

TAXATION

Disclosure of business tax debts: ATO update

ATO has released information on the recently passed law which will allow it to disclose tax debt information of businesses to registered credit reporting bureaus.

Draft rules for restriction on use of cash legislation

Government has released draft rules to support the legislation which will make it a criminal offence for certain entities to make or accept cash payments of \$10,000 or more.

Tax agent lodgment concessions – due dates

ATO has said it will review the lodgment due dates of newly added and existing clients of tax practitioners.

ATO receives 230 tip-offs per day re black economy

ATO has reported it has received a record-breaking number of tip-offs to its Tax Integrity Centre in the first quarter of this financial year.

ATO to visit businesses in Bankstown to tackle black economy

ATO has announced it will visit around 400 Bankstown businesses in November following a spike of dob-ins about black economy behaviour.

Treasury Measures (No 2) Bill receives Assent

Bill containing amendments to genuine redundancy age limit, LCT refunds for farmers and tourism, and interest on ATO super payments has received Royal Assent.

Tax Integrity (No 1) Bill receives Assent

Bill containing amendments to vacant land exceptions, tax debts and small business CGT concessions has received Royal Assent.

CGT changes for foreign residents: Bill introduced

The Bill to remove entitlement to CGT main residence exemption for certain foreign residents has been introduced in the House of Reps.

CGT: assumed liability and cost base

Draft Determination confirms the ATO view that an asset's cost base for CGT purposes does not include a liability assumed in acquiring the asset in certain circumstances.

Taxpayer protected from backpacker tax by DTA

Federal Court has held in a test case that the Australia-UK DTA required an Australian resident British working holiday maker to pay tax at the same rate as other tax residents.

No discount capital gain where shares disposed after roll-overs

Full Federal Court has unanimously dismissed an appeal against a decision that the capital gain made on shares disposed following roll-overs was not a discount capital gain.

Loans to shareholders deemed dividends

AAT has confirmed loans by a company to shareholders and the transfer of property to an associate gave rise to deemed dividends.

Commissioner's annual report: tax collections

Commissioner of Taxation's 2018-19 Annual Report has been released with points of note including an increase in GST collections.

Old tax and BAS agent portals closing

We have reached the end of the transition period from the old tax and BAS agent portals to Online services for agents.

FINANCIAL SERVICES

Robo-advice tools shut down after ASIC concerns

A Sydney-based AFS licensee has voluntarily agreed to shut down two digital advice tools following concerns raised by ASIC.

Ending grandfathered conflicted remuneration Bill receives Assent

The Bill to ban grandfathered conflicted remuneration paid to financial advisers from 1 January 2021 has received Royal Assent.

Financial adviser found guilty of \$5.9m fraud

ASIC has reported that a former Brisbane financial adviser has been found guilty of a \$5.9m fraud and sentenced to 12 years jail.

AFS Licensee suspended due to systemic issues and PI exclusions

ASIC has reported that it has suspended the AFS licence of a Sydney-based financial services provider due to concerns it did not adequately address systemic issues.

ASIC imposes additional IOOF licence conditions

ASIC has imposed additional conditions on the AFS licence of IOOF Investment Services Ltd as a part of an application to vary its licence.

SUPERANNUATION

Transfer balance cap correspondence: ATO reminder

[ATO says that excess transfer balance determinations and commutation authorities issuing in October will have a due date that falls during Christmas/New Year.](#)

SMSF illegal early access scheme: three years' jail

ATO has reported that a man was sentenced to three years' jail after pleading guilty to orchestrating a superannuation illegal early release scheme.

Super fund taxed at 45% on private company dividends

AAT has upheld amended assessments for a SMSF which treated private company dividends received by the fund as NALI.

Super excess transfer balance tax – no AAT jurisdiction

AAT has decided it did not have jurisdiction to rule on whether a taxpayer assessed to pay super excess transfer balance tax was misled by the ATO website.

Westpac super switching campaign was "personal advice"

Full Federal Court has upheld ASIC's appeal and ruled that two Westpac subsidiaries provided "personal advice" in relation to a superannuation switching campaign.

Super fund portfolio disclosure deferred to 31 December 2020

ASIC has registered a Class Order to extend the first reporting date for Portfolio Holdings Disclosure from 31 December 2019 to 31 December 2020.

Senate Committee inquiry into Super Guarantee amnesty Bill

Senate Economics Legislation Committee has held a public hearing as a part of its inquiry into the Bill that will establish the Government's Super Guarantee amnesty.

