



# PwC's Monthly Tax Update

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

March 2023



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# Corporate Tax Update

## Capital management measures introduced into Parliament

On 16 February 2023, the [Treasury Laws Amendment \(2023 Measures No. 1\) