client alert | explanatory memorandum

October 2020

CURRENCY:

This issue of **Client Alert** takes into account developments up to and including 21 September 2020.

Keeping you informed about the Federal Budget

The Australian Government will hand down its Federal Budget for 2020–2021 on the evening of Tuesday 6 October 2020.

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 on Wednesday 7 October.

A little Budget history

Seeing a Federal Budget this late in the year is, like so much of 2020, a bit unusual. Since 1994, Australia's Federal Budget has usually been handed down by the Treasurer on the second Tuesday in May. But, as we've previously reported, this year is not the only time that exceptional circumstances have lead to a change in Budget timing. Exceptions were made in 1996, when an election and a change of government occurred in March and the Budget was handed down in August; in 2016, when the Budget was handed down on the first Tuesday in May because the government was considering calling call a double dissolution election; and most recently in 2019, when a Federal election was called for 18 May and the Budget was presented on 2 April.

Between 1901 and 1993 the Budget was presented in August, on the first Tuesday night of Parliament's spring session.

COVID-19 and FBT: updated ATO advice

The ATO has updated its COVID-19 and fringe benefits tax (FBT) information webpage, providing a really useful outline of some issues that may arise due to an employer's response to COVID-19. There are likely to be some pandemic-related benefits currently provided that may not otherwise have been of consideration; for example, some employers may now be presented with FBT issues for the first time.

Although the webpage (and the following summary) deals with FBT specifically, while reading it is worth thinking through the related income tax consequences, including issues such as who incurs a particular expense (as opposed to who pays it), reimbursements, invoicing and other documentation requirements.

Working from home devices

Items provided to employees to allow them to work from home (or otherwise offsite) due to COVID-19 will usually be exempt from FBT if they are primarily used by employees for work. The items include:

- laptops;
- portable printers; and
- other electronic devices.

Also, the minor benefits exemption or the otherwise deductible rule may apply if an employer:

- allows an employee to use a monitor, mouse or keyboard that they otherwise use in the workplace;
- provides them with stationery or computer consumables; or
- pays for their phone and internet access.

The minor benefits exemption may apply for minor, infrequent and irregular benefits under $300. In addition, the otherwise deductible rule may allow an employer to reduce the taxable value of benefits by the amount that an employee can claim as a once-only deduction.

Garaging work cars at employees' homes

Employers may have been garaging work cars at their employees' homes due to COVID-19. There may not be an FBT liability depending on:

- the type of vehicle;
- how often the car is driven; and

- the calculation method chosen for car benefits.

There is a separate ATO fact sheet on this matter. Its executive summary contains the following information:

- Where a car isn't being driven at all, or is only being driven for maintenance purposes, the ATO accepts that the employer isn't holding the car for the purposes of providing fringe benefits. If the employer elects to use the operating cost method (and maintains appropriate records), it may not have an FBT liability for a car.
- Certain kinds of cars may also be exempt from FBT even where they are garaged at employees' homes.
- If an exemption doesn't apply and a work car is garaged at an employee's home, it will be deemed to be available for private use and the employer may have an FBT liability.
- The employer can take into account the impact of COVID-19 on the business use of a car if it is being driven during the period it is garaged at a home. This will require the employer to maintain a logbook (or to have kept a logbook in any of the previous four years) which will enable it to calculate its FBT liability.
- The logbook-keeping requirements will depend on whether an employer is already maintaining an existing logbook for the year.
- For any car fringe benefits calculated using the operating cost method, the employer may adjust its business use estimates to reflect changes in its employees' driving patterns due to COVID-19.

Logbooks

Employees' driving patterns may have changed due to the effects of COVID-19. The ATO notes that if an employer uses the operating cost method, it may have an existing logbook. If so, the employer can still rely on this logbook to make a reasonable estimate of the business kilometres travelled. However, the employer can also choose to keep a new logbook that is representative of its business use throughout the year.

The issue of logbooks is also addressed in more detail in the COVID-19 and car fringe benefits fact sheet.

Emergency accommodation, food and transport

An employer will not have to pay FBT if it provides emergency accommodation, food, transport or other assistance to an employee where:

- the benefit is emergency assistance to provide immediate relief; and
- the employee is, or is at risk of being, adversely affected by COVID-19.

