

## **TAXATION**

### **ATO collects cryptocurrency data to ensure tax compliance**

The ATO is collecting bulk records from cryptocurrency designated service providers as part of a data matching program to ensure traders are paying the right amount of tax.

### **Consolidation: non-refundable R&D tax offsets**

The ATO has reviewed ATO ID 2015/6 regarding non-refundable R&D tax offsets and has proposed no change.

### **CPI unchanged for March quarter 2019**

The Australian Bureau of Statistics has released the CPI indexation factor for the March quarter 2019 showing no movement from the December 2018 quarter of 114.1.

### **Decision to cancel tax agent's registration set aside**

An AAT decision affirming the termination of a tax agent's registration has been set aside on grounds of procedural unfairness: *Beckett v Tax Practitioners Board*.

### **FBT issues on ATO radar**

With the date for lodging and paying FBT approaching (21 May), the ATO has reminded employers that a number of mistakes attract the ATO's attention.

### **No stay for tax agent registration termination order**

A tax agent has been unsuccessful in seeking a stay of the Tax Practitioners Board determination to terminate his registration: *Hill v TCB*.

### **Truck driver fails to establish entitlement to PAYG credits**

The Federal Court has held that a taxpayer was not entitled to PAYG withholding credits as it was not satisfied amounts had been withheld from his wages: *Price v FCT*.

## **Appeals update**

Taxpayers have appealed to the Full Federal Court from the decision of Thawley J in *Paule v FCT* [2019] FCA 394.

## **Ombudsman's report into ATO's small business debt collection**

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) has issued a report into the ATO's enforcement of debt recovery.

## **PwC discloses average tax rate of partners**

PwC Australia has disclosed that its partners pay an average tax rate of 37% on the profits of the firm.

## **FINANCIAL SERVICES**

### **Ending grandfathered commissions: Draft Regs opposed**

The Australian Institute of Superannuation Trustees has joined Industry Super Australia in opposing the Exposure Draft Regulations on grandfathered commissions.

### **AFS licensee suspended for breaching financial reporting obligations**

ASIC has suspended the AFS licence of a Sydney-based financial services provider until 25 June 2019 for allegedly breaching its financial reporting and audit obligations.

## **SUPERANNUATION**

### **SMSF rollovers in SuperStream: ATO update**

The ATO has advised that it is continuing to work towards a 30 November 2019 start date for electronic SMSF rollovers via SuperStream.

### **Super death benefit for de facto partner upheld**

Federal Court has dismissed an appeal against a decision to pay a super death benefit pension to the deceased member's de facto partner instead of a lump sum to his estate.

## **REGULATOR NEWS**

### **Income protection insurance: APRA calls for improvements**

APRA has called on life insurers to urgently address concerns about individual disability income insurance, also known as income protection insurance.

### **APRA Prudential Standard review: Super member outcomes test**

APRA has issued draft revisions to SPS 515 to clarify how the legislated outcomes assessment interacts with APRA's requirements for RSE licensees to undertake a BPR.

## **TAXATION**

### **ATO collects cryptocurrency data to ensure tax compliance**

The ATO has [advised](#) that it is collecting bulk records from Australian cryptocurrency designated service providers (DSPs) as part of a data matching program to ensure people trading in cryptocurrency are paying the right amount of tax. The data obtained will be used to identify the buyers and sellers of crypto-assets and quantify the related transactions. The data provided by the DSPs will be matched against ATO records to identify individuals who may not be meeting their registration, reporting, lodgment and/or payment obligations. The Commissioner has also lodged a gazette notice setting out the record keeping requirements for cryptocurrency owners and traders.

To ensure that tax law requirements align with a whole of system approach the ATO will be working with other regulators, in particular the Australian Transaction Reports and Analysis Centre and the Australian Securities and Investments Commission. Following the data matching exercise people may be contacted by the ATO and given the opportunity to verify the information collected, before any compliance action is undertaken. People will be given at least 28 days to clarify any information that has been obtained from the data provider.