REGULATOR NEWS

Board of Taxation CEO update

Board of Taxation CRO has provided its October 2019 update including finalised projects submitted to the government for consideration.

Committee hearing into performance of IGT

Senate Economics Legislation Committee is inquiring into the performance of the Inspector-General of Taxation.

APRA's new Data Collection system: update

APRA has provided an update on its Data Collection Solution Implementation Plan for reporting entities.

IGT seeking comments on two new reviews

The IGTO has released a media release announcing the terms of reference for two new investigations to be conducted by the Inspector General of Taxation and Taxation Ombudsman.

TAXATION

Disclosure of business tax debts: ATO update

The [Treasury Laws Amendment \(2019 Tax Integrity and Other Measures No 1\) Bill 2019](#) has received Assent which will allow the ATO to disclose tax debt information of businesses to registered credit reporting bureaus (CRBs). Under the law, the ATO [said](#) it will only be able to disclose tax debt information of a business to a CRB where certain criteria are met. For example, a business must have owed the ATO at least \$100,000 for more than 90 days and not effectively engaged with the ATO to manage their debt. The criteria are set out in the [draft Legislative Instrument](#), which must be finalised and registered before the ATO can disclose tax debt information to CRBs.

The Commissioner said he is not obligated to disclose tax debt information and will apply administrative safeguards above and beyond the legislative safeguards in the Bill and draft legislative instrument, before reporting the tax debt information of a business. See also the [ATO consultation paper on its administrative approach](#). Importantly, the ATO said it will not disclose a tax debt where the Inspector-General of Taxation and Taxation Ombudsman (IGTO) is considering an ongoing complaint about the proposed reporting of the entity's tax debt information. It is also required to notify a business in writing if they meet the reporting criteria and give them 28 days to engage with the ATO to avoid having its tax debt information reported. The ATO said it will only provide information to CRBs if they are registered with the ATO and have entered into an agreement detailing the terms of the reporting.

Draft rules for restriction on use of cash legislation

The government has released draft rules to support the Currency (Restrictions on the Use of Cash) Bill 2019, which will make it a criminal offence for certain entities to make or accept cash payments of \$10,000 or more. The [Currency \(Restrictions on the Use of Cash\) Rules 2019](#) set out how to value an amount of foreign currency or digital currency in Australian currency and specify which payments fall outside of the rules. Payments not subject to the cash payment limit include those:

- related to personal or private transactions (other than transactions involving real property);
- that must be reported by an entity under anti-money laundering and counter-terrorism legislation, provided, broadly, the entity with a reporting obligation complies (or is reasonably expected to comply) with their obligations under that legislation;
- made or accepted by a public official in the course of their duties where it is necessary for the payment to be made in cash for the performance of those duties and payments made or accepted by Australian government agencies where the payment is foreign currency produced for a foreign government;
- that only equal or exceed the cash payment limit because the payment is part of a transaction involving collecting, holding or delivering cash and this is undertaken in the course of an enterprise of collecting or delivering cash (ie providing cash-in-transit services);
- that only equal or exceed the cash payment limit because payment is or includes an amount of digital currency; and
- that occur in exceptional situations where no alternative method of payment could reasonably be used.

Tax agent lodgment concessions – due dates

The [ATO says](#) if tax practitioners have recently added a client or lodged overdue documents for existing clients to bring them up to date, the ATO will review their lodgment due dates and apply lodgment concessions as required. It can take up to three weeks for updated due dates to appear on agents' client lists. The ATO says agents do not need to submit deferral requests for clients they think may have missed out on the agent's concession until after 21 November 2019.

ATO receives 230 tip-offs per day re black economy

The ATO [has reported](#) that it received a record-breaking 15,000 tip-offs to its Tax Integrity Centre in the first quarter of this financial year as the agency continues its focus on the black economy.

The ATO says that the top categories of tip-offs the ATO has received so far this year have been about: not declaring income; demanding cash from customers and/or paying workers "cash in hand"; someone's lifestyle does not appear to match their income level; and not reporting sales.

