client alert | explanatory memorandum

May 2024

CURRENCY:

This issue of **Client Alert** takes into account developments up to and including 22 April 2024.

Keeping you informed about the Federal Budget

The Federal Budget will be handed down on Tuesday 14 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 15 May, after the Treasurer presents the Budget to Parliament on Tuesday evening.

Reactivating old debts: new guidelines for government agencies

In response to the ATO's recent actions on reactivating or offsetting old tax debts, the Commonwealth Ombudsman/ACT Ombudsman and the Inspector-General of Taxation and Taxation Ombudsman (IGTO) have jointly issued new guidelines aimed at improving how Australians are notified about debts they owe to the government. The guidelines report outlines principles designed to ensure that the process of debt notification is handled with transparency, clarity and sensitivity towards the people and businesses affected.

Mr Iain Anderson, serving as both Commonwealth Ombudsman and ACT Ombudsman, together with Ms Karen Payne, the IGTO, has emphasised the importance of government agencies adopting a compassionate and principled approach when dealing with debt notification. "While the law may require agencies to take certain actions, it is crucial that these actions are taken in a manner that minimises distress", they have said.

The guidelines propose five key principles for the ATO and other government departments to consider when conducting programs:

1. Transparency and accountability – agencies should communicate clearly why the debt has arisen, to foster trust and confidence in the process.
2. Clarity on the debt's origin – individuals and businesses should be given the information they need to understand the source and nature of the debt, and this information should be tailored to their circumstances.
3. Clear pathways for review – information on how to request a review of the debt, apply for waivers and arrange repayments should be readily accessible, helping people to understand their rights and options.
4. Accessible support – contacts for further assistance must be provided, acknowledging that people may have additional questions or need personalised support.
5. Commitment to improvement – the process of debt recovery should be viewed as an opportunity to learn and enhance future practices, based on oversight recommendations and past experiences.

Anderson and Payne noted the significance of reflecting on past interactions and the recommendations from oversight bodies to continually elevate how agencies engage with the community regarding sensitive matters such as debt recovery.

The ATO has welcomed the report, saying it is reviewing its approach and is committed to applying the five key principles in future when dealing with and communicating about old tax debts.

Taxpayers who have an unresolved complaint or dispute with the ATO can lodge a dispute with the IGTO to receive independent assurance. The IGTO will conduct an independent investigation of the actions and decisions that are subject to dispute, and can help taxpayers better understand the actions taken by the ATO and/or independently verify whether shortcomings exist in the ATO's actions or decisions which should be rectified, as well as identifying other options taxpayers may have to resolve their concerns.

For example, in one case study, the IGTO assisted a taxpayer to verify whether the full amount of general interest charge (GIC) had been remitted on their tax debts. In another, after a taxpayer's original request for the ATO to exercise the discretion to advance the taxpayer's refund instead of offsetting it against their tax

debt was denied, despite the person's imminent risk of homelessness, the taxpayer lodged a dispute with the IGTO. Following urgent discussions between the IGTO and senior ATO officers, the ATO reversed its decision and the taxpayer received their refund.

The IGTO can also intervene in cases where the ATO has used family assistance payments to offset tax debts. According to another of the IGTO's case studies, the ATO used a Centrelink Family Assistance (CFA) payment to offset a tax debt that a taxpayer had. At the time, the taxpayer was unemployed and supported two minors along with an ageing parent, and therefore relied on the CFA payment. After IGTO intervention, the ATO agreed to refund the offset, recognising it was not appropriate to pursue debt collection given the particular circumstances.

Taxpayers interested in lodging a dispute with the IGTO should note that they must have first attempted to resolve the complaint directly with the ATO, unless special circumstances exist. Those that remain unsatisfied with the ATO response should then lodge a formal complaint with the ATO for review. If taxpayers are still unsatisfied with the outcome of the ATO review, they can then lodge a dispute with the IGTO for an independent investigation, either online or via post or phone.

