client alert | explanatory memorandum

April 2022

CURRENCY:

This issue of **Client Alert** takes into account developments up to and including 18 March 2022.

Keeping you informed about the Federal Budget

The Client Alert team will, as usual, work to bring you a special **Budget Extra** edition that outlines the key announcements to assist you in dealing with your clients' queries. You can expect to receive it by the morning of Wednesday 30 March, after the Budget is handed down on the evening of Tuesday 29 March.

Support for flood-ravaged areas

The recent devastating flooding in South East Queensland and parts of New South Wales has left many people homeless, caused vast amounts of property damage and has sadly led to loss of life. While the clean-up effort continues in many areas, there is some immediate financial help available for those affected, including the Disaster Recovery Payment and Disaster Recovery Allowance. Flood-impacted small businesses will receive an automatic lodgment deferral and can apply for a refund of previously paid PAYG instalments. Any GST refunds will also be "fast-tracked".

While these floods have finally been declared a national emergency by the Federal Government, thus allowing it to intervene and deploy resources, details including the scale and type of funding as well as the mechanisms for distribution have been slow in forthcoming.

As with previous disasters, those who need immediate help can apply for the Australian Government Disaster Recovery Payment. This is a one-off financial assistance of $1,000 per eligible adult and $400 for each eligible child under 16. This includes Australian resident individuals in various local government areas who have been seriously injured, lost their homes, have had their homes/major assets directly damaged, or those who have lost immediate family members as a direct result of the floods. This payment is also available to eligible New Zealand visa holders (Subclass 444) who have been affected by the floods.

In addition to the lump sum Disaster Recovery Payment, Australian residents and eligible New Zealand visa holders may be eligible to apply for the Disaster Recovery Allowance. This is a short-term payment for a maximum of 13 weeks. Eligible individuals will need to be 16 years or over, have lost income as a direct result of the storms/floods, and earn less than the average Australian weekly income (currently $1,737.10 per week) in the weeks after the income loss.

Those who earn more than $1,737.10 per week will have their payment reduced to nil and those already receiving income support payments such as the pension, parental leave pay and ABSTUDY will not qualify for the Disaster Recovery Allowance.

Individuals who qualify for the Disaster Recovery Allowance will receive the equivalent of the maximum JobSeeker or Youth Allowance payment depending on their personal circumstances (single, partnered, with children, living at the parental home, or requiring long term support). Both the Disaster Recovery Payment and the Disaster Recovery Allowance can be applied for through MyGov and Services Australia.

Small businesses affected by the floods in parts of Queensland and New South Wales will have more time to lodge their business activity statements (BASs) and instalment notices with an original due date of 28 February 2022 or 21 March 2022. Those taxpayers can lodge relevant returns up until 28 March 2022 without the need for a lodgment deferral. However, taxpayers need to be aware that the payment due date for these lodgments will not change, so general interest charge (GIC) may apply to any payments not made by the original payment date.

To further help flood-impacted small businesses with cash flow, a refund of previously paid PAYG instalments can be claimed and any GST refunds will be "fast-tracked". Small businesses will also be able to change their GST reporting cycle and vary their PAYG instalments without penalty, provided reasonable care is taken. Any flood-affected small businesses that are unable to meet their lodgment and payment obligations are encouraged to contact the ATO directly for tailored support.

Temporary full expensing of assets extended

Businesses will have another year to utilise the temporary full expensing of depreciating assets measure, now that it has been extended to end on 30 June 2023. The measure was originally introduced to encourage business investment in the backdrop of the COVID-19 pandemic and allowed eligible businesses to deduct the full cost of eligible depreciating assets of any value. Building and other capital works, as well as software development pools, do not generally qualify for full expensing. Neither do second-hand goods for certain entities. Special rules also apply to cars.

The temporary full expensing of depreciating assets has been extended for another year until 30 June 2023. The measure was originally introduced in 2020 as a part of the Federal Government's COVID-19 business rescue package aimed at encouraging business investment by providing a cash flow benefit. As originally introduced, the measure was due to end on 30 June 2022.

Businesses with an aggregated turnover below $5 billion or those that meet an alternative eligibility test can deduct the full cost of eligible depreciating assets of any value that are first held and first used or installed ready for use for a taxable purpose from 6 October 2020 until 30 June 2023.

