SUPERANNUATION PRACTICE COMMITTEE

Information Note: Responses to Submissions on Division 293 Tax Defined Benefit Issues

February 2015

A. Purpose and status of Information Note

1. This Information Note 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 Information Note.

2. This Information Note 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

4. This is the first version of this Information Note.

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 Information Note (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 INFORMATION NOTE

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FILE REF: [FILE NO.]

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PAGES:	6
SUBJECT:	ATO comments on AI End Benefit Cap draft discussion note

Message

Please confirm receipt of this fax with Debra Howard on (03) 622 10274.

Australian Government
Australian Taxation Office

Mr Andrew Boal
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Reply to: Attention Debra Howard
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Our Reference:
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14 August 2014

ATO comments on Actuaries Institute of Australia end benefit caps' draft discussion note

Dear Mr Boal

I refer to your letter to Mr Tilley at Treasury and myself dated 18 June 2014, inviting us to make comments on your Division 293 Tax End Benefit Cap – Draft Institute Discussion Note.

I would like to thank you for the opportunity to provide comments on your Discussion Note, and apologise for the delay in our reply.

Our comments are attached. Please note that the ATO is not providing comments on any of the possible methods of determining the total post-1 July 2012 component, the employer–financed component, or the member-financed component of the value of the superannuation interest.

Treasury have advised us and the Institute informally, that they will not be providing any comments on this draft note, as it is really a matter of the interpretation of the current law.

Yours faithfully

John Shepherd
Assistant Commissioner Superannuation

ATO Comments on the Institute of Actuaries of Australia draft Discussion Note on Division 293 Tax - End Benefit Cap – June 2014.

Paragraph 9

Consideration could be given to mentioning that the defined benefit contributions (notional contributions) that are used for Division 293 tax for defined benefit interests in constitutionally protected funds are not nil as for the concessional contribution cap purposes but will be calculated on the same basis as other defined benefit interests with untaxed elements.

Paragraphs 11 and 12

Consideration could be given to explain that the Commissioner will keep a separate deferred Division 293 tax debt account for each defined benefit interest if the individual has Division 293 tax assessed for more than one defined benefit interest. Then, when the end benefit for the relevant defined benefit interest becomes payable, the debt account discharge liability for that interest becomes due to be paid to the ATO.

Paragraph 19

Consideration could be given to the inclusion here that regulation 307-205.01 only specifies the methods for determining the value of a superannuation interest for the purposes of calculating the pre-July 1983 amount of the crystallised segment of a tax-free component under section 307-225 of the *Income Tax Assessment Act 1997.*

Paragraphs 20 to 23

We think that it would be helpful to include some further discussion on the meaning of defined benefit interest from information from the ATO website on superannuation interests. (See www.ato.gov.au/Super/APRA-regulated-funds/In-detail/Paying-benefits/How-many-super-interests-does-a-member-of-a-super-fund-have-in-their-fund-/. Generally the only time when the issue of a superannuation interest becomes relevant is when a benefit is paid from superannuation and the proportioning rule must be applied to work out the taxable and tax free components of the benefit.

However, the concept of a superannuation interest is also relevant to the determination of concessional contributions and now for Division 293 tax. The ATO view as outlined in the information on the ATO website is that an interest in a fund refers to a distinct claim of any kind against a fund, whether it be proprietary in character or not. It is a question of fact whether the various amounts, benefits and entitlements that a member has in a fund constitute one interest or more than one interest in the fund. If a member has separate accounts in a fund, the Commissioner accepts that an account is a separate interest so long as viewed as an objective matter, the account reflects a claim that is separate and distinct from other claims that the member has against the fund.

Whether there is one or more interests where the benefit in the fund is made up of a defined benefit component and an accumulation component will be a question of fact. However, generally applying this concept to the situation where a member has an accumulation

component of a benefit and a defined benefit component of a benefit (even if the components are part of the one member 'account') then it seems likely that the member will have two separate claims against the fund. One claim being the accumulation of contributions and earnings on those contributions which are separate to the claim for the defined benefit component of the benefit. This concept would mean that the claim that the member has for the defined benefit component of the benefit is a defined benefit interest which is a different interest to the accumulation component of the benefit.

