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Superannuation Legislation Amendment Bill 2010

This is a later edition of a Bills Digest previously prepared for the 42nd Parliament

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Economics Section

A Bill of the same name, covering the same topics, was introduced into the 42nd Parliament on 24 June 2010.

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Superannuation Legislation Amendment Bill 2010

Date introduced: 29 September 2010

House: House of Representatives

Portfolio: Treasury

Commencement: For **Schedule 1** and **Schedule 4**, **Parts 1**, **2,** and **Parts 4 to 7** the day after Royal Assent, and:

- for **Sections 1** to **4,** the day this act receives Royal Assent
- for **Schedule 2**, **items 1** to **5** a single day fixed by Proclamation or at most the day after a 6 month period commencing on the date of Royal Assent
- for **Schedule 2**, **items 6** and **7** – 1 January 2017
- for **Schedule 3**, the day after Royal Assent, and
- for **Schedule 4**, **Part 3** the day this Act receives Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill home page, or through http://www.aph.gov.au/bills/. When bills have been passed they can be found at the ComLaw website, which is at http://www.comlaw.gov.au/.

This Bill lapsed on the proroguing of parliament in July 2010. It has been re-introduced without any significant changes.

Purpose

This Bill seeks to achieve several outcomes, including:

- to facilitate (but not require) both the transfer of unclaimed superannuation money held in prescribed state and territory superannuation schemes to the Commissioner of Taxation and the payment of that money when it is claimed
- to require unclaimed superannuation money held in Commonwealth public sector superannuation schemes to be transferred to the Commissioner of Taxation, and to allow the Commissioner to pay these amounts out when claimed
- to provide relief to superannuation trustees in respect of income tax deductibility of premiums paid in respect of a superannuation fund's total and permanent disability insurance policies
- to allow the trustee of a regulated superannuation fund to acquire an asset in-specie (that is, an asset in a form other than cash, such as shares or property) from a related party of the fund, following a relationship breakdown of a member of the fund. This change will apply mainly to self-managed superannuation funds (SMSFs)
- to allow the equitable application of transitional arrangements in relation to in-house assets where an asset transfer occurs as the result of a relationship breakdown of a member of that fund. Again, this particular set of amendments is most likely to be used in respect of SMSFs, and
- to implement a number of minor superannuation-related amendments.

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In pursuit of these purposes, the Bill amends the following Acts:

- *Superannuation (Unclaimed Money and Lost Members) Act 1999* (Unclaimed Money Act)
- *Income Tax Assessment Act 1997* (ITAA 1997)
- *Income Tax (Transitional Provisions) Act 1997* (Transitional Provisions Act)
- *Superannuation Industry (Supervision) Act 1993* (SIS Act)
- *Tax Laws Amendment (2009 Measures No. 6) Act 2010*, and
- *Taxation Administration Act 1953* (TAA 1953).

Committee consideration

As at the date of writing the Bill has not been referred to a Parliamentary committee.

As the amendments in the Bill's various schedules are only loosely related, this Digest will consist of four sections, each dealing with the amendments in each of the four schedules to the Bill.

Schedule 1–Unclaimed superannuation money

Background

Since 1 July 2007, under section 17 of the Unclaimed Money Act, a non-government superannuation provider has been required to pay any unclaimed superannuation money to the Commissioner for Taxation.[1] Prior to this date, non-government superannuation trustees could pay these amounts to the relevant Commonwealth, state or territory public trustee or receiver of public monies (or other relevant authorities). The trustees of public sector superannuation schemes are exempt from this new requirement, provided that they comply with the relevant state or territory law requiring the reporting and payment of unclaimed superannuation money to the relevant state or territory authority.[2]

The origin of the requirement for private sector superannuation trustees to pay unclaimed superannuation monies to the Commissioner for Taxation has been stated as arising from an earlier requirement to pay all superannuation monies left behind by former temporary residents to the Commissioner.[3]

1. Subsection 17(1), Unclaimed Money Act as amended by item 16 of Schedule 2 to the *Tax Laws Amendment (2009 Measures No. 1) Act 2009*.
2. Section 18, Unclaimed Money Act.
3. Explanatory Memorandum, Tax Laws Amendment (2009 Measures No. 1) Bill 2009, p. 15

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What is 'unclaimed money'?

