**client alert** | explanatory memorandum

December 2022/January 2023

**CURRENCY:**

This issue of **Client Alert** takes into account developments up to and including 25 November 2022.

## Looming changes for the "buy now, pay later" market

In a bid to protect consumers, the Federal Government has released a consultation paper seeking views on options to regulate the "buy now, pay later" (BNPL) market. Currently the BNPL space is unregulated in Australia and thus not subject to responsible lending standards, despite involving financial products that offer credit. Consumer advocates argue that this regulatory gap has the potential to create harm.

The consultation paper outlines three options, of ascending interventionary levels, for the regulation of the BNPL market, ranging from bespoke affordability assessments to treating BNPL like other credit services.

It has been estimated by the Reserve Bank of Australia that approximately seven million active BNPL accounts made a total of $16 billion in transactions in the 20212022 financial year. This accounts for around a 37% increase on the previous year. Low value BNPL products that typically provide a spending limit of $2,000 are the most popular in Australia, although spending limits of up to $30,000 are available from some providers for large ticket items such as home upgrades.

Currently, the BNPL space is unregulated in Australia because it falls under the exemptions available to certain types of credit under the *National Consumer Credit Protection Act 2009* (the Credit Act). Due to this exemption, BNPL products are not subject to responsible lending standards or other requirements of the Credit Act. In addition, providers do not need to hold an Australian credit licence (ACL). Perhaps due to this lack of regulation, there has been an exponential growth in the BNPL market in Australia and many other similar unregulated markets. Consumer advocates argue that this regulatory gap has the potential to create harm in the absence of key consumer protections.

Assistant Treasurer and Minister for Financial Services Stephen Jones has said that, at a minimum, the government is looking at "… putting in place some sort of credit checks to ensure that the product is affordable and suitable for the people … We don't want to see people who are in the same situation they were in the bad old days of the credit card … where they might have had five, six, seven or eight credit cards. No one company knew that the other one had one and this person was just simply unable to pay off their debts ... And that's what we want to address."

Some of the issues raised by various stakeholders on BNPL schemes include:

- unaffordable/inappropriate lending practices contributing to financial stress/hardship;
- poor complaints-handling processes and lack of hardship assistance;
- excessive/disproportionate consumer fees and charges (eg large default fees relative to size of debt);
- non-participation in Australia's credit reporting framework, meaning information is not available for use in credit checks by other lenders;
- poor product disclosure practices, meaning consumers cannot make informed choices;
- unsolicited selling targeting consumers and encouraging the use of BNPL for essentials such as groceries and utilities;
- uncomplicated sign-up to BNPL products, which increases the chances of other consumer harms such as scamming, overselling and financial abuse; and
- inadequate reverse-charging provisions when goods purchased on BNPL are returned.

To resolve some of these issues, the consultation paper proposes three broad options of varying levels of regulatory intervention. Option 1 would impose a bespoke affordability assessment for BNPL providers under the Credit Act and address any other regulatory gaps in a strengthened industry code to make it fit-for-purpose. Option 2 would require BNPL providers to obtain and maintain an ACL, and in addition, would introduce modified responsible lending obligations under the Credit Act to determine unsuitability combined

with a strengthened industry code. Option 3 would impose the strictest regulation, with BNPL providers needing to obtain and maintain an ACL. The existing responsible lending obligations in the Credit Act would also be applied to all BNPL credit, including requirements around reasonable inquiries into a consumer's financial situation and taking reasonable steps to verify this information.

Submissions on the options paper are open until 23 December 2022.

*Source: https://treasury.gov.au/consultation/c2022-338372*
*https://ministers.treasury.gov.au/ministers/stephen-jones-2022/media-releases/buy-now-pay-later-consultations-open*

## NSW first home buyers: choice of tax

In a bid to encourage home ownership in NSW, the state government has introduced the First Home Buyer Choice scheme, which allows eligible first home buyers a choice between paying an annual property tax or the traditional stamp duty. Eligible first home buyers of residential properties valued at up to $1.5 million or vacant land of up to $800,000 will be able to access the scheme, provided other conditions are met.

