SUSTAINABILITY

Climate-related financial disclosures member survey

In December, the government released a consultation paper about the release of mandatory climate-related financial disclosures. As the IPA prepares its submission, we are consulting members to consider your views in our response to Treasury.

ESG Insights: 10 things that should be top of mind in 2023

The World Business Council for Sustainable Development has shared 10 likely ESG concerns to continue to dominate business discussions in 2023. These range from the greenwashing and the rise of litigation, to ESG beyond climate change and the need for credible data.

IPA Resource: Sustainability For Accountants

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TAXATION

Administration of four DGR categories to be transferred to the ATO

Treasury has issued a exposure draft bill which proposes to transfer administration of four DGR categories to the ATO.

Small business restructurings: ASIC report released

ASIC has released a report on small business restructurings for the period 1 January 2021 to 30 June 2022.

Non-arm's length expense rules for superannuation funds

The government has released a consultation paper considering options to amend the non-arm's length income (NALI) provisions which apply to superannuation funds. The government appreciates some superannuation industry stakeholders have raised the potential for disproportionately severe outcomes for breaches relating to general expenses. Members are encouraged to send their feedback to tony.greco@publicaccountants.org.au by **10 February 2023**.

SUPERANNUATION

Child sexual abuse victims to access offenders' superannuation: Govt proposal paper

Government has released a discussion paper on draft proposals to allow victims of child sexual abuse to access the super of their offender for unpaid compensation.

REGULATOR NEWS

ASIC Commissioner due to depart

ASIC has reported that Sean Hughes will end his terms as Commissioner on 3 February.

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Access the survey here.

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The full list can be viewed here.

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Please feel free to contact matthew.cavicchia@publicaccountants.org.au with any sustainability-related enquiries.

TAXATION

Administration of four DGR categories to be transferred to the ATO

Treasury has issued the exposure draft of the Treasury Laws Amendment (Measures for Consultation) Bill 2023: Deductible Gift Recipient Registers Reform.

The draft Bill proposes to transfer administration of the following four DGR categories to the ATO:

- Environmental Organisations -- currently administered by the Department of Climate Change, Energy, the Environment and Water;
- Harm Prevention Charities -- currently administered by the Department of Social Services;
- Cultural Organisations -- currently administered by the Office for the Arts in the Department of Infrastructure, Transport, Regional Development, Communications and the Arts; and
- Overseas Aid Organisations -- currently administered by the Department of Foreign Affairs and Trade.

The draft Bill proposes to amend the ITAA 1997 to repeal the powers of the Minister and departments that facilitate the ministerial approval and registration process of the DGRs to facilitate the transfer of responsibility to the ATO.

The amendments do not change the existing rules as they affect entities seeking endorsement as a DGR, merely how the Government administers the DGR categories.

The provisions relating to maintenance of departmental registers by certain departmental secretaries will also be repealed as they will no longer be required.

Transitional provisions will apply to ensure that the ATO can assess applications currently under consideration for entry onto a register for endorsement as a DGR. Current DGRs will continue to be endorsed so long as they meet the existing eligibility criteria.

Date of effect: The amendments will commence on the first calendar quarter after the Royal Assent and the measures are proposed to apply six months after registration to facilitate the machinery of government changes necessary to administer the changes.

Submissions are due by 19 February 2023.

Small business restructurings: ASIC report released

ASIC has released a report on small business restructurings (REP 756) for the period 1 January 2021 to 30 June 2022. The new simplified debt restructuring process for eligible small businesses, and a new type of registered liquidator, were introduced on 1 January 2021. The report outlines the findings from ASIC's review of the data for all 82 small business restructuring practitioner appointments which commenced in the review period.

ASIC said creditors approved 92% of the proposed restructuring plans. Where a restructuring plan was accepted, 65% were effectuated, while 33% were ongoing. The ATO was a creditor in 89% of companies which entered a restructuring plan and was a major creditor in 79% of those companies.

Non-arm’s length expense rules for superannuation funds

The government has released a consultation paper considering options to amend the non-arm’s length income (NALI) provisions which apply to superannuation funds

the government appreciates some superannuation industry stakeholders have raised the potential for disproportionately severe outcomes for breaches relating to general expenses.

Treasury has developed potential policy changes to the NALI provisions, where they relate to general expenses which have a sufficient nexus to *all* ordinary and statutory income derived by the fund.

Potential amendments to the NALI provisions for superannuation funds could be adopted as follows:

- Self-managed superannuation funds and small Australian Prudential Regulation Authority (APRA) funds would be subject to a factor-based approach which would set an upper limit on the amount of fund income taxable as NALI due to a general expenses breach. The maximum amount of fund income taxable at the highest marginal rate would be 5 times the level of the general expenditure breach, calculated as the difference between the amount that would have been charged as an arm’s length expense and the amount that was actually charged to the fund. Where the product of 5 times the breach is greater than all fund income, all fund income will be taxed at the highest marginal rate.
- Large APRA-regulated funds would be exempted from the NALI provisions for general expenses.

The potential approach outlined in the consultation paper seeks to balance maintaining the integrity of the tax system with providing a greater level of certainty for funds that the consequences of any breaches relating to general expenses would be proportionate to the magnitude of that breach and ensuring the rules are appropriately focussed.

The consultation process and any comments received in relation to the potential amendments outlined in this paper will help inform the development of future policy regarding the NALI provisions.

Members are encouraged to send their feedback to tony.greco@publicaccountants.org.au by **10 February 2023**.

SUPERANNUATION

Child sexual abuse victims to access offenders' superannuation: Govt proposal paper

The Government has released a discussion paper on 2 draft proposals to allow victims and survivors of child sexual abuse to access the superannuation of their offender for unpaid compensation orders. The proposals seek to prevent convicted child sexual abuse offenders from hiding their assets in superannuation to avoid paying court-ordered compensation.