Source: www.igt.gov.au/how-to-tell-people-they-owe-the-government-money/
www.ato.gov.au/media-centre/ato-welcomes-report-how-to-tell-people-they-owe-the-government-money

Serious Financial Crime Taskforce targets false invoicing

The ATO-led Serious Financial Crime Taskforce (SFCT) is warning businesses against using illegal financial arrangements such as false invoicing to avoid tax obligations and/or inflate their deductions. The SFCT is a multi-agency taskforce which combats financial crimes like tax evasion and fraud. It was established in 2015 as a collaborative effort among various law enforcement and regulatory agencies, including the Australian Federal Police, Australian Criminal Intelligence Commission and Australian Securities and Investments Commission (ASIC), among others.

The taskforce aims to address the most complex and detrimental forms of financial crimes, such as fraud, tax evasion, and money laundering by employing a unified approach that combines expertise, intelligence-sharing, and advanced technological methods. Since its inception, the SFCT has made substantial progress in reducing the impact of serious financial crime in Australia, as evidenced by successful audits, investigations and prosecutions that have led to significant convictions and the recovery of large sums of money.

Currently, the SFCT is turning its focus on some businesses using false invoicing arrangements where no goods or services are provided. Most commonly, these arrangements have the following features:

- an entity (usually a promoter of the scheme) issues invoices to a legitimate business, but no goods or services are provided;
- the business pays the invoices by cheque or direct transfer, and the promoter returns most of the amount paid to the owners of the business as cash;
- the promoter keeps a small amount as a commission;
- the business then illegally claims deductions and GST input tax credits from the false invoice; and
- the owners of the business use the cash they have received for private purposes or to pay cash wages to workers, and amounts are not properly reported in their tax returns.

The ATO and Australian Federal Police have already executed search warrants at seven residential and business properties in various Sydney suburbs in relation to an investigation into a Sydney-based cheque-cashing entity suspected of false invoicing. The suspected criminal operation is believed to have laundered money for about 1,200 businesses from a range of industries, and laundered more than $1 billion to facilitate tax fraud.

In further examples cited by the SFCT, it is made clear that businesses that use these types of arrangements are usually caught either by data-matching programs (such as those used by the ATO), which indicate anomalies in expenses compared to previous periods, or from tip-offs from the general public. Businesses that have been persuaded into these types of arrangements by promoters are encouraged to make a voluntary disclosure to the ATO, which may reduce the penalties involved.

Penalties resulting from investigations by the SFCT can be severe, reflecting the serious nature of the financial crimes being addressed. The consequences for individuals and entities found guilty of serious financial crimes can include criminal charges which may lead to convictions and prison sentences, financial penalties such as fines, confiscation of proceeds of crime which may involve assets, and recovery of unpaid taxes, including interest and penalties.

Businesses involved in promoting these schemes may be subject to promoter penalty laws, which are not only restricted to widely offered schemes and can apply in cases where there is only one client in the arrangement. Penalties under the promoter penalty laws range from voluntary self-correction to the imposition of civil penalties of up to 5,000 penalty units for an individual (currently equating to $1,565,000) or 25,000 penalty units for a body corporate (currently equating to $7,825,000). It is important to note that specific penalties imposed will depend on the details of each case and the discretion of the courts.

Source: www.ato.gov.au/media-centre/suspected-criminal-operation-accused-of-laundering-one-billion-dollars www.ato.gov.au/about-ato/tax-avoidance/the-fight-against-tax-crime/our-focus/serious-financial-crime-taskforce/taskforce-action-on-false-invoicing-arrangements

ATO's use of small business benchmarks

Recently, the ATO updated its small business benchmarks to encompass the 2021–2022 income year. While the ATO promotes these benchmarks as an aid for small businesses to enable them to compare expenses and turnover with other similar small businesses in the same industry, it is important to note that these benchmarks are also used by the ATO to identify businesses that may be avoiding their tax obligations.

