommendations, if implemented, they will impact on the SMSF landscape.

The report makes the following key recommendations:

- **Exotic assets prohibited** — Investments in collectables and personal use assets should be prohibited, such as paintings, jewellery, antiques, wine, exotic cars and yachts.
- **In-house assets prohibited** — SMSFs should be prohibited from any in-house assets. (In brief, an in-house asset is an investment in a related party of the fund.)
- **Leverage and instalment warrants** — A review of the borrowing exception (ie instalment warrants) should be carried out in two years to ensure that borrowing has not become a significant focus of SMSFs.
- **Annual member disclosure** — The corporations legislation should be amended to ensure SMSFs' members are provided with key information annually.
- **Illegal early release** — Existing tax laws should be amended so that amounts illegally early released are taxed at the superannuation non-complying tax rate (currently 46.5%) rather than an individual's marginal tax rate.



- **Binding SMSF rulings** — The Tax Office should be given the power to issue binding rulings in relation to SMSFs.

**SMSFs AND INSTALMENT WARRANTS: RULES TO BE TIGHTENED**

The Government proposes to amend the superannuation law to reduce the prudential risks for superannuation funds investing in limited recourse borrowing arrangements (eg instalment warrant arrangements).

The Government hopes to achieve this by repealing the provision in the superannuation legislation which allows a trustee of a regulated superannuation fund to borrow money using limited instalment warrants, and replacing it with two new provisions.

These new provisions seek to ensure that:

- the recourse of the lender (or any other person) against a superannuation fund trustee for default on the borrowing is limited to rights relating to the acquirable asset;
- the asset within the arrangement can only be replaced in prescribed circumstances that arise from owning the original asset; and
- the borrowing is referable and identifiable only over a single asset (excluding money) or a collection of assets which are identical and are treated as a single asset.

**SUPERANNAUTION CO-CONTRIBUTION: PROPOSED CHANGES**

The Government has also introduced a Bill seeking to modify the operation of the Government superannuation co-contribution scheme. In brief, the Bill will:

- freeze the indexation of the co-contribution income thresholds for the 2010/11 and 2011/12 income years. That is, the lower and higher income thresholds will remain at \$31,920 and \$61,920 (the current thresholds for the 2009/10 income year), respectively, for the two years; and
- permanently set the current matching rate at 100% and the maximum co-contribution that is payable on an individual's eligible superannuation contributions at \$1,000.

The amendments are proposed to apply to the 2009/10 and later income years.

**Tax Office Highlights Errors in Claiming Deductions for Superannuation**

The Tax Office has recently highlighted common errors made by individuals when claiming tax deductions for their personal superannuation contributions. These include not lodging the notice to claim the deduction with their superannuation fund on time and incorrectly

claiming their contributions as business or partnership expenses. The Tax Office reminded individuals that personal superannuation contributions are not work-related expenses.

**TIP:** The Tax Office said the errors came to light after it had matched superannuation contributions data it received from super funds with individual and partnership returns. As a result, the Tax Office said it will take a closer at these claims for the 2009-10 year.

**Excess Superannuation Contributions: Superannuation Law Changes on the Way**

A Bill is currently before Parliament which proposes to amend the tax law to allow the Commissioner of Taxation to exercise a discretion to disregard or allocate to another financial year all or part of a person's contributions for the purposes of excess contributions tax before an assessment is issued. Currently, investors have to wait until after the excess contributions tax assessment has been issued.

**TIP:** It should be noted, however, that there is no proposed change to the criteria used by the Commissioner to determine whether the determination should be made, that is, the Commissioner must still be satisfied that 'special circumstances' exist.

**TIP:** In a recent case, the Administrative Appeals Tribunal decided it could only review the Commissioner's refusal to exercise his discretion to reallocate superannuation contributions if the discretion could be applied before an excess contributions tax assessment was issued. While the proposed amendments (if enacted) will not reverse the Tribunal's decision, they could potentially ensure the refusal to exercise the discretion would be a reviewable decision in the future.

**NEW SMSF MEMBER VERIFICATION PROCESS**

The Tax Office has announced that it expects to implement, later this year, a new self-managed super fund (SMSF) member verification process, which is designed to enable authorised APRA-regulated super funds and other authorised entities to confirm whether or not the member requesting a rollover is actually a member of the SMSF.

