



PwC's Monthly Tax Update

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

December 2023

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Corporate Tax Update

New tax rules affecting capital management

The tax treatment of off-market share buy-backs undertaken by listed public companies and the ability to make frankable distributions in certain cases that are funded by capital raisings has changed following the passage of legislation ([Treasury Laws Amendment \(2023 Measures No. 1\) Act 2023](#)).

In broad terms, the new off-market share buy-back rules for listed public companies are aligned with the tax treatment of on-market share buy-backs. In simple terms, this means that no part of the buy-back price will be treated as a dividend. This applies with effect for off-market buy-backs undertaken or announced to the market by listed public companies on or after 7:30pm, by legal time in the Australian Capital Territory, on 25 October 2022.

In addition, to ensure alignment in tax outcomes across the capital management activities of listed public companies, a distribution by a listed public company that is "consideration for" the cancellation of a membership interest in itself, as part of a selective reduction of capital, is unfrankable and will give rise to a franking debit. In this respect, amendments were made to the measures as they progressed through Parliament to ensure that only distributions made as part of a selective reduction of capital announced or undertaken on or after 18 November 2022 are unfrankable.

The new law also operates to prevent frankable distributions funded by certain capital raising activity. This measure will take effect in relation to distributions made on or after 28 November 2023 (ie the day after Royal Assent) (rather than from 15 September 2022 as was originally drafted). The following amendments were also made to the Bill as it progressed through Parliament designed to ensure it is more targeted to artificial and contrived arrangements and mitigates any unintended impacts:

- A distribution is taken to be funded by capital raising if that capital raising funds at least a substantial part of the distribution (rather than any part of the distribution).
- Only the portion of the distribution that is funded by the capital raising will be unfrankable.
- A distribution will not be unfrankable merely because it is funded by an equity issue that is in response to a regulatory requirement, directive or recommendation (eg, by the Australian Prudential Regulation Authority).

ESIC early stage test – expenses incurred

The Australian Taxation Office (ATO) has issued Taxation Determination [TD 2023/6](#) which considers the Commissioner's view as to what is an "expense" that is "incurred" for purposes of applying the early stage test for eligibility under the early stage innovation company (ESIC) regime.

The object of the ESIC regime is to encourage new investment in small Australian innovation companies with high-growth potential, by providing a tax offset and modified capital gains tax treatment to qualifying investors.

One of the qualifying conditions to access the offset is the requirement that the company issuing the shares, and any of its 100 per cent subsidiaries, incurred total expenses of \$1 million or less in the income year preceding the issue of the shares. An additional expense test may also need to be satisfied, depending on when the company was incorporated in Australia or registered with the Australian Business Register.

The Determination outlines the ATO's position that the term "expenses" is taken to be consistent with the general accounting concept of expense. An implication of this interpretation is that an outgoing that has been properly capitalised, and results in the recognition of an asset under general accounting concept, is not an expense for the ESIC expense test.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

Chris Morris

Sydney
Australian Tax Leader
+61 (2) 8266 3040
chris.morris@pwc.com

Trinh Hua

Sydney
Tax Market Leader
+61 (2) 8266 3045
trinh.hua@pwc.com

Norah Seddon

Sydney
Tax Leader
+61 421 051 892
norah.seddon@au.pwc.com

James O'Reilly

Brisbane
Tax Leader
+61 (7) 3257 8057
james.oreilly@pwc.com

Jason Karametos

Melbourne
Tax Leader
+61 (3) 8603 6233
jason.karametos@pwc.com

Matt Budge

Perth
Tax Leader
+61 (08) 9238 2282
matthew.budge@au.pwc.com

Michael Dean

Sydney
Private Tax Leader
+61 402 041 451
michael.dean@au.pwc.com

Alistair Hutson

Adelaide
Partner
+61 (8) 8218 7467
alistair.hutson@pwc.com

Amy Etherton

Newcastle
Partner
+61 (2) 4925 1175
amy.etherton@pwc.com

Sophia Varelas

Melbourne
National Leader, R&D and Government Incentives
+61 417 208 230
sophia.varelas@pwc.com

Similarly, the Commissioner considers the meaning of 'incurred' to have the same meaning as under the general deduction provisions within section 8–1 of the *Income Tax Assessment Act 1997*. This means that the early stage test would not include certain provisions and reserves that may be recognised as expenses for accounting but which are not incurred, for example, provision for doubtful debts or depreciation.

The Determination also sets out the ATO's compliance approach. Specifically, the Commissioner considers there to be a low compliance risk in a company and its investors relying on the amount reported as 'total expenses' in the company tax return, without separately identifying whether those expenses have been 'incurred' in the tax sense. However, compliance action may be taken to verify that the amount of total expenses reported in the tax return is correct.

ATO guidance on market value substitution rules involving hybrid securities

The ATO has updated Practical Compliance Guideline [PCG 2021/1](#) which sets out the ATO's approach to applying the market value substitution rules when there is a buy-back or redemption of hybrid securities and the investor holds the securities on capital account.

Aside from minor style and formatting changes, the PCG has been updated to confirm the existing ATO view that a reference in the Guideline to stripping out an accrued coupon is a reference to the grossed-up coupon. The PCG also now confirms that regard should be given to the [ASX Listing Rules 19.12 definition](#) when calculating the volume weighted average price.

ATO's interim position on recent deemed dividend case

As reported in our [November 2023 Monthly Tax Update](#), the Administrative Appeals Tribunal (AAT) found in [Bendel & Anor v Commissioner of Taxation \[2023\] AATA 3074](#) that unpaid present entitlements (UPEs) to income or capital of a trust estate payable to a private company did not constitute loans under the deemed dividend rules in Division 7A.

This position runs contrary to the Australian Taxation Office's (ATO) longstanding position regarding UPEs and Division 7A. The Commissioner has appealed against the AAT's decision.

In the meantime, the ATO has issued an [interim decision impact statement](#) in which it confirms that, until the appeal process has been finalised, the Commissioner does not intend to revise the current ATO views relating to private company entitlements to trust income, per [Taxation Determination TD 2022/11](#) *Income tax: Division 7A: when will an unpaid present entitlement or amount held on sub-trust become the provision of 'financial accommodation'?*

The ATO also notes that, in addition to the application of section 109D *Income Tax Assessment Act 1936*, the basis on which private company beneficiaries deal with unpaid entitlements to trust income may have implications under other taxation laws, for example section 100A *ITAA 1936*.

Until the appeal process is finalised, the Commissioner does not propose to finalise objection decisions in relation to objections to past year assessments (for which no settlement was reached) where the decision turns on whether or not a UPE was a subsection 109D(3) loan. However, if a decision is required to be made (for example, where a taxpayer gives notice requiring the Commissioner to make an objection decision), any objection decisions made will be based on the ATO's existing view of the law.

For more information about the case, see our [Update](#).

Corporate tax transparency report released

The ATO has released the [Corporate tax transparency report](#) for 2021–22 income year which contains the name, Australian Business Number (ABN), total income, taxable income and tax payable for:

- Australian public and foreign-owned companies with an income of AUD 100 million or more, and
- Australian-owned resident private companies with an income of AUD 200 million or more.

It also contains the name, ABN and tax payable for entities that had a petroleum resource rent tax (PRRT) payable amount for the 2021–22 income year.

The 2021–22 report includes data from 2,713 entities, who paid a cumulative total of \$83.8 billion in income tax – a 22.2 per cent increase from the previous year. Other highlights include:

- Total income for 2021–22 was \$2,630.6 billion, an increase of 14.7 per cent.
- Taxable income was \$341.4 billion, an increase of 33.1 per cent.
- Over half (50.6 per cent) of the tax payable in the corporate transparency population related to the mining, energy and water segment.
- Approximately 31 per cent of entities paid nil tax (12 per cent incurred an accounting loss, 7 per cent incurred a tax loss, 2 per cent utilised offsets, 10 per cent utilised tax losses from prior year).

