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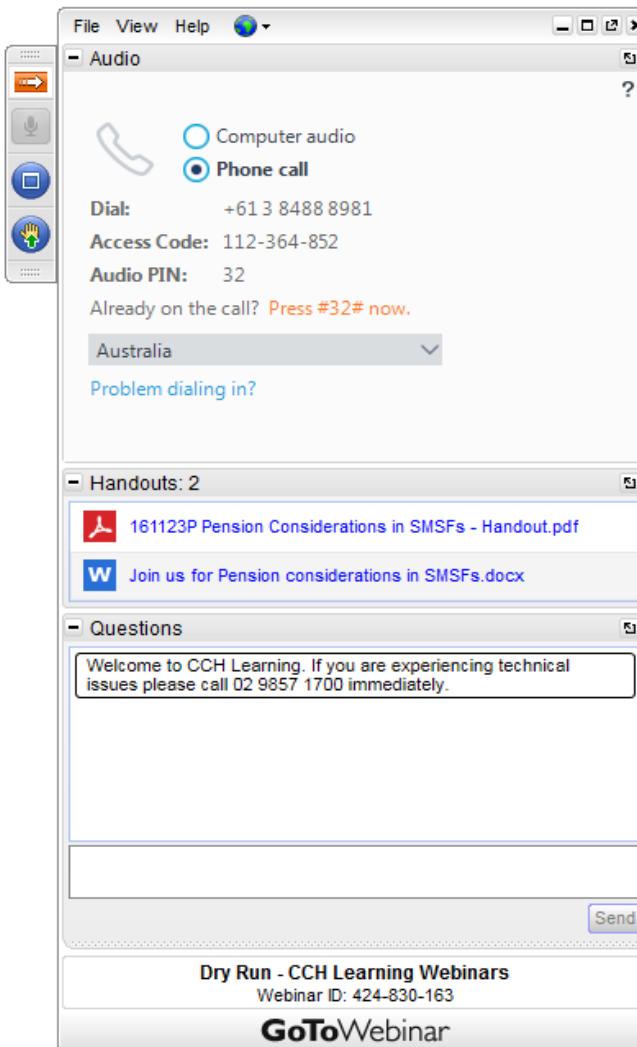
# Tax Technical Update – March 2023

Carlo Di Loreto

Tuesday 21 March



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Susannah Gynther  
Moderator

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question and hit  
'Send'



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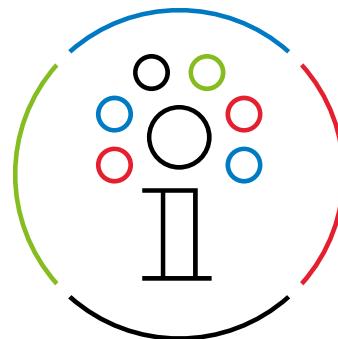


**Carlo Di Loreto**

Partner - Tax Advisory

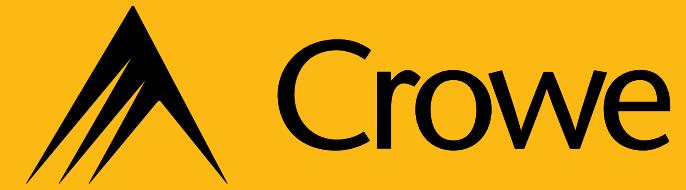
*Crowe Australasia, an affiliate of Findex*

Today's  
session will  
cover



## March Tax Update

- Federal Parliament update
- Bills update
- ATO and Government Announcements
- ATO Rulings
- Cases



# Federal Parliament & Bills Update

# Federal Parliament Update

## Sitting Days 2023

Sitting Days First Half 2023	Sitting Days Second Half 2023
January 2023: No sitting days	July 2023: House and Senate – 1
February 2023: House – 8, Senate – 4	August 2023: House and Senate – 7
March 2023: House – 12, Senate – 13	September 2023: House and Senate – 8
April 2023: No sitting days	October 2023: House – 8, Senate – 4
May 2023: House – 9, Senate – 3	November 2023: House – 8, Senate – 14
June 2023: House and Senate – 8	December 2023: House – 0, Senate – 4



# Australian Carbon Credit Units - Consultation

- Consultation has begun on the proposal to provide concessional tax treatment to certain primary producers that generate [revenue from the sale of Australian Carbon Credit Units \(ACCUs\)](#)
- Announced in the March 2022–23 Budget
- Eligible primary producers will be able to treat the net proceeds from the sale of ACCUs they first held on or after 1 July 2022 as [primary production income for the purposes of the Farm Management Deposit \(FMD\) scheme](#) and accessing income tax averaging
- The [\*taxing point\*](#) for ACCUs held by eligible primary producers will also be set to the [\*point of sale\*](#), instead of being taxed based on changes in the value of their ACCUs each income year



