

TAXATION

Luxury car tax obligations: Taxpayer Alert

ATO has released a Taxpayer Alert on certain entities using structured arrangements to avoid luxury car tax.

Crypto-asset related investment products: ASIC guidance

ASIC has published information sheets on the regulatory obligations for product issuers and market operators in relation to crypto-asset exchange traded products.

Director ID applications now open

Government has issued a media release reminding 2.7m company directors to apply for their new Director identification numbers.

Director ID data standard and disclosure: draft instruments

ATO has released draft legislative instruments in relation to Director Identification Number data standard and disclosure framework.

Second Commissioner of ATO appointed

Government has announced the appointment of Ms Kirsten Fish as a Second Commissioner of the ATO for a seven-year period.

CPI: September 2021 quarter

Australian Bureau of Statistics has released the CPI index number for the September 2021 quarter.

High Court rules “backpacker tax” does not apply to UK national

High Court has held that applying the so called “backpacker tax” to a UK national who was a tax resident of Australia contravened a non-discrimination clause in the DTA.

Trading stock: standard value of goods taken for private use

Taxation Determination TD 2021/8 has been released which sets out amounts the ATO will accept as estimates of value of goods taken from trading stock for private use.

Taxpayer fails to provide bank deposits were loans

A taxpayer has failed to discharge the onus to prove that amended GST assessments were excessive or otherwise incorrect re unexplained bank deposits.

FINANCIAL SERVICES

Better advice legislation: ASIC update

ASIC has provided an update on its expanded regulatory responsibilities under the better advice legislation.

Financial advisers code of ethics: consultation paper

Financial Adviser Standards and Ethics Authority has released a consultation paper on options to amend the wording of Standard three of its Code of Ethics.

Records of advice: ASIC guidance

ASIC has released an information sheet on records of advice to assist financial advisers with their obligations.

ASIC statement on cost recovery levies 2020-21

ASIC has published its 2020-21 cost recovery implementation statement showing how it expects to recover its regulatory costs.

SUPERANNUATION

Stapled super fund regime for new employees: 1 November

Treasurer has reminded employers that from 1 November 2021, where an employee has an existing super account, that account will follow the employee when they change jobs.

Few members have moved from MySuper products that failed test

APRA has reported that only 7% of members have moved from MySuper products that failed the first annual performance test, despite receiving letters of underperformance.

Super fund performance testing: APRA update

APRA has published two new FAQs as further general guidance on the performance test for super funds.

Super portfolio holdings disclosure: Regs finalised

Regulations have been registered to prescribe how portfolio holdings of a registrable super entity must be disclosed for the purposes of the Corporations Act.

APRA super data reporting: FAQs updated

APRA has published four additional frequently asked questions for RSE licensees on the reporting standards for Phase one of the transformation project.

REGULATOR NEWS

Board of Taxation CEO update: October 2021

CEO of Board of Taxation has released its October 2021 update including details of the Board's current work program.

Scam awareness week: TPB highlight

TPB has released a news article encouraging tax practitioners to speak to their clients about scams and ways to prevent them.

NSW Business Support Fraud Reporting

If you suspect a business is defrauding the NSW Government in relation to any NSW Government emergency assistance, you can report it online via the NSW Fraud Reporting Portal.

TAXATION

Luxury car tax obligations: Taxpayer Alert

The ATO has released Taxpayer Alert [TA 2021/4: Structured arrangements that avoid luxury car tax](#).

The Alert highlights the ATO's concern that entities are using certain arrangements to improperly obtain luxury car tax (LCT) refunds and to evade LCT. Such arrangements typically involve the following features:

- the supply of a luxury car to a pre-determined recipient identified by the controlling mind of the arrangement;
- a number of wholesale sales of the car are purportedly made, along a chain of participating entities often acting in collusion, prior to the final retail sale to the pre-determined recipient;
- one of the entities claims a refund of LCT while creating a consequential liability to another entity in the supply chain; and
- one or more of the participating entities (described as a "missing trader") does not correctly report and pay their purported LCT liabilities to the Commissioner; and
- LCT is artificially embedded in the price of the car that is not otherwise subject to LCT. One of the participating entities will then seek to recoup this LCT as a refund. The corresponding and artificially-created LCT liability is never reported and paid.