Note that the reporting threshold changes for the 2022–23 income year onwards, with the threshold for Australian-owned resident private companies reducing from \$200 million to \$100 million. This will impact data reported from 2024 onwards.

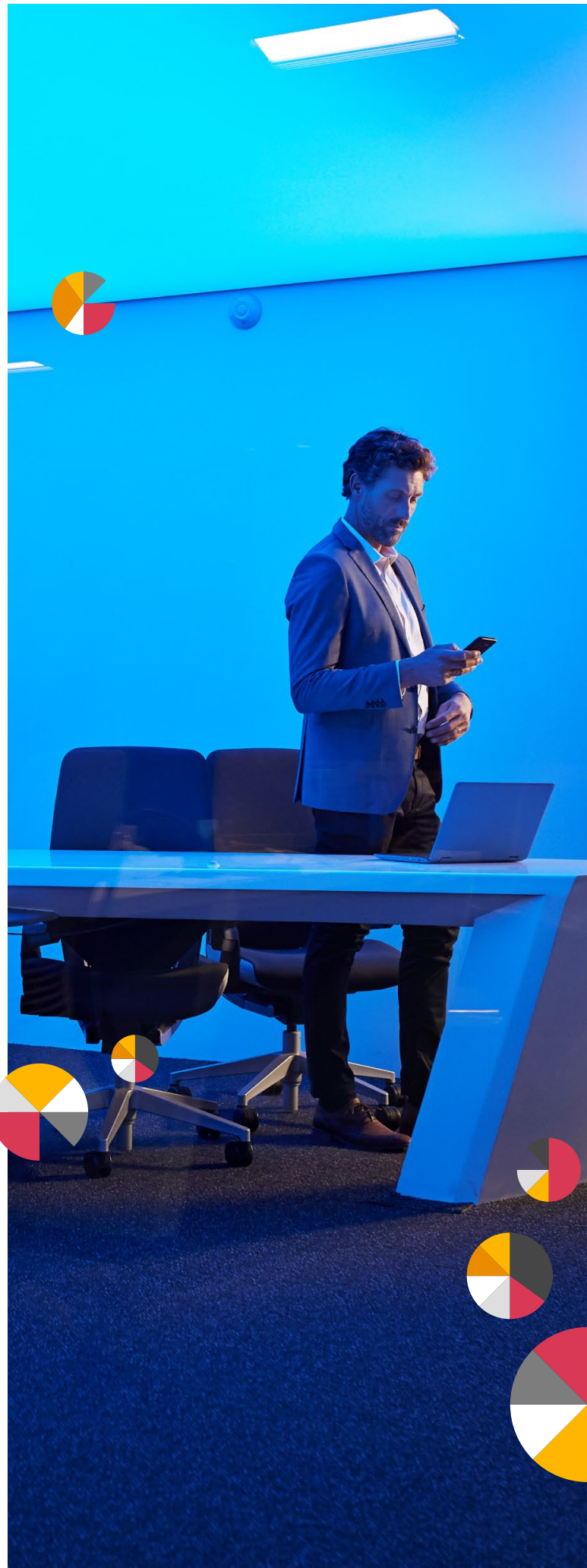
ATO draft guidance on Corporate Collective Investment Vehicles

The ATO has released Draft Law Companion Ruling [LCR 2023/D1](#) which considers the operation of the new Collective Investment Vehicle (CCIV) regime. A CCIV is a legal form company limited by shares that is available for funds management. From a regulatory perspective, a CCIV is a registered company with its assets and liabilities segregated into 'sub-funds' and is operated by a single corporate director.

The tax framework treats each CCIV sub-fund as a separate tax entity that is a trust. The general intent is to align the tax outcomes of CCIVs and their investors with the existing treatment of investors in attribution managed investment trusts (AMITs). General trust taxation rules (with modifications) apply to a CCIV where it does not qualify for the AMIT regime.

The Law Companion Ruling also explains the deeming principle and its effect on the tax treatment of a CCIV, a CCIV sub-fund trust and investors, and provides views on specific tax interpretative issues.

The Ruling is proposed to be effective 1 July 2022 (being the commencement date of the CCIV regime). Comments on the Draft Ruling are invited until 15 December 2023.



Employment Taxes Update

Superannuation Guarantee compliance

The Australian Taxation Office (ATO) has [released](#) the latest annual statistical results for employer obligations relating to superannuation guarantee (SG) compliance and obligations for the 2022–23 financial year. The SG 2022–23 compliance snapshot in infographic form is also available [here](#).

Some highlights of the report include:

- Most employers are paying more than 94 per cent of the SG they are required to without ATO intervention.
- A total of \$1,130 million in SG charge liabilities was collected through SG voluntary disclosures and ATO compliance action.
- The ATO finalised approximately 14,000 SG cases, resulting in around \$447 million SG charge liabilities and \$157 million in Part 7 penalties raised.
 - 12,600 of those reviews were because of employee notification complaints raising \$379 million in SG charge liabilities.
 - 1,400 of those reviews were because of other ATO initiated reviews raising \$68 million in SG charge liabilities.
- Around 56,000 employers came forward to make a voluntary disclosure of unpaid super, resulting in around \$445 million in SG charge liabilities being raised. This is an increase from 30,800 employers in the previous financial year.
- There were 3,660 Director Penalty Notices (DPNs) issued.

These findings are consistent with the commentary in the ATO's [Annual Report](#) for 2022–23 and underlines the ATO's current data-led approach to SG compliance. Specifically, the ATO has noted within the report:

“The value of super guarantee charge collected for 2022–23 reflects the broader environment, which has been impacted by factors including economic conditions. The ATO has recommenced its legal recovery actions with a focus on super guarantee charge debts and expects to collect more in the future years as a result.”

FBT guide for employers updated for car parking

In relation to fringe benefits tax (FBT) matters, the ATO has updated [Chapter 16 – Car parking fringe benefits](#) of its [Fringe benefits tax — a guide for employers](#).

The chapter has been updated following the decision in *Commissioner of Taxation v Virgin Australia Regional Airlines Pty Ltd* [2021] FCAFC 209 and subsequent amendment to *Taxation Ruling* TR 2021/2 that addressed the concept of “primary place of employment” and to provide further guidance on contemporary car parking arrangements.

For further information on the Virgin Australia Regional Airlines decision, please see the ATO's [Decision Impact Statement](#).

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

Norah Seddon

Sydney
Partner
+61 (2) 8266 5864
norah.seddon@pwc.com

Adam Nicholas

Sydney
Partner
+61 (2) 8266 8172
adam.nicholas@pwc.com

Greg Kent

Melbourne
Partner
+61 (3) 8603 3149
greg.kent@pwc.com

Anne Bailey

Melbourne
Partner
+61 (3) 8603 6818
anne.m.bailey@pwc.com

Paula Shannon

Brisbane
Partner
+61 (7) 3257 5751
paula.shannon@pwc.com

Global Tax and Trade Update

Amendments to interest limitation rules

At the time of writing, Government amendments to the [Treasury Laws Amendment \(Making Multinationals Pay Their Fair Share - Integrity and Transparency\) Bill 2023](#) - which contains the proposed reforms to limit interest deductions under Australia's thin capitalisation regime - were released in advance of their introduction in the Senate. These amendments include, among others:

- a deferral of the start date for the debt deduction creation rules until income years commencing on or after 1 July 2024 for all arrangements
- a significant narrowing of the scope of arrangements that may fall within scope of the debt deduction creation rules
- changes to the thin capitalisation fixed ratio test to allow excess "tax EBITDA" to be passed up to certain companies, partnerships, and managed investment trusts, in addition to unit trusts (as previously proposed), and
- broadening the thin capitalisation third party debt test.

