

## **SUPERANNUATION PRACTICE COMMITTEE**

### **Technical Paper: Responses to Submissions on Division 293 Tax Defined Benefit Issues**

**February 2015**

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#### **A. Purpose and status of Technical Paper**

1. This Technical Paper was prepared by the Superannuation Practice Committee (SPC) of the Actuaries Institute (Institute). Its purpose is to provide information to Members about the responses received to date from the Government and the Australian Taxation Office (ATO) to various Institute submissions about issues associated with the operation of end benefits and end benefit caps for defined benefit superannuation fund (DB) members under Division 293 of the Income Tax Assessment Act 1997 (Cth). Copies of previously undistributed correspondence are included in the Annexures to this Technical Paper.
2. This Technical Paper does not represent a Professional Standard or Practice Guideline of the Institute.
3. Feedback from Institute Members is encouraged and should be forwarded to Paul Shallue via email to [paul.shallue@mercer.com](mailto:paul.shallue@mercer.com)
4. This is the first version of this Technical Paper.

#### **B. Background**

5. Division 293 tax refers to the additional tax of up to 15% on the concessional contributions of 'high income earners', introduced with effect from 1 July 2012. A 'high income earner' is a person whose income for surcharge purposes plus their concessional contributions (excluding excess concessional contributions) is greater than \$300,000.
6. Division 293 tax relating to notional DB contributions is generally deferred until an 'end benefit' is paid. When an 'end benefit' is paid for a superannuation interest with a related debt account, the accumulated deferred Division 293 tax debt becomes payable, but is subject to a maximum of the 'end benefit cap'. Both 'end benefit' and 'end benefit cap' are new concepts introduced by the Division 293 tax legislation.
7. The Institute wrote to the ATO and Treasury on 29 May 2014 ([290514 Submission](#)) to raise a number of significant issues associated with the operation of Division 293 tax for DB members.

8. In June 2014, the SPC sent the ATO a draft Discussion Note on Division 293 Tax End Benefit Cap calculations ([June 2014 Draft DN](#)), requesting the ATO's comments. The ATO provided comments on 14 August 2014 (140814 ATO Comments) and, at the SPC's request, a meeting was held between SPC and ATO representatives on 27 August 2014 to discuss the ATO's response and issues arising from it. The SPC provided some notes to the ATO to assist in the discussion and subsequent consideration (270814 SPC Notes).
9. In September 2014, in the absence of further comments from the ATO, the SPC issued the finalised Discussion Note on Division 293 Tax End Benefit Cap calculations ([September 2014 DN](#)), taking into account the 140814 ATO Comments and noting remaining areas of uncertainty.
10. On 30 September 2014, the Institute wrote to the Acting Assistant Treasurer (Senator the Hon Mathias Cormann) recommending that changes be made to the Division 293 tax legislation to drastically reduce the compliance costs associated with the end benefit regime and to ensure that the DB tax deferral process operates effectively ([300914 Submission](#)).
11. On 4 November 2014, the Institute wrote to the ATO about the impact of a family law superannuation payment on a member's end benefit cap ([041114 FL Submission](#)).

## **C. Responses**

### **C.1 Treatment of combined DB+DC interests and crystallisation of DB**

12. Almost all DB plans provide DB members with the ability to have an additional accumulation (DC) account. The SPC's understanding is that most funds (at least in the private sector) treat the member's DB+DC benefit as a single superannuation interest for tax purposes (such as the proportioning rule for benefits tax).
13. This treatment gives rise to a number of issues under the Division 293 tax legislation, such as whether:
  - ▶ a payment from any DC component of a DB member's benefits is an end benefit; and
  - ▶ crystallisation of a DB would be an end benefit in all cases (for example, on conversion to DC whilst in service or where the DB component is crystallised on termination of service but is retained in the fund).
14. These issues were raised (amongst others) in the 290514 Submission and were referred to in paragraphs 20-23 of the September 2014 DN (as they were in the June 2014 Draft DN).
15. The 140814 ATO Comments on the June 2014 Draft DN included the ATO's views that:

- ▶ generally the DB and DC components of a member's benefit would be considered separate superannuation interests (but the facts of each case would need to be considered); and
  - ▶ a transfer from a DB interest to a DC interest in the same fund would be an end benefit if it was the first superannuation benefit to become payable from the DB interest.
16. The SPC subsequently met with ATO representatives on 27 August 2014 to discuss the matter – in particular, the implications for funds which were currently treating DB+DC benefits as a single superannuation interest – and the SPC provided the 270814 SPC Notes on the issue to the ATO to assist in the discussion and subsequent consideration.
17. On 11 December 2014, the ATO provided the Institute with its response (111214 ATO Response) to the matters raised in the 270814 SPC Notes. Note that this response builds on the 140814 ATO Comments and addresses a number of key issues raised in the 290514 Submission and the 300914 Submission.
18. Firstly, the 111214 ATO Response confirms the ATO view that generally the DB and DC components of a member's benefit would be considered separate superannuation interests.
19. Importantly, it goes on to advise that the ATO's view is that, **even if the superannuation interest is not 100% DB, in the following provisions of Schedule 1 of the Taxation Administration Act 1953 (Cth), the meaning of superannuation interest is only referring to the DB interest:**
- ▶ *Sub-section 133-105(1): You are liable to pay the amount of your \*debt account discharge liability for a \*superannuation interest if the \*end benefit for the interest becomes payable.*
  - ▶ *Sub-section 133-130(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 ,....*
  - ▶ *Sub-section 133-120(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.*

20. Key outcomes arising from this interpretation are that:

- ▶ a payment from the DC component of a DB+DC interest will **not** be an end benefit and hence will not trigger a requirement to pay the deferred debt account;
- ▶ crystallisation of a DB component (in part or full) and internal rollover of the proceeds into an existing or new DC account will be an end benefit in all cases (unless an earlier end benefit has been paid from that DB interest); and
- ▶ the end benefit cap is to be calculated having regard only to the DB component of a DB+DC interest (consistent with the approach suggested in the September 2014 DN).

