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# TaxTalk Monthly

Keeping you up to date on  
the latest Australian and  
international tax developments

November 2019



# Corporate Tax Update

## Reportable Tax Position Schedule required for private groups

Certain large public companies are currently required to disclose to the Australian Taxation Office (ATO) their most contestable and material tax positions on the Reportable Tax Position (RTP) Schedule to the company income tax return. In July 2019, the ATO released a [document](#) seeking feedback on its proposed expansion of the requirement to lodge a RTP Schedule to large private companies and corporate groups.

Based on the feedback received in response to the ATO's consultation paper, the ATO has agreed to [defer](#) the requirement for large private groups to lodge the RTP until the 2020-21 financial year. The ATO is currently working with industry groups and advisers to co-design the RTP Schedule for implementation in the 2020-21 financial year.

Consistent with the current reporting thresholds for large public business, it is proposed that all companies will need to lodge the RTP Schedule for the 2020-21 financial year if:

- total business income exceeds AUD 250 million for the year, or
- total business income is between AUD 25 and AUD 250 million for the current year, and they are part of an economic group and the total income of the group (sum of the income labels in the tax return of each group member) exceeds AUD 250 million in the current or the immediate prior year.

The ATO does not intend to expand the RTP schedule to trusts or individuals at this stage.

## ATO guidance on application of the commercial debt forgiveness rules

When a debt is forgiven, there are generally tax consequences to both the lender (the creditor) and borrower (the debtor). However, there is an exception from the commercial debt forgiveness rules applying to the debtor in the case where the debt is forgiven for reasons of natural love and affection. The ATO has released draft tax determination [TD 2019/D9](#) which sets out the Commissioner's view that a creditor must be a natural person to forgive a debt for 'reasons of natural love and affection' to be excluded from the application of the commercial debt forgiveness rules. When the final determination is issued it is proposed to apply before and after its date of issue.

The draft determination takes a different view to ATO Interpretative Decision [ATO ID 2003/589](#) (withdrawn on 6 February 2019) where it was accepted that a company can forgive a debt because of the company directors' love and affection towards the debtor – that is, the exclusion from application of the commercial debt provisions did not require that the creditor be a natural person, only that the reason for forgiveness be 'natural love and affection'. In acknowledging this change in position, the draft determination proposes that the Commissioner will not devote compliance resources to apply the views expressed in the draft determination in relation to debts forgiven prior to 6 February 2019 that would have been covered by ATO ID 2003/589.

Comments are due 1 November 2019.

## On-line trading platform development not eligible R&D activity

The Australian Administrative Tribunal in [H2O Exchange Pty Ltd v Innovation and Science Australia \[2019\] AATA 4195](#) has affirmed that the taxpayer's activities to develop an on-line platform for the trading of water entitlements were neither core nor supporting research and development (R&D) activities within their meaning in Division 355 of the *Income Tax Assessment Act 1997* (Cth).

At the time the work was done, there were several other on-line platforms which enabled trading in water rights to occur, which resembled the business which the applicant sought to conduct in some respects. The Tribunal was not satisfied that the outcome of the registered activities was not known or able to be determined in advance. Furthermore, no information was provided to the Tribunal about what experimental activities using the software were embarked upon, whether those activities were based upon the principles of established science, whether a systematic progression of work was involved, and what hypotheses were considered.

## Large corporate groups income tax gap

According to the ATO's most recent [large corporate income tax gap estimate](#), compliance with Australia's corporate tax system is world leading, with large corporate groups (gross income over AUD 250 million) estimated to have paid around 96 per cent of the total 'theoretical tax payable'

assuming that all relevant taxpayers were fully tax compliant in the 2016-17 year.

In 2016-17, large corporate groups reported AUD 1.8 trillion in gross income, generated AUD 156

billion in taxable income and paid around AUD 47 billion in income tax. The estimated net income tax gap for this group of taxpayers is as AUD 2 billion.

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## Employment Taxes Update

### Superannuation guarantee opt out for employees with multiple employers

New law (enacted by [Treasury Laws Amendment \(2018 Superannuation Measures No. 1\) Act 2019](#)) allows eligible individuals, from 1 January 2020, to avoid unintentionally breaching their concessional superannuation contributions cap (AUD 25,000) when superannuation contributions are made on their behalf from multiple employers.

