

# Essential Estate Planning Strategies For Success



Australian  
Shareholders'  
Association

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Nice Guy

# Super Death Tax: Avoidance or Evasion?



....and the Dozen  
Deathbed Ready  
Checklist

But first.....

Better Targeted  
Super Concessions

# Tax Law Created Modern SMSF



*Scott v CoT (No. 2) 1966*

Super fund had 4 members

Sole Purpose Test first expressed

The SMSF mere façade failed as a tax sham

.... created almost 60 years ago



# Tax Law Created Modern SMSF



*CoT v Roche 1991*

*Raymor Contractors v CoT 1991*

Super sole purpose extended  
Contribution tax test failure created

.... expressed 25 years later



# Tax Law Created Modern SMSF



*Pre 1990's*

All super death payments tax exempt

*Early 1990's*

Super tax introduced for non-tax free dependants on post 83 component

.... almost 30 years later



# Tax Law Created Modern SMSF



Better Targeted  
Superannuation Concessions

...aka you pay more tax

Is it still worth it....

.... almost 60 years later



# Tax Law Created Modern SMSF



Super and Tax are intertwined  
Can't (won't) have one without the other

Remember Part IVA is just another tax section



# SMSF v APRA Fund & Death Benefits

Treated differently - Member pre-death claim processed & paid **after** death

## SMSF

It is a death benefit and taxable as such

## APRA Fund

*‘payment to you from a super fund because you are a fund member’ - tax free (if over 60)*



# SMSF v APRA Fund & Death Benefits

SMSF's and APRA funds treated differently

*“The (APRA Fund) application was accepted and the process commenced prior to her death, with the actual payment paid to the deceased's account after death.”*

*PBR 1051988780639*

ATO accepted no tax also when done by Attorney

Timing is everything, get deathbed ready

*PBR 1051950892840*

# Super Death Benefits

Death is coming?

*Can you tax plan?*

Can Part IVA apply?

But before we go there....

# What is the super death tax?

Isn't super tax free?



Yes, if spouse, child under 18, financial dependent, interdependent

# What is the super death tax?

Isn't super tax free?



No if not to a tax-free person, which is most of our children etc.

Tax is at minimum 15% on the taxable component.

# By the way, an ASA member question

Can you legally nominate a beneficiary that isn't a spouse or someone that isn't financially dependant? For e.g. can a relative - say a brother or sister or other family member that isn't your child or dependant - receive your super death benefit?



No, only two methods;

Super → will → person

Shut super into your name then will → person

Anna

# What is the super death tax?

## Look at your Taxable - taxed

Taxable is 79.6%

$$\$2,879,216 \times .15\% = \$431,882$$



“The Sunday Session” – Sunday, 4 May

### My Own Superannuation Benefit Fund Members Statement

My Name  
My Address  
Drummoyne, New South Wales, 2047, Australia

#### Your Details

##### Member Details

Date of Birth : 21/02/19 xx  
Age: Young  
Tax File Number: Provided  
Date Joined Fund: 01/07/2007  
Service Period Start Date: 10/11/1981  
Date Left Fund:  
Member Code:

##### Account Details

Account Phase: Accumulation Phase  
Account Start Date: 30/06/2017  
Account Description: Accumulation  
Member Balance at 30/06/2023: \$3,617,906.20

##### Your Beneficiary Details

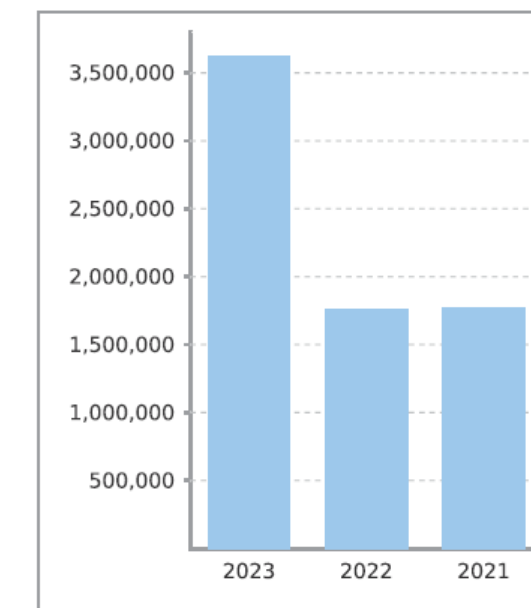
Nominated Beneficiaries: N/A  
Nomination Type: N/A

