PwC's Monthly Tax Update

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

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Corporate Tax Update

No capital benefit following restructure

In Ierna v Commissioner of Taxation [2024] FCA 592, the Federal Court considered whether a restructure invoked the application of section 45B of the *Income Tax Assessment Act 1936 (ITAA 1936)* under which a demerger benefit or a capital benefit was provided for a purpose (other than an incidental purpose) of enabling the taxpayer to obtain a tax benefit. The Court allowed the taxpayer's appeal finding that the Commissioner was not entitled to make a section 45B determination that section 45C applied to treat amounts of a return of capital as an unfranked dividend paid out of the profits.

The restructure broadly involved the following steps:

- a transfer of units in a unit trust to a new company in consideration for new shares in the company
- a selective share buy-back to allow, in substance, a realisation of pre-capital gains tax (CGT) gains to the new company's shareholders
- an assignment of debt (loan) interests arising from the share buy-back to other associate entities, and
- an election by the new company to form a consolidated group with the unit trust.

The Commissioner contended that the taxpayers had realised a capital benefit as a result of the share capital reduction which was to be assessed in accordance with the section 45B determination.

The Court considered whether the asserted capital benefit was 'attributable' under section 45B(8)(a) to the profits of the newly incorporated company or an 'associate', or whether (as the Commissioner contended) the capital benefit was sourced in an increase in value of the unit trust units, which had been realised in part by the cancellation of the new company's shares via a selective capital reduction.

Ultimately, the Federal Court found in favour of the taxpayers, finding that the Commissioner's submission did not survive an objective examination of the whole of the circumstances, informed by reference to considerations specified in section 45B(8).

Fundamentally, the reason for this flowed from the fact that the company was newly formed which had no profits, only its share capital account, and in terms of section 45B(8)(b) had no 'pattern of distributions of dividends, bonus shares and returns of capital or share premium', and neither did any 'associate' which would support a conclusion that the alleged benefit was not a substitute for a payment from profits. The payment to the shareholders was wholly "attributable to" (actually sourced in or caused by) the share capital account. The method chosen had nothing to do with dividend substitution but was explicable by a purpose of taking advantage of Division 615-A rollover relief.

Furthermore, in relation to the application of Part IVA of the *ITAA 1936* the Court concluded that the absence of a tax benefit made it unnecessary to consider the application to the facts.

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Dividend stripping cases

Several recent cases have considered the question of dividend stripping.

Firstly, in the matter of Merchant v Commissioner of Taxation [2024] FCA 498, although the case primarily considered the application of the general anti-avoidance provisions in Part IVA in relation to a share sale scheme designed to crystallise a significant capital loss (see further detail in Other News section), the Federal Court also found for the Commissioner that the forgiveness of debts were schemes having substantially the effect of schemes by way of, or in the nature of, dividend stripping within the meaning of section 177E(1)(a)(ii) of Part IVA of the ITAA 1936.

Furthermore, in Commissioner of Taxation v Michael John Hayes Trading Pty Ltd as trustee of the MJH Trading Trust [2024] FCAFC 80, the Full Federal Court has found that the Administrative Appeals Tribunal (AAT) erred in its consideration of whether a distribution was made as part of a dividend stripping operation with the matter remitted to the AAT for redetermination.

At the core of this dispute was whether fully franked dividends that were paid by each of four operating companies constituted distributions 'made as part of a dividend stripping operation' within the meaning of section 207–155 of the *Income Tax Assessment Act 1997 (ITAA 1997)*. In each case, the dividends were earmarked to be paid back to the operating company, directly or indirectly, by way of new loans or repayment of existing loans.

The Full Federal Court found that the AAT had erred in its construction of section 207-155 by failing to give proper effect to the words 'by way of, or in the nature of' as words of expansion. Whilst it was relevant to observe that the original shareholders did not directly receive all of the dividends by way of capital, it was erroneous not to consider whether the receipt by the operating companies of the balance of the dividends was sufficient in the circumstances for a conclusion that the scheme was 'by way of, or in the nature of dividend stripping'.

The Full Federal Court also found that the AAT had erred in its analysis of dominant purpose by hypothesising that tax might be paid at some future time on the amounts loaned by the trading trusts to the operating companies, rather than addressing whether there was a dominant purpose of avoiding tax on a distribution of profits to the original shareholders.

Additionally, the Court rejected the Commissioner's leave to raise on appeal a submission that it is sufficient if tax avoidance was an "incidental purpose" of a scheme and that a scheme did not need to have a dominant tax avoidance purpose in order for it to be found to be a scheme by way of, or in the nature of, dividend stripping. The Court noted that a dividend stripping scheme is a scheme to avoid tax and a scheme cannot be "by way of, or in the nature of, dividend stripping" if it lacks that essential characteristic as the sole or dominant characteristic.

Employment Taxes Update

PAYG withholding schedules for 2024–25

The Commissioner of Taxation has issued a legislative instrument - Taxation Administration (Withholding Schedules) Instrument 2024 - containing 15 PAYG withholding schedules applicable from 1 July 2024 specifying the formulas and procedures for working out the amount required to be withheld by an entity from certain payments under the PAYG withholding system. This is because of the new personal income tax rates and thresholds, and new Medicare levy thresholds which come into effect from 1 July 2024.

FBT not applicable on luxury cars provided to directors

The Administrative Appeals Tribunal (AAT) has set aside fringe benefits tax (FBT) assessments issued by the Commissioner of Taxation to a company in respect of non-cash benefits provided to directors in BQKD v FC of T [2024] AATA 1542, finding that the evidence positively established that the directors were not employed by the taxpayer and that, even if they were employees, they did not receive the benefits in respect of their employment.

The taxpayer was the corporate trustee of a discretionary family trust. The taxpayer's directors were three brothers who were also eligible beneficiaries under the relevant family trust. There was no written contract of employment for any of the three directors, and no record of any board resolution to enter into such an agreement. Luxury motor vehicles were also purchased in the company name and made available for both business and private use by the three directors, with expenses debited through the trust.

The Commissioner was of the view that the taxpayer was liable to FBT on the value of the non-cash benefits provided to the three directors of the company. The taxpayer objected to those assessments and, when its objections were disallowed, sought review.

The key questions at issue before the AAT was whether:

- the three directors were employees of the taxpayer for FBT purposes; or
- if they were employees, the benefits were paid to them in respect of that employment.

