

TAXATION

ATO portals and other services offline 21-24 June

The ATO has advised that its portals and other online services will be unavailable from Friday, 21 June 11.30pm AEST to Monday, 24 June 7.00am AEST.

Board of Taxation CEO update – June 2019

The June 2019 Board of Taxation CEO update has been released covering projects that have now been finalised and current projects the Board is progressing.

Some perils in lodging tax returns early for 2019, says IPA

The Institute of Public Accountants has reminded taxpayers that there are added complexities in lodging their 2019 tax return early in July.

Interest on overpayments/early payments rate for first quarter 2019-20

The Tax Office has advised the interest on overpayments and early payments, and delayed refund interest for the first quarter of the 2019-20 financial year.

LPP review system needs to work for everyone – Tax Institute

The Tax Institute has strongly challenged the ATO's proposal of a wholesale secondary review of all claims for legal professional privilege.

Uber Australia drivers not employees – Fair Work Ombudsman

The Fair Work Ombudsman has found "the relationship between Uber Australia and the drivers is not an employment relationship".

ASX Compliance Update – declaring dividends in 2019

The ASX has released its Compliance Update No 05/19 reminding listed entities about specifications regarding announcements to the ASX declaring dividends or distributions.

Deferral notification for tax agents after ATO systems outage

After a major ATO systems outage on 4 June 2019 the ATO extended relief to tax agent clients if lodgment for the concessional *arrangement due* 5 June is made by 11 June 2019.

TPB warns agents to check PI re cyber-attack, also legal name

Tax Practitioners Board reminds agents to check their professional indemnity insurance covers them in the event of a cyber-attack and check legal name cross-match with POI.

FBT Determinations withdrawn

The ATO has withdrawn two Taxation Determinations as their dates of effect have ceased.

Retirement village operator leaves consolidated group: PCG

The ATO has set out their approach to the tax treatment, under the consolidation rules, of certain resident liabilities when a retirement village operator leaves a consolidated group.

Div 7A benchmark interest rate for 2019-20

The benchmark interest rate for Div 7A purposes is expected to be 5.35% for the 2019-20 income year (up from 5.20% for 2018-19), in accordance with recent Reserve Bank data.

Tax agent clients with myGov accounts – payment summaries and STP

With Single Touch Payroll in full swing, the ATO has been communicating with tax professionals about payment summary changes for Tax Time 2019.

ATO targets false clothing and laundry work-related expense claims

In line with its focus on work-related expense deductions, the ATO says it will target false clothing and laundry work-related expense claims this Tax Time.

Product Rulings: prepayment facility, Addenda

The ATO has issued *Product Ruling PR 2019/3* on the tax consequences for customers who enter into a Prepay Plus Agreement with Landmark.

Govt contracts tendering statement of tax record needed

Taxpayers are reminded that from 1 July 2019, there will be a new step in the procurement process for Commonwealth Government contracts over \$4 million.

Lifestyle Assets Data Matching Program Protocol – ATO

The ATO has released details of its *Lifestyle assets 2013-14 and 2014-15 financial years data matching program protocol*.

Franking credit refund pilot

In 2019-20, around 200 not-for-profit organisations will participate in a pilot to improve the process for franking credit refund applications.

No CGT main residence exemption for taxpayer

The Federal Court has held that a taxpayer was not entitled to the CGT main residence exemption as he did not have an "ownership interest" in the property in question.

Taxpayer unsuccessful in seeking release from tax-related liabilities

The AAT has affirmed an ATO decision not to exercise its discretion under Div 340 (in Pt 4-50) in Sch 1 TAA to release the taxpayer from her tax-related liabilities.

ATO's current focus areas in small business market

The ATO Deputy Commissioner for Small Business has outlined the ATO's current focus areas in the small business market, including the SME tax gap and Single Touch Payroll.

AAT rejects application by former tax agent following TPB termination

The AAT has rejected an application by a former tax agent to stay a Tax Practitioners Board decision to terminate his registration with the maximum 5-year exclusion.

Tax evasion and money laundering convictions quashed

The NSW Court of Criminal Appeal has allowed taxpayers' appeals and quashed convictions against them.

Rulings applicable to 2013-14 FBT year withdrawn

The ATO has withdrawn a number of FBT Taxation Determinations as their dates of effect have ceased.

FBT car parking threshold for 2019-20 – TD 2019/9

The ATO has issued *Taxation Determination TD 2019/9*, setting out the FBT car parking threshold.

DPNs upheld despite director's "ingenious argument"

The Victorian Supreme Court has granted the Commissioner summary judgment against a company director for a director's penalty for unremitted PAYG tax.

GST: taxpayer not carrying on a precious metal refinery business

A company has been unable to satisfy the AAT that it was carrying on a precious metal refinery business.

FINANCIAL SERVICES

Commonwealth Financial Planning completes ASIC compliance

ASIC has advised that Commonwealth Financial Planning Limited has complied with the Court Enforceable Undertaking entered into with ASIC in April 2018.

Financial adviser banned for retrospectively creating advice documents

ASIC has permanently banned a Perth-based financial adviser for allegedly engaging in misleading or deceptive conduct.

Gold Coast adviser banned for SMSF advice

ASIC has banned a Gold Coast financial adviser for 5 years for allegedly providing inappropriate advice to establish SMSFs to purchase property.

SUPERANNUATION

Family law super splits: interest rate for adjusting base amount

The *Family Law (Superannuation) (Interest Rate for Adjustment Period) Determination 2019* has been registered.

SMSF related-party LRBAs: ATO interest rate for 2019-20

For SMSF related-party limited recourse borrowing arrangements used to acquire real property, the ATO's safe harbour interest rate is 5.95% for 2019-20.

TPB targets tax practitioners' own "higher risk breaches"

Chair of the Tax Practitioners Board has welcomed progress in improving compliance by tax practitioners, with millions of dollars in revenue recouped.

