

TAXATION

COVID-19 disaster Support payment boosted

The government has increased the amount of the COVID-19 disaster payment as well as increased support for individuals on income support payments.

COVID-19 disaster payment extended to QLD hotspots

The COVID-19 disaster payment has been extended to South East Queensland after the Chief Medical Officer declared 11 LGAs as hotspots.

COVID-19 cash-flow boost: ATO DIS

ATO has released a decision impact statement on a case in which the AAT found a company entered into a scheme with sole purpose of obtaining the cash flow boost.

NSW COVID-19 JobSaver changes

NSW government has announced changes to a key support measure for businesses impacted by the ongoing lockdown.

QLD announces COVID-19 business grants

Queensland government has announced that it will provide \$5,000 payments to small and medium businesses across Queensland affected by the current COVID-19 lockdown.

Common mistakes property investors should avoid: reminder

ATO has issued a media release reminding property investors to take care when submitting their tax returns.

ATO DIS: CGT active asset

ATO has released a decision impact statement in relation to whether a property was an active asset for the purposes of CGT small business concessions.

Labor policy update: tax cuts; negative gearing; CGT

Federal Opposition Leader has confirmed that Labor, if elected, would maintain the legislated stage three tax changes as well as the negative gearing and CGT regimes.

CPI June 2021 quarter

ABS has released the CPI index number for the June quarter 2021, the CPI index number is up from the March quarter.

Closely held employees reporting exemption through STP

ATO has registered a legislative instrument that exempts certain entities from the requirement to report through STP.

Employee share schemes: draft legislation

Treasury has released exposure draft legislation proposing changes to the regulatory and tax arrangements for employee share schemes.

Adelaide man charged over alleged \$38.5m tax fraud

AFP has reported that an Adelaide man has been charged with alleged tax fraud totalling more than \$38.5m.

Tax treatment of COVID-19 government payments Bill

House of Reps has rejected Senate changes on the Bill that proposes amendments to the tax treatment of COVID-19 economic response payments.

Expenses associated with holding vacant land

ATO has released a draft ruling which discusses the prohibition of deductions for costs relating to holding vacant land.

Automatic moratorium for creditors' schemes

Treasury has released a consultation paper seeking views on the appropriateness and impact of applying an automatic moratorium on creditor claims in certain instances.

Changed tax treatment for COVID-19 Disaster Payment

The Government announced COVID-19 Disaster Payments in June 2021. These payments provide support to eligible individuals unable to earn income because state or territory health orders prevent them working in their usual employment. The payment is administered by Services Australia.

FINANCIAL SERVICES**Better advice Bill passed by House of Reps**

Bill that proposes to establish a single disciplinary body for financial advisers has passed the House of Reps without amendment.

TPD insurance: ASIC report identifies areas for improvement

ASIC has released a report outline how life insurers are addressing consumer harms identified in the ASIC's 2019 report.

SUPERANNUATION**Super guarantee and stapled funds: ATO draft guidelines**

ATO has released two draft instruments in relation to the single default account regime and choice of super fund requirements.

Super funds: ATO approach to non-arm's length income rules

ATO has released a ruling that explains the effect of recent changes to non-arm's length income rules.

Superannuation contributions: draft update to ruling

ATO has issued proposed changes to its ruling on super contributions as a result of the application of the NALI rules.

Super guarantee charge: remission of additional penalty post-amnesty

ATO has released a draft practice statement which sets out its revised decision-making principles for remitting the additional superannuation guarantee charge.

REGULATOR NEWS**APRA expectation: You Future, Your Super reforms**

APRA has written to all registrable superannuation entity licensees setting out expectations in relation to the Your Future, Your Super reforms.

Compensation for financial advice: ASIC update

ASIC has reported an update on the amount of compensation various financial organisations has paid.

TAXATION

COVID-19 disaster Support payment boosted

The PM and Treasurer has released a [joint media release](#) stating "increased financial support for hundreds of thousands of workers in New South Wales will be available from next week as part of the Commonwealth Government's expanded national COVID-19 Disaster Payment".

