

TAXATION

ATO view on “market value” of assets for tax purposes

The ATO has updated its online Guide to assist taxpayers in understanding its general expectations on market valuation for tax purposes.

Consultation paper on Two Pillar proposals

Treasury has released a consultation paper on the OECD’s so called “Two Pillar Solution” to the tax challenges arising from the digitalisation of the global economy.

Residency tests for individuals

The ATO has released a draft ruling on the residency tests for individuals which consolidates and updates its earlier rulings.

CGT: cost base and non-contingent liabilities

The ATO has issued a determination on the CGT consequences of including a non-contingent liability to pay a specified amount in the cost base of an asset.

Change to Australian tax treatment of Indian technical services income

Legislation has been introduced to preclude Australian taxation of certain technical services payments to entities resident in India.

Withholding tax: interest derived by UK and US financial institutions

The ATO has released a draft update to TR 2005/5, its ruling on the withholding tax exemption for interest derived by UK and US financial institutions.

Use of individual's fame by related entities

The ATO has released a draft determination on the income tax treatment of payments for using an individual's "fame" under third party licensing agreements.

CGT: deceased's dwelling – extension of 2-year disposal rule

The ATO issued an updated version of its guidance on the factors relevant in deciding whether to exercise its discretion to extend the 2-year period for disposing of an inherited dwelling.

Consultation open on the review of the Taxpayer's Charter

The ATO is inviting the community to help shape future interactions with the ATO by providing their feedback and views on the Taxpayers' Charter (the Charter). Consultation closes on 24 October 2022.

TPB Fact sheet – Information for Clients – Proof of Identity Checks for Client Verification

'To help your current and future clients understand what information you can request from them to verify their identity, share' the TPB 'handy factsheet with them'.

FINANCIAL SERVICES

AMP companies fined millions for fees for no service

The Federal Court has ordered 5 AMP companies to pay \$14.5m in penalties for charging fees for no service in relation to 1,452 superannuation members.

ASIC remediation guidance for AFS licensees

ASIC has published updated guidance on consumer remediation to assist AFS licensees (including superannuation trustees) and credit licensees.

SUPERANNUATION

Regulations to support downsizer age reduction

Newly registered regulations amend the SIS Regulations to give effect to the pending amendments to reduce the downsizer contribution age threshold from 60 to 55 years.

Dixon Advisory fined for breaches of best interest obligations

The Federal Court has imposed a \$7.2 million penalty on Dixon Advisory for failing to act in their clients' best interests and provide appropriate advice.

REGULATOR NEWS

APRA advice on super fund outsourcing arrangements

APRA has published an article setting out areas for improvement in relation to the management of outsourcing arrangements by superannuation trustees.

Small Business and Franchising Consultative Committee (SBFCC) update – 7 October 2022

The SBFCC 'was established by the ACCC to provide a forum where competition and consumer law concerns related to the small business and franchising sectors could be discussed by industry and government'. The SBFCC have provided their latest update relevant to franchising and small business.

SUSTAINABILITY

Scalability is on the agenda of the International Sustainability Standards Board (ISSB)

Responding to the diverse readiness of entities to meet the requirements of IFRS S1 and IFRS S2, IFRS Foundation staff members have proposed a set of mechanisms to address the issue of scalability, which were then discussed by the ISSB members on 21 September.

International Ethics Standards Board for Accountants (IESBA) Sustainability Working Group

The IESBA has identified the key role of ethics amongst the development of the ISSB standards to create a global baseline for sustainability reporting. The IESBA has recently confirmed the Terms of Reference of its dedicated Sustainability Working Group.

IPA Sustainability Discussion Group

On 17 October at 6pm AEDT, the IPA's virtual Sustainability Discussion Group will be joined by Alan Dayeh of Point Advisory to discuss the circular economy and decarbonisation.