NFPs: Guidance on super guarantee leave loading

The ATO says it has recently updated its guidance on how to treat super guarantee on leave loading for employees.

Reversionary transition to retirement income streams – LCR Addenda

The ATO has updated Law Companion Rulings to reflect recent amendments to the rules applying to reversionary transition to retirement income streams.

REGULATOR NEWS

First conflicted remuneration case – ASIC acts against SMSF advisers

ASIC has announced it has commenced civil penalty proceedings in the Federal Court against RM Capital and SMSF Club in relation to accepting conflicted remuneration.

Company director convicted of illegal phoenix activity

ASIC has reported that a NSW company director has been convicted and sentenced to a one-year good behaviour bond for charges related to illegal phoenix activity.

Superannuation calculators: ASIC inflation rules amended

ASIC has extended to 5 December 2019 the start date for retirement and superannuation calculators to comply with its inflation rules for generic financial calculators.

TAXATION

ATO portals and other services offline 21-24 June

The ATO has advised that its portals, Online services for agents, the Practitioner Lodgment Service (PLS), Standard Business Reporting and other online services will be unavailable from Friday, 21 June 11.30pm AEST to Monday, 24 June 7.00am AEST.

The ATO reminds practitioners to check its [system maintenance page](#) for details and any updates.

Board of Taxation CEO update – June 2019

The June 2019 Board of Taxation CEO update [has been released](#). Issues covered include:

- Projects that have now been finalised and submitted to the Government for consideration, including: (i) Review of small business tax concessions; and (ii) Reforming Individual Tax Residency Rules – A Model for Modernisation.
- Current projects the Board is progressing in relation to: FBT compliance cost and international practice review; Review of the Voluntary Tax Transparency Code; and Review into tax implications of granny flat arrangements.

Some perils in lodging tax returns early for 2019, says IPA

Some taxpayers may be contemplating lodging their 2019 tax return early in July 2019 to get their tax refund early. They may have done this in past years, but this year is a little different. The Institute of Public Accountants (IPA) [has reminded taxpayers](#) that there are added complexities in lodging early. It suggests that unless taxpayers have certainty and completeness around the information used to finalise their returns, all taxpayers should rethink lodging returns early this year especially in light of the factors below:

- First, Parliament needs to pass the announced increase in the low and middle income offset which applies for the 2019 income year. Eligible taxpayers can receive up to an extra \$530 for singles or \$1,080 for a couple. The ATO has stated that it cannot process the higher amount until the law is passed but will be able to automatically amend a return if the law changes after a taxpayer receives their assessment.

- Second, Single Touch Payroll (STP) has come into operation. Some employers no longer need to provide a payment summary to employees as this information can now be accessed via myGov. The IPA says the information available in early July may not be accurate until the employer completes a finalisation process. Until this happens, employment income will show a notation "tax not ready". [Employers have until 31 July to show a "tax ready" status.]

Interest on overpayments/early payments rate for first quarter 2019-20

The Tax Office has advised that, for the first quarter of the 2019-20 financial year (ie from 1 July to 30 September 2019), the Interest on Overpayments (IOP), Interest on Early Payments (IEP) and Delayed Refund Interest (DRI) rate is 1.54%.

The General Interest Charge ([GIC](#)) and [Shortfall interest charge \(SIC\)](#) rates for first quarter 2019-20 are:

- GIC annual rate – 8.54%; GIC daily rate – 0.02339726%.
- SIC annual rate – 4.54%; SIC daily rate – 0.01243836%.

LPP review system needs to work for everyone – Tax Institute

The ATO has expressed concern that “reckless and false” claims of legal professional privilege (LPP) have been made by some tax professionals to avoid disclosure of documents during tax audits. However, ATO proposals for a new “independent review” process where claims for LPP would be reviewed by an independent legal practitioner pose difficulties, The Tax Institute says, and it has called for more clarity and articulation by the ATO of its concerns regarding the operation of LPP from an administrative perspective. Overall, the proposal of a wholesale secondary review of all claims for LPP has been strongly challenged by The Tax Institute.

The Tax Institute and others have been appointed to consult with the ATO on the establishment of a new framework to alleviate ATO concerns and to preserve the integrity of LPP in the profession. Writing in The Institute's *TaxVine* newsletter, Tax Institute National Technical Committee Chair Sue Williamson said reckless and false LPP claims "do need to be stamped out". However, she said that is only one side of the equation. More often than not, the ATO allows 28 days to respond to notices. However, Ms Williamson said providing 28 days to gather documents, assess them

for relevance and LPP "is often not enough". It can lead to "short cuts" and provisional claims that ultimately cannot be substantiated. Scope and guidance on LPP from the ATO "needs to include guidance to ATO officers about the timeframes necessary to ensure proper compliance". The system needs to work for everyone, Ms Williamson said.

Uber Australia drivers not employees – Fair Work Ombudsman

The Fair Work Ombudsman Sandra Parker has [said](#) in a statement her office has completed its investigation relating to Uber Australia Pty Ltd and its engagement of drivers and found that "the relationship between Uber Australia and the drivers is not an employment relationship". Ms Parker said that inspectors examined a wide range of evidence, including drivers' contracts, log on and log off records, interviews with drivers and Uber Australia, ABN documents, payment statements, banking records and pricing schedules. For an employment relationship to exist, Ms Parker said the courts have determined that there must be, at a minimum, an obligation for an employee to perform work when it is demanded by the employer.

"Our investigation found that Uber Australia drivers are not subject to any formal or operational obligation to perform work," Ms Parker said. Uber Australia drivers have control over whether, when, and for how long they perform work, on any given day or on any given week, she said. In addition, Uber Australia does not require drivers to perform work at particular times and "this was a key factor in [the Ombudsman's] assessment that the commercial arrangement between the company and the drivers does not amount to an employment relationship". As a consequence, the Fair Work Ombudsman will not take compliance action in relation to this matter.