The application of this view of what is an interest somewhat addresses the issue that has been raised in your submission and in your draft discussion note. That is, if a benefit becomes payable from the accumulation component of the benefit that is a separate interest to the defined benefit interest, this would not be an end benefit as it is a payment from an interest for which the Commissioner does not keep a deferred Division 293 debt account.

It is largely a question of fact as to the number of interests that a member has in a fund. For more precise advice on the number of interests a member has in a fund, details of the claim or claims a particular member has against a particular fund would need to be provided to the ATO. The ATO could then consider the issue of appropriate advice.

Paragraph 23(b)

Whether the 'crystallisation/cessation' of a defined benefit interest is an 'end benefit' within the meaning of section 133-130 of *Schedule 1 of the Taxation Administration Act 1953* is largely a question of fact. The outcome may be different for the various treatments in different funds.

The meaning of superannuation benefit is set out section 307-5 of the *Income Tax Assessment Act 1997*. Item 1 of the table in subsection 307-5(1) includes as a superannuation benefit a superannuation fund payment being a superannuation member benefit if it is a payment to you from a superannuation fund because you are a fund member. Subsection 307-5(8) states that if an amount is transferred from one superannuation interest in a superannuation plan to another superannuation interest in the same plan, treat the transfer as a payment in determining whether the transfer of the amount is a superannuation benefit or a rollover superannuation benefit.

Further subsection 307-15(1) states that this section applies in determining whether a payment is a superannuation benefit and determining whether a superannuation benefit is made to you, or received by you. Subsection 307-15(2) then states that a payment is treated as being made to you, or received by you, if it is made: (a) for your benefit; or (b) to another person or to an entity at your direction or request.

In addition section 306-10 states:

"A *superannuation benefit is a *roll-over superannuation benefit* if:

(a) the benefit is a *superannuation lump sum and a superannuation member benefit; and
(b) the benefit is not a superannuation benefit of a kind specified in the regulations; and
(c) the benefit satisfies any of the following conditions:
    (i) it is paid from a *complying superannuation plan;

(ii) it is an *unclaimed money payment;
(iii) it arises from the commutation of a *superannuation annuity; and
(d) the benefits satisfies any of the following conditions:
(i) it is paid to a complying superannuation plan;
(ii) it is paid to an entity to purchase a superannuation annuity from the entity.

Note 1:A superannuation benefit may be paid from one superannuation plan of a superannuation provider to another superannuation plan of the same provider.

Note 2:For the treatment of amounts transferred within a superannuation plan, see subsection 307-5(8)."

Paragraph 2.90 of the Explanatory Memorandum to Tax Laws Amendment (Simplified Superannuation) Act 2007 is of assistance here. That paragraph states:

> 2.90 A person may have more than one superannuation plan with a superannuation provider. It is therefore possible that a superannuation benefit may be rolled over from one superannuation plan to another superannuation plan held by the same superannuation provider. A superannuation plan may also contain more than one superannuation interest. Therefore a superannuation interest in a superannuation plan can be paid into another superannuation interest in the same plan and qualifies as a roll-over.

Therefore interpreting all of these provisions together means that if there is a transfer from a defined benefit interest to an accumulation interest in the same superannuation fund, the transfer is treated as a payment that is treated as being made to the member or received by the member and will therefore satisfy the meaning of superannuation benefit. It is also treated as a roll-over superannuation benefit. Accordingly the transfer from the defined benefit interest to the accumulation interest can be an end benefit if it is the first superannuation benefit to become payable from the defined benefit interest.

For more precise advice on whether there is an end benefit on crystallisation or cessation of a defined benefit, details of steps taken and the outcomes of those steps would need to be provided to the ATO. Perhaps details of common arrangements could be provided to the ATO and the ATO could consider issuing appropriate advice on the matter.

Paragraph 27

The issues raised in your submission on this point require further consideration. However in general the ATO agree with the suggested conclusions in the examples set out in section 4.1 of your submission. At the 30 June prior to the benefit payment, the event described had not occurred (ie death, retirement, etc) and therefore the amount that could have been paid at 30 June could not take into account the event that occurred after that date.

Paragraph 31

The ATO accepts that approximate methods of calculating the end benefit cap will be necessary in some circumstances.

Paragraph 34

The ATO will provide the member with the balance of their deferred debt account at least annually and also upon request. Consideration could be given to suggesting that the trustee may request that their member provide them with the balance of the deferred debt account if it will assist.