TAXATION

ATO view on “market value” of assets for tax purposes

The ATO has updated its [online Guide](#) to assist taxpayers in understanding its general expectations on market valuation for tax purposes. It includes information on what market value means for tax purposes and the evidence and processes the ATO generally expects to see to support a valuation.

The term "asset" used in the Guide includes the following:

- real property;
- plant and equipment;
- businesses;
- goodwill;
- shares;
- units;
- liabilities;
- benefits provided; and
- financial instruments.

It is broken into the following categories:

- (a) market value definition for tax purposes;
- (b) who can determine market value? (setting out who is able to value asset classes);
- (c) valuation standards and valuation fundamentals for tax compliance; and
- (d) review process.

It includes 3 examples, which deal with the margin scheme (GST), the maximum net asset value test and market value substitution (non-arm's length).

Consultation paper on Two Pillar proposals

Treasury has released a [consultation paper](#) on the OECD's so called “Two Pillar Solution” to the tax challenges arising from the digitalisation of the global economy.

Pillar One aims to ensure a fairer distribution of profits and taxing rights among countries with respect to the largest MNEs. In the simplest possible terms, it involves the splitting up of an MNE's profits so that part is taxed by those countries in which the MNE has its headquarters and operations and residual profits are taxed in the countries in which goods and services are consumed. Very complicated stuff and

only about 100 MNEs (none being Australian) will be affected by Pillar One initially (albeit \$US125 billion in profits is up for grabs).

Pillar Two puts a floor on tax competition on corporate income tax through the introduction of a global minimum corporate tax at a rate of 15%. Here we are talking about MNE's with annual global revenue of at least EUR750 million.

The current aim is for the Two Pillars to be implemented from 2024.

Residency tests for individuals

The ATO has released Draft Ruling [TR 2022/D2](#) on the residency tests for individuals in s 6(1) of ITAA 1936.

It consolidates IT 2650 (permanent place of abode outside Australia) and TR 98/17 (residency status of individuals entering Australia). It updates the views reflected in those rulings (now withdrawn) to take into account developments in recent case law).

The definition of "resident of Australia" has 4 alternative tests under which a person will be a resident for tax purposes if they meet one (or more) of the tests. The ATO notes that there are no "bright-line rules" for determining residency and the significance of facts varies from case to case (as illustrated in the 14 examples contained in the draft).

In this context, be reminded of the pending reforms announced in the 2021 Budget involving the introduction of:

- a primary "bright line" test which the current residency tests lack, ie a person who is physically present in Australia for 183 days or more in any income year will be an Australian tax resident; and
- for individuals who do not meet the primary test - secondary tests that depend on a combination of physical presence and measurable, objective criteria.

Non-contingent liability: amount excluded from cost base if expenditure deductible

The ATO has issued [Determination TD 2022/14](#) which states that s 110-45(2) of ITAA 1997 applies if a non-contingent liability to pay a specified amount is included in the cost base of a CGT asset under s 110-25(2) or s 112-35, but that amount is deductible.

Under s 110-45(2), "expenditure" does not form part of an asset's cost base to the extent that a deduction has or can been claimed (subject to certain exceptions). The ATO says that a non-contingent liability to pay a specified amount is a presently existing liability to "expenditure", even if the liability has not been discharged. If the liability can be included in an asset's cost base, and the taxpayer can deduct an amount of expenditure which it represents, then s 110-45(2) can apply to reduce the amount included in the cost base.

Change to Australian tax treatment of Indian technical services income

[Legislation](#) has been introduced into Parliament to amend the International Tax Agreements Act 1953 to stop Australian taxation on certain technical service payments made to entities that are Indian residents for tax purposes.

These relevant payments are made to Indian residents by Australian customers for services provided remotely that are covered by Art 12(3)(g) of the Indian DTA, that are "royalties" and are only taxable in Australia because Art 12(3)(g) and Art 23 of the DTA.

The amendments are being enacted to avoid the outcome in the 2018 Satyam Computer Services case.