For small business entities with an aggregated turnover of less than $10 million, the temporary full expensing of depreciating asset rules has been effectively replaced with simplified depreciation rules for any assets first held and used or installed ready for use for a taxable purpose between 6 October 2020 and 30 June 2023. This means that the full cost of eligible depreciating assets, as well as costs of improvements to existing eligible depreciating assets, can be fully deducted.

While businesses that are not classified as small business entities have the option of choosing to apply the temporary full expensing rules on an asset-by-asset basis, small business entities that use the simplified depreciation rules do not have that choice and are required to deduct the balance of their general small business pool in full. If a small business entity does not use the simplified depreciation rules, it has the choice to opt-out of temporary full expensing rules on an asset-by-asset basis.

A choice to not apply the temporary full expensing rules for a particular asset must be made in an approved form by the day the business lodges its income tax return for the income year to which the choice relates. Once made, the choice is irrevocable.

Not all costs relating to assets qualify for temporary full expensing. For example, building and other capital works, as well as software development pools do not generally qualify. Second-hand assets that would otherwise meet the eligibility conditions also do not qualify for temporary full expensing if the entity that holds them has an aggregated turnover of $50 million or more.

Special rules also apply to cars, where the temporary full expensing is limited to the business portion of the car limit. For example: a business entity purchases a car that costs $70,000 in 2021–2022 that is used for both business purposes (60% of the time) and personal purposes (40% of the time). The car limit for the 2021–2022 year is $60,733. The temporary full expensing amount allowed would be $36,439 (60% of $60,733).

After 30 June 2023, temporary full expensing will cease to apply (unless there is another extension by the government). Any depreciating assets purchased after that date will have their decline in value worked out in accordance with either the uniform capital allowance rules or the simplified depreciation rules, depending on whether the business qualifies as a small business entity.

Record-keeping education in lieu of ATO financial penalties

If you run a small business and are found by the ATO to have made unintentional record-keeping mistakes, you could face an administrative penalty. However, this could soon change under a proposed new law that would give ATO the power to issue a direction to complete an approved record-keeping education course instead of imposing financial penalties. Legislation to implement this measure has been introduced into Parliament but not yet passed.

This proposed change originated as a part of the Black Economy Taskforce's final report, which found that tax-related record-keeping obligations should be made clearer for businesses, and that the ATO should have a range of administrative sanctions available at its discretion for breaches of the rules.

Currently, in instances where a business is required to keep or retain records under tax law but fails to do so, it will be liable to an administrative penalty. However, this penalty does not apply to record-keeping obligations related to retention of statutory evidentiary documents under fringe benefits tax. Nor does it apply to record-keeping obligations related to keeping and retaining documents required to substantiate expenses. The ATO also has the power to remit all or part of the administrative penalty it imposes.

Under the proposed new law, the ATO may issue a tax-records education direction in appropriate situations which will require the appropriate person within a business to take a specified, approved course of education

and provide the ATO with evidence of completion. This would be applied in circumstances where the record-keeping mistakes were unintentional, due to knowledge gaps or variations in levels of digital literacy, or where the ATO reasonably believes that the entity has made a genuine attempt to comply with their obligations.

The tax-records education direction would not be available to those businesses that deliberately avoid record-keeping obligations. In those cases, financial penalties will still be applied, and if there is evidence of serious non-compliance, the ATO may also consider criminal sanctions.

"Appropriate persons" within a business include any individuals who make or participate in making decisions that affect the whole or a substantial part of the business. In the case of sole traders, the individual acting as the sole trader would be the appropriate person to complete any course of education. Businesses issued a written tax-records education direction would be required to either complete or arrange for the completion of an approved course before the end of the period specified in the direction.

Businesses that fail to comply with a tax-records written education direction, either by not completing the course or not completing the course by the set date, would be liable for the original administrative penalty.

It should be noted that since some record-keeping obligations under FBT and substantiation provisions do not give rise to an administrative penalty, the ATO would not be able to issue an education direction in those cases. Similarly, a tax-records education direction could not be issued to an entity that failed to comply with its record-keeping obligations under the *Super Guarantee (Administration) Act 1992*. This is dealt with separately and covered by the super guarantee education direction. The main difference is that failure to comply with a super guarantee education direction is an absolute liability offence and results in an administrative liability of 5 penalty units, whereas failure to comply with tax-records education direction attracts no additional penalty.

