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# PwC's Monthly Tax Update

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

April 2022



# Corporate Tax Update

## ATO decision impact statement on Clough case

The Australian Taxation Office (ATO) has published its [decision impact statement](#) on the decision of the Full Federal Court in [Clough Ltd v Commissioner of Taxation \[2021\] FCAFC 197](#) (Clough) which found that payments to cancel employee entitlements prior to a company takeover were not deductible under section 8-1 of the *Income Tax Assessment Act 1997* (ITAA 1997). In the decision impact statement, the ATO observes that the deductibility of similar costs in the context of a takeover will depend on specific facts and circumstances, however the decision in Clough provides authority for the characterisation of similar outgoings.

The decision impact statement also notes that, prior to the Federal Court hearing, the ATO conceded that the blackhole expenditure provisions (section 40-880 of the ITAA 1997) were applicable to the amounts paid based on additional facts received after the initial objection was made, but does not state what those facts were. The Commissioner's view of the nexus requirement of section 40-880 may be found in Taxation Ruling [TR 2011/6](#).

## ATO guidance on tax impacts of IBOR reforms

The ATO has released [website guidance](#) relating to the tax implications for businesses of changes made to financial arrangements as a result of Inter-bank Offered Rate (IBOR) reforms. This guidance is relevant for entities that changed the contractual terms of a financial arrangement to transition to alternative benchmark rates.

The guidance outlines how the London Inter-Bank Offered Rate (LIBOR) settings and Australian dollar interest rate benchmarks are affected by the reforms, and highlights the income tax and transfer pricing implications of amending or creating new contracts to facilitate these changes, as well as the tax implications of any additional payments required to be made in response to IBOR reform to maintain existing economic positions.

The publication of this guidance follows ATO consultation on this issue in 2021.

## Changing a loss carry back choice

The ATO has [published](#) information on its website on how to amend an income tax return to allow for a change to the loss carry back choice. The loss carry back is a refundable tax offset that eligible corporate entities can claim in their 2020-21, 2021-22 and

2022-23 company tax returns by choosing to carry back losses to earlier eligible income years in which there were income tax liabilities. A change to a loss carry back choice must be made in the approved form, and within the time limit for amending the relevant assessment.

The ATO advises that the approved form for changing a loss carry back choice will be available soon on its website. If a taxpayer needs to change its choice before the approved form is available, an email address is available to contact the ATO.

## Guidance for Top 1,000 taxpayers preparing for a combined assurance review

The ATO has published [additional guidance](#) designed to assist Top 1,000 taxpayers that are preparing for a combined assurance review (CAR). The guidance has a particular focus on income tax risk management and governance frameworks, and provides examples of what the ATO considers to be 'better practice' for four different types of corporate taxpayers that reflect the diversity of the Top 1,000 population.

When assessing the income tax governance of a taxpayer during a Top 1,000 review, the ATO notes that it expects to see evidence that a tax control framework commensurate with the size and complexity of the organisation has been adopted and that this framework is being followed in practice. The guidance is intended to illustrate this 'fit for purpose' approach, by providing examples of policies or procedures which demonstrate the existence and design effectiveness of those policies or procedures having regard to the size, complexity, and tax profile of the four case study taxpayers.

## Draft legislation for Digital Games Tax Offset

Treasury has released [exposure draft legislation and draft explanatory materials](#) for the Digital Games Tax Offset that was announced in 2020-21 Federal Budget. The Digital Games Tax Offset is a 30 per cent refundable tax offset available to eligible companies that spend a minimum of AUD 500,000 on qualifying expenditure on eligible games. Once enacted, the offset will be available from 1 July 2022. The offset is capped at AUD 20 million per year per company (and its related companies) regardless of whether more than one game was developed by that company during the year.

There are specific eligibility criteria to be satisfied for the company developing the game, the game itself and for qualifying expenditure. Australian resident companies or foreign resident companies with a permanent establishment in Australia are eligible provided that they obtain a certificate from the Arts Minister relating to a new game, a game ported to a new platform or ongoing development of an existing game. A game is eligible where it is primarily developed to be made available to the public over or through the internet, does not contain gambling elements, is not likely to be refused classification and has been primarily developed for entertainment or education purposes.

Qualifying expenditure is expenditure that is incurred in or in relation to the development of the game, with some specific inclusions and exclusions. For example, remuneration to employees and independent contractors who carry out technical or project manager roles is specifically included while expenditure incurred in relation to any subcontractors (including where an independent contractor subcontracts) is specifically excluded.

Submissions in response to the consultation are due by 18 April 2022.

## Remake of R&D regulations

The Government has made the [Industry Research and Development Regulations 2022](#) that substantially remake the [Industry Research and Development Regulations 2011](#), which were due to sunset on 1 April 2022, with minor technical changes and clarifications. The Regulations provide for matters relating to the administration of the Research & Development Tax Incentive by Industry Innovation and Science Australia.

