THE TAX INSTITUTE

17 October 2017

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Dear Kasey and Alex

Re: Superannuation – Treatment of a Reversionary TRIS

The Tax Institute refers to the submission prepared by Suzanne Mackenzie (DMAW Lawyers) which was lodged with the Australian Taxation Office (**ATO**) on 6 October 2017 and is attached as Annexure A (**TRIS Submission**).

The TRIS Submission is in relation to the tax treatment of a reversionary transition to retirement income stream (**TRIS**).

The TRIS Submission was primarily drafted by Suzanne Mackenzie. However, it was circulated, discussed and input was provided by members of The Tax Institute's Superannuation Committee.

The Tax Institute fully supports the TRIS Submission. In this regard, we note that we do not agree with the current view of the ATO in relation to the treatment of reversionary TRISs.

In this regard, we understand that the ATO has taken the view that if a member with a TRIS satisfies a 'Nil' cashing restriction and commences to be in retirement phase, it does not cease to be a TRIS. Further, it continues as such so that on the death of the primary pensioner who commenced the TRIS, the reversionary pension also continues as a TRIS regardless of the satisfaction of a further condition of release with a 'Nil' cashing restriction (ie death).

The Institute supports the position put forward in the TRIS Submission, that is that upon the death of the primary beneficiary pensioner and the triggering of the payment of a death benefit there is no longer a TRIS. In other words, once a 'Nil' cashing restriction applies there is no longer any restriction on the form in which the benefit may be cashed and the TRIS conditions are removed. A TRIS then becomes an account based pension.

If you would like to discuss, please contact either me or Tax Counsel, Angie Ananda, on 02 8223 0011.

Yours sincerely

Matthew Pawson
President

ANNEXURE A

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6 October 2017

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Dear Kasey and Alex

Reversionary TRIS

1. This submission has been prepared largely in connection with the author's role as a member of the Superannuation Committee of the Tax Institute. In particular, it follows from a meeting held via teleconference on 12 September 2017, which you both attended and at which discussion took place about the current view of the Australian Taxation Office (**ATO**) in relation to the treatment of a reversionary transition to retirement income stream (**TRIS**).

2. Substantial parts of this submission have also been informed by other members of the Superannuation Committee of the Tax Institute.

3. It is our understanding that the Tax Institute is currently in the final processes of formalising its own submission to you on this issue, but in the interests of time we thought it would be helpful to provide you with this submission (which is likely to be largely mirrored in the final submission from the Tax Institute). We understand the submission has also been supported by the Law Council of Australia.

Summary

4. Through the Tax Institute we have been provided with a copy of a draft ATO guidance note GN 2017/D17 '*Changes to* transition *to retirement income streams*', which includes a section setting out the ATO's views on reversionary TRISs as follows:

> *"When is a reversionary TRIS in the retirement phase?*
>
> *A TRIS can be reversionary. That is, it can automatically revert to a beneficiary on the death of the member.*
>
> *A reversionary TRIS will be in the retirement phase if the beneficiary meets one of the following conditions of release:*

- *age 65*
- *retirement*
- *permanent incapacity, or*
- *terminal illness*

If the beneficiary 65 years or older, the reversionary TRIS will be in the retirement phase as soon as it reverts to them. For the other conditions of release listed above, the beneficiary needs to notify the super provider for the TRIS to be in the retirement phase.

A TRIS that was in the retirement phase before the member died will stop being in the retirement phase if the reversionary beneficiary has not met one of the conditions listed above.

The regulatory (sic) rules stipulate that, where a member dies, an income stream that is paid to a beneficiary needs to be in the retirement phase. If a reversionary TRIS is not in the retirement phase, the beneficiary needs to fully commute the TRIS and instead commence a death benefit income stream that is in the retirement phase, or withdraw the money from super."

5. With respect, we disagree with the ATO's position as set out above and submit that the better view is that upon the death of the primary pensioner and the triggering of the payment of a death benefit there is no longer a TRIS. More detailed legal grounds for this interpretation are set out below.

6. We also note the existence of strong practical reasons for the ATO to change its approach to this issue.

Background

7. A TRIS is a type of account-based pension (**ABP**) where extra terms are overlaid to limit or cap the size of pension payments and prevent lump sum withdrawals unless the pensioner satisfies a condition of release with a 'Nil' cashing restriction, e.g. retirement, death, terminal illness, permanent incapacity (TPD), or attaining age 65 (see the definition of TRIS under r 6.01(2) of the *Superannuation Industry (Supervision) Regulations* (**SISR**)). The purpose of these provisions was to permit members to 'transition to retirement' by commencing to draw a limited pension once they had reached 'preservation age', but were still working and had not otherwise satisfied a condition of release.