Matters set out in the media release are as follows:

- eligible workers will receive \$750 per week if they lose 20 hours or more of work, while those that lose between eight and less than 20 hours, or a full day of work, will receive a payment of \$450 per week;
- the new national payment rate will commence for payments processed week commencing 2 August and will be automatically updated for those already in the Services Australia system;
- it will be available from Day one of any potential lockdown in the future, with claims made from Day eight in arrears for the previous seven days. A weekly payment will then be made for the duration of the hotspot declaration;
- there will be no liquid assets test applied to eligibility for these payments and an individual does not need to run down personal annual leave;
- individuals who currently receive an income support payment will receive a weekly payment of \$200, in addition to their existing payment, if they can demonstrate they have lost more than eight hours of work and meet the other eligibility requirements for the COVID-19 Disaster Payment.

More information about the COVID-19 Disaster Payment can be found on the [Services Australia website](#). It is set out on a State-by-State basis, ie currently NSW, Victoria and South Australia.

COVID-19 disaster payment extended to QLD hotspots

The COVID-19 Disaster Payment has been extended to South East Queensland after the Chief Medical Officer [declared](#) 11 Local Government Areas as hotspots for the period 31 July to 8 August 2021. The Qld LGAs included in the Commonwealth hotspot list include: the City of Brisbane, Moreton Bay Region, Redland City, Logan City, City of Ipswich, Shire of Noosa, City of Gold Coast, Lockyer Valley Region, Scenic Rim Region, Somerset Region and Sunshine Coast Region LGAs.

[Services Australia](#) notes that a person may be eligible for the COVID-19 Disaster Payment if they have lost work and income due to a Queensland COVID-19 public health order, and meet the other eligibility rules. There are two relevant periods to apply for - 1 August to 7 August 2021; and 8 August 2021.

As with the other States, the [Prime Minister said](#) Federal Government financial support will be provided after the end of the first week into the lockdown. So by 7 August 2021, eligible Queenslanders will be able to apply if they've lost more than eight hours and more than 20 hours of work a week. They will be able to apply for those COVID-19 disaster payments of \$450 for eight to 20 and \$750 for more than 20 hours, the Prime Minister said. Those on a social security benefit payment can claim a \$200 payment from 7 August at Services Australia.

COVID-19 cash-flow boost: ATO DIS

The ATO has released a [decision impact statement](#) (DIS) in relation to VNBM and FCT [2021] AATA 1626. In that case, the applicant company was found to have entered into a scheme with the sole or dominant purpose of obtaining the Government's COVID-19 Cash Flow Boost (CFB) by paying director wages of \$107,500 in one week as opposed to its long-established previous pattern of reported wages of \$100 per week. The AAT agreed with the ATO that the company was not entitled to the CFB relief.

The ATO's DIS concludes that the decision:

- accords with the ATO's interpretation and application of the integrity rule in s 5(1)(g) of the Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020 (BCF Act);
- sets out the AAT's view that the definition of 'scheme' is very broad and the scope of s 5(1)(g) of the BCF Act is further expanded by the inclusion of the phrase 'or part of a scheme';
- confirms that where an entity does not satisfy the integrity rule, it is not entitled to any CFB and there is no ability to allow a lower amount of CFB on the basis of what would have been payable had the scheme not been entered into; and
- confirms the ATO's interpretation of the 'payment and withholding requirement' in s 5(1)(a)(i) of the BCF Act, where the applicant company did not sufficiently discharge its burden of proving that wages were paid in the relevant period.

The ATO said it will continue to review entities whose eligibility for CFB was impacted by significant changes in their reporting of withholding amounts and will closely monitor and examine claims that do not appear to reflect the true nature of transactions or events.

NSW COVID-19 JobSaver changes

The NSW Government has [announced](#) changes to a key support measure for businesses impacted by the ongoing lockdown.