The AAT concluded the evidence did not suggest an employment relationship existed due to a lack of contractual agreement or board resolution, and limited evidence of control and integration into the hierarchy of the taxpayer.

In addition, even if the arrangement was to be deemed an employment relationship, the AAT did not consider the benefits to be provided in respect of employment, as there was no evidence that the private use of the luxury cars was provided to the individual directors in lieu of director's fees or remuneration. Instead, the benefits were provided in respect of the individuals being beneficiaries under the trust, with the directors helping themselves to benefits as they genuinely believed they were entitled to them as beneficiaries, not because they see it as a reward for work as a director or an employee.

New South Wales – New payroll tax annual return requirements

Revenue NSW will now require additional details and validations from employers as part of the new annual return process for the upcoming New South Wales (NSW) payroll tax return for the 2024 financial year, which is due 28 July 2024.

The new details and validations will require employers to answer a series of additional questions that delve into various aspects of payroll tax components, with a particular focus on what is not included in the payroll tax return or where there are material movements year on year. These questions will cover:

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- *Contractor engagement and exclusions*: Businesses will need to disclose their use of contractors and the particular exclusions that have been applied in relation to payments made.
- *Employment agency provisions*: The new return process will include questions regarding employment agency arrangements, which will allow Revenue NSW to ascertain compliance by those taxpayers who are regarded or expected to have entered into "employment agency contracts".
- *Analysis of year-to-year variations*: The system will prompt businesses to explain significant differences in payroll components such as salaries and wages, fringe benefits, contractor payments, apprentice/trainee wages, and interstate wages.

These details will provide increased visibility to help Revenue NSW to better understand compliance across the taxpayer base, but also provide businesses with prompts to more stringently assess their own governance and controls.

NSW: Payroll tax relief for GPs

As announced in the NSW 2024-25 State Budget, medical centres paying wages to general practitioners (GPs) will receive payroll tax relief, subject to certain criteria being met. Revenue Legislation Amendment Bill 2024 sets out the criteria for qualifying for the relief, which includes:

- 'Relevant general practitioner' wages (a defined term) and wages paid to certain other general practitioners at medical centres are exempt from payroll tax if the payroll tax is unpaid and the wages are paid or payable before 4 September 2024.
- An employer is entitled to a rebate of payroll tax payable for relevant general practitioner wages paid or payable on or after 4 September 2024.
- Wages are relevant general practitioner wages if the wages are paid to a general practitioner at a medical centre that bulk bills for most of the general practitioner services provided by the medical centre. The proportion of general practitioner services that must be provided under the bulk billing arrangements at the medical centre is at least 80% for medical centres in Metropolitan Sydney and at least 70% for medical centres located elsewhere.

QLD: Payroll tax measures in 2024-25 Budget

The following payroll tax measures were announced in the Queensland (QLD) 2024-25 Budget:

- *Extension of the apprentice and trainee rebate*: The 50 per cent payroll tax rebate for wages paid to apprentices and trainees will be extended for 12 months until 30 June 2025.
- *Changes to regional payroll tax discount*: Currently, a one per cent discount on the payroll tax rate applies to regional employers that had an ABN registered business address in regional Queensland and at least 85 per cent of their taxable wages paid to employees located outside South East Queensland. This measure applies until 30 June 2030. However, from 2024-25, the regional discount eligibility criteria will exclude extremely large businesses, i.e. businesses that pay Queensland taxable wages of more than $350 million on an annual basis will not be eligible for the discount.

South Australia: Payroll tax relief for GPs

The Statutes Amendment (Budget Measures) Bill 2024 (SA) sets out the criteria for qualifying for payroll tax relief on GPs in South Australia (SA), as announced last month by the SA Government.

The Bill allows for an exemption from payroll tax on the wages of general practitioners related to bulk billed services from 1 July 2024. The exemption will be calculated based on the proportion of bulk billed items relative to the total number of billed items by GPs. This percentage deduction will then be applied against the medical practices' total annual GP wages bill.

As noted in the media release, the exemption is available to those successfully applied for the SA Government's existing payroll tax amnesty, which is due to expire by 30 June 2024, as well as those practices which have fully met their existing payroll tax exemptions.

Global Tax and Trade Update

Public Country by Country reporting regime legislation introduced

Legislation to implement Australia's public Country by Country (CbC) reporting regime has been introduced to Parliament. The rules, once enacted, will take effect for reporting periods commencing on or after 1 July 2024, and require certain large multinational enterprises (defined as CbC reporting parents) to publish selected tax information on a CbC basis for specified jurisdictions, and on either a CbC basis or an aggregated basis for the rest of the world. The information is to be published on an Australian government website, with publication facilitated by the Commissioner of Taxation.

For further details, refer to our Tax Alert.

New compliance approach for Australia's foreign investor tax condition reporting

Federal Treasury has adopted a new approach to managing Foreign Investor Compliance by issuing 'Non-Compliance Detection Letters' to notify foreign investors of suspected breaches of Foreign Investment Review Board (FIRB) tax conditions or other foreign investor compliance obligations. For further information, refer to our Tax Alert.

Draft ruling for international organisations and connected persons income tax exemption

The Australian Taxation Office (ATO) has released draft Ruling TR 2024/D2, which considers circumstances in which income of international organisations and persons connected with them is considered exempt under section 6-20 of the *Income Tax Assessment Act 1997 (ITAA 1997)*.

Specifically, the draft ruling considers when an international organisation is covered by the *International Organisations (Privileges and Immunities) Act 1963* (IOPI Act), and when a person is connected with an international organisation for purposes of the section 6-20 exemption.

The draft ruling indicates that when deciding whether a person is currently connected with an international organisation, the relationship between the person and the organisation must be considered having regard to the substance of the terms of the engagement of the person, and the relationship between their engagement and the organisation performing its functions.

The draft Ruling does not consider excise duty, goods and services tax and other indirect taxes that may be paid by international organisations and persons connected with them.

The draft ruling also sets out a proposed practical administration approach to assist taxpayers meet their obligations. Specifically, the Commissioner will accept as documentary evidence that a person is connected with an international organisation that applies the principles outlined in the ruling, subject to any evidence to the contrary, a statement from the organisation that contains the name of the person, a statement that the person is connected with that organisation, and the capacity in which the person is connected (such as high office, office holder, et cetera).

