TAXATION

TPB reminder: practitioner assistance COVID-19 or bushfires

TPB has issued a reminder to tax practitioners that information on types of support available in difficult situations.

SBE full expensing anomaly: accounting bodies' submission

The accounting bodies including the Institute of Public Accountants (IPA) have released a joint submission on full expensing measures as applied to SBEs.

Changes to STP reporting: instrument registered

ATO has registered a legislative instrument which will facilitate changes to Single Touch Payroll reporting requirements as a result of legislative amendments.

Revenue forgone from tax concessions

Treasury has released a statement which provides annual information on government's tax benchmarks and variations.

CPI: December 2020 index number

ABS has released the CPI index number for the December quarter 2020 which was up from the September 2020 quarter.

Penalties: Practice Statements updated

ATO has reissued practice statements in relation to penalties for failing to electronically notify or pay GST liabilities and other matters.

FINANCIAL SERVICES

ASIC welcomes High Court finding re Westpac case

ASIC has welcomed the High Court decision to dismiss Westpac's appeal in relation to a super switching campaign.

High Court rules Westpac super campaign was "personal advice"

High Court has dismissed Westpac's appeal and ruled that it had provided "personal advice" in relation to a super switching campaign.

Financial advice compensation scheme: calls for implementation

A law firm has called on the government to implement a Compensation Scheme of Last Resort for victims of negligent financial advisers.

SUPERANNUATION

Pension transfer balance cap set to increase

The superannuation general transfer balance cap is set to increase from $1.6m to $1.7m on 1 July 2021.

REGULATOR NEWS

APRA's supervisory priorities

APRA has released its policy and supervision priorities for 2021 including to further enhance the resilience of the financial system.

ASIC governance reforms flagged

Treasurer has advised of the government's intention to implement significant changes to the governance of ASIC.

FASEA exam deadline nears

Members are reminded that 'the exam is a required component of the education standard' and existing Advisers will be required to pass the exam by 31 December 2021. There are only 6 sittings (15 to 20) being offered prior to the deadline.

TAXATION

TPB reminder: practitioner assistance COVID-19 or bushfires

The TPB has issued a reminder to tax practitioners, especially those in Western Australia, that their health and wellbeing is of utmost importance and that support for them is available in terms of registration obligations. The reminder includes information on the types of support available and other useful external links that may be helpful for those in difficult situations.

SBE full expensing anomaly: accounting bodies' submission

The accounting bodies, including Institute of Public Accountants (IPA), have released a joint submission to the Federal Government dealing with an anomaly with the full expensing measures as they apply to the small business entities ("SBEs"). The submission is available on their respective websites.

Broadly speaking, the amendments are intended to provide businesses with flexibility to choose whether to apply the full expensing of depreciating assets measure on an asset-by-asset basis. However, this flexibility is not available to SBEs. By the operation of the law, SBEs are required to fully expense their general small business pool (pool) balances on 30 June 2021 and cannot choose not to write off the pool balance. This is in effect makes the full expensing of pool balances mandatory for SBEs.

The accounting bodies argue that the outcome may be "particularly problematic" for discretionary and unit trusts that are commonly used in the SME sector. For example, full expensing may result in a loss being made by a trust, resulting in the trust having no distributable income. They seek that the law be amended to overcome this unintended outcome.

Changes to STP reporting: instrument registered

The ATO has registered legislative instrument Taxation Administration – Single Touch Payroll – Amounts to be Notified Determination 2021, which will facilitate changes to Single Touch Payroll (STP) reporting requirements as a result of legislative amendments affecting:

- the way employment income is used to determine a person's rate of payment under the social security law (implemented by the Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Act 2020;
- the requirements for calculation and reporting of superannuation guarantee obligations in relation to amounts salary sacrificed to superannuation (implemented by the Treasury Laws Amendment (2018 Measures No 4) Act 2019 and Treasury Laws Amendment (2019 Measures No 3) Act 2020; and
- the voluntary reporting of Child Support Deductions and Child Support Garnishee amounts through STP and the sharing of that information with relevant Commonwealth agencies (implemented by the Treasury Laws Amendment (2020 Measures No 2) Act 2020.

When future changes are made to the approved form, the instrument ensures that amounts which were not previously required will not become amounts that are required until the earlier of either:

- the date after 4 January 2021 that an entity chooses to commence reporting those amounts, or
- 1 January 2022.