The changes affect what the NSW Government terms its JobSaver package. There are two important changes:

- JobSaver payments will now be available to businesses with an annual turnover of between \$75,000 and \$250 million, which have experienced a revenue decline of 30% or more. This is up from the original \$50 million; and
- the maximum weekly payment has also increased, with employing businesses that maintain their employee headcount now able to receive between \$1,500 and \$100,000 per week. This is up from \$10,000. Payments are based on 40% of their weekly NSW payroll.

These changes will be backdated, so businesses that have already received a first payment on previous settings will be topped up when their next payment is made. Non-employing businesses remain eligible for a maximum of \$1,000 per week.

More information on the various NSW support measures for businesses can be found on the designated [support package webpage](#). Individuals affected by the lockdown should check this [Services Australia webpage](#).

QLD announces COVID-19 business grants

The Queensland Government has [announced](#) that it will provide \$5,000 payments to small and medium businesses across Queensland affected by the current COVID-19 lockdown in South East Queensland, and lockdowns in other States.

Queensland Treasurer, Cameron Dick, said the \$260m 2021 COVID-19 Business Support Grant program will be available to eligible small and medium businesses employing people in all industries across the State. Small and medium businesses are defined as businesses that have a turnover of more than \$75,000 per annum and

have an annual payroll in Queensland of up to \$10m. To qualify for a grant of \$5,000 (excluding GST), a business doesn't have to be located in South East Queensland, but must have experienced at least a 30% reduction in turnover as a result of the lockdown that commenced on 31 July 2021.

The Qld Government will also provide support payments to eligible impacted large businesses in the hospitality and tourism sector in the 11 local government areas in South East Queensland currently declared COVID-19 hotspots. Large tourism hospitality businesses are defined as those entities with turnover greater than \$10m that have experienced a 30% reduction in turnover.

Applications for the 2021 COVID-19 Business Support Grants will open in mid-August via the [Business Queensland website](#).

Common mistakes property investors should avoid: reminder

The ATO has issued a [media release](#) reminding property investors to take care when submitting their tax returns. Assistant Commissioner Tim Loh shares the most common mistakes rental property and holiday homeowners make when submitting their tax returns:

- **neglecting to declare all their income** - this includes failing to declare any capital gains from selling an investment property. The ATO is also expanding the rental income data it receives directly from third-party sources such as sharing economy platforms, rental bond authorities, and property managers.
- **rental deductions that seem unusually high** - the ATO is scrutinising returns that are questionable using its data analytics. Property investors should expect claims denied without proper receipts or for making ineligible claims to start with;
- **interest charges on personal loan amounts** - interest on a loan or money redrawn from a rental property mortgage for personal use, such as buying a boat, or going on a holiday is not deductible;
- **immediate claims for the full amount for capital works** - the cost of capital works including a new building or an extension, renovations or structural improvements should be spread over a number of years;
- **rental income during COVID-19** - as a general guidance, rental income should only be declared as income in the financial year in which the amounts are received, ie deferred rental should not be declared until such amounts are received.

ATO DIS: CGT active asset

The ATO has released a [decision impact statement](#) (DIS) in relation to *Eichmann v FCT* [2020] FCAFC 155. In the case, the Full Federal Court ruled that the taxpayer's property was being used on a day to day basis as part of the business and thus was an active asset (as defined in s 152-40(1)(a) of the ITAA 1997) for the purposes of the CGT small business concessions.

The ATO's DIS concludes that:

- whether an asset is an active asset is intrinsically fact-dependent. As recognised by the Full Federal Court, whether an asset has been used in the course of 'carrying on', the relevant business demands '... inquiries [that] involve issues of fact and degree'.
- the ATO will closely examine matters such as the way in which an asset has been employed in the business and the extent to which the asset has been so employed in considering whether the asset meets the active asset test. This follows the Full Federal Court's findings in that '... the legislature has not used language which might confine these inquiries', it remains the case that the asset must be '... used at some point in the carrying on of an identified business'.
- in ruling on whether the active asset test is met in a particular case, the ATO will take care to ensure the description of the scheme is, so as far as possible, sufficiently detailed as to reveal all the facts relevant to the statutory enquiry.

