

## Tax and Superannuation Update – Spring 2001 Edition

### SMSF dilemma- Are you ready for the Baby Boomers Retirement?

So you've accumulated funds - what about the pension phase?

Now is the time to start reaping all the tax benefits from your Self Managed Super Fund (SMSF).

Your Adviser won't be able to purchase the correct pensions unless your SMSF Deed allows you to:

- access the money to finance your lifestyle needs,
- easily access funds if any of those "emergencies" arise, and
- save tax when pulling money out.

Some Deeds are too restrictive. Don't despair! Most SMSF Deeds can still be amended so that you can access the money in any way you want (within the provisions of the SIS Act and Regs).

Is your Deed restricted to only paying lump sums if there is a Corporate Trustee and only allowing a pension for individual Trustees? This is old fashioned. Amend your Deed to allow flexibility.

Do you need to change your Trustee to pay the benefits to you in the most suitable way?

Does your Deed allow a member to request any lump sum or benefit in the form of:

- an allocated pension?
- a complying pension?
- other permitted pensions?
- a combination of the above pensions?

If not, then amend your SMSF Deed. Due to successfully accumulating Super, baby boomers can enter retirement financially secure. However, along with this financial security comes RBL (Reasonable Benefit Limit) issues.

An RBL is the maximum amount of money the Government thinks you should have as Super.

Receiving benefits over the maximum RBL is not tax effective. It defeats the purpose of locking away funds for all those years. You need to ensure that your SMSF Deed gives you the most flexibility in trying to avoid a breach of the RBL as you

transfer into the pension phase.

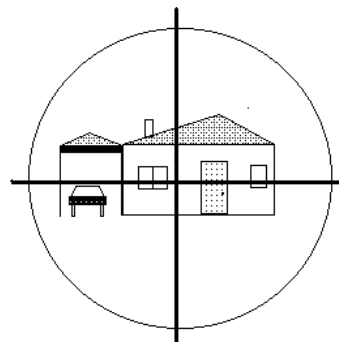
Talk to your Adviser and Accountant to ensure that your Fund's Reserve Accounts and Forfeiture Accounts allow you the greatest ability to move any excess RBL Super to members that are under the RBL.

Once an allocated pension has started, you can not add to or alter the amount. If a lifetime pension is commenced, it locks away capital that might be needed in the future. It is vital that you consult you Adviser and Accountant to set up the pension correctly, right from the start. There are limited avenues to change the income streams once the pension has started.

If you are unsure if your Super Fund is ready for the pension phase, ask your Adviser or Accountant to run through the Brett Davies Lawyers "Pension Checklist".

To get your SMSF Deeds prepared by tax specialists, see [www.LawCentral.com.au](http://www.LawCentral.com.au)

### "One family - one home" says the Tax Man



### Is your Family Home in the Tax Man's sights?

My name is Ann. My husband Michael and I are very much in love and are very much a couple. However we chose to live apart for a large proportion of our lives. Michael worked in Perth, while I prefer the quiet ambience of Margaret River. Our chosen lifestyle required two properties. One, an inner city apartment, the other a country retreat.

On purchase, we believed that we would get a main residency exemption for both properties. We even purchased the properties individually to ensure there would be no difficulties in claiming the main residency exemption for Capital Gains Tax (CGT).

Michael has retired and now lives permanently in Margaret River with me. We sold the Perth apartment early this year. The financial gain we made was earmarked as our retirement fund.

Last week we saw our Accountant for our tax returns. She informed us that if we claimed the full main residency exemption for the Perth property, then we couldn't do the same for the Margaret River property during the time we owned the Perth property. We were stunned. We never dreamt we would be paying CGT for either property.

Our Accountant told us we had several options:

- Claim the exemption for the Perth property and pay the CGT incurred during this period on the Margaret River property when it is sold;
- Pay the CGT on the Perth property and nominate the Margaret River property as our main residence for the entire period. Thus preventing any nasty surprises when we later sell the Margaret River property, or
- Claim the exemption for each property for half the period that both properties were our main residences.

Due to the phenomenal rise in the property market in both areas, the financial impact of this decision is one that we cannot make without further financial advice.

Are you considering this type of lifestyle? Make sure you speak to your Accountant and Adviser before purchasing property. Even your home is not automatically exempt from CGT.