In the context of COVID-19, this would apply to:

- expenses incurred relocating an employee, including paying for flights home to Australia;
- expenses incurred for food and temporary accommodation if an employee cannot travel due to restrictions (domestic, interstate or intrastate);
- benefits provided that allow an employee to self-isolate or quarantine; and
- transporting or paying for an employee's transport expenses, including car hire and transport to temporary accommodation.

An employer will not have to pay FBT for benefits that are considered "emergency assistance". This includes providing temporary accommodation and meals to fly-in, fly-out or drive-in, drive-out employees who are unable to return to their normal residences due to COVID-19 domestic and international travel restrictions.

Items that help protect employees from COVID-19

An employer may need to pay FBT on items it gives employees to help protect them from contracting COVID-19 while at work. These include:

- gloves;
- masks;
- sanitisers;
- antibacterial spray.

The ATO says, however, that these benefits are exempt from FBT under the emergency assistance exemption if employers provide them to employees who:

- have physical contact with – or are in close proximity to – customers or clients while carrying out their duties; or
- are involved in cleaning premises.

Examples of this type of work include:

- medical (such as doctors, nurses, dentists and allied health workers);

- cleaning;
- airline;
- hairdressing and beautician; and
- retail, café and restaurant.

Where employment duties are not of this kind, the minor benefits exemption may apply if an employer provides an employee with minor, infrequent and irregular benefits under the value of $300.

Emergency health care

There is a limited exemption from FBT if an employer provides emergency health care to an employee who us affected by COVID-19. It only applies to health care treatment provided:

- by an employee of the same employer (or an employee of a related company);
- on the employer's premises (or premises of the related company); or
- at or adjacent to an employee's worksite.

If an employer pays for its employee's ongoing medical or hospital expenses, FBT applies. However, if an employer pays to transport an employee from the workplace to seek medical help, that cost is exempt from FBT.

Flu vaccinations for employees working from home

Providing flu vaccinations to employees is generally exempt from FBT because it is work-related preventative health care.

Employers will not have to pay FBT for providing their employees with a voucher or reimbursement for getting the flu vaccine from a GP or chemist, as long as that benefit is available to all of its employees. If only some of the employees choose to receive the flu vaccine, the voucher or reimbursement is still exempt from FBT, as long as it is offered to all of the employer's employees.

COVID-19 testing

The ATO states that, as all employees are considered equally susceptible to contracting the virus, COVID-19 testing qualifies for the FBT exemption for work-related medical screening. However, employers will only be exempt from FBT liability for providing COVID-19 testing to employees if both of the following apply:

- testing is carried out by a legally qualified medical practitioner or nurse; and
- testing is available to all employees.

If it turns out that only some employees get COVID-19 tests, the tests are still exempt – again, as long as they are offered to all of the employer's employees.

Cancelled events

An employer will not have to pay FBT if it is required to pay non-refundable costs for cancelled events that its employees were due to attend. This is because:

- the arrangement was between the employer and the event organisers, not its employees and the organisers; and
- the employer has not provided any fringe benefits to its employees, as they did not get to attend the event.

However, an employer may have to pay FBT if its employees were required to pay for their attendance at the cancelled event and the employer reimbursed them. This would be an expense payment fringe benefit – unless the otherwise deductible rule applies.

Not-for-profit salary packaging: ATO concession for meal provision

Not-for-profit employers may provide salary-packaged meal entertainment to their employees to take advantage of an exempt or rebatable cap.

Arrangements to provide meals may qualify as salary-packaged meal entertainment, depending on the facts and circumstances of the meal and how the meal is provided.

This may be particularly salient for employers such as hospitals and aged care facilities, and the like.

Given the unprecedented circumstances brought about by COVID-19, the ATO will not apply compliance resources to scrutinise expenditure under these arrangements for the:

- FBT year ending 31 March 2021 – where meals are provided by a supplier that was authorised as a meal entertainment provider as at 1 March 2020; and
- FBT year ended 31 March 2020 – when restaurants and public venues were closed.

Source: www.ato.gov.au/General/COVID-19/Support-for-businesses-and-employers/COVID-19-and-fringe-benefits-tax/; www.ato.gov.au/law/view/document?DocID=AFS/CAR-FBT-COVID-19/00001&PiT=99991231235958.

ATO updates on new JobKeeper arrangements

The ATO has released a somewhat dazzling array of new and updated information sheets addressing the changes to JobKeeper.

