client alert | explanatory memorandum

October 2022

CURRENCY:

This issue of **Client Alert** takes into account developments up to and including 23 September 2022.

Keeping you informed about the Federal Budget

Australia's Labor Government is expected to hand down its Federal Budget for 2022–2023 on the evening of Tuesday 25 October.

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 after the Budget is handed down.

Bonus deduction for employee training proposal

To stem the tide of the current workforce shortage in many industries, the government has proposed a new temporary initiative that would give small businesses access to a bonus tax deduction equal to 20% of certain employee training expenditure. This proposal is currently in the draft stage and undergoing consultation, and as such any deduction will not be available until the measure becomes law.

As a part of its strategy to address the current skills shortage and future-proof Australia's workforce by building better trained and more productive workers, the Federal Government has proposed to implement a temporary "skills and training boost" initiative. This initiative proposes to give small businesses access to a bonus deduction equal to 20% of eligible expenditure on certain training for employees, both existing and new, between 29 March 2022 and 30 June 2024.

The bonus deduction would be available to all entities that meet the definition of a small business entity (ie those with an aggregated annual turnover of less than $50 million) in the income year in which the eligible expenditure is incurred.

Under the proposed measure, eligible expenditure would need to satisfy the following criteria:

- expenditure must be for training employees, either in-person in Australia, or online;
- expenditure must be charged, directly, or indirectly, by a registered training provider and be for training within the scope (if any) of the provider's registration – although any additional costs associated with the provider invoicing through an intermediary such as commissions or other fees would not be eligible for the bonus deduction;
- the registered training provider must not be the small business itself or an associate of the small business;
- the expenditure must already be deductible under taxation law (ie the training must be necessarily incurred in carrying on a business for the purpose of gaining or producing income) – the deductible training may be either an operating expense or of a capital nature, although GST is usually excluded;
- expenditure must be incurred within a specific period (between 7.30 pm legal time in the ACT on 29 March 2022 and 30 June 2024); and
- expenditure must be for the provision of training, where the enrolment or arrangement for the provision of the training occurs at or after 7.30 pm legal time in the ACT on 29 March 2022.

This initiative is only intended to cover employees, and as such, the bonus deduction would not be available for the training of non-employee business owners, such as sole traders, partners in a partnership and independent contractors who are not employees of the business within the ordinary meaning. In addition, the requirement for the expenditure to be incurred on external training means that the cost of any in-house or on-the-job training would not be eligible for the bonus deduction. According to the government, this is because the bonus deduction is not intended to cover general business operating costs.

It's proposed that training providers wishing to take advantage of this measure must be registered with at least one of the following four government authorities to ensure quality and integrity:

- Australian Skills Quality Authority (ASQA);
- Tertiary Education Quality and Standards Agency (TEQSA);
- Victorian Registration and Qualifications Authority; or
- Training Accreditation Council of Western Australia.

Example

Company A is a qualifying small business entity and has hired a new employee, Trevor. The business is keen to upskill him to take on more complex work. The business pays $5,500 (incl GST) for a course with a registered training provider whose scope of registration includes the specific skill, held on 1 December 2022. The bonus deduction in addition to the $5,000 (excl GST) that Company A can deduct is $1,000 (20% of $5,000).

It should be noted that this proposal is currently in the draft stage and undergoing consultation, and as such the bonus deduction will not be available until the measure becomes law. No timeframes have been given as to when that will occur. However, it is likely that when passed, the legislation will be retrospective (ie it will encompass expenditure between 7.30 pm legal time in the ACT on 29 March 2022 and 30 June 2024).

Crypto reforms: change in consultation approach

With the skyrocketing uptake of cryptocurrency among Australian retail investors, the government is seeking to change its consultation approach to the regulation of cryptocurrency assets. As a part of this new approach, Treasury will prioritise “token mapping” work as the first step in a reform agenda. This aims to identify how cryptocurrency assets and related services should be regulated. Work is then expected to commence in other areas such as a licensing framework, custodian obligations and additional consumer safeguards.

According to the latest Australian Security and Investments Commission (ASIC) report into retail investment, the uptake in cryptocurrency has skyrocketed among Australian retail investors. The regulator found that 44% of those surveyed reported holding cryptocurrency, making it the second most common product type held after Australian shares. At the same time, a quarter of the surveyed investors who held cryptocurrency also indicated that cryptocurrency was the only investment they held.

With this increase in the uptake of cryptocurrency and other related blockchain technology, coupled with the lack of regulation which has allowed scams to proliferate, it will perhaps come as no surprise to learn that the Australian Competition and Consumer Commission (ACCC) estimates that more than $100 million has been reported lost to cryptocurrency investment scams just in the first half of 2022.

