

## **TAXATION**

### **TBAR spreadsheet lodgments not accepted from 31 October**

The ATO has advised that it will no longer accept a spreadsheet version of transfer balance account report lodgments from 31 October 2019.

### **ATO continues to support flood-affected Queenslanders**

The ATO will continue to support those affected by the North Queensland floods in early 2019 as part of a whole-of-government effort to help people get back on their feet.

### **\$10b refunded so far by ATO**

The ATO says that \$10b has been refunded to Australian taxpayers so far this tax time, with most returns being processed in under 2 weeks.

### **Five charities lose charity status – will lose charity tax concessions**

The ACNC has announced that 5 organisations have lost their charity status following separate investigations into their activities and operations.

### **ATO to start contacting small employers re STP**

The ATO will soon be writing to small employers who have yet to start reporting or apply for a deferral, to remind them of their STP obligations.

### **Glencore loses legal professional privilege "Paradise Papers" appeal**

The High Court has rejected an attempt by the Glencore group to rely on legal professional privilege to prevent the ATO using their "Paradise Papers" documents.

### **ATO welcomes Glencore decision to use information from data leaks**

In response to the Glencore High Court decision, the ATO said the Court confirmed that the ATO may use information obtained from data leaks, even if leaked from a law firm.

### **PSI rules: decision that unrelated clients test not satisfied set aside**

The Federal Court has set aside an AAT decision that income derived by a business analyst through a company was subject to the personal services income rules.

### **ATO visiting 350 businesses in Darwin to tackle black economy**

The ATO is planning to visit around 350 small businesses in Darwin in August as part of their mission to tackle the black economy.

### **Accountants not negligent in preparing tax returns**

The NSW District Court has found that a firm of accountants that took on a new client was not negligent in failing to check work done by the client's previous advisers.

### **Director penalty notice liability**

The Full Federal Court has dismissed an appeal against a decision confirming an ATO application for summary judgment in respect of a director penalty notice liability.

### **TPB terminates tax agent registrations**

The Tax Practitioners Board recently terminated the registrations of a number of tax agents, both individuals and companies.

### **Partnership income subject to PSI rules**

The Federal Court has upheld a decision that a personal services entity did not satisfy the results test, so the personal services income received through the PSE was assessable.

### **Online services for agents to become default login option**

The ATO has advised that the *Online services for agents* public beta for tax agents ended on 17 August 2019, when the login page changed.

### **ATO black economy crackdown on small businesses in North Qld**

The ATO will be visiting around 400 small businesses in Cooktown and Port Douglas, Far North Queensland during August and September to tackle the black economy.

## **Expansion of taxable payments reporting system**

The ATO has issued LCR 2019/4, discussing the recent extension of the taxable payments reporting system to entities providing a number of services.

## **Proposed changes to tax and super laws, and ATO admin treatment**

The ATO has provided an update of the status of proposed changes to tax and super laws from the 2019-20 and 2018-19 Federal Budgets and the 2018-19 MYEFO Statement.

## **TPB review - ATO proposes penalty for tax agents causing tax shortfall for clients**

The recently released Discussion Paper on the review of the Tax Practitioners Board could result in some significant changes affecting tax practitioners.

## **Cleaners, couriers and construction industry reminded to lodge TPAR**

The ATO has said businesses, that provide cleaning or courier services and those in the construction industry, that need to lodge a TPAR, should do so by 28 August 2019.

## **ATO watching for undisclosed foreign income this tax time**

The ATO has reminded taxpayers who receive any foreign income from investments, family members or working overseas to make sure they report it this tax time.

## **Consultation paper: ATO's approach to disclosure of business tax debt**

The ATO has released *Consultation paper: The ATO's administrative approach to the disclosure of business tax debt information to credit reporting bureaus*.

## **Luxury car tax adjustments and GST claims disallowed**

A taxpayer has been unsuccessful in contesting assessments which disallowed claims for input tax credits and decreasing LCT adjustments on the purchase of luxury vehicles.

## **Draft waiver of tax invoice for corporate card statement cardholders**

A draft determination has been released, allowing corporate card holders to claim input tax credits without holding a tax invoice in certain circumstances.

## **GST meaning of improvements on the land**

The ATO has released an Addendum to *GST Ruling GSTR 2006/6*. This ruling considers the meaning of the phrase "improvements on the land" for GST purposes.

## **FINANCIAL SERVICES**

### **Ending grandfathered remuneration: details requested by ASIC**

ASIC has issued notices to financial sector entities requesting details on their progress towards ending grandfathered conflicted remuneration arrangements.

### **Banking Royal Commission – Govt implementation roadmap**

The Government has released an Implementation Roadmap for its response to the recommendations of the Banking Royal Commission.

### **Financial Institutions Supervisory Levies – discussion paper released**

Treasury has released a discussion paper on the design and operation of the Financial Institutions Supervisory Levy.

## **SUPERANNUATION**

### **Super focus areas from ATO roadshows**

The ATO has released its presentation to the 2019 ASFA National Policy Roadshow outlining emerging superannuation focus areas for 2019-20.

### **SMSF voluntary disclosures of contraventions**

The ATO has reported that over 920 SMSFs have used the ATO's early engagement and voluntary disclosure service since it was introduced in 2016.

### **ATO guidance on incorrect ENCC determinations**

ATO has issued guidance concerning incorrect excess non-concessional contribution determinations.

### **ATO checking nearly 18,000 SMSFs re investment strategy**

The ATO will soon contact about 17,700 SMSF trustees and their auditors where ATO records indicate the SMSF may be holding 90% or more of its funds in one asset.

### **Super Downsizer Measure: common errors**

There are some mistakes around eligibility for the Downsizer Measure that has seen older Australians sell their homes and contribute a portion of the sale proceeds to super.

### **SMSF Voluntary Disclosures**

Managing a self-managed superannuation fund (SMSF) can be complicated, and we understand that occasionally mistakes happen.