# Paid Parental Leave

- Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Bill 2022 has been passed by both Houses and awaits assent
  - Gives access to the paid parental leave
  - Gives parents increased flexibility in how they take leave and encourages parents to share care to promote gender equality
  - Changes make it easier for parents to claim Parental Leave Pay, with either parent able to claim first
  - Parents will also be able to access the entitlement in multiple blocks, with periods of work in between.
  - Changes come into effect for parents whose children are born or adopted from 1 July 2023

# Digital Games Tax Offset

- *Treasury Laws Amendment (2022 Measures No. 4) Bill 2022*
- Provides eligible game developers with a **30% refundable tax offset** for qualifying Australian development expenditure from 1 July 2022
- Available for completion, ongoing development, or porting of digital games, subject to:
  - eligibility criteria set out in Division 378 of the Income Tax Assessment Act 1997, including certification by the Arts Minister and
  - at least \$500,000 of qualifying expenditure.



# Digital Games Tax Offset

- The offset is capped at \$20 million per company (or group of companies that are connected or affiliated) per income year
- Reaching this cap would require approximately \$66.7 million in eligible expenditure
- Applicants must be companies that are either:
  - Australian tax residents, or
  - foreign tax residents with a permanent establishment in Australia.



# Exposure Draft changes to Thin Cap rules Div 820 ITAA 1997

- Treasury has released for consultation exposure draft materials on changes to the thin capitalisation rules in Div 820 of ITAA 1997
- The draft Bill will introduce new thin capitalisation [earnings-based tests](#) to disallow an amount of an entity's debt deductions based on the entity's earnings or profits
- [A fixed ratio test](#) will replace the existing safe harbour test
- [A group ratio test](#) will replace the existing worldwide gearing test
- [External third party debt test](#) replaces the arm's length debt test
- The new tests will apply for the existing “general” classes of entities, being “outward investor (general)”, “inward investment vehicle (general)” and “inward investor (general)”
- The tests will not apply to financial entities and authorised deposit-taking institutions (ADIs)



# Exposure Draft changes to Thin Cap rules Div 820 ITAA 1997

- Also establishes a **new arm's length test** in the form of an external third party debt test for general class investors and financial entities that are not ADIs
- The external third party debt test will disallow all debt deductions which are not attributable to third party debt and that satisfy certain other conditions
- This test will **replace the arm's length test** for all entities previously subject to that test
- The amendments are proposed to apply to income years commencing on or after 1 July 2023
- The \$2 million de-minimis threshold is unchanged



# Exposure Draft changes to Thin Cap rules Div 820 ITAA 1997

## Fixed ratio test

- Default test
- Allows an entity to claim net debt deductions up to 30 per cent of its ‘tax EBITDA’
- EBITDA = entity’s taxable income or tax loss adding back deductions for interest, decline in value, capital works and prior year tax losses
- Special deduction is allowed for debt deductions that were previously disallowed
- Debt deductions disallowed over the previous 15 years can be claimed under this special deduction rule
- Designed to address year-on-year earnings volatility concerns



# Exposure Draft changes to Thin Cap rules Div 820 ITAA 1997

## Group ratio test

- Can make the choice to use this test rather than the fixed ratio test
- Can be used as an alternative to the fixed ratio test for more highly leveraged groups
- Can deduct net debt deductions in excess of the amount permitted under the fixed ratio rule, based on a relevant financial ratio of the worldwide group
- Debt deduction disallowed is the amount by which the entity's net debt deductions exceed the entity's group ratio earnings limit for the income year



# Exposure Draft changes to Thin Cap rules Div 820 ITAA 1997

## External third party debt test

- Can make the choice to use this as an alternative to fixed ratio test
- This test allows all debt deductions which are attributable to third party debt and that satisfy certain other conditions
- This test replaces the arm's length debt test for all entities previously subject to the arm's length debt test
- Not available if an associate is not exempt from Thin Cap rules and one of the associates does NOT make a choice to use this test

# Exposure Draft changes to Thin Cap rules Div 820 ITAA 1997

## Choices

- A choice for an income year to use either the group ratio test or the external third party debt test must be made:
  - in the approved form; and
  - on or before the [earlier](#) of [the day the entity lodges its income tax return](#) for the income year and [the day the entity is required to lodge its income tax return](#) for the income year.
- A choice for an income year cannot be revoked.
- The Commissioner may defer the time within which an approved form is required to be given to them (sec 388-55 in Schedule 1 to the TAA 1953)