According to section 12 of the Unclaimed Money Act, unclaimed money generally arises when:

- a superannuation fund member has reached the eligibility age (currently age 65),[4] and
- the superannuation provider has not received a contribution from the member for at least two years,[5] and
- a five year period has passed since the superannuation provider has had contact with that member, despite reasonable efforts to do so.

In relation to a deceased member, according to section 14 of the Unclaimed Money Act unclaimed money arises where all the following conditions are satisfied:

- the member has died
- according to the superannuation fund's rules, a benefit is immediately payable
- the superannuation fund has not received a contribution from the member for at least two years, and
- after making reasonable efforts, and after a reasonable period has passed, the superannuation fund provider is unable to ensure that the benefit is received by a person who is entitled to that benefit.[6]

How do unclaimed superannuation amounts arise?

Generally, unclaimed superannuation moneys arise where:

- a member changes employment or residence (generally both) and neglects to keep their superannuation fund informed of these changes
- a couple splits their superannuation benefits as a result of a property settlement following the breakdown of their relationship and one party changes address or employment and also does not inform their superannuation fund of these changes
- a temporary resident leaves Australia and does not claim their benefits within 6 months of departure and the superannuation fund pays their benefits to the Commissioner for Taxation, or
- a superannuation fund receives a contribution that does not have enough information accompanying it to adequately identify the member (for example, a name may be misspelt, dates of birth or addresses or a tax file number do not accompany the contribution).

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4. These ages are specified in section 10 of the Unclaimed Money Act (or in relevant regulations).
5. Alternatively, an amount is taken to be unclaimed money if in respect of a member in a defined benefit superannuation scheme a benefit has not accrued within the last two years.
6. Section 14, Unclaimed Money Act.

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What happens to this money?

Under section 49 of the Unclaimed Money Act, amounts paid to the Commissioner of Taxation are neither held on trust nor are they 'special public money' for the purposes of the *Financial Management and Accountability Act 1997*. This means that:

- a record of the receipt of the money is held by the Commissioner for Taxation
- the money forms part of the general government funds, and
- it does not earn any interest while it is held by the Commissioner.

Basis of policy commitment

This particular measure was announced as part of the 2010–2011 Budget.[7]

Position of major interest groups

The superannuation industry generally supported the proposed changes to superannuation announced in the 2010–2011 budget.[8] However, a representative of the Association of Superannuation Funds of Australia (ASFA) is reported as noting that the proposed measure will not solve the problem of lost and unclaimed superannuation money.[9]

Pros and cons

Currently unclaimed monies arising from state and territory public sector superannuation schemes are held within the relevant parts of eight state and territory administrations. This complicates the task of re-claiming these amounts for the rightful owner. Centralising the location and administration of these amounts will reduce this particular problem.

In particular, the location of these amounts with the Commissioner for Taxation may enable these amounts to be re-united with their rightful owners via the two programs of Australian Taxation Office (ATO) designed to achieve this outcome:

- the ATO's 'Lost Member's Register', and
- the 'Superseeker' program.[10]

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7. Australian Government, *Budget measures: budget paper no. 2: 2010–11*, Commonwealth of Australia, Canberra, 2010, p. 50.
8. Association of Superannuation Funds of Australia, *Leading super bodies call for support for super reforms*, media release, Sydney, 10 May 2010, viewed 28 June 2010, http://www.superannuation.asn.au/mr100510/default.aspx
9. S Patten, 'Labor to reap $10bn in lost super', *Australian Financial Review*, 18 June 2010, p. 1.
10. For additional information on these programs see Australian Taxation Office, 'Finding your lost and unclaimed super', website, viewed 29 June 2010,

A further advantage is the positive impact of the money on the Commonwealth budget, as these amounts are added to the Commonwealth's financial resources upon their payment to the Commissioner for Taxation.

Lastly, the proposed amendments dealing with this issue will provide a consistent method of dealing with lost and unclaimed superannuation amounts, as the Commonwealth, and each of the states and territories, currently has its own procedures.

However, these amounts are a contingent liability upon the Commonwealth. They must be repaid if and when their rightful owner claims these amounts.