This means that entities using STP can defer using the updated form until 1 January 2022. When the instrument was issued as a draft, the proposed date was 1 July 2021. In practical terms, this is a six-month extension to the mandatory STP phase 2 reporting requirements (which requires additional payroll information).

Date of effect: 3 February 2021 with prospective effect only.

Revenue forgone from tax concessions

Treasury has released the Tax Benchmarks and Variations Statement 2020. The Statement provides annual information on Australian Government tax benchmarks and variations, as required by s 12 of the Charter of Budget Honesty Act 1998.

The majority of estimates included in the Statement are provided on a "revenue forgone" basis. Treasury advises that this is consistent with the approach taken by most OECD countries in their equivalent tax benchmarks and variations publications.

Revenue forgone estimates the difference in revenue between the existing and benchmark tax treatments, assuming taxpayer behaviour is the same. A positive variation to the tax benchmark reduces tax payable relative to the benchmark. A negative variation to the tax benchmark increases tax payable relative to the benchmark.

The report is different this year – due to the impact of COVID-19. In what should be a surprise to no-one, COVID-19-related economic parameter and policy changes led to material changes in a number of tax benchmark variations. This year, all variations were assessed to identify those that were impacted by the pandemic, the Government response or in many cases both. The three largest positive benchmark variations and revenue forgone in 2020-21 are listed below, in order. They are largely the same as for 2019-20.

- Main residence exemption – discount component. Revenue forgone $27.5 billion ($23 billion in 2019-20 – also placed first in last year's list).
- Main residence exemption. Revenue forgone $22.5 billion ($19.5 billion in 2019-20 – placed third in last year's list).
- Concessional taxation of superannuation entity earnings. Revenue forgone $19.65 billion ($17.8 billion in 2019-20 – placed fourth in last year's list).

The two largest negative benchmark variations are:

- Tobacco: $1.71 billion;
- Customs duty: $1.61 billion.

CPI: December 2020 index number

The Australian Bureau of Statistics (ABS) has released the CPI index number of 117.2 for the December quarter 2020 (up from 116.2 for the September 2020 quarter). 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 0.9% increase in the CPI for December 2020 was impacted by an increase in tobacco excise (+10.9%) and the introduction, continuation and conclusion of a number of government schemes, including childcare fee subsidies (+37.7%) and home building grants. The most significant price fall was in electricity (-7.5%) after the WA Household Electricity Credit provided households with a one-off $600 credit. Annual inflation was running at 0.9% for the year to the December 2020 quarter.

Penalties: Practice Statements updated

The ATO has reissued the following Practice Statements:

- PS LA 2005/2 - Penalty for failure to keep or retain records; and
- PS LA 2011/2 - Administering penalties for failing to electronically notify or pay GST or PAYG liabilities.

Both Practice Statements have been rewritten using the ATO's current format and style. There are no changes to ATO policy.

FINANCIAL SERVICES

ASIC welcomes High Court finding re Westpac case

ASIC has welcomed the High Court's decision to dismiss Westpac's appeal and confirm that two of its subsidiaries provided "personal advice" (and not simply "general advice") in relation to a superannuation rollover campaign. ASIC Commissioner, Danielle Press, said the High Court decision in Westpac Securities

Administration Limited & Anor v ASIC [2021] HCA 3 upholds the Full Federal Court decision and clarifies the difference between general and personal advice for consumers and financial services providers.

By clarifying the distinction between tailored, quality, personal advice in the customer's interest, and general advice given via a sales campaign, Ms Press said the High Court's judgment will provide clear guidance to those financial institutions that develop campaigns to sell financial products through direct approaches to retail clients. As noted by the High Court, consumers' decisions regarding superannuation accounts are "significant financial decision[s]" and ASIC has a focus to lift standards in this area, Ms Press said.

ASIC said the matter will now return to the Federal Court for a hearing on relief on a date to be advised. At that hearing, among other things, ASIC will seek orders for pecuniary penalties in relation to WSAL and BTFM's conduct.

