TAXATION

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Australia-Iceland DTA treaty enters into force
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Measures (No 1) Bill 2023 passes Parliament with amendments
The Treasury Laws Amendment (2023 Measures No 1) Bill 2023 has been passed by the Senate with 16 Government and two Greens amendments.

Tax adviser regulatory framework: legislation
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GST

GST compression socks
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FINANCIAL SERVICES

Financial advice registration requirement extended
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Quality of advice review: exposure draft legislation
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SUPERANNUATION

ATO recoups super entitlements
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REGULATOR NEWS

ASIC Newsroom

Updates from ASIC in the past week including media releases, news, articles and speeches.

TAXATION

Interim DIS on Bendel

The ATO has released an interim decision impact statement (DIS) on the AAT's decision in Bendel and FCT [2023] AATA 3074.
The AAT decided in Bendel that a corporate beneficiary of a discretionary trust did not make a loan, within the meaning of s 109D(3) of the ITAA 1936, to the trust on account of its UPEs with the trust. The decision is on appeal and the interim DIS effectively states that, until the appeal process is finalised, the ATO will ignore the AAT's decision and administer the law on the basis of its views in Determination TD 2022/11.

In the meantime, however, the ATO will not finalise objection decisions (unless required to do so) in relation to objections to past year assessments (for which no settlement was reached) where the decision turns on whether or not a UPE was a s 109D(3) loan.

Australia-Iceland DTA treaty enters into force

The Assistant Minister for Competition, Charities and Treasury, Dr Andrew Leigh, announced that the new Australia-Iceland treaty has entered into force.

The DTA, signed on 12 October 2022 is the first to be fully implemented as part of the Government's plan to enter 12 new tax treaties.

The DTA's rates will apply in Australia as follows:

- for withholding taxes on relevant Australian income - 1 January 2024;
- for FBT - on benefits provided from 1 April 2024; and
- for all other taxes on income - from 1 July 2024.

The treaty will take effect from 1 January 2024 in Iceland.

Measures (No 1) Bill 2023 passes Parliament with amendments

The Treasury Laws Amendment (2023 Measures No 1) Bill 2023 has been passed by the Senate with 16 Government and 2 Greens amendments. The Bill returned to the House of Reps and the House agreed to the amendments, ie it now awaits assent.

Broadly, the Bill contains changes to the off-market share buy-back rules, the treatment of franked distributions funded by capital raisings, as well as changes to the Tax Practitioners Board (TPB). The Government's 16 amendments to the Bill include:

- ***Sch 5: Franked distributions funded by capital raisings*** – a distribution will be considered funded by capital raising if that capital raising funds at least a substantial part of the distribution (rather than any part of the distribution). It will also be necessary to show that the entity undertook the capital raising with a purpose to fund at least a "substantial" part of the relevant distribution. The meaning of "substantial" will depend on the facts and circumstance of each distribution (eg the proportion of the distribution funded by the capital raising). This proportion does not need to be a majority but must be more than a small or minor part of the distribution. Only the portion of the distribution that is funded by the capital raising will be unfrankable. Where an equity issue is in response to a regulatory requirement, directive or recommendation (eg by APRA), the amendments provide that the distribution will not be unfrankable merely because of the amendments in Sch 5. **Date of effect**: Sch 5 will now apply from the day after Royal Assent.
- ***Sch 4: Off-market share buy-backs*** - the Bill, as amended, will apply to transactions announced on or after 18 November 2022 (being the day after the exposure draft legislation was released for consultation) instead of 7:30pm on 25 October 2022 (ie Budget night).
- ***Sch 3: TPB*** – the establishment of a Special Account for the TPB, as recommended by the TPB Review, will commence from 1 July 2024 (instead of 1 July 2023).

The various other Government corrections to the Bill are explained in the Supplementary Explanatory Memorandum.

