TAXATION

Trusts avoiding CGT via restructure rollover

ATO has issued a taxpayer alert setting out its concerns about certain arrangements that seek to exploit the CGT rollover for trust restructures to avoid CGT.

Employee v contractor: ATO checklist before hiring

ATO has updated its checklist for business operators to consider before hiring a "contractor".

CGT changes for foreign investors: administrative treatment

ATO has advised of its administrative treatment on the legislation to deny foreign and temporary tax residents access to the CGT main residence exemption.

TPB guidance: whistleblower protection for tax agents

Tax Practitioners Board has published guidance on the legal protection available for tax agents who "blow the whistle" about an entity that is not complying with tax laws.

Commissioner's views on Addy case

ATO has released a statement setting out its views and clarifying the likely impact of the Federal Court's decision in the case of a working holiday maker.

IGTO reviews announced

Inspector-General of Taxation and Taxation Ombudsman has announced the launch of two new investigations into collectable debt and deceased estates.

Old ATO tax and BAS agent portals closing

ATO has advised that the old tax and BAS agent portals will close on 29 November 2019.

Review of compensation scheme for small business tax cases

Government and the ATO have provided their respective responses to the review of the ATO's treatment of small business tax cases under the CDDA scheme.

Government drought assistance – additional measures

Government has announced further support for drought-affected farmers, small businesses and rural towns.

Employee deductions: basic principles

ATO has issued draft ruling on the deductibility of expenses incurred by employees which focuses on general principles and substantiation requirements.

FBT car parking benefits

ATO has issued a draft ruling on when a car parking benefit is provided for FBT purposes. It replaces the previous ruling on the topic.

Non-reporting of audit fees on the SMSF annual return

The Australian Taxation Office wants to understand the reasons why some SMSFs do not report auditor fees on the SMSF annual return.

AUSkey replacement status and design principles

The ATO is encouraging transition as soon as possible to the new identity solution - myGovID and Relationship Authorisation Manager (RAM).

GST on sales of accommodation: reminder

ATO has reminded taxpayers that offshore sellers of Australian commercial accommodation are now required to include those sales when measuring GST turnover.

Draft GST Determinations

ATO has issued draft GST determinations on waiver of tax invoice and adjustment note requirements.

FINANCIAL SERVICES

Financial adviser banned for SMSF property advice

ASIC has banned a former Sydney-based financial adviser for four years for allegedly failing to prioritise his clients' interests in relation to SMSF property investments.

ASIC takes civil penalty action on Royal Commission case study

ASIC has commenced civil penalty proceedings in the Federal Court against a financial advice group and a former financial adviser.

ASIC obtains freezing orders to assist AFCA matter

ASIC has obtained freezing orders, by consent, against a Sydney financial adviser. The matter is scheduled to return to the NSW Supreme Court.

SUPERANNUATION

Super guarantee and ordinary time earnings

ATO has issued a Decision Impact Statement on the Commissioner's successful appeal in a case concerning "ordinary hours of work" for superannuation purposes.

Super sole purpose test: ATO letter to DomaCom

ATO has confirmed its compliance approach to the sole purpose test for SMSFs investing in the DomaCom Fund.

Commissioner's discretion with remedial SC contributions

ATO has released a factsheet setting out the Commissioner's approach to exercising his discretion to disregard to reallocate super contributions.

ASIC's legal action against super trustee and promoter

ASIC has commenced legal proceedings in the Federal Court in relation to the promotion of the MobiSuper Fund.

SMSF auditors disqualified for various breaches

ASIC has disqualified an SMSF auditor for significant breaches of auditor independence rules and other alleged deficiencies.

Super guarantee payable for property maintenance worker

AAT has ruled that a worker engaged by a property maintenance business was an employee and not an independent contractor.

REGULATOR NEWS

Financial and tax advice frameworks

The three major accounting bodies, including the IPA, have joined forces to review the frameworks that regulate how financial and tax advice is provided.

ASIC guidance and relief for whistleblower protection policies

ASIC has released a regulatory guide on the obligation requiring companies and super trustees to implement a whistleblower policy by 1 January 2020.

