



**MINUTES OF MEETING OF VICTORIAN STATE CHAPTER
HARWOOD ANDREWS PTY LTD
HELD AT LEVEL 13, 15 WILLIAM STREET, MELBOURNE
ON MONDAY 8 AUGUST 2011 AT 5.00 P.M.**

Present:

Andrew Cullinan (Chair)
Claire Malone
Amanda Morton
Steven Skoglund
David Baumgartner
David Burrows
Belinda O'Halloran
Supriya Ranade
Ivy Chong
Robert Paganin
Kim Quach
Amanda Davidson
Julie Tilley
Philip Borrello
Michael Martin
Michael Sutherland
Darren Wilson
Michael Harkin
Adrian Beckwith
Gabrielle Teys
Philip Broderick
Ian Waters
Ava Chen
Mary Bailey
Paul Troiano
Sam Marzano

Leebridge Group
Harwood Andrews Lawyers
Harwood Andrews Lawyers
Davidsons Accountants
Baumgartner Superannuation
Baumgartner Superannuation
Baumgartner Superannuation
Baumgartner Superannuation
Baumgartner Superannuation
Mutual Trust
Mutual Trust
Ibbotson & Moscatelli
Bentleys Melbourne Pty Ltd
Leebridge Group
Leebridge Group
Fordham Business Advisors
Fordham Business Advisors
Financial Review Professional Education
Adrian Beckwith Chartered Accountant
JB Were
DLA Piper Australia
Topdocs Legal
Boss Private Clients
Boss Private Clients
Boss Private Clients
Boss Private Clients

In Geelong office

Nil

By telephone

Robert Shelton

Everalls

Apologies:

Rob Jeremiah
Naomi Pavlakis
Joanna Monahan
Marie De Stefano
Rachel Williams
Aileen Fulton

Harwood Andrews Lawyers
Harwood Andrews Lawyers
Harwood Andrews Lawyers
Harwood Andrews Lawyers
Fordham Business Advisors Pty Ltd
Fordham Business Advisors Pty Ltd

1. Welcome:

A Cullinan opened the meeting at 5.05pm AEST.

A Cullinan welcomed new SISFA member Rob Shelton, who attended by telephone from the ACT.

2. Apologies:

R Jeremiah was an apology and A Cullinan chaired the meeting in his absence.

3. Minutes of last meeting:

The minutes of the last meeting were not tabled as they were not available. It was noted these would be made available at the next meeting.

4. Technical session

4.1. Pensions: TR 2011/D3

The recently released TR 2011/D3 regarding when a superannuation income stream commences and ceases was tabled for discussion.

It was noted that SISFA will be preparing a response to the draft ruling and all members are welcome to provide input.

It was agreed that the ATO's views on when an income stream commences are broadly correct and there is nothing in this respect that is cause for concern. However, it was agreed that its statements regarding when an income stream ceases are more controversial. The following points were discussed:

- The draft ruling states that when a pensioner dies, the income stream does not cease if it automatically reverts to another person (whether this is a term of the pension agreement or as a result of a binding death benefit nomination (**BDBN**)). However, if it does not automatically revert the income stream ceases on the date of death of the pensioner.
- SISFA had previously made a joint submission with other industry bodies which argued that an income stream does not cease on death. In SISFA's view, in the scenario where a person dies without a spouse who can be transferred the income stream, the income stream does not cease until the final payment is made to the deceased's legal personal representative or superannuation dependants.
- One significant consequence of an income stream ceasing on the date of death of the pensioner is the loss of the income tax exemption, which means there will be capital gains tax liabilities when the assets that were supporting the income stream are sold or transferred (as well as income tax on the ordinary income).
- If there is a surviving spouse who receives a reversionary income stream but this does not occur automatically (ie, it occurs because of the exercise of the trustee's discretion), the loss of the pension exemption for the period between the date of death and the commencement of the income stream to the spouse could, even if it is a very short period, result in inconvenience and potentially adverse taxation consequences. It was suggested that the fund would need to obtain an actuary's certificate for that year and, if there were any capital gains realised prior to the death of the original pensioner and the fund did not have segregated pension assets, the fund could face adverse tax consequences as the actuary's certificate is based on the entire income year and not just the period prior to death.
- The ATO also states generally that if the minimum payment required under the *Superannuation Industry (Supervision) Regulations 1994* (SISR) is not made in a particular income year, the income stream will be taken to have ceased at the start of that income year. This raises the prospect of the income stream of a member who dies during a particular income year without having withdrawn the minimum amount required being taken to have ceased at the start of that income year rather than the date of death. The loss of income tax exemption for the entire year could have ever greater adverse taxation consequences.
- Some apparently "reversionary" pension documents might not be recognised as such if the superannuation fund's trust deed effectively overrides this and provides the trustee

with a discretion as to payment of death benefits. Trustees will need to have their deeds and pension documents reviewed to ensure the income stream will automatically revert.

