

TAXATION

Division 7A: revised ATO view on UPEs and sub-trusts

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Trust reimbursement agreements

The ATO has released a Draft Ruling containing its long awaited guidance on trust reimbursement agreements.

Parents benefitting from trust entitlements of adult children

ATO has released a Taxpayer Alert on discretionary (family) trust arrangements whereby adult children direct entitlement amounts to be paid to parents or applied against loans.

ATO factsheet: assigned Medicare billings for SA health professionals

ATO has released a factsheet on the tax consequences for eligible South Australian health professionals at rural and remote primary health sites.

Budget super measures and temporary full expensing: Assent

Bill to implement various measures including the extension of temporary full expensing has received Assent.

Loss carry-back extension and other measures: Assent

Bill to implement the extension of the loss carry-back and other measures has received Royal Assent.

AAT power to stay proceedings Bill introduced

Bill to grant AAT the power to stay certain tax proceedings for small businesses has been introduced in the House of Reps.

Pension changes to assist workforce participation Bill introduced

Bill to allow age pensioners to suspend their social security payments for up to two years if their employment income precludes payment has been introduced in the Reps.

Government super co-contributions regulations remade

Government has registered regulations which have remade regulations relating to government co-contribution for low income earners.

Administrative penalties: electronic sales suppression tools

ATO has finalised a practice statement that guides ATO staff on how to apply and remit administrative penalties for offences relating to electronic sales suppression tools.

FINANCIAL SERVICES

Compensation for financial advice misconduct hits \$3.15bn

ASIC has reported an update on the progress of compensation for financial advice misconduct for various providers.

Court imposes \$20m penalty for fees for no service

Federal Court has ordered Aware Financial Services Australia Limited to pay a penalty for charging over 25,000 customers fees for services it did not provide.

Compliance risk management for financial services

APRA has published an article on managing compliance risk to remind financial services organisations to make risk management a priority.

Disclosure relief for PDSs and super dashboards

ASIC has released a consultation paper on its proposal to remake and consolidate legislative instruments which provide disclosure relief for PDSs.

SUPERANNUATION

Payment summary deferrals for ETPs: draft instrument

ATO has released a draft instrument proposing to defer the due date for providing the Commissioner with copies of payment summaries re ETPs and DASPs.

Proxy advice and super fund share voting disclosure

Senate has passed a resolution disallowing Regs that had sought to extend the AFSL licensing regime to cover a greater range of proxy adviser activities.

ATO SMSF statistical overview 2019-20 released

ATO has released its annual self-managed super funds statistical overview for 2019-20 based on data from SMSF annual returns.

Super data reporting and transparency: consultation paper

APRA has issued a discussion paper outlining proposals to publish enhanced data reported under the new super reporting standards.

REGULATOR NEWS**APRA super data reporting: FAQs updated**

APRA has published additional FAQs about its super data transformation phase 1 reporting standards.

Super fund outcomes assessments: APRA FAQs

APRA has issued two new FAQs and updated five updated FAQs on the outcomes assessment requirements for RSE licensees.

TAXATION

Division 7A: revised ATO view on UPEs and sub-trusts

The ATO has released a Draft Determination ([TD 2022/D1](#)) on the application of Div 7A in relation to unpaid present entitlements (UPEs) and sub-trusts which sets out its revised view on when a private company beneficiary provides "financial accommodation" to the trustee or a shareholder.

Financial accommodation and UPEs

The draft states that the expression "financial accommodation" in the s 109D(3) definition of "loan" extends to situations where a private company with a trust entitlement has "knowledge" of an amount that it can demand and does not call for payment. The ATO says that the company will be deemed to have the requisite knowledge if the company and trustee "have the same directing mind and will".

In the case of a private company beneficiary with a UPE, the company will provide financial accommodation to the trustee if "by arrangement, understanding or acquiescence", the company:

- has knowledge of an amount that it can demand immediate payment of; and
- fails to demand payment, thereby consenting to the trustee retaining that amount to continue using it for trust purposes.