TAXATION

Trusts avoiding CGT via restructure rollover

The ATO has issued Taxpayer Alert TA 2019/2 setting out its concerns about certain arrangements that purportedly seek to exploit the CGT rollover for trust restructures under Subdiv 126-G of the ITAA 1997. The ATO is concerned that some taxpayers may be entering into these arrangements to avoid tax on large capital gains that would otherwise be made from the disposal of CGT assets by a unit trust to an arm's length purchaser. Under the arrangements, a trustee of a unit trust (the transferring trust) sells a CGT asset with a large unrealised capital gain to an arm's length purchaser for an agreed purchase price by transferring the relevant asset to a trustee of a new unit trust (the receiving trust) for a purchase price which gives rise to a debt owing to the transferring trust. Rollover relief is chosen for the transfer under Subdiv 126-G of the ITAA 1997. The purchaser subscribes for new units in the receiving trust equal in value to the purchase price, and the receiving trust repays the debt to the transferring trust with the funds received from the issue of the new units.

By entering into these arrangements, rather than selling the relevant asset directly to the purchaser, the ATO considers that the transferring trust is seeking to transfer the underlying ownership of the relevant asset to the purchaser while purportedly avoiding tax on the large capital gain that would otherwise have been made. ATO Assistant Commissioner, Kasey Macfarlane, told the *Australian Financial Review* that only a small number of cases have been detected so far. However, at least one case involves the sale of real property of several hundred million dollars, Ms Macfarlane said. The ATO considers that Pt IVA of the ITAA 1936 may apply to these arrangements where they would otherwise qualify for rollover relief under Subdiv 126-G. The ATO warns that taxpayers and advisers who enter into these arrangements will be subject to increased scrutiny.

Employee v contractor: ATO checklist before hiring

The ATO has updated its checklist for business operators to consider before hiring a "contractor". To provide further context, the ATO notes that there is not just one deciding factor that makes a worker an employee or contractor for tax and superannuation purposes. The ATO says it is crucial for business operators to assess this question correctly as getting it wrong could put the business at risk of penalties and charges. The ATO considers that the employee/contractor distinction can only be made after reviewing the working arrangement in its entirety. To get the

right answer, the ATO recommends that business operators review the case scenarios contained in the checklist before hiring someone as a contractor.

CGT changes for foreign investors: administrative treatment

The ATO has advised of its administrative treatment of the changes that, once legislated, will extend the foreign resident CGT regime to deny foreign and temporary tax residents access to the CGT main residence exemption. The legislation to implement this, the *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019,* was reintroduced in the House of Reps on 23 October 2019 (it was originally introduced in February 2018). The ATO says it will accept tax returns as lodged during the period up until the proposed law change is passed by Parliament. Past year assessments will not be reviewed until the outcome of the proposed amendment is known.

After the new law is enacted, taxpayers will need to review their positions: for properties acquired from 7.30pm (AEST) on 9 May 2017 - back to the 2016-17 income year; and for properties held from 7.30pm (AEST) on 9 May 2017 and disposed after 30 June 2020 - back to the 2020-21 income year. Those taxpayers who lodged their tax return in accordance with the changes do not need to do anything more, the ATO said. Taxpayers who did not return their capital gain will need to seek amendments and obtain or reconstruct records to support any costs associated with the property. The ATO says no tax shortfall penalties will be applied and any interest accrued will be remitted to the base interest rate up to the date of enactment of the law change. In addition, any interest in excess of the base rate accruing after the date of enactment will be remitted where taxpayers actively seek to amend assessments within a reasonable timeframe after enactment, the ATO said.

TPB guidance: whistleblower protection for tax agents

The Tax Practitioners Board (TPB) has published guidance on the legal protection available for tax agents who "blow the whistle" about an entity (including a client) that is not complying with the tax laws. Following the enactment of the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019*, whistleblowers are not subject to civil, criminal or administrative liability for making a disclosure, and an entity cannot be sued for a breach of a confidentiality clause in a contract. In the case of a tax practitioner, the TPB says immunity from disciplinary action means they cannot be sanctioned if they disclose information about their client's tax misconduct. For example, the TPB says there will not be a breach of the TPB Code of

Professional Conduct (item 6), which states "unless you have a legal duty to do so, you must not disclose any information relating to a client's affairs to a third party without your client's permission".

To be eligible for whistleblower protection under Pt IVD (ss 14ZZT to 14ZZZE) of the TAA, the TPB says a person must be, or have been, in a relationship with the entity they are reporting about. For example, an employee (or former employee), a dependant or spouse, and individuals who supply services or goods to the entity (such as a tax or BAS agent or tax (financial) adviser). The disclosure of information must also be made to an "eligible recipient", including the Tax Commissioner (if it assists in the performance of functions under a taxation law), ASIC, APRA or any other person that is in a position to take appropriate action (usually internal action). A disclosure also qualifies for protection if it is made to a legal practitioner for the purpose of obtaining legal advice or legal representation. However, the TPB is not an eligible recipient. There is no requirement for a discloser to identify himself or herself in order for a disclosure to qualify for protection.

