COOPER GRACE WARD
LAWYERS

Div 296 & death

ASF Audits Technical Seminar

13 September 2024

Scott Hay-Bartlem
Partner

Use Slido Code: #2564147

1. A bit about Div 296 tax
2. How it works with death…

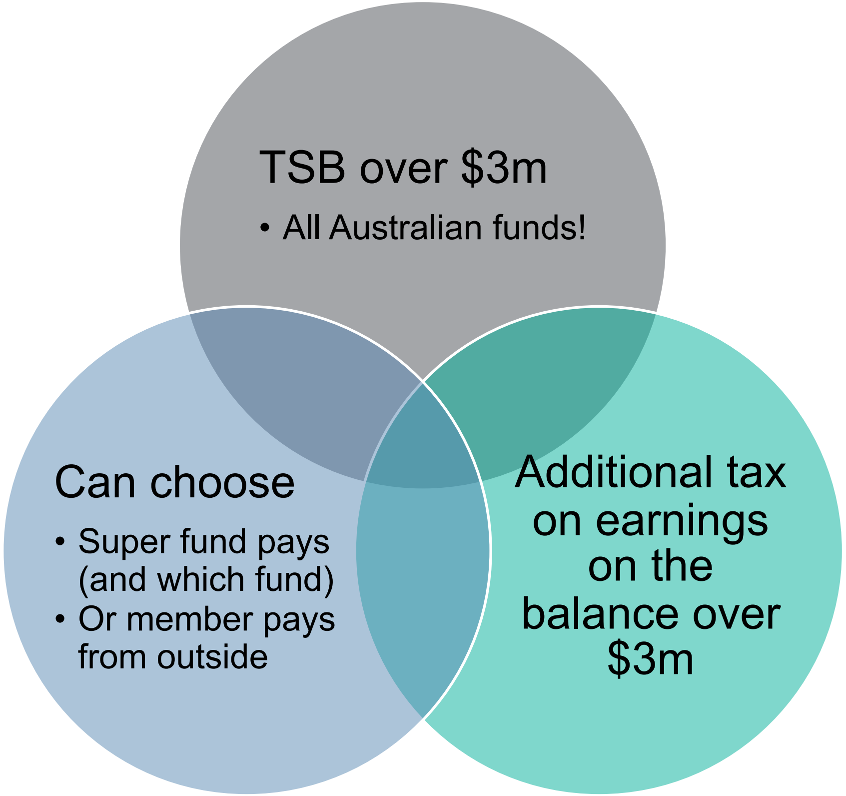
‘Better Targeted Superannuation Concessions’

COOPER GRACE WARD
LAWYERS

NOT LAW YET

- Bill before Federal Parliament
- From 1/7/25 (after next election)
- How will SMSFs/members fund?
- Only affects 0.5% of super fund members (less than 80,000 people)
  - OR 10% from 2052…

‘Better Targeted Superannuation Concessions’



The $3mil cap…

COOPER GRACE WARD
LAWYERS

- Is not indexed
- Ever. At all.

Additional tax

COOPER GRACE WARD LAWYERS

- It's an additional tax
- On top of
  - Contributions tax
  - 15% tax on income from accumulation
  - 0% tax on pensions
  - Tax on capital gains
  - Div 293 tax
  - Tax the member pays outside superannuation
- CGT on realised gains as well as new tax on unrealised gains

- It's a separate tax
  - To the SMSF
  - To the member
- Unaffected by length of ownership of an asset
- Irrespective of the source of the increase in TSB (other than contributions)
- Does not reset cost bases

BUT

COOPER GRACE WARD
LAWYERS

$3m threshold is not indexed

- Over time will affect more and more people
- Effectively $2.5m cap when announced

TSB, so includes amounts in pension

- Eventually, some earnings on pension accounts will be taxed
- Don’t adjust for LRBA debt

Carry forward losses

- Offset against future new tax

SMSFA advocacy

- Totally unnecessary
- If must have then
  - Index cap
  - Not tax unrealised gains

Exemptions

COOPER GRACE WARD
LAWYERS

No tax if

Child recipient of death benefit pension at end of year

Any funds from structured settlement

- Ever and at all
- Even $1.00

Death

- Die 'before the last day of the year'
- Don't die on 30 June!
- For the year in which a member dies and later years, no more Div 296 tax

So Div 296 and death

COOPER GRACE WARD
LAWYERS

- Does not apply to you if you die on or before **29 June** in that year (30 June?)
- Does not apply to you in future years after you have died
- But what about the death benefit recipient

Step 1 – are we in?

