

16 June 2015



Mr Robert Corton
Her Majesty's Revenue and Customs
Pension Scheme Services
Fitzroy House
Castle Meadow Road
Nottingham NG2 1BD
United Kingdom

By email : regulations.QROPS@hmrc.gsi.gov.uk

Dear Sir,

Qualifying Recognised Overseas Pension Schemes

The Superannuation Committee of the Law Council of Australia's Legal Practice Section understands that with effect from 6 April 2015, the conditions that an overseas pension scheme must satisfy in order to register with Her Majesty's Revenue and Customs (HMRC) as a qualifying recognised overseas pension scheme (QROPS) have changed.

The Law Council of Australia is the peak national representative body of the Australian legal profession and represents over 60,000 legal practitioners nationwide. The objectives of the Superannuation Committee are to ensure that the law relating to superannuation in Australia is sound, equitable and demonstrably clear. The Superannuation Committee makes submissions and provides comments on the legal aspects of proposed legislation, circulars, policy papers and other regulatory instruments which affect superannuation funds.

The new requirement

The Superannuation Committee understands that in order to register as a QROPS, an overseas fund must:

- (a) be an 'overseas pension scheme' as set out in regulation 2 of the Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) Regulations 2006 SI 2006/206 ('Requirements Regulations');
- (a) be a 'recognised overseas pension scheme' for the purposes of the Requirements Regulations; and
- (b) have given appropriate undertakings to HMRC.

A superannuation fund that satisfied each of these requirements is then listed on HMRC's QROPS register.

Overseas pension scheme

An Australian regulated superannuation fund is an 'overseas pension scheme' within the meaning of regulation 2 of the Requirements Regulations, and therefore is able to satisfy the first requirement for being a QROPS.

Recognised overseas pension scheme

The Superannuation Committee understands that with effect from 6 April 2015, regulation 2 of the Requirements Regulations was amended by the Overseas Pension Schemes (Miscellaneous Amendments) Regulations 2015 SI 2015/673 (Amendments Regulations) so that an overseas pension scheme must satisfy the 'pension age test' in order to be a recognised overseas pension scheme. Prior to that date the pension age test did not apply to schemes established in the countries listed in the regulations. The listed countries included Australia. This meant that prior to 6 April 2015; an Australian overseas pension scheme was also a recognised overseas pension scheme whether or not it would also satisfy the pension age test. Since that date, the fund must also satisfy regulation 3(6A) of the Requirements Regulations. That regulation provides:

(6A) The benefits payable to the member under the scheme, to the extent that they consist of the relevant transfer fund, payable no earlier than they would be if pension rule 1 in section 165 [of the Finance Act 2004] applied.

Pension rule 1 in section 165 of the Finance Act 2004 provides:

No payment of pension may be made before the day on which the member reaches normal minimum pension age, unless the ill health condition was met immediately before the member became entitled to a pension under the pension scheme.

'Normal minimum pension age' is defined in section 279(1) of the Finance Act 2004 to mean (in respect of retirements on or after 6 April 2010) age 55, and the 'ill health condition' is defined in paragraph 1 of Schedule 28 of the Finance Act 2004 as follows:

1. For the purposes of this Part the ill health condition is met if –
 - (a) the scheme administrator has received evidence from a registered medical practitioner that the member is (and will continue to be) incapable of carrying on the member's occupation because of physical or mental impairment, and
 - (b) the member has in fact ceased to carry on the member's occupation.

Accordingly, the effect of new regulation 3(6A) is that in order for an Australian superannuation fund to qualify as a recognised overseas pension scheme, the benefits for a member who has transferred from a UK registered pension scheme must (to the extent they derive from the member's relevant transfer fund) not be payable earlier than age 55, unless the member is suffering from a medical condition which means they are incapable of carrying out their normal occupation. If a superannuation fund is not a recognised overseas pension scheme, it is not capable of being a QROPS.

Meeting the new requirement

The guidance published by HMRC in its draft pension's tax manual provides that the 'pension age test' can be met either by a requirement:

- (a) set out in the scheme rules of the QROPS; or
- (b) of the law of the country in which the QROPS is established, that benefits are payable to the member;
- (c) no earlier than age 55; or
- (d) earlier than 55 only in cases of ill health, which must be judged by a standard which is 'not lower than the ill health condition set out in paragraph 1 Schedule 28 Finance Act 2004'¹.

The Superannuation Committee understands that the new rules create a real doubt about whether Australian superannuation funds can continue to meet the conditions now needed to qualify as a QROPS.

This is despite the fact that:

- (a) many Australian superannuation funds are listed on the HMRC's QROPS register because they did qualify under the rules prior to 6 April; and
- (b) Australian superannuation funds are highly regulated and closely supervised by Commonwealth regulators, including the Australian Prudential Regulation Authority, the Australian Securities and Investments Commission and the Australian Taxation Office.

The Superannuation Committee understands that there are frequent transfers from pension funds in the United Kingdom to Australia and that to date these have occurred largely without a tax penalty because the receiving Australian fund is a QROPS. The recent changes to the definition of a recognised overseas pension scheme mean that this may no longer be able to occur.

