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2025 Wills and Estates Conference

ACT LAW SOCIETY

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Superannuation, Death and Taxes – A Practical Guide to Advising Clients.

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Agenda

1. About the Presenter
2. Advising on Superannuation
3. Tax and Super Dependant
4. Death benefit taxes and strategies
5. Transfer Balance Cap
6. Other considerations

About the presenter

- Managing Director of Clear Law, a specialist estate planning, superannuation and tax law firm.
- Masters in Tax, Juris Doctor and Bachelor of Commerce.
- Author of *Testamentary Trusts: Strategies and Precedents*, Lexis Nexis (2013, 2016, 2021, 2025)
- Winner of inaugural Wills and Estates Partner of the Year Award for Lawyers Weekly

Advising on Superannuation

Superannuation is a non-estate asset and does not automatically pass in accordance with the Will

Superannuation passes in accordance with:

Binding death benefit nomination	Rules of the fund	Trustee discretion

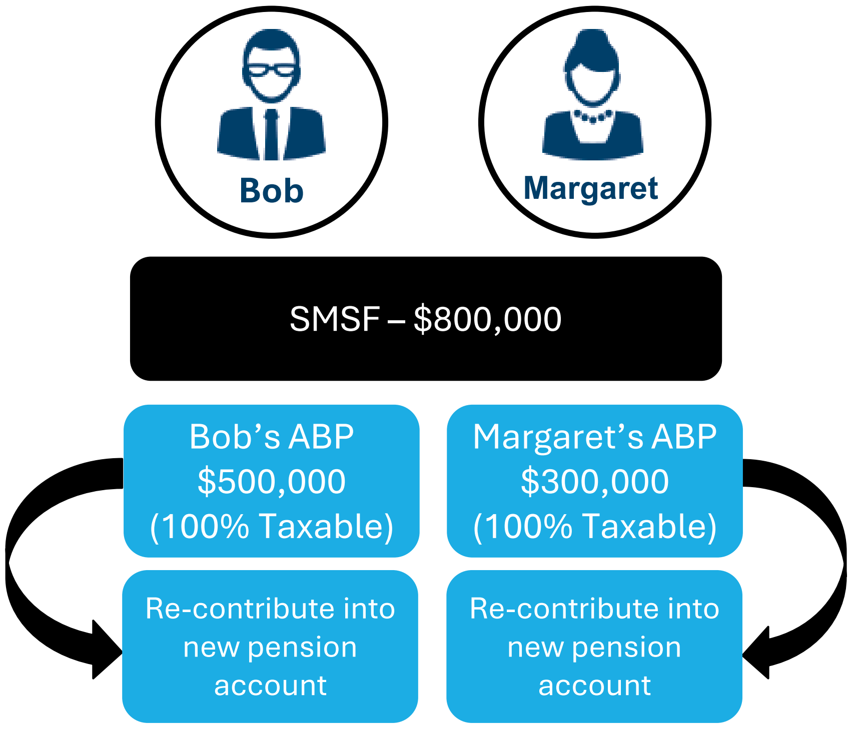
Tax and Super Dependant

- Superannuation Dependant is a person eligible to receive benefits directly from the fund. Generally speaking:
    - Spouse
    - Child
    - Interdependent relationship
    - Legal personal representative
- A tax dependant is someone eligible to receive benefits as a pension and not subject to death benefit taxes

Death Benefit Taxes

- Death benefit taxes is a hidden ‘death tax’ levied on superannuation.
- Components of a superannuation fund:
  - **Taxable Component** (employer contributions or salary sacrifice components) – up to 17%
  - **Untaxed** (life insurance) – up to 32%
  - **Tax Free** (non-concessional contributions – 0%
- Example: Bob and Margaret have $800,000 in super which is 100% taxable. If this were to pass to an adult child: $800,000 x 0.15 = $120,000 (excluding medicare levy).

Withdrawal Re-contribution Strategy



- Bob and Margaret each withdraw $300,000 from their superannuation fund and re-contribute those amounts back into their superannuation account.
- Current $120,000 cap limit or bring forward rule.
- The re-contribution recycles taxable into tax-free components.

