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BANYAN CONSULTING

Client Information Newsletter – Tax & Super – September 2021

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September 2021

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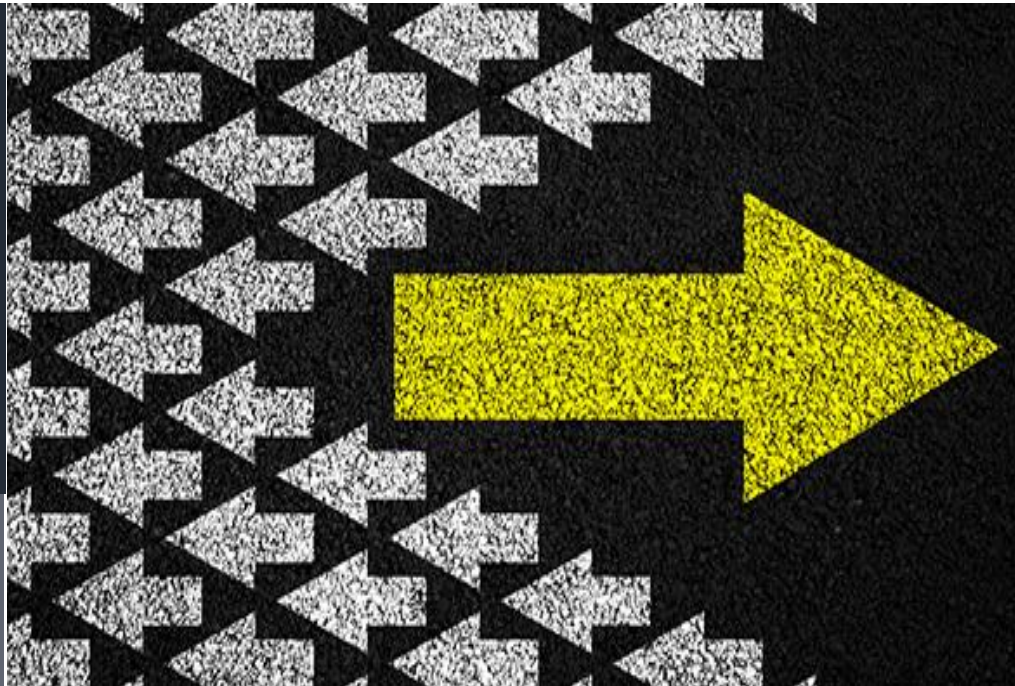
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Note: The material and contents provided in this publication are informative in nature only. It is not intended to be advice and you should not act specifically on the basis of this information alone. If expert assistance is required, professional advice should be obtained.



What now? Unwinding the Pandemic

Australia's two largest states and the ACT are in lockdown as the Delta strain of COVID-19 takes its toll while others are standing firm on a policy of eradication. The result is a country at a policy impasse and divided by border restrictions.

And, it is not just businesses in lockdown that are in crisis.

Tourism and hospitality businesses that rely on interstate trade are equally impacted but financial assistance is often limited or non-existent if they are not in a hotspot.

Continued over...

About this newsletter

Welcome to Banyan Consulting's client information newsletter, your monthly tax and super update keeping you on top of the issues, news and changes you need to know.

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At the time of writing, Australia is on track to fully vaccinate the eligible population of 20.62 million adults in December 2021. Based on National Cabinet's four stage roadmap to normal, Australia should move to phase B of the plan when 70% of the eligible population have received their second dose of the vaccine. At Phase B, it is expected that lockdowns will be "less likely" and special rules will apply to the fully vaccinated. At Phase C, when 80% of the eligible population is vaccinated, the plan is for Australia to return to "baseline restrictions" with no caps on returning visitors, and a gradual opening of inward and outward international travel with safe countries (quarantine requirements will still apply but will be reduced).

The problem for "Team Australia" is that not all players are the same. While some regions remain in an eradication phase, the strategy for opening and returning to normal is necessarily different (assuming these regions remain Delta free).