This outcome is achieved by allowing certain employees with multiple employers to [apply](#) to the Commissioner of Taxation for an 'employer shortfall exemption certificate', which prevents their employer from having a superannuation guarantee shortfall if they do not make superannuation contributions for a period on their behalf. An employer covered by the exemption certificate has a maximum contribution base of nil in relation to an employee for the quarter to which the certificate relates.

An individual employee may be eligible to opt out if:

- they have more than one employer, and
- expect the employers' mandated concessional super contributions to exceed the concessional contributions cap for a financial year.

The Australian Taxation Office (ATO) has [advised](#) that it will accept applications for the 2019-20 financial year as follows:

- third quarter commencing 1 January 2020 – lodge on or before 18 November 2019.
- fourth quarter commencing 1 April 2020 – lodge on or before 31 January 2020.

An exemption certificate can be for a period of up to four quarters in one financial year. A separate application is required for each financial year.

### PAYG withholding for foreign service

Legislative instrument [Taxation Administration: Individuals Engaged in Foreign Service Variation Notice 2019](#) ensures that Pay-As-You-Go (PAYG) amounts withheld from payments made to individuals engaged in foreign service for Australian taxation purposes are calculated with consideration to the amount of tax that is required to be withheld for the relevant payment period and paid to the foreign country for that service. This will apply to those individuals engaged in foreign service whose foreign earnings from that service are not exempt under s23AG of the *Income Tax Assessment Act 1936* (Cth).

The instrument commenced on 28 September 2019 and replaces [Taxation Administration Act 1953 — PAYG withholding — Individuals engaged in foreign service.](#)

## Victorian payroll tax and employment agent declarations

The Victorian State Revenue Office (SRO) has [indicated](#) that those organisations seeking an exemption from payroll tax for wages paid to workers under an employment agency contract to perform work for exempt organisations must provide the SRO with a declaration signed by their client (the exempt organisation) stating that the wages would have been exempt had they paid the worker themselves as an employee. Furthermore, as of 13 September 2019, declarations must be signed in the financial year in which the wages are paid.

## SA charitable purpose payroll tax exemption not available

The Supreme Court of South Australia in [South Australian Employers' Chamber of Commerce &](#)

[Industry Incorporated v Commissioner of State Taxation \[2017\] SASC 127](#) has dismissed an appeal against the disallowance of an objection against the refusal to recognise that the taxpayer was exempt from payroll tax under the charitable purpose exemption in the *Payroll Tax Act 2009 (SA)*.

Although some of the taxpayer's services were found to comply with the relevant requirements, on a holistic assessment it failed to prove that the dominant purpose was to advance trade and commerce in South Australia, which is a recognised charitable purpose. In particular, the taxpayer failed to prove that its policy advocacy, member services or commercial services activities were being undertaken for the required purposes. There was an acknowledged need to avoid conflating the charitable purpose of promoting trade and commerce with the general purpose of advancing the interests of the business.

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# Global Tax Update

## Latest news from international tax and transfer pricing

### OECD publishes proposal to rewrite international profit allocation rules

On 9 October 2019, the Secretariat of the Organisation for Economic Co-operation and Development (OECD) published [Secretariat Proposal for a "Unified Approach" under Pillar One](#) (the "Pillar 1 Unified Approach") that, if ultimately agreed, would fundamentally alter the international tax regime. The Pillar 1 Unified Approach

recommends a departure from the "arm's length principle" (ALP) in certain circumstances, allocating shares of "global" profits in addition to the existing transactional allocations required under the ALP.

The proposal does not ringfence the so-called "digital economy" and instead seeks to allocate a greater share of taxing rights to the countries where consumers are located – regardless of a business' physical presence there. The proposal would impact a large number of "consumer facing" businesses; not just "tech" or online platform businesses.



While the approach is described as unified, there are a number of issues that need to be resolved in order to achieve the goal of arriving at a consensus solution by the end of 2020. In particular:

- Defining with specificity what business activities are “consumer facing”
- Determining the profits attributable to different business activities, and the rates of return deemed to be “routine” and “excess”
- Regarding nexus, the type of threshold (eg, volume of sales) and the degree of local flexibility will need to be agreed in order to develop an appropriate new treaty article, and
- How the proposals could be legally implemented (including dispute resolution mechanisms).