## Director ID determination updated

The Commissioner of Taxation has enacted the [Director Identification Number Laws \(Application\) Data Standard 2022](#) that sets out a number of matters relating to applications for director identification numbers (DINs) including the information that may be requested, how it is collected and how it may be stored and used. It repeals the [Corporations Director Identification Number Data Standard 2021](#). The introduction of a director ID requirement, which is a unique identifier for each individual who consents to being appointed a director, is a Commonwealth Government initiative to facilitate confidence, promote good corporate conduct, and to deter and penalise illegal phoenixing to protect those who are negatively affected by such fraudulent behaviour.

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# Employment Taxes Update

## FBT 2021-22 year end

The 2021-22 fringe benefits tax (FBT) year ended on 31 March 2022. Be sure to note the various [rates and thresholds](#) that apply to the 2021-22 FBT year when preparing the annual FBT return. The due date for the 2021-22 FBT balancing payment is

now aligned with the FBT return lodgment date of 25 June 2022 (as this day falls on a weekend, the due date for the 2022 year will be 27 June 2022 which is the next business day) for employers using tax agents who lodge FBT returns electronically. For non-agent lodged returns, the due date is 23 May 2022.



## Announcement on red tape reduction for Payroll Tax returns

The Treasurer has [announced](#) during the month that the Federal Government will facilitate the sharing of Single Touch Payroll (STP) data with State and Territory Governments on an ongoing basis to allow for the pre-filling of payroll tax returns. The Federal Government anticipates this move will improve lodgement accuracy, reduce compliance costs and save time for approximately 170,000 businesses with payroll tax reporting obligations. Trials are currently in progress for a number of State and Territory Governments in relation to the use of STP data, and the Federal Government is on track to complete its IT system implementation by late 2023. Read further here [\[insert link to 'What's Emerging' if published in time\]](#).

## Decision impact statement on FBT and car parking

The Australian Taxation Office (ATO) has issued a [decision impact statement](#) concerning the decision in [Federal Commissioner of Taxation v Virgin Australia Regional Airlines Pty Ltd & Anor \[2021\] FCAFC 209](#). The decision of the Full Federal Court in the case was that fringe benefits tax (FBT) applied to car parking fringe benefits provided by Virgin Australia to its employees as the airport terminal was the primary place of employment and not the aircraft on which employees travelled. The ATO's view is that the decision is consistent with the Commissioner's application of the relevant provisions and notes that Taxation Ruling TR 2021/2 will be amended to provide further guidance on the meaning of 'primary place of employment' following the decision.

## Deductibility of costs associated with an ESS

The ATO has issued Draft Taxation Determination [TD 2022/D2](#) which sets out the Commissioner's preliminary view on the deductibility of expenses incurred in establishing and administering an 'employee share scheme' (ESS). This expenditure often includes establishing and administering an employee share trust (EST) that holds shares or rights for employees participating in the ESS.

The Draft determination concludes:

- Costs of establishment, such as legal fees incurred in establishing the EST and ESS plan rule, are not deductible to the employer company under section 8-1 of the Income Tax Assessment Act 1997 because they are capital in nature. However, these costs would be deductible to the employer company in equal proportions over five

years under section 40-880 to the extent that the business is carried on for a taxable purpose.

- Expenses incurred amending an ESS are not deductible to the employer company under section 8-1 because they are capital in nature, but may qualify for deduction under section 40-880.
- Ongoing expenses associated with the administration of an ESS are deductible under section 8-1.

When the final Determination is issued, it is proposed to apply both before and after its date of issue. Comments were due to be made on the draft determination by 25 March 2022.

## Deferral of payment summaries for certain payments

The ATO has made a [legislative instrument](#) that defers the due date for providing him with copies of payment summaries in respect of employment termination payments or departing Australia superannuation payments to 14 August following the end of the financial year in which the payments are made. This is a continuation of a deferral which has been in place since 16 November 2006.

## COVID-19 NSW payroll tax waiver

Revenue NSW has [announced](#) that businesses eligible for a 2021 COVID-19 Business Grant or JobSaver payment with grouped Australian wages of AUD 10 million or less will have their annual payroll tax liability for the 2021-22 financial year reduced by 50 per cent. Businesses with grouped wages of AUD 10 million or less may also be eligible for the payroll tax liability reduction if they can demonstrate that they experienced a 30 per cent decline in turnover. The payroll tax liability reduction may be factored into monthly returns for the 2021-22 financial year.