Significant technical flaws

Item 21 of **Schedule 1** to the Bill states that **new subparagraph 49A(1)(b)(i)** of the Unclaimed Money Act applies 'to transfers occurring before, on or after the commencement' of **Item 21** (being the day after Royal Assent). While **Item 14** of **Schedule 1** to the Bill inserts **proposed section 49A** into the Unclaimed Money Act it does not actually contained **proposed subparagraph 49A(1)(b)(i)**.

Financial implications

The following table shows the expected impact on the Commonwealth's budget of the proposed unclaimed money provisions:

Table 1: Budgetary impact of proposed unclaimed money provisions

Year	2010–11	2011–12	2012–13	2013–14
Amount $m	Nil	28.8	0.4	0.4

Source: Explanatory Memorandum[11]

Main issues

Under the provisions of the Bill, a prescribed state or territory superannuation scheme can effectively be prevented from paying unclaimed money to the Commissioner for Taxation if its governing rules are changed so that:

- it is not allowed to provide the Commissioner for Taxation with the relevant statements, and/or
- it is not allowed to make the relevant payments to the Commissioner for Taxation.

http://www.ato.gov.au/individuals/content.asp?doc=/content/16442.htm&pc=001/002/064/002/004&mnu=&mfp=&st=&cy=1

11. Explanatory Memorandum, Superannuation Legislation Amendment Bill 2010 (hereafter Explanatory Memorandum), p. 3.

State or territory governments may sanction the necessary changes to the governing rules of a prescribed superannuation scheme to boost their own financial position via the retention of unclaimed superannuation benefits as part of their own general funds.

Key provisions

Part 1–Amendments to the Unclaimed Money Act

Item 3 of **Schedule 1** inserts the definition of a Commonwealth public sector superannuation scheme into the Unclaimed Money Act. Briefly, such a scheme is one established under:

- a Commonwealth law, an example of which would be the Public Sector Superannuation Scheme (PSS), established under the *Superannuation Act 1990*, or
- under the authority of the Commonwealth or a municipal corporation, another local governing body or a public authority constituted by or under a law of the Commonwealth. For example, a superannuation scheme that holds the benefits of employees of a Commonwealth semi-government authority.

Item 5 inserts a definition of 'State or Territory public sector superannuation scheme', by reference to the existing definition of that term in subsection 18(7) of the Unclaimed Money Act. There, it defined to mean a scheme for the payment of superannuation, retirement or death benefits, where the scheme is established:

- by or under a law of a State or a law of a Territory; or
- under the authority of the government of a State or Territory; or a municipal corporation, another local governing body or a public authority constituted by or under a law of a State or a law of a Territory.

Item 7 inserts **new section 18AA** into the Unclaimed Money Act. This new section generally applies the requirements of this Act to public sector superannuation schemes (defined in **item 4** by reference to the meaning of that term in the *Superannuation Industry (Supervision) Act 1992*). This definition is the same as in subsection 18(7) of the Unclaimed Money Act noted above.

That said, **new subsection 18AA(2)** states that certain existing sections of the Unclaimed Money Act, in relation to a prescribed state or territory public sector superannuation scheme, have the following effects:

- section 16 (Statement of unclaimed money) permits (but not requires) a scheme trustee to give a statement of unclaimed money to the Commissioner for Taxation
- section 16 does not permit a trustee to give an unclaimed money statement to the Commissioner if the governing rules of the particular scheme do not allow for such a statement to be given

- section 17 (Payment of unclaimed money) does not require to payment of unclaimed money if an unclaimed money statement has not been given to the Commissioner
- section 17 only permits (and not requires) the payment of unclaimed moneys to the Commissioner, and
- section 17 does not apply to an amount held by the state or territory public sector superannuation fund trustee, if the governing rules of that particular scheme do not allow the payment of these amounts to the Commissioner.

Comments

It may be argued that the above amendments go against the current intent of the *Unclaimed Money Act*, that requires superannuation providers to pay unclaimed superannuation money to the Commissioner for Taxation. However, the Unclaimed Money Act applies to superannuation providers. In turn, section 8 of the Unclaimed Money Act defines this term as the:

- the trustee of a regulated superannuation fund
- the trustee of an approved deposit fund, or
- a Retirement Savings Account (RSA).