In Australia, other considerations that would need to be resolved include:

- Whether the proposed rules apply equally to business-to-business (B2B) and business-to-consumer (B2C) arrangements
- The way in which rules apply to arrangements already entered into, and how Australian rules would commence with double tax treaty updates
- The impact of the proposed rules on existing ATO guidance products (such as [PCG 2019/1](#))
- Whether the proposed rules impact any previously agreed treatment through ATO products such as Advance Pricing Agreements or settlements
- How the rules would apply to groups that have different divisions, with both different channels to market and varying profit levels
- How the rules may interact with other consumption based taxes such as the GST
- How the extractive industries and commodities carve out will be defined
- How any Pillar 1 reforms interact with Pillar 2 and various existing tax rules.

Additional detail on the Pillar 1 Unified Approach is provided in the PwC International Tax Services [Tax Policy Alert](#).

## ATO's compliance approach for offshore drilling rig projects

The Australian Taxation Office (ATO) has issued draft Practical Compliance Guideline [PCG 2019/D5](#) which sets out the ATO's compliance approach to transfer pricing issues related to projects involving the use in Australian waters of non-resident owned mobile offshore drilling units such as drill-ships,

drilling rigs, pipe-laying vessels and heavy-lift vessels.

The ATO's guidelines provide a self-assessment risk framework that allows taxpayers to assess the compliance risk of the transfer pricing outcomes of their offshore drilling and associated activities in accordance with the ATO's risk framework. Taxpayers may be asked to tell the ATO that they have self-assessed their rating and if so, what their risk rating is, assisting the ATO to prioritise its compliance resources and tailor its future engagement activity accordingly. The ATO's compliance approach will vary depending on the risk rating of the particular offshore drilling and associated activities.

If arrangements for the supply of offshore drilling and associated services are in the ATO's “green zone”, the Draft PCG indicates that the ATO will generally not apply compliance resources to examine the transfer pricing outcomes of those arrangements. These taxpayers can opt to minimise their transfer pricing record-keeping and compliance costs in relation to the relevant arrangements.

The Draft PCG also acknowledges that it may cause taxpayers to review their arrangements for offshore drilling and associated activities with the effect that some taxpayers may adjust the pricing of their arrangements going forward to come within the green zone. In this respect, the draft indicates that in such cases, the ATO is willing to work with the taxpayer to resolve the ‘back years’ in a cooperative and practical manner.

The final guideline is proposed to apply both before and after its issue. Comments on the draft were due 25 October 2019.

## ATO draft guidance on FITO limit and capital gains

The ATO has issued draft taxation determination [TD 2019/D10](#) which provides the Commissioner of Taxation's preliminary view that capital gains are not included when calculating the foreign income tax offset (FITO) limit that operates to reduce the Australian income tax otherwise payable on amounts where foreign tax has also been paid.

The FITO limit calculation broadly compares the total Australian tax payable and the Australian tax that would be payable if certain amounts (including ordinary and statutory income from a non-Australian source) were disregarded. The draft determination states that because a ‘net capital gain’ (being a product of capital gains and capital losses made during an income year) is an amount of statutory income (rather than each component capital gain), and a net capital gain does not have a source, it cannot be disregarded in the FITO limit calculation.

Further, the relevant provisions do not allow you to disaggregate a net capital gain to identify capital gains that have been included in working out your net capital gain.

Once finalised the determination is to apply both before and after its date of issue. Comments on the draft determination are due 8 November 2019.

## US IRS increasing international enforcement efforts

Taxpayers with operations or investments in the United States should note that the US Internal Revenue Service (IRS) is increasing its international tax enforcement efforts.

In this [Tax Insights](#) alert we provide further details on recent IRS changes and trends, together with the key 'inbound' issues on which the IRS is focusing including US withholding taxes, transfer pricing, branch profits taxes, branch interest taxes, earnings stripping, and income tax treaties.

## Reduced corporate tax rates announced for India

On 20 September 2019, the Indian Government [announced](#) the largest reduction in corporate income tax (CIT) rates in the last three decades, bringing India's corporate rate closer to the worldwide average statutory CIT rate of 23.03 per cent.

The effective CIT rate is reduced for existing domestic companies from 34.94 per cent to 25.17 per cent from FY20 onwards. Certain new manufacturing companies may be eligible for an effective tax rate of 17.16 per cent.