## **REGULATOR NEWS**

### **APRA data collection modernisation**

The recent *APRA Insight* - Issue 1 2019 explains that APRA's new Data Collection Solution is only one part of its broader data modernisation program.

### **ASIC's strategic priorities for superannuation**

ASIC Commissioner John Price has set out the regulator's 7 strategic priorities in a keynote address at the Risk Australia Conference on 15 August 2019.

### **Director disqualified for illegal phoenix activity**

ASIC has disqualified a Cairns-based director from managing companies for 5 years due to his involvement in 7 failed companies with debts over \$2m.

### **Quick snapshot of ACCC activities**

We have released our latest Small Business in Focus report providing you with a snapshot of ACCC activities in the small business, franchising and agriculture sectors.

## **TAXATION**

### **TBAR spreadsheet lodgments not accepted from 31 October**

The ATO has advised that it will no longer accept a spreadsheet version of transfer balance account report (TBAR) lodgments from 31 October 2019. With the introduction of online TBAR lodgment via *Online services for agents*, agents will no longer be able to lodge the TBAR spreadsheet form after that date.

While the spreadsheet solution provided an electronic option for some agents when they commenced their transfer balance account reporting, the ATO says it is linked to a higher error rate associated with reverse workflow for agents and slower processing times. The ATO highlighted some advantages regarding the online TBAR form, including pre-filling the supplier and provider details with the agent's details and the SMSF client details.

### **ATO continues to support flood-affected Queenslanders**

The ATO says that it will continue to support those affected by the North Queensland floods in early 2019 as part of a whole-of-government effort to help people get back on their feet. Assistant Commissioner Andrew Watson said that people affected by the disaster should contact the ATO if they are struggling to meet their tax or superannuation obligations.

"The ATO automatically deferred payments and lodgments due from January to May 2019 until 31 May 2019. However, we recognise the floods are still impacting many people in the region and we are committed to assisting people to get back on track. Whether you're an individual, business owner or primary producer, we want to work with you to help sort out your tax affairs." Mr Watson said. Depending on individual circumstances, the ATO may give people extra time to pay their debt or lodge tax forms; re-issue income tax returns, activity statements and notices of assessment; help re-construct tax records that are lost or damaged and fast track refunds; set up a payment plan; and remit penalties or interest charged during the time people have been affected.

## **\$10b refunded so far by ATO**

The ATO says that \$10b has been refunded to Australian taxpayers so far this tax time, an increase of over \$2 billion from this time last year, with most returns being processed in under 2 weeks. ATO Assistant Commissioner Karen Foat highlighted that the ATO seeks to process returns as soon as possible, announcing that over 4 million refunds have already been sent out, compared to over 3 million refunds issued this time last year. Ms Foat listed some things that taxpayers should take care with to ensure their return is not unnecessarily delayed.

"Firstly, it's important to check your bank account details are correct, and if you've changed accounts recently, take a moment to update your details. When refunds get sent to incorrect bank accounts, redirecting them to your new account will take more time. This tax time, we've seen some people who are really keen to get their refund, having missed this important step. Another big obstacle getting between some people and their return is forgetting to declare some income. Common things people forget to include are rental income, bank interest and government allowances or payments – particularly if they lodged before our pre-fill was available."

## **Five charities lose charity status – will lose charity tax concessions**

The Australian Charities and Not-for-profits Commission (ACNC) has announced that 5 organisations have lost their charity status following separate investigations into their activities and operations. The charities that have had their registration with the ACNC revoked are Kaizen Synergy College, White Coats Charity Incorporated, The Trustee for Storybook Angels for Disabled Animals, Australian Community & Health Foundation Limited, and Beyond Community & Health Inc.

ACNC Commissioner, the Hon Dr Gary Johns confirmed that the decision to revoke charity status is taken seriously and is reserved for the most serious cases of misconduct or mismanagement. "Following investigations into these charities, we had no alternative but to revoke the registration of these charities with the ACNC. Without charity status, these organisations will lose their eligibility for Commonwealth charity tax concessions. Dr Johns said if charities fail to display a commitment to their governance, transparency or accountability, "then we will take the appropriate regulatory action".



## ATO to start contacting small employers re STP

Single Touch Payroll (STP) reporting started on 1 July 2019 for small employers (19 employees or less).

The ATO will soon be writing to small employers who have yet to start reporting or apply for a deferral, to remind them of their STP obligations. Small employers have until 30 September 2019 to start reporting or apply for extra time to get ready, says the ATO.

## Glencore loses legal professional privilege "Paradise Papers" appeal

The High Court has unanimously rejected an attempt by the Glencore group to rely on legal professional privilege to prevent the ATO from using documents that were part of the "Paradise Papers": [Glencore International AG v FCT](#) [2019] HCA 26 (High Court, Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ, 14 August 2019). The plaintiffs are companies within the global Glencore plc group. In these proceedings, brought in the original jurisdiction of the High Court, they sought an injunction restraining the defendants – the Commissioner, a Second Commissioner [then Neil Olesen] and a Deputy Commissioner [Mark Konza] – and any other officer of the ATO from making any use of documents described as "the Glencore documents", or any information contained in them. The plaintiffs also sought an order for the delivery up of the Glencore documents. The plaintiffs identified the Glencore documents as having been created for the sole or dominant purpose of the provision by an incorporated law practice in Bermuda (Appleby) of legal advice to the taxpayers. They were among documents known as the "Paradise Papers", which the managing partner of Appleby said were stolen from their electronic file management systems and provided to the International Consortium of Investigative Journalists. The taxpayers claimed that legal professional privilege was a sufficient basis for the grant of the injunction sought, and did not seek to rely on the equitable doctrine of breach of confidence, or to expand any other area of law. The defendants demurred on the principal ground that no cause of action was disclosed by which the taxpayers were entitled to that relief.

