Your

Knowledge

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May Partners
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The New Lifetime Director IDs

Directors will be required to register for a unique identification number that they will keep for life, much like a tax file number under a rewrite of Australia's business registers.

ASIC does not currently verify the identity of directors and Elvis Presley and Bob Marley could "quite possibly" be registered. Or at least that was the view of former ASIC Commissioner John Price at a 2020 Parliamentary inquiry.

The introduction of the Director Identification Number (DIN) regime is part of the Government's Modernisation of Business Registers (MBR) Program creating greater transparency and tracking the movements of individuals over time. The MBR will unify the Australian Business Register and 31 ASIC business registers, including the register of companies. In effect, the system will create one source of truth across Government agencies for individuals and entities and will be managed by the Australian Taxation Office (ATO).

Why a director ID?

Under the new regime, all directors will need to have their identity confirmed when they consent to being a director, so no more Elvis Presley unless your name really is Elvis Presley. You will then keep this number permanently, even if you cease to be a director – the number will not be issued to another person. The result is an ID system that traces a director's relationships across companies, enabling better tracking of directors of failed companies and prevents the use of fictitious identities. *Continued over…*

The target is illegal phoenixing. Phoenixing is when directors transfer the assets of an existing company to a new company without paying full value, leaving the debts with the old company. Once the assets have been transferred, the old company is liquidated leaving creditors out of pocket. Phoenixing has a ripple effect in the community and is estimated to cost between $2.9 billion and $5.1 billion annually. The real face of the impact is to the unpaid creditors – mostly customers and contractors, unpaid employee entitlements, and the broader cost through unpaid taxes.

> ***ASIC does not currently verify the identity of directors and Elvis Presley and Bob Marley could "quite possibly" be registered.***

Once the assets are transferred to a new company, the directors then continue to operate the business in a new entity. They just set aside the problems and start again with the benefit of the good parts of their old company as a foundation.

Who will need a director ID?

The DIN is very broad and introduces the concept of an 'eligible officer'. An eligible officer is a director who:

- is appointed to the position of director, or is appointed to the position of an alternate director and is acting in that capacity (regardless of the name that is given to that position); or
- any other officer of the registered body who is an officer of a kind prescribed by the regulations.

The definition picks up the concept of 'shadow directors' who act in the capacity of directors through influence and control but are not directors by title. That is, its feasible that someone who is not a director but is seen to be making decisions on behalf of the company can be held to account.

An eligible officer is a director of a:

- company
- registered foreign company
- registered Australian body under the Corporations Act such as an association or a charity, or
- an Aboriginal and Torres Strait Islander corporation (which are registered under the CATSI Act).

When the system opens, directors will need to apply for an ID through the Australian Business Register system through their myGov account. If you do not have a [myGov account](), it would be a good idea to create an account and become familiar with how it works. Your myGov account creates your digital credentials to verify who you are.

When you register, you will need to declare that the information you have provided is true and correct, you are or will be an eligible officer within 12 months, and you do not have an existing ID (or applied for one).

Existing directors will have until 30 November 2022 to acquire a DIN (30 November 2023 for directors of corporations under CATSI). For the first year of the program, new directors will have 28 days to apply for a DIN from the time of their appointment. From the first year onwards, you will need to have a DIN prior to being appointed as a director.

Unlike the existing system that merely registers information, the new regime will verify a director's information and may utilise other sources of information such as your driver's license and/or link to your client record held by the ATO.

The problem of directors in name only

The new regime will not overcome one problem area – where naive participants are encouraged to become directors in name only such as elderly parents, or a spouse. That is, the identity of that person is legitimate but their role as a director is merely window dressing and they do not fulfil the role as active participants - a situation that is not uncommon in family groups.

It's important that anyone agreeing to be a director understands the implications. Being a director is not just a title; it is a responsibility. At a financial level, directors are responsible for ensuring that the company does not trade while insolvent. The by-product of this is that the directors may be held personally liable for the debt incurred. The director penalty regime has also been tightened up in recent years to ensure that directors are personally liable for PAYG withholding, net GST and superannuation guarantee charge liability if the company fails to meet its obligations by the due date. For many small businesses, the directors are also often personally responsible for company loans secured against property such as the family home.

