

## Tax updates you may have missed during COVID-19

**For distribution to:** CPA Australia Public Practice Committees and discussion groups  
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### A. Tax

#### 1. High wealth private groups tax gap released

The ATO Commissioner has released the tax gap for high wealth private groups, a global first for tax administrations. The gap is estimated to be 7.7 per cent or \$770 million for high wealth companies and individuals who voluntarily report and pay more than \$9 billion in income tax. This estimate compares with a 12.5 per cent gap for small businesses and a gap of 4.4 per cent for large companies.

Common errors observed by the ATO include not correctly recording or reporting transactions that are outside the normal course of business, not correctly accounting for private use of business funds or assets and omitting domestic or foreign-sourced income, including distributions from related trusts and partnerships.

#### 2. Super guarantee amnesty now law

The Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019 received assent as Act No 21 of 2020 on 6 March 2020.

The Act introduces a one-off amnesty for historical underpayment of superannuation guarantee (SG) that begins on 24 May 2018 and ends six months after the Bill receives assent, that is Sunday 6 September 2020. The amnesty only applies to SG shortfalls arising from 1 July 1992 to the March 2018 quarter, and not for subsequent quarters. The ATO advised that amnesty applications must be lodged and received by the ATO before 11.59pm on Monday 7 September. Its webpage also contains details on the eligibility conditions and how applications can be made.

#### 3. Commissioner's remedial power on deceased estate information takes effect

The Taxation Administration (Remedial Power — Disclosure of Protected Information by Taxation Officers) Determination 2020 expands access to deceased estate information and took effect as of Friday 15 May 2020. Representatives of an executor or administrator of a deceased estate will therefore be considered a “covered entity” for the purposes of s 355-25(2). The ATO must first still be notified of the person’s death and of who has been appointed as the executor or administrator.

#### 4. Finalised STP data due in July

The ATO has reminded employers to finalise payroll information through their Single Touch Payroll (STP) provider after the last pay run for the financial year. Large employers with 20 or more employees must make a finalisation declaration for their employees’ end of financial year payroll information by **14 July**. Small employers with 19 or less employees have until **31 July** to finalise. Employers that have finalised payroll data through STP are exempt from providing payment summaries to their employees and lodging a payment summary annual report to the ATO. Employees will be able to access their payroll information through a registered tax agent or ATO online services using myGov.

#### 5. Car limit for 2020/21

The car limit for capital allowance purposes for 2020/21 has increased to \$59,136 (up from \$57,581 for 2019/20).

#### 6. Deregistering a company

Ensure all tax and superannuation obligations are up to date before voluntarily deregistering a company. This includes:

- lodging all overdue and final taxation forms, including tax returns, activity statements, fringe benefits tax returns and taxable payments annual reports
- paying all outstanding debts
- finalising the company’s superannuation affairs, including paying superannuation guarantee amounts and charges
- finalising end of year reporting, for example, Single Touch Payroll (STP) reports
- ensuring a replacement trustee is appointed if the company is acting as the corporate trustee

of a superannuation fund or trust

- finalising lodgments and other obligations if the company is part of a goods and services tax (GST) or income tax (IT) group, or a partner in a partnership.

Directors of a company may still be liable for some debts incurred before deregistration. For example, if a company does not meet its PAYG withholding or superannuation guarantee charge (SGC) obligations, the ATO may recover these amounts from former directors of the company under the director penalty regime.

#### 7. **IGTO invites feedback on review topics**

The Inspector-General of Taxation and Taxation Ombudsman (IGTO) has released a list of topics that could potentially be reviewed by the organisation, as identified and suggested by stakeholders, the taxation complaints service and other sources. The 27 topics in the register identified for investigation include ATO use of MyGov communications, pre-filing of tax returns, ATO fraud and evasion opinions and the management of objections.

#### 8. **ATO review of foreign investment structures**

The ATO is reviewing cross-border arrangements that mischaracterise the structure used by foreign investors to invest directly into Australian businesses. Relevant arrangements have been described in *Taxpayer Alert TA 2020/2* and the ATO is concerned that arrangements may be deliberately structured to avoid Australian tax otherwise payable by a foreign entity or to obtain a tax deduction for an Australian entity. Taxpayers and advisors who enter into these arrangements will be subject to increased scrutiny and cases of this nature that may have avoided requirements under the *Foreign Acquisitions and Takeovers Act 1975* will be referred to the Foreign Investment Review Board.

#### 9. **TPB reviews practitioners lodging incorrect SMSF auditor details**

The Tax Practitioners Board (TPB) is reviewing 74 registered tax practitioners believed to have provided false information to the ATO.

An ATO compliance campaign that commenced in 2019 initially found that 74 tax practitioners representing 106 funds had lodged SMSF annual returns for the 2017 financial year with an incorrect SMSF auditor number and failed to satisfactorily respond to ATO inquiries. The ATO then referred the matter to the TPB, which found that these practitioners lodged 2017 and 2018 annual returns with an incorrect, perhaps fraudulently recorded, SAN. The TPB said that it will be demanding an explanation from all 74 practitioners.

#### 10. **Less compliance burden for charities and other reforms: Response to ACNC review**

The government has released its response to recommendations made by the 2018 Australian Charities and Not-for-profits Commission (ACNC) legislation review. It will seek to implement various reforms to reduce red tape, strengthen trust and ensure the ACNC continues to be an effective regulator, and will consult further with stakeholders.

