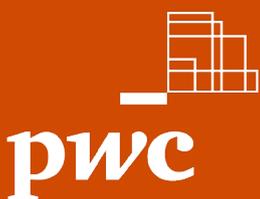


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# PwC's Monthly Tax Update

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

February 2022



# Corporate Tax Update

## 2019-20 Corporate Tax Transparency Report

The Australian Taxation Office (ATO) has published the [2019-20 Corporate Tax Transparency Report](#) outlining total income, taxable income and tax paid by:

- Australian public and foreign-owned companies with an total income of \$100 million or more; and
- Australian-owned resident private companies with an income of \$200 million or more.

The 2,370 companies included in the report paid a total of \$57.2 billion, or around 65 per cent, of all corporate income tax in the 2019-20 income year. Since the first report in 2013-14, there has been growth in total income, taxable income, and income tax payable. In 2019-20, the growth in these amounts has been largely driven by the mining sector, which accounted for around 44 per cent of tax payable.

The report also outlines the Petroleum Resources Rent Tax (PRRT) paid by 12 corporate entities.

## ATO rulings on R&D incentive “at risk” rule

The ATO has issued final Taxation Ruling [TR 2021/5](#) on the research and development (R&D) tax incentive and when expenditure is considered to be ‘at risk’. The ‘at risk’ rule operates to deny a notional deduction for some or all of R&D expenditure if the taxpayer or an associate receives consideration as a direct or indirect result of the expenditure incurred, and would have received the consideration regardless of the results of the activities on which the R&D expenditure was incurred. The Ruling is intended to provide certainty to taxpayers about whether the ‘at risk’ rule is satisfied, for example, where R&D activities are carried out in the context of commercial contracts for the supply of products or services. It contains a number of examples illustrating how the ‘at risk’ rule applies.

The ATO has also issued final Taxation Determination [TD 2021/9](#) on how the ‘at risk’ rule applies to JobKeeper payments received that relate to eligible employees who undertake R&D activities. Broadly, the Determination concludes that the receipt of JobKeeper payments in these circumstances triggers the ‘at risk’ rule such that the taxpayer cannot notionally deduct the portion of the wages expenditure incurred on R&D activities that has attracted the JobKeeper payment. However, the receipt of a JobKeeper payment in respect of an ‘eligible business participant’ (such as a director, shareholder, partner or trust beneficiary) does not trigger the ‘at risk’ rule.

## Draft R&D tax incentive determination on clinical trials

The Department of Industry, Science, Energy and Resources has published a [draft R&D determination](#) for consultation. The draft *Industry Research and Development (clinical trials, Phase 0, I, II, III for an unapproved therapeutic good) Determination 2021* identifies when phase 0, I, II or III clinical trials will be accepted to be core R&D activities and is intended to provide increased certainty on eligibility to entities conducting clinical trials. Comments on the draft determination can be made by 17 February 2022.

This is the first R&D Tax Incentive determination in development following reforms announced in the 2021-22 Federal Budget allowing for determinations on the R&D tax incentive. AusIndustry has consulted with the Australian Taxation Office and Department of Health on this work.

## ANAO report on R&D incentive administration

The Australian National Audit Office (ANAO) has released a [performance audit report](#) on the joint administration of the R&D tax incentive program. The report concluded that administration, communication and claims processing by Industry Innovation and Science Australia (IISA) – supported by the Department of Industry Science, Energy and Resources – and the ATO, were largely effective. However, there were weaknesses in their compliance activities, including:

- the Department of Industry Science, Energy and Resources’ approach was not clearly aligned with compliance risks and its examination processes did not meet timeframe targets and did not always result in an outcome, and
- The ATO’s monitoring and reporting on R&D tax incentive compliance was not commensurate with risk.

There were also weaknesses identified in the joint approach to compliance for the program.

The report made two recommendations to IISA and the Department of Industry Science, Energy and Resources, relating to improvement of advance findings and examinations, and one recommendation to the ATO to establish monitoring and reporting arrangements to assess the effectiveness of its compliance activities. All recommendations were agreed to by IISA, the Department of Industry Science, Energy and Resources and the ATO.

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## Employment Taxes Update

### ATO view on vaccination incentives for employees

The Australian Taxation Office (ATO) has [published](#) a fact sheet setting out its view on the tax implications for employers of various incentives or rewards provided to employees for getting a COVID-19 vaccination.

The fact sheet confirms the ATO's view that cash incentives, cash rewards or paid leave should be treated as part of wages for pay as you go withholding (PAYG), superannuation guarantee and income tax purposes. Furthermore, it confirms that there is generally no fringe benefits tax (FBT) on the provision or payment for an employee's transport to get their COVID-19 vaccination, as the travel is associated with work-related preventative health care that is exempt from FBT. Other exemptions to the FBT regime, such as the minor benefits exemption may also be used for other vaccination incentives provided the relevant criteria are satisfied. No FBT arises on non-cash incentives or rewards that are provided by the employer to the public at large (even if some of the recipients are employees) where the incentives are not provided in respect of employment.

### Guidance on remission of SG charge penalty

The ATO has released Practice Statement Law Administration [PS LA 2021/3](#) that outlines the principles for the remission of the additional 200% superannuation guarantee (SG) charge and penalty relief. The finalised Practice Statement reiterates the

same principles adopted in the earlier draft version, PS LA 2021/D1, which includes a greater emphasis on employer proactivity, and effective controls and processes. This Practice Statement includes a number of examples which demonstrate the circumstances in which the Commissioner will, or will not, provide relief.

For more details, please see our article [What's emerging? Finalised ATO Guidance on remission of 200% SGC penalty](#)

### STP exemption

The ATO has made a legislative determination – [Taxation Administration — Single Touch Payroll — 2021–22 and 2022–23 years Withholding Payer Number Exemption 2021](#) – to exempt entities which have a withholding payer number and no Australian Business Number from reporting under single touch payroll (STP) for the 2021-22 and 2022-23 income years. The instrument applies retrospectively from 1 July 2021.

### SA COVID-19 support

The South Australian (SA) Government has [announced](#) a business support package for hospitality and tourism businesses as well as gyms, impacted by density restrictions. The package includes cash grants of up to AUD 22,000, liquor licence waivers and payroll tax deferrals for eligible businesses.

