client alert | explanatory memorandum

September 2018

CURRENCY:
This issue of **Client Alert** takes into account developments up to and including 24 August 2018.

Super sector must address trust deficit

In a speech to the Financial Services Council Summit on 26 July 2018, Australian Securities and Investments Commission (ASIC) Chair James Shipton said the superannuation sector must restore the "trust deficit" and be more mindful of the responsibilities that come with being the custodians of other people's money. Mr Shipton said the super industry has been exploiting opportunities to make money from members, citing examples of conduct that could lead to poor member outcomes, including poor advice, treatment of customers and defensiveness when it comes to transparency about fund operations.

Among other things, Mr Shipton called for a wholesale review of conflicts of interest in firms, and greater attention from senior management to "conduct issues". Mr Shipton said there is an urgent need for super funds to invest in systems, procedures and policies that can quickly identify emerging conduct and systemic issues. A recent ASIC review of 12 banking groups found that it took an average of four years between an issue occurring and being identified internally for investigation, before a significant breach report was finally lodged with ASIC. Breach reporting to ASIC is a statutory requirement and a cornerstone of the regulatory architecture that requires greater commitment and attention by the senior leaders of financial firms, Mr Shipton said. Interestingly, he noted that ASIC has experienced a 30% increase in breach reports in the 2017–2018 financial year.

Source: https://asic.gov.au/about-asic/media-centre/speeches/the-trust-deficit-and-superannuation/.

Call to boost instant asset write-off to $100,000

The Australian Small Business and Family Enterprise Ombudsman, Kate Carnell, has called for the $20,000 instant asset write-off for small businesses to be embedded in legislation and extended up to $100,000 every three years. Appearing on 7 August 2018 before the House of Representatives Standing Committee on Economics inquiry into business investment impediments, Ms Carnell said increasing the instant asset write-off to $100,000 every three years would enable small businesses with higher costs for key equipment to participate. The Ombudsman also made a submission highlighting other opportunities that the government and the wider business community could employ to support business investment. These recommendations stem from the Ombudsman's paper, *Barriers to investment: a study into factors impacting small to medium enterprise investment*, November 2017.

Source: www.asbfeo.gov.au/news/news-articles/ombudsman-discuss-impediments-business-investment-house-reps-hearing.

Tax return required for excess super non-concessional contributions

The ATO has reminded taxpayers that they need to lodge a tax return for a financial year in which they exceed their non-concessional contributions cap, and may have to pay extra tax.

The ATO will send excess non-concessional superannuation contribution determinations to taxpayers if they have exceeded their non-concessional contribution cap, but have not lodged that year's income tax return within 28 days of their lodgment due date. If tax agents do not want their clients to receive a determination before their tax return is submitted, the ATO says the agent will need to request a lodgment deferral before the due date.

Non-concessional contributions cap

The annual non-concessional cap is $100,000 (or $300,000 over three years for people aged under 65), provided the taxpayer has a total superannuation balance of less than $1.6 million at 30 June of the prior year. The ATO determines if a taxpayer has exceeded the non-concessional cap by looking at their date of birth and the information reported by super funds and in the individual's tax return.

Taxpayers who go over the non-concessional cap can withdraw the excess non-concessional contributions (plus 85% of the associated earnings). The full amount of the earnings (100%) is then included in the taxpayer's assessable income (and subject to a 15% tax offset). If an individual does not withdraw their excess contributions, the excess will be taxed at the top marginal tax rate (plus Medicare levy).

Excess non-concessional contributions

From 2017–2018, the ATO says that for "most people" who exceed the non-concessional cap it is "easiest to do nothing". The ATO will ask the taxpayer's super funds to release and send the excess amounts to the ATO. It will then amend the taxpayer's income tax assessment to include the associated earnings, which will be taxed at the individual's marginal tax rate (plus Medicare levy). The ATO will use any money released from the individual's super funds to first pay any tax or government debts, then will refund any remaining balance to the individual.

If a person has no money in super, the ATO will amend their income tax assessment to include the associated earnings amount. If a person's only super interest is held in a defined benefit fund or a non-commutable super income stream that the fund cannot or will not voluntarily release, the ATO will send the individual an excess non-concessional contributions tax assessment.