#### 11. **Charities encouraged to check DGR registration details**

Charities with deductible gift recipient (DGR) endorsement are encouraged to check their registration details, ahead of reviews by the Australian Charities and Not-for-profits Commission (ACNC) commencing in July 2020.

The ACNC encourages all charities to self-assess using an online tool available on the [ACNC website](#).

#### 12. **OECD releases second peer review report on preventing treaty shopping**

The OECD has released the [second peer review report](#) assessing countries' efforts to implement the Action 6 minimum standard (on preventing the granting of treaty benefits in inappropriate circumstances), as agreed under the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project.

#### 13. **FASEA RPL for CPA Program from 1985**

FASEA has [approved](#) the CPA Program commenced in or after 1985 for recognition of prior learning (RPL) of 1 credit towards the bridging course requirements for existing financial advisers. This is in addition to the existing RPL approval for the CPA Program, including the further 1 credit for completing an approved financial planning elective within the Program.

#### 14. **The APESB and the Australian Accounting Bodies issue revised Independence Guide**

Accounting Professional & Ethical Standards Board Limited (APESB), in collaboration with the three professional accounting bodies, Chartered Accountants Australia and New Zealand, CPA Australia and the Institute of Public Accountants, has today issued the [Independence Guide – Fifth Edition](#) in respect to the Restructured Code that was issued in January 2020.

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**B. Superannuation**

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**1. SMSF auditors - ATO issues of concern**

The ATO has found the following issues when reviewing the performance of SMSF auditors:

- Auditor independence
- Knowledge of super laws
- Insufficient documentation
- Failure to report contraventions to the ATO.

Where the ATO finds matters of concern, appropriate actions may include [referral](#) to Australian Securities & Investments Commission (ASIC).

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**2. Women and SMSFs**

The ATO has released an [infographic](#) on members in the SMSF sector by gender. It shows that nearly half of SMSF members are female and that in 2018-18, average member contributions for women were \$35,000 and \$34,000 for men.

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**3. ATO eyes on SMSFs and property development**

The ATO has issued *SMSF Regulator's Bulletin* [SMSFRB 2020/1](#) on self-managed superannuation funds investing in property development, citing concerns that some arrangements may be in breach of regulatory requirements. Particularly, the ATO is focused on investments using joint venture arrangements, partnerships or an ungeared-related trust or company, and is monitoring those, which involve limited recourse borrowing arrangements (LRBAs) and related-party transactions.

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**4. Late SMSF annual returns affect SMSF status**

A self-managed super fund's (SMSF) status on Super Fund Lookup will be changed to "Regulation details removed" if the SMSF is more than two weeks overdue on any annual return lodgment due date and has not requested a lodgment deferral. Having a status of "Regulation details removed" means that APRA funds would not roll over any member benefits to the SMSF and employers would not make any super guarantee contribution payments for members of the SMSF.

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**5. ATO on SMSFs involved in property development**

The ATO has expressed concerns over self-managed superannuation funds (SMSFs) entering into certain arrangements involving real property developments. According to SMSF Regulator's Bulletin [SMSFRB 2020/1](#), the ATO has seen an increase in the number of SMSFs entering into arrangements, with related or unrelated parties, involving the purchase and development of real property for subsequent disposal or leasing.

In particular, there are a number of arrangements in which the investment activity is undertaken utilising joint venture arrangements, partnerships or investments through an ungeared related unit trust or company. The ATO will continue to monitor property development arrangements involving SMSFs, particularly those that include limited recourse borrowing arrangements (LRBA) and related party transactions, to ensure that SMSFs are not contravening relevant provisions.

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**6. New approved form for SMSF independent auditor's report from 1 July 2019**

The ATO has made changes to the approved form of the Self-managed super fund independent auditor's report (IAR) effective for reporting periods starting on or after 1 July 2019. The report replaces the previous IAR that applied to reporting periods starting on or after 1 July 2016. Auditors may use the new report for audits completed for earlier periods, but care should be taken to comply with the auditing standards and legislation that applied to that earlier period. Auditors may have already used the previous version for reporting periods from 1 July 2019 for funds that wound up during the 2019/20 income year. In this circumstance, the ATO will accept the previous version as having met the 2019/20 reporting requirements.

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**7. Key superannuation rates and thresholds for 2020-21 year**

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## C. Legislation

### 1. Tax legislation wrap-up

The following tax and related Bills recently received assent and are now law:

- **Treasury Laws Amendment (2019/20 Bushfire Tax Assistance) Bill 2020** (Act No 1 of 2020) — providing tax exemptions for bushfire support payments
- **Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019** (Act No 6 of 2020) — amendments relating to phoenixing offences, including making directors liable to GST liabilities
- **Treasury Laws Amendment (2018 Measures No 2) Bill 2019** (Act No 8 of 2020) — minor amendments to venture capital and early stage investor tax offset
- **Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019** (Act No 21 of 2020) — superannuation guarantee amnesty in place.
- **Defence Legislation Amendment (Miscellaneous Measures) Bill 2020** (Act No 45 of 2020) – enables former Australian Defence Force (ADF) members, who have provided at least 12 months of service, to continue to make contributions to their ADF Super accounts
- **The Treasury Laws Amendment (2020 Measures No 1) Bill 2020** (Act No 49 of 2020) – extends the circumstances in which an entity is a significant global entity and amends the country by country (CBC) reporting requirements.