Once the Bill and its amendments have completed their passage through both Houses of Parliament, the next stage will be enactment, which we expect will be forthcoming well before the end of this calendar year. For further details on the measures, refer to our [Tax Alert](#).

ATO's practical compliance guidance on central management and control updated

The Australian Taxation Office (ATO) updated its Practical Compliance Guideline [PCG 2018/9](#), which provides practical guidance to assist foreign-incorporated companies determine whether they are tax resident under the central management and control (CMC) test. The updated PCG follows the end of the ATO's administrative approach which applied for the transitional period that ended on 30 June 2023. The PCG sets out the circumstances in which the Commissioner will not allocate resources to review a company's residency position under the CMC test.

The Commissioner also acknowledges in the updated PCG that for some foreign-incorporated companies there may not be much difference in Australian taxation outcomes whether the company is treated as Australian resident under the CMC test or not. This can be the case for public groups with strong established governance practices and internal tax processes.

Specifically, the updated PCG sets out circumstances where there is a very low risk that the Commissioner would seek to treat a foreign-incorporated company as a resident under the CMC test to provide ongoing certainty for public groups.

The PCG also sets out a three-tier risk assessment framework for other companies. Where a company has relied on the risk framework for an income year, the Commissioner may, in the course of ordinary engagement and assurance activities, seek to verify the risk zone that a company has determined it falls within. Where a company's circumstances are not within this framework, this does not mean there is a high risk of the company being a resident of Australia under the CMC test – however, the Commissioner may engage with the company to understand its circumstances.

Simplified transfer pricing record-keeping guidance updated

The ATO's Practical Compliance Guideline [PCG 2017/2](#) which offers simplified transfer pricing record-keeping options to minimise record-keeping for eligible taxpayers has been updated. The updated PCG provides the maximum interest rate for low-level inbound loans and the minimum interest rate for low-level outbound loans for the 2023–24 year as 5.81 per cent. Relevant examples to reflect those interest rates have also been updated.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

Chris Morris

Sydney
Australian Tax Leader
+61 (2) 8266 3040
chris.morris@pwc.com

Michael Bona

Brisbane
Global Tax Leader
+61 (7) 3257 5015
michael.bona@pwc.com

Michael Taylor

Melbourne
Partner
+61 (3) 8603 4091
michael.taylor@pwc.com

Greg Weickhardt

Melbourne
Partner
+61 428 769 169
greg.weickhardt@pwc.com

Nick Houseman

Sydney
Australian Transfer Pricing Leader
+61 (2) 8266 4647
nick.p.houseman@pwc.com

Angela Danieletto

Sydney
Partner
+61 (2) 8266 0973
angela.danieletto@pwc.com

Jonathan Malone

Sydney
Partner
+61 (2) 8266 4770
jonathan.r.malone@pwc.com

Gary Dutton

Partner
Australian Trade Leader
+61 434 182 652
gary.dutton@pwc.com

Australia-Iceland tax treaty in force

The [new tax treaty](#) between the Governments of Australia and Iceland is now in force.

The treaty which [came into effect](#) on 8 November 2023 will apply in Australia for withholding tax purposes on the relevant Australian income earned from 1 January 2024, fringe benefits provided from 1 April and to any other Australian taxes on income earned from 1 July 2024. In Iceland, all aspects of the treaty will take effect from 1 January 2024.

Corporate Tax Statistics 2023

The Organisation for Economic Co-Operation and Development (OECD) has published [Corporate Tax Statistics 2023](#) that compiles data on corporate tax revenues, statutory corporate income tax rates, corporate effective tax rates, tax incentives for research and development (R&D) and innovation, in addition to two years of anonymised and aggregated Country-by-Country Report (CbCR) statistics compiled by jurisdictions based on CbCRs collected as a result of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project. For the first time, the publication also includes information on withholding tax rates under tax treaties for over 100 countries and jurisdictions.

The report has been released alongside a new accompanying working paper, [Effective tax rates of MNEs: New evidence on global low-taxed profit](#), which provides new estimates of the distribution of effective tax rates of large multinational enterprises across and within jurisdictions.

According to the working paper, the results show that low tax profit is common, and that substantial low-taxed profit exists outside low tax jurisdictions. The OECD estimates that 'high tax' jurisdictions (those with average effective tax rates (ETRs) above 15 per cent) account for more than half of global profits taxed below 15 per cent, much more than very low tax jurisdictions (those with average ETRs below five per cent) which only account for 18.7 per cent of low-taxed profits.

OECD releases MAP statistics

The OECD has [released](#) the 2022 Mutual Agreement Procedures (MAP) Statistics as well as the 2023 Consolidated Information on MAP.

The 2022 MAP Statistics highlight the following trends:

- Taxpayers are engaging with MAP more than ever
- Fewer MAP cases were closed in 2022
- Outcomes remain generally positive; and
- Average case times are closing in on their 24-month target.

The OECD has also released the first edition of [Making Dispute Resolution Mechanisms More Effective – Consolidated Information on Mutual Agreement Procedures 2023](#), which provides stakeholders with an overview of published MAP information in each member jurisdiction of the OECD/G20 Inclusive Framework on BEPS.

Countries pledge to implement crypto-asset transparency standard

The OECD has [announced](#) that 48 countries and jurisdictions, including Australia, intend to implement the OECD's global tax transparency framework for the reporting and exchange of information with respect to crypto-assets by 2027.

The Crypto-Asset Reporting Framework (CARF) is a key component of the International Standards for Automatic Exchange of Information in Tax Matters developed by the OECD under a G20 mandate. It provides for the automatic exchange of tax-relevant information on crypto-assets and comes against the backdrop of a rapid adoption of the use of crypto-assets for a wide range of investment and financial uses. Unlike traditional financial products, crypto-assets can be transferred and held without the intervention of traditional financial intermediaries, such as banks, and without any central administrator having full visibility on either the transactions carried out or on crypto-asset holdings.

In a [joint statement](#), the countries and jurisdictions that have committed to implementing CARF also invited other jurisdictions to join them, with a view to enhancing the global system of automatic information exchange.

Other OECD updates

Other updates from the OECD include:

- a [public discussion draft](#) proposing changes to the commentary on Article 5 (permanent establishment) of the OECD Model Tax Convention, to develop an alternative provision on activities in connection with the exploration and exploitation of extractable natural resources (oil, gas and minerals), together with related commentary. Comments are invited by 4 January 2024.
- an update to its [Frequently Asked Questions](#) (FAQs) on the Modern Reporting Rules for Digital Platforms. The FAQs are received from business and government delegates, with the answers clarifying the Model Rules and assisting in ensuring consistency in their implementation.
- [Revenue Statistics in Africa 2023](#), an annual publication that compiles comparable tax revenue and non-tax revenue statistics for 33 countries in Africa.

Some global Pillar Two developments

The following global developments have occurred in relation to the Pillar Two solution to address the tax challenges arising from the digitalisation of the economy:

- Not only has the Philippines [joined](#) the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS), it has also committed to participate in the Two-Pillar Solution to reform the international taxation rules.
- The Hungarian Government has published draft legislation for public consultation to implement EU Directive 2022/2523/OECD Model Rules on the global minimum tax (GloBE). For further information, refer to our [Tax Alert](#).
- The Government of Bermuda issued draft legislation proposing a 15 per cent corporate income tax. This is consistent with alignment with the GloBE rules and qualification as a Covered Tax. However, Bermuda currently has no proposals to introduce the Income Inclusion Rule (IIR) or the Undertaxed Profits Rule (UTPR). For further information, refer to our [Tax Alert](#).



Indirect Tax Update

ATO's views on GST frozen food case

In [Simplot Australia Pty Limited v Commissioner of Taxation \[2023\] FCA 1115](#), the Federal Court of Australia considered the goods and services tax (GST) treatment of certain frozen food products supplied and imported, holding that the products were not GST-free as they were of a kind marketed as prepared meals, which are excluded from the GST-free category of food.