- Superannuation account breakdown: $600,000 tax free and $200,000 taxable.
- $200,000 x 0.15 = $30,000

Tax Saving: $90,000

01

PBTC

Lifetime limit

Between $1.6M and $2.0M

02

Accumulation accounts

Do not count towards PBTC

But can only be inherited as a death benefit income stream (DBIS) and under PBTC

03

Pension accounts

The timing and amount depends on whether the deceased spouse's pension was reversionary or non-reversionary

Can transfer to a surviving spouse as a pension

Maximising Super Upon Death

Death Benefit Payment – No Restructure

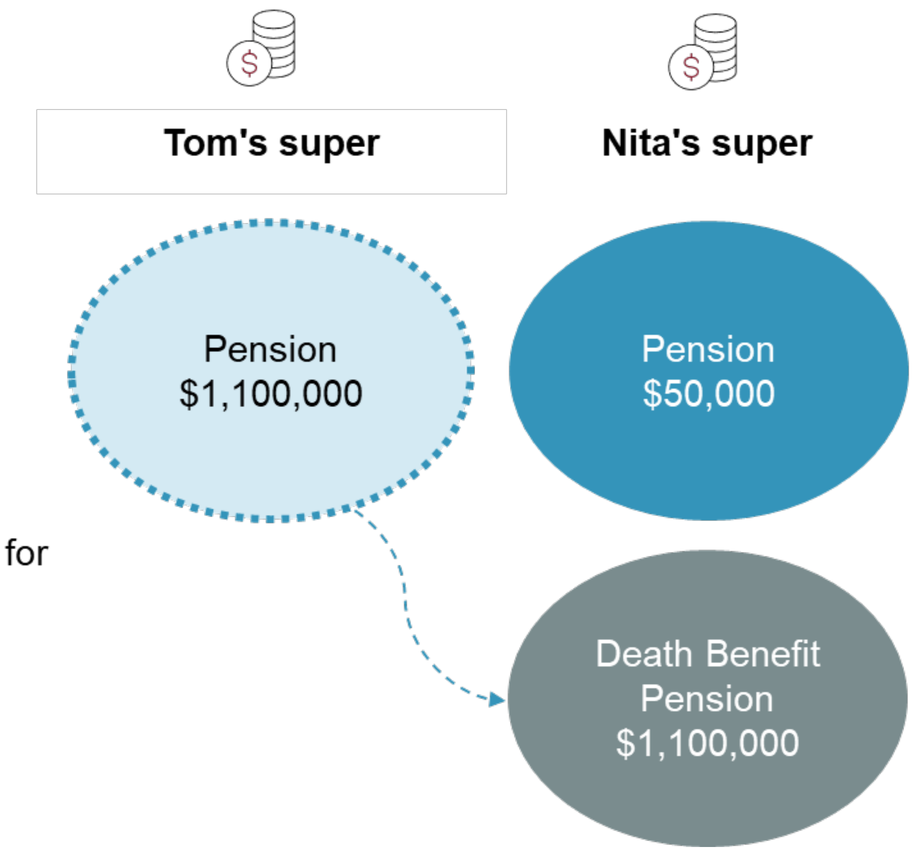
Example 1: No restructure required

Tom and Nita, 66

Tom passes away

- Nita is sole beneficiary
  - As a dependent, Nita can receive a pension
- Tom's pensions are reversionary
  - They automatically revert to Nita
    - The pensions don't count towards Nita's TBC for 12 months