Payroll tax deferral will apply to tourism, hospitality and gyms impacted by the trading restrictions upon application to RevenueSA. Any business operating in eligible sectors is able to apply for a deferral of

payroll tax payments due over the period January to March 2022. Deferred payments will be due from April 2022.

## Employment relationship found

The Administrative Appeals Tribunal (AAT) has held in [Trustee for Viridis Family Trust t/a Rickard Heating Pty Ltd v Federal Commissioner of Taxation \[2022\] AATA 3](#) that the relationship between the taxpayer and a contractor was characterised as an employment relationship with the result that the taxpayer was liable to pay the SG charge.

In this case, the contracted plumber worked for an hourly rate and was required to follow reasonable and lawful directions given by the taxpayer. The contractor worked full time for the taxpayer at places directed by the taxpayer, and was not required to arrange a replacement or delegate work if he was not available on that day. The AAT found that the contract was wholly or principally for the provision of labour with no capacity to delegate that labour, and was accordingly an employment contract for purposes of the SG charge. The fact that the parties agreed that the contractor would pay his own superannuation contributions or agreed that the taxpayer should not pay them was irrelevant to the liability of the applicant to pay the SG charge.

## JobKeeper payment date extended for successful objections

The Treasurer has published the [Treasury Laws Amendment \(Miscellaneous Amendments\) Rules 2021](#) that amend the [Coronavirus Economic Response Package \(Payments and Benefits\) Rules 2020](#). The amendments allow the ATO to make JobKeeper payments after 31 March 2022 if the payment gives effect to an objection decision, provided the original objection was lodged on or before 30 November 2021.

## AAT decisions on JobKeeper

The AAT has considered a number of decisions which concern an entity's entitlement to the JobKeeper:

- [Yazdani v Federal Commissioner of Taxation \[2021\] AATA 4814](#) – the taxpayer had applied for an Australian Business Number prior to the introduction of JobKeeper and changed his Goods and Services Tax registration to report annually. If the taxpayer had lodged monthly, he would have been eligible for JobKeeper and the taxpayer contended that his circumstances were ones to which JobKeeper should apply. The AAT

found that there was no discretion for the ATO or the AAT to extend the period in which a taxable supply could be made so that the taxpayer was not eligible to receive JobKeeper payments.

- [DGSC v FC of T 2021 \[2021\] AATA 4816](#) – the taxpayer who initially nominated to receive JobKeeper with her employer, subsequently withdrew the nomination and submitted a further nomination to receive JobKeeper as a business participant was not eligible to receive JobKeeper. The AAT found for the Commissioner on the basis that one of the requirements to qualify for JobKeeper was that the individual had not given any other entity notice prior to nominating for JobKeeper with the ATO. While the Tribunal acknowledged the decision was harsh, there were no grounds available to it to set aside the previous notice provided to the employer and the requirements of the JobKeeper rules meant that the nomination requirements were not satisfied.
- [RWPY v Federal Commissioner of Taxation \[2021\] AATA 4921](#) – the taxpayer was found not to be eligible to receive JobKeeper payments as a business participant on the basis that the taxpayer was correctly classified as an employee despite the purported contractor arrangements put in place. While there were some indicia of a business being conducted, the Tribunal found that on balance, when having regard to the entirety of the working relationship, it was clear the taxpayer was not conducting a business
- [FFYS v Federal Commissioner of Taxation \[2021\] AATA 4844](#) – the taxpayer, an AirBnB superhost, was found not to be carrying on a business and accordingly was not eligible for JobKeeper. The Tribunal was also satisfied that the taxpayer was not supplying commercial residential premises, which means the supply of residential premises is input taxed, and hence the revenue generated in connection with those supplies does not form part of the applicant's projected GST turnover which is a relevant criteria for JobKeeper entitlement.

## Listed entity JobKeeper data

The Australian Securities and Investments Commission (ASIC) has [released](#) the first of its monthly reports disclosing data on JobKeeper payments received by listed entities. The report discloses the amount of JobKeeper that each listed entity received, the number of individuals that received payments and any voluntary repayments. ASIC will continue to release monthly reports as listed entities provide data.

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## Global Tax Update

### ATO guidance on imported hybrid mismatches finalised

The Australian Taxation Office (ATO) has finalised Practical Compliance Guideline [PCG 2021/5](#) (PCG 2021/5) on the Commissioner's approach to the imported hybrid mismatch rule. PCG 2021/5 sets out the expectations regarding the Commissioner's assessment of risk in connection with the imported hybrid mismatch rules, including the Commissioner's approach to reviewing whether a taxpayer has undertaken reasonable enquiries in relation to the rules for non-structured arrangements. This PCG is relevant to any Australian taxpayer that makes any cross-border related party payments (including interest, royalties, management fees and purchases of raw materials and trading stock).

There are welcome changes to the PCG based on consultation in relation to the draft issued in April 2021. However, it is clear that the Commissioner's expectations on the process and information required by a taxpayer to evidence compliance with the imported hybrid mismatch rule are extensive. A number of changes to the seven "risk zones" have been made in the final PCG along with clarification of some aspects of the ATO's expectations.

Reporting obligations for all multinational companies with operations in Australia in relation to the hybrid mismatch rules are extensive and are expected to be expanded for the 2022 tax year. Read more in PwC's [Tax Alert](#).

### ATO review of advance pricing arrangements

The ATO has [announced](#) that it intends to conduct a review into the advance pricing arrangement (APA) program, commencing in early 2022. The review will

primarily focus on whether the APA product continues to provide the right service for taxpayers and how to assure transfer pricing risks in the most efficient way. The ATO would also consider how to tailor the APA process to better align with risk and behavioural indicators.

### Transfer pricing dispute relating to cross-border funding

The Federal Court found for the Commissioner in [Singapore Telecom Australia Investments Pty Ltd v Commissioner of Taxation \[2021\] FCA 1597](#), which concerned interest claimed in Australia on funding by way of a cross-border intra-group loan note issuance agreement (LNIA) that was amended a number of times after its initial issuance. The lengthy judgment canvasses both the old transfer pricing provisions in former Division 13 of the *Income Tax Assessment Act 1936* and the current provisions in Subdivision 815-A of the *Income Tax Assessment Act 1997*, as well as considering other recent transfer pricing cases.