ATO to visit businesses in Bankstown to tackle black economy

The ATO [has announced](#) that it plans to visit around 400 Bankstown businesses in November following spike in dob-ins about black economy behaviour like paying workers 'cash in hand'. It has also received intelligence that some Bankstown businesses have refused to provide tax invoices for sales, are underreporting income, and not reporting sales to the ATO. Assistant Commissioner Peter Holt said that certain industries are on our radar in Bankstown, including cafes, restaurants and takeaway food services, transport businesses, building completion businesses, delivery businesses, and businesses providing cleaning, pest control and gardening services. During the visits, the ATO will also be running information sessions tailored to support small businesses.

Treasury Measures (No 2) Bill receives Assent

The [Treasury Laws Amendment \(2019 Measures No 2\) Bill 2019](#) has received Royal Assent as Act No 94 of 2019. The Bill includes the following amendments:

- Genuine redundancy age limit - the age limit of 65 will be aligned with the pension age for genuine redundancy and early retirement scheme payments. That is, concessional tax treatment will apply if the employee is dismissed or retires before they reach pension age (which is currently age 66, rising to 67 by 1 July 2023). Date of effect: will apply to payments received by employees who are dismissed or retire on or after 1 July 2019.
- LCT refunds for farmers and tourism - the luxury car tax (LCT) refund arrangements will be amended to provide a full refund (up to a cap of \$10,000) for eligible primary producers and tourism operators who have purchased or imported an eligible vehicle. Date of effect: will apply to cars supplied or imported on or after 1 July 2019.
- Interest on ATO super payments - provides for regulations to prescribe a rate of interest which is payable on amounts held by the ATO which are proactively reunified into a person's superannuation account, as originally intended. Date of effect: The day after Royal Assent.

Tax Integrity (No 1) Bill receives Assent

The [Treasury Laws Amendment \(2019 Tax Integrity and Other Measures No 1\) Bill 2019](#) has received Royal Assent as Act No 95 of 2019. The Bill had previously been passed by the Senate [with one Government, two Opposition and two Centre Alliance amendments](#) which the House of Reps subsequently agreed to. The Government amendment provides three exceptions for the Bill measure that will deny deductions in relation to holding vacant land from 1 July 2019. The exceptions apply to vacant land: (i) held by primary producers; (ii) available for use in carrying on a business under arm's length arrangements; and (iii)

structures affected by natural disasters or other exceptional circumstances (for up to three years).

The two Centre Alliance amendments are in relation to the ATO's disclosure of business tax debts to a credit reporting bureau (CRB). An Opposition amendment also increases from 21 to 28 days the notice period before the ATO can disclose a business tax debt. The other Opposition amendment brings forward the start date to 1 January 2020 for the SG loophole measure that will ensure employers cannot count an individual's salary sacrifice contributions to reduce the employer's minimum super guarantee contributions. In addition to the amendments, the Bill also prevents the small business CGT concessions from being available for assignments of partnership income, and extends to family trusts the anti-avoidance rule for circular trust distributions. Other amendments modify the TOFA provisions and provide a framework for an ATO system of electronic invoicing.

CGT changes for foreign residents: Bill introduced

The [Treasury Laws Amendment \(Reducing Pressure on Housing Affordability Measures\) Bill 2019](#) has been introduced in the House of Reps. It proposes the following amendments:

- remove entitlement to the CGT main residence exemption for foreign residents other than where certain life events occur during the period that a person is a foreign resident where that period is six years or less, and modify the foreign resident CGT regime to clarify that, for the purpose of determining whether an entity's underlying value is principally derived from TARP, the principal asset test is applied on an associate inclusive basis. Date of effect: The measures would apply from 7:30pm by legal time in the ACT on 9 May 2017 (application time). However, transitional provisions will continue the main residence exemption for CGT events that occur to certain dwellings on or before 30 June 2020, where the dwelling was held before the application time.
- provide an additional affordable housing capital gains discount. The discount of up to 10% would apply if a CGT event occurs to an ownership interest in residential premises that has been used to provide affordable housing. Date of effect: would apply to capital gains realised by investors from CGT events occurring on or after 1 January 2018 for affordable housing tenancies that start before, on or after 1 January 2018.
- enables a reconciliation payment to be made by developers who sell dwellings to foreign persons under a near-new dwelling exemption certificate. Consequential amendments are proposed by the [Foreign Acquisitions and Takeovers Fees Imposition Amendment \(Near-new Dwelling Interests\) Bill 2019](#), to the Foreign Acquisitions and Takeovers Fees Imposition Act 2015 in

order to impose the amount of the fee payable by developers. Date of effect: 1 July 2017.