##### Your Insurance Details

Vested Benefits: \$3,617,906.20  
Total Death Benefit: \$3,617,906.20  
Current Salary: \$0.00  
Previous Salary: \$0.00  
Disability Benefit: \$0.00

#### Your Balance

Account Phase	Accumulation Phase
	\$
Opening Balance	1,758,089.20
Increase(Decrease)	1,859,817.00
<b>Closing Balance</b>	<b>3,617,906.20</b>
<b>Your Investment Return Rate</b>	<b>17.63%</b>
<b>Preservation Components</b>	<b>\$</b>
Preserved	
Unrestricted Non Preserved	3,617,906.20
Restricted Non Preserved	
<b>Tax Components</b>	<b>\$</b>
Tax Free	738,689.77
<b>Taxable - Taxed</b>	<b>2,879,216.43</b>
Taxable - Untaxed	



#### Your Detailed Account Summary

	2023	2022
	\$	\$
<b>Opening balance at 01/07/2022</b>	<b>1,758,089.20</b>	<b>1,773,685.87</b>
<b>Increases to Member account during the period</b>		
Employer Contributions		
Personal Contributions (Concessional)		
Personal Contributions (Non Concessional)		
Government Co-Contributions		
Other Contributions		
Proceeds of Insurance Policies		
Transfers In		
Net Earnings	580,872.00	63,923.72
Internal Transfer In	1,318,768.71	
<b>Total Increases to your Member account</b>	<b>1,899,640.71</b>	<b>63,923.72</b>
<b>Decreases to Member account during the period</b>		
Pensions Paid		
Contributions Tax		
Income Tax	38,432.21	40,506.45
No TFN Excess Contributions Tax		
Excess Contributions Tax		
Refund Excess Contributions		
Division 293 Tax		
Insurance Policy Premiums Paid		
Management Fees		
Member Expenses		
Benefits Paid/Transfers Out	1,391.50	39,013.94
Superannuation Surcharge Tax		
Internal Transfer Out		
<b>Total Decreases to your Member account</b>	<b>39,823.71</b>	<b>79,520.39</b>
<b>Closing balance at 30/06/2023</b>	<b>3,617,906.20</b>	<b>1,758,089.20</b>

# Super Death Benefits

Death is coming?

*Can you tax plan?*

Can Part IVA apply?



# What is Part IVA purpose?

How the scheme was implemented

The effects of the scheme

The connection between parties to the scheme

But for the scheme, what?

Any change in the financial position of any person  
who has, or has had, any connection

PS LA 2005/24

# What is Part IVA purpose?

the manner in which the 2013 related scheme was entered into and carried out supports a conclusion that Mr Springer, Guardian or AITCS (*or those advising them*) entered into or carried out that scheme for the dominant purpose of enabling Mr Springer to obtain a tax benefit

CofT v Guardian [2021] FCA 1619

# Super Death – Case Study

Aged 65 with one child under 18 & one over 18,  
both living independently. There is no spouse.

Advised 6 mth terminal disease

\$1,000,000 super, 90% is taxable component

Has a home (PPR) also valued at \$1,000,000

# Super Death – Case Study

Home is tax free, \$1,000,000 to the family.  
Maximum possible super death tax is **\$153,000**

Net to family \$1,847,000

**What can you/should you do?**



# Tell the estate to receive the super

Save the medicare levy = \$9,000 saved ( $\$900,000 \times 2\% \times \frac{1}{2}$ )



# Tell the estate to receive the super

Save the medicare levy = \$9,000 saved ( $\$900,000 \times 2\% \times \frac{1}{2}$ )



Proper to advise of consequences of a decision to be made

Tell have a will, older the home, under  
18/tax free dependant the super

Save max tax = \$153,000 ( $\$900,000 \times 17\%$ )





Tell have a will, older the home, under  
18/tax free dependant the super

Save max tax = \$153,000 ( $\$900,000 \times 17\%$ )



Proper to advise of  
need for will and  
outcomes that follow

Tell executor, older the home, under  
18/tax free dependant the super

Save max tax = \$153,000 ( $\$900,000 \times 17\%$ )



Tell executor, older the home, under 18/tax free dependant the super

Save max tax = \$153,000 ( $\$900,000 \times 17\%$ )



Proper to advise of consequences of a decision to be made

Tell client to withdraw the super and hold the proceeds



Save max tax = \$153,000 ( $\$900,000 \times 17\%$ )



# Tell client to withdraw the super and hold the proceeds

Save max tax = \$153,000 ( $\$900,000 \times 17\%$ )



Who is this for?  
Client or their dependents?

