"The Bottom Line"
SIMMONDS LE-FEVRE
Tax & Super Information that's Important to
November 2021

New laws to improve the way super is divided in divorce

A new law will level up the playing field for divorcing couples to ensure both partners have fair and equitable access to superannuation, particularly during acrimonious family court proceedings.

For many Australians, superannuation is their second biggest asset aside from the family home. In a divorce situation, it's important that both partners, including those with lower superannuation balances who may have taken time out of the workforce to care for children, get their fair share of available super.

In the case of an amicable divorce where both partners are being open and honest, splitting super is relatively straightforward. Yet it can be much harder to split when there is animosity between the divorcing couple, family law proceedings are occurring, and one partner is being dishonest or evasive about how much super they have.

The new law — contained in the *Treasury Laws Amendment (2021 Measure No. 6) Bill 2021* that received Royal Assent on 13 September — provides an information sharing mechanism between court registries and the ATO to improve the visibility of superannuation assets.

How the new law works

From 1 April 2022, divorcing couples can apply to the registries of the Family Court of Australia, the Federal Circuit Court of Australia and Family Court of Western Australia to request superannuation information about their former partner that is held by the ATO. The requesting registry can then provide this information to the parties or to their lawyers.

Access to this vital information will allow parties to family law proceedings to properly identify their partner's

Continued overleaf ⇨

About this newsletter

Welcome to your tax and super update from Simmonds Le-Fevre. This newsletter is aimed at keeping you on top of the issues you need to know about and changes as they happen. If you have any queries don't hesitate to contact us.

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New laws to improve the way super is divided in divorce (continued)

superannuation and, ultimately, divide this asset on a just and equitable basis. It will also reduce time in court and the costs and complexity involved with seeking this information.

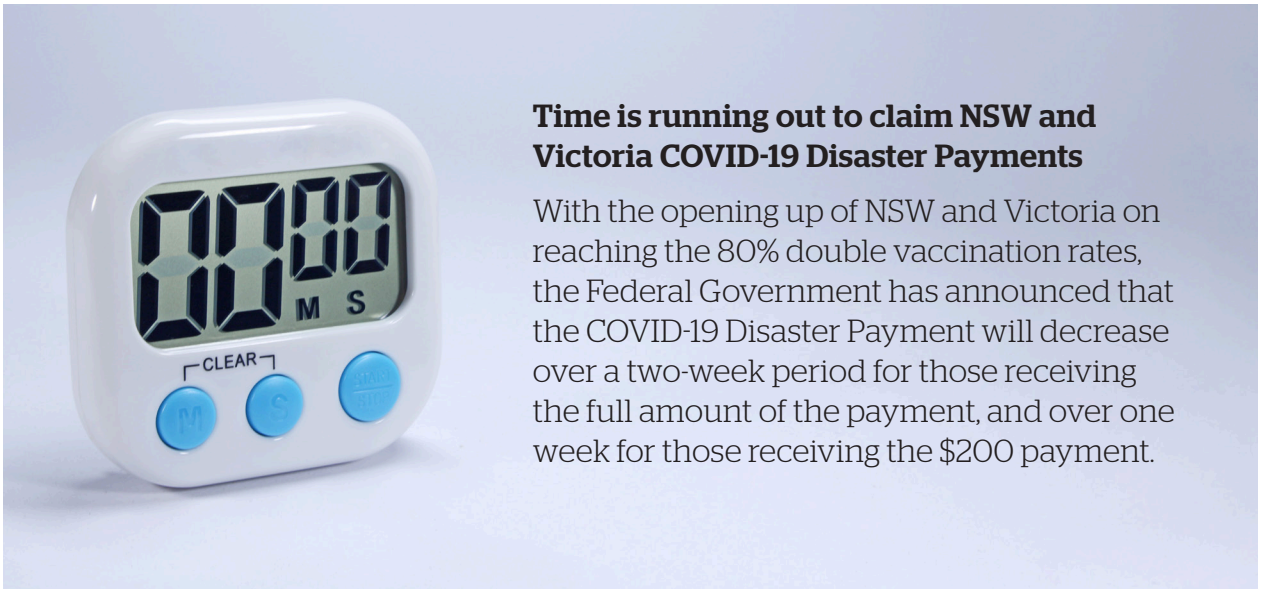
This measure, which was originally announced as part of the government's 2018 *Women economic security statement,* was designed specifically to alleviate the financial hardship that is often felt by partners who experience significant drops in disposable income after divorce, in particular women and domestic and family violence victims.

