

*May 2017*

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# TaxTalk Monthly

*Keeping you up to date on the latest Australian and international tax developments*



# Corporate Tax Update

## **Release of submissions to Senate inquiry into Corporate Tax Avoidance and oil and gas industry**

The non-confidential [submissions](#) made to the Senate inquiry into Corporate Tax Avoidance and Australia's offshore oil and gas industry are now available. Of particular interest is the [Australian Taxation Office's \(ATO\) general submission](#) which indicates among other information, its concerns around exploration, supply chain (i.e. marketing, procurement and shipping hubs) and related party debt financing. A separate [ATO Petroleum Resource Rent Tax \(PRRT\) submission](#) notes that areas of ATO focus for PRRT cover assessable receipts, deductible expenditure, transferrable exploration expenditure, starting base expenditure, governance and record keeping.

## **Consultation on application of incentives for ESIC investment**

The ATO has released the following new documents for consultation relating to investments in early stage innovation companies (ESIC):

- the [early stage innovation company decision-making tool](#);
- a fourth discussion paper on technical issues relating to [company level tests](#); and
- the [definition and description of accelerator programs](#).

## **Stapled Structures Consultation paper**

The Government has released a [consultation paper](#) which seeks stakeholder views on potential policy options in relation to stapled structures, the taxation of real property investments and the re-characterisation of trading income. This consultation paper is not limited to specific integrity or compliance issues previously highlighted by the ATO. Rather the Government seeks to undertake a holistic examination of the taxation of investment income derived using these structures, including the dichotomy between trading and passive income.

### *Let's talk*

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# Employment Taxes Update

## ***ATO issues FBT determinations***

The following Fringe Benefits Tax (FBT) determinations have been issued:

- [TD 2017/2](#): Fringe benefits tax: the record keeping exemption threshold for the FBT year commencing 1 April 2017 is AUD \$8,393.
- [TD 2017/3](#): Fringe benefits tax: The benchmark interest rate for the FBT year commencing on 1 April 2017 is 5.25 per cent per annum.
- [TD 2017/4](#): Fringe benefits tax: The Determination sets out the cents per kilometre rates that can be used for determining the taxable value of a motor vehicle (other than a car) for the FBT year commencing 1 April 2017.
- [TD 2017/5](#): Fringe benefits tax: The Determination sets out the reasonable amounts for food and drink expenses incurred by employees receiving a LAFHA fringe benefit for the FBT year commencing 1 April 2017.
- [TD 2017/6](#): Fringe benefits tax: The Determination sets out the indexation factors for valuing non-remote housing for the FBT year commencing 1 April 2017.

## ***Applicant liable for payroll tax as employer under a “relevant contract”***

The NSW Civil and Administrative Tribunal in [Sydney Flooring Pty Ltd v Chief Commissioner of State Revenue](#) has held that certain third parties, whose services as flooring installers were made available to the Applicants’ customers, were each engaged by the Applicants under a “relevant contract” within the meaning of s32 of the *Payroll*

*Tax Act 2007* (NSW). Accordingly, the Applicant as the employer was liable for payroll tax on taxable wages. Whilst the Applicant argued for numerous contractor exemptions to be applied to the payments made under these contracts, the Tribunal largely found the exemptions were unavailable in light of the absence of supporting evidence. This case affirms the need for taxpayers to present sufficient evidence to support any of the contractor exemptions relied upon.

## ***Applicants not entitled to work related travel expenses***

The Administrative Appeals Tribunal (AAT) in [Davy v Commissioner of Taxation](#) has affirmed the Commissioner’s decision and held that the Applicant was not entitled to work related travel expenses in excess of travel allowances, as these expenses could not be substantiated and the substantiation exemptions did not apply.

Similarly, in [Banks v Commissioner of Taxation](#) the AAT has affirmed the Commissioner’s decision to only allow deductions for work related travel expenses based on the reasonable amounts set out in relevant tax rulings as the Applicant failed to provide documentary evidence to substantiate his claims.

## ***Lodging FBT returns***

According to the [ATO](#), tax agents can only lodge clients’ 2017 FBT returns electronically through the practitioner lodgment service (PLS). To ensure your organisation is covered by the lodgment program, you must appoint a registered tax agent by 21 May 2017. The due date for lodgment of 2017 FBT returns under a tax agent is 25 June 2017 (if the return is lodged electronically) and 21 May 2017 (if the return is lodged by paper). Under the lodgment program, the due date for payment is 28 May 2017.

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## Global Tax Update

### Latest news from international tax and transfer pricing

#### **Full Federal Court dismisses taxpayer's appeal on transfer pricing matters**

On 21 April 2017, the Full Federal Court in [Chevron Australia Holdings Pty Ltd v Commissioner of Taxation \[2017\] FCAFC 62](#) unanimously dismissed the taxpayer's appeal against the decision of the Federal Court. The Federal Court found in favour of the Commissioner and dismissed the taxpayer's appeal against the Commissioner's decision in relation to objections against amended income tax assessments and administrative penalty assessments.