The associated Bill has been passed by NSW Parliament, and eligible first home buyers can access the scheme from 12 November 2022. These buyers are required to pay stamp duty on purchases made until 15 January 2023, but will be able to apply for a refund of their stamp duty if they choose to opt into the annual fee. From 16 January 2023, purchasers can opt in to the annual fee directly.

As its name suggests, the First Home Buyer Choice scheme is only available to individual first home buyers over 18 years of age who have not previously owned residential land in Australia. For individuals with a spouse, it is also a requirement that the spouse has not at any time owned residential land in Australia either solely or with another person.

Eligible first home buyers of residential properties of up to $1.5 million or vacant land of up to $800,000 will be able to choose between smaller annual property payments or the traditional stamp duty. Occupation of the property must occur within 12 months of the first home buyer taking possession and must continue for at least six months.

For vacant land purchases, the occupation requirement does not apply if the Chief Commissioner of State Revenue is satisfied that the land is intended to be used as the site of a home and the home will be occupied by a first home buyer as their principal place of residence. The legislation does not specifically detail what documents are required, but presumably entering a contract to build a residence on the vacant land within a reasonable time should suffice.

The Chief Commissioner also has the discretion to vary or waive the occupancy requirements where there are extenuating circumstances.

If the option to pay the annual property tax is elected by the eligible individual, the rate of tax will differ depending on whether the property is owner-occupied or used as an investment after the initial six months occupation requirement. For owner-occupiers, the property tax rates per annum will be $400 plus 0.3% of the home's land value (as determined by the Valuer General).

In cases where the property is rented out, the property tax rates per annum will be $1,500 plus 1.1% of land value. While the NSW government has committed to not increasing these rates for the first two financial years of operation, from the 2024–2025 financial year property tax rates will be indexed each year, capped at a 4% maximum.

It should be noted that the legislation excludes certain transfers from being "eligible transfers" and thus they are excluded from the scheme. These include business premises, a business, land use for primary production (ie farmland), and holiday homes.

In addition, a point of difference between this legislation and the original stamp duty reform consultation announced earlier in 2022 is that the property tax will now only be payable by first home buyers and will not apply to subsequent purchasers of that property. Initially, the choice to opt in to the annual property tax system would carry on to subsequent purchasers.

The First Home Buyers choice will apply on eligible purchases that settle on or after 16 January 2023. Eligible first home buyers who purchase a property between 11 November 2022 (when the Bill received Assent) and 15 January 2023 will still need to pay stamp duty to complete their purchase. However, from 16 January 2023 they will be able to apply to opt-in to property tax and receive a refund for any stamp duty paid.

A First Home Buyer Choice calculator is available on the Service NSW website at www.service.nsw.gov.au/transaction/calculate-your-property-tax.

*Source: www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=4018*
*www.nsw.gov.au/media-releases/historic-first-home-buyer-law-passes-parliament*

## Proposed new method for calculating work from home expenses

Taxpayers could soon be dealing with more paperwork at tax time, or facing the prospect of a lower deduction for work from home (WFH) expenses. The ATO has recently proposed a new revised fixed rate method of calculating WFHexpenses for the purposes of claiming a tax deduction from 1 July 2022. The proposed new rate of 67c per hour would replace the previous shortcut method of 80c per hour (which many taxpayers have been using during the COVID-19 pandemic) as well as the previous fixed rate method. It's important to note that this proposal is still in the draft stage, and open to submissions from interested parties.