The two amendments by the Greens (agreed to by the Senate) will ban any senior executives or partners currently working at a tax firm with more than 100 employees, or with ongoing financial links to large tax firms, from being members of the TPB. The amendments will also require tax agents not only to report to the TPB if they've breached the code of professional conduct but also to report if another agent has breached the code. Greens Senator Barbara Pocock said this amendment seeks to prevent partners protecting other partners and turning a blind eye to unethical behaviour.

Tax adviser regulatory framework: legislation

The Government has introduced the Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023. The Bill is part of the Government's broad intention to implement reforms to address the "severe shortcomings" in regulatory frameworks relating to "tax adviser misconduct".

Tax promoter penalties

The proposed changes to the tax promoter penalty regime are contained in a package under the banner *PwC Response – promoter penalty law reform*. The changes include the following.

- ***Tax promoter penalties – broadened scope*** – the Government will make it easier for the ATO to apply the promoter penalty laws by broadening the scope of important definitions, including "promoter", "benefits" from the promotion of a scheme (rather than the current "consideration" requirement); expanding the meaning of "tax exploitation scheme" to cover schemes that breach, or would breach, the multinational anti-avoidance law or diverted profit tax rules; and expanding the coverage of the rules prohibiting the misrepresentation of a tax scheme's conformance with an ATO product ruling, whether the scheme is implemented or not, to all types of ATO rulings – private, public and oral rulings.
- ***Increased penalties and extension to SGEs*** – the Government will significantly increase the maximum civil penalties for promoters of tax exploitation schemes, consistent with the penalties in the Corporations Act 2001.
- ***More time for ATO*** – the Government will extend the time the ATO can commence civil penalty proceedings related to the promotion of tax exploitation schemes or schemes not conforming to ATO rulings. Generally, the ATO can commence proceedings up to four years from the last time the conduct was engaged in – this will increase to six years.

Increased regulatory powers

Proposed changes include the following.

- ***Secrecy laws*** – the Government will amend the secrecy provisions that apply to the ATO and TPB to enable them to disclose suspected breaches in confidence against government agencies to the Treasury. In addition, the Government will amend the secrecy provisions that apply to the ATO and TPB to enable the regulators to disclose suspected misconduct of professionals to their professional associations or professional disciplinary bodies. The changes to the secrecy law are also subject to a separate consultation process on draft legislation under the banner *PwC response – information sharing*.
- ***TPB investigations and Register*** – currently, the TPB is required to complete formal investigations within six months. Legislation will extend the timeframe the TPB has to complete investigations into tax practitioners suspected of misconduct and breaching registration requirements to 24 months. In addition,

the Government aims to lift the functionality and utility of the TPB Register and enhance information about tax agent misconduct, improving transparency of the regulation of tax advisers. There is a separate consultation package on this, under the banner *PwC response – Tax Practitioner Board reform*.

- ***Whistleblower reforms*** – the Government will extend the tax whistleblower protections to eligible whistleblowers who wish to disclose alleged misconduct to the TPB. The Government will also authorise the ATO and the TPB to share information they have received from whistleblowers with the Australian Charities and Not-for-profits Commission ("ACNC"), as well as each other, where the information received relates to their regulatory responsibilities. The changes to the whistleblower laws have a separate consultation process under the banner *PwC response – extending tax whistleblower protections*.

The measures were released in draft form in September 2023. The Bill also contains measures to make changes to the petroleum resource rent tax deductions cap. The commencement dates vary.

GST

GST compression socks

The ATO has withdrawn ATO ID 2003/953 on the GST treatment of multi-purpose compression socks. This Interpretative Decision provided that the supply of these socks by a supplier of medical aids and appliances is GST-free because the socks come within the scope of compression garments in the GST Regulations, are specifically designed for people with an illness or disability, and are not widely used by people without an illness or disability.

The ATO says that the ID has been withdrawn because its Reason for Decision "requires clarification and may be misleading". In particular, whether compression socks are specifically designed for people with an illness or disability and are not widely used by other people is to be determined by the facts in each case. The current ATO position is stated in its GST and health guide.

