29 May 2014

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and

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Dear Mr Tilley and Mr Shepherd

Division 293 Tax - Defined Benefit Issues

We write to raise a number of issues associated with defined benefit aspects of the Division 293 tax legislation, mainly relating to end benefits and end benefit caps.

The Actuaries Institute is the sole professional body for actuaries in Australia. It represents the interests of over 4,100 members, including more than 2,200 actuaries. Our members have had significant involvement in the superannuation industry and the development of superannuation regulation, reporting and disclosure, interpreting financial statistics, risk management and related practices in Australia for many years.

We have set out our comments, queries and recommendations in the Attachment to this letter. Although some of our recommended outcomes may be achieved by appropriate interpretation and administration of the current legislation by the ATO, we think it is likely that legislative change in some areas may also be required. Hence we have addressed this letter to both the Treasury and the ATO.

We note that some of the issues were raised in our submission of 8 May 2013 on the exposure draft legislation. We are unsure whether the points raised were considered and accommodated in the final legislation or whether they resulted in no change being made.

Costs to superannuation funds

We wish to place on record our concern that funds are likely to incur significant costs to enable them to meet their reporting obligations in respect of end benefit caps. These costs are likely to be quite disproportionate to any tax savings that accrue to members as a result of the caps.

As pointed out in our submission of 8 May 2013, DB funds may need to keep additional records, such as the member's accrued multiple at 1 July 2012 and/or separate account balances relating to pre- and post-1 July 2012, purely for the purpose of the end benefit cap. Where such information is required to calculate the end benefit cap (as it will be in many cases), funds will need to keep this extra data for all DB members (just in case they do incur Division 293 DB tax) even though very few (perhaps none) will

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in practice be affected by Division 293 DB tax and even fewer (if any) by the end benefit cap.

Accurate calculations will potentially be very complex, with formulae needing to be developed to cater for variations in benefit design between different categories of memberships and, in some cases at least, individual member circumstances. For many funds, particularly those with many DB categories, or master funds with a large number of DB sub-funds, it will be a large and costly exercise which, as indicated above may benefit very few, if any, members.

Funds will also need to put in place processes to enable them to calculate and report the end benefit cap within 14 days of request by the ATO (rather than 30 days as requested by the Institute) – processes that will need to be durable until the last DB member leaves and may only be used a handful of times (or never) over the next 10, 20 or 30 years. As discussed in the Appendix, the timeframe is even longer - and the administrative processes will need to extend to ex-DB accumulation members as well as DB members - if crystallisation/cessation of the defined benefit can occur without giving rise to an end benefit. The additional costs associated with this latter situation could be avoided if our recommendations are accepted.

Costs for funds could be further reduced if the legislation specified a default formula for calculation of the end benefit cap, with funds permitted to adopt tailored formulae. Use of the default formula could not be challenged via the SCT. We would be pleased to discuss this option further should the Government be open to considering it.

Tax Agent Services Legislation

The Institute has been having discussions with Treasury for a number of years now about an exemption for actuaries from certain provisions of the Tax Agent Services (TAS) legislation (the most recent written correspondence being our letter of 27 September 2013 to the Treasurer).

The introduction of Division 293 end benefit caps provides a further example of actuarial advice potentially being inappropriately caught by the TAS legislation.

We note that trustees are not required by the legislation to seek advice from an actuary about the determination of end benefit caps. However we expect that trustees will almost invariably seek advice on this matter from their plan actuaries as it requires deep understanding of the defined benefit design and accrual process and how an accrued benefit can reasonably be apportioned between different accrual periods. Furthermore the calculation of the end benefit cap can be challenged by a member via the SCT.

Yet it appears that the TAS legislation may mean such advice can only be provided by a registered tax agent, since the trustee is likely to rely on the advice for the purpose of fulfilling an obligation under taxation legislation (i.e. reporting of end benefits caps).

We understand that it was not the intention of the TAS legislation to require actuaries to register as tax agents in order to advise on matters such as this and to prepare actuarial certificates as required under tax (including Superannuation Guarantee) legislation. We again request a legislative change to insert an appropriate exemption as soon as possible.

