

### Minimum pension draw down requirements

Account based, market linked and allocated pensions require a member to take (or draw down) a minimum amount each year. In the current economic climate, with significant share based pension funds, the statutory requirement is causing some difficulty for fund members receiving pensions from a rapidly declining asset base.

On 18 February 2009, the Treasurer announced temporary relief from the statutory draw down requirements by halving the minimum draw down amount for the financial year 2008/09.

Thus, if a fund member was required to draw down \$36,000 during the year, the requirement is now to draw down \$18,000. In cases where fund members have already drawn down half of the statutory minimum, they will not be required to draw down further amounts in the 2008/09 year.

Declining asset values in many fund share portfolios have seen a number of pensions recently commuted and new pensions created with lower draw down amounts due to a declining asset base. The technique is sensible for those who are prepared to crystallise losses. The 50% discount announced by the Treasurer may now save many the time and trouble of the commutation technique.

### Business real property

The ATO has tried on a number of occasions to define business real property for the purposes of Section 66(5) of the *Superannuation Industry (Supervision) Act 1993*. Section 66 allows a self-managed fund to acquire certain assets (including business real property) from a member, member's relative or an associate of a fund. The first of the ATO's attempts took place with the remarkably named Draft Ruling "2003/xx" which dictated with some force that vacant land "could never be business real property".

In *Self Managed Superannuation Funds Ruling SMSFR 2009/1*, the ATO takes the "omnibus approach" to explaining what an interest in property is and, how property is used "wholly and exclusively in one or more businesses" carried on by an entity. Over 70 pages of discussion, definition and examples takes the revised definition of business real property well beyond the vacant block of land. The Ruling is essential reading for those who are contemplating a fund acquiring business real property from a member, member's relative or an associate of a fund.

### Binding death benefit nominations

At last, the air has been cleared in relation to the capacity of self-managed funds to use binding death benefit nominations. In *Self Managed Superannuation Funds Determination SMSFD 2008/3*, the ATO has stated that there are no restrictions on self-managed funds accepting binding death benefit nominations from fund members subject of course to a fund's trust deed conferring power on fund trustees to accept such a nomination.

We often see requests for binding death benefit nominations to be made in favour of persons who are not dependants or legal personal representatives of a fund member. By way of reminder, binding death benefit nominations may only be made in favour of dependants or legal personal representatives of a member.

The SIS Regulations require binding death benefit nominations to be renewed by a member every three years. This requirement often causes difficulty as our practice proves that in most cases, members forget! If a member forgets to renew the nomination, the nomination ceases to have effect. This situation can be overcome by expressing a binding death benefit nomination to be inuring and not subject to renewal every three years. This can be done in accordance with the SIS Regulations and overcomes the ever-present problem of memory lapse. Our self-managed fund deeds cater for binding death benefit nominations which do not require renewal every three years.

However, there are obvious dangers in expressing a binding death benefit nomination to inure forever where family or marital circumstances may change and just as members forget to renew nominations every three years, they also forget to revoke old nominations and prepare new nominations when circumstances do change!

## What the ATO (almost) forgot to tell you

Is that superannuation funds are also entitled to reduce their PAYG instalments by 20% in certain circumstances. In its SMSF News Alert publication of 3 March 2009, the ATO has stated:

*"Given the current financial downturn, SMSFs can vary their PAYG amount due to a change in their financial circumstances.*

*If you need to vary the amount, you can do so by lodging your business activity statement or instalment notice on or before the payment due date.*

*You may also be entitled to a 20 per cent reduction to your PAYG instalment amount for the quarter that includes December 2008, if you can meet the following criteria:*

- *you pay PAYG instalments quarterly using our calculated instalment amount printed on your activity statement/instalment notice, and either:*
  - *you are carrying on a business that has an annual turnover of less than \$2 million*

*OR*

- *you receive income from a partnership or trust that is carrying on a business, which has an annual turnover of less than \$2 million."*

## An Australian superannuation fund

Concessional taxation treatment to superannuation funds depends upon a fund being classified as an "Australian superannuation fund". In *Taxation Ruling TR 2008/9*, the ATO sets out the Commissioner's view as to what is an Australian superannuation fund. There are three tests a fund may satisfy:

- a fund was established in Australia; or any asset of a fund is situated in Australia at the relevant time; or;
- the central management and control of a fund is ordinarily in Australia; or
- active members of the fund are ordinarily resident in Australia.

In the case of the central management and control test, the Commissioner regards one who participates in "strategic and high level decision making processes and activities" as taking part in management and control of a fund.

## In-specie contributions

In-specie (non-cash) contributions to superannuation funds are not all that unusual. However, the ATO has addressed a recent spate of arrangements where funds do not recognise and record the true market value of an asset contributed and where an associated party pays the costs of improving a fund asset which was contributed in-specie.

In its *Taxpayer Alert TA 2008/12: Non-cash contributions to superannuation funds*, the ATO says that such arrangements are usually contrived to circumvent the new superannuation contributions limits which came into effect on 1 July 2007.

Not only does the ATO consider such arrangements as contravening the *Superannuation Industry (Supervision) Act 1993*, it also considers that such arrangements attract the operation of the derivation of non-arm's length income provisions found in Division 295 and the value shifting provisions of Division 725 of the *Income Tax Assessment Act 1997*.

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