- Even if a BDBN binds a trustee to pay the deceased's benefits to the spouse in the form of "a pension", it could be unclear whether this is in fact a reversion of the same existing income stream or possibly the commencement of a new income stream.
- It is also concerning that the ATO's recognition that an income stream could be made automatically reversionary via a BDBN is not included in the actual draft ruling itself but in the detailed explanation (at paragraph 115), which does not bind the Commissioner.

Other points that were raised in relation to the ruling included the following:

- Paragraph 53 of the draft ruling states that the SISR requires that a certain minimum amounts must be paid "to the member" each year. However, the SISR does not actually require the amount to be paid to the member but just states that the total "payments" must be at least the prescribed amount (and the regulations state that this applies to an income stream where there is an account balance attributable to the "beneficiary", not the member).
- Paragraph 16 states that if the requirements under the SISR are not met in a particular year and the income stream ceases for income tax purposes, a new income stream commences for income tax purposes if it later meets the requirements again in a future year (even though under the terms of the trust the same income stream has continued to be paid at all times). The ATO should clarify that this does not require any new pension documents to be prepared.
- It seems unusual for the ATO to suggest that a commutation is effective when the member requests it (rather than when it's agreed to). This appears to be inconsistent with the ATO's approach to when an income stream commences, which is not necessarily when a request or application is made but which is determined by reference to factors such as the terms and conditions of the pension agreement and the trust deed.

4.2. SISFA's submission to Treasury regarding conversion to a regulation 13.22C compliant trust

A recent submission made by the Technical and Policy Committees of SISFA to the Assistant Treasurer was tabled and discussed by C Malone. This concerned the conversion of unit trusts to meet the requirements of regulation 13.22C of the SISR, specifically where a superannuation fund invested in the unit trust before 12 August 1999 and the unit trust has undertaken a borrowing after 28 June 2000.

It was noted that the technical issues surrounding the ATO's interpretation of the regulations have been discussed at previous State Chapter Meetings. The submission argues that there is possibly a defect in the drafting of the regulations because the outcomes produced as a result of the ATO's interpretation were arguably unintended.

The submission also canvasses some policy arguments in support of amending the regulations. It argues there is no reason to distinguish between unit trusts that undertook borrowings before and after 28 June 2000 because, if all borrowings are now discharged, the distinction is of no consequence to the superannuation fund investor today. It is also argued that, if the ATO's interpretation of the regulations is adopted, a fund that wanted to leave open the possibility of undertaking further investment in the unit trust after 30 June 2009 would have had to ensure, from 28 June 2000, that no borrowings or other restricted activities were undertaken by the unit trust. It is submitted that it is unfair to penalise those funds whose unit trusts did not look ahead up to nine years into the future and structure their affairs so as to leave open this mere possibility.

It was noted that we do not know when the Assistant Treasurer is likely to respond to the submission but any developments will be discussed at future State Chapter meetings.

4.3. Excess contributions – contributions reserves

P Broderick discussed a recent question regarding contributions reserves. It was noted that although this is not a new development, it has been raised again recently.

The issue concerns the ATO's analysis in item 6.6 of the minutes of the National Tax Liaison Group, Superannuation Technical Sub-Group meeting in June 2009. At that meeting the ATO expressed the view that if a concessional contribution is tendered to a fund at a particular time (eg, in June of a financial year) but it is not allocated to the member until the next financial year in accordance with regulation 7.08(3) (which allows the contribution to be allocated within 28 days of the end of the month), the contribution is counted towards the member's cap when it is actually allocated to them and not when it is received into the fund. It is accepted that this analysis applies equally to concessional contributions and non-concessional contributions.

It was noted that, if this scenario in fact occurs, it could potentially prevent the member from having excess contributions that would otherwise arise in the first financial year and the contributor would still be entitled to any available a deduction for the contribution in the first financial year. It was agreed that in the case of concessional contributions, the contribution would be assessable to the trustee at 15% in the first financial year rather than the second year.

However, it is questionable whether this contributions reserving strategy would have much application in practice. It was noted that some members could be tempted to rely on this after the event (ie, after they have become aware of an excess contributions problem). The question would be whether the trustee did in fact hold the contribution in reserve in June and then allocate it in July. If there is no evidence this actually occurred at the time it may be difficult to sustain this type of argument.

It was noted that the ATO has stated that a "reserve" is not necessarily required and that a suspense account would be sufficient. However, members queried what would be required for an amount to be "paid into" such an account and whether this actually requires a separate account to be maintained or whether this can occur notionally.

One member queried whether this strategy can have any credibility in the case of a single member self managed superannuation fund

It was also noted that the regulatory return format does not allow for these types of allocations to be recorded. It was noted that this issue has been raised with the ATO previously.

5. Other business:

A Cullinan reminded members that the SISFA forums would be held nationally in September 2011 with the Melbourne forum in early September.

6. Next meeting:

The next meeting will be held on Monday 3 October 2011.

7. Closure:

A Cullinan closed the meeting at approximately 6.25pm AEST.


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Chair