Estate planning and the 2017 super reforms – 17 things you must be aware of

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The 2017 superannuation reforms are widely acknowledged as being the most fundamental changes to the superannuation landscape in over a decade.

While the reforms will have a significant impact across a range of areas, the consequences from an estate planning perspective are at risk of being overlooked.

In no particular order, the fundamental issues that must now be considered when managing superannuation entitlements from an estate planning perspective are as follows:

- Where an individual has a reversionary pension for an amount currently in excess of the $1.6 million balance transfer cap (which will be indexed for CPI), steps will need to be taken to manage how the amount which gets rolled back to their accumulation account is dealt with upon their death – for instance, via a binding death benefit nomination.
- While the exact factual matrix will always be critical, as a general comment, entitlements above the $1.6 million limit should be paid to tax death benefits dependants, ideally via a superannuation proceeds trust as part of a testamentary trust under a will (previous articles have explored various aspects of superannuation proceeds trusts, see for example our article at 2015 WTB 29 [1077]).
- The utility of a superannuation proceeds trust is significantly undermined where there are no death benefit dependants for tax purposes. Where a person has superannuation entitlements and no tax dependants, the consequences of the 'fast death tax' remain critical to consider. The so-called 'fast death tax' arises where funds that could otherwise be withdrawn tax free by the member during their lifetime remain in the fund at the date of death of the member and are then subject to tax on the distribution from the fund.
- The ability to make anti-detriment payments ends on 30 June 2016. Anti-detriment payments were beneficial in many situations, although had limited applications for self-managed superannuation funds.
- Any estate planning strategy will continue to be ultimately dependent on the trust deed for the relevant fund and a detailed review of the deed should be undertaken before any succession strategies are implemented.
- The conservative approach is that all trust deeds should be reviewed in light of the 2017 changes, with particular focus on the client's estate planning objectives. Our experience to date is that in most cases, a deed update will be appropriate.
- Regardless of whether a trust deed is updated, reviewing related estate planning documents to ensure they align with the client's objectives is critical. In particular, all death benefit nominations and reversionary pensions must be reviewed (for instance, in the context of the $1.6 million transfer balance cap mentioned above). To the extent there are binding nominations in place, the structure of those nominations may need to be updated.
- Similarly, the ability to make decisions, including potentially renewing or changing nominations in the event of a member's incapacity, must be addressed by a comprehensive, superannuation compliant, enduring power of attorney. An appropriately crafted document in this regard will also provide a pathway to potentially avoid the 'fast death tax' being triggered.

- The utility of reversionary pensions will be significantly undermined if the consequence of the reversionary pension is that the recipient exceeds their transfer balance cap.
- That said, in the right factual scenario, a child pension may provide planning opportunities as a child is entitled to access each of their parents' transfer balance caps – in other words, if the 2 parents pass away, the children of the relationship can get access to up to $3.2 million. Unless a child has a permanent and significant disability however, any balance in a pension account on the child reaching the age of 25 must be commuted and paid to them as a lump sum. From an asset protection perspective, this has significant adverse consequences that need to be considered.
- A carefully crafted testamentary trust will, which can provide tax benefits that are broadly similar to those that could be obtained by a child allocated pension, may be preferable to ensure that access to capital only takes place at appropriate junctures and not automatically at the age of 25.

In addition to the estate planning issues above, there are also a number of post-death considerations, namely:

- Death benefit pensions can now be rolled over to a new fund (under the previous rules, this was very difficult).
- Reversionary beneficiaries will now have up to 12 months from the death of the member to determine whether or not they wish to cash a benefit before it is credited to their entitlements and if the amount will result in the beneficiary exceeding their $1.6 million transfer balance cap, the excess amount must be paid as a lump sum benefit.
- Where there is no reversionary pension, the pre-existing requirement that benefits be paid 'as soon as practicable' remains in place. Whether this phrase can be read in the context of the new amendments to mean (say) within 12 months remains open to debate.
- Where no specific strategies have been implemented and a member passes away, it may be possible to establish a post-death superannuation proceeds trust. Generally, a post-death superannuation proceeds trust can allow infant beneficiaries to gain access to adult tax rates on income received.
- This said, there are a number of technical requirements that must be met and the range of circumstances where the structure is available and appropriate is relatively narrow and should generally be seen as an alternative of last resort.
- When dealing with an SMSF, control of the fund continues to be critical and prior to implementing any of the approaches above, steps should be taken to ensure the SMSF is compliant with the SIS Act and trust deed (in particular, by ensuring any required changes to the trustees or directors of the corporate trustee are processed within the required timeframes).