

TAXATION

Tax treatment of JobKeeper voluntary repayments

ATO has issued advice on the tax consequences of voluntary repayments of JobKeeper by businesses.

SME loan guarantee scheme changes

The Prime Minister has announced changes to the SME loan guarantee scheme along with the tourism aviation network support program.

Data matching for JobKeeper payment extended

Services Australia has registered a notice of data matching program with the ATO in relation the extension of the JobKeeper program.

FBT factsheet: WFH during COVID-19

ATO has issued an update to COVID-19 and working from home benefits in relation to FBT.

DIS: Victoria Power Networks case

ATO has issued a decision impact statement on a case relating to economic options offers by electricity distributors to customers.

Modernising business registers: director IDs

Treasury has issued exposure drafts relating to the director ID regime which forms a part of the modernising business registers program.

Charity governance reform: government reminder

Government has reminded stakeholders of the importance of proposed charity governance reforms to strengthen laws and prevent alleged unlawful behaviour.

Consumer confidence in tax practitioners high: TPB

TPB has issued a media release providing some highlights to the latest survey it conducted across tax practitioners and consumers.

ATO guidance on the PSI rules

Draft TR 2021/D2 provides general guidance on the operation of the personal services income (PSI) rules.

High Court holds ATO not obliged to pay interest of GST refund

High Court has unanimously allowed ATO's appeal in the Travelex case finding it was not obliged to pay interest on refunded GST.

Draft GST Determinations: waiver of tax invoice

ATO has issued Draft GST Determinations in relation to waiver of tax invoice and adjustment note requirements.

GST-free cars for disabled: repeal provision

ATO has introduced a repeal provision into an instrument registered to ensure continued access to GST-free supplies of cars and car parts for disabled people.

FINANCIAL SERVICES

Financial services breach reporting: draft regs

Treasury has released draft regulations which will support changes enacted as a part of the Government's response to the Hayne Royal Commission.

Changes to responsible lending obligations: Bill passes Reps

Bill to remove key elements of the responsible lending obligations has been passed by the House of Reps without amendment.

SUPERANNUATION

ATO SMSF statistical overview 2018-19

ATO has released its annual SMSF statistical overview for 2018-19 based on data from SMSF annual returns.

SMSF auditor number misuse enquiries underway: TPB

TPB has provided an update on its decision to terminate a registered tax agent and his partnership for misconduct which was affirmed by the AAT.

Tax agent's registration terminated for lodging false SMSF returns

A decision by the TPB to terminate registration of a tax agent and the partnership of which he was a member for lodging false SMSF returns has been upheld.

Insurance in superannuation practices unsustainable: APRA

APRA has issued a media release stating that it has written to life insurers the RSEs urging them to address concerning trends and practices it has identified.

Reuniting more super Bill awaiting assent

Bill to facilitate the closure of eligible rollover funds has finally passed Parliament after being first introduced in early 2020.

REGULATOR NEWS

IGTO quarterly reporting pack released

IGTO has released its Q2 reporting pack highlighting its activities during the quarter including total complaints received and strategic priorities.

TAXATION

Tax treatment of JobKeeper voluntary repayments

The ATO has issued a [worksheet](#) that sets out its views on the tax consequences of voluntary repayments of JobKeeper by businesses. The ATO considers that a voluntary repayment of such receipts is only deductible in "limited circumstances". Businesses which are unable to claim a deduction may choose instead to make what may be described as a general voluntary repayment.

The ATO states that a deduction is only available if the repayment is "clearly appropriate to achieve, or directed at achieving, the business objectives of the business". Examples would include where a payment is made to prevent reduction in business, or publicise and promote a business in the short-term.

The ATO states that businesses that are unable to claim a deduction may still wish to make a voluntary repayment. A voluntary repayment equal to the JobKeeper received less the tax paid on that amount "will ensure a tax neutral outcome overall".

SME loan guarantee scheme changes

The Prime Minister has [announced changes](#) to the SME Loan Guarantee Scheme, along with a new Tourism Aviation Network Support Program designed to assist the aviation and tourism industries deal with the challenges of the economic fallout from COVID.

More specifically, Treasury [advises](#) that participating lenders will be offering guaranteed loans under the SME Recovery Loan Scheme on the following terms:

- the Government guarantee will be 80% of the loan amount;
- lenders are allowed to offer borrowers a repayment holiday of up to 24 months;
- loans can be used for a broad range of business purposes, including to support investment, eg to refinance any pre-existing debt of an eligible borrower;
- borrowers can access up to \$5 million in total;
- loans are for terms of up to 10 years;
- loans can be either unsecured or secured (excluding residential property); and

- the interest rate on loans will be determined by lenders, but will be capped at around 7.5%, with some flexibility for interest rates on variable rate loans to increase if market interest rates rise over time.