# Superannuation Tax increase announcement

- Government intends to legislate for an additional 15% tax for super fund members that have a fund balance above \$3 million
- To take effect from 1 July 2025
- The concessional tax rate applied to earnings for balances above \$3 million will be 30%
- This change does not impose a limit on the size of superannuation account balances in the accumulation phase
- Members with “Total Superannuation Balances” (TSBs) above \$3 million will pay additional 15 per cent tax on a proportion of future earnings
- The TSB is already reported by the super fund to the ATO annually



# Superannuation Tax increase announcement

- Government believes the adjustment to tax breaks will affect less than 0.5 per cent of all Australians
- Expected to generate revenue of about \$2 billion in its first full year
- The \$3 million cap is not adjusted for inflation
- Additional 15 per cent tax only applies to the proportion of earnings corresponding to balances above \$3 million for each member
- ATO will use a formula to calculate the earnings using information it already receives from the super fund



# Superannuation Tax increase announcement

- Formula will calculate the difference between the member's TSB for the current and previous financial year and adjust for net contributions (excluding contributions tax paid by the fund on behalf of the member) and withdrawals
- Calculation includes all notional (unrealised) gains and losses in determining earnings of the super fund
- Assets with high investment performance will be taxed regardless if a disposal has not occurred
- Therefore, if an asset increases in value from one financial year to the next, the unrealised gain will be taxed
- If the assets fall in value in the following year, the negative earnings can be carried forward to offset against future years' tax liabilities



# Superannuation Tax increase announcement

- May cause **cashflow concerns** for members who do not have cash to pay for the tax
- Where the super fund comprise of assets (such as real property or unlisted securities) it may be difficult to sell the asset or withdraw the proceeds if a member has not met a condition of release (e.g. attained age 65 or 60 and retired)
- Younger members with high growth investments (for e.g. in start-ups) may need to consider other structures if the proposals proceed in their current form
- The tax is payable by the member of the super fund and the assessment will be issued to the member and not the super fund
- Similar treatment expected for defined benefits funds



# Legislating objective of Superannuation consultation

- The Federal Treasury has released a consultation paper for public comment in relation to legislating an objective for superannuation:

*The objective of superannuation is to preserve savings to deliver income for a dignified retirement, alongside government support, in an equitable and sustainable way*

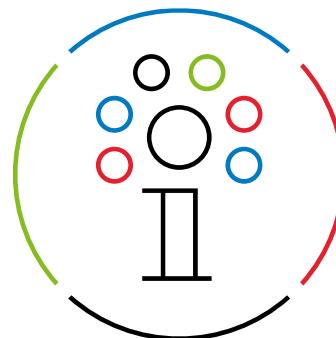
- Seeks to answer the following:
  - The purpose of superannuation
  - How superannuation delivers on its purpose
  - The place of superannuation in the broader retirement income system



# Legislating objective of Superannuation consultation

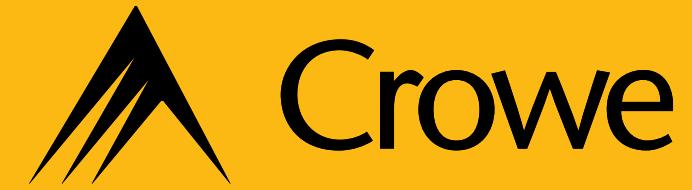
- Proposed that the objective of superannuation would be established in legislation
- To ensure the stability of the objective and provide certainty to regulators, policy makers, and Government of the longevity of the objective
- The location of the objective in legislation could be in a new stand-alone Act or in existing superannuation legislation, such as the Superannuation Industry (Supervision) Act 1993
- The objective would be forward-looking and could be used as a common yardstick to consider prospective policy changes to the superannuation system
- Policymakers would consider how changes to policy fit within and impact existing legislation
- The objective would provide a guide for parliamentary scrutiny and debate in the context of superannuation legislation considered by Parliament

# Poll Question 1



The changes to the Thin Capitalisation rules will apply:

- a) From 1 July 2022
- b) From 1 July 2023
- c) After Royal Assent
- d) Some other date



# ATO/Government Announcements

# ATO Update - Client Verification

- You must verify 2 separate proof of identity documents using one or a combination of the following methods:
  - Visual
  - Source ATO
  - Source Document Verification Services
  - Client to agent linking
- ATO and the TPB don't require you to or recommend that you retain identification documents
- Retaining identification documents may increase your risk of being targeted by criminals undertaking identity theft



# Client Verification

- Instead, maintain contemporaneous records to demonstrate that you undertook proof of identity steps
- TPB Practice Note TPB(PN) 5/2022 contains detailed information on the proof of identity requirements for client verification

## Example: Individual seeking to engage the registered tax practitioner in their own right:

- The Individual's full name and either residential address or date of birth
- An original or certified copy of a primary photographic identification document, or both of the following:
  - an original or certified copy of a primary non-photographic identification document; and
  - an original or certified copy of a secondary identification document.