It is arguable that most state and territory government superannuation funds do not fall into either of these categories. As they are generally exempt superannuation schemes under the provisions of the *Superannuation Industry (Supervision) Act 1993* they do not it into the first of the above categories. Clearly they are also neither approved deposit funds or RSAs. Thus, these amendments continue the current approach in the Unclaimed Money Act of not requiring the payment of these amounts to the Commissioner for Taxation, but the proposed amendments allow it to occur. Whether such payments will actually occur is another question beyond the scope of this Digest.

Item 8 inserts **new subsection 20C(3)** into the Unclaimed Money Act. This new subsection exempts the Commissioner for Taxation from providing a notice to state and territory public sector superannuation schemes regarding superannuation benefits of a former temporary resident. But it applies only where this scheme is not prescribed for the purposes of **new section 20JA** (see **item 9** below).

Item 9 inserts **new section 20JA** into the Unclaimed Money Act. This new section applies the main provisions of the Unclaimed Money Act in respect of the unclaimed money left behind by former temporary residents to:

- public sector superannuation schemes specifically prescribed for the purposes of this particular section, and
- certain Commonwealth public sector superannuation schemes.

Proposed subsection 20JA(2) contains provisions that permit, rather than require, trustees of prescribed state and territory public sector superannuation schemes to comply with the

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requirements of this new section. Again, these particular rules do not apply to these trustees if the governing rules of these schemes prevent them from complying with these requirements.

Item 13 inserts **new section 24HA** into the Unclaimed Money Act. This new section applies the main provisions of the Unclaimed Money Act in respect of the superannuation accounts of lost members to:

- public sector superannuation schemes specifically prescribed for this particular section, and
- Commonwealth public sector superannuation schemes.

New subsection 24HA(2) permits, rather than requires, the trustees of prescribed state or territory public sector superannuation scheme to comply with the main requirements of the Unclaimed Money Act in respect of accounts of lost members.

Item 14 inserts **new section 49A** into the Unclaimed Money Act. Essentially, this new section requires the payment of lost or unclaimed benefits held by a 'currently responsibility authority' (being a state or territory authority) to the Commissioner of Taxation where:

- the person was a member of non–public sector superannuation fund
- that non-public sector superannuation fund transferred the member's interest to a state or territory authority, and
- that state of territory authority would have been required by either the fund's rules or a relevant state or territory law to make a payment in respect of that member.

Under **proposed subsection 49A(2)** the above requirement does not apply to benefits transferred to state or territory authorities by a state of territory public sector superannuation scheme.

Part 2

Items 15 to **20** make minor consequential amendments to the ITAA 1997.

Schedule 2 – Total and permanent disability insurance premiums

Background

A superannuation fund must be set up for certain purposes. Generally these purposes include the payment of benefits to a fund member upon their retirement. However, a superannuation fund can also be set up to meet a number of ancillary purposes, one of which is the payment of benefits in the event of the member's death or disability.[12] In order to pay death or disability benefits most

12. Section 62 of the Superannuation Industry (Supervision) Act 1993 (hereafter the SIS Act).

superannuation fund trustees take out group total and permanent disability insurance policies (TPD policies).

Since 1 July 2007, the premiums paid in respect of these policies are tax deductible for the superannuation fund. However, only so much of the insurance policy premiums are deductible, as are attributable to the liability to provide either death or a 'disability superannuation benefit'.[13] This latter term is defined as occurring where:

- the benefit is paid to a person because he or she suffers from ill-health (whether physical or mental); and
- two legally qualified medical practitioners have certified that, because of the ill-health, it is unlikely that the person can ever be gainfully employed in a capacity for which he or she is reasonably qualified because of education, experience or training.[14]

Before 1 July 2007, the ability of a superannuation fund to deduct these insurance premiums was governed by the now repealed subsection 279(1) of the *Income Tax Assessment Act 1936* (ITAA 1936).[15] Briefly, this subsection provided a deduction for an insurance premium for an insurance policy that is, in whole or in part, in respect of a current or contingent liability of the fund to provide death or disability benefits. In turn, death or disability benefits were defined to include:

- a benefit provided in the event of the death of the member, and
- a benefit provided to the member in the event of the permanent disability of the member.[16]

No further clarification on the meaning of 'permanent disability' was provided in the ITAA 1936 for these purposes.