When the final Ruling is issued, it is proposed to apply both before and after its date of issue. Comments closed 21 June 2024.

ATO focus on cross-border dividend, interest and royalty payments

Taxpayers who fall within the parameters of the ATO's medium public and multinational business engagement program and that make dividend, interest and royalty payments to non-residents, should check whether they are meeting their PAYG withholding and reporting obligations as the ATO may be contacting them as part of its current focus. A range of issues beyond failing to withhold and pay withholding taxes will attract the ATO's attention.

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Australia-China treaty synthesised text

The ATO has released a synthesised text for the application of the tax treaty Australia has with China, as modified by the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (the MLI). The MLI entered into force for Australia on 1 January 2019, and on 1 September 2022 for China.

Pillar Two obligations for groups with Belgium entities

Multinational groups with Belgian entities that are already in scope of the Pillar Two rules (e.g. since 1 January 2024) need to act quickly in order to meet a filing obligation coming up on 13 July 2024 - especially considering the information to be provided is quite substantial. For groups with Belgian entities whose fiscal year has not started, they will have no later than 30 days after the start of the fiscal year for which the group enters the scope of Pillar 2 (i.e. 30 July 2024 for a June balancer) to file a Pillar Two notification.

Similar obligations may arise for other countries that have begun enacting procedures that require in-scope groups and entities to register before making Pillar Two payments or filing a GloBE Information Return (GIR) or, if applicable, a qualifying domestic minimum top-up tax (QDMTT) return. This PwC Tax Insight details the registration requirements in Belgium, the United Kingdom, and Ireland.

Final package for Pillar One nears completion

The Organisation for Economic Co-operation and Development (OECD)/G20 Inclusive Framework on base erosion and profit shifting (BEPS) has released the following supplementary elements relating to the report on Amount B of Pillar One.

- The definitions of qualifying jurisdictions within the meaning of section 5.2 and 5.3 of the Amount B guidance, with such definitions to facilitate adjustments to the return calculated under the simplified and streamlined approach for tested parties located in those qualifying jurisdictions.
- The definition of covered jurisdictions within scope of the political commitment on Amount B.

Additional work on the Pillar One package, including the Amount B framework, is ongoing. Namely, the Co-Chairs of the OECD/G20 Inclusive Framework announced following the 16th meeting of the Inclusive Framework in Paris that completion is nearing on negotiations for a final package on Pillar One (which includes a text of the Multilateral Convention (MLC) for Amount A and a framework for Amount B) with the goal of reaching a final agreement in time to open the MLC for signature which at the time of writing is planned to be by the end of June 2024.

Further Pillar Two guidance

The OECD/G20 Inclusive Framework on BEPS has also released further guidance clarifying and simplifying the application of the global minimum tax and an overview of the streamlined process for recognising qualified status for the legislation of jurisdictions implementing the Global Anti-Base Erosion (GloBE) Rules. This includes:

- Administrative Guidance, which will be incorporated in the Commentary to the GloBE Model Rules. This package of administrative guidance:
  - sets out simplified procedures that will allow multinational groups to aggregate various categories of deferred tax liabilities for determining whether they have reversed within five year and therefore do not need to be recaptured
  - clarifies the methodology used to determine deferred tax assets and liabilities for GloBE purposes and further guidance on the allocation of cross-border current and deferred taxes and the profits and taxes on certain flow-through tax structures, and
  - provides specific guidance on the treatment of securitisation vehicles under a jurisdiction's domestic minimum top-up tax that will prevent these vehicles giving rise to volatile outcomes under the GloBE Rules.
- A May 2024 update to interpretative Country by Country Safe Harbour Guidance, which concerns the question of payments received from other Constituent Entities that are treated as dividends in the payer's tax jurisdiction, ensures consistent treatment of those intragroup payments and avoids the need for further adjustments under the global minimum tax where consistent treatment is applied.
- A Question & Answer document that summarises the main features of the Transitional Qualification Mechanism, which is the process that provides jurisdictions with the certainty that their rules will be recognised as qualified by other implementing jurisdictions for a transitional period.

The guidance reaffirms the need for advance planning around data identification, classification and utilisation for GloBE purposes. For further insight into this (and also the supplementary guidance on Amount B in Pillar One noted above), refer to our Alert.

Fiji and Moldova join Inclusive Framework on BEPS

Fiji and the Republic of Moldova have joined the OECD/G20 Inclusive Framework on BEPS. Through their memberships, Fiji and Moldova have also committed to addressing the tax challenges arising from the digitalisation of the economy by participating in the Two-Pillar Solution and will participate in the BEPS package to tackle tax avoidance, improve the coherence of international tax rules and ensure a more transparent tax environment.

Draft alcohol excise ruling regarding water addition to beer

The ATO has released draft Excise Determination ED 2024/D1, which explains the Commissioner's view about how much water can be added before a beverage will no longer meet the definition of beer under the *Excise Tariff Act 1921*.

According to the draft Determination, where water and other allowable unfermented substances have been added to the fermented substance in a volume greater than the fermented substance (that is, more than half the total volume of the final beverage), the final beverage is not 'beer' for the purposes of the Schedule to the Tariff Act. In such cases, the beverage is considered an 'other excisable beverage' and is subject to excise duty at the applicable rate.

When the final Determination is issued, it is proposed to apply from 1 July 2024. Comments are invited until 12 July 2024.

Indirect Tax Update

Finalised reporting exemptions for EDPs

Under the Sharing Economy Reporting Regime (SERR), operators of electronic distribution platforms (EDPs) are required to report information about certain supplies made through their platforms to the Commissioner of Taxation.

The Australian Taxation Office (ATO) has finalised Legislative Instrument LI 2024/17, which exempts operators of EDPs from having to include specified classes of transactions for reporting periods starting on or after 1 July 2024.

Although the Instrument repeals the *Taxation Administration (Reporting Exemptions for Electronic Distribution Platform Operators – Relevant Accommodation and Taxi Travel) Determination 2023* with effect from 1 July 2024, the exemptions provided in that determination have generally been replicated, meaning that entities that satisfied the requirements of the previous determination will generally satisfy the requirements of this instrument. LI 2024/17 also contains new, additional exemptions that cover certain types of suppliers and transactions, including new exemptions for scheduled events, and permanent attractions or experiences.