FINANCIAL SERVICES

Financial advice registration requirement extended

ASIC has registered the ASIC Corporations (Amendment) Instrument 2023/730 (the "Amending Instrument"). The Amending Instrument puts in place further interim measures to delay the requirement (the "Registration Requirement") for "relevant providers" to be registered with ASIC as a precondition for providing personal advice ("Financial Advice") to retail clients about relevant financial products.

By way of background, the requirement for relevant providers to be registered was introduced by the Financial Sector Reform (Hayne Royal Commission Response --

Better Advice) Act 2021 ("Better Advice Act"). The registration provisions, as inserted by the Better Advice Act, staggered commencement dates so that Australian financial services ("AFS") licensees and relevant providers could continue providing Financial Advice without being registered up to 1 January 2023. Subsequent steps were taken by the Government to delay the Registration Requirement to 1 October 2023.

The Amending Instrument provides for a further delay to the Registration Requirement to 1 February 2024 in order to allow:

- parliament to further consider the Treasury Laws Amendment (2023 Measures No. 1) Bill 2023 ("TLAB 1"), which gives ASIC the power to use assisted decision-making systems when processing registration applications and facilitate multiple registration of relevant providers;
- ASIC to implement TLAB 1 if TLAB 1 is enacted;
- industry to understand its rights and obligations concerning the Registration Requirement; and
- AFS licensees to register their relevant providers with ASIC prior to the Registration Requirement commencing.

Quality of advice review: exposure draft legislation

The Government has released exposure draft legislation for consultation as part of the first tranche of its Delivering Better Financial Outcomes reform package. The package aims to cut red tape adding to the cost of financial advice with no benefit to consumers.

Responding to half of the recommendations of the Quality of Advice Review, the draft legislation proposes amendments to the SIS Act, ITAA 1997 and Corporations Act 2001 covering:

- Recommendation 7 - Clarifying the legal basis for superannuation trustees paying a member's financial advice fees from their superannuation account, and associated tax consequences.
- Recommendation 8 - Consolidating different ongoing fee consent documents into one simplified document.
- Recommendation 10 - Allowing more flexibility in how financial services guides (FSGs) are provided.
- Recommendations 13.1 & 13.3 - Clarifying that monetary or non monetary benefits given by a client are not conflicted remuneration, along with the removal of consequential exceptions.
- Recommendation 13.4 & 13.5 - removing the exception to conflicted remuneration rules for: (i) the issue of financial products where advice has not been provided in the previous 12 months; and (ii) agents or employees of ADIs.
- Recommendation 13.2 - introducing a specific exception to the conflicted remuneration provisions that permits a superannuation fund trustee to pay a fee for personal advice where the client requests the trustee to pay the fee from their superannuation account.

- Recommendations 13.7 to 13.9 - Strengthening transparency and protections for consumers by introducing written consent requirements for consumers before they purchase an insurance product that will result in a commission payment.

The Assistant Treasurer and Minister for Financial Services, Stephen Jones, said the Government will announce its final position on the outstanding recommendations of the Quality of Advice Review before the end of 2023, with further legislation to be released in 2024.

Submissions are due by 6 December 2023.

SUPERANNUATION

ATO recoups super entitlements

The ATO has reported that it recouped and distributed $683.8m of superannuation entitlements to funds and individuals during the 2022-23 financial year. ATO Deputy Commissioner Emma Rosenzweig said this included SG amounts collected for liabilities raised arising from employee complaints, ATO initiated compliance activities and employer voluntary disclosures. Overall, more than $1.13bn in super guarantee charge (SGC) liabilities were raised through SG disclosures and ATO compliance action during 2022-23.

The ATO said it completed around 14,000 SG audit cases and issued around 134,000 reminders and prompts. These actions raised over $685m in liabilities, including penalties. Additionally, 56,000 employers voluntarily disclosed $445m in liabilities, demonstrating an increased awareness and review of their obligations, Ms Rosenzweig said.