## Tax and Superannuation Update – Spring 2001 Edition

### Splitting The Super - Roll Over and Die

"This is my first marriage. I love my wife and she loves me. When we retire, my Super supports us both."

Unpleasant though they may be, we all have to face some facts of modern life.

- 43% of all marriages end in divorce - 8% within 5 years, 19% within 10 years, 32% within 20 years and 39% within 30 years. The figures are higher for second and subsequent marriages.
- For at least 81% of couples, at least one partner has Super.
- Men are more likely to have more Super than women.
- Both men and women have little idea about their partner's Super.
- On average, Super accounts for 25% of a couple's asset wealth.
- The Family Court takes Super into account in 46% of divorce cases.

The Family Court has its own checklist for dividing up the matrimonial property. Prior to June 2001, the Family Court wasn't allowed to "touch" the Super. (*That didn't always stop it from trying though!* – Ed) It did however "take into account" the Super when splitting up the other assets.

As a consequence, one party often walks away from the divorce with the lion's share of the non-Super property. The other is left with little else than something to look forward to in the future. If they died of starvation in the meantime, bad luck.

In December 1995, the Keating Government introduced a Bill, dealing with property and pre-nuptial agreements. Alas, they wimped out on Super. As Senator Bolkus said at the time "...a working group established by the Government to examine this extremely complex and increasingly significant matter is expected to report shortly." (*And it only took a paltry 6 years – Ed*). Now here we are in 2001. At last we have the all-new "Part VIII B - Superannuation Interests". (It is now L-A-W but it doesn't come into effect for about another 1½ years.) The new legislation overrules other Superannuation Rules. This includes Commonwealth and State laws as well as Trust Deeds. There are fines payable by Trustees and others for not complying with this new law.

The new law deals comprehensively with the dividing up of Super. This includes making it 'property' for the purposes of the Act. Now the Family Court can "touch" it and move it around. It introduces such concepts as 'splitting', 'flagging' and 'breakdown declarations'.

Under the new arrangements, Court Orders or agreements are made that are enforceable against third parties such as Super Fund Trustees. They may specify an amount or percentage by which the Super is divided.

### What if the person is approaching retirement and their final Super benefit is about to be known?

The member's Super can be the subject of a flagging agreement. This means that rather than splitting the Super immediately, the split is delayed until you know the exact value of the benefit.



**Super complexities? Family Lawyers are not happy bunnies.**

### Can Super be rolled over from Dad's Super Fund to two separate Funds?

Yes. First you need independent financial advice to be provided by 'prescribed financial advisers'. Mum can also complain to the Superannuation Complaints Tribunal.

The gladiatorial Family Lawyer is use to wielding his axe on a nice clean balance sheet. He is now drowning under the complexities of the new legislation. Forthcoming State legislation to extend the benefits of Family Law to de-facto and same-sex couples is not likely to make life any easier either.

Lawyers' PI Insurers are worried. In April this year, they cried "...if the practitioner strays into areas outside the normal scope of legal practice, (eg an investment adviser) he/she is unlikely to be covered. BE CAREFUL". (And of course, make sure you work alongside a professional Financial Adviser at all times).

### Lawyer's "Simple" Will left the Adviser Impotent

Last month I had a nightmare put before me. The husband had decided to get a Will from his local lawyer. "I have no assets", he said. He died. A ton of insurance went into his estate. His Super assets also went into his estate. He also confused Tenants in Common with Joint Tenancy. He thought he would die a pauper. His estate ended up with \$580,000 in assets and cash. The Adviser wanted to improve an estate asset before it was sold. He wanted to borrow money to do this. There was no right for the wife, as Trustee, to borrow money. The Adviser was also unable to mortgage estate assets to secure the loan.

The Executor was the main beneficiary. However, the Executor was prohibited from obtaining a personal benefit from the estate. This got in the way of the Adviser's strategy. The Will even stopped the wife from borrowing money from the estate.

Some States prescribe a specific list of approved Trustee investments.