According to the ATO, it uses small business benchmarks along with other risk indicators to select businesses for further compliance activities. The first step consists of comparing information reported in business tax returns lodged with the key performance benchmarks for the industry. The industry that a business is considered within depends on the industry codes selected, as well as the description of the main business activity on the tax return and the business trading name.

The benchmarks themselves are divided into nine broad business categories: accommodation and food; building and construction trade services; education, training, recreation and support services; health care and personal services; manufacturing; professional, scientific and technical services; retail trade; transport, postal and warehousing; and other services. These categories split into additional subcategories; for example, bakeries, chicken shops, coffee shops, kebab shops and pubs all have their own separate subcategory under accommodation and food.

There are five tax return benchmark ratios calculated by the ATO, each expressed as a percentage of turnover (excluding GST). These consist of total expense/turnover, cost of sales/turnover, labour/turnover, rent expenses/turnover, and motor vehicle expenses/turnover. To calculate the turnover, the ATO generally uses the amount reported at the "Other sales of goods and services" label on the tax return or, if that figure is not present, the figure from the "total business income" label.

Small businesses can use the Business Performance Check tool on the ATO app to work out their own personal ratios and then compare them to the benchmarks, or manually calculate the various ratios and compare to the benchmarks. For businesses with ratios inside the benchmark ranges for their industry, the ATO notes that nothing else needs to be done. However, businesses with ratios outside of benchmarks are encouraged to look to see if there are any factors that can be improved.

Generally, businesses reporting ratios above the benchmarks indicate that expenses are high relative to sales, which may point to a variety of factors ranging from benign (eg higher wastage, lower volume of sales, or lower mark-up) to concerning (eg sales not recorded properly, failure of internal cash controls, etc). Businesses reporting ratios below the benchmarks commonly have fewer issues of concern as they have lower expenses relative to sales, which may indicate some expenses not being recorded, having a higher mark-up or just being more efficient.

Not all benchmark ratios will apply to every business. It is up to the individuals in control to work out which benchmarks are applicable and check that the business is within the appropriate range, as well as investigate instances where it is not. The ATO reminds small businesses that benchmarks are never used in isolation in instances where further action of investigations are initiated; instead, a wide range of other supporting factors are also considered.

Source: www.ato.gov.au/businesses-and-organisations/small-business-newsroom/use-our-small-business-benchmarks-to-improve-your-business
www.ato.gov.au/businesses-and-organisations/income-deductions-and-concessions/small-business-benchmarks

FBT: alternatives to employee declarations

From 1 April 2024, employers will have the option to rely on existing or other alternative records (besides prescriptive declaration formats) for certain classes of fringe benefits. Using these options will not change or reduce the information employers need to hold to support their FBT return, and only alters the prescriptive format for obtaining that information. In situations where the ATO is not "reasonably" satisfied that adequate alternative records are available, employers are expected to continue using existing approved forms.

Employers that provide certain fringe benefits to their employees can now use appropriate alternative statutory evidentiary documents to satisfy FBT requirements from the FBT year ending 31 March 2025. This has come about with the registration of ATO legislative instruments that specify acceptable record-keeping obligations for certain FBT benefits. These instruments, along with complementary legislation passed in 2023, seek to reduce FBT compliance costs for employers.

Under the FBT law, employees are required to provide information to employers about fringe benefits received, and employers are required to prepare declarations in an approved form. As a part of record-keeping obligations, information and declarations are required to be kept for five years and the ATO may request these records for compliance purposes at any time.

On the ATO website, there are some 20 different approved employee declarations for various fringe benefits including expense payment fringe benefits, LAFHA, property fringe benefits, residual benefits, loan benefits, car and fuel, holiday transport, temporary accommodation, and relocation. In addition to approved employee declarations, there are also two employer declarations and a travel diary requirement currently used as statutory evidentiary documents for FBT purposes.

The requirement for certain records to be in ATO approved form to comply with FBT record-keeping obligations means that some employers and employers may have needed to create additional records despite the required information already being captured through other processes such as corporate record-keeping. From 1 April 2024, employers will have the option to rely on existing or other alternative records, as determined by the ATO by way of legislative instrument, for some types of fringe benefits. However, these instruments do not generally change or reduce the information employers need to hold or support their FBT return; they only alter the prescriptive formats and processes for obtaining and holding that information.