8. A significant feature of the 2016 Budget reform measures was to remove the exempt current pension income (**ECPI**) status of earnings on assets supporting TRISs and, as such, TRISs were excluded from being in 'retirement phase'. A level of controversy arose between the ATO and the industry prior to 1 July 2017 in relation to whether a TRIS, once commenced, would automatically cease to be a TRIS upon the satisfaction of a condition of release with a 'Nil' cashing restriction.

9. The ATO (and the Treasury) took the view that once a TRIS had commenced it would always remain a TRIS despite the member in receipt of the TRIS later satisfying a 'condition of release' with a 'Nil' cashing restriction.

10. There were arguments presented against this position, though it was recognised by industry that any auto-conversion of a TRIS into 'retirement phase' would from a practical perspective be problematic for large funds – due to the funds not having sufficient knowledge of whether a member in receipt of a TRIS had satisfied a condition of release with a 'Nil' cashing restriction – other than where the member attained age 65 years.

11. The response to the controversy was to introduce further amendments to the 'retirement phase' provisions, now appearing in s 307-80(3) of the *Income Tax Assessment Act 1997* (**ITAA 97**). Those amendments, in effect, provided that a TRIS will be in retirement phase if the member attains age 65 years or gives notice to the trustee of their retirement, terminal medical condition or permanent incapacity.

12. It is submitted that 'death' was never contemplated as needing to be addressed in these later amendments because industry had taken the view that the payment of a death benefit would and could never be a TRIS. Indeed, we understand that a number of members of the Tax Institute have submitted that there is a widespread industry practice of treating a TRIS as an ABP once a nil cashing restriction was satisfied, provided the relevant governing rules allowed for this.

13. We understand the ATO has since taken the view that if a member with a TRIS satisfies a 'Nil' cashing restriction for the purposes of the amended s 307-80(3) and commences to be in 'retirement phase, it does not cease to be a TRIS. Further, it continues as such so that on the death of the primary pensioner who commenced the TRIS the reversionary pension also continues as a TRIS regardless of the satisfaction of a further condition of release with a 'Nil' cashing restriction – being death.

14. As such, the ATO position means that a pension that has commenced as a TRIS and then converts to retirement phase under s 307-80(3) is confined to being treated as in 'retirement phase' only for the life of the primary pensioner and then will move out of 'retirement phase' if it reverts to a beneficiary who has not also satisfied one of the specified conditions of release under s 307-80(3) of ITAA 97 and not notified the trustee of such (other than the attaining age 65 years condition).

15. Many superannuation fund rules (including for both large regulated superannuation funds regulated by APRA and SMSFs) or pension terms provide for the TRIS 'overlay' conditions to cease to form part of the terms of the pension once a condition of release with a 'Nil' cashing restriction is met. Further, reversionary TRIS terms would never anticipate the reversionary beneficiary also being required to themselves satisfy a 'condition of release' with a 'Nil' cashing restriction. We understand this issue is common across both the SMSF sector and for large APRA funds.

16. We are not aware of APRA having taken a position on this issue, but note that reversionary TRISs have been available from numerous large regulated funds.

17. The current ATO position would clearly discriminate against younger widows and widowers (under age 65 years) and children who are not in a position to themselves satisfy a 'condition of release' mentioned under s 307-80(3) of ITAA 97. There are also other irrational and arbitrary outcomes dependent upon the manner in which pensions have been commenced by the primary pensioner, for example, compare two members – one commencing a TRIS at age 64 and the other commencing an ABP at age 65 – with both dying at age 70 and their spouse and dependent children then being exposed to significantly different tax treatment on the resulting death benefits.

18. Further, there is doubt as to whether adequate records would have been retained by funds to administer death benefits in this way. For example, a pensioner who commenced a TRIS at age 64 – who is now 73 – would be taken to still have a TRIS. However, the fund is unlikely to have continued to record the pension as such, and upon death of the pensioner the trustee is unlikely to be aware that the reversionary beneficiary must also satisfy a separate 'condition of release' in order that the

pension continues to be in the 'retirement phase'.