In a bid to stamp out these scams, the then Coalition government had commissioned the Board of Taxation to conduct a review into the appropriate policy framework for the taxation of digital transactions and assets in Australia. This review was to focus on the scope of digital transactions and assets without increasing the overall tax burden. Specifically, it was asked to consider:

- the current Australian taxation treatment of digital assets and transactions and emerging tax policy issues;
- the awareness of the taxation treatment by both retail and wholesale investors and those transacting in digital assets as part of their business;
- the characteristics and features of digital assets and transactions in the market, including the rapid evolution of technology supporting the broader digital asset ecosystem;
- the taxation of digital assets and transactions in comparative jurisdictions and consideration of how international experience may inform the taxation of digital assets and transactions in Australia; and
- whether or not any changes to Australia’s taxation laws and/or their administration are warranted in the context of digital assets and transactions, both for retail and wholesale investors.

Various public consultation dates in September 2022, both in person and virtual, have also been announced by the Board of Taxation in relation to the review, with submissions closing on 30 September 2022. The Board is due to report back to the government by the end of 2022.

However, the Labor Government has recently criticised the previous government for "prematurely jump[ing] straight to options without first understanding what was being regulated". According to the Assistant Treasurer and Minister for Financial Services, this government is seeking to take a "more serious approach to work out what is in the ecosystem and what risks needs to be looked at first".

As a part of this new approach, Treasury will prioritise "token mapping" work as the first step in a reform agenda. This aims to identify how cryptocurrency assets and related services should be regulated. The next steps in this process will be to identify notable gaps in the regulatory framework, progress a licensing framework, review innovative organisational structures, look at custody obligations for third party custodians of cryptocurrency assets and provide additional consumer safeguards.

Treasury will be commencing consultation with stakeholders on a framework for industry and regulators soon by the release of a public consultation paper on "token mapping". While the Board of Taxation review was not explicitly addressed, it is assumed the review as previously announced will continue.

Sale of principal home: extension of exemption

To reduce the impact of selling and buying a new principal home and to encourage pensioners to downsize, the government, in conjunction with the announcement of its intention to reduce the eligibility age for downsizer super contributions, has introduced a Bill to extend the existing assets test exemption under social security for principal home sale proceeds that an individual intends to use to purchase or build a new principal home. The Bill also seeks to apply the lower deeming rate to the proceeds of sale.

In a bid to support pensioners and in conjunction with the announcement to reduce the eligibility age for downsizer super contributions, the government has introduced a measure to extend the existing assets test exemption under social security for principal home sale proceeds which a person intends to use to purchase a new principal home.

Under the social security system, the level of income support received by individuals depends on their income and assets. For example, for an individual to receive the age pension, Services Australia (Centrelink) will assess the individual's and their partner's income from all sources, including financial assets such as superannuation, using deeming. Deeming assumes that a financial asset earns a set rate of income regardless of the actual income generated. Applicants for the age pension also need to pass the assets test, the limits of which change depending on whether they own their own home and whether they are single or in a couple.

Currently, when an age pensioner or other eligible income support recipient sells their principal home to either purchase or build another home, those proceeds are exempt from the assets test for up to 12 months. However, the proceeds will still be subject to deeming. An additional 12-month extension may be granted where the income support recipient has a continued intention to apply the sale proceeds to the purchase, build, rebuild, repair or renovation of a new principal home and has:

- made reasonable attempts to purchase, build, rebuild, repair or renovate their new principal home (eg signing a contract to purchase or renovate etc);
- made those attempts within a reasonable period after selling the principal home; and
- experienced delays beyond their control in purchasing, building, rebuilding, repairing or renovating their new principal home.

The Bill introduced by the government would automatically extend the existing assets test exemption from 12 to 24 months. An additional 12-month extension may also be available in particular circumstances, taking the maximum exemption period to 36 months in total.

It should be noted that only the value of the principal home proceeds that are intended to be used to purchase/build a new home can be exempt. For example, if an individual sells their principal home for $1 million and intends to purchase a new home for $700,000 and use the remaining $300,000 to buy an investment, then the total amount of sale proceeds that can be exempt from the assets test is $700,000, while the other $300,000 is not exempt from the assets test.

In addition to extending the exemption, the Bill also seeks to apply a lower deeming rate to the principal home sale proceeds when calculating deemed income for the period during which the proceeds are exempt from the assets test. For deeming purposes, the threshold is currently $56,400 for an individual and $93,600 for couples. Below those thresholds, the financial assets are deemed to earn at a rate of 0.25%, while anything above those thresholds are deemed to earn 2.25%. If this proposed measure becomes law, the

exempt principal home sale proceeds will be treated as a separate pool to the other financial assets and deeming will be calculated at 0.25% instead of 2.25%.

ASIC's focus on super complaints handling

Recently, the Australian Securities and Investments Commission (ASIC) conducted surveillance to assess superannuation trustees' compliance with enforceable requirements relating to internal dispute resolution (IDR). The results indicated significant compliance issues and pointed to areas which need to be strengthened. For example, one in three trustees advised ASIC of varying failures in their IDR processes. These included failure to capture complaints, the omission of mandatory content from response letters or failure to send out responses to complainants. Based on these results, further surveillance will be conducted by ASIC.