The committee is writing to ask HMRC to assist in overcoming these difficulties by:

- (a) confirming that the laws of Australia that apply to Australian regulated superannuation funds are consistent with the new rules;
- (b) confirming that the governing rules (or scheme rules) of an Australian regulated superannuation fund that limit, *to the extent possible under Australian law*, the circumstances in which UK pension transfer amounts can be paid to a member other than where they are 55 years of age or more or where they are permanently incapacitated would satisfy the new rules; or
- (c) provide an exemption for Australian regulated superannuation funds.

The members of the Superannuation Committee are not qualified to provide advice on English law and our opinions are based on our interpretation of the relevant regulations and statements from HRMC. We acknowledge that they may be given a different interpretation under UK law.

¹ PTM 112300, under "The Pension Age Test".

Australian superannuation regulation

An Australian regulated superannuation fund is established (with some limited exceptions) as a trust. The terms of the trust are found in the trust deed for the fund and any rules that the trustee determines apply to the trust. The rules may form part of the trust deed or they may be found in other documents. Together they form the 'governing rules' of the fund. The governing rules of an Australian regulated superannuation fund and the trustee of the fund must comply with the *Superannuation Industry (Supervision) Act 1993 (Cth)* (SIS Act) and the regulations made under the Act (SIS Regulations). The trustee must also comply with prudential standards made by the Australian Prudential Regulation Authority (APRA).

Under section 62 of the SIS Act, a trustee must ensure that a regulated superannuation fund is maintained solely for one or more of the core purposes or solely for one or more of the core purposes and one or more of the ancillary purposes. In summary, the core purposes are to provide retirement benefits for members and benefits to the dependants of members on the death of a member and the ancillary purposes are to provide benefits for members following the termination of employment because of ill-health and the provision of other benefits as APRA approves in writing.

Under the SIS Regulations, the trustee of a regulated superannuation fund must not pay a benefit from the fund as a lump sum or pension unless the member has satisfied a 'condition of release'. These are consistent with the sole purpose test and include the member reaching 65 and the retirement of a member over 'preservation age'. The preservation age depends on the member's date of birth, but is at a minimum 55 years. They also include the permanent incapacity of the member and the death of the member. Additional conditions of release circumstances include the financial hardship of a member (in which case a benefit not exceeding \$10,000 may be paid), terminal illness of a member, the release of a benefit to pay excess contributions tax to the tax office (or to reimburse the member for that tax) or the release of an amount to release any excess contributions to the member (or the tax office).

Under the SIS Regulations, the trustee of a regulated superannuation fund must pay a benefit from the fund in certain circumstances. In particular, the trustee must pay part of all of a member's benefit:

- (a) if the member dies;
- (b) to another regulated superannuation fund at the request of the member;
- (c) to the Commissioner of Taxation if the member is a lost member as defined;
- (d) to the Commissioner of Taxation or the member if the Commissioner or member provides a release authority to the trustee under the *Income Tax Assessment Act 1997 (Cth)* or the *Tax Administration Act 1953 (Cth)*;

The Superannuation Committee understands that for the purposes of the Requirements Regulations, a benefit is only 'payable to the member' if it is to be paid *to the member* or if it *could be paid to the member and is paid to someone else at the direction of the member*. This means that a benefit is not 'payable to the member' in any of the circumstances set out above, except in paragraph (d) where the member provides a release authority to the trustee or the Commissioner provides a release authority to the trustee to release excess non-concessional contributions.

The circumstances in which a member may give a trustee a release authority apply only where the member has made excess contributions in a year and has been assessed for excess contributions tax or where high income members incur additional tax liabilities on their contributions. Generally, this is paid to the member if the member has paid the tax personally (but the member may instead use the release authority to direct the trustee to pay it to the Commissioner from their superannuation account).

Where the Commissioner provides a release authority to the trustee to release excess non-concessional contributions (after the member has given an election to the trustee that this is what they want to do with their excess contributions), the trustee must pay the excess non-concessional contributions directly to the member. This is a narrow set of circumstances which allow a release of monies that have been, in effect, overpaid to a fund and would not be regularly applied.

Law of the country in which the QROPS is established

As summarised above, Australian law is broadly consistent with the 'pension age test'. However, there are limited circumstances where a member's benefit may be cashed on an earlier date. This means that, applied strictly, an Australian regulated superannuation fund will not satisfy the pension age test because of the 'law of the country in which the [fund] is established'.

Nevertheless, we are aware that there the conditions in which a benefit of a member of a pension scheme in the United Kingdom can be paid that do not meet the pension age test. For example, we understand a "refund of excess contributions lump sum" can be paid to a member from a UK registered scheme before age 55. On that basis, we query whether the pension age test is intended to be read narrowly so as to exclude its application to most Australian superannuation funds. We would be grateful if you would provide confirmation of whether the additional circumstances in which a member's benefit can be paid or commence being paid in Australia by a regulated superannuation fund (as outlined above) in fact mean that the fund cannot meet the 'pension age test'?