19. Practically, it will be impossible for the ATO to monitor the position, in many circumstances there will be ABPs that have transitioned from old TRISs where no record of the original TRIS status has been maintained on current administration systems.

20. Indeed, there are many superannuation deeds and pension rules that retain an automatic conversion mechanism in them that a TRIS is treated as an ABP once a 'Nil' cashing restriction is satisfied. A substantial impost on the superannuation industry and ultimately members will be imposed if the ATO continues to pursue its current approach.

Legal analysis

21. The payment of benefit from regulated superannuation funds is generally restricted by Part 6 of SISR which deals substantially with the 'preservation requirements', being a fundamental plank of the superannuation regime. Regulation 6.17 of SISR specifically prevents a benefit from being cashed to a member other than under Division 6.3. Regulation 6.18(3) provides for the form in which a voluntary cashing of preserved benefits may take place as follows:

> *"(3) Subject to subregulation (4), the form in which preserved benefits may be cashed under this regulation is, <u>unless the satisfied condition of release is the death of the member:</u>*
>
> *(a) a form (if any) specified in Schedule 1 as a cashing restriction relating to the condition of release; or*
>
> *(b) if the specified cashing restriction is 'Nil'--any 1 or more of the following forms:*
>
> *(i) 1 or more lump sums;*
>
> *(ii) 1 or more pensions;*
>
> *(iii) the purchase of 1 or more annuities.*
>
> *Note: For the cashing requirement applying on the death of the member, see regulation 6.21."*
>
> *[Our emphasis]*

22. An equivalent provision applies to restricted non-preserved benefits under r 6.19 of SISR. A TRIS is relevant only to paragraph (a) as a '*form …specified in Schedule 1 as a cashing restriction relating to the condition of release*'. It is relevant to note that a TRIS is not enlivened where '*the satisfied condition of release is the death of the member*' – as the death condition of release is specifically carved out and left to be dealt with under r 6.21 (as per the note at the foot of r 6.18(3) and r 6.19(3) of SISR).

23. It is submitted that the purpose of the lifting of the TRIS restrictions pursuant to the definition of TRIS in r 6.01(2) of SISR is to convert the TRIS into an ABP. There is no longer a requirement imposed by the cashing restriction under Schedule 1 of SISR where a condition of release with a 'Nil' cashing restriction has been satisfied. From the perspective of the application of the preservation conditions under Part 6 of SISR once a 'Nil" cashing restriction applies there is no longer any restriction on the form in which the benefit may be cashed and the TRIS conditions are removed. There is no longer any special feature of the pension such as to identify it as a TRIS from that time forward (other than for historical relevance, noting that it may have

once commenced as a TRIS). Prior to 1 July 2017 there was little consequence for these provisions, other than it clearly allowed for a TRIS to be automatically converted to an ABP without the need for cessation and re-commencement. For many funds, TRIS terms and conditions have been prepared on this basis and would continue to apply.

24. In keeping with this approach, it is submitted that the term 'pension', as used in SISR is an adaptive term as prescribed by the governing rules of the particular fund from time to time rather than being an inflexible term as suggested by the ATO in limiting its analysis strictly and literally to the definition contained in r 6.01 of SISR.

25. We note that the ATO accepts that a TRIS is actually, by definition, an ABP with additional restrictions. Accordingly, we submit that a TRIS becomes an ABP when a condition of release with a 'Nil' cashing restriction is satisfied. It is no longer a TRIS for SIS purposes – there is no purpose under Part 6 of SISR to treat it as such. We accept that for the purposes of treating the ABP (former TRIS) to be in 'retirement phase' the further practical conditions under s 307-80(3) must be satisfied where the relevant conditions of release are age 65, retirement, TPD or terminal illness.

26. If the governing rules of the fund and related pension documents provide for the rules of an ABP to apply to a TRIS once a relevant condition of release with a 'Nil' cashing restriction is met, the income stream meets the definition of an ABP regardless of whether it commenced as a TRIS originally. We have annexed in Attachment A relevant extracts from the SIS legislation to support such an approach.

27. Furthermore, there is no express provision in the legislation that precludes the effective conversion of a TRIS to an ABP. If the legislature intended such a restriction it would have been expressed and not implied via the recent amendments to s 307-80(3) of ITAA 97. The conversion of TRISs to ABPs via governing rules and pension terms has been a long established industry practice originally contemplated by the *Explanatory Statement to the Superannuation Industry (Supervision) Amendment Regulations 2007 (No. 1)* (Cth).