FHSS maximum releasable amount increased

The maximum amount that individuals can take out of their super under the First Home Super Saver Scheme will be increased from $30,000 to $50,000 for any release requests made on or after 1 July 2022. The scheme was originally envisaged as a tax-effective way for first home buyers to save for a deposit, and the increase in the maximum releasable amount presumably reflects the rapidly escalating housing price increases. The scheme is available to both first home buyers and those intending to build their first home subject to certain conditions of occupation.

Cost of living pressures coupled with high house prices mean that many people in Australia are finding it increasingly difficult to get on the property ladder. This is not confined exclusively to young people. Older long-term renters, particularly in regional areas, have also been disproportionately affected due to the great migration to the regions driven by the COVID-19 pandemic.

Instead of making fundamental changes to investment/tax structures that drive up house prices, the government has sought to solve the housing issue by allowing individuals to take money out of their super under the First Home Super Saver (FHSS) scheme. The scheme allows eligible first home buyers to apply to release voluntary contributions made to their super, along with associated earnings. The maximum releasable amount is currently $30,000, but will increase to $50,000 for any release requests made on or after 1 July 2022.

Individuals planning to use the scheme must be first home buyers who will occupy the property that is being purchased or intend to do so as soon as practicable, for at least six months within the first 12 months of ownership. The FHSS scheme is also available to those intending to build their first home, provided the contract to construct the home is entered into within 12 months from the date of the super release request.

The first step in releasing eligible funds is to obtain a FHSS Determination from the ATO which sets out the maximum amount that an individual can have released under the scheme. More than one FHSS Determination can be applied for, but once a request for release of amounts has been lodged the individual will not be able to seek further FHSS Determinations. So, it is imperative for individuals to ensure that they have finished making all their voluntary contributions under the scheme before applying for a Determination, and of course, to check the accuracy of the Determination issued by the ATO.

There is a limit of $15,000 of eligible contributions that can be released each financial year (up to a total limit of $30,000 currently, or $50,000 from 1 July 2022). Eligible contributions include any voluntary concessional and non-concessional contributions that have been made (ie salary sacrifice contributions and personal after-tax contributions). It does not include super guarantee, other mandated employer contributions, spousal contributions, or co-contributions, among other things.

The most important thing to note for individuals intending to use this scheme is that they must have a FHSS Determination before any contract to purchase is signed. This includes both those purchasing pre-established homes and those intending to build their first home (ie the vacant land must not be purchased

before an FHSS Determination application is made). If an individual signs a contract for any property (or interest in a property including land) first, they will not be eligible to request a FHSS Determination and hence not eligible for the scheme.

For those individuals who have a FHSS Determination and subsequently sign a contract to purchase, a valid release request must be given to the ATO within 14 days. After the release of money, if an individual does not sign a contract to purchase or construct a home within 12 months, the ATO will generally grant an extension of time for a further 12 months automatically. Individuals also have the choice to recontribute the amount back into their super funds or to keep the money and pay a flat 20% tax on assessable FHSS released amounts.

Downsizer contributions: age limit change

More people will soon be able to make up to $300,000 in downsizer contributions into their superannuation, with the lowering of the age limit to include those aged 60 years and over from 1 July 2022. Before this date, only those aged 65 and over are able to make downsizer contributions. Essentially, downsizer contributions are super contributions that can be made from the proceeds of the sale of a main residence. This measure was designed to encourage older people to move into smaller, more suitable homes and free up housing stock.

To help those nearing retirement boost their super balances, those aged 65 and over are able to make downsizer contributions to their super of up to $300,000 from the proceeds of the sale of their home. Downsizer contributions are separate from concessional and non-concessional contributions, which means that amounts contributed do not count towards the contribution caps ($27,500 for concessional and $110,000 for non-concessional contributions). However, downsizer amounts do count towards the transfer balance cap, which applies when super is moved into the retirement phase.

As part of a suite of measures introduced to provide more flexibility for those contributing to super, from 1 July 2022 the age limit for those making downsizer contributions will be decreased to include individuals aged 60 years or over. Optimistically, the government expects this decrease in the age threshold will encourage more older Australians to downsize sooner and "[free] up the stock of larger homes for younger families".

