

# client alert | explanatory memorandum

April 2019

## CURRENCY:

This issue of **Client Alert** takes into account developments up to and including 22 March 2019.

## Things to get right this FBT season

Fringe benefits tax (FBT) returns will soon be due and with the FBT season now in full swing, it's vital for tax professionals and managers to have the latest information. FBT expert Stephen O'Flynn has outlined some things to get right with 2019 FBT returns.

### FBT rate updates

While there have been no major changes to the FBT rules, the following rates have been updated for the 2019 FBT year:

- The cents per-kilometre-rate for vehicles (other than cars) between zero and 2500cc and vehicles over 2500cc have increased to 54c/km and 65c/km, respectively.
- The car parking threshold has increased to \$8.83.
- The statutory/benchmark interest rate has been reduced to 5.2%.
- The FBT recordkeeping exemption threshold has increased to \$8,552.
- The housing indexation values for states and territories have been updated.

### Car parking valuations

If you have been using car parking rates advertised online to calculate the taxable value of your car parking fringe benefits, you may not be using the lowest value available. Car parking rate valuers generally have access to cheaper rates than found online.

In general, rates advertised online include various taxes (eg congestion levy) that inflate the parking rate. Car parking valuers can analyse and exclude these taxes (which are not separately identified) to provide you with a lower daily parking rate.

In practice, employers with five or more car parking spaces should consider obtaining a private valuation of their car parking spaces, as any reduction in the daily rate would reduce the overall car parking FBT liability.

### Travel expenses

The ATO is yet to finalise Draft Taxation Ruling 2017/D6, which provides guidance on the tax treatment of many common travel expenses. The draft ruling considers when travel expenses such as transport and accommodation would be considered otherwise deductible and, as such, not subject to FBT. When final, the ruling will clarify when deductions are available for work-related travel expenses.

While the ruling is still a draft, the principles discussed in it are an indication of the ATO's view of the matter and therefore can be referred to when considering whether travel expenses should be treated as being otherwise deductible.

### Contractors and FBT

The ATO has continued to crack down on employers incorrectly engaging employees as independent contractors. As it seems to be a focus point for tax authorities, it is important that employers make accurate determinations of whether contractors engaged are in fact genuine contractors or are common law employees. This is because pay as you go (PAYG) withholding, the superannuation guarantee and FBT would apply to common law employees.

### Entertainment benefits

Entertainment benefit rules are often misunderstood by both employees and employers. It is an area that can both pose an FBT risk and provide saving opportunities.

It is common for employers to adopt the 50/50 split method for administrative convenience, but this method takes away the ability to use the minor and infrequent benefits exemption and the on-premises exemption.

In addition, employers should be aware of the distinction between sustenance and meal entertainment. If it is sustenance, it does not have to be included as an entertainment benefit and you do not have to apply the 50/50 split to them.

### **‘Minor, infrequent and irregular’ use of vehicles**

The private use of vehicles is another issue to keep an eye on.

Under subss 8(2) and 47(6) of the *Fringe Benefits Tax Assessment Act 1986*, a fringe benefit is an exempt benefit where the private use of eligible vehicles (eg vans, utes, four-wheel drives) by current employees during an FBT year is limited to work-related travel, and other private use that is ‘minor, infrequent and irregular’. For the 2019 FBT year, the ATO has released guidance in the form of Practical Compliance Guideline PCG 2018/3. If employers rely on this guideline, they do not have to keep records about their employee’s use of the vehicle to demonstrate that the private use of the vehicle is ‘minor, infrequent and irregular’. Under the guideline, employees are allowed up to 1,000 km of private travel in the vehicle as long as no single return journey exceeds 200 km. Other conditions for this concession to apply include that:

- the vehicle is provided to the employee for business use to perform their work duties;
- the vehicle had a GST-inclusive value less than the luxury car tax threshold at the time it was acquired;
- the vehicle is not provided as part of a salary packaging arrangement and the employee cannot elect to receive additional remuneration in lieu of the use of the vehicle; and
- the employee uses the vehicle to travel between their home and their place of work and any diversion adds no more than 2 km to the ordinary length of that trip.

### **Tax concierge service available to small businesses**

The Small Business Ombudsman, Kate Carnell, has announced that taxpayers wanting an external review of an adverse tax decision by the ATO through the Administrative Appeals Tribunal (AAT) can contact the office of the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) for assistance from 1 March 2019.

Mrs Carnell said, “Small business owners without legal representation will be offered one hour with an experienced small business tax lawyer at a cost of just \$100, as we fund the difference. The lawyer will review relevant documents and provide advice on the viability of the appeal. Should an appeal progress, our case managers will help the small business owner with the process.”

After lodging the application with the AAT, the small business owner will be assigned a case manager from the AAT’s new Small Business Taxation Division, and ASBFEO will offer an additional hour with a lawyer at no cost to the small business.

Small business taxation decisions will be finalised within a turnaround time of 28 days from the date of a hearing at the AAT.

