# TAXATION

## JobMaker Hiring Credit: draft statutory rules

Government has released draft statutory rules which sets out details of the JobMaker Hiring Credit rules.

## Other wage subsidies on offer

In addition to the proposed JobMaker scheme, the government has also reminded businesses that there are a number of other wage subsidy schemes already offered.

## ATO speech: corporate tax compliance expectations

ATO has reminded company executives to consider the potential reputational impact from their tax decisions in a post-COVID world.

## Two new Justices appointed to the High Court

The Prime Minister has announced the appointment of two new judges to the High Court, who will replace retiring judges.

## ATO data matching program: DHA visas

ATO has gazetted a data matching program to acquire visa data from the Department of Home Affairs for the 2020-21 through to 2022-23 income years.

## Tax practitioners and PI insurance details: TPB

TPB has reminded tax practitioners to update their professional indemnity insurance details to ensure ongoing registration requirements are met.

## R&D guide updated

Minister for Industry, Science and Technology has advised that the R&D Guide has recently been updated.

## Seasonal worker program: ATO factsheet

ATO has published a factsheet for workers and approved employers in the Seasonal Worker Program following government changes.

## Senate estimates hearings: views on COVID economic response

Transcript for the 2020-21 Budget estimates hearings has been released, which involved Treasury giving its views on the coronavirus economic response.

## CPI: September quarter 2020 index number

ABS has released the CPI index number for the September quarter 2020 showing a 1.8 increase from the June 2020 quarter.

## Specified BAS services: Instrument registered

An Instrument has been registered to allow registered BAS agents to provide certain services that would otherwise be restricted to registered tax agents.

## BAS agents authorised to offer expanded super guarantee charge services under TASA

Following extensive consultation with key stakeholders, the Tax Practitioners Board has registered a new BAS services legislative instrument, Tax Agent Services (Specified BAS Services No. 2) Instrument 2020.

## FINANCIAL SERVICES

### AFCA transition Bill introduced

Bill has been introduced in the House of Reps that make transitional amendments associated with AFCA replacing the SCT.

### ASIC chair stands aside pending review

ASIC Chair, James Shipton, has stood aside pending a review into relocation expenses, including for income tax advice.

## SUPERANNUATION

### Super guarantee charge statements due by 28 November

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### SMSF annual returns: late lodgment may impact fund status

ATO has reminded trustees of SMSFs that the annual return due date for some funds has passed.

### ATO asks auditors to check for SAN misuse by SMSFs

ATO has requested all auditors carefully check for SMSF Auditor Number (SAN) misuse by reviewing their client list.

### Visibility of super in family law proceedings: state date delayed

Government has indicated that its proposed information sharing scheme to improve visibility of super assets in family law proceedings will not be operative until 2021.

## Climate change risks: super fund settles action

Retail Employees Superannuation Trust (REST) has settled a legal action brought by a fund member alleging that the trustee breached its statutory and equitable duties.

## REGULATOR NEWS

## IGTO 2019-20 annual report released

Inspector-General of Taxation and Taxation Ombudsman (IGTO) has released its 2019-20 Report setting out performance and achievements.

## APRA super data transformation: new FAQs

APRA has published new FAQs about its Superannuation Data Transformation (SDT) project.

## OTHER NEWS

### Supporting competition and innovation in payment services

The Morrison Government has released the report of the Council of Financial Regulators' (CFR) review of the regulation of Stored-Value Facilities (SVFs) in Australia. Full media release **here**

## TAXATION

### JobMaker Hiring Credit: draft statutory rules

The Government has released the Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No 9) 2020 which sets out details of the JobMaker Hiring Credit rules.

The JobMaker Hiring Credit was announced in the Federal Budget and legislation to implement the rules – namely the Economic Recovery Package (JobMaker Hiring Credit) Amendment Bill 2020 – is currently before Parliament. This Bill contains what may be termed the machinery provisions, while the Statutory Rules will contain the nuts and bolts of the system.

The draft Statutory Rules specify:

- the start and end date of the scheme;
- when an employer or business is entitled to a payment;
- the amount and timing of a payment; and
- other matters relevant to the administration of the payment.