The loan arises when the financial accommodation is provided. This occurs at the point in time when the company has the requisite knowledge to demand immediate payment. The ATO acknowledges that where the company is presently entitled to a percentage of trust income (or some other part of trust income identified in a calculable manner, but not a fixed amount), it cannot demand immediate payment until the trust income (or relevant part) is calculated. This will typically be at some time after 30 June.

To avoid a deemed dividend under Div 7A, one of the following needs to occur before the company's lodgment day:

- the company is paid its trust entitlement;

- the UPE is made subject to complying loan terms. If this option is chosen, the first minimum yearly repayment will be due by 30 June of the year following the income year in which the financial accommodation was provided;
- the UPE is satisfied and replaced with a complying loan agreement. The ATO accepts that these steps will result in the formalisation of the original loan identified in respect of the financial accommodation, rather than a refinancing of that loan (so as to cause the loan to remain unpaid at the lodgment day). Again, the first minimum yearly repayment will remain due by 30 June of the year following the income year in which the financial accommodation was provided; or
- a sub-trust is created and the use of the sub-trust funds by the main trust is made subject to complying loan terms.

Financial accommodation and sub-trusts

Where a sub-trust is created, a s 109D loan will not arise if the company simply chooses not to exercise its right to call for payment of the sub-trust fund.

However, the company will provide financial accommodation to the trustee if "by arrangement, understanding or acquiescence":

- all or part of the sub-trust fund is used by the company's shareholder (or shareholder's associate); and
- the company has "knowledge" of this use.

The ATO says that a s 109D loan will arise in this situation even if the sub-trust fund is on commercial terms, with a return paid to the fund. To avoid a deemed dividend, the parties can enter into a complying loan agreement.

The ATO says it no longer agrees with the view expressed in TR 2010/3 that there is no financial accommodation to the trustee of the main trust if the funds representing the UPE remain intermingled in the main trust as a consequence of an investment back by the sub-trust, provided the investment is on terms entitling the sub-trust to all the benefits from use of those funds and a repayment of the principal of the investment.

When finalised, the determination will replace TR 2010/3 (and PS LA 2010/4) and apply to trust entitlements arising on or after 1 July 2022.

IPA, together with other professional associations, will be making a submission on the draft documents.

We appreciate any feedback from members on what issues they have on the draft guidance.

Feedback can be sent direct to tony.greco@publicaccountants.org.au.

Trust reimbursement agreements

The ATO has released a Draft Ruling ([TR 2022/D1](#)) containing its long awaited guidance on trust reimbursement agreements.

Section 100A of the ITAA 1936 is a specific anti-avoidance rule that may operate to assess the trustee at penalty rates if a beneficiary's present entitlement to a share of trust income arises out of a reimbursement agreement. A reimbursement agreement is an agreement that provides for "the payment of money or the transfer of property to, or the provision of services or other benefits for, a person or persons other than the beneficiary or the beneficiary and another person or persons".

There is an important exclusion from the operation of s 100A. An arrangement entered into in the course of ordinary family or commercial dealings is not a reimbursement agreement (see below). The ATO's views on the operation of this exclusion were previously set out in ATO guidance released in July 2014.

Requirements of s 100A to apply

The draft identifies 4 basic requirements for s 100A to apply:

- the "connection" requirement - there must be a legally-effective present entitlement, or deemed present entitlement, of a beneficiary to a share of trust income, which has arisen out of a pre-existing agreement that meets the requirements to be a reimbursement agreement. The ATO says that a direct causal connection is not needed;
- the "benefit to another" requirement - the agreement must provide for the payment of money etc to a person other than the presently entitled beneficiary. The draft notes that an agreement that a beneficiary will not demand payment of their present entitlement would satisfy this requirement;

- the "tax reduction purpose" requirement - a purpose of one or more of the parties to the agreement must be that a person would be liable to pay less income tax (including deferring that person's tax to a later year). The person does not need to be a party to the agreement; and
- the ordinary dealing exception.

Ordinary dealing exception

The draft stresses that the essential feature of the ordinary family or commercial dealing exception is the term "ordinary". Acts undertaken in the course of ordinary family or commercial dealing must be capable of explanation by the familial and /or commercial objects they are apt to achieve. The presence of any tax-driven features is, however, relevant to the objective enquiry to determine whether an agreement is entered into in the course of ordinary dealing.