Tell child to use power of attorney to  
withdraw the super

Save max tax = \$153,000 ( $\$900,000 \times 17\%$ )



Tell child to use power of attorney to withdraw the super

Save max tax = \$153,000 ( $\$900,000 \times 17\%$ )



No benefit to parent.  
Breach of PoA?  
Who is it for?



Alter alter smsf trust deed to *eo instanti* on death  
hold assets not as super but deemed bare trust for  
member

Save max tax = \$153,000 ( $\$900,000 \times 17\%$ )



Alter alter smsf trust deed to *eo instanti* on death  
hold assets not as super but deemed bare trust for  
member

Save max tax = \$153,000 ( $\$900,000 \times 17\%$ )



I have difficulty with  
this at law. Anyway, why  
not a scheme?

Tell super to testamentary trust via will  
where at least one beneficiary is tax free  
dependant

Save max tax = \$153,000 ( $\$900,000 \times 17\%$ )



Tell super to testamentary trust via will  
where at least one beneficiary is tax free  
dependant

Save max tax = \$153,000 ( $\$900,000 \times 17\%$ )

ATO says no, if there is no current certainty  
of who in the TT will benefit from the super.

PBR 1051920326857



Might work if followed  
through to TT control of  
super to dependant

# Tell pay g'child school fees and 'direct' the super to them



Save max tax = \$153,000 ( $\$900,000 \times 17\%$ )



Tell pay g'child school fees and 'direct'  
the super to them

Issue is; was g'child reliant on regular continuous  
contribution ... to maintain that standard

Who really has the school fee liability?

Is there a scheme?

Consider Re Malek v CofT [1999] AATA 678



Doesn't work, but also is it  
contrived?



# Super Death & Part IVA – ATO view?



Not directly but from the ATO website on  
Withdraw and re-contribute?

*Super Scheme Smart: Individual information pack*

“If Gavin goes ahead and deliberately contributes in excess of his cap, and then withdraws the excess resulting in a reduction of his taxable component, he could be subject to the anti-avoidance rules in Part IVA”



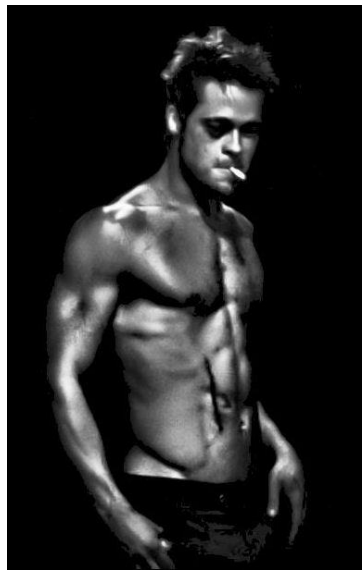
# Are you a tax scheme promoter?

Maybe (like me) you are too tax excitable?!

Our tax excitement becomes their Part IVA

... and that is not fair to them because.....

# Take another look, super is a potent mix of ....





# Take another look, super is a mess





# Take another look, super is a potent mix of ....

The smallest death benefit issue that I have read went from;

- death to
- trustee decision to
- the complaint to
- the new trustee decision to
- the appeal to
- the determination;



and was fought over ....\$858.62!

