ASHBY ROMA & CO

Client Information Newsletter - Tax & Super

December 2012

Key tax and superannuation changes in 2013

With the year end approaching, we run through tax and superannuation changes you can expect from January 1, 2013.

January 1, 2013

- The Dad and Partner pay will be available to eligible working fathers and partners who:
  - a) care for a child born or adopted from January 1, 2013
  - b) work full-time, part-time or are casual, seasonal, contract or self-employed workers
  - c) have worked at least 330 hours – just over a day a week – in 10 of the 13 months before the birth of their baby with no more than an eight week gap between two consecutive working days
  - d) earned $150,000 or less in the previous financial year, and
  - e) fulfil the Australian residency test.
- The SchoolKids Bonus replaces the Education Tax Refund. Around a million families will receive a cash handout of $820 for every high school child and $410 for every primary school child as part of the new bonus. The direct, upfront payments require no paperwork.
- The Government will limit eligibility for Family Tax Benefit Part A to young people under 18 years of age or, where a young person remains in secondary school, the end of the calendar year in which they turn 19. Individuals who no longer qualify for FTB Part A may be eligible to receive Youth Allowance.
- All unemployed single parents will lose the Parenting Payment when their youngest child turns eight. For unemployed partnered parents, the payment will stop when their youngest child turns six. Although the cut-offs were introduced in 2006, it did not apply to parents who were already receiving the support payment. Now, it will apply across the board and force these parents on to the Newstart Allowance while they seek employment. Also, recipients of the Parenting Payment will have compulsory part-time participation requirements when their youngest child turns six.
- There will be a more generous income test for single principal carer parents on Newstart Allowance that will allow them to earn around $400 more per fortnight before ceasing eligibility for payment.
- Individuals can travel overseas and continue to receive income support payments such as the Parenting Payment, Austudy, Rent Assistance and Family Tax Benefit Part A and B – among others – for only six weeks as opposed to 13 weeks.

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About this newsletter

Welcome to Ashby Roma & Co's client information newsletter, your monthly tax and super update keeping you on top of the issues, news and changes you need to know. Should you require further information on any of the topics covered, please contact us via the details below

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Also in this issue:

Key tax and superannuation changes in 2013 (cont)

- The government will increase a number of visa application charges for skilled graduates, partners, working holiday makers and temporary overseas workers.
- The government will restrict telehealth services to those patients for whom distance is the most significant barrier to accessing specialist care, meaning the eligibility criteria for the Medicare Benefits Schedule will be amended to exclude patients in outer metropolitan areas and major cities of Australia.

March 1, 2013

- Recipients of eligible income support payments will benefit from the introduction of a new lump sum Supplementary Allowance. The means-tested, tax-free, indexed payments will be an additional $210 a year for singles and $350 a year for couples – paid in two instalments in March and September.

July 1, 2013

- The Baby Bonus payment for second and subsequent children will be cut from $5,000 to $3,000.
- The maximum rate of Family Tax Benefit Part A will increase by $300 a year for families with one child and $600 per year with families with two or more children. The base rate of the Family Tax Benefit will increase by $100 per year for families with one child and $200 per year for families with two or more children.
- Newly unemployed Australians and students will no longer have to wait 13 weeks to access income support if they have liquid assets of up to $5,000 for singles without children and $10,000 for all others.
- The National Disability Insurance Scheme will begin operating in up to four locations across Australia. 10,000 participants will start being assessed, increasing to 20,000 from mid-2014.
- Self-managed superannuation fund (SMSF) trustees will be subject to a new exacting administrative penalties regime which gives the ATO power to issue penalties, rectification and "education" directions to individual trustees who contravene the SMSF rules.
- Auditors must be registered with ASIC by July 1, 2013 to be legally permitted to be engaged by SMSF trustees and to sign off on SMSF audits. ■

Why you need to think about estate planning

They say there are two things that are certain in life – taxes and death. Daunting as the latter may be, it is vital to devise an estate plan. All it takes is good advice, advanced planning and some serious thought. A complete estate plan will allow you to protect your hard-earned assets, determine who will make decisions on your behalf should you be unable to, and distribute certain assets to certain people. This benefits not only you, but also your family members who will not suffer financially or undergo irrevocable fallouts. We outline the various steps that need to be considered in estate planning below.

