



PETER BOBBIN

LEGAL BRIEF

Dear John ...

It's over, but please give those left behind their full entitlement.

*A "letter" to the Prime Minister
The Hon. John Howard MP
Prime Minister of Australia
Parliament House
Canberra*

On behalf of the widows, widowers and children of Australia's 26 million-plus superannuation member accounts, I ask that you apply just a little of our budget surplus to simplifying a tax law. It won't cost much. I am asking for only one section of the Income Tax Assessment Act 1936 to be made to do what it has always been intended to achieve.

In fact, I will do you a deal; if you give me some Treasury and senior Australian Taxation Office lads, and put me up for a few nights in Canberra, the lads and I will amend the section for free.

Don't worry about those Labor and Democrats types; they will support the change. Even Barnaby Joyce will throw his political weight behind it.

What section amendment do I implore your support? Section 279D, which bears the hope-inspiring title: Deduction for certain potential detriment payments made after the death of a fund member.

You probably do not remember this section but it came into existence when you and other like-minded politicians, who cared for the surviving spouses and children of Australian superannuation members, opposed the fiscal fiend Paul Keating and his tax grab for their superannuation death benefits.

Let me remind you. Keating brought about the taxation of superannuation from 1988 by inserting Part IX into the 1936 Tax Act. This was quickly amended by introducing section 279D with the same retroactive operation.

You and other like-minded politicians no doubt recognised that taxing superannuation contributions was going to leave widows, widowers, and children worse off. Those aspiring minds remedied the situation by introducing section 279D.

The essence of the section is this: if a superannuation death benefit is paid to a widow, widower or child of the deceased superannuation member, the super fund making the payment can claim a special tax deduction that will allow it to increase the money it gives to them by up to 17.6 per cent. Section 279D operates to enable a super-fund trustee to increase the death benefit to the family by clawing back through the taxation system the taxes paid on the taxable contributions the fund received over the years.

Even former spouses can get in on this, provided the deceased still liked them enough to give them their super.

Let me put this another way. If you were like the rest of us and you died, Janette could be getting up to 17.6 per cent more from your super savings to help look after her in retirement.

So the idea behind section 279D is a good thing. But it doesn't always work, even though it should. You can fix this and I will help for free, if you give me some lads to do the job.

There are many reasons why it doesn't work. The first is trying to understand how it functions. You and I both have law degrees. You worked as a solicitor, as I do. You were the treasurer working in taxation, as I do. Try reading section 279D for yourself; it is almost incomprehensible. This probably explains why many super funds either do not know that it exists or have made the conscious decision to ignore it.

Because of my early teaching days, I am a member of Asset Super, an industry-based superannuation scheme. Recently, Asset Super told me in its annual member information brochure that the trustee has decided to begin to improve member family death benefits. Luckily, you and I with law degrees can read behind what it was saying; it effectively said that Asset Super was now going to pay more money to the widows, widowers and children of its deceased members because it is going to claim the section 279D tax deduction and pass the benefit to them. This is 17 years after it was first able to do so.

Why did it and so many others wait so long, or still not do it today?

The special tax deduction that allows the super fund to make the extra death benefit payment can only be claimed if the super fund has *made* the payment in respect of the deceased to their family.

By way of example, the superannuation account balance of a deceased member may be \$235,000. If we said that \$150,000 of it represents the after-super-tax contributions by the member's employer, there is a potential for the trustee to increase the amount payable to the member's family by \$26,470 and to get this amount back through the tax system. This is an extra \$26,470 at a time when most families will truly need it and all because the super fund trustee has lodged a special claim for a tax deduction under section 279D.

It appears that many super funds have avoided the benefit because to claim it a fund must pay the extra benefit first *then* claim the tax back. But often a fund cannot make the payment before it has the tax refund available to pay the extra – it would need to take the money out of other member accounts while it waited for its tax refund and it is not allowed to do this.

Some other super funds get around this by accounting for an immediate tax credit (which worries some accountants) then take



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the money out of other member accounts. Other super funds create a reserve and draw the extra money from this, but this too represents other member's money that is withheld from them.

Self-managed superannuation fund members are particularly discriminated against. To obtain the full benefit of the section, the fund needs a huge taxable income in the year of payment. In our example, it would need an income of \$176,467 when the total member assets are only \$235,000.

This is not fair. In fact, there is nothing about section 279D that is fair – it is the tax benefit for the widows and children that Keating gave when he really didn't want to give it.

I don't know what the cost to the federal budget may be but I do notice that Finance Minister Nick Minchin said the underlying cash balance for the financial year to December 31 was a surplus of \$943 million and the net operating result was a surplus of \$3.086 billion. So I guess we can afford it. All that we would be doing is making the rule work in the way it should, by giving more to the family of the deceased.

And there is an easy way to do this: repeal section 279D and follow the lead given by that other well-known superannuation tax rule, section 27CA – Anti-detriment provision for service mismatch cases. Let's not go into how that section works; it is also horrible. Importantly, what it does is give the receiver of any superannuation monies that were affected by Keating's tax on super a tax refund or tax credit sufficient to reimburse them.

This is simplicity in itself. Repeal section 279D and insert a new section 27CAA – Anti-detriment provision for Paul Keating's super tax on family death benefits.

And while we are at it, maybe you and I can restore the tax-free threshold for super death benefits that are not paid to family members. When the rules were introduced, the first \$50,000 threshold amount (now \$129,751) paid from a taxed super fund was tax free to the retiring super fund member. It was also tax free when he/she died, no matter to whom the payment was made.

In the mid 1990s, in yet another tax grab for the dead super dollar, the rules were changed. If you were single, retired, took your super and then died, your beneficiaries avoided the 16.5 per cent tax on the first part of your super. If you were single, died and then the super was paid, so too would the tax be payable.

And while I am on a roll, it really is time to get rid of either the Reasonable Benefits Limit or the Maximum Deductible Contribution limit – having both of these is inefficient, complicating and unfair. You and your parliamentary colleagues want the rest of us to save for our retirement, but then you stop us from accumulating too much (the RBL) or saving too much (the MDC). This is particularly discriminatory to women who often have variable time in the workforce, so need the opportunity to put in as much as they can when they can.

I could go on, but I don't want to confuse you too much, the Australian superannuation taxation and regulatory laws are bewildering enough already. Let's just fix up the system one by one, starting with the death benefits payable to widows, widowers and children. I am sure that Janette will approve.

I look forward to your call.

Asset

*Yours in superannuation,
Peter Bobbin*