Paragraph 57

Some of the rules contained in the Superannuation Industry (Supervision) Regulations 1994 for commutation of complying pensions have been amended to allow a commutation for the purposes of complying with a release authority issued for Division 293 tax. If the benefit payable from the defined benefit interest is a non-commutable income stream and if there is an option to pay a lump sum prior to commencing the income stream this could be explained to the member by the trustee prior to commencing the income stream. However if the fund rules do not allow any commutation, or the non-commutable income stream has commenced, the member will have to pay the debt account discharge liability from other sources. In certain circumstances the individual may be able to make a payment arrangement for payment of the debt with the ATO.

14 August 2014.

Work-In-Progress Notes for Actuaries Institute – ATO meeting 27 August 2014 re: Defined Benefit (DB) Division 293 Tax Issues

Treatment of DB+DC Super Interests - Background

1. Almost all private sector DB plans provide DB members with the ability to have an additional accumulation (DC) account
2. We expect that for tax purposes most would treat the member's DB+DC benefit as a single interest with two components e.g. there is a single record of the combined DB+DC post-2007 undeducted contributions and of the combined DB+DC crystallised segments at 1 July 2007
3. This gives rise to three major issues for Division 293 DB tax:
    A. The triggering of an end benefit
    B. The end benefit cap
    C. The ability to pay the discharge debt liability

A. Division 293 Tax – Treatment of DB+DC Super Interests for End Benefit purposes

This treatment of the member's DB+DC benefit as a single interest appears to lead to the following outcomes based on the ATO letter to the Institute of 14 August:

1) Such members who use a release authority to pay any one or more of:
    a) Their Div 293 tax in respect of their DC contributions from their DC account
    b) Their Div 293 tax in respect of their DB contributions from their DC account
    c) Their excess non-concessional contributions tax from their DC account (note the member has no option in such cases)
    d) Their excess concessional contributions tax from their DC account
    e) A refund of up to 85% of excess concessional contributions from their DC account
    f) A refund of up to 85% of excess concessional contributions from their DB interest (from 2014/15)

    will have triggered an end benefit.

2) Such members who roll over or cash a part of their DC account will have triggered an end benefit
3) Once an end benefit is triggered, there is no ability to defer future Div 293 DB tax
4) There is no ability for a fund to pay future Div 293 DB assessments from the defined benefit interest – it must come from a DC interest which may be rapidly depleted
5) These problems could continue for many years with DB members having to find significant amounts each year to pay their Div 293 DB tax

Possible solutions to fix triggering of end benefit problem

The above outcomes highlight that the approach set out in the ATO letter (where the member's DB + DC benefit is treated as a single interest) cannot have been the intention of the legislators e.g. see s133-1 of Taxation Administration Act 1953 (TAA1953)*. The deferral mechanism would be unworkable for almost all private sector funds.

Possible solutions include:

1) Amend the TAA1953 legislation (unlikely to fit timing requirements but best long term solution); OR
2) An interpretation by the ATO which allows or requires funds to treat a single DB+DC interest as two separate interests for the purposes of Div 293 tax end benefits only; OR
3) Issue regulations under s307-200 of ITAA 1997 requiring funds and members to treat a single DB+DC interest as two separate interests for the purposes of Div 293 tax end benefits only; OR
4) Issue regulations under s133-130 of TTAA1953 to exclude the following from being an end benefit:
    - Payments made in accordance with a release authority issued by the ATO
    - Other rollovers and cash payments from the DC component of the super interest to which the debt account relates (where the DB interest has not been crystallised)

Note that option 2 (if compulsory) and option 3 would also achieve the desirable outcome that crystallisation of a DB would be an end benefit in all cases. Option 4 would not achieve this (e.g. a DB to DC conversion would not necessarily trigger a benefit to become payable from the superannuation interest).

**S133-1 of TAA1953 reads: " Payment of Division 293 tax is deferred to the extent to which the tax is attributable to defined benefit interests from which no superannuation benefit has yet become payable. This reflects the fact that money generally cannot be released from defined benefit interests until a superannuation benefit is paid, usually upon retirement."*

B. End benefit cap problem

The above solutions options 1-3 could also be used to clarify that the end benefit cap should relate only to the DB component of a DB+DC interest. (Note that the Institute proposes to make a submission to Government recommending that end benefit cap provisions be largely or entirely abolished.)

