client alert | explanatory memorandum

May 2023

CURRENCY:

This issue of **Client Alert** takes into account developments up to and including 24 April 2023.

Keeping you informed about the Federal Budget

The Federal Budget will be handed down on Tuesday 9 May. 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 10 May, after the Treasurer presents the Budget to Parliament on Tuesday evening.

Is your content making you income?

The ATO has warned content creators that they need to be aware of their income tax and GST obligations. Examples of content creators are individuals who write a blog, post make-up tutorials to social media or streaming gaming for others to see.

If you start making money from your online content, you will have income to declare. You will also need to consider whether you are in business. If you are, or you want to start your own business, it's important you know what income you need to report, the deductions you can claim and what registrations you may need.

The income you receive could be:

- cash;
- money for advertising or appearance fees; and
- goods like a new gaming console, clothes or make-up.

It doesn't matter whether the income comes from Australia or overseas. It is all taxable in Australia, as long as you are considered to be a tax resident of Australia.

Some of your supporters may purchase your merchandise or pay a subscription fee to access your content. They may send tips or gratuities (often called gifts). All of these are likely to be income and should be declared.

There are some important things to think about if you're a content creator.

Can you afford to accept the gifts? A new handbag or a free holiday may be enticing, but because it's regarded as income, you'll need to pay tax on it.

Consider how the income you earn will affect your other amounts payable. Sole trader income counts towards your total assessable income, so it could impact your study loans or Medicare calculation.

Make sure you keep your cash flow in mind when it comes to accepting goods or services.

GST

If you're in business, and you have a GST turnover of $75,000 or more, you'll need to register for GST. You will be liable to pay GST on your taxable supplies, even if you don't pass it on to your supporters. However, you can claim input tax credits on what are called "creditable acquisitions".

Deductions

You will be able to claim deductions for business related expenses. For example, you may be entitled to:

- an immediate deduction for certain prepaid business expenses; and
- an immediate deduction for certain start-up expenses, such as payments for advice or services relating to the business' structure or operation and government fees or charges relating to the establishment of the business.

You may also be eligible for various small business concessions.

If you work from home and have a dedicated room for work (a home office), you may be able to claim a proportion of your mortgage interest or rent, power bills and cleaning costs.

If you don't have a home office, the ATO may let you claim a deduction for additional "running expenses" (eg electricity, phone and internet expenses) incurred as a result of working from home.

Source: www.ato.gov.au/Business/Small-business-newsroom/Lodging-and-paying/Is-your-content-creating-you-income-/

Home charging rate guideline for EVs released

With the increasing popularity and uptake of electric vehicles (EVs), the ATO has now released a draft compliance guideline which contains the methodology for calculating the cost of electricity when an eligible electric vehicle is charged at an employee's or an individual's home. The methodology contained in the guideline can be applied for FBT (eg car fringe benefit, residual benefit, or car expense payment fringe benefit) from 1 April 2022 and for income tax purposes (eg car expenses relating to carrying out income-earning activities) from 1 July 2022.

According to the ATO, the EV home charging rate will be 4.20 cents per kilometre. If charging costs are incurred at a commercial charging station, a choice must be made: if the EV home charging rate is used, the commercial charging station cost will be disregarded, and vice versa. However, records such as receipts must still be kept to substantiate any claims, and the choice to rely on the guideline applies for the entire FBT or income year.

Example

Alinta owns a zero emissions EV which she mainly uses for work but also for private purposes. For the relevant year, she maintains odometer records as well as a logbook. She works out that for the year the business use percentage of the car is 60% and she drove 26,000 km. She charges her car at commercial charging stations while on the road, and also at home. Using receipts she has retained, the cost of charging at commercial stations amounted to $300 for the year. Using the guideline, she works out that her home charging electricity deduction would be $655 (26,000 km × 4.20c per km × 60%).

Alinta has a choice to either deduct the $300 from the commercial charging stations as a part of her work-related car expense deduction claim or deduct the $655 worked out using the methodology contained in the guideline. She cannot do both. Since $655 is higher than $300, Alinta opts to rely on the guideline and have it apply for the entire income year.

For the 2023 FBT and income tax year, the ATO will accept a reasonable estimate based on service records, logbooks, or other available information where odometer records have not been maintained as a transitional measure. This approach is only available for the opening odometer reading at 1 April or 1 July 2022.