### 2. Treasury Laws Amendment 2020 Measures No 2 Bill introduced

A Bill containing measures relating to the hybrid mismatch rules, single touch payroll reporting, deductible gift recipients and tax secrecy has been introduced into parliament.

Schedule 1 of the **Treasury Laws Amendment (2020 Measures No 2) Bill 2020** amends the hybrid mismatch rules with a range of clarifications including the operation of the hybrid mismatch rules for trusts and partnerships and the circumstances in which an entity is a deducting hybrid, and to ensure that the hybrid mismatch rule can be applied appropriately to financing arrangements.

Schedule 2 of the Bill contains changes to broaden the amounts that employers can voluntarily report under the Single Touch Payroll rules to include employer withholding of child support deductions from salary or wages and child support garnishee amounts from salary or wages that are paid to the Child Support Registrar. It also ensures that if employers choose to report under Single Touch Payroll to the Commissioner of Taxation, they do not also have to report the amounts to the Child Support Registrar.

Schedule 3 of the Bill introduces a new general category of deductible gift recipients (DGR) for community sheds. The new DGR category applies to public institutions that are registered charities and satisfy the definition of a community shed.

Schedule 4 of the Bill increases funding capital for the World Bank Group.

Schedule 5 of the Bill allows certain entities to be DGRs under the income tax law.

Schedule 6 of the Bill amends the tax secrecy provisions to allow protected information relating to the JobKeeper scheme to be disclosed to the Fair Work Commission and the Fair Work Ombudsman for the purposes of the administration of the *Fair Work Act 2009*.

### 3. Payment times reporting and consequential amendments Bills introduced

The Payment Times Reporting Bill 2020 (the Bill) has been introduced into parliament, including a new Payment Times Reporting Scheme (the Scheme) which requires large businesses and large government enterprises with an annual total income of over \$100 million to publicly report on their payment terms and practices for their small business suppliers. To complement the Bill and ensure the Scheme operates as intended, consequential amendments will be made to the *Taxation Administration Act 1953*. The **Payment Times Reporting (Consequential Amendments) Bill 2020** has also been introduced into parliament and amends the *Taxation Administration Act 1953* to enable the Commissioner of Taxation to disclose certain tax information to the Payment Times Reporting Regulator (the Regulator) for the purpose of administering the Scheme.

### 4. Bill introduced to extend non-concessional contributions bring forward rule to those aged 65

and 66

A **Treasury Laws Amendment (More Flexible Superannuation) Bill 2020** has been introduced to enable individuals aged 65 and 66 to make up to three years of non-concessional superannuation contributions under the bring forward rule.

#### 5. **Levy Imposition Amendment Bills introduced**

The Superannuation Supervisory Levy Imposition Amendment Bill 2020, which amends the *Superannuation Supervisory Levy Imposition Act 1998* and the **Retirement Savings Account Providers Supervisory Levy Imposition Amendment Bill 2020**, which amends the *Retirement Savings Account Providers Supervisory Levy Imposition Act 1998*, to increase the statutory upper limit on the amount of levies the APRA can collect from the entities it prudentially regulates and ensuring that the APRA remains industry-funded, have been introduced into the House of Representatives. The Bills also make amendments to how the indexation factor used to index the statutory upper limit is calculated.

#### 6. **Social Services and Other Legislation Amendment (Omnibus) Bill introduced**

The Social Services and Other Legislation Amendment (Omnibus) Bill 2020 has been introduced into parliament.

Schedule 3 of the Bill amends ITAA 1997 to remove provisions relating to the one-off payments to older Australians in 2006, 2007 and 2008 as those provisions are no longer necessary and removes references to Mature Age Allowance and Mature Age Partner Allowance, which are closed to new recipients and have no ongoing recipients.

Schedule 3 of the Bill also makes consequential amendments to ITAA 1936 to remove a reference to Mature Age Allowance and Mature Age Partner Allowance, which are closed to new recipients and have no ongoing recipients.

These amendments will commence the day after Royal Assent.

#### 7. **Intermediary LRBAs — legislative instrument finalised**

The ATO has finalised the Superannuation Industry (Supervision) In-house Asset Determination — Intermediary Limited Recourse Borrowing Arrangement Determination 2020 following stakeholder consultation. The instrument commences retrospectively from 24 September 2007.

#### 8. **GST determination for margin scheme valuation of real property**

A GST legislative determination has been made to provide the acceptable methods for valuing real property so that the supplier can use the margin scheme to calculate the amount of GST payable. **A New Tax System (Goods and Services Tax) Margin Scheme Valuation Requirements Determination 2020** (F2020L00346) repeals **A New Tax System (Goods and Services Tax) Margin Scheme Valuation Requirements Determination MSV 2009/1(F2009L03954)** but is substantially the same.

#### 9. **Effective life of depreciating assets**

The **Income Tax (Effective Life of Depreciating Assets) Amendment Determination 2020** provides taxpayers in specific industries and for specific assets with effective lives as a basis to calculate the decline in value (depreciation) of a depreciating asset for income tax purposes. It amends the **Income Tax (Effective Life of Depreciating Assets) Determination 2015** and applies from 1 July 2019.

#### 10. **FBT rates and thresholds for 2020-21**

- Taxation Determination **TD 2020/3** provides the rates to be applied on a cents per kilometre basis for calculating the taxable value of a fringe benefit arising from the private use of a motor vehicle other than a car for the FBT year commencing on 1 April 2020.
- Taxation Determination **TD 2020/4** sets out the amounts that the Commissioner considers reasonable under s **31G** of the *Fringe Benefits Tax Assessment Act 1986* for food and drink expenses incurred by employees receiving a living-away-from-home allowance fringe benefit for the FBT year commencing on 1 April 2020.