Requirements of the scheme rules

We have summarised above the circumstances in which Australian law permits the trustee of a regulated superannuation fund to pay or commence paying a benefit to a member. Except in limited cases, the trustee may impose additional restrictions in the governing rules of the fund. There are a few exceptions:

- (a) the trustee must cash a member's benefit on death;
- (b) the trustee must cash a member's benefit (or a part of a member's benefit) if the member incurs an excess contributions tax liability and the member gives a release authority to the trustee;
- (c) the trustee must cash a benefit to release a member's excess non-concessional contributions if the member elects to do so (and the Commissioner provides a release authority for this purposes to the trustee);
- (d) the trustee must cash a benefit in favour of a member's spouse or former spouse in the event that they enter into a 'superannuation agreement' or if a court orders in the context of a separation or divorce; and
- (e) the trustee must cash a benefit for a former temporary resident who has permanently departed Australia and requests that their benefit be cashed.

We understand paying a benefit on the death of a member is consistent with the pension age test.

Subject to these circumstances, a trustee may be in a position to amend the governing rules of the fund to limit the circumstances in which a benefit is payable to members who have transferred an amount from a UK pension fund. The governing rules of the fund would then satisfy the pension age test for those members, except that the governing rules cannot be amended to override the trustee's obligation to pay a benefit to satisfy a release authority or make a payment in relation to a former temporary resident.

We do not consider that the pension age test is intended to treat the release of an amount from a superannuation fund to release excess contributions or to pay a tax liability (or to reimburse a member for a tax liability) relating to the member's contribution to the fund.

However, it is not clear that this is the case and therefore it is also not clear that an Australian superannuation fund can in fact satisfy the pension age test either under the Australian law or the scheme rules.

We would be grateful if you would please confirm that a fund will meet the pension age test if the governing rules state that benefits that relate to a UK pension transfer amount can only be paid or commenced to be paid to a member if the member:

- (a) ceases work over the age of 55;
- (b) is permanently incapacitated (which is effectively the same as the 'ill health condition' under the pension age test) ;
- (c) gives the trustee a release authority or elects to release their excess non-concessional contributions in accordance with the *Income Tax Assessment Act 1997 Cth or Tax Administration Act 1953*; or
- (d) is a former temporary resident of Australia who has permanently departed Australia and requests their benefit be cashed in accordance with Australian law. In relation to this paragraph (d), we note that it would be unusual for a temporary resident of Australia to transfer their UK pension assets to an Australian superannuation fund.

For your convenience we have set each of the conditions of release out in an attachment, together with our opinion against each condition as to whether the pension age test could be satisfied for that condition.

If you have any questions or require further clarification about the matters we have raised in this letter please contact the Chair of the Superannuation Committee, Ms Michelle Levy on T: 61 29230 5170 or at E: michelle.levy@allens.com.au.

Yours sincerely



MARTYN HAGAN
SECRETARY-GENERAL

Attachment

Australian law conditions of release	Satisfies pension age test?	Can scheme rules be amended so that benefit is only payable where pension age test is satisfied?
Member reaches age 65	Yes	N/A because pension age test is already satisfied
Member ceases gainful employment on or after age 60	Yes	N/A because pension age test is already satisfied
Member permanently retires on or after the member's preservation age (between age 55 and 60 depending on the member's date of birth)	Yes	N/A because pension age test is already satisfied
Member starts a transition to retirement (or non-commutable) pension after reaching preservation age (between age 55 and 60 depending on the member's date of birth)	Yes	Yes
Member becomes permanently incapacitated	Yes	N/A because pension age test is already satisfied. The permanent incapacity condition is effectively the same as the 'ill health' condition
Member becomes temporarily incapacitated (only to allow the payment of income protection insurance benefits received by the fund)	No – because the ill health condition requires that the member's physical or mental impairment 'will continue'*	Yes
Member is diagnosed with a terminal medical condition	No – unless the member has in fact ceased his occupation*	Yes
Member dies	Yes – because benefits on death are not 'payable to the member'	N/A because pension age test is already satisfied
Trustee is given a release authority by the ATO that must be paid to the ATO	Yes - because benefits on death are not 'payable to the member'	N/A because pension age test is already satisfied
Trustee is given a release authority by the ATO that must be paid to the member (excess	No*	No – the trustee must pay a benefit if the ATO provides a release

Australian law conditions of release	Satisfies pension age test?	Can scheme rules be amended so that benefit is only payable where pension age test is satisfied?
non-concessional contributions only)		
Trustee has been given a release authority by the ATO to pay an amount to the member or the ATO	No*	No – the trustee must pay a benefit if the member provides a release authority
APRA approves the release of a benefit to a member on ‘compassionate grounds’ as defined in superannuation law	No*	Yes
The member satisfied financial hardship condition	No*	Yes
The member had temporary residency which has expired and has permanently departed Australia	No*	No – the trustee must pay the benefit to the member under law

* In each of the circumstances marked as "No", there would be no difficulty under the pension age test if the member is 55 years or over when the relevant circumstance arises.