

TAXATION

Termination of tax agent registration: AAT decision backs TPB finding

The AAT has rejected applications by two tax agents to stay the Tax Practitioners Board decisions which terminated their tax agent registration.

Taxation of testamentary trusts - draft legn released

Treasury has released a draft Bill for comment on the tax concessions available to minors in relation to income from a testamentary trust.

Commercial debt forgiveness: love and affection exclusion

A Draft Taxation Determination has been issued regarding the exclusion from the commercial debt forgiveness rules for debts forgiven for natural love and affection.

No stay of tax agent registration terminations

The AAT has refused applications by tax agents to stay decisions of the TPB to terminate their registrations.

Commissioner may access information about taxpayer's tax affairs

The Federal Court has held that the Commissioner can access information about the tax affairs of a taxpayer who is taking defamation proceedings against him.

ATO to scrutinise every return for tax time 2019

The ATO has announced that it will scrutinise every tax return lodged during Tax Time 2019 as part of its ongoing focus on "closing tax gaps".

Tax debt relief denied – serious hardship not established

A taxpayer has been unable to show that he would suffer serious hardship if required to pay a tax debt of just over \$47,000 plus the general interest charge.

Allocation of profits within professional firms: ATO update

After suspending the application of its guidelines on allocation of profits within professional firms, the ATO has released some results of its recent consultation.

ATO DIS on Linfox fuel tax case

The ATO has [released](#) a decision impact statement on the Full Federal Court decision in [Linfox Australia Pty Ltd v FCT](#) [2019] FCAFC 131.

AAT corrigendum to asset betterment case

The AAT has issued a [Corrigendum](#) to its decision in *QTWG and FCT* [2019] AATA 2428.

Cash restrictions Bill referred to Senate Committee

The *Currency (Restrictions on the Use of Cash) Bill 2019* has been referred to the Senate Economics Legislation Committee for an inquiry and report by 7 February 2020.

Proof of life requirement for overseas pensioners: Bill receives assent

The *Social Security Legislation Amendment (Overseas Welfare Recipients Integrity Program) Bill 2019* has received Royal Assent as Act No 74 of 2019.

GST Transition Regulations repealed except some provisions

The [A New Tax System \(Goods and Services Tax\) Amendment \(Transition\) Regulations 2019](#) have been registered.

FINANCIAL SERVICES

Internal dispute resolution – ASIC transitional rules extended

The [*ASIC Corporations and Credit \(Internal Dispute Resolution - Transitional\) Instrument 2019/965*](#) has been registered.

ASIC update on regtech initiatives

ASIC Chair James Shipton said its Regtech Initiatives events are seeking out new compliance technology and real-world situations to test and apply the latest regtech.

SUPERANNUATION

Super funds: proposed changes to non-arm's length income rules

[*Draft Law Companion Ruling LCR 2019/D3*](#) has been issued, discussing the proposed amendments to the non-arm's length income (NALI) rules.

Unclaimed Money and Lost Members – Draft Regs released

The Government has released for consultation [*Exposure Draft Regulations*](#) to remake the existing *Superannuation (Unclaimed Money and Lost Members) Regulations 1999*.

Retirement income review panel announced

The Government has [*announced*](#) the terms of reference for its review of the retirement income system, as recommended by the Productivity Commission.

PSS trust deed amended – child death benefits expanded

An Instrument has been registered, amending the PSS to expand the benefits payable to an "eligible child" or "partially dependent child" of a deceased member.

Super excess transfer balance tax – no ATO discretion to remit

The AAT has upheld an ATO decision not to remit a super excess transfer balance tax liability in relation to notional earnings that had accrued.

ATO SMSF auditor checklist updated

The ATO has released an update of its *Approved SMSF auditor checklist* setting out what ATO staff look for when auditing or reviewing SMSF auditors.

Super Guarantee amnesty Bill referred to Senate Committee

The *Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019* has been referred to the Senate Economics Legislation Committee for a report by 7 November.

Super Measures (No 1) Bill 2019 receives assent

The [*Treasury Laws Amendment \(2018 Superannuation Measures No 1\) Bill 2019*](#) has received Royal Assent as Act No 78 of 2019.

Insurance within super Bill is now law

The [*Treasury Laws Amendment \(Putting Members' Interests First\) Bill 2019*](#) has received Royal Assent as Act No 79 of 2019.

REGULATOR NEWS

Director oversight of non-financial risk: ASIC report

ASIC has released its [*Director and officer oversight of non-financial risk report*](#) urging greater focus and a sense of urgency to the oversight and management of non-financial risk.

Pension tax bonuses: ATO compliance approach for APRA funds

[*Practical Compliance Guideline PCG 2019/7*](#) has been issued, setting out the ATO's compliance approach for large APRA-regulated superannuation funds.