#### 11. **Lodgment of returns for 2019/20**

Two legislative instruments setting out the requirements to lodge income tax returns for the 2019/20 income year have been made:

- **Notice of Requirement to Lodge a Return for the Income Year Ended 30 June 2020**
- **Notice of Requirement for Parents with a Child Support Assessment to Lodge a Return for the Year of Income Ended 30 June 2020.**

#### 12. **Draft determination: Exemptions from third party reporting regime**



A draft legislative instrument, the Draft Taxation Administration Excluded Classes of Transactions and Entities for Third Party Reports on Shares and Units Determination 2020, has been made. The ATO has published the legislative instrument as legislative determination **TPRE 2020/D2** on its legal database. This instrument, which is proposed to commence on 1 July 2017, will replace Legislative Instrument F2018L00473, registered on 9 April 2018, and this previous instrument will be repealed on the commencement of this instrument.

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### 13. **Sunsetting of legislative instruments deferred**

Legislative instruments have been made to defer the sunseting of the following legislative instruments:

- **GST:** The **Legislation (Deferral of Sunsetting—A New Tax System (Goods and Services Tax) (Average Input Tax Credit Fraction) Determination) Certificate 2020** (registered on the Federal Register of Legislation as F2020L00318 on 26 March 2020) defers the sunseting date of A New Tax System (Goods and Services Tax) (Average Input Tax Credit Fraction) Determination 2010 from 1 October 2020 to 1 October 2022.
- **Tax agent services:** The **Legislation (Deferral of Sunsetting — Tax Agent Services Regulations) Certificate 2020** (registered on the Federal Register of Legislation as F2020L00319 on 26 March 2020) defers the sunseting date of the Tax Agent Services Regulations 2009 from 1 April 2020 to 1 April 2022.
- **Superannuation:** The **Legislation (Deferral of Sunsetting — Superannuation (Government Co-contribution for Low Income Earners) Regulations) Certificate 2020** (registered on the Federal Register of Legislation as F2020L00320 on 26 March 2020) defers the sunseting date of the Superannuation (Government Co-contribution for Low Income Earners) Regulations 2004 until 1 April 2022.
- **ABN regulations:** The **Legislation (Deferral of Sunsetting — A New Tax System (Australian Business Number) Regulations) Amendment Certificate 2020** (registered on the Federal Register of Legislation as F2020L00316 on 26 March 2020). This certificate amends the Legislation (Deferral of Sunsetting — A New Tax System (Australian Business Number) Regulations) Certificate 2018 to defer the sunseting date of A New Tax System (Australian Business Number) Regulations 1999 until 1 April 2021

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### 14. **Synthesised text of tax treaty with Canada**

The ATO has issued a **synthesised text** of Australia's tax treaty with Canada for its application as modified by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the MLI) signed by Australia and Canada on 7 June 2017. The MLI entered into force for Australia on 1 January 2019. The synthesised text is to help the users of the agreement to understand how the MLI modifies the particular tax treaty. It does not constitute a source of law.

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## D. Rulings and determinations

### 1. **Ruling on interpreting Australia's double tax agreements amended**

The ATO has issued an addendum to *Taxation Ruling TR 2001/13* dealing with interpretation on Australia's double tax agreements. The addendum essentially refreshes the Commissioner's view on interpretation given the various legislative changes and cases that were handed down since the ruling was issued. These include changes to the structure of the *International Tax Agreements Act 1953* in 2011, the impact of the Multilateral Instrument, OECD Model developments and a number of Federal Court cases including *Chevron* (**2015 ATC ¶20-535**).

### 2. **Ruling on effective life of depreciating assets amended**

The ATO has issued an addendum to *Taxation Ruling TR 2019/5* dealing with effective life of depreciating assets. The addendum amends **TR 2019/5** to change the description of certain depreciating assets listed in the oil and gas extraction industry back to their previous determination, following feedback from the industry. The addendum applies on and from 1 July 2019.

### 3. **Expansion of estimates regime to overdue GST, LCT and WET**

The ATO has finalised its administration of changes made by Sch 3 of the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020*. Schedule 3 of the that Act brings GST, LCT and WET within the existing estimates and director penalty regimes.

*Practical Compliance Guideline PCG 2020/2* focuses on the expansion to estimates. The estimates regime enables the Commissioner to make an estimate of certain unpaid and overdue tax-related liabilities and recover the amount of the estimates. It should be read with the *Law Administration Practice Statement PS LA 2011/18* Enforcement measures used for the collection and recovery of tax-related liabilities and other amounts.

The Guideline will apply from the commencement of Sch 3 of the Act, being 1 April 2020. It was previously issued as *Draft PCG 2019/D4*.

### 4. **Valuation of debt capital for thin cap purposes**

The ATO has finalised its view on the valuation of "debt capital" for the purposes of the thin capitalisation rules in Div 820 of ITAA 1997. Debt capital is used to work out "adjusted average debt" in s **820-85** and **820-185**. Taxation Determination **TD 2020/2** deals with the requirement in s **820-680(1)(b)** that an entity comply with the accounting standards in calculating the value of its liabilities, which includes its debt capital..