However, the definition of 'permanent disability' used in various TPD policies generally does not match the above legislative definitions. Some of these TPD policy definitions have been, and are:

- inability of the member to perform any occupation
- inability of the member to perform his or her own occupation
- loss of independence, and/or
- loss of limbs or sight.[17]

The problem is that tax deductions have been given to superannuation funds in respect of TPD policy premiums, that do not provide payments, strictly speaking, for the legislative purposes outlined above. That is, some or all of these deductions should not, strictly speaking, have been allowed. The amendments in **Schedule 2** provide relief from this problem.

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13. Subsection 295-465(1) and section 295-460 of the *Income Tax Assessment Act 1997* (hereafter ITAA 1997).
14. Subsection 955-1 ITAA 1997.
15. This subsection, and Part IX of the *Income Tax Assessment Act 1936* (hereafter ITAA 1936) in which it lay, was repealed by Part 1 of the *Superannuation Amendment (Simplification) Act 2007* (No. 15 of 2007).
16. Section 267 of the ITAA 1936 (now repealed).
17. Explanatory Memorandum, p. 18.

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An additional problem

The payment of superannuation benefits is governed by the conditions of release found in Schedule 1 of the Superannuation Industry (Supervision) Regulations 1994 (SIS Regs). Generally, a superannuation disability benefit can be paid if a person meets the definition of 'permanent incapacity' in these regulations. This definition is very similar to the definition of 'disability superannuation benefit' noted above.[18]

However, where a superannuation fund makes a payment to a member, and the payment was for a purposes not exactly in-line with the conditions of release, that payment must be kept by the fund on the member's behalf until they are otherwise eligible to receive all their superannuation benefits. The Explanatory Memorandum gives several examples where this problem may arise.[19]

Policy Development

On 6 May 2010, Treasury released a consultation paper and exposure drafts of proposed legislative amendments, explanatory memoranda and associated regulations and called for submissions from industry. The closing date for submissions was 3 June 2010.[20] Seven submissions were received in response.[21]

Transition to what?

The relief provided by the provisions of **Schedule 2** extends from 1 July 2004 to 30 June 2011. From 1 July 2011, TPD insurance premiums will only be tax deductible to the extent that the relevant policy provides benefits in the circumstances outlined in the ITAA 1997 noted above.

Basis of policy commitment

The proposed changes were announced by the Minister for Financial Services, Superannuation and Corporate Law on 13 October 2009.[22]

18. Subregulation 6.01(2) of the Superannuation Industry (Supervision) Regulations 1994 (hereafter SIS Regs)
19. See Explanatory Memorandum p. 18.
20. Treasury, 'Transitional relief in respect of income tax deductibility of total and permanent disability (TPD) insurance premiums by superannuation funds', website, 6 May 2010, viewed 2 July 2010, http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1799
21. Treasury, 'Submissions: Transitional relief in respect of income tax deductibility of total and permanent disability (TPD) insurance premiums by superannuation funds', website, 24 June 2010, viewed 2 July 2010, http://www.treasury.gov.au/contentitem.asp?ContentID=1841&NavID=
22. C Bowen (Minister for Financial Services, Superannuation and Corporate Law), *Transitional relief for superannuation funds: deductibility or disability premiums*, media release, no. 27, Canberra, 13 October 2009, viewed 2 July 2010, http://mfsscl.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/027.htm&pageID=003&min=ceba&Year=2009&DocType=0

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Position of major interest groups

The Association of Superannuation Funds of Australia (ASFA) has stated that the proposed changes only go part way to fixing the problems in this area. It is also concerned that TPD premiums may rise, with coverage being lowered, despite the proposed changes. They are concerned that the proposed full tax deductibility for TPD premiums may only continue to 1 July 2011.[23]

A fund management tax expert has noted that the proposed provisions would cause a significant upheaval for many superannuation funds and insurance companies, as their TPD policies would have to be rewritten to conform with the requirements of the ITAA 1997 in order to continue to claim the relevant tax deduction.[24]

Six of the seven respondents to the Treasury consultation process mentioned above either had no overall comment on the proposed provisions or were comfortable with the overall direction of the proposed changes. However, all respondents provided substantial technical comment on the exposure draft of the legislation and explanatory memoranda.[25]

The seventh respondent, Mercer (Australia) Pty Ltd, considered that its understanding of the position that had existed before 1 July 2007, namely that all TPD insurance premiums were tax deductible, be retained.[26]

