Institute of Actuaries of Australia

SUPERANNUATION AND EMPLOYEE BENEFITS PRACTICE COMMITTEE

Discussion Note:
An Update on Payroll Tax

October 2009

Purpose

The purpose of this Discussion Note is to:

- set out one possible approach for Members to use to apportion defined benefit liabilities and contributions for payroll tax purposes (generally it would be expected that only Members who have the expertise to provide actuarial advice in relation to superannuation would be involved in such apportionments);
- share the views of the Superannuation and Employee Benefits Practice Committee ("SEBPC") on various issues to consider when deciding the appropriate method of apportionment to use for payroll tax purposes; and
- solicit feedback from Members on the issues raised in this Discussion Note, which can be emailed to Andrew Boal at: andrew.boal@watsonwyatt.com

Brief overview

The payroll tax legislation of various states and territories was amended at various times to include a superannuation contribution (as defined) in the definition of "wages" for payroll tax purposes. The amending legislation generally contained transitional provisions along the following lines (the following extract is taken from Schedule 3 of the Payroll Tax Act 2007 (VIC) and similar provisions are contained in the Payroll Tax Act 2007 (NSW) substituting 1996 for 1997 – legislation in other states and territories may vary from the following wording but is broadly similar in most states and territories except South Australia and ACT):

"**7 Superannuation contributions relating to pre-1 July 1997 service**

(1) Despite anything in section 11 or 17, wages do not include a superannuation contribution paid or payable in respect of services performed by an employee before 1 July 1997.

(2) A superannuation contribution that is alleged by an employer to be paid in respect of services performed by an employee before 1 July 1997 must be evidenced to the satisfaction of the Commissioner in the employer's records for payroll tax purposes.

(3) In particular, the employer's records must show the manner of calculation of the contribution and any actuarial basis for it.

(4) For the purposes of subclause (3) and of any assessment of payroll tax to which that subclause is material, the certificate of a fellow or accredited member of the Institute of Actuaries of Australia to the effect that the actuarial basis on which an amount is calculated is justified is evidence and, in the absence of evidence to the contrary, proof of that fact.

(5) If records are not kept as required by this clause, the Commissioner is entitled to assume that a payment of money by an employer as a superannuation contribution on or after 1 July 1997 is an amount payable in respect of services performed by an employee on or after that day."

In the case of a defined benefit superannuation fund, an actuary may from time to time be called upon by a sponsoring employer to help identify any contributions that relate to services performed by an employee (who is a defined benefit member of the fund) before the payroll tax transition date (for example, 1 July 1997 for Victoria, 1 July 1996 for NSW and so on).

There are a number of possible methods that can be used by an actuary to apportion defined benefit liabilities and contributions into different service periods for various purposes. This discussion note briefly outlines one possible method for payroll tax purposes.

SEBPC also notes that there was a relevant case in the Supreme Court of NSW (CSR Ltd v The Chief Commissioner of State Revenue [2006] NSWSC 1380) with the following judgment by Gzell J on 14 December 2006:

http://www.austlii.edu.au/au/cases/nsw/NSWSC/2006/1380.html

In this case, "top-up contributions" were apportioned based on defined benefit liabilities. SEBPC understands that the term "top-up contributions" refers to additional contributions, although it is not clear what contributions they are additional to. SEBPC believes that it is reasonable to assume that "top-up contributions" are those in excess of the "normal" level of contributions determined by the actuary to be appropriate in the circumstances based on his or her professional judgment.

SEBPC notes that the current requests to apportion contributions have generally been in respect of the more recent larger contributions paid to funds.

Method used to apportion defined benefit liabilities and contributions for payroll tax purposes

After considerable discussion, the SEBPC agrees that one possible approach is the approach outlined in the case above:

1. Determine the total of all accrued defined benefit liabilities at the start of the relevant payroll tax year (it may also be possible to determine the liabilities as at another date in the year, for example if the actuary recommended a top-up contribution based on data at another date during the year, then this date could be justified).

2. For each state, determine how much of those liabilities are attributable to service prior to the date payroll tax was introduced. A simple proportionate approach based on service before and after the relevant payroll tax transition date would generally be considered adequate for this purpose, unless special circumstances apply.

3. For each state, use 1 and 2 to determine the percentage of those liabilities (in total for the whole fund) that relate to service of members in the relevant state prior to the date payroll tax was introduced for that state.

4. Determine the total level of "top-up contributions" paid to the fund in respect of those defined benefit liabilities for the relevant payroll tax year, being the employer contributions that are determined by the actuary to exceed the "normal" contributions required in respect of the defined benefit liabilities for that year.

5. For each state, multiply the percentage determined in 3 by the "top up" contributions determined in 4 to calculate the relevant contributions for each state that are in relation to service completed before the payroll tax transition date.

There may, of course, be circumstances where this method might not be appropriate (for example, certain public sector schemes that at least partially use a "pay as you go" funding method). In this case, a portion of the entire contribution may be considered by the actuary to relate to the period prior to the payroll tax transition date.