What counts as an 'estate'?

All assets of any value constitute your "estate". This includes property, business and farm interests, investments, superannuation, life insurance proceeds, personal property, art and other collectables, cash, antiques and so forth. *Note: assets owned under a joint tenancy arrangement will pass to the surviving joint tenant(s) upon death.*

Who needs to plan their estate?

The amount of planning required depends on your stage in life. If you have dependants, own anything of value or have financially complicated affairs, it is crucial to plan your estate. A plan should be reviewed periodically or when your circumstances change – such as when you buy a house, get married or divorced, have children or stepchildren, or go in or out of business.

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Things to think about

You should formulate your estate plan by taking into consideration the fair market value of your assets, how you own them, how much income they produce, their growth potential, their liquidity, and which assets should be passed to specific individuals It is important to consider the following when you plan your estate:

- personal and financial goals
- asset protection
- minimisation and deferral of tax liabilities
- planning for illness or incapacity
- selection of guardians and personal representatives
- how to manage and distribute any assets to minors under the age of 18, and
- succession strategies for family businesses.

Estate planning checklist

Use the checklist below to help clarify what you would like to happen to your estate:

1. Do you have a valid, legal will? For a will to be legally valid, it must be in writing and witnessed in the proper manner.
   - Is it up-to-date?
   - Does it nominate a guardian for your children if they are under 18, and does it cover children from previous relationships?
   - Has it taken into account your wishes for any specific assets, or specific beneficiaries?
2. Have you appointed an executor?
   - Are they a good choice – can you trust them?
   - Can they handle the emotional and time demands as well as the ongoing administrative tasks?
   - Do they have the necessary financial and legal knowledge?
   - Do they understand that they are financially liable for any mistakes they make in the administration of your estate?
   - If you're unsure about your executor, have you considered choosing a "professional" executor such as an accountant?
3. Have you determined whether a power of attorney is required and who should be appointed in that role?
4. Do you have a complex family situation? Any family that involves marriage, divorce, merged families or disabled family members requires careful planning.
5. Have you nominated beneficiaries in any funds you might have, such as super or life insurance funds?
6. Have you made a binding death benefit nomination? This removes any uncertainty about who receives your super and allows you to say how you want your retirement savings distributed.
7. Have you left instructions with your executor for funeral arrangements and organ donation?
8. Does your spouse, children or executor know the contact details of financial, legal or professional advisers you may have been dealing with?
9. Are there any debts that will need finalising?
10. Does your estate plan incorporate the possibility of someone making a claim on your estate?
11. Have you considered how the capital gains and land taxes as well as various state and territory duties might affect the value of your estate?
12. Does your business have a succession plan?

What to do if you have a business

It is wise to consider succession planning in the aftermath of your death if you have a business. What will happen to your business when you die? Who will take over? Will your family be compensated for any stake in the business? Will the business continue or close? A good succession plan should prepare for any and all of these scenarios to ensure your business is managed according to your wishes and your family is financially secure.

If you want to sell your business, decide if you want to sell the shares in the company through which the business operates, or only the assets of the business — there can be differing tax consequences from each. The tax consequences would differ yet again if the business structure is a trust or partnership rather than a company. Consult this office about the various options.