Businesses that can rely on this guideline include those that provide electric vehicles to their employees (or associates) for private use, where that results in the provision of a car fringe benefit, residual benefit or car expense payment fringe benefit and the business is required to calculate the value of benefit as a part of FBT obligations. For example, the EV home charging rate can be used to determine the recipient contribution component for the statutory formula method for car fringe benefits. Similarly, it can be used to determine both the operating cost and recipient contribution if the operating cost method is used.

For individuals, the guideline can only be relied on to calculate the cost of charging an electric vehicle if a zero emissions electric vehicle was used in carrying out income-earning activities and relevant records have been kept during the year. It should be noted that plug-in hybrids (ie those powered by a combination of liquid fuel and electricity) are not considered to be zero emission vehicles and individuals that use plug-in hybrids are unable to rely on the guideline even if the vehicle was used in carrying out income-earning activities.

The guideline is currently in draft form but is expected to apply to the 2023 FBT and income tax year.

Source: www.ato.gov.au/law/view/view.htm?docid=%22DPC%2FPCG2023D1%2FNAT%2FATO%2F00001%22
www.ato.gov.au/Business/Fringe-benefits-tax/Types-of-fringe-benefits/fbt-on-cars,-other-vehicles,-parking-and-tolls/electric-cars-exemption/

Property investors beware: new data matching program

Individual property investors should be aware that the ATO has announced the commencement of a new data matching program that seeks to obtain data from various financial institutions for the 2021–2022 to 2025–2026 income years. Among other things, information collected will include loan details and borrowing costs. Records relating to approximately 1.7 million individuals will be obtained each financial year and used to identify relevant cases for administrative action, including compliance activities and education strategies.

Recent results of sample audits across individuals conducted under the ATO's random enquiry program appeared to show a net tax gap of $9 billion for the 2020 income year, with the incorrect reporting of rental property income and expenses being a significant driver of the gap. Specifically, the estimated net tax gap for rental property expenses contributed around $1 billion or 14% of the total individuals gap, with a common driver being the incorrect apportioning of loan interest costs where the loan was refinanced or redrawn for private purposes.

Based on the results of the program, it comes as no surprise that the ATO has announced the commencement of a data matching program to acquire residential investment property loan data from authorised financial institutions for the 2021–2022 to the 2025–2026 income years. Information collected will include:

- identification details – unique client IDs, names, addresses, phone numbers, dates of birth, email addresses;
- account details – account numbers, BSBs, balances, commencement and end dates, terms of loans, opening and closing balances, borrowing costs;
- transaction details – transaction dates, amounts, transaction descriptions; and
- property details – addresses, etc.

The data providers include the big four banks (ANZ, Commonwealth, Westpac and NAB), as well as other providers and their subsidiaries, including Adelaide Bank, Bank of Queensland, Bendigo Bank, Bankwest, ING, Macquarie Bank, Suncorp, RAMS, Ubank, St George, Bank of South Australia, Bank of Melbourne and ME Bank. The ATO will also be the matching agency and the sole user of the data obtained during this program.

Records relating to approximately 1.7 million individuals will be obtained each financial year.

The ATO will be using the data obtained to ascertain information about rental property loans including details of repayments, interest charged and borrowing expenses. It will be using this information to identify, assess and address several tax risks, including:

- lodgement – confirming that taxpayers with rental properties are lodging tax returns and the relevant rental property schedule on or before the relevant due date;
- income tax – confirming taxpayers with a rental property are correctly reporting interest on loan and borrowing expense deductions in their rental property schedules and associated income tax return labels; and
- capital gains tax (CGT) – confirming the calculation of cost base elements used to determine the net capital gain or loss on a rental property used to generate income.

According to the ATO, after a return is lodged, it will be using the data collected to identify relevant cases for administrative action including compliance activities and education strategies. If a discrepancy is identified, taxpayers will be contacted by phone, letter or email. Taxpayers will then have 28 days to respond before the ATO takes any administrative action in relation to the discrepancy.

In addition to compliance action, the ATO will also be using the data collected to gain insights to help develop and implement treatment strategies to improve voluntary compliance. The data obtained may also be made available to individual self-preparers through myTax, specifically the rental property schedule interest on loans and/or borrowing expense labels and rental income tax return labels.