While the option to use alternative records will generally reduce the FBT record-keeping burden for employers, the ATO will not necessarily specify alternative record-keeping options for all available fringe benefits or situations. Where records are extensively defined within legislation, such as log-books or odometer records, employers will generally need to continue to meet their record obligations under those current arrangements.

Legislative instruments on acceptable alternatives to statutory evidentiary documents that have been registered relate to the following FBT benefits:

- living-away-from-home allowance (LAFHA) – maintaining an Australian home;
- temporary accommodation relating to relocation;
- fly-in, fly-out and drive-in, drive-out employees;
- private use of vehicles other than cars;
- car travel to certain work-related activities;
- car travel to employment interview or selection test;
- travel diaries;
- relocation transport;
- overseas employment holiday transport; and
- otherwise deductible benefits.

The legislative instruments apply from 1 April 2024 (ie they apply for the FBT year ending 31 March 2025). They outline the specific information required for an alternative record to be acceptable in each FBT category.

For instance, the record will need to be in English and will need to contain names of employees/associates, make and model of car, address of departure/arrival location, dates of travel and number of whole kilometres travelled, to name a few examples. Each legislative instrument outlines the years of tax, the classes of persons and the classes of statutory evidentiary documents or records an employer may use to satisfy their alternative record-keeping obligations.

In circumstances where the ATO is not “reasonably” satisfied that adequate alternative records are available for certain fringe benefits, employers will be expected to continue using existing approved forms to ensure that statutory evidentiary documents that meet record-keeping obligations are retained.

Source: www.ato.gov.au/businesses-and-organisations/hiring-and-paying-your-workers/fringe-benefits-tax/fbt-registration-lodgment-payment-and-reporting/record-keeping-for-fbt/fringe-benefits-tax-alternative-record-keeping

More information: super on paid parental leave

In a bid to improve retirement outcomes for Australian women, the government has recently announced that from 1 July 2025 it will commence paying super on government paid parental leave (PPL), along with making other changes to expand the PPL scheme. This follows appeals from unions and women's rights groups, and a growing body of research which highlights a significant disparity in retirement savings between genders. Data indicates that women, on average, retire with 25% less in their superannuation accounts compared to men, a gap attributed to periods spent out of the workforce for child-rearing.

"[Paying super on government parental leave] helps normalise taking time off work for caring responsibilities and reinforces Paid Parental Leave is not a welfare payment – it is a workplace entitlement just like annual and sick leave", Minister for Social Services Amanda Rishworth has said.

According to the government, this reform, along with the proposed expansion to the PPL scheme, is key to women's economic security and is beneficial for the broader economy. Currently, subject to meeting eligibility conditions, a family can receive up to 20 weeks (or 100 payable days) of government PPL at the rate of $176.55 per day before tax, or $882.75 per five-day week (at the national minimum wage for children born or adopted from 1 July 2023). Two weeks out of the 20 available weeks is reserved for each parent.

Current eligibility conditions for the government PPL payment include:

- caring for a child who was born or adopted from 1 July 2023;
- meeting the income test – individual adjusted taxable income must be $168,865 or less in the 2023–2023 financial year. If the individual income test cannot be met, the family income test can be used. Under the family income test, an individual can qualify for government PPL if their combined adjusted taxable income, along with that of their partner, is $350,000 or less;
- not working on parental leave pay days, except for allowable reasons;
- meeting the work test – the individuals must have worked both:
  - for 10 of the 13 months before the birth or adoption of the child; and
  - for a minimum of 330 hours (around one day per week) in that 10-month period;
- meeting the residency rules – the individual must be living in Australia and have either Australian citizenship, a permanent visa, a special category visa or a certain temporary visa. Newly arrived residents may have to wait two years before getting government PPL; and
- registering or applying to register the child's birth with the state or territory birth registry if the child is a newborn.