### **Consolidation: non-refundable R&D tax offsets**

The ATO has updated its 2019 completed issues webpage to confirm that it will not publish a Taxation Determination to replace ATO ID 2015/6. The ATO said it has completed a review of whether to replace ATO ID 2015/6 with a Taxation Determination that would provide advice more generally on how a joining entity's non-refundable carried forward tax offsets may be accessed and utilised by the head company of the joined consolidated group.

After completing its review of this issue, the ATO said it does not propose to publish any further guidance. The ATO view on this issue in [ATO ID 2015/6](#) remains available on the Legal database. The ATO ID states that the head company of a consolidated group can access the non-refundable carry forward R&D tax offsets available to the joining entity at the joining time. In order to apply the carry forward tax offset after the joining time, the ATO says the head company will need to overcome the limitations in s 65-40 of the ITAA 1997. These include satisfying either

the continuity of ownership test or the same business test under Subdiv 165-A of the ITAA 1997.

### **CPI unchanged for March quarter 2019**

The Australian Bureau of Statistics (ABS) has [released](#) the CPI indexation factor for the March quarter 2019 showing no movement (0.0) from the December 2018 quarter of 114.1.

The ABS said inflation was running at 1.3% through the year to March quarter 2019. The most significant rises in this quarter were vegetables (+7.7%), secondary education (+4.2%) and motor vehicles (+2.4%). These price rises were fully offset by price falls in automotive fuel (-8.7%), domestic holiday, travel and accommodation (-3.8%) and international holiday, travel and accommodation (-2.1%).

### **Decision to cancel tax agent's registration set aside**

An AAT decision affirming the termination of a tax agent's registration has been set aside on grounds of procedural unfairness. [Beckett v Tax Practitioners Board](#) [2019] FCA 353, Federal Court, Griffiths J, 17 April 2019. In November 2017, the Tax Practitioners Board terminated the applicant's registration as a tax agent as it did not consider she was a "fit and proper person". The Board's decision was based on, among other things, convictions in 2017 for presenting in sworn evidence to officers from the NSW Office of State Revenue in September 2010, photocopies of bank cheques with a false date and for making false statements about them. The AAT affirmed the Board's decision (in *Beckett and Tax Practitioners Board* [2018] AATA 1860), stating that unchallenged character references from 4 of her 1400 clients were insufficient to establish she was a fit and proper person.

The Federal Court has accepted the tax agent's submission that she had been denied procedural fairness. This was because the AAT had failed to give adequate notice to the tax agent of the possibility that it may make adverse findings concerning her conduct in September 2010 (the AAT made discreet and serious adverse findings that "the tax agent's preceding conduct was dishonest, knowingly improper and involved misconduct"). The court also held that the AAT should not have rejected the unchallenged character references, commenting that what was left entirely unclear was how many more client affidavits would be required to provide a basis for being satisfied that the tax agent was a fit and proper person. "Is it 10, 50, 100, 500, or every one of those clients?" Although the court rejected 2 other

submissions by the tax agent, it set aside the AAT's decision and remitted the matter to a differently constituted AAT for reconsideration according to law.

### **FBT issues on ATO radar**

With the date for lodging and paying FBT approaching (21 May), the ATO has [reminded](#) employers that a number of mistakes attract the ATO's attention, including the following:

- failing to report car fringe benefits, incorrectly applying exemptions for vehicles or incorrectly claiming reductions for these benefits;
- mismatches between the amount reported as an employee contribution on an FBT return compared to the income amounts on an employer's tax return;
- incorrectly calculating car parking fringe benefits; and
- not lodging FBT returns (or lodging them late) to delay or avoid payment of tax.