# Client Verification

**Example: Individual representative seeking to engage the registered tax practitioner on behalf of a non-individual client**

- The individual representative's full name and either residential address or date of birth
- The non-individual client's full name and either ABN, ACN or any other additional detail in order to make a reasonable assessment of the legitimacy of the non-individual's identity
- Authority of the individual representative to engage the registered tax practitioner on behalf of the non-individual client
- For individual representative, documentation is as per individual client example
- For the non-individual client, documentation or data that verifies the existence of the non-individual client and a legal document demonstrating the authority of the individual representative to engage the registered tax practitioner on behalf of the non-individual client



# GIC and SIC Rates

- The ATO has issued the general interest charge (GIC) rates and shortfall interest charge (SIC) rates for the period from 1 April to 30 June 2023.
  - GIC rate is 10.46%
  - GIC daily compounding rate is 0.02865753%
  - SIC rate is 6.46%, and
  - SIC daily compounding rate is 0.01769863%.
- The interest rate on overpayments, early payments and delayed refund interest is 3.46%.



# 2023 FBT return – form and instructions

- Now available on ATO website
- Guidance on how to lodge an FBT return, the due date for lodging and paying, and instructions for making quarterly instalments
- Contains FBT rates and thresholds for the 2019–20 to 2023–24 FBT years and the 2014–15 to 2018–19 FBT years
- FBT rate 2023 = 47%
- Type 1 Gross Up = 2.0802 (where input tax credit available for benefit)
- Type 2 Gross Up = 1.8868 (where input tax credit NOT available for benefit)



# 2023 FBT return – form and instructions

## Reportable fringe benefits

- Where fringe benefits with a total taxable value of more than \$2,000 during the FBT year, must report:
  - the grossed-up taxable value of the fringe benefits on the employee's income statement or payment summary for the corresponding income year.
  - Reportable fringe benefits are grossed-up using the lower gross-up rate



# 2023 FBT return – form and instructions

## Capping of concessional FBT treatment of benefits

- Public benevolent institution (other than public hospitals) and health promotion charities
  - FBT exemption capped at \$30,000
  - Salary packaged meal entertainment and entertainment facility leasing expense benefits capped at \$5,000
- Public hospitals, not-for-profit hospitals and public ambulance services
  - FBT exemption capped at \$17,000
  - Salary packaged meal entertainment and entertainment facility leasing expense benefits capped at \$5,000



# 2023 FBT return – form and instructions

## Capping of concessional FBT treatment of benefits

- Rebatable employers – certain registered charities, non-government and not-for-profit organisations
  - FBT rebate of 47% capped at \$30,000
  - Salary packaged meal entertainment and entertainment facility leasing expense benefits capped at \$5,000

## Record keeping exemption threshold

- For FBT year ending 31 March 2023 - \$9,181

# 2023 FBT return – form and instructions

## Car parking threshold

- 31 March 2023 - \$9.72

## Statutory or benchmark interest rate

- 31 March 2023 - 4.52%



# 2023 FBT return – form and instructions

Reasonable food and drink amounts for one adult (per week) by cost groups – overseas

Cost group	FBT year ending 31 March 2023 ( <a href="#">TD 2022/2</a> )	FBT year ending 31 March 2022 ( <a href="#">TD 2021/3</a> )	FBT year ending 31 March 2021 ( <a href="#">TD 2020/4</a> )	FBT year ending 31 March 2020 ( <a href="#">TD 2019/7</a> )
1	\$137	\$137	\$137	\$137
2	\$201	\$201	\$201	\$201
3	\$273	\$273	\$273	\$273
4	\$346	\$346	\$346	\$328
5	\$437	\$437	\$437	\$437
6	\$537	\$537	\$537	\$537



# SMSF Compliance

- Speech by Justin Micale, Assistant Commissioner, Self Managed Super Funds Risk and Strategy delivered at the CA ANZ National SMSF & Financial Advice Conference
- SMSFs are holding just over a quarter of the \$3.4 trillion in the Australian superannuation asset pool
- Approx. 603,000 SMSFs, with over 1.1 million members holding an estimated total asset value of just over \$868 billion
- The overall tax and regulatory performance of the sector continues to remain strong
- Speech highlights a number of areas where the ATO are putting their focus



# SMSF Compliance

## ID fraud and investment scams

- Becoming more prevalent - in the 2022 financial year, ATO identified increasing numbers of individuals that were victims of identity fraud where SMSFs were registered without their knowledge
- Other key type of fraud arises where scammers contact individuals and coerce them into providing personal information, setting up an SMSF and/or investing in their bogus products
- Various methods used by scammers to contact people such as email or cold calling, pretending to be financial advisers
- Encouraging them to transfer their superannuation into a new SMSF or investment product
- The investor is often promised high returns



