

# client alert | explanatory memorandum

June 2019

## CURRENCY:

This issue of **Client Alert** takes into account developments up to and including 17 May 2019.

## Requirement registered to lodge 2019 tax and other returns

The *Notice of Requirement to Lodge a Return for Income Year Ended 30 June 2019* has been registered. This covers income tax returns, and other lodgments for:

- franking account returns, including special rules for late balancing corporate tax entities that elect to use 30 June as a basis for determining their franking deficit tax liability;
- venture capital deficit tax returns;
- ancillary fund returns;
- trustees of SMSFs; and
- member information statements by superannuation providers.

The Notice also covers use of approved forms for lodgment, lodgment deferrals, lodgment exemptions, and penalties for non-lodgment.

The *Notice of Requirement for Parents with a Child Support Assessment to Lodge for the Income Year Ended 30 June 2019* has also been registered. It requires liable and recipient parents under a child support assessment to lodge an income tax return for the income year, by the due date specified in the instrument. Such persons may not otherwise be required to lodge an income tax return. The return must be in the approved form.

Source: <https://www.legislation.gov.au/Details/F2019L00675>

## Payment summaries and STP this tax time – taxpayers may need a myGov account

While it is being reported that many businesses are not ready for Single Touch Payroll (STP) – one report suggests that 70% of small and medium-sized entities (SMEs) are not ready – employees of businesses that are operating STP face some changes.

For the first time, as a result of the introduction of STP, taxpayers may need a myGov account in order to get the payment summary details they need to complete their 2019 tax returns.

How taxpayers receive their payment summary or income statement from their employer depends on how their employer reports their income, tax and super information to the ATO. Taxpayers will be provided with either:

- **an income statement via myGov** – if an employer reports through STP, they are no longer required to give their employees a payment summary, instead this information will be made available to the employee through ATO online services via myGov and finalised by 31 July. The income statement will show the employee's year-to-date salary and wages, the tax that has been withheld and the reported amounts of the employer super. Income statement/s will be ready to use in tax returns when the employer marks it as "**tax ready**". Employers have until 31 July 2019 to do this but may do it earlier. A notification will be sent to an employee's myGov inbox when all of their income statements are tax ready. It is important that employees don't use any information that is not marked tax ready as their employer may finalise their income statement with different amounts, meaning they may have to amend their tax return. Once an employee's myGov account is set up and linked to ATO online services, they need to:
  - log in to myGov using their email address or mobile phone number;
  - select **ATO online services**; and
  - select **Employment** and then view my **Income statement**; or
- **a payment summary** – if an employer is not yet reporting through STP, they will continue to provide employees with a payment summary by 14 July (as they do currently).

Employers need to let employees know if they won't be giving them a payment summary this year.

Employees with more than one employer may receive both a payment summary and an income statement. In that situation, employees will need to check that income from their payment summaries is included in their tax return.

#### **TIP**

This major change for 2019 will see many taxpayers needing to set up a myGov account and link it to the ATO. This is not necessarily a straightforward process – if taxpayers have a myGov account already linked to other services such as Centrelink or Medicare, adding the ATO can be problematic. For example, the name on the Centrelink account has to exactly match the name on ATO records – the ATO is likely to have a taxpayer's full name whereas a Centrelink account may only have first and last name. This may prevent the ATO from being added to a taxpayer's myGov account. The situation can be rectified but may require a trip to a Centrelink office.

Source: <https://www.ato.gov.au/Individuals/Working/Working-as-an-employee/Accessing-your-payment-summary/>

## **STP exemptions and deferrals – ATO reminders**

With reported unpreparedness for Single Touch Payroll (STP), mainly among small businesses, and with employers having less than 19 employees needing to report their employees' tax and super information through STP from 1 July 2019, the ATO has reminded businesses about the STP exemptions and deferrals that are available.