### 5. **Practice statement on ATO advice updated**

Following the decision of *FC of T v Hacon Pty Ltd & Ors* **2017 ATC 20-639**; **[2017] FCAFC 181**, the ATO has released an updated *Practice Statement Law Administration PS LA 2008/3* which explains:

- the forms of advice and guidance the ATO provides about the application of laws administered by the Commissioner
- the level of protection available to taxpayers who rely on each form of advice and guidance
- where to find further information about procedures in developing and issuing each form of advice and guidance.

### 6. **Changed ATO view on car parking fringe benefits deferred**

The ATO will defer the effective date of its upcoming final FBT ruling on car parking benefits to 1 April 2021 after receiving significant feedback on the ruling, including a joint **submission** from CPA Australia, Chartered Accountants Australia and New Zealand, and the Corporate Tax Association.

### 6. **Provisional guidance on payments for using professional sportsperson's fame or image withdrawn**

The ATO has withdrawn *Draft Practical Compliance Guideline PCG 2017/D11* that provides a safe harbour for apportioning lump sum payments for providing a professional sportsperson's services and using their public fame or image with effect from 24 August 2018. The government announced in its 2018-19 Federal Budget that it would ensure that high profile individuals would no longer be able to take advantage of lower tax rates by licensing their fame or image to another entity from 1 July 2019.

### 7. **Class and product rulings issued**

The ATO has issued:

- *Class Ruling CR 2020/12* Apex Salary Packaging Pty Ltd — use of an electric bicycle (e-bike) by an employee. This ruling applies from 1 April 2019 to 31 March 2024.
- *Class Ruling CR 2020/13* Museums Victoria — early retirement scheme 2020. The ruling applies from 18 March 2020 to 31 December 2020.

- *Class Ruling* [CR 2020/20](#) Trans Pacific Energy Group Ltd — exchange of shares for New Generation Minerals Limited shares. The ruling applies from 1 July 2019 to 30 June 2020.
- *Class Ruling* CR 2020/23 Australian Football League Players' Association — AFLW competition education and training grants. The ruling applies from 1 November 2019 to 1 November 2022.
- *Class Ruling* [CR 2020/24](#) GrainCorp Limited — demerger of United Malt Group Limited. The ruling applies from 1 July 2019 to 30 June 2020 to ordinary shareholders in GrainCorp registered as at 25 March 2020 that held their shares on capital account.
- *Class Ruling* [CR 2020/25](#) Adelaide Airport Limited – provision of car parking facilities using an access card. The ruling applies from 1 April 2020 to 31 March 2025
- *Class Ruling* [CR 2020/26](#) Suncorp Group Limited – Suncorp Capital Notes 3. The ruling applies from 1 July 2019 to 30 June 2028.
- *Product Ruling* [PR 2020/1](#) Income tax: Tax consequences of investing in equities using Bell Geared Equities Investment (2019 Product Brochure). The ruling applies only to the specified class of entities that enter into the scheme from 11 November 2019 to 30 June 2022.
- *Product Ruling* [PR 2020/4](#) Income tax: taxation consequences for a borrower being charged an “Indexed Rate” of interest under a home loan. It applies to individuals who enter the relevant scheme on or after 1 July 2020 and on or before 30 June 2023.

The ATO has withdrawn:

- *Product Ruling* PR 2018/12 Income tax: Challenger CarePlus Annuity and Insurance.

The ATO has issued an addendum to:

- *Product Ruling* [PR 2019/3](#) Income tax: taxation consequences for a customer entering into a Prepay Plus Agreement with Landmark to reflect that on 2 March 2020, Landmark Operations Limited changed its name to Nutrien Ag Solutions Limited
  - Product Ruling PR 2019/17 Income tax: PPS Mutual Professionals Choice — 2019. The addendum amends PR 2019/17 to include a reference to documents relevant to the scheme that were issued after the ruling was published on 2 October 2019.
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## E. Cases and decision impact statements

### 1. High Court unanimously dismisses BHP's appeal as entities were associates

The High Court has unanimously held that income derived by BHP Billiton Marketing AG (BMAG) from its sale of commodities it purchased from BHP Billiton Plc's (BHP Plc) Australian entities was to be included in the assessable income of BHP Billiton Ltd (BHP Ltd), because BHP Plc's Australian entities were "associates" of BMAG. In so finding, the High Court dismissed an appeal from BHP Ltd against the Full Federal Court decision of *FC of T v BHP Billiton Ltd* [2019 ATC ¶20-680](#); [2019] FCAFC 4.

*BHP Billiton Limited v FC of T* [\[2020\] HCA 5](#), Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ, 11 March 2020.

### 2. Payment for company founder's shares not capital receipt

One of two founders of a financial services software company who received a "Founders Retention Amount" for the sale of his shares in it has failed to convince the AAT that the amount was assessable as a capital gain.

The taxpayer initially self-assessed his income for the 2014 to 2016 income years on the basis that the payment was included in his assessable income outside of the capital gains regime. He then objected to the assessments, taking a position that it was to be included in calculating any capital gain he made on the disposal of his shares. The Commissioner disallowed the taxpayer's objection and he sought review by the AAT. The taxpayer contended that the payment was a portion of the sale price under the relevant share purchase agreement, and that his entitlement to it arose in his capacity as vendor and not as an employee.

*NQZG v FC of T* [2020 ATC ¶10-523](#); [\[2020\] AATA 379](#), L Hespe (Senior Member), 2 March 2020

### 2. Ban on tax agent to apply for re-registration reduced

The AAT has affirmed the decision of the Tax Practitioners Board (the Board) to terminate the registration of a tax agent, but varied the Board's decision to prohibit her from applying for registration so that she would be permitted to seek registration after two years, rather than three years, from the date of termination.