CGT: assumed liability and cost base

The ATO has issued [Draft TD 2019/D11](#), which confirms the ATO view that an asset's cost base for CGT purposes does not include a liability assumed in acquiring the asset if expenditure on discharge of the liability is deductible, it will apply retrospectively when the determination is made final.

Under s 112-35 ITAA 1997, if a taxpayer acquires a CGT asset that is subject to a liability, the first element of the asset's cost base (or reduced cost base) includes the amount of the liability assumed by the taxpayer. According to the ATO, this liability will not form part of an asset's cost base to the extent that the taxpayer has deducted, or can deduct, expenditure in discharging that liability. The ATO explains that cost base is a fluid concept and that s 112-35 does not operate to fix the cost base on acquisition of the asset. If the liability is discharged, this will change the constituent components of the first element of cost at the time of discharge. Comments are due by 29 November 2019.

Taxpayer protected from backpacker tax by DTA

The Federal Court has held in a test case that the Australia-UK DTA required a British working holiday maker, who was an Australian tax resident, to pay tax at the same rate as other Australian tax residents and not at the special rate applicable to working holiday makers (the so-called "backpacker tax"): [Addy v FCT \[2019\] FCA 1768](#) (Fed Court, Logan J, 30 October 2019).

The taxpayer is a British citizen who arrived in Australia on 20 August 2015 on a 12-month working holiday visa. She obtained a second 12-month visa and eventually returned to the UK on 1 May 2017. For most of her time in Australia, the taxpayer lived in share house accommodation in Earlwood in Sydney, having arranged it before leaving the UK. It was also her postal address here. In the first half of 2016 she toured S-E Asia for 2 months, and also spent 2 months working on a horse farm in WA (so she could qualify for the second working holiday visa). She had two bank accounts and a pre-paid mobile phone account in Australia. From 18 July 2016 to 30 April 2017 the taxpayer worked as a waitress in Sydney. Her wages were paid into one of the Australian bank accounts. The ATO assessed her in 2016-17 to pay tax on the taxable income derived from 1 January 2017 at the working holiday tax rate (15% on the first \$37,000 of taxable income).

The Federal Court firstly held that the taxpayer was a resident of Australia (for tax purposes) for the 2016-17 income year. She was settled in Sydney at the Earlwood house, and as a matter of habit and intent, it was her home base for employment, living and social purposes. There was nothing itinerant about her life. She was also held to be a resident on the basis of the "183-day test" as the Earlwood house had become her usual place of abode. The Court also ruled, however, that her residency ceased when she left Australia on 1 May 2017 and therefore, by virtue of s 18 of the Rates Act, she had a part year residency period which commenced on 1 July 2016 and concluded on 30 April 2017. The Court then found that, by virtue of Art 25 of the Australia-UK DTA, the taxpayer was entitled to be taxed at the same rates that apply to Australian citizens who are tax residents, including getting the benefit of the tax-free threshold. Article 25 is a "non-discrimination clause" which relevantly provides that tax imposed by Australia on nationals of the UK should not be "more burdensome" than the tax imposed on Australian nationals "in the same circumstances". As the working holiday rate of tax could not apply to Australian nationals, the discrimination in the Rates Act between resident derived income from the same source in Australia was based on nationality which was not allowed.

No discount capital gain where shares disposed after roll-overs

The Full Federal Court has unanimously dismissed an appeal against a decision that the capital gain made on shares disposed of following a series of roll-overs was not a discount capital gain, as the shares were not deemed to have been held for more than 12 months: [Hart & Ors v FCT \[2019\] FCAFC 179](#) (Full Federal Court, Kenny, Kerr and Moshinsky JJ, 18 October 2019).

The taxpayers were four members of the Paule family (AP, CP, SP and TP) and Mr Hart. They were all beneficiaries of various family trusts which, in a series of transactions conducted between 14 and 18 January 2008, disposed of assets held for more than 12 months. In all cases, the trusts exchanged their shares in E-Quest for shares in Findex (involving a scrip-for-scrip roll-over). The trusts then sold their Findex shares less than 12 months later, realising capital gains. The issue to be decided was whether the Findex shares, which were owned for less than 12 months, should be deemed, by virtue of the combined operation of ss 115-30 and 115-34, to have been held for more than 12 months. If so, the capital gain realised by each trust would be a discount capital gain. At first instance, in *Paule & Ors v FCT* [2019] FCA 394, it was held that the Findex shares were not deemed to have been owned for more than 12 months. Accordingly, the capital gains in question were not discount capital gains. The taxpayers appealed.