Commissioner's views on Addy case

The ATO has released a statement setting out its views intended, it says, to "clarify the likely impact" of the Federal Court's decision in *Addy v FCT* [2019] FCA 1768. The Court there held that the Australia-UK DTA required a British working holiday maker, who was an Australian tax resident, to pay tax at the same rate as other Australian tax residents and not at the special rate applicable to working holiday makers. The ATO considers that there are two limiting factors to the impact of the decision. First, it only applies to working holiday makers from the following countries: Chile, Finland, Germany, Japan, Norway, Turkey and the UK. Second, the decision only affects those persons who are a resident of Australia for tax purposes. The release is at pains to point out that the decision does not mean that every working holiday maker is a resident. Each taxpayer has different circumstances and the release states that "many" working holiday makers are not tax residents due to the "itinerant and temporary nature of their time spent in Australia". The statement advises that the Commissioner is still considering whether or not to lodge an appeal. If it is not appealed, any affected taxpayer who may be entitled to a refund can object to their assessments (to have their tax residency considered). If taxpayers can show that they were a resident, they will be subject to tax at the resident rates.

IGTO reviews announced

The Inspector-General of Taxation and Taxation Ombudsman (IGTO), Ms Karen Payne, has announced the launch of two new investigations into aspects of the ATO systems and procedures. The investigations will examine and explore the following matters:

- Rise in collectable debt levels - IGTO will examine the underlying causes for the rise in uncollected, undisputed tax debts (called 'collectable debts' by the ATO); and
- Tax administration of deceased estates - IGTO will review the ATO's approaches to dealing with deceased estate tax matters.

Ms Karen Payne said that if a tax debt is not disputed as to liability or amount, the community would expect that taxes would be paid as and when they fall due. "Our 'collectable debt' investigation aims to gain a clear line of sight as to the characteristics of participants that are contributing to increasing undisputed debt. These might include sectors of the economy, debtor age, debt components - penalties, interest & primary tax, industries and taxpayer size and scale - and therefore indicate individuals and businesses potentially needing help in paying their debts," Ms Payne stated.

Old ATO tax and BAS agent portals closing

The ATO has advised that the old tax and BAS agent portals will close on 29 November 2019. There has been a transition to the replacement Online services for agents, with over 70% of tax agents and 84% of BAS agents using the newer system. The old portals had not been updated "for several months" and the ATO advises that they no longer carry accurate information. The ATO has also highlighted some priority areas for improving functionality in the new online services including deceased estates, tax type summary reports, non-lodgement advice for non-individuals, and activity statement account transactions navigation (including GIC).

Review of compensation scheme for small business tax cases

Both the Government and the ATO have provided their respective responses to the review of the ATO's treatment of small business tax cases under the Compensation for Detriment Caused by Defective Administration (CDDA) Scheme. The report is dated June 2019 and contains 12 recommendations including categorising claims,

separating investigation and decision making functions, following more precisely defined procedural fairness processes, taking a more liberal approach to offering and accepting requests for internal review, and redrafting the ATO's standard CDDA documentation and correspondance with claimants in succinct, everyday language.

Based on the comments and perceptions that came to the Review's attention, a major criticism of the Scheme as administered by the ATO was that it is not widely known or understood. The Review considered more can be done to raise small business awareness of the CDDA Scheme and recommended a comprehensive and ongoing communication program to address that issue. Further, small amounts of compensation have led small businesses to decide it is not worth applying for compensation and that the CDDA is a "token scheme". To contextualise, in 2017-18 the ATO's compensation payments under the CDDA Scheme in 2017-18 totalled some $409,000 (while its net tax collections for the period were almost $397 billion). The Report addresses some of the factors to be considered in quantifying damages, noting that there is no limit on the amount payable (as long as the payment is publicly defensible).

The Government has released its response to this review. It has accepted all 12 recommendations made by the review either in full, in part or in principle. The intention is to make applying for compensation easier, ensure fair and independent decision making, and improve oversight. The ATO has also issued a statement following the government's response. It states that applying for compensation "should be as easy as possible". Further, the ATO is committed to making the process straightforward, fair and consistent. To this end, it will be revising its guidance materials and engaging in an education and awareness campaign in the coming months to raise awareness about the CDDA Scheme among small businesses and tax professionals. The ATO expects that the introduction of an independent reviewer for the most complicated cases and the adoption of a lesser standard of proof will reassure businesses that fair and balanced decisions are being made.