Loans will be available from 1 April 2021 and must be approved prior to 31 December 2021. More than 350,000 current JobKeeper recipients are expected to be eligible under the expanded Scheme.

Other schemes and support measures

The Tourism Aviation Network Support Program 800,000 half-price air tickets to regions including the Gold Coast; Cairns; the Whitsundays and Mackay region (Proserpine and Hamilton Island); the Sunshine Coast; Lasseter and Alice Springs; Launceston, Devonport and Burnie; Broome; Avalon; Merimbula; and Kangaroo Island.

There are also direct assistance packages for airlines.

Data matching for JobKeeper payment extended

Services Australia has registered a [notice of data matching program](#) with the ATO in relation to the JobKeeper Payment program, in order to continue the data matching program following JobKeeper's extension until 28 March 2021. The data matching program will assist Services Australia in identifying the overlapping populations of people who may be registered for both the JobKeeper program and social security payments, as well as identify social security customers who may need extra support to correctly declare their income, to help prevent them getting an overpayment.

FBT factsheet: WFH during COVID-19

The ATO has issued an update to its worksheet entitled [COVID-19 and working from home benefits](#). The ATO states that an eligible work-related item is exempt from FBT if it is primarily for use in the employee's employment and not a duplicate of something with a substantially identical function that has already been provided to the employee in the FBT year (unless it is a replacement). An eligible work-related item is a portable electronic device, computer software, protective clothing, a briefcase and a tool of trade.

During periods of temporary working from home ("WFH") arrangements due to COVID-19, the provision of office equipment will be exempt from FBT if it is property that is ordinarily located on business premises and wholly or principally used directly in connection with business operations. The equipment does not need to have been physically located on the business premises prior to entering into a WFH arrangement to meet the test, provided it is an item that is expected to be returned to the premises.

Office equipment that an employer loans to an employee to support a WFH arrangement that will continue on a long-term basis is, in the ATO's view, unlikely to meet the exemption above. However, it states that the benefit may be exempt if the employer makes a "no-private-use declaration".

DIS: Victoria Power Networks case

The ATO has issued a [decision impact statement](#) on Victoria Power Networks Pty Ltd v FCT [2020] FCAFC 169. In that case, the Full Court ruled on the two economic options offered by the electricity distributors (the "Distributors") to customers:

- Option one – the Customer Cash Contributions were assessable as ordinary income because they were received in the ordinary course of the Distributors' business, a part of which was connecting customers to the network in accordance with the applicable regulatory regime; and
- Option two – the shortfall was not income according to ordinary concepts, but the Transferred Assets (construction undertaken by customers that is transferred to the Distributors at the time of connection to electricity networks) constituted a non cash business benefit for the purposes of s 21A of the ITAA 1936, and the arm's length value of the assets were to be reduced by the Distributor's contribution.

The DIS details the Full Court's decision for each "Options". It notes the ATO's contention that Option two resulted in the Distributors receiving the amount of the customer contribution as ordinary income was rejected because there was no obligation on customers to make any payment to the Distributors under that option. Rather, the obligation on the customer was to undertake the construction and to transfer the assets to the Distributors, and the obligation on the Distributors was to pay the rebate to the customer and provide the connection. This meant that the non-cash business benefits received by the Distributors from customers, being the arm's length value of the transferred assets reduced by the recipient's contribution (if any)

should be the amount to be brought to account as income pursuant to s 21A(2)(a) of the ITAA 1936.

The DIS concludes that the Full Courts decision was consistent with the ATO's view with regards to Option one.

However, the ATO said that the findings for Option two was clearly the result of the particular facts of the case which does not necessarily provide any principle of general application regarding s 21A of the ITAA 1936. The ATO does note that it has implications for other electricity distributors subject to equivalent regulatory regimes. The ATO is also assessing the potential impact of the decision on other infrastructure providers and regulated industries such as gas, water, telecommunications, rail, and ports.

Comments are due by 2 April 2021.

Modernising business registers: director IDs

Treasury has issued [exposure drafts](#) relating to the director ID regime which forms part of the Modernising Business Registers (MBR) Program. The MBR program was introduced through [legislation](#) in 2020 to improve business registry services. The director identification number (director ID) is designed to prevent the appointment of "fictitious" directors and, over time, facilitate traceability of individual's profile and relationships with companies.