Broadly, the JobMaker Hiring Credit will be available to employers for each new job they create over the next 12 months for which they hire an eligible young person, aged 16 to 35 years old. It is expected that JobMaker Hiring Credit will support 450,000 positions at a cost of $4 billion from 2020-21 to 2022-23.

Generally, the amount of the JobMaker Hiring Credit payment depends on the age of the eligible additional employee when they commence employment with the entity. An entity may receive up to $200 per week for each eligible additional employee aged 16 to 29 years and up to $100 per week for each eligible additional employee aged 30 to 35 years.

Under the JobMaker scheme, qualifying entities can only receive the payment for a JobMaker period in respect of eligible additional employees. An eligible additional employee is an individual who:

- was employed by the qualifying entity at any time during the JobMaker period;
- commenced employment between 7 October 2020 and 6 October 2021;

- was aged between 16 and 35 years at the time they commenced employment;
- commenced employment no more than 12 months before the start of the JobMaker period;
- has worked an average of 20 hours a week for each whole week the individual was employed by the qualifying entity during the JobMaker period;
- meets the pre-employment conditions;
- meets the notice requirement; and
- is not excluded as an eligible additional employee.

**Comments** are due by 27 November 2020.

## Other wage subsidies on offer

In addition to the proposed JobMaker scheme, there are a number of other wage subsidy programs already offered by the Government. These are summarised in the following table.

| Wage subsidy (name) | Age range (years) | Amount (up to) $ |
|---|---|---|
| Restart | 50+ | 10,000 |
| Youth Bonus | 15-24 | 6,500/10,000 |
| Youth | 25-29 | 6,500 |
| Parents | N/A | 6,500 |
| Long-term unemployed | N/A | 6,500 |

Wage Subsidies are available to eligible Participants in jobactive, Transition to Work (TtW) and ParentsNext Intensive Stream. Employment services providers determine if a wage subsidy is offered and will enter into an agreement with the employer to make payments over six months.

The placement details are as follows:

- all wage subsidy placements must average at least 20 hours per week over the 26-week wage subsidy period and be ongoing employment that complies with the National Employment Standards;
- jobs can be full time, part time or casual;

- apprenticeships and traineeships are also eligible to attract a wage subsidy; and
- all wage subsidy agreements must be approved in the Department's IT System no later than 84 days from the employee's start date.

Further details can be found on the Department of Education, Skills and Employment website.

## ATO speech: corporate tax compliance expectations

The ATO has reminded company executives to consider the potential reputational impact from their tax decisions in a post-COVID world.

Speaking at a CFO Live event, Jeremy Hirschhorn, ATO Second Commissioner, Client Engagement, said community expectations in relation to corporate tax compliance have been sharpened during COVID-19. In particular, Mr Hirschhorn said companies that have accessed Government economic support measures need to be mindful that the community increasingly expects large corporates to improve their approach to tax. The line "we follow the tax laws in every country in which we operate" will play even less well when aggressive tax behaviour spills into the public domain, particularly in times of budget deficit, Mr Hirschhorn said. "Yes, follow the tax law, but also follow the spirit of the law", he added.

By way of example, Mr Hirschhorn said there was nothing explicit in the rules for the stimulus measures that required companies to stop paying executive bonuses or increasing dividends. However, there was a quick community backlash for those companies that appeared to be exploiting the spirit of those measures.

The ATO also warned CFOs not to use artificial mechanisms to take advantage of the 2020-21 Budget measures that provide for the carry back of losses and outright deductions for capital assets. Mr Hirschhorn said these measures should be embraced, but for the purpose for which they were introduced. The ATO said it will be watching for structured transactions where the plant and equipment is not actually used in the business, intellectual property migration with no change in real activity; and asset swaps with related parties. Do not attempt to artificially shift profits (and losses) around a group to access the loss carry back, Mr Hirschhorn said.

