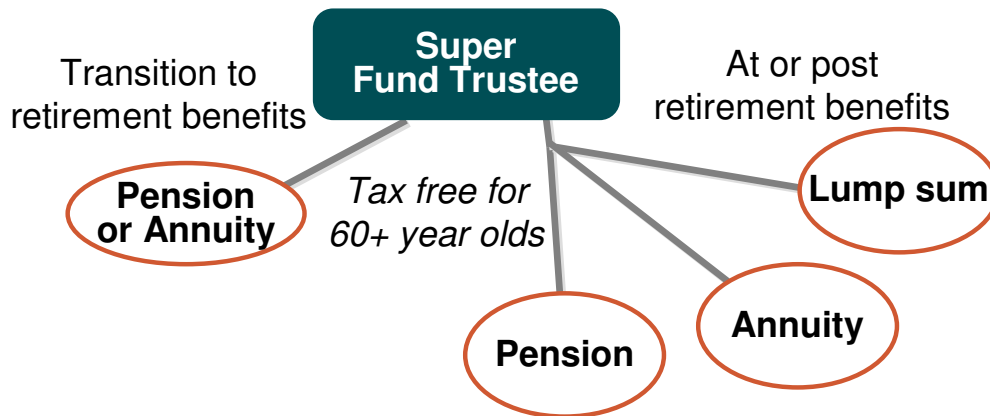


Superannuation Pensions



Pensions/annuities can be reversionary or non-reversionary & can continue after death for an "income stream" dependant, eg surviving spouse

Superannuation Retirement Benefits – Conditions of Release

A condition of release must be met before a member of a regulated superannuation fund can move from investment to benefits phase, eg:

- Being terminally ill – lump sum only (any age);
- Being permanently incapacitated and unable to continue in gainful employment (any age);
- Attaining age 55 (or any day thereafter) – transitional to retirement income streams only (the member can continue in gainful employment);
- Attaining age 55 (or any day thereafter) and retiring, ie ceasing gainful employment with no intention of resuming gainful employment in the future;
- Attaining age 60 (or any day thereafter) and ceasing current gainful employment;
- Attaining age 65 (or any day thereafter) – the member can continue in current or different gainful employment.

A lump sum payment or income stream is required when the member dies.

Payments on retirement can be an income stream, a lump sum (eg to clear a mortgage or to fund travel) or a combination of both. Alternatives for income streams include:

- An account based pension or annuity. This type of income stream has considerable flexibility in terms of the level of payment each year; and
- A lifetime or other term income pension or annuity provided by a 50+ member fund. These income streams are generally less flexible in terms of their levels of payment each year.

TRIS

Uses – Transition to Retirement Income Stream

Supplementing income where working hours (&/or income) are reduced

Trigger a tax free CGT liability in benefits phase

Funding recontribution to super

TRIS recipient aged at least 60 can

- Receive tax free pension/annuity income
- Arrange for contributions to be paid to super

Less tax effective if TRIS recipient is under 60

Transition to Retirement Income Stream

Australian regulated superannuation fund members who have reached preservation age, ie age 55 for people born before 1 July 1960, can commence a transitional to retirement income stream ("TRIS"). A TRIS is subject to the same core pension standards as retirement and death benefit income streams (but with additional restrictions on maximum payments, ie 10% of each year's opening account balance, and on commutation before a subsequent condition of release). The TRIS recipient, in addition to still being able to make non-concessional contributions, can continue to:

- Work in full or part time employment (or not work in any paid employment); and
- Have concessional contributions made for them by their employers or (if classed as self employed) make their own concessional contributions (like all concessional contributions, a 15% contributions tax is payable by the trustee of the superannuation fund).

Recontribution of TRIS Payments

Both the Federal Government and the ATO have made it clear that there is no general prohibition in either the tax or superannuation legislation on a person commencing a TRIS and recontributing the payment in whole or in part as a:

- Salary sacrifice payment via a contribution by the person's employer; or
- Personal contribution by the person (if that person meets the wholly or substantially self employed test, ie less than 10% of the person's income in the relevant financial year is derived from employment).

