

## Pensions

With TR 2011/D3 yet to be finalised — and not slated to be finalised until the Government's October 2012 Mid-Year Economic and Fiscal Outlook ('MYEFO') amendments become law — some uncertainty currently surrounds SMSF pensions.

Some guidance, however, can be obtained from the recently released ATO webpage, 'Self-Managed Superannuation Funds — Starting and Stopping a Superannuation Income Stream (Pension)' (available from <http://www.ato.gov.au/content/00343757.htm>) ('ATO Webpage').

In light of the above, this month we focus on pensions and some of the key trips and traps that advisers need to keep abreast of.

### Ensure minimums are paid

30 June is fast approaching and therefore it is important that pension minimums are paid. Ideally, an additional buffer amount should also be paid, to cater for any calculation errors, etc.

#### *Practical implications*

The implications of not paying the minimum can be severe. The ATO takes the view that where a minimum has not been paid, the pension is taken to have ceased from the *start* of the relevant income year. This is problematic for a number of reasons, including:

- the 'pension exemption' will no longer apply for the whole income year in which the trustee failed to pay the minimum, which is likely to result in an increased tax bill for the fund;
- the member's pension and accumulation interests in the fund will mix, which can result in unwanted merging of the tax free and taxable components; and
- subject to the member's specific circumstances, any 'pension' withdrawals made during the relevant income year may constitute unauthorised lump sum payments and will be taxed accordingly.

#### *Commissioner's powers of general administration*

The ATO may however exercise its powers of general administration ('GPA') to allow the trustee to treat the pension as not having ceased.

For first time offenders, trustees may have the ability to self-assess and apply the GPA concession themselves. This will broadly be available if they underpay the annual minimum by less than one twelfth.

Refer to the ATO Webpage for further details.

The introduction of the GPA concession is positive. However, it is not an excuse for trustees to become complacent. As with most things, prevention is better than a cure.

### Consider making pensions reversionary

Auto-reversionary pensions ('ARP') are still an effective tax planning tool, despite the proposed MYEFO changes.

The main reason for this is that having an ARP prevents a member's interests from mixing upon death. Thus an ARP, ensures that a pension continues beyond death and therefore prevents this mixing of interests.

#### *Reverting a pension mid-stream*

There is some uncertainty regarding whether existing account style pensions (eg, transition to retirement income streams ('TRIS') or account-based pensions) can be reverted mid-stream.

For various legal reasons, we firmly believe that — subject to the specific documentation — it is possible to alter such non-reversionary pensions 'mid-stream' so that they become reversionary.

Note, however, that expert advice should be obtained before varying a defined benefit pension. Further, the ATO should soon clarify this topic.

#### ***Reversionary nominations***

DBA Lawyers offers a 'Reversionary Nomination' service. For a fixed fee of \$330 per pension, DBA Lawyers will draft documentation to ensure that a pension is an ARP. Please visit [www.dbalawyers.com.au/reversionary-pensions](http://www.dbalawyers.com.au/reversionary-pensions).

### Check the pension documents — are they adequate?

The ATO considers that a valid pension requires each term and condition to be detailed (ie, in either the pension documents themselves or the fund's governing rules).

Consider Josie. Josie established the Josie SMSF in 2006 (ie, before TRIS were introduced). The governing rules of the Josie SMSF have not subsequently been updated.

On 1 October 2008 the trustee of the Josie SMSF started paying Josie a TRIS. This was in accordance with the fund's governing rules which allowed the trustee to pay out benefits in 'any form permitted by the standards'. In doing so, the trustee executed brief resolutions. No further pension documentation exists.

It is unlikely that Josie's pension documentation is sufficient. Also, a specific pension PDS should exist. Additional documentation can be put in place now, however, to ratify the position.

Given recent changes, it is an ideal time to ensure pensions are appropriately documented, especially if an ARP is needed.

### **Additional considerations**

The following is a summary of some of the other key pension items that should be considered coming up to 30 June:

- The capital supporting a pension cannot be added to by way of contribution or roll-over. However, trustees can allocate from reserves directly into a pension interest (subject to possible concessional contribution counting).
- Where a member's binding death benefit nomination ('BDBN') and APR are inconsistent, the BDBN will typically win out, subject to the wording of the specific documentation. To avoid any future debate, however, best practice is to ensure that both documents are consistent.
- Broadly, if a pension is commuted in whole during a financial year, the minimum can be pro-rated. However, if the pension is only partially commuted, pro-rating is not available.

### ***Want to commence or commute a pension?***

DBA Lawyers offer numerous pension kits to assist SMSF trustees and advisers. Please visit <http://www.dbalawyers.com.au/products-order-forms/pensions> for a summary of the kits DBA Lawyers offers.

## **Defective ATO administration**

Applications are regularly made to the ATO, often at a significant cost to taxpayers. The associated professional fees alone can run into the thousands of dollars. Therefore, even if an application is successful, the associated costs can significantly reduce the net proceeds the taxpayer receives.

What few advisers are aware of, however, is that government approved channels exists whereby taxpayers (including SMSFs) may be able to seek compensation from the ATO. This can provide taxpayers with the ability to recover a proportion, if not all, of the professional fees and other costs associated with a successful application.

### *Available avenues*

The main avenues for compensation are as follows:

- the Scheme for Compensation for Detriment caused by Defective Administration;
- compensation for legal liability (eg, negligence); and
- act of grace payments (administered by the Department of Finance, not the ATO).

### *Practical implications*

Although the above is often worthwhile looking into, it will only be available in limited circumstances.

Further, lodging a claim for compensation will typically give rise to further costs (eg, professional fees, etc).

While this is not a popular process, it is definitely something to keep in mind.

### ***Want to become an SMSF expert? — DBA Network SMSF Core Course***

The SMSF Core Course is fast approaching and will be held on 8–10 July in Melbourne. It provides practitioners with a detailed and in-depth understanding of the SMSF rules and associated strategies. For more information or to register click <http://www.dbanetwork.com.au/dbalawyers/seminars3/1490/2319/SMSF-Core-Course.html>.

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