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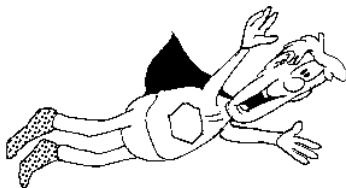
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This again restricted the Adviser in what he could invest his client's assets in. (*Ed- Why would you want to tie your Adviser's hands by removing all investment flexibility?*)

The Trustee powers didn't even include a power to insure the assets. However, we were able to deal with this through the Trustees Act (*Ed- More money spent on lawyer's fees!*) Further, the Will:

- Didn't allow the estate to continue to run the business.
- Didn't allow assets to be transferred to beneficiaries – rather the assets had to be sold, converted into cash and the money distributed. (What a disaster for Capital Gains Tax and Stamp Duty).
- Didn't provide any power for the Executor to deal with the banks.
- Didn't allow the wife as the Executor to delegate some of her powers to any other person.
- Didn't allow Advisers, Accountants and Lawyers to charge their normal fees (*Ed- What's wrong with that?*).

The Adviser had no power to help manage the estate.



#### What powers will your Trustee be left with?

Estate Planning is not just about Testamentary Trusts. It is about making sure that wealth gets into the hands of your loved ones in a proper, tax effective, and most importantly FLEXIBLE way. The wife is now working with her Adviser to make sure that her own Estate Planning is carried out. It is too late for her husband.

#### 1,000s of people are losing their pensions

##### CENTRELINK V FAMILY TRUSTS

Do you have a Family Trust? Do you currently get Centrelink benefits? Presently you can have millions in a Family Trust and still get the pension. Within 3 months that stops. You have only 3 months to work with your Adviser, Accountant and Lawyer to escape. You don't have to control the Family Trust to be caught. Even if you are only the Trustee you are trapped. We have seen many people over the last few months. These are the most common questions:

##### 1. WHAT IS A FAMILY TRUST "LOAN ACCOUNT"?

The Family Trust makes some money. The money is distributed to Mum. This is because Mum, for that year, is on a low tax rate. Mum then "loans" the money back to the Family Trust. This is called a "loan account". The Family Trust continues to owe Mum the money. Is this loan subject to Centrelink means testing now or only on 1 January 2002? Bad news. The answer is now. Mum should always have been declaring that loan to Centrelink. To not have declared the money is illegal. Amending the Family Trust can't change the "loan accounts". Are you 5 years off retirement? If yes then we can work with your Adviser and Accountant to get rid of the loan account.

##### 2. DAD IS OF UNSOUND MIND. CAN I USE THE POWER OF ATTORNEY TO REMOVE DAD AS APPOINTOR?

Sorry, I know that your Dad is a pensioner and he is about to lose Centrelink benefits. You can't however, use your Dad's Power of Attorney to remove Dad as Appointor and put yourself in his place. This is a misuse of a Power of Attorney. A Power of Attorney can only be used in Dad's "best interests" (what ever that means). There may be other ways to protect your parents.

##### 3. CAN DAD JUST RESIGN AS A BENEFICIARY?

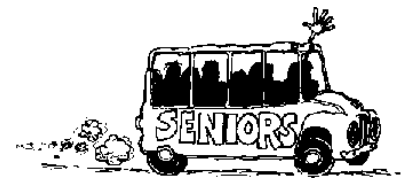
No he can't. It isn't that simple. This "resettles" the Trust and you suffer Capital Gains Tax and stamp duty. The Australian Tax Office said you can't on 29 August 2001. See Draft Taxation Determination TD 2001/D7.

##### 4. BUT CENTRELINK SAID DAD HAS TO RESIGN AS A BENEFICIARY?

On its website Centrelink has told everyone to amend the Trust deed by removing Dad. In some States, the stamp duty office has unofficially said it will turn a blind eye (for the moment). However, you can't get around the above TD 2001/D7. But don't despair. There is more than one way to skin a cat.

##### 5. WHAT DO I DO NOW?

Speak with your Accountant and Adviser. Complete a Brett Davies Lawyers' Centrelink Questionnaire form. [http://www.taxlawyers.com.au/Publications/What's%20New/Centrelink\\_kit.htm](http://www.taxlawyers.com.au/Publications/What's%20New/Centrelink_kit.htm) Your Adviser or Accountant rings us to make a time for you to come into our offices (or over the telephone). You can not ring us directly. We are a private tax law firm. We need the Questionnaire and original Trust Deed at that first meeting.



**Do Mum and Dad need to get out of your Family Trust?**