TRIS – Key Features

Must comply with subregs 1.06(9A) & 6.01(2)

- Recipient must have reached preservation age (55 if born pre 30 June 1960)
- No need to meet a condition of release
- No need to use entire account balance
- Income stream has 10% maximum cap, can be rolled back to investment phase in first 6 months, but cannot be commuted unless or until there is a subsequent condition of release

Transition to Retirement Pensions

Apart from the need to meet the preservation age, key features of a TRIS include:

1. That it complies with key **account based pension standards** (generally the same standards that apply to retirement and death benefits pensions). Those standards, set out in subregulation 1.06(9A) of the *Superannuation Industry (Supervision) Regulations 1994* (“the *SIS Regs*”), require the annual payment or payments to at least equal the minimum level required for the age of the recipient. They also prohibit a transfer of the account balance to another person during the duration of the TRIS or at its conclusion (other than by way of death benefit) and further prohibit the capital value of the pension being used as security for a borrowing – see subparagraph 6.01(2)(b)(i) of the *SIS Regs*.

2. **Total payments** in a given year (including payments made under a Family Court ordered payment split) cannot exceed **10% of the pension account balance** at 1 July of that year (or the commencement day if the pension commences during the financial year).

3. **Cashing of the TRIS is prohibited** unless and until the pension recipient meets a condition of release with a “nil” cashing restriction, eg attains 65 years of age.

The trustee can “cherry pick” which fund assets are to be segregated to pay the TRIS, eg assets that have high latent capital gains and might be realised during the course of the pension. The trustee cannot, however, “cherry pick” which component of a member’s account balance (ie the concessional component or the non-concessional component) is to fund the pension.

Account Based Retirement Pensions

- * Paid **annually** (in one or more instalments)
- * **No standard maximum** percentage limit – may be wise to pay 100% just before death to avoid death benefit lump sum tax, eg re an independent adult child
- * Alternatives or modifications may be needed for **vulnerable** people (to avoid fraud and exploitation)
- * **Minimum percentages** – depending on age (see notes)

Retirement Benefits – Lump Sum Payments

Lump sum payments on retirement are tax free for people:

- Who are at least 60 years of age (unless paid out of an untaxed amount, eg total and permanent disability insurance proceeds or a terminal illness life insurance benefit);
- (Of less than 60 able to access their member balances, eg because of becoming permanently incapacitated) to the extent they are paid out of the tax-free component, eg non-concessional contributions; and
- (If born before 30 June 1964) between their preservation age and age 60, if within the indexed low rate cap (currently \$140,000).

Varying income tax rates apply to lump sum payments not falling into any of these categories, unless the benefit is paid in consequence of a member's terminal illness. Where a lump sum payment (on retirement or death) consists of both a tax-free and a taxable component, a proportioning rule applies.

Minimum Annual Payments – All Account Based Pensions

The pension standards (SIS regulations 1.06 and 1.07A) that apply to account based pensions include the following minimum percentages of the opening balance for the financial year for annual pension payments (these payments can be made in one or more instalments during each year):

- Under 65: 4%. • 65-74: 5%. • 75-79: 6%. • 80-84: 7%. • 85-89: 9%. • 90-94: 11%. • 95+: 14%.

No maximum ceiling applies to retirement or death benefits account based income streams that commenced (or were converted from other types of income streams) after 30 June 2007 (other than for restricted account based pensions paid by SMSFs).

50+ Member Fund Payment Options

Account based pensions or annuities

- * **Account based**, flexible (with minimum) rates & capital access when needed

Defined benefit pensions or annuities

- * **Lifetime** and **life expectancy** (no requirement for life office funding)
- * **Other defined benefit** (some funds only)

Account Based Pension Standards – Subregulation 1.06(9A)

These standards apply to all 3 types of superannuation income streams, ie:

- Transition to retirement benefits (additional standards apply as well, eg a 10% annual maximum for payments);
- Retirement benefits; and
- Death benefits.

Various other minimum and maximum percentages apply to other types of income streams such as market linked (term allocated) pensions commenced prior to 20 September 2007 and defined benefit income streams.