ASX Compliance Update – declaring dividends in 2019

The ASX has released its [Compliance Update No 05/19](#). It reminds listed entities as follows:

- Clearly announcing types of dividends or distributions: to specify in announcements to the ASX declaring dividends or distributions whether they are "interim", "final", "special" or "combination" dividends or distributions. This specification should accord with how the dividend or distribution is described in the online ASX form (see Part 2A of ASX Appendix 3A.1 Notification of dividend/distribution).
- Dividends and distributions before 30 June 2019: that if declaring a dividend or distribution for the period ending 30 June 2019 (which falls on a Sunday):

(i) the last possible record date is Friday, 28 June 2019; and (ii) the last day to announce it is Monday, 24 June 2019.

Deferral notification for tax agents after ATO systems outage

A major ATO systems outage on Tuesday, 4 June 2019 may have affected tax agents' ability to meet their clients' lodgment or payment obligations for the 5 June concessional arrangement. At the time, the ATO said tax agents and their clients "will not be disadvantaged for late lodgment or payment as a result of this outage". The ATO has [updated that advice](#) to say that tax agent clients will not be subject to penalties, interest or follow-up action providing lodgment was made by 11 June 2019.

A lodgment deferral will be applied to all tax returns with a lodgment due date of 15 May 2019 that have not already been lodged, the ATO said. A payment deferral to 11 June 2019 will be applied to companies and super funds. The ATO said individuals and trusts should pay any liabilities by the date specified on their notice of assessment. Practitioners can check for updates on system availability on the ATO [Practitioner lodgment service](#) and [Agent online services](#) dashboards.

TPB warns agents to check PI re cyber-attack, also legal name

The Tax Practitioners Board (TPB) latest eNews for June 2019 reminds agents of a number of issues:

- Check PI re cyber-attack: The Board says agents should [check their professional indemnity \(PI\) insurance](#) to determine if they are covered in the event of a cyber-attack. The TPB warns that PI insurance does not generally cover for events such as: third party cyber liability; first party hacker damage; cyber extortion; data breach notification costs; and public relations costs. The Board recommends agents consider appropriate risk mitigation for cyber threats, including the option of supplementing their insurance to cover cyber breaches.
- Check legal name: Before completing [proof of identity \(POI\) checks](#) when submitting individual annual declarations, the TPB says agents should ensure their legal name on their identity documents is exactly the same as the name they used to register with the TPB. If the legal name on the TPB Register is incorrect, agents must complete the TPB's online form to update their details. "It is important to get it right - if you fail to meet our POI requirements, your registration may be interrupted", the Board warned.

FBT Determinations withdrawn

The ATO has withdrawn the following Taxation Determinations as their dates of effect have ceased:

- [TD 2012/5](#) – *FBT*: for the purposes of Div 7 of Pt III of the FBTA 1986, what amount represents a reasonable food component of a living-away-from-home allowance for expatriate employees for the FBT year commencing on 1 April 2012?
- [TD 2013/4](#) – *FBT*: reasonable amounts under s 31G of the FBTA 1986 for food and drink expenses incurred by employees receiving a living-away-from-home allowance fringe benefit, for the fringe benefits tax year commencing on 1 April 2013.

Retirement village operator leaves consolidated group: PCG

The ATO has issued *Practical Compliance Guideline* [PCG 2019/4](#), setting out the ATO's administrative approach to the tax treatment, under the consolidation rules, of certain resident liabilities when a retirement village operator leaves a consolidated group.

Where a head company is covered by *PCG 2019/4*, the ATO accepts that, in applying s 711-45(5) ITAA 1997 (adjustment for unrealised gains and losses), the change in value of a lease surrender liability or an increase entry price liability is an amount that is taken into account for income tax purposes at a later time than under accounting principles.

Div 7A benchmark interest rate for 2019-20

The benchmark interest rate for Div 7A purposes is expected to be 5.35% for the 2019-20 income year (up from 5.20% for 2018-19), in accordance with recent Reserve Bank data. The ATO will confirm the benchmark interest rate in a Taxation Determination as per its normal practice.

One of the conditions for a loan or converted payment to be treated as a complying loan (and therefore not taxed as a deemed dividend under Div 7A of the ITAA 1936) is that the loan interest rate for each year of the loan must not be less than the benchmark interest rate. The benchmark interest rate is also relevant in calculating the amount of the minimum yearly repayment on an amalgamated loan.

Tax agent clients with myGov accounts – payment summaries and STP

With Single Touch Payroll (STP) in full swing, the ATO has been communicating with tax professionals about payment summary changes for Tax Time 2019. The [ATO says](#) that if an employer reports through STP and any of its employees are linked to ATO online services through myGov, the ATO will send those employees a myGov Inbox message to let them know that their end-of-year payment summary (formerly a group certificate) is now called an income statement and that they can access their income statement in ATO online services through myGov or their tax agent can give them the information. The ATO will further advise those employees that they should wait until their employer has marked their information as “Tax ready” before lodging their tax return. Their employer has until 31 July to do this.

The ATO says tax agents can still view its communications to clients through myGov, including notices of assessment, via the Communication history in Online services for agents and the Client communication list function in the tax and BAS agent portals. Tax practitioners can let their clients know that if they don't already have a myGov account, they do not need one to lodge their tax return. The agent can access their employment data and lodge for them once their information is “Tax ready”. There is also no need for tax agents to access their client's myGov accounts directly, the ATO said.

ATO targets false clothing and laundry work-related expense claims

Work-related expense deductions have been high on the ATO radar for the last couple of years, and this Tax Time, [the ATO says](#) it will target false clothing and laundry work-related expense claims. In 2018, around 6 million people claimed work-related clothing and laundry expenses totalling nearly \$1.5 billion. ATO Assistant Commissioner Karen Foat said "You must have spent the money you are claiming on buying or cleaning eligible clothes. While you don't need receipts for claims up to \$150, we can ask how you calculated your claim. We may even ask your employer if you have a required uniform."