Pros and cons

The proposed provisions have several advantages:

- they provide tax certainty to superannuation fund trustees. If these provisions are passed the superannuation industry's understanding that all premiums paid in relation to TPD policies are tax deductible up to 30 June 2011 will apply. There will be no reassessment of a superannuation fund's tax liability arising from this source

23. P Vamos (Chief Executive Officer, Association of Superannuation Funds of Australia (ASFA)), *A better outcome needed for the disabled*, media release, Sydney, 15 October 2009, viewed 2 July 2010, http://www.superannuation.asn.au/mr091015/default.aspx
24. Andrew Mills (of legal firm Greenwoods and Freehills), cited in B Dunstan and J Kehoe, 'Great change looms for super', *Australian Financial Review*, 14 October 2009, p. 4. See also T Negline, 'Disability provisions deserve careful scrutiny', *The Australian*, 17 March 2010, p. 4.
25. Treasury, Submissions, op. cit. The six organisations in this category were AMP, ASFA, AXA, BT Financial Group, Colonial Mutual and the Institute of Actuaries of Australia. See Australian Government, Treasury, Superannuation – transitional relief for income tax deductibility of total and permanent disability insurance by superannuation funds : Summary of consultation process, June 2010, viewed 2 July 2010, http://www.treasury.gov.au/documents/1799/PDF/Consultation_Summary_TPD.pdf. I note that Treasury claims that all respondents supported the proposed changes.
26. Mercer (Australia) Pty. Ltd., Submission: Transitional relief tax in respect of tax deductibility of total and permanent disability insurance premiums by superannuation funds, 3 June 2010, p. 1, viewed 2 July 2010, http://www.treasury.gov.au/documents/1841/PDF/Mercer.pdf

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- the post 1 July 2011 policy will be clear. The superannuation, and insurance, industries will have time to adjust the wording of their TPD policies to conform with the requirements of the ITAA 1997 on this matter, and
- after 1 July 2011 amounts received by way of a successful claim on TPD policies whose wording has been adjusted to be in-line with the requirements of the ITAA 1997 noted above, will meet the permanent disability condition of release specified in the SIS Regs noted above. That is, the money will be able to be paid.

Financial implications

The Explanatory Memorandum states that these proposed measures would not have any financial implications.[27]

Key provisions

Part 1 – 2004–05 to 2006–07 income years

Item 1 specifies that any insurance premium paid by a superannuation fund from 1 July 2004 to 30 June 2007 is a premium to secure a death or disability benefit under the now repealed sub section 279(1) of the ITAA 1936 (as noted above). This means that these premiums are fully tax deductible to the superannuation fund making these payments.

These particular provisions in **Part 1** of **Schedule 2** do not amend any other legislation.

Part 2 - 2007–08 to 2010–11 income years

Item 5 inserts **new section 295-466** into the Transitional Provisions Act. This new section specifies that an insurance premium paid by a superannuation fund between 1 July 2007 and 30 June 2011 is to be treated as being paid to secure a 'disability superannuation benefit' for the purposes of the ITAA 1997. This means that the premium is fully tax deductible to a superannuation fund making such premium payments.

27. Explanatory Memorandum, p. 4.

Schedule 3 – Superannuation and relationship breakdowns

Background

The overriding policy principle in regard to the division of superannuation assets of a couple, who experience a relationship breakdown, is that these assets should be divided cleanly wherever possible. That is, there should be, as far as possible, a 'clean break' between the former partners in superannuation matters.[28] The two changes in **Schedule 3** further this aim.

As noted above, the two proposed changes will allow a superannuation fund trustee to accept 'in-specie' assets and to allow the equitable application of transitional arrangements in relation to in-house assets, where an asset transfers occurs as the result of a relationship breakdown.

What are 'in-specie' assets?

There is no formal definition of 'in-specie' assets for superannuation purposes. However, as noted above, these assets are generally understood to be assets in a form other than cash. That is, they can be assets such as listed securities, property and more controversially assets such as paintings, furniture, jewellery or other valuable collectables.

What are 'in-house' assets?