# SMSF Compliance

## Illegal Early Access

- Early access is the most common risk in the sector
- Occurs when individuals access their retirement savings before meeting a condition of release
- Increasing number of trustees taking advantage of direct access to their superannuation bank account and using these savings to pay for items such as business debts, holidays, renovations and new cars

## New Entrants

- One method is for new registrants to enter the system purely for the purpose of getting access to their super.
- Often with the support of promoters who help individuals to establish an SMSF and withdraw their super before they are legally entitled to – usually for a significant fee



# SMSF Compliance

## Illegal Early Access

- Once the money is rolled over from their APRA fund and then withdrawn from the SMSF bank account, these members abandon the fund and never lodge a return
- In 2020-21 over 20% or 5,600 of the 28,000 new registrants have not lodged

## Existing Trustees

- Access their super early - in some instances, they will stop lodging to avoid detection or to get additional time to put the money back in before they lodge
- Early access is usually picked up and reported in an auditor contravention report as a loan or breach of the payment standards



# SMSF Compliance

## Non-lodgment of SMSF annual returns

- There are around 24,000 funds who haven't lodged their first return and a further 80,000 lapsed lodgers with one or more outstanding returns
- For the 2020-21 year, there are around 67,000 returns outstanding
- ATO use '3 Strikes letter campaign'
- ATO have recently disqualified 104 trustees who failed to respond to ATO first batch letters
- ATO have a specific focus on tax agents and auditors who have their own personal SMSF lodgment obligations outstanding
- ATO hold professionals to a higher standard when it comes to meeting their tax and regulatory obligations



# SMSF Compliance

## Regulatory Contraventions

- Around 97% of the lodging SMSF population have no reportable contraventions from their independent audit
- ATO received ACRs for 13,558 funds (3.5% increase) with 39,997 contraventions (6.3% increase) being reported



# SMSF Compliance

## Approved SMSF auditors – adequacy and independence

- ATO continue to see the vast majority of auditors demonstrating a high level of competency and professionalism
- With the changes to the independence standards ATO has seen 31% of funds engage the services of a new auditor
- Compliance program for SMSF auditors will focus on audit adequacy, in-house audits and reciprocal auditing arrangements



# SMSF Compliance

## Approved SMSF auditors – adequacy and independence

- Some common issues include:
  - failing to obtain sufficient appropriate audit evidence
  - inadequate evaluation of the audit evidence, and
  - inappropriate documentation to support the conclusions reached

## SMSF auditor number misuse

- SMSF annual returns being lodged where an auditor's details have been entered incorrectly or an audit has not been undertaken



# Deductible Gift Recipient Revocations

- Most non-government deductible gift recipients (DGRs) needed to be a registered charity by 14 December 2022 to remain eligible for DGR endorsement
- An eligible DGR must:
  - meet the definition of an Australian government agency
  - be a registered charity
  - be operated by a registered charity or an Australian government agency, or
  - be an ancillary fund or a DGR that is listed by name in tax legislation.
- If a DGR doesn't meet eligibility requirements and hasn't been approved by the ATO for a 3-year extension, it will have its DGR status revoked
- Can re-apply for endorsement once it satisfies the eligibility requirements



# NSW Point to Point Financial Assistance Scheme

- Applies to payments received by taxi licence owners in NSW from NSW Government under the *Point to Point Transport (Taxis and Hire Vehicles) Amendment Act 2022 (NSW)*
- Payments to taxi licence owners occur when an application is made during the transitional period and the nominated licence is cancelled
- Payments are not ordinary income
- Payments should be included in the calculation of the capital gain or capital loss that is made by the licence owner on the cancellation of the taxi licence
- Capital gain or loss is the difference between what it cost to acquire the taxi licence and the consideration received in relation to the cancellation of the license



# NSW Point to Point Financial Assistance Scheme

- If a capped amount is received due to holding more than 6 metropolitan Sydney licences ATO will accept an allocation of the payments to individual licences on a reasonable basis
- Must have accurate records of when licence was acquired and how much it cost to acquire the licence
- Payments do not have pay as you go instalment implications
- The amount receive is not subject to GST
- Tax consequences that arise in relation to financial assistance payments can be found in *Taxation Ruling TR 2006/3 Income tax: government payments to industry to assist entities (including individuals) to continue, commence or cease business*

