



# PwC's Monthly Tax Update

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

July 2023



# Corporate Tax Update

## AASB considering more disclosure of franking balances

The Australian Accounting Standards Board (AASB) is currently considering developing [additional disclosure requirements](#) for franking credit disclosures in financial statements (i.e., amending the current requirements in [AASB 1054 Australian Additional Disclosures for Tier 1 for-profit entities](#)). In prior consultation, some stakeholders indicated that further guidance or disclosures should be developed showing:

- a reconciliation of the actual franking accounting balance at the reporting date to the adjusted franking account balance using the guidance in AASB 1054;
- additional narrative or other disclosures about the impact of future franking debits arising from declared dividends that have not been recognised as a liability in the financial statements and receiving research and developments (R&D) refundable offsets; and
- how much franking credit is available for distribution to shareholders of the consolidated group separately from franking credits available for distribution to the parent entity.

Further work is yet required before this proposal may eventuate (not expected before 2024).

## ASIC highlights focus areas for 30 June 2023 reporting

The Australian Securities and Investments Commission (ASIC) has released its list of [focus areas](#) for full and half-year reporting periods ending Friday 30 June 2023. Asset values provisions and other estimates continue to be an area of focus. ASIC also notes that reports should provide information about the impact where a group has operations in countries that have enacted Pillar 2 tax reforms (i.e. the measures adopted as part of the Organisation of Economic Cooperation and Development (OECD) / G20 Two-Pillar Solution to address digitalisation of the economy) and the group has operations in low tax jurisdictions.

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# Employment Taxes Update

## Super guarantee penalty not remitted

The Administrative Appeals Tribunal (AAT) in [Burswood Care Pty Ltd \(ACN 154 327 545\) as trustee for Roshana Family Trust and Commissioner of Taxation \[2023\] AATA 1468](#) did not remit the penalties that were imposed by the Commissioner of Taxation in relation to the taxpayer's failure to meet superannuation guarantee (SG) obligations, specifically the penalty imposed under part 7 of the *Superannuation Guarantee (Administration) Act 1992*.

Having regard to the facts and circumstances that reflect on the taxpayer's culpability in failing to meet its obligations, the Tribunal found that there was nothing harsh about the penalty imposed and it was unable to conclude the penalty ought to be further remitted. The Commissioner has treated the taxpayer leniently in the past, but the taxpayer chose to pursue a business expansion without addressing the need to build effective and resilient capacity to meet its obligations.

In addition, in [Geelong Turf Company Pty Ltd v FC of T \[2023\] AATA 1718](#), the AAT has held that there were no exceptional circumstances found to fully remit the Part 7 superannuation guarantee penalties imposed on an employer who failed to lodge SG charge statements during the SG amnesty period.

The AAT was not persuaded that the employer had exceptional circumstances during the amnesty period, stating that personal health issues of responsible persons were not unusual, uncommon, or unprecedented and they did not prevent the employer from disclosing SG shortfalls, as other matters of the business were being attended to. Other factors that did not meet the "exceptional circumstances" threshold included any impact of the incompetence of former accountants, limited knowledge of accounting or tax matters, or the precarious financial position of the business.

The employer did not prove that any of these factors prevented it from lodging SG statements or disclosing the SG shortfalls.

## Super guarantee appeal and Fair Work news

In [JMC Pty Ltd v Commissioner of Taxation \[2023\] FCAFC 76](#), the Commissioner has sought leave to appeal to the High Court against the Full Federal Court decision dealing with an employee vs independent contractor question in the context of SG obligations (refer to the [June 2023 Monthly Tax Update](#) for discussion on the decision).

The [Fair Work Legislation Amendment \(Protecting Worker Entitlements\) Bill 2023](#) which amends the *Fair Work Act 2009* (Cth) and related legislation to protect worker entitlements, including superannuation, has completed its passage through Federal Parliament.

## Fringe Benefits Tax: Travel expenses for FIFO workers fail "otherwise deductible" test

In the matter of [Bechtel Australia Pty Ltd v FC of T \[2023\] FCA 676](#), the Federal Court has held that the taxable value of travel expenses incurred by a taxpayer in relation to its "Fly In Fly Out" (FIFO) employees for travel before and after the employees began and finished duties should not be reduced to nil, as the relevant travel did not occur in the course of employment and thus did not satisfy the "otherwise deductible" test in the *Fringe Benefits Tax Assessment Act 1986* (Cth).

As part of one of the taxpayer's construction projects, FIFO employees travelled from their respective point-of-origin airports to Gladstone to undertake duties at Curtis Island during the period in which they were rostered on, known as "swings". Travel from a FIFO employee's point-of-origin airport to Curtis Island and the return trip was organised, paid for and provided by the taxpayer. FIFO employees made their own arrangements in relation to travel to (or from) their residence to (or from) that point-of-origin airport.

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## Victorian Budget payroll tax measures now law

The [State Taxation Acts Amendment Bill 2023](#), which contains various measures announced in the 2023-24 Victorian State Budget, has been given Royal Assent. As noted in last month's update, the Bill amends the *Payroll Tax Act 2007 (Vic)* to:

- ensure amounts paid or payable by a corporate collective investment vehicle to its corporate director are not wages subject to payroll tax
- clarify that the rate of payroll tax for the financial year commencing on 1 July 2021 also applies to each subsequent financial year
- introduce a COVID-19 debt temporary payroll tax surcharge from 1 July 2023
- raise the payroll tax annual threshold from \$700,000 to \$900,000 from 1 July 2024, and to \$1 million from 1 July 2025
- reduce the deduction available to employers and groups with annual wages above \$3 million from 1 July 2024, and
- alter the operation of the exemption for wages paid or payable by non-government schools so that the exemption only applies to wages paid or payable by schools declared by the Minister for Education.