In finding for the Commissioner, the Court concluded that the conditions operating between the parties in their commercial and financial relations differed from those which might be expected to operate between independent enterprises dealing wholly independently with one another, and that a reliable hypothesis is that independent parties in the positions of the taxpayer and the lender might have been expected to have agreed to the interest rate as per the original LNIA, that interest could be deferred and capitalised, and that there would be a parent guarantee. Furthermore, having agreed to a transaction with these components initially, a reliable hypothesis is that the independent parties would not have agreed to make the changes contained in later amendments to the LNIA.

## OECD Pillar Two model rules released

The Organisation for Economic Cooperation and Development (OECD) has [published](#) model rules for Pillar Two of the Two Pillar Solution to address tax challenges arising from the digitalisation and globalisation of the economy. Pillar Two is designed to establish a global minimum corporate tax rate of 15 per cent for multinational enterprises with revenues greater than EUR750 million, with the model rules being a template to assist jurisdictions with implementing Pillar Two into domestic legislation by:

- defining multinational enterprises within the scope of Pillar Two
- setting out a mechanism for calculating the effective tax rate on a jurisdictional basis and determining the amount of top-up tax payable and
- imposing the top-up tax in accordance with an agreed rule order.

Further clarification in relation to the rules is expected to be provided with the Implementation Framework in mid-2022. For further details read PwC's [Tax Policy Alert](#).

At the [14th Plenary meeting](#) of the OECD's Forum on Tax Administration, held on 16-17 December 2021, tax commissioners from across the globe agreed to prioritise support for implementation of the Two-Pillar Solution, including through the possible further development of tax certainty tools to help prevent disputes and reduce burdens, and to develop a new strategic framework covering both digitalisation and digital transformation to inform both domestic reforms and international collaboration.

## Other OECD updates

The OECD has published the following:

- The 2022 edition of [Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations](#), which provides guidance on the arm's length principle, the international consensus on valuation of cross-border transactions between associated enterprises for income tax purposes. The latest edition includes revised guidance on the application of the transactional profit split method, hard-to-value intangibles and financial transactions.
- [2020 Peer Review Reports on Exchange of Information on Tax Rulings](#), which finds that the global reach of the BEPS Action 5 minimum standard on tax rulings continues to increase, with 22 000 tax rulings having been identified and 41 000 exchanges between jurisdictions having taken place. According to the report,

95 jurisdictions are now fully in line with the BEPS Action 5 minimum standard, with the remaining 36 jurisdictions receiving one or more recommendations to improve their legal or operational framework to identify and exchange the tax rulings.

- 2021 edition of [Revenue Statistics](#), which found that, among other things, the impact of the COVID-19 pandemic on tax revenues in OECD countries was less pronounced than during previous crises, in part due to government support measures introduced to support households and businesses.
- [2020 Mutual Agreement Procedure \(MAP\) Statistics](#) covering 118 jurisdictions. The MAP statistics show that the top 25 jurisdictions account for 95 per cent of MAP cases and the number of transfer pricing cases has continued to grow since 2016. MAP cases continue to take a long time to resolve, with the average transfer pricing case taking 35 months to resolve, and 15 per cent of cases outstanding at the end of 2020 had been pending for at least five years.
- [Measuring effective taxation of housing](#), which examines taxation policy and effective tax rates for owner-occupied and investment property in 40 OECD member and partner countries. The report finds that the level and components of housing taxation varies greatly based on the investment scenario., and that this tax differential should be reduced to increase equity.

## Australia-UK Free Trade Agreement

Australia has [signed](#) a comprehensive Free Trade Agreement with the United Kingdom (UK). Upon entering into force, the agreement will reduce or eliminate tariffs on over 99 percent of Australia goods exports to the UK and on almost all UK goods imports, provide the same level of access for Australian professionals to the UK job market as EU nationals, provide the right for Australian businesses to bid for UK government contracts and provide for best practice investment rules to encourage UK businesses to invest in Australia. The agreement is intended to enter into force during 2022.

## Changes to tariff regulations

The [Customs Tariff Amendment \(2022 Harmonized System Changes and Other Measures\) Regulations 2021](#) and [Customs Amendment \(2022 Harmonized System Changes and Other Measures\) Regulations 2021](#) update tariff classification headings and subheadings in various regulations in Australia in line with the Harmonized Commodity Description and Coding System (the Harmonized System) maintained by the World Customs Organisation (WCO). The WCO reviews and updates the

Harmonized System every five years, and this update implements the outcomes of the sixth review that was completed in 2019 and is commonly referred to as the 2022 Harmonized System.

## Updated excise guidelines

The ATO has updated its [excise guidelines for the alcohol industry](#) to include the remission scheme for alcohol manufacturers that was announced in the 2021-22 Federal Budget. Under the scheme, eligible alcohol manufactures are able to receive an immediate remission of excise duty up to an annual cap of AUD 350,000, commencing from 1 July 2021. The excise guidelines provide guidance on eligibility for the scheme and application of the relevant criteria.

The ATO has also updated its [excise guidelines for duty free shops](#).

## AAT decision on tariff classification of dishwashers

The Administrative Appeals Tribunal (AAT) has found in favour of the Comptroller-General of Customs in its decision in [Winterhalter \(Australia\) Pty Ltd v Comptroller-General of Customs \[2021\] AATA 4407](#). The decision concerned whether commercial dishwashers with three standard programs were covered by Tariff Concession Order 1612840 which applied to dishwashers with one, two or four cycles. The taxpayer had argued that while the dishwashers contained three standard programs, each program used two cycles involving a wash and then rinse. The AAT had regard to expert evidence to conclude that the terms program and cycle were used interchangeably in Australia so that the dishwashers in question had three cycles and were therefore not covered by the tariff concession order.

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# Indirect Tax Update

## Valuation methodology for GST margin scheme

The Administrative Appeals Tribunal (AAT) has held in [Decleah Investments Pty Ltd & Anor as trustee for the PRS Unit Trust v Federal Commissioner of Taxation \[2021\] AATA 4821](#) that a land valuation using a discounted cashflow methodology to conduct a land valuation as at 1 July 2000 was an approved valuation for goods and services tax (GST) margin scheme purposes despite using hindsight information. The AAT accepted the taxpayer's argument that since there were no professional standards relating to real property

valuations that regulated the use of hindsight information, the valuation was not made contrary to professional standards and should be accepted as an approved valuation.

