Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Submission to the Federal Government

Budget proposal: Adverse impact of restrictions on undeducted contributions to superannuation for the totally and permanently disabled

---

JUNE 2006

CONTACT:

Patrick McCarthy
Legal and Policy Officer
Phone: 02 9258 7700
Fax: 02 9258 7777
Email: patrick@lawyers.alliance.com.au

Suite 5, Level 7, 189 Kent Street, Sydney NSW 2000 GPO Box 7052 Sydney NSW 2001
DX 10126 Sydney Stock Exchange ABN 96 086 880 499

T + 61 2 9258 7700 F + 61 2 9258 7777 E enquiries@lawyersalliance.com.au www.lawyersalliance.com.au

The Australian Lawyers Alliance submits that the proposals made by the Federal Government to restrict undeducted contributions to superannuation will be disadvantageous to injured people who qualify for total and permanent disability (TPD) benefits. Consequently, we propose that an exemption be made so that the restrictions do not apply to those with TPD.

The Federal Government announced proposed changes to superannuation on 9 May 2006. This proposed 'Plan to Simplify and Streamline Superannuation' is intended to take effect as of 9 May 2006. According to the Federal Government, the proposed plan is intended to reduce the current complexities that surround superannuation benefits. It is suggested that this will improve retirement incomes and increase incentives to work longer in paid employment, thereby saving money.

As part of this plan, the Government has proposed to restrict undeducted contributions to superannuation to $450,000 every three years.

The Australian Lawyers Alliance submits that this proposal will finanically disadvantage injured people who no longer have a paid work capacity due to injury or ill-health.

The Australian Lawyers Alliance is seeking an exeption to the restriction on undeducted contributions to superannuation for clients who qualify for TPD. The criteria for TPD will vary between insurance policies. However, a generally accepted definition of TPD is where an injured person is unable and unlikely ever again to undertake any form of remunerative work for which they are reasonably fitted by education, training or experience.[1] Often this will mean that the injured person has suffered an irrecoverable loss of the brain and / or limb function resulting, in their absence from paid employment.

[1] *Cullinane v Mercer Benefit Nominees Limited (formerly known as Mellon Nominees Limited)* [2005] FCA 1470

Prior to 2006-07 there existed a tax-effective strategy for seriously injured people who were unable to work. If an injured person had a lump sum to invest, presumably one that resulted from a compensation claim or insurance payment, they could:

1. contribute the lump sum to superannuation by way of an undeducted contribution;
2. commence an allocated pension from the accumulated superannuation benefit to fund their ongoing lifestyle needs.

This strategy was, however, available only to those who satisfied the criteria for TPD.

If an injured person satisfied the criteria for TPD, they were deemed to be effectively retired and could therefore access their superannuation regardless of their age. Most injured people elected to draw a minimum allocated pension. Lump sums could be withdrawn if required.

The strategy was tax effective for a number of reasons:

1. no contributions tax was payable on the amount placed in superannuation;
2. Investment returns (including capital gains) within the allocated pension were not subject to tax;
3. a portion of the annual pension income was exempt from income tax; and
4. the portion of the annual income that was subject to tax attracted a tax offset of 15%.

The need to satisfy the TPD criteria limited the availability of the strategy to only the most seriously disabled. The Australian Lawyers Alliance submits that seriously disabled people require every assistance in making their available lump sum last their lifetime and/or to provide for their dependants. Even those who have received full compensation will find it a challenge to meet their financial needs, not because their needs are unrealistic, but because of the impact of the discount rate, reduction for contingencies[2] and statutory caps and thresholds on damages. People with TPD who are unable to make their compensation or insurance payments last their lifetimes then become reliant on the federal health and welfare systems.

A discount rate comes into operation when a court awards damages for future economic loss (which include lost future income; expected medical and care costs; home or vehicle modifications to accommodate wheelchairs or other special needs). The Court it assumes that the plaintiff will invest the lump sum and earn income from the investment. Discount rates are percentages used to reduce the total amount of lump-sum compensation awarded to an injured person. The rationale for discount rates is that since the injured person will invest their lump sum, interest earned will increase the total amount of their damages award.

To ensure that the plaintiff is not 'better off' as a result of receiving money now – which they would otherwise receive only over time – the court applies a discount rate to reduce the lump sum. The higher the discount rate, the lower the lump sum awarded to a plaintiff.

The Federal Government has shown itself to be willing to provide tax relief to compensation clients in the past by legislating to allow structured settlements. Unfortunately the pricing of lifetime indexed annuities within Australia makes the use of structured settlements financially disadvantageous to plaintiffs. To date compensation clients have been able to utilise the strategy set out above to implement a pension structure.

We note that the Detailed Outline of the 'Plan to Simplify and Streamline Superannuation' included new pension payment factors that begin at age 55 and therefore do not cater for younger clients. Younger clients commencing a pension under these revised factors may be forced to draw an income in excess

[2] Discount rates and reductions for contingencies significantly impact on a claimants lump-sum compensation payment.

of their requirements and this may lead to a premature reduction and exhaustion of their pension account. In the event the exeption referred to above is allowed, we would ask that the age appropriate pension payment factors apply for those younger clients.

The Australian Lawyers Alliance submits that the current proposal to simplify and streamline superannuation is detrimental and disadvantageous to the totally and permanently disabled. Therefore we propose that those with TPD be exempted from the proposed restrictions. The Australian Lawyers Alliance looks forward to the Federal Government's consideration of this submission.

WHO WE ARE

Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Background

The Australian Lawyers Alliance is the only national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of individuals. We have some 1,500 members and estimate that they represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. The Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

Corporate Structure

The Australian Lawyers Alliance is a company limited by guarantee that has branches in every state and territory of Australia. We are governed by a board of directors made up of representatives from around the country. This board is known as the National Council. Our members elect one director per branch. Directors serve a two-year term, with half the branches holding an election each year. The Council meets four times each year to set the policy and strategic direction for the organisation. The members also elect a president-elect, who serves a one-year term in that role and then becomes National President in the following year. The members in each branch elect their own state/territory committees annually. The elected office-bearers are supported by ten paid staff who are based in Sydney.

Funding

Our main source of funds is membership fees, with additional income generated by our events such as conferences and seminars, as well as through sponsorship, advertising, donations, investments, and conference and seminar paper sales. We receive no government funding.

Programs

We take an active role in contributing to the development of policy and legislation that will affect the rights of the injured and those disadvantaged through the negligence of others. The Lawyers Alliance is a leading national provider of Continuing Legal Education/Continuing Professional Development, with some 25 conferences and seminars planned for 2005. We host a variety of Special Interest Groups (SIGs) to promote the development of expertise in particular areas. SIGs also provide a focus for education, exchange of information, development of materials, events and networking. They cover areas such as workers' compensation, public liability, motor vehicle accidents, professional negligence and women's justice. We also maintain a database of expert witnesses and services for the benefit of our members and their clients. Our bi-monthly magazine *Precedent* is essential reading for lawyers and other professionals keen to keep up to date with developments in personal injury, medical negligence, public interest and other, related areas of the law.