Source: www.ato.gov.au/General/Gen/Residential-investment-property-loan-2021-22-to-2025-26-data-matching-program-protocol/

Super tax concession changes: consultation

As flagged earlier in the year when the announcement was made, the Federal Government has released a consultation paper seeking public views and feedback on its proposal to reduce super tax concessions for individuals with super balances over $3 million, including those with self managed super funds (SMSFs). Some important questions the paper asks include whether the proposal would create any unintended consequences and whether the current proposed proportioning methods are appropriate. Consultation was open for a limited time, until 17 April 2023, and the comments and views submitted will be used to inform the next stage. This measure is not yet law.

To recap, the government proposed in late February that individuals with a total super balance (TSB) of more than $3 million combined in all the super accounts will have their super concessional tax rate changed to 30% from the 2025–2026 financial year onwards. This means from 30 June 2026, the earnings of those individuals on the part of their TSB over $3 million will attract an additional 15% tax. The additional tax will be applied directly to the individual and there will be no change to the tax arrangements within super funds.

The ATO will continue to calculate the TSB of all individuals annually using existing information provided by super funds and SMSFs. Individuals will be able to quickly identify whether they will be subject to the new tax by reference to their TSB at the end of each financial year through myGov. As it is proposed, the threshold will not be indexed and is not shared between spouses, family members or between other individuals who have interests in the same fund such as an SMSF.

Once it has been determined that an individual's TSB exceeds the threshold of $3 million for the year, earnings related to that part of their TSB will attract an additional 15% tax. First the earnings are calculated as the difference between the TSB for the current year (adjusted for withdrawals and contributions) and their TSB from the previous financial year. If the calculated earnings are negative, this amount can be carried forward and used to offset future earnings for this purpose and no further calculations would be required. Negative earnings will not expire and can be applied over multiple future years.

Otherwise, where the earnings are positive, the next step is to calculate the proportion of earnings that can be attributed to super balances of more than $3 million on a proportional basis. For example, if an individual's TSB is $6 million on 30 June 2026, the proportion of TSB that's more than $3 million is 50%, therefore 50% of the calculated earnings will attract an additional 15% tax.

The additional 15% tax will be determined by the ATO and levied directly on individuals, similar to the existing tax under Division 293 of the *Income Tax Assessment Act 1997* (commonly known as the Div 293 tax). This will also be imposed separately to personal income tax, and it is intended that the amount of tax payable would not be reduceable by deductions, offsets or losses available under the personal income tax system (ie only prior year negative earnings could be applied). Once an individual receives notice of the amount payable, they will have the option of either paying the liability from funds held outside of super or by releasing amounts from one or more of their super interests.

Source: https://treasury.gov.au/consultation/c2023-373973
https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/superannuation-tax-breaks

Superannuation and independent contractors: fresh Full Federal Court guidance

In February 2022, the High Court handed down a landmark decision in *ZG Operations v Jamsek* [2022] HCA 2, which clarified the test for determining whether a worker is an employee or an independent contractor.

The High Court remitted the question of whether the workers were "employees" under the extended definition of that term in s 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (the SGA Act) back to the Full Federal Court.

In deciding that the relevant workers were not "employees" under the extended definition in s 12(3), the Full Federal Court determined in *Jamsek v ZG Operations Australia Pty Ltd (No 3)* [2023] FCAFC 48 that s 12(3) does not apply to an independent contractor relationship where the worker uses a company, trust or other service vehicle to contract with the putative employer instead of doing so in their personal capacity. This confirms the ATO's guidance in Superannuation Guarantee Ruling SGR 2005/1.

Additionally, in determining whether a worker is an "employee" under the extended definition in s 12(3), the Full Federal Court has confirmed that a worker will not be taken to work under a contract that is "wholly or principally for [their] labour" in the following circumstances.

Finding	Comment
The contract is for labour and non-labour (eg the provision of substantial capital assets or the assumption of risk) components, and based on a quantitative valuation, the non-labour components predominate.	In many independent contractor relationships, the contractor may be required to provide their own tools and equipment. Whether the contract is principally for labour or alternatively the provision of capital assets and the assumption of material risks is likely to turn on a valuation of the labour and non-labour components respectively.
The worker has the ability to delegate the performance of work under the contract to other persons.	The party that bears the onus of proof will need to substantiate the value of the labour and non-labour components through evidence.
The worker is engaged under a contract for a "result".	This finding is consistent with previous case law and ATO guidance. The workers had a contractual right of delegation in this case.