## Overpayment of GST

The AAT has held in [M3K Services Pty Ltd v Federal Commissioner of Taxation \[2021\] AATA 4416](#) that the taxpayer was not entitled to a refund of overpaid GST on the basis that the excess GST had been passed on to customers. The taxpayer supplied and administered cosmetic injectables and accounted for GST assuming that the supplies were wholly taxable, when in fact the supplies included a

mix of GST-free and taxable supplies. The AAT affirmed the decision of the Commissioner in refusing a refund of the overpaid GST as the taxpayer had not reimbursed customers for excess GST paid.

## GST treatment of adjustable beds and pressure mattresses

The Australian Taxation Office (ATO) has published GST Determination [GSTD 2021/2](#) on when the supply of an adjustable bed, pressure management mattress or pressure management overlay are GST-free. The determination uses an essential character test examining the basic nature, composition, function and other factors to determine if the bed, mattress or overlay is specifically designed for people with an illness or disability and not widely used by people without an illness or disability. GSTD 2021/2 also contains a practical compliance approach to determining if the item is widely used by people without an illness or disability.

Although the Determination applies both before and after its date of issue, transitional arrangements

apply in cases where the supplies of adjustable beds, pressure management mattresses or pressure management overlays are currently being treated as GST-free where in such cases the Commissioner will not seek to disturb this approach for tax periods commencing prior to the Determination being issued, or within three months after the issue of the final Determination on 8 December 2021.

## Consultation on GST treatment when meals are supplied in residential care

The ATO is proposing an [update](#) to GST Ruling GSTR 2012/3 which deals with when care services and accommodation provided to residents in privately funded nursing homes, aged care hostels and retirement villages are GST-free. The proposed changes will address when a retirement village operator is considered to 'provide daily meals' for all residents living within that operator's serviced apartment in order for the residential care services to be GST-free. Comments on the draft update are due by 25 February 2022.

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# Personal Tax Update

## AAT residency decisions

The Administrative Appeals Tribunal (AAT) has considered the following in which the tax residency of the taxpayer was considered:

- [Sanderson v Federal Commissioner of Taxation \[2021\] AATA 4305](#) – the Tribunal found that the taxpayer was a tax resident of Australia despite being in Australia for only 83 days. The taxpayer owned a business designing and constructing theme parks in Asia and the Middle East and spent much of the year overseas. The AAT concluded the taxpayer was resident in Australia on the basis that he owned a home in Australia where his wife and child resided, he returned to Australia to visit them as often as he could, he did not have a regular place of residence overseas, he maintained a business and vehicle in Australia and he maintained Medicare and medical insurance in Australia.
- [Oberq v Federal Commissioner of Taxation \[2021\] AATA 4606](#) – the AAT concluded that the taxpayer was a resident of Australia while employed by a mining company and living abroad. The AAT's decision was based on a number of factors including the temporary nature of the taxpayer's accommodation while overseas, the sharing of a vehicle with other employees, his housing and visa status which were subject to his employment, the fact that his

wife and child primarily continued to reside in Australia, the use of his Australian home as the address for his employment contracts, his return to Australia for significant events and continuing to maintain Australian bank accounts.

## ATO's views on residency and backpackers

The Australian Taxation Office (ATO) has released its [decision impact statement](#) on the decision of the High Court in [Addy v Federal Commissioner of Taxation \[2021\] HCA 34](#). In this case, the High Court considered that the tax rates applicable to working holiday makers, known as the 'backpacker tax', contravened the non-discrimination article in the double tax agreement between Australia and the United Kingdom (UK). The ATO considers that the decision is relevant only to working holiday visa holders that are a national of Chile, Finland, Germany, Israel, Japan, Norway, Turkey and the UK as Australia's double tax agreements with these countries contain the type of clause that was considered by the High Court. The ATO anticipates that most working holiday makers would not ordinarily be a tax resident of Australia on the basis that they are likely to be in Australia for a holiday.

If a taxpayer wishes to contend that they are a resident under the residency tests, the Commissioner will expect an explanation as to why they consider that they are a resident and may ask for supporting evidence (whether or not the taxpayer self-assessed as a resident or a non-resident).

The Commissioner will consider appropriate compliance strategies to ensure that working holiday maker visa holders are not self-assessing as residents when a consideration of the facts and circumstances would show that they are not resident.

Comments on the decision impact statement are due by 11 February 2022.

## Discretionary trust distribution and reimbursement agreements

The Federal Court has found in favour of the taxpayer in [Guardian AIT Pty Ltd ATF Australian Investment Trust v Commissioner of Taxation \[2021\] FCA 1619](#), the first case in more than a decade to consider the meaning of "reimbursement agreement" in section 100A of the *Income Tax Assessment Act 1936*. The case broadly involved a situation where a private company (whose sole shareholder was a discretionary trust) was established to receive the benefit of the discretionary trust's income. The corporate beneficiary subsequently paid franked dividends to the trust to discharge the unpaid present entitlement. The Federal Court held that there was no relevant "reimbursement agreement" to trigger the application of section 100A.

The Commissioner also argued in the alternative that the general anti-avoidance provisions (Part IVA of the *Income Tax Assessment Act 1936*) applied to the "scheme", on the basis that the dominant purpose of a scheme was to derive a tax benefit. This argument also failed, with the judge finding there was no tax benefit, and even if there was, an analysis of the relevant factors would lead to a conclusion that the dominant purpose of the scheme was risk minimisation and wealth accumulation.

Whilst this case provides some guidance on the application of section 100A, it is important to note that the outcome is very fact specific, and it is not yet known if the Commissioner will appeal this decision to the Full Federal Court. The ATO is expected to release [proposed guidance](#) on section 100A in February 2022. For further insights into this decision, [refer to our summary](#).

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# State Taxes Update

## Victorian windfall gains tax and build to rent concessions now law

The [Windfall Gains Tax and State Taxation and Other Acts Further Amendment Bill 2021 \(Vic\)](#) is now law. This legislation introduces a windfall gains tax in Victoria that is designed to capture uplifts in value above AUD 100,000 resulting from rezoning and measures to provide land tax and absentee owner surcharge concessions for eligible build-to-rent developments.