# Why shut down/withdraw from super?

Avoid two or more legal claims

Conflicts of interest are real and dangerous

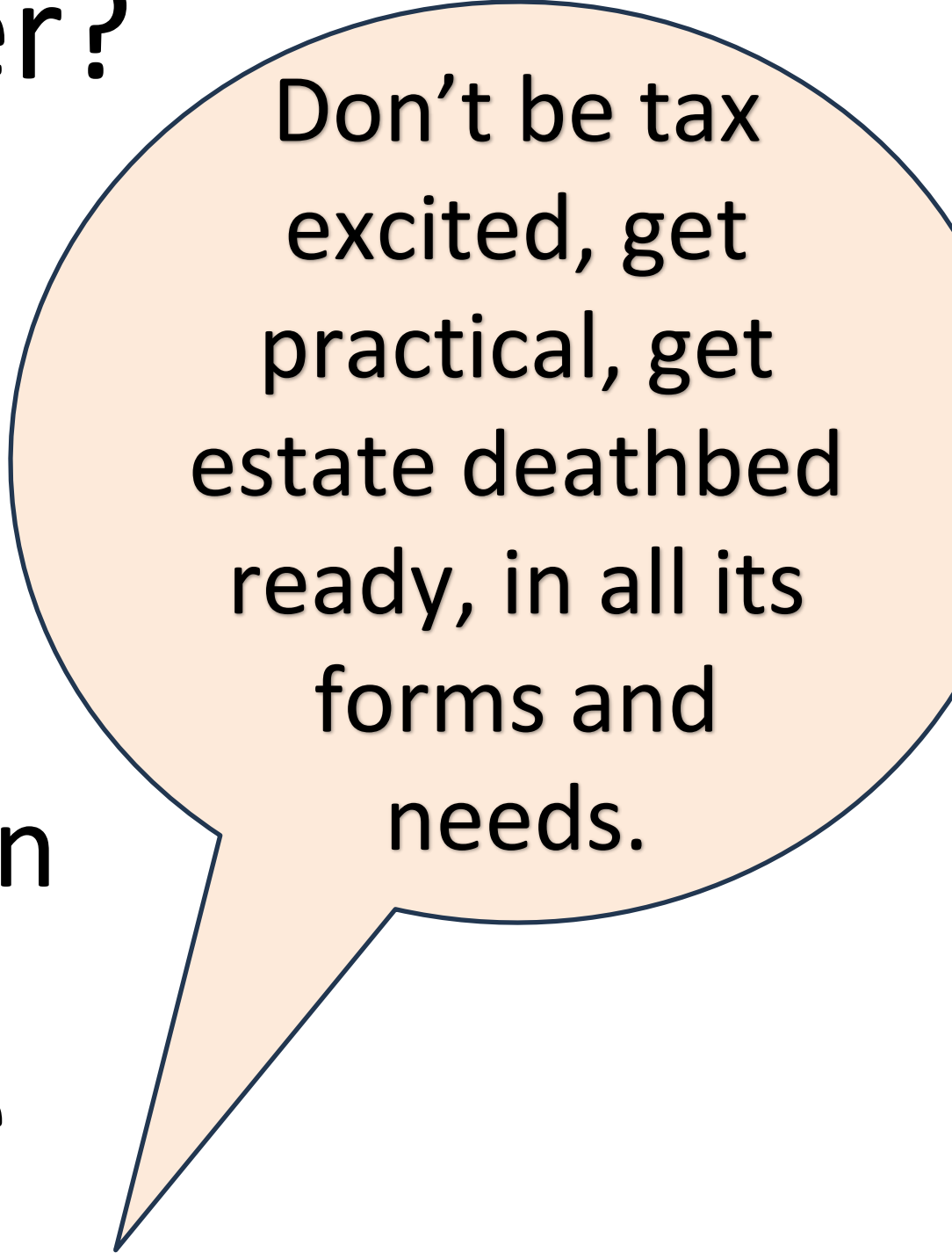
Achieve certainty & peace of mind

The step-child loss risk is real

Don't want another and more administration

Give with a warm hand not a cold one

Just part of a greater plan to be ready to die



Don't be tax excited, get practical, get estate deathbed ready, in all its forms and needs.