The ATO said it will review the impact of this decision on related advice and guidance products.

Comments are due by 27 August 2021.

Labor policy update: tax cuts; negative gearing; CGT

Federal Opposition Leader Anthony Albanese has [confirmed](#) that Labor, if elected, would maintain the Government's legislated tax relief, including the Stage three tax changes that are legislated to commence from 1 July 2024. From that time, taxpayers earning between \$45,000 and \$200,000 will face a marginal tax rate of 30%.

Mr Albanese also confirmed that Labor would maintain the existing regimes for negative gearing and CGT. As a result, Labor will not proceed with the policy it took

to the 2019 Federal election that proposed to "reform" negative gearing and CGT on residential investment housing by limiting negative gearing to investment in new housing and halving the CGT discount to 25%.

CPI June 2021 quarter

The Australian Bureau of Statistics (ABS) has [released](#) the CPI index number of 118.8 for the June quarter 2021 (up from 117.9 for the March 2020 quarter). This CPI index number is used to index certain tax and superannuation amounts under Subdiv 960-M of the ITAA 1997. The index number is also used for FBT purposes concerning remote area benefits (under ss 60 and 60AA of the FBTAA). The most significant price rise for the quarter was automotive fuel (+6.5%). Over the year to the June 2021 quarter, the CPI rose 3.8%.

Closely held employees reporting exemption through STP

The ATO has registered legislative instrument [Taxation Administration – Single Touch Payroll – 2019-20 and 2020-21 Income Years Closely Held Payees Exemption 2021](#). The instrument exempts certain entities from the requirement to report through Single Touch Payroll (STP) on payments made to closely held payees. The exemption applies in the 2019-20 and 2020-21 income years.

Date of effect: This instrument is taken to have commenced on 1 July 2019.

Employee share schemes: draft legislation

Treasury has released [exposure draft legislation](#) proposing changes to the regulatory and tax arrangements for employee share schemes (ESS), including the removal of the cessation of employment as a taxing point. The proposed changes seek to implement the Government's 2021-22 Budget proposal to make it easier for businesses to offer ESS.

The Draft Bill and Regulations propose changes to:

- amend Subdiv 83-A of the ITAA 1997 to remove the cessation of employment taxing point for tax-deferred ESS that are available for all companies. Tax would instead be deferred until the earliest of the remaining taxing points;
- completely remove the Corporations Act 2001 requirements for ESS offers to employees who do not pay or incur debt to participate in these schemes;

- increase the value cap, under which Corporations Act requirements do not apply, to \$30,000 for all other ESS offers of unlisted companies;
- consolidate exemptions and class order relief from disclosure, licensing, hawking, advertising and other obligations under the Corporations Act;
- expand relief for unlisted companies to include contribution plans and limited or no recourse loans, where an employee can make a monetary contribution to acquire eligible financial products; and
- relax the requirements to lodge disclosure documents.

Date of effect: The removal of the cessation of employment as a taxing point is proposed to apply to ESS interests acquired on or after the first 1 July to occur after the Bill receives assent.

Submissions are due by 25 August 2021.

Adelaide man charged over alleged \$38.5m tax fraud

In a [joint release](#) between the ATO, the Australian Criminal Intelligence Commission (ACIC) and the Australian Federal Police (AFP), it was reported that a 74 year old man from Adelaide was charged in the Adelaide Magistrates Court for alleged taxation fraud totalling more than \$38.5m. Authorities allege the accused failed to disclose overseas trust assets in his income tax returns and therefore evaded income tax in Australia between 1999 and 2013.

The accused is facing 15 charges relating to the following offences, where each offence is punishable by up to 10 years' imprisonment:

- Defraud the Commonwealth contrary to s 29D of the Crimes Act 1914; and
- Obtain a financial advantage by deception contrary to s 134.2 of the Criminal Code (Cth).