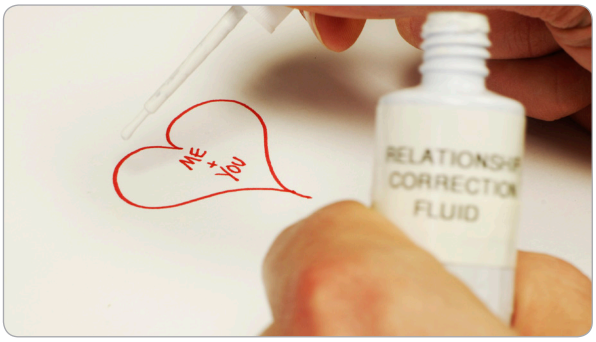
Remember also that the treatment of benefits from the super fund will need to be dealt with if there is a self-managed superannuation fund (SMSF) which includes business assets.

Talk to a professional

Sorting out the contents of your estate can be complicated – especially where family discretionary trusts, SMSFs, private companies, jointly held assets or other financial and personal interests are involved. It is recommended that you consult with a tax professional to ensure your assets are dealt with properly through an easily administered and comprehensive estate plan. Speak to this office if you need help with your estate planning. ■

Superannuation and relationship breakdown

Gone are the times of matrimonial longevity. Instances of relationship breakdowns are far from uncommon, with the Australian Bureau of Statistics indicating that as many as one in three marriages end in divorce.



The division of assets is among the key issues needing to be addressed whenever a relationship breaks down, with superannuation one of the biggest assets of any long-term partnership.

Changes to the Family Law Act in 2002 and further amendments in 2005 have now accorded superannuation the same status as any other asset of a long-term partnership that can be split between individuals in the partnership. Now there are "splitting superannuation" laws which means to split a member's superannuation benefit and allocate a certain portion of the benefit into the superannuation account of that member's spouse, either within the same fund or rolled over into a newly nominated fund. The laws apply to married couples as well as de-facto couples, which includes same sex couples, in most states and territories.

Couples can work out what proportion of a superannuation interest will go to each person through a financial agreement if the relationship breakdown is amicable. If the breakup is acrimonious, however, and lawyers are involved, the Family Court has a four step process through which it will go when assessing any parties' interest to the division of superannuation:

a) Ascertain and value the asset pool
b) Assess the contributions by both parties – both direct and indirect, financial and non-financial (contributions "made in the capacity of homemaker or parent" are always taken into account and it is immaterial if one partner was the sole financial contributor to the super fund)
c) Consider the future needs and income-earning abilities of both parties
d) After having considered steps 1-3, make orders which are fair and equitable.

Splitting superannuation does not convert it into a cash asset as it is still subject to superannuation laws – such as the fact that it is inaccessible until a person reaches preservation age.

In the event of any relationship breakdown and superannuation split, you need to obtain valuation information for your super benefit and decide on a method to split the superannuation – both of which we go into below.

STEP 1: OBTAIN VALUATION INFORMATION

The value of your superannuation is contingent upon the type of fund to which you belong. The table on the following page summarises how you obtain valuation information for each fund.

STEP 2: DECIDE THE METHOD OF SPLITTING

The options for splitting superannuation are to:

- enter into a formal written agreement (a formal written agreement requires that both you and your partner instruct a lawyer who must sign a certificate stating that independent legal advice about the agreement has been given. If this agreement is made, you do not need to go to court but each person must retain a copy)
- seek consent orders to split superannuation, or
- seek a court order where agreement cannot be reached.

A splitting order divides a superannuation entitlement between a member and a non-member of the fund. There are three ways to split a superannuation interest, by specifying:

a) the base amount of the superannuation benefit which the non-member spouse will receive. The base amount is a dollar amount upon which the parties agree the non-member will receive from the member's superannuation interest
b) a method by which a base amount can be calculated, or
c) a percentage which the non-member spouse will receive.

The most common splitting method is the base amount method. In a case where both husband and wife are working and have accrued their respective

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Accumulation superannuation funds and defined benefit funds

In an accumulation fund (which is what many Australians belong to), the value of your benefit depends on:

- how much money your employer contributes
- how much extra you contribute
- how much your fund earns from investing your super
- the amount of fees charged, and
- the investment option you may choose.