The High Court upheld the demurrer, stating that the plaintiffs' argument fundamentally rested upon an incorrect premise, namely that legal professional privilege is a legal right which is capable of being enforced. The privilege is only an immunity from the exercise of powers which would otherwise compel the disclosure

of privileged communications. In other words, legal professional privilege is a "shield" and not a "sword". The Court said that the plaintiffs' case "seeks to transform the nature of the privilege from an immunity into an ill-defined cause of action which may be brought against anyone with respect to documents which may be in the public domain". The Court observed that on the present state of the law, once privileged communications have been disclosed, resort must be had to the equitable doctrine of breach of confidence for protection respecting the use of that material. However, the Court acknowledged that there may be difficulties for the plaintiffs in meeting the requirements for such relief, "given that the Glencore documents are in the public domain and there being no allegation concerning the defendants' conduct or knowledge". Having upheld the demurrer on the ground that no cause of action was disclosed, there was no need to consider the defendants' alternative contention that they were entitled and obliged to retain and use the documents in question by reason of, and for the purposes of, s 166 of the ITAA 1936.

### **ATO welcomes Glencore decision to use information from data leaks**

In a [media release](#) responding to the Glencore High Court decision, the ATO said the Court confirmed that the ATO may use information obtained from data leaks, even if leaked from a law firm. ATO Second Commissioner Jeremy Hirschhorn said the decision means the ATO can continue to use the 'Paradise Papers' and other similar data leaks. "Today's decision is not just a win for the ATO; it's a win for the Australian community who rightly expect the ATO to use all information available to ensure large corporations and those who seek to hide money overseas are paying the right amount of tax," he said. The information in question was already in the public domain. He said the Court's ruling ensures that the ATO will continue to be able to use information in its possession, and can make decisions based on all of the available facts. "An offshore law firm is not a cloak of invisibility to hide offshore arrangements."

The Second Commissioner said the broader ramifications of this decision beyond Glencore are that "the days of being able to hide money overseas are rapidly coming to an end – not only are foreign banks providing the ATO with details of Australians with offshore money, but taxpayers are only one data leak away from their entire affairs being exposed". He said the ATO fully supports the appropriate use of privilege and understands the importance of entities being able to seek advice on issues of law – "we want taxpayers to have full access to high quality independent tax advice". Further, the "critical importance of the case was confirming that the ATO

can use leaked copies of documents like contracts, board minutes and banking details".

## **PSI rules: decision that unrelated clients test not satisfied set aside**

The Federal Court has set aside an AAT decision that income derived by a business analyst through a company was subject to the personal services income (PSI) rules: [Fortunatow v FCT](#) [2019] FCA 1247 (Federal Court, Griffiths J, 12 August 2019). The taxpayer was a business analyst and at all relevant times the sole director of Fortunatow Pty Ltd. The taxpayer provided his services through the company to various large organisations such as government departments, universities, banks and utilities. The company transferred income generated by the taxpayer's personal services to a family trust which was characterised as "management fees". These fees were claimed as deductions and had the effect of reducing the company's taxable income to nil. The trust income was offset against the trust's rental losses. As a result, no tax had been paid by the taxpayer, the company or the family trust on the income generated by the supply of the taxpayer's personal services as a business analyst in 2012 and 2013. The ATO concluded that the PSI rules in Div 86 of the ITAA 1997 applied to include all of the income received by the company in the taxpayer's assessable income for 2012 and 2013. The taxpayer, however, argued that Div 86 did not apply because the unrelated clients test in s 87-20 was satisfied and therefore the income was from conducting a personal services business. The AAT decided in favour of the ATO. All of the work obtained and carried out by the taxpayer in the relevant years was through an intermediary. According to the AAT, the taxpayer was not operating a genuine business as an independent contractor because he, in effect, received referrals from intermediaries (recruitment companies) and allowed those intermediaries to take responsibility for obtaining and dealing with customers.

The issues for determination on appeal were whether the taxpayer made any offers or invitations to the public at large or to a section of the public to provide his services (the fourth element of the unrelated clients test) and, if so, whether the services provided to the unrelated entities were so provided as a direct result of the taxpayer making those offers or invitation (the fifth element). The taxpayer contended that he met the fourth element because of his active profile on LinkedIn and his marketing by word of mouth at industry functions. The Federal Court held that the AAT had misconstrued s 87-20(2) and misapplied its interaction with s 87-20(1)(b). In the Court's view, the exclusion or exception in s 87-20(2) did not apply where, in a case such as this, there was evidence that the taxpayer (or the company) advertised his

services to the public or a segment of the public through a forum such as LinkedIn, and also obtained work through the involvement of an intermediary. According to the Court, simply because an individual or PSE is able to provide services through an intermediary, such as a recruitment or similar agency, this does not constitute the making of an offer or invitation for the purposes of s 87-20(1)(b). More than that is required for the purposes of the unrelated clients test. The Court remitted the matter to the AAT for further reconsideration according to law, as it was not an appropriate case for the Court itself to resolve the issues which remained in dispute.

### **ATO visiting 350 businesses in Darwin to tackle black economy**

The ATO is [planning to visit](#) around 350 small businesses in Darwin in August as part of their mission to tackle the black economy. Assistant Commissioner Peter Holt said ATO officers will be visiting businesses in Darwin following a number of tip-offs from the community about businesses engaging in black economy activities.

"Our intelligence suggests that some businesses are not declaring all of their income to the ATO and avoiding their obligations by not paying their entitlements like super and tax contributions. We have also received reports of some businesses operating without proper GST, PAYG withholding or ABN registrations." The ATO also says that during the visits, some information sessions tailored to support small businesses will be held.