Reporting obligations for APRA-regulated funds – ATO reminder

The ATO [*has reminded*](#) APRA-regulated super funds to meet their reporting obligations within specific required timeframes.

Fair Work Ombudsman communication with businesses in the fast food, restaurant and café sector

The Fair Work Ombudsman (FWO) is currently focussed on improving compliance in the fast food, restaurant and café (FRAC) sector.

The time is running out for labour hire providers to apply for a licence to keep operating in Victoria.

A business which supplies workers in any occupation to another business in any industry may be a labour hire provider under the law.

TAXATION

Termination of tax agent registration: AAT decision backs TPB finding

The AAT has rejected applications by Taxation Guru Pty Ltd (Taxation Guru) and Mr Gambhir Watts to stay the Tax Practitioners Board (TPB) decisions which terminated their tax agent registration: [Taxation Guru Pty Ltd and Gambhir Watts and Tax Practitioners Board](#) [2019] AATA 3249, AAT, Grigg M, AAT File Nos: 2019/4540 & 2019/5044, 4 September 2019. The Tribunal said Taxation Guru Pty Ltd has been operating as a registered tax agent for 16 years. Mr Gambhir Watts has been operating as a registered tax agent since 1999 and is the sole director and controlling mind of Taxation Guru. Taxation Guru's registration was terminated following the TPB's finding that it had failed to comply with the Code of Professional Conduct by claiming unsubstantiated deductions on behalf of clients. It found the work-related expenses that were claimed were clearly not allowable and unlawful. Mr Watts had his registration terminated following the TPB's determination that he had ceased to meet 'fit and proper' requirements. Taxation Guru and Mr Watts filed applications in the Tribunal, seeking review of the TPB's decisions. In doing so, they also sought to stay the implementation of the decisions pending final resolution of their appeals.

Before the Tribunal, the Board claimed that, in relation to the 4 clients of Mr Watts (as opposed to the 5 clients of Taxation Guru), multiple work-related expense deduction claims were reduced to nil upon completion of ATO audits due to not having sufficient nexus and/or not being adequately substantiated. In rejecting the stay applications, the Tribunal acknowledged that the applicants, and their clients, would suffer some inconvenience, but determined that a stay order would not be in the public interest, finding '...the public interest outweighs the detriment which the applicants contend they will suffer if the stay is not granted'. The Tribunal concluded: '...Mr Watts does not appear to have shown any remorse, contrition and an awareness of the significance and consequences of the misconduct or wrongdoing...such that the TPB and the Commissioner can have confidence in the practitioner's continued ability to honestly and competently discharge the functions of the profession'.

Taxation of testamentary trusts - draft legn released

Treasury has released a [draft Bill](#) for comment to ensure the tax concessions available to minors in relation to income from a testamentary trust only apply in respect of income generated from assets of the deceased estate that are transferred to the testamentary trust (or the proceeds of the disposal or investment of those assets).

Currently, income received by minors from testamentary trusts is taxed at normal adult rates rather than the higher tax rates that generally apply to minors. However, the Government says some taxpayers are able to inappropriately obtain the benefit of this lower tax rate by injecting assets unrelated to the deceased estate into the testamentary trust. This measure was announced in the 2018-19 Federal Budget. Date of effect: 1 July 2019. Submissions are due by 30 October 2019.

Commercial debt forgiveness: love and affection exclusion

[Draft Taxation Determination TD 2019/D9](#) has been issued, considering the exclusion from the commercial debt forgiveness rules where a creditor forgives a debt for reasons of natural love and affection. The Commissioner's preliminary view is that the creditor must be a natural person for the exclusion (in s 245-40(e) of the ITAA 1997) to apply. According to Draft TD 2019/D9, the context of s 245-40(e) requires a direct causal nexus between the forgiveness and the natural love and affection. This natural love and affection must be felt by the creditor, the ATO says.

The ATO previously took the view that the love and affection exclusion does not require the creditor to be a natural person. In ATO ID 2003/589 (withdrawn on 6 February 2019), the ATO concluded that the exclusion applied where the love and affection emanated from the directors of a corporate creditor. Proposed date of effect: retrospective. However, the ATO will not devote compliance resources to apply the views expressed in Draft TD 2019/D9 in relation to debts forgiven prior to 6 February 2019 that would have been covered by ATO ID 2003/589. Comments on the draft are due by 1 November 2019.