For each of the assessments in question, the Commissioner disallowed deductions claimed by the taxpayer in respect of interest incurred on loans provided to the taxpayer by a related company resident in the United States. The amended assessments were issued to the taxpayer based on the Commissioner's view that the interest rate applying to the loan exceeded the arm's length rate, and thus the deductions claimed were excessive.

The dispute centred on the Commissioner's application of the transfer pricing rules in Division 13 of the *Income Tax Assessment Act 1936* (ITAA 1936) in respect of each of the 2004 – 2008 financial years, and Subdivision 815-A of the *Income Tax Assessment Act 1997* (ITAA 1997) in respect of each of the 2006 – 2008 financial years. The Full Federal Court agreed with the approach taken by the primary Judge and held that the taxpayer did not

satisfy the onus of proving that the Commissioner's assessments were excessive.

Refer to [TaxTalk Monthly: November 2015](#) for a background to the decision of the Federal Court.

The Full Federal Court agreed that there was no reason to depart from the primary judge's conclusion that (in the particular circumstances) an independent borrower would have included security and operational and financial covenants in the loan terms, which would have resulted in a lower interest rate than that actually charged.

In relation to cross-border guarantees, the Full Federal court accepted that it may be reasonable to expect that a taxpayer would be required to pay a fee to a parent entity for any security provided.

#### **New Zealand proposes changes to the taxation of employee share schemes**

On 6 April 2017, the New Zealand government introduced proposed changes to the taxation of employee share schemes (ESS) ([Taxation \(Annual Rates for 2017-18, Employment and Investment Income, and Remedial Matters\) Bill](#)). If enacted, the new law will fundamentally change the way ESS are taxed in New Zealand. Refer to [PwC New Zealand's Tax Tips Alert](#) for further information.

## US IRS releases Advance Pricing and Mutual Agreement Program Report

The United States (US) Internal Revenue Service (IRS) Advance Pricing and Mutual Agreement Program Report reveals that applications for Advanced Pricing Agreements (APAs) for 2016 decreased from the record high number of requests filed in 2015. The 2015 surge was driven by the then impending effective date of the new APA procedural requirements and higher user fees. Refer to [PwC Global Tax Insights](#) for further information.

## China's SAT issues new measures for special tax investigation adjustments and mutual agreement procedures

The Chinese State Administration of Taxation (SAT) issued a Public Notice regarding the Release of the 'Administrative Measures for Special Tax Investigation Adjustments and Mutual Agreement Procedures' (Public Notice [2017] No.6). The Notice, which is effective from 1 May 2017, provides rules on risk management, investigations and adjustments, administrative review and mutual agreement procedures regarding special tax adjustments, and other relevant issues. For further information, refer to [PwC Global Tax Insights](#).

## OECD and BEPS developments

Almost fifty delegates from fourteen countries and seven organisations gathered in Tbilisi for the [second regional meeting](#) of the Inclusive Framework on Base Erosion and Profit Shifting (BEPS) in the Eastern Europe and Central Asia region. Participants discussed the status of implementation of the BEPS measures and focused on recent developments in transfer pricing and the tax treaties area, including the country by country (CbC) reporting and the tax treaty-related minimum standards.

In further BEPS-related developments, the OECD has also released the following:

- [public comments](#) received on [draft examples](#) prepared as part of the follow-up work on the interaction between the treaty provisions of the report on BEPS Action 6 and the treaty entitlement of non-CIV funds.
- [new guidance](#) for Automatic Exchange of Financial Account Information in Tax Matters (the Common Reporting Standard [CRS]). The guidance includes a series of additional CRS-related [Frequently Asked Questions](#), and the second edition of the [Standard for Automatic Exchange of Financial Account Information in Tax Matters](#).

- [further guidance](#) to provide essential information that will give certainty to tax administrations and multinational groups on implementation of Country-by-Country (CbC) reporting (BEPS Action 13).

In other developments:

- Belize and the Cayman Islands have joined the [inclusive framework on BEPS](#).
- The Canadian Revenue Agency has issued a reporting form and additional guidance for preparing CbC reporting in Canada. Refer to [PwC Global Tax Insights](#) for more information.
- Italy has issued dates for implementation of CbC reporting. For further information, refer to [PwC Global Tax Insights](#).

## Singapore-Australia Free Trade Agreement

The Minister for Trade, Tourism and Investment [tabled](#) the agreement to amend the Singapore-Australia Free Trade Agreement and the accompanying National Interest Analysis in the House of Representatives. The review of the free trade agreement is a key plank of the Singapore-Australia Comprehensive Strategic Partnership, which was announced in 2015.

## Australia – EU Free Trade Agreement scoping exercise

Australia and the European Union (EU) have successfully concluded a joint scoping exercise on a future free trade agreement between the two economies. This is a key step toward the launch of negotiations. Both sides will now work through their domestic processes to secure approval of a negotiating mandate. Refer to the [media release](#) from the Minister for Trade, Tourism and Investment for further information.