### **Accountants not negligent in preparing tax returns**

The NSW District Court has found that a firm of accountants that took on a new client was not negligent in failing to check work done by the client's previous advisers when preparing financial statements and tax returns: [Mark Hackelton T/as Hackeltons Accountants and Advisers v Manbead Pty Ltd](#) [2019] NSWDC 147 (NSW District Court, Hatzistergos DCJ, 17 April 2019). The plaintiff (MH trading as Hackletons) was an accountant and tax adviser who acted for the defendants, Manbead and its controlling shareholder/director (P), between about March 2007 and late 2014. MH completed the accounts and returns by referring to Manbead's financial statements for 2006 (prepared by P's previous accountant). Eventually the ATO conducted an audit of the tax affairs of P, Manbead and other associated entities for the 2009 and 2010 income years. MH continued to act for the defendants in responding to the audit. In due course, the ATO assessed the defendants for approximately \$8m for unpaid tax, penalties and interest. The ATO agreed to settle the matter for just over \$1.36m. In these proceedings, MH sued Manbead and P for

unpaid fees of \$145,125. They defended the claim (and cross-claimed for damages) on the basis that the fees were for work required to remedy deficiencies in accounting work for the 2007-2012 financial years, which resulted in the damages suffered (the liability to pay the fees and penalties and interest in the 2007-2012 financial years). It was not in issue that MH owed Manbead and P a duty of care to perform the accounting and tax work with reasonable skill and care. MH relied on s 5O of the *Civil Liability Act 2002* (NSW), which provides that "a professional does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice".

In finding for MH, the NSW District Court held that it was reasonable for MH to rely on the information provided by the defendants and that he had no duty or obligation to verify financial statements and tax returns prepared by the previous accountant and lodged with the ATO. Although a tax agent needs to take reasonable steps to be satisfied that the figures that appear in tax returns they prepare can be justified, the Court was satisfied that, by the time Manbead's tax returns and financial accounts for 2007 were lodged with the ATO, MH had adequate source documentation to be satisfied that the returns were accurate with P's instructions. As a result, the Court rejected the assertion that the deficiencies in the accounting work were due to MH's negligence in not enquiring as to the source of potentially declarable income. Applying the *Civil Liability Act*, the Court said that, taking into account the matters in s 5B(2) of the Act, it was not satisfied that a reasonable person in MH's position would have taken precautions, such as re-checking the work performed by P's previous accountant, against a risk of harm. The Court also rejected the defendants' cross claim based on s 251M of the ITAA 1936 (now repealed), which allowed a taxpayer to recover any penalties and interest payable as a result of the negligence of a tax agent. In making its decision, the Court observed that Australian Professional Ethical Standards (APES) 110, 220 and 305 are mandatory only to members of the Institute of Chartered accountants, CPA Australia and the Institute of Public Accountants. Since neither MH, his father or M had the qualifications and skill for membership of those bodies, the relevant standard of care was not "informed by the APES".



## Director penalty notice liability stands

The Full Federal Court has dismissed an appeal against a decision confirming an ATO application for summary judgment in respect of a director penalty notice (DPN) liability of almost \$160,000. This followed the director in question (P) being unable to convince the Court that payments by the company extinguished or reduced the specific debt identified in the DPN. [\*Pedley v Deputy Commissioner of Taxation\* \[2019\] FCAFC 130](#), Full Federal Court, Davies, Colvin and Abraham JJ, 8 August 2019. In January 2014 the ATO issued a DPN to P in respect of PAYG withholding amounts for the period August to November 2013 (the DPN liability period). Between April and August 2014, the company entered a payment agreement with the ATO which forestalled the commencement of recovery action by the ATO. Immediately before making these payments, the company's tax liabilities stood at \$684,066 and comprised a range of liabilities including many earlier than, and different from, the PAYG withholding amounts attributable to the DPN liability period. In May 2015, when the ATO commenced action to recover on the DPN, P's liability had been reduced to \$159,767 to reflect the allocation of \$44,050 of the company's payments in reduction of the PAYG withholding amounts attributable to the DPN liability period. The balance of the company payments was allocated in reduction of its earlier tax liabilities, in line with the ATO approach set out in Practice Statement PS LA 2011/16.

At first instance, in *DCT v Pedley* (No 2) [2018] FCA 2015, McKerracher J found that there was no basis for a conclusion that the payments made by the company under its payment arrangement with the ATO were intended to be made for the benefit of reducing P's parallel liability, nor was any such request made at any time. His Honour concluded that none of the payments for which the ATO sought recovery were payments previously made by the company in reduction of P's liability. The Full Federal Court has upheld this decision, primarily because the appeal identified no evidence to displace the evidence presented to McKerracher J and there was no jurisdictional error on his Honour's part. In reaching this conclusion, the Full Court commented that: the liability of a director (in this case P) is derivative, in the sense that it arises as a consequence of the company not meeting its obligations, and therefore P's appeal proceeded upon the false premise that his liability to pay a penalty was to be determined independently of the nature and extent of the company's liability; and by virtue of s 8AAZLE of the TAA, the ATO is under no obligation to allocate or appropriate payments received in a particular way, and is not

obliged to apply them first in a manner that would reduce the liability of a director under a DPN.

## TPB terminates tax agent registrations

The Tax Practitioners Board (TPB) recently terminated the registrations of a number of tax agents, both individuals and companies in the following cases.

- Failure to take reasonable care: A tax agent company's registration was terminated after ATO audits on 21 clients for the 2013 and 2014 financial years had led to the disallowance of work-related expenses because the relevant expenses were not adequately substantiated and/or the clients did not demonstrate sufficient connection between the claims and the work-related activities.
- Multiple breaches of Code: The TPB received a complaint from a former client of a tax agent claiming the tax agent had carried out fraudulent activity by: (i) making changes to their 2017 income tax returns without authority; (ii) lodging amended 2015 and 2016 tax returns without the client's authority or knowledge.
- A tax agent company and individual (sole director) had their registration terminated after it was found they had a personal tax and superannuation debt of over \$1.4 million.