Alternatively, a taxpayer has 60 days from the date of the determination to irrevocably choose one of the following options:

- Option 1 – release the excess from their super funds (and have the associated earnings included in assessable income); or
- Option 2 – leave the excess non-concessional contributions in their super funds (and have the excess taxed at the top marginal tax rate plus Medicare levy).

Remember to take personal circumstances into account

While the ATO suggests that for "most people" who exceed the non-concessional cap it is "easiest to do nothing", each taxpayer needs to consider the tax implications for their own circumstances.

Rather than leaving it to the ATO to decide which super fund the excess contributions should be released from, a taxpayer with multiple superannuation interests should consider any tax planning benefit from actively choosing to release the excess from a specific interest (Option 1) – for example, the interest with the largest taxable component.

As the proportioning rule does not apply to a release authority payment, such an amount paid from a super fund will always reduce the taxable component of a superannuation interest in accumulation phase. This is due to the fact that the tax-free component of an interest remains the same immediately after the release authority payment, and the taxable component is determined as the value of the interest less the tax-free component. It is also important to remember that an amount withdrawn from a particular superannuation interest will cash out first from the unrestricted non-preserved component. So, it is important to take care if looking to maintain an unrestricted non-preserved component that has been deliberately isolated within a particular superannuation interest.

Also, a taxpayer who receives an excess non-concessional contributions determination should ensure that their super fund has correctly reported their contributions to the ATO before they make an irrevocable election to withdraw any excess contributions. Likewise, before making an election, a taxpayer should consider the viability of applying for the ATO to exercise its discretion (under s 292-465 of the *Income Tax Assessment Act 1997*) to disregard or reallocate any excess non-concessional contributions. Although this is a very narrow concession, it remains relevant, as the tax payable on the associated earnings (8.73% for 2017–2018) for withdrawn excess contributions is not insignificant in some situations.

Source: www.ato.gov.au/Tax-professionals/Newsroom/Superannuation/Excess-non-concessional-superannuation-contributions/.

APRA's response to Productivity Commission draft report

The Australian Prudential Regulation Authority (APRA) has released its submission in response to the Productivity Commission's draft report on superannuation efficiency and competitiveness. APRA agreed with a number of the findings and the direction of many, but not all, of the recommendations in the draft report.

However, APRA rejected the Commission's claim that APRA's powers and role, and their significant overlap with the powers and role of the Australian Securities and Investments Commission (ASIC), have resulted in "confusing and opaque" regulatory arrangements, poor accountability and a lack of strategic regulation. APRA Deputy Chair Helen Rowell said APRA's role is to administer the prudential and retirement income provisions of the *Superannuation Industry (Supervision) Act 1993*. In that context, APRA is primarily responsible for ensuring that registrable superannuation entity (RSE) licensees manage their business operations to deliver quality member outcomes. By comparison, ASIC's role is to oversee specific conduct obligations that apply to RSE licensees when dealing with individuals in relation to disclosure, financial product advice and complaints.

Clear role for APRA and ASIC

APRA accepts that there will be occasions when RSE licensee conduct may attract the attention of both APRA and ASIC. Given the nature of the regulators' distinct but complementary responsibilities, APRA said there is a clear role for both APRA and ASIC in undertaking strategic regulation and supervision of their respective responsibilities across the super industry. These areas of common interest do not necessarily mean there will be duplication in regulatory activity, Ms Rowell said.

APRA believes that the industry has made substantial progress since 2012 when it was given the power to make prudential standards for the super industry. This has translated into improved industry practices, but the progress has been variable and some trustees still have room for improvement. While the regulatory framework has been improved by recent legislative reforms, Ms Rowell said the absence of certain powers inhibits APRA's ability to take timely and proactive action. APRA believes that having stronger powers will support enhanced supervision outcomes, usually without needing to resort to the use of those powers.

Source: www.apra.gov.au/sites/default/files/productivity_commission_-_apra_public_submission_-_aug_2018.pdf.

Protecting Super Bill: Senate Committee report

The Senate Economics Legislation Committee has released its report into the *Treasury Laws Amendment (Protecting Your Superannuation Package) Bill 2018* and recommended that the Bill be passed.

The Bill (still before the Senate at the time of writing) contains the following measures to prevent the erosion of super balances:

- super fees capped at 3% per year for balances less than $6,000;
- exit fees banned for all super accounts, regardless of the balance;
- an insurance opt-in rule for:
  - account balances less than $6,000;
  - new members under age 25;
  - accounts that have not received a contribution for 13 months; and
- inactive low-balance accounts (ie balance less than $6,000) will be transferred to the ATO.