The new process adds another plank to efforts by the Tax Office to deter schemes which seek to obtain illegal early access to or release of superannuation. The first plank, which has been in operation since January this year, involved upgrading the SMSF registration process so that new SMSFs may not be displayed on the Super Fund Lookup (SFLU) Website for up to seven days while the Tax Office carries out a risk assessment of the SMSF.

**TIP:** The new process is expected to make processing member rollovers from superannuation funds to SMSFs more efficient and secure. However, it would be important for the Tax Office to be notified quickly of any SMSF membership changes. For example, it would be

prudent to ensure name changes are appropriately dealt with before a rollover is attempted by a member.

#### **EXCESS SUPER CONTRIBUTIONS ASSESSMENTS UPHOLD**

The Administrative Appeals Tribunal has found it did not have the jurisdiction to review a decision of the Commissioner, who had refused to make a determination to disregard (or to reallocate) excess non-concessional superannuation contributions made by two taxpayers. This was because the Tribunal was of the view that the making of the Commissioner's discretion is independent of the issuing of the assessments.

**TIP:** Super investors can apply to the Commissioner to disregard or reallocate excess contributions for a financial year. However, the Commissioner's discretion is limited to special circumstances outside the control of the investor.

#### **SUPERANNAUTION BENEFITS — TIMING OF PAYMENT BY CHEQUE**

The Tax Office has issued a draft self-managed super fund determination which states that a superannuation benefit can be considered to be 'cashed' at the time a cheque or promissory note is issued to the member or beneficiary, provided the money is payable immediately (ie not post-dated) and the trustee takes all reasonable steps to ensure that the money is paid promptly (ie generally within a few business days).

#### **Reportable Employer Superannuation Contributions Definition: Changes Proposed**

The Government has recently proposed that it will amend the law to clarify the scope of the reportable employer superannuation contributions (RESC) definition. RESCs are generally superannuation contributions made under formal salary sacrifice agreements. Amounts reported as RESCs are used in determining eligibility for a range of government financial assistance programs.

The Minister for Superannuation, Chris Bowen, said the Government has become aware that some contributions made on behalf of an individual, which the individual or their employer has no real capacity to influence, are being captured by the RESC definition. The Minister said it wasn't the Government's intention for this to occur. The changes are proposed to apply from 1 July 2009 to ensure that the contributions are not captured by the RESC definition.

#### **Minimum Pension Drawdown Amounts — 50% Reduction to Continue**

The Prime Minister has recently announced that the Government will extend for another year the 50% reduction in the required minimum payment amounts that must be made from account-based, allocated and market-linked pensions. The relevant regulations will need to be amended and the Government says this will be done in the new financial year.

The minimum amounts had been reduced by 50% for the 2008/09 and 2009/10 financial years — that will now be extended for the 2010/11 financial year. This means, for example, that the minimum annual drawdown for 2010/11 for someone aged 64 years or less will remain at 2%; and for those aged 65 – 74, will be 2.5%.

#### **Super and Instalment Warrant Rule Changes**

The superannuation law has recently been amended to reduce the risks for superannuation funds investing in limited recourse borrowing arrangements (eg instalment warrants). The legislative changes seek to ensure that the recourse of the lender (or any other person) against the superannuation fund trustee for default on the borrowing is limited to rights relating to the acquirable asset.

#### **ATO Sends Warning to SMSFs Regarding Employee Share Schemes**

The ATO has warned taxpayers of an arrangement where an individual nominates his or her SMSF as the acquirer of shares or share options under an employee share scheme and the trustee of the SMSF pays no consideration or less than market value consideration for the shares or options. The warning provided in Taxpayer Alert TA 2010/3 states that the arrangement could have superannuation and income tax law implications for both the SMSF and the individual.

#### **CLOSURE OF OFFICE**

We will be closing the office from mid-day on Thursday 23 December 2010 until 9am Monday 10 January 2011. This period covers the Christmas/New Year break, plus an extra week.

Therefore on behalf of us all here, I wish everyone a Happy and Holy Christmas and a prosperous New Year.

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