Actual decline in turnover test

The ATO states that the actual decline in turnover test can be satisfied in two ways, using:

- the basic test; or
- the alternative test.

The basic test involves the comparison of actual GST turnover for the relevant comparison periods (eg September 2020 to September 2019). Generally, businesses will use the basic test. The option of an alternative test has been made available for some cases where the normal comparison period is not appropriate – for example, when a business has been operating for less than a year (although there are other instances where an alternative test can be used). The ATO will issue guidance on the alternative test "soon".

There is also a modified basic test for group employer labour entities. This refers to those entities that supply employee services to members of consolidated or consolidatable group, or GST groups.

The ATO states that the actual decline test is similar to the "original" decline in turnover test (ie based on projected turnover), except that:

- it must be used for specific quarters only;
- actual sales made in the relevant quarter must be used, not projected sales, when working out GST turnover; and
- sales must be allocated to the relevant quarter in the same way a business would report those sales to a particular BAS (if registered for GST).

Decline in turnover tests

The ATO states that existing participants (ie those enrolled in JobKeeper before 28 September) have already satisfied the original decline in turnover test, and do not need to satisfy it again. They do, however, need to satisfy the actual decline in turnover test.

New participants (ie those enrolling from 28 September) also need to satisfy the actual decline in turnover test. Although they need to satisfy the original decline in turnover test, they will satisfy it if they satisfy the actual decline in turnover test – and they can enrol on that basis.

The ATO advises employers unable to claim JobKeeper that they should notify their eligible employees. Employees should also be advised that the employer is no longer obligated to pay them the amount equivalent to JobKeeper. Those employees will not be eligible to be nominated for JobKeeper by any other entity.

There is no obligation to do monthly reporting during extension period in which an employer is not eligible to receive JobKeeper.

JobKeeper key dates

For the JobKeeper fortnights starting 28 September 2020 and 12 October 2020 only, the ATO is allowing employers until 31 October 2020 to meet the wage condition for all employees included in the JobKeeper scheme.

In addition, to claim payment for the September JobKeeper fortnights, employers must have enrolled by 30 September.

80-hour threshold for employees

The ATO states that a full-time employee who has been employed for their full 28-day reference period will usually satisfy the 80-hour threshold.

However, closer examination may be required for eligible employees who are:

- part-time;
- long-term casual;
- not paid on an hourly basis; and/or
- stood down.

If an employee has been stood down, an alternative reference period may apply to them.

Any overtime performed by an employee in the course of their employment in their 28-day reference period will count towards the 80-hour threshold. It is the actual hours of overtime performed that count; that is, if a penalty rate loading applies, it does not increase the number of hours counted.

It does not matter if an eligible employee takes their leave at full pay or half pay, or through a purchased leave arrangement. The employer must still count the total number of hours covered by the leave taken. For example, if an employee takes eight hours of annual leave at half pay, the employer counts eight hours towards their 80-hour threshold, not four (full pay) hours.

Unpaid leave is not counted towards the 80-hour threshold. However, if an employee takes unpaid leave, an alternative reference period may apply.

An employee only needs to satisfy the 80-hour threshold in one of the 28-day reference periods. If they satisfy it in one reference period, the employer does not need to determine if they satisfy it in other reference periods.

For employers who have a 30-day pay cycle, the 80-hour requirement equates to 85.72 hours. For a 31-day pay cycle, the equivalent is 88.58 hours.

Employers should use the most accurate workplace records to show the actual hours eligible employees worked in their 28-day reference period. Employers can use their employment records (eg payroll data or timesheets) to help determine whether employees satisfy the 80-hour threshold.

Eligible employees

Employers cannot claim for employees who:

- were first employed after 1 July 2020;
- left employment before 1 July 2020 (except in limited circumstances);
- have been, or have agreed to be, nominated by another employer (except in limited circumstances); or
- are casual employees, unless they were employed by the employer on a regular and systematic basis during the 12-month period that ended 1 July 2020.

If employees have multiple employers, they can usually choose which employer they want to be nominated by. However, if employees are long-term casuals and have other permanent employment, they must choose their permanent employer. They can't be nominated for the JobKeeper payment by more than one employer.