The ATO said that it is engaging with taxpayers to ensure that all parties have correctly met their LCT, GST and income tax obligations. Taxpayers who adopt these types of arrangements, and their advisers, will be subject to increased scrutiny, the ATO advises.

Crypto-asset related investment products: ASIC guidance

ASIC has published the following Information Sheets on the regulatory obligations for product issuers and market operators in relation to crypto-asset exchange traded products (ETPs) and other investment products:

- [INFO 225 - Crypto-assets](#); and
- [INFO 230 - Exchange traded products: admission guideline](#).

ASIC requires responsible entities that intend to hold underlying assets that comprise crypto-assets to hold an authorisation in relation to crypto-assets. To this end, ASIC has introduced a new "crypto-asset" category in the licensing application for responsible entities.

Director ID applications now open

The Government has issued a [media release](#) reminding Australia's 2.7 million company directors to apply for their new Director identification numbers (DIN).

The DIN is a unique 15-digit identifier that will stay with a director for life. The key timelines are as follows:

- individuals who became a director on or before 31 October 2021 - must apply by 30 November 2022;
- individuals who become a director between 1 November 2021 and 4 April 2022 - must apply within 28 days of appointment; and
- individuals who become a director from 5 April 2022 onwards - must apply before appointment.

To apply, directors can log into ABRS online using the [myGovID app](#). The online application form is stated to be very quick, with DINs issued instantly. It is free to apply, and available to directors within Australia and overseas. Applications are available by phone and by paper, for those who need it.

Further information about the MBR program and director IDs can be found at the Australian Business Registry Services (ABRS) [website](#).

Director ID data standard and disclosure: draft instruments

The ATO has released draft legislative instruments in relation to Director Identification Number (DIN) data standard and disclosure framework.

[ABRS 2021/D1: Director Identification Number Laws \(Application\) Data Standard 2021](#) addresses the following matters as part of an individual's application for a DIN:

1. what information may be requested and collected for the purposes of the performance of the Registrar's functions and exercise of the Registrar's powers;
2. how such information may be collected;
3. how an application is made;
4. when information is given to the Registrar;
5. how the Registrar authenticates, verifies or validates information;
6. how the Registrar records, uses and stores information;

7. correcting information held by the Registrar; and
8. the manner and form of communication by persons who give information to or seek to access information from the Registrar.

[ABRS 2021/D2: Director Identification Number Laws \(Other Government Bodies\) Disclosure Framework 2021](#) authorises the disclosure of DIN information to certain government entities in relation to the performance or exercise of their functions and powers.

Date of effect: Both instruments commence on the day after they are registered on the Federal Register of Legislation.

Comments for both instruments are due by 8 December 2021.

Second Commissioner of ATO appointed

The Government has [announced](#) the appointment of Ms Kirsten Fish as a Second Commissioner of the ATO for a seven-year period. Ms Fish is Chief Tax Counsel at the ATO providing technical leadership in relation to significant tax issues, cases and rulings. She has also been acting as Second Commissioner in the Law Design and Practice Group at the ATO for the past 12 months.

CPI: September 2021 quarter

The Australian Bureau of Statistics (ABS) has [released](#) the CPI index number of 119.7 for the September quarter 2021 (up from 118.8 for the June 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.

The CPI rose 0.8% for the September 2021 quarter. The most significant price rises were for New dwelling purchases by owner-occupiers (+3.3%) and Automotive fuel (+7.1%). Over the year to the September 2021 quarter, the CPI is now running at 3.0% - which is the upper end of the RBA target range of 2-3%.