## NSW payroll tax – Entities entitled to de-group

The New South Wales (NSW) Supreme Court in the decision of [Elanor Operations Pty Ltd & Ors v Chief Commissioner of State Revenue \(NSW\) \[2022\] NSWSC 104](#) that members of a corporate group carried on independent businesses and were entitled to be de-grouped for NSW payroll tax purposes. The group consisted of 16 companies that acquired an investment asset and its land, conducted improvements to the asset, sold a majority interest in the asset to third party investors and then charged an ongoing fee for managing the relevant asset. The decision of the Supreme Court concerned whether each business was carried on independently of, and not in a way that was connected with the carrying on of, a business

carried on by another entity within the group. The Court found that material connections between each of the businesses must exist, having regard to the fact that the payroll grouping provisions were enacted to counter payroll tax avoidance by splitting of business activities. The fact that the head company of the corporate group did not have a majority shareholding in any of the separate assets so that it had a limited capacity to control any of the assets was considered the key factor by the Court to determine that the companies were entitled to de-group for payroll tax purposes.

## Jobkeeper payments denied

The Administrative Appeals Tribunal has considered a number of matters relating to eligibility for the Jobkeeper payments:

- [North Australian Contracting Pty Ltd v FC of T \[2022\] AATA 223](#) - the Tribunal held that the applicant was not entitled to Jobkeeper payments for August 2020 in respect of nine employees. These employees were not actually employed by the applicant on 1 July 2020, but rather by an associated company, but regularly moved between the two entities who both carried on construction work. The case turned upon whether section 9(6)(b) of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth) ('the Rules') applied to treat the applicant as having employed the

additional employees on 1 July 2020 which the Tribunal found could not apply. Although the Tribunal acknowledged that there was a good deal of commonality in the conduct of the companies both internally and in their client-facing activities, it was unable to conclude that each could be said to be carrying on the same business, having regard to how each entity, each with their own client base, incurring their own business expenses, contracting in their own right and maintaining their own separate financial accounts, and accounting to their shareholders.

- [Tiani v Federal Commissioner of Taxation \[2022\] AATA 416](#) - the Tribunal found that the taxpayer who had applied for JobKeeper as a business participant after previously applying as an employee was not eligible to receive JobKeeper as the legislation did not permit a nomination to be made more than once.

## Tasmanian payroll tax rebate scheme extended

The Tasmanian government has [announced](#) that its payroll tax rebate scheme for apprentices, trainees and youth employees will be extended to 30 June 2024 (beyond the current end date of 30 June 2022). The amendments are currently before the Tasmanian Parliament in the [Treasury Miscellaneous \(Affordable Housing and Youth Employment Support\) Bill 2022](#).

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# Global Tax and Trade Update

## ATO compliance focus on non-resident royalties

The Australian Taxation Office (ATO) has [indicated](#) that its International Risk for Private Groups Program has launched a campaign focusing on non-resident withholding tax relating to royalty expenses paid overseas for the 2019 and 2020

income years. Not only are there obligations for the payer to deduct, remit and report the applicable withholding tax to the ATO but also in the event that the withholding tax is not paid, a deduction will be denied for the otherwise deductible royalty.

## Update on OECD Pillar Two Model Rules

The Organisation for Economic Cooperation and Development (OECD) has [released](#) commentary and illustrative examples in relation to the [Global Anti-Base Erosion Model Rules](#), released in December 2021, which provide for a global minimum tax rate of 15 per cent under Pillar Two of the [Two-Pillar Solution](#) to address tax challenges arising from digitalisation of the economy. The Commentary is intended to provide a consistent interpretation of the Pillar Two Model Rules by explaining intended outcomes and, together with the Illustrative Examples, provide clarifications to a number of questions.

The OECD has also begun [public consultation](#) on the Implementation Framework for Pillar Two which will be developed to support tax authorities with the introduction and administration of the Pillar Two rules.

Read more in PwC's [Tax Policy Alert](#).

In further developments, the EU Finance Ministers did not reach unanimous support for the proposed Pillar Two Directive. The date on which Member States would transpose the Directive and make it effective had been changed from 1 January 2023 to 31 December 2023 in the compromise text. The Undertaxed Profit Rule (UTPR) was pushed out to 31 December 2024 under this compromise text. Estonia, Malta, Poland and Sweden still have reservations. Read more in this [Tax Policy Alert](#).

## MLI update

Bahrain and Romania have [deposited their instruments of ratification](#) of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). This means that the MLI will enter into force in relation to Australia's tax treaty with Romania from as early as 1 June 2022.

## Other OECD Updates

Ms Marlene Nembhard-Parker of the Tax Administration Jamaica has been [appointed](#) co-chair of the OECD G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS). Ms Nembhard Parker is the first co-chair to be appointed, following a report on developing countries and the Inclusive Framework on BEPS calling for more representation and support for developing countries.