### **No stay for tax agent registration termination order**

A tax agent has been unsuccessful in seeking a stay of the Tax Practitioners Board determination to terminate his registration: [Hill v Tax Practitioners Board \(Taxation\)](#) [2019] AATA 756. The tax agent had been in practice since 1980. Following an investigation that commenced in September 2018, the TPB decided to terminate his registration and prevent him from applying for re-registration for 5 years. This was done on the basis that the agent had allegedly not complied with the Code of Professional Conduct requirement to act honestly and to comply with taxation laws in the conduct of his personal affairs. Breaches allegedly included making false and misleading statements (by failing to disclose various overdue tax obligations), being personally culpable (as a director or tax agent) in the failure of various entities to lodge returns and BASs, as well as the non-remission of SGC and PAYG amounts by these entities.

The tax agent argued that he had never had any personal substantial overdue tax obligations and that the Code of Conduct obligation did not extend to include compliance by corporate entities. In other words, the term "personal tax obligations" required a distinction between an agent's obligations as an individual taxpayer and the taxation law obligations a person might incur as an officer of a corporate taxpayer. The AAT held that the facts showed that the agent did indeed have outstanding individual taxation payment obligations (amounting to some \$700,000 by late 2018). Further, the agent did not provide specifics in response to standard

disclosure questions about the outstanding tax debts. This gave rise to the need for careful assessment of the subjective honesty of the response. This in turn gave rise to a question about his underlying fitness to be a tax agent. For this reason, the AAT dismissed the agent's application.

### **Truck driver fails to establish entitlement to PAYG credits**

The Federal Court has held that a taxpayer was not entitled to PAYG withholding credits as it was not satisfied amounts had been withheld from his wages: [Price v FCT](#) [2019] FCA 543 (Federal Court, Thawley J, 18 April 2019). The taxpayer was a truck driver who, for the 2001-2016 income years, was employed by 4 different corporate entities, each of which was said to have been controlled by his brother. The taxpayer contended that his employers had withheld amounts from his wages under the PAYG system, but had not remitted those amounts to the ATO. The amounts allegedly withheld varied between \$22,120 and \$25,460.

Unfortunately for the taxpayer, he was unable to satisfy the court that any PAYG amounts had been withheld from his wages. For the 2001-2015 income years, the factors that weighed against the taxpayer included: the absence of any records from the ATO supporting the inference that amounts had been withheld and the lack of any contemporaneous record of any person or entity who paid the taxpayer evidencing that any amount had been withheld. As regards the 2016 income year, the court was not satisfied that the employer withheld the amounts identified in the 2016 payment summary.

### **Appeals update**

Taxpayers have appealed to the Full Federal Court from the decision of Thawley J in [Paule v FCT](#) [2019] FCA 394. The Federal Court had held that a capital gain made on the sale of shares following a series of roll-overs was not a discount capital gain, as the shares were not deemed to have been held for more than 12 months.

*The taxpayer has withdrawn and discontinued her appeal to the Full Federal Court from the decision of the AAT in [Ransley and FCT](#) [2018] AATA 4359. The AAT had decided that the profit on the sale of shares in a mining company was assessable income and not, as contended by the taxpayer, a capital gain.*



## **Ombudsman's report into ATO's small business debt collection**

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) has issued a report into the ATO's enforcement of debt recovery. In a [media](#) release, the ASBFEO called for the ATO to immediately cease debt recovery action where tax disputes were before the AAT. The report contains 3 key conclusions. First, that the stronger forms of debt recovery (ie garnishee notices, director's penalty notices and statutory demands) can directly cause the failure of a small business. Second, that ATO debt recovery action needs to be exercised by all staff in a proportionate, fair and consistent manner. Finally, that the ATO does not engage with small business in the same ways that it expects small business to engage (ie that ATO recovery action needs to be considered using a "small business lens" and interactions should be "far more tailored and nuanced").

The report contains 8 recommendations, including that small business must be able to seek a stay order of any ATO debt recovery action when before the AAT and that garnishee notices must have mandated external oversight and approval. The ATO issued a press release outlining its response to the report. It states that the ATO's long standing policy on debt recovery for cases in dispute at the AAT is to only pursue disputed debt in "exceptional circumstances". The ATO states that, in 2017-18, it took garnishee action against small business in just 4 cases. It will give consideration to the report's recommendations while it awaits the Australian National Audit Office's review of how the ATO manages tax debts for small business.