## PNG Special Economic Zones being considered

The PNG Prime Minister has recently indicated that the PNG Government is considering adopting a

number of Special Economic Zones (SEZ) for particular under-developed areas in PNG. Although details of the particular concessions are not yet public, it is understood that these may include tax 'holidays' for periods of up to 10 years. No time frame for consultation or application has been suggested at this time.

Further details and other recent PNG tax updates are included in our [PNG Pulse](#) publication.

## New free trade agreements for Asia-Pacific

To give effect to the recently signed:

- Peru-Australia Free Trade Agreement (PAFTA)
- Indonesia-Australia Comprehensive Economic Partnership Agreement (IA-CEPA), and
- Free Trade Agreement between Australia and Hong Kong, China (A-HKFTA).

legislation has been introduced into Parliament ([Customs Amendment \(Growing Australian Export Opportunities Across the Asia-Pacific\) Bill 2019](#) and the [Customs Tariff Amendment \(Growing Australian Export Opportunities Across the Asia-Pacific\) Bill 2019](#)).

For each Agreement, the new law will insert a schedule of preferential rates of customs duty for goods determined to be originating goods in accordance with the applicable Agreement.

Once the relevant Bills have completed their passage through Parliament, the new agreements will not commence until the Minister announces the day on which each applicable Free Trade Agreement enters into force for Australia by notifiable instrument.

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# Indirect Tax Update

## No fuel tax credits for fuel lost through evaporation or leakage

The Federal Court in [Coles Supermarkets Australia Pty Ltd v FC of T \[2019\] FCA 1582](#) held that the taxpayer was not entitled to fuel tax credits nor decreasing fuel tax adjustments in relation to the fuel that was lost by virtue of evaporation or leakage and therefore not sold to customers.

The Court found that the purpose of the taxpayer's acquisition of the portion of fuel that evaporated or leaked should be characterised in the same way as the purpose of acquisition for the bulk of the fuel – namely, for sale to customers.

Furthermore, the Court was not satisfied that the taxpayer acquired the fuel that eventually evaporated or leaked “for use in carrying on [its] enterprise” pursuant to s41-5(1) of the *Fuel Tax Act 2006 (Cth)*. In addition, the Court also found that the portion that evaporated or leaked was not “used” in carrying on the enterprise, but rather was wholly incidental to the taxpayer making a taxable supply of fuel to its customers and accordingly, the taxpayer was not entitled to a decreasing fuel tax adjustment under s44-5 of the *Fuel Tax Act 2006 (Cth)* with respect to the evaporated or leaked fuel.

Although the Court was not required to consider s47-5 which deals with the time limits on entitlements to fuel tax credits, it was generally supportive of the taxpayer's contentions.

## Proposed changes to GST ruling for providers of financial supplies

The Australian Taxation Office (ATO) has issued for comment a [draft consolidation](#) of goods and

services tax (GST) ruling [GSTR 2006/3](#) which provides guidance in relation to methods for calculating input tax credits and adjustments for changes in use by financial supply providers under the *New Tax System (Goods and Services Tax) Act 1999 (Cth)*.

The proposed changes clarify areas of GSTR 2006/3 in relation to determining the creditable purpose of acquisitions in a credit card issuing business and assignment of payment streams including under a typical securitization arrangement.

Comments are due on 1 November 2019.

## GST apportionment of acquisitions that relate to certain financial supplies

The ATO has issued a draft Practical Compliance Guideline [PCG 2019/D7](#) which outlines the ATO's compliance approach for GST apportionment of acquisitions that relate to certain financial supplies and the framework the ATO uses to assess the risk associated with methods to determine the extent of creditable purpose of such acquisitions.

The current Schedule to the draft PCG sets out the risk assessment framework for apportionment of acquisitions that are for use or partly for use in making supplies in the credit card issuing business, regardless of where they are allocated in a taxpayer's cost allocation system. It is the ATO's intention to include additional Schedules to address other specific contexts in the future.

When finalised, the Guideline is proposed to take effect from 1 January 2020.

Comments are due on 1 November 2019.

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## Personal Tax Update

### Consultation on testamentary trust integrity measures

In the 2018-19 Federal Budget, the Government announced that it would implement an integrity measure to improve the taxation of testamentary trusts.

Currently, income received by minors from testamentary trusts is taxed at normal adult rates rather than the higher tax rates that generally apply to minors.