For the exception to apply, the ATO says that the whole dealing "in the course of" which the agreement is entered into must possess the quality of an ordinary family or commercial dealing.

In relation to ordinary family dealings, the transactions between family members and their entities must be capable of explanation as achieving normal or regular familial or commercial ends. For a dealing to be capable of explanation as achieving ordinary commercial objects, the parties would be expected to advance their respective interests and commercial objects. The ATO accepts that the absence of dealings at arm's length or market value will not, of itself, prevent a dealing from being explained as achieving the parties' ordinary commercial objectives.

ATO's risk rating compliance approach

[Draft PCG 2022/D1](#) (released with the draft determination) explains how the ATO proposes to differentiate risk for a range of trust arrangements to which s 100A might apply. It contains 4 risk zones:

- white (low risk) - arrangements entered into in income years ending before 1 July 2014;
- green (low risk) - arrangements covered by 1 of 3 scenarios (involving distributions to family members, ordinary dealings and the trustee's retention of funds);

- blue (medium risk) - some arrangements involving the trustee's retention of funds may be treated as medium risk);
- red (high risk) - arrangements where the motivation appears to be sheltering the trust's (taxable) net income from higher tax rates and arrangements with contrived elements.

The ATO will not generally dedicate new compliance resources to consider the application of s 100A to white and green zone arrangements (unless a pre-1 July 2014 arrangement would come with the blue or red zone).

The final ruling and guidance are intended to apply retrospectively. However, for entitlements conferred before 1 July 2022, the ATO will stand by any administrative position reflected in its 2014 guidance, to the extent that view is more favourable to the taxpayer's circumstances.

Note that Taxpayer Alert TA 2022/1 (see below) also flags the potential application of the trust reimbursement rules in the context of parents benefitting from the trust entitlements of their children over 18.

IPA, together with other professional associations, will be making a submission on the draft documents.

We appreciate any feedback from members on what issues they have on the draft guidance.

Feedback can be sent direct to tony.greco@publicaccountants.org.au.

Parents benefitting from trust entitlements of adult children

The ATO has released [Taxpayer Alert TA 2022/1](#) on discretionary (family) trust arrangements where the controllers' adult children are made presently entitled to trust income but the income is used to meet the expenses of the controllers. The entitlements are "satisfied" by the children directing (or purportedly directing) that the amounts be paid to their parents or applied against any beneficiary loans owed by the parents.

According to TA 2022/1, the parties argue that the children are required to repay their parents for their share of family costs or for expenses incurred in relation to their upbringing (eg private school fees or their share of family holidays). However, in

some arrangements the children are unaware of their purported entitlements or that their entitlements are being applied against expenses incurred on their behalf by their parents.

The ATO is concerned that taxpayers are entering into these arrangements in order to utilise the lower marginal tax rates applying to their children. The ATO considers that the arrangements may be a sham or that Pt IVA or the reimbursement agreement rules may apply.

ATO factsheet: assigned Medicare billings for SA health professionals

The ATO has released a [factsheet](#) on the tax consequences for eligible South Australian health professionals taking part in the arrangement that allows Medicare benefits to be claimed for some services provided by eligible health professionals at rural and remote primary health sites. Under the Initiative between the Commonwealth and SA, the health professional pays all the Medicare billings from those services to the SA government.

The ATO fact sheet says the medical service fees derived by the health professional from undertaking medical service work are assessable income of the health professional. The fee is assessable when collected by the State of South Australia on behalf of the health professional. This income should be returned as "Other Income" in the health professional's tax return. A deduction is allowable for the amounts of medical service billings assigned to the SA government under the arrangement.