Withholding tax exemption: interest derived by UK and US financial institutions

The ATO has released a [draft update](#) to TR 2005/5, its ruling on the withholding tax exemption for interest derived by UK and US financial institutions. It amends TR 2005/5 to clarify the meaning of "financial institution" as defined in the Art 11(3)(b) of the UK and US Conventions.

Key changes include:

- updating the commentary on ADIs as a result of changes to Australian banking law;
- explaining why some activities are not considered by the ATO to be the provision of finance (eg arrangements where finance may be provided if a contingency occurs, or where an upfront payment is made for the right to collect receivables from third parties);
- discussing the indicia of carrying on a business; and

- explaining when an enterprise is substantially deriving its profits from carrying on a business of spread activities.

The draft also extends the application of TR 2005/5 to residents of other countries, where the country of residence has a DTA with Australia that includes an article with similar wording to, and the same effect as, the UK and US Conventions.

Use of individual's fame by related entities

The ATO has released [Draft Determination TD 2022/D3](#) on the income tax treatment of payments for using an individual's "fame" under third party "licensing" agreements. Specifically, it considers arrangements where:

- an individual with fame establishes a company, family trust or other related entity;
- an agreement is entered into with the related entity for the use of the individual's "fame"; and
- the related entity then "authorises" other entities to use the individual's fame for a fee.

The ATO's preliminary view is that any fees paid for the use of the individual's fame will be ordinary income of the individual. The reason for this conclusion is that Australian laws do not recognise any proprietary right in a person's fame, so the individual cannot transfer or assign property in their fame to another entity.

CGT: deceased's dwelling – extension of 2-year disposal rule

The ATO issued an [updated version](#) of Practical Compliance Guideline PCG 2019/5 which sets out the factors the ATO takes into account in deciding whether to exercise its discretion to extend the 2-year period for disposing of an inherited dwelling (so as to qualify for the CGT main residence exemption).

PCG 2019/5 also outlines a safe harbour compliance approach that allows taxpayers to manage their tax affairs as though the discretion has been exercised for a period not exceeding 18 months (ie without formally applying to the ATO).

Various amendments have been made to PCG 2019/5 to improve its practical application. In particular, the guidance now refers to COVID-19, including the impact of lockdowns and restrictions placed on the real estate industry.

Consultation open on the review of the Taxpayer's Charter

The Charter aims to help people understand their rights and obligations, what they can expect from their interactions with the ATO, and what to do if they are not satisfied. As part of the review, the ATO wants to hear from all members of the community, even if they have never provided feedback to the ATO before or do not often interact with the ATO.

If you have any comments on the Taxpayer's Charter, send them to taxpayerscharter@ato.gov.au by **24 October 2022**.

View the ATO review [here](#).

TPB Fact sheet – Information for Clients – Proof of Identity Checks for Client Verification

'With identity crime on the rise, it's essential you verify your clients' identity before providing your services. To help your current and future clients understand what information you can request from them to verify their identity, share' the TPB 'handy factsheet with them. This way, your clients will know what to expect and the types of documents needed. Share' the TPB [factsheet](#) now.

FINANCIAL SERVICES

AMP companies fined \$14.5m for fees for no service

The Federal Court has ordered 5 AMP companies to pay \$14.5m in penalties for charging fees for no service in relation to 1,452 superannuation members: [ASIC v AMP Financial Planning Proprietary Limited](#) [2022] FCA 1115.

The Court ruled that the AMP entities contravened s 912A of the Corporations Act 2001 by failing to do all things necessary to ensure that the financial services covered by its AFSL were provided efficiently, honestly and fairly. ASIC had sought penalties totalling \$17.5m.

While it was not suggested that senior management were involved in the contraventions, the Court said the failure to investigate whether or not there was a

systemic issue, despite many complaints, reflected very poorly on the "corporate culture".