Treasury has released [exposure draft legislation](#) which will clarify that minors will be taxed at adult marginal tax rates only in respect of income that a testamentary trust generates from assets of the deceased estate, or the proceeds of the disposal or investment of these assets. This change is proposed to apply from 1 July 2019.

The draft legislation was open for comment until 30 October 2019.

### US citizen on working holiday not an Australian resident

The Federal Court in [Stockton v Commissioner of Taxation \[2019\] FCA 1679](#) has held that a citizen of the United States of America (US) who came to Australia on a working holiday was not a resident of Australia for the purposes of Australian income tax law.

The Court found that although the taxpayer had spent 10 months in Australia, she had no settled employment or place of abode in Australia, and her association with Australia during the income year was only ever casual. She never had any plan to live and work at any one location for any particular length of time, nor did she do so. Her usual place of abode was in the US.

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## State Taxes Update

### Tasmanian Revenue Ruling on GST and dutiable transactions

Revenue Ruling [PUB-DT-2019-3](#) explains how ad valorem duty applies to a dutiable transfer of property which attracts the goods and services tax (GST).

Broadly, where a dutiable transaction is silent as to whether the transferor is liable to GST in respect of the transaction, duty will be assessed on the consideration or the full unencumbered value of the property, whichever is the greater. Where a dutiable transaction contains a condition that the transferee will pay the stated consideration plus an amount

equal to the GST payable by the transferor, the GST component forms part of the consideration and duty is assessed on the greater of the consideration (including the GST component) or the full unencumbered value of the property.

### NSW land tax crackdown and amnesty

The NSW Government is launching a [new crackdown](#) on land tax compliance, with a new investment of AUD 7.1 million helping to improve information management and help fund additional compliance officers to identify people who are avoiding NSW land tax.



Revenue NSW is also offering a three-month amnesty period ending on 31 January 2020 for landholders who may be unaware of their land tax liabilities to voluntarily disclose their landholdings without incurring any additional penalty on top of their existing liability.

NSW land tax is broadly paid by those with aggregate taxable landholdings above the tax-free threshold, which is AUD 692,000 for the 2019 land tax year. For the 2020 land tax year, the NSW general land tax threshold has increased (refer [NSW Gazette No 119 of 11 October 2019](#)) to AUD 734,000.

## New WA regulations dealing with demergers

The [Duties Amendment Regulations 2019](#) (WA) insert provisions dealing with, among other things, listed entity demergers, hybrid demergers, dutiable property and dutiable transactions from 9 October 2019.

## Victoria amends state tax and land valuation laws

The [State Taxation Acts Further Amendment Bill 2019](#) was introduced on 15 October 2019 into the Victorian Legislative Assembly to improve the operation of Victoria's taxation and land valuation laws. Among other changes, the Bill proposes the following amendments:

- extend the vacant residential land tax to properties that remain uninhabitable after two years or more;
- exclude beneficiaries of implied or constructive trusts as owners for the purposes of the principal place of residence and primary production land tax exemptions;
- reforming the primary production land exemption for land in an urban zone in greater Melbourne to require a connection between the landowner, business of primary production and the relevant land;
- align the primary production requirement for the duty concession and exemption for young farmers with changes to the land tax exemption for primary production land in an urban zone in greater Melbourne; and
- confirm the legislative basis for charging insurance duty when an insured person obtains insurance from an overseas insurer.

## Important NSW duties and land tax amendments

The [State Revenue Legislation Further Amendment Bill 2019](#) was introduced to the NSW Legislative Assembly on 22 October 2019 and makes some important amendments in relation to NSW duties and land tax law. Specifically, the Bill proposes, among other things, the following:

- an exemption from, and potential refunds of, surcharge purchaser duty and surcharge land tax payable in respect of residential land by the trustee of a discretionary trust if the trust irrevocably prohibits a foreign person from being a beneficiary of the trust (so as to prevent a discretionary trust from inadvertently attracting liability for surcharge duty and tax payable by a foreign trustee). In some cases where trust deeds need amending they must be amended by 31 December 2019.
- to extend provisions that treat an assignment to a third person of an option to purchase dutiable property as a transfer of the property for duty purposes so as to include an arrangement for the relinquishment of the option with an agreement to sell to the third person.
- to change the method of determining the value of the land holdings of a landholder for the purposes of the threshold for provisions that impose duty on the acquisition of an interest in a landholder so that unencumbered value is used instead of unimproved value.
- to provide that, for the purposes of duty payable on the acquisition of an interest in a landholder, land includes anything (whether or not a fixture) that is fixed to land, and
- to make a landholder jointly liable for the duty payable by a person when the person acquires an interest in the landholder and to provide for the liability of the landholder to be a charge on the land for which a caveat can be registered.