The new law also sets out measures to protect the superannuation information requested from the ATO from being accessed by unauthorised parties. This means that this information can only be used for the purpose of permitted family law proceedings (ie, for the subject matter of the dispute before the court or the conciliation proceedings leading up to a determination of that matter before the court).

Research has shown that couples who are divorcing tend to have low levels of awareness about their own superannuation entitlements, and even less so about their spouse's super. This makes the new legislation a step in the right direction that would make it harder for parties to hide or under-disclose their superannuation assets in family law proceedings.

The CEO of the Association of Superannuation Funds of Australia, Dr Martin Fahy, congratulated the government on bringing forward this legislation, saying:

> "The ability to split superannuation on separation or divorce is one of the most important measures to ensure equity and fairness for parties who have experienced the breakdown of a relationship. We support the implementation of any mechanism that assists parties to be able to split their super more easily and fairly.
>
> The measures are particularly important for vulnerable individuals and will go some way to ensuring they have a more secure long-term financial future." ■



Time is running out to claim NSW and Victoria COVID-19 Disaster Payments

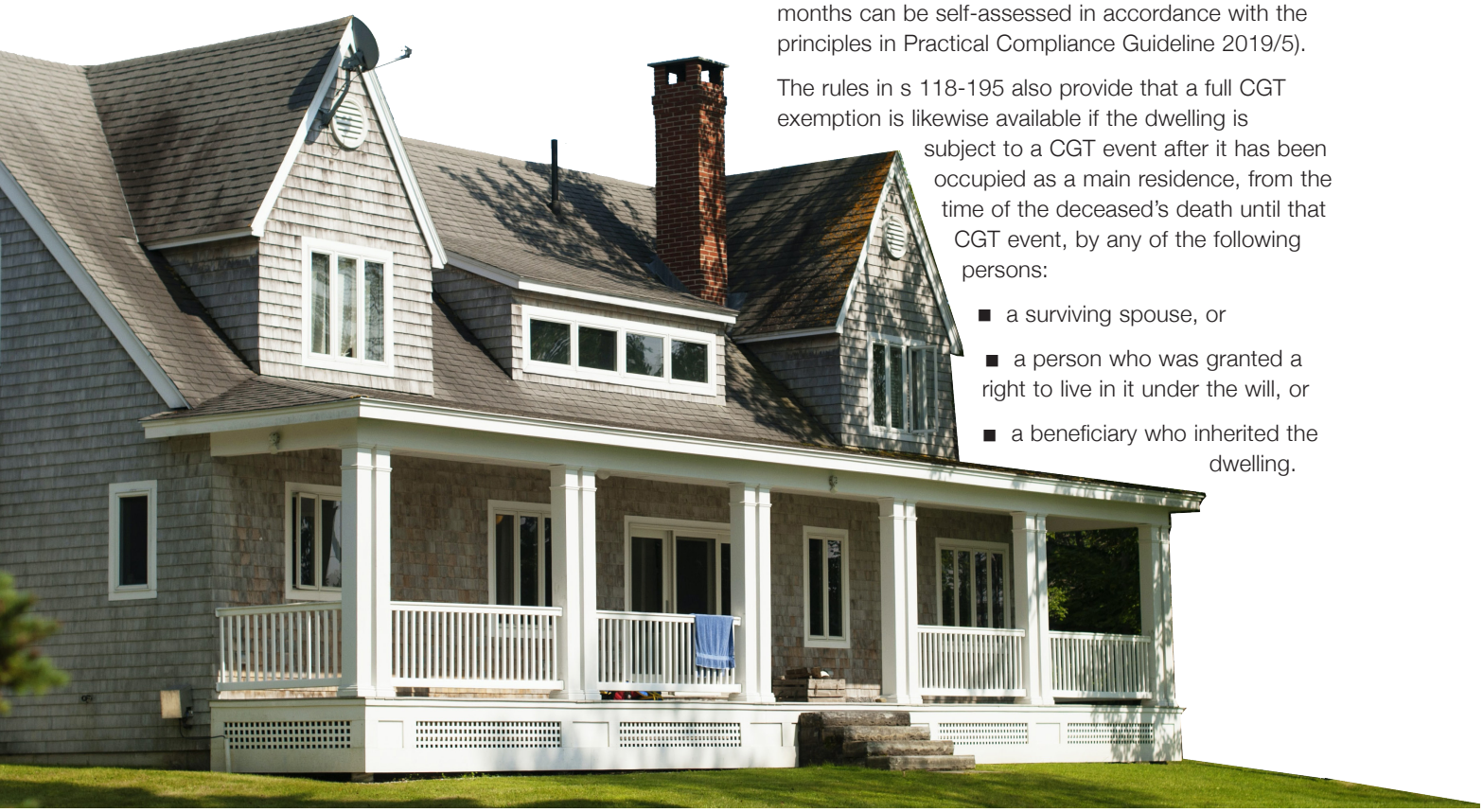
With the opening up of NSW and Victoria on reaching the 80% double vaccination rates, the Federal Government has announced that the COVID-19 Disaster Payment will decrease over a two-week period for those receiving the full amount of the payment, and over one week for those receiving the $200 payment.