Step 1 – pension automatically reverts



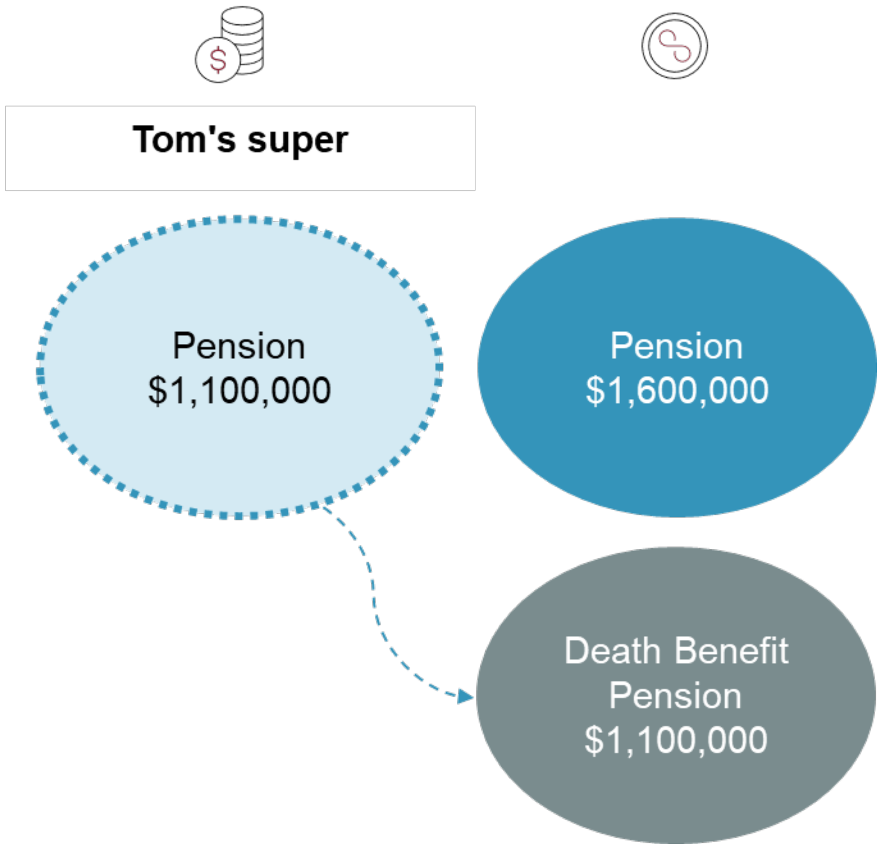
Example 2: Super restructure required

Tom and Nita, 66

Tom passes away

- Nita is sole beneficiary
  - As a dependent, Nita can receive a pension
  - Nita has used up her TBC $1,600,000
- Tom's pensions are reversionary
  - They automatically revert to Nita
    - The pensions don’t count towards Nita's TBC for 12 months

Step 1 – pension automatically reverts



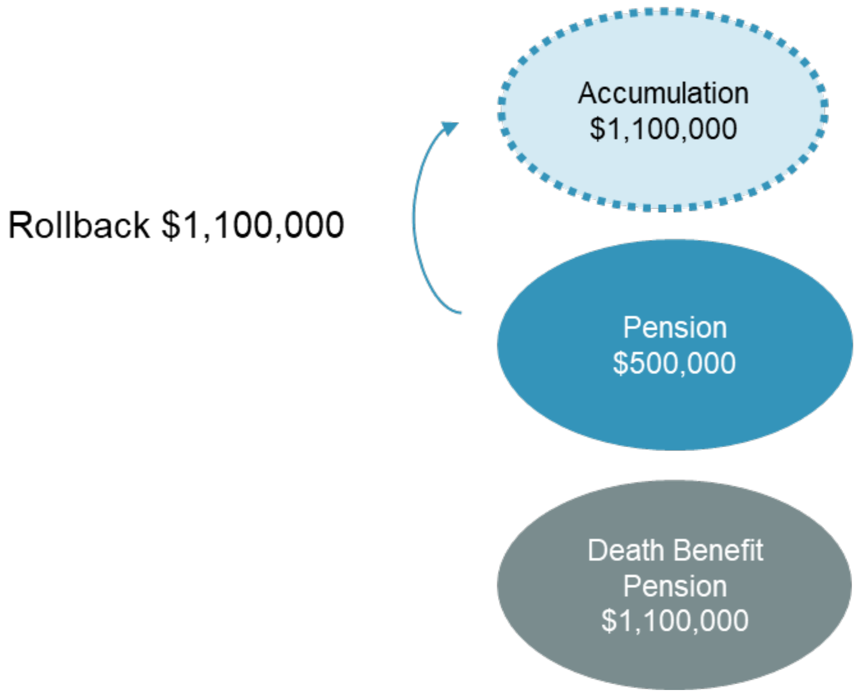
Death Benefit Payment – Restructure Required