Prior to 1 July 2022, people working from home were able to use one of three methods for calculating a deduction for expenses incurred as a result of working from home:

- the actual costs method, which involved calculating the actual expenses incurred as a result of working from home;
- the fixed rate method, which allowed 52c per hour for each hour a taxpayer worked from their home office, to cover their electricity and gas expenses, home office cleaning expenses, and the decline in value of furniture and furnishings. In addition, a separate deduction for the taxpayer's work-related internet expenses, mobile and home telephone expenses, stationery and computer consumables and the decline in value of a computer/laptop could be claimed; and
- the shortcut method, which was introduced during the COVID-19 pandemic to make it easier for the large proportion of employees suddenly finding themselves undertaking WFH. This method allowed taxpayers to claim 80c per hour for each hour that they worked from home and covered all expenses such as phone, internet, decline in value of equipment and furniture, electricity, gas, lighting, and so on.

From 1 July 2022, taxpayers can no longer use the shortcut method of 80c per hour, and the ATO has now revised the fixed rate method. According to the ATO, the revised fixed rate method apportions additional running expenses "on a fair and reasonable basis by using a fixed rate of 67c per hour". Not only is this rate lower than the 80c per hour used by the shortcut method, but it is also proposed to include energy expenses (electricity and gas), internet, mobile, telephone, stationery, and computer consumables, some of which could have been claimed as a separate deduction under the previous fixed rate method.

The work-related decline in value of any depreciating assets could continue to be claimed as a separate deduction under the proposed fixed rate method, as could other running expenses not specifically outlined. Therefore to calculate the total deduction under this new revised fixed rate method, taxpayers will need to calculate the number of hours worked from home during the income year, and multiply that by 67c per hour. To that figure, the decline in value of depreciating assets and other running expenses which are not included in the 67c base rate can be added, giving a final deduction amount.

Given the continual increase in energy bills and other inflationary pressures, this new proposed fixed rate method is likely to yield consistently lower deductions than if the actual cost method was used. Coupled with the abolition of the shortcut method, this means that taxpayers will either have to accept a lower WFH deduction in the coming years or deal with increased paperwork to be able to claim WFH deductions under the actual costs method.

### Considering the proposal

Draft Practical Compliance Guideline PCG 2022/D4 *Claiming a deduction for additional running expenses incurred while working from home – ATO compliance approach* was released on 2 November 2022. Practical compliance guidelines do have value and a clear place within the ATO's broader tax compliance framework, particularly in the more factually "grey" areas like transfer pricing, where the precise application of the law can be ambiguous.

However, there are concerns that Draft PCG 2022/D4 may miss the mark in its attempt to simplify matters and provide certainty at the small end of town. Given that the Commissioner of Taxation can only administer – not make – the law, and practical compliance guidelines are just a tool in the ATO's compliance armoury, the best apparent solution is to simplify personal work-related deductions in our tax legislation.

***The proposed method doesn't simplify things much***

To rely on Draft PCG 2022/D4, taxpayers must keep records showing the total number of hours they worked from home during the income year (estimates will not be accepted – only a total record of hours) and one document (eg an invoice) for each additional running expense incurred during the year.

If they also claim a deduction for the decline in value of depreciating assets, they must keep documents that meet the requirements of Div 900 of the *Income Tax Assessment Act* 1997 (employees) or s 262A of the *Income Tax Assessment Act* 1936 (those carrying on a business), and records that demonstrate their income-producing use of these depreciating assets.

While this is somewhat less than what would be required if they were to claim their actual additional expenses, the main thing the Draft PCG seems to simplify is what proportion of these costs may be claimed – which is contentious to some to argue it is too low.

***The proposed method provides limited protection***

The simplified method does not exist in the tax laws. As with all practical compliance guidelines, the ATO is really just promising to not look into these matters in certain circumstances, but is not barred from doing so if an investigation is separately commenced.

