



**Lindsay Stoddart, Stoddart Legal Pty Ltd**

Lindsay has a great depth of legal experience, with a legal career spanning over 30 years in the areas of business structuring, estate planning, trusts and church law. He rejoined Kells in 2010 after three years in Hobart as dean of St David's Anglican Cathedral.

At Kells, Stoddart created a suite of best quality testamentary trust wills and related succession planning documents. He is currently a director at Stoddart Legal Pty Ltd.

# HOW LONG WILL SMSF TAXATION CONCESSIONS LAST?

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The primary question is, of course, unanswerable. There is little in the wind but the unexpected is always possible, especially when Government's budgets are tight.

In the last budget we have just seen income earners with total income in excess of \$300,000 pa dealt the blow of increased concessional superannuation tax. This was raised from 15% in the dollar to 30 cents in the dollar. The increased tax assists the Government to take the 2012/13 budget out of deficit although only by a minuscule splinter.

Post Keating the provision of employer contributed and self-contributed superannuation had the primary goals of decreasing the call on the public purse (less of the retired population on Centrelink pension) and concomitantly the increase in retirement income and lifestyle.

## The Henry Report

Superannuation is a complex often changing area of retirement planning and taxation law. The Henry Report made a number of suggested reforms:

1. Concessional contributions tax should be abolished and replaced with employee's marginal tax rate paid by the employee in their tax return. In addition, subject to annual limits, all contributions would attract a tax offset payable to contributors;
2. All earnings of superannuation funds should be taxed at a rate of 7.5%;
3. The \$50,000 transitional cap for contributors aged 50 or older should be continued indefinitely;

4. Superannuation balances should be included in Age Pension means tests on the same basis as other savings;
5. Tax free status over 60 affirmed
6. The development of longevity insurance products should be encouraged and the government should consider offering such products itself;
7. Increase in Superannuation guarantee on staged release
8. Care services for the aged should in general be separated from accommodation choices and provided on a means tested basis – preferably, any future compulsory funding levies should apply to all personal taxpayers and not be linked only to the superannuation guarantee.

In the interests of the balanced budget a number of these recommendations have been expressly set aside or not taken on board.

## SMSFs continue to increase

The ATO has estimated that at the 30th December 2011 there were in excess of 458,500 self managed funds, with an average value so far as ATO records indicate of \$888,433. There are currently 873,000 members. Per member contributions at 30 June 2011 was \$466,909 (an increase over 2009 of \$36,000 approx.)

Total wealth of these funds is estimated \$400 billion, which is about 31% of total superannuation assets.<sup>1</sup>

None the less some argue the growth in the number of new SMSFs proportionate to the total of funds in prior years is decreasing.

Is the rapid increase of total wealth for the rich and the mega-rich a possible catalyst for the negative review of tax concessions?<sup>2</sup>

## The biggest danger is political

With the family residence the superannuation fund continues as one of two safe tax havens for the ordinary person.

Over recent months the Gillard Government has wakened the old class war (Battlers and the burgeoning rich). As late as the Henry Review we did not anticipate an increase in tax on concessional contributions.

Will the so-called wealthy face the reintroduction of unfair taxes on fund income and more importantly high net worth income streams post 60. These are currently tax-exempt.

As an estate planning lawyer I come across many SMSFs with member balances in excess of \$4,000,000 but I have, in my own experience, dealt with funds of \$6,000,000 plus.

It is possible with the limits now on concessional and non-concessional (\$450,000 for each member every three years) that the very large funds may at present be disproportionately high and will proportionately decrease with time. However there are large pockets of wealth in Australia and specialist superannuation planners. This is a subject beyond my expertise and I simply flag the idea.

On current popularity projections if they continue to the next election the Labor Government will not be returned (being apolitical for a wider readership for good or for bad) but just as we have seen the imposition of increased superannuation tax on high income earners, it is possible that the current taxation holidays may be attacked.

## The nature of the deed

### Review:

The SMSF deed is in the nature of a deed. As such apart from non-superannuation compliance and taxation questions, review lies not with the but with the Supreme Court of the State in which the fund is resident.

This is relatively expensive the Superannuation Complaints Tribunal by its charter being free.<sup>3</sup>

Other funds fall under the Superannuation Industry (Supervision) Act 1993 direct complaints to the Superannuation Complaints Tribunal.

"The Superannuation Complaints Tribunal is an independent tribunal set up by the Commonwealth Government to deal with superannuation-related complaints. Its purpose is to inquire into and resolve complaints about decisions of trustees insurers retirement savings account providers and other relevant decision-makers in relation to regulated superannuation funds approved deposit funds retirement savings accounts annuity policies and the surcharge contributions tax."<sup>4</sup>

## The deed

The fund only ceases on death of all members and funds paid out. In this sense the deed dies or is at an end when the fund has a nil balance. This is similar to deeds generally be they discretionary, bare or other trust deeds.