Employers must also have given a JobKeeper employee nomination notice to any additional employees who first become eligible on or after 3 August 2020 using the 1 July test. This should have been given to any newly eligible employees by 24 August 2020. If not already done, the ATO says it should be done as soon as possible.

Source: www.ato.gov.au/General/JobKeeper-Payment/In-detail/Actual-decline-in-turnover-test/; www.ato.gov.au/General/JobKeeper-Payment/Decline-in-turnover-tests/; www.ato.gov.au/General/JobKeeper-Payment/Payment-rates/80-hour-threshold-for-employees/; www.ato.gov.au/General/JobKeeper-Payment/Employers/Your-eligible-employees/.

Extended COVID-19 support and relief measures

JobKeeper extension Bill passed

The *Coronavirus Economic Response Package (Jobkeeper Payments) Amendment Bill 2020* received Royal Assent on 3 September 2020 as Act No 81 of 2020. This followed the House of Representatives agreeing to the six Government amendments passed by the Senate on 1 September 2020. Those minor Senate amendments apply to the Fair Work measures in Sch 2 of the Bill.

The changes in the Bill extend the end date of the JobKeeper scheme from 27 September 2020 to 28 March 2021, as announced by Prime Minister Scott Morrison on 21 July 2020. The Bill also amends the tax secrecy provisions in relation to JobKeeper and extends certain provisions of the *Fair Work Act 2009* implemented in response to COVID-19.

From 27 September until March 2021, there will be a two-tiered JobKeeper payment:

- for the December quarter, payments will be reduced from $1,500 to $1,200 per fortnight per employee, or $750 for workers employed for less than 20 hours a week; and
- for the March quarter, payments will be $1,000 per fortnight, or $650 for workers employed for less than 20 hours a week.

The extension to the employment reference date from 1 March to 1 July 2020 has been made via statutory rules.

Fair Work amendments: 10% decline in turnover certificate

The legislation requires that an eligible financial service provider issues a written certificate that relates to a specified employer, stating that the employer satisfied the 10% "decline in turnover test" for the designated quarter applicable to a specified time.

As originally drafted in the Bill, the definition of "eligible financial service provider" included a registered company auditor, a registered tax or BAS agent (or tax (financial) adviser) or a qualified accountant.

The amendments *remove* registered company auditors and tax (financial) advisers from the definition. This means qualified accountants, registered tax agents and BAS agents are the only professionals who can supply the certificate. It is important to note that lawyers may not do so.

In addition, the amendments make clear that the issuing of the 10% decline in turnover certificate involves a declaration from an eligible financial service provider that relates to a specific employer and confirms that, based on the information provided, the employer satisfied the 10% test for the designated quarter applicable to a specified time. This replaces the originally drafted requirement that the provider "express an opinion".

Source:
https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr6583%22; https://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r6583_amend_ed967ce0-aee9-4f9a-8ff5-ef8861a029d3/upload_pdf/B20SW102.pdf;fileType=application%2Fpdf; https://www.ato.gov.au/General/JobKeeper-Payment/JobKeeper-extension-announcement/.

Coronavirus Supplement extended

The *Social Security (Coronavirus Economic Response - 2020 Measures No 14) Determination 2020*, registered on 30 August 2020, extends the period for payment of the COVID-19 Supplement from 25 September to 18 December 2020, but at the reduced rate of $250 per fortnight (down from $550). This measure was announced by Federal Treasurer Josh Frydenberg on 21 July 2020. A further instrument will be made to extend the COVID-19 Supplement from 19 December to 31 December 2020.

The instrument amends multiple legislative instruments that have modified aspects of the *Social Security Act 1991* as part of the Government's COVID-19 economic response. For example, the assets tests and the liquid assets test waiting period are reinstated for certain payments from 25 September 2020.

The instrument also temporarily increases the income free area to $300 a fortnight for certain JobSeeker Payment recipients for the period 25 September 2020 to 31 December 2020, and increases the partner income taper rate for JobSeeker Payment recipients from 25 cents to 27 cents for every dollar over the partner income free area. The instrument also extends to 31 December 2020 the temporary pension portability measure.

Source: www.legislation.gov.au/Details/F2020L01093.

COVID-19 early release of super extended

The *Treasury Laws Amendment (Release of Superannuation on Compassionate Grounds) Regulations (No 3) 2020*, registered on 3 September 2020, give effect to the Government's extension of the COVID-19 early release of superannuation up to $10,000 until 31 December 2020.