## Partnership income subject to PSI rules

The Federal Court has upheld a decision that a personal services entity (PSE) did not satisfy the results test and therefore the personal services income (PSI) received through the PSE was assessable to the individual providing the relevant services: [Douglass v FCT](#) [2019] FCA 1246 (Federal Court, Griffith J, 12 August 2019). The taxpayer was an electronics engineer who, during the 2013 and 2014 income years, provided services through a partnership with his wife (the PSE). The services related to his role in respect of a project being carried out by BHP Billiton. The business income received by the partnership was split equally between the taxpayer and his wife. The ATO concluded that the PSI rules in Div 86 of the ITAA 1997 applied to include all of the income received by the partnership in the taxpayer's assessable income for 2013 and 2014. The taxpayer, however, argued that Div 86 did not apply because the results test in s 87-18 was satisfied and therefore the income was from conducting a personal services business. In *Douglass and FCT* [2018] AATA 3729, the AAT decided that the results test was not satisfied and upheld the 2013 and 2014 assessments. The AAT said that the taxpayer confused "working for an overall

result" with the requirement in s 87-18 that the income is "for producing a result". The AAT considered the former to be so general that it would mean that all engineers engaged to work by contract would be excluded from the PSI rules. The AAT also upheld the imposition of a 50% shortfall penalty based on recklessness.

On appeal, the taxpayer submitted that the AAT's findings that the work done by him was ordinarily done by an independent contractor and that it was the custom or practice that work of the relevant kind was not performed by an employee, meant that the results test was satisfied by virtue of s 87-18(4). The Federal Court accepted the ATO's contention that neither the text nor context of s 87-18 supported the taxpayer's position. While the results test is based on the common law criteria for characterising an independent contractor as opposed to an employee-employer relationship, the test must be satisfied by meeting the 3 specified statutory criteria. Consequently, it is not necessary for the purposes of s 87-18(3) that all the recognised common law criteria for an independent contractor be present as long as the 3 statutory criteria are satisfied. The Court also upheld the 50% shortfall penalties, agreeing with the AAT that the taxpayer's failure to include in his returns for the relevant years the PSI generated by the work he performed on the project "merits characterisation as gross carelessness".

### Online services for agents to become default login option

The ATO has [advised](#) that the *Online services for agents* public beta for tax agents ended on 17 August 2019, when the login page changed. *Online services for agents* will be practitioners' default login option. In January 2019, the ATO began to gradually rollout *Online services for agents* in a public beta. Since then, it has reviewed around 2,500 items of feedback and is ready to finalise the beta for tax agents.

The ATO says the benefits of *Online services for agents* are to get real-time updates without needing to contact the ATO; register, update and cancel tax registrations; make and view payment arrangements; and see more obligations and accounts, including taxable payments annual reports, super accounts and GST property credits. The ATO notes that tax agents will still be able to access the Tax Agent Portal, but the ATO has stopped building new functions into it.



## ATO black economy crackdown on small businesses in North Qld

The ATO [has announced](#) that it will be visiting around 400 small businesses in Cooktown and Port Douglas, Far North Queensland during August and September as part of the agency's work to tackle the black economy and protect honest businesses from unfair competition. Assistant Commissioner Peter Holt said "we've received numerous community referrals from people in Cooktown and Port Douglas about some businesses getting an unfair advantage over their honest competitors. Our intelligence suggests that some businesses are not declaring all of their income to the ATO or paying staff in cash which means employees may be missing out on their entitlements like super."

"We understand that some businesses may be operating in cash and not have merchant payment facilities due to individual circumstances. The issue is when businesses are deliberately 'cash only' to avoid reporting all their income. By detecting and addressing this behaviour, we're helping to keep things fair for honest small businesses in FNQ." The ATO notes that during the visits, it will also be running some information sessions tailored to support small businesses.

## Expansion of taxable payments reporting system

The ATO has issued [Law Companion Ruling LCR 2019/4](#), discussing the recent extension of the taxable payments reporting system (in Subdiv 396-B of Sch 1 to the TAA) to entities providing the following services: road freight services. (These services have been added to item 12 in s 396-55 to form the combined "courier and road freight" category); security, investigation or surveillance services; and information technology services.

ABN holders who supply these services are required to advise the ATO of any payments (or other consideration) they make to contractors on or after 1 July 2019, where such consideration is wholly or partly for providing a service on their behalf. The first annual report (the Taxable payments annual report) will be due by August 2020. Date of effect: LCR 2019/4 applies from 1 July 2019. It finalises Draft LCR 2018/D8 and contains the same approach as the draft.

## Proposed changes to tax and super laws, and ATO admin treatment

The ATO has provided a handy [update of the status](#) of proposed changes to tax and super laws stemming from the 2019-20 and 2018-19 Federal Budgets and the 2018-19 MYEFO Statement. It has also provided details of its administrative treatment of

retrospective legislation. All Bills before Federal Parliament at the time the election was called lapsed. Some of the measures noted on the ATO webpage were announced but not enacted prior to the election. Whether those measures proceed is a matter for the government to decide.

2019-20 Budget measures listed include: extension and expansion of the ATO Tax Avoidance Taskforce on Large Corporates, Multinationals and High Wealth Individuals – proposed to start 1 July 2019; and strengthening the ABN system – proposed to start 1 July 2019.

2018-19 MYEFO measures listed include: Superannuation guarantee amnesty – currently before House of Reps in the *Treasury Laws Amendment (2018 Superannuation Measures No 1) Bill 2019*; and Disclosure of business tax debts – amendments – currently in the *Treasury Laws Amendment (2019 Tax Integrity and Other Measures No 1) Bill 2019* which has passed the House of Representatives without amendment and is currently before the Senate.

### **TPB review - ATO proposes penalty for tax agents causing tax shortfall for clients**

The recently [released](#) Discussion Paper on the review of the Tax Practitioners Board (TPB) could result in some significant changes affecting tax practitioners. The Discussion Paper considers potential reforms to the regulation of tax practitioners in Australia and discusses the effectiveness of the TPB and the operation of the *Tax Agent Services Act 2009* (TASA) and the *Tax Agent Services Regulations 2009* (TASR). Among other things, it has flagged the possibility of applying administrative penalties on tax practitioners, where the taxpayer has a tax shortfall owing to the tax practitioner's fault.