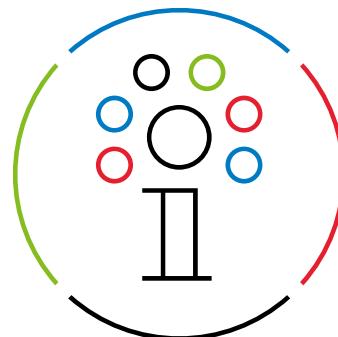


# Indexation of Transfer Balance Cap (TBC)

- From 1 July 2023, individuals will have a TBC between \$1.6 million and \$1.9 million, depending on the extent to which they have already utilised their personal TBC (if at all)
- When the TBC concept was introduced with effect from 1 July 2017 it was initially \$1,600,000
- It was increased by \$100,000 as of 1 July 2021 to \$1,700,000
- The TBC increases in \$100,000 increments (or multiples of \$100,000) in line with the Consumer Price Index ('CPI')
- As a result of a substantial increase in the CPI, the TBC is due to increase on 1 July 2023 by \$200,000
- Individuals who start their first retirement phase income stream on or after 1 July 2023 will have a TBC of \$1.9 million

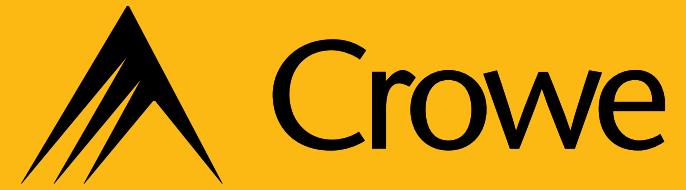


# Poll Question 2



Which of the following methods is not a recommended Client Verification method?

- a) Visual
- b) Source Document Verification Services
- c) Client Agent linking
- d) Retaining client identification documents



# ATO Rulings

# Update to Penalties Practice Statements

- Minor updates to reflect the recent increase in the penalty unit value (from \$222 to \$275 from 1 January 2023)
- PS LA 2011/19 Administration of the penalty for failure to lodge on time
- PS LA 2012/4 Administration of the false or misleading statement penalty – where there is no shortfall amount
- PS LA 2012/5 Administration of the false or misleading statement penalty – where there is a shortfall amount, and
- PS LA 2014/4 Default assessment penalty.



# PS LA 2011/19 Administration of the penalty for failure to lodge on time

- Imposed by subsec 286-75(1) of Schedule 1 to the Taxation Administration Act 1953 (TAA)
- Imposes failure to lodge (FTL) penalty:
  - for failing to lodge returns, notices, statements or other documents (referred to as 'taxation documents')
  - in the 'approved form' by a particular day
- PS LA 2011/19 provides guidance on how the FTL penalty is applied and administered
- Also provides guidance on exercising the discretion to remit the FTL penalty

# PS LA 2011/19 Administration of the penalty for failure to lodge on time

- FTL penalty applies to:
  - activity statements
  - annual goods and services tax (GST) returns and information reports
  - income tax returns
  - fringe benefits tax returns
  - PAYG withholding annual reports
  - taxable payments annual reports
  - member statements



# PS LA 2011/19 Administration of the penalty for failure to lodge on time

- Base penalty amount is one penalty unit for every 28 days (or part thereof) that the taxation document is late, up to a maximum of 5 penalty units
- The base penalty amount is multiplied by 2 if the entity:
  - is a medium withholder in the month the document was due
  - has an assessable income for the income year in which the taxation document was due more than \$1 million but less than \$20 million, or
  - has a current GST turnover of more than \$1 million but less than \$20 million in the month the document was due

# PS LA 2011/19 Administration of the penalty for failure to lodge on time

- The base penalty amount is multiplied by 5 if the entity:
    - is a large withhold in the month the taxation document was due
    - has an assessable income for the income year in which the taxation document was due of \$20 million or more, or
    - has a current GST turnover of \$20 million or more in the month the taxation document was due
  - The base penalty amount is multiplied by 500 where the entity is a significant global entity (SGE)
  - FTL penalties for SGEs apply to an entity that fails to lodge a taxation document required to be given at a date that is on or after 1 July 2017

# PS LA 2011/19 Administration of the penalty for failure to lodge on time

- Remission of FTL penalties is generally considered appropriate where:
  - circumstances beyond the control of the entity exist,
  - where it is fair and reasonable or where imposing the FTL penalty would not provide a just result
- The increased amount of FTL penalties applying to SGEs is not by itself a relevant factor in considering if a penalty should be remitted
- If the lodgment due date is deferred, it is calculated from the deferred due date, not the original due date

# PS LA 2011/19 Administration of the penalty for failure to lodge on time

- ATO may remit the FTL penalty if t/p is able to demonstrate that:
  - the FTL was caused by circumstances beyond their control
  - those circumstances could not be predicted, and
  - they or their agent were not in a position to request further time to lodge
- Even if circumstances were not beyond the entity's control, ATO may still remit the penalty (in full or in part) where it is reasonable to do so
- The onus is on the t/p to demonstrate that it is fair and reasonable to remit, considering the nature of the specific event or decision that prevented lodgment



