

Is it really "simplified"?

The majority of the new Simplified Superannuation regime comes into operation on 1 July 2007. The new regime follows mountains of commentary, speculation, and finally, vast volumes of legislation to digest and attempt to understand. To distil a 250 mm high pile of paper exalting the virtues of 'Simplified Super' to a neater (and more precise) pile of some 25 mm is one of the necessary skills to be acquired by anyone attempting to understand the new legislation. We are having some difficulty in coming to terms with new nomenclature. Expressions we have known and used for 20 plus years have been thrown out. This probably means that the author's various books are now all redundant and sales will cease altogether!

There should be a national competition (and a very handsome prize) offered by the Federal Treasurer for those who in less than five minutes, can find Regulation 1.06 (9A) of the *Superannuation Industry (Supervision) Regulations 1994*. This is the new Regulation which sets the standards for account based pensions available from July 2007. Logically, Regulation 1.06 (9A) should appear somewhere between Regulations 1.06 (9) and 1.06 (10) or, so we thought. How silly of us. It is located in Item [18] of the Note 2 of the Schedules at the very end of the Regulations!

Instalment Warrants

Avid readers will by now know that both APRA and the Tax Office have taken a dim view of investment by self-managed funds in instalment warrants. Some years ago, APRA declared that instalment warrants were a form of "borrowing". Not to be outdone, the Tax Office shortly after APRA's announcement, made the same perspicacious observation.

Now the view has become more enlightened. In *Minister for Revenue Press Release No 6 (22 May 2007)*, the Minister announced that after consultation (with whom is not entirely clear), "the Government has decided to legislate to allow superannuation funds to invest in instalment warrants of a limited recourse nature over any asset a fund would be permitted to invest in directly". The Minister's announcement is not quite imprimatur to self-managed funds yet. There must be legislation passed which doubtless, will (hopefully) be of a very prescriptive nature. For our part, we can't help thinking that instalment warrants are still a form of borrowing, non-recourse or not.

Work test abolished – for some

Children of members, have been eligible as members of self-managed funds since 1 July 2004. However they have been required to satisfy the "work test" outlined in the SIS Regulations in order for contributions to be made on their behalf. Thankfully, someone thought about the difficulty of young children being required to satisfy a work test of a minimum of 10 hours paid employment weekly. In September 2006, the federal Government abolished the work test for all fund members under 65 with effect from 1 July 2004. Regardless of age, there is now, no work test in relation to members aged less than 65 years.

However for members aged between 65 and 74 years the work test still exists to determine their eligibility for contributions to be made. Again, with effect from 1 July 2004, the work test has been modified to permit eligibility for contributions where a member works at least 40 hours in a continuous 30 day period in the same financial year. In respect of members aged over 70 years, funds can only accept mandated employer contributions.

Excess non-concessional contributions

There are instances where transitional non-concessional contributions exceeding \$1 million have been made on behalf of members between 10 May and 6 December 2006. Most often this situation arises where a member contributes real estate (business real property) to a fund which is valued at the time of contribution of in excess of \$1 million. The situation can also arise through inadvertence.

Excess non-concessional contributions attract excess non-concessional contributions tax of 46.5% from 1 July 2007, on the excess over \$1 million. Members who have made excess non-concessional contributions have until 30 June 2007 to apply for release of the excess amount or, seek the approval of the Tax Office to reallocate the excess component to a different financial year. The Tax Office has indicated that reallocation of an excess contribution to a different year will only be considered in very limited circumstances.

Funds must own the assets

The Tax Office has recently spent a great deal of time emphasising the need for trustees of self-managed funds to be recorded as the legal proprietor of a fund's assets. It is apparently not uncommon for funds to assert ownership of an asset by a fund where a trustee of a fund is not the legal owner of an investment asset. The Tax Office recognises that in some circumstances, a fund's ownership cannot be shown on title. For instance, in Victoria, the *Transfer of Land Act 1958* prohibits the recording of a trust interest on title. To illustrate the point, "John Smith Pty Ltd" will be recorded on title, not "John Smith Pty Ltd as trustee of the John Smith Superannuation Fund". To overcome this anomaly, the Tax Office considers that "*a caveat, instrument or declaration of trust must be executed for the asset*" in order to record assets being held on trust (by a fund trustee) for members of a fund. An interesting proposition when we consider the following:

- ❖ a registered proprietor cannot caveat its own title;
- ❖ fund members as beneficiaries have in most cases, no vested or defined interest in a fund's assets and accordingly, are unable to caveat; and
- ❖ a declaration of trust (at least in Victoria) gives rise to payment of Duty calculated on the value of the assets which are the subject of the declaration. Paying Duty twice does not seem sensible!

