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13 April 2017

Manager
Retirement Benefits Unit
Retirement Income Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: superannuation@treasury.gov.au

Dear Sir/Madam

SUPERANNUATION REFORM PACKAGE - MINOR AND TECHNICAL AMENDMENTS

1. I refer to the exposure draft bill and explanatory memorandum issued for consultation on 12 April 2017.
2. Whilst I sit on both the Law Council of Australia Superannuation Committee and the Superannuation Technical Committee of the Taxation Institute, I have decided to make this submission in my personal capacity having regard to issues that will affect my clients. These same issues may or may not be picked up by the Law Council and the Taxation Institute in time for you to give them adequate consideration.

Death benefit roll-overs

3. My key concern with the further proposed amendments relates to the retrospective application of the death benefit roll-over provisions, in particular the bringing forward of the application date for the changes to the effect that the repeal of subsections 307-5(3), (3A) and (3B) (and ancillary measures) will be taken to commence from 9 November 2016.
4. Numerous widows and widowers in receipt of death benefit pensions (including those that may not even exceed \$1.6 million¹) of their late spouses will have already acted on the law as it currently stands to commute or partially commute death benefit pensions to have them treated as a "superannuation member benefit" in order that they may be rolled over to another fund (or internally within the same fund). The rollover forms used by the ATO (Rollover benefits statement NAT 70944-03.2013)

¹ These provisions currently apply regardless of the \$1.6 million TBC restructuring and may not have necessarily been acted upon with regard to the reform measures, but simply in the ordinary course of managing the structure of superannuation benefits for rollovers (including internal roll-backs).

have not yet been updated to permit death benefit rollovers because the measures will not currently commence until 1 July 2017 and accordingly any rollovers will have been treated as “Superannuation Member Benefits” - assuming the 307-5(3) (six month rule) criteria has been satisfied (which incidentally is specifically mentioned in the instructions for trustees guide to the form as it currently appears).

5. The result of the current arrangements is that many roll-overs of converted death benefit pensions via the six month rule will have already occurred and may continue to properly occur under the law as it stands and with the current framework in place. Whilst some roll-overs may have been made within and between self-managed superannuation funds, others will have been made within and to and from APRA regulated funds. For example, a death benefit pension in an industry fund that has been commuted pursuant to the six month rule in March 2017 and roll-over to a new interest as a superannuation member benefit to commence a new pension from a different fund (or to hold fully or partly in accumulation phase) will not be traceable in the new (transferee fund) as a “superannuation death benefit”.
6. In view of the current framework it is virtually impossible to comply with the retrospective operation of the proposed amendments – at the present moment a trustee of a fund is bound to withhold tax on a commuted death benefit pension that is cashed out as a lump sum following the six month rule; the trustee has no other option and its systems would be currently configured according to the law as it presently stands. The current framework is also embedded in communication materials that funds have in place for members for dealing with the rollover of superannuation death benefits; the proposed bill now puts these communication materials on an uncertain footing – such that if they remain in place (despite being accurate as of today) they are nevertheless potentially incorrect and misleading. The same issue applies to advice properly given by tax and financial advisers about death benefit rollovers.
7. Whilst I can understand the concern about spouse death benefit pensions being penalised if pensioners commute and cash out under age 60 years before 1 July 2017, it is likely most of these commutations would not occur until late June (after the proposed further amendments bill is introduced in the winter sittings). It would be appropriate for other specific relief to be provided to pensioners who might have inadvertently commuted and incurred penalty tax prior to this time, but this inadvertence is not sufficient justification for the introduction of retrospective measures that threaten the rule of law and risk disadvantage to pensioners who have dutifully complied with the law (particularly section 307-5(3) and related provisions).
8. Further, I note and refer to past criticisms from industry in respect of the introduction of retrospective amendments impacting superannuation tax. Given the potential for pensioners and fund trustees to be adversely impacted by these further amendment measures – there is no sound reason to make any exception for retrospectivity to apply in this case.
9. A straightforward solution would seem to be to apply the amendments from the time the further amendments bill is introduced into parliament. An alternative solution might be to clarify and confirm that any pensioner taking action pursuant to the current measures to convert a superannuation death benefit to a superannuation member benefit under the six month rule would not be affected by the changes made under the later further amendments bill – notwithstanding its retrospective operation (in circumstances where the retrospective operation would be adverse to a pensioner’s interests or the fund trustee is not in a position to trace the benefit back to having been commuted under the six month rule). It is possible that such

construction is available under the current terms of the exposure draft bill, but it is not clear because of the tenuous effect of retrospective measures.

10. I would be very pleased to discuss these issues further with Treasury representatives, if required. An early resolution of this matter is essential as there are many pensioners currently looking to take action with respect to their death benefit pensions and the proposed exposure draft bill opens up further confusion and uncertainty. Larger funds and advisers also need to be in a position to properly communicate and inform death benefit pensioners regarding their options.

Yours faithfully

A handwritten signature in cursive script, reading "Suzanne Mackenzie".

Suzanne Mackenzie