The legislative instrument applies to exempt the operator of an EDP from having to report the following types of transactions:

- supplies made through the EDP where the supply is also made through at least one other EDP, and the first platform does not itself provide any consideration it receives in relation to the supply directly to the supplier, and the operator of another EDP provides all or part of the consideration given by the recipient of the supply to the supplier and has a reporting obligation in relation to that transaction
- supplies made by a listed entity or a wholly owned subsidiary of a listed entity, or a government department, agency, authority, or entity wholly owned by the government, or where the supplier is a 'substantial supplier' (i.e. a supplier that, in relation to a reporting period and an EDP, made a total value of supplies facilitated by that EDP of at least $1,000,000 (including goods and services tax (GST))
- supplies involving 'substantial property' (i.e. property where, for a reporting period, at least 2,000 transactions were facilitated by the EDP)
- supplies of certain services outside Australia
- where an EDP facilitates a mere booking or reservation but does not otherwise facilitate the supply
- the supply of certain scheduled passenger travel services
- the supply of a right to attend or participate in a scheduled event in certain circumstances (i.e. events for which the supplier has made 200 or more places for the event available for booking on the platform)
- the supply of a right to attend or participate in a permanent attraction or experience in certain circumstances (i.e. if the supplier has made 50 or more places for that attraction or experience available for booking on the platform each day it was open during the reporting period), and
- the rental or lease of assets, other than real property, in certain circumstances.

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Luxury car tax thresholds 2024-25

The ATO has advised that the luxury car tax (LCT) thresholds for 2024-25 are as follows:

- Fuel efficient vehicles: $91,387 (2023-24: $89,332)
- Other vehicles: $80,567 (2023-24: $76,950)

No LCT refund for import of luxury car

In Waller and Comptroller-General of Customs (Taxation) [2024] AATA 1097, the Administrative Appeals Tribunal (AAT) found in favour of the Comptroller-General, finding that the taxpayer was not entitled to a refund of customs duty related to LCT on the importation of a motor vehicle from New Zealand for AUD 162,782.80.

The Tribunal found that the importation of the car was a taxable importation of a luxury car as provided by the *A New Tax System (Luxury Car Tax) Act 1999* and none of the exemptions applied. It followed that duty regarding LCT was properly payable.

Draft WET determination regarding water addition to cider or perry

The ATO has released draft WTED 2024/D1, which sets out how much water can be added before a beverage will no longer meet the definition of cider or perry for the purposes of *A New Tax System (Wine Equalisation Tax) Act 1999* (WET Act).

According to the draft Determination, the addition of water must not cause the final beverage, being the product that must meet the definition of cider or perry, to no longer be regarded as the product of the complete or partial fermentation of the juice or must of apples or pears. A beverage, which because of the addition of water, has an unfermented component exceeding the fermented component, will not be regarded as the product of the complete or partial fermentation of the juice or must of apples or pears under the 'cider or perry' definition for the purposes of the WET Act.

A beverage that does not satisfy the definition of 'cider or perry' under the WET Act is an 'other excisable beverage' for the purposes of the Schedule to the *Excise Tariff Act 1921*, with that beverage subject to excise duty at the applicable rate.

When the final Determination is issued, it is proposed to apply from 1 July 2024. Comments close 12 July 2024.

Personal Tax Update

Cents per kilometre deduction rate for 2024-25

The rate at which work-related car expense deductions may be claimed under the cents per kilometre deduction rate has been increased to 88 cents per kilometre with effect from 1 July 2024.

The new rate, introduced by Income Tax Assessment (Cents per Kilometre Deduction Rate for Car Expenses) Determination 2024, will apply to income years commencing 1 July 2024, and to any subsequent income years until such time as the legislative instrument is repealed or varied.

Data matching Medicare levy exemption

The Australian Taxation Office has announced via Gazette notice that it will acquire Medicare Exemption Statement (MES) data from Services Australia for the 2024 financial year through to the 2026 financial year inclusively. The purpose of this data matching program is to, among other things, ensure individuals are correctly claiming the exemption from payment of the Medicare levy and Medicare levy surcharge and undertake verification activities where the information obtained indicates a taxpayer may not be entitled to claim the exemption, either partly or in its entirety.

The data items that will be collected include name, date of birth, residential address and entitlement status, and approved entitlement period details.

The ATO estimates that records relating to approximately 180,000 individuals will be obtained each financial year.

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State Tax Update

New South Wales 2024-25 Budget

On 18 June 2024, the Treasurer of New South Wales (NSW), Daniel Mookhey, handed down the NSW 2024-25 Budget, which projected a deficit of $3,6 billion in 2024-25. The Government's fiscal strategy prioritises stablising the State's gross debt trajectory to keep interest expenses management and support the State's operating position, while making substantial investment in areas such as housing, education, supporting those impacted by domestic and family violence, and rebuilding essential services.

In terms of revenue-raising measures, the following measures were introduced and subsequently enacted by the Revenue Legislation Amendment Bill 2024 (NSW) to implement the Budget announcements:

- increase the surcharge purchaser duty payable and surcharges on acquisitions payable by foreign persons from 8 per cent to 9 per cent from 1 January 2025.
- increase the surcharge land tax rate applicable to residential land owned by a foreign person to 5 per cent from the 2025 land tax year onwards (up from 4 per cent).
- freeze the land tax thresholds at their 2024 land tax year values, i.e. the land tax threshold will be set at $1,075,000 and the premium rate threshold set at $6,571,000. The Treasurer will be required to review the tax threshold and the premium rate threshold by 1 June 2027 to determine if they continue to be appropriate.
- provide certain payroll tax relief for general practitioners (see Employment Taxes section for further details).

Queensland 2024-25 Budget

The Queensland (QLD) 2024-25 Budget was delivered on 11 June 2024 by Treasurer Cameron Dick. Whilst the Budget focuses on cost-of-living relief, it also contains new revenue initiatives in the form of increases to the existing foreign land tax surcharge and the additional foreign acquirer duty.