Government drought assistance – additional measures

The Government has announced further support for drought-affected farmers, small businesses and rural towns. These latest drought assistance measures include:

- interest-free drought loans for farmers - new and existing drought loans for farmers will be interest free for two years. Years three to five will be interest only payment, and years six to ten will be interest and principal. Under the

current scheme, the first five years are interest only payments, and interest and principal payments for the balance of the loan term;
- loans for small business (agricultural) - a new program for small businesses dependent on agriculture with loans worth up to $500,000 that can be used to pay staff, buy equipment and refinance. It follows the same new payment scheme as the drought loans for farmers;
- councils- an additional $1m for each of the 122 drought-affected councils and shires (including Greater Hume, Hilltops, Lockhart and Upper Lachlan in NSW, and Kangaroo Island and Tatiara in SA). A $50m discretionary fund to support projects in Local Government Areas impacted by the drought. Redirecting $200m into a Building Better Regions Fund drought round to support new projects, and $138.9m of additional Roads to Recovery funding in calendar year 2020 for the 128 Local Government Areas eligible for the Drought Communities Programme Extension; and
- water allocation - 100 gigalitres will be allocated to grow up to 120,000 tonnes of fodder as well as silage and pasture to secure supplies for the months ahead.

These latest drought initiatives are in addition to the previously announced measures (including tax concessions). For example, the immediate deduction for fodder storage assets. A summary of the full range of drought relief tax measures is set out on the Department of Agriculture Website. The ATO has also reminded affected taxpayers that they can contact the ATO if they need assistance. Tax refunds can be expedited, for example, and tax payment plans can be set up. The ATO encourages those affected to contact it as early as they can and says it is "committed to providing support and assistance where possible".

Employee deductions: basic principles

The ATO has issued Draft Ruling TR 2019/D4, a back-to-basics guide on the deductibility of expenses incurred by employees. The draft focuses on the general principles for deductibility under s 8-1 and the substantiation requirements in Div 900 of the ITAA 1997. Some of the key points made in the draft are:

- an expense that is deductible for an employee in one job is not necessarily deductible for another employee holding a similar job;
- some expense types almost always have a relevant connection to employment activities (eg union membership and professional association subscriptions);
- an expense that ordinarily bears the characteristics of an everyday personal expense (eg sun protection) and may be deductible if the particular

employment context creates a close connection between the expense and the production of assessable income through work activities. The draft provides the obvious example of an arborist working outdoors all day;
- an expense does not become deductible simply because an employer requires the employee to incur the expense (eg a restaurant owner asks a waiter to wear a white shirt and black pants). Conversely, an expense may be deductible even if the employer does not require or encourage it (eg a course to improve the specific knowledge and skills needed to do the job).

Draft TR 2019/D4 includes a handy appendix of work expense categories with links to specific rulings, practice statements and ATO IDs. The ATO plans to update these links as further rulings and guidance products are released. When finalised, it is proposed that the Ruling will apply retrospectively.

Comments are due by 6 December 2019.

FBT car parking benefits

The ATO has issued Draft TR 2019/D5 on when a car parking benefit is provided for FBT purposes. It replaces the previous ruling on this topic, TR 96/26, which has now been withdrawn. There are some changes to the ATO view as a consequence of two Full Federal Court decisions - Virgin Blue Airlines Pty Ltd v FCT [2010] FCAFC 137 and FCT v Qantas Airways Ltd [2014] FCAFC 168.

A car parking benefit is provided to an employee if various requirements in s 39A of the Fringe Benefits Tax Assessment Act 1986 are met. One requirement is that a commercial parking station must be located within a one-kilometre radius of the work car park. A commercial parking station is a permanent facility that makes all-day parking available to the public for a fee and does this in the ordinary course of business. The ATO considers that a facility can qualify as a commercial parking station even if it has a purpose other than providing all day parking (eg hourly parking at a hospital or airport), and even if its fee structure discourages all-day parking. The previous ATO view (in withdrawn TR 96/26) was that a car parking facility did not qualify as a commercial parking station if it had a primary purpose other than providing all day parking by charging penalty rates significantly higher than the rates chargeable for all day parking at commercial all-day parking facilities. It will generally apply retrospectively, however, the revised ATO view on commercial parking stations charging higher fees will only apply to car benefits provided from 1 April 2020.