Failing to perform your duties as a director is a criminal offence with fines of up to $200,000 and five years in prison.

Ignorance is not a legal defence. Don't sign anything unless you understand the consequences.

Better monitoring and bigger teeth for ASIC

The introduction of a structured director verification system comes with greater controls and influence by the regulators to enforce the law with civil penalties of up to $200,000 in situations which include:

- Failure to register within the relevant timeframes
- Applying for multiple DINs
- Misrepresenting a DIN, and
- Accessorial liability where someone seeks to pervert the system

The failure to register when required is a strict liability and the regulator does not have to prove fault, they will simply issue an infringement notice.

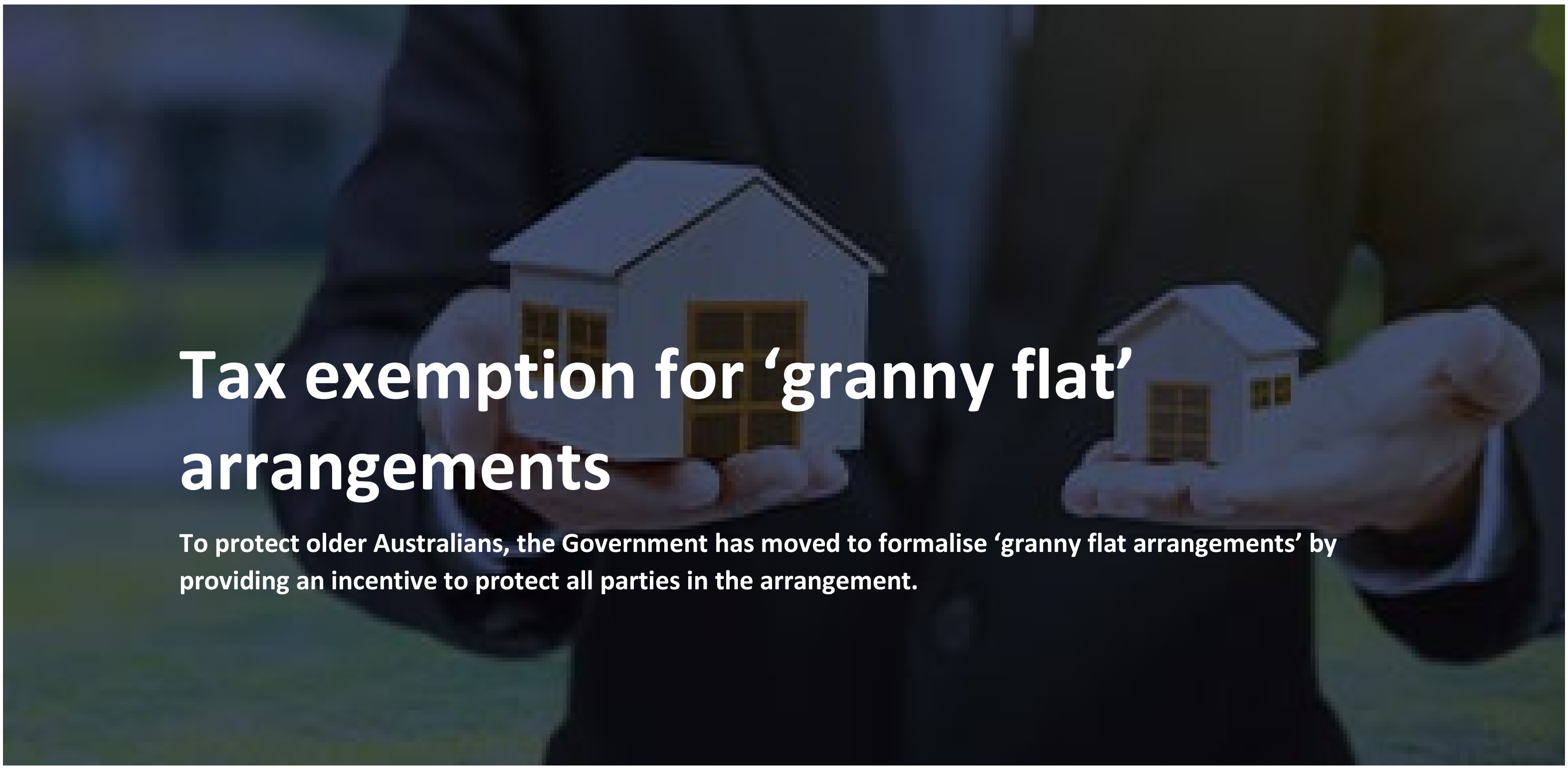
-End-

The top 8 reasons why staff leave

Australia is facing a shortage of skilled labour. When the supply of staff dry up the focus often turns to retention. But, the first step is to understand why people you want to stay, choose to move on?

1. Change in leadership - Leadership vacuum or concern about the impact of the change.
2. Work not challenging - This is the classic reason for leaving that is behind the "it's just time" comment. The employee feels as if the business has nothing left to offer.
3. Conflict with a supervisor - Your business can have the best retention policies and strategies in place but a conflict between a Manager and subordinate is immediate and damaging.
4. Change in company dynamics - Each business is generally made up of smaller subgroups. These might be based on age, gender, professional status or cultural identity. The loss of a popular team member from one of these groups will be more deeply felt by their subgroup.
5. Unfavourable change in responsibilities - Changes in team structures, reallocation of resources or taking on new assignments that are not within the skills set or comfort level of the employee.
6. Life work balance issues - Retention is about mutual respect for priorities. The employer respecting the employee's personal responsibilities and employees recognising that they have corporate responsibilities. Both need to be fulfilled.
7. Poor recruitment - Professional or cultural misfits. Ever hired Mr Right now rather than Mr Right?
8. Lack of recognition for perceived value - Overlooked for opportunities held out but not delivered.

Sometimes, it's not all bad. We've all had them; that employee who is the cultural and professional misfit. Decisive action when there is a poor fit can improve team morale.



Tax exemption for 'granny flat' arrangements

