Contributions for older Australians

Utilising the changes to the bring-forward rules

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27 October 2021

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What we will cover today

- Legislative changes to the Bring Forward Rule
- Case Study
- The latest in SMSF Case Law:
  - *Hill v Zuda Pty Ltd* [2021] WASCA 59
- Questions.

Abbreviations

- ATE – Assets Test Exempt
- ABP – Account Based Pension
- BDBN – Binding Death Benefit Nomination
- CC – Concessional Contribution
- ECPI – Exempt Current Pension Income
- EPOA – Enduring Power of Attorney
- LPR – Legal Personal Representative
- MLP – Market Linked Pension
- NCC – Non Concessional Contribution
- NOI – Notice of Intent
- OMT – Off Market Transfer
- TBA – Transfer Balance Account
- TBAR – Transfer Balance Account Reporting
- TBC – Transfer Balance Cap
- TSB – Total Super Balance.

Opportunity due to changes to the bring-forward rule

- The work-test requirement has been pushed out to age 67, and the ability to trigger the two year bring-forward rule for non-concessional contributions has now also been extended to people to age 67.
- The change, as part of the *Treasury Laws Amendment (More Flexible Superannuation) Bill 2020* applies retrospectively to non-concessional contributions made from 1 July 2020.
- Importantly, there have been no corresponding increases to the preservation age which determines when you can make lump sum withdrawal from super.
- When a person turns age 65, they've triggered a condition of release meaning all their superannuation benefits can be accessed and withdrawn from super. This means we have opportunity between the ages of 65 and 67 to utilise a recontribution strategy.

Opportunity due to changes to the bring-forward rule

Case Study

- Richard turned 65 on 18/08/2021 and has just retired and commenced an account-based pension valued at $1,000,000 from his SMSF with the following components:
- Taxable Component – 70% ($700,000)
- Tax-Free Component – 30% ($300,000)
- Richard is the sole member of his SMSF and has a binding death benefit in favour of his Legal Personal Representative (Executor) for the entirety of his superannuation benefits.
- Richard has two adult children who will receive 50% each from his estate as per his recently updated Will.

Opportunity due to changes to the bring-forward rule

- If Richard passed away and a superannuation death benefit was paid to his estate for $1,000,000, the tax paid by the estate would be:
- Taxable Component: $700,000 x 15% = **$105,000**
- Tax-Free Component – $300,000 x 0% = $0
- By comparison, if Richard had put in place a binding death benefit nomination to his adult children (50% each again), the total tax payable on the $1,000,000 in death benefits would be:
- $119,000 (15% + 2% Medicare Levy x $700,000).

Opportunity due to changes to the bring-forward rule

- In the 2021/22 financial year, Richard will complete the following transactions:
- Commence Account-Based Pension 1 (e.g. on 1 July 2021) from the full amount of his $1,000,000 accumulation account
- Withdraw at least the required minimum amount (or pro-rata minimum) for the period from 1 July 2021 to 30 June 2022 (let's say he withdraws $110,000)
- As Richard has commenced an Account-Based Pension, he has no maximum drawdown
- Re-contribute the $110,000 as a non-concessional contribution in June 2022 and immediately commence Account-Based Pension 2 (no minimum drawdown required prior to 30 June 2022 if pension commenced in June).

Opportunity due to changes to the bring-forward rule

2021/22
Financial Year

Pension 1	
Tax free	$300,000
Taxable	$700,000
Total	$1,000,000

Withdrawal 1	
Tax free	$33,000
Taxable	$77,000
Total	$110,000

Opportunity due to changes to the bring-forward rule

2021/22
Financial Year

Pension 1	
Tax free	$267,000
Taxable	$623,000
Total	$890,000

Pension 2	
Tax free	$110,000
Taxable	$0
Total	$110,000

Opportunity due to changes to the bring-forward rule

- In the 2022/23 financial year, Richard will complete the following transactions:
- Withdraw at least the required minimum amount for the period from 1 July 2022 to 30 June 2023 for both Account-Based Pensions 1 and 2
- Draw anything above the minimum from Account-Based Pension 1 (again let's say he draws $110,000 in total)
- Re-contribute the $110,000 as a non-concessional contribution in June 2023 and immediately commence Account-Based Pension 3 (no minimum drawdown required prior to 30 June 2023 if pension commenced in June).