A defined benefit fund is infinitely more complicated but far less common. Each defined benefit fund can have its own set of unique provisions.

To value your benefit, you need to provide the following forms to the trustee of the superannuation fund:

- Form 6 declaration, and
- Superannuation Information Request Form.

The valuation of superannuation benefits can be complex and you may need legal advice.

SMSFs and Small APRA funds (SAFs)

The value of a member's benefit in an SMSF and SAF typically consists of the member's account balance plus their share of any reserves.

The value of the assets is normally found in the financial statements of the SMSF or SAF. Members are required to revalue the assets each year to ensure the value of the assets reflect the current market value.

There are a range of potential matters that should be considered when valuing an SMSF or SAF, including:

- the value of assets at the date of the cohabitation, separation and close to the court hearing, and
- any tax implications that superannuation splitting may have upon a relationship breakdown.

When a spouse leaves an SMSF, administrative measures have to take place according to whether an individual or corporate trusteeship is being utilised:

- individual trustees are required to amend the ownership of their investments by notifying all relevant share registries, banks and title offices and changing the names shown on the ownership documents such as a title deed. A transfer of numerous investments – particularly in real estate and shares – involves the transfer of the new titles for all assets and is likely to expend a significant amount of time, effort and money. Trustees must also prepare a deed of retirement for each outgoing trustee.
- corporate trustees have to notify ASIC within 14 days of the change. Legal titles of all assets remain vested in the company which continues to act as a trustee.

SAFs are in a better position than SMSFs in the event of a relationship breakdown as members are not trustees of the fund so there is less red tape to adhere to. When a spouse leaves an SAF, a six-month grace period applies. The breathing space allows membership of the SAF to be reorganised.

Alternatively, spouses in an SMSF or SAF also have the option of staying in the fund. If they choose to split their superannuation at a later date, they will have to value the assets in their fund and decide on a method to split it, which we go into below.

SMSF and SAF assets are typically valued with the assistance of an expert such as an accountant. Consult this office.

Superannuation and relationship breakdown (cont)

superannuation, one spouse will be the recipient of a superannuation benefit – thus according them the "non-member" spouse title.

Dividing the super fund can see one portion rolled over to another account in the same fund in the name of the "non-member spouse" or transferred into another fund altogether. The tax-free and taxable components are determined and proportionally split between the two. A roll over within the same fund will generally be tax-free to the fund. Anything that happens to the non-member spouse's balance, like contributions, investment earnings and benefit payments, will be subject to the usual tax laws.

Investment earnings may be divided in the pre-retirement phase either as an agreed amount or percentage. Interests divided in the payment phase (when the member is a recipient of pension and an income stream has already commenced for the "member spouse") are divided as a percentage of the regular pension payments. In most cases, the income stream will be stopped while the benefit is divided and recommenced under the new arrangements.

Alternatively, parties can defer their agreement about how a super interest is divided by "flagging" the super interest, preventing a trustee from making any payments out of it until the flag has been lifted. "Flagging" may occur because there is a case for maintaining the account and dividing it later, especially where doing so is likely to lead to greater growth of the final amount.

Splitting superannuation is complex, so be sure to consult this office on all matters pertaining to it in the unfortunate event of a relationship breakdown. ■

How to deal with SMSF trustee disputes

Everyone goes through the odd rough patch in their relationships with one another and self-managed superannuation fund (SMSF) trustees are no different. But the ramifications of a dispute between SMSF trustees are likely to be more severe than the average quarrel between friends because SMSF trustees have vested interests, established duties and legal responsibilities towards the fund, where if breached, can result in severe penalties.

How can disagreements between trustees come about?