CGT on sales of property inherited by a foreign resident

Is there CGT when a property inherited from a foreign resident is sold? Am I liable for CGT on a home I inherited from a foreign resident when I sell it one year later? The following scenario demonstrates how the CGT rules work in this situation.

I have just inherited my uncle's home. He purchased it on 1 July 1997 and lived in it until 1 July 2012 when he moved to Spain — and where he lived for the last eight years of his life until his death on 1 July 2020. Having inherited the home, I am now selling it for $1m. The contract of sale will settle on 30 June 2021 (and I have been living in it as my home from the time of his death and will do so until its sale). Will I be liable for CGT?

The short answer is, yes – and in relation to quite a substantial amount.



By way of background, the rules in s 118-195(1) of the *Income Tax Assessment Act 1997* (ITAA 1997) apply to determine in what circumstances an inherited dwelling can be sold without being subject to CGT.

However, they were amended following the introduction of the measures to deny the CGT main residence exemption to a foreign resident (which apply, in effect, to sales or disposals occurring after 30 June 2020).

GENERAL RULES

The basic exemption rules in s 118- 195 provide that if the dwelling was either a pre-CGT asset of the deceased or the deceased's main residence at their date of death (and that was not then being used to produce assessable income), then if the dwelling is sold or otherwise subject to a relevant CGT event within two years of the deceased's death, then there will be no CGT on its sale etc.

Note: This two-year period is measured by reference to the settlement date of the contract of sale and it can be extended by the Commissioner (or an additional 18 months can be self-assessed in accordance with the principles in Practical Compliance Guideline 2019/5).

The rules in s 118-195 also provide that a full CGT exemption is likewise available if the dwelling is subject to a CGT event after it has been occupied as a main residence, from the time of the deceased's death until that CGT event, by any of the following persons:

- a surviving spouse, or
- a person who was granted a right to live in it under the will, or
- a beneficiary who inherited the dwelling.

Is there CGT when a property inherited from a foreign resident is sold? (continued)

However, if the deceased was an excluded foreign resident just before their death, these full CGT exemption rules do not apply (s 118-195(1)(c)). Note: An excluded foreign resident is a person who has been a foreign resident for a continuous period of more than six years (s 118-110(4)).

CALCULATION OF PARTIAL EXEMPTION

Where a full CGT main residence exemption does not apply, the partial calculation rules in s 118-200 must be used to calculate the partial exemption.

In the case of a post-CGT dwelling of the deceased, the partial exemption calculation formula in s 118-200(2) requires you to treat as non-main residence days the following days:

- the days that the deceased owned the dwelling when it was not his or her main residence (s 118-200(a)) — ie, eight years from 1 July 2012 until his death on 1 July 2020, and
- if the deceased was an excluded foreign resident, the "remaining days" in the deceased's ownership period (s 118-200(2)(aa)) – ie, 15 years from 1 July 1997 until 1 July 2012, and
- the period after the deceased's death until its sale when it was not the main residence of a surviving spouse, a person with a right to occupy it or a beneficiary (s 118- 200(2)(b)) – ie, nil days in this case because you, as the beneficiary, have lived in it as your main residence in this time.

In short, the total non-main residence days in this case where the deceased is an excluded foreign resident at his date of death will be the deceased's entire 23-year period of ownership of the dwelling.

The total days of ownership of the dwelling for the purposes of the partial exemption calculation will be from when the deceased acquired it on 1 July 1997 until its sale by you on 30 June 2021 — being 24 years.