The Full Court has unanimously dismissed the appeal. It said s 115-34(2), which deems shares to have been acquired at least 12 months before the relevant CGT event, did not extend to s 115-30(1) and that only one of s 115-30 or s 115-34, and not both, may apply to

affect the time when an entity is treated as having acquired a CGT asset. The Court rejected an argument that it was necessary, in order for the provisions to achieve their purpose, to read into s 115-34(2) a reference to s 115-30. In addition, the Full Court said Subdiv 115-A did not expressly provide for the deeming effect of s 115-34(2) to be, in effect, carried over to a later disposal of shares.

Loans to shareholders deemed dividends

The AAT has confirmed that loans by a company to shareholders and the transfer of property to an associated entity gave rise to deemed dividends under Div 7A and that the ATO was correct not to exercise the discretion to overlook the operation of Div 7A:

[Abichandani and FCT \[2019\] AATA 4296](#) (AAT, File No 2018/1734, 2018/1808, McCabe DP, 1 October 2019).

The taxpayers, who were registered tax agents and accountants, were the shareholders of a company which loaned money to a partnership consisting of the taxpayers. Since the loans had not been repaid, nor did they satisfy the minimum rate and maximum term criteria, they were deemed to be dividends. Personal expenditure by the taxpayers on the company's accounts was also deemed to be dividends as they constituted "loans" to the taxpayers, which they failed to show had been repaid.

Another issue concerned non-concessional contributions to the taxpayers' SMSF by way of transfer of units in a unit trust. The AAT concluded that the transfer constituted "payments" that were deemed to be dividends, as the SMSF was an associated entity of the company. The AAT also agreed with the ATO that the discretion to overlook the operation of Div 7A on grounds of an honest mistake or an inadvertent omission should not be exercised as the taxpayers were experienced tax agents and accountants. Their experience as tax agents and accountants was also a significant factor in the AAT deciding to confirm the administrative penalty which was based on recklessness.

Commissioner's annual report: tax collections

The Commissioner of Taxation's 2018-19 Annual Report [has been released](#). Points of note include:

- the ATO collected gross tax of around \$533 billion, and provided refunds of around \$107 billion.

- net tax collections were \$426 billion, up \$29 billion (7.4%) over the previous year: company tax collections increased by \$9.0 billion (10.7%) in 2018-19. The outcome was \$4.5 billion above the Budget forecast, largely reflecting higher-than-expected mining profits due to high commodity prices; total individuals tax collections grew by \$16.7 billion (8.1%) in 2018-19. The outcome was \$5.7 billion above the Budget forecast, partly reflecting higher-than-expected capital gains and dividend income, and weaker deductions; GST collections increased by \$2.0 billion (3.2%) in 2018-19. The outcome was \$2.2 billion below the Budget forecast, reflecting weaker than expected growth in consumption and dwelling investment.
- the revenue impact of the ATO's drive on individual work-related expense claims was estimated by the ATO at \$500 million.

Old tax and BAS agent portals closing

We have reached the end of the transition period from the old tax and BAS agent portals to Online services for agents. Thank you for collaborating with us throughout 2019 as we brought Online services for agents through the public beta process to make it the default digital platform for you.

The portals have not been updated with new services for several months, and with major systems upgrades commencing shortly, the portals will soon no longer carry accurate information. Therefore, they will close at 11.30pm AEDT Friday 29 November 2019.

For more information [click here](#)

FINANCIAL SERVICES

Robo-advice tools shut down after ASIC concerns

A Sydney-based AFS licensee has [voluntarily agreed](#) to shut down two digital advice tools following concerns raised by ASIC. Digital advice (also known as robo-advice) is the provision of automated financial product advice using algorithms and technology, without the direct involvement of a human adviser. The advice provided by online tools include budgeting analysis, life insurance reviews, tax, pensions, investment and superannuation matters.

After reviewing a sample of advice files from the authorised representatives, ASIC raised concerns about the quality of advice being generated by the online tools and the ability to

monitor the advice. ASIC said it was concerned that the level of inquiries made by the online tools about client objectives, financial situation and needs, were inadequate. In some instances, ASIC considered that the recommendations generated by the tools were in conflict with client goals or with other recommendations also generated by the tools. As a result of ASIC's concerns, both online tools were voluntarily shut down for the foreseeable future. See also ASIC Regulatory Guide [RG 255](#).