No stay of tax agent registration terminations

The AAT has refused applications by tax agents to stay decisions of the TPB to terminate their registrations: [Gao and Tax Practitioners Board](#) [2019] AATA 3651, AAT, Grigg M, AAT File No: 2019/4788, 19 September 2019. Australia Fortune Financial Group Pty Ltd (“AFFG”) and Mr Feng Gao (collectively “the Applicants”) have been operating as registered tax agents since 2013. After an audit, the ATO found that Meihua had not correctly reported GST in relation to some property transactions between 1 January 2014 and 30 June 2016, resulting in outstanding GST and penalty of over \$500,000. The ATO also found that Meihua had overclaimed interest deductions on loans totalling \$1,133,780 resulting in a carried forward loss of \$152,960. The ATO also audited AFFG and found: AFFG consistently lodged its own income tax returns and BASs late; AFFG lodged superannuation guarantee charge statements late and paid its employees superannuation guarantee charges late; and AFFG had prepared the income tax returns of 535 workers in the Meat Industry who had made large work-related expense claims. All those Meat Workers were required to amend their returns. Substantial adjustments had to be made in relation to 401 income tax returns resulting in a tax shortfall of over \$690,000.

After referral to the TPB, the Board found AFFG and Mr Gao had failed to comply with the Code of Professional Conduct and terminated their registration and may not apply for registration for 5 years. Mr Gao and AFFG filed stay applications of the TPB’s decisions. The Tribunal noted the higher standard of care required of tax agents in preparing their clients’ returns. After careful review, the Tribunal found that a stay order was not in the public interest and “the public interest outweighs the detriment which the Applicants contend they will suffer if the stay is not granted”. The Tribunal said: “Mr Gao does not appear to have shown an ‘awareness of the significance and consequences of the misconduct or wrongdoing, such that the TPB and the Commissioner can have confidence in the practitioner’s continued ability to honestly and competently discharge the functions of the profession’”.

Commissioner may access information about taxpayer's tax affairs

The Federal Court has held that information about the tax affairs of Mr Vanda Gould can be released to the Commissioner to help him prepare his defence in defamation proceedings instituted by Mr Gould: [*Jordan, Commissioner of Taxation v Second Commissioner of Taxation and Gould*](#) [2019] FCA 1602, Federal Court, White J, 27 September 2019. In July 2017 Mr Chris Jordan made a speech to the National Press Club in his capacity as Commissioner of Taxation. In answering a question, Mr Jordan referred to the "Hua Wang Bank" case which involved companies controlled or managed by Mr Gould. A few months later, the latter commenced defamation proceedings against Mr Jordan, alleging that his words implied that Mr Gould had engaged in the worst kind of money laundering, insider trading and tax fraud. To help prepare his defence, Mr Jordan sought access to material held by the ATO concerning Mr Gould, including "protected information" as defined in s 355-30 in Sch 1 to the TAA. However, a Second Commissioner declined the request for access to the protected information. Section 355-50(1) allows a taxation officer to disclose protected information if made in the performance of the officer's duties. The table in s 355-50(2) lists examples of where disclosure is allowed.

The Federal Court concluded that disclosure of the protected information would be for the purpose of civil proceedings related to a taxation law and thus covered by item 3 in the table in s 355-50(2). The reasonable prospect that Mr Jordan might want to refer in the defamation proceedings to the Hua Wang bank litigation created a relationship with the taxation laws that was encompassed by item 3. Further, it was very likely that compliance with taxation laws by Mr Gould and the companies he controlled would be an issue in the defamation proceedings. Accordingly, in the Court's view, the defamation proceedings related in a reasonably direct way to at least some taxation laws for which Mr Jordan was responsible in his capacity as Commissioner.

ATO to scrutinise every return for tax time 2019

The ATO has [announced](#) that it will scrutinise every tax return lodged during Tax Time 2019 as part of its ongoing focus on "closing tax gaps". Assistant Commissioner, Karen Foat, said taxpayers who have done the wrong thing may be subject to an audit, even if the over-claim of deductions is minor. Third party data indicating under reported income, and deductions that appear high compared to people with a similar job and income level, tend to raise concerns, Ms Foat said.

While the ATO contacts around two million people each year about their returns, in most cases, Ms Foat said an audit is not the ATO's first action.

If the ATO does decide to conduct an audit, it will contact the taxpayer and/or their tax agent to make further enquiries of evidence to support the claims in question. The ATO may also request information from third parties (ie employers) to verify expenses, and depending on the behaviour of the taxpayer, it may apply penalties or seek to prosecute. Once the ATO has been in contact with a taxpayer to review claims, "it is important to be honest and get the matter resolved quickly". The ATO notes that taxpayers are more likely to face penalties if they aren't honest. If a taxpayer thinks they may have made a mistake, or there is an error in their tax return, the best thing to do is "fess up" as soon as possible, Ms Foat said.