ASIC remediation guidance for AFS licensees

ASIC has published [updated guidance](#) on consumer remediation (Regulatory Guide RG 277) to assist AFS licensees (including superannuation trustees) and credit licensees. The guidance clarifies the 9 principles for conducting a remediation to help licensees comply with their obligations and conduct remediations efficiently, honestly and fairly. ASIC says licensees should also consider whether it is appropriate to offer assistance to consumers to seek their own independent legal and/or taxation advice about a remediation offer.

As at June 2022, ASIC said it was monitoring 36 remediation activities across superannuation, advice, credit and banking and insurance whereby \$3.25bn has been paid or offered to over 3.4 million consumers, and a further estimated \$1.6bn is yet to be returned to around 2.7 million consumers.

SUPERANNUATION

Regulations to support downsizer age reduction

The Government has registered [Regulations](#) which amend the SIS Regulations to give effect to the Government's intention to expand the eligibility for downsizer contributions into superannuation by reducing the eligibility age from 60 to 55 years.

Under pending changes to the downsizer rules in the ITAA 1997, individuals aged 55 years or over can make downsizer contributions to their complying superannuation plan from the proceeds of selling their main residence. The Regulations support those changes by ensuring that downsizer contributions will be accepted by regulated superannuation funds who are aged 55 years or over.

\$7.2m penalty for breaches of best interest obligations

The Federal Court has imposed a \$7.2 million penalty on Dixon Advisory and Superannuation Services Limited (DASS) after finding that 6 of its representatives failed to act in their clients' best interests and failed to provide advice appropriate to their clients' circumstances: [ASIC v Dixon Advisory & Superannuation Services Ltd \[2022\] FCA 1105](#).

The Court ruled that DASS contravened s 961K(2) of the Corporations Act 2001 on 53 occasions by being the responsible AFS licensee of its representatives who contravened s 961B(1) (best interests duty) and/or s 961G (inappropriate advice). The Court noted that the DASS representatives did not conduct a reasonable investigation of the clients' circumstances before providing the advice. In some cases, the inappropriate advice resulted in the client's SMSF being "insufficiently diversified" and exposed to an inappropriate risk of capital loss.

While the maximum total penalty for the 53 contraventions was \$10.38m, the Court determined that a 30% reduction should be applied to reduce the penalty. The Court said a "significant reduction" was warranted as the contravening conduct did not involve any dishonesty or wilful contravention, DAAS had co-operated with ASIC and that all the entitlements have since been paid in full to DAAS clients.

REGULATOR NEWS

APRA advice on super fund outsourcing arrangements

APRA has published an [article](#) setting out areas for improvement in relation to the management of outsourcing arrangements by superannuation trustees. The article follows an APRA thematic review of outsourcing arrangements which focused on 10 retail superannuation funds.

APRA's areas for improvement, and examples of better practices, focus on:

- (i) how trustees assess "value for money" when selecting a service provider;
- (ii) performance measurement and monitoring; and
- (iii) oversight of service providers.

In a related-party outsourcing arrangement, APRA notes that trustees need to be especially aware of potential conflicts of interest. Specific obligations for managing outsourcing arrangements are also set out in APRA Prudential Standard SPS 231 (Outsourcing) and Draft Prudential Standard CPS 230 (Operational Risk Management).

Small Business and Franchising Consultative Committee (SBFCC) update – 7 October 2022

Recent updates relevant to franchising and small business

[Jim's Group pays penalties for alleged breach of Franchising Code and the Australian Consumer Law](#)

