TAXATION

ATO data matching: Medicare exemption statement

ATO has registered a notice that it will acquire Medicare Exemption Statement (MES) data from Services Australia from 2021 to 2023 financial years.

Remote witnessing of legal documents: NSW Bill passed

An NSW Bill has been passed to permanently allow documents to be witnessed in real time over an audio-visual link.

Charity sector reform – ACNC regulations finalised

Regulations have been registered to implement several elements of the government's response to the ACNC legislation review.

Remake of Public Ancillary Fund guidelines

Treasury has released the draft guidelines that proposes to remake the Public Ancillary Fund guidelines 2011.

Draft legislation to improve technology neutrality

Treasury has released exposure draft legislation to modernise business communication including electronic communications and execution of documents.

Retrospective amendment to JobKeeper and sovereign entities

Federal Court has held that retrospective amendments to JobKeeper rules applied to deny eight Australian resident companies that were sovereign entities.

Airline car parking fringe benefits: ATO wins appeal

Full Federal Court has held that Virgin Airlines provided car parking fringe benefits to its flight and cabin crew at various airports thus allowing ATO's appeal.

Review of Taxpayers’ Charter: IGTO paper

Inspector-General of Taxation and Taxation Ombudsman has released a brief history of the Taxpayers’ Charter to encourage feedback from stakeholders about improvements.

FINANCIAL SERVICES

AFCA review report released

Treasury has released the report on the review of the Australian Financial Complaints Authority.

ASIC draft guidance on consumer remediation

ASIC has released a consultation paper and draft regulatory guide on how licensees should conduct remediations to return money owed to consumers.

Temporary relief on ASIC levies for financial advisers

A regulation has been registered to temporarily cap the ASIC levies for licensees that provide personal advice to retail clients.

ASIC cost recovery levies for 2020-21

ASIC has registered legislative instruments setting out figures it will use to calculate the cost recovery levies payable by each leviable entity for the 2020-21 financial year.

SUPERANNUATION

SGC PS LA: remission of penalty post-amnesty

ATO has released a PS LA which sets out its revised decision making principles for remitting the additional super guarantee charge.

Use of derivatives by super funds: government review

Government has announced a review into the extent of exposures to derivatives by super funds.

Super calculators and retirement estimates: ASIC consultation

ASIC has released a consultation paper looking to continue the relief for super trustees that provide calculators and retirement estimates to consumers.

APRA standard: insurance within super

APRA has finalised its revision to Prudential Standard SPS 250 concerning insurance within superannuation.

ATO draft determination: SMSF in-house asset exemption

ATO has issued a Draft Determination proposing to extend to 2021-22 its temporary in-house asset exemption for SMSF assets re rental deferrals.

APRA discussion paper: super financial resilience

APRA has issued a discussion paper on strengthening financial resilience in superannuation and seeking feedback.

REGULATOR NEWS

APRA imposes licence conditions on super trustee

APRA has imposed additional licence conditions on a specific super scheme in order to protect the interests of members.

APRA accepts court undertakings by AMP super

APRA has accepted a court enforceable undertaking from AMP Super to rectify government and risk management deficiencies.

TAXATION

ATO data matching: Medicare exemption statement

The ATO has registered a notice that it will acquire Medicare Exemption Statement (MES) data from Services Australia from 2021 to 2023 financial years (inclusive). MES data items to be acquired will include names, dates of birth, relevant addresses etc, as well as entitlement status and approved entitlement period details.

The purpose of this program is to enable the ATO to compare the MES data with claims made in income tax returns to ensure that individuals are correctly claiming exemption from payment of the Medicare levy and Medicare. It is estimated that records relating to approximately 100,000 individuals will be obtained each financial year.

Remote witnessing of legal documents: NSW Bill passed

The Electronic Transactions Amendment (Remote Witnessing) Bill 2021 (NSW) has been passed by both House of NSW Parliament and awaits assent.

Attorney General Mark Speakman said the Bill amends the Electronic Transactions Act 2000 (NSW) to permanently allow documents to be witnessed in real time over an audio-visual link (AVL). Documents that may be witnessed by audio visual link include wills, powers of attorney, deeds and agreements. People outside of NSW may also use the remote witnessing provisions for documents required to be signed under or governed by NSW law.

After a successful trial period of 18 months, the Attorney General said the Bill will make permanent the temporary electronic witnessing measures that are set to expire on 31 December 2021. The Bill also amends the Oaths Act 1900 (NSW) to expand the classes of persons before whom oaths and NSW statutory declarations may be made to align with Commonwealth requirements.

Date of effect: The Bill will commence on assent.