As part of the Economic and Fiscal Update in July 2020, the Government announced that it would extend the application period to allow those dealing with adverse economic effects of COVID-19 to access up to $10,000 of their super (tax-free) for the 2020–2021 year.

These regulations amend reg 6.19B(2) of the *Superannuation Industry (Supervision) Regulations 1994* (SIS Regs) to allow an application via the myGov website to access $10,000 of super until 31 December 2020 (extended from 24 September). Eligible Australian and New Zealand citizens and permanent residents were also able to access up to $10,000 of their super for the 2019–2020 year by 1 July 2020.

The changes under the new regulations apply from 4 September 2020. In accordance with the original provisions, provided that a valid application is made by 31 December 2020, the ATO can make a determination to release up to $10,000 of super after the application period has expired.

Source: www.legislation.gov.au/Details/F2020L01133.

Bankruptcy concessions and director liability safe harbour extended

In a media release on 7 September 2020, the Government announced that it will extend its temporary insolvency and bankruptcy protections until 31 December 2020. Federal Treasurer Josh Frydenberg said that regulations will be made to extend the temporary increase in the threshold at which creditors can issue a statutory demand on a company and the time companies have to respond to statutory demands they receive.

The changes will also extend the temporary relief for directors from any personal liability for trading while insolvent.

Background

In March 2020 the Government made a number of important changes to the *Bankruptcy Act 1966* and the *Corporations Act 2000* (Corporations Act) via the *Coronavirus Economic Response Package Omnibus Act 2020* (the Omnibus Act). The changes were intended to provide relief from issues caused by the pandemic by way of lessening the threat of actions which could unnecessarily push companies and/or directors, as well as individuals, into insolvency and force the winding up of a business.

Statutory thresholds

The Omnibus Act increased the minimum amount of debt required to be owed before a creditor can initiate involuntary bankruptcy proceedings from $5,000 to $20,000. The statutory minimum for a creditor to issue a statutory demand was increased from $2,000 to $20,000.

Timeframes

The timeframe in which a debtor must comply with a bankruptcy notice was changed from 21 days to six months. The timeframe in which a debtor is protected from enforcement action by a creditor following presentation of a declaration of intention to present a debtor's petition was changed from 21 days to six months.

There was also an increase to the period within which a debtor must respond to a statutory demand. The statutory period increased from 21 days to six months.

Directors' personal liability

The Omnibus Act inserted a new provision which provides that directors have temporary relief from personal liability for insolvent trading if debts are incurred in the ordinary course of business. Directors otherwise have a duty to prevent insolvent trading.

A director may rely on the temporary safe harbour in relation to a debt incurred by the company if the debt is incurred:

- in the ordinary course of the company's business;
- during the period starting on 24 March 2020; and
- before any appointment of an administrator or liquidator of the company during the temporary safe harbour application period.

A director is taken to incur a debt in the ordinary course of business if it is necessary to facilitate the continuation of the business. This could include, for example, a director taking out a loan to move some business operations online. It could also include debts incurred through continuing to pay employees during the pandemic.

A person wishing to rely on these safe harbour provisions in a proceeding in which unlawful insolvent trading is alleged bears an evidential burden in relation to that matter – and a new definition of "evidential burden" was inserted into the Corporations Act.

A holding company may rely on the safe harbour for insolvent trading by its subsidiary if it takes reasonable steps to ensure the safe harbour applies to each of the directors of the subsidiary, and to the debt, and if the safe harbour does so apply. The holding company bears an evidential burden in relation to these matters.

Egregious cases of dishonesty and fraud are still subject to criminal penalties. Any debts incurred by the company will still be payable by the company.

Measures extended

The measures were enacted with an intended life span of six months, meaning that they were due to finish on or around the time that the JobKeeper and JobSeeker measures were originally intended to finish, on 28 September 2020.

The end time has now been pushed back to 31 December 2020 (unlike JobKeeper, which is going to the end of March 2021).

The Omnibus Act actually amended the Bankruptcy Act (and Corporations Act) to remove references to amounts and time periods, and updated them to reflect that the statutory minimum may be changed via regulation. This means that the proposed extension will be implemented by regulation rather than by further amending legislation, removing the need to wait for Parliament to resume before the proposal becomes law.