Comments are due by 17 January 2020.

Non-reporting of audit fees on the SMSF annual return

The Australian Taxation Office wants to understand the reasons why some SMSFs do not report auditor fees on the SMSF annual return.

Frank and honest responses without identifying specific funds or individuals has been requested via email to ATOSMSFauditorteam@ato.gov.au by **28 November 2019.** More information

Background

All self-managed super funds (SMSFs) must be audited before they lodge an SMSF annual return (SAR) pursuant to section 35C of *Superannuation Industry (Supervision) Act 1993* (SISA).

SMSFs report auditor fees in Section C: Deductions and non-deductible expenses of the SMSF annual return at labels:

- H1 SMSF auditor fee (tax deductible)
- H2 SMSF auditor fee (not tax deductible).

The information presented at these labels is used by the ATO to:

1. determine the SMSF's taxable income
2. report to the public and to Government
3. risk profile SMSF auditors

Non-reporting of audit fees reduces our [ATO] confidence in the accuracy of determinations of taxable income, reporting and SMSF auditor risk assessments.

Several reasons for non-reporting of audit fees on the SMSF annual return have been proposed but we [ATO] now intend to seek reliable data with which to understand the actual reasons for non-reporting of audit fees and their prevalence.

AUSkey replacement status and design principles

The ATO is encouraging transition as soon as possible to the new identity solution - myGovID and Relationship Authorisation Manager (RAM).

More information

Information on how agents can transition, along with a range of support materials, is available at myGovID and RAM for tax professionals.

GST on sales of accommodation: reminder

The ATO has reminded taxpayers that offshore sellers of Australian commercial accommodation are now required to include such sales when measuring their GST turnover to determine if they are required to register for GST. If the turnover exceeds $75,000 in a 12-month period, then GST must be charged. This change took effect from 1 July 2019. The types of accommodation this change impacts includes: hotels, motels, and hostels; serviced apartments; student accommodation; caravan and tourist parks; house boat hire or cruise operator; and bed and breakfast accommodation. The ATO had earlier released a worksheet for those suppliers who might be affected by the new measures. Entities may be brought into the Australian GST net for the first time. This will require them to register, obtain an ABN, issue tax invoices, claim input tax credits, convert foreign currency amounts into Australian dollars, lodge BASs etc. The worksheet addresses these issues.

The worksheet also addresses the important distinction between a foreign entity acting as an offshore seller and one acting as an agent. The GST consequences between the two are significant and the worksheet provides a useful example to illustrate this. It also points out that an agency arrangement will not be subject to the Netflix rules (as the hotel business does not qualify as an Australian consumer for the purposes of those rules – ie there is no private consumption). Finally, the worksheet outlines the concessional arrangements the ATO has implemented to transition entities into the Australian GST system, which will last 12 months (ie until 30 June 2020). It will be necessary to apply for the concession, ie it is not automatic. However, if entities make a "genuine attempt" to comply, the ATO will apply the concession and no penalties will apply. The concessions cover: (i) deferrals of lodgement or payment; (ii) remission of GIC and failure to lodge on time penalties; and (iii) remission of any shortfall payments.

Draft GST Determinations

The ATO has issued the following Draft GST Determinations, both made under s 29-10(3) of the GST Act.

- Good and Services Act: Waiver of Tax Invoice Requirement (Visa Purchasing Card) Determination 2019 (WTI 2019/D2) will allow Visa Purchasing Card cardholders to claim input tax credits without holding a tax invoice in certain circumstances. When issued in final form, the determination will replace the Goods and Services Tax: Waiver of Tax Invoice Requirement (Visa Purchasing Card) Determination 2018.
- Good and Services Act: Waiver of Adjustment Note Requirement (Corporate Card Statements) Determination 2019 (WAN) 2019/D1) will allow corporate credit and charge card holders to claim decreasing adjustments without holding an adjustment note in certain circumstances. The final version will replace the Goods and Services Tax: Waiver of Adjustment Note Requirement (Corporate Card Statements) Determination 2018.

In both cases, the determination is substantially the same as the previous determination it replaces. The determinations are minor and machinery in nature.

FINANCIAL SERVICES

Financial adviser banned for SMSF property advice

ASIC has banned a former Sydney-based financial adviser for four years for allegedly failing to prioritise his clients' interests in relation to SMSF property investments. ASIC said a review of the advice files revealed that the adviser's clients wanted to purchase an investment property and were referred to him by an associated mortgage broking business. Despite having differing needs and circumstances, almost all of his clients were advised to establish a self-managed super fund (SMSF), or use an existing SMSF, and to use limited recourse borrowing arrangements (LRBAs) to fund the purchase of a property.