In NSW and Victoria, hope of defeating Delta has been abandoned with the focus now on bringing the population up to the maximum vaccination level to prevent hospitalisations and death.

In QLD and WA however, the strategy for opening is more complex with the bar being raised well beyond the national plan (Queensland Premier Annastacia Palaszczuk has demand that children under 12 be included in vaccination targets).

Freedoms for the fully vaccinated and what it means to business

A major concern for many business operators is the expectation of policing vaccination status for both staff and customers.

Identifying vaccinated customers

Both the New South Wales and Victorian Premiers have stated that there will be greater freedoms for those who are double jabbed with new QR code check-in technology expected at the end of September. Instead of having to show a vaccination certificate or medical

record, Victorian Premier Dan Andrews said that the QR codes, "don't store that information, but you either get a tick or a cross, and on that basis you are allowed in or not." This system might also assist those who are medically exempt from vaccination as they would not need to explain their medical history behind their exemption.

But is it discriminatory? The [Australian Human Rights Commission](#) (ARC) says, "Vaccine passports are more likely to be consistent with human rights when they are used as a tool to ease existing restrictions and improve public health outcomes. Rather than becoming a further requirement on top of existing restrictions, vaccine passports should generally operate in place of them."

"...the guiding human rights principles for considering measures taken to advance public health are:

- They must be reasonable, necessary, and proportionate.
- They must take into account the potential for discrimination."

While public health orders are likely to protect business operators from discrimination claims, not all are waiting. Qantas was the first major airline to state that it would require passengers to be vaccinated on international flights when borders open. Several sporting venues have also stated that the price of the return to live events is double vaccination for both staff and patrons.

A business operator has the ability now to [refuse entry](#) or service to a customer as long as anti-discrimination rules are not breached. Excluding an individual by vaccination status without a public health order however will be a question of whether the rule is reasonable, necessary, and proportionate.

Staff members and vaccinations

In general, vaccination will remain voluntary and free in Australia but there are some sectors

where vaccinations are mandatory (see [Legislation and public health orders requiring vaccination against coronavirus](#)). Common sectors include aged care and hotel quarantine. In these sectors, the employer is generally responsible for enforcing the Health Orders.

Outside of a public health order an employer can mandate that employees are vaccinated but only if the direction to be vaccinated is “lawful and reasonable”. In addition to being able to mandate vaccinations under the relevant Award or agreement, employers need to ensure that mandating vaccinations is reasonable for example, because the staff member’s duties put them at increased risk of being infected or they have close contact with vulnerable people (see [Can an employer require an employee to be vaccinated?](#) on the FairWork website).

Qantas for example will require all frontline employees to be fully vaccinated by 15 November 2021 and all other employees to be vaccinated by 31 March 2022. The [announcement](#) followed a company wide survey of staff that revealed 89% planned to be fully vaccinated and only 4% were unwilling or unable to be vaccinated. Qantas is yet to release details of how medical exemptions will be applied.

In workplaces where vaccinations are not mandated, an employer can only collect information on an employee’s vaccination status where it is reasonably necessary for the organisation’s functions or activities or where it is required by law. In these cases, it may be possible for the employer to ask to see evidence of an employee’s vaccination status without breaching privacy laws (see the [FairWork website](#) and the [Office of the Australian Information Commissioner](#) for further information).

Another question is whether an employee can refuse to come to work because their co-

workers are not vaccinated. On this, FairWork says “If an employee refuses to attend the workplace because a co-worker isn’t vaccinated, their employer can direct them to attend the workplace if the direction is lawful and reasonable.” But, the Australian Human Rights Commission states that where someone is particularly vulnerable to COVID-19, a “blanket rule requiring all employees to attend a particular workplace may constitute indirect discrimination.” Whether it’s reasonable for an employee to attend their workplace is highly dependent on the facts and you should seek legal advice.

- End-

Did your super fund receive a compensation payment?

Is a financial services compensation payment to your superannuation fund a contribution?

Of late, there have been several compensation payments made by financial services providers to customers that were inappropriately charged or overcharged for insurance premiums or services they did not receive, etc.