To protect older Australians, the Government has moved to formalise 'granny flat arrangements' by providing an incentive to protect all parties in the arrangement.

Typically, granny flat arrangements occur when an older person transfers some sort of consideration (often title to property or proceeds from the sale of property) to their adult child in exchange for the promise of ongoing care, support and housing. In some circumstances, it's a way for a parent to give their children access to their inheritance when it's needed not at a later point when the person dies.

However, a 2017 Australian Law Reform Commission report highlighted the potential for elder abuse where granny flat arrangements fall apart. If the relationship breaks down, or other unforeseen circumstances arise, the older person can be left homeless. A central problem is a lack of formality in these arrangements.

The tax system, in particular, the capital gains tax (CGT) system, acts as a disincentive to formalising a granny flat arrangement. Under the current rules if a granny flat arrangement if formalised, this can lead to an upfront tax liability for the home owners. Also, the children can potentially lose part of their main residence exemption when the parent pays for the right to live in the home depending on how the arrangement is structured. If the arrangement is left informal, and the money paid by the parent is merely a gift, the main residence exemption is generally unaffected.

Recently released exposure draft legislation seeks to overcome the disincentive to formalising a granny flat arrangement by providing a CGT exemption.

This does not mean that every separate dwelling built out the back of a house will have a CGT exemption. The legal meaning of granny flat is derived from social security law; it describes an arrangement rather than a type of accommodation and can arise whenever money or other consideration is given in exchange for a right to use accommodation for life.

The draft legislation provides that no CGT event will arise from a granny flat arrangement where certain conditions are met including where the individual with the granny flat arrangement has:

- Reached pension age or has a disability, and
- That the arrangement is in writing and is not of a commercial nature.

2021-22 Federal Budget

Look out for our Federal Budget update taking you beyond the headlines to what's important to you and your business!

Your SMSF: when expenses and investments are not at arm’s-length

We often get questions from clients about what they can and cannot do in their SMSF. Often the questions relate to related party transactions – that is, interactions between the SMSF, its assets, and its members (or relatives of members). We’ve set out some of the common questions and answers.