According to the report, the joint investigation was undertaken as part of the Serious Financial Crime Taskforce (SFCT). The investigation also involved international law-enforcement agencies from the Bailiwick of Jersey, the US, the UK and the British Virgin Islands.

Tax treatment of COVID-19 government payments Bill

The [Treasury Laws Amendment \(COVID-19 Economic Response No 2\) Bill 2021](#) was passed by the Senate with [one amendment](#) by Independent Senator, Rex Patrick which would require the Commissioner to publish details about each entity (with annual turnover of \$10m or more) that received a JobKeeper payment or a Coronavirus economic response payment. The Bill then went back to the House of Reps for consideration of that proposed amendment, which was subsequently rejected.

In rejecting the proposed Senate amendment, a Government member of the House of Reps said it would undermine the protected nature of taxpayer information enshrined in the tax secrecy laws. "Australians disclosed information for the purposes of receiving JobKeeper to the ATO on the basis that the information would be subject to these strict tax confidentiality and secrecy laws. The same argument applies to information provided for other types of COVID payments." Further, the House of Reps noted that public companies are required to prepare annual financial reports and to give those reports to ASIC, where they are available for the public to access. ASIC has advised reporting entities that they should prominently disclose material amounts of COVID-19 government assistance in their financial reports.

The Bill as originally introduced proposes amendments to the ITAA 1997 and TAA in relation to the tax treatment of Government COVID-19 Economic Response payments for business and individuals. The amendments, not previously announced, are set out in the following 5 Schedules to the Bill:

- Coronavirus economic response payments - the Coronavirus Economic Response Package (Payments and Benefits) Act 2020 will be amended to allow the Treasurer to make rules for an additional kind of payment to an entity adversely affected by restrictions imposed by a State or Territory public health order. Date of effect: The Treasurer may establish a new payment scheme after the Bill receives Royal Assent, applicable between 1 July 2021 to 31 December 2022.
- Disclosure of tax information to Govt agencies - the tax secrecy provisions in the TAA will be amended to allow protected information to be disclosed to Government agencies for the purposes of administering COVID-19 business support programs. Date of effect: The day after Royal Assent.
- Tax-free treatment of COVID-19 business support payments – the ITAA 1997 will be amended to make payments received by eligible businesses under certain COVID-19 business support programs non-assessable non-exempt

income. Date of effect: The day after Royal Assent, applicable to assessments for income years ending on or after 1 July 2021.

- Modification power – a temporary mechanism will be reintroduced for responsible Ministers to change arrangements for meeting information and documentary requirements, including requirements to give information and produce, witness and sign documents, in response to COVID-19. This mechanism was previously included as a temporary measure that ended on 31 December 2020. The Bill will ensure that the mechanism has effect until 31 December 2022. Date of effect: The day after Royal Assent.
- Tax-free treatment of COVID-19 disaster payments - the ITAA 1997 will be amended to make COVID-19 disaster payments for individuals non-assessable non-exempt income. Date of effect: applicable to the 2020-21 income year and later income years for qualifying payments.

Expenses associated with holding vacant land

[Draft TR 2021/D5](#) discusses aspects of the operation of s 26-102 ITAA 1997. With effect from 1 July 2019, s 26-102(1) prohibits deductions for costs relating to holding vacant land. However, this prohibition is subject to various exemptions (for business use, exceptional circumstances, primary producers and institutional investors).

Having regard to the specific wording of s 26-102(1), the ATO says that - in the absence of an exemption - three tests determine whether the section applies to a land holding: Is there a substantial and permanent (ie fixed and enduring) structure on the land? If such a structure exists, is it in use or available for use? If such a structure is available for use, is it independent of and not incidental to the purpose of any other structure, or proposed structure, on the land?

Draft TR 2021/D5 includes 13 examples and practical compliance approaches for two situations - where residential premises are unavailable for lease, hire or licence for short periods, and to determine whether the lessee of vacant land uses the land to carry on a business.

Proposed date of effect: 1 July 2019.

Comments are due by 17 September 2021.