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Information to actuaries

The Institute's Superannuation Practice Committee is preparing a Discussion Note to assist actuaries in providing advice about the determination of end benefit caps and to stimulate discussion on this matter. The Discussion Note will provide information and raise issues for actuaries to consider in providing such advice. It will not set out mandatory guidance (which is provided via Institute Professional Standards) or set out generally accepted actuarial practice (which is provided via Institute Practice Guidelines).

We will provide a draft of the Discussion Note to the ATO for comment before it is issued to members.

Please do not hesitate to contact the Chief Executive Officer of the Actuaries Institute, David Bell (phone 02 9239 6106 or email david.bell@actuaries.asn.au) to discuss any aspect of this paper.

Yours sincerely

Daniel Smith
President

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Attachment

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1. End benefits should only be defined benefits

Section 133-130 of the Taxation Administration Act 1953 (TAA) provides that: "A *superannuation benefit is the ***end benefit*** for a *superannuation interest if it is the first superannuation benefit to become payable from the interest, disregarding a benefit that is any of the following…….". A copy of s133-130 is set out in Appendix 1.

The issue that concerns us is whether, for a member whose superannuation benefit includes both an accumulation component and a defined benefit component, a payment solely from the accumulation component of the benefit can be an end benefit.

There are many references in the Explanatory Memorandum (EM) to the Bills introducing Division 293 tax (the *Tax and Superannuation Laws Amendment (Increased Concessional Contributions Cap and Other Measures) Bill 2013* and the *Superannuation (Sustaining the Superannuation Contribution Concession) Imposition Bill 2013)* which appear to indicate that, for a member with defined benefits, the terms 'superannuation interest' and 'defined benefit interest' should be read as having the same meaning. For example, paragraph 5.2 reads:

> *"5.2 The amount of Division 293 tax is, generally, either:*
>
> - *due and payable within 21 days after the notice of assessment is issued, to the extent the tax relates to a superannuation interest that is an accumulation interest;*
> - *deferred for later payment and included in a debt account maintained by the Commissioner of Taxation (Commissioner) to the extent the tax relates to a superannuation interest that is a defined benefit interest; or*
> - *due and payable within 21 days after a superannuation benefit is paid from the* ***defined benefit interest*** *for which a debt account is maintained by the Commissioner." (emphasis added)*

In respect of the third dot point we note it uses the term 'defined benefit interest' whereas s133-130 refers to the superannuation benefit becoming payable from the 'superannuation interest', not the 'defined benefit interest'.

Similarly paragraph 5.86 reads:

> *"5.86 There are limited circumstances in which a superannuation benefit can be paid from* ***a defined benefit interest*** *for which the Commissioner keeps a debt account without triggering liability to pay the debt account discharge liability for that interest. These include circumstances where …….. " (emphasis added)*

We strongly support the outcome that an end benefit should only be a payment from the member's defined benefit interest i.e. a payment from any accumulation component of a defined benefit member's benefits should not be an end benefit.

We note that the ATO's interpretation appears to support this outcome, judging by the information provided on the ATO website at QC 25355 e.g. the reference to an end benefit being paid "from the defined benefit interest".

However we are concerned that these interpretations are not assisted by the definition of defined benefit interest in s.291-175 of ITAA:

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291-175 ***Defined benefit interest***

(1) An individual's *superannuation interest is a ***defined benefit interest*** to the extent that it defines the individual's entitlement to *superannuation benefits payable from the interest by reference to one or more of the following matters:

(a) the individual's salary, or allowance in the nature of salary, at a particular date or averaged over a period;

(b) another individual's salary, or allowance in the nature of salary, at a particular date or averaged over a period;

(c) a specified amount;

(d) specified conversion factors.

(2) However, an individual's *superannuation interest is *not* a ***defined benefit interest*** if it defines that entitlement solely by reference to one or more of the following:

(a) *disability superannuation benefits;

(b) *superannuation death benefits;

(c) payments of amounts mentioned in paragraph 307-10(a) (temporary disability payments).

Our understanding of the meaning of 'to the extent that' in part (1) of this definition is that, for a member whose superannuation interest includes both an accumulation component and a defined benefit component, the defined benefit interest is only the defined benefit component. Hence the terms 'superannuation interest' and 'defined benefit interest' are not interchangeable.

Hence we seek:

- confirmation that an end benefit should only be a payment from the member's defined benefit interest i.e. a payment from any accumulation component of a defined benefit member's benefits should not be an end benefit

and

- confirmation that an amendment is not considered necessary to achieve this outcome; or
- a clarifying amendment, if necessary.

