

COVID-19 relief extended for SMSFs

Only a few months ago, the Government was proposing that trustees of Self-Managed Superannuation Funds (SMSFs) were to be subject to a retirement income covenant, which would require the trustee to have a strategy that outlines how the trustees plan to assist their members to balance three objectives; namely maximising their retirement income, managing risks and having flexibility to access super savings.

Submissions were invited and SUPERCentral's lawyers, Townsends Business and Corporate Lawyers, lodged a submission which forcefully argued that the retirement strategy covenant should not (and could not sensibly) apply to SMSFs. We understand other submissions were also lodged questioning the utility of applying the covenant to SMSFs.

Thankfully, the Government seems to have considered and accepted those submissions. In the exposure draft of the proposed legislation to implement the covenant, SMSFs are excluded from its operation. This is good news. It is extremely difficult to understand what benefit would arise to SMSF members from this covenant.

The covenant will apply to industry superannuation funds, retail superannuation funds and corporate superannuation funds from the proposed commencement date of 1 July 2022.

COVID-19 reliefs for SMSF trustees extended to 2021/22

The ATO has recently confirmed that the Covid-19 reliefs which applied to SMSFs for 2019/20 and 2020/21 will continue to apply to the current financial year of 2021/22. However, it would seem unlikely that they would be further extended beyond 1 July 2022.

There are four reliefs relating to SMSF residency - rent obligations, loan repayments and the strict application of the in-house asset rules.

SMSF residency relief

For SMSFs to qualify for the superannuation taxation concessions they must satisfy the definition of being an "Australian resident superannuation fund" which requires the satisfaction of a number of different types of residency tests. The principal residency test is that the SMSF must have its central management and control either situated in Australia or only temporarily out of Australia for a period not exceeding 2 years. Given international travel restrictions, SMSF members may be temporarily outside Australia for more than 2 years, thereby causing the fund to fail the central management and control test.

The relief is that the ATO will not devote compliance resources to determine whether the SMSF has or has not satisfied the central management and control test. This relief is conditional on there being no other changes in relation to the SMSF or the stranded member's circumstances which affect the other residency conditions for the SMSF to satisfy the definition of being an Australian superannuation fund (such as the "active member test").

Rental relief

For SMSFs which own real estate (whether on an ungeared or on a geared basis using a limited recourse borrowing arrangement) the trustee may, due to hard economic realities, have given relief to the tenant by temporarily reducing rent, temporarily deferring the payment of rent or even allowing, on a temporary basis, rent holidays. While these actions are commercially realistic in the current circumstances, they are, from a regulatory perspective, problematic.

The relief provided by the ATO is that it will not take any compliance action against the trustee provided that:

- the actions taken by the trustee were taken on commercial terms (having regard to Government Covid-19 support measures) and those actions were taken solely due to the financial impact of Covid-19; and
- the actions taken are properly documented.

The ATO will also be making a determination to the effect that the amount of rent/lease payments deferred where the tenant/lessee is a related party will be treated as an in-house asset.

Loan repayment relief - loan repayments are due to the SMSF

If the SMSF is a lender in respect of a commercial loan, the trustees of the SMSF may prefer to permit the borrower to defer all or a portion of the loan repayments or to allow some other accommodation on a temporary basis given the economic impact of Covid-19. While there are good commercial reasons for such actions by the trustee, they will raise regulatory issues, particularly if the borrower is a related party.

The relevant relief provided by the ATO is that it will take not any compliance action against the SMSF if the actions taken by the trustees are on commercial terms and the changes to the loan agreement are properly documented.

Loan repayment relief - loan repayments are payable by the SMSF

If the SMSF has entered into a limited recourse borrowing arrangement (whether the lender is a related party or a third party) and the lender offers temporary loan repayment relief to the SMSF (for example, deferral of loan repayments or a reduction in the interest rate) and the relief has been offered due to the financial impacts of Covid-19, such relief would normally give rise to regulatory issues and also non-arm's length income issues.

The ATO will, in these circumstances, accept that the parties are dealing with each other at arm's length with the consequence that no non-arm's length income arises, if

- the loan repayment relief offered to the SMSF is on commercial terms and if the terms are comparable to the terms of relief offered by commercial lenders for real estate investments; and
- the changes to the loan arrangement are properly documented.

In house asset relief

Where an SMSF exceeds the 5% in house asset threshold (i.e. the market value of SMSFs in-house assets exceeds 5% of the market value of all of the SMSFs assets) as at 30 June 2021 due to the financial impacts of Covid-19, then the trustees must prepare and implement a written plan to reduce the excess level of in-house asset. The excess level is the excess above 5% of the market value of the SMSFs in-house assets by 30 June 2022.

Normally, the implementation requires a disposal of sufficient number or value of in-house assets whether or not there has been a recovery in the market value of the assets such that the 5% threshold is no longer exceeded.

The ATO will not take any compliance action against the SMSF if the divestment plan has not been implemented by 30 June 2022 because either

- the market has not recovered; or
- while no or insufficient number or value of in-house assets have been sold the market has recovered and the recovery means that market value of in-house assets compared to the value of all assets as at 30 June 2022 does not exceed 5%.

Concluding comments

While the attitude of the ATO is to be appreciated, the relief granted by the ATO is implicitly conditional upon the actions taken by the trustees of the SMSF (or by lenders to the SMSF in the case of limited recourse borrowing transactions) and is solely due to the financial consequences of Covid-19 and are no more than necessary to eliminate or reduce those consequences.

Additionally, if the SMSF has regulatory issues which have arisen independently of Covid-19 and its financial consequences, the ATO will implement its normal compliance responses and actions.

Finally, there must be strict compliance with the eligibility conditions on which the relief is provided by the ATO.

For more information on any aspect covered in this article, please call SUPERCentral on 02 8296 6266 or email info@supercentral.com.au.