The legislation also contains other tax-related amendments to:

- extend the motor vehicle duty exemption for vehicles that are specially converted for wheelchair access
- provide a point of consumption framework for keno tax
- require land to be occupied exclusively for charitable purposes in order for charities to be eligible for a land tax exemption
- remove the land tax exemption for non-racing clubs from private gender-exclusive and gender restrictive clubs; and
- provide tax offsets for emergency relief measures.

## ACT circular on landholder duty

The Australian Capital Territory (ACT) Revenue Office has issued [Revenue Circular LHD002](#) which identifies how landholder duty in the ACT is calculated, including how relevant acquisitions are valued. The circular, which is effective from 2 December 2021, confirms that duty is only payable once an acquisition results in ownership of 50 per cent or more of a landholder and the method of calculating landholder duty depends on whether there was a single acquisition or multiple acquisitions in the three-year period before the relevant acquisition.

## SA land tax – designated beneficiaries of discretionary trusts

Revenue South Australia (SA) has [published](#) details on how to nominate a designated beneficiary of a discretionary trust to limit exposure to surcharge land tax rates. Trustees of discretionary trusts had

until 31 December 2021 to nominate a designated beneficiary. If a designated beneficiary was not nominated for a discretionary trust, or if the notice of designated beneficiary was submitted after 31 December 2021, SA land tax will be assessed against the trust held land at the trust land tax rates.

## NSW – Revised duty thresholds

Revenue New South Wales (NSW) has [issued](#) a [notice](#) with transfer duty thresholds and base amounts applicable to transactions after 1 February 2022 that are subject to duty. The notice was published to correct errors in thresholds and base amounts published in a [previous notice](#) that would result in less duty being payable. The thresholds and base amounts in the previous notice will apply to transactions that have already incurred a duty liability, or incur a liability before 1 February 2022, duty, if not already assessed.

## NSW – land tax rulings on low cost accommodation and boarding houses

Revenue NSW has issued the following land tax rulings:

- [LT 111](#) which outlines the approved guidelines for the 2022 land tax year for landowners to claim an exemption or reduction in taxable land value in respect of boarding houses, and
- [LT 112](#) which sets out the approved guidelines for the 2022 land tax year for landowners to claim an exemption or reduction in taxable land value in respect of low cost accommodation situated near the Sydney central business district.

## Queensland land tax changes

The Queensland Government, as part of its [2021-22 Mid-Year Fiscal and Economic Review](#), has announced that additional land tax will be payable on the taxable Queensland landholdings of entities that own land in multiple jurisdictions. The proposed amendments will amend current land tax rules to account for the value of land held interstate in determining the taxpayer's QLD land tax liability. The timing of commencement of this measure will be subject to the passage of appropriate legislative amendments.

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## Superannuation Update

### Draft guidance on exclusion of super benefits from assessable income

Generally, a superannuation benefit received by an individual is taxed concessionaly. However, a superannuation benefit received by an individual from a complying superannuation fund otherwise than in accordance with relevant superannuation regulations is included in their assessable income under Division 304 of the Income Tax Assessment Act 1997 and assessed according to the individual's marginal tax rates. This is however subject to the exercise of the Commissioner's discretion that it would be unreasonable to include the superannuation benefit in the individual's income, having regard to the nature of the fund the superannuation benefit was paid from.

The Australian Taxation Office (ATO) has issued draft taxation determination [TD 2021/D6](#) that clarifies the tax treatment when the Commissioner exercises his discretion. In particular, the draft determination considers how Division 304 interacts with the other Divisions of the tax law which set out the relevant tax rules for amounts paid as superannuation member benefits or superannuation death benefits.

The ATO has also issued draft law administration practice statement [PS LA 2021/D3](#) that sets out the circumstances where the Commissioner will exercise his discretion to exclude a superannuation benefit from an individual's assessable income when paid in breach of legislative requirements. Discretion is more likely to be exercised where the circumstances were outside of the individual's control, which is more likely to be the case with regulated funds that are managed at arm's length. The PS LA also lists out factors that should have little or no weight in the Commissioner's decision,

such as financial hardship or distress or events that occurred after the benefit was received.

Comments on the draft practice statement and taxation determination are due by 4 February 2022.

### Treatment of veterans's invalidity pensions to be changed

The Government has [announced](#) that it will amend the tax treatment of superannuation benefits that commenced on or after 20 September 2007 and were affected by the Full Federal Court decision in [Commissioner of Taxation v Douglas \[2020\] FCAFC 220](#) so that they are taxed as superannuation income stream benefits, rather than as lump sums. A new non refundable tax offset will apply to recipients of invalidity pensions paid from the impacted schemes, but will operate in a manner that ensures that veterans who would be better off in a particular income year if the invalidity pension were still treated as lump sums would retain that tax benefit.

Although the proposed changes will apply retrospectively, in the interim, the ATO's legislative instrument [MS 2022/1](#) continues with an alternative method for calculating the tax-free and taxable components of superannuation benefits paid under defence force invalidity pensions during the 2021-22 financial year.

### Regulations to allow ATO to pay amounts to KiwiSaver accounts

The [Treasury Laws Amendment \(KiwiSaver Scheme\) Regulations 2021](#) prescribe certain criteria that must be satisfied for the ATO to pay an amount to a KiwiSaver scheme provider. The regulations support amendments to superannuation legislation allowing individuals to direct the ATO to pay unclaimed superannuation amounts to a KiwiSaver scheme under the Trans-Tasman Retirement Savings Portability scheme which allows Australians

and New Zealanders to transfer their retirement savings between Australia and New Zealand.

## Division 293 tax: No discretion to disregard lump sum payout

The Administrative Appeals Tribunal (AAT) has held that there is no discretion for the ATO to alter, reduce, remove, disregard or reallocate superannuation contributions to a different financial year for purposes of applying the Division 293 superannuation contributions tax. In [\*KXCS v Federal Commissioner of Taxation\* \[2021\] AATA 4498](#), the taxpayer was made redundant in the second last month of the financial year and received a large redundancy payment and payouts for accrued annual leave and long service leave which increased his income and superannuation contributions for the 2017-18 financial year to \$257,546, which exceeded the Division 293 earnings threshold of \$250,000. The taxpayer argued that this outcome was unfair and the ATO should exercise a discretion to excuse him from the additional tax. The AAT found that there is no discretion within Division 293 to disregard any amount of leave payout from the amount of the taxpayer's 2017-18 income.