In general, all interactions between your SMSF and its members should be at arm’s length – that is, the terms of the transactions are the same as what would be entered into between independent parties, but there are circumstances where the interests of the fund and its members intersect. A transaction which is favourable to either party is deemed to be at non-arm’s length terms, which could create some taxation issues.

Can I charge my SMSF for work that I do?

Let’s say your SMSF owns a residential rental property and the property needs a fence. You’re a builder and can build the fence. Can you charge the SMSF for the fence? The answer is maybe.

What you charge and how it is charged is critically important here.

If the fund acquires the fencing material, and is invoiced by the building business to construct the fence, and pays a market rate for the labour involved, then there is unlikely to be a problem as the charges are transparent and at market value. However, documentation is essential, and you may also need to verify that the labour cost charged is the market rate.

However, if the business decides to install the fence for no charge, or alternatively charge an excessively high rate, then the transaction could be deemed to be non-arm’s length.

If the building business acquires the fencing material and then installs the fence at arm’s length rates for the SMSF, this could still cause in-house asset issues as the fund has acquired an asset from the member; the fencing material. It all gets very messy and it might just be easier to have someone else do it!

What happens if the building business either charges below market rates or does not charge the fund for labour cost? The rules have recently been extended to capture non-arm’s length expenses where a related party is acting in a capacity other than as trustee and a non-arm’s length expense was not charged. i.e., where the fund benefits from work performed by a member in a capacity other than trustee. The ATO sees these non-arm’s length expenses as potentially artificially inflating an SMSFs earnings.

The market value of the work performed might be treated as a contribution, or all of the income from the asset could be deemed to be non-arm’s length, which means the highest marginal tax rate will be charged on all income and capital gains derived from the asset.

This same scenario applies to any member of an SMSF (or relative of a member) who provides services to their SMSF – electricians, plumbers, accountants, real estate agents, etc.

The rule is, work that is done for the SMSF by a related party in their professional capacity must be equivalent to arm's length market value, with no acquisition of materials. Free, below market value, above market value, may breach the superannuation rules. And, where work is performed by a related party at market value, it must be documented and provable.

If you are not a qualified professional, you cannot undertake work on behalf of your fund unless you are fulfilling your duties as trustee.

Can I charge for the work I do to administer my fund?

Trustees of an SMSF cannot be remunerated for the work that they do for the fund. The exception is where you are qualified to provide certain services to your fund and act in that professional capacity. For example, you are a real estate agent and are buying and selling property assets for the fund. In this case, you are not being paid for work you do in your capacity as trustee but as a professional providing a service at market value (see *Can I charge my SMSF for work that I do?*).

Can my SMSF purchase a rental property that I own?

Your SMSF cannot acquire property from a related party of the fund unless the property (land and buildings) is used wholly and exclusively in a business (business real property).

Under these circumstances your SMSF could purchase the commercial premises used by a business you own and lease the property back on commercial terms.

If business real property is used in a primary production business such as a farm, it can still meet the test of being used wholly and exclusively in a business even if it contains a dwelling that is used for private or domestic purposes. But, the dwelling must be in an area of land no more than two hectares and the main use of the whole property can't be for domestic or private purposes.

Can I lend money to my SMSF?

Members of a fund can lend money to their SMSF in very limited circumstances, and usually to buy property, if the following conditions must be met:

- It is a limited recourse loan to the SMSF and is appropriately documented, and
- The SMSF is not charged higher than an arm's-length rate of interest for borrowing, i.e., the loan is on commercial terms, there are 'safe harbour' guidelines provided around loan to value ratios, and repayment terms to ensure the loan is at arm's-length.

Can my SMSF lend me money?

No. Your SMSF cannot lend you or any of your related parties money. The superannuation rules specifically prohibit the fund providing financial assistance to members. This includes where a member takes money out of the SMSFs account for a short amount of time and replaces it in full. Just don't do it.

Quote of the month

"Survival is not about being fearless. It's about making a decision, getting on and doing it."

"Bear" Grylls