The Tax Office has a point being that assets must be owned by a fund's trustee and no other party but, its consequent advice to trustees to caveat or execute a declaration of trust must be treated carefully. There are other ways to satisfy the Tax Office edict but, proper, professional advice should be obtained on a case-by-case basis.

Transfers to yourself

With the recent transitional provisions concerning non-concessional personal contributions to funds pre 30 June 2007, there have been a number of instances where business real property has been acquired by fund trustees from members. But if the trustees are themselves members, then an 'absurdity waiting to happen' is created by Section 37 of the *Transfer of Land Act 1958*. Similar provisions exist in other states. The absurdity is highlighted by the following example:

John and Mary Smith are registered proprietors of land which falls within the definition of "business real property" pursuant to the provisions of the *Superannuation Industry (Supervision) Act 1993* ("SIS"). John and Mary Smith are also the trustees of the Smith Self Managed Superannuation Fund as they are entitled to be by virtue of the provisions of SIS.

John and Mary Smith desire to transfer the property (held in their joint names as registered proprietors) to themselves in their capacity as Trustees of the Smith Superannuation Fund. They are permitted to make a transfer of unencumbered business real property by SIS. A Contract of Sale of Land is prepared reflecting the business real property transferred as a non-concessional contribution to the Smith Superannuation Fund. As it should be, for the purposes of SIS, a Transfer of Land is prepared but, given the provisions of Section 37, in the Transfer, the Transferors are reflected as "John and Mary Smith" and, the Transferees are reflected as "John and Mary Smith", in other words, a transfer to themselves!

As it should be, the Transfer of Land after execution is lodged for assessment of Duty at the State Revenue Office and pursuant to the provisions of Section 41 of the *Duties Act 2000*, the Transfer is assessed as non-dutiable. The Transfer of Land is lodged at the Titles Office and (for obvious reasons) is refused registration and returned.

Whilst recognising the very existence and rationale of Section 37 of the *Transfer of Land Act*, it seems to us that one of two things must happen in order to avoid further repetition of this farcical situation. Either, a transfer is registered by the Titles Office albeit to the prior registered proprietor/s or, some other provision is made for the purposes of registering transfers of a similar nature. Obviously, there is no difficulty in the case of a transfer in similar circumstances to a corporate trustee. This absurd experience has daunted a number of our clients who have made similar transfers of property in past months. Needless to say, Land Victoria which administers the *Transfer of Land Act 1958* has no solution!

The 2007 Federal Budget

Once again, your learned author was on business in the United Kingdom on the evening that an effervescent Federal Treasurer strode to the podium in the Lower House to announce tax cuts for all and extol the virtues of his economic wizardry. It was difficult but your author did locate coverage of this television feast in a small watering hole just out of Plymouth in Devon. Devon is actually a very picturesque part of England and the watering hole catered for the author's every need during some 45 minutes (and well beyond) of "Budget excitement".

The author was accompanied during the Budget excitement by Lord Tollywaddle of Bloomsbury (resplendent with pork pie hat), a Director of an English client who found it difficult to retain composure during the Treasurer's electric presentation. Lord Tollywaddle was often interjecting and speaking with some gusto regarding his extensive collection of pork pie hats ("a veritable plethora of them") and other sartorial paraphernalia which obviously includes a handsome collection of tartan waistcoats and, some chap called Gordon Brown. Your author needed to retreat from His Lordship's presence in order to hear the full import of the economic miracles being delivered by our esteemed Treasurer.

His Lordship was clearly agitated on Budget night, relishing the finality of the Treasurer's presentation in order to hastily return to the passenger seat of his brand new Rolls Royce Phantom IV which was delivered that day. Either, his Lordship felt the need to urgently pen a short note with his new, hand-fitted (complimentary) Conway Stewart pen set carefully crafted into the glove box or, took objection to your author's comments concerning the true identity of our Federal Treasurer or, the company of the author himself! Now, Lord Tollywaddle is a senior Director of an English client of ours and certainly it was felt imperative that he share the author's sense of colonial concern about the state of our great nation.