SMSF trustees are required to sign a trust deed that requires them to adhere to certain responsibilities, some of which require them to:

- act honestly in all matters concerning the fund
- exercise skill and diligence in managing the fund
- act in the best interests of all members
- keep the money and assets of the SMSF separate from personal money and assets
- retain control over the fund
- develop and implement an investment strategy as well as make investment decisions
- not enter into contracts or behave in a way that hinders them or other trustees from performing or exercising function or powers
- allow access to information for all members, and
- not allow early access to the fund.

Together with all the superannuation laws – and the corporate trustee constitution in the case of corporate trusteeships – a trust deed forms an SMSF's governing rules which will include such things as the duties and obligations of trustees, the payment of member benefits and fund administration.

Personal interpretation of how best to adhere to these duties can lead to disputes. For instance, an overriding requirement of every SMSF is that it fulfils the "sole purpose test" – that the fund is established to provide benefits to each member at retirement age or to a member's dependants upon the member's death. There are, however, various ways to achieve a common goal and disagreements are not uncommon.

Various issues can give rise to disputes. What to invest in and how much to invest can be a hotbed of discussion, because notwithstanding the fund's

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written investment strategy, trustees can have different opinions on how best to satisfy strategies on diversification and asset allocation.

Other issues that regularly crop up are typically regarding the allocation and payment of death benefits, the end of business partnerships, treatment of business real property and disagreements between spouses.

Another area where disputes commonly occur is if the SMSF considers admitting new members into the fund. One trustee may be eager to bring in a family member or a new spouse that other trustees may have no wish to be financially involved with.

What are the best ways to prevent a dispute?

Disputes are unpleasant but they are unavoidable in many circumstances. They commonly arise when there are two or four trustees – a situation that serves as a breeding ground for deadlocks. Where there are three members, two can outvote one and where there is a single member (such as in a corporate trusteeship), no disagreements will arise – making a single-member SMSF the safest fund of choice.

Each trustee must act in the best interest of all fund members irrespective of any differences that emerge between trustees. For instance, a trustee cannot exclude another trustee from making decisions concerning the SMSF, cannot unlawfully withdraw money from the SMSF and must address each trustee's requests – that is, when it comes to requests to redeem assets and transfer super savings into another superannuation fund.

Trustees can establish certain "deadlock-breaker" provisions - provided there is more than one trustee in the fund – to minimise the likelihood of disputes:

- carry out a trustee decision only if a simple majority of trustees agree to it, or if a unanimous vote by all trustees is made,
- make a notice of a trustee meeting in writing with a minimum notice period,
- allow voting by proxy, telephone or email, or to be more strict, stipulate that if a trustee cannot attend a meeting, they do not get a vote on decisions dealt with at that meeting, and
- conversely, only allow decisions to be made if all trustees are physically present at a meeting.

The trust deed is typically the first port-of-call in a dispute. Trustees of SMSFs should consider inserting dispute resolution measures or advance guidance on how disputes can be approached into their trust deed. A handy way to prevent the mismanagement of assets in the case of a dispute is to use safeguards such as joint bank account signatures.

What are the best ways to resolve a dispute?

If a dispute is well and truly underway, there are steps in place to ensure the matter is dealt with. Disagreements can either be settled through alternative dispute resolution techniques – such as mediation, conciliation and arbitration – or via a court hearing for more serious cases.

The ATO is not involved in resolving disputes between trustees unless the dispute is over a breach of superannuation law, and even then any intervention is to iron out regulatory issues. The ATO can provide general advice about your options in resolving disputes, but cannot provide specific guidance so there is little regulatory assistance for SMSF trustees. Consult this office for more advice in the event of disputes.

Those SMSFs that use a corporate trustee structure may have mechanisms to deal with dispute resolution through the Corporations Act and regulations or may be able to obtain guidance from the corporate trustee's constitution.

No compensation scheme exists for SMSFs in the case of disputes, but APRA-regulated SAFs have more readily available redress options including a grant of financial assistance as statutory compensation and access to the Superannuation Complaints Tribunal which deals with complaints about the decisions and conduct of APRA-regulated fund trustees. You may wish to read the article in the October Monthly Client Newsletter entitled *SMSF or SAF: Which Super Fund Option Suits You?* if you want to know more about the differences between the two types of funds. Contact this office if you have not got a copy.