## **PwC discloses average tax rate of partners**

PwC Australia has [disclosed](#) that its partners pay an average tax rate of 37% on the profits of the firm. PwC made this disclosure in response to recent interest in the tax position of the Big 4 professional services firms, including a request of the ATO by the Senate Economics Legislation Committee. Taking into account the tax rate paid on personal income, together with the tax rate paid on income distributed through Everett arrangements and the firm's services trust, PwC said an average effective tax rate of 37% is paid by partners on the profits of the firm.

In the 2018 financial year alone, PwC said it contributed more than \$620 million in total taxes, including taxes paid on partner income, FBT, payroll tax, stamp duty as well as taxes collected on behalf of the Government such as GST and staff PAYG. PwC noted that the tax rules for partnerships require tax to be paid by the person to whom the profits are distributed. CEO, Luke Sayers said: "The ATO acknowledges



that as owners of a large professional services firm, it is reasonable for a portion of the income of the firm to be regarded as business income and therefore taxed at the corporate tax rate, rather than being treated entirely as personal income of the partners and taxed at personal tax rates.”

## **FINANCIAL SERVICES**

### **Ending grandfathered commissions: Draft Regs opposed**

The Australian Institute of Superannuation Trustees (AIST) has joined Industry Super Australia in opposing the Exposure Draft Regulations that seek to implement the Government's response to Recommendation 2.4 of the Banking Royal Commission to ban all conflicted remuneration from 1 January 2021. Where a financial product issuer is contractually obliged to pay any previously grandfathered conflicted remuneration after 1 January 2021, the Draft Regs will require it to be rebated to the impacted retail customers or passed on in the form of a monetary benefit.

The AIST said that while the Draft Bill (released on 22 February 2019) would repeal the grandfathered conflicted remuneration provisions from 1 January 2021, the Draft Regs propose to allow product issuers to completely avoid the ban on grandfathering arrangements, by setting up a rebate scheme. AIST CEO, Eva Scheerlinck, said the Government's proposal would put a stop to financial advisers charging fees-for-no-service but the Draft Regs will not remove the incentive for advisers to recommend that clients stay in existing, often poorly performing and expensive products. Industry Super Australia Chief Executive, Bernie Dean, called on the provisions for conflicted remuneration to be repealed as soon as possible. "To claim administrative inconvenience as an excuse to try and water down what should be a blanket ban on grandfathered commissions, is astounding given the disgraceful conduct that was exposed during the Royal Commission", Mr Dean said.

### **AFS licensee suspended for breaching financial reporting obligations**

ASIC has [suspended](#) the AFS licence of a Sydney-based financial services provider until 25 June 2019 for allegedly breaching its financial reporting and audit obligations, and failing to obtain membership of the Australian Financial Complaints Authority (AFCA).

ASIC said it will consider whether to cancel the licence if, at the end of the suspension period, the financial services provider is unable to demonstrate that it has complied with its obligations as an AFS licence holder. The provider has since obtained AFCA membership but is yet to fulfil the financial reporting and audit obligations, ASIC said.

## **SUPERANNUATION**

### **SMSF rollovers in SuperStream: ATO update**

The ATO has [advised](#) that it is continuing to work towards a 30 November 2019 start date for electronic SMSF rollovers via SuperStream despite a Budget proposal to delay it until 31 March 2021. As the enactment of the Budget announcement is dependent on the SIS Regulations being updated, the ATO said it is still working towards the currently-legislated start date of 30 November 2019 to use SuperStream to request electronic rollovers to SMSFs.

Jason Lucchese Assistant Commissioner said that during the election caretaker period, which commenced on 11 April 2019, the implementation of administrative matters for existing legislation continue where the law has been enacted. Any unenacted measures cannot be consulted on or discussed until the outcome of the federal election is known, Mr Lucchese said. Accordingly, the ATO said it is continuing to work on updating technical documentation for the SMSF Member Services Tick and the SMSF Verification Services.