## Division 293 tax: Crown Prosecutor a constitutionally protected office

The AAT has found that a Victorian Senior Crown Prosecutor was a constitutionally protected higher level office holder, holding a position equivalent to the head of a government department, instrumentality or agency and accordingly was not subject to Division 293 superannuation contributions tax. The decision in [\*Rogers v Federal Commissioner of Taxation\* \[2021\] AATA 4478](#) was made on the basis that a Crown Prosecutor enjoyed significant autonomy to conduct proceedings in the name of the Director of Public Prosecutions and was effectively stepping into the shoes of the Director when conducting proceedings. As a result, the taxpayer was exempt from Division 293 tax imposed on superannuation contributions.

## No deduction for personal super contributions

The AAT has held in [\*Khanna v Federal Commissioner of Taxation\* \[2022\] AATA 33](#) that a taxpayer was not able to claim a deduction for personal superannuation contributions on the basis that the required notice to his superannuation fund was not lodged on or before the date of the relevant income tax return for the income year in which the contribution was made. The AAT found that there was no discretion in the legislation to extend the

time for the notice to be given or to disregard the notice requirement despite the taxpayer's claims of hardship.

## Assets found not to be held by SMSF

The Federal Court has held in [\*Frigger v Trenfield \(No 10\)\* \[2021\] FCA 1500](#) that certain assets were not assets held by a self-managed superannuation fund (SMSF) and were therefore divisible amongst the creditors of the taxpayers as undischarged bankrupts. In the facts of this case, the assets were held in the name of only one of the trustees and were not clearly identified as assets of the SMSF as distinct from personal assets, including by being legally recorded as owned by the SMSF.

## MySuper and Choice heatmaps published

The Australian Prudential Regulation Authority (APRA) has [published](#) the annual statistics for individual superannuation funds and products for 2021. A number of statistics are reported including fund performance, fees and profile and structure.

APRA has also [published](#) the Choice Heatmap (on products actively chosen by members) and MySuper Heatmap, supported by an insights paper and technical papers. The Choice Heatmap provides information on investment returns, fees and costs and sustainability of member outcomes.

It has been reported that 60 per cent of the Choice investment options considered gave returns belows APRA's benchmark over seven years and performance varied significantly more than MySuper products. In respect of MySuper products, 31 of 69 delivered returns belows APRA's benchmarks and twenty-two MySuper products had closed since the last Heatmap was published.

## Superannuation Data Transformation FAQs

APRA has also [published](#) additional frequently asked questions (FAQs) for registrable superannuation entities (RSE) on the Superannuation Data Transformation Phase. The FAQs clarify reporting issues raised by RSE licensees.

## Remake of the sunset super co-contribution regulations

Federal Treasury has [released](#) for comment draft [\*Superannuation \(Government Co-contribution for Low Income Earners\) Regulations 2022\*](#) that will remake the *Superannuation (Government Co-contribution for Low Income Earners) Regulations 2004* which sunset on 1 April 2022.

The proposed new regulations will simplify and restructure the previous regulations while also omitting certain redundant provisions. The regulations also include changes to the definition of "eligible account" excluding those that only provide terminal medical condition benefits and to clarify where a government co-contribution should be directed in certain circumstances. Comments on the draft regulations were due by 14 January 2022.

## Super splitting in WA

The [Superannuation Legislation Amendment \(Western Australia De Facto Superannuation Splitting\) Regulations 2021](#) ensure separating de facto couples in Western Australia (WA) receive a fair split of superannuation property in separation proceedings. The regulations were enacted pursuant to a referral of power from Western Australia to the Commonwealth in respect of superannuation matters in family law proceedings in Western Australia.

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## Legislative Update

Federal Parliament resumes for the 2022 calendar year on 8 February 2022. Since our last update, the following Bills have been introduced into Parliament:

- [Corporate Collective Investment Vehicle Framework and Other Measures Bill 2021](#), introduced into the House of Representatives on 25 November 2021, which proposes to:
  - establish the tax and regulatory framework for the corporate collective investment vehicles
  - extend the loss carry back measure for an additional year to 30 June 2023
  - list additional deductible gift recipients
  - make minor and technical amendments to treasury laws
  - insert a new covenant requiring registrable superannuation entities to develop a retirement income strategy for beneficiaries approach retirement, and
  - remove the cessation of employment as a taxing point for employee share scheme interests.

- [Customs Amendment \(Controlled Trials\) Bill 2021](#), introduced into the House of Representatives on 25 November 2021, is part of the Government's Simplified Trade System agenda announced in the 2020-21 Budget. The Bill establishes a new regulatory framework to facilitate proof-of-concept trials of new technology, business models and regulatory approaches with appropriate regulatory oversight.

The following legislation has received Royal Assent and is now law:

- [Treasury Laws Amendment \(2021 Measures No 5\) Act 2021](#) that gives effect to reforms to the Australian screen production incentives and makes minor and technical amendments to various tax and superannuation measures.
- [Territories Stolen Generations Redress Scheme \(Consequential Amendments\) Act 2021](#) that, amongst other things, ensures no tax is payable on payments made under the Territories Stolen Generations Redress Scheme.