Employers are required to provide their employees with a minimum level of superannuation support (currently 10.5%) each quarter, otherwise the employer will become liable to pay the superannuation guarantee charge. An "employee" for these purposes includes an employee at common law. The SGA Act also includes a number of provisions which extend the meaning of "employee". Relevantly, s 12(3) of the SGA extends the meaning of "employee", so that:

"If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract."

This provision is broad and captures many independent contractor relationships. An entity that engages an independent contractor under a contract of this nature is required to provide the contractor with superannuation support (otherwise they will become liable to pay the superannuation guarantee charge).

Facts

The appellants are truck drivers who were engaged (in their capacity as partners of their respective partnerships) by the respondent, ZG Operations Australia Pty Ltd, under a series of contracts to provide delivery services. Under the arrangements, the drivers were required to supply and maintain their own trucks in order to perform the services.

The drivers initially commenced proceedings against ZG Operations seeking declarations in respect of statutory entitlements alleged to be owed to them on the basis that they were either common law employees of ZG Operations or "employees" under the extended definition in s 12(3) of the SGA Act. If either allegation was successful, ZG Operations would be liable to pay the superannuation guarantee charge in respect of the drivers.

The drivers were unsuccessful at first instance and appealed to the Full Federal Court. The Court held that the drivers were common law employees of ZG Operations and made no decision on s 12(3). That decision was appealed to the High Court, which held that the drivers were not common law employees of ZG Operations and the case was remitted back to the Full Federal Court to decide the s 12(3) issue. The ATO Commissioner of Taxation was joined as a party to the remitted case and made submissions in support of ZG Operations' position that s 12(3) did not apply to the drivers.

The reason for joining the Commissioner as a party is because, if the drivers were successful, ZG Operations would have been liable to pay the superannuation guarantee charge. The charge is imposed as a tax and administered by the ATO (with the potential imposition of penalty tax and interest). The ATO would then be required to remit any charge recovered to the drivers' superannuation funds.

Decision

The Full Federal Court (Perram, Anderson and Wigney JJ) held that the drivers were not employees under s 12(3) of the SGA Act as they were unable to satisfy the three-limbed test which had previously been set out by the Full Federal Court in *Dental Corporation Pty Ltd v Moffet* [2020] FCAFC 118. The test requires that:

1. there should be a "contract";
2. the contract is wholly or principally "for" the labour of a person; and

3. the person must "work" under that contract.

In particular, the Court held that the drivers were unable to satisfy the first two elements of the test.

No "contract" between the drivers and ZG Operations

The drivers had contracted with ZG Operations in their capacity as partners of their respective partnerships (each partnership comprising the driver and the driver's wife). The Court held in this context that there was no contract between the drivers in their individual capacity and ZG Operations.

The Court held that s 12(3) could not apply to this relationship because the language of the provision requires the contract to be entered into by a natural person in their individual capacity.

In particular, s 12(3) was found only to be capable of operating where:

- an identified natural person (the worker) is a party to the contract in their individual capacity;
- the worker works under the contract; and
- the party on the other side of the contract makes payments to the worker in respect of their labour under the contract.

This interpretation was contended for and supported by the Commissioner. This is not unexpected given the Commissioner's public position in Superannuation Guarantee Ruling SGR 2005/1 that:

> *Where an individual performs work for another party through an entity such as a company or trust, there is no employer-employee relationship between the individual and the other party for the purposes of the* [SGA Act]*, either at common law or under the extended definition of employee. This is because the company or trust (not the individual) has entered into an agreement rather than the individual.*

The Court confirmed, however, that it is still possible for s 12(3) to apply where a natural person enters into a contract in their individual capacity alongside their personal service company or trust. Depending on how the contract is drafted, simply adding a personal service company or trust as another contracting party should not prevent s 12(3) from applying in circumstances where the natural person (in their individual capacity) is obliged to provide their labour under the contract. The situation may be different, however, if the natural person is a party to the contract but only makes promises under the contract that do not relate to their personal labour (eg providing certain warranties or indemnities).

Contract was not "for" the labour of the drivers

The question of what the contract is "for" is to be assessed from the perspective of the putative employer (ie ZG Operations) by having regard to the terms of the contract.