Tax debt relief denied – serious hardship not established

A taxpayer has been unable to show that he would suffer serious hardship if required to pay a tax debt of just over \$47,000 plus the GIC: [Burns and FCT](#) [2019] AATA 3860 (AAT, File No 2018/7172, Evans SM, 24 September 2019). The taxpayer was a 34-year old self-employed flooring installer. He lived in rented accommodation with his partner. Neither of them had any children or dependants. The taxpayer had income tax debts for the 2014, 2015 and 2017 income years totalling just over \$47,000, plus associated GIC (the eligible debt). He applied under s 340-5 in Sch 1 TAA to be released from the liability for those debts on serious hardship grounds. He also owed just over \$51,000 in GST and failure to lodge on time (FTL) penalties, but they were not eligible for release under s 340-5 (the ineligible debt). The reasons given by the taxpayer for not having paid his tax liabilities were initial lack of awareness that he had to pay GST; health issues; loss of licence; relationship breakdown and family deaths.

Although the taxpayer had insufficient assets to pay the eligible debt, the AAT was not satisfied that the taxpayer would suffer serious hardship if he was required to pay it. The evidence showed that, after taking into account his partner's income, the taxpayer's income exceeded his expenditure by just over \$2,570 per month. The AAT considered that this was sufficient to meet his reasonable living expenses, even if required to pay both the eligible debt and the ineligible debt, and also considered that 46 months was not an unreasonable period for repayment.

Allocation of profits within professional firms: ATO update

In 2017, the ATO suspended the application of its guidelines on allocation of profits within professional firms and Everett assignments, to institute a review after finding the guidelines were being misinterpreted. It has now [released](#) some results of the recent consultation undertaken with a view to publishing new guidance. In particular, the ATO had concerns with some arrangements, including those where there was: a lack of meaningful commercial purpose; inappropriate use of CGT concessions and disregard of CGT consequences; and profit sharing not directly proportionate to equity interest held.

According to the ATO, those taxpayers who entered into arrangements prior to 14 December 2017 can continue to rely on the suspended guidelines for the year ended 30 June 2019 provided they comply with the suspended guidelines, are "commercially driven" and do not exhibit any of the characteristics outlined above. It is also encouraging those contemplating new arrangements or have concerns regarding their current arrangements to make contact.

ATO DIS on Linfox fuel tax case

The ATO has [released](#) a decision impact statement (DIS) on the Full Federal Court decision in [Linfox Australia Pty Ltd v FCT](#) [2019] FCAFC 131. In that case, the Full Court had upheld a decision of the AAT that the road user charge under the *Fuel Tax Act 2006* (FTA) applied in the relevant circumstances.

The ATO said the Full Court's decision confirms its view on what a "public road" is. In addition, it noted that the first instance decision in *Linfox Australia Pty Ltd and FCT* [2019] AATA 222 found that the fuel acquired for travelling included fuel used for operations other than propulsion (ie cabin air-conditioning). According to the DIS, this reasoning would extend to the operation of all such auxiliary equipment in vehicles and the use of fuel for travel on public roads. However, the ATO said that some elements of the AAT reasoning were inconsistent with its earlier decision in *Linfox Australia Pty Ltd and FCT* [2012] AATA 517. The ATO said it intends to apply the current (ie 2019) decision to the extent of any inconsistency. Comments are due by 25 October 2019.

AAT corrigendum to asset betterment case

The AAT has issued a [Corrigendum](#) to its decision in *QTWG and FCT* [2019] AATA 2428. In that case, the taxpayer only had limited success in challenging asset betterment assessments for the 2004-2010 income years. Generally, the AAT was not satisfied that various payments were loans as claimed by the taxpayer. In some cases, there was a lack of documentary evidence and, in other cases, there was no evidence to show that the "lenders" had the resources to make the "loans" in question.

The Corrigendum clarifies that the ATO conceded that the sum of \$270,000, which was presented to the taxpayer in a cheque that was subsequently dishonoured, should have been excluded from the 2009 assessment. Otherwise, the Corrigendum does not alter the original decision.

Cash restrictions Bill referred to Senate Committee

The [Currency \(Restrictions on the Use of Cash\) Bill 2019](#) has been referred to the Senate Economics Legislation Committee for an [inquiry](#) and report by 7 February 2020.

The Bill will make it a criminal offence for entities to make or accept cash payments of \$10,000 or more. The offences aim to reduce the risk of tax evasion, money laundering, fraud, bribery, obtaining financial advantage by deception and terrorism financing which can be facilitated by cash. It also seeks to ensure entities can't avoid the scrutiny of the ATO and participate in the black economy by making or receiving large cash payments. Submissions are due by 15 November 2019.