Under STP, there are exemptions for reporting:

- through STP for a particular financial year, or certain payments – for example:
  - insolvency practitioners for an employer that is required to report through STP won't be required to report through STP on their behalf in 2018-19. However, they will need to start reporting through STP from 1 July 2019;
  - employers in certain industries, such as building, construction, or cleaning, may make regular contributions to a long service leave or redundancy scheme for their employees. Those employees, who are members of the scheme, may then be entitled to a payment of long service leave or termination of payment if certain conditions are met. The ATO says administrators of one of these schemes who don't use STP-enabled payroll software to manage payments to members are exempt from reporting those payments through STP for the 2018-19 and 2019-20 financial years. However, they will need to start reporting these payments through STP from 1 July 2020.
- certain employees through STP – for example:
  - employers will be exempt from reporting payments to foreign employees for the 2018-19 financial year if **all** of the following apply: (i) the employee is employed by an offshore entity eg an entity that is non-resident for Australian taxation purposes; (ii) the employee is seconded to Australia; (iii) all or part of the employee's base salary and other remuneration is paid by an offshore entity; (iv) the employer maintains a shadow payroll arrangement for the employee eg a notional payroll for the purposes of tax and social security obligations and internal tax equalisation and protection policies.

### **STP deferrals**

For **employers with 20 or more employees**, their software provider may have applied to the ATO for a later start date for STP reporting, which covers them as an existing client. Employers covered by their software provider's deferral will need to start reporting on or before the deferral date. The software provider will provide the employer with this date and a deferral reference number (DRN), verifying that they have a deferral for the employer. Employers must retain the DRN for their own records.

Employers unable to start reporting by their software provider's deferral date will need to apply for their own deferral.

If **employers with 19 or less employees** currently use payroll software that offers STP reporting, they can update their product and start reporting at any time up to 30 September 2019. If an employer knows they won't be able to start before 30 September 2019, they, or their registered agent, can ask the ATO for a deferral. To do this, they need to:

- log in to the Business Portal; and
- select **Manage employees**, then click on **STP deferrals and exemptions**.

### **Registered agents**

Agents must be a registered tax or BAS agent to report through STP for their clients.

Payroll services include processing payroll on behalf of the employer, or performing any payroll related functions that involve interpreting legislation and helping employers calculate their PAYG withholding and super guarantee liability.

For deferral requests, where one of an agent's employer clients will not be ready to report, the agent can apply through:

- Tax or BAS Agent Portal – select **Client's employer obligations**, then **STP deferrals or exemptions**;
- Online services for agents – select **Business**, then **STP deferrals and exemptions**.

For employer clients with 19 or fewer employees, in most cases, the agent will receive a response in real-time. If the ATO needs more information, it will let the agent know. For employer clients with 20 or more employees, the agent will need to provide supporting evidence to help the ATO understand their circumstances through a portal mail message.

### **Recurring deferral**

Where there are extenuating circumstances that impact an employer's ability to regularly report on or before pay day (eg regular intermittent internet connectivity issues that result in the ATO receiving its report a couple of days after pay day), they can apply for a recurring deferral.

Source: <https://www.ato.gov.au/Business/Single-Touch-Payroll/Get-ready-for-Single-Touch-Payroll/Single-Touch-Payroll-exemptions/>

## **Ombudsman calls on ATO to cease small business recovery action where tax disputes are before AAT**

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) has issued a report into the ATO's enforcement of debt recovery. In a press release, the ASBFEO called for the ATO to immediately cease debt recovery action where tax disputes were before the Administrative Appeals Tribunal (AAT).

The report contains three key conclusions:

- stronger forms of debt recovery (ie garnishee notices, director's penalty notices and statutory demands) can directly cause the failure of a small business;
- ATO debt recovery action needs to be exercised in a proportionate, fair and consistent manner; and
- the ATO does not engage with small business in the same ways that it expects small business to engage (ie debt recovery processes need to be considered using a "small business lens" and interactions should be "far more tailored and nuanced").