Budget super measures and temporary full expensing: Assent

The [Treasury Laws Amendment \(Enhancing Superannuation Outcomes For Australians and Helping Australian Businesses Invest\) Bill 2021](#) has received assent as Act No 10 of 2022, it passed the Senate with no amendments. Measures include:

- allowing individuals aged between 67 and 75 to make non-concessional superannuation contributions under the bring-forward rule (from 1 July 2022);
- supporting the repeal of the work test for non-concessional and salary sacrificed contributions made by individuals aged between 67 and 75 (from 1 July 2022);

- removing the \$450 per month income threshold under which employees do not have to be paid the superannuation guarantee by their employer (from 1 July 2022);
- allowing trustees to use their preferred method of calculating exempt current pension income where the fund is fully in the retirement phase for part of the income year but not for the entire income year (for the 2021-22 income year onwards);
- increasing the maximum amount of voluntary contributions that could be released under the First Home Super Saver Scheme from \$30,000 to \$50,000 (from 1 July 2022); and
- extending the temporary full expensing regime by 12 months to 30 June 2023.

The Treasurer has issued two media releases trumpeting the changes, [one with the Assistant Treasurer](#) and the [other with the Minister for Superannuation](#).

Loss carry-back extension and other measures: Assent

The [Corporate Collective Investment Vehicle Framework and Other Measures Act 2022](#) has received assent as Act No 8 of 2022. It enacts the loss carry back extension, as well as other measures including establishing the tax and regulatory frameworks for CCIVs to be used for funds management, amending the taxing point rules for employee share scheme interests, and implementing the retirement income covenant rules, among other things.

AAT power to stay proceedings Bill introduced

The [Treasury Laws Amendment \(Streamlining and Improving Economic Outcomes for Australians\) Bill 2022](#) has been introduced in the House of Reps and proposes to implement the following measures.

- ***Small Business Taxation Division of AAT to issue stay proceedings*** – the TAA will be amended to enable small business entities to apply to the Small Business Taxation Division of the AAT ("SBTD") for an order staying, or otherwise affecting, the operation or implementation of certain specified decisions of the Commissioner that are being reviewed by the AAT. The SBTD will be able to make an order (including varying or revoking an order that is already in force) under s 41 of the AAT Act in relation to a reviewable objection decision that relates to a small business taxation assessment decision. The purpose of the amendments is to provide small business entities with a cheaper, faster and simpler way to pause the effects of a decision to recover a tax debt during merits review of the decision as

compared to applying to a court. DATE OF EFFECT: applications for review made on or after assent to the Bill.

- **Foreign financial services providers licensing exemption** – the *Corporations Act 2001* will be amended to provide an AFS licence exemption for persons regulated by comparable regulators that provide financial services to wholesale clients. An AFS licence exemption will also be provided for the provision of financial services from outside Australia to "professional investors". A "fit and proper person test" exemption will also assist with the fast-tracking of AFS licences for the provision of financial services to wholesale clients by persons seeking to establish more permanent operations in Australia who are regulated by comparable regulators. DATE OF EFFECT: 1 April 2023.
- **Financial reporting and auditing of APRA super funds** - registrable superannuation entities (RSE) licensees will be required to prepare and lodge financial reports for each financial year and half-year with ASIC, including directors' reports and financial statements. The RSE will also be required to publish the reports on its website. RSEs will be required to keep financial and accounting records for seven years. The Bill will also amend the requirements for the auditor of an RSE, including a prohibition from playing a significant role in the audit of a RSE for more than five (out of seven) years. DATE OF EFFECT: 1 July 2023.

Pension changes to assist workforce participation Bill introduced

The [Social Services Legislation Amendment \(Workforce Incentive\) Bill 2022](#) has been introduced in the House of Reps. It proposes to allow age pensioners and certain veterans to have their social security payment suspended for up to two years (instead of cancelled) if their income from employment precludes a payment. Currently, if an age pensioner's total ordinary income exceeds the relevant income limit, their benefit is cancelled after 12 weeks. The Bill will also allow working pensioners, and their pensioner partners, to retain their pensioner concession card for up to two years.

Government super co-contributions regulations remade

The Government has registered the [Superannuation \(Government Co-contribution for Low Income Earners\) Regulations 2022](#) which have remade the Superannuation (Government Co-contribution for Low Income Earners) Regulations 2004 (which were due to sunset on 1 April 2022).

The 2022 Regs have omitted certain redundant provisions from the 2004 Regs, and simplified the language and renumbered provisions. The changes do not affect the substantive meaning or operation of the provisions except in limited cases where definitions or new provisions are inserted to clarify and remove ambiguity.