Proof of life requirement for overseas pensioners: Bill receives assent

The [Social Security Legislation Amendment \(Overseas Welfare Recipients Integrity Program\) Bill 2019](#) has received Royal Assent as Act No 74 of 2019. It was passed by the Senate without amendment, having earlier passed the House of Representatives with [one amendment](#) to revise the commencement date. The Bill introduces a proof of life requirement for certain overseas social security recipients aged 80 years and over. It will apply to those in receipt of an Age Pension, Carer Payment, Disability Support Pension, Widow B Pension or Wife Pension. Such

pensioners who have been residing permanently overseas for at least 2 years will be required to provide a proof of life certificate at least once every 2 years.

If a pensioner fails to give a proof of life certificate, or the pensioner does not enter Australia within the 13-week suspension period, the pensioner's payment will be cancelled 26 weeks from the date of the notice. The proof of life measures in Sch 1 of the Bill commence on 21 December 2019 (being the day after the end of 3 months beginning on the day this Act receives Royal Assent).

GST Transition Regulations repealed except some provisions

The [*A New Tax System \(Goods and Services Tax\) Amendment \(Transition\) Regulations 2019*](#) have been registered. The purpose of the Amending Regulations is to remake provisions in the *A New Tax System (Goods and Services Tax Transition) Regulations 2000* (GST Transition Regulations) that may continue to have some operation before they sunset. Rather than remaking the GST Transition Regulations, the provisions which may have some further operation have been included in the *A New Tax System (Goods and Services Tax) Regulations 2019*. As a result, the Amending Regulations also repeal the GST Transition Regulations from 1 October 2019.

Those provisions prescribe a number of bodies and the members of those bodies as arbitrators for the purposes of the GST Transition Act. The Amending Regulations also prescribe other changes to Commonwealth, State and Territory laws as matters that can be taken into account in working out an arbitrated offer concerning price agreements to account for GST and other related tax system reforms.

FINANCIAL SERVICES

Internal dispute resolution – ASIC transitional rules extended

The [*ASIC Corporations and Credit \(Internal Dispute Resolution - Transitional\) Instrument 2019/965*](#) has been registered and applies until 30 June 2020 pending the finalisation of ASIC's proposed new policy on internal dispute resolution (IDR). Financial services licensees and regulated superannuation funds (other than

SMSFs) are required to have an IDR procedure that complies with the standards and requirements approved by ASIC.

The Instrument continues ASIC's transitional policy that approves the procedure for a "complaint" as defined in AS ISO 10002-2006 and the "Guiding principles" in AS ISO 10002-2006 (known as *Customer Satisfaction - Guidelines for complaints handling in organizations* published by Standards Australia). The procedure must also include adequate measures for informing complainants about the availability and accessibility of the Australian Financial Complaints Authority scheme.

ASIC update on regtech initiatives

In an [opening statement](#) at the ASIC regtech voice analytics symposium in Melbourne, ASIC Chair James Shipton explained that the event would explore the potential of voice analytics and voice signal analysis technologies within the context of the insurance sector. This follows an ASIC report (REP 587) which found that sales practices and product design were leading to poor consumer outcomes.

Mr Shipton said ASIC's Financial Services team worked with 3 trial participants who were provided with 1,700 sales calls to test whether voice analytics and voice-to-text could be applied to replicate what ASIC staff members did when they manually reviewed those calls. ASIC said its Regtech Initiatives events are seeking out new compliance technology and real-world situations to test and apply the latest regtech. ASIC said these exercises demonstrated the future potential of regtech to improve business procedures and consumer outcomes.

SUPERANNUATION

Super funds: proposed changes to non-arm's length income rules

[Draft Law Companion Ruling LCR 2019/D3](#) has been issued, discussing the proposed amendments to the non-arm's length income (NALI) rules (s 295-550 of the ITAA 1997) where a superannuation fund incurs non-arm's length expenditure under a scheme. These changes are in the *Treasury Laws Amendment (2018 Superannuation Measures No 1) Bill 2019* (and were previously in the lapsed *Treasury Laws Amendment (2018 Superannuation Measures No 1) Bill 2018*). The

amendments seek to ensure that income is included in a superannuation entity's non-arm's length component and taxed at the top marginal rate if: non-arm's length expenses are incurred in gaining or producing the income; no expenses are incurred but might be expected to have been incurred if the transaction were on arm's length terms; or the superannuation entity holds a fixed entitlement to the income of a trust, derives income as a beneficiary of that trust and incurs non-arm's length expenses in acquiring that entitlement or in gaining or producing that income. Proposed date of effect: applicable to income derived from 1 July 2018.

Draft Practical Compliance Guideline PCG 2019/D6 has also been released, setting out a transitional compliance approach for 2018-19 and 2019-20. The ATO recognises that fund trustees may not have realised that the proposed amendments would extend to non-arm's length expenditure of a general nature. Accordingly, the ATO will not allocate compliance resources to determine whether the NALI provisions apply to a complying fund for the 2018-19 and 2019-20 income years if the fund incurred non-arm's length expenditure of a general nature that has a sufficient nexus to all ordinary and/or statutory income derived by the fund in those income years. Comments on both drafts are due by 15 November 2019.