## Is this the true dominant purpose?



# Be deathbed ready

1. Get cash now
2. Know authority ends, know who and how of immediate new authority
3. Check documents now whilst alive!



# Be deathbed ready

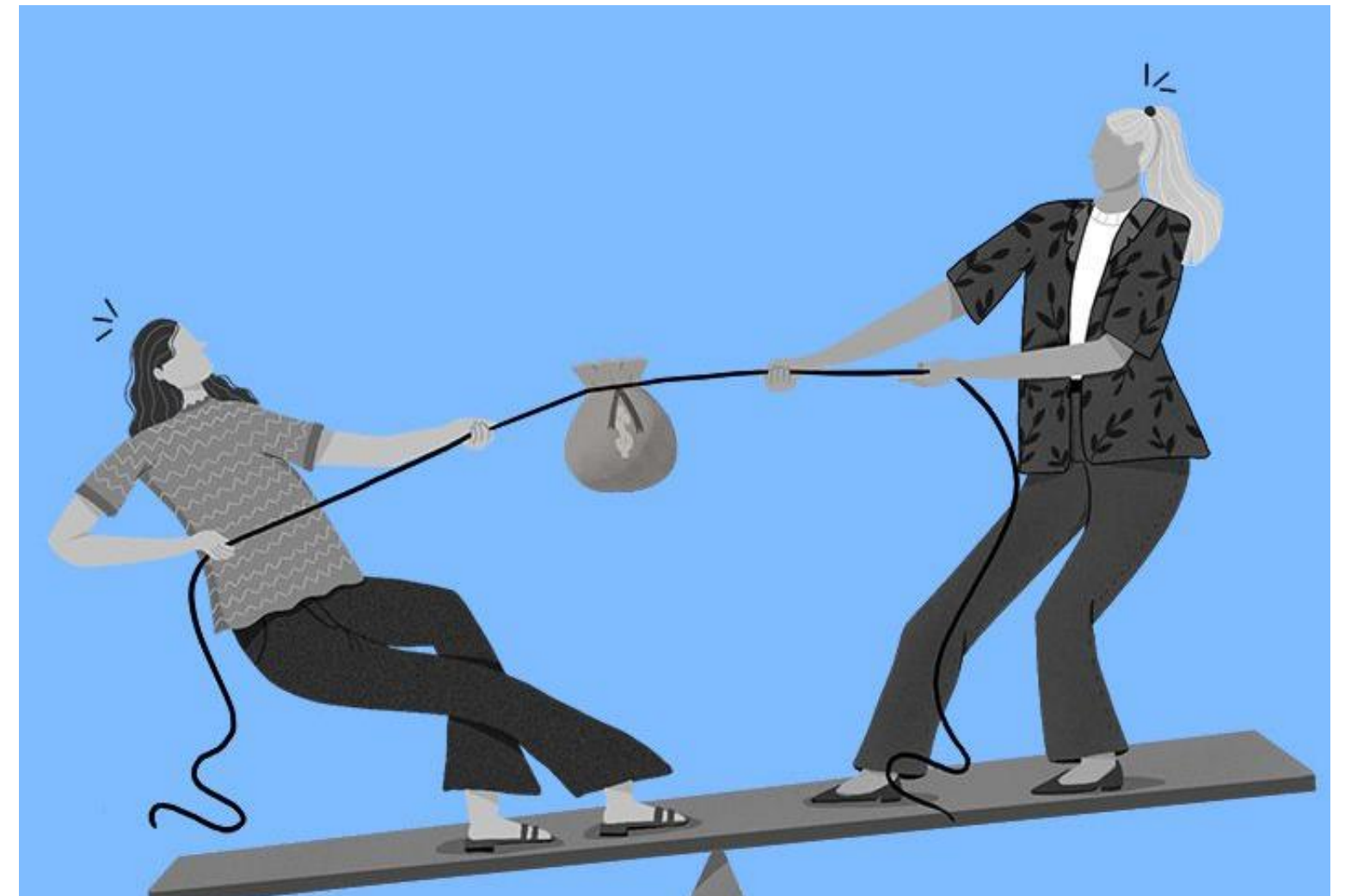
4. Make your super dependent certain, BDBN? or trust deed terms.
5. Cut problem connections
6. Beat the hearsay rule with sect. 73 Evidence Act relationships and age statement





# Be deathbed ready

7. Use conflict release and self-benefit authorities in Power of Attorney and Will. They (and you) need it



# Be deathbed ready

8. Change directors now?  
Make them a member now?  
Adjust authorized  
signatories?
9. Convert lumpy assets now?  
Have transfer forms ready?