The OECD has also released the following publications:

- A report on [Prevention of Tax Treaty Abuse – Fourth Peer Review Report on Treaty Shopping](#) that includes the aggregate results of the fourth peer review of implementation of the BEPS

Action 6 standard on treaty shopping. The report shows that OECD members are respecting their commitment to implement the standard, with the MLI being the primary tool used by the vast majority of members.

- An additional batch of [transfer pricing country profile updates](#), providing information on legislation and practice regarding the transfer pricing aspects of financial transactions and the application of the authorised OECD approach to attribution of profits to permanent establishments. The country profiles have also been updated to reflect new information on a number of transfer pricing issues such as transfer pricing methods, documentation and administrative approaches to prevent and resolve disputes.
- A report on [Taxation of Part-Time Work](#) in the OECD, which provides a summary of the effective tax rates on part-time work in OECD countries for both males and females as well as for different households. The report finds that average tax rates for part-time workers are lower than full-time workers for almost all OECD countries, however marginal tax rates are often higher for part-time workers.
- A report on [Tax Policy and Gender Equality](#), which analyses the approaches of 43 countries (from the G20, OECD and beyond) to tax policy and gender outcomes, including assessments of explicit and implicit biases, tax policy reforms to improve gender equity, and policy processes and priorities. The report affirms that improving gender equality and reducing gender-based discrimination can also produce significant economic benefits, by increasing the stock of human capital, making labour and product markets more competitive, and increasing productivity and that tax policy can contribute to those goals. In the report Australia rates as one of many countries that do not have tax policy measures implemented that have gender equity as a main consideration in its formulation.

## Pacific Agreement on Closer Economic Relations enters into force

The Government has published a [notice](#) announcing that the Pacific Agreement on Closer Economic Relations Plus (PACER Plus) has entered into force with effect from 13 December 2020 for the Cook Islands, Kiribati, New Zealand, Niue, Samoa, Solomon Islands and Tonga and from 3 April 2022 for Tuvalu. The PACER Plus is a development-centred free trade agreement which will provide commercial opportunities for Australian exporters and investors in a range of sectors.

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# Indirect Tax Update

## Draft determination on how to determine the principal purpose of a car for LCT

The Australian Taxation Office (ATO) has issued draft Luxury Car Tax Determination [LCTD 2022/D1](#) setting out the ATO's proposed view on how to determine the principal purpose of a car for the purposes of luxury car tax. In examining the principal purpose of a car, LCTD 2022/D1 looks at particular types of vehicles or design modifications made to a vehicle, focusing on the design of the vehicle rather than how it is actually used. The principal purpose test is relevant to whether a car is a 'luxury car' that may be subject to luxury car tax or it is a commercial vehicle that is not designed for the principal purpose of carrying passengers. Comments on LCTD 2022/D1 were due by 25 March 2022.

## Landlord entitled to underpayment on rent on GST-exclusive basis

The New South Wales Supreme Court has held in [Shimden Pty Ltd v Park Pty Ltd \[2022\] NSWSC 267](#) that a commercial landlord was entitled to recover underpaid rent on a Goods & Services Tax (GST) exclusive basis. The landlord had mistakenly issued

invoices for rent on a GST inclusive basis, however the Supreme Court held that rent payable under the contract was properly GST exclusive based on its terms. The landlord was able to rely on the lease terms on the basis that the Supreme Court was not satisfied that the parties had adopted a mutual assumption in relation to GST and were bound by the terms of the lease as they had executed it.

## No input tax credit for falsified transactions

The Administrative Appeals Tribunal (AAT) has held in [Kais Jewellery \(Syd\) Pty Ltd v Federal Commissioner of Taxation \[2022\] AATA 425](#) that the taxpayer was not entitled to input tax credits on purported scrap gold acquisitions on the basis that it failed to substantiate that the acquisitions were actually made. The ATO had originally disallowed the input tax credits on the basis of evidence, including statements made by a supplier of the purported scrap gold that invoices had been falsified. The AAT affirmed the ATO's decision on the basis that it could not be satisfied that the transactions had actually occurred and that while tax invoices were a significant aspect of Australia's GST system, they did not create a taxable supply.



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# Personal Tax Update

## Proposed new cents per kilometre rate

The Australian Taxation Office (ATO) has issued draft legislative determination [LI 2022/D8](#) that proposes to set the cents per kilometre rate for calculating work-related motor vehicle expenses at 75 cents per kilometre for 2022-23 income year. The new rate is proposed to apply from 1 July 2022 and will replace the previous legislative determination. Comments on the draft determination were due by 31 March 2022.

## Changes announced to the sale of ACCUs and biodiversity certificates

The Government has [announced](#) that income earned by primary producers selling Australian Carbon Credit Units (ACCUs) and biodiversity certificates will be treated as primary production income and subject to concessional treatment. This will allow farmers to access income tax averaging arrangements and the Farm Management Deposit (FMD) Scheme (with deposits paid into an FMD being deductible and then able to be withdrawn at a later time as assessable income).