The Australian Taxation Office (ATO) has since released a [decision impact statement](#) outlining its response to this case, confirming the Commissioner's classification of the particular products.

A product is taxable as 'food of a kind marketed as a prepared meal' if it is within a class or genus of food marketed generally as having the attributes of a prepared meal – quantity, composition and presentation. The ATO has noted that the Federal Court has left open that a prepared meal may have attributes additional to the three stated attributes.

The decision impact statement explains that since the concepts of 'meal' and 'meal component' are not mutually exclusive, a product which is regarded as a 'meal component' may be taxable as 'food of a kind marketed as a prepared meal' in some situations. This does not mean that everything which is a meal component or any particular meal component will be taxable and whether or not this is the case will depend on application of the statutory test as a 'single composite question'. In practice, it will be the facts, circumstances and evidence which determine whether a meal component is 'food of a kind marketed as a prepared meal'.

The Commissioner considers that it will be rare that, as a result of the *Simplot* decision, a meal component not previously understood to be taxable will now be understood to come within a class or genus of food marketed generally as having the attributes of a prepared meal (including quantity, composition and presentation).

The ATO recommends that taxpayers review food products to ensure correct classification is consistent with the decision in *Simplot*. If there is uncertainty as to the GST treatment of any products, the ATO encourages taxpayers to seek ATO advice while it develops further public guidance.

Comments on the decision impact statement close on 8 December 2023.

GST and multi-purpose compression socks

The ATO has withdrawn Interpretative Decision [ATO ID 2003/953](#) which related to GST and the supply of multi-purpose compression socks, as it may be misleading.

Compression socks will only be GST-free if they are specifically designed for people with an illness or disability, and are not widely used by people without an illness or disability. This is determined by the facts in each case.

For the ATO's current position on the supply of compression socks, see its [GST and health website guidance](#).

GST compliance

Hector Thompson, Deputy Commissioner, International, Support and Programs has spoken on the [future of GST compliance](#) at the Tax Institute's National GST Conference.

Key highlights include:

- In the 2022–23 financial year, GST cash collections were over \$81 billion. This financial year, GST receipts are forecast to grow to \$86 billion.
- Recent estimates suggest the net GST gap (ie the gap after Australian Taxation Office (ATO) compliance activities) was 3.6 per cent, or around \$2.8 billion in 2021–22.
- The ATO is piloting concepts to streamline the tax experience, including piloting right-time GST payments and voluntary monthly reporting of GST, for small business.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

Matt Strauch
Melbourne
Indirect Tax Leader
+61 (3) 8603 6952
matthew.strauch@pwc.com

Adrian Abbott
Sydney
Partner
+61 (2) 8266 5140
adrian.abbott@pwc.com

Jeff Pfaff
Brisbane
Partner
+61 (7) 3257 8729
jeff.pfaff@pwc.com

Brady Dever
Sydney
Partner
+61 (2) 8266 3467
brady.dever@pwc.com

Mark Simpson
Sydney
Partner
+61 (2) 8266 2654
mark.simpson@pwc.com

Suzanne Kneen
Melbourne
Partner
+61 (3) 8603 0165
suzanne.kneen@pwc.com

Shagun Thakur
Perth
Partner
+61 (8) 9238 3059
shagun.thakur@pwc.com

Andrew Howe
Sydney
Partner
+61 (4) 1464 1438
andrew.s.howe@pwc.com

Mark De Luca
Sydney
Partner
+61 (2) 8266 2461
mark.de.luca@pwc.com

- The ATO is developing further analytical risk models so that it can more effectively target those attempting to commit fraud against the GST system. For example, the ATO is working alongside the Australian Business Registry Services to coordinate strategies and disrupt fraudulent behaviour at the point of Australian Business Number registration.
- This year, the ATO will implement a targeted industry strategy in relation to privately owned high wealth groups focusing on retail, construction and retirement village industries, noting that retail and construction are the two most significant industries for GST activity.
- At 30 June 2022, GST collectable debt was \$12.3 billion, having more than doubled in three years. While this increase in debt has been experienced across all taxes administered by the ATO, GST debt is growing the fastest.



Personal Tax Update

Deductible loss on sale of residence

In [Bowerman and Commissioner of Taxation \(Taxation\) \[2023\] AATA 3547](#), the Administrative Appeals Tribunal (AAT) found that, having regard to the facts of the case, not only was a loss on the sale of a property in which the behavior taxpayer lived deductible, but that it could be claimed in the taxpayer's 2020 tax return (despite the sale completing in the 2021 income year).

The taxpayer lived in a residential unit purchased with an intent to sell for a profit. However, due to unfortunate timings relating to COVID-19, the unit was sold at a loss of over \$265,000, which was claimed as a deduction under section 8-1 of the *Income Tax Assessment Act 1997*.

In respect of whether the loss on the sale of the residential unit was incurred in gaining or producing assessable income, the Tribunal placed considerable weight on the 'incontrovertible fact' that, even before purchasing the property, the taxpayer already intended to re-sell it for a profit instead of holding on to it for long-term investment. The AAT also agreed that a profit-making intention was not required to be the sole or dominant purpose of entering into the transaction and this is satisfied if just one of the purposes included the requisite profit-making intention. Furthermore, the AAT noted that the acquisition of the property could be considered a 'commercial transaction' as it was the sort of thing a business person would do (and that the requirement that a transaction be a 'commercial transaction' involves only a low threshold).

The AAT noted that the fact that the taxpayer resided in the property did not displace the fact that it was acquired by them in gaining or producing assessable income. The Tribunal also commented that just because the property sold was the taxpayer's residence, did not give reason for it to automatically be a loss of a domestic nature.

As to the time when the loss was 'incurred', the Tribunal accepted the taxpayer's argument that their treatment of the loss being incurred in the 2020 income year (when they were definitively committed, rather than at settlement) was consistent with the Commissioner's views in binding public ruling TR 97/7 *Taxation Ruling Income tax: section 8-1 – meaning of 'incurred' – timing of deductions*. The AAT commented that absent the taxpayer's reliance on TR 97/7, it would have decided that the taxpayer had not incurred the loss on the sale until settlement in the 2021 income year.

The AAT itself acknowledged that the result in this case was unusual, and that the issues considered were contentious. However, the Tribunal noted that there was no rule in Australian income tax law that a profit or gain made on the sale of one's residence, in circumstances where there is a profit-making intention, cannot give rise to a profit that is taxable as ordinary income (and, so it follows, a taxpayer who makes a loss in such a manner may claim a deduction under section 8-1).

Value of goods taken from trading stock

The Australian Taxation Office (ATO) has released Taxation Determination [TD 2023/7](#) which sets out the amounts that the Commissioner will accept as estimates of the value of goods taken from trading stock for private use by taxpayers in named industries (predominantly within food and hospitality) for the 2023–24 income year.

Non-commercial losses and flood, fire or other COVID-19 impacts

By way of background, the non-commercial business loss rules apply to prevent an individual's losses from non-commercial business activities from being offset against the individual's other assessable income in the year the loss is incurred.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

Glen Frost

Sydney
Partner
+61 (2) 8266 2266
glen.frost@pwc.com

Amy Etherton

Newcastle
Partner
+61 (2) 4925 1175
amy.etherton@pwc.com

Samantha Vidler

Brisbane
Partner
+61 (7) 3257 8813
samantha.vidler@pwc.com

Matt Gurner

Perth
Partner
+61 (8) 9238 3458
matthew.gurner@pwc.com

Alistair Hutson

Adelaide
Partner
+61 (8) 8218 7467
alistair.hutson@pwc.com

The ATO has updated Practical Compliance Guideline [PCG 2022/1](#) which outlines a safe harbour approach for taxpayers affected by flood, bushfire or COVID-19 in relation to the application of the non-commercial business loss rules whereby the Commissioner of Taxation is taken to have exercised his discretion that it would be unreasonable, by reference to the circumstances specified, to defer the losses.