- Jim's Group Pty Ltd has paid \$24,420 in penalties in its capacity as franchisor of the Jim's Dog Wash franchise after the ACCC issued it with two infringement notices for an alleged contravention of the Franchising Code of Conduct, and an alleged contravention of the Australian Consumer Law (ACL).
- The first infringement notice related to an alleged failure by Jim's Group to disclose certain information to a prospective franchisee, as required by the Franchising Code. In particular, the ACCC alleged that the disclosure document significantly understated the number of former franchisees within the Dog Wash division and failed to provide the contact details of those former franchisees.
- "If someone is thinking about buying a franchise, being able to contact former franchisees is critical for making informed decisions," ACCC Deputy Chair Mick Keogh said. "At this time of year, most franchisors must update their disclosure documents, so this action by the ACCC serves as a timely warning to all franchisors about the importance of ensuring these documents are compliant with the Franchising Code," Mr Keogh said.
- Jim's Group also paid a penalty after the ACCC issued an infringement notice alleging that Jim's Group had made a false or misleading representation. The ACCC alleged that Jim's Group misrepresented to a Jim's Dog Wash franchisee that their cooling off rights under the Franchise Code ended 14 days after entering into the franchise agreement or the making of a payment to the franchisor, whichever was earlier. In fact, under the Franchise Code, a franchisee can terminate the agreement and receive a refund within 14 days of signing the agreement, even if they have previously paid a deposit.
- The ACCC offers a [free online course](#) for anyone thinking about buying a franchise, and it includes questions to ask former franchisees. The ACCC website also has detailed guidance for franchisors about their [disclosure obligations](#) including the updated [franchising model disclosure document](#) and the [cooling off period](#).

[ACCC internet sweeps target greenwashing fake online reviews](#)

- On 4 October 2022 the ACCC launched two internet sweeps to identify misleading environmental and sustainability marketing claims and fake or misleading online business reviews. The sweeps are being conducted over the coming weeks as part of the ACCC's compliance and enforcement priorities for 2022-23, with the broad aim of identifying deceptive advertising and marketing practices by businesses or industries.
- At least 200 company websites will be reviewed in the sweep for misleading environmental claims across a range of targeted sectors including energy, vehicles, household products and appliances, food and drink packaging, cosmetics, clothing and footwear. "This sweep forms a core part of our work in actively monitoring for 'greenwashing' in the market and will help inform what steps businesses can take to improve the integrity of their environmental claims" ACCC Deputy Chair Delia Rickard said. "In looking at claims we are concerned about what the ordinary consumer will understand the claim to mean. The ACCC won't hesitate to take enforcement action where we see that consumers are being misled or deceived by green claims" Ms Rickard said.
- At the same time, the ACCC will conduct a separate internet sweep targeting fake or misleading online reviews and testimonials. This will be the first of a series of smaller-scale sweeps focusing on deceptive practices in the digital marketplace. The sweep will target misleading reviews posted to business' websites, Facebook pages and third-party review platforms. Misleading advertising by influencers on social media will be considered in a second sweep, which will focus on identifying posts that fail to clearly disclose advertising or sponsorship.
- The ACCC will publish the findings of the sweeps once they are collated and analysed.

[Arm Architecture in court over alleged cartel conduct for university project](#)

- On 30 September 2022 the ACCC launched civil proceedings in the Federal Court against Ashton Raggatt McDougall Pty Ltd (ARM Architecture) and its former managing director, Anthony (Tony) John Allen, alleging they engaged in cartel conduct by attempting to rig bids for the tender for a building project at Darwin's Charles Darwin University.
- ARM Architecture was awarded the contract for principal design and consultant services under the first phase of the project after a tender in May 2019. In September 2020, the tender for the second phase of the Charles Darwin University project was issued. It is alleged that following the issue of

the tender, Mr Allen sent emails to eight other architectural firms requesting them not to submit a bid for the second phase of the Charles Darwin University project.

- The ACCC alleges that in doing so ARM Architecture, through the conduct of Mr Allen, attempted to rig or induce other competitors to agree to rig the tender for principal design consultant services. The ACCC also alleges that Mr Allen attempted to induce other competitors to agree to rig this tender. “Bid rigging for tenders, whether the tenders take place in the public or private sector, is against the law. This type of cartel conduct increases the costs of tenders for businesses or taxpayers, and has a chilling effect on competition,” ACCC Chair Gina Cass-Gottlieb said.
- [In November 2021](#), the ACCC issued a warning to public sector agencies to be alert to the potential of bid rigging for public sector tenders and report any collusive activity to the ACCC. This year the ACCC has launched an outreach program aimed at engaging with public sector procurement officials regarding the risk and indicators of cartel conduct in procurement processes.
- The ACCC is seeking declarations, pecuniary penalties and costs, as well as orders for compliance training. The case will be listed before the Federal Court at a date to be set.