The current administrative penalty regime administered by the ATO creates a liability on the relevant taxpayer, even if the penalty is due to the tax practitioner's fault. While the taxpayer may seek a reduction of all or part of their penalty, the current law does not operate to apply and collect these penalties from the practitioner, where the penalised behaviour may have occurred. Submissions on the Discussion Paper are due by 30 August 2019. A Final Report is due to be provided to the Government by 31 October 2019.

## **Cleaners, couriers and construction industry reminded to lodge TPAR**

The ATO has reminded businesses that provide cleaning or courier services, as well as businesses in the construction industry that they may need to lodge a Taxable Payments Annual Report (TPAR) with the ATO by 28 August 2019. ATO Assistant Commissioner Peter Holt said the Taxable Payment Reporting System (TPRS) has been a requirement in the building and construction industry since 2012, and this is the first year that businesses that provide cleaning or courier services may need to lodge.

"Payments made to contactors or subcontractors who have provided cleaning or courier services on behalf of businesses in these industries in the 2018-19 financial year must be reported to the ATO – including cash payments," Mr Holt said. Businesses that provide a range of services, not just cleaning or courier services – known as "mixed businesses" – may also need to report if payments they received for cleaning or courier services make up 10% or more of their total GST turnover. In practice this means that if the payments the business receives for cleaning or courier services are only a minor part of their overall turnover then it is unlikely they will need to lodge a TPAR.

## **ATO watching for undisclosed foreign income this tax time**

The ATO has reminded taxpayers who receive any foreign income from investments, family members or working overseas to make sure they report it this tax time. The ATO says that new international data sharing agreements allow the ATO to track money across borders and identify individuals not meeting their obligations. "This year, the ATO has received records relating to more than 1.6 million off-shore accounts holding over \$100 billion and is now using data-matching and sophisticated analytics to identify foreign income that has not been reported," Assistant Commissioner Karen Foat said.

Under the new Common Reporting Standard (CRS), The ATO has shared data on financial account information of foreign tax residents with over 65 foreign tax jurisdictions across the globe. This includes information on account holders, balances, interest and dividend payments, proceeds from the sale of assets, and other income. "If you're an Australian resident for tax purposes, you are taxed on your worldwide income, so you must declare all of your foreign income no matter how small the amount may be. This may include income from offshore investments,

employment, pensions, business and consulting, or capital gains on overseas assets," Ms Foat said.

## **Consultation paper: ATO's approach to disclosure of business tax debt**

The ATO has released [Consultation paper: The ATO's administrative approach to the disclosure of business tax debt information to credit reporting bureaus](#). The purpose of this paper is to facilitate the consultation process between the ATO, businesses and credit reporting bureaus (CRBs) on the ATO's administrative approach to the Disclosure of Business Tax Debts measure. While this document helps explain some aspects of the proposed law (the *Treasury Laws Amendment (2019 Tax Integrity and Other Measures No 1) Bill 2019*, which has passed the House of Reps without amendment and is currently before the Senate) and draft legislative instrument (the *Draft Taxation Administration (Tax Debt Information Disclosure) Declaration 2019*), the focus is on the ATO's proposed administrative approach.

The Bill proposes to amend the TAA to allow taxation officers to disclose the business tax debt information of a taxpayer to credit reporting bureaus when certain conditions and safeguards are satisfied. The Bill would allow the ATO to disclose to credit reporting bureaus the tax debt information of businesses that have owed the ATO at least \$100,000 for more than 90 days and have not effectively engaged with the ATO to manage their debt. Comments are due by 6 September 2019.

## **Luxury car tax adjustments and GST claims disallowed**

A taxpayer has been unsuccessful in contesting assessments which disallowed claims for input tax credits and decreasing luxury car tax (LCT) adjustments on the purchase of luxury vehicles: [Stallion \(NSW\) Pty Ltd v FCT \[2019\] FCA 1306](#), Federal Court, Thawley J, 19 August 2019. The taxpayer was a company involved in the purchase of 9 luxury cars between November 2016 and February 2017. The taxpayer contended that it purchased the cars itself and then on-sold them to another entity (CJS), which in turn sold them to its clients.

The taxpayer did not quote its ABN on the purchase of each car, which meant that it paid LCT as well as GST on each purchase. It then claimed the related input tax credits and decreasing LCT adjustment for each car in the respective BAS. Key to the taxpayer's claim was that it purchased the cars in its own name and that there was then an actual sale of the cars by the taxpayer to CJS. The taxpayer's appeal was dismissed with costs. The Federal Court was not satisfied that the taxpayer

purchased the vehicles on its own account, became the beneficial owner of the cars or sold the cars to CJS. Rather, the true legal effect of the parties' conduct was that CJS was the purchaser of each of the 9 luxury vehicles and that the taxpayer acted as its agent in signing the contracts for the purchase. As the taxpayer was not the purchaser, it was not eligible for decreasing LCT adjustments or to claim input tax credits.

### **Draft waiver of tax invoice for corporate card statement cardholders**

The [Draft Goods and Services Tax: Waiver of Tax Invoice Requirement \(Corporate Card Statements\) Determination 2019](#) has been released, allowing corporate card holders (under s 29-10(3) of the GST Act) to claim input tax credits without holding a tax invoice in certain circumstances.

The Instrument repeals and replaces *Goods and Services Tax: Waiver of Tax Invoice Requirement (Corporate Card Statements) Legislative Instrument 2017* (F2017L01018) registered on 14 August 2017. Comments are due by 4 September 2019.

### **GST meaning of improvements on the land**

The ATO has released an [Addendum](#) to [GST Ruling GSTR 2006/6](#). This ruling considers the meaning of the phrase "improvements on the land" for GST purposes. The Addendum provides further details and clarification of the ATO view in order to make it easier for relevant entities to meet their GST obligations. In particular, the Addendum amends GSTR 2006/6 by: expanding the commentary on human intervention; noting that while a professional valuer's opinion may assist in determining whether an intervention enhances the value of land, valuation concepts are not relevant in determining whether the intervention objectively enhances the usefulness of the land to an occupier; and adding new commentary and examples on subdivided land and land with multiple titles.

