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ASIC calls on lenders to support customers

With the cost of living crisis and increase in interest rates hitting Australian households, there is growing evidence that many are falling into financial stress. It is with this background that the Australian Securities and Investments Commission (ASIC) has issued an open letter to various banks, credit institutions, and lenders, calling on them to ensure that their customers have the appropriate level of support.

ASIC has reminded lenders that under s 72 of the National Credit Code, providers must consider varying a customer's credit contract if they are notified that these credit obligations are unable to be met. Credit providers must also ensure that credit activities authorised by their licence are engaged in efficiently, honestly and fairly. First and foremost, to meet their obligations, lenders must proactively communicate to customers about the circumstances in which they can seek hardship assistance and the options that are available.

Hardship options may be temporary (eg deferring a payment) or permanent (eg setting up a payment plan or altering/varying loan repayments). Applications for financial hardship will usually be required to provide proof of hardship including reasons for the hardship, current income and other major financial expenses, as well as the level of repayments that can be afforded at the current time.

Customers worried that seeking hardship arrangements will permanently affect their future credit scores can rest easy knowing the effects are only temporary. While hardship arrangements for certain credit products such as loans or credit cards can appear in credit reports, the report will only show the months the arrangement is in place, or if the arrangement is permanent, the month the loan is varied, no other details are included and the listing will be deleted after 12 months.

Where a hardship application is granted, lenders should contact customers as the period of assistance comes to an end, to understand their most up-to-date financial circumstance and consider whether further assistance is required. This includes ensuring that customers understand what happens to any arrears that may exist at the end of the hardship assistance period.

Where a customer's hardship assistance is denied, written reasons must be provided along with other options including making a complaint to the Australian Financial Complaints Authority (AFCA) about the decision.

Subscriptions included in digital adoption boost: ATO clarification

The ATO has advised that new and ongoing subscription costs can also qualify as eligible expenditure for the purposes of the digital adoption boost. This was not specified in the ATO's original release on the measure.

The additional 20% tax deduction applies to eligible expenditure incurred by small and medium business entities between 7:30 pm AEDT on 29 March 2022 and 30 June 2023. The boost is for business expenses and depreciating assets and is capped at $100,000 of expenditure per income year. Eligible claimants can receive a maximum bonus deduction of $20,000 per income year.

In its latest release, the ATO states that a good rule of thumb is to consider "if the small business would have incurred the expense if they didn't operate digitally. That is, if they hadn't sought to adopt digital technologies in the running of their business".

Using this rule of thumb, the ATO confirms that these costs are eligible:

- advice about digitising a business;
- leasing digital equipment; and
- repairs and improvements to eligible assets that aren't capital works.

Whether some expenditure is eligible for the boost will depend on its purpose and its link to digitising the operations of the specific small business. For example, "the cost of a multifunction printer would not be eligible if it were intended to only make copies of paper documents. However, it would be claimable if being used to convert paper documents for digital use and storage".

Importantly, the ATO states that new and ongoing subscription costs can also qualify as eligible expenditure if it relates to a taxpayer's digital operations; for example, an ongoing subscription to an accounting software platform for the business would qualify, as would a new subscription for digital content that is used in developing web content to advertise the business.

Small business litigation funding: improvements recommended

A recent Inspector-General of Taxation and Taxation Ombudsman (IGTO) report has recommended improvements to the small business litigation funding program, aimed at delivering better access to justice and fairness for small businesses.

The original intention of the funding program was to mitigate the disadvantage that small business taxpayers face against the ATO, which is a well-resourced and experienced litigant in proceedings which are often complex and costly.

Taxpayers that are self-represented in the Administrative Appeals Tribunal Small Business Taxation Division in disputes with the Commissioner of Taxation are generally eligible for litigation funding where the ATO engages external legal representation. Eligible small business taxpayers will have reasonable costs of engaging an equivalent level of legal representation covered.

The report from the IGTO was mainly based on two completed dispute investigations, where taxpayers expressed concerns that the ATO had attempted to cap the funding to levels below that necessary to run their matter.

There were also questions as to the ATO's calculation basis for reimbursements which taxpayers were not made aware of when entering these agreements, and the ATO's "numerous emails to the taxpayers' legal representatives questioning the bills which … detracted from case preparation".

The IGTO notes that without the adoption of its suggested improvements to litigation funding by the ATO, further dispute investigations should be expected. Meanwhile, in response, the ATO considers itself to be no longer bound by the original policy intent of the program, and has continued to confine the findings of the report to the two cases investigated, notwithstanding similar ATO actions and decisions that have been subject to further complaints to the IGTO.

However, it is understood that the ATO does intend to consult with stakeholders before committing to any improvements and that the IGTO recommendations contained in the report will be considered as a part of this process. While changes may not be forthcoming for the small business litigation program, the takeaway for taxpayers is that they can always turn to the IGTO, which provides an independent body to investigate the ATO's decisions.

SMSF compliance activity escalation

The ATO has ramped up compliance activity in the self managed super fund (SMSF) space in response to an increasing number of funds that have been identified as not complying with superannuation obligations. For the 2023 year, the ATO says it has issued double the amount of tax and penalties when compared with the 2022 income year, and the number of disqualifications has tripled.

For the 2023 year, ATO compliance actions included issuing an additional $29 million in income tax liabilities, administrative and tax shortfall penalties, and interest on SMSF trustees and/or members, which is double the amount of tax and penalties the ATO issued in 2022. In addition, a total of 753 trustees were disqualified in the 2023 income year, and that is more than triple the amount of disqualifications in the 2022 income year.

According to the ATO, the most common reason for applying penalties was the illegal early access of super benefits by fund members. It reminds SMSF trustees that they have a responsibility to ensure that members have met a condition of release before any funds are released. Trustees should also be aware that some conditions of release have cashing restrictions which restrict the form of benefit (ie lump sum or pension) or the amount of benefit that can be paid.

Common conditions of release include the fund member having reached preservation age and retired, or commenced a transition-to-retirement income stream; ceasing an employment arrangement on or after the age of 60; being 65 years old even though they haven't retired; or having died.

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If the common conditions of release aren't met, where a member meets eligibility requirements under certain special circumstances, they are able to have at least part of their super benefits released before reaching preservation age. These special circumstances include that the fund member:

- has terminated gainful employment;
- is temporarily or permanently incapacitated;
- is suffering severe financial hardship;
- meets conditions for compassionate grounds;
- has a terminal medical condition; or
- is taking part in the first home super saver scheme.

Besides targeting illegal early release, the ATO has reminded trustees of SMSFs that their fund must be audited every year by a suitably qualified auditor and an annual return must be lodged by the due date. This blitz on the SMSF compliance is set to continue all through until the end of the 2024 income year, with the ATO explicitly stating it will take "firm action" against trustees who persistently fail to comply with their obligations and seriously breach the superannuation laws.

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