[ACCC seeks further views on Telstra TPG mobile network deal](#)

- The ACCC has released a [statement of preliminary views](#) on the authorisation sought by Telstra and TPG for their proposed regional mobile network arrangements. The ACCC is calling for further submissions and looks forward to hearing from stakeholders about its preliminary views.
- Telstra and TPG are asking the ACCC to provide authorisation for the deemed acquisition of certain TPG spectrum, which is tied to three interrelated network agreements that are being considered together. Under these agreements, Telstra would obtain much of TPG’s mobile spectrum in a range of outer-suburban and regional areas, where about 17 per cent of Australians live. Telstra would also obtain 169 of TPG’s mobile sites in that area. TPG would then shut down its remaining 556 mobile sites in those areas and acquire mobile network services from Telstra for mobile coverage.
- The ACCC can only grant authorisation if it is satisfied in all the circumstances that either there is not a likely substantial lessening of competition, or that there is likely to be public benefits that outweigh any public detriments.
- The ACCC’s final decision on whether to grant authorisation to Telstra and TPG will likely be announced in early December. Further details are available

at: [Telstra Corporation Limited and TPG Telecom Limited proposed spectrum sharing](#).

SUSTAINABILITY

Scalability is on the agenda of the International Sustainability Standards Board (ISSB)

Responding to the diverse readiness of entities to meet the requirements of IFRS S1 and IFRS S2, IFRS Foundation staff members have proposed a set of mechanisms to address the issue of scalability, which were then discussed by the ISSB members on 21 September. Options for scalability create transitional pathways for under resourced entities to partly comply with standards, as they simultaneously build the capacity to fulfil all their obligations in the future.

Proposed mechanisms:

1. The specification of basic and advanced disclosures, whereby an entity can make an alternative disclosure or no disclosure if they can explain how they meet a specific scalability criterion (i.e., the size of the entity, the availability of data in their industry sector).
2. Providing some examples to support preparers to assess their readiness to make disclosures, given the number of instances in which 'unable to do so' is referenced throughout the two exposure drafts.
3. Ensuring scalability interventions are transitional and do not undermine the objective to create a global baseline.

To view the materials and recordings from the ISSB September Board meeting, click [here](#).

International Ethics Standards Board for Accountants (IESBA) Sustainability Working Group

The IESBA has identified the key role of ethics amongst the development of the ISSB standards to create a global baseline for sustainability reporting. The IESBA has recently confirmed the Terms of Reference of its dedicated Sustainability Working Group.

The Sustainability Working Group will:

- Develop a strategic vision to guide the IESBA's standard-setting actions in relation to sustainability reporting and assurance.
- Undertake awareness-raising activities to highlight the role of the IESBA and the applicability of the provisions in the *International Code of Ethics for Professional Accountants (including International Independence Standards)* to sustainability reporting and assurance.
- Conduct fact finding, including extensive stakeholder outreach to inform the IESBA's standard-setting activities and other workstreams.

Latest updates from IESBA are available [here](#).

IPA Sustainability Discussion Group

On 17 October at 6pm AEDT, the IPA's virtual Sustainability Discussion Group will be joined by Alan Dayeh of Point Advisory to discuss the circular economy and decarbonisation.

Alan Dayeh is the Managing Principal, NSW at Point Advisory. Alan's primary focuses are:

- Developing and executing sustainability strategies
- Creating shared value
- Integrating ESG factors

To join the discussion, register your interest [here](#).