ASIC alleged that the adviser failed in his duty as a financial adviser to put in place a strategy that was in the client's best interests. According to ASIC, the adviser failed to provide a professional, independent assessment of whether an SMSF, which borrowed to invest in property, was an appropriate strategy for his clients. It also alleged that the adviser put his own interests ahead of his clients and that his advice exposed a number of clients to financial harm. In banning the adviser for four years,

ASIC considered that he was not adequately trained, or competent, to provide financial services and that he engaged in misleading conduct by backdating file notes.

ASIC takes civil penalty action on Royal Commission case study

ASIC has commenced civil penalty proceedings in the Federal Court against RI Advice Group Pty Ltd (RI Advice) and a former financial adviser, John Doyle. RI Advice was, until its recent acquisition by IOOF, an ANZ financial advice business. ASIC said the conduct of RI Advice and Mr Doyle was examined as a case study on "Bad Advice" as part of the Banking & Financial Services Royal Commission (Interim Report, 4.2.1 Mr Doyle). ASIC's concise statement (File No: VID1170/2019) alleges that RI Advice failed to take reasonable steps to ensure that Mr Doyle provided appropriate advice, acted in clients' best interests and put his clients' interests ahead of his own, as required by the *Corporations Act 2001*. Mr Doyle was an authorised representative of RI Advice between May 2013 and June 2016.

ASIC said it is also taking action against Mr Doyle, alleging that he gave inappropriate "cookie cutter" advice to retail clients to invest in complex structured financial products called Macquarie Flexi 100 Trust and Instreet Masti 36 and 38, without taking into account their financial goals or risk tolerance. ASIC alleged that Mr Doyle received upfront and ongoing commissions for each of his clients' investments in the structured products. In respect of each instance in which advice regarding structured products was given, ASIC alleges that Mr Doyle contravened ss 961B, 961G, 961H and 961J of the *Corporations Act 2001*.

ASIC has further alleged RI Advice knew, or should have known, that there was substantial risk Mr Doyle was not complying with his obligations under the law and was repeatedly recommending structured products to his clients, bypassing compliance processes. ASIC also alleged RI Advice did not take reasonable steps in response. ASIC claims that RI Advice contravened s 912A(1)(a) of the Corporations Act by failing to ensure that the financial services were provided "efficiently, honestly and fairly". In addition, ASIC alleged that RI Advice contravened general obligations as an AFS licence holder and is seeking compliance orders from the Court to prevent similar contraventions occurring in the future.

ASIC obtains freezing orders to assist AFCA matter

ASIC has obtained freezing orders, by consent, against a Sydney financial adviser. ASIC said it commenced an investigation in relation to allegations that the adviser failed to assist the Australian Financial Complaints Authority (AFCA) to resolve client complaints. ASIC said its investigation is continuing. The matter is scheduled to return to the NSW Supreme Court on 18 November 2019.

SUPERANNUATION

Super guarantee and ordinary time earnings

The ATO has issued a Decision Impact Statement (DIS) in respect of the Commissioner's successful appeal in *Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union* [2019] FCAFC 84. At first instance, the Court had found that BlueScope Steel had contravened terms of various industrial awards and enterprise agreements by not making superannuation contributions relating to the "additional hours component" and the "public holidays component" of their employees' annualised salaries. In arriving at that conclusion, the Court held that the "ordinary hours of work" of the employees included the "additional hours" and "public holidays" provided for in the relevant industrial awards and agreements.

In overturning that decision, the Full Court ruled that where "ordinary hours of work" are defined by an award or agreement, ordinary time earnings (OTE) in s 6(1) and 23(2) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA), means earnings in respect of those "ordinary hours of work" as defined. Accordingly, the payments included in the workers' annualised salary for "additional hours" and "public holidays" were *not* OTE under the SGAA, as they were not part of the "ordinary time rate of pay for the worker's standard or ordinary hours per week as fixed by award, agreement or contract". The ATO considers that the Full Court's interpretation of the terms "ordinary time earnings" (OTE) and "ordinary hours of work", as used in the SGAA, is consistent with the Commissioner's view in Superannuation Guarantee Ruling SGR 2009/2.

Comments are due by 13 December 2019.