High Court rules Westpac super campaign was “personal advice”

The High Court has dismissed Westpac's appeal and ruled that it had provided "personal advice" (and not simply "general advice") in relation to a superannuation switching campaign: [Westpac Securities Administration Limited & Anor v ASIC [2021] HCA 3]() (High Court, Kiefel CJ, Bell, Gageler, Keane and Gordon JJ, 3 February 2021).

Westpac Securities Administration Limited (WSAL) and BT Funds Management Limited (BTFM) conducted a telephone sales campaign in 2014 to encourage existing customers to roll over their other super accounts into their Westpac-related accounts. ASIC commenced civil penalty proceedings alleging that Westpac had crossed "an important and clear line" by employing a subtle sales technique of "social proofing" - creating an impression that customers should feel comfortable in accepting the rollover service without giving consideration to their personal circumstances.

The Full Court ([2019] FCAFC 187) held that "personal advice" had been given under s 766B(3)(b) of the Corporations Act 2001 because a reasonable person might expect the callers to have "considered" the objectives of the customers in making the recommendation to accept the rollover service. Consequently, as personal advice had been provided, the Westpac entities had also contravened the more onerous obligations on an adviser who provides personal advice (eg ss 946A, 961B and 961K).

In dismissing Westpac's appeal, the High Court ruled that the financial product advice given by Westpac was personal advice under s 766B(3)(b). Gordon J (with whom the other High Court judges agreed) said s 766B(3)(b) is concerned with the circumstances of the retail client including the form, content and context of the financial product advice. As O'Bryan J observed in the Full Court decision, Gordon J agreed that "where a provider of advice urges the recipient to follow a particular course of action, there is a greater likelihood that a reasonable person might expect the adviser to have considered the recipient's personal circumstances." Gordon J said this observation applies with particular force in the present case, where:

- the course of action concerns a subject matter of significance to most members (being the consolidation of multiple super accounts);
- there is a pre-existing relationship of dependence between the adviser and the member (that of trustee and beneficiary);
- the adviser elicited the member's objectives; and
- once having been told them, the adviser confirmed those personal objectives through the use of social proofing as being common and relevant objectives.

Gordon J concluded that these circumstances would have conveyed to a reasonable person not only that those personal objectives were considered, but that no other matters needed to be taken into account and no other advice was required before the member made a decision to accept the recommendation and roll over their external super accounts.

Financial advice compensation scheme: calls for implementation

Law firm Maurice Blackburn has called on the Government to implement a Compensation Scheme of Last Resort for victims of negligent financial advisers, as recommended by the Banking Royal Commission.

Maurice Blackburn Principal Kim Shaw said crucial recommendations made by the Royal Commission to protect consumers had stalled, with many requiring urgent implementation in 2021. Ms Shaw said it is now two years since the Royal Commission final report was released by Kenneth Hayne in February 2019 but more than half of the recommendations are yet to be acted on in full or have been abandoned altogether.

Ms Shaw said the delay in implementing a Compensation Scheme of Last Resort (CSLR) is a key recommendation that must be acted on. Commissioner Hayne's report made it clear that such a scheme was badly needed to compensate victims of negligent financial advisers who have gone bust. Yet the Federal Government is still to introduce legislation to Parliament for this, Ms Shaw said.

Note that Treasury released a discussion paper on the proposed CSLR in December 2019. Submissions closed on 7 February 2020. In October 2020, the Assistant Minister for Superannuation and Financial Services, Senator Jane Hume, said the Government would introduce legislation by mid-2021 to establish a compensation scheme of last resort.

SUPERANNUATION

Pension transfer balance cap set to increase

The superannuation general transfer balance cap is set to increase from $1.6m to $1.7m on 1 July 2021. This follows the release by the ABS of the All Groups CPI index number of 117.2 for the December 2020 quarter which has triggered the indexation of the general transfer balance cap to $1.7m (up from $1.6m since 2017-18).

The ATO website has confirmed that when the general transfer balance cap is indexed to $1.7m from 1 July 2021, there won't be a single cap that applies to all individuals. Rather, every individual will have their own personal transfer balance cap of between $1.6m and $1.7m, depending on their circumstances.

At the time an individual first commences a retirement phase superannuation income stream, the individual's "personal transfer balance cap" is set to the general transfer balance cap for that financial year. Therefore, individuals need to be aware that a decision to start their first ever retirement phase superannuation income stream before 1 July 2021 will activate a personal transfer balance cap and effectively set it at the general transfer balance cap of $1.6m at that time. If their first income stream is started on or after 1 July 2021 their lifetime personal transfer balance cap will be set at $1.7m.