21. These outcomes are in line with the Institute's strong preferences as set out in the 190514 Submission. Hence the 111214 ATO Response is very welcome and represents a significant step forward in resolving the uncertainties and reducing the potentially anomalous outcomes of the end benefit legislation.

22. The above comments reflect the SPC's understanding of the impact of the views expressed by the ATO and do not constitute legal advice. Funds should seek their own legal advice (or updated legal advice) having regard to the ATO's responses and the particular circumstances of their fund.

## **C.2 Type of benefit to be used in end benefit cap calculation**

23. Paragraph 26 of the September 2014 DN discusses whether:

- ▶ the end benefit cap calculation depends on what 'end benefit' is to be paid (for example, death, early retirement, pension or lump sum); or
- ▶ the calculation date being the prior 30 June means the end benefit cap calculation is the same regardless of what type of end benefit is being paid.

The Institute's 290514 Submission (section 4.1) included some examples with suggested conclusions in line with the latter view (that is, that the calculation is based on the benefit entitlement at the calculation date, not on the type of benefit actually paid).

24. In its 140814 ATO Comments on the June 2014 Draft DN (in which the relevant paragraph was numbered 27 as compared with 26 in the September 2014 DN), the ATO indicated that the issues raised required further consideration. However, in general, the ATO agreed with the suggested conclusions.

25. The September 2014 DN states that, pending clarification by Treasury/ATO, the SPC considers that it would be reasonable for the end benefit cap calculation to be prepared consistently with the suggested conclusions. As no further comments on this issue have been received from the Treasury or the ATO, this remains the SPC's view.
26. However this should not be taken as meaning the SPC regards the matter as satisfactorily resolved. As the Institute's 290514 Submission (at the end of section 4.1) pointed out, based on the above interpretation, 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 (though an extremely uncommon event).
27. To address this issue, the Institute's 300914 Submission (at the end of section 3.1) recommended that, if the end benefit cap provisions were not abolished entirely, they be amended so that the cap is based on the benefit actually payable.

### **C.3 Recommendation to abolish or restrict end benefit caps (300914 Submission)**

28. The main recommendation of the Institute's 300914 Submission was that the end benefit cap provisions be abolished or limited to a narrow set of specified circumstances. On 15 December 2014, the Acting Assistant Treasurer (Senator the Hon Matthias Cormann) wrote to the Institute expressing thanks for the 300914 Submission and advising that he had asked the Treasury to consider the matters raised and provide the Government with advice (151214 Government Interim Response).

### **C.4 End benefit cap treatment of family law superannuation payments**

29. On 24 December 2014, the ATO responded to the 041114 FL Submission (241214 ATO FL Response) confirming that it agreed with the views expressed in that submission. Those views were that a family law superannuation payment will reduce a member's end benefit cap in some circumstances (that is, if the payment is made before the end benefit cap calculation date and it includes part of the defined benefit which accrued after 30 June 2012). This is because the end benefit cap will be based on the amount of the DB interest remaining after the family law superannuation payment was made.
30. Members should refer to the 041114 FL Submission and the 241214 ATO FL Response for further details.

## **D. Conclusion**

31. As noted above, the 111214 ATO Response is very welcome and represents a significant step forward in resolving the uncertainties and reducing the potentially anomalous outcomes of the end benefit legislation. Nevertheless, significant issues remain to be resolved, including:

- ▶ problems arising from the restriction that a release authority for a debt account discharge liability may only be given to a superannuation provider that holds the (DB) superannuation interest to which the debt account relates (which would seem to mean the release authority is unusable if that DB interest no longer exists – including if it has been paid into a DC account for the member). Note that the ATO has indicated in its 111214 ATO Response that it may be able to provide some assistance to members affected by this restriction;
  - ▶ practical issues with the legislated timing requirements for notifications to the ATO of an end benefit becoming payable and the amount of the end benefit cap;
  - ▶ the disproportionate compliance costs of the end benefit cap regime; and
  - ▶ the end benefit cap not being based on the benefit actually payable.
32. The SPC intends, in due course, to update the September 2014 DN on Division 293 Tax End Benefit Cap calculations to take into account the above developments. In the meantime, the SPC encourages Members advising on end benefits and/or end benefit cap calculations to have regard to this Technical Paper (including the Annexures), as well as the September 2014 DN.

**E. Annexures**

140814 ATO Comments  
270814 SPC Notes  
111214 ATO Response  
151214 Government Interim Response  
241214 ATO FL Response

**END OF TECHNICAL PAPER**