# Global Tax and Trade Update

## New interest limitation and transparency measures

**Legislation** which includes the following multinational tax and transparency measures proposed by the Government was introduced to the Federal Parliament on 22 June 2023:

- Revised thin capitalisation rules to limit debt-related deductions by reference to one of the following new tests – fixed ratio (i.e. 30 per cent of a tax determined EBITDA), a group ratio (i.e. up to the level of the worldwide group's net interest expense as a share of global earnings) or external third party debt limit (i.e. disallowing third party debt deductions that do not meet the requisite conditions and all related party debt deductions) and new debt creation rules - applies to income years commencing on or after 1 July 2023, and
- Enhanced tax transparency by requiring public companies to publicly disclose information about their subsidiaries, including tax residency – applies to annual financial reports prepared for financial years commencing on or after 1 July 2023.

**Information** has also been released on the outcomes of the public consultation processes that resulted in the above legislation.

The Bill does not include the following:

- the rule to deny a significant a global entity (SGE) a tax deduction for cross-border payments relating to intangibles made directly or indirectly to an associate which results in the recipient (or another associate) deriving income in a low corporate tax jurisdiction, and
- the tax transparency measure for Country by Country (CbC) reporting parent entities to publicly disclose the information in their CbC reports as well as other tax and financial information.

The Government has indicated that it is making changes to better achieve the policy intent on the intangibles measures and these changes are reflected in a revised Bill and explanatory memorandum which is not yet before Parliament (see below).

In relation to the proposed CbC reporting requirements, the Government has indicated that it will defer the application date by 12 months to 1 July 2024 to align with the commencement of the European Union's reporting directive and consult further on the appropriate level of disaggregated reporting.

For further summary information on the above measures, refer to our [Tax Alert](#).

See also the [announcement](#) by the Assistant Minister for Competition, Charities and Treasury regarding the above.

## SGEs and intangible related payments

As noted above, legislation has not yet been introduced to implement the Government's proposal to deny a SGE a deduction for certain intangible related payments. However, the Government has released a [revised Bill and explanatory memorandum](#) which it plans to finalise to give effect to this proposal which will continue to apply to all payments made or credited or liabilities incurred after 1 July 2023.

The Government is further considering interactions of the intangibles measure with global minimum taxes and domestic minimum taxes.

For further information, refer to our [Tax Alert](#).

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## Vietnam and MLI

Vietnam has deposited its [instrument of ratification](#) for the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (Multilateral Convention or MLI). The MLI will enter into force in Vietnam on 1 September 2023.

## Uzbekistan joins the inclusive framework on BEPS

On 9 June 2023 it was [announced](#) that Uzbekistan joined the Inclusive Framework on Base Erosion and Profit Shifting (BEPS). Uzbekistan has also committed to addressing the tax challenges arising from the digitalisation of the economy by joining the two-pillar plan.

## OECD update on automatic exchange of information

Countries of the Organisation of Economic Cooperation and Development (OECD) have agreed to swiftly implement the newly revised [International Standards for Automatic Exchange of Information in Tax Matters](#) which encompass several important updates and additions to address emerging challenges in the evolving tax environment. This includes:

- the Crypto-Asset Reporting Framework which provides for the automatic exchange of tax relevant-information on crypto-assets, and
- amendments to the Common Reporting Standard to bring certain electronic money products, central bank digital currencies and indirect investments in crypto-assets into scope.

## ATO excise ruling on meaning of “legally and economically independent”

The Australian Taxation Office has issued [Excise Ruling ER 2023/1](#), providing guidance on the Commissioner's view on the meaning of “legally and economically independent” for the purposes of the excise remission and refund schemes for manufacturers of alcoholic beverages.

There are specific eligibility criteria that have to be met to be eligible to receive a remission or refund under either scheme. One of the eligibility criteria for both schemes is that an alcohol manufacturer must be legally and economically independent of any other entity that has received a remission or refund under the scheme in the financial year.

ER 2023/1 provides that the phrase “legally and economically independent” is not defined in the excise legislation, however, the text and the statutory context in which the phrase appears indicate that there are two limbs that need to be satisfied, being: legal independence and economic independence. Each aspect must be satisfied for both manufacturers to be eligible for remission or refund, where it cannot be satisfied only one of the entities will be entitled to the remission or refund.



# Indirect Tax Update

## Notional GST payments from local council did not contravene Constitution

In [Hornsby Shire Council v Commonwealth of Australia & Anor 2023 \[2023\] HCA 19](#), the High Court found that a scheme for the payment of notional goods and services tax (GST) by local government bodies in New South Wales (NSW) or in the event of non-payment, the arrangement for the withholding of equivalent amounts from financial grants to those bodies, did not contravene section 114 of the Constitution as it did not involve the imposition of a tax on property belonging to a State.

The dispute concerned whether the payment of notional GST was a compulsory exaction

enforceable by law (that is, a tax) or an entirely voluntary act. The High Court unanimously held that the inclusion by the Council of notional GST in the Business Activity Statement (BAS) was a voluntary act made in accordance with an Intergovernmental Agreement entered into by the Commonwealth and each State and Territory. No federal law legally or practically compelled the Council to include that notional GST in its BAS. Accordingly, there was no Act imposing a tax for the purposes of section 114 of the Constitution.

## GST applied to combination food product

The Administrative Appeals Tribunal found in [Chobani Pty Ltd v FC of T 2023 \[2023\] AATA 1664](#) that the supply of flavoured yoghurt in a plastic tub along with a blend of dry ingredients in a separate compartment was not GST-free.

Although it was not in dispute that the product is "food" as defined for GST purposes and it constituted a single supply, the issue for determination is whether the GST-free status of the supply of the product is excluded by section 38-3(1)(c) of *A New Tax System (Goods and Services Tax) 1999*. Specifically, whether the product falls within the exclusion in the second limb (i.e. biscuit goods or confectionery, or food that is a combination of one or more foods at least one of which is food of such a kind).