## South Australian land tax changes

The [Land Tax \(Miscellaneous\) Amendment Bill 2019](#) introduces changes to land tax aggregation rules and surcharges for certain trusts. It also reduces the top land tax rate from 3.7 per cent to 2.4 per cent from 1 July 2020.

The Bill also confirms that self-managed super funds (SMSFs) are unaffected by the changes to the aggregation rules and that companies will not be subject to both grouping as related corporations as well as the trust surcharge. The Bill also enables trustees to nominate a new designated beneficiary for land tax purposes in the event of a marriage

breakdown, in addition to the existing ability to renominate in the event of death or incapacity.

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## Superannuation Update

### Review of retirement income system

The Treasurer and the Assistant Minister for Superannuation, Financial Services and Financial Technology have [announced](#) the independent review of the retirement income system. The review will look at the three pillars of the existing retirement income system, being the Age Pension, compulsory superannuation and voluntary savings. It will cover the current state of the system and how it will perform in the future as the population ages and will identify:

- how the retirement income system supports Australians in retirement,
- the role of each pillar in supporting Australians through retirement,
- distributional impacts across the population and over time, and
- the impact of current policy settings on public finances.

The review will be conducted by an independent three person panel with Mr Michael Callaghan AM PSM, a former Executive Director of the International Monetary Fund and a former senior Treasury official to chair the review.

A consultation paper will be released in November 2019 and the final report provided to Government by June 2020.

### ATO's draft documents on non-arm's length measures

The Australian Taxation Office (ATO) recently published two draft documents – Law Companion Ruling [LCR 2019/D3](#) and Practical Compliance Guideline [PCG 2019/D6](#) – which deal with the newly

enacted non-arm's length income and expense provisions designed to prevent the inflating of superannuation fund earnings through non-arm's length dealings.

By way of background, the taxable income of a complying superannuation fund is made up of two components – a 'low tax component', which is taxed at 15%, and a 'non-arm's length component', which is taxed at the top marginal tax rate. The non-arm's length component for an income year is the amount of a complying superannuation fund's non-arm's length income (NALI) less any related deductions.

LCR 2019/D3 provides the ATO's preliminary view of the application of the non-arm's length income provisions where a trustee incurs 'non arm's length expenditure' under a scheme. The ruling is proposed to apply in the 2018-19 income year and later income years, regardless of whether the scheme was entered into prior to 1 July 2018.

PCG 2019/D6 provides a transitional compliance approach for a complying superannuation entity concerning the application of the recent non-arm's length amendments. Broadly, the draft guideline proposes that the ATO will not allocate compliance resources to determine whether the NALI provisions apply to a complying superannuation fund for the 2018-19 and 2019-20 income years where the fund incurred non-arm's length expenditure (as described in LCR 2019/D3) of a general nature that has a sufficient nexus to all ordinary and/or statutory income derived by the fund in those respective income years (for example, non-arm's length expenditure on accounting services where they are discounted due to relationship of the Trustee with the service provider).

Comments on both documents are due 15 November 2019.

## ATO compliance approach for large APRA funds

The ATO has issued Practical Compliance Guideline [PCG 2019/7](#) which outlines the Commissioner of Taxation's compliance approach for large Australian Prudential Regulation Authority (APRA) regulated superannuation funds in respect of pension tax bonuses not included in members' opening account balances on commencement of a pension.

The guideline provides a transitional compliance approach for large APRA-regulated superannuation funds that provide a pension tax bonus to members where the funds are facing practical difficulties in complying with certain legislative requirements. In particular, where certain conditions are met, the ATO has indicated that it will not allocate compliance resources to review the calculation of the superannuation fund's exempt current pension income as a result of the superannuation fund not incorporating the value of the pension tax bonus into the member's pension account balance when calculating the required minimum pension payments.

The guideline applies from 1 July 2017 to 30 June 2020.