So, if we assume that you make a capital gain on the dwelling of $450,000 (calculated by reference to sale proceeds of $1m), your partial capital gain calculated under s 118- 200(2) will be:

$$\text{CG or CL amount} \times \frac{\text{Non-main residence days}}{\text{Total days}}$$

$$= \$450{,}000 \times \frac{23 \text{ years}}{24 \text{ years}}$$

$$= \$431{,}250$$

[Note for simplicity, this calculation is in years instead of days as required.]

However, the CGT 50% discount will be available because the dwelling is treated as having been owned for more than 12 months in this case (s 115-30(1), Item 4).

(See also Example 1.7 at para 1.43 in *Treasury Laws Amendment (Reducing Pressure on Housing Affordability No. 2) Bill 2018*, which introduced the amendments to deny a foreign resident a CGT main residence exemption.) ■

CGT retirement exemption where gain is made by a company or trust

Applying the "Retirement Exemption" in the CGT Small Business Concessions can be quite difficult – particularly where a company or trust makes the capital gain and the exemption is sought to be applied for the benefit of individual shareholders in the company or beneficiaries in the trust.

In this case, the rules in s 152-325 of the *Income Tax Assessment Act 1997* the "company or trust conditions" must be followed in order for the benefit of the concession to be passed on to such persons.

Among other things, these rules require you to first apply the CGT discount to a capital gain made by a trust (noting that a company is not entitled to the discount), then to choose the amount of remaining gain for which the exemption is sought and, above all, to identify the CGT concession stakeholder/s in the company or trust - as only such persons can obtain the benefit of the exemption.

In relation to this latter requirement, such a person is an individual who has an interest in the company or trust of 20% or more - and their spouse provided the spouse has an interest in the company or trust of more than zero.

And whether this test is met will depend on if the taxpayer is a company or a fixed or discretionary trust. These rules can be quite complicated – and definitely need the expertise of a professional adviser.

Moreover, in the case of a discretionary or family trust, action can usually be taken in the relevant year of income to make someone a CGT concession stakeholder to meet this requirement.

There is also the key requirement to make a relevant payment to the identified CGT concession stakeholder or stakeholders in the required timeframe – which will depend on, among other things, how the capital gain arose.

Finally, there is the crucial matter that if the CGT concession stakeholder is aged less than 55 just before the payment is to be made in relation to them, then the company or trust must contribute it to a complying superannuation fund or an RSA on behalf of the stakeholder. Otherwise, the amount can be paid directly to the concession-stakeholder without any CGT consequences.

But again there are steps that can be taken to bring about the optimal result for the taxpayer in regard to this issue – depending on the circumstances.

So, in short, the ability to "sheet home" the benefits of the CGT retirement exemption to the individual stakeholders in a company or trust that made the gain is one that requires the expertise of a professional – if only because appropriate action can be taken to maximise the benefit of the exemption. ■

ATO extends COVID-19 relief measures for SMSFs

SMSF trustees that are financially impacted due to COVID-19 because of extended lockdowns in certain States and Territories will be granted extended relief to cover the 2021-22 financial year.

The relief was originally offered by the ATO to SMSFs for the 2019-20 and 2020-21 financial years where certain situations may have caused SMSF trustees to contravene the superannuation laws.

For example, a SMSF trustee may have provided or accepted certain types of relief, such as giving a tenant/s (including a related party tenant) a reduction in rent if they were financially impacted due to COVID-19. As charging a price that is less than market value will usually give rise to contraventions under the superannuation laws, the relief measures will avoid this outcome if the arrangement meets certain criteria (ie, the relief is offered on commercial terms and the arrangement is documented, etc).

The relief measures available

In September, the ATO announced it would extend the several types of relief to SMSF trustees for 2021-22: see table overleaf.

Actions required for SMSF trustees

SMSF trustees must ensure they properly document the relief and can provide their approved SMSF auditor with evidence to support it for the purposes of the annual SMSF audit.

When documenting any changes, providing the reasons for change will help the SMSF auditor when they use their judgement to determine whether relief is offered on commercial terms due to the financial effects of COVID-19.

It is also good practice to document any changes by way of a minute or a renewed lease agreement or other documentation.