Opportunity due to changes to the bring-forward rule

2022/23
Financial Year

Pension 1	
Tax free	$267,000
Taxable	$623,000
Total	$890,000

Pension 2	
Tax free	$110,000
Taxable	$0
Total	$110,000

Withdrawal 2	
Tax free	$33,000
Taxable	$77,000
Total	$110,000

SuperConcepts

Opportunity due to changes to the bring-forward rule

2022/23
Financial Year

Pension 1	
Tax free	$234,000
Taxable	$546,000
Total	$780,000

Pension 2	
Tax free	$110,000
Taxable	$0
Total	$110,000

Pension 3	
Tax free	$110,000
Taxable	$0
Total	$110,000

Opportunity due to changes to the bring-forward rule

- In the 2023/24 financial year, Richard will complete the following transactions:
- Withdraw the required minimum pension for the period from all Account-Based Pensions
- Withdraw anything above the minimum from Account-Based Pension 1 (let's say combined $330,000 in total)
- Re-contribute the $330,000 as a non-concessional contribution **prior to turning age 67** on 18/08/2023 and immediately commence Account-Based Pension 4 (as it's not expected Richard will meet the work test in the 2024/25 financial year)
- Withdraw the minimum from Account-Based Pension 4 for the period 18 August 2024 to 30 June 2025.

Opportunity due to changes to the bring-forward rule

2023/24
Financial Year

Pension 1	
Tax free	$234,000
Taxable	$546,000
Total	$780,000

Pension 2	
Tax free	$110,000
Taxable	$0
Total	$110,000

Pension 3	
Tax free	$110,000
Taxable	$0
Total	$110,000

Withdrawal 3	
Tax free	$99,000
Taxable	$231,000
Total	$330,000

Opportunity due to changes to the bring-forward rule

- For administrative simplicity, the 3 new Account-Based Pensions (2, 3 & 4) can be consolidated into a single Account-Based Pension (5)
- Importantly, each financial year the SMSF would need to lodge the relevant pension commencement transactions with the ATO under the transfer-balance cap reporting regime (TBAR)
- As Richard's total superannuation balance is $1m then the TBAR reporting would be required quarterly.

Opportunity due to changes to the bring-forward rule

2023/24
Financial Year

Pension 1	
Tax free	$135,000
Taxable	$315,000
Total	$450,000

Pension 2	
Tax free	$110,000
Taxable	$0
Total	$110,000

Pension 3	
Tax free	$110,000
Taxable	$0
Total	$110,000

Pension 4	
Tax free	$330,000
Taxable	$0
Total	$330,000

Can be amalgamated into
one income stream

Opportunity due to changes to the bring-forward rule

- If the re-contribution strategy is implemented for Richard following the above steps, he will end up with the following two Account-Based Pensions as at 18 August 2024:
- Account-Based Pension 1 – $450,000 ($315k taxable / $135k tax free)
- Account-Based Pension 5 – $550,000 ($550k tax free)
- The actual balances above will be higher or lower depending on the earnings of the SMSF across the three years the re-contribution strategy was implemented.

Opportunity due to changes to the bring-forward rule

2024/25
Financial Year
onwards

Pension 1	
Tax free	$135,000
Taxable	$315,000
Total	$450,000

Pension 5	
Tax free	$550,000
Taxable	$0
Total	$550,000

Opportunity due to changes to the bring-forward rule

- By withdrawing and re-contributing $550,000 over the three-year period, Richard has converted $385,000 taxable component to tax-free
- This reduces the future death benefits tax on his superannuation balance by an estimated **$57,750** ($385,000 x 15% tax)
- Moving forward, as Richard draws out more from his SMSF, the most suitable drawdown strategy would be for him to take the minimum from Account-Based Pension 5
- Any amounts required above the minimum should be taken from Account-Based Pension 1 to use up the pension with the highest taxable component first
- *If the fund does not have the cash to undertake the strategy, a partial commutation can be implemented.*

BDBNs in an SMSF – the latest Case Law

Hill v Zuda Pty Ltd [2021] WASCA 59

- Ms Hill was the only child of Alec Kumar Sodhy (Deceased)
- The Deceased was in a de facto relationship with Ms Murray
- In 2011 the Deceased made a document purporting to be a Binding Death Benefit Nomination (BDBN)
- The BDBN was in favour of Ms Murray
- The Deceased died in 2016
- Importantly, the Deceased died more than three years after making the BDBN.