C. Restriction on payment of debt account discharge liability

Under s135-40 of TAA1953 a release authority for a debt account discharge liability may only be given to a superannuation provider that holds the super interest to which the debt account relates. This would seem to mean the release authority is unusable if that interest no longer exists.

Leaving service will, in some cases, trigger the commencement of a DB pension – this would generally be considered to be the same interest even though the member may have a different membership number in pension phase. If the pension is considered to be the same interest, the restriction on the fund from which the debt account discharge liability can be paid would not create any significant concerns in this instance.

However, in most cases the DB is crystallised and becomes a DC interest – combined with any existing DC interest.

If the DB interest is considered to be a separate interest to the DC interest, this could then be considered to be an automatic internal rollover. In such cases it would appear that it will not be possible for the member to use a release authority to pay the debt account discharge liability as the fund no longer holds the DB interest to which the debt account relates. This would make the release authority mechanism unworkable and hence could not be the intention of the legislators.

If the DB interest is considered to be part of a single DB+DC interest, presumably this interest would be regarded as continuing when the DB is crystallised and the added to the DC component. However under this approach problems will still arise as the benefit may then be:

i) "Rolled over" to commence an account based pension in the fund; or
ii) "Rolled over" to another interest in the same fund e.g. from the corporate sub-fund to the individual section of the fund; or
iii) Rolled over to another fund

In each of these cases it appears that it will not be possible for the member to use a release authority to pay the debt account discharge liability, since the fund either no longer holds or, in case (iii), never held the super interest to which the debt account relates. In many corporate DB funds (particularly sub-funds) it may not be possible to retain the crystallised DB in the fund until a debt account discharge liability release authority is received. Again, common practice may result in the release authority being unusable.

The member may be, for example, age 45, and may need to find many thousands of dollars in non-superannuation monies to pay the debt account discharge liability as no relevant condition of release has been satisfied.

Possible solutions would be:

- Amend the TAA1953 legislation to enable the debt account discharge liability to be paid from any superannuation fund/interest (best solution in the long term) OR
- Issue regulations under s307-200 of ITAA 1997 allowing funds, for the purpose of payment of a debt account discharge liability only, to treat:

  (i) the original DB interest; and

  (ii) a super interest (whether in the same fund or a different fund) into which a payment from the original DB interest has been made; and

  (iii) a super interest (whether in the same fund or a different fund) into which a payment from an interest referred to in paragraph (ii) has been made

  as the same super interest (being the super interest to which the debt account relates); OR
- An ATO interpretation that the debt account discharge liability can be paid from either the fund that held the original interest or a fund that holds any interest to which part or all of the crystallised defined benefit has been transferred (on the basis that for practical purposes this would be the same interest as it is the same money). This may be a useful short term solution.

DB+DC Interests Key Issues Table

Single super interest with DB+DC	End benefit?	Implications
Release authority used to pay tax/refund from DC	Yes	• Payment of deferred DB tax debt triggered – may not be able to be paid from DB • All future Div 293 DB tax immediately payable and cannot be paid from DB
Part or all of DC account cashed or rolled over to new fund or used to start a pension	Yes	As above
DB crystallised due to termination of employment (or DB-> DC transfer) and $ credited to new DC sub-account; combined account treated as SAME interest	No	• Payment of deferred DB tax debt NOT triggered • Fund has to maintain deferred DB tax debt flag for DC only member until end benefit paid • Fund has to calculate end benefit cap for DC only member
DB crystallised due to termination of employment (or DB-> DC transfer) and $ credited to new DC sub-account; combined account treated as NEW interest	Yes	• Payment of deferred DB tax debt triggered • Debt can only be paid from the fund holding the interest to which the debt account relates; as this interest no longer exists, the release authority cannot be used, so the member must pay from non-super monies?