Finally, we note that if payment of a superannuation benefit from the accumulation component of a defined benefit member's benefit would be an end benefit, the ludicrous situation would arise that if a defined benefit member used a release authority to pay Division 293 tax relating to their accumulation contributions (for example), this would be an end benefit which would trigger payment of their current Division 293 deferred tax debt - and require all future Division 293 tax on DB notional contributions to be paid immediately (on assessment) rather than deferred.

This situation could be addressed by adding payment of a superannuation benefit from the accumulation component of a defined benefit member's benefit to the list of end benefit exceptions. However this 'fix' would not address the administrative issues associated with allowing deferred debt accounts to continue after the associated defined benefit interest has ceased – refer section 2.1.

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2. When does the end benefit arise?

2.1 Does crystallisation of the DB interest constitute an end benefit?

Whether or not a payment from any accumulation component of a defined benefit member's benefits is an end benefit will have an impact on when an end benefit arises. If an end benefit is only a payment from a member's defined benefit interest, we seek clarity on the following situations:

(a) A member's defined benefit is converted to accumulation and the member remains in the fund as an accumulation member (with no defined benefit interest) – is the conversion of the defined benefit an end benefit?

<u>If an end benefit is only a payment from the member's defined benefit interest</u>, in our view the answer logically should be yes. However this would seem to require the internal transfer to meet the definition of a 'superannuation benefit', which appears questionable. If the answer is no, then it is difficult to see how an end benefit could arise subsequently, since there is no longer a defined benefit interest from which a superannuation benefit could be paid.

<u>If, on the other hand, 'superannuation interest' in s133-130 is not intended to be read as 'defined benefit interest'</u> and the transfer is not considered to meet the definition of a 'superannuation benefit', the answer logically would be no – an end benefit would not arise until a 'superannuation benefit' was paid i.e. there was a payment out of the fund.

(b) A defined benefit member leaves service and has the option to retain their leaving service benefit in the fund (the default) or roll it over to another fund; the defined benefit leaving service benefit is a lump sum; the member elects to retain their leaving service benefit in the fund where it will accumulate with investment earnings; the member no longer has a defined benefit interest in the fund. Is the leaving service benefit an end benefit?

Comments as for (a).

(c) A defined benefit member leaves service and has the option to retain a deferred defined benefit in the fund (the default) or to take a lump sum benefit and roll it over to another fund; the member elects to retain their benefit in the fund, thereby maintaining their entitlement to a future defined benefit. Is the leaving service benefit an end benefit?

On either interpretation, the answer should be no, as there has not been any crystallisation of the defined benefit interest. However we note that some such deferred benefit arrangements may follow similar process to examples (a) and (b) above, so that if an approach were to be adopted of deeming internal transfers to be superannuation benefits for end benefit purposes in order to cover cases (a) and (b), care would be needed to avoid inadvertently also catching cases of type (c). One way of achieving this would be to make the cessation of a defined benefit interest an end benefit.

(d) The deferred defined benefit member referred to in example (c) reaches age 65 at which time the defined benefit becomes payable as a lump sum (no pension option); the member has the option to retain their lump sum benefit in the fund (the default), to take it in cash or to roll it over to another fund; the member elects to retain their benefit in the fund where it will accumulate with investment earnings; the member no longer has a defined benefit interest in the fund. Is the age 65 defined benefit an end benefit?

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Comments as for (a).

The point at which a defined benefit interest is crystallised to a lump sum (including the crediting of such lump sum to an accumulation interest) will generally be clear. For example:

- In case (a) it will be the effective date of conversion to an accumulation benefit
- In case (b) it will be the date the member ceased service
- In case (d) it will be the date the member reaches age 65 (or earlier voluntary withdrawal date)

Hence in our view the date of crystallisation/cessation of a defined benefit interest would be a suitable date to deem that an end benefit has become payable from the defined benefit interest.

If crystallisation/cessation of the defined benefit interest does not constitute an end benefit, it is less clear when an end benefit will 'become payable'. Given the retained benefit options that now apply in most funds, an end benefit may not 'become payable' until a payment is requested by the member. This could conceivably be up to 20 or more years after the member ceased to have a defined benefit interest. It this is the intended outcome of the legislation, the rationale behind this is not evident on our reading of the EM.