**KEEP  
CALM**

**YOU'RE  
IN CHARGE**

# Be deathbed ready

10. Do nothing until the process can start, then put the claims staking flag up - 1<sup>st</sup> step is list of dependants



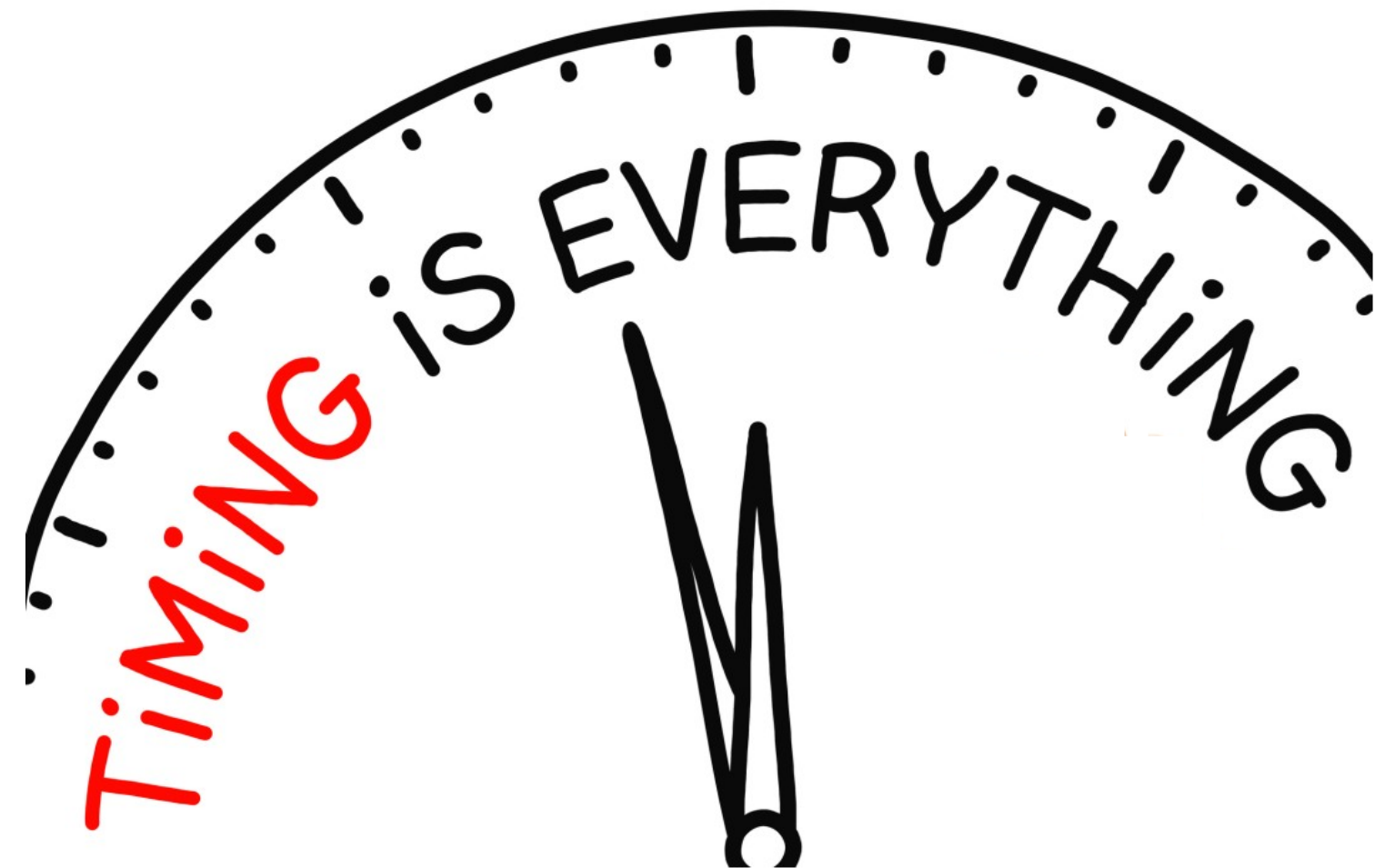
# Be deathbed ready

11. Have all of the  
paperwork orderly  
and fill in the gaps



# Be deathbed ready

12. Carry a pack of  
withdrawal forms?  
Fill-in, sign, submit &  
whine until payment into  
the bank account





# Be deathbed ready

## Got Super, maybe....



# Be deathbed ready

Let's do the maths

Remember \$1m super, 90%  
taxable component equals  
\$135,000 tax

Assume 5% return





# Be deathbed ready

Let's do the maths

In-super tax saving is  
\$24,500pa which means  
that the trade off is 5.5  
years away!



# Better Targeted Super Concessions – the Bobbin view is



Super is still the greatest legal tax  
avoidance scheme in the world

Average of the new tax is still better choice

Tax on unrealised capital gains is egregious,  
especially for lumpy assets like property or non-  
marketable private equity

# Better Targeted Super Concessions – the Bobbin view is



Next decision time is May 2026, do  
nothing until then

Maximise values for 2025, offer bottle of single malt?