Mr Hirschhorn acknowledged that it has been hard in practice for CFOs to truly understand where their company sits in the tax behaviour spectrum. However, he suggested some practical ways for CFOs to understand where their company stands. For example, ensure that the KPIs for the tax team are driving desirable behaviours and ensure there is a board-endorsed tax governance framework. Mr

Hirschhorn said it still surprises him how many large companies rely on an advisor's "more likely than not" or "reasonably arguable" opinion which at most only provides penalty protection if it all goes wrong. Rather, Mr Hirschhorn recommends obtaining assurance commensurate with importance, for example, through a private binding ruling.

## Two new Justices appointed to the High Court

The Prime Minister has announced the appointment of two new judges to the High Court, ie Justice Simon Steward and Justice Jacqueline Gleeson.

The new judges will take the place of Justice Geoffrey Nettle (appointed to the High Court in 2015) and Justice Virginia Bell (appointed in 2009). Both judges had reached the constitutionally prescribed retirement age of 70.

Both the new appointments are currently judges in the Federal Court. Justice Steward is a noted tax specialist who has been involved in some important decisions since his appointment to the Federal Court in 2018, including:

- Greig v FCT [2020] FCAFC 25 (where the FFC held that share losses of $11.85m and legal fees of just over $500,000 were deductible under s 8-1 of the ITAA 1997, thereby allowing the taxpayer's appeal);
- Burton v FCT [2019] FCAFC 141 (where the FFC upheld a decision that a taxpayer was not entitled to a full foreign income tax offset (FITO) for US tax paid on the sale of investments, as only half the capital gain had been included in his assessable income);
- FCT v Travelex Limited [2020] FCAFC 10 (where the FFC dismissed the ATO 's appeal against a 2018 decision concerning the payment of interest on an RBA surplus that arose where the taxpayer had overstated its GST liability);
- Decleah Investments Pty Ltd and Prince Removal and Storage Pty Ltd as Trustees for the PRS Unit Trust v FCT [2018] FCA 717 (where the Federal Court upheld a taxpayer's appeal against an AAT decision that the taxpayer had not provided an approved valuation when applying the margin scheme on the supply of subdivided lots); and
- FCT v Scone Race Club Limited [2019] FCAFC 225; FCT v Racing Queensland Board [2019] FCAFC 224 (where the FFC allowed the Commissioner's appeals and ruled that certain horse racing clubs and State racing boards were liable for the superannuation guarantee charge on riding fees and prizemoney paid to jockeys).

## ATO data matching program: DHA visas

The ATO has registered a gazette to acquire visa data from the Department of Home Affairs for 2020-21 through to 2022-23. The data will be acquired and matched with ATO data holdings to identify non-compliance with obligations under taxation and superannuation laws – which may include registration, lodgment, reporting and payment responsibilities.

The ATO estimates that approximately 10 million individuals' records will be obtained each financial year.

## Tax practitioners and PI insurance details: TPB

The TPB has issued a reminder to tax practitioners to update their professional indemnity (PI) insurance details to ensure ongoing registration requirements are met. The TPB said that even though it has temporarily waived the requirement for some tax practitioners to complete annual declarations (which are due on or before 31 December 2020), PI insurance details are still required to be up-to-date. The TPB also said that it will be contacting tax practitioners if records indicate their PI insurance is not up-to-date.

## R&D guide updated

The Minister for Industry, Science and Technology has advised that the R&D Guide has recently been updated.

The Guide to Interpretation is an AusIndustry publication. It incorporates feedback that AusIndustry has received from recent consultation, including additional examples around evidence and record keeping. It includes new flowcharts, diagrams and an improved "wayfinding structure", with the "greater clarity" over legislative definitions for those wishing to access the R&D Tax Incentive.

The Guide's structure aligns with the legislation, addressing in turn: (i) core R&D activities; (ii) activities excluded from being core R&D activities; and (iii)supporting R&D activities.