ASIC is the body responsible for overseeing the operation of Australia's financial services dispute resolution framework, including the IDR systems of superannuation trustees and other financial firms. This, together with external dispute resolution systems of the Australian Financial Complaints Authority (AFCA), forms the key consumer protection mechanism to ensure all complaints are resolved in a fair and timely manner.

Recently, to gauge the degree of superannuation trustees' compliance with the enforceable requirements contained in ASIC's Regulatory Guide 271 *Internal Dispute Resolution*, initial surveillance was conducted on a selection of trustees and funds. ASIC collected data from a selection of 35 trustees of 38 funds, covering 49,029 complaints received between 5 October 2021 and 28 February 2022. The data was then analysed to determine the status and timeliness of complaints handling, excluding objections to death benefit distributions. The results of this initial surveillance found indicators of significant compliance issues and areas which will need to be strengthened. According to ASIC, RG 271 requires super trustees to record all member complaints, and overall fund data as at 30 June 2021 indicates a complaints rate of 30 per 10,000 members. However, the data from the surveillance showed that 10% of the funds recorded fewer than 10 complaints per 10,000 members, which is significantly lower than the overall rate and may be a result of trustees failing to either record all member complaints or using an inappropriately narrow definition of "complaint".

In addition, RG 271 has a 45-day maximum period for super trustees to respond to complaints as part of their IDR response (except for complaints regarding death benefit distributions, which have a longer timeframe). Of the 38 funds reviewed by ASIC as a part of this initial surveillance, 2.7% of IDR responses were sent after the 45-day maximum. The concern for ASIC is that super trustees may be over-applying the limited exceptions to the maximum timeframe or not sufficiently monitoring how long complaints take to resolve.

Failures were also detected in the area of informing complainants of delays and in IDR processes. Specifically, RG 271 requires that super trustees notify complainants of delays and their rights to go to AFCA when a written response is not sent within 45 days. The initial review results found that nearly 50% of complainants were not notified of the delay or their rights. Further, one in three trustees advised ASIC of varying failures in their IDR processes, including failure to capture complaints, the omission of mandatory content from response letters or failure to send out responses to complainants.

In the next stage of the surveillance and based on these results, ASIC will be seeking to check how relevant trustees are addressing concerns identified thus far, and closely examine a smaller subset of trustees. It notes that it will consider regulatory action where appropriate.

Compliance with super laws: ATO's approach

When it comes to legal compliance by self managed superannuation fund (SMSF) trustees, the ATO's main focus is on encouraging trustees to comply with the super laws. However, there are occasions when stronger responses are required.

The following courses of action are available to the ATO to deal with SMSF trustees who have not complied with super laws:

- *Education direction* – the ATO may give an SMSF trustee a written direction to undertake a course of education when they have been found to have contravened super laws. The trustee will need to provide evidence they have completed the course. Trustees will also be required to sign a Trustee declaration confirming they understand their obligations as a trustee of an SMSF.

- *Enforceable undertaking* – an SMSF trustee may initiate a written undertaking to rectify a contravention. The ATO will decide whether or not to accept the undertaking, taking into account factors such as the compliance history of the trustee, the nature of the contravention and the strategies to prevent the contravention from recurring.
- *Rectification direction* – the ATO may give a trustee, or a director of a corporate trustee, a written direction to rectify a contravention of the super laws. Rectification generally involves putting in place arrangements that could reasonably be expected to ensure there are no further similar contraventions.
- *Administrative penalties* – individual trustees and directors of corporate trustees are personally liable to pay an administrative penalty for breaches of various provisions of the super laws. Administrative penalties may also be imposed on SMSF trustees if they make false and misleading statements to the ATO. Penalties cannot be paid or reimbursed from the assets of the fund.
- *Disqualification of a trustee* – the ATO may disqualify an individual from acting as a trustee or director of a corporate trustee if they have contravened super laws or if the ATO is concerned about the individual's actions or suitability to be a trustee. It is an offence for an individual to continue to act as a trustee, or as a director of a corporate trustee, if they have been disqualified.
- *Civil and criminal penalties* – these may apply where an SMSF trustee has contravened certain provisions of the super laws. The ATO will consider the severity of the contravention, the circumstances that led to it and the actions of the individuals involved before instigating civil or criminal prosecution.
- *Notice of non-compliance* – serious contraventions of the super laws may result in an SMSF being issued with a notice of non-compliance. In this case, the fund remains non-compliant until they receive a notice of compliance. Making a fund non-complying can have a significant financial impact on the SMSF.
- *Allowing the SMSF to be wound up* – following a contravention, the trustee may decide to wind up the SMSF and roll over any remaining benefits to an APRA regulated fund. However, the ATO may continue to issue the SMSF with a notice of non-compliance or apply other compliance treatments.
- *Freezing an SMSF's assets* – the ATO may give a trustee or investment manager a notice to freeze an SMSF's assets where it appears that conduct by the trustees or investment manager is likely to adversely affect the interests of the beneficiaries to a significant extent. This is particularly important when the preservation of benefits is at risk.

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