Taking into account

August 2018

Inside

When can you take your super?

The cash sitting in your superannuation fund can be tempting, particularly if you are short of cash. But, the reality is there are very few ways you can take advantage of your superannuation once it has been contributed to the fund – even if you change your mind.

The sole purpose test underpins access to your superannuation – that is, superannuation is for the sole purpose of providing retirement benefits to fund members, or to their dependants if a member dies before retirement. It's important to keep this in mind because it's often forgotten when people are tempted by 'too good to be true' schemes to access their super early.

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The ATO recently warned against a scheme spreading through suburban Australia where scammers encourage people to access their superannuation early to pay debts, take a holiday, or provide money to family overseas in need. All the scammers need is a fee for their services and you to sign blank forms and provide identity documentation. Typically, the forms are used to roll-over your super from an industry fund, establish an SMSF, and open a bank account for the new SMSF. Once the superannuation is rolled into the SMSF, the funds are accessible to withdraw. Problem is, accessing the superannuation is illegal unless you meet the conditions. Any super that is withdrawn early is taxed at your marginal tax rate even if the money is returned to your fund later, plus you are disqualified from being a trustee of your SMSF. If you knowingly allow super benefits to be accessed illegally from your fund, penalties of up to $1.1 million and a jail term of 5 years can apply.

Generally, you can only access your super once you turn 65, when you reach preservation age and retire, or reach preservation age and choose to keep working and start a transition to retirement pension. Currently, the preservation age is 55 years old for those born before 1 July 1960. It then increases by one year, every year, up to the maximum of 60 for those born after 30 June 1964. There are some very limited circumstances where you can legally access your super early.

Treasury is in the midst of a review into the early release of superannuation. The review was sparked by a rapid increase in requests for early access to fund medical treatments such as gastric banding surgery.

"A significant proportion of recent applications appear to relate to out-of-pocket expenses associated with bariatric surgery (that is, weight loss surgery), with a smaller proportion attributable to assisted reproductive treatment (ART), also referred to as in-vitro fertilisation (IVF) treatment."

The review however is focussed on more than medical treatments, looking at the issue broadly including whether it is appropriate to provide early access to superannuation to pay compensation to victims of crime.

Compassionate grounds

Superannuation benefits can be released on compassionate grounds to meet expenses related to medical treatment, medical transport, modifications necessary for the family home or motor vehicles due to severe disability, and palliative care. Funds may also be released on compassionate grounds to prevent foreclosure of a mortgage or exercise of a power of sale over the fund member's home (principal place of residence); or to pay for expenses with a dependant's death, funeral or burial.

Early access to super needs to be a last resort. It's up to the person applying for early access to prove to the regulator that they don't have the financial capacity to meet these expenses without access their superannuation.

In 2016-17, the Department of Human Services received 37,105 applications for early access to superannuation on compassionate grounds, with 21,258 approved. The average amount released was $13,644. The great majority (72%) of funds released were on medical grounds , 18% were released for mortgage payments.

A person seeking early release for medical treatment must provide written evidence from at least two medical practitioners - one of whom must be a specialist - certifying that the treatment or medical transport:

- is necessary to treat a life threatening illness or injury; or alleviate acute or chronic pain; or alleviate an acute or chronic mental disturbance; and
- is not readily available to the individual or their dependant through the public health system.

At present, the Department of Human Services will respond to applicants within 28 days. The applicant then must approach their superannuation fund trustee who has ultimate discretion regarding the release of the funds. From 1 July 2018 however, the Australian Taxation Office will take over administration of early release applications, streamlining the process so applicants and superannuation funds receive the compassionate release notice electronically and simultaneously.

First home buyers

The First Home Super Saver Scheme (FHSS) enables first-home buyers to save for a deposit inside their superannuation account, attracting the tax incentives and some of the earnings benefits of superannuation.

Home savers can make voluntary concessional contributions (for example by salary sacrificing) or non-concessional contributions (voluntary after-tax contributions) of $15,000 a year within existing caps, up to a total of $30,000. Mandated employer contributions cannot be withdrawn under this scheme, it is only voluntary contributions made from 1 July 2017 that can be withdrawn.

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When you die

Superannuation is not an asset of your estate so your superannuation is provided to your eligible beneficiaries - your spouse (de facto) children or a financial dependant - by the fund trustee.