The Tribunal found that the exclusion in section 38-3(1)(c) applies at least when a product is a combination of foods that includes separately identifiable food or foods excluded by the law. This was not the case in this matter as the dry inclusions are not integrated into the yoghurt and are significant as indicated by their physical separation in the product as sold; relative weight and cost; the marketing of the product and consumer experience; and its naming as a "flip" product.

The Tribunal also rejected the taxpayer's alternative submission that the dry ingredients comprised a blend that is neither confectionery nor biscuit goods.

## Updated GST Ruling on supplies outside of Australia

The Australian Taxation Office (ATO) has updated GST ruling [GSTR 2004/7](#) which deals with when a supply is made to a non-resident, or an entity that is not an Australian resident or other recipient of a supply who is not in Australia or is outside Australia when the thing supplied is done. The Addendum reflects updated ATO guidance on individual residency in Taxation Ruling [TR 2023/1](#) (see Personal Tax section in this update) and to make minor style changes.

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# Personal Tax Update

## Residency tests for individuals

The Australian Taxation Office (ATO) has released Taxation Ruling [TR 2023/1](#) which outlines the residency tests for individuals for tax purposes and when the Commissioner of Taxation considers that a person will be a resident of Australia.

The Ruling explains that residency under the first three tests of the legislation – i.e. ordinary concepts test, the domicile test and the 183-day test – is determined by considering all relevant facts and circumstances. Because of this, there are no 'bright-line rules' or any single factor that determines the outcome and the significance of facts varies from case to case. The new Ruling also contains examples to assist taxpayers in how they should be considering their specific facts and circumstances.

Refer to our [Tax Alert](#) for further information.

## No deduction for work-related self-education expenses

In [Anders and Commissioner of Taxation \[2023\] AATA 1471](#) the Administrative Appeals Tribunal (AAT) has held that a taxpayer who was a qualified teacher specialised in music teaching and working as a casual music teacher at a secondary school was not able to claim a deduction for work-related self-education expenses.

The taxpayer had sought to claim a deduction for education expenses for courses in public policy and management. Based on the evidence provided, the Tribunal found that the occasion of the taxpayer's outgoing, in this case Masters course fees, cannot be found in his work as a relief teacher, being the role he held at the time that generated the assessable income of which he sought to rely on to create the required link. In addition, the subjects undertaken did not maintain or improve his skills or knowledge as a music teacher and were not likely to lead to an increase in the taxpayer's income-earning activity as a relief teacher or as a music teacher.

The AAT also considered the taxpayer's intention of being able to expand his ability to teach in subjects outside of music and to gain leadership positions related to new employment or new income-earning activities. Expenditure incurred with the aim of securing or improving the prospects of obtaining new employment was not incurred in the course of gaining or producing income. As such, it was not sufficient basis for those expenses to be deductible.

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# State Taxes Update

## South Australia Budget

The South Australian Treasurer, the Honourable Stephen Mullighan MP, handed down the [2023–24 South Australian Budget](#) on 15 June 2023. This Budget focuses on providing substantial cost of living relief, allocates large increases in funding for health, housing and child protection, and invests in the South Australian economy.

Due to additional spending pressures and a reduction in expected goods and services tax (GST) revenues in the 2022-23 financial year, the Budget estimates a net operating deficit for the 2022-23 financial year of \$249 million and is forecast to return to surplus in 2023-24 with a net operating balance surplus of \$250 million growing to \$639 million by 2026-27. However, non-financial public sector net debt is expected to rise to \$37.6 billion as at 30 June 2027.

Although there were no new announced taxes or tax increases in the 2023-24 Budget, there have been some updates and revisions in relation to tax measures:

- the abolition of stamp duty for first home buyers who purchase a new home valued up to \$650,000, or vacant land valued up to \$400,000 to build a new home, on or after 15 June 2023.
- an increase in the property value cap for the First Home Owner Grant from \$575,000 to \$650,000 for eligible first home buyers who enter into a contract on or after 15 June 2023.
- “A Better Housing Future”, as released in February 2023, comprising a \$325 million plan intended to deliver more social and affordable houses, greater protections for those who are renting, and support for people to buy a home by:
  - providing greater support through HomeStart products, including increasing the annual income cap for the Starter Loan from \$65,000 to \$75,000 for singles, and from \$90,000 to \$100 000 for couples, and

- providing a build-to-rent 50 per cent land tax discount for eligible new build-to-rent housing projects where construction commences on or after 1 July 2023.

- Tax relief for residents and businesses damaged by recent flooding including:
  - stamp duty relief for those purchasing a replacement for a flood damaged home or destroyed vehicle
  - emergency services levy relief for flood destroyed vehicles, and
  - land tax relief for business properties and long-term residential rentals that are substantially damaged or destroyed.
- The abolition of the asset sustainability levy payable by outback residents which was introduced by the previous government.
- Changes to allow RevenueSA to issue individual Notice of Emergency Services Levy Assessments to lessees of privately leased shack sites.
- The indexation rate for government fees and charges has been limited to 4.8 per cent in 2023-24 with the emergency services levy for a median valued metropolitan residential property increasing by 4.8 per cent in 2023-24.

The [Statutes Amendment \(Budget Measures\) Bill 2023](#), was also introduced into the SA Parliament, to amend the *Stamp Duties Act 1923* (SA), *First Home and Housing Construction Grants Act 2000* (SA) and *Land Tax Act 1936* (SA) to give effect to measures in the Budget that were aimed at supporting first home buyers to enter the property market.

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## Queensland Budget

The Queensland (QLD) Treasurer, the Honourable Cameron Dick MP, has handed down the [QLD Budget for 2023–24](#) on 13 June 2023. The Budget has identified the QLD Government's focus areas for the 2023-24 financial year as including responding to cost-of-living pressures, improving health services, addressing housing affordability and keeping communities safe.

The Budget recognises a historic \$12.03 billion surplus in the 2022-23 financial year, which is noted as being driven by a temporary surge in royalties due to the exceptionally high coal prices. The Budget anticipates a \$2.2 billion dollar deficit in 2023-24.