Automatic moratorium for creditors' schemes

As part of the Government's on-going efforts to improve the insolvency framework, Treasury has released a [consultation paper](#) seeking views on the appropriateness and impact of applying an automatic moratorium on creditor claims during the formation of a creditors' scheme under Part 5.1 of the Corporations Act 2001. Currently, no automatic moratorium is applied.

The consultation paper is also seeking views on other improvements, such as the appropriate threshold level for creditor approval of a scheme, "debtor-in-possession" finance considerations and any other issues.

Submissions are due by 10 September 2021.

Changed tax treatment for COVID-19 Disaster Payment

The Government announced COVID-19 Disaster Payments in June 2021. These payments provide support to eligible individuals unable to earn income because state or territory health orders prevent them working in their usual employment. The payment is administered by [Services Australia](#).

Legislation changing the taxable status of these payments to non-assessable non-exempt income received Royal Assent on 10 August 2021. The law applies retrospectively, which means if your client received this payment from Services Australia due to the Greater Melbourne lockdowns in the 2020-21 income year and you've already lodged their tax return, you will need to lodge an amendment.

Clients who received the payment on or after 1 July 2021 won't need to include the amount as assessable income in their tax return next year.

Our [website](#) was updated on 11 August with advice for clients.

Communication approach

Direct messaging to impacted clients has been undertaken by Services Australia:

- myGov message:

You received a COVID-19 Disaster Payment from Services Australia.

There has been a change to the legislation for this payment and it is no longer taxable.

The Australian Taxation Office has information on their website about what this means for individuals, click on the 'Australian Taxation Office – COVID-19 relief' link below.

More information about the COVID-19 Disaster Payment is available at the 'COVID-19 Disaster Payment' can be found [here](#).

- SMS:

You received a COVID-19 Disaster Payment, legislation has changed and this payment is no longer taxable. For information on what this means for you, go to the ATO website and search 'COVID-19 relief payments'. Do not reply by SMS.

These direct messages have been complemented by a mix of proactive communication from the ATO to raise awareness in the community about how to report these payments.

Activities include:

- Social media messaging through ATO corporate channels
- Messaging added to ATO Community
- Article in the Tax Professionals Newsroom
- Tax return instructions updated

Communication for Tax Time 2022

A gradual ramp-up of communication will be undertaken in the lead-up to Tax Time 2022, focusing on not only the COVID-19 Disaster Payment but the full suite of government payments which individuals may have received during 2021-22.

Please contact us if you have any questions in relation to the taxable status of COVID-19 Disaster Payments.

FINANCIAL SERVICES

Better advice Bill passed by House of Reps

The [Financial Sector Reform \(Hayne Royal Commission Response - Better Advice\) Bill 2021](#) has been passed by the House of Reps without amendment. It now moves to the Senate.

The Bill proposes to: (i) establish a single disciplinary body for financial advisers, to be administered by the Financial Services and Credit Panel (FSCP) within ASIC, and require the registration of all financial advisers who provide personal financial advice to retail clients; (ii) wind up the Financial Adviser Standards and Ethics Authority (FASEA) on 1 January 2022, and transfer the education and training standards functions to the Minister and ASIC; and (iii) establish a new model for regulating tax (financial) advisers.

TPD insurance: ASIC report identifies areas for improvement

ASIC has released a report, TPD Insurance: Progress made but gaps remain ([REP 696](#)), outlining how nine life insurers are addressing consumer harms identified in ASIC's 2019 report. While progress has been made in reviewing restrictive TPD definitions, ASIC said insurers and super trustees need to enhance their data capabilities to improve product design and claims handling. ASIC notes that around nine million people hold total and permanent disability (TPD) insurance, most (86%) through their super fund.

The ASIC report sets out residual gaps and areas where improvements are still needed, particularly in the ability of insurers and trustees to store and use data. For example, by ensuring that data is stored in a searchable format rather than "free text" fields that require manual review.