Ending grandfathered commissions for financial advisers

The [Treasury Laws Amendment \(Ending Grandfathered Conflicted Remuneration\) Bill 2019](#) was passed by the Senate without amendment and awaits Royal Assent. The Bill will ban grandfathered conflicted remuneration paid to financial advisers from 1 January 2021. The Bill goes further than the Royal Commission recommendation by including an obligation on AFS licensees and financial product issuers to rebate product holders for any grandfathered conflicted remuneration that they are legally obliged to pay after 1 January 2021. The Bill also enables regulations to provide for a scheme to rebate conflicted remuneration to affected "product holders" (ie customers) via a payment or monetary benefit (eg reduced fees). Draft Regulations were previously released on 28 March 2019.

Financial adviser found guilty of \$5.9m fraud

ASIC has [reported](#) that a former Brisbane financial adviser has been found guilty of a \$5.9m fraud and sentenced to 12 years jail (with a minimum of six years) in the District Court of Queensland. Through his financial services company, ASIC alleged that the former adviser induced various investors to transfer funds, including funds from their SMSFs, for investment into an unregistered managed investment scheme (MIS). ASIC also alleged that the adviser invested some clients' superannuation funds into the MIS without the clients' knowledge or permission.

The adviser claimed that the MIS was a diversified fund investing in cash, property, shares, aquaculture and agriculture when, in fact, the only investment was a single project, an abalone farm in South Australia operated by entities under his control. The abalone farm was subsequently wound up by receivers with no return of money available. ASIC said the majority of the adviser's clients were near or at retirement age and suffered significant financial harm.

AFS Licensee suspended due to systemic issues and PI exclusions

ASIC has [reported](#) that it has suspended until 23 September 2020 the AFS licence of a Sydney-based financial services provider due to concerns that it did not adequately address systemic issues identified by the Financial Ombudsman Service (now Australian Financial

Complaints Authority (AFCA)). ASIC also alleged that certain exclusions in the entity's professional indemnity (PI) insurance cover did not meet minimum adequacy requirements.

ASIC said the Financial Ombudsman Service (FOS) had identified at least 23 clients who were affected by systemic issues and as a result it determined that the financial services provider had failed to do all things necessary to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly. ASIC also found that the PI insurance cover had exclusions that made it inadequate for the licensee's business and any liabilities arising from potential compensation claims.

ASIC imposes additional IOOF licence conditions

ASIC has imposed [additional conditions](#) on the AFS licence of IOOF Investment Services Ltd (IISL) as part of an application by IISL to vary its licence. ASIC said IISL sought a variation to its AFS licence to facilitate the transfer of managed investment scheme, investor directed portfolio services (IDPS) and advice activities from IOOF Investment Management Ltd (IIML) to IISL. The transfer is part of a reorganisation of the IOOF Group.

In granting the licence variation, ASIC said it decided to impose additional conditions relating to the governance, structure and compliance arrangements of IISL. ASIC said its decision to impose additional conditions took into account concerns highlighted by the Banking Royal Commission about the "real and continuing possibility of conflicts of interests in IOOF Group's business structure", ASIC's past supervisory experience and material supplied by IISL. IISL agreed to the imposition of the additional conditions.

SUPERANNUATION

Transfer balance cap correspondence: ATO reminder

The ATO [says](#) that excess transfer balance determinations and commutation authorities issuing in October will have a due date that falls during the Christmas/New Year period. It encourages SMSF trustees and members to respond early to this correspondence to avoid adverse consequences:

- commutation authorities need to be actioned by the due date to avoid losing access to the income tax exemption on the assets supporting the pension; and
- if SMSF members don't respond to excess transfer balance determinations by the due date, the ATO will send a commutation authority to the fund specified in the determination.

SMSF illegal early access scheme: three years' jail

The ATO [has reported](#) that a man was sentenced in the Downing Centre District Court in Sydney to three years' jail after pleading guilty to orchestrating a superannuation illegal early release scheme. The 51-year old man was found to have unlawfully created, operated and benefited from a fraudulent SMSF named "Tot Form Super Fund". The fund did not comply with the relevant protocol, procedures and requirements of superannuation legislation to make it a legal SMSF.