The Budget contains some new revenue measures and provides more information on previously announced measures. With the introduction of the Budget Papers, the [Revenue Legislation Amendment Bill 2023 \(QLD\)](#) was also introduced to give effect to some of the below measures and has since completed its passage through the QLD Parliament.

### Duty and land – Build to Rent concessions

The Budget and the Bill provided further insight into the previously announced Build-To-Rent (BTR) measures that commence from 1 July 2023. These concessions will be available for the earlier of a maximum of 20 years or until 30 June 2050, and consist of the following:

- 50 per cent reduction in the taxable value of land for general land tax for land used for BTR development, up to a maximum of 20 years
- 100 per cent reduction in the taxable value of land for land tax foreign surcharge for land used for BTR development, up to a maximum of 20 years, and
- 100 per cent discount on any Additional Foreign Acquirer Duty (AFAD) for land used for BTR development.

At a high level, to constitute an eligible BTR development, the development must:

- become operational (i.e. certificate of occupancy issued) after 1 July 2023 and before 30 June 2030, with all eligibility requirements met by the second full financial year after becoming operational
- provide 10 per cent or more of its dwellings as affordable housing at discounted rents to Australian citizens or permanent residents that are subject to income and asset tests
- provide at least 50 self-contained dwellings which are constructed or substantially renovated for the purpose of being occupied under residential tenancy agreements
- if owned by more than one person, ensure that no person is to be entitled to a specific part of the land that another owner is not

- be managed by a single entity (however there are some exceptions to this where an additional entity providing management services is a registered community housing provider), and
- meet the above eligibility requirements for at least five continuous years for AFAD relief and continuously for land tax relief.

### Land tax – home exemption

The Bill also introduces land tax amendments that remove the requirement to apply for an exemption from land tax for land used as a home. Where the Commissioner believes a home exemption should apply to the land, the Commissioner is able to exempt the land from land tax without a formal application from the taxpayer. Where the Commissioner is unable to form a view that the exemption should apply, the taxpayer can submit an application to the Commissioner setting out the reasons why the home exemption should be applied to the land. It is noted in the Explanatory Memorandum for the Bill that this is intended to reduce the administrative burden for land owners in relation to land tax.

### QLD Office of State Revenue compliance and debt recovery

The Budget announced funding to the QLD Office of State Revenue for the continuance and establishment of key compliance and debt recovery measures. This will consist of various activities to assist taxpayers in understanding and meeting their obligations, and also enforcement through various actions, audits and investigations.

### Payroll tax measures

The following payroll tax measures were announced in the Budget (see Employment Taxes section in this update for further information):

- an amnesty from payroll tax to qualifying medical practices up to 30 June 2025 and for the previous five years in relation to the payroll tax treatment of contractors as it relates to general practitioners
- an extension of the payroll tax discount for regional employers in QLD until 30 June 2030, and
- an extension of the 50 per cent apprentice and trainee payroll tax rebate for 12 months until 30 June 2024.

## Tasmanian Budget

The Tasmanian Treasurer, the Honourable Michael Ferguson MP, has handed down the Tasmanian Budget for 2023–24 on 25 May 2023. The Tasmanian Government anticipates a deficit of \$297.5 million in the 2023-24 financial year, and expects a return to surplus of \$12.7 million in 2025-26, increasing to \$61.2 million in 2026-27.

There were no new state taxation related measures introduced, but an extension of certain existing state taxation relief measures and a commitment to introduce a new road user charge as previously announced.

The road user charge will be implemented for low and zero emission vehicles from 1 July 2027, or when zero or low emissions vehicles make up 30 percent of all new vehicle sales. Legislation is proposed to be introduced in 2024 subject to the outcome of the High Court challenge to Victoria's distance-based charge for zero and low emission vehicles.

The Government will extend the following exemptions and concessions for a further 12 months to 30 June 2024:

- the eligible period for the first home buyer and pensioner downsizing duty concessions, and
- the exemption from land tax for newly constructed dwellings made available for long-term rental and short-stay accommodation converted to long-term rentals.

Additionally, where a contract to purchase a new electric and hydrogen fuel-cell vehicle is entered into prior to 25 May 2023, the waiver of duty on purchase will be extended to 31 December 2023. This was implemented by the [Taxation and Miscellaneous Amendments Act 2023](#) (which also amended the *First Home Owner Grant Act 2000* (Tas) to maintain the First Home Owner Grant at \$30,000 from 1 July 2023 until 30 June 2023).

## Victorian Budget

The [2023-24 Victorian State Budget](#) was delivered on 23 May 2023 by the Treasurer, the Honourable Tim Pallas MP. This year's Victorian Budget centres on improving the healthcare system, boosting education and a continued focus on infrastructure spend. There was also a focus on stabilising State debt with a particular emphasis on paying off all COVID debt within ten years. The Victorian Government aims to achieve this primarily through the new COVID Debt Repayment Plan which includes the introduction of the COVID-19 Debt Levy (discussed below) which will be a temporary and targeted levy that will apply for a ten year period until 30 June 2033.

The Victorian Government anticipates total revenue in 2023-24 will be \$89.3 billion, which is expected to grow by an average of 3.8 per cent per year over the forward estimates. Total revenue growth is anticipated to be driven primarily by growth in taxation revenue such as payroll tax, land tax and the new COVID Debt Levy. Taxation revenue is forecast to be \$34.9 billion in 2023-24 with annual growth of 5 per cent per year over the forward estimates.

- The key tax measures announced in the Budget are discussed below.