28. There have been no relevant changes to the definition of a TRIS or an ABP in the SISR that would support the conclusion that a TRIS cannot be automatically converted to an ABP. In particular, numerous members of the Tax Institute have indicated that there has been a widespread practice of funds (particularly SMSFs) making provision for TRISs to convert to ABPs since 1 July 2007.

29. We understand that this conversion practice became quite popular following the super reforms that occurred in mid-2007 aimed at 'crystallising' a tax free component in respect of a pension (broadly, the then pre-1983 component). This was typically then an allocated pension, which soon followed in respect of transition to retirement allocated pensions (**TRAP**) (a TRAP being the predecessor to a TRIS) converting to an allocated pension or an ABP.

30. Following the mid-2007 reforms a member was permitted to convert their allocated pension (which pensions were phased out with no new allocated pensions being allowed to commence after 19 September 2007) to an ABP without the need to first commute their original allocated pension back to accumulation to commence a new ABP (and therefore be subject to the proportioning rule on the commencement of the new ABP). Instead, the member could seamlessly convert allocated pension to a new ABP. Similarly, the practice developed of converting a TRAP to an allocated pension or an ABP. It is relevant to note the following extract from the *Explanatory Statement to the Superannuation Industry (Supervision) Amendment Regulations*

2007 (No. 1) (Cth):

> "*The new minimum standards [being the payment rules for an ABP] will not be restricted to income streams which commence on or after 20 September 2007. This means that existing allocated pensions will be able to operate under the new minimum payment rules from 1 July 2007* ***without the need to commute and restart the pension****.*"
>
> *[Emphasis added]*

31. For the purposes of s 307-80(3) of ITAA 97 (and despite the operation of Part 6 of SISR) we accept that a pension that has commenced as a TRIS and for which one of the relevant four specified conditions of release is satisfied is not in 'retirement phase' until the additional criteria regarding relevant notice to the trustee is given (other than for the age 65 condition of release).

32. This has a practical operation for large APRA funds that do not provide auto-conversion to an ABP a resolution; which was the purpose behind the amendment to s 307-80(3) in June 2017. Section 307-80(3) is silent in relation to 'death' as a condition of release because a death benefit pension should never be taken to be a TRIS – even if it results from a reversionary TRIS or a pension that commenced as a TRIS – and the death benefit pension should instead be immediately treated as in 'retirement phase' and is not within the ambit of s 307-80(3).

33. If the ATO approach to reversionary TRISs is adopted it has the unusual consequence of requiring a 'double-layer' of conditions of release with a 'Nil" cashing restriction to be applied to the same benefit – firstly, being the death of the original pensioner and secondly, when the reversionary beneficiary is required to satisfy age 65 years, retirement, TPD or terminal illness.

34. We consider that such a result is at odds with the operation of the 'SIS' legislation and the purpose of the preservation and payment standards contained in Part 6 of SISR. Further, the ATO approach also appears to be at odds with the policy supporting the amendments to s 307-80(3) that were principally for the purpose of ensuring that a TRIS continued in retirement phase until it was practical for a fund to be informed that a 'Nil' cashing restriction had been satisfied in respect of the member concerned for the four relevant and specified conditions of release. These practical difficulties would not apply to a reversionary death benefit pension – as funds and their administrators would typically transfer on commencement all death benefit pensions to retirement phase.

35. Further, the ATO position is such that a reversionary TRIS results in the eventual death benefit pension also being a TRIS. As already stated, SISR does not contemplate a TRIS in respect of a death benefit payable under r 6.21 and therefore the taxation treatment would conflict with the SIS treatment of the death benefit. The ATO argues that the taxation treatment is linked into SISR via the reference to death benefit pensions being required to be in 'retirement phase' under r 6.21 of SISR. We respectfully suggest that this requirement was merely to put beyond doubt any options for the 'parking' of death benefits within the superannuation system beyond the $1.6 million transfer balance cap. From a SIS perspective, if a TRIS is reversionary then upon the death of the primary pensioner a condition of release with a Nil cashing restriction is satisfied and the trustee of the fund is obliged to pay the death benefit to the reversionary pensioner as an account based death benefit pension (not being a TRIS – because it must be in 'retirement phase').