*Ridden v Tax Practitioners Board* [2020 ATC ¶10-524](#); [2020] AATA 422, Bernard J McCabe (Deputy President), 6 March 2020.

### 3. Invalidity pay arrears found to be "superannuation lump sum"

The AAT has held that lump sum arrears of invalidity pay under the *Defence Force Retirement and Death Benefits Act 1973* (Cth) received by a taxpayer was not a "superannuation income stream benefit" as defined by s [307-70\(1\)](#) of the ITAA97 and, therefore, it was a "superannuation lump sum". It said that the payment was made from an "income stream" and, having satisfied the relevant conditions, should be treated in the manner prescribed in s [307-145\(1\)](#) of the ITAA97. This section modifies the proportioning rule to work out the tax-free component of a benefit, where the superannuation lump sum is a disability superannuation benefit.

*Douglas v FC of T* [\[2020\] AATA 494](#), Logan J (Deputy President), 13 March 2020.

### 4. Small business CGT concessions available for entrepreneur's sale of forestry land

A taxpayer has successfully argued before the AAT that he was carrying on a forestry business and so entitled to the small business CGT concessions for the capital gain made on his sale of land predominantly covered by native forest.

*SWPD v FC of T* [2020 ATC 10-526](#), 2020 AATA 555, AG Melick AO SC (Deputy President), L Rieper (Member), 18 March 2020, Hobart.

### 5. Benefits paid to ex-defence force members were superannuation lump sums

The Commissioner has so far been unsuccessful in two test cases before the AAT concerning the operation of the income tax rules on payments of retirement, death and invalidity benefits to former Australian Defence Force (ADF) members.

The key issue in the matters of *Douglas* and *Burns* was whether the benefits paid in each instance were entitled to a concessional tax treatment under s [307-145\(1\)](#) of ITAA 1997. This section modified the proportioning rule to work out the tax-free component of a benefit where the superannuation lump sum was a disability superannuation benefit.

*Douglas v FC of T* [2020 ATC ¶10-525](#); [\[2020\] AATA 494](#) 13 March 2020; *Burns v FC of T* [2020 ATC ¶10-527](#); [\[2020\] AATA 671](#) 25 March 2020, Logan J (Deputy President).

### 6. Ex-serviceman's invalidity pension found to be superannuation lump sum

The AAT has held that the invalidity pension received by an ex-serviceman taxpayer under the *Military Superannuation and Benefits Act 1991* (Cth) in the 2010 to 2015 (inclusive) income years was a “superannuation benefit”, a “superannuation lump sum” and a “disability superannuation benefit” required to be treated in accordance with s [307-145](#) of the ITAA 1997.

*GDGR v FC of T* [\[2020\] AATA 766](#), Logan J (Deputy President), 30 March 2020.

## 7. **Annual capacity charges paid by private electricity seller were capital expenditure**

The Federal Court has held that annual capacity charges paid by a private electricity seller into National Electricity Market (NEM) were an outgoing of capital or of a capital nature. The charges were paid to state-owned power stations under long-term electricity supply contracts. The taxpayer was the head company of a consolidated group, that included Origin Energy Electricity Ltd (OEEL). OEEL entered into two agreements with Eraring Energy, a statutory State-owned corporation, relating to two power stations in New South Wales. Under those agreements, OEEL agreed to pay several charges to Eraring Energy, including substantial annual capacity charges. OEEL effectively paid all of the capacity charges in advance. The power stations were still owned, managed and operated by Eraring Energy, but OEEL (a) could control when and how much electricity was generated; and (b) had right to trade the entire output of the power stations for 22 and 28 years. OEEL also took on risks and opportunities with respect to Eraring’s generation activities: (a) the market risk associated with selling electricity into the NEM; and (b) the risk associated with fluctuations in the fuel price only in respect of the Eraring power stations.

At issue was whether the annual capacity charges were capital in nature and therefore not deductible under s [8-1\(2\)\(a\)](#), and if they were deductible under the blackhole expenditure provisions in s [40-880](#).

*Origin Energy Limited v FC of T* [2020 ATC ¶20-739](#) [\[2020\] FCA 409](#), Thawley J, 31 March 2020.

## 8. **Initial construction phase of airport runway not a separate “project”**

The Federal Court has dismissed an appeal in relation to capital expenditure incurred during the initial phases of construction of the new runway at Brisbane Airport under the “project pool” provisions in Subdiv [40-1](#) of ITAA 1997. The airport operator failed to secure a favourable private ruling from the ATO that deductions could be claimed on the basis that the early phases of construction were in themselves a separate “project” that had commenced to operate. The Court agreed with the Commissioner that the appeal was not competent because the scheme as ruled on in the ruling was not implemented and could never be implemented in the terms described in the ruling. Nevertheless, the Court also said for the purpose of the Subdiv [40-1](#) provisions, the project was always the construction of the runway, and it would not have commenced operation until the construction was complete, meaning the taxpayer would have failed in the appeal relating to the deduction rules as well.

*BAC Holdings Ltd v FC of T* [2020 ATC ¶20-738](#) [\[2020\] FCA 413](#), Logan J, 31 March 2020.