If this occurs and the Commissioner and taxpayer disagree about the deductions that many be claimed, the simplified method cannot be relied upon by the taxpayer and they will only be permitted to claim deductions in strict compliance with the law. Relevantly, Draft PCG 2022/D4 provides (emphasis added):

> *Irrespective of paragraph 5 of this Guideline,* ***if you lodge an objection in relation to your working from home expenses for whatever reason, you cannot rely on this Guideline using the revised fixed-rate method*** *to determine whether you are entitled to a deduction for your expenses. Only the actual expenses you incurred as a result of working from home and for which you have adequate records will be allowed as a deduction.*
>
> ***This is the same way objections regarding working from home expenses calculated using the shortcut method and the fixed-rate method are, and have been, dealt with by the Commissioner****.*

This is legally correct, but by publishing these practical compliance guidelines and pushing them out to taxpayers, it is arguable that the ATO is effectively seeking to have its cake and eat it too. It gains a flexible policy tool to shepherd taxpayers toward particular modes of compliance, but when push comes to shove, the ATO can disclaim any reliance upon it.

The language used in Draft PCG 2022/D4 is therefore concerning and arguably undermines the reliability of practical compliance guidelines as a tool to provide taxpayers with certainty and comfort that their tax affairs are in order and free from scrutiny.

***Are taxpayers being set up to fail?***

ATO web guidance in most instances conveys to taxpayers that the simplified method may be relied upon absolutely, with no suggestion that taxpayers may be required to adopt a completely different method if the ATO reviews their affairs. And how many ordinary taxpayers do you think will read Draft PCG 2022/D4 (or the final version), or have ever heard of a practical compliance guideline?

This speaks to a lack of clarity in the reliability of this simplified deduction method and the use of practical compliance guidelines.

Taxpayers and advisors should be wary of overreliance on the relief promised in Draft PCG 2022/D4. Comments on the draft are due by 30 November 2022 and it will be interesting to see what, if any, changes there are in the final version.

*Source: www.ato.gov.au/law/view/view.htm?docid=%22DPC%2FPCG2022D4%2FNAT%2FATO%2F00001%22*

## ABN registration: draft legislation to enforce lodgement and notification compliance

Treasury has released draft legislation which proposes two new grounds under which the Registrar of the Australian Business Register may cancel an Australian Business Number (ABN), as well as containing corresponding provisions for the reinstatement of ABNs cancelled under these new grounds.

The government had earlier announced its intention to "strengthen" the ABN system by imposing new compliance obligations for ABN holders to retain their ABN. Currently, ABN holders are able to retain their ABN regardless of whether they are meeting their income tax return lodgment obligations or the obligation to update their ABN details.

As announced in the 2019–2020 Federal Budget, ABN holders with an income tax return obligation will be required to lodge their income tax return and confirm the accuracy of their details on the Australian Business Register annually. This measure stems from the 2018–2019 Budget measure *Black Economy Taskforce: consultation on new regulatory framework for ABNs*. The start date of the measure was deferred in the March 2022 Federal Budget.

It is worth noting that there are over nine million active ABN holders.

### Cancellation for outstanding income tax lodgement obligations

If enacted, the amendments will provide that the Registrar of the Australian Business Register may cancel a person's ABN if satisfied that they are required to lodge an income tax return in relation to an income year and the person has not lodged income tax returns in relation to two or more income years where the period specified by the ATO for lodgement has ended.

The income years in which a person fails to lodge their returns do not need to be consecutive years.

This ground for cancellation applies in relation to a failure to lodge tax returns beginning with income years commencing on 1 July 2022. Therefore, the earliest the Registrar may cancel an ABN under this ground is in the second half of 2024, following a person's failure to lodge an income tax return for the income years beginning on 1 July 2022 and 1 July 2023.

If the Registrar cancels a person's ABN because of a failure to lodge income tax returns, the Registrar must reinstate the ABN where the Registrar is satisfied that the person has lodged, or has made arrangements with the ATO to lodge, the relevant income tax returns. Where an ABN is reinstated in this way, the reinstatement has effect on and from the day on which the Registrar cancelled the ABN.

However, the draft legislation does specifically block attempts to side-step its intention. The Registrar must not register a person where the person has had a previous ABN cancelled due to failure to lodge income tax returns, but the person has not lodged those returns and has not made arrangements to lodge them. This will prevent a person from simply reapplying and being reregistered.