Before 1-year anniversary

Nita's TBC

- Before: $1,600,000
- After rollback: $500,000

Nita's super



Death Benefit Payment – Restructure Required

Complexities and Considerations

- Death benefit restructuring is complex and can be costly if not done correctly.
- If there is an excess consider custom death benefit nomination with formula and including DTT.
- Recommend that the client engages a financial adviser to assist with the analysis and implementation.
- Those under 75 may have an opportunity to rebalance accounts and minimise the amount of withdrawal required under a death benefit restructure.
- Consider how cash withdrawals will be invested and the tax implications, noting investment income will now be taxed at personal marginal tax rates.
- Getting holistic advice across personal and super assets will help ensure a cohesive estate plan and investment strategy.

Key Considerations

Check BDBNs

Contact the super fund to check Binding Death Benefit Nominations

Reversionary nominations

If there are existing retirement pensions, check whether they have reversionary nominations in place

Taxable super components

- Understand the breakup of super balances and how much taxable components there are
- Are there any ways to reduce these taxable components?

Death benefit restructure

- Understand what may happen on the death of one spouse
- Consider strategies that help maximise super benefits in the event of death

102AG of the ITAA 1936

- Where adult children are receiving benefits consider including testamentary trust in will.
- Ability to distribute income from the earnings of an inheritance to any of the potential beneficiaries.
- Access to tax free threshold for minor beneficiaries.
- Section 102AG ITAA 1936 gives special tax treatment to testamentary trusts.

Superannuation Proceeds Trust

- A SPT is a trust established to receive superannuation benefits.
- A SPT can be established by Will or by deed after the death of an individual.
- Where super is paid to a SPT, the LPR is taxed on how the person will receive it would be taxed.
- ATO takes a “look through” approach.
- Beneficiaries must be death benefit dependant (tax dependant).

Section 102AG Expanded

Excepted income in relation a beneficiary of the trust to the extent that the amount comes from:

- A Will;
- As a result of the death of a person and under the terms of a policy of life insurance;
- As a result of the death of a person and out of a superannuation or retirement fund;
- As a result of the death of a person by an employer of a deceased person.

Section 102AG Expanded

- Excepted income in relation a beneficiary of the trust to the extent that the amount comes from:
  - A Will;
  - As a result of the death of a person and under the terms of a policy of life insurance;
  - **As a result of the death of a person and out of a superannuation or retirement fund**;
  - As a result of the death of a person by an employer of a deceased person.

102AG where no DTT

- Deceased died with a minor child and a balance with Australian Super.
- The total amount in the fund was $500,000.
- The trustee exercised its discretion to pay benefits to the minor child.
- We contacted Australian Super and requested that they pay it to a trust established for the benefit of the daughter.
- The trust was drafted to comply with s 102AG and allows distributions to daughter to be taxed at concessional rates – first $18,200 is tax free.

Division 296 Changes

- In 2023 the government announced an additional 15% tax on earnings attributable to total superannuation balances exceeding $3 million.
- It was proposed that earnings would include realised and unrealised gains.
- Recent announcements suggest the government has abandoned the plan to tax unrealised gains.
- Superannuation earnings attributable to balances between $3 million and $10 million will be taxed at an effective rate of 30% (existing 15% plus the Div 296 additional charge)
- Balances over $10 million will be taxed at 40%.
- Indexation is likely to occur.

Key Tips

- Consider the mechanism for dealing with superannuation e.g. reversionary pensions v death benefit nominations.
- Consider tax and maximising retention where benefits pass to spouse.
- Death benefit taxes can be considerable – consider implications of benefits passing to adult non-dependant children.
- A good estate planner works collaboratively with accountants and financial advisers to obtain the best outcome for clients.

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