[New guidance](#) from the ATO helps decipher whether these compensation payments are treated as contributions to your fund. The problem for some people is that where these compensation payments are treated as a contribution to their superannuation fund, they may exceed their contribution cap or attract Division 293 tax (a 15% tax on super contributions imposed on those with combined income and super contributions of \$250,000 or more).

In general, the treatment of the compensation depends on who engaged the financial services provider. In general:

- **Super fund engaged the financial services provider and compensation paid to the fund** – compensation not treated as a contribution.
- **Individual engaged the financial services provider and compensation paid to the fund but not at member's discretion** – compensation is a concessional contribution in the financial year it is received.
- **Individual engaged the financial services provider and compensation paid to the fund at member's discretion** - compensation is a non-concessional contribution in the financial year it is received

Where neither the member of the fund or the financial services provider had a right to seek compensation, the amount will be a concessional contribution in the financial year it is received by the fund.

If you have received a compensation payment from a financial services provider and the payment means you have exceeded your contribution cap, or are liable for Division 293 tax, there is a potential solution to avoid an adverse impact where you did not have control over the payment. In these cases, you can apply to the Tax Commissioner to exercise his discretion to disregard excess contributions or reallocate them to another year. **-End-**



Divorce, Superannuation and the Gender Divide

New legislation will help prevent superannuation assets from being hidden during divorce proceedings.

From 1 April 2022, the Australian Taxation Office (ATO) will be able to release details of an individual's superannuation information to a family law court.

The recently enacted laws are designed to ensure that there is procedural and economic fairness in divorce proceedings to prevent the under-reporting of superannuation assets. While a spouse's superannuation information can be obtained now through legal action, if it is not provided willingly, it is often expensive and time consuming to obtain factual

information through subpoenas or court orders. From April 2022, when a couple have entered into divorce proceedings, if one of the parties believes the other is not being forthcoming about the value of assets held in superannuation, they can apply to a family law court registry to request their former partner's superannuation information held by the ATO. They will then be able to seek up-to-date superannuation information from their former partner's superannuation fund.

What happens to superannuation in a divorce?

In a divorce, superannuation is treated like any other asset and included in the division of assets in a property settlement or financial agreement. Depending on how the total assets of the couple are split, the superannuation balances of each individual may remain intact with each party taking their respective entitlement from the asset pool, or split between the couple.

For superannuation to be split, there must be:

- An order from the Family Court or Federal Magistrate Court; or
- A superannuation agreement (a financial agreement that deals with superannuation interests)

If a superannuation account is split, it does not convert into cash unless the receiving spouse is aged 65 or over, or has reached preservation age and has retired. In most cases, the superannuation is immediately rolled over into the receiving spouse's superannuation account and remains there until they are legally able to access it.

The tax-free and taxable components of the super payment to a receiving spouse will be calculated immediately before the payment is made with the relevant payment retaining the tax components of the account the funds are being transferred from.

For self managed superannuation funds (SMSFs), generally an SMSF cannot acquire assets such as residential property from a related party but there is an exemption when the acquisition is a result of marriage breakdown. Where a property like a residential rental property is involved, the superannuation rules allow an in-specie rollover under a court order or financial agreement rather than forcing the former couple to sell the property. For example, where a couple have an SMSF together, it's common for one member to step down when they divorce (until that point it's important to remember that the trustees are legally obliged to act in the best interests of all members). This same member might

then set up their own SMSF and utilise the exemption to receive the residential rental property as an in-species rollover.

Capital gains tax relief is also available where property is transferred to a spouse's superannuation fund as a result of divorce proceedings so that any potential capital gains tax does not apply on transfer. Instead, the spouse or former spouse who receives the asset will effectively 'inherit' the transferor's cost base of the asset for CGT purposes. That is, when the property is transferred, the tax implications are generally the same as if the receiving spouse or their superannuation fund owned the property from the time it was acquired.

If you and your spouse have an SMSF together and a divorce is imminent, it's important to get advice on the decisions that need to be made about your SMSF and their implications.