## 9. **Ban on tax agent to seek re-registration reduced to two years “project”**

The AAT has affirmed that the decision of the TPB to terminate the registration of a tax agent but varied the its decision to prohibit him from applying for registration so that he would be permitted to seek registration after two years, rather than five years, from the date of termination.

Mr Hill was a registered tax agent. Following an investigation in January 2019, the Board decided to terminate his tax agent registration. The principal reason for the Board’s decision was its view that he was not a “fit and proper” person as he failed to comply with the Tax Agents Services Act 2009 (TASA) Code of Professional Conduct obligations to act honestly, and failed to comply with the taxation laws in the conduct of his personal affairs. The TPB also determined that he could not apply for re-registration within five years.

*Hill v Tax Practitioners Board* [2020 ATC ¶10-528](#); [\[2020\] AATA 678](#), PW Taylor SC (Senior Member), 26 March 2020.

## 10. **AAT revokes stay of banning order against financial adviser “project”**

The AAT has revoked its order staying ASIC’s decision to ban Mr Simon Poidevin from providing financial services. As such, ASIC’s original decision to ban Mr Poidevin for five years came into full operation, effective immediately following the AAT’s revocation order. The AAT revoked its stay order after Messrs Poidevin and Rodr withdrew their applications for review.

## 11. **Trust distribution resolutions not effective to only apply increased income to residual beneficiary**

The AAT has affirmed a decision of the ATO to assess all the beneficiaries of a family trust to an increase in the net income of the trust, having disallowed deductions claimed in relation to an accounting practice in which it had an interest. The taxpayers were unsuccessful in arguing that the

respective distribution resolutions had the effect that all of the resulting increase in the net income should have only been assessed to a residual beneficiary, being the trustee of the trust.

*Donkin & Ors v FC of T* 2020 ATC ¶10-529; [\[2019\] AATA 6746](#).

## 12. R&D tax offsets denied for mining-related activities

The AAT has held that certain mining-related activities conducted by a taxpayer, engaged in mining activities for gold, copper-gold and iron ore, were not “core R&D activities”. Hence, the taxpayer was not entitled to claim research and development tax offsets in accordance with Div [355](#) of ITAA 1997.

It found that the activities were not core R&D activities as they came within the exclusion in s [355-25\(2\)\(b\)](#) of ITAA 1997 for prospecting, exploring or drilling for minerals, and s [355-25\(2\)\(f\)](#) of ITAA 1997 for activities associated with complying with statutory requirements or standards.

*Havilah Resources Ltd v Innovation and Science Australia* [\[2020\] AATA 933](#), P Britten-Jones (Deputy President), 16 April 2020.

## 13. Input tax credit denied on vacant land acquisition

The AAT has held that a corporate trustee of a trust was not entitled to claim input tax credits on an acquisition of vacant land in New South Wales from another corporate trustee as the acquisition was not an activity that constituted the carrying on any enterprise. In the absence of evidence to support the conduct of an enterprise, the acquisition was not a “creditable acquisition”. Following an ATO audit, the taxpayer’s claim of a \$70,000 input tax credit had been denied and a \$35,000 administrative penalty was imposed.

*304 Wanda Street Pty Ltd v FC of T* [\[2020\] AATA 921](#), PW Taylor SC (Senior Member), 22 April 2020

## 14. Trust’s capital gains distribution to non-resident beneficiary assessable to trustee

The Federal Court has held that the distribution of capital gains of a trust, made from disposing shares that were not “taxable Australian property”, by its resident trustee to its non-resident beneficiary were deemed capital gains of the beneficiary (as a result of s [115-215\(3\)](#) of the ITAA 1997) and were assessable to the trustee. Further, it said that the capital gains could not be disregarded under s [855-10\(1\)](#) of ITAA 1997.

*Peter Greensill Family Co Pty Ltd (as trustee) v FC of T* [2020 ATC ¶20-742](#); [\[2020\] FCA 559](#), Thawley J, 28 April 2020.

## 15. Upfront payments for franchise were capital in nature

The Federal Court has held that certain upfront payments that were made upon entering into several lease and licence agreements of franchise restaurants were not deductible as they were outgoings of capital or of a capital nature.

The trustee of the Mussalli Family Trust (MFT) entered into several lease and licence agreements to operate McDonald’s Family Restaurants at various sites. The agreements provided MFT an option to make an upfront payment which, if made, could reduce the rent from being payable at a higher percentage (the higher percentage rent) to a lower percentage (the lesser percentage rent).

At issue was whether the upfront payments were deductible.

*Mussalli v FC of T* [2020 ATC ¶20-743](#); [\[2020\] FCA 544](#), Jagot J, 28 April 2020.

## 16. Gains on sale and exchange of shares by trustee found to be income

The AAT has found that gains on the sale and exchange of shares were subject to income tax as income according to ordinary concepts where the sole director and shareholder of the trustee company that acquired the shares was a director of the company in which the shares were acquired.

*XPQZ & Ors v FC of T* [2020 ATC ¶10-532](#); [\[2020\] AATA 1014](#), RJ Olding (Senior Member), 24 April 2020

## 17. TPB’s termination of tax agent’s registration affirmed

The AAT has affirmed the decision of the Tax Practitioners Board to terminate a tax agent’s registration but reduced the prohibition period for him to apply for re-registration from four to three years. The tax agent had conceded that he had used for his personal purposes the GST refunds generated from business activity statements that he knew were false and lodged without his client’s knowledge. The tax agent had contested claims about other breaches of a similar nature.