An 'in-house' asset is defined in sub section 71(1) of the SIS Act as an asset of the fund that is a loan to, or an investment in, a related party of the fund, an investment in a related trust of the fund, or an asset of the fund subject to a lease or lease arrangement between a trustee of the fund and a related party of the fund.[29]

Generally, only 5 per cent of a superannuation fund's assets may be 'in-house' assets.[30] Of particular importance for the proposed amendments in this schedule are the various provisions of existing Part 8 of the SIS Act.[31] Sections 71A to 71E provide exceptions for various assets purchased by a superannuation fund before 11 August 1999 from this general in-house asset rule.

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28. Explanatory Memorandum, Family Law Legislation Amendment (Superannuation) Bill 2000, p. 7. This Bill was enacted as the *Family Law Legislation Amendment (Superannuation) Act 2001* (No 61 of 2001), which was the main piece of amending legislation implementing the current provision of the *Family Law Act 1975* and other legislation dealing with the splitting of superannuation assets after a relationship breakdown.
29. CCH, *Australian Master Superannuation Guide 2010*, Topic 3-450 – In-house asset rules.
30. Sections 83C and 83D of the SIS Act.
31. Part 8 of the SIS Act deals generally with in-house asset rules applying to regulated superannuation funds.

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Self Managed Superannuation Funds (SMSFs)

In 2008 about 2.4 per cent of SMSFs had 'in-house' assets.[32] Certain assets are specifically excluded from the in-house asset definition in the SIS Act. For an SMSF, the most important exemptions are investments in business real property, leases between the fund and a related party, and investments in widely-held unit trusts.[33]

These exceptions mean that SMSFs are likely to have a higher proportion of assets that are 'lumpy', that is, they are assets that are not easily divided into smaller parcels. As at 30 June 2008 the general SMSF sector had the following asset allocation:

- residential property 3.3. per cent
- non-residential property 9.2 per cent
- artwork and jewellery etc 0.1 per cent
- other assets 5.4 per cent.[34]

Dividing these assets in circumstances where there is a relationship breakdown presents obvious difficulties. As they cannot be easily divided payment may have to be made in kind (i.e. in specie), rather than in cash. Further, specific title changes may have to be made in respect of these lumpy assets, if they are to stay in an SMSF. The proposed changes facilitate the division of these lumpy assets in the event of a relationship breakdown.

The demographic pattern of most SMSFs makes them particularly open to these problems. As of 30 June 2009 about 67 per cent of SMSFs had just two members.[35] By law, an SMSF can have no more than 4 members.[36]

The potential scale of these problems appears to be large and increasing. As at 30 June 2009 there were about 410 000 SMSFs with about 772 000 members. In terms of assets held, the sector's annualised growth rate is about 20 per cent a year.[37] The number of SMSFs rose by about 6.5 per cent in 2009. Stronger growth rates in the number of SMSF were experienced in previous years.[38]

SMSFs are regulated by the Commissioner for Taxation. Any administrative relief provided by the Commissioner from the provisions of the SIS Act and other legislation this office administers only applies to these funds. Such relief would not apply to funds administered by the Australian Prudential Regulatory Authority. Thus any solution to the problems mentioned below need to be implemented by legislation, if they are to apply to all superannuation funds.

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32. Review of the governance, efficiency, structure and operation of Australia's superannuation system (that is, the Cooper Review), *A statistical summary of self managed superannuation funds*, Canberra, 10 December 2009, p. 8, viewed 8 July 2010, http://www.supersystemreview.gov.au/content/downloads/statistical_summary_smsf/SMSF_statistical_summary_report.pdf
33. CCH, op. cit., Topic 5-455 – Investing in in-house assets.
34. Cooper Review, Ibid, pp. 13-14.
35. ibid, p. 8.
36. *S*ection 17A of the SIS Act.
37. Cooper Review, ibid, p. 2.
38. Ibid, p. 5.

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Position of major interest groups

In a submission to Treasury, ASFA supported the proposed amendments.[39]

Particular problems

Under existing subsection 66(1) of the SIS Act, a superannuation fund trustee generally cannot acquire assets from a person who is a member of that superannuation fund. While other parts of section 66 provide for exceptions to this general rule these other provisions do not apply where the fund in question has to receive in-specie assets not otherwise mentioned in this section, rather than cash.