The trustees act under the relevant trustee acts of the states. They have onerous duties of care and

responsibilities covering many duties and including duties to invest prudently. A number of jurisdictions have seen reform of the investment powers but each State act should be reviewed independently. (The trustee acts e.g. NSW require updating.)<sup>5</sup>

The trustees will be liable in equity for breach of trust and referrals to the Supreme Courts of the relevant states will make decisions on the principles of equity and the common law. As in all equitable deed disputes the express terms of the relevant deed will be paramount.

Costs will always be an expensive impost on the fund. The trustees will generally be entitled to indemnity except in extreme factual situations (fraud, complete dereliction of responsibility and duty etc.)

It has been asked why an SMSF deed has no completion date like a discretionary trust deed, which in all states except South Australia are subject to an ancient rule, called the Rule against Perpetuities. This is often expressed as a period of 80 years from the date of the settlement by which the discretionary fund must vest. If no appointment is made by the trustee as to settling the fund at its discretion the deed has a mandated settlement.<sup>6</sup>

## Binding Death Benefit Nominations and estate planning

After the family home, superannuation and the self managed superannuation fund is the most effective tax planning vehicle (unless we can afford expensive off shore trusts and similar).

1. It is not unusual today to see large member superannuation contributions of several million dollars each.
2. Whilst financial planners and accountants are keen for all assets, especially in these larger funds to be retained in superannuation, that is not necessarily always the right estate planning conclusion.

Many BDBNs are inadequate for good estate planning. Many do not realise that the nomination is effective on payment not on death. The BDBN must be conditional providing for the next generation of benefit recipients. If there is a Testamentary Trust Will (TTW), and the recipients are well off retirement the appropriate nomination is in favour of the LPR.

- Joan has an estate of \$4,000,000. Her husband has superannuation member funds of \$3,200,000 and she has just less.
- She dies in a motor vehicle accident. The children are all in their late 20's.
- Joan has made a BDBN leaving \$1,000,000 in the fund to the husband's benefit. She nominates the balance to her LPR for investment in the Will trusts. There is no superannuation tax as it passes to her husband.



### The quote

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### The quote

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A BDBN may be contingent. The contingent provisions may be subject to the Trustee's reasonable consent.

A good superannuation trust in the TTW will allow the executors to minimise superannuation tax and yet equalise the various beneficiaries' gifts in accord with the Will makers decision.

Any number of scenarios could be portrayed. But this is not the point. What must be focussed on are these aspects of contingency and conditionality.

The question is: should sufficient funds be left in superannuation and residue funds brought into a testamentary trust where they can be more appropriately invested.

What if the current favourable taxation regime for superannuation changes in the future? The SMSF and the BDBN is an estate planning tool and exercise in itself. It is not just an add on. **FS**

## Sally & Roberts CPTs

Sally and Robert want their non-joint assets including superannuation to go into a capital trust. The survivor has no rights to capital (or limited rights with the consent of both daughters). In the event of her death Sally wants Robert to be free to marry but she must ensure these assets ultimately pass to her daughters.

Their assets are joint assets including their home in excess of \$3,000,000.

Individual assets are in excess of \$2,300,000 each.

Superannuation member accounts – Sally (\$1,100,000 and Robert \$1,650,000).

Sally wants her CPT to include her assets and superannuation.

A BDBN is made to the LPR and the superannuation funds are held pursuant to the superannuation trust for Robert as a tax dependent.

The daughter's interests are protected.

### Summary points:

1. Superannuation is a great vehicle with tax free status.
2. Especially when dealing with very large member accounts do we do a full estate planning exercise as to what amount should be retain in superannuation and is a testamentary trust an appropriate investment vehicle for all or part of that member's fund.
3. Will tax concessions ever be attacked? I am a lawyer with little by way of political intrigue, but remember the 2012'13 hike on high income earners concessional superannuation contributions

### Notes

1. *The Australian, 10 April 2012*
2. <http://www.triapartners.com/triapartners-blogs.php?article=content/Blog-SMSF%20high%20tide%20%28has%20SMSF%20growth%20peaked,%20part%20%29&type=MzA=>
3. See the NSW Supreme Court case of *Katz v Grossman [2005] NSWSC 934*. The facts In this case, Daniel Katz brought an action against his sister Linda Grossman and her husband Peter Grossman claiming an interest in their father's self managed superannuation fund. On the father's death Linda a director of the Trustee Company passed a resolution appointing her husband to the trustee company. The trustee company passed a resolution paying all superannuation funds to Linda. Daniel took the matter to the Supreme Court, which found

against him despite the moral merits of his claim. He lost his financial interest, he lost the case and had costs awarded. They both shared equally in the estate under the Will but, of course, superannuation, in the absence of a nomination is a non-Will asset.

4. <http://www.accc.gov.au/content/index.phtml/itemId/288111/fromItemId/815972/quickLinkId/816518/whichType/org>
5. Trustee Act 1898 (Tas), Trustee Act 1925 (NSW), Trustee Act 1925 (ACT), Trustee Act 1936 (SA), Trustee Act 1958 (Vic), Trustee Act 1962 (WA), Trusts Act 1973 (Qld).
6. In South Australia the Rules against Perpetuities and Accumulations have been abolished. However there is a statutory power of the Court to vest.