## Taxes on labour income across the OECD continues to decrease

According to the latest [OECD Taxing Wages report](#), taxes on labour income for the average worker across the OECD decreased for the third consecutive year during 2016, dropping to 36 per cent of labour costs. The decrease in the average tax wedge - the difference between labour costs to the employer and the corresponding net take-home pay - is partly explained by reforms in some countries to reduce taxes on labour income.

## OECD report on technology tools to tackle tax evasion and tax fraud

The OECD has [released](#) a [report](#) which outlines some of the technology tools implemented by tax authorities to address tax evasion and tax fraud, focussing on electronic sales suppression and false invoicing. The report also discusses complementary work that tax authorities are undertaking to address the cash economy and sharing economy, which, although not types of tax evasion and fraud themselves, can facilitate it.

## Solutions for common challenges in the design and operation of VAT systems

In the [fourth meeting](#) of the [OECD Global Forum on Value Added Tax \(VAT\)](#) on 12-14 April 2017, tax experts discussed solutions for common challenges in the design and operation of VAT systems. The OECD's Deputy Secretary-General announced the release of the *Recommendation of the Council on the Application of Value Added Tax/ Goods and Services Tax (GST) to the International Trade in Services and Intangibles*. This recommendation is

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the first OECD Act in the area of VAT and it is open to 'adherence' by non-OECD members. The VAT/GST Recommendation incorporates the *International VAT/GST Guidelines*, which were developed with the active involvement of a wide range of countries beyond the OECD and the global business community.

## US tax reform principles announced by Trump Administration

The Trump Administration's principles for tax reform were released in the last week of April 2017. At a very high level, they call for lowering business tax rates in the United States (US) to 15 per cent for corporations, a move to a territorial tax system from the current US worldwide tax system, enacting a one-time repatriation tax on the foreign earnings of US companies, and moving from seven to three individual tax brackets. Refer to the [TaxTalk Alert on 26 April 2017](#).

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## Indirect tax update

### IGOT to review GST refund verification

The Inspector-General of Taxation (IGOT), has [announced](#) the [terms of reference](#) for his review into the Australian Taxation Office's (ATO) Goods and Services Tax (GST) refund verification process. The review focuses on the GST refund verification process and:

- its accuracy in detecting incorrect or fraudulent claims,

- engagement with affected taxpayers and their representatives throughout the process, including timely notification of the retention, the reasons for it and rights of review as well as the appropriateness of any information requests and effectiveness of resolution mechanisms,
- its interaction with other ATO compliance processes triggered due to other risks being identified or because the taxpayer is involved in certain industries,

- the time required to conduct verification activities and opportunities to expedite the process through, for example, pro-actively providing information to the ATO, and
- the impact on taxpayers and their representatives when considered against resulting adjustments, as well as the ATO's endeavours to minimise these impacts.

Submissions to the review can be made until 17 May 2017.

## ***GST on low value goods - Senate Committee public hearing***

The [Senate Economics Legislation Committee](#) held a public hearing on 21 April 2017 to discuss the [Treasury Laws Amendment \(GST Low Value Goods\) Bill 2017](#). The [Labor Party has called on the government](#) to delay the implementation of these proposed rules until 1 July 2018, engage with all stakeholders and review alternative models, and deliver a Regulation Impact Statement to assure small businesses and consumers that the measure will operate as intended. Labor supports the removal of GST on low-value imports with a feasible model.

## ***ATO GST administration annual performance report for 2015–16***

The ATO has released the [GST administration annual performance report for 2015–16](#). Highlights include:

- The ATO collected AUD\$57.4 billion in net GST cash (excluding non-general interest charge penalties), 5.4 per cent higher than last year. AUD\$3.3 billion in GST liabilities was raised through compliance activities, with further AUD\$54.3 million raised by compliance activities of the Department of Immigration and Border Protection.
- The value of GST liabilities paid on time increased (up 1.7 per cent) and collectable GST debt decreased (down 2.6 per cent). The estimated GST gap (including debt) for 2014-15 is AUD\$3.78 billion.
- The release of advice on the sharing economy and on providing taxi travel services through ride-sourcing, the ATO's focus on the gold bullion and precious metals refining industry, and the ATO's contribution to the development

of the OECD guidelines on low value and imported services were mentioned

## ***Reverse charge in the precious metals industry***

The Minister for Revenue and Financial Services has [announced](#) that the Government is taking action to combat fraud in the gold trading industry. From 1 April 2017, entities buying gold, silver and platinum that have been supplied as a taxable supply for GST purposes will be required to apply a [reverse charge](#).

## ***GST distribution between States and Territories***

The Commonwealth Grants Commission has updated its [report](#) on GST Revenue Sharing Relativities. This report contains the Commission's response to the Terms of Reference for the 2017 Update, which asked the Commission to advise how GST revenue should be distributed among the States and Territories in 2017-18.

## ***Call option fee and acquisition cost of real property for margin scheme***

In the [Trustee for the Whitby Trust v Commissioner of Taxation \[2017\] AATA 343](#), the Administrative Appeals Tribunal (AAT) has affirmed the Commissioner's decision and held the applicant could not include a call option fee in the acquisition cost of real property (acquired following the exercise of the option) for margin scheme purposes in accordance with Division 75 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act). The Tribunal was of the view that [GSTD 2014/2](#), although not binding on the Tribunal, was well-founded both in terms of the GST Act and the common law on options.