## Taxpayer granted partial release from debt

The Administrative Appeals Tribunal (AAT) has granted a partial release from a taxation liability due to financial hardship in the case of [Shaw v Federal Commissioner of Taxation \[2022\] AATA 343](#). The AAT found that although the taxpayer had some surplus funds that could be applied towards paying his taxation liabilities, he cannot repay them in a reasonable time and he has minimal to no assets which indicates a lack of capacity to pay his taxation liabilities. However, other relevant factors such as his poor compliance history and structure of his business (to operate under a trust) in a manner that contributed to his being in a position of hardship, weighed against discretion being exercised to grant a release from payment. Overall, after weighing the relevant criteria for assessing whether or not to release the debts, the Tribunal was satisfied that the taxpayer would suffer serious hardship if he was required to satisfy the whole of his eligible taxation debt and found that a partial release was appropriate, being a release from the General Interest Charge portion of the debt.

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# State Taxes Update

## NSW State Revenue Amendments

The [State Revenue and Fines Legislation Amendment \(Miscellaneous\) Bill 2022](#) has been introduced into the New South Wales (NSW) Parliament to amend the *Duties Act 1997* (NSW), *Land Tax Act 1956* (NSW) and *Taxation Administration Act 1996* (NSW). We are actively monitoring the progression of the Bill through Parliament.

The amendments (if enacted) may significantly broaden the types of transactions subject to stamp duty, for example -

- The introduction of a new type of dutiable transaction, where '**an acknowledgement of trust**' in relation to dutiable property (ie a statement that purports to be a declaration of trust, but merely has the effect of acknowledging that identified property vested to be vested is already held) will be a dutiable transaction. This goes well beyond the type of 'declaration of trust' of dutiable property that is currently dutiable and could, by virtue of its broad application, tax situations where there is no change in the rights of any party relating to the property.
- The introduction of a new type of dutiable transaction for transactions 'that result in a **change in beneficial ownership** of dutiable property'. This provision seems largely modelled off the Victorian equivalent and while similarly there are a series of "excluded transactions" which should not constitute a dutiable transaction (eg the grant of a lease for no consideration), there is unlike Victoria however no exclusion for options over land.

This may be problematic as technically, the securing of a property by way of the grant of an option *prima facie* could trigger a dutiable transaction. This is because a "change of beneficial ownership" is defined to include a change in equitable interests in dutiable property". While it depends on the terms of the particular option, it is not unusual for an option holder to hold some equitable interest in the land the subject of the option. Under the new rule this will be deemed to be a "change of beneficial ownership" of that property to which duty can apply, in the absence of an exclusion (like in Victoria).

For this measure there is a transitional rule such that it should not apply to a transaction following commencement if it occurs in accordance with an agreement or arrangement entered into before commencement.

The Bill proposes to introduce a **refund mechanism** which enables **surcharge duty paid** in relation to a transfer of land to be refunded if, after the transfer, the land is used by the transferee wholly or predominantly for commercial or industrial purposes. Any such surcharge duty paid can be refunded if the application is made within 12 months after the 'entitling event', being 'the start of the use of the land wholly or predominantly for commercial or industrial purposes'. A similar mechanism is proposed to be introduced into the land tax legislation so as to refund any **surcharge land tax paid** on land which subsequently realises a commercial or industrial purpose.

For refund mechanisms of this type, the Duties Act also provides the Chief Commissioner a power to grant an exemption in advance (rather than requiring payment and refund) for particular transactions or classes of transactions where they are satisfied that the entitlement to the refund is likely to arise in the future (ie that the use of the land for commercial industrial purpose will be achieved within 10 years after the transfer).

The final key amendment is to the taxation administration legislation, being the introduction of a new anti-avoidance regime that will cover a range of taxes (including stamp duty). Under this amendment, 'avoid' relevantly includes postponement or deferral of tax. The concern is whether this has the potential to impact ordinary transactions like the use of put and call options, as by their nature they (at least in NSW) defer the relevant taxing event to when an option is exercised and an agreement is made (which is the dutiable transaction).

## NSW support for flood affected communities

Revenue New South Wales has put in place a [range of support measures](#) for individuals and businesses affected by recent floods. The relief includes extension of payment and lodgment timelines, placing debts on hold, waiving fines, interest or additional costs as a result of the flooding and providing a payroll tax exemption for wages paid to an employee for flood assistance activities which are recorded as emergency services leave. If a vehicle is written off as a result of flooding, a refund of stamp duty on a replacement vehicle may be available.