Unclaimed Money and Lost Members – Draft Regs released

The Government has released for consultation [Exposure Draft Regulations](#) to remake the existing *Superannuation (Unclaimed Money and Lost Members) Regulations 1999* which are due to sunset on 1 April 2020. The draft regulations include 2 substantive changes to the previous regulations. These include prescribing conditions of release whereby an account will no longer be considered an inactive low balance account if met by a member, and that interest will apply to the payment of unclaimed amounts in relation to inactive low balance accounts. Minor technical changes have also been made to reflect current drafting practice.

Additional regulations to repeal the existing regulations are also being consulted on. These regulations repeal the 1999 regulations upon the commencement of the 2019 regulations should that occur before the scheduled sunset date of 1 April 2020. Submissions are due by 25 October 2019.

Retirement income review panel announced

The Government has [announced](#) the terms of reference for its review of the retirement income system, as recommended by the Productivity Commission. The Treasurer, Josh Frydenberg, said the review will be conducted by an independent 3-person panel chaired by Mr Michael Callaghan, a former Executive Director of the International Monetary Fund (IMF) and a former senior Treasury official. The other panellists are Ms Carolyn Kay, a member of the Future Fund Board of Guardians with more than 30 years' experience in the finance sector, and Dr Deborah Ralston, a Professorial Fellow in Banking and Finance at Monash University, a member of the RBA's Payments System Board, and most recently, chair of the Alliance for a Fairer Retirement.

The Treasurer said the review will look at the "three pillars" of the existing retirement income system, being the Age Pension, compulsory superannuation and voluntary savings (including home ownership). In doing so, the review will cover the current state of the super system and how it will perform in the future as people live longer and the population ages. The review will also establish a fact base on the operation of the current retirement income system and the outcomes being delivered. A consultation paper will be released in November 2019 and the final report will be provided to Government by June 2020.

PSS trust deed amended – child death benefits expanded

The [Superannuation Amendment \(PSS Trust Deed\) Instrument 2019](#) has been registered, amending the Public Sector Superannuation Scheme (PSS) to expand the benefits payable to an "eligible child" or "partially dependent child" of a deceased member. PSS death benefits can take the form of a higher pension payable to a spouse to recognise an eligible child, or may be payable directly to the child if they do not live with the spouse or if there is no spouse. The definitions of "eligible child" and "partially dependent child" generally require a child to be less than 16 years of age; or age 16 or more but less than the age 25 years and undertaking full-time study at a school, college or university and *not ordinarily employed or self-employed*.

The Instrument amends the PSS Trust Deed to increase the age from which an eligible child must be in full-time education from age 16 to age 18, and also removes the restriction relating to not ordinarily being in employment. As a result, a child of a deceased member can still qualify for a payment if they are under 18, or 18-25 and

in full time education, even if they are also employed. The amendments seek to reflect that it is now more usual for students to remain in formal education until at least age 18. It is also more common for students who undertake further education to work in part-time or casual employment to sustain themselves while studying, even if they have some parental support. The amendments will commence from 1 January 2020 (subject to application provisions).

Super excess transfer balance tax – no ATO discretion to remit

The AAT has upheld an ATO decision not to remit a superannuation excess transfer balance tax liability in relation to the notional earnings that continued to accrue after the initial excess transfer balance had been commuted: [*Vernik and FCT*](#) [2019] AATA 3754 (AAT, File No: 2019/0086, Britten-Jones DP, 9 August 2019). The taxpayer (Dr Vernik) is the recipient of two "capped defined benefit income streams" and an account based income stream. As the total value of his income streams exceeded his \$1.6m pension transfer balance cap, the taxpayer had an excess transfer balance of \$361,406 on 1 July 2017. The special values of the capped defined benefit income streams were reported to the ATO by PSS and DFS on 14 November 2017. On 3 January 2018, the ATO issued an excess transfer balance (ETB) determination requiring the taxpayer to commute \$376,647. On 31 January 2018, the taxpayer commuted \$376,647 from his account-based pension and thought he had now reduced his excess transfer balance to nil. While the commutation had debited the taxpayer's transfer balance account, ETB earnings of \$19,082 had continued to accrue on the excess amount. The ATO said the taxpayer was now required to commute a further \$3,842 by 30 August 2018 so as to return his transfer balance account to below the \$1.6m transfer balance cap. On 9 August 2018, the taxpayer made a further commutation to reduce his excess transfer balance to nil. On 13 September 2018, the ATO issued a second ETB assessment of \$2,868 (being 15% of \$19,119 of ETB earnings). These ETB earnings comprised the \$19,082 and a further \$37 for the period 1 July 2018 to 8 August 2018 (ie between the second determination and the second commutation).