## Draft superannuation regulations

Treasury has released for comment [draft Superannuation \(Unclaimed Money and Lost Members\) Regulations 2019](#) which are being made to ensure the ongoing operation of the lost and unclaimed money regime for certain superannuation amounts. These regulations, once finalised, will repeal the existing Superannuation (Unclaimed Money and Lost Members) Regulations 1999 which are scheduled to sunset on 1 April 2020.

Along with minor technical changes to reflect current drafting practice and the numbering of particular sections, the draft regulations include the following substantive changes to the previous regulations:

- prescribing conditions of release whereby an account will no longer be considered an inactive low balance account if met by a member, and
- ensure that interest will apply to the payment of unclaimed amounts in relation to inactive low balance accounts.

Comments were due to be made by 25 October 2019.

## ATO release SMSF quarterly statistical report for June 2019

The ATO has released its latest [Self Managed Superannuation Fund \(SMSF\) quarterly statistical report](#) for the period to June 2019.

Highlights include the following:

- there are 1,125,201 members of a total of 599,678 SMSFs,
- the total estimated assets of SMSFs are AUD 748 billion,
- the average asset value of a SMSF is AUD 1.3 million,
- the average asset value per SMSF member is AUD 679,000,
- members contributed AUD 11.6 billion to SMSFs, and
- employers contributed AUD 5.7 billion to SMSFs.

## ASIC urges consumers to question whether SMSFs are right for them

The Australian Securities and Investment Commission (ASIC) has [noted](#) that many Australians set up SMSFs that are inappropriate for their circumstances, and has warned Australian investors considering establishing their own SMSF to be aware of the potential downsides. To assist members make more informed decisions, ASIC has released a factsheet, [SMSFs: Are they for you?](#) for consumers and SMSF trustees deciding or reassessing if an SMSF is appropriate.

## ATO insights over superannuation

At a [presentation](#) to the Australian Institute of Superannuation Trustees (AIST) 2019 AIST Chairs Forum on 14 October 2019, James O'Halloran, Deputy Commissioner, Superannuation and Employer Obligations, provides some insight into the ATO's current focus.

Of note is that the ATO's immediate focus is its role in the low balance account reporting aspects of the *Protecting Your Super* measure and the proactive reuniting by the ATO of superannuation accounts and balances. The ATO reports that its systems are ready to deal with the reporting by superannuation providers of inactive low balance accounts as at 30 June 2019 and payment of the unclaimed superannuation money by 31 October 2019.

The ATO is also heavily focused on reducing the incidence of non-payment of superannuation guarantee (SG) using its access to near real-time data from Single Touch Payroll reporting to identify

non-compliant employers and correct late or under-payment of employer SG contributions. The ATO plans to contact 2,500 employers who have paid some or all of their SG contributions late during 2018/19 and will also be sending due-date reminders to around 4,000 employers.

This also serves as a timely reminder of the proposed once-off amnesty to encourage employers

to voluntarily disclose historical SG non-compliance. The amnesty period starts on 24 May 2018 and ends six months after the day that the [Treasury Laws Amendment \(Recovering Unpaid Superannuation\) Bill 2019](#) receives Royal Assent. For further information about the amnesty, refer to our [TaxTalk](#) alert.

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## Legislative Update

Federal Parliament continued the 2019 Spring sittings during October 2019. Since our last update the following Commonwealth tax and superannuation Bills were introduced into Parliament:

- [Customs Amendment \(Growing Australian Export Opportunities Across the Asia-Pacific\) Bill 2019](#) and the [Customs Tariff Amendment \(Growing Australian Export Opportunities Across the Asia-Pacific\) Bill 2019](#), which were both introduced into the House of Representatives on 16 October 2019, to give effect to the recently signed Peru-Australia Free Trade Agreement, Indonesia-Australia Comprehensive Economic Partnership Agreement, and the Free Trade Agreement between Australia and Hong Kong, China.
- [Treasury Laws Amendment \(Reducing Pressure on Housing Affordability Measures\) Bill 2019](#), which was introduced into the House of Representatives on 23 October 2019, proposes to implement the measures announced in the 2017-18 Budget housing affordability package including amendments to:
  - deny the Capital Gains Tax (CGT) main residence exemption for foreign residents with effect from 7:30pm (AEST) on 9 May

2017 (refer to our [TaxTalk Alert](#) for further insight)

- address an integrity issue with the CGT rules for foreign residents that hold indirect interests in Australian real property, such as land, from 7.30 pm (AEST) on 9 May 2017
- allow resident investors in qualifying affordable rental housing to obtain a CGT discount of up to 60 per cent from 1 January 2018, and
- make a technical amendment in relation to reconciliation payments for a near-new dwelling exemption certificate to provide the mechanism for imposing a fee on the developer for each near-new dwelling sale to foreign persons.

