DBA Butler Pty Ltd Lawyers

NEWS

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SMSF Trust Deeds

As you may be aware, there have been substantial reforms in recent times impacting self managed superannuation funds ('SMSF'). Recent changes include the following:

Contribution Rules

Government 'co-contributions' can, from mid 2003, be made to funds with appropriate powers in their trust deed. This provides a potential maximum of $1,500 in co-contributions by the government for those with employer support making personal superannuation contributions with taxable incomes below $28,000 for the 2004-05 financial year ('FY'). The $1,500 co-contribution progressively phases out for those with taxable incomes of more than $58,000 per FY.

The 'work' or 'gainful employment' test for superannuation contributions has, from 1 July 2004, been removed for contributions made before age 65.

The work test has also been simplified for members over age 65 but under age 75 so that such members now only need to have worked at least 40 hours in a period of not more than 30 consecutive days in the relevant FY.

For example, Liam, who is 66 years old, worked 40 hours over 25 consecutive days in July 2004. He is deemed to be gainfully employed for the entire 2004–05 FY. Thus, he or his employer can make contributions at any time throughout the 2004–05 FY.

Accessing Benefits

Many deeds are unnecessarily restrictive in respect of accessing benefits as they require a termination of employment with an employer before a benefit can be paid.

This is generally inappropriate for the self-employed, those who are not gainfully employed and people who have already retired.

Employer-sponsored deeds may also inappropriately restrict the types of contributions that can be made to a fund. DBA's deed does not require an employer to be a party to the deed to provide flexibility.

From 1 July 2004, the 'compulsory cashing rules' have been simplified for members over age 65 but under age 75. Benefits of such members can now be retained in the fund so long as the member has worked at least 240 hours in the prior FY.

For example, if Liam was gainfully employed for at least 240 hours for the 2003–04 FY he does not have to commence his benefit at least until July 2005. Prior to 1 July 2004, a member was required to be gainfully employed for at least 10 hours per week on an ongoing basis.

From 1 July 2004, members are required to 'cash' their benefit on or before reaching age 75. However, members who had already reached 75 on 1 July 2004 and have continued to work at least 30 hours per week will only be required to cash their benefit when they cease working at least 30 hours per week.

New Disclosure Rules

Trustees of SMSFs must issue a Product Disclosure Statement ('PDS') to each new member admitted after 11 March 2002. From 11 March 2004, SMSFs must also provide a PDS to a member prior to starting a pension.

The DBA SMSF deed upgrade comes with a PDS for each member. This is considered 'best practice' for advisers and their clients.

A PDS must include all of the information a person requires to make an informed decision on the main risks, costs and benefits of membership in the fund and, if a pension is commenced, the pension PDS must outline the main risks, costs and benefits of the pension.

Estate Planning Flexibility

Members can now make binding death benefit nominations in respect of who will be paid their benefit on death (dependants or their estate) and in what manner (eg, lump sum or pension) and thus achieve greater certainty from an estate planning viewpoint. Pre-July 1999 deeds generally do not allow for binding nominations to be made.

The DBA SMSF deed upgrade comes with basic binding nomination forms that can be completed by each member; DBA can prepare comprehensive binding nominations as part of a client's estate plan.

Note, from 1 July 2004, the range of 'dependants' has been expanded to include persons in an 'interdependency relationship' with the member. Broadly, this will exist if the person lives with the member as part of a close personal relationship involving personal care and financial and domestic support.

Family Law

Since 28 December 2002, a member's superannuation benefit can be dealt with as property under the *Family Law Act 1975* (Cth) on marriage breakdown. A deed should contain provisions to deal with the issues of splitting of superannuation in such circumstances and appropriate powers to protect members' interests.

Pensions

Subject to the discussion on 'defined benefit pensions' ('DBP') (see next topic), a range of pensions (including allocated pensions) can be paid from SMSFs with appropriately drafted deeds.

From 20 September 2004, the new 'market linked pension' ('MLP') can be paid from funds with appropriate powers. The rules for this new pension are already law and are reflected in DBA's SMSF deed.

Members can use a MLP to access their pension RBL and obtain a 50% exemption from the social security assets test on the assets backing their pension. These pensions therefore offer considerable flexibility.

There is no requirement to obtain actuarial certification from the 2004–05 FY for allocated and MLPs.

Recent changes also allow pensions to be 'rolled back' into a fund to restore the member's RBL position in relation to a prior counted benefit.

This may allow a member to stop a pension and start a new one for cash-flow, estate planning or other reasons. Until recently, such 'internal roll-overs' were not permitted, so deeds prior to mid-2002 may not provide this added flexibility.

SMSF Deed Upgrades

DBA's SMSF documents comply with the raft of recent changes. Each DBA SMSF deed is prepared by lawyers who are SMSF experts. Advisers can access our letter and procedures' checklist for obtaining client authority for having variations completed. Please contact our office if you would like a copy. We can also discuss the availability of discounts for bulk orders.

Defined Benefit Pensions

The May 2004 federal budget and subsequent changes to the superannuation rules have highlighted the benefits of SMSFs having quality, up to date trust deeds.

Broadly, the budget changes mean that from 12 May 2004, members of SMSFs cannot be paid DBPs (including complying lifetime pensions and complying life expectancy or fixed-term pensions) unless the power to pay them was contained in the deed as at 11 May 2004.

Any variation to the governing rules of a SMSF should be carefully drafted to ensure that any DBP power in the deed as at 11 May 2004 is preserved.

A generic upgrade or an upgrade which takes place without regard to prior deeds may jeopardise this transitional relief. (Note the ATO take a very narrow view of what qualifies for the 12 May 2004 transitional relief; '12 May TR'.)

Supplementary transitional relief was introduced on 25 June 2004 ('25 June TR'). Broadly, the 25 June TR applies if a person, who was a member of an SMSF on 11 May 2004, retires after attaining 55 years or attaining 65 years and commences a DBP prior to 1 July 2005.

Under the 25 June TR, a trust deed can be amended to provide for DBPs. However, any such amendment may jeopardise the 12 May TR discussed above.

Unless deeds of variation are properly varied, clients' legal rights may be compromised. The DBA SMSF deed seeks to maximise the flexibility for each client. A choice of two deeds of variation are now available depending on whether a client seeks to rely on the 12 May TR or the 25 June TR.

For further Information please contact:

DBA BUTLER PTY LTD, Lawyers, 23 Union Street, South Melbourne Vic 3205
Ph 03 9682 0903 Fax 03 9682 0907 dba@dbabutler.com www.dbabutler.com

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