### Cancellation due to failure to confirm accuracy

The amendments will also provide that the Registrar may cancel a person's ABN if satisfied that the person has not notified the Registrar about still requiring the ABN and the currency of information given to the Registrar. The Registrar's power to cancel an ABN in this way applies where the ABN holder has not provided a notification within the previous 12 months.

This ground for cancellation applies in relation to an ABN holder's failure to confirm their details and their continued requirement for an ABN. It can be exercised after 1 July 2024. In effect, this requires an ABN holder to notify the Registrar at least once in the period between the commencement of these provisions and 1 July 2024, and at least once in each subsequent 12-month period.

The Registrar must reinstate the ABN if the person notifies the Registrar with the requisite details, and the reinstatement will take effect on and from the day on which the ABN was cancelled (ie retrospectively).

### Proposed dates of effect and submissions

Cancelling a person's ABN due to their failure to lodge two or more income tax returns applies from income years commencing on or after 1 July 2022.

The Registrar may cancel a person's ABN from 1 July 2024 following the person's failure to confirm their details and their need for an ABN within a 12-month period.

Submissions on the draft legislation are due by 29 November 2022.

*Source: https://treasury.gov.au/consultation/c2022-332618*
*www.abr.gov.au/who-we-are/our-work/abr-integrity*

## A little planning can help avoid an FBT hangover this festive season

Yes, it's that time of year again! As the so-called "silly season" gets underway, and with many employers reverting to pre-pandemic norms around meal entertainment, it is the perfect time to consider what benefits

your business is going to provide to staff and how, with a little planning, employers might be able to avoid an FBT hangover.

During this time of the year, in addition to the typical end-of-year party, we generally see a marked increase in expenditure across meal and recreational entertainment, as well as gifts. This may include:

- Friday night drinks;
- team lunches and dinners;
- client lunches and dinners;
- attendance at cultural and sporting events (eg horse racing or tennis); and
- Christmas and other end-of-year gifts (eg vouchers/bottles of wine).

## FBT implications: meal entertainment

Under the *Fringe Benefits Tax Assessment Act 1986* (the FBT Act), employers must choose how they calculate their FBT meal entertainment liability. Most use either the "50/50" method or the "actual" method, rather than the "12-week" method.

For completeness, it's important to note that neither of the following should usually be considered meal entertainment, irrespective of the method of calculation used:

- "sustenance"; and
- meals while travelling.

### *Using the "50/50" method*

Rather than apportioning meal entertainment expenditure based on the proportion received by employees (and their associates) and non-employees (who aren't associates of employees) and by reference to where food and drink is actually consumed under the actual method, many employers choose to use the simpler "50/50" method. Under this method, irrespective of where the meal entertainment occurs or who attends, 50% of the total expenditure is subject to FBT and 50% is deductible for income tax purposes. However, the following traps must be considered:

- the "property exemption" available under the actual method won't apply – this means even if the function is held on the employer's premises, the food and drink provided to employees is not automatically exempt from FBT;
- the minor benefits exemption cannot apply; and
- the general taxi travel exemption (for travel to or from the employer's premises) also cannot apply.

### *Using the "actual" method*

Under the "actual" method, only the entertainment provided to employees and their associates is subject to FBT. In addition, where food and drink are consumed by employees on the employer's premises, there will be no FBT due to the property exemption -– this takes care of Friday night drinks in the office! But usually, the greatest reduction in FBT when using the actual method will come from the "minor benefits" exemption (note that the minor benefits exemption is not as broad for taxpayers who provide tax-exempt body entertainment).