## ***AAT affirms Commissioner's decision to impose penalties for failing to lodge BAS statements and report taxable supplies***

The AAT in [The Norwestern Trust v Commissioner of Taxation \[2017\] AATA 361](#) has affirmed the decision of the Commissioner to impose administrative penalties imposed on the applicant for failing to lodge Business Activity Statements (BAS) and report sales of properties as taxable supplies. The Tribunal also affirmed the specific finding of fraud and evasion made by the Commissioner based on relevant evidence and did

not exercise its discretion to remit the administrative penalties.

### **Select Committee on Red Tape - interim report regarding sale, supply and taxation of alcohol**

The Senate Select Committee on Red Tape has tabled its [interim report on the effect of red tape on the sale, supply and taxation of alcohol](#). The Committee made several recommendations, including that the Government provide leadership on the issue of alcohol taxation by establishing clear policy objectives for and to progress reform of alcohol taxation (such as a single volumetric tax rate and changes to time of settlement of tax liabilities).

### **Wine equalisation tax rebate – release of exposure draft legislation**

The Government has released [exposure draft legislation](#) that proposes to give effect to the previously announced reforms to the wine equalisation tax (WET) rebate. The proposals include the following key measures:

- From 1 July 2018, eligible producers will be required to own at least 85 per cent of the grapes used to make the wine throughout the winemaking process.
- The rebate will be limited to wine branded with a registered trademark, and packaged in a container not exceeding five litres for domestic retail sale.
- Wine producers will need to better link their rebate claims to the wine tax being paid.
- The WET rebate cap will be reduced from AUD \$500,000 to AUD \$350,000 from 1 July 2018.

Submissions were due to be made by 28 April 2017. Refer to the [joint media release](#) by the Minister for Revenue and Financial Services and the Assistant Minister for Agriculture and Water Resources for further information.

### **GST legislative determinations issued**

A number of GST legislative instruments were issued in recent weeks. This includes a number of determinations that relate to certain industries or businesses to:

- allow the issue of recipient created tax invoices (RCTIs)
- waive the requirement for a tax invoice or an adjustment note to attribute a decreasing adjustment to a tax period
- specify the particular attribution rule for GST payable on a taxable supply or creditable acquisition for various transactions, and including [Goods and Services Tax: Application of Particular Attribution Rules Determinations \(Determination\) 2017](#) which applies when two or more determinations specify different attribution rules for the same kind of taxable supply or creditable acquisition.

In addition, the following legislative instruments were made:

- [GST-free Supply \(Child Care\) Determination 2017](#)
- [GST-free Supply \(Long Day Care and In-home Care\) Determination 2017](#)
- [GST-free Supply \(Health Services\) Determination 2017](#)
- [GST-free Supply \(Care\) Determination 2017](#)
- [Goods and Services Tax: Accounting on a cash basis Determination 2017 – Industrial Trade Unions](#)
- [A New Tax System \(Goods and Services Tax\) \(Language Other Than English – LOTE – courses offered by ethnic schools\) Determination 2017](#)



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## State Taxes Update

### QLD Tax ruling on remission of unpaid interest tax interest

The Queensland (QLD) Commissioner of State Revenue has issued ruling [TAA060.1.6—Remission of unpaid tax interest](#), which identifies the relevant matters the Commissioner of State Revenue will consider for remitting unpaid tax interest, and takes effect from 6 April 2017.

### NT revenue measures for Budget 2017

The North Territory (NT) Treasurer has [announced](#) a range of revenue measures ahead of the Territory's Budget due to be handed down on 2 May 2017 including:

- Changes to community gaming machine tax rates and thresholds, to return them to closer to pre-2009 levels. This means a reduction in thresholds for clubs and hotels in 2017-18. There is a further adjustment in thresholds and tax rates for hotels in 2018-19.
- A rise in the stamp duty rate on high-valued properties, including commercial properties, to 5.75 per cent for properties valued at \$3 million to less than \$5 million, and 5.95 per cent for properties valued at \$5 million and above. This will have no effect on households or small and medium businesses.
- A moderate increase in motor vehicle registration fees.

