

Non-Commutable Pensions

Under new laws that come into effect on 1 July this year, preserved superannuation moneys will be able to be accessed by fund members once they have reached preservation age, regardless of whether or not they have formally retired or satisfied some other condition of release.

These new pensions provide greater flexibility, particularly for those seeking to top up their income when they are seeking to reduce their working hours (and therefore their income). This is part of the Government's initiative to retain older workers in the workforce.

A non-commutable pension can be paid from 1 July 2005 under the *Superannuation Industry (Supervision) Regulations 1994* ('SISR'), without having to retire from the workforce. The two new main types of pensions that can be paid from self managed superannuation funds ('SMSF') include:

- non-commutable allocated pensions ('NC-AP'); and
- non-commutable market linked pensions ('NC-MLP').

What is a Non-Commutable Pension?

From 1 July 2005 a person will be able to commence a pension (ie, an NC-AP or NC-MLP) on attaining their preservation age, without having to satisfy a condition of release. However, these pensions are subject to certain statutory limitations and conditions. Basically, these new types of pensions will not be capable of being commuted unless the purpose of the commutation is to give effect to a payment split under the *Family Law Act 1975* (Cth) or where the pensions could otherwise be commuted (see below).

Non-Commutable Allocated Pensions

If the pension is an NC-AP, then the pension can be commuted and rolled-back into the fund if, for instance, the income from the NC-AP is no longer needed. Further, an NC-AP can be commuted if the person satisfies another condition of release with a nil cashing restriction or if the funds could have been cashed out prior to the commencement of the NC-AP (ie, they were unrestricted non-preserved benefits).

If a person takes an NC-AP and their preservation restrictions later cease (eg, say someone attains 65 or retires under SISR 6.01(7)), then the NC-AP continues on as an ordinary allocated pension (albeit one that is still called an NC-AP). This is because at this stage it can be commuted at any time. In short, the restrictions on the NC-AP fall away and it becomes akin to an ordinary allocated pension.

Therefore there is no need to convert the NC-AP into an ordinary allocated pension after the commutation restrictions cease, as an NC-AP is essentially defined in the SISR to be an allocated pension with extra restrictions attached. These restrictions remain until the pension can be commuted when an appropriate condition of release is attained: SISR 6.01(2).

Non-Commutable Market Linked Pensions

If the pension is an NC-MLP, then once the pension has been paid for at least 6 months, the pension generally cannot be commuted unless the commutation is rolled-over to commence another NC-MLP, say with a different term. If the member has not satisfied a condition of release, then the pension can be rolled-back into the accumulation phase within this six month period.

The NC-MLP may be useful to access the pension RBL. However, as discussed above, once an NC-MLP is started and runs for more than six months, access to the capital is generally lost. The NC-AP is generally therefore more flexible as capital can be accessed once the commutation restrictions cease.

Non-Commutable Defined Benefit Pensions

The non-commutable pension regulations also cover some defined benefit pensions ('DBP'), ie, lifetime and fixed term pensions payable in accordance with regulation 1.06(2) or (7) of the SISR. Note, however, the restrictions in SISR 9.04I that permit a DBP to be commenced by a SMSF prior to 1 January 2006. In particular, a member must generally retire on or after attaining 55 years before a DBP can be commenced in an SMSF.

SMSF Deed & PDS

Members wanting to access a non-commutable pension upon reaching their preservation age should ensure their SMSF deed or governing rules allow sufficient flexibility, as an existing allocated pension or market linked pension power will not, by itself, be sufficient to commence an NC-AP or NC-MLP.

Naturally, the DBA SMSF deed and PDS has been updated for these latest changes. You should ensure your supplier has also updated their precedents if you are obtaining new SMSFs or deeds of variation from now on.

Varying SMSF deeds via the web

We are often asked why our clients, particularly advisers, should get their SMSF deeds varied by lawyers. In particular, advisers comment about online superannuation deeds of variation providers, which claim to be cheap, quick and efficient without any warnings of the risks that such services may entail.

Broadly, web based SMSF variation services enable the adviser to enter the data via the website, make all decisions regarding how to comply with the variation clause, what parties need to be bound by the deed and make other relevant changes. The documentation is effectively prepared by the adviser and the adviser is therefore responsible for the documentation. Any legal sign-off merely relates to the precedent before any changes occur. While this facility may initially appear attractive, care must be taken, as such services carry a number of significant risks including:

- there are many issues to cover in amending a deed, such as reviewing all of the deed's document history to determine whether previous deeds have been correctly executed and identifying possible requirements to preserve existing provisions in relation to issues such trustee requirements, pension powers and variation clauses. Inexperienced people would most likely overlook such issues;
- an adviser who prepares a document that affects a person's legal rights for a fee who is not a qualified legal practitioner will generally be in breach of the relevant Legal Practice Act of the applicable State/Territory. In Victoria a two year jail sentence applies for someone who is not a qualified legal practitioner charging a fee for legal services. A SMSF deed of variation, in our opinion, involves considerable legal work. The adviser is therefore likely to jeopardise their own professional indemnity cover;
- an adviser who is a member of the ICA, CPA or FPA who undertakes legal work is also in breach of their professional rules; and
- an incorrectly performed deed of variation may be invalid, thereby rendering invalid any actions undertaken by the trustees on the basis of that deed (eg, pension strategies, reserving and binding death benefit nominations). Further, some jurisdictions require certain provisions to be preserved in order to retain very generous stamp duty concessions. An incorrectly performed variation could very well result in the fund losing these concessions.

Advisers should therefore be mindful of the significant risks in using web based services. It is recommended that SMSF deeds be produced by qualified legal practitioners who are superannuation experts. The investment in getting a quality service generally overcomes the above risks.

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