- Total superannuation balance is over $3m at EOFY
- All Australian super interests
- Do not adjust for LRBA debt
- Defined benefit pensions and interests?

TSB example - LRBA

COOPER GRACE WARD
LAWYERS

Homer is 65 and has

- Pension $1.7m
- Accumulation $1m
- LRBA debt of $1m
- Gross assets $3.7m, net assets $2.7m

TSB?

- $3.7m ‘ordinary’ calculation (add back LRBA debt)
- $2.7m in actual balance – yes that is under $3m
- BUT do we add back LRBA debt?

No!

- For these purposes, TSB is not adjusted for LRBA debt

The formula

COOPER GRACE WARD
LAWYERS

15% x percentage x ‘earnings’

Step 2 – the % of fund 'earnings'

COOPER GRACE WARD
LAWYERS

- Calculating % = $\dfrac{\text{TSB end - \$3m}}{\text{TSB end}}$
- That is, the percentage of your member balance that is over \$3m at the end of the year
- Apply this to 'earnings' to get the proportion of the earnings attributed to your balance that belongs to your balance over \$3m

Example

- Homer
- 30/6/25 – TSB $4m
- 30/6/26 – TSB $4.5m
- Proportion of TSB over $3m = $\frac{\$4.5\text{m} - \$3\text{m}}{\$4.5\text{m}} = 33\%$
- So, 33% of ‘earnings’ is subject to the new extra tax at 15%

Step 3 – ‘earnings’

COOPER GRACE WARD
LAWYERS

- Earnings =
  - Adjusted TSB end – TSB beginning
- Adjusted TSB =
  - TSB end + withdrawals – contributions
- That is, the movement in total superannuation balance across a year (with adjustments)
- Minimum of $3 million for
  - Adjusted TSB end
  - TSB at beginning
- Includes unrealised gains

Example

COOPER GRACE WARD
LAWYERS

- Homer
- 30/6/25 – TSB $4m
- 30/6/26 – TSB $4.5m
- No contributions or withdrawals
- Earnings = $4.5m - $4m = $500,000

Example

- Homer
- 30/6/25 – TSB $4m
- 30/6/26 – TSB $2.9m
- No contributions or withdrawals
- Negative earnings = $4m - $3m = ($1,000,000)

Step 4 – apply 15% tax rate

COOPER GRACE WARD
LAWYERS

- The percentage of ‘earnings’ is then taxed at 15%
  - Tax = 15% x percentage x earnings

Example

COOPER GRACE WARD
LAWYERS

- Homer
- 30/6/25 – TSB $4m
- 30/6/26 – TSB $4.5m
- No contributions or withdrawals
- Proportion of TSB over $3m = $\dfrac{\$4.5m - \$3m}{\$4.5m}$ = 33.33%
- Earnings = $4.5m - $4m = $500,000
- Tax = 15% x $500,000 x 33.33% = $24,750

Withdrawals – add back!

- Superannuation benefit paid out of your super
- Contributions split out of your super to someone else
- Family law payment out of your super to someone else
- Death benefit from death benefit pension you are receiving (eg commutation of a reversionary pension)
- FHSSS (formula) and some other release authorities
- Rollover containing untaxed element
- Amount paid to lost/unclaimed super

Withdrawals – do not add back!

COOPER GRACE WARD
LAWYERS

- If (all 3)
  - Result of fraud or dishonesty
  - Individual convicted of an offence in relation to it
  - Notify Commissioner in approved form

Example

COOPER GRACE WARD
LAWYERS

- Homer

Facts

30/6/25 – TSB $9m

30/6/26 – TSB $10m

Benefit payments $150,000

No contributions

Steps

1. TSB EOFY = $10m >$3m

2. Proportion over $3m = $\frac{\$10m - \$3m}{\$10m}$ = 70%

3. Adjusted TSB = $10m + $150,000 = $10,150,000

   Earnings = $10,150,000 - $9m = $1,150,000

4. Tax = 15% x $1,150,000 x 70% = $120,750

Contributions – reduce!