### State legislative amendments

- The [State Revenue Legislation Amendment Bill 2017 \(NSW\)](#) has passed the New South Wales (NSW) Legislative Council and awaits assent. The Bill amends *Duties Act 1997* (NSW), *Land Tax Management Act 1956* (NSW), *Payroll Tax Act 2007* (NSW) and various Acts to permit disclosures to the Australian Charities and Not-for-profits Commission.
- The [Revenue Legislation Amendment Bill 2017](#) (ACT) has been introduced into the Australian Capital Territory (ACT) Legislative Assembly. The Bill amends the *Duties Act 1999*, *Land Tax Act 2004* and *Rates Act 2004* to give effect to decisions arising from the 2015-16 and 2016-17 Budget which include:
  - changes to the method for calculating rates and land tax for residential unit subdivisions,
  - the repeal of insurance duty legislation, and
  - a technical change to the rebate on rates for pensioners.
- The [Taxation and Related Legislation \(Miscellaneous Amendments\) Bill 2017](#) (Tas) has passed the Tasmanian parliament and now awaits royal assent. The Bill amends the *Duties Act 2001* (Tas), *Land Tax Act 2000* (Tas), *Land Titles Act 1980* (Tas), *Local Government Act 1993* (Tas), *Payroll Tax Act 2008* (Tas), *Taxation Administration Act 1997* (Tas), *Taxation Administration Regulations 2010*, and *Valuation of Land Act 2001* (Tas). Refer to this [fact sheet](#) for further information.

## State cases update

- In [Danvest Pty Ltd & Anor v Commissioner of State Revenue](#) [2017] VSC 125, the Supreme Court of Victoria has set aside assessments issued by the Victorian Commissioner of State Revenue on the basis that duty was not payable upon the acquisition by the appellants of their interests in a partnership. The Court held that the interests acquired by the appellants were not interests in dutiable property for the purposes of section 10(1)(ac) of the *Duties Act 2000* (NSW). Rather, the interests the Appellants acquired in the partnership were rights to any surplus assets of the partnership upon its dissolution.
- In [Tay v Chief Commissioner of State Revenue](#) [2017] NSWSC 338, the Supreme Court of NSW has affirmed the decision of the NSW Chief Commissioner of State Revenue, and held the plaintiff was liable for landholder duty. This was based on the fact that the transfer of shares from a deceased estate were not acquired 'solely' as the result of the distribution of the deceased's estate in the ordinary course of execution of the will. As such, the plaintiff could not seek an exemption under section 163A of the *Duties Act 1997* (NSW). However, the Court revoked the Chief Commissioner's decision to assess the plaintiff as being liable to pay ad valorem marketable securities duty on the transfer of shares from a deceased estate pursuant to a deed of family agreement.
- In [Spedding Estates Pty Ltd v Chief Commissioner of State Revenue](#) [2017] NSWCATAD 117, the NSW Civil and Administrative Tribunal has affirmed the land tax assessments issued by the Chief Commissioner of State Revenue, finding the applicant was not exempt from land tax for relevant years as the relevant land was not used for primary production. The tribunal held the dominant use of the land was for the applicant's business activities, such as wedding ceremonies, receptions, a restaurant, and short term rental of villas.
- In [Triston Pty Ltd atf The Ghantous Family Trust v Chief Commissioner of State Revenue](#) [2017] NSWCATAD 100, the Civil and Administrative Tribunal has affirmed land tax assessments issued by the NSW Commissioner of State Revenue, finding that the applicant was not entitled to the primary production exemption for relevant years as they were not satisfied that the applicant was using the land for the purpose of profit on a continuous or repetitive basis.
- In [Sharifi v Commissioner for ACT Revenue](#) [2017] ACAT 24, the ACT Civil and Administrative Tribunal has affirmed the Commissioner's decision to impose penalties on a land tax assessment on the basis that there was no grounds to remit the penalties.
- In [Grove Auto Electrical Pty Ltd as trustee for the R Foster Property Trust v Commissioner of State Revenue](#) [2017] VCAT 505, the Victorian Civil and Administrative Tribunal has affirmed the Commissioner's assessment of land tax on land held by the trustee of a discretionary trust at the trust surcharge rate because the trustee had failed to nominate a beneficiary by the applicable date and there was no discretion in the law to extend the time for making such a nomination.
- In [Lotus Projects Pty Ltd v Commissioner of State Revenue](#) [2017] VSC 63, the Supreme Court of Victoria has dismissed the taxpayer's appeal and found that an estate, which comprised a golf course and club house (the subject of a lease), was not exempt under section 71(1) of the *Land Tax Act 2005* which exempts '[l]and vested in a person or body' for certain purposes.
- In [Planet Red Pty Ltd v Commissioner of ACT Revenue](#) [2017] ACAT 18, the ACT Civil and Administrative Tribunal has substituted the land valuation decision of Commissioner of ACT Revenue in relation to the unimproved value of various blocks of land. The Tribunal considered the subjective features of each of the relevant blocks compared with the features of comparable sales to form a view about the unimproved value of the blocks

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## Superannuation update

### **Exposure Draft regulations: Treasury Laws Amendment (Innovative Superannuation Income Streams) Regulations 2017**

On 21 March 2017 Treasury issued exposure draft [regulations](#), which are intended to introduce a new set of design rules for lifetime superannuation income stream products that will enable retirees to better manage consumption and longevity risk in retirement. The overarching goal of the new rules is to provide flexibility in the design of income stream products and the new rules are intended to cover a range of innovative income stream products including deferred products, investment-linked pensions and annuities and group self-annuitised products. The proposed changes may assist funds with the development of innovative retirement products that may form part of the fund's product offering and member retention strategies. Submissions are due by 12 April 2017

### **Superannuation reform: total superannuation balance**

The ATO finalised Law Companion Guide [LCG 2016/12](#) on 20 March 2017. This guide provides guidance on how a person's total superannuation balance is calculated from 30 June 2017. The total superannuation balance is relevant for determining:

- eligibility for unused concessional contributions cap carry forward
- non-concessional contributions cap and for the bring forward of the non-concessional contributions

- eligibility for the government co-contribution
- eligibility for the tax offset for spouse contributions.