## Seasonal worker program: ATO factsheet

The ATO has published a factsheet for workers and approved employers in the Seasonal Worker Programme (SWP), following the Government's announcement of the change of visa for participants in the SWP to extend their stay for up to 12 months while working for approved employers. The announcement stated that the conditions under the SWP visa arrangements would be carried over to the new visa arrangements. This factsheet applies if seasonal workers:

- have been participating in the SWP, and continue to do so;
- were previously on a Temporary Work (International Relations) subclass 403 visa (subclass 403 visa); and
- are now on a different temporary visa (eg Bridging visa E or Temporary Activity (subclass 408) AGEE - COVID-19 Pandemic event visa).

The factsheet states that the ATO is currently making arrangements to ensure that previous taxation arrangements under the subclass 403 visa stay the same under the different temporary visa. This factsheet provides guidance to relevant seasonal workers on what to do while the ATO makes the arrangements.

## Senate estimates hearings: views on COVID economic response

The Senate has been busy with 2020-21 Budget estimates hearings. The transcript for the hearing has been released. It involved the Secretary of the Department of the Treasury, Dr Kennedy, who was grilled on the economic impact of the COVID-19 pandemic.

The ATO Commissioner, Mr Jordan, appeared before the committee, so the transcript of that encounter will be keenly anticipated.

Significantly, Dr Kennedy stated that it was still his judgement that "JobKeeper ideally should taper down and end in March". In his view, government should look "more to incentives to hire people rather than to hang on to people". From this, it would appear sensible to suggest that businesses and their advisors should operate on the basis that JobKeeper will definitely cease in March 2021.

## CPI: September quarter 2020 index number

The Australian Bureau of Statistics (ABS) has released the CPI index number of 116.2 for the September quarter 2020 showing a 1.8 increase from the June 2020 quarter of 114.4. This CPI index number is used to index certain tax and superannuation amounts under Subdiv 960-M of the ITAA 1997. The index number is also used for FBT purposes concerning remote area benefits (under ss 60 and 60AA of the FBTAA).

The ABS said the 1.6% increase in the CPI for September 2020 quarter follows a record fall of 1.9% in the June 2020 quarter. The September quarter increase was mainly the result of increases for automotive fuel (9.4%) and pre-school and primary education (11.1%). Annual inflation was running at 0.7% for the year to the September 2020 quarter.

## Specified BAS services: Instrument registered

The Tax Agent Services (Specified BAS Services No 2) Instrument 2020 has been registered to allow registered BAS agents to provide certain services that would otherwise be restricted to registered tax agents. The Instrument declares the following services as BAS services so that they can be provided by a registered BAS agent:

- a service under the Superannuation Guarantee (Administration) Act 1992 (SGAA) to the extent that the service relates to a payroll function or payments to contractors;
- a service under the Superannuation Guarantee Charge Act 1992;
- a service under Pt 3B of the SIS Act (Data and payment standards);
- a service under Pt 5-30 in Sch 1 to the TAA (Payments and ABN verification);
- a service under ss 202CD and 202CF of the ITAA 1936 (TFN declarations); or
- a service under s 9 of the ABN Act.

**Date of effect**: 6 November 2020. The instrument also repeals the former Tax Agent Services (Specified BAS Services) Instrument 2016.

### BAS agents authorised to offer expanded super guarantee charge services under TASA

Following extensive consultation with key stakeholders, the Tax Practitioners Board has registered a new BAS services legislative instrument, *Tax Agent Services (Specified BAS Services No. 2) Instrument 2020*. The new legislative instrument allows BAS agents to provide an expanded range of services in relation to the superannuation guarantee charge, including supporting clients in their interactions with the Commissioner of Taxation.

## FINANCIAL SERVICES

### AFCA transition Bill introduced

The Treasury Laws Amendment (2020 Measures No 4) Bill 2020 has been introduced into the House of Reps. Among other things, the Bill will make transitional amendments associated with the Australian Financial Complaints Authority (AFCA) replacing the Superannuation Complaints Tribunal (SCT). The Bill will provide for the transfer of records and documents from the SCT to ASIC, the remittal of matters on appeal by the Federal Court, and introduce a rule-making power to allow the Minister to prescribe other matters of a transitional nature.