The taxpayer contended that it was unfair to be taxed with respect to the ETB earnings accruing from 1 July 2017 as he wasn't informed of the excess until 3 January 2018. He further submitted that if the ATO had informed him earlier, he would have taken action immediately, and not incurred the extra \$2,868 tax liability for the period 1 July 2017 to January 2018. The ATO ruled that the ETB assessment had been correctly calculated under Div 294 of the ITAA 1997 for the excess transfer

balance period between 1 July 2017 and 8 August 2018. The AAT noted that the law does not give the Commissioner a discretion to waive the tax payable and there is no "special circumstances" provision under Div 294. The AAT said the grace period provided by s 294-30 of the *Income Tax (Transitional Provisions) Act 1997* for minor excess transfer balances does not apply to the taxpayer because his ETB was greater than \$100,000 and was still in existence after the first 6 months as at 1 January 2018. The AAT also considered that the ATO letter and determination made it clear that a tax amount will be payable, and will continue to increase until the excess is removed. The AAT also believed that the ATO had acted in a "timely fashion" by issuing the ETB determination on 3 January 2018 given that the special values for the income streams were reported to the ATO on 14 November 2017.

ATO SMSF auditor checklist updated

The ATO has released an update of its [Approved SMSF auditor checklist](#) setting out what ATO staff look for when auditing or reviewing SMSF auditors. The ATO checklist covers auditor obligations under the SIS Act, SIS Regs, auditing standards and audit documentation requirements. Some of the key checklist topics are set out below.

- Auditor independence
- Auditing standards
- Investment strategy
- LRBAs
- Non-arm's length income and expenses
- Exempt current pension income.

Super Guarantee amnesty Bill referred to Senate Committee

The [Treasury Laws Amendment \(Recovering Unpaid Superannuation\) Bill 2019](#) has been referred to the Senate Economics Legislation Committee for a report by 7 November 2019. The Bill seeks to implement the Government's Super Guarantee (SG) amnesty to enable employers to self-correct historical underpayments of SG amounts without incurring additional penalties that would normally apply.

The amnesty is proposed to run until 6 months after the day the Bill receives Royal Assent. It will apply to SG shortfalls as far back as 1 July 1992, and up until the quarter starting on 1 January 2018 (inclusive). Importantly, employers will be able to claim a tax deduction for payments of SG charge or contributions made during the amnesty period.

Super Measures (No 1) Bill 2019 receives assent

The [Treasury Laws Amendment \(2018 Superannuation Measures No 1\) Bill 2019](#) has received Royal Assent as Act No 78 of 2019. The Bill had passed all stages without amendment. It makes the following amendments:

- *Super Guarantee opt-out*: high-income employees with multiple employers will be able to opt-out of the Super Guarantee regime to avoid unintentionally breaching the \$25,000 concessional contributions cap. Such employees with income exceeding \$263,157 will be able to apply to the ATO for an "employer shortfall exemption certificate". Date of effect: 1 July 2018.
- *Non-arm's length expenses*: the non-arm's length income (NALI) rules in s 295-550 of the ITAA 1997 will be expanded so that super funds are taxed at 45% for related-party schemes involving non-arm's length expenses not incurred that would normally be expected to apply in a commercial transaction. Date of effect: 1 July 2018, regardless of whether the scheme was entered into before that time.
- *LRBAs*: a member's share of the outstanding balance of certain limited recourse borrowing arrangements (LRBAs) will be included in the member's total superannuation balance (TSB). Date of effect: Will only apply to new LRBAs entered on or after 1 July 2018. Refinancing of existing loans entered into prior to that date will be excluded.

Insurance within super Bill is now law

The [Treasury Laws Amendment \(Putting Members' Interests First\) Bill 2019](#) has received Royal Assent as Act No 79 of 2019. The House of Representatives had agreed to the [16 Government amendments](#) (as amended by One Nation) passed by the Senate. The Bill, as introduced, proposes to require insurance within superannuation be provided on an opt-in basis for: (i) account balances less than \$6,000; and (ii) members under 25 years old (who begin to hold a new product). Date of effect: The [16 Government amendments](#) passed by the Senate (and agreed to by the House Representatives) delay the commencement of the measure until 1 April 2020. Under the amendments, on 1 November 2019, trustees will be required to identify members who may be affected by the measure and notify these members by 1 December 2019.