Look at accounting methods, take up tax  
provisions? In 2026 not 2025?

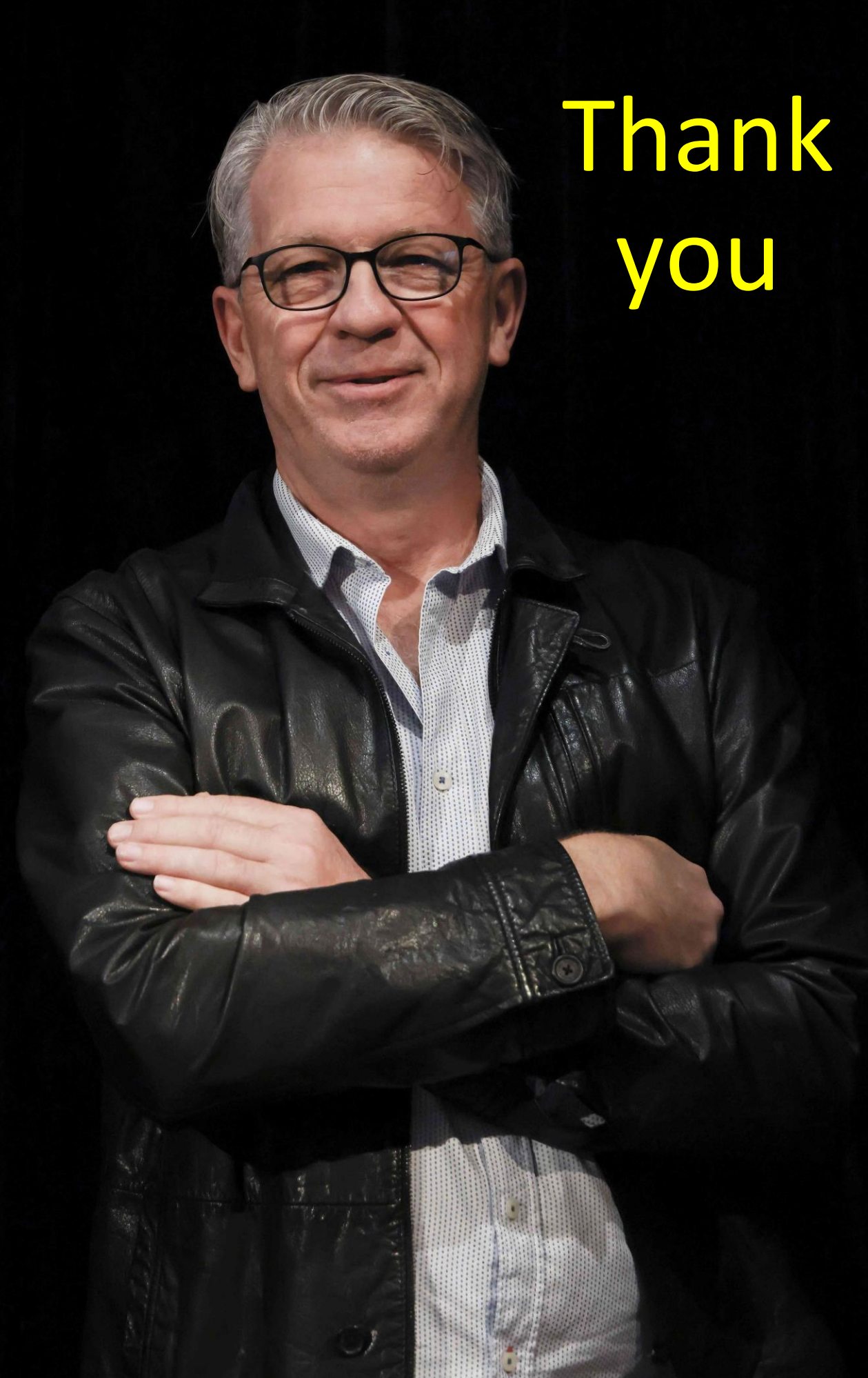
# Super Death Tax: Avoidance or Evasion?



Check your and their  
purpose

....and be Dozen  
Deathbed Ready





Thank  
you

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