High Court rules “backpacker tax” does not apply to UK national

The High Court has held that applying the so-called “backpacker tax” to wages earned by a UK national who was a tax resident of Australia contravened a non-discrimination clause in the Australia-UK DTA, thereby allowing the taxpayer’s appeal: [Addy v FCT \[2021\] HCA 34](#) (High Court, Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ, 3 November 2021).

Ms Addy was a UK national who arrived in Australia in August 2015 on a 12-month working holiday visa. She obtained another 12-month visa and eventually left Australia in May 2017. During the 2017 income year, Ms Addy derived taxable income of \$26,576 working in casual employment as a food and beverage waiter in Sydney.

The Full Federal Court held that Ms Addy was a tax resident of Australia under the 183-day test. The Court also held (by majority) that earnings derived by Ms Addy from 1 January 2017 should be taxed at the special rates applicable to working holiday makers (the "backpacker tax"). Ms Addy had argued that they should be taxed at the lower standard resident rates because of a non-discrimination clause (Art 25(1)) in the Australia-UK Double Tax Agreement (DTA). Article 25(1) relevantly provides that nationals of the UK shall not be subjected in Australia to "other or more burdensome" taxation than is imposed on Australian nationals "in the same circumstances, in particular with respect to residence".

The only issue for the High Court was the application of Art 25(1). It has now unanimously held that taxing the wages derived by Ms Addy from 1 January 2017 at the higher "backpacker tax" rate contravened Art 25(1).

The High Court said that the "same circumstances" that must be considered under Art 25(1) cannot include being or not being the holder of a working holiday visa, because that status depends on nationality, the very attribute protected by Art 25(1). However, the more onerous "backpacker tax" was imposed on Ms Addy because of her nationality - an Australian national in the same circumstances, ie deriving taxable income from the same source during the same period rate, would have been taxed at the lower rate. Accordingly, Art 25(1) was contravened.

ATO's response

The ATO has released a [media release](#) stating, not unexpectedly, that it is "considering this decision" and will provide further guidance "as soon as possible". It also points that the decision is only relevant where the working holiday maker is both an Australian resident for tax purposes and from Chile, Finland, Japan, Norway, Turkey, the United Kingdom, Germany or Israel.

Trading stock: standard value of goods taken for private use

[Taxation Determination TD 2021/8](#) sets out the 2021-22 amounts the ATO will accept as estimates of the value of goods taken from trading stock for private use by taxpayers in specified businesses (eg restaurants and bakeries).

The ATO also withdrew Determinations on the value of goods for 2013-14 (TD 2014/2), 2014-15 (TD 2015/9) and 2015-16 (TD 2016/9).

Taxpayer fails to provide bank deposits were loans

A taxpayer has failed to discharge its onus to prove that amended GST assessments were excessive or otherwise incorrect in respect of unexplained bank deposits: [Southern Global Group Pty Ltd and FCT \[2021\] AATA 3968](#) (AAT, Mitchell M, 28 October 2021).

The taxpayer's main business activity was described as "management consulting services". The ATO considered that unexplained bank deposits were unreported consideration for taxable supplies. The taxpayer contended they related to loans which had been fully repaid.

This covered BAS's lodged in the period from September 2016 to September 2018. The total of bank deposits identified at audit was \$1,053,491, with the GST shortfall calculation based on taxable supplies of \$598,641. There was some \$38,835 of GST in dispute.

The AAT concluded that the taxpayer's evidence was "limited" on the basis that:

- there was a lack of independent, contemporaneous and primary source documents which should have been available to the taxpayer to support its contentions;
- the taxpayer did not call any witness to corroborate its contentions;
- the material provided by the taxpayer was "brief" and lacked supporting evidence; and
- that material did not accord with the evidence presented by the ATO in relation to bank deposits and transfers.

Accordingly, the AAT affirmed the ATO's objection decisions. The taxpayer had not objected to the imposition of penalties, so that aspect was not addressed by the AAT.