Although LCG 2016/12 relates to members, advisors and administrators are likely to find the ATO guidance useful in addressing member queries.

### **Transitional CGT relief for superannuation funds**

The ATO finalised Law Companion Guide [LCG 2016/8](#) on 8 March 2017. This LCG provides guidance on the transitional CGT relief available for superannuation funds because of the transfer balance cap and transition-to retirement reforms commencing on 1 July 2017. As mentioned in last month's update, this is an area of uncertainty for large superannuation funds. Whilst the LCG is useful to some extent, trustees nonetheless need to assess the practical viability of accessing the rollover relief, including the costs and risks that may be involved versus the rollover benefit that may be available.

### **Qualifying recognised overseas pension schemes (QROPS) – UK Budget Changes**

The UK government [announced](#) an introduction of a 25% charge on transfers QROPS as part of its measures against tax avoidance, which apply to individuals who request an overseas pension transfer on or after 9 March 2017. Whilst there are some exceptions, from an Australian funds perspective, it is important to note that the scheme administrator of the registered pension scheme or the scheme manager of the QROPS making the transfer is jointly and severally liable to the tax

charge and where there is a tax charge, they are required to deduct the tax charge and pay it to the UK tax authority (HM Revenue and Customs or HMRC).

Funds that accept QROPS need to consider the changes and may need to review their procedures and processes to deal with these changes.

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## Legislative update

Since Federal Parliament finished its Autumn session on Friday 31 March 2017, very little has happened on the legislative front. However new or progressed Commonwealth revenue measures since [TaxTalk Monthly: April](#) include the following:

- [PAYG Withholding variation for foreign resident capital gains withholding payments - income tax exempt entities](#) varies to nil the amount that would otherwise have to be paid to the Commissioner of Taxation for foreign resident capital gains tax under section 14-200 of Schedule 1 of the *Taxation Administration Act 1953*, when certain acquisitions of taxable Australian property from income tax exempt entities occur.

The following Bills have received Royal Assent:

- The [Treasury Laws Amendment \(Combating Multinational Tax Avoidance\) Bill 2017](#) which increases administrative penalties for significant global entities and updates Australia's transfer pricing rule for references to the latest OECD guidelines, and together with the Diverted Profits Tax Bill 2017 implement the [Diverted Profits Tax](#).
- [Treasury Laws Amendment \(2017 Measures No 1\) Bill 2017](#), which makes minor technical

changes to the tax concessions applicable to early stage investment and venture capital investments, and allows the Australian Securities and Investments Commission to share confidential information with the ATO.

- [Treasury Laws Amendment \(2016 Measures No 1\) Bill 2016](#), which amends the Corporations Act 2001 to improve disclosure for Employee Share Schemes, and adds six organisations to the list of deductible gift recipients.
- [Customs and Other Legislation Amendment Bill 2016](#) and [Customs Tariff Amendment Bill 2016](#), which makes various amendments to the Customs Act 1901 and the *Customs Tariff Act 1995*.

In addition, the [Treasury Laws Amendment \(Enterprise Tax Plan\) Bill 2016](#) passed the Senate with several changes that have the effect of limiting the proposed phased-in corporate tax rate reduction to companies with aggregated turnover of less than AUD\$50 million. Specifically, the Bill as currently amended will result in the following:

- The corporate tax rate for small business entities (with aggregated turnover of less than AUD \$10 million) will be reduced to 27.5 per cent for the

2016-17 income year and subsequently extended to the following corporate tax entities:

- for the 2017-18 income year - those with aggregated turnover of less than AUD\$25 million, and
- for the 2018-19 income year and later income years - those with aggregated turnover of less than AUD\$50 million.
- The 27.5 per cent rate for corporate tax entities with aggregated turnover of up to AUD\$50 million will subsequently be cut to:
  - 27 per cent for the 2024-25 income year,
  - 26 per cent for the 2025-26 income year, and

- 25 per cent for the 2026-27 and later income years.

The Bill must return to the House of Representatives for these amendments to be agreed before it can receive Royal Assent. However, in the interim in accordance with the [Treasurer's statement](#) and [media release](#), the ATO will be administering the tax changes in accordance with the Bill that has passed the Senate. Refer to the [TaxTalk Alert on 28 April 2017](#).

Federal Parliament commences the Winter sitting on Tuesday 9 May 2017, which is also the day of the 2017-18 Federal Budget.

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## Other news

### **First proposed application of Commissioner's exercise of remedial power**

The Commissioner of Taxation now has the power to amend taxation laws in certain cases. The first proposed application of the Commissioner's exercise of remedial power is [Commissioner's Remedial Power - CRP 2017/D1](#): Draft Taxation Administration (Remedial Power - Foreign Resident Capital Gains Withholding Tax) Determination 2017, which is available for general comment.