36. Our position (which we understand is supported by the Tax Institute) not only has

regard to the text of s 307-80(3) of ITAA 97 and Part 6 of SISR, but also to the context and purpose (or policy) of those provisions where the following factors are relevant to their interpretation:

36.1 there is no express provision that precludes the conversion of a TRIS to an ABP where the pension provided has governing rules that provide for auto conversion or removal of the TRIS overlay conditions (as expressed above);

36.2 there is no clear policy intent or purpose to support the additional layer of conditions of release having to be satisfied by a reversionary beneficiary upon the payment of a death benefit pension, merely because it reverts from a TRIS;

36.3 the ATO accepts that a death benefit pension could be paid by commuting the TRIS reversionary pension and commencing a new pension, thus ultimately achieving the same result by an indirect and more cumbersome means without any clear policy basis for so doing;

36.4 there is no policy intent to restrict TRISs from being in the 'retirement phase' once a condition of release with a 'Nil' cashing restriction has been satisfied – whether during a person's lifetime or on death – in fact, the position would appear to be to the contrary;

36.5 the amendments to r 6.21 of SISR to require the death benefit pension to be in 'retirement phase' are designed to quell any suggestion that a death benefit might be paid as a new TRIS, for example, or another kind of 'parking' arrangement (though in our view this would never be possible as the context of the payment to the beneficiary is as a death benefit – which takes on a different application under Part 6 of SISR as is evident from r 6.17, 6.18 and 6.19 of SISR, where the recipient of the payment is not the member);

36.6 to strictly apply the ATO's view would be to require a reversionary beneficiary to have also satisfied the preservation age criteria under item 110 of Schedule 1 of SISR in order for the TRIS provisions to apply – this is not consistent with the operation of the preservation restrictions or the sole purpose test.

Cost and Practical Inconveniences

37. The ATO approach involves significantly increased complexity for the administration of TRISs (and auto-converted TRISs to ABPs) as outlined in Attachment B. Increased complexity leads inevitably to increased costs and inefficiencies.

38. We also note below many costs and practical inconveniences that would be encountered if the ATO view were to prevail:

38.1 members wishing to better provide for their dependants would need to go to the trouble to commute pensions originally started as a TRIS upon satisfying a condition of release with a 'Nil' cashing restriction, to then just re-start an identical 'retirement phase' pension;

38.2 members and fund trustees and administrators are unlikely to understand the ATO position (as it is not intuitive and is inconsistent with how funds have previously managed reversionary TRISs) and professional advice is costly and favours those that are better resourced – albeit, ultimately at a cost to members in either case;

38.3 the pension commutation and restart carries needless transaction processing costs for the superannuation fund and ATO, including additional transfer balance cap reporting, re-setting components and tax-free and taxable proportions and action by the member;

38.4 minimum pension payments for the remainder of the year in which the original pension is commuted and restarted will need to be re-calculated by the superannuation fund, and can generally be expected to be lower;

38.5 superannuation funds would need to post a ‘flag’ on pension accounts that were originally started as a TRIS (which may be impossible where the fund did not retain those records for pensioners that had already met a condition of release with a ‘Nil’ cashing restriction – thus resulting in differential treatment across members and across funds);

38.6 social security income means testing will not be grandfathered for the re-started pension, meaning that lower income pensioners who also rely on the Age pension (or their younger dependants) will often be disadvantaged compared to wealthier households that do not need to rely on the Age pension and therefore do not face the same down-side from commuting and restarting – in this way the Budge reform measures impact on more than the ‘wealthy’;

38.7 if the pension does not revert, dependent family members (who may be traumatised by the death of their spouse or parent) will need to make investment decisions about how best to meet day-to-day living expenses at a time when they need to grieve – by contrast if the pension was allowed to revert, the pension is transferred smoothly and automatically, and any resulting transfer balance account breach by the reversionary pensioner can be dealt with up to 12 months later;

38.8 a widow, or more particularly child orphans, may find the complex financial decisions involved in reinvesting a lump sum commutation on death difficult, with the cost of professional advice likely to be taken from the estate or other funds that would otherwise be available to support them;

38.9 tax treatment of the investment earnings between the date of death and when a replacement pension is acquired creates an extra layer of complexity compared to if the pension reverted;

38.10 a pension that cannot revert (because the beneficiary cannot satisfy a condition of release with a ‘Nil” cashing restriction) is more likely to be paid out by the superannuation fund on death, and the dependant may not have sufficient non-concessional cap space to re-contribute the amount, may not be able to draw their own pension if they did re-contribute, and to the extent they can re-contribute and draw a pension, it may be less favourably taxed (both pension earnings, and pension drawings taxed as life benefit);

38.11 death benefit nominations (which would typically expire every three years) may need to be repeatedly made to address the contingency that the pension will not revert and a lump sum commutation amount must be paid.