The exposure drafts focuses on the new data standard and disclosure framework which support the commencement of the director ID regime:

- the draft data standard prescribes the information required to apply for a director ID under the Corporations Act including how the information is to be provided, used and stored; and
- the draft disclosure framework sets out the circumstances in which the Registrar may disclose director ID information to these bodies in the same way as government entities.

Proposed date of effect: The day after registration on the Federal Register of Legislation or the day on which the Commonwealth Registrar is appointed to perform functions and powers in connection with the Corporations Act 2001, whichever later.

Submissions are due by 1 April 2021.

Charity governance reform: government reminder

In a joint [media release](#), Assistant Treasurer Michael Sukkar and MP Gavin Pearce remind stakeholders of the importance of proposed charity governance reforms to strengthen laws to prevent alleged unlawful behaviour. A [charity governance reform consultation](#) has been underway since February and is due to end on 14 March 2021 to extend the scope of governance standard three of the Australian Charities and Not-for-profits Commission Regulation 2013 to make clear unlawful activities will result in de-registration under the ACNC Act 2012.

Consumer confidence in tax practitioners high: TPB

The TPB has issued a [media release](#) providing some highlights to the last survey it conducted across tax practitioners and consumers. The November 2020 survey found that:

- Consumer confidence in the tax practitioner profession remains very high;
- Consumers have a high trust level in their tax practitioner (88%) and the majority rated their experience as excellent (66%). The majority of consumers (58%) advise that they have used the same tax practitioner for more than five years;
- Most consumers (66%) who were aware of the TPB were also aware of the public register of tax practitioners;
- Understanding of the role of the TPB by the profession has remained steady (79%);
- A high percentage of tax practitioners (85%) believe that the TPB is effective at ensuring that tax practitioners are registered; and
- A majority of respondents also recognised that regulation of the sector protected both tax practitioners and consumers.

ATO guidance on the PSI rules

[Draft TR 2021/D2](#), provides general guidance on the operation of the personal services income (PSI) rules in Pt 2-42 of the ITAA 1997. The Draft combines the ATO's previously rulings on these rules - TR 2001/7 (on the meaning of PSI) and TR 2001/8 (on the meaning of a personal services business (PSB)) - which will be withdrawn when Draft TR 2021/D2 is finalised. The Draft also takes into account significant court and AAT decisions handed down since the release of those rulings nearly 20 years ago.

Draft TR 2021/D2 discusses:

- the meaning of PSI;
- income that does not qualify as PSI;
- determining whose PSI it is;
- the effect of the PSI rules;
- PSB and the PSB tests (results, unrelated clients, employment and business premises tests);
- applying to the ATO for a PSB determination; and
- the potential application of Pt IVA where the PSI rules do not apply and a PSB is being conducted.

Draft TR 2021/D2 includes 40 examples and a flow chart to demonstrate the operation of the PSI rules.

Proposed date of effect: When finalised, the Ruling is proposed to apply to arrangements begun to be carried out from the day after TR 2001/7 and TR 2001/8 are withdrawn.

Comments on the Draft are due by 9 April 2021.

High Court holds ATO not obliged to pay interest of GST refund

The High Court has unanimously allowed the ATO's appeal in the Travelex case, finding that it was not obliged to pay interest on refunded GST: [FCT v Travelex Limited \[2021\] HCA 8](#) (High Court, Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ, 10 March 2021).

Travelex's business included supplying foreign currency on the departure side of the customs barrier at international airports in Australia. In September 2010, the High Court held that such supplies were GST-free. As a result, Travelex had overstated its GST liability for the November 2009 tax period (the "test period" chosen for the purposes of these proceedings). In June 2012, the ATO agreed to amend Travelex's GST return for the November 2009 tax period to increase the amount claimed for input tax credits for creditable acquisitions by \$149,020. The ATO assumed that this created an RBA surplus, which it paid to Travelex.

The parties could not agree on the start date (the "RBA interest day") for the payment of interest on the refunded amount to Travelex under the Taxation (Interest on Overpayments and Early Payments) Act 1983 (the "TIOEP Act").

In *FCT v Travelex Limited* [2020] FCAFC 10, a majority of the Full Federal Court upheld the first instance decision that interest was payable from the 14th day after the day on which the RBA surplus arose (31 December 2009) and not, as contended by the ATO, the 14th day after Travelex notified the ATO in June 2012 of the amount of the refund.

The Full Federal Court also upheld (unanimously) the first instance finding that neither Travelex nor the ATO had statutory authority to amend the GST return for the November 2009 tax period (the parties no longer disputed this).

The High Court looked at the RBA provisions in Pt IIB of the TAA and concluded that an allocation that the ATO in fact makes to an RBA of an amount it is not legally obliged to pay to a taxpayer under a taxation law cannot result in an RBA surplus. Since the ATO was not legally obliged to pay the GST refund to Travelex, the allocation of the refund to the RBA did not result in an RBA surplus. The ATO was therefore not obliged to pay interest under the TIOEP Act.