The Draft determination seeks to ensure that an entity's credit entitlement for amounts paid to the Commissioner under the Foreign Resident Capital Gains Withholding (FRCGW) legislation is made available in the income year in which the transaction that caused the amount to be withheld is recognised

for tax purposes (i.e. to deal with contracts that straddle income years).

The simplest straddling cases and the most common to arise are where a contract entered into in May or June settles in July or August of the same calendar year and gives rise to a capital gain for the vendor in the year in which the CGT event occurred, i.e. the year the contract was entered into.

According to the [explanatory statement](#) accompanying the draft determination, the issue where settlement occurs in a year subsequent to the year the contract is entered into does not appear to have been considered by Parliament in creating the FRCGW provisions. The crediting misalignment produced in straddling cases results in unintended compliance costs and adverse cash flow impacts for affected entities. It is reasonable to conclude that interactions with the crediting provisions in

straddling cases would have been addressed if the issue had been considered. In light of the intended purpose of the FRCGW and crediting provisions, the Commissioner considers it reasonable to exercise the Commissioner's discretion to use the remedial power for this issue.

The draft determination is proposed to apply retrospectively to align with the commencement date of the FRCGW legislation, being 1 July 2016.

### ***PAYG withholding variation for foreign resident capital gains withholding payments - income tax exempt entities***

The ATO has issued an [Instrument](#) which varies to nil the rate of withholding for purposes of the FRCGW legislation when an entity provides to the purchaser evidence of a private binding ruling issued by the ATO confirming the entity is income tax exempt for the year in which the transaction is occurring; or documentation showing that the entity is endorsed for income tax exemption as a registered charity under item 1.1 of section 50-5 of the *Income Tax Assessment Act 1997* (ITAA 1997).

### ***Special leave refused regarding application of annual threshold for accessing the small business CGT concessions***

The High Court in [Doutch v Commissioner of Taxation & Anor \[2017\] HCASL 85](#) has refused the taxpayer's application for special leave to appeal on the basis that the application disclosed no reason to doubt the correctness of the decision of the Full Federal Court. As reported in [TaxTalk Monthly: February 2017](#), the Full Federal Court had dismissed the taxpayer's appeal and upheld the decision of the Administrative Appeals Tribunal (AAT) which found that receipts in respect of fuel disbursements were ordinary income that the entity derived 'in the ordinary course of carrying on a business'. As such, the taxpayer's aggregated turnover exceeded the annual threshold, as applicable under section 328-120 of the ITAA 1997 which meant that the taxpayer did not meet the requirements for the small business Capital Gains Tax (CGT) concessions.

### ***Distributing franking credits to beneficiary of a discretionary trust***

The Full Federal Court in [Thomas v Commissioner of Taxation \[2017\] FCAFC 57](#) has allowed the taxpayer's appeal against the Federal Court decision

and held that a beneficiary of a discretionary trust was entitled to the benefit of the franking credits for the relevant years in accordance with the resolution of the trustee. This outcome applied notwithstanding that the allocation of franking credits was disproportionate to the distribution of the franked dividend. The Supreme Court of Queensland in the first instance held that trustee resolutions were effective in distributing franking credits to the beneficiaries of the trust. It is worth noting that this decision dealt with the law as it applied before introduction of the interim trust streaming rules which rely on the notion of specific entitlement to franked dividends.

### ***Federal Court rules on entitlement to roll-over relief following marriage breakdown***

The Federal Court in [Sandini Pty Ltd v Commissioner of Taxation \[2017\] FCA 287](#) has made a declaration that the taxpayer was entitled to roll-over relief under Subdivision 126-A of the ITAA 1997 applicable to marriage or relationship breakdowns in relation to the disposal of shares to a family trust pursuant to a Family Court order. The Federal Court held that CGT Event A1 occurred on the transfer, as the expression 'change of ownership' in section 104-10 of the ITAA 1997 includes changes in equitable ownership.

### ***Taxation statistics for 2014-15 released***

The Australian Taxation Office (ATO) has released the [taxation statistics for 2014-15](#), which provides a comprehensive statistical picture of the Australian tax system. It covers most labels from return forms and schedules.

### ***Cyclone Debbie declared a disaster for tax purposes***

The Minister for Revenue and Financial Services has [declared](#) Tropical Cyclone Debbie, and the associated rainfall and flooding, a disaster for the purposes of establishing Australian disaster relief funds. Donations to Australian disaster relief funds, established to provide relief in the aftermath of the cyclone, will be tax deductible for a period of two years from 28 March 2017, the date the cyclone made landfall in Queensland.

In addition, the [ATO is fast-tracking refunds](#) for people affected by tropical cyclone Debbie and ex-Cyclone Debbie in Queensland and New South Wales. Taxpayers and their tax and Business Activity Statement agents will also have additional

time to lodge income tax returns and activity statements. For further information, refer to [Natural disasters - March-April 2017](#).

