

## Converting to new pension? Mind the triggering events!

Many people who have the old allocated pension ('AP') now want to convert to the new account-based pension ('ABP').

Generally this conversion is implemented by way of written request from the member to the trustee, an ABP PDS being issued to the member and then documenting detailed trustee resolutions. The resolutions resolve that the rules governing the existing income stream (ie, the AP) are amended to reflect the criteria of an ABP in the superannuation legislation.

### Is conversion a triggering event?

The components funding most super interests crystallised automatically just before 1 July 2007 into the taxable or the tax free component. However, this is not the case for interests funding pensions where, as at 1 July 2007, the pensioner was aged under 60 and had received at least one pension payment. In this case the interest only crystallises into the new components where a 'triggering event' occurs: ie, when the member turns 60, dies or commutes (wholly or partially).

Converting an AP into an ABP is *not* a triggering event. Conversion merely changes the characteristics of an income stream — it does not wholly or partially commute the income stream.

### Watch out for accumulation interests

Many advisers are keen for all of their clients' super interests to crystallise as soon as possible (for administrative efficiency). Accordingly, in addition to converting, many advisers are also commuting APs. A small partial commutation of, say, \$100 constitutes a triggering event and is unlikely to have adverse practical consequences. However, remember that extreme care must be taken where a large amount is being commuted.

An internal roll-over of a pension back to accumulation will be mixed in with any accumulation interest (unless that amount is immediately used to commence a new pension, withdrawn as a lump sum or rolled over to another fund).

Accordingly, wholly commuting a pension into an existing accumulation interest will mix the components of the pension interest and the

accumulation interest together. These interests will never be able to be separated again.

The taxable and tax free components of the new combined interest will effectively be re-set which, for example, could reduce the tax free proportion that previously existed in the accumulation account. Thus, extreme care is required before converting or commuting. Moreover, proper documentation is required to ensure correct implementation. DBA Butler offers a range of kits to guide you through these strategies, such as the Pension Conversion Kit, the Pension Roll-Back Kit and the Crystallisation Kit.

## Do you need an Enduring Power of Attorney?

An Enduring Power of Attorney ('EPOA') is a document whereby a person (the donor) gives power to another person (the attorney) to legally step into their shoes and authorises them to do all legal actions on the donor's behalf. It differs to a Medical Power of Attorney in that it relates to financial affairs only and not to any medical treatment.

The EPOA will continue (regardless as to whether the donor has capacity) until the earlier of the donor revoking the EPOA or the death of the donor.

### Benefits of an EPOA

The benefits of an EPOA include the following:

#### 1. *Potential taxation advantages*

If a member is 60 or over and retired, then an attorney acting under an EPOA could be used to withdraw benefits of a person who has lost capacity during their lifetime, eg, they are on their death bed with serious illness or injury.

Thus the attorney could stand in their shoes and pay out the member's entire benefit while they are still alive. That benefit would then be received tax free by that person if the payment is made prior to the member's death.

#### 2. *SMSF compliance if a member is incapacitated*

If a trustee or director of a corporate trustee becomes incapacitated, they generally automatically cease to be a trustee/director of the SMSF under many deeds. As the disabled member would still have their benefit within the fund, the SMSF may be in breach of the trustee/member rules.

The fund has 6 months to move out (by way of roll-over) the disabled member's interest to a public offer fund or arrange for an APRA trustee to be put in place. The SMSF may also need to be restructured.

An EPOA enables the SMSF to retain its compliance status as the legislation allows the attorney/legal personal representative to step into the shoes of the trustee/director who is incapacitated.

### 3. Binding Death Benefit Nomination

A binding death benefit nomination ('BDBN') is not a testamentary instrument. Accordingly, it is arguable that an attorney acting under an EPOA can effect a BDBN, eg, if a member is unconscious and their BDBN has expired due to a 3 year sunset period.

In an SMSF context, with an appropriate deed in place, a BDBN can be made for an indefinite period. Nevertheless, it is good to have an EPOA in place just in case.

It is also good practice in any event to review and refresh BDBNs every 3 years.

### Risks of an EPOA

The main risk associated with an EPOA is appointing a trusted person as the attorney as they will have the power to withdraw funds, sell your home, withdraw

your superannuation benefits and do anything that you could legally do (unless it is expressly limited).

In Victoria, to limit the power you can either:

- (a) specify what your attorney has authority to do; and/or
- (b) specify when the EPOA commences.

For example, you could specify that the attorney may only handle a member's affairs in respect of the XPE Superannuation Fund.

Further, you are able to specify that the attorney only has power to act on your behalf if the donor loses capacity and a medical certificate to that effect is produced. This latter limit may require additional documents to be completed and may restrict the ability of the attorney to act quickly.

Care needs to be taken when drafting an EPOA to ensure that it meets both the legal requirements of the particular State/Territory and your needs.

Note, than an EPOA expires upon a person's death and the executors then act as the deceased's representative.

DBA Butler advises on SMSF and estate planning matters and, in addition to SMSF deeds that cater for succession, prepare Wills and EPOAs.



## Leading SMSF documentation from DBA

Reserving Kit (\$550)

Conversion Kit (\$440\*)

Crystallisation Kit (\$330)



New: the Reserving Kit provides guidance, examples and sample resolutions for the management of investment reserves. Includes guidance on the new laws applying to allocations from reserves after 1 July 2007.

\* Single use licence. If you would like to purchase multiple use licences, please contact Ian Waters or Bryce Figot at our office.

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Ph 03 9682 0903 Fax 03 9682 0907 [dba@dbabutler.com.au](mailto:dba@dbabutler.com.au) [www.dbabutler.com.au](http://www.dbabutler.com.au)

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