111214 ATO RESPONSE

ATO Response to Institute of Actuaries of Australia Division 293 Tax Issues raised 27 August 2014

Division 293 Tax

Issue A. Treatment of defined benefit plus defined contributions Super Interests for End Benefit purposes

Based on the information provided, and the ATO view that the number of interests that a member of a superannuation fund has depends on the distinct claims that the member has against the fund, it would generally be the case that where a member has a both defined benefit component and a separate accumulation component of a benefit that each component of the benefit would be a separate interest. Only the defined benefit component of the benefit would be a defined benefit interest and the accumulation component of the benefit would be a separate interest that was not a defined benefit interest. This treatment would be the same for the purposes of Division 293 tax as well as the proportioning rule for the payment of superannuation benefits.

If a different treatment has been adopted by providers in the past then this would be a matter to be raised on a provider by provider basis with the ATO.

Subsection 133-105(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) states:
"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. "

Subsection 133-130(1) of Schedule 1 to the TAA 1953 states:
"A *superannuation benefit is the *end benefit* for a *superannuation interest if it is the first superannuation benefit to become payable from the interest, ..."

Subsection 133-120(2) of Schedule 1 to the TAA 1953 states:
"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.

In the scheme of the other provisions within of Division 133 of Schedule 1 to the TAA 1953 the ATO takes the view that the meaning of "superannuation interest" in these provisions is referring to the defined benefit superannuation interest for which the Commissioner has kept the deferred debt account for assessed Division 293 tax that is defined benefit tax attributable to that defined benefit superannuation interest. Therefore even if the "superannuation interest" is not 100% defined benefit interest, the meaning of superannuation interest in these provisions is only referring to the defined benefit interest.

Thus – in response to outcomes listed in the Notes from the institute of Actuaries:

1) An end benefit is not triggered if a superannuation benefit is paid in relation to a release authority from an interest that is not the defined benefit interest for which the deferred debt account is kept. In any event except in specific circumstances a super provider is not able/required to satisfy a release authority by paying a superannuation benefit from a defined benefit interest.
2) A superannuation benefit that is not paid from the defined benefit interest for which the deferred debt account is kept will not be an end benefit.

3) As there is no end benefit until a superannuation benefit is payable from the defined benefit interest for which the deferred debt account is kept then future Division 293 tax attributable to the defined benefit interest will be deferred to the debt account.
4) See response to 3) above. There will be no requirement for immediate payment of the future Division 293 tax attributable to the defined benefit interest until a superannuation benefit is payable from the defined benefit interest for which the debt account is kept.
5) See response to 4) above.

Issue B. End benefit cap problems

Adopting the ATO interpretation that the meaning of 'superannuation interest' in subsection 133-120(2) of Schedule 1 to the TAA 1953 means the defined benefit interest for which the Commissioner has kept the deferred debt account for assessed defined benefit tax attributable to that defined benefit superannuation interest means that the superannuation interest for which the value needs to be calculated is confined to the value of that defined benefit interest.

Issue C. Restriction on payment of debt account discharge liability

If, at the time the release authority is given to the superannuation provider by an individual, the superannuation provider no longer holds the defined benefit interest to which the debt account relates, then the release authority issued at the time of issue of the notice of debt account discharge liability cannot be used.

If the superannuation provider that holds the defined benefit interest to which the debt account relates, is given a release authority for the debt account discharge liability, there is no requirement for the amount to be released from that defined benefit interest. Therefore the superannuation provider can release the amount from an accumulation interest if one is held for the individual.

If the release authority issued with the notice of debt account discharge liability is unable to be used, and an individual has a superannuation interest that they are able to have an amount released from in order to pay the liability, they should contact the ATO. The Commissioner has the ability to issue a further release authority under subsection 135-10(3) of Schedule 1 to the TAA 1953 if he considers that it is reasonable in the circumstances to do so. The payment from the superannuation provider would be made to the Commissioner for this further release authority. However, the further release authority/ies could only be issued for an amount up to the amount of the assessed Division 293 tax that was deferred to the debt account. A separate release authority would be issued for the amount of each amount of assessed tax that was deferred. That is, the amount of the release authority/ies in total would not include any end of year interest that may have been added to the deferred debt account. Still, it may assist some individuals to pay at least part of their liability.

Minister for Finance
Acting Assistant Treasurer

Mr Daniel Smith
President
Institute of Actuaries of Australia
Level 2 50 Carrington Street
SYDNEY NSW 2000

Dear Mr Smith

Thank you for your letter of 30 September 2014 concerning the Division 293 tax end benefit cap provisions. I am writing to you in my capacity as Acting Assistant Treasurer. I apologise for the delay in responding to you.