The ATO is also concerned about the number of people claiming deductions for conventional clothing. Some retail workers claim normal clothes because their boss told them to wear a certain colour, or items from the latest fashion clothing line. Others think they can claim normal clothes because they only wear them to work.

The Assistant Commissioner said a workplace may expect an employee to wear clothing items like suits or black pants. But an official “dress code” doesn't qualify as a uniform, she said, and taxpayers can't make a claim for normal clothing, even if their employer requires them to wear it, or they only wear it to work. She warned that the ATO's data analytics will flag claims that are significantly above the average in occupations that regularly claim for laundry, like chefs or security guards. It will also flag claims made by people in occupations that usually don't claim, like office workers.

Product Rulings: prepayment facility, Addenda

The ATO has issued *Product Ruling* [PR 2019/3](#) on the tax consequences for customers who enter into a Prepay Plus Agreement with Landmark. The ATO accepts that the prepayment amount is immediately deductible in the income year it is paid.

Addenda to the following Product Rulings were also issued (to incorporate updates to the scheme documents):

- *PR 2018/2*: Taxation consequences of investing in Macquarie Equity Lever Instalment Receipts; and
- *PR 2018/3*: Tax consequences of investing in equities using the Macquarie Geared Equities Investment plus (2018 Product Brochure).

Govt contracts tendering statement of tax record needed

As 30 June approaches, the ATO [reminded taxpayers and their advisers](#) that from 1 July 2019, there will be a new step in the procurement process for Commonwealth Government contracts over \$4 million (including GST). If a business tenders for these contracts or is a first-tier contractor, they must obtain a statement of tax record (STR) showing "satisfactory engagement" with the tax system.

"Satisfactory engagement" with the tax system means the business: is up to date with registration requirements, which may include being registered for an ABN, GST, and having a TFN; has lodged at least 90% of its relevant income tax returns, BASs and FBT returns that were due in the last 4 years of operation from the date of its request for an STR; and does not have a \$10,000 or greater in outstanding undisputed debt due, or have a payment plan in place with the ATO. The ATO suggests that tax practitioners should advise their business clients to: refer to their tender request documentation to clarify requirements; keep their tax obligations up to

date, including registration, lodgment and payment to ensure they receive a satisfactory STR; and apply for an STR early to allow time for processing before the tender closing date.

Lifestyle Assets Data Matching Program Protocol – ATO

The [ATO has released details](#) of its *Lifestyle assets 2013-14 and 2014-15 financial years data matching program protocol*. It says it will obtain information on insurance policies for certain classes of assets, including marine vessels, enthusiast motor vehicles, thoroughbred racehorses, fine art and aircraft. The information will cover the 2013-14 and 2014-15 financial years in respect of the following classes of assets: Marine vessels valued over \$100,000; enthusiast motor vehicles valued over \$50,000; thoroughbred horses valued over \$65,000; fine art valued over \$100,000 per item; and aircraft valued over \$150,000.

The ATO anticipates obtaining records of more than 100,000 policies, many of which will be held by individuals. The ATO expects that the data matching program will allow it to identify and address a number of taxation risks, including: asset betterment; income tax and capital gains; GST; FBT and superannuation funds. The ATO says the data "will not be used directly to initiate compliance activity, but will be made available to compliance staff to assist in their profiling of taxpayers selected for audit and review activities through other methodologies". This existence of an insurance policy may prompt the compliance officer to pursue a particular line of enquiry, the ATO said.

Franking credit refund pilot

The [ATO has advised](#) that in 2019-20, around 200 not-for-profit (NFP) organisations will participate in a pilot to improve the process for franking credit refund applications. Participants in the pilot will automatically receive a refund of any franking credit they are entitled to without lodging an application.

Each year, share registries and other providers are required to report dividends and franking credits to the ATO. The ATO receives this information from 1 July onwards and will use it to work out pilot participant refunds. Refunds will be paid into the organisation's bank account, as dividend and franking credit information is reported. NFPs participating in the pilot that have any queries can phone the ATO on the not-for-profit help line 1300 130 248 between 8.00am and 6.00pm, Monday to Friday.

No CGT main residence exemption for taxpayer

The Federal Court has held that a taxpayer was not entitled to the CGT main residence exemption as he did not have an "ownership interest" in the property in question: [Mingos v FCT](#) [2019] FCA 834, Federal Court, Davies J, 7 June 2019. In the 2014 income year, the LI Trust distributed to the taxpayer, a discretionary beneficiary, the whole of the capital gain made on the sale of a property. The trustee was a company (Lemnian) controlled by the taxpayer and his brother. The property was originally acquired in 1992 by another trust, but it was the main residence of the taxpayer and his family. In 2011, when the taxpayer's marriage broke down, the property was held by his wife. As part of the divorce settlement, she transferred the property to Lemnian, as the taxpayer's nominee. The transaction was financed by a bank loan secured by a mortgage over the property (and other properties owned by Lemnian).

The taxpayer submitted that he had an "ownership interest" in the property, in terms of s 118-30 of the ITAA 1997, at the time it was sold and was therefore entitled to the main residence exemption in Subdiv 118-B. Although the property was recorded as a Trust asset, the taxpayer submitted that the property was owned by him beneficially and that legal title to the property had only been transferred to Lemnian in order to obtain the bank loan. The Federal Court held that the taxpayer did not have an "ownership interest" in the property. Email evidence showed that the bank had not required that the property be transferred to Lemnian and other evidence showed that the taxpayer (and his brother) had accepted that the property was a Trust asset. The Court also rejected an argument that court orders made in the divorce settlement had vested an equitable interest in the property to the taxpayer. Further, as the taxpayer had not established that he had an absolute entitlement to the property as against Lemnian, he could not rely on s 106-50 (which would have deemed the sale of the property to be done by the taxpayer).