FINANCIAL SERVICES

Better advice legislation: ASIC update

ASIC has provided an [update](#) on its expanded regulatory responsibilities under the Financial Sector Reform (Hayne Royal Commission Response - Better Advice) Act 2021.

From 1 January 2022, the role of the Financial Services and Credit Panel (FSCP) within ASIC will be expanded to cover financial advisers. The Financial Adviser Standards and Ethics Authority (FASEA) will be wound up and the administration of the financial adviser exam will be transferred to ASIC. A single registration and disciplinary system will apply for financial advisers who provide tax (financial) advice services.

From 1 January 2023, all financial advisers who provide personal advice to retail clients must be registered. Registration will occur in two stages. Stage one involves a one-off registration process administered by ASIC using the existing Financial Adviser Register. Financial advisers who are registered with the Tax Practitioners Board (TPB) as a tax (financial) adviser as at 31 December 2021 will generally be deemed to be registered with ASIC. Stage two will commence once the Financial Advisers Register transitions to the ATO as part of the Australian Business Registry System (ABRS).

Financial advisers code of ethics: consultation paper

The Financial Adviser Standards and Ethics Authority (FASEA) has released a [consultation paper](#) on options to amend the wording of Standard three of its Code of Ethics 2019.

Standard three provides that financial advisers "must not advise, refer or act in any other manner where they have a conflict of interest or duty". Based on feedback from stakeholders, FASEA is considering amendments to align the wording of Standard three to its intent as explained in FASEA's Guide. A number of stakeholders have expressed concern that the FASEA guidance cannot be legally relied upon for interpretation of the actual Standard.

Submissions are due by 1 December 2021.

Records of advice: ASIC guidance

ASIC has released an information sheet ([INFO 266](#)) on records of advice (ROA) to assist financial advisers with their obligations when using ROAs to provide personal advice to retail clients. INFO 266 also explains four exemptions from providing a statement of advice (SoA) and covers the meaning of "significantly different" when providing personal advice in a further advice situation.

ASIC statement on cost recovery levies 2020-21

ASIC has published its [2020-21 Cost Recovery Implementation Statement](#) showing how it expects to recover its regulatory costs of \$359.6m via cost recovery and statutory levies. The actual levies for industry sectors will be published in December 2021 and invoiced in January 2022.

Statutory levies make up \$70.2m of the total \$359.6m in regulatory costs that ASIC expects to recover. Of this, \$56.6m will be recovered via a statutory levy for the ASIC Enforcement Special Account (ESA). In relation to the financial advice sector, ASIC will recover total levies of \$72.246m (comprising \$54.281m in cost recovery levies and \$17.965m in statutory levies).

SUPERANNUATION

Stapled super fund regime for new employees: 1 November

The Treasurer has [reminded](#) employers that, from 1 November 2021, where an employee has an existing superannuation account, that account will be "stapled" and follow the employee when they change jobs. For new employees from 1 November 2021, Mr Frydenberg said employers must pay super guarantee contributions into their new employee's existing ("stapled") super account, unless the employee nominates a different account. This reform was implemented by the Treasury Laws Amendment (Your Future, Your Super) Act 2021.

Employers will need to request stapled super fund details from the ATO for new employees who start on or after 1 November 2021 and do not choose a super fund to receive super guarantee contributions. The ATO recommends that employers update their authorised representatives permissions so that they have full access in ATO online services, including "Employee Commencement Form" permission in order to request details about a new

employee's stapled fund. Tax practitioners are also able to make a request on behalf of an employer through ATO Online services for agents. Further details about the stapled super fund regime are available on the [ATO Website](#).

Few members have moved from MySuper products that failed test

APRA has [reported](#) that only 7% of members have moved from MySuper products that failed the first annual performance test, despite receiving letters notifying them that their product was underperforming.

Of the 76 MySuper products assessed under APRA's performance test on 31 August 2021, 13 failed and were required to write to members notifying them of the result. From the one million member accounts in products that failed the test, APRA said fewer than 68,000 have been closed. While it is "early days", that accounts for 7% of total accounts in the failed products or only 4.2% (\$2.2bn) of assets.