### **Recommendations**

The report contains seven recommendations:

- small business must be able to seek a stay order of any ATO debt recovery action when before the AAT. The AAT can generally hear applications for stay orders from parties in non-tax matters, seeking to prevent the practical implementation of a decision being disputed, but this is not the case for taxation decisions;
- garnishee notices must have mandated external oversight and approval – currently the ATO alone has the authority to produce garnishee notices without any external oversight;
- other forms of security should be used instead of garnishees;
- settlement deeds for matters before the AAT should be published by the AAT;
- the ATO must offer the range of internal dispute resolution options and have small business acknowledgement before legal recovery action commences;
- for any small business tax debt (disputed or not), adequate opportunity must be provided to pay, aligned with cash flow of the small business; and
- the ATO should continue and expand its current independent review process for small business after the pilot program finishes.

The ASBFEO also reminds small business taxpayers in dispute with the ATO of its Small Business Concierge Service, which started on 1 March 2019. This service provides legal assistance for AAT appeals for a limited cost.

### **ATO Response**

The ATO issued a press release outlining its response to the report stating its ATO's long standing policy on debt recovery for cases in dispute at the AAT is to only pursue disputed debt in "exceptional circumstances" and that there are only "very rare cases" (for example, in 2017-18, it took garnishee action against small business in just four cases). However, it should be noted that this formed the basis of the ATO's submission

to ASBFEO. The report concluded that "evidence gathered by our Office, combined with that in IGT reviews appears to contradict this". The report states that ASBFEO found:

- 127 incidences of heavy handed practices;
- 98 incidences of issues with timeframes and processes of decision making; and
- 29 examples of the use of garnishee notices.

The ATO further stated that it will give consideration to the report's recommendations while it awaits the Australian National Audit Office's review of how the ATO manages tax debts for small business.

### **Differing views**

There does seem to be a significant difference in views between the ATO and the ASBFEO when it comes to the extent of the problem. The ATO says that there are some 3.8 million small businesses in Australia, who collectively owe some \$15 billion in tax debt (two-thirds of all debts owed). Presumably, it is to be expected that there will always be some degree of dysfunction at some point to some taxpayers – but obviously the aim is to have systems in place that keep this to an absolute minimum.

Of course, it is not possible for each small business to have its own ATO case manager, but if it were, it would overcome one of the frequent complaints to the ASBFEO involving contact and follow up. Currently, ATO telephone numbers show up as a "private number". If no voicemail message is left, the taxpayer cannot return the call. If the taxpayer then contacts the ATO, their call is placed in a queue for a long period and the taxpayer must wait for an ATO staff member to familiarise themselves with the file notes and/or start their discussions again. As the report concludes: "anonymous calls, long wait times and repeated conversations of distressing situations do not assist a small business (nor the ATO) to resolve disputes in a timely way".

Source: <https://www.asbfeo.gov.au/news/news-articles/asbfeo-report-finds-ato-early-debt-recovery-action-excessive>

## **Cryptocurrency: record keeping requirements and data matching program**

The Commissioner has published a gazette notice setting out the record keeping requirements for cryptocurrency owners and traders. The ATO advises that it is undertaking a data matching program for 2014-15 to 2019-20 for such entities.

### **Who is a DSP?**

The ATO states that the "source entities for this data matching program include cryptocurrency designated service providers through whom individuals and businesses are able to buy, sell or transfer cryptocurrency holdings". Inclusion in the hit list will be based on the principle that the "data owner or its subsidiary operates a business in Australia that is governed by Australian law" and that the data owner provides cryptocurrency designated services for individuals. This does not shine a lot of light on the issue. The ATO documents themselves concede that cryptocurrency exchange platforms are generally not regulated. It seems to the writer that a major issue with internet-based activities is working out who does what, where it is done and at what point it is done, as well as working out under which jurisdiction a particular activity falls – but presumably the ATO is well versed in this.