Taxpayer unsuccessful in seeking release from tax-related liabilities

The AAT has affirmed an ATO decision not to exercise its discretion under Div 340 (in Pt 4-50) in Sch 1 TAA to release the taxpayer from her tax-related liabilities: [Schweitzer and FCT](#) [2019] AATA 1100, AAT, File No: 2017,0583, Forgie DP, 29 May 2019. The liabilities were for the 1991 to 1999 income years and consisted of just over \$1.2m in income tax, Medicare levy and Medicare levy surcharge and GIC of \$3.47m. She also owed interest of almost \$2.98m that had accrued on a judgment

obtained in respect of those liabilities in December 2003, but the parties accepted that the interest was not a tax-related liability. The AAT firstly decided that the release provisions in Div 340 can apply to income tax imposed before the 1997-98 income year. In interpreting the term "tax" in item 6 of the table in s 340-10(2), the AAT decided that the reference in that item to s 4-1 of the ITAA 1997, which only applies from the 1997-98 income year, should be read so as to include the ITAA 1936 equivalent to s 4-1 (s 17).

In contrast, the AAT was unable to discern any basis for reading the term "general interest charge" in item 3 of the table in s 340-10(2) as including interest imposed under s 170AA before 1 July 1999 (when the provisions of Pt 4-50 came into operation). The AAT commented that when regard is had to the pattern of amendments made by the 1999 Act that introduced the GIC provisions, "it would seem that Parliament made a conscious choice to include liability incurred under some provisions and not on others". The AAT also said that, by operation of law, the taxpayer's tax liability ceased to exist when judgment was obtained for a sum that reflected the amount of that liability. Nor is a judgment debt a liability arising under a provision or provisions of an Act specified in the table in s 340-10(2). Finally, the AAT decided that, assuming that all of the amounts sought were liabilities within the meaning of s 340-10(2), on the evidence the taxpayer would not suffer serious hardship if required to satisfy those liabilities.

ATO's current focus areas in small business market

In a [recent address](#) to a CAANZ tax planning day, ATO Deputy Commissioner for Small Business Deborah Jenkins outlined the ATO's current focus areas in the small business market, including the SME tax gap and Single Touch Payroll (see below), the Black Economy and disputes. The Deputy Commissioner acknowledged that, over the last year or so, "the ATO has received negative media attention over our treatment of small business. While we don't agree with all the criticisms, there are always ways we can improve."

- **SME tax gap:** Ms Jenkins said the ATO has progressed its program to determine the small business income tax gap. However, she said that while the ATO was not ready to release the gap just yet, this work has given the ATO "a range of insights on the behaviours of small business and key issues in the market, and it is going to shape [the ATO's] strategy for supporting small business for the year ahead". The ATO has established a mobile strike approach to provide help and education to assist businesses with their

obligations as well as identify businesses who may not be complying with their tax obligations.

- Single Touch Payroll: Over 100,000 employers are now reporting under STP (Single Touch Payroll) which includes over 53,000 small employers. This equates to 6.7 million employees and that is growing by the day. Ms Jenkins said the ATO is taking a flexible approach re STP eg: if employers start reporting between 1 July - 30 September, the ATO will regard them as reporting on time; no penalties will be applied for missed or late STP reporting in the first year; and the ATO will grant deferrals to any small employer who needs more time to start STP reporting.

AAT rejects application by former tax agent following TPB termination

The AAT has rejected an application by a former tax agent, Mr Vanda Gould, to stay a Tax Practitioners Board (TPB) decision to terminate his registration with the maximum 5-year exclusion: [Gould and Tax Practitioners Board](#) [2019] AATA 1056, AAT, Molloy DP, AAT File No: 2019/0495, 28 May 2019. In December 2018, the TPB found that Mr Gould ceased to meet the fit and proper person requirements in the law, following findings highly critical of him in a decision of the Federal Court in *Hua Wang Bank v FCT* [2014] FCA 1392. In response to Mr Gould's application to stay the decision, the TPB tendered evidence in relation to an ATO investigation named Operation Rubix, which Molloy DP noted was "... concerned with the use of multi-layered off-shore structures based in the UK, Cayman Islands, Bahamas, Samoa and elsewhere by Mr Gould, his associates and clients of his former accounting firm, Gould Ralph, to avoid Australian taxation and to accumulate wealth off-shore."

In rejecting Mr Gould's application, the AAT noted: "...the public interest favours refusing a stay in light of the serious implications of the Applicant's conduct, as found by the Federal Court, for the revenue, the integrity of Australian tax laws, the standing of the tax profession within the community, and the ability of the Commissioner of Taxation to discharge his statutory functions." The AAT referred to the Federal Court decision in *Hua Wang* which pointed to "sustained, calculated and layered dishonesty", including describing Mr Gould's conduct as "disgraceful". The Tribunal concluded that it was not satisfied on the material before it that Mr Gould had shown good prospects of success on the review. The Tribunal said it was not satisfied that the taxpayer had established a strong case "such that it could be said his application for review is more likely to succeed than not". TPB CEO, Michael O'Neill, welcomed the AAT stay decision, noting that Mr Gould continues to appeal his termination.