BDBNs in an SMSF – the latest Case Law

- Ms Hill brought an action. She contended, among other things:
- *[the binding death benefit nomination] was signed more than three years prior to the deceased's death, and so had ceased to have effect under reg 6.17A(7)(a) of the SIS Regulations.*
- In Self Managed Superannuation Fund Determination SMSFD 2008/3. Namely, the ATO stated:
- *"… the governing rules of an SMSF may permit members to make death benefit nominations that are binding on the trustee, whether or not in circumstances that accord with the rules in regulation 6.17A of the SISR."*
- In other words, the ATO confirmed that it is possible for an SMSF's trust deed to be drafted to enable a binding death benefit nomination to last for more than three years.

BDBNs in an SMSF – the latest Case Law

So why is this still an issue?

- The ATO is not a lawmaking body
- All SMSFD 2008/3 can really stand for is that the ATO will not treat a non-lapsing BDBN as causing a contravention of the super rules from a regulatory compliance viewpoint
- A court is, on the other hand, effectively a lawmaking body
- There have been certain supreme court decisions holding that it is possible for an SMSF's trust deed to be drafted in a wide enough fashion for a BDBN to be able to ***last more than three years***.

BDBNs in an SMSF – the latest Case Law

HOWEVER....

- Australia is a federation of states
- What one judge decides in one state (e.g. Queensland or New South Wales), is not binding in other states (South Australia or Tasmania)
- This is a very important point to bear in mind
- Especially in, for example, Victoria, where there is no Victorian case law to provide precedent on this issue.

BDBNs in an SMSF – the latest Case Law

What did the Court of Appeal decide?

- The Court of Appeal held that it is possible for an SMSF's trust deed to be drafted to enable a binding death benefit nomination to last for more than three years
- *And that this is the position in all Australian jurisdictions*
- Therefore, it is important that an SMSF trust deed expressly and clearly allows for non-lapsing binding death benefit nominations.

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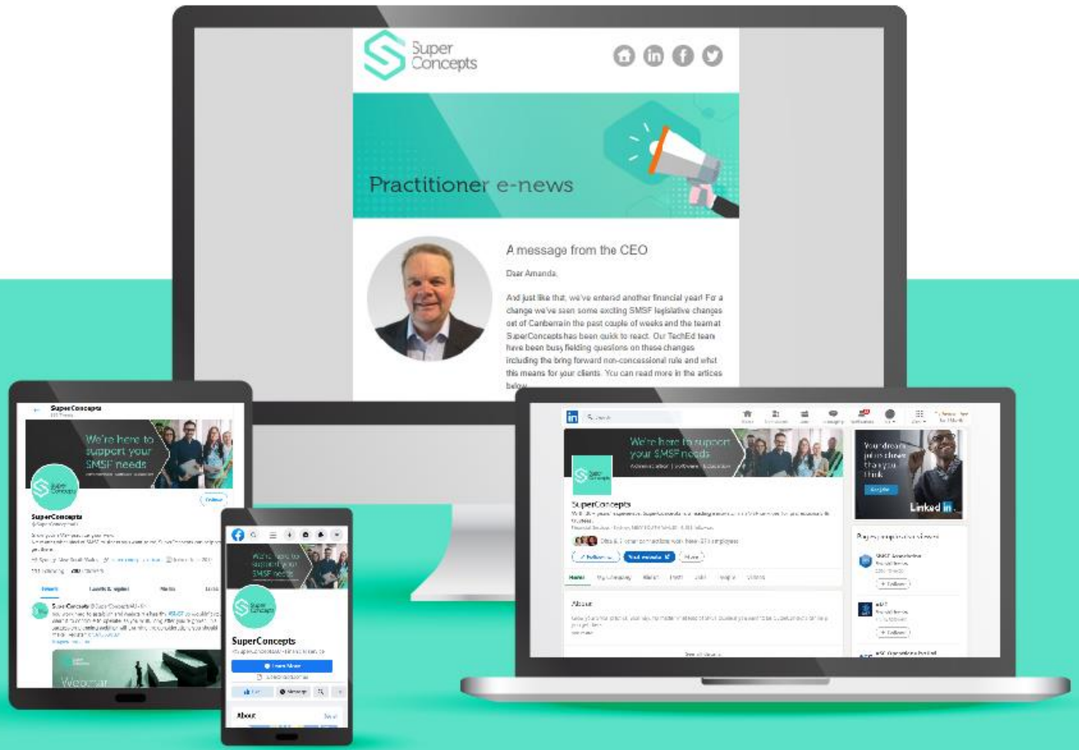

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