## COVID-19 Debt levy on landholdings and Payroll

Two separate levies, one for landholdings (Landholdings Levy) and the other for large businesses with national payrolls above \$10 million (Payroll Levy) will be imposed to offset the impact of COVID-related debt and will apply until 30 June 2033. In summary:

- The Landholdings Levy will apply from 1 January 2024. The effect of this levy will be to temporarily reduce the tax-free threshold for general land tax rates from \$300,000 to \$50,000 and impose a temporary fixed charge of \$500 on taxpayers with landholdings between \$50,000 to \$100,000, and a temporary fixed charge of \$975 on taxpayers with landholdings between \$100,000 and \$300,000. For property holdings above \$300,000 (and trust taxpayers with property holdings above \$250,000), land tax rates will also temporarily increase by \$975 plus 0.1 per cent of the value of their landholdings.
- The Payroll Levy will commence from 1 July 2023 and will apply to large businesses with national payrolls above \$10 million a year. A rate of 0.5 per cent will apply to businesses with national payrolls above \$10 million a year and an additional 0.5 per cent will apply to businesses with national payrolls in excess of \$100 million a year. The additional rates will be paid on the Victorian share of wages above the relevant threshold.

## Stamp duty reform

The Government proposes to transition from land transfer duty to an annual property tax of 1 per cent of the property's unimproved land value for commercial and industrial properties, commencing from 1 July 2024.

The transition will take effect from the time the property is next transacted (i.e. it will not impact current owners), with the annual property tax applying after a transition period of ten years.

To ease the transition, the first purchaser of a commercial or industrial property on or after 1 July 2024 has the choice to either pay the property's final stamp duty liability as an upfront lump sum, or transition to an annual payment immediately by opting to pay fixed instalments over ten years equivalent to stamp duty and interest with a government-facilitated transition loan.

## Land tax – absentee owner surcharge

From 1 January 2024 the absentee owner surcharge rate will increase from 2 per cent to 4 per cent. The tax-free threshold for non-trust absentee owners will decrease from \$300,000 to \$50,000.

## Payroll tax

The following payroll tax measures were also announced in the Budget:

- From 1 July 2024 the payroll tax-free threshold will be lifted from \$700,000 to \$900,000. A further increase in the tax-free threshold to \$1 million will apply from July 2025.
- However, from 1 July 2024, the payroll tax-free threshold will be phased out for larger businesses. This phase out will result in the tax-free amount reducing for each dollar a business pays in wages over \$3 million. Businesses with wages over \$5 million will not benefit from the tax-free threshold.

## Business insurance duty

Business insurance duty (which includes insurance on public and product liability, professional indemnity, employers' liability and fire and industrial special risks) will be completely abolished by 2033. The rate of duty is currently 10% and will be reduced by 1 percentage point each year from 1 July 2024.

The [State Taxation Acts Amendment Bill 2023](#) which has since passed both Houses of the Victorian Parliament amends several pieces of legislation in alignment with the 2023-24 Victorian State Budget. The Bill includes the following changes to the:

- *Duties Act 2000* (Vic) to:
  - apply to include corporate collective investment vehicles
  - provide further exemptions and concessions from duty for special disability trusts
  - provide for an exemption from duty for a transfer of a principal place of residence to a person with a disability in certain circumstances
  - amend exemptions and concessions from duty for eligible cardholders, and
  - provide for a decreasing rate of duty and exemption from duty on business insurance premiums.
- *Land Tax Act 2005* (Vic) to:
  - apply to include corporate collective investment vehicles
  - provide for an exemption from land tax for land subject to a conservation covenant
  - temporarily increase certain land tax rates to offset COVID-19 debt
  - increase the absentee owner surcharge rate to 4 per cent
  - decrease the tax-free threshold for land held by an absentee owner to \$50,000
  - provide an exemption from land tax for land used or occupied by a person with a disability in certain circumstances, and
- make further provision for the exemption for the construction and renovation of a principal place of residence.
- *Payroll Tax Act 2007* (Vic) to, among other things:
  - introduce the COVID-19 debt temporary payroll tax surcharge from 1 July 2023
  - raise the payroll tax annual threshold from \$700,000 to \$900,000 from 1 July 2024, and to \$1 million from 1 July 2025, and
  - reduce the deduction available to employers and groups with annual wages above \$3 million from 1 July 2024.
- *Taxation Administration Act 1997* (Vic) and *Valuation of Land Act 1960* (Vic) with respect to objections to valuations used for assessing a windfall gains tax liability.

## NSW surcharge and international tax treaties

Revenue NSW has [confirmed](#) the countries which have international tax treaties which may affect the imposition of NSW surcharge purchaser duty and surcharge land tax liability. The current list of countries that are affected is:

- Finland
- Germany
- India
- Japan
- New Zealand
- Norway, and
- South Africa.

Individuals who are citizens of the nations concerned purchasing residential-related property or land in their own capacity will no longer be required to pay surcharge purchaser duty or surcharge land tax.

Revenue NSW has stated that surcharge purchaser duty or surcharge land tax liability for non-individuals, such as corporations, trusts or partnerships, that arises because of an entity's affiliation with these nations may also be affected by the international tax treaties.

The refund period has also been extended. Refunds may be available for purchasers/transferees and landowners from the nations concerned who paid purchaser duty or surcharge land tax on or after 1 January 2021 (previously 1 July 2021).

## NSW landholder duty and goods

In [Chief Commissioner of State Revenue \(NSW\) v Shell Energy Operations No 2 Pty Ltd \[2023\] NSWCA 113](#), the NSW Court of Appeal has found that power stations that had legally been severed from the land were “goods” for the purposes of NSW landholder duty.

The matter arose following the acquisition of all the shares in a private company which held interests in three power stations pursuant to a State privatisation process. The Commissioner considered that the company was a “landholder” under Chapter 4 of the *Duties Act 1997* (NSW) because it held property interests in the items constituting the power stations, which were fixtures and thus part of the land on which they sat. The taxpayer had submitted that the property interests in the items constituting the power stations had legally been severed from the land by reason of two vesting orders made under the *Electricity Generator Assets (Authorised Transactions) Act 2012* (NSW).