Date of effect: 1 April 2022.

Administrative penalties: electronic sales suppression tools

[Practice Statement PS LA 2022/1](#) guides ATO staff on how to apply or remit administrative penalties for offences relating to electronic sales suppression tools (ESSTs). These offences include manufacturing, supplying or possessing ESSTs, or incorrectly keeping or making tax records using an ESST. Administrative penalties may be imposed by the ATO as an alternative to prosecution.

In relation to whether to remit a penalty for incorrectly keeping records using an ESST, the ATO notes that it would not generally be appropriate to remit the penalty if the offender has deliberately destroyed or omitted records during the record-keeping period.

Date of effect: 24 February 2022.

PS LA 2022/1 finalises PS LA 2021/D2 and is similar to the Draft.

FINANCIAL SERVICES

Compensation for financial advice misconduct hits \$3.15bn

ASIC has [reported](#) that AMP, ANZ, CBA, Macquarie, NAB and Westpac have paid or offered a total of \$3.15 billion in compensation, as at 31 December 2021, to over 1.3 million customers for non-compliant financial advice or fees for no service (FFNS) misconduct. This includes almost \$1.3bn paid or offered between 1 July to 31 December 2021.

Court imposes \$20m penalty for fees for no service

The Federal Court has [ordered](#) Aware Financial Services Australia Limited (Aware FS), formerly State Super Financial Services Australia Limited (StatePlus), to pay a \$20 million penalty for charging over 25,000 customers fees for services it did not provide. The matter was a case study before the Banking Royal Commission.

Between 2014 and 2018, Aware FS charged 25,300 customers a total of \$50 million in fees for advice services included as part of the superannuation product offered by Aware FS. The firm provided at least 17,500 customers with written disclosure documents advising them that they would receive an annual financial planning review. Another 7,800 customers entered into ongoing advice service arrangements that included provision of an annual review service. However, Aware FS did not provide the promised services.

The Court found that by charging fees for no service and failing to have internal procedures, measures and controls in place to monitor compliance, Aware FS breached its obligations as an AFS licensee to act efficiently, honestly and fairly and to comply with financial services laws. The Court considered that that Aware FS's conduct was serious and systematic, with thousands of similar contraventions having occurred repeatedly over an extended period of time. Aware FS was also ordered to publish an adverse publicity notice on its website for one year. The Court acknowledged that Aware FS has remediated \$104.8 million to clients.

Compliance risk management for financial services

APRA has published an article, [How to manage compliance risk and stay out of the headlines](#), and reminded financial services organisations to make compliance risk management a priority. APRA said there isn't a single consolidated set of obligations that a financial services organisation must follow (given the diversity of activities). Instead, businesses need robust processes to identify obligations and keep up-to-date with regulatory change.

APRA said it recently examined larger and more complex entities with a focus on their management of non-financial risk. Key observations from this APRA work highlighted the need for entities to have: (i) a clearly defined approach to managing compliance risk; (ii) established processes to support compliance risk management practices; and (iii) clear accountability for managing compliance risk.

Disclosure relief for PDSs and super dashboards

ASIC has released a consultation paper ([CP 358](#)) on its proposal to remake and consolidate the legislative instruments (without substantive changes) which provide disclosure relief for product disclosure statements (PDSs), superannuation dashboards and financial services guides (FSGs). Most of the existing seven instruments will automatically repeal or cease in the next two years if not remade. ASIC is proposing to:

- remake, in a single new instrument, the relief for PDS in-use notices for employer-sponsored super and product dashboard disclosure - [CO 12/415], [CO 13/1534] and [CO 14/443];
- remake, in a single new instrument, the relief for shorter PDSs and PDS obligations for super trustees, IDPS operators and responsible entities of IDPS-like schemes – [CO 12/749], [CO 13/797] and *ASIC Corporations (Superannuation: Investment Strategies) Instrument 2016/65*; and
- remake, as a new instrument, the relief for FSGs in time critical situations – [CO 12/417].

Date of effect: The proposed three new instruments will be given effect until 1 October 2027.