Super sole purpose test: ATO letter to DomaCom

The ATO has confirmed its compliance approach to the sole purpose test for self-managed superannuation funds (SMSFs) investing in the DomaCom Fund - the managed investment scheme at the centre of Aussiegolfa Pty Ltd (Trustee) v FCT (2018) 108 ATR 527. In that case, the Full Federal Court held that an SMSF investment in the DomaCom Fund to acquire a fractional interest in a property (to be leased at market rent to the member's daughter) did not breach the sole purpose test.

In a letter to DomaCom Limited, the ATO confirmed the circumstances where it will not apply compliance resources to scrutinise whether an SMSF's investment in the DomaCom Fund has contravened the sole purpose test in s 62 of the SIS Act. For prospective SMSF investors, the ATO confirmed that it will not apply compliance resources in relation to s 62 of the SIS Act where the trustee of an SMSF:

- invests in a sub-fund of the DomaCom Fund [that own a residential property that may become leased to a related party of the SMSF];
- signs a "sole purpose test declaration", including that the trustee will not exert influence for a related party to become a tenant of the property or regarding any dealings with such a tenant; and
- the ATO is not subsequently made aware of evidence that indicates the trustee has acted inconsistently with the terms of the declaration.

Importantly, the ATO letter warns that it may still apply compliance resources to scrutinise whether an SMSF investment in the DomaCom Fund contravenes other provisions of SIS Act (such as the in-house asset rules). Note that the Full Court ruled that the trustee in Aussiegolfa still breached the in-house asset limit of 5%. This was because the relevant investment was found to be the units in the DomaCom property sub-fund, which was a "related trust" controlled by the SMSF and its Part 8 associates, and not an exempt "widely held unit trust". The ATO says SMSF trustees can seek further information on their specific arrangements by contacting the ATO - tel: 13 10 20.

Commissioner's discretion with remedial SC contributions

The ATO has released a factsheet setting out the Commissioner's approach to exercising his discretion to disregard or reallocate superannuation contributions when an employer makes remedial super guarantee (SG) contributions. Even though

remedial SG contributions may relate to an earlier income year, they are treated as a concessional contribution in the year they are "made" and can result in an employee exceeding their concessional contributions cap (currently $25,000 per year). An employee may apply for an ATO determination under s 291-465 of the ITAA 1997 to have these remedial SG contributions disregarded or allocated to another year, and not counted towards their concessional contributions cap in the year they are made.

In deciding whether to exercise this discretion, the ATO says it will consider whether: the remedial SG contributions results in "unfair or unintended outcomes"; the employee had "control" over the circumstances that led to the remedial contributions; and it was "reasonably predictable" that the remedial SG contributions would result in excess contributions for an income year. However, the ATO does not have the power to exercise this discretion for Div 293 purposes.

ASIC's legal action against super trustee and promoter

ASIC has commenced legal proceedings in the Federal Court in relation to the promotion of the MobiSuper Fund, a division of the Tidswell Master Superannuation Plan (Fund): *ASIC v MobiSuper Pty Limited & Ors* (Federal Court, File No: SAD237/2019). The defendants are listed as MobiSuper Pty Limited (the promoter of the MobiSuper Fund); Tidswell Financial Services Ltd (an AFS licensee and super trustee); ZIB Financial Pty Limited (Mobi's AFS licensee); and Andrew Richard Grover (a director of Mobi and ZIB). ASIC has alleged that Tidswell and ZIB failed to do all things necessary to ensure the financial services covered by their AFS licences were provided efficiently, honestly and fairly. ASIC also alleges that both Tidswell and ZIB failed to adequately monitor Mobi's promotion of the Fund through a purported "general advice model" that had insufficient regard for consumers' best interests. Further, ASIC alleges false and misleading statements were made about super, insurance products and services.

ASIC's concise statement also contends that Mobi offered an obligation-free "lost super" search to consumers through internet advertising campaigns with the primary objective to get consumers to join the Fund and roll their other super balances into Mobi-promoted products. ASIC further alleges that, in marketing telephone calls to consumers, Mobi customer service officers made misleading claims about fee savings and equivalent insurance cover, and provided personal advice that was allegedly not in consumers' best interests. ASIC is seeking civil penalties and Court declarations, including that Tidswell and ZIB failed to comply with their obligations as AFS licensees and Mobi engaged in (and Mr Grover was knowingly concerned in) misleading conduct. ASIC said this action has been taken following consultation with APRA - which also has responsibility for regulating Tidswell as a registrable

superannuation entity (RSE) under the SIS Act. To this end, APRA has provided ASIC with a delegation of certain functions and powers under the SIS Act. The matter is yet to be listed for mention before the Court.