The majority of the Court found that the primary judge did not err in concluding that the vesting orders transferred ownership of the items in question and thereby legally severed the interests in the items constituting the power stations. Furthermore, it found that each of the items constituting the power stations had the legal character of goods prior to being incorporated into the power stations and thus affixed to, and becoming part of, the land and that the legal affixation was ended by way of severance effected by the vesting orders such that their legal character returned to the status of being goods. The *Duties Act 1997* did not change that outcome.

## Victorian land tax and primary production

In [Mintfield Pty Ltd v Commissioner of State Revenue \(Vic\) \[2023\] VSC 317](#) the Victorian Supreme Court has highlighted that for the purposes of the land tax exemption under section 68 of the *Land Tax Act 2005* (Vic) for land being prepared for primary production, that the preparation of the land be specific to one or more of the primary production activities as prescribed.

The case in question related to rural land purchased by the taxpayer in September 2015, with the claimed intention to use the land for cattle farming. The cattle farming never eventuated and in March 2017 the taxpayer commenced crop cultivation.

The Court noted that one or more elements of the definition of primary production, such as maintenance of animals and cultivation of crops, must be satisfied, and that it was not to the point with respect to section 68 that there is some general intention to use land for primary production. On the basis of the evidence before the Tribunal and its reasons, the Court found that it is correct to say there was an hiatus in a relevant specific “primary production” intention in terms of the statutory provisions. Thus, there was properly found to be an intention to cattle farm which was spent prior to 31 December 2016, and there was no other specific intent with respect to “primary production” properly found to exist until early 2017, being for crop cultivation. Accordingly, as at midnight on 31 December 2016, the definition of “primary production” in section 64 of the *Land Tax Act 2005* was not satisfied with respect to the preparatory activities being conducted with respect to the property.



# Superannuation Update

## Consultation on amendments for non-arm's length income and expenses for super funds

Treasury has released exposure draft law with respect to proposed amendments to the non-arm's length income (NALI) and non-arm's length expense (NALE) provisions that was announced in the 2023-24 Budget.

The proposed amendments seek to:

- Limit application of the NALE rules to self-managed superannuation funds (SMSFs) and small Australian Prudential Regulation Authority (APRA) regulated funds.
- Distinguish between specific and general expenses for the purposes of NALE rules for both general and specific expenses of the fund.
- Set the amount of income that will be taxable as NALI from a general expense breach as twice the difference between the amount that would have been charged as an arm's length expense and the amount that was actually charged to the fund.
- Limit potential income of the fund that will be taxable as NALI to the fund's taxable income less contributions and related deductions.
- Exempt expenses which were incurred, or might have been expected to be incurred, before the 2018-19 income year.

Comments can be made on the exposure draft by 7 July 2023.

## ATO reviewing SMSFs with property development arrangements

The Australian Taxation Office (ATO) has issued Taxpayer Alert [TA 2023/2](#) indicating that it is reviewing arrangements under which one or more SMSFs have, or acquire, direct or indirect ownership of a special purpose vehicle that undertakes a property development project, and because of the non-arm's length arrangements, the special purpose vehicle derives a profit that ultimately benefits the SMSFs which is more than what it would have been if all the parties had dealt with each other at arm's length.

The Commissioner will consider whether the dividends and other income received by the SMSFs are non-arm's length income and the application of the regulatory requirements in the *Superannuation Industry (Supervision) Act 1993* and other relevant law in respect of these arrangements.

## Reminder – minimum annual payments for super income streams

The ATO has [reminded](#) funds that for the 2023-24 financial year, the previously applicable temporary 50 per cent reduction in the minimum pension drawdown rate will no longer apply. Failing to satisfy the minimum standards of account-based pensions may impact the availability of related income tax concessions.

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# Legislative Update

Federal Parliament concluded its Winter sittings on 22 June 2023.

The following tax or superannuation related Bills were introduced into Federal Parliament since our last update:

- [Treasury Laws Amendment \(2023 Measures No. 3\) Bill 2023](#), which was introduced into the House of Representatives on 14 June 2023, among other things (not tax or super related), make technical changes to the First Home Super Saver Scheme to improve the scheme's flexibility.
  - [Treasury Laws Amendment \(2023 Law Improvement Package No. 1\) Bill 2023](#), which was introduced into the House of Representatives on 14 June 2023, amongst other things, makes amendments relating to tax and superannuation that align with the Australian Law Reform Commission recommendations to improve the navigability of the law, and make minor and technical amendments including to:
    - ensure that the definition of 'year of income' in *Superannuation Industry (Supervision)*
    - *Act 1993* is same as for income tax purposes
    - clarify the provisions relating to the supply of goods and services tax (GST)-free cars and car parts to eligible individuals with current disability certificates, and
    - ensure that the entity that is liable to pay GST on the relevant taxable supply of new residential premises and potential residential land would be entitled to the credit for the GST paid by the purchaser.
  - [Crimes Legislation Amendment \(Combatting Foreign Bribery\) Bill 2023](#), which was introduced into the House of Representatives on 22 June 2023, proposes to strengthen Australia's implementation and enforcement of the Anti-Bribery Convention by strengthening the legal framework for investigating and prosecuting foreign bribery, and from a tax perspective amend the existing provision that denies deductions for bribes to foreign public officials.
  - [Treasury Laws Amendment \(Making Multinationals Pay Their Fair Share - Integrity and Transparency\) Bill 2023](#), which was introduced into the House of Representatives on 22 June 2023, proposes to implement the following components of the Government's multinational tax and transparency measures:
    - revised thin capitalisation rules and new debt creation rules to limit debt-related deductions – applies to income years commencing on or after 1 July 2023, and
    - enhanced tax transparency by requiring public companies to publicly disclose information about their subsidiaries, including tax residency – applies to annual financial reports prepared for financial years commencing on or after 1 July 2023.
- The following tax and superannuation related Bills have now completed their passage through Parliament:
- [Treasury Laws Amendment \(2023 Measures No. 2\) Bill 2023](#), which:
    - amends the Medicare levy and Medicare levy surcharge income thresholds to apply to the 2022-23 income year
    - allows eligible primary producers to treat certain carbon abatement income as primary production income; and
    - reduces the GDP adjustment factor to work out certain pay as you go (PAYG) and GST instalments for small businesses and eligible individuals.