## Victorian ruling clarifying duty concession for restructures of listed stapled entities

The Victorian State Revenue Office has released Revenue Ruling [DA-047v3](#) clarifying when a concessional rate of duty will apply to relevant acquisitions resulting from the reorganisation of listed stapled entities. The ruling replaces Revenue Ruling [DA-047v2](#), following amendments to the Victorian legislation that replaced an exemption for these transactions with a concessional rate of duty, being 10 per cent of the duty that would otherwise be payable. The concessional rate of duty (and previous exemption) is available for reorganisations that satisfy the requirements in income tax legislation for capital gains rollover relief and applied with effect from 1 July 2019.

## Tasmanian land tax and stamp duty relief

The following Bills have been introduced into the Tasmanian Parliament to provide land tax and stamp duty relief in the context of the Tasmanian [Premier's commitment](#) regarding housing:

- The [Treasury Miscellaneous \(Affordable Housing and Youth Employment Support\) Bill 2022](#) proposes to increase the threshold for the 50 per cent stamp duty concession for first home buyers and pensioners seeking to downsize to AUD 600,000 (up from AUD 500,000). The increased threshold is intended to apply retrospectively from 1 January 2022 and be available until 30 June 2023. In addition, the First Home Owner

Grant scheme will be extended for the 2022-23 financial year.

- The [Land Tax Rating Amendment Bill 2022](#) proposes to lift the tax free threshold for land tax to AUD 100,000 (currently AUD 50,000), lift the upper tax threshold to AUD 500,000 (currently AUD 400,000) and lower the tax rate for land valued between AUD 100,000 and AUD 500,000 to 0.45 per cent (currently 0.55 per cent) with effect from 1 July 2022.

## ACT - Stamp duty exemption threshold for off-the-plan residential homes increased

The Australian Capital Territory (ACT) government has [announced](#) that it will increase the threshold at which off-the-plan stamp duty concessions are available to AUD 600,000 from the current AUD 500,000. The concession means that no stamp duty will apply to eligible purchases from 1 April 2022 with the \$500,000 threshold applying to contracts exchange before 31 March 2022.

## QLD land tax relief for special disability trusts

The [State Penalties Enforcement \(Modernisation\) Amendment Bill 2022](#) has been introduced into the Queensland (QLD) Parliament, amending the *Land Tax Act 2010* (QLD) to ensure that trustees of special disability trusts are able to utilise a higher tax-free threshold and lower land tax rates that apply to individuals. Previously, only trustees of bankrupt individuals or the Public Trustee managing the estate of an incapacitated individual were entitled to the beneficial treatment.

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# Superannuation Update

## Key superannuation rates and thresholds

The Australian Taxation Office (ATO) has published [key superannuation rates and thresholds](#) for the 2022-23 income year. The following key thresholds apply for the forthcoming financial year commencing from 1 July 2022:

- the superannuation guarantee rate is 10.5 per cent (up from 10 per cent)
- the concessional contributions cap is AUD 27,500
- the non-concessional contributions cap is AUD 110,000
- the capital gains tax cap amount for contributions from the sale of small business assets is AUD 1.65 million (up from 1.615 million)
- the Division 293 tax threshold amount is AUD 250,000
- the maximum super contribution base is AUD 60,220 per quarter (up from AUD 58,920)
- the low-rate superannuation benefit cap is AUD 230,000 (up from AUD 225,000)
- the general transfer balance cap is AUD 1.7 million
- the defined benefit income cap is AUD 106,250
- the employment termination payment (ETP) cap for life benefit termination payments is AUD 230,000, and
- the tax-free part of genuine redundancy payments and early retirement scheme payments is AUD 11,591, and for each complete year of service is AUD 5,797.

## Quarterly statistical report published

The ATO has [published](#) the Self-Managed Super Fund (SMSF) quarterly statistical report for December 2021. The report provides information on the population of SMSFs, their assets and membership.

## In-house asset determination for SMSFs providing rental deferrals

The ATO has made the [Superannuation Industry \(Supervision\) Self-Managed Superannuation Funds \(COVID-19 Rental Income Deferrals - In-House Asset Exclusion\) Determination 2022](#) that excludes certain assets of a SMSF from being considered in-house assets in the 2021–22 income year where a rental deferral was provided to ease the financial impact of COVID-19. The determination applies to:

- an asset acquired by the SMSF allowing a related party to defer the payment of arm's length rent to ease the financial impact of COVID-19; or
- an interest that is an interest in a company or unit trust which would not otherwise be an in-house asset and the company or unit trust allows a tenant to defer the payment of arm's length rent to ease the financial impact of COVID-19.