Non-labour components

The Court found that the contract could not be "wholly or principally" for the labour of the drivers as the "contracts required the use of a substantial capital asset, the trucks, for which the partnerships were wholly responsible" (at [57]). The partnerships also took on the costs and risks of operating the trucks and were responsible for the maintenance of insurance. While labour was required to be provided in order to deliver the goods, Wigney J found that "the size of the capital commitment represented by the need to provide functional and properly maintained delivery trucks [meant that] labour could not be said to be the principal or predominant component" (at [77]).

Perram and Anderson JJ alternatively held that where the contract required the provision of a "single integrated benefit" that involved both labour and non-labour components, whether the contract was "wholly or principally" for labour required a quantitative valuation and comparison of the various components. Their Honours found that the drivers had failed to adduce quantitative evidence at trial which demonstrated the market value of the different components of the contract. Without this evidence, it was not possible to quantify the value of the labour component of the delivery service compared to the other benefits that ZG Operations obtained under the contracts. As such, the drivers were unable to discharge their onus of proving that any of the contracts were "principally" for the labour of either driver.

There are a couple of relevant observations in relation to the Court's finding on this point.

- In this case, the drivers bore the onus of proof because they had initiated the proceedings seeking a declaration as to their status as employees. In other cases, the s 12(3) issue may arise in the context of a challenge to an assessment of superannuation guarantee charge issued by the Commissioner. In such cases, the onus of proof would rest with the employer and not the Commissioner.

- The provision of a “substantial capital asset” (such as a truck) is likely to be distinguishable from many situations where a contractor is required to provide their own tools and equipment. Accordingly, a contractor who is required to supply their own tools and equipment as well as their labour may still be engaged under a contract that is “wholly or principally for their labour”, unless the tools and equipment are highly specialised or require a substantial capital commitment.

Right of delegation

The Court also confirmed that an employment relationship cannot exist under s 12(3) where the contractor has the ability to delegate the performance of the work under the contract to other persons (as this means the contract is not “for” the contractor’s personal labour). Perram and Anderson JJ held that, because the contracts allowed the partnerships to delegate the work to a substitute driver with agreement from ZG Operations, this meant the “performance of the contractual obligations was not personal to [the drivers]” (at [58]).

Contract for a “result”

The Court confirmed (in obiter) that a contract for labour cannot exist under s 12(3) where the contractor is engaged “to produce a given result”. In this case, the Court held that the contracts were not “for a result”. The factors that the Court considered relevant to this finding included that the drivers were remunerated:

- based on an hourly rate, rather than per item delivered; and
- for a set number of hours each working day, even if less hours were actually required to be worked.

These findings build on the earlier decision of Wigney J in *JMC Pty Limited v FCT* [2022] FCA 750, in which the mode of remuneration was seen a key factor in determining whether a contract is “for a result”. In particular, time-based remuneration points against a contract being “for a result”. It may well be the case that, if the drivers had been remunerated on a per-delivery basis, the contract could have been characterised as being “for a result”.

Proposed amendments to the Fair Work Act

Employer obligations to pay superannuation remain a hot issue.

Currently, absent an entitlement to superannuation under an award or enterprise agreement, a worker who meets the definition of an “employee” under the SGA Act (including the extended definition in s 12(3)) cannot directly enforce the employer’s obligation to make superannuation contributions. Rather, the Commissioner is responsible for enforcing the employer’s liability to the superannuation guarantee charge in cases where superannuation contributions are not made voluntarily by the employer.

On 29 March 2023, the Government introduced the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023* to amend the *Fair Work Act 2009* to include the obligation to pay superannuation contributions within the National Employment Standards as a workplace entitlement. If the Bill is passed (it is currently still before the House of Representatives), this will mean that “national system employees” (as defined in the Fair Work Act) (or employee organisations or Fair Work Inspectors on their behalf) would be able to directly recover from an employer any unpaid superannuation contributions in circumstances where the employer would be liable for the superannuation guarantee charge. A failure of an employer to comply with the obligation would also be a civil penalty provision and could result in the imposition of penalties subject to certain carve outs where an employer is also pursued by the Commissioner for an amount owed to an employee.

However, because the National Employment Standards apply only to common law employees, it appears that these amendments will not affect the situation of an independent contractor who is an employee only under the extended definition in s 12(3) of the SGA Act. In such cases, the existing system of enforcement of the superannuation guarantee charge by the Commissioner will remain the only option for recovery of unpaid superannuation contributions.

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