The PCG 2022/1 has been updated so that it now also applies to the 2023–24 income year.

Officeholder data-matching program announced

The ATO has [given notice](#) that it will acquire officeholder data relating to approximately 11 million individuals from the Australian Securities and Investments Commission (ASIC), the Office of the Registrar of Indigenous Corporations (ORIC) and the Australian Charities and Not-for-profits Commission (ACNC) for 2023–24 through to 2024–25.

The program seeks, among other items, to enable the Australian Business Registry Services (ABRS) to increase uptake of director ID, and effectively link persons known to the ATO to officeholders and their associated companies, as well as to combat unlawful and phoenix activity.



State Tax Update

New South Wales: Guide to recent amendments

The [Treasury and Revenue Legislation Amendment Act 2023 \(NSW\)](#), which legislates for the measures announced in the New South Wales (NSW) State Budget, implements measures which are to generally commence on 1 February 2024.

Revenue NSW has published a [guide](#) that provides key information relating to these amendments which include the corporate reconstructions and consolidations concession and landholder duty changes, and how they affect duties transactions.

NSW: Duties rulings updated

Revenue NSW has released the following updated Rulings taking effect from 4 September 2023 that, among other changes, incorporate amendments from the [Revenue, Fines and Other Legislation Amendment Act 2023 \(NSW\)](#):

- Revenue Ruling [DUT 030v2](#) *Property vested in an apparent purchaser*
- Revenue Ruling [DUT 033v2](#) *Consideration for duties transactions*
- Revenue Ruling [DUT 36v4](#) *Aggregation of dutiable transactions*
- [DUT 012v4](#) *Evidence of value requirements and guidelines*
- [DUT 044v2](#) *Valuation of Property – suitably qualified valuer*

NSW: Unstamped trust deed had no legal effect

In [Hildard Pty Ltd ATF Hildard Trust v Chief Commissioner of State Revenue \[2023\] NSWCATAD 247](#), the NSW Civil and Administrative Tribunal confirmed a 2021 land tax assessment in respect of a property held by a corporate trustee on trust.

The Chief Commissioner of State Revenue argued that the trust was a discretionary trust and taxable as a special trust under section 3A of the *Land Tax Management Act 1956 (NSW)*.

The taxpayer produced an unstamped Declaration of Trust to support its appeal, however the Tribunal noted that by virtue of section 304 of the *Duties Act 1997 (NSW)*, the unstamped Trust Declaration had no effect at law or in equity. In the absence of any evidence as to its terms, the precise terms of the trust were unknowable and the Tribunal could not be satisfied that the trust was a fixed trust.

The taxpayer's alternative argument that the principal place of residence (PPR) exemption applied since at all relevant times the property was the PPR of the sole director and shareholder of the corporate trustee and his stepson (who was beneficiary of the trust) was also rejected by the Tribunal. This was because it was not satisfied that the relevant limited circumstances to allow the PPR exemption were not satisfied.

ACT: Revenue amendments now law

The [Revenue Legislation Amendment Bill 2023 \(ACT\)](#) which is now law, among other things, amends the *Duties Act 1999 (ACT)* with effect from 1 July 2024 to:

- simplify and strengthen landholder duty exemptions by consolidating them under Chapter 3 of the Duties Act and base them on actual acquisitions (rather than applying a hypothetical test)
- remove an ACT-specific exemption for beneficiaries of trusts which is replicated through other provision
- clarify the scope of duty exemption for acquisitions made to secure finance
- provide a definition of 'land'; and
- clarify duty liability when an acquisition occurs under an agreement, combined acquisitions under an arrangement and uncompleted agreements.

The Act also amends the *Rates Act 2004 (ACT)* and the *Taxation Administration Act 1999 (ACT)*.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

Rachael Cullen

Sydney
Partner
+61 409 470 495
rachael.cullen@pwc.com

Barry Diamond

Melbourne
Partner
+61 (3) 8603 1118
barry.diamond@pwc.com

Cherie Mulyono

Sydney
Partner
+61 (2) 8266 1055
cherie.mulyono@pwc.com

Matthew Sealey

Partner
+ 61 400 684 803
matthew.sealey@pwc.com

Jess Fantin

Brisbane
Partner
+61 (7) 3257 5501
jess.fantin@pwc.com

Rachael Munro

Perth
Partner
+61 (8) 9238 3001
rachael.munro@pwc.com

ACT: New stamp duty exemption for dual occupancy homes

The Australian Capital Territory (ACT) Government has [announced](#) that it will introduce a new stamp duty exemption for dual occupancies on suburban residential blocks to further progress housing choice, access and affordability.

From 27 November 2023 to 30 June 2026, a new stamp duty exemption will apply to the first transfer of unit-titled dwellings on suburban residential (RZ1) blocks for purchases valued up to \$800,000.

The introduction of the exemption will coincide with the commencement of the new Territory Plan, which will allow dual occupancy developments on large blocks. Any block over 800 square metres in an RZ1 zone will be able to accommodate a second dwelling, up to 120 square metres in size, and be able to unit title that second dwelling, enabling it to be individually sold.

The Government is also introducing changes to the lease variation charge (LVC) – a windfall gains tax – to support the development of more dual occupancy homes in Canberra.

Between the commencement of the new Territory Plan and 30 June 2026, the Government will give lessees the choice on how the LVC is calculated for maximum number of dwelling lease clauses on RZ1 blocks, between the codified values or 75 per cent of the value uplift as measured by an accredited valuer.

ACT: Expansion of off-the-plan stamp duty concession

The ACT Government has [announced](#) that the stamp duty concession for off-the-plan purchases will increase for qualifying purchases valued up to (and including) \$800,000 for contracts signed and exchanged on or after 27 November 2023. Previously, the concession applied to properties valued up to \$700,000.

This increase in threshold aligns with the ACT's new stamp duty exemption for dual occupancies on suburban residential blocks (above).

QLD: First Home Owner Grant doubled

The Queensland (QLD) Government has [announced](#) that it will double the First Home Owner Grant to \$30,000 for eligible first home buyers.

The measure is effective for eligible transactions entered into between 20 November 2023 and 30 June 2025, when the boost is set to expire. First home owners are expected to be able to apply for the increased grant from the first week of January 2024.

To be eligible for the First Home Owner Grant, an individual must be at least 18 years old, buy or build a new home valued less than \$750,000 (including land and any contract variations), and that home must be the first residential property owned in Australia. Refer to the [QLD Revenue Office guidance](#) for more information.

Victoria: Revised revenue ruling on meaning of land development

The *Duties Act 2000 (Vic)* (Duties Act) imposes duty on a transfer of dutiable property unless an exemption applies. Where land development as defined in section 3(1) has occurred, duty consequences may arise under section 18A, section 28A and/or Part 4A of Chapter 2 of the Duties Act.

The Victorian State Revenue Office has released revised ruling [DA-064v2](#) *Meaning of land development*, which provides clarification on the actions and activities that constitute land development as defined in section 3(1) of the Duties Act. Namely, the updated ruling further clarifies the activities contemplated under limbs (a) (ie preparing a plan of subdivision of the land or taking any steps to have a plan registered) and (c) (ie requesting under the *Planning and Environment Act 1987* a planning authority to prepare an amendment to a planning scheme that would affect the land) of the land development definition within the Duties Act.

The ruling is effective 31 October 2023.