## Regulations to support flexible super package

The [Treasury Laws Amendment \(Enhancing Superannuation Outcomes\) Regulations 2022](#) give effect to the Flexible Super package announced in the 2021-22 Federal Budget to improve the flexibility for Australians to contribute to their superannuation and in support of the amendments made in the *Treasury Laws Amendment (Enhancing Superannuation Outcomes for Australians and Helping Australian Businesses Invest) Act 2022*. Specifically, the Regulations allow regulated superannuation funds and Retirement Savings Account institutions to accept downsizer contributions from individuals aged 60 years and over. In addition, the Regulations support the repeal of the work test to allow non-concessional and salary sacrificed contributions for individuals aged between 67 and 75 years to be made under the bring-forward rule. The Regulations apply on and from 1 July 2022.

## Funds must implement retirement income covenant

The Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) have released a [joint letter](#) outlining an indicative implementation pathway for registrable superannuation entities (RSEs) to consider when implementing the retirement income covenant. Under the retirement income covenant, RSEs must formulate a retirement income strategy and publish this strategy on their website by 1 July 2022.

The joint letter outlines a three year pathway that may be adopted by RSEs beginning with publication of the RSEs strategy, followed by annual reviews of outcomes and assessment of different products in order to improve the strategy over time. While the letter states that RSEs will not be subject to detailed regulatory guidance, APRA's existing prudential requirements may be amended in order to integrate the retirement income covenant within this existing guidance.

## No special circumstances warranted discretion to disregard non-concessional super contributions

The Administrative Appeals Tribunal (AAT) has decided in [\*SQPM v Federal Commissioner of Taxation 2022 \[2022\] AATA 298\*](#) that there were no special circumstances justifying the exercise of a discretion to disregard non-concessional superannuation contributions in an income year. Where non-concessional contributions exceed the legislative annual caps, the taxpayer can be subjected to tax on excessive contributions. Section 292-465 of the *Income Tax Assessment Act 1997* enables the Commissioner on application by the taxpayer to make a determination to disregard non-concessional contributions or allocate them to another financial year only if he or she considers that there are special circumstances and the determination is consistent with the object of the Division.

The taxpayer in the case had a non-concessional contribution cap of nil in the 2019 income year due to her superannuation balance as at 30 June 2018. However the taxpayer was not aware of changes to the non-concessional contribution cap that applied from 2017 that resulted in her cap being nil, and made a series of non-concessional contributions in the 2019 income year. The AAT rejected the taxpayer's arguments regarding her personal circumstances, including post traumatic stress disorder and inadequate accounting advice, and found that these did not constitute special circumstances as her medical report did not provide any evidence that her decision making was affected and the accounting advice was obtained after making the contributions. In addition, the AAT found that incorrect advice does not by itself constitute a special circumstance and that ignorance of the law does not amount to special circumstances without additional factors.

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## Legislative Update

Federal Parliament resumed sittings on 29 March 2022, when the 2022-23 Federal Budget was handed down. Refer to [our in-depth analysis](#) of the key tax measures announced in the Budget.

The following Commonwealth revenue measures were registered as a legislative instrument since our last update:

- [Superannuation Industry \(Supervision\) Self-Managed Superannuation Funds \(COVID-19 Rental Income Deferrals - In-House Asset Exclusion\) Determination 2022](#) that excludes certain assets from being considered in-house assets for the 2021-22 and future income years

where a rental deferral was provided to ease the financial impact of COVID-19.

- [Treasury Laws Amendment \(Enhancing Superannuation Outcomes\) Regulations 2022](#) that supports recent legislative amendments to give effect to the Flexible Super package announced in the 2021-22 Federal Budget.
- [Social Security \(Australian Government Disaster Recovery Payment—South East Queensland floods\) Determination 2022 \(No. 5\)](#) and [Social Security \(Australian Government Disaster Recovery Payment—Northern New South Wales floods\) Determination 2022 \(No. 2\)](#) that provide the eligibility criteria for individuals adversely



- affected by recent flooding to access Australian Government Disaster Recovery Payments.
- [Taxation Administration \(Data Sharing—Relevant COVID-19 Business Support Program\) Amendment Declaration \(No 1\) 2022](#) that declares certain New South Wales and South Australian programs to be COVID-19 business support programs allowing for the sharing of protected information by taxation officers for the purposes of administering the declared program.
- [Director Identification Number Laws \(Application\) Data Standard 2022](#) that sets out a number of matters relating to applications for director identification numbers.
- [Industry Research and Development Regulations 2022](#) that substantially remakes the [Industry Research and Development Regulations 2011](#), which were due to sunset on 1 April 2022, with minor technical changes and clarifications, covering matters relating to the administration of the Research and Development Tax Incentive by Industry Innovation and Science Australia.

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## Other News

### Consultation on new DGR category for pastoral care services

Treasury has [released](#) a consultation paper on the design of a new deductible gift recipient (DGR) category for pastoral care services delivered to students in primary and secondary schools. The new DGR category was announced in the 2021-22 Mid Year Fiscal and Economic Outlook by the Federal Government with the consultation informing the design of legislative amendments required to implement the announcement. Submissions in response to the consultation are due by 29 April 2022.