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- [Treasury Laws Amendment \(2022 Measures No. 4\) Bill 2022](#), which gives effect to a range of tax measures including:
  - the digital games tax offset to apply to qualifying Australian development expenditure incurred in relation to eligible game development from 1 July 2022
  - amendments to clarify that digital currencies continue to be excluded from the income tax treatment of foreign currency and in the context of the GST
  - measures to reduce the compliance burden for employers finalising their fringe benefits tax
  - the skills and training boost for small businesses
  - the technology investment boost for small businesses
  - amendments to extend and adapt certain financial reporting and auditing requirements for registrable superannuation entities, and
  - amendments to various taxation laws to confirm the tax treatment of certain defined benefit pensions and provide a non-refundable tax offset for recipients of certain military invalidity benefits.
- [Customs Tariff Amendment \(Incorporation of Proposals\) Bill 2023](#) makes various customs amendments including to:
  - extend the temporary increase in customs duties for goods that are the produce or manufacture of Russia or Belarus imported into Australia between 25 April 2022 and 24 October 2023
  - provide a 'Free' rate or reduced rate of customs duty for goods that are the produce or manufacture of Ukraine
  - extend the 'Free' rate of customs duty for prescribed medical products and hygiene products capable of use in combating COVID 19
  - provide for the classification of certain electric and low emission vehicles with a customs value less than the 'fuel-efficient car limit', and
  - correct tariff references for blood-grouping reagents and 'herbicides, anti-sprouting products and plant-growth regulators'.
- The [Fuel Tax \(Road User Charge\) Determination 2023](#) which provides the new rates of the road user charge for taxable fuels for which duty is payable from 1 July 2023
- [A New Tax System \(Goods and Services Tax\): Recipient Created Tax Invoice Determination 2023](#) which permits government related entities, large business entities and business entities to issue a recipient created tax invoice in respect of a taxable supply (rather than the supplier) where certain requirements are satisfied.
- [Taxation Administration \(Single Touch Payroll Reporting Exemption for Withholding Payer Number Holders\) Instrument 2023](#) which provides an exemption to 2033 for any entity that would otherwise be required to report an amount through single touch payroll, that does not have an Australian Business Number (ABN) and has been assigned a withholding payer number by the ATO for the purposes of PAYG withholding.

Parliament next resumes for the Spring sittings on 31 July 2023.

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

- The [Income Tax Assessment \(Cents per Kilometre Deduction Rate for Car Expenses\) Determination 2023](#) which sets the cents per kilometre rate for calculating work-related car expense deductions for income years commencing on or after 1 July 2023 to 85 cents per kilometre



# Other News

## Labour costs related to the construction or creation of capital assets

The Australian Taxation Office (ATO) has released Taxation Ruling [TR 2023/2](#) which outlines when certain labour costs related to constructing or creating capital assets (whether tangible or not) cannot be deducted under section 8-1 of the *Income Tax Assessment Act 1997* (ITAA 1997). The ruling acknowledges that generally labour costs are revenue in nature and therefore will be deductible, however the ruling comments on certain capital asset labour costs which will be on capital account.

According to the Ruling, to the extent that capital asset labour costs are incurred specifically for constructing or creating capital assets, their essential character is considered to be of a capital nature and are therefore not deductible under section 8-1. This is a question of fact and degree.

The Ruling indicates that the cost of workers or employees whose role has a remote connection with constructing or creating capital assets, or who have a broader role that involves incidental activities connected with constructing or creating capital assets, will generally not be regarded as being incurred specifically for constructing or creating capital assets and therefore will not be capital or of a capital nature.

Furthermore, the Ruling notes that whether capital asset labour costs are incurred specifically for constructing or creating capital assets is ordinarily to be ascertained at the time the loss or outgoing is incurred. This may mean that costs in relation to an employee may be initially on capital account and later change to be on revenue account (and vice versa), and employees may be specifically employed for both constructing or creating capital assets and other duties, in which case apportionment of the losses or outgoings will need to be considered. Apportionment should be conducted on a fair and reasonable basis.

While the Ruling confirms that the accounting treatment is not a determinative factor of the character of expenditure incurred for income tax purposes, it is one of the many relevant factors that need to be considered when conducting a complete analysis of all the facts and circumstances relevant to the determination of whether these costs are deductible and may be a useful indication of a reasonable basis for apportionment of expenditure.

A number of examples are provided in the Ruling.

Furthermore, the Ruling notes an alternative view, which the Commission does not accept, that the costs of labour can never be an outgoing of capital or of a capital nature.

This Ruling applies to years of income commencing both before and after its date of issue.

## Variation of trustee resolutions

The ATO has updated its [guidance](#) including an addendum to Tax Determination [TD 2012/22](#) and [website material](#) to cover income variation resolutions made by trustees. Broadly, income variation resolutions arise where, in formulating resolutions to distribute trust income, the trustee has made further resolutions which are intended to deal with the situation where there is a later change to the income of the trust.

While the ATO indicates the validity and effect of these resolutions depend on the facts and circumstances of each case, the addendum indicates that for variation resolutions made from 31 May 2023, where it is necessary to conclude on the tax liabilities flowing from it, the Commissioner will consider raising alternative assessments. The ATO has indicated compliance resources will not be devoted to examining the effect of variation of income resolutions made before 31 May 2023, provided all net income has been assessed and there is no evidence of tax avoidance, evasion or fraud.

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## Performance audit report of response to shadow economy

The Australian National Audit Office (ANAO) has issued its [report](#) into its review of the Implementation of the Government Response to the Black Economy Taskforce. This taskforce was established in 2016 to develop a whole of government strategy and policy agenda to address the shadow economy. The taskforce provided its report to the Australian Government in late 2017, which agreed with 27 of the 80 recommendations in the report.