The superannuation divide

On average, women earn 14.2% less than men based on full time earnings. If you take overtime into account, the gap is 16.8%. When part-time work is taken into account, this figure blows out to 31.3%. And, the COVID-19 pandemic has only worsened the pay gap.

Given that 93% of all primary carer leave is taken by women, it's not surprising that there is a divide between the superannuation balances of men and women on retirement. While the gap is diminishing over time reflecting the positive shifts in work participation and the earning potential of women, it is currently estimated to be around 42%. That is, when a woman retires, she retires with around 42% less superannuation than a man.

While the situation is much better in SMSFs, a gap remains. Over the five years to June 2019, the average member balances of women increased by 28% to \$654,000, however the average balance of a male was \$784,000.

The Federal Budget proposal to remove the \$450 threshold on superannuation guarantee payments (the minimum amount someone needs to earn in a month

before an employer is required to pay superannuation guarantee) will help reduce the superannuation divide, but this is not intended to commence until 1 July 2022.

Superannuation equalisation

Where couples have significantly different superannuation account values but are of a similar age, there are practical reasons why they might look at evening out any gap.

Where one spouse is close to or likely to reach their transfer balance cap (between \$1.6m and \$1.7m), redirecting superannuation contributions to the spouse with the lower balance means that together, they maximise their tax-free income in retirement. Together, the couple can accumulate between \$3.2 and \$3.4 million tax-free.

You can make a contribution to your spouse's superannuation fund up to their non-concessional cap (currently up to \$110,000 depending on their superannuation balance). If they are under 67 years of age, you might also be able to use the bring-forward rule and contribute up to 3 years' worth of non-concessional contributions in one year (up to \$330,000 depending on their superannuation balance).

If your spouse is not working or a low income earner (assessable income less than \$40,000), there is also a tax offset of up to \$540 available on contributions you make on their behalf.

If your spouse is under 65 and not retired, you can split your superannuation with them. Up to 85% of your concessional superannuation contributions from your employer or salary sacrifice each year, can be directed to your spouse's fund.

Actively addressing the value of each spouse's superannuation account might also help to manage some of the issues that can occur when a spouse dies. While superannuation will pass to the beneficiary nominated in the death benefit nomination or estate, this does not always occur in the most practical or tax effective way. The superannuation rules in this area are complex, particularly when there have been family

breakdowns in the past. It's important to seek advice to ensure your superannuation is managed in a way that delivers the best possible outcome for your beneficiaries.

-End-

Quote of the month

"Now you put water in a cup, it becomes the cup; You put it in a teapot it becomes the teapot. Now water can flow or it can crash. Be water, my friend."

Bruce Lee

**MY BUSINESS HAS
HIT A ROUGH PATCH...**
...SO HAVE I



Free and confidential mental health support
for small business owners.

Running a business can be an isolating experience. And, with COVID-19 lockdowns and disruptions to trade, the pressure can be intense.

NewAccess for Small Business Owners is a free and confidential mental health program developed by Beyond Blue to give small business owners the support they need. Whether you're just feeling stressed, or completely overwhelmed about everyday life issues, they can help.

Understandably, a lot of small business owners are reporting that COVID-19 has negatively affected their mental health.

NewAccess is designed to appeal to people who might not otherwise seek support for their mental health and to provide support early, preventing symptoms from potentially getting worse.

Coaches of the NewAccess for Small Business Owners program all have a small business background and are trained in Low-intensity Cognitive Behavioural Therapy - a structured, evidence based psychological treatment. Put simply, it allows us to recognise the way we think, act and feel.

The program is open to small business owners (under 20 employees) who are not currently seeing a psychologist or psychiatrist. The program starts with an initial assessment, then works with you over five sessions to tackle unhelpful thoughts and behaviours, using an individual plan that you develop with your coach. Together you will develop an understanding of what is causing distress and then work on practical tools and strategies that can be used in day-to-day life. For more visit:

<https://www.beyondblue.org.au/get-support/newaccess/newaccess-for-small-business-owners>