ASIC called on insurers and super trustees to act now to deliver on the improvements needed to meet the 5 October 2021 deadline for design and distribution obligations (DDO). In doing so, ASIC said they also need to be mindful of their new obligations to act efficiently, honestly and fairly (under s 912A of the Corporations Act 2001) when handling claims and providing superannuation trustee services.

SUPERANNUATION

Super guarantee and stapled funds: ATO draft guidelines

The ATO has released the following two draft instruments in relation to the single default account (stapled fund) regime and additional choice of super fund requirements that apply from 1 November 2021:

1. [SPR 2021/D1: Superannuation Guarantee \(Administration\) - choice of fund - written guidelines for the reduction of an increase in an employer's individual superannuation guarantee shortfall determination 2021](#) - provides written guidelines the ATO must have regard to for the purpose of s 19(2E) of the Superannuation Guarantee (Administration) Act 1992 (SGAA) in deciding the level of reduction to apply to an increase in an employer's individual superannuation guarantee shortfall under s 19(2A).
2. [SPR 2021/D2: Superannuation Guarantee \(Administration\) - stapled fund - guidelines for the reduction of an employer's individual superannuation guarantee shortfall for late contributions due to non-acceptance by notified stapled fund determination 2021](#) - provides written guidelines the ATO must have regard to for the purpose of making a decision to reduce (including to nil) the amount of an employer's shortfall for an employee for the quarter in accordance with s 19(2F) of the SGAA.

ATO transitional compliance approach: From 1 November 2021 until 31 October 2022, the ATO says it will provide employers with help and assistance to comply with the stapled fund requirements. During this transitional period, the ATO will reduce any choice shortfall to nil if that shortfall arose due to the employer's lack of knowledge of the stapled fund requirements rather than intentional disregard. This transitional approach applies only to the stapled fund changes to the choice of fund requirements, it does not apply to existing choice rules.

Date of effect: Both instruments are proposed to commence on 1 November 2021.

Comment are due by 16 August 2021.

Super funds: ATO approach to non-arm's length income rules

[Law Companion Ruling LCR 2021/2](#), explains the effect of recent changes to the non-arm's length income (NALI) rules in s 295-550 ITAA 1997. Under these amendments (applicable to income derived from 1 July 2018), income is included in a superannuation fund's non-arm's length component and taxed at 45% if there is a related-party scheme whereby non-arm's length expenses (NALE) are incurred in gaining or producing that income (or no expenses are incurred but the fund might be expected to have incurred expenses if the transaction were on arm's length terms).

The ATO says that, in applying the amendments, it is necessary to determine: the steps of the relevant scheme, the parties dealing with each other under those steps and whether, within the identified steps of the scheme, the fund incurs NALE in gaining or producing income (or in acquiring a fixed entitlement to trust income). This requires a sufficient nexus between the expenditure and the relevant income.

In the ATO's view, NALE incurred to acquire an asset (including associated financing costs) will have a sufficient nexus to all ordinary or statutory income derived by the complying super fund in respect of that asset. This includes any capital gain derived on the disposal of the asset. According to the ATO, the nexus between the initial NALE and any capital gain derived on the disposal of the asset is not broken if there is a subsequent refinancing on arm's length terms. The Ruling also makes it clear that NALE of a "general nature" (eg accounting fees) may have a sufficient nexus to all of the ordinary and statutory income of a fund.

LCR 2021/2 was previously released as Draft LCR 2019/D3. The final Ruling includes extra examples and expanded commentary (in relation to refinancing, non-arm's length expenditure of a general nature, the capacity in which activities are performed and whether dealings are on a non-arm's length basis).

The Appendix to LCR 2021/2 explains how the ATO will allocate its compliance resources from 1 July 2022 in considering whether general fund expenses are on arm's length terms.

Date of effect: 1 July 2018, including in relation to schemes entered into before that date.