I note your concerns about the compliance costs associated with this aspect of the Division 293 tax regime.

I have asked the Treasury to consider the matters you have raised and provide the Government with advice. I will write to you again after the Government has considered this advice and made decisions in relation to these matters.

Thank you again for raising your concerns and providing suggestions.

Kind regards

MATHIAS CORMANN

15 December 2014

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Australian Government
Australian Taxation Office

Mr Andrew Boal,
Convenor – Superannuation Practice Committee
Actuaries Institute
Level 2, 50 Carrington Street
Sydney NSW 2000

24 December 2014

Division 293 Tax – Impact of excluded payments on Defined Benefit End Benefit Cap

Dear Mr Boal,

Thank you for your letter dated 4 November 2014, in which you query whether a family law superannuation payment will potentially reduce a member's liability for deferred Division 293 tax debt.

In summary, we concur with the view that family law superannuation payments that are made between, or includes part of a benefit that accrued after 1 July 2012, would reduce the amount of the end benefit cap.

Our complete technical response to your question is outlined below:

Does the ATO agree that it is an outcome of the current Division 293 of the Income Tax Assessment Act 1997 (ITAA 1997) tax end benefit cap (sub-section133-130(1) TAA 1953) and deferred debt (section 133-120 TAA 1953) legislative provisions that in situations where a family law superannuation payment is made prior to the member's end benefit cap calculation date that this has the potential to reduce an individual's liability for deferred Division 293 tax debt?

1. We concur with the view of the segment and with the conclusions of the submission of the Actuaries Institute that a family law superannuation split payment ordered under sections 90MS and 90MT of the *Family Law Act 1975* (FLA) made prior to the a member's end benefit cap calculation date can reduce an individual member's liability for a deferred Division 293 tax debt.

2. Division 293 of the ITAA 1997 reduces the concessional tax treatment of certain superannuation contributions made for very high income individuals. The high income threshold is $300,000. This provision has been modified in the case of individuals who are in defined benefit superannuation schemes whereas a fund member's benefit does not crystalise until the end benefit is paid. Sub-section 133-130(1) TAA 1953 defines an end benefit as the first superannuation benefit to become payable from the superannuation interest. There are some notable exceptions to this:

    (a) a roll-over to a successor fund;
    (b) a severe financial hardship benefit payment;
    (c) a benefit that becomes payable on compassionate grounds;
    (d) a benefit specified in a legislative instrument.

3. Of particular interest is sub-section 133-130(2) which excludes benefits that are specified in a legislative instrument. Legislative Instrument F2013L02050 *Taxation Administration Act 1953* (Meaning of End Benefit) Instrument 2013 provides that a Family Law Superannuation payment is excluded from being an end benefit for the purposes of taxation law. It should be noted that this legislative instrument specifies Family Law Superannuation *payments* and would not necessarily cover other arrangements.

(Meaning of End Benefit) Instrument 2013 provides that a Family Law Superannuation payment is excluded from being an end benefit for the purposes of taxation law. It should be noted that this legislative instrument specifies Family Law Superannuation *payments* and would not necessarily cover other arrangements.

4. The Explanatory Statement for the legislative instrument characterises family law superannuation payments as arising in the context of property settlements following the end of relationships. In that situation, members have not in substance received a benefit from their superannuation fund, and as such it would not be appropriate to treat these payments as an end benefit.

5. This means that if a Family Law Superannuation payment is made between, or includes part of a benefit that accrued after 1 July 2012 (when the provision came into effect) this would reduce the amount of the end benefit cap. It stands to reason that if a percentage of a member's superannuation is hived off to satisfy a Family Law split then this would have the effect of reducing the amount of superannuation left for the benefit of the member. Accordingly, the end benefit cap calculation would have to be calculated from the amount of superannuation interest left after the Family Law Superannuation payment was made.

6. We note that the Actuaries Institute point out that there may be a number of methods by which to calculate the value of the relevant superannuation interest that has accrued since 1 July 2012. As subsection 133-120(2) provides that the end benefit cap is to be advised by the superannuation provider (rather than the Commissioner) it is open for the provider to adopt any reasonable method.

Yours faithfully

D. K. Howard

John Shepherd
Assistant Commissioner Superannuation

Per
(Debra Howard)