Conclusion

39. We consider that we need to move towards a superannuation tax system where the least engaged, those with the lowest account balances, those unable to afford advice, those with low incomes and the most vulnerable are not automatically disadvantaged.

40. Whilst the current ATO view results in more complex legal and administrative outcomes which mean there are greater opportunities for professionals to earn fees, we have made this submission in a genuine attempt to provide better practical out comes and lower costs for retirees and the superannuation industry more generally.

Yours sincerely

Suzanne Mackenzie.

Suzanne Mackenzie

ATTACHMENT A (Extracts from relevant legislation)

1. The definition of TRIS in r 6.01 of SISR states that a ‘transition to retirement income stream’ means:

   (b) a pension provided from a superannuation fund, the rules of which:…

2. The definition of pension is set out in r 1.06(1) of SISR:

   A benefit is taken to be a pension for the purposes of the Act if:

   (a) it is provided under rules of a superannuation fund that:

   (i) meet the standards of subregulation (9A) or 1.06A(2); and

   (ii) do not permit the capital supporting the pension to be added to by way of contribution or rollover after the pension has commenced; and …

3. This TRIS definition relies on the definition of pension which is defined in s 10 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (‘**SISA**’) to mean:

   ..pension, except in the expression old-age pension, includes a benefit provided by a fund, if the benefit is taken, under the regulations, to be a pension for the purposes of this Act.

4. For completeness since the term pension refers to old-age pension we have extracted that definition from s 10 of the SISA below:

   ..old-age pensions has the same meaning as in paragraph 51(xxiii) of the Constitution.

5. The governing rules of a pension can include the superannuation fund deed, pension documents and any unwritten rule. In particular, the term governing rules is defined in s10 of the SISA to mean:

   "governing rules", in relation to a fund, scheme or trust, means:

   (a) any rules contained in a trust instrument, other document or legislation, or combination of them; or

   (b) any unwritten rules;

   governing the establishment or operation of the fund, scheme or trust.

ATTACHMENT B

The following is a summary of the treatment of a TRIS on death based on our understanding of the current ATO view:

1. **TRIS — not in retirement phase (non-RP)**

1.1 **TRIS is not automatically reversionary**

If a member with a non-RP TRIS that is not automatically reversionary dies:

- the TRIS cannot revert as SISR 6.21(1) only permits, among other things, 1 or more pensions, each of which is a superannuation income stream ('SIS') that is in the retirement phase ('RP') to be paid;
- therefore, the TRIS would cease on the primary beneficiary's death and a new ABP could be commenced (ABPs are in the RP).

1.2 **TRIS is automatically reversionary**

If a member with a non-RP TRIS that is automatically reversionary dies, such a TRIS:

- cannot revert to a reversionary beneficiary who is not in RP;
- can revert to a reversionary beneficiary who is in RP.

2. **TRIS — is in RP**

2.1 **TRIS is not automatically reversionary**

If a member with a RP TRIS that is not automatically reversionary dies:

- the TRIS ceases on death (see: TR 2013/5 and LCG 2017/3);
- a new ABP could be commenced.

2.2 **TRIS is automatically reversionary**

If a member with a RP TRIS that is automatically reversionary dies, such a TRIS:

- cannot revert to a reversionary beneficiary who is not in RP;
- can revert to a reversionary beneficiary who is in RP.

3. **Exempt current pension income (ECPI) exemption**

A superannuation income stream (ie, the tax term for a 'pension') must be in RP for a pension exemption to continue following the death of a primary beneficiary where that pension is in RP. Therefore:

- a TRIS would need to be in RP and not automatically reversionary on death to obtain a continuation of the ECPI exemption under r 995-1.01(2) to (5) of the *Income Tax Assessment Regulations 1997* (Cth);

- a TRIS that was automatically reversionary and the reversionary beneficiary was in RP, the ECPI exemption would continue under s 295-385 or 295-390 of the ITAA 97.

4. The proportioning rule - tax free versus taxable components

Broadly, the same taxable and tax-free components of a superannuation income stream will apply to the death benefit under reg 307-125(2) of the ITAA 97, provided the TRIS is not automatically reversionary.