Charity sector reform – ACNC regulations finalised

The Australian Charities and Not-for-profits Commission Amendment (2021 Measures No 3) Regulations 2021, has been registered to implement several elements of the Government response to the ACNC Legislation Review.

The Regulations amend the Australian Charities and Not-for-profits Commission Regulation 2013 to increase from 2021-22 the annual revenue thresholds used for determining whether a registered entity is a small registered entity (less than $0.5m), a medium registered entity (between $0.5m and $3.0m) or a large registered entity ($3.0m or more).

The Regulations also require medium and large registered entities with the ACNC, other than basic religious charities, to include certain related party disclosures in their special purpose annual financial reports in accordance with AASB 124 Related Party Disclosures.

Date of effect:

- Financial reports required for the 2021-22 financial year - (i) the disclosure of compensation to key management personnel provided by the accounting standard AASB 124, Related Party Disclosures; and (ii) revenue thresholds for determining small, medium and large registered entities takes effect.
- Financial reports required for the 2022-23 financial year - any other matters provided by the accounting standard AASB 124, Related Party Disclosures that does not relate to the disclosure of compensation to key management personnel.

Remake of Public Ancillary Fund guidelines

Treasury has released the draft Taxation Administration (Public Ancillary Fund) Guidelines 2022. The draft proposes to remake the Public Ancillary Fund Guidelines 2011, of which sets out the rules for a public ancillary fund to obtain and maintain deductible gift recipient status (DGR), which is scheduled to sunset on 1 April 2022.

The majority of the changes made by the draft guidelines are technical changes to reflect current drafting practice, improve clarity, and to align the public ancillary fund guidelines with the relevant requirements from the Taxation Administration (Private Ancillary Fund) Guidelines 2019. One notable change is that public and private ancillary funds will be able to seek merits review of the Commissioner of Taxation's decision to reject applications for a lower minimum annual distribution rate.

Date of effect: The instrument will commence the day after it is registered on the Federal Register of Legislation.

Submissions are due by 9 December 2021.

Draft legislation to improve technology neutrality

Treasury has released exposure draft legislation to modernise business communications.

Treasury Laws Amendment (Modernising Business Communications) Bill 2021 (the "Bill"):

- expands the scope of the changes made by the Corporations Amendment (Meetings and Documents) Bill 2021 by amending the Corporations Act 2001 in relation to: (i) signing and executing documents electronically; (ii) sending certain documents electronically; and (iii) the introduction of relief for companies from sending documents to members whose contact details are known to be incorrect.
- allow credit providers to communicate with their customers and other persons under the National Consumer Credit Protection Act 2009 (NCCPA) electronically in a greater range of situations; and facilitate the greater use of electronic payments.
- replaces provisions that require or permit notices to be published in newspapers with technology neutral rules. The amendments ensure the relevant notices are still published in manner which result in them being publicly available and reasonably prominent.

Treasury Laws Amendment (Modernising Business Communications) Regulations 2021, which also forms part of the consultation, contains the proposed regulations to supplement measures in the Bill.

Submissions are due by 10 December 2021.

Retrospective amendment to JobKeeper and sovereign entities

The Federal Court has held that retrospective amendments to the JobKeeper Rules applied to deny eight Australian resident companies that were sovereign entities the right to receive JobKeeper payments: Airport Handling Services Australia Pty Ltd v FCT [2021] FCA 1405 (Federal Court, O'Callaghan J, 15 November 2021).

From 30 March 2020, the companies paid wages in anticipation that they would be subsidised under the JobKeeper scheme, initially on the basis of the Prime Minister's statement on 30 March 2020 announcing the scheme and then, from 10 April until 1 May 2020, on the basis of self-assessed eligibility under the JobKeeper Rules (which were registered on 9 April 2020).

As originally made, the JobKeeper Rules allowed sovereign entities that were Australian tax residents to claim JobKeeper payments. However, the rules were amended to exclude such entities by a Legislative Instrument that was registered on 1 May 2020. As a result, the 8 companies were no longer eligible to receive JobKeeper payments. The Amending Instrument commenced on 1 May 2020, but the specific amendment affecting the 8 companies was expressed to apply "in relation to JobKeeper fortnights beginning on or after 30 March 2020".

The eight companies contended they were entitled to the JobKeeper payments for the first two fortnights (30 March-12 April and 13-26 April) as the Amending Instrument operated retrospectively, thereby bringing s 12(2) of the Legislation Act 2003 (Cth) into play. If a legislative instrument operates retrospectively, s 12(2) preserves rights that exist at a time the instrument is registered.