*Elsawi v Tax Practitioners Board* [2020 ATC ¶10-531](#); [\[2020\] AATA 998](#), Dr K Kendall (Member), 29

April 2020.

## 18. **Directors remain liable for unpaid estimated PAYG withheld despite voluntary liquidation**

The NSW Court of Appeal has unanimously held that the directors of a company were liable to penalties under director penalty notices (DPNs) issued before the company went into voluntary liquidation.

The Commissioner issued the directors with DPNs on 11 April 2014 for the company's failure to make payment for estimates of unpaid PAYG withholding amounts. The Notice of Estimate Liability issued to the company related to PAYG withholding for 22 periods up to 1 June 2012. The company had not made payment for the notice and did not lodge a statutory declaration to reduce or revoke the estimate amount. On 16 April 2014, the company went into voluntary liquidation

*Lee v DFC of T; Silverbrook v DFC of T* **2020 ATC ¶20-747**, Payne, McCallum and Simpson JJ, 19 May 2020.

## 19. **Claim to deduct partnership loss disallowed**

The AAT has held that a taxpayer and his wife did not carry on business as a partnership and rejected the taxpayer's appeal against the Commissioner's default income tax assessment.

In 2011, the taxpayer's wife registered an ABN, business name and GST for a clothing retail business. The taxpayer submitted that he provided the funds for the business, helped on weekends and agreed to split the profits on an 80/20 basis. The taxpayer deducted 80% of the business loss, amounting to \$50,543, in his tax return for the 2011/12 income year. The ATO issued an amended assessment removing the taxpayer's claim for the business loss on the basis that a partnership had not existed for income tax purposes. The AAT affirmed the Commissioner's decision and noted that assisting a spouse in running a business was commonplace and did not in itself constitute a "partnership" for taxation purposes. The business was registered solely in the wife's name and there was no record of a partnership tax file number. Due to the lack of evidence, the AAT was unable to determine the extent of the taxpayer's capital contributions to the business.

*Holman v FC of T* **[2020] AATA 1375**, DK Grigg (Member), 20 May 2020.

## 20. **Appeal news — Douglas; Doyle**

- The Commissioner has appealed to the Federal Court against the decision of *Douglas v FC of T* **2020 ATC ¶10-525**. In that case, the AAT held that lump sum arrears of invalidity pay received by the taxpayer under the *Defence Force Retirement and Death Benefits Act 1973* was a "superannuation lump sum" satisfying the relevant conditions for concessional treatment under s **307-145(1)** of ITAA 1997.
- The taxpayer has appealed to the Federal Court against the decision of *Doyle v FC of T* **2020 ATC ¶10-522**. In that case, the AAT agreed with the Commissioner and held that proceeds from the sale of undeveloped industrial land were income, not capital, in nature.

## 21. **Impact statement on Melbourne Apartment Project**

The ATO has issued a decision impact statement on the Federal Court's decision in *Melbourne Apartment Project Pty Ltd (as trustee for Melbourne Apartment Project) v FC of T* **2019 ATC ¶20-729; [2019] FCA 2118**.

The ATO has updated two ATO Interpretative Decisions (ATO IDs) as a result of this decision:

- **ATO ID 2009/103** Goods and Services Tax: GST and services related to accommodation in a retirement village operated by an endorsed charitable institution or a trustee of a charitable fund that are GST-free
- **ATO ID 2009/104** Goods and Services Tax: GST and services not related to accommodation in a retirement village operated by an endorsed charitable institution or a trustee of a charitable fund.

## 22. **Decision impact statement on Burton case**

The ATO has issued a decision impact statement on the Full Federal decision of *Burton v FC of T* **2019 ATC ¶20-709**; [2019] FCAFC 141.

The High Court dismissed the taxpayer's application for special leave to appeal against this decision. The ATO says that the Court's decision confirms the correctness of the Commissioner's view expressed in **ATO ID 2010/175** that where a foreign capital gain was only partly assessable in Australia, only a proportionate share of the foreign income tax counted towards the calculation of the FITO.

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**23. Interim decision impact statement on appealed decision on recovery of unauthorised refunds**

The ATO has issued an interim decision impact statement on the decision of *DCT v MWB Accountants Pty Ltd* [2019] VCC 1516. The impact statement outlines the ATO's response to this case which concerns whether administrative overpayment liabilities are recoverable from an errant tax agent. In this case, MWB lodged business activity statements (BAS) for a client, claiming credits that were not authorised. These credits were then refunded by the ATO and paid into MWB's bank account. The client later identified and disclosed these matters to the ATO, together with the corrections to the BAS. The ATO subsequently cancelled the BAS that were lodged by MWB without the client's authorisation.

The ATO then sought to recover the unauthorised refunds paid to the client by mistake as an administrative overpayment giving rise to a recoverable debt under S **8AAZN** of the TAA, from MWB. The Victorian County Court held that s **8AAZN** of the TAA could not be used to recover the unauthorised refunds because the defendant, MWB, was not the 'recipient' of an administrative overpayment.

The ATO said the decision was inconsistent with its view in Law Administrative Practice Statements PS LA 2008/11 *Suspected fraud by a third party or tax practitioner* and PS LA 2011/5 *Recovery of administrative overpayments*.

The ATO takes the view that the judge erred in finding MWB was not the recipient for the purposes of S **8AAZN** of the TAA, and there was an administrative overpayment recoverable from MWB. The ATO has filed an application for leave to appeal from the judgment to the Victorian Court of Appeal.

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