Superannuation objective compatibility statement

The Government has introduced the Superannuation (Objective) Bill 2023 which will "enshrine" the objective of superannuation in legislation, requiring policy-makers to demonstrate how any future changes to superannuation law are consistent with the legislated objective of superannuation (including a statement of compatibility with the objective of superannuation that must be prepared for a Bill or regulation that relates to superannuation, unless specifically exempt).

The objective is stated to be "to preserve savings to deliver income for a dignified retirement, alongside government support, in an equitable and sustainable way".

The Bill was released in draft form in September 2023. There was an accompanying draft Bill released at that time – the Superannuation (Objective) (Consequential and Transitional Provisions) Bill 2023 – which has not as yet been introduced into Parliament.

The measures in the Bill will commence 28 days following assent.

REGULATOR NEWS

ASIC news

ASIC has released the following updates in its Newsroom section:

- 17 November 2023 - NEWS ITEM ASIC proposes to extend parent entity financial reporting and auditor independence legislative instruments - ASIC proposes to extend the operation of two legislative instruments, ASIC Corporations (Auditor Independence) Instrument 2021/75 and ASIC Corporations (Parent Entity Financial Statements) Instrument 2021/195, which are due to expire in April 2024, for a further five years. It has assessed that these instruments are operating effectively and efficiently, and continue to form a necessary and useful part of the legislative framework.

- 17 November 2023 - MEDIA RELEASE 23-306MR ASIC consults on ABA's proposed changes to the banking code - ASIC has opened its consultation on the Australian Banking Association's (ABA) proposed changes to its Banking Code of Practice (the Code). The Code contains a set of contractually enforceable standards that customers and small business can expect subscribing banks to uphold. The ABA plans to apply for ASIC approval of the revised Code. This is the first time that ASIC has undertaken a public consultation before making a decision on approving the Code. ASIC is seeking to ensure the Code continues to provide real benefits to consumers, small businesses, and subscribing banks before deciding whether to grant final approval. The consultation will help inform ASIC's decision on whether to approve the proposed Code, and is focused on obtaining feedback and insights on key issues.

- 16 November 2023 - NEWS ITEM ASIC Chair and AFSA Chief Executive sign refreshed memorandum of understanding - ASIC Chair Joe Longo and the Australian Financial Security Authority (AFSA) Chief Executive Tim Beresford signed a refreshed Memorandum of Understanding (MoU), following the last update in 2014. The updated MoU provides a framework for continued cooperation through the facilitation of liaison, assistance and exchange of information between ASIC and AFSA and sets out how the agencies will work together to deliver on strategic priorities and government objectives. The MoU also aligns with reforms to the Corporations Act 2001 and Bankruptcy Act 1966 (regulated by ASIC and APRA respectively) stating ASIC and AFSA are to work together in relation to individuals who are both a registered liquidator and registered trustee, and acts as a master MoU for inter-agency activities including AFSA giving ASIC access to the Personal Property Securities Register.

- [16 November 2023 - MEDIA RELEASE 23-305MR ASIC suspends AFS licence of First City Corporate Advisory Services] - ASIC has suspended the Australian financial services (AFS) licence of First City Corporate Advisory Services Pty Limited (First City) for failing to lodge its annual financial statements and audit reports. The suspension, in place until 27 March 2024, provides First City with an opportunity to meet its outstanding compliance obligations. If First City has not complied with its outstanding obligations by the end of the suspension period, ASIC will consider cancelling its AFS licence. The suspension took effect on 3 October 2023.

- [16 November 2023 - MEDIA RELEASE 23-304MR ASIC suspends AFS licence of JB Markets] - ASIC has suspended the Australian financial services (AFS) licence of JB Markets Pty Ltd (JB Markets) until 30 April 2024 for failing to: comply with the financial requirements of its AFS licence; and have adequate resources to provide the financial services covered by the licence and to carry out supervisory arrangements. The licence suspension means that JB Markets (and its representatives) cannot provide financial services unless it is for the purpose of terminating existing arrangements with clients. The licence suspension includes a provision that requires JB Markets to continue as a member of the Australian Financial Complaints Authority, with arrangements for compensating retail clients to continue including the holding of professional indemnity insurance cover. JB Markets may apply to the Administrative Appeals Tribunal for a review of our decision. The suspension took effect on 8 November 2023.