Although the wording of the Government's press release on the extension does not specifically address the minimum amount of debt required before a creditor can initiate involuntary bankruptcy proceedings, it is reasonable to assume that both $20,000 limits will stay in place – the release only refers to "the threshold at which creditors can issue a statutory demand on a company and the time companies have to respond to statutory demands they receive".

Source: https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/extension-temporary-relief-financially-distressed.

ASIC grants hardship relief for withdrawals from frozen funds

The Australian Securities and Investments Commission (ASIC) has announced new relief measures for operators of managed funds to facilitate withdrawals by members who are facing financial hardship during the COVID-19 pandemic.

The conditional relief implemented by the ASIC Corporations (Hardship Withdrawals Relief) Instrument 2020/778, registered on 27 August 2020, will apply to all responsible entities (REs) of registered managed investment schemes (MIS) that have become "frozen funds".

The relief measures will ease some of the statutory restrictions on REs and improve access to investments by members who meet specific hardship criteria. ASIC previously granted hardship relief to REs of frozen funds on a case-by-case basis only. ASIC has also issued Information Sheet INFO 249 *Frozen funds – information for responsible entities* to provide updated guidance about frozen funds.

Frozen funds

At times of extreme market volatility, some managed funds may need to suspend redemptions and freeze funds to protect the interests of the members as a whole. A fund is frozen when the responsible entity has suspended or cancelled redemptions to prevent withdrawals from destabilising their fund. When a fund is frozen members will generally not have access to their investments for a period of time. This does not necessarily mean that there has been a loss of asset value or that investors will not get their money back eventually.

ASIC Deputy Chair Karen Chester has said the hardship relief will make it easier for REs of frozen funds to enable withdrawals by investors suffering hardship. However, in doing so, REs will still have to act in the best interests of members.

Eligibility criteria

To be eligible to make hardship withdrawals from frozen funds, a member must meet at least one "hardship criterion" such as severe financial hardship, unemployment for over three months, compassionate grounds or permanent incapacity. An eligible member may:

- withdraw up to a total of $100,000 of their investment per calendar year; and
- receive up to four withdrawals per calendar year.

An RE has the discretion to facilitate a hardship withdrawal where the RE is satisfied that the member has met the hardship criteria. Members of frozen funds should contact their RE for information on hardship withdrawals in the first instance. More information on frozen funds is available on ASIC's Moneysmart website, www.moneysmart.gov.au.

Source: www.legislation.gov.au/Details/F2020L01069; https://asic.gov.au/for-finance-professionals/fund-operators/running-a-fund/requirements-when-running-a-managed-investment-scheme/frozen-funds-information-for-responsible-entities/.

Super choice of fund and enterprise agreements Bill passed

The *Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019* received Royal Assent on 3 September 2020. The changes the Bill makes will extend the super "choice of fund" regime to employees covered by enterprise agreements and workplace determinations made from 1 January 2021 (revised from 1 July 2020).

Federal Treasurer Josh Frydenberg has said this will allow another 800,000 people to make choices about where their super guarantee contributions are invested, representing around 40% of all employees covered by a current enterprise agreement. The measure was originally announced as part of the Government's response to the Murray Financial Services Inquiry (FSI) in October 2015.

Choice of fund extended to enterprise agreements

The Bill amends s 32C of the *Superannuation Guarantee (Administration) Act 1992* (SGAA) to enable employees to choose their own super fund where they are employed under a workplace determination or enterprise agreement made on or after 1 January 2021. This will require an employer to give a standard choice form to an employee in certain circumstances; for example, upon commencement of their employment or when receiving a written request from an employee.

An employer will not be required to provide existing employees with a choice form, unless they request it once a new determination or agreement is made on or after 1 January 2021. However, existing employees will be able to request a choice of fund form from their employer and the employer will be required to act on such a request.

Where a new employee does not choose a fund, the proposed changes will enable an employer to continue to make compulsory super guarantee contributions for an employee with the same fund, in accordance with the previous determination or agreement, and comply with the choice of fund rules.

If a workplace determination or enterprise agreement made after January 2021 includes a term that restricts choice, such a term will not be enforceable under s 32Z of the SGAA to the extent that the employer instead makes contributions to an employee's chosen fund. Examples of terms which restrict choice include terms that list several funds the employer must choose between to make contributions to.