The Senate Committee commented that the measures in the Bill are an important first step in addressing the extensive proliferation of superannuation accounts and serious erosion of members' balances through excessive fees and inappropriate insurance arrangements. Labor senators, however, noted that the Government should have awaited the final findings from the Productivity Commission and the Royal Commission regarding superannuation and insurance arrangements before proceeding with the Bill.

Source: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ProtectingSuperPackage/Report.

First Home Super Saver scheme: ATO guidance

Law Companion Ruling LCR 2018/5, issued by the ATO on 15 August 2018, provides guidance on the First Home Super Saver (FHSS) scheme. This scheme, which commenced on 1 July 2018, is designed to help eligible individuals boost their savings for a first home by allowing them to withdraw voluntary superannuation contributions and an amount of associated earnings for the purposes of purchasing their first home. An individual can access the scheme by applying to the ATO for an FHSS determination and a release authority, if they:

- have never held a stipulated interest in Australian real property (namely, a freehold interest, a long-term lease or a company title interest) – this requirement can be waived if the Commissioner determines that the individual has suffered a financial hardship (although LCR 2018/5 provides no guidance on the financial hardship exemption);
- are aged 18 years or older; and
- have not previously requested a release authority in relation to an FHSS determination (that is, an individual can only access the FHSS scheme once).

In addition, the individual must have superannuation contributions that are eligible for release under the scheme, namely voluntary concessional or non-concessional contributions that come within the relevant contributions cap. Contributions that cannot be released include amounts that reduce an employer's potential super guarantee charge (SGC) liability, amounts required to be made under an industrial agreement, member contributions made by another person, Government co-contributions and amounts paid under a contributions splitting arrangement.

There are limits on the amount that is eligible for release ($15,000 per financial year and $30,000 in total, subject to the contribution caps). The ruling notes that while the full amount of the eligible concessional and non-concessional contributions count towards these limits, only 85% of the concessional contributions can be released.

When a request for a release authority is made, the concessional contributions and the total associated earnings identified in the FHSS determination are treated as assessable income and taxed at the individual's marginal rates. However, the individual obtains a tax concession in the form of a 30% non-refundable tax offset. On receiving the released amount, the individual has 12 months (or any further period allowed by the ATO) to either enter into a contract to purchase or construct residential premises, or make non-concessional re-contributions into superannuation. Failure to take either step (or to notify the ATO that the step has been taken) exposes the individual to a 20% penalty tax (FHSS tax). The ruling emphasises that any contract to purchase or construct a home must be entered into after the FHSS amount has been released from superannuation. If the contract is entered into before an amount is released, non-concessional re-contributions will need to be made to avoid being subject to FHSS tax.

LCR 2018/5 also explains the ordering rules, which seek to maximise the amount available for release where an individual has a combination of contributions, some of which are ineligible for release. The ruling includes three examples, involving contributions across multiple years (Example 1), concessional and non-concessional contributions made simultaneously (Example 2) and contributions where a tax deduction is claimed in one year but not the other (Example 3).

ATO targeting car sharing platforms

The ATO has announced it will be turning its attention to anyone earning income through car sharing platforms. The growing popularity of third-party services such as Car Next Door, Carhood and DriveMyCar Rentals has prompted the ATO's interest, said ATO Assistant Commissioner Kath Anderson. She said there is evidence that some taxpayers who are undertaking sharing activities might not understand the taxation implications. Ms Anderson said people involved in car sharing "must declare the income and you cannot avoid tax by calling it a hobby".

While expenses claimed for car sharing must relate directly to the renting, hiring or sharing of the car, deductions can legitimately be claimed for expenses like platform membership fees, availability fees, cleaning fees and car running expenses, the Assistant Commissioner said. However, she warned that a deduction can only be claimed for cleaning and running expenses if the car owner is responsible for them under their car sharing agreement. For example, different agreements require either the car borrower or the car owner to bear the costs of refuelling the car. In addition, for cars owned jointly, income will need to be declared and expenses claimed in proportion to the share of ownership. If someone is registered for GST, or required to be registered for GST, and has an enterprise of renting or hiring their car, they will be liable to pay GST on payments they receive.