To give effect to the Budget announcements, the Revenue and Other Legislation Amendment Bill 2024 was introduced into and subsequently passed by the QLD Parliament. Among other measures, the Bill amended the Duties Act 2001 (Qld) to:

- increase the transfer duty first home and first home vacant land concession thresholds and values effective from 9 June 2024, and
- increase the rate of duty surcharge applying to foreign persons acquiring (directly or indirectly) certain residential land in QLD from 7 per cent to 8 per cent from 1 July 2024.

The Land Tax Act 2010 (Qld) is also amended to increase the land tax surcharges applying to absentees, foreign companies and trustees of foreign trusts from 2 per cent to 3 per cent with effect from the 2024-25 financial year.

Payroll tax measures were also announced and included in the above-mentioned Bill – see Employment Taxes section for further details.

For further information, refer to our Tax Alert.

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South Australia 2024-25 Budget

On 6 June 2024, the Treasurer of South Australia (SA) handed down the SA 2024-25 Budget. The Budget contains measures that invest in the SA Government's priorities of housing, cost of living relief, jobs and skills, and health.

From a taxation perspective, the Budget contains, among other matters, the following measures:

- removal of the property value cap for stamp duty relief for eligible first home buyers and the First Home Owner Grant who enter into an eligible contract on or after 6 June 2024.
- tightening of previous ownership criteria for both the stamp duty relief for eligible first home buyers and the First Home Owner Grant who enter into an eligible contract.
- removal of relief from the foreign ownership surcharge for transfers eligible for stamp duty relief for eligible first home buyers who contract to purchase a new home or vacant land.
- Provide payroll tax relief for general practitioners (see Employment Taxes section for further detail).

These measures were included in the Statutes Amendment (Budget Measures) Bill 2024 (SA), which was introduced into the SA Parliament on 6 June 2024.

Tasmanian State Budget deferred

The 2024-25 Tasmanian State Budget has been deferred and is now scheduled to be handed down on Thursday, 12 September 2024.

Tasmania: Bill on election measures

The Taxation Legislation (Affordable Housing and Employment Support) Bill 2024 (Tas), which gives effect to the Tasmanian Government's re-election commitments, has been introduced into (and subsequently passed by) the Tasmanian Parliament. The Bill made several amendments to duties and land taxes.

Specifically, the Bill made amendments to:

- introduce the First Home Buyer Duty Exemption, which has a $750,000 dutiable value cap and will be in place until 30 June 2026. The exemption applies retrospectively from 18 February 2024
- extend the 50 per cent duty concession available to eligible pensioners that sell their existing home and downsize (where the transfer of dutiable property does not exceed a dutiable value of $600,000) for one further year to 30 June 2025
- extend the existing three-year land tax exemption for all newly built housing available for long-term rental for two more years to 30 June 2026
- extend the one-year land tax exemption for short term visitor accommodation converted to long term rental for a further two years to 30 June 2026, and
- increase the land tax-free threshold from $99,999 to $124,999.

These measures commence from 1 July 2024, except for the introduction of the First Home Buyer Duty Exemption, which applies retrospectively from 18 February 2024.

Tasmania: Duty concession introduced

The Taxation Legislation (Miscellaneous Amendments) Bill 2024 (Tas) has been introduced into the Parliament of Tasmania to implement the re-elected Government's remaining election commitment for a 50 per cent duty concession to buyers of a new apartment or unit off-plan or under construction valued at up to $750,000. This amendment commences from 1 July 2024, with the duty concession to be in place for two years to 30 June 2026.

Future of state road-user charges

The Council on Federal Financial Relations continues to discuss the implications of the High Court decision in Vanderstock & Anor v State of Victoria [2023] HCA 30 where the Court ruled that the Victorian road user charge was constitutionally invalid. The Commonwealth Government is working with the states and territories to explore options to protect state revenue sources.

The Treasurer has indicated that the Commonwealth will consider options such as that taken with the *Franchise Fees Windfall Tax (Collection) Act 1997* following a previous constitutional challenge to various business franchise fees on tobacco, alcohol, and petroleum products in the states, if required in future.

NSW: Transfer duty and annual indexation correction

Revenue New South Wales has identified errors in the transfer duty thresholds and base amounts as published for the 2021-22 financial year. As a result, taxpayers have been assessed for less duty than what would have otherwise been the case.

Transactions that become liable to duty on and from 1 February 2022 will be assessed in accordance with the amounts in the new notice. For those transactions that have already incurred a duty liability, or incurred a liability before 1 February 2022, duty, if not already assessed, will be assessed in accordance with the amounts in the previous notice for 2021-22.

NSW: Duties - Water pipeline an interest in goods

In Conexa Sydney Holdings Pty Ltd v Chief Commissioner of State Revenue [2024] NSWSC 628, the Supreme Court of New South Wales found that a water carrying pipeline was an interest in goods for the purposes of the *Duties Act 1997 (NSW)*.

The taxpayer acquired 100 per cent of the shares in a company in September 2019, to which the Chief Commissioner of State Revenue subsequently assessed landholder duty under the Duties Act. The critical issue in the appeal was whether, at the date of the assessment, a water carrying pipeline owned and constructed by the acquired company which was buried in the ground for its entire length was 'land' or 'goods' for the purposes of section 155 of the *Duties Act*.

Ultimately, the NSW Supreme Court concluded that the company's interest in the pipeline was not an interest in land for the purposes of section 155(1), but that it was an interest in goods for the purpose of that section, and that the taxpayer had failed to discharge its onus of proof that the unencumbered value of the pipeline at the time of the acquisition was less than the amount on which the assessment was based.

It is also worth noting that, in this case, the acquisition occurred before section 147A(1) of the *Duties Act* was enacted, which provides that 'land' includes anything fixed to the land, whether or not the thing constitutes a fixture at law, or is owned separately from the land or is notionally severed from the land by any other Act or law.

NSW: Duties and variation of trust deed

The NSW Civil and Administrative Tribunal n Baxter v Chief Commissioner of State Revenue [2024] NSWCATAD 153 decided that the matter be remitted to the Chief Commissioner of State Revenue for determination because it found that a change in beneficial ownership of dutiable property occurred as a result of variation of the trust instrument and that the land in NSW, the subject of that change, included one of the parcels of land held on trust but not the other parcel of land.