Source: [www.asbfeo.gov.au/news/news-articles/tax-concierge-service-open-small-businesses](http://www.asbfeo.gov.au/news/news-articles/tax-concierge-service-open-small-businesses).

### **ATO small business benchmarks updated**

The ATO has released its latest small business benchmarks, providing over 100 different industries with average cost of sales and average total expenses. Businesses can see clearly what the relevant benchmarks are for their industry. The benchmark data is drawn from over 1.5 million small businesses around Australia.

Assistant Commissioner Peter Holt said that businesses should use the benchmarks to gauge the strength of their business and keep an eye on their competition.

“We want small businesses to stay afloat, so our benchmarks are a great way to ensure your business is viable, competitive and not at risk of venturing into rough water”, he said.

The benchmarks also help the ATO identify small businesses that may be doing the wrong thing and not properly reporting some or all of their income.

“Think of the benchmarks like the red and yellow flags on the beach. If you stay between the flags, you’ll be less likely to attract our attention”, Mr Holt said.

Using the business performance check tool in the ATO app is the quickest and easiest way to work out how a taxpayer compares to the small business benchmarks.

Source: [www.ato.gov.au/Media-centre/Media-releases/ATO-benchmarks-help-small-businesses--swim-between-the-flags-/](http://www.ato.gov.au/Media-centre/Media-releases/ATO-benchmarks-help-small-businesses--swim-between-the-flags-/).

## Early recovery of small business tax debts: ATO to be scrutinised

Minister for Small and Family Business Michaelia Cash has asked the Australian Small Business and Family Enterprise Ombudsman (ASBFEO), Kate Carnell, to look into the ATO's practices in pursuing early recovery of tax debts from small businesses who are in dispute with the ATO.

The Minister said she was determined to make sure the ATO treats small businesses fairly.

"Early recovery can be devastating for a small business, and is particularly damaging when the small business disputes the recovery and then goes on to win the case," she said.

The Minister has asked the Ombudsman to look into the extent of the problem and its impact on small businesses, to gather a holistic picture of how current systems impact people running small businesses. The scrutiny will focus on historical cases and will not include live cases currently before the AAT.

The ASBFEO's 2018 research into unfair treatment by the ATO found some serious system-wide issues affecting the small business sector, including in the area of early debt recovery. The Ombudsman heard from a number of small businesses devastated financially by this practice, which is made all the worse if the ATO gets it wrong.

The Minister said that although she understands the ATO will not enforce recovery of a tax debt other than in exceptional circumstances, "there may be cases where the errors have occurred, and this has substantial consequences for these businesses, which needs to be avoided".

Source: <https://ministers.jobs.gov.au/cash/focus-tax-dispute-issues-and-impact-small-business>.

## Compensation for defective ATO administration: review announced

The Government has announced that Mr Robert Cornall, a former Secretary of the Attorney-General's Department, will lead a review of the Scheme for the Compensation for Detriment Caused by Defective Administration (the CDDA Scheme).

The CDDA Scheme allows Commonwealth Government agencies (including the ATO) to pay discretionary compensation when a person or an organisation has suffered detriment as a result of defective administration, but when there is no legal requirement to make a payment.

The Government has commissioned the review to consider the operation by the ATO of the CDDA Scheme in relation to small business. Assistant Treasurer Stuart Robert has said the review will consider:

- the consistency of the ATO's CDDA Scheme processes for small businesses;
- the timeliness of decisions;
- how effectively findings are communicated to small business;
- how independent decision-making can be best achieved in future; and
- the adequacy of compensation for small businesses that have suffered an economic and/or personal loss as a consequence of the ATO's actions.

Mr Cornall will report to the Government in early 2019.

Source: <http://srr.ministers.treasury.gov.au/media-release/024-2019/>

## Single Touch Payroll: low-cost solutions now available

Single Touch Payroll (STP) is a payday reporting arrangement where employers need to send tax and superannuation information to the ATO from their payroll or accounting software each time they pay their employees. For large employers (with 20 or more employees), STP reporting started gradually from 1 July 2018, and it will be required for all small employers (with fewer than 20 employees) from 1 July 2019.

Companies have put forward product proposals to offer no-cost and low-cost STP solutions in response to the ATO's market request. The solutions are required to be affordable (costing less than \$10 per month), take only minutes to complete each pay period and not require the employer to maintain the software.

A range of these no-cost and low-cost STP solutions are now coming into the market, and the ATO has updated its list of the current solution providers, as well as those currently developing solutions. They will best suit micro employers (with one to four employees) who need to report through STP but do not currently have payroll software.

While the ATO says it will take all reasonable care to ensure information provided in its list is accurate, changes in circumstances may occur after the solutions are released which may affect the accuracy of the information.

Source: [www.ato.gov.au/Business/Single-Touch-Payroll/In-detail/Low-cost-Single-Touch-Payroll-solutions/](http://www.ato.gov.au/Business/Single-Touch-Payroll/In-detail/Low-cost-Single-Touch-Payroll-solutions/).