Some relief from this particular problem, in circumstances arising from the breakdown of a marriage, has been given by the ATO in a tax determination.[40] However, the Explanatory Memorandum notes that this particular determination does not apply in circumstances where:

- assets are split on the breakdown of an opposite sex de facto or same sex relationship, and/or
- where assets are split and the receiving fund is regulated by the Australian Prudential Regulation Authority.[41]

Further, the transitional provisions applying to in-house assets in Part 8 of the SIS Act (see in particular sections 71A to 71E) do not apply to such assets transferred to a new fund under existing subsection 66(2A).

The proposed amendments overcome these specific difficulties.

Policy development

Treasury released an exposure draft of these provisions and related material on 6 May 2010 and sought comments from interested parties up to 3 June 2010. One submission was received. It supported the proposed changes (see above).[42]

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39. ASFA, *Submission – Exposure Draft – Superannuation Funds Acquiring Assets from Related Parties*, 3 June 2010, viewed 8 July 2010, http://www.treasury.gov.au/documents/1837/PDF/ASFA.pdf
40. Australian Taxation Office, *Self-managed Superannuation Funds (Assets Acquired on Marriage Breakdown) Determination 2006*, SPR 2006/MB1, 28 August 2006 (having effect from 2002), viewed 9 July 2010, http://law.ato.gov.au/atolaw/view.htm?docid=SLD/SLD2006SUPERMB1/00001
41. Explanatory Memorandum, p. 32.
42. Treasury, 'Exposure draft – Superannuation funds acquiring assets from related parties', website, viewed 9 July 2010, http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1802

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Financial implications

The Explanatory Memorandum notes that the expected financial impact of these particular amendments is 'unquantifiable, but expected to be small'.[43]

Key provisions

Item 2 inserts **new subsection 66(2B)** into the SIS Act. The effect of this new subsection is to provide an exception to the general ban on superannuation fund trustees acquiring assets from a member of that fund in circumstances of a relationship breakdown.

The proposed subsection covers asset transfers arising from the breakdown of opposite sex de facto, and same sex, relationships as well asset transfers arising from the breakdown of a marriage relationship. It will apply to all superannuation funds, not just those regulated by the Commissioner for Taxation.

Item 3 inserts **new section 71EA** into the SIS Act. The effect of this new section is to ensure that the existing transitional provisions of Part 8 of the SIS Act apply to 'in-house' assets when they are transferred to another superannuation fund as a result of a relationship breakdown.

Schedule 4–Other amendments

Schedule 4 contains a number of minor amendments to superannuation and taxation law. The following briefly addresses the proposed amendments.

Basis of policy commitment

The proposed amendments were announced as part of the 2010–2011 Budget.[44]

Financial implications

The Explanatory Memorandum notes that the proposed amendments in this schedule will have an 'on-going, but unquantifiable revenue impact'.[45]

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43. Explanatory Memorandum, p. 5.
44. Australian Government, *Budget measures: budget paper no. 2: 2010–11*, Commonwealth of Australia, Canberra, 2010, p. 49.
45. Explanatory Memorandum, p. 5.

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Key provisions

Items 1 to **17** amend the ITAA 1997 so that a person making a personal superannuation contribution may give a notice of their intent to have that contribution classed as tax deductible to a successor superannuation fund.

These provisions apply in circumstances where a person may have made a personal superannuation contribution to a superannuation fund and did not on that occasion notify the fund of their intent to claim this contribution as a tax deduction. If these benefits are later transferred to a successor superannuation fund (as may occur if two superannuation funds are merging) these provisions allow the person to give a tax deductibility notice to that successor fund.

Item 21 inserts **new subsection 290-85(1AA)** into the ITAA 1997. The effect of this new subsection is to allow a deduction for an employer's superannuation contribution made on the behalf of a former employee to an accumulation style fund, provided this contribution was made within in a 4 month period after that employee left that employer. An accumulation style fund is one where the benefits are made up of the relevant contributions plus associated investment earnings.

Item 21 also inserts **new subsection 290-85(1AB)** into the ITAA 1997. This new subsection also allows the employer to claim a tax deduction in relation to a contribution made to a defined benefit style superannuation scheme at any time after the employee ceased the relevant employment. Briefly, a defined benefit scheme is one where the benefits are determined by a formula (for example involving years of service and salary level).

Under current law this deduction is only available if the contribution is made within two months of that person ceasing employment.[46]

46. See section 290-85 of the ITAA 1997 which deals with contributions on the behalf of former employees.

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