

Our ref: PHC 0658014

15 January 2007

Committee Secretary
Senate Economics Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600
By email economics.sen@aph.gov.au

Dear Sir

Enquiry into the provisions of the Tax Laws Amendment (Simplified Superannuation) Bill 2006 and five related Bills

We act for the trustees of the ACIRT, MERT and BIRST redundancy funds. Each of these funds is 'an approved worker entitlement fund' under s 58PB of the *Fringe Benefits Tax Assessment Act 1986*.

Each of the trustees is concerned about the consequences of the proposed requirement in proposed section 82-130 in Schedule 2 of the Tax Laws Amendment (Simplified Superannuation) Bill 2006 (the Bill) that employment termination payments be made no later than 12 months after that termination. Each of the trustees is also concerned about the consequences of the restrictions on rollover of benefits in the transitional provisions in Schedule 2 of the Bill.

Twelve month rule

- 1 Each of my clients receives contributions from employers in accordance with various employment agreements and awards which are credited to the account of the employee and holds these contributions in accordance with the terms of the trust deed until they become payable. They become payable on termination of employment of the employee or his or her death.
- 2 Each fund operates in the construction industry which is well known for its transitory nature of employment. The purpose of the contributions is to provide a source of income between jobs in the construction industry. There are some cases where the employee will defer claiming payment of the money in the fund on termination of an employment. This usually occurs where the employee is able to find suitable alternative employment relatively soon after that termination, and does not need the money. The employee will defer payment of the money in the fund for

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another day when circumstances are different. This would no longer be permissible without a tax penalty under the proposed section 82-130(1)(b).

- 3 Because payment is not limited to payment in circumstances of genuine redundancy, the payments are treated under the current ETP provisions as eligible termination payments, rather than bona fide redundancy payments. Ordinary ETP tax rates are payable. This will continue under the new rules.
- 4 The twelve month rule in clause 82-130(1)(b) also applies to these payments.
- 5 Whilst the Bill provides for exemption from the twelve month rule, either on an individual application or by class ruling – clause 82-130(5) and (7) – there is nothing in either the legislation or the Explanatory Memorandum that makes it clear that the circumstances of these funds are such that a class ruling should be given providing relief from the 12 month rule.
- 6 The trustee of the fund under the PAYG provisions in the Taxation Administration Act is the payer of eligible termination payments and so, is required to withhold. Whilst the Bill provides for exemption from the twelve month rule, either on an individual application or by class ruling – clause 82-130(5) and (7) – this will not affect the withholding obligation, unless there is a determination made before payment is made.
- 7 In the case of death payments, it would not always be the case that they are paid within twelve months of the date of death, particularly where there is a dispute as to entitlement or delays in making a claim.
- 8 In the case of death, this is likely to cause hardship where there is delay, as the payment for PAYG purposes will not be exempt, although it is highly likely that if application is made by the recipient dependant, relief would be granted under clause 82-130(5). This is likely to cause hardship, as it is not necessarily generally understood that the deduction by the payer is a non final withholding on account and not a final tax, and accordingly, subject to refund. In addition, not all dependent recipients will have the necessary skills to make an application to the Commissioner.
- 9 Payments to individuals outside the 12 months where there is good reason for the Commissioner to waive the 12 month requirement will still cause hardship due to the need to withhold PAYG unless payment is delayed until after application, which in itself would be another form of hardship.
- 10 It is submitted that the twelve month rule should not apply to payments by trustees of funds that are approved worker entitlement funds in terms of the FBT legislation, or, in the alternative, that if there is to be a twelve month rule, it not apply by reference to the cessation of employment with the employer, but by some more generous rule such as leaving the construction (or other relevant industry) industry.

Rollover to superannuation

- 11 These funds face difficulties in monitoring the transitional provisions. Under the current law member entitlements being ETPs may be rolled over to a

superannuation fund without restriction. They are of course are untaxed rollovers, and so attract tax at 15%.

- 12 The difficulty with the transitional provisions is the employment terms of each member wishing to roll over benefits to a superannuation fund requires analysis to determine whether or not rollover is permitted.
- 13 It is submitted that the alternative for approved worker entitlement funds should be a transitional period cap applicable to each member. Rollovers up to \$140,000 may be made in respect of a member up until 1 July 2012.

I would be happy to elaborate either in person or by further correspondence on any queries you may have out of the above.

Yours sincerely



Peter Charteris

Partner

Direct +61 2 9286 8176

peter.charteris@dlaphillipsfox.com