Date of effect: The Addendum applies before and after its date of issue. A draft version of the Addendum was released in June 2018. Some refinements have been made to the final Addendum.

## **FINANCIAL SERVICES**

### **Ending grandfathered remuneration: details requested by ASIC**

ASIC has [issued notices](#) to financial sector entities requesting details on their progress towards ending grandfathered conflicted remuneration arrangements for financial advisers. This follows the *Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019*, introduced on 1 August 2019, which proposes to ban grandfathered conflicted remuneration by 1 January 2021.

As previously directed by the Treasurer, ASIC is reviewing the steps taken by industry participants from 1 July 2019 until the 2021 deadline. ASIC will also investigate any impediments to this transition, and the extent to which benefits are being passed on to affected clients.

### **Banking Royal Commission – Govt implementation roadmap**

The Government has [released](#) an Implementation Roadmap for its response to the recommendations of the Royal Commission into misconduct in the banking, superannuation and financial services industry. The Treasurer, Josh Frydenberg, said 54 of the Commission's 76 recommendations were directed to the Government, while 12 were aimed at the regulators (APRA and ASIC) and 10 were for the industry. Of the 54 recommendations directed to the Government, over 40 require legislation. In addition, the Government announced a further 18 commitments.

The Government said it has already implemented 15 of its commitments. This comprises 8 of the 54 recommendations, and 7 of the Government's 18 additional commitments. The Treasurer said significant progress has also been made on a further 5 recommendations with draft legislation either introduced to the Parliament, released for comment or detailed consultation papers issued. Date of effect: For measures contained in legislation introduced before 1 July 2020, the Government expects the majority to commence by 1 July 2020 or Royal Assent.

### **Financial Institutions Supervisory Levies – discussion paper released**

Treasury has [released](#) a discussion paper on the design and operation of the Financial Institutions Supervisory Levy. The levy is designed to cover the majority of the costs of APRA, and to fund specific costs for a range of other Commonwealth agencies and departments (eg ATO and ASIC). The discussion paper is separate to



the annual Proposed Financial Industry Levies paper released each year. That paper generally focuses on how the levy for a particular year is calculated, while this discussion paper focuses on the methodology that is applied in calculating the levy.

Treasury notes that the maximum amount payable by ADIs under the restricted component was unable to be increased for 2019-20 due to a cap imposed by legislation. As a result, funding associated with the supervision of large institutions was deferred until 2020-21, subject to legislative changes amending the statutory cap. Questions raised for consultation in the paper include: Is the current levy base appropriate for each industry sector? What is the appropriate level for the statutory cap for the restricted component of the levies on ADIs? What changes would stakeholders find useful to the annual levies consultation process? Comments are due by 13 September 2019.

## **SUPERANNUATION**

### **Super focus areas from ATO roadshows**

The ATO has [released](#) its presentation to the 2019 ASFA National Policy Roadshow outlining emerging superannuation focus areas for 2019-20. Topics covered included the taxation of compensation received by super funds, pension tax bonuses, successor fund transfers and the treatment of inactive low-balance accounts. The ATO noted that it held 5.39 million super accounts worth \$3.98bn as at 2 July 2019. Of this money, the ATO estimated that it will now be able to reunite \$473m to 485,000 fund members using the Protecting Your Super measures.

The ATO also flagged that the pension transfer balance cap (TBC) of \$1.6m could increase by \$100,000 on 1 July 2020 or 1 July 2021, depending on when the CPI index number reaches 116.9. While the ATO does not expect indexation to occur until at least 1 July 2021, the ATO says it is important to consider what this may mean for funds and members. Once indexation of the general transfer balance occurs, there will be no single personal TBC which applies to all members with a retirement phase income stream. Each member will potentially have their own personal TBC.

## SMSF voluntary disclosures of contraventions

The ATO has [reported](#) that over 920 SMSFs have used the ATO's early engagement and voluntary disclosure service since it was introduced in 2016. In these cases, the ATO said it was able to work with the fund's trustees and advisers to develop a rectification proposal to get the SMSF back on track, or allow it to wind up. If an SMSF trustee or their adviser voluntarily discloses an unrectified contravention of the SIS Act or Regs before the ATO commence an audit, the ATO says the disclosure will be taken into account in determining the enforcement action it takes, and any remission of administrative penalties. However, the voluntary disclosure service is not available where the SMSF has already received notification of an ATO audit or review.

To utilise this service, the ATO disclosure form should be completed by either the SMSF trustee, auditor or other professional. All relevant facts and supporting documentation must be provided, together with a rectification proposal. Any outstanding SMSF annual returns must also be lodged prior to utilising the service.

## ATO guidance on incorrect ENCC determinations

ATO has [issued guidance](#) concerning incorrect excess non-concessional contribution determinations. The ATO says an incorrect excess non-concessional contribution (ENCC) determination may issue "due to a known system issue" with the calculation of some SMSF members' total super balance (TSB). This is due to incorrectly 'double counted' an individual's pension in the calculation of their TSB. The ATO says this may occur where the SMSF has lodged transfer balance account reports (TBARs) with the ATO reporting pensions with an effective date of 30 June 2017 and 1 July 2017.

The ATO says it has fixes and processes in place to prevent an incorrect ENCC determination issuing in these circumstances. If an incorrect ENCC determination does issue, the ATO says there is no need for the SMSF to amend its reporting – an amended determination should issue within 4 weeks. If an amended ENCC determination does not issue within 4 weeks, those affected should contact the ATO by emailing [SuperAdvice@ato.gov.au](mailto:SuperAdvice@ato.gov.au). An incorrect determination is, in the ATO's view, more likely to issue where an SMSF is reporting late or amending its TBAR reporting as this will trigger the ATO's calculation of the individual's total super balance and override any fixes already in place.