### Penalties for failing to lodge TPAR

The Australian Taxation Office (ATO) has [indicated](#) that it will start to apply failure to lodge penalties for taxpayers that have failed to lodge the 2021 or earlier Taxable Payments Annual Report (TPAR) in which payments made to certain contractors providing building and construction, courier,

cleaning, information technology (IT), road freight or security, investigation or surveillance services are required to be reported to the ATO. The TPAR, where required, must be lodged by 28 August each year. Penalties for failure to lodge may be applied to entities that:

- did not lodge their 2021 or prior year TPAR
- have received three non-lodgement letters about their TPAR; and
- do not respond to follow up phone calls.

Read more in this [PwC alert](#).

### Taxpayer ineligible for COVID-19 cashflow boost

The Administrative Appeals Tribunal (AAT) has found in the decision of [Water West Pty Ltd v Federal Commissioner of Taxation \[2022\] AATA 427](#) that a taxpayer was ineligible to receive the cash flow boost COVID-19 stimulus measure on the basis that it did not satisfy the definition of being a small business entity or medium business entity. The

decision was made on the basis that the taxpayer had previously been a subsidiary of a large corporate group in prior income years and so did not satisfy the requirement to have aggregated turnover of less than AUD 10 million in the previous income year. Due to a series of ownership changes, the taxpayer had twice applied for a substituted accounting period, with the effect that the 'previous income year' for determining aggregated turnover was the income year in which it was part of the large corporate group and the provision allowing the Commissioner to determine aggregated turnover on a 'reasonable basis' was only relevant where the aggregated turnover of the taxpayer could not be determined with certainty.

## New programs declared COVID-19 support programs

The Government has enacted the [Taxation Administration \(Data Sharing—Relevant COVID-19 Business Support Program\) Amendment Declaration \(No 1\) 2022](#) that declares the following New South Wales and South Australian programs to be COVID-19 business support programs:

- 2021 Land Tax COVID-19 Relief (for commercial tenants only)
- 2022 Small Business Support Grant
- Alfresco Restart Rebate
- Commercial Landlord Hardship Fund
- Business Hardships Grants (December 2021 & January 2022)
- COVID-19 Tourism and Hospitality Support Grant
- COVID-19 Tourism, Hospitality and Gym Grants.

This enables taxation officers to share protected information with Australian government agencies for the purposes of administering these programs.

## Draft effective lives

The ATO has published a draft list of effective lives of [assets used in the clothing manufacturing industry](#) to apply to depreciating assets purchased, installed and ready to use or otherwise first used from 1 July 2022. Comments on the proposed effective lives must be made by 28 March 2022.

## Assets subject to freezing order for takeover transaction

The Federal Court in [Deputy Commissioner of Taxation v State Grid International Australia Development Company Limited \[2022\] FCA 139](#) has held that a taxpayer's assets may be subject to a freezing order even where the transaction giving rise to the possible tax liability has not yet occurred. The decision concerned the takeover of a listed

company which was due to be given effect to the day after the application by the Commissioner for the freezing order.

The Commissioner contended that the takeover would give rise to a capital gains tax (CGT) liability for the vendor and that it would issue a special assessment for that liability as soon as the transaction was completed. The taxpayer contended that the transaction would not give rise to a CGT liability on the basis that the shares in the company did not constitute an indirect Australian real property interest and accordingly were not taxable Australian real property.

The Federal Court found that the Commissioner had established a good arguable case that the CGT liability would arise once the transaction had completed and the special assessment issued to the taxpayer. The Federal Court also determined that the balance of convenience favoured the grant of the freezing order over monies that would be transferred to the taxpayer with the remaining funds able to be distributed to other shareholders of the target company.

## Report into housing affordability and supply

The House of Representatives Standing Committee on Tax and Revenue has released its report [The Australian Dream: Inquiry into Housing Affordability and Supply in Australia](#). The report examines the impact of local, state and federal taxes on housing supply and examines other factors that may promote or impede housing supply. The report notes that the impact of tax settings on housing affordability is a strongly contested issue and specifically examined CGT, negative gearing, stamp duty and land tax settings. The report makes a number of recommendations designed to increase housing supply and affordability and from a tax perspective this included:

- allowing first home buyers to use superannuation assets as security for mortgages without using these funds as a deposit
- current negative gearing settings be retained
- State governments replace stamp duty with land tax with a review conducted by the Federal Government into how the costs of the transition may be 'smoothed', and
- the Government conduct a review into how current regulations and tax policies affect the build-to-rent housing market and how it is affected by progressive land tax and other tax and regulatory settings.

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# PwC's Monthly Tax Update

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