Outside of a handful of exceptions, where a benefit with a notional taxable value of less than $300 (including GST) is provided to an employee or an associate, the minor benefits exemption will generally apply to exempt the benefit from FBT. This being said, it's important to be cognisant of the following:

- *the frequency and regularity of the minor benefit* – the more frequently and regularly a particular benefit is provided, the less likely the benefit will qualify as an exempt benefit;
- *the total of the notional taxable values of the minor benefit and other identical or similar benefits* – the greater the total value of minor benefits, the less likely it is that any minor benefit will qualify as an exempt benefit;
- *the likely total of the notional taxable values of other "associated benefits", ie those provided in connection with the minor benefit* – for example, where a meal, which is a minor benefit, is provided in connection with a night's accommodation and taxi travel, which themselves may or may not be a minor benefit, the total of their taxable values must be considered. The greater the total value of other associated benefits, in this case being the accommodation and the taxi travel, the less likely it is that the minor benefit will qualify as an exempt benefit;

- *the practical difficulty in determining what would be the notional taxable value of the minor benefit and any associated benefits* – this would include consideration of the difficulty in keeping the necessary records in relation to the benefits; and
- *the circumstances in which the minor benefit and any associated benefits were provided* – this would include consideration as to whether the benefit was provided as a result of an unexpected event, and whether or not it could be seen as principally being in the nature of remuneration.

Usually, employers would save a considerable amount of FBT using the "actual" method (including removing the end-of-year party!); however, they usually don't have the time to determine who received the benefit in order to apply the exemption.

### FBT implications: recreational entertainment

A common trap is where an employer has an employee who is considered a "frequent entertainer" for meal entertainment purposes and then is automatically considered a frequent entertainer for recreational entertainment, such that the minor benefits exemption is not applied.

As is the case when comparing an end-of-year staff party to regular meal entertainment during the year, attendance at a football match is different from lunch with a client. Accordingly, we recommend reassessing which employees should be eligible for the minor benefits exemption with respect to recreational entertainment.

Also, in valuing the recreational entertainment, particularly where you have a corporate box or a marquee, it may be appropriate to value the benefit using the capacity of the facility, as opposed to the final attendees. This could result in significant FBT savings.

### Giving of gifts

Gifts provided to employees, or their associates, will typically constitute a property fringe benefit and therefore be subject to FBT unless the minor benefits exemption applies. Gifts, and indeed all benefits associated with the end-of-year function, should be considered separately to the party itself in light of the minor benefits exemption. For example, the cost of gifts such as vouchers, bottles of wine or hampers given at the function should be looked at separately to determine if the minor benefits exemption applies to these benefits.

Gifts provided to clients are outside of the FBT rules, but may be deductible if they are being made for the purposes of producing future assessable income.

## FBT car parking benefits: new draft ruling

Businesses that provide FBT car parking benefits should be aware that the ATO has recently released an updated consolidated draft taxation ruling (Taxation Ruling 2021/2DC1) which incorporates proposed changes to FBT car parking benefits to address the Full Federal Court's decision in *Commissioner of Taxation v Virgin Australia Regional Airlines Pty Ltd* [2021] FCAFC 209 (*Virgin*) concerning the "primary place of employment". In general, the consolidated draft ruling now considers the primary place of employment to be a broad test that is not limited to the place at which duties are performed.

The ATO has updated a previously issued draft ruling which consolidates proposed changes to FBT car parking benefits as well as addressing the Full Federal Court's decision in *Virgin* concerning the "primary place of employment". When made final, this consolidated draft ruling will replace the previously withdrawn Taxation Ruling TR 96/26 (FBT: car parking benefits) as well as other previously issued drafts.

In *Virgin*, the Full Federal Court allowed the ATO's appeal and held that Virgin Airlines provided car parking benefits to its flight and cabin crew in various airports. The case centred around the concept of primary place of employment.

In the first instance, the Federal Court found that where employees operated on only one aircraft during a particular day, that aircraft was their primary place of employment. In addition, it held that where employees operated on more than one aircraft during a particular day, they had no primary place of employment for that day. The ATO disagreed and then appealed to the Full Federal Court.

The Full Court then noted that, under the enterprise agreements covering the flight and cabin crew, they were allocated a "home base" and that numerous rights and obligations were defined by reference to the home base, including rosters, rest periods between "tours of duty" or "trips", allowances and car parking entitlements. A "tour of duty" was the period commencing when an employee signed on at their home base and ending when they signed off at their home base.