## Super guarantee amnesty not yet law: ATO will apply existing law

The ATO reminds businesses to be aware that under the current law, if they have missed a superannuation payment or haven't paid employees' super on time, they are required to lodge a superannuation guarantee (SG) charge statement.

Until law giving effect to the proposed superannuation guarantee amnesty is enacted, the ATO says it will continue to apply the existing law, including applying the mandatory administration component (\$20 per employee per period) to SG charge statements lodged by employers. The Bill containing the amnesty – the *Treasury Laws Amendment (2018 Superannuation Measures No 1) Bill 2018* – was introduced into Parliament on 24 May 2018, but had not been enacted when Parliament most recently concluded on 22 February 2019. It had been passed by the House of Representatives without amendment but was still before the Senate.

If it is eventually passed into law, the proposed amnesty will be a one-off opportunity for employers to self-correct their past SG non-compliance without penalty. It is intended to be available for 12 months from 24 May 2018 to 23 May 2019. The ATO will apply the new law (if it is passed) retrospectively to voluntary disclosures made during this period. Businesses will be entitled to the benefits of the amnesty for any SG shortfalls they have voluntarily disclosed to the ATO, subject to the eligibility criteria.

To be eligible for the proposed amnesty, an employer will need to:

- have voluntarily disclosed amounts of SG shortfall or late payments that have not been previously disclosed for any period from 1 July 1992 up to 31 March 2018;
- have made the voluntary disclosure within the proposed 12-month amnesty period (between 24 May 2018 and 23 May 2019); and
- not be subject to an audit of its SG for the relevant periods.

Source: [www.ato.gov.au/Business/Super-for-employers/Proposed-Superannuation-Guarantee-Amnesty/](http://www.ato.gov.au/Business/Super-for-employers/Proposed-Superannuation-Guarantee-Amnesty/)

## ATO finds 90% error rate in sample of rental property claims

In a March 2019 address to the Tax Institute Convention, ATO Commissioner Chris Jordan spoke about the ATO's release of the *Individuals not in business tax gap* information for the first time in July 2018, in which it found that work-related expenses are the main driver of the tax gap. Incorrect rental claims and not reporting cash wages also contribute.

Mr Jordan said that following ATO efforts to ensure people claim only what they are entitled to, for the first time in almost 25 years the average work-related claim has decreased, falling on average by about \$130 over the past two years. The estimated revenue gain for that same period will be around \$600 million.

The Commissioner said the ATO's next focus is rental income and deductions. As part of the ATO's broader random enquiry program, its auditors have now completed over 300 audits on rental property claims and "found errors in almost nine out of 10 returns reviewed". The ATO is seeing incorrect interest claims for entire investment loans where the loan has been refinanced for private purposes, incorrect classification of capital works as repairs and maintenance, and taxpayers not apportioning deductions for holiday homes when they are not genuinely available for rent.

The Commissioner concluded, "when you consider that rentals include over 2.1 million taxpayers claiming \$47.4 billion in deductions, against \$44.1 billion in reported income, you can get a sense of the potential revenue at risk".

As 85% of taxpayers with rental properties are represented by an agent, the Commissioner said, "there is work we [the ATO and tax agents] can do together in this space".

Source: [www.ato.gov.au/Media-centre/Speeches/Commissioner/Commissioner-s-address-to-the-Tax-Institute-National-Convention-2019/?page=1#Individuals\\_focus\\_\\_the\\_tax\\_gap](http://www.ato.gov.au/Media-centre/Speeches/Commissioner/Commissioner-s-address-to-the-Tax-Institute-National-Convention-2019/?page=1#Individuals_focus__the_tax_gap)

## Tribunal: property used for storage was an active business asset

The Administrative Appeals Tribunal (AAT) has decided that a property a small business owner used to store materials, tools and other equipment was an active asset for the purpose of the small business capital gains tax (CGT) concessions.

The taxpayer carried on a business of building, bricklaying and paving through a family trust. He owned a block of land on which there were two 4m x 3m sheds used to store work tools, equipment and materials. Bricks, pavers, scaffolding, mixers and other equipment were stored on open space on the property, and work vehicles and trailers were also parked there. On occasion, some preparatory work was done at the property in a limited capacity. There was no business signage on the property.

After the property was sold in October 2016, the ATO issued a private ruling that the taxpayer was not entitled to apply the small business CGT concessions to the capital gain because the property had not been an active asset within the meaning of s 152-40 of the *Income Tax Assessment Act 1997* (ITAA 1997).

The AAT, however, concluded that the extent of the use of the land was far from minimal, and its use was more than incidental to the carrying on of the business. Accordingly, the property was “used, or held ready for use, in the course of carrying on a business” and was an active asset in terms of s 152-40.

Source: *Eichmann and FCT [2019] AATA 162, AAT, File No: 2017/5571, Hanger DP, 15 February 2019.*

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