The ATO said that between 2007 and 2009, the man used the fund to arrange the unlawful early release of superannuation funds for a number of people in the community. Many of the people were in financial trouble and were approached by friends who told them "they knew someone" who could help. In each of the 25 cases, the ATO said the individual's super balance that was held within a retail super fund was rolled over to Tot Form Super Fund. The total amount of funds unlawfully withdrawn exceeded \$700,000. The man retained a significant portion of this amount telling his clients that the money had been paid to the ATO as tax, the ATO stated.

Super fund taxed at 45% on private company dividends

The AAT has upheld amended assessments for a self-managed super fund (SMSF) which treated private company dividends received by the fund as non-arm's length income (NALI): [GYBW and FCT \[2019\] AATA 4262](#) (McCabe DP and Hespe SM, 21 October 2019).

The taxpayer is the corporate trustee of an SMSF of which a Mr D and his spouse are the members. Mr D, through his accounting practice, did work for a Mr K who owned a business. After Mr K's relationship with his business partners broke down, Mr K offered Mr D a 20% interest in the business if he would become the CFO with a salary of \$243,000. B Holdings Pty Ltd was subsequently incorporated and Mr D's SMSF acquired 200 shares for \$200. B Holdings Pty Ltd then acquired for \$200 the shares in BE Pty Ltd (the entity through which the business had been conducted). For the 2013 to 2015 income years, B Holdings Pty Ltd paid fully franked dividends to the SMSF totalling over \$2.56m (including franking credits). Following an ATO audit, amended assessments were issued treating the dividends and franking credits as NALI, taxable at the highest marginal rate (instead of 0% for the pension phase SMSF).

In upholding the assessments, the AAT ruled that the private company dividends paid to the SMSF were NALI under s 295-550 of the ITAA 1997. The AAT rejected the

taxpayer's contention that s 295-550(2) was only concerned with whether dividends were paid at the same rate. The AAT said the factors in s 295-550(3) can consider whether the dividend paid to the SMSF was sourced in a non-arm's length transaction. The AAT concluded that the source of the dividends paid by B Holdings cannot be divorced from a non-arm's length transaction, being B Holdings acquisition of the shares in BE Pty Ltd. The AAT said the intent of s 295-550 was engaged because, if the shares in BE Pty Ltd had been sold to B Holdings at their market value, the dividends on the BE Pty Ltd shares would have largely continued to accrue to the transferor, a non-concessional taxpayer.

Super excess transfer balance tax – no AAT jurisdiction

The AAT has decided that it did not have jurisdiction to rule on whether a taxpayer assessed to pay super excess transfer balance tax was misled by a statement on the ATO website: [Lacey and FCT \[2019\] AATA 4246](#) (AAT, File No: 2018/2853, Ehrlich SM, 18 October 2019).

The taxpayer's pension transfer balance account exceeded the \$1.6m cap for 2017-18 by \$63,607. He had until 31 December 2017 to bring it within the cap. On 14 December 2017, he transferred \$30,000 from his transfer balance account to his accumulation account. He believed that the transfer, when combined with pension drawdowns totalling \$41,589, would bring his transfer balance account within the \$1.6m cap. However, that was not the case and the ATO made an excess transfer balance (ETB) determination under s 136-10 of the TAA. In due course, the taxpayer was assessed to pay ETB tax of \$596. In challenging the ETB determination, the taxpayer submitted that he was misled by a document on the ATO website stating that ETB tax would not be payable if "you remove" the excess by 31 December 2017.

The AAT acknowledged that, as a consequence of reading the ATO document, the taxpayer genuinely believed that the steps he took would operate to bring his transfer balance below the \$1.6m cap (the ATO did not dispute this). However, that was irrelevant in relation to s 14ZZK of the TAA, which required the taxpayer to prove that the ETB determination should not have been made. In addition, neither the TAA nor the AAT Act gave the AAT jurisdiction to adjudicate upon an allegation that a taxpayer has been led into error because the ATO engaged in misleading or deceptive conduct.

Westpac super switching campaign was "personal advice"

The Full Federal Court has upheld ASIC's appeal and ruled that two Westpac subsidiaries provided "personal advice" (and not simply "general advice") in relation to a superannuation

switching campaign: [ASIC v Westpac Securities Administration Limited & Anor \[2019\] FCAFC 187](#) (Full Federal Court, Allsop CJ, Jagot and O'Bryan JJ, 28 October 2019).