Throughout the dispute resolution process, trustees must ensure their fund remains compliant with superannuation law. One important step that should not be overlooked is the updating of legal documents in the aftermath of a dispute where a trustee has left the fund.

Ramifications

If a fund does not comply with superannuation law during a dispute, the ATO can deem the fund non-compliant – which is more than a slap on the wrist as this will remove the SMSF concessional tax treatment and tax the fund at the highest marginal tax rate, 45%.

Measures can be carried out to mitigate disputes, but the fact remains that SMSFs with more than one trustee will never be completely immune from disagreements. That aside, a well-drafted trust deed, a rational outlook as well as prudent planning can assist with or better still prevent such disputes from arising.

Consult this office for tips, advice and assistance in preventing and resolving disputes within an SMSF. ■

Is property co-ownership viable for you?

The significant cost of buying into property may lead many younger investors and aspiring home-owners to pool their resources to buy real estate jointly – and taking this path can be a good first step towards final individual home ownership.

But deciding to buy a home with a friend, a family member or business partner must by necessity be done with some important safeguards in mind, and awareness of certain pitfalls to avoid, to ensure the arrangement works.

Co-ownership involves two or more people pooling funds and sharing the ownership of a property as "tenants-in-common", as the parties to the arrangement are known. Tenants-in-common can own equal or unequal interests.

This is unlike buying property as "joint tenants", as many couples often do, which is the holding of property by two or more in equal shares. If one owner dies, for example, his or her share automatically goes to the other. But as tenants-in-common, when one party dies their share of the property can be left to anyone they may have nominated in their will.

Co-ownership does not necessarily mean that owning real estate has to be vastly different to more traditional property ownership, except that the share of ownership has to be defined as each party may own a specified percentage and this needs to be stipulated on the title.

Co-ownership also allows parties, for example, to sell or transfer their share without having to sell the property as a whole. Another advantage is that the combined borrowing capacity (as each co-owner will borrow individually) can be larger than a buying couple would have of their own accord. (Although it should be pointed out that many if not most loan providers will require each borrower to be "jointly and severally" liable for the whole debt, which is why it is paramount to get good legal and financial advice.)

Property experts have recently reported that they are seeing more and more people buy property as tenants-in-common, even couples. It has also become more common for friends or family members such as siblings to buy real estate together. Of course buying a property alone or together with others to live in or as an investment depends on personal circumstances.

As with most financial arrangements, there can be a downside to co-ownership. Disagreements can crop up, but also the ongoing financial viability of each co-owner may not necessarily be assured. If one can't afford to make their loan repayments, for example, the remaining members may end up being held responsible for making up these loan repayments for the property. So it is important to enter into any such co-ownership arrangements with people you trust and that are reliable.

Get it in writing

A co-ownership agreement, setting out people's rights and obligations in relation to the property, must be put in writing and signed before you buy as tenants-in-common, and can include terms covering:

- the division of any profits or losses when the property is sold (important for capital gains)
- obligations on each co-owner to repay their loan on time
- the splitting of operating expenses
- a mechanism to protect a co-owner against default by another co-owner
- a plan on being able to sell out
- a dispute-resolution clause.

With borrowing, generally all the usual lender criteria will need to be met by each borrower, but some lenders may also allow the loan to be structured so that, while all borrowers may still be "jointly and severally" responsible for the whole debt, the loan can be split so that each party can make separate repayments to cover their share.

Borrowers in a co-ownership agreement can apply for the First Home Owner Grant, which is run by the state and territory governments. If eligible, they must share the $7,000 tax-free proceeds. Several state and territory governments offer additional bonuses to first-home buyers, such as stamp duty exemptions or discounts on property transfer duty. ■