Furthermore, we consider that it would be highly undesirable from a fund administration viewpoint for accumulation members to have Division 293 deferred debt accounts. Imposing the substantial and complex additional administration requirements associated with debt accounts (such as: special fields to flag members with debt accounts and maintain records to calculate end benefit caps; dealing with ATO - and potentially member - reporting requirements; member communications around debt accounts and end benefit caps, particularly at the time of a benefit payment) for a very small number of defined benefit members is bad enough without also extending these to the accumulation categories of defined benefit funds – including the fund's MySuper product (assuming it has one).

Deeming that an end benefit has become payable from the defined benefit interest at the date of crystallization/cessation of a defined benefit interest would avoid this by requiring the deferred debt account to be dealt with at that time, as part of the transfer of the member from defined benefit to accumulation. The deferred debt account complexity would then not be carried over into the accumulation category.

Hence we seek:

- confirmation that crystallisation/cessation of a defined benefit interest is to be considered an end benefit

and

- confirmation that an amendment is not considered necessary to achieve this outcome; or
- a clarifying amendment, if necessary.

2.2 End benefit notification requirements

We note that s133-135 of the TAA requires an individual who 'requests a superannuation provider to pay the end benefit' to notify the ATO of the request. On our reading this requirement would not be triggered in any of examples (a) to (d) above. However, if the answer to questions (a), (b) and (d) is yes and that view is promulgated by the ATO,

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we expect that funds would be required to report these types of cases to the ATO as end benefits.

We note there may be a practical problem with the time period for the fund's notification requirements in some circumstances. For example, in cases such as (b) above, it will often be some time after the member ceased service before the fund is notified of the cessation. Yet under s.133-140 of the TAA the fund must notify the ATO within 14 days after the earlier of:

(i) Receiving a request to pay the benefit; and
(ii) The benefit becoming payable.

As (i) is not applicable, (ii) will need to be the trigger for fund notification to the ATO. This results in a practical difficulty with the date the member ceased service being the date of the benefit 'becoming payable' as the fund will commonly not be advised of the termination until some weeks after the date the member ceased service.

Hence we believe the fund notification requirements may require amendment, for example to within 14 days of the earlier of:

(i) Receiving a request to pay the benefit; and
(ii) The benefit becoming payable or the superannuation provider becoming aware of the benefit becoming payable, whichever is the later.

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3. End benefit cap should be based on DB component only

The end benefit cap is defined in TAA s133-120(2) as the amount that is "15% of the employer-financed component of any part of the *value of the superannuation interest that accrued after 1 July 2012". A copy of s133-120 is set out in Appendix 1.

The use of the term 'superannuation interest' rather than 'defined benefit interest' in s133-120(2) raises similar concerns as are discussed in section 1 above in relation to end benefits where the member's superannuation benefit includes both an accumulation component and a defined benefit component.

The deferred debt to which the end benefit cap applies relates only to Division 293 tax on the defined benefit component of the superannuation benefit – hence for a member whose superannuation interest includes both an accumulation component and a defined benefit component, logically the cap should be calculated by reference only to the defined benefit component.

Paragraph 5.106 of the EM (refer below) provides some support for this interpretation by referring to the cap as applying to "protect individuals with defined benefit interests from paying amounts of Division 293 tax on estimated employer contributions for benefits that are ultimately not payable".

> *End benefit cap*
>
> *5.106 To protect individuals with defined benefit interests from paying amounts of Division 293 tax on estimated employer contributions for benefits that are ultimately not payable, the debt account discharge liability is limited to 15 per cent of the employer financed component of the value of the benefit payable to the member that accrues after 1 July 2012. An individual's debt account discharge liability is the lesser of the amount by which their debt account is in debit or 15 per cent of the employer-financed component of that part of the value of the superannuation interest that accrued since 1 July 2012. [Schedule 3, Part 1, item 2, section 133-120 of Schedule 1 to the TAA 1953]*

Hence we seek:

- confirmation that the end benefit cap should be calculated by reference only to the defined benefit interest;

and

- confirmation that an amendment is not considered necessary to achieve this outcome; or
- a clarifying amendment, if necessary.