COOPER GRACE WARD
LAWYERS

- Contributions made to super for you (concessionals 85%)
- Contributions split to your super from someone else
- Family law payment to your super from someone else
- Opening value of a death benefit pension
- Insurance payment included in your super because of death, TPD or terminal medical condition of the insured
- Amount allocated to your super that is not deemed contribution
- Amount transferred from foreign super fund (formula)
- Unclaimed money payment credited to your super (formula)
- Amount your TSB increases from a payment as compensation for fraud or dishonesty or remediation

Example

- Homer

Facts

TSB
30/6/25 – \$1.9m + \$2.9m = \$4.8m

30/6/26 – \$2m + \$3m = \$5m

Concessional contributions \$20,000
= \$17,000 after tax (85%)

No withdrawals

Steps

1. TSB EOFY = \$5m >\$3m

2. Proportion over \$3m = $\frac{\$5m - \$3m}{\$5m} = 40\%$

3. Adjusted TSB = \$5m - \$17,000
 = \$4,983,000

 Earnings = \$4,983,000 - \$4.8m
 = \$183,000

4. Tax = 15% x \$183,000 x 40% = \$10,980

Example - death

COOPER GRACE WARD
LAWYERS

- 1 June 2026 – Marge dies
- 31 July 2026 – Homer receives Marg’s death benefit as a pension
- $200,000 in pension payments in 2026/27
- No Div 296 tax for Marge – she died before 30 June 2026
- Marge’s pension does not count to Homer’s benefit for Div 296 purposes until 31 July 2026
- Div 296 issues for Homer in 2026/27

Timeline

Start Date

1/6/26

30/6/26

31/7/26

30/6/27

End Date

Marge dies

Decide to pay Homer a death benefit pension from Marg’s benefit

Example – death

COOPER GRACE WARD
LAWYERS

2026/27	Marg	Homer
Opening TSB	$2,000,000	$3,500,000
Closing TSB	Nil	$5,500,000
Percentage	Nil	45.45%
Withdrawals to add back – pension payments		$200,000
Death benefit income stream – contribution to deduct		$2,000,000
Adjusted TSB		$3,700,000
Earnings		$200,000
Tax	Nil	$13,635

Calculations

COOPER GRACE WARD
LAWYERS

- Earnings $200,000
- Marg's benefit $2,000,000
- Pension payment $200,000
- Homer's balance
  - $3,500,000 +$2,000,000 + $200,000 - $200,000 = $5,500,000
- Percentage
  - ($5,500,000 - $3,000,000)/$5,500,000
- Adjusted TSB
  - $5,500,000 - $2,000,000 + $200,000 = $3,700,000
- Earnings
  - $3,700,000 - $3,500,000 = $200,000

Example - death

COOPER GRACE WARD
LAWYERS

- 1 June 2026 – Marge dies
- 31 July 2026 – Homer receives Marg’s death benefit as a pension
- 30 September 2026 – Homer commutes Marg’s pension to a lump sum
- $200,000 in pension payments
- No Div 296 tax for Marge – she died before 30 June 2026
- No Div 296 tax for Homer because of Marge’s death benefit for 2025/26 – pension does not count to Homer’s TSB until 31 July 2026

Timeline

COOPER GRACE WARD
LAWYERS

Start Date

1/6/26
Marge dies

30/6/26

31/7/26
Decide to pay Homer a death benefit pension from Marg's benefit

30/9/26
Homer commutes $2m from Marge's pension

30/6/27

End Date

Example – death

2026/27	Marg	Homer
Opening TSB	$2,000,000	$3,500,000
Closing TSB	Nil	$3,500,000
Percentage	Nil	14.29%
Withdrawals to add back – pension payments Lump sum commutation		$200,000 $2,000,000
Death benefit income stream – contribution to deduct		$2,000,000
Adjusted TSB		$3,700,000
Earnings		$200,000
Tax	Nil	$4,287

Calculations

COOPER GRACE WARD
LAWYERS

- Earnings \$200,000
- Marg's benefit \$2,000,000
- Pension payment \$200,000
- Homer's balance
  - \$3,500,000 + \$2,000,000 + \$200,000 - \$200,000 - \$2,000,000 = \$3,500,000
- Percentage
  - (\$3,500,000 - \$3,000,000)/\$3,000,000
- Adjusted TSB
  - \$3,500,000 - \$2,000,000 + \$200,000 + \$2,000,000 = \$3,700,000
- Earnings
  - \$3,700,000 - \$3,500,000 = \$200,000