## **ATO checking nearly 18,000 SMSFs re investment strategy**

At the end of August 2019, [the ATO says](#) it will contact about 17,700 SMSF trustees and their auditors where ATO records indicate the SMSF may be holding 90% or more of its funds in one asset or a single asset class. The ATO is concerned some trustees haven't given due consideration to diversifying their fund's investments; this can put the fund's assets at risk.

Lack of diversification or concentration risk can expose the SMSF and its members to unnecessary risk if a significant investment fails. The ATO will ask trustees to review their investment strategy to ensure it complies with regulation 4.09 of the SIS Regs. The ATO will also ask trustees to have their documentation ready for their SMSF's approved auditor for their next audit to help the auditor form an opinion on the fund's compliance with these requirements.

## **Super Downsizer Measure: common errors**

The Downsizer Measure, which started on 1 July 2018, has seen older Australians sell their homes and contribute up to \$300,000 of the proceeds from the sale into super. The [ATO says](#) that it is seeing some common mistakes around eligibility for the Downsizer Measure. So, the ATO reminds tax practitioners that: their client or their spouse must have owned their home for 10 years or more prior to sale; the date for contract of sale must be 1 July 2018 or later; and the proceeds from the sale of the home must be either exempt or partially exempt from capital gains tax under the main residence exemption, or would be entitled to such an exemption if the home was a CGT rather than a pre-CGT asset.

The ATO also warns that tax agents' clients should know they are eligible before making a downsizer contribution. If a contribution is found to be ineligible, it could be re-reported as a non-concessional contribution and their client may receive an excess non-concessional contribution determination. False and misleading penalties may also apply.

## **SMSF Voluntary Disclosures**

Managing a self-managed superannuation fund (SMSF) can be complicated, and we understand that occasionally mistakes happen. Where a trustee has made a mistake and contravened the super laws, we encourage them to work with their appointed SMSF professionals to rectify the contravention as soon as possible.

We have recently published an article on our SMSF early engagement and voluntary disclosure service, which offers a single entry point for SMSF trustees and professionals to engage early with us in relation to unrectified contraventions.

The article, which can be accessed [here](#), sets out how to use this service, and how any action a trustee takes may be taken into consideration in determining the enforcement action we take and the appropriate level of remission of administrative penalties.

## **REGULATOR NEWS**

### **APRA data collection modernisation**

The recent *APRA Insight* - [Issue 1 2019](#) explains that APRA's new Data Collection Solution is only one part of its broader data modernisation program. APRA's Data Collection Solution is set to replace its "Direct to APRA" (D2A) reporting tool for around 4,500 reporting entities from mid-2020. APRA said it is also overhauling its processes and infrastructure for storing, analysing and delivering data, with future benefits for both industry and the wider public. To this end, APRA has built a new Enterprise Data Warehouse (EDW) that will enable deeper analysis of data. It has also set up a new Innovation Centre Laboratory (ICL) to experiment with information and test the use of artificial intelligence.

Once the new system is implemented, APRA said it will focus on harnessing its increased data capability to gather more granular data to support supervision, eg in relation loan level information on residential mortgages. APRA will also use data models rather than forms to reduce the reporting burden on entities. APRA also reported that there was a significant reduction in the number of APRA-regulated superannuation funds from 2008 to 2018. The number of corporate super funds has shrunk from 143 to 24 over the decade, while the 118 retail superannuation funds remained the most common type of APRA fund. Industry funds have also decreased to 38 funds but they overtook the 24 corporate funds during this period. There are also 22 public sector funds.

### **ASIC's strategic priorities for superannuation**

ASIC Commissioner John Price has set out the regulator's 7 strategic priorities in a [keynote address](#) at the Risk Australia Conference. The priorities include: Effective

and efficient enforcement action; Addressing the Royal Commission's recommendations and referrals; Establishing ASIC as conduct regulator for superannuation; and Protecting vulnerable consumers.

In terms of superannuation, ASIC said consumers are susceptible to the threats of poor product design and substandard governance and risk management. It is therefore committed to taking decisive regulatory and enforcement action to deter misconduct and potential harms. For example, ASIC is watching for the inappropriate establishment of SMSFs when they may not be in the best interests of the client, given the cost of management of the fund, portfolio concentration risk, loss of protections, or size of investment. Mr Price said ASIC will undertake supervision and surveillance of superannuation trustees, including more frequent on-site visits to ensure trustees act in the best interests of consumers. In conjunction with its enforcement priority, ASIC said it will prioritise action against individuals for governance failures in financial institutions and superannuation trustees that result in consumer harm through poor governance and risk management.

### **Director disqualified for illegal phoenix activity**

ASIC has [disqualified](#) a Cairns-based director from managing companies for 5 years due to his involvement in 7 failed companies with debts over \$2m.

ASIC alleged that the director had improperly used his corporate position to gain an advantage for himself and enabled conduct that showed evidence of illegal phoenix activity. ASIC further alleged that he had failed to pay taxes and exercise his duties as a director with due care and diligence. As a member of the Phoenix Taskforce, ASIC said it collaborates with other government agencies to combat illegal phoenix activity.

### **Quick snapshot of ACCC activities**

We have released our latest [Small Business in Focus report](#) providing you with a snapshot of ACCC activities in the small business, franchising and agriculture sectors.

The report shows what actions have been taken by the ACCC within the last six months to help support small business, and discusses issues affecting businesses in Australia.

### Key highlights:

- judgements against Ultra Tune Australia (currently under appeal) and Geowash (former franchise) for breaches of the Australian Consumer Law and the Franchising Code
- stevedoring companies agreed to remove or amend potential unfair contract terms after discussion with the ACCC
- a trader in fresh fruits agreed to change a potentially unfair term in its horticulture produce agreements with growers
- looking at potential reforms in a number of agriculture markets relating to dairy, beef cattle and wine grapes
- a new education campaign as part of the franchising project, titled [Buying a Franchise? Know the risks](#) aimed at prospective franchisees.

Find out more in our [media release](#).

If you missed the multi-agency webcast 'A Small Business Journey' last week, you can now watch the video or read the transcript at the [Viostream](#) website.