The ANAO found that the Treasury did not establish a framework to assess the effectiveness of the implementation of the Taskforce report and, as such, it is not evident that outcomes have been achieved. However, it found that the ATO and the Department of Home Affairs have been largely effective in implementing their recommendations. Treasury is not effective in implementing its recommendations and partly effective with regards to recommendations with shared responsibilities.

Four recommendations were made aimed at improving governance, updating public information, progressing implementation, and enhancing evaluation. The relevant bodies agreed to three recommendations and agreed in part with one.

## Data matching programs - income protection and rental property insurance

The ATO will commence the following new data matching programs:

- [landlord insurance](#) – to support the identification, assessment, and treatment of rental property income, expenses, and capital gains tax risks, and
- [income protection insurance](#) – to support identification of correctly reported assessable income and deductible premiums.

The ATO will acquire the applicable insurance policy data from insurers for the income years of 2021-22 through to 2025-26.

## Depreciation car limit for 2023–24

The ATO has advised that the car limit for capital allowance purposes for the 2023-24 financial year has increased to \$68,108 (up from \$64,741). The car limit is used, among other things, to work out the depreciable cost of passenger vehicles (except motorcycles or similar vehicles) designed to carry a load of less than one tonne and fewer than nine passengers.

## Deductions for an uninhabitable property

In [DiStefano and Commissioner of Taxation \[2023\] AATA 1697](#) the Administrative Appeals Tribunal (AAT) has held that deductions for interest, land tax, council rates and insurance in relation to a waterfront property that was vacant from 2013 were incurred in gaining or producing the taxpayer's assessable income in the 2017 year.

The taxpayer originally acquired the property for rental purposes and with limited success in attracting high-paying tenants that he anticipated following the purchase, there was no reason to doubt he was making genuine efforts to market the property during the earlier periods. There also was no doubt that serious defects emerged in the property which made it practically uninhabitable, after which the taxpayer took steps (albeit slow) to rectify commencing with the lodgment of a development application. The application was approved in early 2016, but nothing happened from then until before the end of the 2017 year of income.

The AAT considered that the taxpayer had done 'just enough' to demonstrate a commitment to have the property improved to yield assessable income. The Tribunal was not satisfied the slow progress towards realising the project and the lull in activity between February 2016 and 30 June 2017 suggest a want of commitment given the activities the taxpayer had been undertaking and the evident purpose of the original investment. Accordingly, it concluded that the nexus between the outgoings and the production of assessable income remained.

## Beneficiary was not presently entitled to trust income

On appeal from the decision in [BBlood Enterprises Pty Ltd v Commissioner of Taxation \[2022\] FCA 1112](#), the Full Federal Court in [B&F Investments Pty Ltd ATF the Illuka Park Trust & Anor v FC of T \[2023\] FCAFC 89](#), upheld the assessment issued to the trustee of a trust after a beneficiary was deemed not to have been presently entitled to trust income.

The taxpayers were a corporate beneficiary, Bblood Enterprises Pty Ltd, of a discretionary trust and the trustee of that trust.

In the 2014 income year a company bought back shares held in it by the trust. The proceeds of the buy-back paid by the company to the trustee were deemed to be a dividend for tax purposes. However, the share buy-back dividend constituted the corpus of the trust for trust purposes. A newly introduced beneficiary (Bblood Enterprises Pty Ltd) was made presently entitled to the trust income, which included the share buy-back dividend and franking credits that were allocated to the dividend.

The Commissioner assessed the trustee in respect of the relevant trust income on the basis that the reimbursement agreement provision of section 100A of the *Income Tax Assessment Act 1936* (ITAA 1936) deemed Bblood Enterprises Pty Ltd not to be presently entitled to that income. In the alternative, the Commissioner also assessed Bblood Enterprises Pty Ltd on the basis that section 207-150(1) of the *Income Tax Assessment Act 1997* (ITAA 1997) applied to deny the entitlement to a tax offset equal to the franking credits because the deemed dividend was paid as part of a dividend stripping operation.

The Full Court found that the primary judge's conclusion that section 100A of the *ITAA 1936* applied was correct in the first instance, i.e. Bblood Enterprises Pty Ltd was deemed to not be presently entitled to the trust income. Since the Court found that section 100A applied, the corporate beneficiary's appeal against the section 207-150(1) assessment was allowed and it was therefore not necessary to decide whether the deemed dividend was made as part of a dividend stripping operation.

### **Deduction allowed for litigation settlement payment**

In [Commissioner of Taxation v Wood \[2023\] FCA 574](#) the Federal Court ruled that a payment for settlement of a proceeding was deductible.

The taxpayer who was employed by a company that was owned by him and his wife provided consultancy services to other entities under consultancy agreements. The settlement was to discharge proceedings in which damages were sought on the basis that the taxpayer had engaged in misleading or deceptive conduct in contravention of a statutory provision, had breached fiduciary obligations and breached the consultancy agreement.

The Court held that at the time of the settlement sum although the taxpayer was no longer employed by the relevant company or that his subsequent employment was not threatened by anything that might be found to have been done by him in employment, the settlement is a loss or outgoing referable (with a sufficiently close albeit indirect connection) to the respondent's assessable income when he was employed and whether or not it qualifies as a general deduction does not depend on it being referable to present or future income.

In relation to a consideration of whether the amount was capital in nature the Court found, with reference to several authorities, that in this instance the payment of the settlement did not involve the acquisition of any tangible asset, arose from activities that the taxpayer had performed in gaining assessable income. The Court said that the discharge of the liability that arose out of those activities cannot sensibly be characterised as a loss or outgoing of capital or of a capital nature, i.e. it was not to protect goodwill or widespread or general reputation, or to secure habitual patronage by clients or customers.



## Editorial

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