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4. What benefit is the end benefit cap based on?

4.1 Value used and type of benefit

The end benefit cap is defined in s133-120(2) of the ITAA1953 as the amount that is "15% of the employer-financed component of any part of the *value of the superannuation interest that accrued after 1 July 2012".

Under s133-120(3), for the purpose of the end benefit cap calculation "the *value of the superannuation interest is to be worked out at the end of the *financial year before the financial year in which the *end benefit becomes payable".

We understand that the "value of the superannuation interest" is to be determined in accordance with s307-205 of ITAA1997, which also applies for determining the tax components of a superannuation benefit:

> **307-205 *Value* of superannuation interest**
>
> The ***value*** of a *superannuation interest at a particular time is:
>
> > (a) if the regulations specify a method for determining the value of the superannuation interest—that value; or
> >
> > (b) otherwise—the total amount of all the *superannuation lump sums that could be payable from the interest at that time.

Part (a) only applies in very limited circumstances, mainly where the benefit being paid, or commencing to be paid, is a defined benefit pension. (The relevant regulation is set out in Appendix 2.)

Secondly, we note that the calculation date for the end benefit cap is "the end of the *financial year before the financial year in which the *end benefit becomes payable" i.e. effectively the prior 30 June.

This specification of the timing along with the definition of the value of a *superannuation interest gives rise to a number of questions (in addition to the defined benefit component issue addressed at section 3 above) which are illustrated by the following examples:

> *Example 1 – Member has become eligible for early retirement benefit since prior 30 June*
>
> Ashleigh retires on 31 December 2014 after turning 55 on 1 December 2014. She is entitled to a lump sum (DB) early retirement benefit which is available to members retiring on or after age 55. Prior to age 55 the entitlement on leaving service is a resignation benefit which is generally significantly lower than the early retirement benefit.
>
> Ashleigh's end benefit cap is to be calculated at 30 June 2014. Under s.307-205, the value of the benefit to be used in the end benefit cap calculation is to be determined as the 'total amount of all the *superannuation lump sums that could be payable from the interest at that time'. This seems to be Ashleigh's resignation benefit at 30 June 2014, as she was not entitled to an early retirement benefit at 30 June 2014.
>
> Is this correct?

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Example 2 – Member dies

Boris dies on 31 December 2014. His beneficiaries are entitled to a lump sum (DB) death benefit which is substantially greater than his leaving service benefit.

Boris's end benefit cap is to be calculated at 30 June 2014. Under s.307-205, the value of the benefit to be used in the end benefit cap calculation is to be determined as the 'total amount of all the *superannuation lump sums that could be payable from the interest at that time'. This seems to Boris's resignation benefit at 30 June 2014, as he was not entitled to a death benefit at 30 June 2014.

Is this correct?

Would the same apply if Boris became eligible for a lump sum TPD benefit on 31 December 2014?

Example 3 – Member elects a retirement pension

Carmen retires on 31 December 2014 and elects take a DB lifetime pension.

Carmen's end benefit cap is to be calculated at 30 June 2014. At 30 June 2014 a defined benefit pension was not currently being paid for Carmen nor was a pension being commenced. Hence it would appear that s307-205 (a) would not apply and so the value of the benefit to be used in the end benefit cap calculation is to be determined as the 'total amount of all the *superannuation lump sums that could be payable from the interest at that time'. This seems to be Carmen's lump sum retirement benefit at 30 June 2014.

Is this correct?

If our suggested conclusion in any of the above examples is not correct, practical complications will arise, for example:

- it will make it even more prohibitive for funds to automate annual calculations of the end benefit cap for reporting to the ATO (if required) or to relevant members, as the calculation will vary according to the mode of exit
- if Boris's death benefit was 6 times Salary at the date of death and was also 6 times Salary at 30 June 2012, would the end benefit cap be zero? If not, how would it be calculated?

On the other hand, if our suggested conclusions are correct, the end benefit cap may not have its intended effect where the benefit paid is significantly less than the lump sum voluntary leaving service benefit. This is extremely uncommon, but we understand it may occur in very unusual circumstances in some public sector plans e.g. where a member dies with no dependants.