**Date of effect:** The AFCA amendments will come into effect on the commencement of Sch 3 to the AFCA Act (being 5 March 2022 or an earlier date yet to be proclaimed by the Treasurer).

### ASIC chair stands aside pending review

ASIC Chair, James Shipton, has stood aside pending a review into relocation expenses, including for income tax advice paid for by ASIC.

Appearing before the House of Representatives Standing Committee on Economics, Mr Shipton said a note in ASIC's 2019-20 annual report has identified payments of certain relocation expenses incurred on his behalf (on his appointment and return to Australia from the US) and Deputy Chair Daniel Crennan (as part of an agreement that he move from Melbourne to Sydney).

Following an audit of ASIC's financial statements, Mr Shipton said the ANAO expressed a view that the total remuneration paid to both office holders may exceed the limits set by Remuneration Tribunal Determinations. The matter was first raised in the ANAO's 2018-19 closing report. ASIC has acknowledged that the processes supporting the approval of these relocation expenses were inadequate, and accepted the ANAO recommendations which include conducting an independent review.

While Mr Shipton maintains that he acted properly and appropriately in this matter, he has advised the Treasurer that it is appropriate for him to stand aside pending the outcome of the review. Mr Shipton said he holds himself to the highest possible standard, and will voluntarily reimburse ASIC for the tax related expenses ASIC paid following his 2018 relocation from the US. Mr Shipton said the accommodation payments for ASIC Deputy Chair, Daniel Crennan, were ceased following his request, and he offered and agreed to repay the accommodation payments made to him.

## SUPERANNUATION

### Super guarantee charge statements due by 28 November

The ATO has reminded employers that they must lodge a Superannuation Guarantee Charge (SGC) statement with the ATO by 28 November if they failed to make the mandatory 9.5% super contributions for the quarter ended 30 September 2020.

The ATO acknowledged that some employers may have been impacted by COVID-19 and were unable to pay SG contributions for employees by the 28 October due date for the quarter. However, the ATO cannot extend the quarterly due date for SG contributions.

Employers who missed the SG contributions due date must lodge a SGC statement by 28 November 2020, even if they can't pay the SGC in full (which is also due on 28 November). The ATO said it expects employers to lodge a SGC statement and work with it to address outstanding amounts (including setting up a payment plan). Failing to lodge a SGC statement by the due date can result in an additional Part 7 penalty of up to 200% of the amount of SGC payable.

## SMSF annual returns: late lodgment may impact fund status

The ATO has reminded trustees of self-managed super funds (SMSFs) that the annual return due date for some funds has passed (31 October). As this date was a Saturday, these funds could lodge by Monday 2 November 2020.

Trustees of SMSFs that cannot lodge their SMSF annual return (SAR) by their due date should contact the ATO to request a deferral *before* the due date. Otherwise, the ATO will change the fund's status on Super Fund Lookup to "Regulation details removed" for any SMSF that is more than two weeks overdue on any annual return lodgment, and hasn't requested a deferral from the ATO. This status will remain in place until any overdue lodgments have been brought up to date. Having a status of "Regulation details removed" means:

- APRA funds will not roll over any member benefits to the SMSF;
- employers cannot make any super guarantee contributions for members of the SMSF;
- non-lodgment indicates to the ATO that members' retirement savings may be at risk.

Registered tax agents can request an extension of time to lodge via ATO Online services. Otherwise, SMSF trustees can request a lodgment deferral from the ATO - tel: 13 10 20.

## ATO asks auditors to check for SAN misuse by SMSFs

The ATO has requested all auditors to carefully check for SMSF Auditor Number (SAN) misuse by reviewing their client list, as they may notice funds that they have not audited.

The reminder follows a recent Tax Practitioners Board (TPB) decision to terminate the registration of an agent who had made false and misleading statements in various annual returns, indicating an audit had been done when it had not. In that case, the agent's behaviour was uncovered after an auditor reviewed their client lists from multiple years and noticed funds listed that they had not audited. This auditor then contacted the ATO and the matter was referred to the TPB for appropriate action. The agent is barred from registration for two years. This is the fourth agent who has had their registration terminated for SAN misuse. Auditors who notice any funds they have not audited can email the ATO.