Superannuation contributions: draft update to ruling

Following the release of LCR 2021/2 on the non-arm's length income (NALI) rules, the ATO has issued proposed [changes to Taxation Ruling TR 2010/1](#), its ruling on superannuation contributions. The key changes address the application of the NALI rules where:

- a superannuation provider incurs non-arm's length expenditure (eg where an asset is purchased under a contract at less than market value). The ATO does not consider that the difference between any consideration paid and the market value represents an in specie contribution as the asset is acquired under the terms of the contract and not via an *in specie* contribution;
- a person does something that increases the value of a fund asset and the parties are not acting on an arm's length basis. The ATO says that the dealing will be on a non-arm's length basis if the superannuation provider is aware, or objectively should be aware, of the contribution being made but does not record the market value of the increase in capital as a contribution to the relevant member(s).

A proposed compliance approach is included at Draft Appendix two. The ATO intends not to allocate compliance resources (from 2018-19) to determine whether a contribution has been made in circumstances where: a person performs one or more actions that shift value to a fund asset; the superannuation provider does not recognise the value shift as a contribution to be allocated to a member; and income derived by the superannuation provider with respect to the asset is NALI.

Comments on the proposed changes (including their start date) are due by 27 August 2021.

Super guarantee charge: remission of additional penalty post-amnesty

[Draft Practice Statement PS LA 2021/D1](#), sets out the ATO's revised decision-making principles for remitting the additional superannuation guarantee charge. When finalised, the Practice Statement will replace PS LA 2020/4, containing the ATO's current approach (post-SG amnesty).

An additional penalty of 200% of the SGC amount is automatically imposed if an employer fails to lodge an SG statement by the due date or otherwise fails to provide information relevant to assessing the employer's liability to pay the SGC for a

quarter. The ATO has the discretion to remit the penalty, in full or in part, during the original assessment stage or through an objection decision.

Draft PS LA 2021/D1 sets out a four-step penalty remission process, which ATO officers must consider in making a remission decision. The ATO says that the revised four-step process is aimed at recognising the "full range of compliance behaviours" in SG matters, and differentiates between good compliers and repeat offenders. For example, the remission amount is higher (30-40%) if the employer attempted to comply with their SG obligations by making a late payment prior to being contacted by the ATO. However, penalty relief would not be appropriate if multiple (over four) SG statements are lodged late.

Proposed date of effect: prospective.

Comments are due by 27 August 2021.

REGULATOR NEWS

APRA expectation: You Future, Your Super reforms

APRA has [written](#) to all registrable superannuation entity (RSE) licensees setting out its expectations in relation to the Your Future, Your Super (YFYS) reforms that came into effect on 1 July 2021. The new legislative requirements include a best "financial" interests duty (BFID) for trustees and APRA benchmark testing of investment performance.

APRA said the BFID sharpens the focus of all RSE licensee decisions, including on expenditure and investments. The reform places the onus on RSE licensees to ensure, and demonstrate, that all decisions are consistent with the best financial interests of their members. Given the BFID is now law, APRA said RSE licensees should have already taken immediate steps to initiate changes to their practices and reviewed internal frameworks.

APRA said it will undertake the first performance test for MySuper products, and notify RSE licensees of their results by 31 August 2021. Where an RSE licensee is

advised by APRA that they have a product that has failed the performance test, they must, within 28 days, give notice in writing to beneficiaries who hold this product.

To ensure RSE licensees are meeting their obligations for performance, APRA intends to report on the findings of its Thematic review of unlisted assets valuation and consult on proposed changes to Prudential Standard PS 530 (Investment Governance) and associated guidance. APRA also said it has conducted a thematic review of fund expenditure which has identified a range of industry practices that need to be strengthened. In the coming months, APRA said it intends to collect data on the expenses of each fund on a look-through basis using more granular categories.

Compensation for financial advice: ASIC update

ASIC has [reported](#) that AMP, ANZ, CBA, Macquarie, NAB and Westpac have paid or offered a total of \$1.86bn in compensation, as at 30 June 2021, to over one million customers for non-compliant financial advice or fees for no service (FFNS) misconduct. This includes \$620.9m paid or offered between 1 January to 30 June 2021.