If an individual had a transfer balance account before 1 July 2021, but has not used the full amount of their transfer balance cap, their cap will be proportionally increased based on the highest ever balance of their transfer balance account. If a person has already used 100% of their available cap space, their personal transfer balance cap will not be subject to further indexation on 1 July 2021. The ATO says individuals can view all their transfer balance cap information via ATO online.

The indexation of the general transfer balance cap also means that the "defined benefit income cap" will increase from $100,000pa to $106,250pa from 1 July 2021 (being the general transfer balance cap divided by 16). The "total superannuation balance" threshold will also increase from $1.6m to $1.7m from 2021-22. This means that individuals with a total superannuation balance of $1.7m or more on 30 June 2021, will have a non-concessional cap of nil from 1 July 2021.

REGULATOR NEWS

APRA’s supervisory priorities

APRA has released its policy and supervision priorities for 2021. Consistent with the strategic objectives detailed in APRA's Corporate Plan, a key focus is to further enhance the resilience and crisis readiness of the financial system. APRA Chair, Wayne Byres, said while the industry demonstrated its resilience in 2020 on the back of substantial public sector support, it was important to continue strengthening the financial system.

APRA's key policy priorities include:

- finalising and implementing a revised prudential standard on remuneration, a key Royal Commission recommendation that remains outstanding;
- strengthening crisis preparedness, including a new prudential standard on resolution and recovery planning;
- updating prudential standards on operational risk, governance and risk management, and consulting with industry on guidance for climate change financial risk;
- completing the ongoing review of the capital framework for authorised deposit-taking institutions to fully implement "unquestionably strong" capital ratios and the Basel III reforms; and

- supporting implementation of the Government's *Your Future, Your Super* reforms to improve member outcomes.

In relation to its supervision activities, APRA said its priorities include:

- increased action on crisis readiness, including recovery and resolution planning and stress testing;
- increased scrutiny of entities' cyber security capabilities;
- embedding the new remuneration standard, conducting a risk culture survey, undertaking a range of GCRA-related supervisory reviews and deep dives, and working to close risk governance issues currently requiring capital overlays; and
- addressing areas of MySuper underperformance, taking enforcement action where appropriate and providing greater transparency through the expansion of the heatmaps to include Choice products.

ASIC governance reforms flagged

The Treasurer has advised of the Government's intention to implement significant changes to the governance of ASIC. The changes will be the result of an independent review commissioned in October 2020 and undertaken by Dr Vivienne Thom AM.

The report was submitted in December 2020 and an abridged version has been released by the Treasurer. The report made recommendations for "significant improvement" to ASIC's internal practices, systems and processes, including internal audit management, quality assurance of legal advising processes and improving the management of and controls for spending relating to Commissioners.

Given the nature of the matters raised, the Government expects ASIC to implement as a priority the recommendations made by Dr Thom concerning its internal risk, management and governance arrangements and to report regularly on its progress.

The current Chair of ASIC, Mr James Shipton, has returned to his role after volunteering to take leave for the period of the review. However, the Treasurer advises that Mr Shipton has agreed to step down from his role and Treasury will immediately commence a search process for a new Chairperson. He will continue in that role until the replacement commences.

FASEA exam deadline nears

‘The exam is a required component of the education standard that all advisers are required to pass to provide personal financial advice to retail clients in respect of retail financial products. The examination has been designed to reflect the competencies required to provide quality personal financial advice to retail clients by assessing the following knowledge areas:

1. Financial Advice Regulatory and Legal requirements (including Corporations Act chapter 7, AML, Privacy and Tax Agents Services Act (TASA) 2009)
2. Financial Advice Construction – suitability of advice aligned to different consumer groups, incorporating consumer behaviour and decision making
3. Applied ethical and professional reasoning and communication – incorporating FASEA Code of Ethics and Code Monitoring Bodies

FASEA provides suggested reading material and practice questions to help you prepare for the exam.

There is more information on the FASEA website on:

- Exam policy
- Preparing for the exam
- Booking and sitting the exam
- FAQs
- Exam Legislative Instrument and Explanatory Statement