A technical amendment (s 20(3A) of the SGAA) will ensure employers are not penalised with a SG shortfall if they rely on the existing exemptions for employees in certain defined benefit schemes.

Start date revised to 1 January 2021

The Bill was passed after the House of Representatives agreed to the two Government Senate amendments to revise the start date so that it applies to enterprise agreements and workplace determinations made from 1 January 2021 (instead of 1 July 2020, as originally proposed). The other amendment by Senator Rex Patrick (Independent) requires the Australian Prudential Regulation Authority (APRA) to review the provisions to identify any unintended consequences, including the ongoing viability and profitability of defined benefits schemes. The APRA review will need to be completed within 30 months of Royal Assent to the Bill and must involve consultation with industry stakeholders.

Source:
https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr6447%22; https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/government-passes-legislation-through-senate-allow; https://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r6447_amend_c2eff2f8-445e-4d13-adde-dce9de7dcdec/upload_pdf/B20UD113.pdf;fileType=application%2Fpdf; https://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r6447_amend_f94c441e-cf5b-4897-ae4d-83a4af7fbf01/upload_pdf/8926%20revised%20TLA%20(Your%20Super,%20Your%20Choice)%20Bill%202019_Patrick.pdf;fileType=application%2Fpdf.

Super guarantee amnesty now closed

The ATO has reminded employers that the superannuation guarantee (SG) amnesty closed on 7 September 2020. The amnesty enabled employers to self-correct historical SG underpayments, without incurring the normal penalties, for SG shortfalls from 1 July 1992 until 31 March 2018.

Any amnesty applications received by the ATO after 11:59pm on 7 September will not qualify for the amnesty and but instead will be treated as a standard lodgment of a super guarantee charge (SGC) statement.

Applications received after 7 September

The ATO says it will notify late applicants in writing of the quarters that aren't eligible for the SG amnesty and charge the administrative component ($20 per employee per quarter). The ATO will consider whether to remit the additional SGC Part 7 penalty (up to 200%): see Draft Practice Statement Law Administration PS LA 2020/D1. A minimum penalty of 100% will apply if the ATO subsequently commences an audit in respect of non-disclosed quarters covered by the amnesty.

The ATO will issue a notice of amended assessment with the increased SGC amount owing. Any SGC payments made after 7 September 2020 are not deductible, even if they relate to SG shortfalls disclosed under the amnesty.

Applications received by 7 September

To retain the benefits of the amnesty, the law requires an eligible employer to pay the outstanding SGC amount in full or enter into a payment plan with the ATO. Note that the SGC amount disclosed in an amnesty application must be paid to the ATO (not the employee's super fund).

Amnesty payments made after 7 September 2020 are not deductible (including amounts paid under a payment plan after 7 September). If an employer is subsequently unable to maintain payments under a payment plan, the ATO will disqualify the employer from the amnesty and remove the amnesty benefits for any unpaid quarters.

Example

Lucia applied for the SG amnesty for five quarters from 1 January 2016 to 31 March 2017. The ATO advised her that she is eligible for the amnesty for all of the quarters. The amount of SG shortfall and nominal interest she owes is $500 per quarter – a total of $2,500.

Lucia sets up a payment plan to pay $500 a month for five months. She pays two instalments of $500 each ($1,000 in total) which cover the amounts owing for the quarters 1 January 2016 to 30 June 2016.

Lucia fails to pay the next three instalments in her payment plan and doesn't renegotiate her payment plan with the ATO. As a result of the disclosures and instalments Lucia has paid, the quarters 1 January 2016 to 30 June 2016 remain eligible for the amnesty. However, the disclosures for 1 July 2016 to 31 March 2017 are disqualified from the amnesty.

The ATO advises Lucia which quarters are disqualified for the amnesty and amends the assessments to add the administration component and Part 7 penalties to those quarters. Because Lucia made the disclosure of unpaid SGC before the end of the amnesty period without the ATO prompting her, the Part 7 penalties may be remitted below 100% of the SGC. The ATO will continue to work with Lucia through its debt collection processes to collect the remaining amount of SGC she owes to her employees. This is $1,500 unpaid SG plus the administrative component and general interest charge.

Source: www.ato.gov.au/Business/Super-for-employers/Superannuation-guarantee-amnesty/.