Draft GST Determinations: waiver of tax invoice

The ATO has issued the following Draft GST Determinations:

- [Goods and Services Tax: Waiver of Tax Invoice Requirement \(eftpos Interchange Services Reports\) Determination 2021](#) (WTI 2021/D1) will allow a member of the eftpos payment system that holds an eftpos interchange services report to claim input tax credits without holding a tax invoice in certain circumstances; and
- [Goods and Services Tax: Waiver of Adjustment Note Requirement \(eftpos Interchange Services Reports\) Determination 2021](#) (WAN 2021/D1) will allow a member of the eftpos payment system that holds an eftpos interchange services report to claim decreasing adjustments without holding an adjustment note in certain circumstances.

Comments for both are due by 6 April 2021.

GST-free cars for disabled: repeal provision

The ATO has introduced a repeal provision into the Taxation Administration (Remedial Power – Certificate for GST-free supplies of Cars for Disabled People) Determination 2020 (the "principal instrument"), registered in August last year to ensure continued access to GST-free supplies of cars and car parts for disabled people in certain circumstances.

The registered legislative instrument [Taxation Administration \(Remedial Power – Certificate for GST-free supplies of Cars for Disabled People\) Repeal Amendment Determination 2021](#) amends the principal instrument so that the repeal takes effect on 1 April 2024.

FINANCIAL SERVICES

Financial services breach reporting: draft regs

Treasury has released [draft regulations](#) which will support changes enacted by the Financial Sector Reform (Hayne Royal Commission Response) Act 2020. Schedule 11 of this Act implemented the Government's response to recommendations 1.6, 2.8 and 7.2 of the Hayne Royal Commission by:

- clarifying and strengthening the breach reporting regime for financial services licensees in the Corporations Act;
- introducing a comparable breach reporting regime for credit licensees in the Credit Act; and
- requiring financial services licensees and credit licensees to report serious compliance concerns about financial advisers and mortgage brokers respectively.

The draft regs propose to:

- prescribe civil penalty provisions that are not taken to be significant (and therefore may not be reportable) under the relevant breach reporting regime if those provisions are contravened; and
- ensure certain breach reporting offences and civil penalty provisions are subject to an infringement notice.

The regs will also make minor and technical amendments when finalised, including updating references to the Corporations Act.

Submissions are due by 9 April 2021.

Changes to responsible lending obligations: Bill passes Reps

The [National Consumer Credit Protection Amendment \(Supporting Economic Recovery\) Bill 2020](#) has been passed by the House of Reps without amendment. Key elements include the removal of the responsible lending obligations from the National Consumer Credit Protection Act 2009 (with the exception of small amount credit contracts (SACCs) and consumer leases where heightened obligations will be introduced) and allowing lenders to rely on the information provided by borrowers, replacing the current practice of "lender beware" with a "borrower responsibility" principle.

SUPERANNUATION

ATO SMSF statistical overview 2018-19

The ATO has released its annual [Self-Managed Super Funds: statistical overview 2018-19](#) which is based on data from SMSF annual returns. There were over 593,000 SMSFs holding \$733bn in total assets as at 30 June 2020, with more than 1.107m SMSF members. SMSFs had assets of over \$1.3m each on average in 2018-19 (up 5% from the previous year).

In the five years to 2019-20, the number of SMSFs has grown by an annual average of 2.1%. An average of 26,000 new funds were established annually (almost 2,200 per month) during this period but there has been a declining trend from 33,000 establishments in 2015-16 to 21,000 in 2019-20 (down 35%). Average SMSF assets on establishment in 2018-19 were \$417,000 (median \$281,000). While a full read is recommended for those interested in the data, the following sets out some highlights.

- More than half (55%) of SMSFs have existed for more than 10 years.
- The average member balance for females increased by 28% over the five years to 2018-19, while the average balance for males increased by 22% over the same period.
- The median age of SMSF members of newly established funds in 2018-19 was 46, compared with 61 for all members as at 30 June 2020.
- Average total SMSF expenses for 2018-19 were \$15,472 (median \$8,116).
- SMSFs used the services of around 5,000 SMSF auditors and 13,700 tax agents in 2018-19. The average SMSF audit fee was \$686 (median fee \$550).

As at 30 June 2019, 10.8% of SMSFs reported LRBA assets (up from 10.7% in 2017-18). LRBAs made up 6.1% of all SMSF assets (down from 6.5% in 2017-18). Of the \$46bn of assets held under LRBAs, 96% (\$41.1 bn) is related to real property.