4.2 Need for clarity about the date at which a benefit 'becomes payable'

Given the calculation date is the prior 30 June there may be a significant impact on the end benefit cap if the benefit ' becomes payable' shortly after 30 June rather than shortly before. This is because an extra year's accrual would generally be included in the former case compared with the latter. It is therefore important that there is clarity about the date at which a benefit 'becomes payable' – refer to the discussion in section 2 above.

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4.3 Timing of assessments vs end benefit cap

Division 293 tax assessments are issued after the end of the relevant income year. We understand that this is the reason that the end benefit cap is to be calculated at the prior 30 June.

This effectively provides consistency between the accrual period for the end benefit cap and the accrual period for the Division 293 deferred tax where the debt account discharge liability includes all assessments for DB Division 293 tax which relate to the period up to the prior 30 June.

Clearly this will not be the case where:

- the assessment for DB Division 293 tax for the prior year has not yet been made, as will often be the case given that assessments are generally expected to issue in the second half of the subsequent income year; or
- where amended assessments are made relating to the period up to the end benefit cap calculation date.

We recommend that amendments be made to require the Commissioner of Taxation to cap any DB Division 293 tax assessments:

- which are made after the debt account discharge liability is determined; and
- which relate to the period up to the end benefit cap calculation date to the extent necessary to ensure that the total of the *debt account discharge liability paid plus the relevant subsequent assessments* does not exceed the end benefit cap.

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5. Restriction on use of release authority

A release authority for a debt account discharge liability is only valid for use with the fund that 'holds the superannuation interest to which the debt account relates". (TAA s135-40(3))

This appears to mean that a member who has rolled their benefit over to another fund will have to meet the debt account discharge liability from non-superannuation monies. This may cause financial difficulties (particularly where the member does not meet a condition of release), as well as being tax-inefficient.

Is this correct? Why is this restriction considered necessary?

This restriction is likely to result in complaints from members if the benefit is rolled over before the debt account discharge liability is paid. However funds are required to process rollover requests within 3 business days – this allows little time for the fund to clarify with the member whether they have considered the debt account issue. We also note that the member is required to notify the ATO within 21 days after making a benefit payment request and that the general interest charge starts to accrue from 21 days after the benefit is paid.

So if the member wants to have their debt account discharge liability paid from their superannuation and not incur further interest charges, in effect the member has to request the benefit be paid, but also request the benefit NOT be paid until after the debt account discharge liability is paid?

We note if the member does this, the period until their benefit is paid may not be insignificant:

- the fund has 14 days to advise the ATO of the end benefit cap
- the ATO then has an unspecified period to prepare and send the debt account discharge liability notice to the member
- the member then needs to complete and send the release authority to their fund; and
- the fund then has 30 days to process this.

We recommend removal of the restriction that a release authority for a debt account discharge liability can only be used with the fund that "holds the superannuation interest to which the debt account relates".

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6. General interest charge

We note that the general interest charge on the debt account discharge liability starts to accrue from 21 days after the benefit is paid.

As set in Section 1, in our view an end benefit should only be a payment from the member's defined benefit interest.

Where the first benefit paid from a defined benefit interest is a defined benefit pension, in our view the date the first benefit is paid would be the date the first pension payment is made. Hence the general interest charge on any outstanding debt account discharge liability would start to accrue from 21 days after this date.

However the situation for lump sum defined benefits is not so straightforward. In Section 2.2 we put the view that the date of crystallization/cessation would be a suitable date to deem that an end benefit has become payable from the defined benefit interest and provided a number of examples. For the general interest charge, a deemed date of payment would also be required.

We suggest this be the date that the debt account discharge liability notice is issued to the member. This would be consistent with the treatment of non-deferred Division 293 tax assessments.

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APPENDIX 1 – Legislated definitions of End Benefit Cap and End Benefit

End benefit cap is defined in section 133-120(2) of Schedule 1 to the Taxation Administration Act 1953 (TAA1953):

133-120 Meaning of *debt account discharge liability*

(1) The ***debt account discharge liability*** for a *superannuation interest for which the Commissioner keeps a debt account is the lesser of:

(a) the amount by which the debt account is in debit at the earlier of:

(i) the time the *end benefit for the superannuation interest becomes payable; and

(ii) the time a notice under section 133-125 is made; and

(b) the end benefit cap specified in a notice given to the Commissioner by the *superannuation provider under subsection (2) or section 133-140 (as the case requires).