# PS LA 2011/19 Administration of the penalty for failure to lodge on time

- The following are examples where remission **would ordinarily be appropriate** (not exhaustive):
  - taxpayer or their agent was sick with a severe life-threatening illness, such as battling cancer
  - taxpayer was caring for another person who was sick with a severe life-threatening illness
  - taxpayer could not lodge as they had not received information from other parties such as employers (a payment summary for example) that would enable them to lodge – ideally, the taxpayer should be able to demonstrate they have persistently tried to get this information
  - taxpayer was affected by a disaster such as fire or flood or state of emergency which took their complete attention and perhaps meant that some records were lost.
- Exemption from FTL may apply where tax agent fails to lodge and not due to recklessness or intentional disregard by tax agent



# PS LA 2011/19 Administration of the penalty for failure to lodge on time

- The following are examples where remission would **ordinarily not be appropriate** (not exhaustive):
  - taxpayer claims they could not lodge on time because they were on holiday
  - taxpayer claims they could not lodge on time because they were extremely busy
  - taxpayer could not lodge because they were sick with a cold (or other short-lived non-severe illness)
  - taxpayer requests remission because they claim that they did not receive any reminders to lodge from the ATO
  - taxpayer has not yet lodged the document.



# PS LA 2011/19 Administration of the penalty for failure to lodge on time

- There are rights of review in relation to remission decisions:
  - If there are more than 2 penalty units remaining after the remission decision is made - can object under Part IVC of the TAA
  - If there is less than two penalty units remaining - can seek a review under the Administrative Decisions (Judicial Review) Act 1977
- Exemption decisions
  - The entity has no objection rights if ATO determine that they are not exempt from the FTL penalty under subsection 286-75(1A)
  - Can seek a review under the Administrative Decisions (Judicial Review) Act 1977

# PS LA 2012/4 false or misleading statement penalty

## - where there is no shortfall amount

- Penalty where an entity (or their agent) makes a statement to the Commissioner, and the statement:
  - is about a tax-related matter
  - is false or misleading in a material particular, and
  - does not result in a shortfall amount.

BEHAVIOUR	BASE RATE PENALTY UNIT	SIGNIFICANT GLOBAL ENTITIES
Failure to take reasonable care	20 units (\$5,500)	40 (\$11,000)
Recklessness	40 units (\$11,000)	80 (\$22,000)
Intentional disregard	60 units (\$16,500)	120 (\$33,000)

## PS LA 2012/4 false or misleading statement penalty

### - where there is no shortfall amount

- Penalty also applies where an entity (or their agent) makes a statement to another entity (other than the Commissioner) and the statement
  - is, or purports to be one, that is required or permitted under a taxation law or
  - might reasonably be expected to be used in determining, for the purposes of goods and services tax (GST) law, whether the entity is an Australian consumer, and
  - the statement is false or misleading in a material particular



# PS LA 2012/4 false or misleading statement penalty

## - where there is no shortfall amount

- A statement is **false** if it is contrary to fact or wrong
- A statement may also be false because of something contained in the statement or because something is omitted from the statement
- It does not matter if the person who made the statement did not know that it was false
- A statement is **misleading** if it creates a false impression, even if it is literally true.
- It may be misleading because of something contained in the statement or because of something omitted from the statement
- The reason it is misleading may be because it is uninformative, unclear or deceptive

# PS LA 2012/4 false or misleading statement penalty

## - where there is no shortfall amount

- An entity will not be liable to a penalty where:
  - the entity and their agent (if relevant) took **reasonable care** in connection with making the statement, or
  - a '**safe harbour**' applies to the statement
- Reduced liability to a penalty where the entity followed ATO advice or guidance, or general administrative practice



# PS LA 2012/4 false or misleading statement penalty

## - where there is no shortfall amount

- The '**reasonable care test**' requires an entity to make a **reasonable and genuine attempt** to comply with obligations imposed under a taxation law
- This means taking into account all actions leading up to the making of the statement
- **Reasonable and genuine attempt** means actively engaged with the tax system and actively attempting to comply with their tax obligations
- Many factors relevant in determining if reasonable care exercised:
  - It was an inadvertent mistake
  - Whether reasonable enquiries were made



# PS LA 2012/4 false or misleading statement penalty

## - where there is no shortfall amount

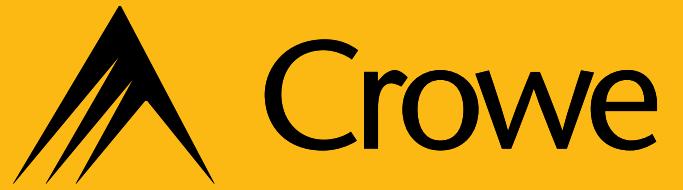
- [Safe harbour](#) provides that an entity will not be subject to a penalty as a result of certain actions (or omissions) of their registered tax or BAS agent, as long as:
  - they gave all the relevant tax information necessary for the statement to be correctly prepared to the agent, and
  - the agent did not act recklessly or with intentional disregard of the law
- This means the [safe harbour exception](#) applies only where the agent has failed to take reasonable care
- Even if an entity [uses a registered tax agent or BAS agent](#), they are still expected to take a prudent attitude to their tax affairs
  - Engaging an agent does not, by itself, mean that reasonable care has automatically been taken