Victoria: Draft rulings released on economic entitlements

The Victorian State Revenue Office has released the following draft revenue rulings concerning the application of the duty rules that apply in connection with economic entitlements in relation to relevant land:

- Draft ruling [DA-066](#) *Land transfer duty – Calculation of economic entitlements* which provides guidance on how to determine the percentage of beneficial ownership of land taken to have been acquired under an economic entitlement, including circumstances where the Commissioner considers it appropriate to exercise discretion under section 32XE(3) *Duties Act 2000 (Vic)* to determine a percentage less than 100 per cent.
- Draft ruling [DA-065](#) *Land transfer duty – Acquisition of economic entitlements in relation to land (service fees)* which provides clarification on the application of the economic entitlement provisions to service fees. The ruling also sets out when the economic entitlement provisions can apply to a resident in a retirement village, and deals with acquisitions of shares in companies and units in unit trust schemes that may be outside the scope of the landholder provisions. The ruling does not deal with any other arrangement or the acquisition of an economic entitlement in relation to a private landholder.

Comments for both draft rulings closed on 1 December 2023.

Victoria: Interim position on late settlement interest duty to continue

In Victoria, following a judicial decision, late settlement interest is taken to be part of the consideration which 'moves' the transfer of the land it is subject to duty. However, the State Revenue Office has an [interim position](#) applicable from 1 July 2022, whereby duty would only be payable if late settlement interest paid or payable was \$5,000 or more.

This means that a transaction should be re-lodged for reassessment if the contract of sale or arrangement was entered on or after 1 July 2022, and the late settlement interest exceeds \$5,000. This process is expected to continue until further notice.

WA: Duties amendments passed

The [Duties Amendment \(Off-the-Plan Concession and Foreign Persons Exemptions\) Bill 2023 \(WA\)](#), which proposed amendments to implement a range of duty amendments, has now completed its passage through the Western Australian (WA) Parliament. Specifically, the Bill amends the Duties Act 2008 (WA) to:

- implement the off-the-plan duty concession announced in the 2023–24 WA State Budget for agreements to purchase a new apartment before development commences;
- expand the circumstances in which a refund of foreign buyers duty is available for residential developments; and
- implement the off-the-plan duty concession announced on 10 October 2023 for agreements to purchase a new apartment under construction (noting this measure was inserted as an amendment to the Bill during its passage).

NSW 2024 land tax year information released

In preparation for the 2024 land tax year, Revenue New South Wales has provided some [key information](#) to assist taxpayers. For example:

- the 2024 land tax thresholds will be published on 1 December 2023 (rather than on 15 October as in previous years).
- 2024 land tax notice of assessment will commence being issued from 3 January 2024.
- A 2024 Section 47 land tax clearance certificate can be requested from 11 December 2023.
- Changes have been made to payment options for the 2024 land tax year, with the due date for the initial notice of assessment increasing from 40 to 60 days, and payment plan options increasing from six to nine months.

In respect of the PPR exemption, recent changes to the *Land Tax Management Act 1956* (NSW) require individuals who use and occupy land as a PPR together to have a minimum 25 per cent stake in a property to claim the exemption. However, landowners who are eligible to claim the PPR exemption prior to 31 January 2024, but own less than a 25 per cent interest in the land may continue to claim the exemption for the 2024 and 2025 land tax years. The minimum 25 per cent ownership requirement will then apply to those owners from the 2026 land tax year. Owners who purchase property on or after 1 February 2024 and do not meet the minimum ownership requirement will become liable from the 2025 land tax year.

NSW: Updated land tax ruling

Revenue New South Wales has issued updated Ruling [LT 048v2 Concession for Unutilised Land Value of land containing a single dwelling-house](#).

Effective 4 September 2023, the Ruling explains the calculation of land tax on the site of a single dwelling-house that is eligible for an unutilised value allowance (UVA), and how an owner of eligible land may apply to the Chief Commissioner of State Revenue to have a UVA determined. If land is entitled to have a UVA determined, the average land value of the land for a tax year is reduced by the unutilised value allowance determined by the Valuer-General for that tax year.

NSW: PPR exemption unavailable for land tax assessments

In [Song v Chief Commissioner of State Revenue \[2023\] NSWCATAD 301](#), the NSW Civil and Administrative Tribunal found a taxpayer liable to land tax and surcharge land tax for the relevant years as the taxpayer was unable to utilise the PPR exemption.

The taxpayer was a citizen of China and ran a business exporting products from Australia to China, which required him to spend significant time in China. When he was in Australia, the taxpayer stayed at the property with his wife and daughter, who had used and occupied the property during all relevant years as their principal place of residence.

However, as the Civil and Administrative Tribunal noted, for the exemption to apply, the owner of the property must use and occupy it as their PPR, so the taxpayer's family use was not relevant. On the evidence, the Tribunal found that the taxpayer had not provided sufficient evidence to demonstrate that his use or occupation of the property in the relevant land tax years was of a sufficient length, nature or degree to constitute the property as his PPR.

In respect of surcharge land tax, the Tribunal found that this was correctly applied as the taxpayer was a foreign person according to the law. Specifically, during the 2021 calendar year, the taxpayer who was not an Australian citizen, was not in Australia at any time and did not satisfy the first limb of the definition of "ordinarily resident" and regardless of COVID-19 border restrictions in place in that year, the Tribunal has no discretion in this regard. Furthermore, as at 17 March 2020, the taxpayer held a bridging visa and was not granted a permanent visa until 7 June 2022 and accordingly, did not satisfy the second limb of the definition of "ordinarily resident".



Superannuation Update

Objective of superannuation law

Legislation ([Superannuation \(Objective\) Bill 2023](#)) to enshrine into law the objective of superannuation was introduced into Federal Parliament on 16 November 2023. The proposed objective of superannuation is stated 'to preserve savings to deliver income for a dignified retirement, alongside government support, in an equitable and sustainable way.'

The objective also includes the key principles which policy-makers should consider in delivering on this purpose – ie the system should operate in an equitable and sustainable way and recognise the interaction of superannuation with forms of government support, particularly the Age Pension. The law also requires that a statement of compatibility with the objective of superannuation must be prepared for a Bill or Regulation that relates to superannuation (unless an exception applies).

The new measure will commence 28 days after Royal Assent is given to the Bill. The requirement for a statement of compatibility with the objective of superannuation will apply to Bills introduced into the Parliament on or after the commencement of the Objective Bill. Similarly, for Regulations relating to superannuation, the requirement for a statement of compatibility with the objective of superannuation applies to Regulations made on or after the commencement of the Objective Bill.

Downsizer contribution guidance updated

Older Australians that sell or partially sell their ownership interest in a dwelling, for example to downsize, can contribute an amount into superannuation based on the proceeds from the sale of their dwelling.

The Australian Taxation Office (ATO) has issued an [Addendum](#) to Law Companion Ruling [LCR 2018/9](#), which deals with the downsizing superannuation contribution measures to reflect recent amendments to the law covering changes to the eligibility age at the time of making a downsizer contribution. The current eligibility age is now 55 years.

An updated [Guidance Note](#) has also been released to provide guidance on the measures for contributing the proceeds of downsizing to superannuation.

ATO announces measures to combat SMSF early access

Justin Micale, Assistant Commissioner, SMSF Regulatory, has delivered a [speech](#) at the CAANZ National SMSF and Financial Advice Conference, in which he discussed how illegal early access of funds within Self-Managed Superannuation Funds (SMSFs) remains a major focus area for the ATO.

Among other matters, the Assistant Commissioner announced a new program that will allow the ATO to estimate the amount of money leaving the system before it should. The program – known as the illegal early access estimate – is the ATO's first attempt at measuring the amount of money inappropriately withdrawn by trustees who manage their own super, and will allow the ATO to determine the size, scale and trajectory of this risk, as well as gather intelligence to assist the ATO in addressing the issue. The ATO intends to publicly release this estimate in early 2024.