Comments are due by 12 April 2022.

SUPERANNUATION

Payment summary deferrals for ETPs: draft instrument

The ATO has released [Draft Legislative Instrument LI 2022/D6](#) proposing to defer the due date for providing the Commissioner with copies of payment summaries in respect of employment termination payments (ETPs) or departing Australia superannuation payments (DASPs) to 14 August following the end of the financial year in which the payments are made.

Under the Draft Instrument, payers will not be required to give copies of payment summaries to the Commissioner within 14 days of making ETPs or DASPs where they have withheld amounts from payments in accordance with Sch 1 to the TAA. However, they will still be required to provide copies but within a timeframe aligned with their other reporting obligations.

Date of effect: When finalised, the Instrument will commence on 1 April 2022. It will replace the existing Instrument that was registered on 2 March 2012.

Comments are due by 7 March 2022.

Proxy advice and super fund share voting disclosure

The Senate has passed a [resolution](#) disallowing the [Treasury Laws Amendment \(Greater Transparency of Proxy Advice\) Regulations 2021](#) (previously registered on 17 December 2021).

The disallowed Regs had sought to extend the AFSL licensing regime to cover a greater range of proxy adviser activities, and require proxy advisers to be independent of their institutional clients. The disallowed Regs also sought to amend reg 2.38 of the SIS Regs to require APRA regulated super funds to disclose more detailed information on their share voting and the use of proxy advice.

ATO SMSF statistical overview 2019-20 released

The ATO has released its annual [Self-Managed Super Funds: A statistical overview 2019-20](#) which is based on data from SMSF annual returns. It includes 34 tables of SMSF data and analysis.

As at 30 June 2021, there were almost 598,000 SMSFs (with 1.115m members) holding \$822bn in total assets. In the five years to 2020-21, the number of SMSFs grew by an annual average of 1.7%. There were 25,000 SMSFs established in 2020-21 with average assets of \$391,000 (median \$260,000). Around 15,900 SMSFs were wound up in 2019-20. The average SMSF member balance at 30 June 2020 was \$696,000 (median \$415,000). The average balance for female members was \$644,000 (\$768,000 for males).

SMSFs used the services of 4,600 SMSF auditors and 13,800 tax agents in 2019-20. Average total SMSF expenses for 2019-20 were \$15,300 (median \$8,200) representing a total expense ratio of 1.16%. A total of \$596m in downsizer contributions were made by 2,344 SMSF members in 2019-20 (up from \$439m).

Auditor contravention reports (ACRs) were lodged for 13,900 SMSFs in 2020-21, reporting 40,200 contraventions (of which 45% were reported as rectified). The most commonly reported contraventions continued to be loans or financial assistance to members (20%), in-house assets (17%) and separation of assets (13%).

Super data reporting and transparency: consultation paper

Following the finalisation of Phase 1 of APRA's Superannuation Data Transformation project, APRA has issued a [discussion paper](#) outlining proposals to publish enhanced data reported under the new superannuation reporting standards.

APRA says it is proposing to publish new aggregate industry-level, superannuation fund level publications and superannuation product-level statistics - starting in June 2022. Most of the Phase 1 data collected is proposed to be determined as "non-confidential" and therefore able to be published by APRA.

Comments are due by 15 April 2022.

REGULATOR NEWS

APRA super data reporting: FAQs updated

APRA has published [additional frequently asked-questions \(FAQs\)](#) about its Superannuation Data Transformation (SDT) Phase 1 reporting standards to clarify historical data requirements. APRA said it has made a correction to Historical Data FAQ 1.0 and published six additional FAQs to provide further guidance to RSE licensees on the reporting standards.

Super fund outcomes assessments: APRA FAQs

APRA has issued two new [frequently asked questions \(FAQs\)](#) and five updated FAQs on the outcomes assessment requirements for registrable superannuation entity (RSE) licensees under s 52(9) of the SIS Act. The FAQs set out APRA's expectation for RSE licensees to align their outcomes assessment and business performance review cycle. APRA said the alignment of the cycle is intended to ensure that an RSE licensee is using up-to-date assessments and optimising value from the process.