The paper notes that victims or survivors of child sexual abuse can currently seek compensation via:

- State and Territory compensation schemes (where the State pays the compensation);
- compensation or reparation orders as part of criminal proceedings; or
- civil action for damages from the alleged offender.

However, in each of the avenues above, the offender's super assets are not available to the victim or survivor. Consequently, offenders subject to criminal or civil proceedings relating to child sexual abuse may be incentivised to voluntarily make large personal contributions to their (or their spouse's) super to shield assets from potential compensation orders. Such contributions are referred to as "additional" contributions in the discussion paper.

The Assistant Treasurer, Stephen Jones, said the Government will look to introduce legislation into parliament as a matter of priority following consultation. *(Source: Assistant Treasurer's media release, 19 January 2023.)*

Proposal 1: Accessing "additional" super contributions by offenders

The first proposal would allow victims and survivors to access "additional" contributions from the superannuation of the offender (or their spouse) to satisfy an unpaid compensation order.

"Additional" contributions are proposed to include all personal contributions (but not Super Guarantee contributions) made in a deemed period (either 6 or 12 months) before the day the offender was charged, to the day the court grants access to the offender's super. However, the measure will not apply to defined benefit schemes.

A payment from a spouse's super would only be permitted where that person met the definition of "spouse" in s 10 of the SIS Act at the time the contribution was made, and the offender transferred money to the spouse's account during the deeming period.

Tax-free treatment of released superannuation

Released amounts of super are proposed to be non-assessable non-exempt (NANE) income when paid to the victim or survivor. The same tax-free treatment would apply to the offender.

The proposal provides for a court-ordered early release of super mechanism facilitated by the ATO. Upon receipt of the court order, the ATO would issue one or more release authorities to the relevant super fund(s) to facilitate the release of the super of the offender (or their spouse).

Importantly, a release from the offender's super will not be considered an "unwinding" of a contribution. Rather, the aim is to enable an amount equivalent to the deemed "additional" contributions to be released from the offender's super to allow compensation to be paid.

Personal contributions that are taxed at the fund level will contribute on a post-tax basis. That is, where an offender has made a personal contribution that is later deemed "additional", and that personal contribution was taxed at the fund level (eg by virtue of a deduction being claimed) only the post-tax value of the "additional" contributions would count toward the sum the victim or survivor could be paid from the offender's super.

Child sexual abuse offences

The proposed superannuation release and compensation procedures would apply to compensation orders awarded to the victim or survivor:

- by a criminal court as part of sentencing or post-conviction; and
- in a civil proceeding where a criminal conviction or recognisance release order has also been handed down for the same conduct.

The requirement for a criminal conviction or recognisance release order reflects the position that the conduct should have been proven to the criminal standard - beyond reasonable doubt. [***Thomson Reuters note:*** The paper does not address the added complexity of what happens if a conviction is subsequently overturned on appeal.]

The provisions are proposed to apply to State, Territory and Commonwealth offences covered by the definition of "child sexual abuse offence" in s 3 of the Criminal Code Act 1995 (Cth), and the sexual slavery and trafficking offences in Divs 270 and 271 of the Criminal Code. This approach seeks to recognise the different classes of offences between jurisdictions and is preferred to alternatives that reference maximum custodial sentence thresholds or manually listing offences.

Bankruptcy proceedings

The paper also considers potential changes to the existing Bankruptcy proceedings that enable the "claw-back" of superannuation contributions made to avoid compensation orders and other creditors. For example, an amendment to the Bankruptcy Act could allow victims and survivors to take part in bankruptcy proceedings and be paid a dividend while continuing to be able to pursue the balance of the compensation debt against the offender after their discharge from bankruptcy. If so, the super fund trustee would be prohibited from complying with release orders made by a court until the offender's parallel bankruptcy is finalised.

Once the offender's bankruptcy ends, the proposed amendments would allow the victim's compensation debt to survive.

Family law super splitting

The paper envisages that concurrent family law property settlement proceedings (which often involve super assets) should always be completed prior to a victim's application for super access being heard by another court. As such, super funds subject to family law proceedings would be excluded from compensatory proceedings until the relevant family law matter was finalised. The paper also states that victims and survivors would not be eligible to be paid from an offender's former spouse's account after the finalisation of family law property proceedings, even if that account included contributions that were later deemed to be "additional".

Date of effect

The proposed measures are expected to apply retrospectively, both in terms of the historical offences and the "additional" personal superannuation contributions. However, the full extent of the retrospectivity is yet to be determined and subject to consultation.

Proposal 2: Requesting information about offender's superannuation

The second proposal aims to improve transparency by allowing victims and survivors to submit a superannuation information request to the relevant court to ascertain the value of the "additional" contributions made by an offender. The court would then submit a request to the ATO seeking the relevant super information in a manner similar to the mechanism for family law property proceedings (see 2022 WTB 15 [339]).

Any feedback can be sent to tony.greco@publicaccountants.org.au preferably by 5 February 2023.

REGULATOR NEWS

ASIC Commissioner due to depart

ASIC has reported that Sean Hughes will end his term as Commissioner on 3 February 2023, after accepting a role in the commercial sector. Mr Hughes was due to end his five-year term on 1 December 2023.

ASIC Chair Joe Longo said the appointment of an ASIC commissioner is determined by the Treasurer. ASIC said it will continue to work via a whole-of-ASIC approach, with current members Chair Longo, Deputy Chairs Sarah Court and Karen Chester, and Commissioner Danielle Press, working with the Chief Operating Officer and the Executive Team.