The following measures have now completed their passage through Parliament:

- [Treasury Laws Amendment \(Putting Members' Interests First\) Bill 2019](#), which includes amendments to protect individuals' retirement savings from erosion by ensuring that trustees can only provide insurance to a member of a choice or MySuper product if directed by the member where the member is under 25 years old and begins to hold a new product on or



after 1 April 2020 (changed from original 1 October 2019 proposal) or to members who hold products with balances below AUD 6,000.

- [Treasury Laws Amendment \(2018 Superannuation Measures No 1\) Bill 2019](#), which introduced a range of superannuation measures including: the 2018-19 Federal Budget measure to allow individuals to avoid unintentionally breaching their concessional contributions cap when they receive superannuation contributions from multiple employers, and to ensure that the cap on tax-free retirement phase assets cannot be circumvented through the use of non-arm's length expenditure or certain strategies using limited recourse borrowing arrangements.
- [Treasury Laws Amendment \(2019 Measures No. 2\) Bill 2019](#), which included, among other things, amendments to extend the concessional tax treatment for genuine redundancy and early retirement scheme payments to amounts paid to individuals who are at least 65 years of age
- provided the dismissal or retirement occurs before they reach pension age, Luxury Car Tax (LCT) refund entitlements for eligible primary producers and tourism operators.
- The [Treasury Laws Amendment \(2019 Tax Integrity and Other Measures No 1\) Bill 2019](#), which contained a package of measures designed to improve the integrity of Australia's tax and superannuation system such as limiting the small business CGT concessions regarding certain partnership arrangements and dealing with circular trust distributions, and also to implement an electronic invoicing framework. Notably, amendments were made to this Bill during its passage through Parliament to provide new exceptions to the rules that would otherwise deny tax deductions for certain vacant land holdings (see our latest [TaxTalk Alert](#) for further details), the disclosure of business tax debts, and also to bring forward to 1 January 2020 the amendments to superannuation guarantee rules as they relate to salary sacrificed contributions.

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## Other News

### Outgoings for gaming machine entitlements not deductible

The High Court in [Commissioner of Taxation v Sharpcan Pty Ltd \[2019\] HCA 36](#) has unanimously allowed the Commissioner's appeal from the Full Federal Court and has found that deductions were not allowed for payments to acquire gaming machine entitlements (GMEs) under the *Gambling Regulation Act 2003* (Vic).

The High Court found that the GMEs were capital assets of enduring value acquired as the means of production, necessary for the structure of the business, and a barrier to entry. The purchase price of the GMEs was therefore in the nature of a once-and-for-all outgoing for the acquisition of a capital asset, and not deductible under the general deduction provisions in s8-1 of the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997).

The Court further held that the evidence did not establish that the purpose of purchasing the GMEs was to preserve, but not enhance, the goodwill of the hotel business. Accordingly, a five-year deduction was also not available under the capital business related measures ('blackhole expenditure' provisions) in s40-880 of the ITAA 1997.

## ATO updates professional firm profit allocation guidance

The Australian Taxation Office (ATO) has [updated its guidance](#) on "assessing the risk: allocation of profits within professional firms" to provide certainty for the year end 30 June 2019.

Taxpayers who have entered into arrangements prior to 14 December 2017 can continue to rely on the ATO's 2015 suspended guidelines *Assessing the Risk: Allocation of profits within professional firms guidelines and Everett Assignment* for the year

ending 30 June 2019 as long as their arrangement complies with the now suspended guidelines, is commercially driven, and does not exhibit any of the high risk factors outlined in the ATO's guidance.

Where these conditions are satisfied, they will be considered lower risk by the ATO for the year ended 30 June 2019.

The ATO is continuing to consult with professionals with a view to publishing new guidance on these arrangements.

## Government calls for 2020-21 pre-Budget submissions

The Federal Government is [seeking submissions](#) from individuals, businesses and community groups on their views for priorities for the 2020-21 Federal Budget.

Submissions are due by 20 December 2019.

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