Tax evasion and money laundering convictions quashed

The NSW Court of Criminal Appeal has allowed taxpayers' appeals and quashed convictions against them: [*Castagna v R; Agius v R*](#) [2019] NSWCCA 114, NSW Court of Criminal Appeal, Bathurst CJ; Macfarlan JA; Gleeson JA, 5 June 2019. The taxpayers, Dr Anthony Castagna and Mr Robert Agius, were charged with offences arising out of payments made by Macquarie Bank Ltd and its associated companies pursuant to a series of agreements between itself, Dr Castagna, and Billbury Ltd, a company controlled by Mr Agius, in exchange for the supply (by Billbury) of Dr Castagna's services as a consultant from 1998 to 2009. The agreements did not provide for any payment to be made directly to Dr Castagna. It was alleged that Dr Castagna was required to declare these payments as part of his assessable income and that he failed to do so. Thus, the charges were that Dr Castagna and Mr Agius were members of a conspiracy to defraud or cause financial loss to the Commonwealth by concealing Dr Castagna's assessable income, and a conspiracy to deal with money which was the proceeds of crime, being the part of the payments not declared as assessable income. The Court said the evidence showed that Macquarie Bank required all agreements with its consultants to be with companies rather than individuals. Thus, there was no suggestion that the agreements between Macquarie Bank, Dr Castagna and Billbury were "shams".

At trial, the prosecution case was that the payments were "ordinary income" which had been "derived" by Dr Castagna within the meaning of s 6-5(2) of the ITAA 1997, and therefore were "assessable income" which he had not, but was required to, declare in his tax returns. The jury found Dr Castagna and Mr Agius guilty of conspiracy to defraud or cause financial loss to the Commonwealth, and to deal with money which was the proceeds of crime. Dr Castagna and Mr Agius appealed from their convictions on the grounds that the primary judge had erred in directing the jury about how they were to approach the task of determining whether the payments to Billbury were "ordinary income". After review, the Court of Criminal Appeal found the primary judge did err in directing the jury that, in order to determine whether the payments to Billbury were "ordinary income" which had been "derived" by Dr Castagna within the meaning of s 6-5(2), it was necessary to consider the circumstances surrounding the agreements. The Court also found it was not open to the jury to find that the payments to Billbury formed part of Dr Castagna's "assessable income" because they were held by Billbury on trust for Dr Castagna. In the result, the Court quashed the convictions and entered a verdict of acquittal.

Rulings applicable to 2013-14 FBT year withdrawn

The ATO has withdrawn the following Taxation Determinations as their dates of effect have ceased. Each Determination continues to be legally binding on the Commissioner for the 2013-14 FBT year:

- [TD 2013/5 - FBT](#): for the purposes of s 28 of the FBTA, what are the indexation factors for valuing non-remote housing for the fringe benefits tax year commencing on 1 April 2013?
- [TD 2013/6 - FBT](#): for the purposes of s 135C of the FBTA, what is the exemption threshold for the FBT year commencing on 1 April 2013?
- [TD 2013/7 - FBT](#): what are the rates to be applied on a cents-per-kilometre basis for calculating the taxable value of a fringe benefit arising from the private use of a motor vehicle other than a car for the FBT year commencing on 1 April 2013?
- [TD 2013/8 - FBT](#): what is the benchmark interest rate to be used for the FBT year commencing on 1 April 2013?
- [TD 2013/9 - FBT](#): for the purposes of s 39A of the FBTA, what is the car parking threshold for the fringe benefits tax year commencing on 1 April 2013?

FBT car parking threshold for 2019-20 – TD 2019/9

The ATO has issued *Taxation Determination* [TD 2019/9](#), setting out the FBT car parking threshold at \$8.95 from 1 April 2019 (up from \$8.83 for the 2018-19 FBT year).

DPNs upheld despite director's "ingenious argument"

The Victorian Supreme Court has granted the Commissioner summary judgment against a company director for a director's penalty for unremitted PAYG tax: [DCT v De Simone](#) [2019] VSC 346, *Victorian Supreme Court, Mukhtar J, 27 May 2019*. The tax was withheld by 2 companies of which the taxpayer was a director. The director's penalty totalled around \$540,000. In a lengthy judgment, and after exploring the relevant statutory regime and considering the director's arguments in some detail, the Court found for the Commissioner and granted summary judgment. The Court considered that the Deputy Commissioner had proved the claim. In reviewing the matter, the Court noted what it said was "an ingenious argument" by the director but found it was unsustainable. According to the Court, "... The endplay was this: as the money was paid by him for his liability, it then extinguishes the same debt for the

company's liability; and it follows that the Commissioner's discretion to allocate payments on the RBA does not even come into play."

The Supreme Court said, "The defendant has no basis for challenging or seeking a trial on the application of the first five payments for \$625,000 because those payments were made before any of the 14 liabilities were incurred, and were applied to older PAYG liabilities. For the sixth to ninth payments for a total of \$375,000 the Deputy Commissioner has justified the allocation of that amount and the defendant has shown no basis for challenging that allocation according to statutory method to tax debts. The proven fact remains that the company of which Mr De Simone was a director deducted tax from the wages and salaries of employees, withheld that money, and has not remitted it to the Commissioner."

GST: taxpayer not carrying on a precious metal refinery business

A company has been unable to satisfy the AAT that it was carrying on a precious metal refinery business: [*Very Important Business Pty Ltd and FCT*](#) [2019] AATA 1120, AAT, File No 2016/6219, McCabe DP and Lazaras SM, 4 June 2019. The taxpayer company maintained that, during the quarter ending 31 December 2015, it was a refiner of precious metal and entitled to claim input tax credits with respect to purchases of scrap gold it made in the course of its business. It also claimed its subsequent supplies of precious metal (gold it had refined into bullion) to dealers in precious metal were GST-free supplies. The ATO, however, doubted that many (or any) of the acquisitions of scrap gold occurred as claimed in the invoices and other records. This was in part due to the lack of independent evidence that the taxpayer, which had a limited financial capacity, provided consideration or was liable to provide consideration for all acquisitions of scrap gold. The ATO also contended that the taxpayer's record-keeping was seriously deficient.

