EMERSON RANDELL YOUNG

SMSF NEWSLETTER

July 2014

SPECIAL POINTS OF INTEREST:

- Understanding the options to split your superannuation on divorce
- ATO concession for pensions in the year of death
- What can we expect from the ATO with the new penalty rules?

INSIDE THIS ISSUE:

SUPERANNUATION AND DIVORCE

Statistics show that many Australians face the prospect of divorce. More specifically, recent data from the Australian Bureau of Statistics reveals that 49,917 divorces were granted during the 2012 year.

With division of assets an important issue for divorcing couples, this article discusses how your superannuation is dealt with in the event of divorce.

What happens to my superannuation on divorce?

If you divorce, your property is generally divided between you. In this regard, there are crucial issues to bear in mind regarding the treatment of superannuation on separation:

- your superannuation can be split with your spouse even though you may be below an age where you can access your superannuation savings;
- superannuation is dealt with separately to other assets you own; and
- recent changes mean that the rules also apply to de facto and same-sex couples (except WA residents).

Family laws provide the following options for allocating superannuation savings between you:

- **Superannuation agreement** - you both enter into a **binding** agreement either before or during your marriage detailing how your superannuation will be allocated if you divorce. Note, this agreement will not be binding unless specific requirements are satisfied, such as receiving sign-off that independent legal advice has been obtained.
- **Court order** - if you have not entered into a binding agreement with your spouse, orders can be made by the Family Court to split your superannuation. Note, if the court considers all of your assets are already divided fairly between you both, it may leave your superannuation as is, and not order it to be split.

TIP– If you have made a binding agreement to divide your superannuation, the trustees of your SMSF must comply with this agreement. Furthermore, the court cannot overrule or modify this agreement.

What are the different options to deal with superannuation?

If your superannuation must be split, your SMSF will need to abide by the decisions made.

In terms of how your superannuation is split in the event of divorce, the three broad options available are outlined in the table below:

Method	Description
Payment split	A payment is to be made to your spouse from your superannuation account once you satisfy a condition of release (e.g., retirement). The superannuation rules set out how this amount is to be calculated.
Interest split	Part of your superannuation balance is transferred across to a new superannuation account for your spouse. A transfer of benefits to another fund for your spouse may also be permitted.
Flagging interest	An agreement to deal with your superannuation is deferred until a later time (e.g., if you are close to retirement). The flagging agreement ensures that your spouse’s superannuation entitlements are protected until the agreement is lifted at a later time.

This area of the law is extremely complex, and it is recommended that advice be sought before deciding what course of action to take.

IMPORTANT ATO CONCESSION FOR PENSIONS

The ATO are continuing to release guidance for SMSF trustees on the issue of pensions. In this regard, the ATO has recently announced an important concession relating to the minimum pension obligations for a member who dies during the income year.

Death of a pensioner

If you are in receipt of a pension, the superannuation laws require a minimum pension payment to be made each income year. Meeting this pension payment each year is a key requirement for fund earnings on assets supporting the pension to be tax exempt.

By way of background, there are essentially two types of pensions you can have, as outlined in the table:

Type	Description
Pension continues on death	The pension continues to be paid after death to an eligible beneficiary (e.g., your spouse or children under 18). This is known as a 'reversionary pension'.
Pension ceases on death	The pension stops when you die. This is known as a 'non-reversionary pension'.

If your pension ceases on death, strictly speaking, the fund is still obligated to make the minimum pension payment before death. If this did not occur, the earnings on the pension assets would be taxable from the start of the income year. However, this would be a harsh outcome, given that you can't predict your time of death.

The ATO have now stated that it will not require a minimum pension payment to be made in the year of death if you are in receipt of a 'non-reversionary pension'. This means that your fund will not lose the tax exemption on earnings from pension assets simply because it has not made the minimum pension payment. Also, the tax exemption continues until your pension benefit is paid to your beneficiaries, provided that this occurs as soon as practicable.

WARNING–If your pension is 'reversionary' and continues after your death (e.g., to your spouse), your spouse must ensure that the minimum pension payment is made in the year of death.

EXAMPLE–John is a member of an SMSF and he is in receipt of an account-based pension that ceases on his death. He typically makes his pension payments in June each year, but dies in March 2014.

In these circumstances, under the ATO concession, no minimum pension payment is required for the 2014 income year. Furthermore, the fund retains the tax exemption on earnings from pension assets until the pension benefits are paid out to your beneficiaries (provided this occurs as soon as practicable).

ATO CONTINUE TO TALK UP NEW PENALTY REGIME

The ATO's new penalty regime for SMSF trustees commenced on 1 July 2014. Under this regime, the ATO has expanded powers to deal with SMSF contraventions (including monetary penalties).

Recently, the ATO have been commenting on what the new regime means for trustees moving forward.

What are we expecting of the ATO under the new rules?

Some of the issues the ATO have raised are as follows:

- **Contraventions** - the ATO auditor will review the contraventions report provided by your fund auditor.
- **Phone call** - if you have contravened the superannuation rules, you may receive a phone call from the ATO asking you questions about why you broke the rules.
- **Risk categories** - based on the phone call, the ATO will assess your risk, and whether they will take any further action (including audit activity). It is expected that breaches of the law such as taking money out before you retire will be treated by the ATO as high risk.

"The ATO have now stated that it will not require a minimum pension payment to be made in the year of death if you are in receipt of a 'non-reversionary pension'."

"Under this regime, the ATO has expanded powers to deal with SMSF contraventions (including monetary penalties)."

EMERSON RANDELL YOUNG

Accountants & Business Advisors

ABN 88 065 325 953

Sydney
Level 9, 117 York Street
Sydney NSW 2000

GPO Box 3707
Sydney NSW 2000

Melbourne
13 Dudley Street
Melbourne VIC 3003

www.ery.com.au

admin@ery.com.au