Continued overleaf ⇨

> "We understand that COVID-19 continues to have a significant financial effect on self-managed super funds (SMSFs), particularly in some States or Territories where there are reoccuring and prolonged lockdown periods.
>
> As a result, you may still find yourself in a position where you (in your role as trustee), or a related party of the fund, are having to provide or accept certain types of relief, which may give rise to contraventions under the super laws.
>
> The COVID-19 health crisis has also resulted in many countries imposing travel bans and restrictions, and you may have become stranded overseas for long periods, which can have an effect on your fund's residency status.
>
> In recognition of this, we have extended the following types of relief, currently offered for the 2019-20 and 2020-21 financial years, to cover the 2021–22 financial year.
>
> You must ensure you properly document the relief and can provide your approved SMSF auditor with evidence to support it for the purposes of the annual SMSF audit."
>
> *Australian Taxation Office*

ATO extends COVID-19 relief measures for SMSFs (continued)

Type of COVID-19 relief available	ATO compliance approach
SMSF residency relief	If SMSF trustees are stranded overseas due to COVID-19 and this causes them to be out of Australia for more than two years, this may affect whether their fund meets some of the residency conditions to be an Australian superannuation fund for tax purposes (and hence whether the fund is a complying superannuation fund and entitled to receive tax concessions). The ATO will not take any compliance action to determine whether the SMSF meets the relevant residency conditions.
Rental relief	Rental relief provided by a SMSF (or a related non-geared company or unit trust) to a tenant in the form of a reduction, waiver or deferral may give rise to a contravention of the superannuation laws. The ATO will not take any compliance action against an SMSF in these circumstances if: ■ The relief is offered on commercial terms (having regard to State and Territory COVID-19 support measures), and ■ The SMSF trustee has properly documented the arrangement.
Loan repayment relief	*Where SMSF is the lender and provides relief* If loan repayment relief is provided by a SMSF to a related or unrelated party due to the financial impacts of COVID-19, this may give rise to a contravention of the superannuation laws. The ATO will not take compliance action against a SMSF where the relief is offered on commercial terms and the changes to the loan agreement are properly documented.
	Where SMSF is the borrower and receives relief If an SMSF has a limited recourse borrowing arrangement (LRBA) in place with a related party and the lender offers loan repayment relief to the fund due to the financial impacts of COVID-19, this may give rise to a contravention of the superannuation laws. The ATO will accept the parties are dealing with each other at arm's length, provided: ■ The relief is offered on commercial terms (having regard to the terms of relief offered by commercial lenders for real estate investment loans), and ■ The SMSF trustee has properly documented the changes to the loan agreement.
In-house assets relief	If an SMSF exceeded the 5% in-house asset threshold at 30 June 2021 due to the financial impacts of COVID-19, the trustee is required to prepare a written plan to reduce the market value of the fund's in-house assets to below 5% by 30 June 2022. The ATO will not take any compliance action against an SMSF where the trustee is unable to execute the plan by 30 June 2022 because the market has not recovered in some areas, or it may be unnecessary to implement it as the market has recovered.

Becoming the executor of a deceased estate

There comes a time in many people's lives when they are appointed the executor of a deceased estate.

Even in the simplest of estates, though, the responsibilities involved can be quite onerous – and getting things wrong can make even the executor personally liable.

It's therefore normally recommended to get professional assistance with this task.

From a tax point of view, this assistance will help an executor deal with such matters as:

- Preparing the deceased's final ("date of death") tax return.
- Determining if income received after the deceased's death is to be returned in the deceased's final tax return or the tax return of the deceased estate (including capital gains).
- Working out the rate of tax to be paid on income that is assessable to the trustee of a deceased estate.
- When a deceased estate tax return is not required to be prepared.
- When the "estate is finalised" so that any income and assets from the estate can be distributed to beneficiaries.

Professional advice also helps you decide, as an executor, whether assets of the deceased should be realised in the estate (assuming the deceased's will allows for this) or whether they should instead be distributed to beneficiaries.

This, in turn, may allow for gains and losses from such assets (particularly extensive shareholdings and other investments) to be dealt with in a way that legitimately brings about the best tax outcomes.

Finally, in relation to what is often the deceased's most valuable asset – their home – good tax advice is invaluable to ensure that the relevant CGT exemption can be properly applied or that any liability can be reduced.

So again – if you're ever appointed an executor of a deceased estate, don't go it alone. Get proper advice even in what seems like a simple estate. ■