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

- [Treasury Laws Amendment \(Miscellaneous Amendments\) Rules 2021](#) which allows the Australian Taxation Office (ATO) to make JobKeeper payments after the previous 31 March 2022 cutoff date when giving effect to an objection decision.
- [Income Tax Assessment \(Developing Country Relief Funds\) Declaration 2021](#) that consolidates previous developing relief fund declarations into a single instrument and declares four additional public funds to be developing country relief funds.
- [Treasury Laws Amendment \(KiwiSaver Scheme\) Regulations 2021](#) to prescribe further matters that must be satisfied for the ATO to pay an amount to a KiwiSaver scheme provider.
- [Taxation Administration — Single Touch Payroll — 2021–22 and 2022–23 years Withholding Payer Number Exemption 2021](#) to exempt entities with a withholding payer number and no Australian Business Number from reporting under single touch payroll for the 2021-22 and 2022-23 income years.
- [Income Tax: Alternative method for calculating the tax free component and taxable component of a superannuation benefit paid during the 2021-22 financial year for recipients of certain pensions under the Defence Force Retirement and Death Benefits Act 1973 and the Trust Deed referred to in section 4 of the Military Superannuation and Benefits Act 1991](#) that specifies an alternative method for calculating the tax-free and taxable components of superannuation benefits paid under defence force invalidity pensions during the 2021-22 financial year.
- [Treasury Laws Amendment \(Miscellaneous and Technical Amendments No. 2\) Regulations 2021](#) which amend various Treasury portfolio regulations for minor and technical changes, including amendments to the *Superannuation (Unclaimed Money and Lost Members) Regulations 2019* to ensure the recovery of overpayment in Part 4B of the *Superannuation (Unclaimed Money and Lost Members) Act 1999* operates properly and consistent with the other recovery of overpayment provisions in that Act.
- [Superannuation Legislation Amendment \(Western Australia De Facto Superannuation Splitting\) Regulations 2021](#) that ensures that any provisions in regulations which deal with superannuation splitting under the *Family Law Act 1975* also apply to superannuation splits made by de facto couples in Western Australia.
- [Customs Tariff Amendment \(2022 Harmonized System Changes and Other Measures\) Regulations 2021](#) and [Customs Amendment \(2022 Harmonized System Changes and Other Measures\) Regulations 2021](#) that update tariff classification headings and subheadings to implement the 2022 Harmonized System (refer to *Global tax* section for further details).

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# Other News

## ATO's Next 5,000 findings report

The Australian Taxation Office (ATO) has released its [findings report](#) containing observations and insights into the findings of the privately owned and wealthy groups Next 5,000 program up to 5 November 2021. The ATO's key observations of the private groups reviewed to date include:

- a high percentage have governance processes and procedures, but most are not documented
- documentation of the tax return preparation, review process and identification of material transactions helps groups to recognise tax risk and avoid errors, and
- private groups that seek tax advice for material risks and issues are more likely to make correct disclosures and adopt correct tax treatments.

Common tax issues encountered include loans and payments to shareholders and associates not complying with Division 7A of the *Income Tax Assessment Act 1997* (deemed dividends and private companies), lack of record keeping and incorrect use of prior year losses, non-arm's length transactions involving family or related parties, and treatment of property sales on capital account.

For further information, refer to [PwC's Next 5,000 website](#) and [summary of the ATO's findings report](#).

## Temporary full expensing ruling finalised

The ATO has finalised Law Companion Ruling [LCR 2021/3](#) on temporary full expensing. The final ruling contains additional guidance on the operation of temporary full expensing, based on feedback received on the draft ruling that was released for consultation.

By way of reminder, the temporary full expensing measure provides an optional temporary deduction for the full cost of certain depreciating assets acquired by taxpayers with aggregated turnover of up to AUD 5 billion. LCR 2021/3 provides guidance on a number of concepts relevant to this measure, including in relation to eligible entities and eligible assets, interaction with other provisions such as tax consolidation and the research and development (R&D) tax offset, and integrity issues.

## Allocation of professional firm profits guidance

The ATO has finalised Practical Compliance Guideline [PCG 2021/4](#) which deals with the allocation of profits by professional services firms (PCG 2021/4). PCG 2021/4 outlines the ATO's

approach to determining if income earned by an individual professional practitioner is not appropriately taxed and provides a risk assessment framework allowing taxpayers to self-assess their risk. The ATO is primarily concerned with arrangements where profits are allocated in a way that does not have a genuine commercial basis and contains high risk features such as non-arm's length financing arrangements or multiple classes of shares and units held by non-equity holders. PCG 2021/4 will apply from 1 July 2022.

## Mid-Year Economic and Fiscal Update

The Treasurer released the [Mid-Year Economic & Fiscal Outlook](#) (MYEFO) on 16 December 2021. Whilst the majority of the tax and superannuation measures contained in MYEFO had been previously announced, there were some new measures and/or changes to previously announced measures including:

- an income tax exemption for the International Federation of Association Football (FIFA) and its Australian subsidiary for the FIFA 2023 Women's World Cup to be held in Australia and New Zealand in 2023
- the establishment of a deductible gift recipient (DGR) general category to enable funds that support pastoral care and analogous wellbeing services delivered to students in Australian primary and secondary schools to access DGR status
- from 1 July 2021 to 30 June 2030, individuals will be allowed to re-contribute amounts withdrawn as part of the COVID-19 early release of superannuation program as non-concessional contributions above and beyond the existing non-concessional cap
- the Digital Games Tax Offset, which is proposed to be available from 1 July 2022, will be expanded to include qualifying expenditure on eligible games following their public release, and
- additional funding for the ATO to:
  - continue its personal income taxation and shadow economy compliance programs (now funded until 30 June 2023), and for an independent review of the ATO's ongoing resourcing requirements
  - develop a service that supports superannuation funds to transfer members' superannuation balances to the ATO for reunification with members' eligible active accounts identified via the service

- modernise its information technology systems, including strengthening the ATO's capabilities in data matching and pre-filing taxpayers' tax returns through MyGov, and
- assist with the administration of business support measures.

## Government responds to cryptocurrency reviews

The Government has outlined its [response](#) to the [Review of the Australian Payments System](#), the [Senate Select Committee on Australia as a Technology and Financial Centre Final Report](#), and the [Parliamentary Joint Committee Corporations and Financial Services Report on Mobile Payment and Digital Wallet Financial Services](#).

The Government did not agree with a recommendation from Senate Committee Australia as a Financial and Technology Centre for a 10 per cent tax discount for digital asset mining using renewable energy, and noted the recommendation for reform of the capital gains tax regime to account for digital asset transactions.

The Government has confirmed that it will task the Board of Taxation to conduct a review into the appropriate policy settings for the taxation of digital transactions, and in the interim, Treasury will liaise with the ATO on the potential for issuing more expansive guidance on the tax treatment of crypto-assets.

## Business invoicing

Treasury has begun [consultation](#) on the introduction of a "Business invoicing Right" (BER), requiring all businesses in Australia to comply with a request by an invoicing enabled trading partner to send invoices over the Peppol network. Initially, it is proposed that only large businesses will be required to send invoices with the scope of the obligation expanding to other businesses over time. An implementation period of 18 months for large businesses in particular will not leave much time for projects to be completed and so early planning is recommended.