In the matter considered, the trustee executed a deed of variation amending a trust deed which was intended to change the trust into a "fixed trust" for the purposes of the *Land Tax Management Act 1956 (NSW)*. The entitlements of the beneficiaries changed from those of takers in default to those of someone presently entitled to income and capital. The Tribunal noted that there is no requirement that the trust in question be a continuing trust or a new trust - the land in question neither became the subject of a trust nor ceased to be the subject of a trust, but the nature of the beneficial entitlements to the land changed.

NSW: Surcharge duty correctly applied

In Feng v Chief Commissioner of State Revenue [2024] NSWCATAD 155 the NSW Civil and Administrative Tribunal affirmed the Chief Commissioner of State Revenue's assessment of surcharge duty. There was also no dispute that the relevant property was a "dutiable transaction" arising from a contract dated 2 October 2020 and that the property was "residential land" purchased by the taxpayer and her husband as joint tenants. The taxpayer was not an Australian citizen - she was born overseas and was married her husband (an Australian citizen) in 2017 and was granted an Australian permanent residence visa in August 2020.

The Tribunal found that the taxpayer was a "foreign person" as defined at the liability time. This was because she was not an Australian citizen or a New Zealand citizen; she was not ordinarily resident in Australia at the particular time (2 October 2020) because she had not actually been in Australia during 200 or more days in the period of 12 months immediately preceding 2 October 2020.

Additionally, the Tribunal was not satisfied that she was an "exempt permanent resident" and found, on the balance of probabilities, that the taxpayer did not use and occupy the property as her principal place of residence for a continuous period of at least 200 days within the period of 12 months after the contract date of 2 October 2020 because the Occupation Certificate for the completion of the house on the property was not issued until 21 January 2022, that also was the date her occupation commenced. The fact there were delays in building the home due to COVID-19, and that the property was always intended to be used as the principal place of residence, there is no discretion available in such cases.

NSW: No land tax exemption for rural land

In Godolphin Australia Pty Ltd v Chief Commissioner of State Revenue [2024] HCA 20, the High Court of Australia unanimously dismissed an appeal from a judgment given by the Court of Appeal of the Supreme Court of New South Wales, finding the Supreme Court's 'dominant use-for-the-identified-purpose' construction of section 10AA(3)(b) of the *Land Tax Management Act 1956 (NSW)* to be correct.

For the 2014-2019 years, the Chief Commissioner of State Revenue assessed the taxpayer as liable for land tax in respect of two properties, both of which were used by the taxpayer in a business which comprised the breeding and sale of horses (and their natural increase and bodily produce) as well as the racing of horses. The issue on appeal was whether the land tax exemption applied because each parcel was rural land 'used for primary production' on the basis that the 'dominant use' of each parcel was for 'the maintenance of animals [...] for the purpose of selling them or their natural increase or bodily produce.'

The High Court considered the proper construction of section 10AA(3)(b), noting that whether land is being used for the dominant purpose of maintaining animals for their sale or the sale of their natural increase or bodily produce was a question of characterisation of the use or uses to which the land is put. The proper approach is to consider the amount of land used for any purpose, the nature and extent and intensity of the various uses which are taking place, and the time and labour and resources spent in using the land. Where land has more than one use, for a given use to be dominant it must exhibit such predominance as to impart to the whole of the land the necessary exempting character.

While the High Court noted that the taxpayer succeeded in showing that a significant use of the land was animal maintenance for the purpose of selling animals and their produce and progeny, the taxpayer did not demonstrate that this was the dominant use of the land – that is, so predominant a use as to impart an exempting character of this type to the land as a whole.

NSW: Surcharge land tax - variation to trust deed had no retrospective effect

In Keddas Pty Ltd ATF Kaluarachchi Family Discretionary Trust v Chief Commissioner of State Revenue [2024] NSWCATAD 138, the New South Wales Civil and Administrative Tribunal dismissed the taxpayer's appeal against an assessment to surcharge land tax in respect of residential property that it held on discretionary trust.

The taxpayer requested that the surcharge land tax amounts be reversed, as there were no foreign beneficiaries of the trust and no trust distributions were made in any relevant land tax year. Further, the taxpayer argued that they were unaware of the requirement to amend the trust deed to preclude foreign beneficiaries, and that once it was made aware, the trust deed was promptly amended.

The Tribunal found that the taxpayer failed to discharge its onus of proof that prior to the deed of variation, there were no foreign beneficiaries of the trust. While the trust's nominated beneficiaries were not foreign persons, the general beneficiaries extended well beyond those persons, such that the Tribunal could not be satisfied on the evidence that none of the potential (general) beneficiaries were foreign persons for the purposes of section 5D of the *Land Tax Act 1956 (NSW)*. Accordingly, the trust would not have been considered to prevent a foreign person from being a beneficiary of the trust under section 5D(3) of the *Land Tax Act* and, therefore, the trustee would, under section 5D, be deemed to be a foreign person for the purposes of section 5A.

Additionally, the deed of variation was found only to apply in respect of the 2024 land tax year and onwards, with the Tribunal noting that a subsequent alteration of rights under a discretionary trust did not affect the operation of taxing legislation at the time a liability arises. There is no provision that permits amendments to the trust deed after the applicable 31 December deadline and nor does the Commissioner have any discretion to extend the time for amending the deed.

Victoria: Primary production land tax exemption

In Merristock Pty Ltd v Commissioner of State Revenue (Review and Regulation) [2024] VCAT 535, the Victorian Civil and Administrative Tribunal has rejected the Commissioner's submission that the 'Beneficial Owner Condition' outlined in section 67B *Land Tax Act 2005 (Vic)* was not met because shares in the land holding company were held subject to a trust. The Tribunal concluded that in applying the Beneficial Owner Condition to shares in a company held by the trustee(s) of a trust, it is necessary to consider whether the underlying beneficiaries of that trust can be regarded as beneficial owners.

The taxpayer sought review of two land tax assessments in respect of properties for the 2020 and 2021 land tax years, claiming that the assessments should be set aside, as the company was entitled to the primary production exemption within section 67(1) of the *Land Tax Act 2005 (Vic)*. The relevant exemption provides that land is exempt if the Farming Use Condition is met and the owner of the land meets certain ownership requirements, which depend on the type of owner.

The case was centred around whether the condition within section 67B(1)(c) was met, namely whether all the company's shares were beneficially owned by natural persons. In issue was a 20 per cent interest in the corporate entity, which was held by two individuals in their capacity as trustees (the remaining 80 per cent of the shares were owned by natural persons and were not in issue).