With the passing of recent legislation, the PPL scheme will be expanded from 1 July 2024. From that date, individuals and families will have access to an extra two weeks of leave, giving 22 weeks in total, which will increase to 24 weeks from 1 July 2025 and to 26 weeks from 1 July 2026. This means a total of six additional weeks of PPL for new parents, and by 2026, a total of four weeks will be reserved for each parent on a "use it or lose it" basis, which will help encourage greater sharing of the care responsibilities.

The number of PPL days that a family can take together at the same time will also be increased from the current two weeks to four weeks from 1 July 2025, which will increase flexibility for families and support parents to take time off work together. The government hopes that these changes – along with reforms to child care and parenting payments – will mean a more dignified and secure retirement for more Australian women.

Source: https://ministers.dss.gov.au/media-releases/14036
www.servicesaustralia.gov.au/parental-leave-pay

Changes proposed for annual super performance test

The annual super performance test was introduced in 2021, by the previous Coalition government, as a way to hold registrable superannuation entity (RSE) licensees to account for any super fund underperformance through enforcing greater transparency. The annual test, conducted by the Australian Prudential Regulation Authority (APRA), also allowed members of funds and products to move to better-performing funds and improve their retirement outcomes.

Essentially, APRA assesses the performance of super investment options every year against tailored benchmarks. This has applied to MySuper products since 2021 and was recently extended to trustee directed products (a subset of the choice sector) in 2023. According to estimates, the annual test covered 80 MySuper products, which accounted for 14 million member accounts containing $900 billion in assets, and around 805 trustee directed products consisting of a further four million member accounts and $360 billion in assets.

Products that fail the test are subject to clear legislated consequences. Where the test is failed for one year, the trustees must write to affected members notifying them that the product they have invested in has failed the test. Where a product fails the test two years in a row, it is closed to new members until it passes a future test. In addition, funds that fail the test will often be subjected to heightened supervision from APRA to ensure that trustees are delivering better outcomes for their members.

However, the current government initiated a review of these performance tests after receiving feedback from the industry that the tests may have unintended consequences, including focusing on investment implementation over other measures of performance, encouraging short-term decision making, incentivising super funds to "hug" benchmarks, reducing investment flexibility, and reducing choice, diversification and active management.

Moving to mitigate this, the government has released a consultation paper which considers improvements to the performance test to improve its sophistication while still ensuring the test holds trustees to account for delivering the best outcomes. The consultation, which closed in mid-April, sought views on the preferred design and approaches, with four options on the table.

Option 1 is keeping the status quo, which involves keeping the current product performance and benchmark measurements. Option 2, using an alternative single metric, is divided into the following subcategories:

- Sharpe ratio, which assesses how effectively the trustee delivers risk-adjusted investment returns above that of the risk-free rate;
- peer comparison of risk-adjusted returns, which assesses whether a product is providing competitive risk-adjusted returns compared to peers (ie product cohort such as MySuper);
- risk-adjusted returns relative to the simple reference portfolio frontier, which assesses whether a product provides superior investment returns relative to a simple benchmark portfolio that bears a similar level of risk.

Option 3 is the use of multi-metric frameworks which allow assessment of the performance of a product against multiple metrics (similar to the APRA heatmaps) to provide a comprehensive performance assessment. Another alternative is the use of targeted three-metric which assesses the performance of a product against a smaller set of metrics to provide a more comprehensive assessment relative to the current test, but similar than the Heatmap option.

Finally, Option 4 provides the opportunity for stakeholders to put forward an alternative framework not canvassed in the first three options that would satisfy the key principles of improving member outcomes, being effective and efficient, being widely applicable and transparent, and enduring. While the government has not committed explicitly to making the changes recommended by stakeholders, interested parties are encouraged to provide input to guide any potential future changes.

Source: https://treasury.gov.au/consultation/c2024-471223
www.apra.gov.au/annual-superannuation-performance-test