### **Record keeping requirements**

The gazette notice sets out the data that is to be provided cryptocurrency designated service providers (DSPs). There are two broad areas:

- **digital currency owner details** – involving names, addresses, ABNs, contact numbers and email addresses/social media accounts; and
- **account and transaction details** – focusing on individual transactions. This involves transaction dates and times, the type of cryptocurrency, amount, type of transfer etc. Other required information includes status of accounts (eg closed, suspended, open etc), total account balances, wallet addresses associated with accounts and unique identifiers.

### **Data Matching Program**

The data obtained from DSPs is being (and will continue to be) used to identify the buyers and sellers of crypto-assets and quantify the related transactions. Data will be matched against ATO records to identify individuals who may not be meeting their registration, reporting, lodgment and/or payment obligations.

The ATO will be working with other regulators, in particular, the Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Australian Securities and Investments Commission (ASIC) to ensure that tax law requirements align with a whole of system approach.

The ATO has advised that people may be contacted by the ATO and given the opportunity to verify the information collected, before any compliance action is undertaken, with at least 28 days to clarify any

information that has been obtained from the data provider. One statistic that jumps out of the page is that the Government estimates that records relating to between 500,000 and 1 million individuals will be obtained – **each financial year**. Those numbers appear quite staggering. If the actual matches the estimate, it's possible that a lot of people could be given 28 days to explain themselves.

## **An ongoing project**

The ATO is requesting permission (from the Privacy Commissioner) that it be able to keep data for seven years from the receipt of the final instalment of verified data files, rather than the standard period of review (generally four years). Much space is devoted in explaining its reasons for requesting this, in terms of privacy and so on. Clearly, the ATO sees this as an ongoing major project, which presumably will pay dividends in terms of collecting additional tax.

Finally, the dark net. The ATO notes that the "pseudonymous nature of cryptocurrencies may make it attractive to those seeking to avoid their taxation obligations". Hopefully the ATO's program gives rise to the uncovering significant commercial activity that has been designed to operate beyond the reach of the revenue net, rather than snaring a multitude of ignorant and/or forgetful amateur speculators.

Source: <https://www.legislation.gov.au/Details/C2019G00386>

## **Super death benefit for de facto partner upheld - *Howard v Batistich***

The Federal Court has dismissed an appeal against a decision to pay a superannuation death benefit pension to a fire fighter's de facto partner instead of a lump sum to his estate: *Howard v Batistich* [2019] FCA 525 (Federal Court, Robertson J, 15 April 2019).

### **Background**

The deceased, Daniel Howard, died in 2014 as a result of injuries suffered in the course of his employment with Fire and Rescue NSW whilst fighting a fire at the Occidental Hotel in Cobar NSW.

The trustee of the Crown Employees (NSW Fire Brigades Firefighting Staff Death & Disability) Superannuation Fund determined that the respondent, Ms Batistich, was a "de facto partner" of the deceased at the date of his death under the *Superannuation Act 1916* (NSW) and s 21C of the *Interpretation Act 1987* (NSW). Accordingly, the trustee determined that Ms Batistich was entitled to a fortnightly pension of \$1,180. If there was no spouse (including a de facto), a lump sum death benefit of \$350,000 would have been payable to the deceased estate.

The deceased's parents, as the administrators of his estate, complained to the Superannuation Complaints Tribunal (SCT) that Ms Batistich did not meet the definition of de facto partner. However, the SCT determined that the trustee's decision was fair and reasonable in the circumstances. The SCT considered that text messages clearly establish that the deceased and Ms Batistich were in a loving, committed relationship and shared responsibility for the day-to-day household responsibilities, which included shopping, cooking and the care of her son.

The deceased's parents appealed this determination arguing that the SCT erred in law by focusing on whether the Ms Batistich qualified as a spouse rather than whether the decision was fair and reasonable under s 37(6) of the *Superannuation (Resolution of Complaints) Act 1993* (SROC Act). The applicants submitted that a proper exercise of the SCT's power would necessarily have involved some consideration of why aspects of their case that Ms Batistich was not in a de facto relationship were not to be accepted or discounted in favour of other evidence. The applicants said it was not clear why the SCT gave primacy to one view of the material before it and not the other.