The Tribunal did not consider that any beneficiary identified in the trust deed had a beneficial or other interest in the assets of the trust, other than right of due administration. As a result, the two individual taxpayers were found to be the legal and beneficial owners of the 20 per cent interest in the company, which they held as trustees on trust.

Queensland: Land tax - forestry business

In Varitimos v The Commissioner of State Revenue [2024] QCAT 71, the Queensland Civil and Administrative Tribunal found that the primary production land tax exemption was not available to the taxpayer, who was found not to be carrying on a forestry business.

The taxpayer maintained that they purchased the property in 2002 for the purposes of resting cattle, but that purpose changed to a forestry business around 2004, and that use had continued to date. During that time, no trees had been harvested for sale, and no income or profit derived.

The Tribunal found that the taxpayer's expectation of eventually turning a profit was unsupported by any evidence other than his opinion. While the Tribunal accepted that the level of activity may be low in the forestry business, it noted that there still must be some activity. Apart from basic record keeping, compliance with general land ownership obligations and occasional informal enquiries about timber prices, there was no evidence of any activity by the taxpayer throughout their period of ownership in the relevant years.

WA: Land tax primary production exemption

In Teissier and Senior Revenue Consultant As Delegate of the Commissioner of State Revenue [2024] WASAT 55, the State Administrative Tribunal found that the taxpayer had failed to demonstrate that they used their relevant land solely for a primary production business and accordingly was not entitled to claim an exemption from land tax.

The fact that the taxpayer was doing capital works that would, in some later years, allow them in future years to use the land for a primary production business did not (and could not) impart a primary production business character to the use of the land in those earlier years.

Superannuation Update

Superannuation 2024-25 rates and thresholds

As a reminder, the following key superannuation rates and thresholds apply from 1 July 2024:

	2024-25	2023-24
Concessional contributions cap	$30,000	$27,500
Non-concessional contributions cap	$120,000	$110,000
Capital gains tax cap amount	$1,780,000	$1,705,000
Life benefit termination payments ETP cap	$245,000	$235,000
General transfer balance cap	$1,900,000	$1,900,000
Defined benefit income cap	$118,750	$118,750
Division 293 threshold	$250,000	$250,000

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Legislative Update

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

- The Payment Times Reporting Amendment Bill 2024, which was introduced into the House of Representatives on 29 May 2024, implements the Government's response to the Statutory Review of the Payments Time Reporting regime seeking to improve the scheme's operation, and help it better achieve its objectives, including giving effect to the Government's commitment to improve small business payment times.
- The Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024, which was introduced into the House of Representatives on 5 June 2024, introduces a range of amendments, including, among other matters:
  - an increase to the capital works deduction rate to four per cent per year for eligible new build to rent (BTR) developments where construction commenced after 7:30PM, by legal time in the Australian Capital Territory, on 9 May 2023
  - reduction in the final withholding tax rate on eligible fund payments from managed investment trust (MIT) investments for eligible new BTR developments from 30 per cent to 15 per cent from 1 July 2024
  - ensuring that low-income taxpayers are not denied concessional Medicare levy treatment solely as a result of receiving an eligible lump sum payment in arrears for the 2024-25 income years and later income years.
  - the implementation of Australia's public Country by Country (CbC) reporting regime in respect of reporting periods commencing on or after 1 July 2024
  - an update to the list of deductible gift recipients, and
  - the extension of the $20,000 instant asset write-off for small business by 12 months until 30 June 2025.
- The Capital Works (Build to Rent Misuse Tax) Bill 2024, which was introduced into the House of Representatives on 5 June 2024, imposes a misuse tax when one or both of the new BTR tax concessions noted above are claimed in circumstances where they are not available due to BTR development ineligibility.

The following tax and superannuation related Bills have now completed their passage through Parliament:

- The Administrative Review Tribunal Bill 2024, which establishes the Administrative Review Tribunal as a replacement for the Administrative Appeals Tribunal. The Bill also re-establishes the Administrative Review Council. The Bill will come into effect on a single day to be fixed by proclamation.

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

- Taxation Administration (Reporting Exemptions for Electronic Distribution Platform Operators) Determination 2024, which exempts operators of electronic distribution platforms from having to include specified classes of transactions for reporting periods starting on or after 1 July 2024.
- Income Tax Assessment (Cents per Kilometre Deduction Rate for Car Expenses) Determination 2024, which sets the rate at which work-related car expense deductions may be claimed when using the cents per kilometre method for the income year commencing 1 July 2024 at 88 cents per kilometre.
- Taxation Administration (Withholding Schedules) Instrument 2024, makes pay as you go (PAYG) withholding schedules that specify the amount, formulas and procedures to be used for working out the amount required to be withheld by an entity from 1 July 2024.

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Other News Update

Build to rent tax concessions

The measures to give effect to the Government's proposal to provide the following tax concessions in relation to eligible new Build to rent (BTR) developments is now before Parliament (see Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024):

- increase the capital works deduction rate from 2.5 per cent to 4 per cent per year over 25 years for eligible new BTR development construction costs where construction commenced after 7:30PM, by legal time in the Australian Capital Territory, on 9 May 2023, and
- reduce the final withholding tax rate on eligible fund payments (distributions of rental income and capital gains) from eligible Management Investment Trusts (MITs) for active BTR developments from 30 per cent to 15 per cent with application from 1 July 2024.

To access one or both concessions, the BTR development will need to meet all of the following eligibility criteria:

- The development's construction commenced after 7.30pm, by legal time in the Australian Capital Territory, on 9 May 2023.
- The development consists of 50 or more residential dwellings made available for rent to the general public.
- All dwellings in the development (and common areas that are part of the BTR development) continue to be owned together by a single entity, at any one time, for at least 15 consecutive years (although the BTR development can be sold to another single entity during the period and remain eligible for the concessions).
- Dwellings in the BTR development must be available for lease terms of at least three years (although a tenant can request a shorter period).
- At least 10 per cent of the dwellings are available as affordable tenancies (an affordable dwelling is a dwelling where the rent is discounted by at least 25.1 per cent and offered to eligible tenants (broadly, those who meet certain income thresholds).