Super fund performance testing: APRA update

APRA has [published](#) two new FAQs as further general guidance on the Government's Your Future, Your Super performance test. The new FAQs set out APRA's intentions to publish the 2020-21 performance test values for all MySuper products as part of its heatmap, due to be released in December 2021. APRA also notes that the benchmark representative administration fees and expenses (RAFE) used for the 2020-21 performance test was 0.3286%.

Super portfolio holdings disclosure: Regs finalised

The [Corporations Amendment \(Portfolio Holdings Disclosure\) Regulations 2021](#), has been registered to prescribe how portfolio holdings of a registrable superannuation entity (RSE) must be disclosed for the purposes of s 1017BB of the Corporations Act 2001.

The Regulations detail the way PHD information must be made publicly available and presented consistently with the tables in new Sch 8D to the Corporations Regulations 2001. The information must be easily downloadable from the website of the entity in a delimited file format. The Regulations also allow super trustees to provide supplementary information in a separate public disclosure.

Date of effect: The Regulations will apply to reporting days that occur on or after 31 December 2021.

APRA super data reporting: FAQs updated

APRA has [published](#) four additional frequently asked questions (FAQs) for RSE licensees on the reporting standards for Phase one of the Superannuation Data Transformation (SDT) project. APRA has also updated FAQ 1.02 to clarify reporting due dates, including for historical information required under three new prudential standards.

REGULATOR NEWS

Board of Taxation CEO update: October 2021

The CEO of the Board of Taxation, Ms Christina Sahyoun, has issued the [CEO Update – October 2021](#).

The update welcomes Mr Anthony Klein and Ms Andrea Laing as part-time members of the Board for a three year period from 20 October 2021. Mr Klein has more than 20 years of experience working in tax advisory at PwC mostly, and Ms Laing has over 20 years of experience in indirect and employment taxes working with Shell.

The update also discusses the Board's current work program:

- **Research & Development Tax Incentive - Review of the dual administration model** - the Board is collating and analysing information collected in its consultation sessions and discussions with international regulators. The Board has also sent a short questionnaire to select companies to get a "high-level" understanding of the nature and level of compliance costs involved in making a claim under the R&DTI program. The Board has been requested to deliver its final advice to the Government by 30 November 2021.
- **Review of GST on Low Value Imported Goods** - the Board has completed its public consultation sessions and received written submissions from a number of stakeholders. The Board is in the process of meeting with representatives from New Zealand, the UK and the EU to gain insight as to how other countries have implemented their GST/VAT on low value imported goods. The Board has been requested to deliver its final advice to Government on 17 December 2021.
- **Review of CGT Roll-overs** - the Board is currently in the process of drafting the final report with key findings and recommendations.

The meetings for the remainder of the year are scheduled for 8 November 2021 and 10 December 2021.

Scam awareness week: TPB highlight

The TPB has released a [news article](#) encouraging tax practitioners to speak to their clients about scams and ways to prevent them. In conjunction with this year's Scams Awareness Week which runs from 8 to 12 November, the TPB has highlighted online resources and activities to help protect against scams.

Some interesting facts from Scamwatch:

- As at 31 August 2021, Scamwatch received over 190,000 reports with losses over \$192 million so far this year. This is a 95.4% increase in losses since this time last year; and
- Over \$96 million have been lost so far this year due to investment scams where half of those losses are related to cryptocurrency.

The article includes some simple steps to prevent scams and who to contact when one is made aware of scams, eg [Scamwatch](#) or the [ATO scam site](#). Help is also available for those experiencing anxiety or distress at [Lifeline](#) or [Beyond Blue](#).

NSW Business Support Fraud Reporting

If you suspect a business is defrauding the NSW Government in relation to any disaster payments, grants, voucher schemes, landowners and tenants relief, and/or any other NSW Government emergency assistance, you can report it online via the [NSW Fraud Reporting Portal](#).