SMSF Rulings amended

The ATO has issued amendments to the following Self Managed Superannuation Funds Rulings to reflect the legislative change (Treasury Laws Amendment (Self Managed Superannuation Funds) Act 2021) that increased the maximum allowable number of SMSF members from four to six, effective 1 July 2021:

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

Naree Brooks

Melbourne
Partner
+ 61 (3) 8603 1200
naree.brooks@pwc.com

Marco Feltrin

Melbourne
Partner
+ 61 (3) 8603 6796
marco.feltrin@pwc.com

Stephanie Lam

Brisbane
Partner
+61 (7) 3257 8455
stephanie.lam@au.pwc.com

Alice Kase

Sydney
Partner
+ 61 (2) 8266 5506
alice.kase@pwc.com

Ken Woo

Sydney
Partner
+ 61 (2) 8266 2948
ken.woo@pwc.com

Allister Sime

Melbourne
Director
+61 3 8603 1195
allister.sime@pwc.com

Sharyn Frawley

Melbourne
Partner
+61 3 8603 1217
sharyn.frawley@pwc.com

- [SMSFR 2009/1A1 – Addendum](#) *Self Managed Superannuation Funds: business real property for the purposes of the Superannuation Industry (Supervision) Act 1993.*
- [SMSFR 2009/3A1 – Addendum](#) *Self Managed Superannuation Funds: application of the Superannuation Industry (Supervision) Act 1993 to unpaid trust distributions payable to a Self Managed Superannuation Fund.*
- [SMSFR 2009/4A3 – Addendum](#) *Self Managed Superannuation Funds: the meaning of ‘asset’, ‘loan’, ‘investment in’, ‘lease’ and ‘lease arrangement’ in the definition of an ‘in-house asset’ in the Superannuation Industry (Supervision) Act 1993.*
- [SMSFR 2010/1A1 – Addendum](#) *Self Managed Superannuation Funds: the application of subsection 66(1) of the Superannuation Industry (Supervision) Act 1993 to the acquisition of an asset by a self managed superannuation fund from a related party.*



Legislative Update

The following tax or superannuation related Bills have been introduced to Federal Parliament since our last edition of the Monthly Tax Update:

- The [Treasury Laws Amendment \(Tax Accountability and Fairness\) Bill 2023](#), which was introduced into the House of Representatives on 16 November 2023, includes measures to amend the *Petroleum Resource Rent Tax Assessment Act 1987* to effectively cap the availability of deductible expenditure incurred in relation to a petroleum project for a year of tax and a range of administrative reforms including measures to reform the Tax Practitioners Board (TPB), enhance promoter penalty laws, extend tax whistleblower protections, and enhance information sharing by taxation officers and TPB officials with Treasury and prescribed professional disciplinary bodies.
- The [Superannuation \(Objective\) Bill 2023](#), which was introduced into the House of Representatives on 16 November 2023, proposes to legislate the objective of superannuation to codify a shared purpose of superannuation, which is 'to preserve savings to deliver income for a dignified retirement, alongside government support, in an equitable and sustainable way.' For further information, refer to the *Superannuation Update* section in this issue.
- The [Treasury Laws Amendment \(Better Targeted Superannuation Concessions and Other Measures\) Bill 2023](#) which was introduced into the House of Representatives on 30 November 2023, includes, among other things, amendments to:
 - impose a tax of 15 per cent on certain earnings of a superannuation fund to those individuals who have total superannuation balances in excess of \$3 million with effect from the 2025-26 income year (supplemented with the [Superannuation \(Better Targeted Superannuation Concessions\) Imposition Bill 2023](#), also introduced on the same day)
 - make miscellaneous amendments to the provisions in the goods and services tax (GST) law relating to the attribution of input tax credits to tax periods that start on or after 1 July 2012, and
 - ensure consistent outcomes to the deductibility of GST amounts between how GST is generally charged and for GST that is reverse charged in relation to assessed net amounts that are payable in the income that includes 1 July 2023 and later income year.
- The [Customs Tariff Amendment \(Incorporation of Proposals\) Bill \(No. 2\) 2023](#), which was introduced into the House of Representatives on 30 November 2023, makes the following amendments to Customs law:
 - expand the scope of a tariff concession to include goods covered by the Agreement between the Government of Australia and the European Space Agency for a Co-operative Space Vehicle Tracking Program
 - extend the duration for which the temporary decrease in duties for goods imported from Ukraine into Australia until 4 July 2024
 - extend the duration for which the temporary additional duty for imported goods that are the produce or manufacture of Russia or Belarus applies until 24 October 2025, and
 - provide a 'Free' rate of customs duty to goods that are imported for use in connection with international sporting events prescribed by by-law.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

Chris Morris

Sydney
Australian Tax Leader
+61 (2) 8266 3040
chris.morris@pwc.com

Trinh Hua

Sydney
Tax Market Leader
+61 (2) 8266 3045
trinh.hua@pwc.com

Norah Seddon

Sydney
Tax Leader
+61 421 051 892
norah.seddon@au.pwc.com

James O'Reilly

Brisbane
Tax Leader
+61 (7) 3257 8057
james.oreilly@pwc.com

Jason Karametos

Melbourne
Tax Leader
+61 (3) 8603 6233
jason.karametos@pwc.com

Matt Budge

Perth
Tax Leader
+61 (08) 9238 2282
matthew.budge@au.pwc.com

Michael Dean

Sydney
Private Tax Leader
+61 402 041 451
michael.dean@au.pwc.com

Alistair Hutson

Adelaide
Partner
+61 (8) 8218 7467
alistair.hutson@pwc.com

Amy Etherton

Newcastle
Partner
+61 (2) 4925 1175
amy.etherton@pwc.com

Sophia Varelas

Melbourne
National Leader, R&D and Government Incentives
+61 417 208 230
sophia.varelas@pwc.com

The following tax and superannuation related Bill has completed its passage through Federal Parliament and is now enacted:

- [Treasury Laws Amendment \(2023 Measures No. 1\) Bill 2023](#), which, among other things, makes amendments to align the tax treatment of off-market share buybacks undertaken by listed public companies with the tax treatment of on-market share buy-backs, prevent certain distributions that are funded by capital raisings from being frankable (see also *Corporate Tax Update* section in this issue for further details) and make amendments to the regulation of tax practitioners and the operation of the Tax Practitioners Board. Amendments were made to this Bill since it was first introduced.

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

- The [A New Tax System \(Australian Business Number\) Amendment \(Display of Trading Names\) Regulations 2023](#) extends the period for which trading names will continue to be shown on the Australian Business Register from 1 November 2023 to 31 October 2025.
- The [PDV Offset Amendment Rules 2023](#) and the [Location Offset Amendment Rules 2023](#), both applicable from 9 November 2023, each replace the existing requirements to provide a statutory declaration as part of a certificate application with the requirement to provide a “digital declaration”, to be made by the applicant or authorised representative.
- The [Income Tax Assessment \(Developing Country Relief Funds\) Amendment \(Update No. 1\) Declaration 2023](#), amends the *Income Tax Assessment (Developing Country Relief Funds) Declaration 2021* to update the list of declared developing country relief funds with six additional public funds.
- The [Shipping Reform \(Tax Incentives\) Regulations 2023](#), which remakes the Shipping Reform (Tax Incentives) Regulation 2012, which sunset on 1 October 2023, with minor amendments to ensure the continuation of measures in place for the training and management requirements that must be met for a shipping exempt income notice or certificate to be issued under the *Shipping Reform (Tax Incentives) Act 2012* (Cth) to an Australian registered vessel.

The last day of Federal Parliament for this calendar year is currently scheduled to be Friday 7 December 2023. Parliament will commence sitting for the 2024 Autumn session on 6 February 2024.

Other News Update

Top 500 findings report

The Australian Taxation Office (ATO) has published its [Findings Report for the Top 500 Private Groups](#) Tax Performance Program for the 2022–23 financial year.