During 2014, Westpac Securities Administration Limited (WSAL) and BT Funds Management Limited (BTfM) conducted a telephone sales campaign to encourage existing customers to roll over their other super accounts into their Westpac-related accounts. At first instance, the Federal Court ruled that ASIC had not proved that it was also "personal advice" under s 766B(3)(b) of the Corporations Act.

In allowing ASIC's appeal, the Full Court unanimously held that "personal advice" had been given because a reasonable person might expect the callers to have "considered" the objectives of the customers in making the recommendation to accept the rollover service. Consequently, the Full Court said the Westpac entities had also contravened ss 946A and 961B. Allsop CJ said a decision to consolidate super funds is not suitable for marketing or general advice. "It is a decision that requires attention to the personal circumstances of a customer and the features of the multiple funds held by the customer."

Super fund portfolio disclosure deferred to 31 December 2020

[ASIC Corporations \(Amendment\) Instrument 2019/1056](#), has been registered to amend ASIC Class Order [\[CO 14/443\]](#) to extend the first reporting date for Portfolio Holdings Disclosure from 31 December 2019 to 31 December 2020. The portfolio holdings disclosure rules require most superannuation trustees to provide information about fund holdings on the fund website: s 1017BB of the *Corporations Act 2001*.

The first reporting date to identify the holdings of the fund was to be 31 December 2019, with disclosure required on the trustee's website no later than 90 days from this date, and each following reporting day (30 June and 31 December each year). These disclosures must identify investment items (being assets and derivatives) allocated to investment options of the fund at the end of the reporting day. As the regulations have not yet been finalised, ASIC has extended the relief in [\[CO 14/443\]](#) to the first reporting day of 31 December 2020. ASIC said this deferral will allow further time for Government to develop the regulations, and enable funds to finalise their reporting processes and disclosures.

Senate Committee inquiry into Super Guarantee amnesty Bill

The Senate Economic Legislation Committee has held a [public hearing](#) in Sydney as part of its inquiry into the Bill that will establish the Government's Super Guarantee (SG) amnesty - the [Treasury Laws Amendment \(Recovering Unpaid Superannuation\) Bill 2019](#).

The Committee heard from representatives from the ATO, Treasury, Australian Institute of Superannuation Trustees (AIST), ACTU, Shop, Distributive and Allied Employees' Association, United Voice, Financial Services Council, Australian Small Business and Family Enterprise Ombudsman and ASFA. Some of the submissions are available on the [Committee's Website](#).

REGULATOR NEWS

Board of Taxation CEO update

The October 2019 Board of Taxation CEO update [has been released](#). A number of projects have now been finalised and submitted to the Government for consideration, including the Voluntary Transparency Code and report into FBT compliance cost and International Practice. The Board is also in the process of finalising its review into granny flat arrangements.

The update also addresses the review of the corporate tax residency rules, reminder of the public forum (sounding board) for regulatory reform, and the voluntary code. The next Board meeting will take place on 21 November 2019 in Sydney.

Committee hearing into performance of IGT

The Senate Economics Legislation Committee is inquiring into the performance of the Inspector-General of Taxation (IGT). The Committee's [latest public hearing](#) heard of taxpayers' interactions with the IGT, some positive, some negative. Witnesses included the ATO and the Inspector-General of Taxation and Taxation Ombudsman. The Committee is inquiring into performance of the IGT with particular reference to:

- whether the accountability framework the IGT operates within needs to be amended or strengthened;
- how the IGT conducts its investigations into the ATO;
- what safeguards exist to ensure the independence of the IGT;
- the complaints management policies and practices of the IGT;
- the protections afforded to whistle-blowers who disclose information to the IGT.

The Committee has published 13 submissions, which are available on the Committee's website. It is due to report on 2 December 2019.

APRA's new Data Collection system: update

APRA has provided an [update](#) on its Data Collection Solution Implementation Plan for reporting entities which is set to replace "Direct to APRA" (D2A). APRA said it is now in a position to explore alternative implementation approaches for the new system and will conduct workshops to explore the impact of each approach for entities. APRA also advised that the test environment for the Data Collection Solution is expected to be released in mid-2020 (instead of the first quarter of 2020).

IGT seeking comments on two new reviews

The IGTO has released a media release announcing the terms of reference for two new investigations to be conducted by the Inspector General of Taxation and Taxation Ombudsman.

- [The two reviews relate to:](#)
- [Rise in Collectable Debts](#); and

To read the full media release, [click here](#).

For any feedback please email tony.greco@publicaccountants.org.au.