“In Specie” Payments as Part of a Pension

Lump sum (and pension) benefits are usually paid in the form of cash, although there does not appear to be any prohibition on the making of “in specie” payments of properly valued assets of the superannuation fund. Such “in specie” payments would be a taxable CGT event and (in many States and Territories) a dutiable transaction – in Victoria, sections 41 and 41A of the *Duties Act 2000* should exempt a non-concessional contribution from a fund member to the trustee and a payment from trustee to the fund member or the fund member’s estate.

Planning Issues for the Vulnerable

The absence of a maximum percentage for account based pensions can be an issue for people who are vulnerable to exploitation or are unable to manage their finances and it may be prudent to consider other pension options, eg a restricted account based pension or a lifetime defined benefits pension paid by a 50+ member super fund.

Reversionary Income Streams

Automatically pass to a nominated “income stream” dependant, eg

- ❖ Spouse
- ❖ Child with a significant disability – see notes

To benefit, the reversionary nominee must both

- ❖ Survive the initial recipient &
- ❖ Still be an income stream dependant when the initial recipient dies

Taxation of Reversionary Income Streams

Pensions and annuities (whether funded out of income or capital) are income tax free for initial recipients who are 60 years or older in the year of payment (or are recipients of a pension or annuity that has reverted or continued on from a recipient who had attained 60 before dying)

The compulsory cashing provisions apply to child death benefit pensions and annuities when the reversionary or continuing pensioner attains 25 years of age, unless the child pensioner or the annuitant has “substantially reduced capacity for communication, learning or mobility” and “the need for ongoing support services”.

Preventing Challenges

A major reason for reversionary income streams can be to prevent a challenge:

- (Via the Superannuation Complaints Tribunal) to the payment of superannuation death benefits paid by the trustee of an externally managed superannuation fund; or
- (In NSW) to a person’s “notional estate” under the *Family Provision Act 1982*.

Cancelling Reversionary Income Streams

A living initial recipient can cancel most, but not all reversionary income streams and recommence the income stream as a non-reversionary income stream. Among the income streams that may not be able to be cancelled and recommenced are:

- Transition to retirement income streams where the initial recipient has not satisfied a subsequent condition of release; and
- Lifetime, life expectancy and term pensions and annuities paid by the trustee of a defined benefits superannuation fund or funded by a life office annuity.

Superannuation Pensions – Further Reading

**Australian Master Estate
Planning & Succession
Guide – Chapter 16**

**You Can't Take It
With You –
Chapter 15**

**The latest version of this Pocket Summary is at
www.mooreslegal.com.au/services/epss/pocket-summaries**

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Further Reading

- The 1st edition of the **Australian Master Estate Planning and Succession Guide** by Allan Swan is scheduled to be published by **CCH** in 2011.
- The 1st edition of **You Can't Take It With You** by Andrew Simpson was published by **Wrightbooks** in 2009.
- The 5th edition of **Tax Issues in Family Law Property Settlements** – The Difference Between Hacking and Carving by Peter Szabo was published by **MOORESLEGAL** in 2008.

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In addition to his main role as a principal of the **MOORESLEGAL** estate planning team (working in the areas of **Asset Protection, Trusts, Superannuation, Tax and Estate Planning**) Allan is also the principal of **APTSTEP**, a provider of training and materials. Allan's current presentation topics are:

- Asset Protection Planning
- Blended Families (includes pages 1 & 4 of this Pocket Summary)
- Business Structures Overview
- Estate Planning – Key Cases and Rulings
- Estate Planning – Practical Case Studies for 2010
- Estate Planning – Tax and Strategic Issues (6)
- Funding Estate Planning
- Ruling from the Grave (4-6)
- SMSFs – Planning Issues (all)
- Superannuation Death Benefits (all)
- Superannuation Overview (4-6)
- Testamentary Trusts
- Trusts – Income and Capital Distributions
- Trusts – The A-Z.

Contact Allan 03 9843 2153 for further information regarding on the content of the topics, the fees charged and to schedule a presentation, workshop or seminar.