SMSF auditor number misuse enquiries underway: TPB

The TPB has provided an [update](#) on its decision to terminate a registered tax agent and his partnership for misconduct which was affirmed by the AAT in Cross and Tax Practitioners Board [2021] AATA 441.

The TPB also said that following ATO referrals, more than 60 tax practitioners are now subject to TPB enquiries regarding SMSF Auditor Number misuse. The TPB

said that currently 10 tax practitioners have been terminated and four suspended, as a result of false declarations in SMSF annual returns.

Tax agent's registration terminated for lodging false SMSF returns

A decision by the Tax Practitioners Board (TPB) to terminate the registrations of a tax agent and the partnership of which he was a member for lodging false SMSF returns has been upheld: [Cross and Tax Practitioners Board \[2021\] AATA 441](#) (AAT, Boyle DP, 9 March 2021).

The first applicant (Mr C) and the second applicant (a partnership comprising Mr C and Ms A) were registered tax agents. In 2019, the ATO started raising concerns about SMSF annual returns being lodged by the applicants. In due course, Mr C and the partnership conceded that, contrary to the Code of Conduct in the TAS Act, they knowingly lodged over a nine-year period 125 SMSF annual returns containing false information and false declarations that the funds had been audited prior to lodgment. As a result, the TPB terminated the registrations of Mr C and the partnership on the basis that Mr C was no longer a fit and proper person. The TPB also banned Mr C from applying for registration for a period of two years. (There is no suggestion in the AAT's decision that Ms A was involved in lodging the false returns or that she was aware they were false.)

Mr C and the partnership challenged the TPB's decisions, relying on the following: the sole motivation for making the false declarations was to avoid penalties being incurred by the clients; the applicants did not derive any financial benefit from the course of conduct; neither the Commonwealth nor the clients suffered any financial loss; since 1 July 2019 no returns had been lodged before the audit was completed; and Mr C was remorseful.

The AAT, however, upheld the TPB's decisions as it was satisfied that Mr C was not "a fit and proper person", largely because he had deliberately misled the ATO over a nine-year period knowing of the legal significance of the need for audits to be completed prior to lodgment of the returns. Mr C "chose to put what he perceived to be the interests of his clients, above his fundamental professional duty to act honestly". Further, the applicants only ceased lodging false returns when the ATO started raising issues in 2019, suggesting that Mr C's claims of remorse were not "particularly convincing".

Insurance in superannuation practices unsustainable: APRA

The Australian Prudential Regulation Authority (APRA) has issued a [media release](#) stating that it has written to life insurers and registrable superannuation entity (RSE) licensees, urging them to address "concerning trends and practices" in the provision of insurance to superannuation members.

Citing "significant" deterioration in group life insurance claims experience in 2019 and 2020, APRA is concerned that members are likely to be adversely affected by further substantial increases in insurance premiums and/or reductions in the value and quality of life insurance offered through superannuation.

APRA said that it expects life insurers and superannuation funds to take steps to ensure that insurance offerings and benefits are sustainably designed and priced, advocating for:

- superannuation trustees to maintain, and make available to insurers, high quality and sufficiently granular data to facilitate sustainable insurance design and pricing;
- clear insurance strategies developed and maintained by trustees, that reflect a scheme design for default insurance which carefully considers and appropriately balances their members' needs and the cost of insurance; and
- tender processes that provide adequate information and time to all participants, to enable them to consult on scheme design and appropriately price the risks and benefits.

Reuniting more super Bill awaiting assent

The [Treasury Laws Amendment \(Reuniting More Superannuation\) Bill 2020](#) has finally passed by Parliament. The Bill was introduced on 6 February 2020 and passed by the House of Reps without amendment over 12 months ago.

The measures in the Bill will facilitate the closure of eligible rollover funds (ERFs) by 30 June 2021. The balance of all ERF accounts less than \$6,000 on 1 June 2020 will be required to be transferred to the ATO by 30 June 2020. All remaining ERF accounts will be required to be transferred to the ATO by 30 June 2021.

During the course of its passage through Parliament, the Senate requested amendments, which had to go back to the House of Reps and subsequently back to the Senate for sign off. The Bill now awaits assent.

REGULATOR NEWS

IGTO quarterly reporting pack released

The IGTO has released its [Q2 reporting pack](#) highlighting its activities during the quarter. It provides a couple of case studies of how the IGTO has assisted taxpayers in their complaints. The report also provides an update on the following:

- total complaints received and the Top five complaints received in Q2;
- IGTO's strategic priorities; and
- its Key Performance Areas.