The Federal Court agreed that the Amending Instrument operated retrospectively, but the problem for the eight companies was that they had no accrued rights as at the relevant date (30 March 2020). The Court held that an entity was not entitled to JobKeeper payments unless and until each of the seven separate criteria in s 6 of the JobKeeper Rules had been fulfilled as at that date. That was not the case here, as none of the eight companies had complied with the requirement to give to the ATO information about their entitlement for the relevant JobKeeper fortnight, including details of the relevant employees.

Airline car parking fringe benefits: ATO wins appeal

The Full Federal Court has held that Virgin Airlines provided car parking fringe benefits to its flight and cabin crew at Sydney, Brisbane or Perth airports, thus allowing the ATO's appeal: FCT v Virgin Australia Regional Airlines Pty Ltd [2021] FCAFC 209 (Full Federal Court, Logan, Thawley and Downes JJ, 22 November 2021).

Virgin contracted with owners of car parks adjacent to the Sydney, Brisbane and Perth airports to procure parking spaces for flight and cabin crew. The ATO assessed Virgin to FBT under s 39A(1) of the FBT Assessment Act for car parking fringe benefits provided to flight and cabin crew employees operating from those airports for the 2013 to 2016 FBT years.

At first instance (in Virgin Australia Airlines Pty Ltd v FCT [2021] FCA 523), the Federal Court held that Virgin Airlines did not provide car parking fringe benefits to the flight and cabin crew because: (i) where they operated only one aircraft on a particular day, their primary place of employment" on that day (for the purposes of s 39A(1)) was that aircraft; and (ii) if they operated more than one aircraft on a particular day, they had no "primary place of employment" on that day.

The Full Court has allowed the ATO's appeal, finding that the flight and cabin crew's home base airport was their "primary place of employment" for the purposes of s 39A(1). In coming to this conclusion, the Full Court took into account the relevant enterprise agreements covering the flight and cabin crew. Under those agreements, employees were allocated a "home base" and numerous rights and obligations were defined by reference to the home base, including rosters, rest periods, allowances and car parking entitlements.

Review of Taxpayers' Charter: IGTO paper

The Inspector-General of Taxation and Taxation Ombudsman (IGTO) has released a brief history of the Taxpayers' Charter to serve as a thought leadership document and encourage feedback from stakeholders about how the Charter could be improved.

The ATO has advised the IGTO that it is currently undertaking a review of the Charter which will open to external consultation in February 2022.

FINANCIAL SERVICES

AFCA review report released

Treasury has released the report on the review of the Australian Financial Complaints Authority (AFCA). The review considers submissions received from current and former complainants, financial firms, consumer advocacy organisations, industry bodies and others, as well as detailed data on AFCA's operations.

As an overall, the review found that AFCA has performed well despite a "difficult operating environment and a changing regulatory landscape". While the review found that AFCA has performed well in its establishment phase, it noted that AFCA will need to continue to develop and improve its processes as it consolidates its place in the financial system.

The review also made 14 recommendations, mostly focusing on enhancements to AFCA's transparency towards parties to a complaint, and improvements to decision making processes.

See also the Government's response to the review.

ASIC draft guidance on consumer remediation

ASIC has released a consultation paper and draft regulatory guide on how licensees should conduct remediations to return money owed to consumers. ASIC said it is currently monitoring 64 remediations in the financial services industry that will see the return of $5.4bn to 5.6 million consumers upon finalisation.

Temporary relief on ASIC levies for financial advisers

The ASIC Supervisory Cost Recovery Levy Amendment (Levies Relief) Regulations 2021 has been registered to temporarily cap the ASIC levies for licensees that provide personal advice to retail clients. The Regulations cap the ASIC levies charged for personal advice to retail clients on relevant financial product at $1,142 per adviser for 2020-21 and 2021-22. The measure was previously announced on 30 August 2021.

ASIC cost recovery levies for 2020-21

ASIC has registered the following legislative instruments setting out the figures it will use to calculate the cost recovery levies payable by each leviable entity for the 2020-21 financial year:

- ASIC (Supervisory Cost Recovery Levy - Annual Determination) Instrument 2021/0936
- ASIC (Supervisory Cost Recovery Levy - Regulatory Costs) Instrument 2021/0938

ASIC will use these instruments to prepare the levy invoices which will be sent out in January 2022.

SUPERANNUATION

SGC PS LA: remission of penalty post-amnesty

Practice Statement PS LA 2021/3 sets out the ATO's revised decision-making principles for remitting the additional superannuation guarantee charge.

An additional penalty of 200% of the SGC amount is automatically imposed if an employer fails to lodge an SG statement by the due date or otherwise fails to provide information relevant to assessing the employer's liability to pay the SGC for a quarter. The ATO has the discretion to remit the penalty, in full or in part, during the original assessment stage or through an objection decision.