Responses to the consultation are due by 25 February 2022. Read more in PwC's [Tax Alert](#).

## Consultation of self-assessing the of effective lives of intangible assets

Treasury has [released](#) exposure draft legislation and explanatory materials on proposed amendments to allow taxpayers to self-assess the tax effective life of certain intangible depreciating assets. The proposed measure will apply to assets that are acquired from 1 July 2023, which is the date that the temporary full expensing measure is proposed to cease. Submissions on the exposure draft legislation were able to be made until 23 December 2021.

## Consultation on AAT power to pause or modify debt recovery

Treasury has [released](#) exposure draft legislation and explanatory materials on the measure announced in the 2021-22 Federal Budget to allow the Administrative Appeals Tribunal (AAT) to pause or modify ATO debt recovery actions for small business debts that are being disputed before the AAT. The draft legislation would allow small businesses to apply to the AAT to pause or modify debt recovery action provided conditions intended to maintain the integrity of the taxation system are satisfied. The AAT will not have the power to pause the accrual of general interest charge or to modify judicial remedies obtained by the ATO in the court system. Comments on the exposure draft materials were due by 19 January 2022.

## Minor and technical amendments

Treasury has [released](#) exposure draft legislation, regulations and explanatory materials on minor and technical amendments to Treasury portfolio laws. Among other things, the proposed amendments address:

- an unintended fringe benefits tax outcome relating to income tax exempt not-for-profit private health insurers that operate hospitals, and
- unintended outcomes arising from the inability of recipients of certain non-capped defined benefit income streams (that were commenced on or after 1 July 2017) to address excess transfer balance amounts.

Comments on the draft materials were due by 15 December 2021.

## IGTO reviews and quarterly report

The Inspector General of Taxation and Taxation Ombudsman (IGTO) has [announced](#) that her office will conduct three new reviews in 2022 on:

- [the ATO's administration and management of objections](#) focusing on the timeliness in issuing objection decisions, independence of decision makers and decision making process, as well as the interaction between objections processes and other initiatives in minimising or narrowing disputes, with submissions due on 28 March 2022;
- [the exercise of the general powers of administration](#) covering, among other things, the ATO's systems and processes to receive, consider, determine and communicate matters for the exercise of decisions and whether they operate effectively and efficiently, with submissions due on 28 February 2022; and
- [the exercise of the Commissioner's remedial powers](#) covering, among other things, the ATO's

systems and processes to receive, consider, determine and communicate any potential use of the remedial power, with submissions due by 28 February 2022.

The IGTO has also released a [reporting pack](#) for quarter 1 of the 2022 financial year. The pack provides progressive updates on key performance areas against the IGTO corporate plan.

## Taxpayer not carrying on a business

The Administrative Appeals Tribunal (AAT) has upheld the decision of the ATO in [Kwan v Federal Commissioner of Taxation \[2021\] AATA 4465](#) to disallow a net business loss. In this case, the taxpayer had claimed a tax loss for marketing expenses, rent of a residential property and car expenses in respect of a property development business. The ATO disallowed the tax loss on the basis that the taxpayer was not conducting a business during the relevant year and the evidence did not establish that the business activity was conducted systematically, regularly or routinely. The AAT agreed with the Commissioner, finding that the taxpayer's plan to identify and redevelop property with the intention of selling to buyers in Hong Kong was vague, inconsistent with the taxpayers previous experience as an accountant and was not supported by any documentation.

## Update to ruling on illegal activities

The ATO has published an [updated draft of Taxation Ruling TR 93/25](#) on the assessability of proceeds from illegal activities, treatment of amounts recovered and deductibility of fines and penalties. The updated version takes into account legislative changes and developments in case law, with comments on the draft due by 25 February 2022.

## Decisions on asset freezing and use of information

The High Court has held in the decision of [Deputy Commissioner of Taxation v Huang \[2021\] HCA 43](#) that a "realistic possibility" that a judgment obtained could be enforced against the worldwide assets of a taxpayer was not a necessary requirement of obtaining a worldwide freezing order. The majority of the High Court held that the Full Federal Court had asked the wrong question in considering if the Federal Court could make a freezing order, and the correct question to ask was whether the order would seek to meet a danger that the prospective judgment will be wholly or partly unsatisfied.

The Federal Court in the decision of [La Mancha Africa S.A.R.L. v Federal Commissioner of Taxation & Anor \[2021\] FCA 1564](#) has held that the Commissioner is not subject to the 'Harman' undertaking or obligation in the course of litigation with regards to the use of subpoenaed documents. The Harman obligation limits the use of documents received in litigation to that litigation; however, it is subject to other statutory obligations, such as the obligation of the Commissioner to administer the income tax law on the basis of information available. The Court held that the Harman obligation did not constrain the Commissioner from using the subpoenaed documents in the lawful exercise of his powers and functions.

The Supreme Court of New South Wales has held in [Kupang Resources Pty Ltd v Commonwealth of Australia \[2021\] NSWSC 1580](#) that the ATO was required to produce documents in response to a notice to produce during litigation and that the production of the documents was not inconsistent with the secrecy provisions of the Australian tax law. The decision was made on the basis that taxation officers were able to produce the relevant documents for the purpose of performing their duties as taxation officers.

## Latest on Payment Times Reporting (PTR)

The 12 month transition period for compliance and enforcement measures for the [PTR](#) has ended. With penalties and reviews potentially starting from 1 January 2022 it is now time to consider whether your systems and processes enable you to correctly and efficiently report. It is also time to explore your current reporting metrics, in particular where there are internal or external drivers to improve those reporting metrics.

The Regulator has published its PTR dashboard as a series of tables setting out the details contained in the PTR. PwC has developed its own PTR dashboards using the data published by the Regulator that enables comparison between reporting entities, including comparison with others in the same industry. The PwC dashboards also allow you to compare your current data to the last reporting period providing insights on trends.

The PTR Small Business Identification (SBI) Tool that is used to identify small businesses has been updated and now provides results in three sections: small businesses; not small business; and invalid ABNs. This should help reporting entities to identify invalid ABNs and improve the accuracy of their reporting.

For more information, reach out to [Alison Marshall](#), Payment Times Reporting Lead.

## Let's talk

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## 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.

## Editorial

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# PwC's Monthly Tax Update

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