## Visibility of super in family law proceedings: state date delayed

The Attorney-General's Department has indicated that the Government's proposed information sharing scheme to improve the visibility of superannuation assets in family law proceedings will not be operative until July 2021 at the earliest.

The measure, originally announced on 21 November 2018, proposed to develop an electronic information sharing mechanism between the ATO and the Family Law Courts to allow superannuation assets held by relevant parties during family law proceedings to be identified swiftly and more accurately.

Appearing at the Senate Economics Legislation Committee estimates hearing, the Minister for Superannuation and Financial Services, Senator Jane Hume, said the legislative amendments to the Tax Administration Act 1953 required to implement this measure should be introduced by mid-2021. The measure also involves changing the secrecy provisions to allow the ATO to provide information to the courts. The Government remains committed to the measure. It's just more difficult than anticipated, Senator Hume said.

## Climate change risks: super fund settles action

The Retail Employees Superannuation Trust (REST) has settled a legal action brought by a fund member alleging that the trustee breached its statutory and equitable duties regarding climate change risks.

In settling the legal proceedings brought by the fund member (Mr McVeigh), REST agreed to take further steps to ensure that its investment managers take active steps to consider, measure and manage financial risks posed by climate change and other relevant ESG risks. REST also agreed to continue to develop its management processes for dealing with the financial risks of climate change on behalf of its members.

Mr McVeigh also welcomed REST's initiatives to implement a long-term objective to achieve a net zero carbon footprint for the fund by 2050; and measure, monitor and report outcomes on its climate related progress and actions in line with the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD). (Source: Rest media release, 2 November 2020.)

**Background**

As a member of Rest since 2013, Mr McVeigh had sought information as to what actions the fund was taking regarding the financial risks posed to his superannuation by climate change. REST pointed to publicly available information on its website which broadly notes that it takes environmental risks seriously in the context of investments and management. However, the fund initially declined to give any information more specific than that.

The applicant commenced legal proceedings alleging that s 1017C of the Corporations Act 2001 required REST to provide to him, as a fund member, with information to allow him to make an informed judgment about the management and financial condition of his superannuation product and its investment performance. He further alleged that the REST had breached the SIS Act and its duties as a trustee by not having a more developed climate change policy than it had indicated.

The applicant obtained an indemnity from Friends of the Earth Australia Inc (FOE) for $310,450 in the event of an adverse costs order against him. In an interlocutory application in 2019, the Federal Court agreed that the member's application raised matters of a public interest nature but it declined to grant an application for a maximum costs order of $310,450: McVeigh v Retail Employees Superannuation Pty Ltd [2019] FCA 14.

## REGULATOR NEWS

### IGTO 2019-20 annual report released

The Inspector-General of Taxation and Taxation Ombudsman (IGTO) has released her 2019-20 Annual Report setting out the performance and achievements of the IGTO office. Some key highlights for 2019-20 were presented:

- A total of 2,775 tax complaints (compared to 2,712 in prior year) were received, of which 93.7% have been processed and finalised within the same period;
- 67% of the 2,775 cases relate to the top five complaint issues raised with the IGTO: (i) Payments to the taxpayer; (ii) Debt collection; (iii) Lodgment and processing; (iv) Communications; and (v) Registration/Taxpayer details;
- Three review investigations commenced and in progress: (i) An investigation and exploration of undisputed tax debts in Australia; (ii) Death and Taxes: An investigation into ATO systems and processes for dealing with deceased estates; and (iii) An investigation into the effectiveness of ATO communications of taxpayers' rights to complain, review and appeal decisions, actions and outcomes made by the ATO.

### APRA super data transformation: new FAQs

APRA has published new frequently asked questions (FAQs) about its Superannuation Data Transformation (SDT) project. The FAQs and worked examples cover issues in relation to expenses, asset allocation, insurance arrangements and fees and costs. The FAQs outline queries in relation to the Phase 1 topic papers for the SDT project.

## OTHER NEWS

#### Supporting competition and innovation in payment services

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