(2) If requested by the Commissioner, the *superannuation provider in relation to a *superannuation interest must give the Commissioner notice of the amount (the end benefit cap) that is 15% of the employer-financed component of any part of the *value of the superannuation interest that accrued after 1 July 2012.

Note: A person may make a complaint to the Superannuation Complaints Tribunal under section 15CA of the Superannuation (Resolution of Complaints) Act 1993 if the person is dissatisfied with notice given to the Commissioner under this subsection.

(3) For the purposes of subsection (2), the *value of the *superannuation interest is to be worked out at the end of the *financial year before the financial year in which the *end benefit becomes payable.

(4) A notice under subsection (2) must be given:

(a) in the *approved form; and

(b) within 14 days of the Commissioner making the request.

End benefit is defined in section 133-130:

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133-130 Meaning of *end benefit*

(1) A *superannuation benefit is the ***end benefit*** for a *superannuation interest if it is the first superannuation benefit to become payable from the interest, disregarding a benefit that is any of the following:

(a) a *roll-over superannuation benefit paid to a *complying superannuation plan that is a *successor fund;

(b) a benefit that becomes payable under the condition of release specified in item 105 of the table in Schedule 1 to the *Superannuation Industry (Supervision) Regulations 1994* (about severe financial hardship);

(c) a benefit that becomes payable under the condition of release specified in item 107 of that table (about compassionate ground);

(d) a benefit specified in an instrument under subsection (2).

(2) The Minister may, by legislative instrument, specify a *superannuation benefit for the purposes of paragraph (1)(d).

(3) Despite subsection 12(2) of the *Legislative Instruments Act 2003*, a legislative instrument made under subsection (2) may be expressed to take effect from any time on or after 1 July 2012.

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APPENDIX 2 – Legislated definition of value of superannuation interest

The 'value of a superannuation interest' is defined for various tax legislation purposes (including the Div 293 tax end benefit cap) in s307-205 of ITAA1997 (refer section 4) and in the Income Tax Regulations 1997 (ITAR 1997) at:

Regulation 307-205.02 - Value of superannuation interest

(1) For paragraph 307-205(a) of the Act, this regulation:

(a) applies to a superannuation income stream or a superannuation annuity, other than:

(i) a superannuation income stream that is a pension mentioned in subparagraph 295-385.01(a)(i), (ii) or (iii); or

(ii) a superannuation income stream or a superannuation annuity for which the rules providing for the income stream or annuity are based on:

(A) an identifiable lump sum amount; or

(B) the amount available in the member's account; or

(iii) a superannuation income stream that is supported by a superannuation interest that can be valued under paragraph 307-205.02B (a); and

(b) specifies a method for determining the value of a superannuation interest at a particular time if the interest supports a superannuation income stream to which this regulation applies.

Note: The proportioning rule requires the tax-free and taxable components of superannuation to be paid out as benefits in the same proportion as they make up of the underlying interest. A value of a superannuation interest is required to ensure that the proportioning rule operates appropriately.

(2) The value of the interest at a particular time is the sum of:

(a) the product of:

(i) the annual amount of the superannuation income stream payable in respect of the superannuation interest at that time; and

(ii) the applicable factor set out in clause 1 of Schedule 1B; and

(b) the product of:

(i) the nominal value of the superannuation lump sum, if any, which is payable in respect of the interest at a time in the future, other than a future lump sum which is a commutation of the income stream included in

subparagraph (a)(i); and

(ii) the applicable factor set out in clause 2 of Schedule 1B.

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307-205.02A Superannuation income streams or superannuation annuities based on identifiable amounts—value of an interest

For a superannuation income stream or a superannuation annuity mentioned in subparagraph 307-205.02(1)(a)(ii), the value of the superannuation interest that supports the income stream or annuity is:

(a) the identifiable lump sum amount; or

(b) the amount available in the member's account.

307-205.02B Public sector superannuation schemes—value of an interest

A superannuation interest in a public sector superannuation scheme is to be valued:

(a) by using the practice for valuing a superannuation interest (other than an interest that supports a superannuation income stream mentioned in subparagraph 307-205.02(1)(a)(i)) that was used by the scheme immediately before 28 June 2007; or

(b) if there was not a practice for valuing an interest at that time—by using the method in subregulation 307-205.02(2).

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