The ATO's Top 500 population consists of Australia's largest family, or closely controlled, private groups. The criteria for inclusion requires the private group to have one of the following:

- over \$250 million turnover, regardless of net asset value
- over \$500 million net assets, regardless of turnover
- over \$100 million turnover and over \$250 million net assets
- be a market leader or group of specific interest.

The Report notes that during the last 12 months, there has been an increase in Top 500 groups that developed or are developing their written tax governance policies and procedures.

The common tax risks identified across the Top 500 population include capital gains tax (such as rollovers, calculations and capital vs revenue), use of trusts (including imputation issues and section 100A "reimbursement arrangements"), private company loans and benefits, business versus private, related party and international transactions, and goods and services tax (GST).

Over the next 12 months, the ATO has indicated that it will be increasing its review and audit activities in determining whether Top 500 groups who are not engaged with the Top 500 program are paying the right amount of tax and will focus on the handful of Top 500 groups who are late in satisfying their Business Activity Statement (BAS) payment obligations.

Next 5,000 findings report

The ATO has also released its [Findings Report for the Next 5,000](#) Tax Performance Program for the 2022–23 financial year.

The Next 5,000 program covers privately owned and wealthy groups including entities linked to Australian resident individuals who, together with their associates, control wealth of more than \$50 million.

The ATO reports that its streamline assurance reviews indicate that many Next 5,000 groups have a lack of documented governance processes and procedures.

Reported key priority areas which will continue under this program in 2023–24 include:

- groups that are experiencing rapid growth
- groups that are expanding offshore or engaging in cross-border transactions with related parties
- intra-group domestic transactions which may result in the transfer of wealth
- succession planning, and
- wealth extraction by use of private equity funds.

ATO's 2022–23 annual report

The ATO has released its 2022–23 annual [report](#), which informs Parliament, stakeholders and the community about the ATO's performance for the past financial year.

Addressing growing collectable debt remains an area of ATO focus – collectable debt was \$50.2 billion at 30 June 2023, compared to \$26.5 billion at 30 June 2019 – an 89 per cent increase over four years.

Looking forward, the ATO has identified a number of key, strategically important, focus areas, some of which are improving small business tax performance and strengthening superannuation guarantee integrity, while uplifting its data and digital infrastructure to ensure the ATO meets client and community expectations.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

Chris Morris

Sydney
Australian Tax Leader
+61 (2) 8266 3040
chris.morris@pwc.com

Trinh Hua

Sydney
Tax Market Leader
+61 (2) 8266 3045
trinh.hua@pwc.com

Norah Seddon

Sydney
Cath Tax Leader
+61 421 051 892
norah.seddon@au.pwc.com

James O'Reilly

Brisbane
Tax Leader
+61 (7) 3257 8057
james.oreilly@pwc.com

Jason Karametos

Melbourne
Tax Leader
+61 (3) 8603 6233
jason.karametos@pwc.com

Matt Budge

Perth
Tax Leader
+61 (08) 9238 2282
matthew.budge@au.pwc.com

Michael Dean

Sydney
Private Tax Leader
+61 402 041 451
michael.dean@au.pwc.com

Alistair Hutson

Adelaide
Partner
+61 (8) 8218 7467
alistair.hutson@pwc.com

Amy Etherton

Newcastle
Partner
+61 (2) 4925 1175
amy.etherton@pwc.com

ATO response to case concerning tax compensation

In response to [Bains and Commissioner of Taxation \(Taxation\) \[2023\] AATA 2477](#), in which the Administrative Appeals Tribunal (AAT) determined that a one-off payment from the Victorian Taxi Reform Fairness Fund was not income according to ordinary concepts, the ATO has released its [decision impact statement](#).

The Commissioner has accepted the Tribunal's decision, and will administer the law in accordance with that decision, noting that the Tribunal did not consider payments from the Victorian Taxi Reform Hardship Fund, Victorian Transition Assistance payments, or other payments made as a result of taxi industry reforms in other Australian states. Accordingly, the Commissioner considers that the decision does not impact the ATO's position on the other types of financial assistance payments made to Victorian tax licence holders.

The ATO is identifying taxpayers who might be impacted by the Tribunal's decision, and will provide remediation pathways to them.

Comments on the decision impact statement closed 1 December 2023.

ATO's approach to collection of disputed debts

The ATO has updated Practice Statement Law Administration [PS LA 2011/4](#) which considers the ATO's approach to the collection and recovery of disputed debts.

The Practice Statement clarifies as a general principle that the Commissioner will generally not seek to recover a debt when there is a dispute, save in exceptional cases where there is a significant risk to revenue (generally in high-risk cases).

It also includes further guidance around 50/50 arrangements, which can minimise a taxpayer's exposure to the General Interest Charge (GIC) which would normally be payable on an amount of a disputed debt that remains unpaid. For example, the Practice Statement now includes a statement regarding the ATO's general encouragement for large corporate groups to either pay their disputed debts or to enter into a 50/50 arrangement.

Draft law on government entity and charity

Treasury has released [exposure draft legislative instrument](#) and explanatory materials regarding the definition of 'government entity' as applicable within the Charities Act 2013. This instrument will prescribe kinds of entities established under a law by a State or Territory as government entities, which by virtue of their status as government entities, will be excluded from the definition of charity for purposes of all Commonwealth law.

The exposure draft legislation proposes to remake the existing legislative instrument (Charities (Definition of Government Entity) Instrument 2013) that sunsets on 1 April 2024 and makes some minor amendments to ensure that it continues to operate as intended.

Comments are invited until 15 December 2023.

Editorial

PwC's Monthly Tax Update is produced by the PwC's Financial Advisory Marketing and Communications team, with technical oversight provided by PwC's Tax Markets & Knowledge team.

Jannette Krezel

Senior Manager, Tax Markets

jannette.krezel@au.pwc.com

Lynda Brumm

Principal, Tax Markets & Knowledge

+61 (7) 3257 5471

lynda.brumm@pwc.com

Lucy Webb

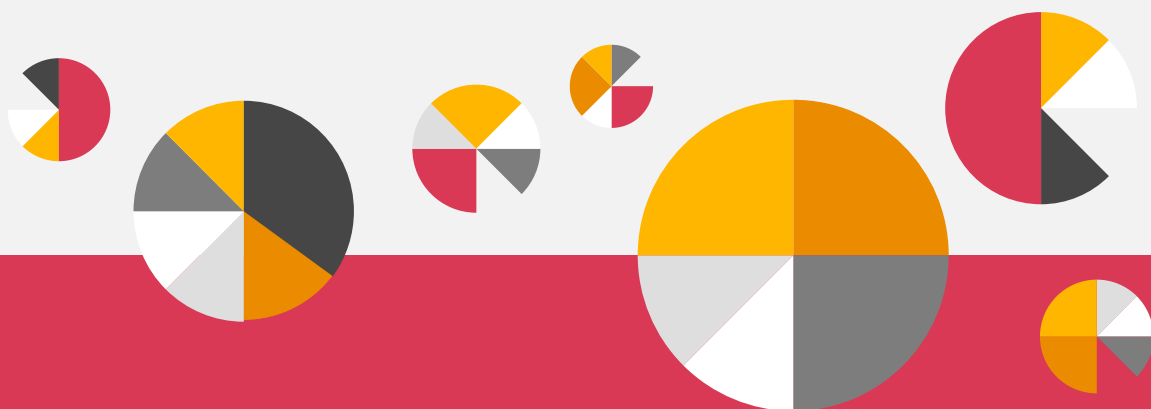
Manager, Tax Markets & Knowledge

lucy.webb@au.pwc.com

Rosie Muirden

Director, Employment Taxes

rosie.muirden@au.pwc.com



pwc.com.au

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