- [15 November 2023 - MEDIA RELEASE 23-303MR ASIC targets misconduct in superannuation sector] - ASIC has warned that it is planning enforcement action in the superannuation sector over the coming months and extending into 2024 as part of its focus on member outcomes. This follows ASIC's release of its July to September 2023 enforcement and regulatory update ([REP 777]), highlighting progress on ASIC's enforcement priorities including greenwashing, member services failures in the super sector and misleading conduct.

- [14 November 2023 - MEDIA RELEASE 23-302MR Gen Z more concerned about finances than any generation in Australia] - New research shows Gen Zs are feeling financially stressed, with high levels of debt including Buy Now Pay Later use. New nationwide research released by ASIC’s Moneysmart program today shows for seven in ten (68%) Gen Zs, finances are a major cause of concern, more than any other age group (57% of non-Gen Zs). Faced with rising cost of living, 82% of Aussie Gen Zs, representing Aussies aged 18 to 26 years old, feel financially stressed, but are twice as likely as other generations to want to better manage their finances as a response. Encouragingly, nine in ten Gen Zs have a strong desire and intent to boost their money skills and financial confidence, despite facing several barriers. Almost half (49%) of Gen Zs who aren’t financially confident say feeling overwhelmed is the biggest barrier to becoming more confident with money, followed closely by not knowing where to start (42%). The research also revealed Gen Zs want to learn things in the shortest time possible (77%) and are twice as likely as other generations to turn to social media for information and guidance about managing their finances (56% compared to 23% of non-Gen Zs).

- 13 November 2023 - MEDIA RELEASE 23-301MR AAT amends ASIC banning order made against Mark Babbage - On 25 October 2023, the Administrative Appeals Tribunal (AAT) varied ASIC's decision to ban Mark Babbage from engaging in credit activities and providing financial services. The AAT upheld the scope of ASIC's original ban, but varied the banning period from ten years to six years. ASIC had previously banned Mark Babbage for ten years following findings that he lacked the honesty and integrity to participate in the financial services and credit industries. Mr Babbage was convicted of three charges relating to a failure to comply with a direction under the *Emergency Management Act 2005 and* one charge of gaining a benefit by fraud in contravention of the Criminal Code WA on 13 October 2021 in the Magistrates Court of Western Australia (22-077MR). The AAT's Senior Member O'Donovan noted, "given the nature of the dishonesty which included forging bank statements and misleading public officials, the applicant's lack of insight and the need to emphasise to participants in the financial and credit industries the fundamental importance of honesty in the work that they do, a significant ban which excludes the applicant from participation in the industry is appropriate".

- 13 November 2023 - MEDIA RELEASE 23-300MR ASIC calls for greater organisational vigilance to combat cyber threats - ASIC has called for the prioritisation of cyber security after the results of its 2023 Cyber Pulse Survey identified significant gaps in the cyber capabilities of corporate Australia. Designed to help organisations understand their cyber resilience through assessment of their current cyber maturity and incident preparedness and to allow ASIC to assess corporate Australia's cyber maturity on an anonymous basis, the results of the voluntary survey (REP 776) exposed deficiencies in cyber security risk management, indicating that organisations are reactive rather than proactive in managing cyber security. The report also summarises important cyber security trends, identifies areas for improvement and highlights better practices with practical examples. ASIC Chair Joe Longo said it was alarming that 44% of participants are not managing third-party or supply chain risks. While ASIC noted that it was encouraging that larger organisations consistently self-reported more mature cyber capabilities, small organisations lagged behind in third-party risk management, data security, consequence management and the adoption of industry standards.