The AAT was not persuaded that the taxpayer had actually taken over the refinery business and was regularly refining prior to 31 December 2015. Additionally, there were serious shortcomings in its evidence and documentation regarding the alleged purchase transactions. Some of those supplies were supposedly made by the entity that previously operated the refinery. Accordingly, the AAT was not satisfied that the taxpayer was a refiner of precious metal in the quarterly tax period in question (although satisfied that the taxpayer was undertaking some activities and therefore was carrying on an enterprise for the purposes of the GST Act).

FINANCIAL SERVICES

Commonwealth Financial Planning completes ASIC compliance

ASIC has advised [in 19-134MR](#) that Commonwealth Financial Planning Limited (CFPL) has complied with the Court Enforceable Undertaking (CEU) entered into with ASIC in April 2018 regarding CFPL's fees for no service conduct. On 30 May 2019, ASIC received an attestation from CFPL and a final independent expert report from Ernst & Young (EY). ASIC said it is satisfied with the attestation and report, and compliance with the obligations under the CEU is now finalised, save for the payment of some remaining refunds due to clients which is to be done by 30 September 2019.

In January 2019, CFPL was required under the CEU to immediately take all necessary steps to stop charging or receiving ongoing service fees, and not enter into any new ongoing service arrangements with customers (19-018MR). CFPL had completed those necessary steps by April 2019 and it will also compensate those customers who were charged fees during the period February to April 2019, with refunds and reconciliations to be completed by 30 September 2019. CFPL has also confirmed with ASIC that it does not intend to resume charging upfront ongoing service fees going forward, as it transitions to a new service model. ASIC said it will continue to monitor CFPL's transition to its new service model.

Financial adviser banned for retrospectively creating advice documents

ASIC has permanently [banned](#) a Perth-based financial adviser for allegedly engaging in misleading or deceptive conduct, including by retrospectively creating advice documents and reproducing a client's signature. ASIC said it reviewed meta data from advice documents and allegedly found that, in response to statutory notices, the adviser had created replicas of statements of advice documents that he was required by law to create and retain but had not. Additionally, ASIC said the adviser had attempted to cover up his failure to obtain a signed "authority to proceed" from a client by copying and pasting his client's signature from a "fact-find" document.

ASIC also alleged that the adviser did not objectively assess the information provided by his clients or tailor his recommendations to their circumstances. For example, in relation to a property investment through an SMSF, ASIC alleged that

the adviser did not make adequate inquiries to assess if an SMSF was indeed appropriate or whether his client could undertake the role of an SMSF trustee. Additionally, ASIC said the adviser could not demonstrate that he had investigated alternative products or strategies that could help his clients achieve their goals. He also failed to provide information to his clients about the costs, benefits and consequences of his recommendations, ASIC said.

Gold Coast adviser banned for SMSF advice

ASIC has [banned](#) a Gold Coast financial adviser for 5 years for allegedly providing inappropriate advice to establish self-managed superannuation funds (SMSFs) to purchase property. ASIC said the financial adviser received referrals from a property business to help their clients establish SMSFs to purchase investment properties. ASIC reviewed the advice provided to 15 clients and allegedly found that the adviser had failed to act in the best interests of his clients.

Some of the clients were advised to set up SMSFs with limited recourse loan arrangements (LRBAs) that ASIC said were "completely unsuitable and placed his clients in a vulnerable financial position". ASIC alleged that the adviser had completely failed to consider his clients' needs, objectives and circumstances. It further alleged that he failed to give his clients statements of advice that set out the advice he provided and the information on which he based his advice.

SUPERANNUATION

Family law super splits: interest rate for adjusting base amount

The [Family Law \(Superannuation\) \(Interest Rate for Adjustment Period\) Determination 2019](#) has been registered, specifying the interest rate to be used for adjusting the "base amount" allocated in a court order or a superannuation agreement under the *Family Law Act 1975* that splits a future defined benefit superannuation interest or an interest in a self-managed superannuation fund (SMSF).

Where the adjustment period is the financial year beginning on 1 July 2019, the interest rate is set at 0.048 (down from 0.49 for 2018-19) for the purposes of reg 45D(3) of the *Family Law (Superannuation) Regulations 2001*. The Determination will commence on 1 July 2019.

SMSF related-party LRBAs: ATO interest rate for 2019-20

For SMSF related-party limited recourse borrowing arrangements (LRBAs) used to acquire real property, the ATO's safe harbour interest rate is 5.95% for 2019-20 (up from 5.80% for 2018-19), in accordance with recently published Reserve Bank data. Practical Compliance Guideline PCG 2016/5 sets the safe harbour interest rate each year according to the Reserve Bank Indicator Lending Rates for banks providing standard variable housing loans for investors (being the rate published for May immediately prior to the start of the relevant financial year). This Indicator Lending Rate for May 2019 is 5.94%. Accordingly, the ATO's safe harbour interest rate is rounded to 5.95% for 2019-20 (7.95% for listed securities).

If an LRBA is structured in accordance with PCG 2016/5, the ATO will accept that the LRBA is consistent with an arm's length dealing and the non-arm's length income (NALI) rules (45% tax) will not apply to the income generated from the LRBA asset. If an LRBA does not meet the safe harbour rules, the SMSF trustees will need to otherwise demonstrate that their arrangement is consistent with an arm's length dealing.

TPB targets tax practitioners' own "higher risk breaches"

Chair of the Tax Practitioners Board (TPB), Mr Ian Klug AM, has [welcomed progress](#) in improving compliance by tax practitioners, with the latest figures showing millions of dollars in revenue have been recouped. Last year, in collaboration with the ATO, the TPB commenced action on thousands of tax practitioners who had fallen behind in their own tax obligations. Practitioners have paid over \$40 million in outstanding tax bills and taken action with more than 6,000 late lodgments, but the TPB has commenced 35 investigations into "higher risk breaches", with a view to imposing sanctions, including termination of registration, Mr Klug said.