Taking those matters into account, the Full Court concluded that, in relation to each relevant day, an employee's relevant home base airport was their "primary place of employment" and this was the case even on days when the employee did not attend the home base airport at all. As a result, it found that car parking benefits were provided because the employees' cars were parked at, or in the vicinity of, the primary place of employment.

The consolidated draft ruling now considers the primary place of employment to be a broad test that is not limited to the place at which duties are performed and includes other considerations such as the place which is primary to an employee's conditions of employment (rostering, allowances, car parking, etc) contained in their employment contract or industrial instrument.

Generally, where the conditions of employment indicate that a particular business premises are primary to the employee's employment, those premises satisfy the definition of primary place of employment on a particular day even if the employee performs duties principally at another place on that day.

In situations where an employee performs duties at more than one business premises on a particular day, the consolidated draft ruling notes that the primarily place of employment should be identified through a quantitative and qualitative analysis of the duties performed from, or at, the different business premises.

This new consolidated draft ruling also includes clarification on the meaning of "in the vicinity of" as well as what constitutes a commercial parking station for the purposes of FBT. It is currently open for comment and when made final will apply to parking benefits provided on or after 1 April 2022.

*Source: www.ato.gov.au/law/view/view.htm?docid=%22DTC%2FTR20212DC1%2FNAT%2FATO%2F00001%22*
*www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2021/2021fcafc0209*

## Tax implications of deferred rent for businesses

As inflationary pressures start to bite, many businesses may be seeking rental deferrals or variations from their landlords to help them through this tough period. However, businesses that are lucky enough to receive a waiver, deferral or variation of rent need to be aware that there may be income tax, GST and perhaps even CGT consequences depending on a number of factors. These include the period of occupancy, whether the rent has been paid and otherwise refunded, how the business accounts for GST, and whether consideration has been provided or a new agreement formed.

If you run a business from rented premises, there may be tax consequences when rent is either waived, deferred or varied under commercial terms due to various circumstances. The tax consequences differ depending on whether the waiver, release or variation is for a past or future occupancy as well as other factors.

In instances where your business owes rent for a past occupancy period which is later waived or released by the landlord, including under bankruptcy or insolvency law, if you have already claimed a deduction for the rent on the business tax return, you will still be entitled to that deduction. However, the unpaid amount will be considered to be a debt forgiveness. This means that the amount will not need to be included in the assessable income of the business but may be offset against amounts that could otherwise be claimed as deductions.

For businesses that have already paid rent for a past occupancy period and claimed a deduction, any amounts waived or refunded will need to be included as assessable income.

Where your landlord waives rent related to a future period of occupancy, the business will not be entitled to a deduction for the amount of rent that would have been paid. The only amount that can be claimed is the amount of rent that the business is required to pay. For example, if a landlord reduces the amount of rent payable from $500 per week to $25 per week, the business is only entitled to claim $25; if the rent payable is reduced to nil, the business is not entitled to a deduction.

For businesses that account for GST on an accruals basis, a waiver or variation of rent payable may lead to GST consequences. If the business has already claimed a GST credit for the rent which is waived or refunded, an increasing adjustment will need to be raised to pay back the credit that was claimed. This will need to be done in the Business Activity Statement (BAS) period in which the business becomes aware of the waiver or receives a refund.

Deferrals, however, generally do not need any GST adjustment. Businesses do need to be aware that if their landlord has changed the rental agreement, including timing or amount of scheduled payments, the GST credit that can be claimed will be based on the new agreement. In addition, if your business had claimed a

GST credit for a deferred amount which the landlord later writes off as a bad debt, an increasing adjustment may be required.

Businesses that account for GST on a cash basis need not worry about adjustments as they can only claim GST on the basis of actual rent paid as shown on a tax invoice (ie GST credits cannot be claimed for deferred rent until the rent is actually paid).