If you or your spouse are thinking of selling the family home to capture a premium, especially in regional areas, besides the age qualification, other criteria that must be satisfied in order to make a downsizer contribution to your super include the following:

- the location of the home must be in Australia;
- the home must have been owned by your or your spouse for at least 10 years;
- the home must not be a caravan, houseboat or other mobile home;
- the disposal must be exempt or partially exempt from CGT under the main residence exemption; and
- a previous downsizer contribution must not have been made from the sale of another home or from the part sale of the current home.

The downsizer contribution must be made within 90 days of receiving the proceeds of sale (ie from the date of settlement), and your super fund must be provided with the appropriate downsizer contribution form before or at the time of making the contribution.

Each individual can make the maximum contribution of $300,000, so for a couple a total contribution of $600,000 can be made. However, the total contribution amount cannot be greater than the total proceeds from the sale of the home. In instances where a home is owned only by one spouse and is sold, the spouse who did not have ownership is also able to make a downsizer contribution or have one made on their behalf, provided all other requirements are met.

Example

Trevor and Ian are a couple in their late 60s who have lived in their home for 20 years and have decided to downsize. Only Trevor's name is on the title deed of the home. They meet all the other requirements for the downsizer contribution and sell their home for $500,000. In this scenario, the maximum contribution Trevor and Ian can both make is $500,000. It does not matter that only Trevor's name is on the title deed. They also have the choice of either equally splitting the amount (putting $250,000 into each of their super accounts) or using another combination (eg contributing $300,000 for Trevor and $200,000 for Ian).

There is no maximum age for downsizer contributions. As long as the individual or couple are aged 60 years or older at 1 July 2022 and satisfy the other conditions, a contribution up to the maximum amount can be made.

Work test scrapped for super contributions: under 75s

Individuals aged between 67 and 75 will be able to make non-concessional and salary-sacrificed contributions to their superannuation without the need to pass the work test or satisfy the work test exemption criteria from 1 July 2022. The removal of the work test from that date also allows individuals aged under 75 to access the bring-forward of non-concessional contributions in some cases. Personal contributions will also be affected, although now instead of having to pass the work test to contribute, the work test only applies if a deduction is sought.

The work test will be scrapped for non-concessional and salary-sacrificed super contributions made by individuals aged between 67 and 75 from 1 July 2022. Currently, those individuals need to either pass the work test or satisfy the work test exemption criteria for each financial year that they make contributions in order for their super funds to accept these contributions. This change is designed to provide older Australians with more flexibility to contribute to their super and add to their comfort in retirement.

Contribution caps will still apply to any contributions made. The concessional contributions cap, which relates to salary-sacrificed contributions, is $27,500 from 1 July 2021 to 30 June 2022. This cap is indexed every year in line with average weekly ordinary time earnings and may increase year on year. The non-concessional contributions cap from 1 July 2021 is $110,000, and is set at four times the concessional contributions cap. This means that if the concessional contributions cap goes up due to indexing, the non-concessional cap will also increase.

With the removal of the work-test from 1 July 2022, individuals aged under 75 years will also be able to access the bring-forward of non-concessional contributions in any one financial year, which may allow them to access up to three times the annual non-concessional contributions cap in a single year (ie up to $330,000 for the 2021–2022 income year). Exactly how much can be accessed depends on the total super balance of the individual on 30 June of the previous financial year.

In addition to these incoming changes to the work test for non-concessional and salary-sacrificed contributions, a change will also be made to personal contributions made by those aged between 67 and 75 years from 1 July 2022. From that date, these individuals only need to meet the work test if they want to claim a deduction for their personal contribution.

To pass the work test, an individual must be gainfully employed for at least 40 hours during a consecutive 30-day period in each income year in which contributions were made. It is an annual test, which means that once it is met, the individual can make contributions for that entire income year. “Gainfully employed” requires the individual to be employed or self-employed for gain or reward in any business, trade, profession, vocation, calling or occupation.

Unpaid work or generation of passive income (eg interest, dividends, trust distributions, rent) do not satisfy the criterion of being gainfully employed.

If an individual cannot meet the work test, there is also a work test exemption which can be used to obtain a deduction for a personal contribution. To meet the work test exemption an individual must have:

- satisfied the work test in the financial year before the year in which the contribution was made;
- a total super balance of less than $300,000 at the end of the previous financial year; and
- not relied on the work test exemption in a previous financial year.

It should be noted that individuals who are aged 75 and meet the work test can only claim a deduction in relation to a contribution that is made on or before 28 days after the month in which they turn 75.

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