### **Super death benefit for de facto partner upheld**

The Federal Court has dismissed an appeal against a decision to pay a superannuation death benefit pension to the deceased member's de facto partner instead of a lump sum to his estate: [Howard v Batistich](#) [2019] FCA 525, Federal Court, Robertson J, 15 April 2019. The deceased, Daniel Howard, died in 2014 as a result of injuries suffered in the course of his employment while fighting a fire in Cobar NSW. The trustee of the NSW Fire Brigades Firefighting Staff Death & Disability Superannuation Fund determined that the respondent, Ms Batistich, was a "de facto partner" of the deceased at the date of his death under the *Superannuation Act 1916* (NSW) and s 21C of the *Interpretation Act 1987* (NSW). Accordingly, the trustee determined that Ms Batistich was entitled to a fortnightly pension of \$1,180. If there was no spouse (including a de facto), a lump sum death benefit of \$350,000

would have been payable to the deceased estate. The deceased's parents complained to the Superannuation Complaints Tribunal (SCT) that Ms Batistich did not meet the definition of de facto partner. However, the SCT determined that the trustee's decision was fair and reasonable in the circumstances.

The SCT considered that text messages clearly establish that the deceased and Ms Batistich were in a loving, committed relationship and shared responsibility for the day-to-day household responsibilities, which included shopping, cooking and the care of her son. In dismissing the appeal, the Federal Court said it was not satisfied that the SCT had misunderstood its task or failed to take into account all the circumstances of the relationship. The court also rejected the applicants' argument that the SCT had not had regard to the material submitted by the applicants. While the court agreed that the SCT's reasons were not "fulsome", it ruled that it had set out its findings on material questions of fact. "That a matter is not mentioned in a statement of reasons does not mean that it was not considered, although that may be inferred", the court said.

## **REGULATOR NEWS**

### **Income protection insurance: APRA calls for improvements**

APRA has [called](#) on life insurers to urgently address concerns about individual disability income insurance (DII), also known as income protection insurance. In a letter to all life insurers, APRA said its thematic review of the industry, which included onsite reviews with the 8 largest providers of individual DII, found shortcomings with insurers' strategy and risk governance, and pricing and product design, as well as inadequate data and resourcing. APRA said it has been concerned about DII sold to individuals (rather than provided through superannuation in the form of group insurance) due to its ongoing poor performance. The industry has collectively lost \$2.5 billion through this product offering over the past 5 years, with no signs of improvement, APRA said.

APRA is setting deadlines for each life insurer to start taking a range of steps in response to APRA's concerns, including formulating a strategy to address the issues identified by the thematic review, and reviewing DII product design and pricing practices. Life companies that failed to promptly and effectively meet APRA's

expectations would face consequences, said APRA Executive Board Member, Geoff Summerhayes.

### **APRA Prudential Standard review: Super member outcomes test**

APRA has [released](#) for consultation proposed revisions to Prudential Standard SPS 515 (Strategic Planning and Member Outcomes) following the enactment of the *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No 1 Act 2019* (Member Outcomes Act) on 5 April 2019. APRA issued its final SPS 515 in December 2018 as part of its Strengthening Member Outcomes package. The package included strengthened requirements for strategic and business planning, including an outcomes assessment requiring licensees to annually evaluate their performance in delivering sound, value-for-money outcomes to all members, covering both MySuper and choice products.

The draft revisions to SPS 515 clarify how the legislated outcomes assessment interacts with APRA's requirements for RSE licensees to undertake an annual Business Performance Review (BPR), having regard to the outcomes achieved for different cohorts of members. SPS 515 is also being amended to include the requirements for RSE licensees to document the methodology applied in undertaking the legislated outcomes assessment, including how the RSE licensee has determined "comparable choice products"; and separately consider the impact of scale and the operating costs of its business operations on the financial interests of members that hold the product (s 52(11) of the SIS Act).

Date of effect: APRA proposes to maintain 1 January 2020 as the start date for SPS 515. This means that the first BPR is required to be undertaken by 31 December 2020. Submissions are due by 29 May 2019.