ATO Assistant Commissioner, Ms Dana Fleming, noted it is especially important for tax practitioners to keep their personal tax obligations up to date where they act as trustees for their own self-managed superannuation fund (SMSF). "Over 1,000 SMSF late returns have now been lodged by tax agent trustees, disclosing total assets exceeding \$500 million," she said. "We continue to target tax practitioners who fail their legal and ethical responsibilities and the ATO is separately pursuing agent cases, including debt recovery litigation and prosecution actions."

NFPs: Guidance on super guarantee leave loading

The ATO [says](#) it has recently updated its guidance on how to treat super guarantee on leave loading for employees. It is the ATO's view that in some circumstances, annual leave loading is considered a part of ordinary time earnings (OTE), which is used as a basis for employer super contributions.

The ATO warns that if NFPs have previously self-assessed on the basis that their employees' annual leave loading is not OTE, there is a risk of SG shortfalls and liability for the SG charge. In this case, NFPs may be required to lodge a Super Guarantee Charge statement if they think they have SG shortfalls for past quarters. The ATO says that in general, its compliance resources won't be directed to look at the past history of NFPs to scrutinise the purpose for which annual leave loading was paid, if the NFP self-assessed that annual leave loading was not OTE (as it was in place of the opportunity to work overtime), and there is no evidence (that is less than 5 years old) that suggests the entitlement was for something other than overtime.

Reversionary transition to retirement income streams–LCR Addenda

The ATO has issued Addenda to the following Law Companion Rulings, updated to reflect recent amendments to the rules applying to reversionary transition to retirement income streams:

- [LCR 2016/8](#) - Superannuation reform: transitional CGT relief for complying superannuation funds and pooled superannuation trusts; and
- [LCR 2016/9](#) - Superannuation reform: transfer balance cap.
- These amendments ensure that a reversionary TRIS can always be paid to a reversionary beneficiary, irrespective of whether the beneficiary satisfies a condition of release. Date of effect: The Addenda apply from 1 April 2019.

REGULATOR NEWS

First conflicted remuneration case – ASIC acts against SMSF advisers

ASIC has issued a [media release 19-135MR](#), announcing that it has commenced civil penalty proceedings in the Federal Court against RM Capital Pty Ltd ("RM Capital") and its authorised representative, The SMSF Club Pty Ltd ("SMSF Club"), in relation to accepting conflicted remuneration. ASIC alleges that SMSF Club advised its clients to set up SMSFs, then use their SMSFs to buy real property marketed by a real estate agent, Positive RealEstate Pty Ltd ("Positive RealEstate"). ASIC asserts that SMSF Club had referral agreements with Positive RealEstate and that RM Capital was aware of this referral agreement. ASIC contends that, from December 2013 to July 2016, each time an SMSF Club client used their SMSF to buy a property marketed by Positive RealEstate, Positive RealEstate paid around \$5,000 to SMSF Club. On some occasions, Positive RealEstate paid these amounts directly to SMSF Club, while at other times it paid them to RM Capital who passed on the majority to SMSF Club. ASIC alleges that SMSF Club accepted more than \$730,000 in conflicted remuneration from Positive RealEstate.

ASIC's case is that the payments could reasonably be expected to have influenced financial product advice given by SMSF Club to its clients, and so constituted banned conflicted remuneration under the Corporations Act. ASIC also alleges that RM Capital was aware of the payments and did not take reasonable steps to stop the SMSF Club from accepting them. ASIC contends that as the authorising licensee for SMSF Club, RM Capital's failure to take reasonable steps to ensure SMSF Club's compliance also breached the law. ASIC is seeking declarations of contravention, civil penalties and compliance orders against both RM Capital and SMSF Club. This will be the first case concerning the alleged breach of conflicted remuneration provisions. ASIC will contend that SMSF Club and RM Capital contravened the Act on as many as 259 occasions each. Each contravention attracts a potential civil penalty of up to \$1 million.

Company director convicted of illegal phoenix activity

ASIC has [reported](#) that a NSW company director has been convicted and sentenced to a one-year, \$500 good behaviour bond and ordered to pay \$22,000 in reparation after pleading guilty to charges related to illegal phoenix activity. The woman was charged with one count of breaching her director duties and another count of destroying company records.

ASIC said that the director transferred \$22,000 from the Company bank account to the bank account of another company of which she was director. The investigation also found that between 3 February 2014 and 19 August 2014, the woman destroyed the books of the Company. The Company was placed into liquidation on 3 February 2014. At the time, the Company owed \$78,153.90 to the ATO and \$19,807.86 in unpaid premiums for workers compensation insurance.

Superannuation calculators: ASIC inflation rules amended

ASIC has extended to 5 December 2019 (instead of 1 July 2019) the start date for retirement and superannuation calculators to comply with its inflation rules for generic financial calculators. The [ASIC Corporations \(Amendment\) Instrument 2019/514](#), registered on 4 June 2019, amends the relief in *ASIC Corporations (Generic Calculators) Instrument 2016/207* to give superannuation and retirement calculator providers the option of using an assumed inflation rate of 3.2% (instead of the 2.5% assumed inflation rate used for other generic financial calculators).

As a financial calculator could potentially involve financial product advice and personal advice, the ASIC Instrument provides relief from the general licensing and disclosure requirements, as long as certain disclosure requirements are satisfied. One of these requirements is to display to users the assumed rate of inflation (being 2.5% for generic financial calculators). The amendments require superannuation and retirement calculator providers to adjust for inflation certain present value estimates by using either: the default inflation rate of 3.2% for superannuation and retirement calculators; or an alternative inflation rate, as long as certain disclosure requirements are met to make it clear that the estimate does not take into account inflation and explain the implications. ASIC said it will amend the Instrument in June each year to reflect any changes in the default inflation rate used by ASIC's MoneySmart superannuation and retirement calculators.