Dangerous occupations: The Government amendments also included a dangerous occupations exception that will allow trustees to continue to provide opt-out insurance to new members aged under 25 years and members with balances below

\$6,000. The exception will apply to emergency services workers, including a member of the police force or service, fire service or ambulance service. A trustee will also be able to elect that members are covered by the exemption if an actuary has certified that, based on rates of death, or death and total permanent disability, the occupation is in the riskiest quintile of occupations in Australia.

REGULATOR NEWS

Director oversight of non-financial risk: ASIC report

ASIC has released its [Director and officer oversight of non-financial risk report](#) urging greater focus and a sense of urgency to the oversight and management of non-financial risk. ASIC Chair, James Shipton, said the boards of the 7 large financial institutions reviewed by ASIC were challenged by important elements of non-financial risk management and their oversight of these risks was "less mature than required". ASIC's review found that management was all too often operating outside of board-approved risk appetites for non-financial risks, particularly compliance risk. Boards need to actively hold management accountable for operating within stated risk appetites, ASIC said. The report also found that the reporting of risk against appetite often did not effectively communicate the company's risk position.

Material information about non-financial risk was often buried in dense, voluminous board packs making it difficult to identify key non-financial risk issues. ASIC said boards should require reporting from management that has a clear hierarchy and prioritisation of non-financial risks. ASIC also recommended that board risk committees should meet more regularly to oversee material risks in a timely manner.

Pension tax bonuses: ATO compliance approach for APRA funds

[Practical Compliance Guideline PCG 2019/7](#) has been issued, setting out the ATO's compliance approach for large APRA-regulated superannuation funds that, due to system constraints, are unable to incorporate the value of a pension tax bonus into the opening balance of a new income stream that is in retirement phase. The ATO does not intend to allocate compliance resources to review the calculation of a fund's exempt current pension income if the conditions set out in PCG 2019/7 are met.

These conditions include: incorporating the value of the pension tax bonus in the member's pension account balance for the following income year; the pension tax bonus being less than 1.5% of the member's closing accumulation balance; informing the ATO of the correct value of the superannuation interest supporting the income stream for the purposes of the member's transfer balance credit; notifying APRA of the potential breach of the minimum pension payment standards; and deploying a full system solution by 30 June 2020 to address the system constraints. Date of effect: 1 July 2017 to 30 June 2020.

Reporting obligations for APRA-regulated funds – ATO reminder

The ATO [has reminded](#) APRA-regulated super funds to meet their reporting obligations within the required timeframe as follows:

- *Annual amounts and balance reporting* – A fund has an obligation to report, via the Member account transaction service (MATS), the 30 June account balance amounts and any applicable phase values, notional taxed contributions and defined benefit contributions, on or before *31 October 2019* for any account that is open as at 30 June 2019.
- *Correcting annual amounts and balances* – When a fund needs to correct a 30 June account balance it is required to correct this by reporting a subsequent 30 June account balance amount. The fund must correct this reporting within 30 days of becoming aware there was an error or omission in the information provided.
- *Unclaimed super money* – Funds are required to report and pay unclaimed amounts for the statement period 1 January to 30 June 2019, on or before *31 October 2019*.
- *Lost member reporting* – A fund is required to report the lost status of their members at a minimum biannually via the Member account attribute service (MAAS) by assessing the lost status of their members:
 - on or after 30 June but before 31 October and if there has been a change in the member's 'lost status' account attribute, report that information on or before *31 October*.
 - on or after 31 December but before 30 April and if there has been a change in the member's 'lost status' account attribute, report that information on or before *30 April*.

The time is running out for labour hire providers to apply for a licence to keep operating in Victoria.

A business which supplies workers in any occupation to another business in any industry may be a labour hire provider under the law.

- Labour hire providers have until 29 October 2019 to apply for a licence with the Labour Hire Authority to continue operating in Victoria or face major penalties.
- From 30 October 2019 businesses must only use licensed providers or providers who have applied for a licence before 30 October 2019 and have not been refused, or face major penalties.
- The maximum penalties can exceed \$500,000 per breach.
- The labour hire licensing scheme was introduced to protect labour hire workers from exploitation and to improve transparency and integrity.
- There is more information about what labour hire providers and hosts need to do on our website.

Fair Work Ombudsman communication with businesses in the fast food, restaurant and café sector

The Fair Work Ombudsman (FWO) is currently focused on improving compliance in the fast food, restaurant and café (FRAC) sector. The FWO recently wrote to small business operators in this sector to advise them of this work and educate them on their responsibilities. To view the letter, [click here](#).

The FWO recognise that this is a very competitive industry and that small business operators often need additional support to ensure they are compliant with workplace laws. As part of the FRAC strategy, the FWO are promoting our free tools, templates, calculators and other resources to educate small business operators on their obligations, including the [Small Business Showcase](#) and our [fast food, restaurants and cafes webpage](#).