PS LA 2021/3 sets out a four-step penalty remission process, which ATO officers must consider in making a remission decision. The ATO says that the revised four-step process is aimed at recognising the "full range of compliance behaviours" in SG matters, and differentiates between good compliers and repeat offenders. For example, the remission amount is higher (30-40%) if the employer attempted to comply with their SG obligations by making a late payment prior to being contacted by the ATO. However, penalty relief would not be appropriate if multiple (over four) SG statements are lodged late.

Date of effect: 25 November 2021.

PS LA 2021/3 replaces PS LA 2020/4 and finalises Draft PS LA 2021/D1.

Use of derivatives by super funds: government review

The Government has asked the Council of Financial Regulators to prepare a report on the extent of exposures to derivatives by super funds. In announcing the finalisation of the portfolio holdings disclosure (PHD) regulations, Mr Frydenberg said it became apparent during consultation that some super funds have large exposures to derivatives.

Given that super funds are systemically important to the financial system, the Treasurer has asked the Council of Financial Regulators (CFR) to prepare a report on the extent and nature of the use of derivatives by super funds, drawing upon the information gathering powers of APRA and input across the CFR (including the Reserve Bank).

Super calculators and retirement estimates: ASIC consultation

ASIC has released Consultation Paper CP 351 Superannuation forecasts: Update to superannuation calculators and estimates relief. The paper is looking to continue the relief for superannuation trustees that provide superannuation calculators and retirement estimates to consumers from certain licensing and disclosure requirements associated with providing personal financial advice.

ASIC intends to publish the updated instruments and guidance before the existing relief in ASIC Class Order [CO 11/1227] sunsets on 1 April 2022.

Submissions are due by 28 January 2022.

APRA standard: insurance within super

APRA has finalised its revisions to Prudential Standard SPS 250 (Insurance in Superannuation) and the accompanying Prudential Practice Guide (SPG 250). These revisions fulfil recommendations 4.14 and 4.15 of the Banking Royal Commission.

SPS 250 will require super trustees to strengthen arrangements to protect members from potential adverse outcomes caused by conflicted life insurance arrangements.

This will include robust decision-making in the negotiation and ongoing review of insurance arrangements. Trustees will also need to obtain independent certification of related party insurance arrangements before entering into, or materially altering, an insurance arrangement, and on a triennial basis.

Date of effect: The enhancements to SPS 250 will commence on 1 July 2022.

ATO draft determination: SMSF in-house asset exemption

The ATO has issued a Draft Determination (SPR 2021/D3) proposing to extend to 2021-22 its temporary in-house asset exemption for SMSF assets that are attributable to the deferral of rental income due to COVID-19.

Draft Superannuation Industry (Supervision) Self-Managed Superannuation Funds (COVID-19 Rental Income Deferrals - In-House Asset Exclusion) Determination 2021 proposes to ensure that an SMSF asset will not be considered an in-house asset where rent payable by a related party under a lease is deferred due to COVID-19 during the 2021-22 income year. The exemption will only apply where the landlord has "acted in good faith" and there is documentation reflecting arm's length terms.

Comments are due by 17 December 2021.

APRA discussion paper: super financial resilience

APRA has issued a discussion paper on strengthening financial resilience in superannuation. APRA is seeking feedback from super trustees on the use of the operational risk financial requirement (ORFR), reserving practices, and protections afforded to trustees via insurance, and how these might need to adapt over time.

Submissions are due by 11 March 2022.

REGULATOR NEWS

APRA imposes licence conditions on super trustee

APRA has imposed additional licence conditions on Energy Industries Superannuation Pty Ltd, the trustee of the Energy Industries Superannuation Scheme (EISS), in order to protect the best financial interests of EISS's members. APRA said the conditions seek to address concerns arising from APRA's investigation into expenditure and governance matters at EISS, as well as "persistent underperformance" which culminated in EISS's MySuper product failing the first annual performance test.

The terms of the new licence conditions require EISS to implement better expenditure processes and cease sponsorship arrangements that are not in the members' best interests. EISS is also required to implement a strategy to merge with a larger, better performing fund by 30 June 2022.

APRA accepts court undertakings by AMP super

APRA has accepted a court enforceable undertaking (CEU) from AMP Superannuation Limited and N.M. Superannuation Proprietary Limited (collectively AMP Super) to rectify governance and risk management deficiencies. This follows a lengthy investigation into past conduct that APRA believes led to a number of potential breaches of the SIS Act.

APRA Member Margaret Cole said AMP Super has committed to fix promptly remaining legacy issues that have existed within its superannuation business and ensure affected members are appropriately remediated. AMP Super will also continue to enhance its governance controls, risk management and processes for acting in members' best interests.