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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.

The Reserve Bank of Australia estimates that approximately seven million active BNPL accounts made a total of $16 billion in transactions in the 2021–2022 financial year – 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*. This means BNPL products aren't subject to responsible lending standards or the other requirements of the Credit Act, and BNPL providers don't need to hold an Australian credit licence.

Consumer advocates argue that this regulatory gap has the potential to create harm – "instant" access to BNPL credit for all sorts of purchases might seem great at first, but the lack of requirements for providers to check your financial status and make sure you understand the terms and fees can make it easy for you to end up in unsustainable debt.

The consultation paper proposes three broad options for 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 hold a credit licence and comply with modified responsible lending obligations and a strengthened industry code. Option 3 would impose the strictest regulation, with BNPL providers needing to hold a credit licence and comply with all its regulations and the responsible lending obligations, including taking reasonable steps to check that their BNPL products are suitable for each person who accesses them.

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.

Eligible 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 haven't previously owned residential land in Australia. For individuals with a spouse, it's also a requirement that the spouse has not at any time owned residential land in Australia. Generally, occupation of the property must occur within 12 months of the first home buyer taking possession and must continue for at least six months.

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.

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.

TIP: A first home buyer choice calculator is available on the Service NSW website at www.service.nsw.gov.au/transaction/calculate-your-property-tax.

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 tax deduction for work from home (WFH) expenses. The ATO has recently proposed a new revised fixed rate method of calculating WFH expenses 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 people have been using during the COVID-19 pandemic) as well as the previous fixed rate method.

TIP: It's important to note that this proposal comes from the ATO (which does not itself create the tax law) and is still at the draft stage. The ATO is asking for submissions from interested parties.

Before 1 July 2022, people working from home could use one of three methods for calculating a tax deduction for the expenses incurred:

- 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 to cover their electricity and gas expenses, home office cleaning expenses, and the decline in value of furniture and furnishings, with a separate deduction claimable for work-related internet expenses, telephone expenses, stationery and computer consumables and the decline in value of a computer/laptop; and
- the shortcut method, which was introduced during the COVID-19 pandemic to make it easier for the large proportion of employees suddenly working from home. This method allowed claiming 80c per hour to cover *all* WFH expenses, with no separation of deductions.

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 seems to mean that taxpayers would 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.

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).

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 regularly update their ABN details.

It's worth noting that there are over nine million active ABN holders on the Australian Business Register.

Outstanding income tax returns

The proposed changes would allow the Registrar of the Australian Business Register to cancel a person's ABN if they haven't lodged their required income tax returns for two or more income years where the period for lodgement has ended. These wouldn't need to be consecutive income years.

This ground for cancellation would apply for failures to lodge tax returns beginning with income years commencing on 1 July 2022, so the earliest the Registrar could cancel an ABN would be in the second half of 2024, if the ABN-holder failed to lodge tax returns for the income years beginning on 1 July 2022 and 1 July 2023.

Failing to confirm accuracy

The proposed changes would also allow the Registrar to cancel an ABN if the holder hadn't given a notification within the past 12 months that they still require the ABN and that the information on the Register is current and correct.

This power would be available to the Registrar after 1 July 2024. In effect, this would require ABN holders to check their ABN details and notify the Registrar at least once in the period between the commencement of these provisions and 1 July 2024, and then at least once annually.

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

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in expenditure across meal and recreational entertainment, as well as gifts.

Meal entertainment

Employers must choose how they calculate their FBT meal entertainment liability. Most use either the "50/50" method or the "actual" method.

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.

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. 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.

Usually, employers would save a considerable amount of FBT using the "actual" method; however, they usually don't have the time to determine precisely who received the benefit in order to apply the exemption.

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 doesn't apply.

Accordingly, we recommend reassessing which employees should be eligible for the minor benefits exemption with respect to recreational entertainment.

Giving 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.

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 that incorporates proposed changes to FBT car parking benefits. Broadly, the ATO is saying that for FBT purposes from 1 April 2022, it will consider the "primary place of employment" as a broad test that isn't limited to the specific place at which an employee's duties are performed on any one day. Relevant considerations will include the employee's conditions of employment, such as rostering, allowances and car parking, as contained in their employment contract or industrial instrument.

This follows the decision in *Commissioner of Taxation v Virgin Australia Regional Airlines Pty Ltd*, where the Full Federal Court looked at the concept of "primary place of employment" and ultimately found that Virgin Airlines provided FBT car parking benefits to its flight and cabin crew in various airports.

The Virgin employees parked at (or near) a "home base" airport and undertook travel as part of their work, including staying overnight at other locations, while their home base car parking continued.

Virgin originally argued successfully in the Federal Court that the employees were carrying out their duties in many different places (on planes and in other airports) from where the parking occurred, so the parking location shouldn't be considered the "primary place of employment" and the car parking shouldn't be considered a Virgin-provided benefit subject to FBT.

The ATO appealed to the Full Federal Court, which in the end concluded that a Virgin employee's relevant home base airport was their "primary place of employment", even on days when the employee didn't attend or work at the home base airport at all, for example because they were working on flights or had a rest period in another location. The car parking was therefore an employer-provided FBT benefit because the employees' cars were parked at, or in the vicinity of, their primary place of employment.

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, if your business has been lucky enough to receive a waiver, deferral or variation of rent you need to be aware that there may be income tax, GST and perhaps even CGT consequences, depending on a number of factors.

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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'll still be entitled to that deduction. However, the unpaid amount will be considered a debt forgiveness. This means the amount won't 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 won't 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 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 needs to be done in the BAS period when the business becomes aware of the waiver or receives a refund.

Deferrals, however, generally don't 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.

Rental concessions 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.

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 (earmarking it specifically 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.

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.

A Bill was previously introduced in 2016 that proposed to enshrine\ the primary objective of the super system in legislation: 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 lapsed ahead of the 2019 election and was never reintroduced.

Having a clear legal objective of super, the government says, 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.

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.With this in mind, the government is looking to have a conversation around the concessional taxation of these high-asset SMSFs.

The other change the government is looking to make 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.

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 they should.

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, perhaps with different benchmarks.

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