These tax benefits only apply to BTR developments that remain continuously active for the 15-year compliance period. If a BTR tax concession is claimed for a particular year, and the development subsequently becomes ineligible (during the 15-year compliance period), then the tax benefit is clawed back. The 15 per cent reduced MIT final withholding tax rate can continue to apply beyond the 15-year compliance period, as long as a BTR development meets the eligibility criteria.

A specific reporting mechanism will also be introduced to enable the Commissioner to receive information from entities participating in active BTR developments.

In addition, the Capital Works (Build to Rent Misuse Tax) Bill 2024, once in effect, will provide for the levy of a non-deductible misuse tax (at a rate of 1.5 per cent) in the event that an entity improperly claims one or both of the tax concessions. The misuse tax is only applicable to non-compliance during the 15-year BTR compliance period. Any non-compliance after the 15-year BTR compliance period will be dealt with year-by-year through the ordinary assessment process.

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Capital losses on share sale scheme defeated

In Merchant v Commissioner of Taxation [2024] FCA 498, the Federal Court found largely for the Commissioner regarding a share sale scheme designed to crystallise a significant capital loss.

In summary, a family trust of the taxpayer sold shares it held in a public company to the taxpayer's superannuation fund, which crystallised a capital loss. The family trust also sold shares it held in a start-up company after undertaking a forgiveness of group loans.

The Commissioner took the view that, for the purposes of section 177D(1) in Part IVA of the Income Tax Assessment Act 1936, the predominant reason why the super fund acquired the shares from the family trust was to crystallise a capital loss in the family trust which could be applied against the capital gain from the trust's anticipated sale of its shares in the start-up company. Separately, the Commissioner considered that the forgiveness of debts by two of the three lenders were schemes having substantially the effect of schemes by way of, or in the nature of, dividend stripping.

The Federal Court found having regard to the evidence and the eight matters in section 177D(2), it would (objectively) be concluded that the dominant purpose of the parties was to obtain a tax benefit for the trust, being the capital loss obtained on the sale of the shares to the super fund. It followed that taxpayers have not discharged the onus of establishing that the general anti-avoidance provisions in Part IVA do not apply.

The Court also found that the debt forgiveness had the effect of a scheme by way of, or in the nature of, dividend stripping (see discussion in Corporate Tax section).

A further consideration by the Court was in relation to the treatment of the contingent rights to future payments for the sale of the start-up company, being Milestone Amounts and Earn-Out Amounts, and specifically whether the taxation of financial arrangement (TOFA) provisions applied. In this respect, the Court held that on the assumption that the future payments rights were "financial arrangements" to which the TOFA provisions would otherwise have applied, the rights were subject to the exception in the then applicable section 230-460(13) of the Income Tax Assessment Act 1997 (ITAA 1997). As such, the TOFA proceeding was dismissed.

Small business CGT concession applied in non-arm's length sale

In Moloney and Commissioner of Taxation (Taxation) [2024] AATA 1483, the Administrative Appeals Tribunal (AAT) found for the taxpayer in a matter which considered the market value substitution rule within section 116-30 of the ITAA 1997 and whether the small business capital gains tax (CGT) concession applied.

Even though the AAT was satisfied that the parties to the share sale agreement did not deal with each other at arm's length in respect of the transaction, the Tribunal found that the taxpayer's expert evidence in relation to market value was to be preferred, with the result that the small business concession applied. Specifically, it found that the maximum net asset value (MNAV) test in Division 152 of the ITAA 1997 was satisfied before the relevant CGT event, noting that the MNAV test requires that the net value of the CGT assets of the taxpayer (a discretionary family trust) and connected entities did not exceed $6 million.

ATO to rate third-party data tax controls of investment entities

The Australian Taxation Office (ATO) has announced that it will start to rate certain investment industry entity's third-party data tax controls during its assurance reviews, from 1 July 2024, namely those of:

- Large superannuation funds
- MITs or attribution managed investment trusts (AMITs)
- Corporate collective investment vehicles (CCIVs)
- Insurance companies.

The ATO expects all relevant investment entities to have put controls in place that follow the principles in the Governance over third-party data supplementary guide by 1 July 2024.

The ATO will also check if the entity has systems and processes to:

- ensure accurate reporting of third-party data, and
- mitigate the risks of inaccuracies in income tax reporting and distribution statements, where applicable.

Depreciation car limit for 2024–25

The ATO has advised that the car limit for capital allowance purposes for the 2024-25 financial year has increased to $69,674 (up from $68,108). 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.

CGT improvement threshold for 2024-25

The capital gains tax (CGT) improvement threshold is one of the factors used to determine whether an improvement to a pre-CGT asset is treated as a separate asset for CGT purposes under section 108-70 of the Income Tax Assessment Act 1997. For the 2024-25 year, the improvement threshold is $182,665, an increase on the threshold of $174,465 in 2023-24.

Editorial

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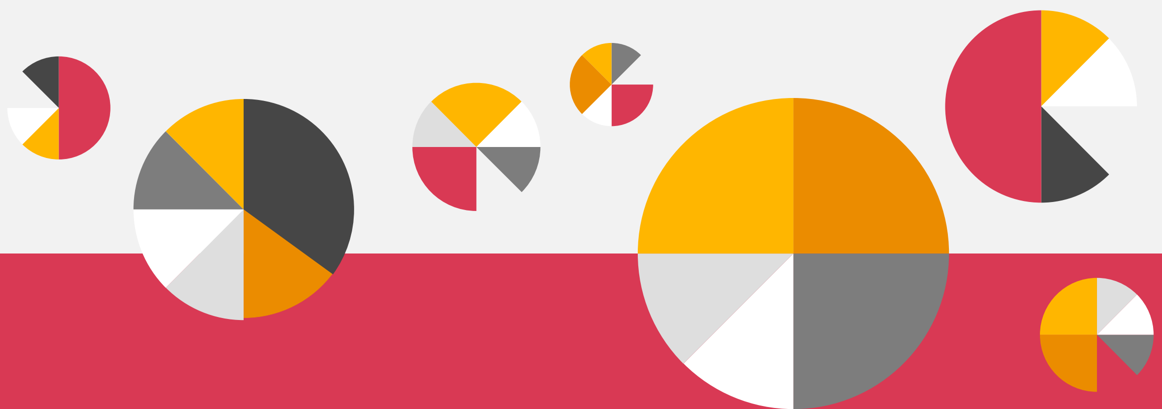

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