### **Decision**

In dismissing the appeal, the Court said it was not satisfied that the SCT had misunderstood its task or failed to take into account all the circumstances of the relationship. The Court rejected the applicants' argument that the SCT had not had regard to the material submitted by the applicants. While the Court agreed that the SCT's reasons were not "fulsome", it ruled that it complied with s 40 of the SROC Act by setting out its findings on material questions of fact. "That a matter is not mentioned in a statement of reasons does not mean that it was not considered, although that may be inferred", the Court said.

The Court noted that the SCT had found that Ms Batistich and the deceased lived together at the time of the deceased's death. It then expressly considered:

- whether they were in a loving, committed relationship;
- whether they shared responsibility for the day-to-day household responsibilities;
- whether they shared responsibility for the care of Ms Batistich's son;
- whether they both contributed to the day-to-day expenses of running the household as well as maintaining their own financial responsibilities in respect of the properties that they each owned;

- whether there was an intention between them for the relationship to continue in the manner of a committed future together; and
- whether there was evidence of the public acknowledgement of the relationship.

The Court said the SCT's findings addressed the matters in s 21C of the *Interpretation Act* going to the issue of "relationship as a couple" and by necessary implication rejected the applicants' contentions, including factual contentions, to the contrary. The contentions included Ms Batistich's status with Centrelink and what the cleaner and gardener said. The Court ruled that the SCT plainly made a factual finding that newspaper articles provided evidence of the public acknowledgement of the relationship and in doing so rejected the applicants' contention to the contrary, including that the articles, or some of them, were wrong.

## Protecting Your Super – how new law may affect SMSFs

Under the Protecting Your Super package, the ATO says SMSFs may receive a rollover of consolidated unclaimed super money for members.

The *Treasury Laws Amendment (Protecting Your Superannuation Package) Act 2019* introduces a number of reforms to protect individual's super savings from undue erosion by fees and unnecessary insurance. [The Bill was originally introduced in June 2018 and was finally passed in February 2019, receiving Royal Assent on 12 March 2019 as Act No 16 of 2019. Some 22 amendments were made to the Bill by the Greens in the Senate and they were subsequently agreed to by the House. Those amendments to the Bill retain group insurance on an "opt-out" basis for people with default superannuation.]

Super providers, excluding SMSFs and small APRA funds, will be required to report and pay inactive low-balance accounts to the ATO as a new category of unclaimed super money (USM) for the first time by 31 October 2019. The ATO says it will now be able to proactively consolidate eligible USM into eligible active super accounts, including SMSFs and small APRA funds, if an individual hasn't requested a direct payment of this money or for it to be rolled over to a fund of their choice. While SMSFs won't be required to report and pay inactive low-balance accounts, they may receive a rollover of consolidated USM for members, the ATO said.

The ATO says it start proactive consolidation from November 2019 and notify individuals when it has consolidated their USM into an active super account.

Source: <https://www.ato.gov.au/Super/Sup/Protecting-Your-Super---how-the-new-law-may-affect-SMSFs/>

## ATO reminds SMEs about paying super for backpackers

The ATO has reminded businesses that employ backpackers that they may need to pay superannuation guarantee (SG) for them.

Backpackers on working holidays are considered temporary residents, and are entitled to superannuation guarantee (SG) if they are paid \$450 or more before tax in a calendar month. Once they leave Australia, they can claim the super paid to them as a Departing Australia superannuation payment (DASP) providing all requirements are met.

The ATO says those who employ backpackers should:

- check they hold a valid visa using the Visa Entitlement Verification Online (VEVO) service;
- use the ATO's Super guarantee eligibility decision tool to determine if they are eligible for super;
- offer them a choice of super fund if requested, and follow the same steps they would for any other worker before they start working for them;
- advise them that they can start their DASP application using the ATO's free online application system while they are in Australia.

Source: <https://www.ato.gov.au/Newsroom/smallbusiness/Super/Paying-super-to-backpackers/?sbnews20190508>

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