SMSF auditors disqualified for various breaches

ASIC has disqualified an SMSF auditor for significant breaches of the auditor independence rules and alleged deficiencies in auditing the acquisition of shares, borrowings, valuation of assets, in-house asset rules and regarding a non-commutable life pension. ASIC said it disqualified another SMSF auditor for allegedly failing to comply with a condition to have peer reviews of 3 of his audits. This condition was imposed by ASIC following a referral from the ATO.

In addition, ASIC said it imposed conditions on another SMSF auditor for alleged deficiencies in maintaining auditor independence and in audit work, including auditing the ownership and valuation of fund assets and ensuring compliance with the borrowing rules. The conditions imposed by ASIC require audits to be reviewed by another SMSF auditor, not auditing funds where there are independence threats (irrespective of the safeguards), completing specified courses in ethics and auditing, and providing a copy of the conditions to his professional association.

Super guarantee payable for property maintenance worker

The AAT has ruled that a worker engaged by a property maintenance business was an employee (and not an independent contractor): Probin and FCT [2019] AATA 4597 (AAT, Grigg M, 8 November 2019).

Over a 12-year period, the taxpayer engaged the worker to undertake property maintenance tasks for his business, such as painting, plastering and carpentry. There was no written agreement. The worker was paid a fixed hourly rate and given instructions each day of what jobs to do. He used his own tools and vehicle. The taxpayer maintained that the worker was engaged as an independent contractor whereby the worker provided an ABN and was responsible for all tax, holiday pay, sick leave, workers compensation and superannuation. In May 2016, the former worker complained to the ATO that he had not been paid SG contributions. Superannuation guarantee charge (SGC) assessments totalling $27,272 (including interest) were issued to the taxpayer for the period 1 April 2011 to 31 March 2016. The AAT upheld the SGC assessments after ruling that the worker was an

"employee" under s 12 of the Superannuation Guarantee (Administration) Act 1992 (SGAA) for whom the taxpayer had an obligation to make SG contributions.

Although the worker was often not supervised, the AAT found that the taxpayer practically exercised full control of the worker's daily activities, which were discussed in advance of each task. The AAT also noted that the worker did not provide quotes and was paid a flat hourly rate which did not vary depending upon the task. There was also no evidence of any capacity of the worker to delegate tasks. While some weight was given to the intention to engage the worker as a contractor, the AAT said a taxpayer cannot contract out of SGAA obligations.

REGULATOR NEWS

Financial and tax advice frameworks

The three major accounting bodies – including the IPA - have joined forces to review the frameworks that regulate how financial and tax advice is provided. The accounting bodies launched their review by releasing a video in which the three CEOs call for more efficient regulatory frameworks for advisory services and pledge to work together in advocating for change. The review will focus on revisiting definitions, licensing regimes and harmonising obligations where members operate under multiple regulatory frameworks to provide the advisory services. One of the first areas to address is how to support and encourage accountants who practice under a limited or full AFS licence to continue providing financial planning advisory services.

IPA Group CEO, Andrew Conway, said the "shared goal is to reduce the regulatory burden on our members, so we retain financial advisers in the industry. For the first time in the best part of two decades we are at a risk of creating an advice gap in the market." Coupled with the new FASEA education and professional standards, implementation of the Banking Royal Commission recommendations and the current review of the Tax Practitioners' Board (TPB), Mr Conway said there is a very real threat of added complexity. To help progress the review, the accounting bodies have called for members to share their experiences in dealing with regulatory complexity. Submissions can be made to: IPA - email: wayne.debernardi@publicaccountants.org.au.

ASIC guidance and relief for whistleblower protection policies

ASIC has released a Regulatory Guide (RG 270) on the obligation requiring companies and superannuation trustees to implement a whistleblower policy by 1 January 2020. In addition, ASIC announced that it will grant relief from the requirement to have a whistleblower policy for public companies that are not-for-profits or charities (with annual revenue of less than $1 million).

The whistleblower policy requirement in s 1317AI of the *Corporations Act 2001* applies to public companies, large proprietary companies and corporate trustees of registrable superannuation entities (RSEs). RG 270 sets out the mandatory components of a whistleblower policy, include the types of matters covered by a policy; who can make and receive a disclosure; how to make a disclosure; legal and practical protections for disclosers; investigating a disclosure; and ensuring fair treatment of individuals mentioned in a disclosure.