## **Government response to the Senate Economics References Committee report - Foreign Investment Review Framework**

The Government tabled its [response](#) to the findings and recommendations of the Senate Economic References Committee report into the Foreign Investment Review Framework on 28 March 2017. This response addresses the recommendations raised in the report including those that sought to establish a publicly available Agricultural Land Register for all foreign-owned agricultural land.

## **AAT extends the time for lodgment of out of time objections**

The AAT in [Primary Health Care Limited v Commissioner of Taxation \[2017\] AATA 393](#) has set aside the Commissioner's decision to refuse to extend the time for lodgment of objections and found that the relevant objections are taken to have been lodged within the required time frame.

According to the Tribunal, factors which weighed heavily in favour of the extension of time in the matter in hand include:

- the apparent strength of the taxpayer's case,
- the absence of genuine prejudice to the Commissioner, and
- the fact that the applicant was seeking to ensure correct and consistent tax treatment over time of a long-standing business model that continues to the present day.

The Tribunal, in exercising the discretion in section 14ZX(1) of the *Taxation Administration Act 1953* (Cth) to consider applications for extension of time, referred to the decision of Justice Hill in *Brown v Federal Commissioner of Taxation* (1999) 99 ATC 4516, which according to the Tribunal provides a suitable framework of the matters that are required to be considered when a taxpayer seeks an extension of time in which to lodge an objection.

## **ATO advice and guidance issued**

The ATO has issued the following taxation determinations since our last edition of *TaxTalk*:

- [TD 2017/7](#): Freshwater crayfish can be trading stock and a reasonable estimate of the number of freshwater crayfish can be used to value trading stock on hand at year end.
- [TD 2017/8](#): The cost of travelling to have a tax return prepared by a 'recognised tax adviser' is deductible (under section 25-5 of the ITAA 1997), however the expenditure needs to be apportioned to the extent that the travel relates to another non-incidental purpose.
- [TD 2017/9](#): This determination sets out the value of goods taken from stock for private use for the 2016-17 income year.
- [TD 2017/10](#): Costs incurred after a CGT event happens can relate to that CGT event for the purpose of working out incidental costs that form part of the cost base of the asset.

The ATO has also released for comment draft effective lives for depreciating assets used in the [oil and fat manufacturing industry](#).

## **Tax and Revenue Standing Committee report on ATO Performance**

The House of Representatives Tax and Revenue Standing Committee has released its [report on the ATO's 2015/16 Annual Report](#). Recommendations made to the ATO include:

- further investing in data analytics and auditing to promote the integrity of the tax system and working with other agencies to enhance the auditing and review of apparent discrepancies identified through data matching,
- developing best practice benchmarks for measuring and reporting on the security and functionality of ATO online systems in its Annual Report,
- providing information in its Annual Report on its trajectory and progress in the redesign of tax law to simplify compliance; and the number and timeliness of public rulings, issued and finalised, over the reporting period,

- assess and issue automatic notices of assessment to non-resident taxpayers with nil income in the interests of fairness (to address concerns regarding retrospective audits and no limited amendment period where no income tax return is lodged), and
- publish its revenue gap measures, and report the total revenue gap estimate and assessments for different community sectors on its website as they become available, and in the 2016–17 Annual Report.
- receiving unclear ATO communications and guidance on reporting and payment obligations, including how PAYG instalment debts are applied against income tax return assessments as well as how to vary instalment amounts and reporting frequency requirements.

## IGOT review into administration of PAYG instalments

The Inspector-General of Taxation (IGOT) has [announced](#) the terms of reference for his review into the administration of PAYG instalments system with respect to individual taxpayers and called for submissions. Some of the concerns that previously have been raised with the IGOT include individual taxpayers:

- being unnecessarily entered into the PAYG instalments system due to one-off spikes in income in a particular income year;
- being unaware of automatic entry into the system or not receiving appropriate correspondence which may, for example, explain reasons for entry into the system and receiving unexpected tax debts,
- experiencing difficulties varying instalment amounts or lodgment frequency, making payments or exiting the system, all of which may result in tax debt errors or refund delays, and

## External scrutiny of the ATO Report – Government response

The Government has [released](#) its response to the House of Representatives Standing Committee on Tax and Revenue report, [External scrutiny of the Australian Taxation Office](#). The Government has agreed with the recommendations made by the Committee and noted that the scope of the biannual inquiries into either the ATO or the IGOT will increase to accommodate the working relationship between the two bodies.

## Shining a light on offshore tax evasion

Through a joint international investigation, the Serious Financial Crime Taskforce (SFCT) has [identified](#) 346 Australians with links to Swiss banking relationship managers alleged to have actively promoted and facilitated tax evasion schemes. The Minister for Revenue and Financial Services said information gathered throughout the course of international collaboration by the SFCT indicates that the Australians identified hold unnamed numbered accounts with a Swiss bank. Of the 346 Australians identified, 23 have already come forward under the ATO's Project DO IT or have been previously subject to ATO compliance action.

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WL127039817