In any event, at the conclusion of the Treasurer's presentation, his Lordship retreated blustering with some haste to his thunderous new flagship, sans pork pie hat, and started writing furiously from the glove box and constantly muttering (as he often is known to do) about this chap by the name of Gordon Brown. Your author retrieved the pork pie hat from the watering hole and instead of a regal "thank you" (which was well-deserved and expected), was presented by his Lordship with a hand-written note simply stating – "Gordon Brown will be England's next Prime Minister – you fool". How was your author to have known that? Ah yes, the Budget. It was memorable. And yes, Wayne Rooney's knee is back to normal.

Spouse-splitting of con-concessional contributions

Untaxed member (non-concessional) contributions are unable to be split between spouses from 5 April 2007. It is however still possible to split taxed ("concessional") contributions - see *Superannuation Industry (Supervision) Amendment Regulations 2007 (No1)*.

CFDs – Contracts for Difference

In *ATO Interpretative Decisions ID 2007/56* and *ID 2007/57*, the Tax Office has considered the use of CFDs by self-managed funds both in the context of fund assets being deposited with a CFD provider (as security) and where no fund assets are deposited. The Tax Office is quick to point out the risks inherent in these synthetic investments but says that subject to certain safeguards, CFD's may be suitable investment for a self-managed fund where no fund assets are deposited with or pledged as a security to a CFD provider. All we would say is that CFDs are not for the feint hearted and represent yet another form of legalised gambling provided by member organisations of the ASX.

ETPs – no longer the same

As part of the Simplified Super process, ETPs (as such) are abolished with effect from 1 July 2007. In another nomenclature adjustment, what was an "eligible termination payment" will now be an "employer termination payment". Though, strictly speaking, still an "ETP". But, that is where the resemblance ends.

There are complex transitional provisions governing the treatment of ETPs paid between 1 July 2007 and 30 June 2012 which revolve around a recipient's preservation age. There are special transitional rules in respect of ETPs received during the 2007/2008 financial year. These need to be clearly understood by those contemplating receipt of an ETP over the coming years.

The new ETP can be:

- ❖ a "life benefit termination payment" for instance a 'golden handshake' or (axiomatically);
- ❖ a "death benefit termination payment" ;
- ❖ an unused long service leave payment;
- ❖ an unused annual leave payment; or
- ❖ a genuine redundancy or (approved) early retirement scheme payment.

To further aggravate the complexity, different taxation regimes apply to different types of payment. Whilst the taxation of all ETPs has changed from 1 July 2007, the treatment of death benefit ETPs has changed dramatically. Any thorough outline of

the new taxation regime is beyond the scope of this Newsletter. For those contemplating an ETP (other than a death benefit ETP), professional advice should be sought as to the complex taxation treatment.

Amending Deeds

We have now completed our review of Trust Deeds and ancillary documents. These have now been updated to cater for the new regime, new pension benefits and the myriad of other changes introduced by the plethora of recent legislation.

As a result of Simplified Super, we have had to sensibly amend not only superannuation trust deeds but also, virtually every other document we use in providing our superannuation services to clients. The lengthy amendment process has resulted in what we believe to be the most up to date deed and pension provisions available in the country.

Technical papers available

Electronic copies of the following papers are available on request to Chris Ratten at aga@andrewgray.com.au :

Superannuation proceeds trusts:

Andrew Gray has recently revised our technical paper dealing with superannuation proceeds trusts.

Employment legislation:

Jessica Murray-Boer and Amy Granger have now revised an extensive paper on the new legislation which will provide invaluable assistance to most employers, especially those considering the different types of employment agreement available under the new regime. Apparently, it is no longer called "WorkChoices" but, we haven't had the time to view the advertisements, to know its new name!

Superannuation legislation summary:

For years we have maintained a summary of important superannuation legislation, cases, rulings and determinations. This summary has recently been updated.

Simplified Super – what it means for Self-Managed Funds:

Andrew Gray has completed an update of the impact of the new legislation on self-managed funds.

The contents of this Newsletter are not intended to constitute the provision or rendering of legal or other advice. Accordingly, we can accept no responsibility for loss or damage (howsoever arising) to persons who act solely on the basis of this Newsletter without first seeking our professional advice.