Besides the income tax and GST consequences, rental concessions, whether it be a waiver or a deferral given by your landlord, may also have CGT consequences for your business. This may occur if, for example, your landlord has changed the rental agreement for payment or other consideration from the business or has created a new or additional agreement. Where that has not occurred (ie the landlord has given the rental concession on an existing lease without any consideration, payment or new agreement), there will be no CGT consequences.

## Future of superannuation

The Federal Government has showed its hand in terms of potential future changes to the Australian superannuation system. The Assistant Treasurer and Minister for Financial Services, Stephen Jones, recently outlined two main areas the government will be focusing on. This includes legislating an objective for super (ie for use in retirement), which will then enable conversations around the taxation of super – in particular tax concessions given to high-asset self managed superannuation funds (SMSFs). The second area the government will seek to tackle is performance tests, on which work has already commenced.

In a recent address, Assistant Treasurer and Minister for Financial Services Stephen Jones outlined the changes the government will be pursuing in terms of superannuation. From its beginnings in 1992, superannuation collectively has become a juggernaut and has grown to encompass over $3.3 trillion in assets held by an estimated 16 million Australians. That figure makes Australian superannuation the world's third largest pension pool.

As the world's economy is challenged by war, the effects of the ongoing pandemic, energy scarcity, and possible recession in dominant economies, it is perhaps no surprise that the government is looking to this large pool of money to work in both the national interest and the interests of superannuation members where possible.

To that end, one of the main changes the government will be focusing on in terms of superannuation is to legislate an objective for super. A Bill was previously introduced in 2016 that proposed to enshrine the primary objective of the super system in legislation, which is to provide income in retirement to substitute or supplement the age pension. It would have also required all new Bills relating to super to be accompanied by a statement of compatibility with the objective of the super system. This Bill subsequently lapsed ahead of the 2019 election and was never reintroduced.

Having a clear objective of super, Mr Jones notes, will break the vicious cycle of plans to raid super such as drawing on super to pay for housing, HECS or living expenses, which have all been proposed at various stages in the past few years. According to Mr Jones, once this objective is settled on, important conversations around the taxation of super can also be had.

The government estimates that there are 32 SMSFs with more than $100 million in assets, with the largest SMSF having over $400 million in assets. Industry estimates also indicate that the tax concessions on a single $10 million SMSF could support 3.1 full age pensions. It is with this background in mind that the government is looking to have a conversation around the concessional taxation of these high-asset SMSFs which have an obvious cost to the Budget.

"If the objective of super is to provide a tax-preferred means for estate planning, you could say it is doing its job … Those who support the status quo will need to demonstrate how concessional tax arrangements for high balance super funds meet the common objective. Those who argue for change will need to show how that approach meets the objective", Mr Jones said

The other change the government is looking to make in the super area will stem from the results of the review into the Your Future, Your Super (YFYS) laws. The YFYS measures were initiated to ostensibly remove "unintended consequences" and keep the focus on "high performance". A consultation paper has been released and the government has established a technical working group in addition to public submissions and stakeholder consultations.

It should be noted that, paradoxically, in order to conduct the review to keep the focus on high performance, the government paused the extension of the existing Australian Prudential Regulation Authority (APRA) performance test to Choice super products for 12 months. The performance test therefore currently only applies to MySuper products, which represent around $13.7 million accounts. Super members in other types of products will not have access to the same independent APRA performance analysis unless the consultation concludes thus.

According to Mr Jones, "[t]he performance tests, conducted by APRA, must and will continue. Trustees need to be held to account because it is about 'Your Future'. We also need to ensure members have meaningful information so that they can hold their funds to account and make informed decisions about their retirement." Hence, it appears that the performance tests will continue in one form or another into the future with perhaps different benchmarks.

*Source: https://ministers.treasury.gov.au/ministers/stephen-jones-2022/speeches/address-afr-wealth-and-super-summit-sydney*
*https://ministers.treasury.gov.au/ministers/stephen-jones-2022/speeches/address-australian-institute-superannuation-trustees*
*https://treasury.gov.au/consultation/c2022-313936*
*https://treasury.gov.au/consultation/c2022-333837*