# Notices to lodge tax returns

- The ATO has released two draft legislative instruments setting out the proposed requirements to lodge income tax returns for the 2022–23 income year:
  - Notice of Requirement to Lodge a Return for the Income Year Ended 30 June 2023 (LI 2023/D7)
  - Notice of Requirement for Parents with a Child Support Assessment to Lodge a Return for the Income Year Ended 30 June 2023 (LI 2023/D8).
- Comments on both draft legislative instruments are due by 14 April 2023.





# Case Law

# Asset betterment statement

## Overview

- VTBL and Commissioner of Taxation (Taxation) [2023] AATA 168
- T/p has been partially successful in reducing assessments made by the ATO under the default assessment provisions in sec 167 ITAA 1936

## Facts

- T/p was an individual and beneficiary of a number of trusts
- Trusts undertook substantial property development activities
- Following ATO audits, ATO issued amended assessments to the taxpayer
- Increased taxable income for the 2009, 2010 and 2011 income years, from a total of \$112,316 to just over \$13.29 million.



# Asset betterment statement

## Facts

- Basis of amended assessments was that t/p had many large and unexplained deposits in several bank accounts
- The Commissioner used his powers under S.167 of the ITAA 1936 to assess the taxpayer on this unexplained wealth
- Entities (such as trusts and companies) associated with the taxpayer were engaged to build over 200 residential dwellings over the period to which the amended assessments related
- The taxpayer argued that many of the cash transactions in bank accounts held by the taxpayer that the ATO was questioning, represented settlement on the sale of real estate which was beneficially held by other entities



# Asset betterment statement

## Decision

- T/p was able to demonstrate to the satisfaction of the Tribunal that deposits into bank accounts controlled by the taxpayer represented amounts received by the taxpayer as a bare trustee on behalf of different entities undertaking property development activities
- There was sufficient documentation provided by the t/p to prove that the taxpayer was not the beneficial owner of many of the properties in question
- The gains on these properties had been reflected as assessable income to the entities that were the genuine beneficial owners
- Three of the bank accounts that the ATO had treated as bank accounts of the t/p in the asset betterment assessment process were accepted by the Tribunal as being bank accounts of different entities that the taxpayer was associated with (such as trusts and companies)



# Asset betterment statement

## Decision

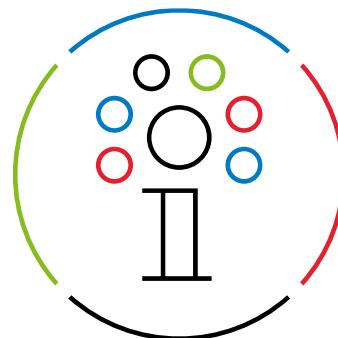
- ATO was successful in some matters – the Tribunal was satisfied that a purported \$1 million loan to the t/p was not a loan and was for the t/p's benefit
- The Tribunal also allowed the t/p's objection to the 20% uplift in the shortfall penalties

## Note

- T/ps are usually unsuccessful in appealing sec 167 default assessments/asset betterment cases
- In this case, the t/p had records to support that the transactions genuinely related to entities other than the t/p



# <Questions>



You can type them in the “Questions” box now  
Or contact me via:

- <Carlo Di Loreto>
- <Partner – Tax Advisory>
- <Crowe Australasia – an affiliate of Findex>

# Questions?



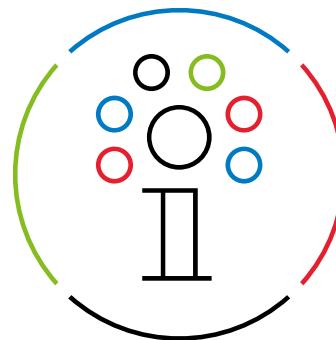
Susannah Gynther,  
Moderator

Type your  
question and hit  
'Send'



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# Upcoming Webinars



- 22 March – FBT 2023 – Meals & Entertainment
- 23 March - Income Tax Case Law Update
- 28 March – ATO Private Rulings – When, Why & How?
- 29 March – FBT 2023 – Update Essentials
- 4 April – Cyber Security Update – April 2023
- 4 April – Division 7A Advanced

# Questions



**Carlo Di Loreto**

Partner - Tax Advisory

*Crowe Australasia, an affiliate of Findex*

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