Putting in place a binding death nomination however will direct your superannuation to whoever you nominate, as long as they are an eligible beneficiary. If you have nominations in place, it is essential that you keep these current. Death benefits are normally paid as a lump sum but in some circumstances can be paid as an income stream.

Just be aware that with the $1.6 million transfer balance cap in place, if your superannuation is paid as a death benefit pension to your nominated beneficiary, this could tip them over the cap. It's a good idea to get estate planning advice to manage it correctly.

Divorce and super

The Family Law Legislation Amendment (Superannuation) Act 2001 allows superannuation to be split during a divorce either by agreement or by court order.

Before making a superannuation agreement, the parties must receive separate and independent legal advice. The agreement must be in writing and must be endorsed by a qualified legal practitioner.

Where the superannuation is split by order of the family court, the court decides on how the fund is split.

Essentially, the amount of split super is rolled into the other parties superannuation fund. The same rules apply to accessing superannuation. That is, it cannot be accessed until you turn 65 or reach perseveration age.

If you and your spouse have an SMSF, you need to continue to manage the fund. Relationship breakdown does not suspend your obligations as trustee.

What happens if you contributed too much?

If you contributed too much superannuation to your fund, you cannot simply withdraw the amount.

If you breached your contribution caps, you can apply to withdraw the amount above your cap from your fund. The excess amount is treated as personal assessable income and taxed at your marginal tax rate plus an excess concessional contributions charge. Withdrawal of the excess amounts should not occur until the ATO provides you with a release authority that then needs to be given to the superannuation fund.

If you did not breach your contribution limit but simply overcommitted to superannuation, you cannot simply withdraw the amount.

Using SMSF assets and funds

In general, the assets of an SMSF cannot be used for the personal use or enjoyment of the fund members (or their associates such as friends or family). For example, if the SMSF owns a holiday home, you cannot use it, if the fund has vintage cars, you cannot drive them, if your fund owns art, you cannot hang the art in your home or your office.

The exception to this is business real property. For example, assuming the trust deed allows for it, business owners can use their SMSF to purchase a building, then lease that building back to their business. Business real property is land and buildings used wholly and exclusively in a business.

Trading names are being 'retired'

The Australian Business Register (ABR) is working with ASIC in preparation for the retirement of trading names.

To continue trading under a specific name, the entity needs to register it as a business name.

After a business name is successfully registered, it will appear on ASIC's business names register and the ABN Lookup.

From November, all trading names will be removed from ABN Lookup, and only registered business names will continue to be listed, so check the trading name has been registered as a business name with ASIC by then.

ATO Scam Alerts

In addition to voicemail and email scams the ATO has recently reported that scammers are now sending text message scams as well!

There was a spike in reports of scammers sending scam text messages in June 2018, similar to the example below:

Example

George (not his real name) received a text message from 'ATO Refund" saying there was a tax refund of $275 for him to claim – all he needed to do was click on the website link and log in with his phone number and the PIN number provided in the message.

He was then asked to fill in personal details and provide his Tax File Number (TFN) and credit card number (including the 3 digit code from the back of his card) so his refund could be deposited into his account.

George didn't have a credit card so he called the ATO to make other arrangements, which is when he was advised that the text message was a scam designed to get his information and potentially steal money from his credit card.

Another variation of this scam asks for a small fee to be paid via personal credit or debit card in order to receive the refund. Within days of paying the small fee those impacted by the scam see sizeable deductions made from their bank accounts.

These text message scams often appear to come from the ATO, but the ATO notes they will never send a text message:

- Asking for personal information, including TFN or credit card details;
- Asking for a person to pay a fee for a tax refund.

Anyone unsure about whether any communication is really from the ATO should call the ATO Scam Hotline on 1800 008 540 or visit ato.gov.au/scams.

ATO Phoenix Hotline introduced

A new "Phoenix Hotline" is available for employees, creditors and the general public to report suspected phoenixing behaviour directly to the ATO.

The hotline is part of the government's wider response to combat phoenix activities of directors and their companies who seek to avoid their employee wage and superannuation obligations.

Minister for Revenue and Financial Services Kelly O'Dwyer said disclosures made to the ATO would be protected by privacy laws and the government's legislative action in protecting whistle-blowers (which is yet to be legislated).

The Phoenix Hotline is available on 1800 807 875 or online at ato.gov.au/reportphoenixactivity

Quote of the month

"Many of life's failures are people who did not realise how close they were to success when they gave up"

Thomas A. Edison