Example – what if…

- Homer withdrew
  - Marge's benefit
  - Plus another $600,000
- Homer's closing TSB = $2.9m
- No Div 296 tax
- Even though was over once adjusted…

Example - death

COOPER GRACE WARD
LAWYERS

- 1 June 2026 – Marge dies
- Marg’s pension is reversionary to Homer
- No Div 296 tax for Marge – she died before 30 June 2026
- Ah but Homer’s result has changed for 2025/26 – pension does count to Homer’s TSB on **30 June 2026**
- **1 year earlier!**

Timeline

COOPER GRACE WARD
LAWYERS

Start Date

1/6/26

30/6/26

30/6/27

End Date

Marge dies
Marg’s pension reverts to Homer

Example – death

COOPER GRACE WARD
LAWYERS

2025/26	Marg	Homer
Opening TSB	$2,000,000	$3,500,000
Closing TSB	Nil	$5,500,000
Percentage	Nil	45.45%
Withdrawals to add back		$200,000
Death benefit income stream – contribution to deduct		$2,000,000
Adjusted TSB		$3,700,000
Earnings		$200,000
Tax	Nil	$13,635

Calculations

COOPER GRACE WARD
LAWYERS

- Earnings $200,000
- Marg's benefit $2,000,000
- Pension payment $200,000
- Homer's balance
  - $3,500,000 + $2,000,000 + $200,000 - $200,000 = $5,500,000
- Percentage
  - ($5,500,000 - $3,000,000)/$3,000,000
- Adjusted TSB
  - $5,500,000 - $2,000,000 + $200,000 = $3,700,000
- Earnings
  - $3,700,000 - $3,500,000 = $200,000

Losses

- What if TSB drops
- Have a loss
- Carry forward to future years
- But what if no future increase?

Negative earnings

COOPER GRACE WARD
LAWYERS

- ‘transferrable negative superannuation earnings’
  - Earnings less than nil
  - TSB at start or end of year over $3m
- Calculate earnings with adjustments
  - Adjusted TSB – TSB at start
- Deduct prior year TNSE
- No end date to carry forward

Example

COOPER GRACE WARD
LAWYERS

- Homer
- 30/6/25 – TSB $10m
- 30/6/26 – TSB $9m
- No withdrawals or contributions
- Earnings = $9m - $10m = ($1m)
- Carry forward the negative $1m

Example – following year

COOPER GRACE WARD LAWYERS

- Homer
- 30/6/26 – TSB $9m
- 30/6/27 – TSB $9,750,000
- No withdrawals or contributions
- Earnings = $9,750,000 - $9m = $750,000
- $750,000 - $1m = ($250,000)
- Offset the previous year, with $250,000 to still carry forward

Example

- Homer
- 30/6/25 – TSB $4m
- 30/6/26 – TSB $2.9m
- No withdrawals or contributions
- Earnings = $3m - $4m = ($1m)
- Carry forward the negative $1m
- Use larger of TSB and $3m

Record provisions for all possible tax liabilities

COOPER GRACE WARD
LAWYERS

- If recognise unrealised gains, should also provision tax liabilities on them
- Include tax consequences of unrealised gains in accounts
- Selling costs
- Reduces TSB

Winding up SMSFs

- TSB drops as take funds out
- End up with a loss in final years
- Nothing to offset against
- Member specific

Do we need to do anything now?

- Questionable
- Not law
- May never eventuate
- Robust valuations leading up to 30 June 2024
- Assets with big gains before being realized outside super?

BUT

- Consider contribution strategies for younger members
- Benefits on business real property?
- Contributions are limited and can be hard to get in – take advantage when you can!

Summary

COOPER GRACE WARD
LAWYERS

- It's nasty!
- Not law yet
- Applies after next election

- Does not apply once you have died
- Can affect the recipients
- Reversionary pensions may bring forward liability
- Withdraw to get under by end of year?

COOPER GRACE WARD
LAWYERS

COOPER GRACE WARD

LAWYERS