Source: www.ato.gov.au/Media-centre/Media-releases/Attention-all-car-owners---you-must-declare-what-you-share!/.

Delay in extending reportable payments to courier and cleaning services

The legislative logjam in Federal Parliament is affecting the implementation of a wide range of tax measures, and the ATO is having to implement practical work-arounds for the measures.

In the 2017–2018 Federal Budget on 9 May 2017, the Government announced that from 1 July 2018, businesses that supply courier or cleaning services will need to report payments made to contractors if the payments are for courier or cleaning services. These payments must be reported to the ATO each year using the taxable payments annual report (TPAR). However, while legislation to implement this has been passed by the House of Representatives, the *Treasury Laws Amendment (Black Economy Taskforce Measures No 1) Bill 2018* is still before the Senate at the time of writing.

In announcing its administrative treatment of this announcement, the ATO said it will not require a TPAR to be lodged during the period up until the proposed law change is passed by Parliament. Taxpayers will, however, be expected to keep sufficient business records to enable a TPAR to be prepared and lodged "as soon as is reasonably practicable after the law is enacted".

After the new law is enacted, taxpayers will need to review their payments made to contractors from 1 July 2018 and complete and lodge a TPAR for the 2018–2019 income year.

The ATO says those taxpayers who have recorded their payments and lodged their annual report in accordance with the changes do not need to do anything more. Those taxpayers who have not recorded their payments to contractors will need to review their records and compile a summary of all payments made after 1 July 2018 and the required details for each payment.

Further extension of TPRS

Also in the 2018–2019 Federal Budget, the Government announced that from 1 July 2019, businesses that supply road freight, security, investigation, surveillance or IT services will need to report payments made to contractors if the payments are for road freight, security, investigation, or IT services. These payments must also be reported to the ATO each year using the TPAR.

The ATO notes that draft legislation for this measure has been released for public consultation, which closed on 17 August 2018. A related draft legislative instrument and draft guidance have also been released for public consultation, closing on 31 August 2018.

Source: www.ato.gov.au/General/New-legislation/In-detail/Direct-taxes/Income-tax-for-businesses/Black-Economy-Taskforce--extension-of-the-taxable-payments-reporting-system-(TPRS)/.

GST: supplies of real property connected with Australia

GST Ruling GSTR 2018/1, issued on 22 August 2018, sets out the ATO's view on when supplies of real property are connected with the indirect tax zone (ie Australia) under s 9-25(4) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).

GSTR 2018/1 states that a supply of real property is connected with Australia if the real property, or the land to which the real property relates, is in Australia. The ATO stresses that the test is the location of the physical land and not the location of the interest or right over the land.

The ruling also states that the supply of a right to accommodation in Australia constitutes the supply of real property connected with Australia. It is irrelevant whether the supplier (eg a tour operator) provides any actual accommodation to the recipient, the ATO says.

The ruling includes the following examples of supplies of real property that are connected with Australia:

- selling land situated in Australia;
- granting, assigning or surrendering a lease or licence of land situated in Australia;
- a personal right to call for or be granted any interest or right over land in Australia;
- granting a put or call option over land situated in Australia;
- a licence to occupy land in Australia; and
- granting contractual rights to occupy or stay at accommodation in Australia (including a stay at a hotel or motel on presentation of a voucher or travel document) – for example, a tour operator (whether a resident or non-resident) who grants a traveller the right to stay at a Perth hotel, where the hotel is operated by a different entity, makes a supply of real property connected with Australia (see Examples 1 and 2 of GSTR 2018/1).

GSTR 2018/1 applies from its date of issue, 22 August 2018. It finalises draft GSTR 2017/D2 and contains the same views as the draft. The ruling replaces GSTD 2004/3 *GST: is a supply of rights to accommodation a supply of real property for the purposes of the GST Act?*, which was withdrawn on and with effect from 22 August 2018.

GSTR 2018/1 also updates the ATO's views in GST Ruling GSTR 2000/31 *GST: supplies connected with Australia* in relation to supplies of real property. The ATO proposes to withdraw GSTR 2000/31 when final rulings are issued with respect to the other connection rules in GSTR 2000/31. (Draft GSTR 2017/D1 considers the supply of goods.) In the meantime, taxpayers can continue to rely on GSTR 2000/31 in relation to those other connection rules.

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