



## A Competitor Cries “Wolf”...

Although we don't feel it was necessary as our trust deeds are currently up-to-date with the Superannuation Industry (Supervision) Act (the “Act”), Macquarie Group Services Pty Ltd (“MGS”) have reviewed the ACIS superannuation trust deed along with those of some of our other competitors. Readers should not confuse Macquarie Group Services Pty Ltd in any way with Macquarie Bank or Macquarie Group Limited.

Unfortunately, MGS have got it wrong.

To put this all in the context, MGS published a paper and circulated it to some of our clients. The paper is titled “WARNING: SMSF deeds relying on deeming clauses to pay tax-free pensions”. The paper tries to assert that we and others rely on deeming clauses in our trust deeds in order to pay complying pensions under the Act. This is misleading.

**Just to be very clear here, we wholeheartedly disagree with the conclusions at which MGS has arrived and the material it has used in doing so. If you use the ACIS trust deed and pension pack, the issues raised by MGS do not affect you.**

Turning to the specifics of the MGS argument, they rely on several parts of the SIS regulations and specifically mention ATO Taxpayer Alert TA 2010/2. To deal with each of their assertions:

1. Reg 1.06(1) of the SIS Regulations says that a benefit is taken to be a pension under the Act if it is provided under the rules of a superannuation fund .....that **do not permit** the capital supporting the pension to be added to by way of contributions or rollover once the pension has commenced. MGS equate the words “do not permit” with “specifically prohibit”. Standard dictionary meanings of “permit” indicate something quite different. Such definitions include “allow” “authorize” or “grant permission” to do a certain thing. MGS assert that because the ACIS trust deed does not specifically prohibit the acts referred to in Reg 1.06 (1) that it must therefore rely upon a general deeming or catch-all clause to read the restriction referred to in Reg 1.06(1) into the rules of the fund. They also seem to assert that relying on a deeming clause is somehow inappropriate or ineffective. Not only is it not inappropriate or ineffective, but MGS fail to mention other parts of the ACIS trust deed which deal with the matters referred to in regulation 1.06. The fact is that the ACIS deed does not rely on a deeming clause to pay a complying pension and even if it did such provisions **are** effective.
2. Reg. 1.07D says that a benefit meets the standard if **under the applicable contract or rules** a pension cannot be commuted except .....where the pension has paid the minimum payment for the relevant year. MGS assert that **the rules of the fund** must not allow commutation of an income stream without

the minimum payment being made. MGS have conveniently left out the capacity for the pension agreement between the trustee and the member to include such a condition. In any event, the ACIS deed and our pension documents do indeed require the minimum payment to be made. There is no exclusion from making a minimum payment simply because a commutation has occurred. MGS again appeared to have equated the words in regulation 1.07D as meaning that the rules of the fund must specifically prohibit commutation without paying the minimum pension amount. That interpretation is, again, wrong. Again the fact is that the ACIS deed does not rely on a deeming clause in these circumstances.

3. MGS use TA 2010/2 as authority for the proposition that deeming clauses in superannuation fund trust deeds are ineffective. Unusually, TA2010/2 does not deal with deeming clauses! It deals solely with schemes which include a provision in the trust deed which attempts to avoid the excess contributions tax. The alert does not mention benefit payments, pensions, Reg. 1.06(1), 1.07D or deeming clauses nor could any reasonable person interpret it in that way. TA 2010/2 deals with trust deeds which contain a very specific provision, on which the trustee relies to treat an excess contribution as an amount held on a separate trust to the superannuation trust. What the offending provision attempts to do is to make excess contributions something other than excess contributions after they have been received by the fund (i.e. to change the facts). These provisions are considered by the ATO as artificial and as sham attempts to avoid the consequences of the excess contributions tax. The ATO considers something which attempts to change the facts after the event to be an attempt to avoid the operation of the tax regime and considers it ineffective. If it were otherwise, every superannuation fund could accept excess contributions and simply create a sub-trust and avoid the tax. Taking that to its logical conclusion means that it results in some sort of “moral hazard” where the fund can disregard be excess contributions rules with impunity. MGS seem to be suggesting that the use of deeming provisions in documents, based on the ATO's position in TA 2010/2, is somehow ineffective. The alert simply does not support that conclusion. In fact, it says something entirely different. There are countless examples of deeming provisions in legislation, contracts and other documents which deem the inclusion of relevant provisions or exclude inconsistencies where they arise. They are recognised as legitimate by the courts. There are simply too many to list however as an example, the S10 definition of “governing rules” and S52 of the Act are both examples of types of deeming provisions.

MGA also seem to have blurred the line between the trustees of a SMSF and the members of the fund. Their position requires that the fund must contain the specific prohibitions referred to above. However, they fail to recognize that, without an express **obligation** for a fund's trustee to accept contributions or rollovers or to commute a pension prior to the minimum payment being made, the trustee has an obligation to refuse contributions or rollovers. Doing otherwise would breach the trustee's duties. It is immaterial that the trustee and the member may be the same.

Consider this scenario – a member requests the trustee to accept a rollover after the payment of the pension commences or wants to commute the pension prior to receiving the minimum payment. The trustee can agree or not (incidentally, regardless of what the trust deed says). If the trustee agrees, not only does this have adverse tax consequences for the member and the fund but the trustee would have breached its duty to the member by agreeing to allow this to happen. The trustee is the custodian of the

fund for the member and by doing this has knowingly and willfully endangered the trust fund.

In short, we take the view that, not only is MGS wrong in its interpretation of the Act and the ATO ruling, but that they are equally wrong in their conclusions about our trust deed. MGS have taken limited text in isolation and misinterpreted it. Should you receive any further correspondence from MGS in relation to any matter - particularly if it quotes or refers to ACIS - please contact us immediately.

MGS is also against some powerful authority in its position. For example, APRA clearly believes that deeming clauses should be incorporated into every superannuation fund trust deed and that they are effective (see FAQ8.3 <http://www.apra.gov.au/Superannuation/Super-Licensing-FAQ-Trust-Deeds-Governing-Rules.cfm>).

In short, *all* well-drafted superannuation fund trust deeds have deeming clauses – they are an accepted part of good drafting practice.

ACIS' trust deed is well drafted, fully compliant and used by tens of thousands of superannuation funds around Australia. Clients and trustees alike should be assured that funds using the ACIS deed are able to pay all existing superannuation pensions allowable by law.

On a closing note, MGS have provided in their paper a table comparing aspects of the trust deeds used by various suppliers. MGS suggests that ACIS will provide a Wills Kit, Investment Strategies, Reserving Kit and Pension Rollback Kit for what an additional charge and that, by comparison, MGS provide these free of charge at inception of the fund. ACIS does not and has never provided such products. However, ACIS will provide a Pensions Pack to order and we make no apology for an additional charge for that product. Supplying blank "Kits" at inception is fraught with danger and should be accompanied by a warning that by the time they are used they may be out of date and that the user must seek professional advice before using them.

Please call us toll-free on 1-800-773-477 should you have any queries.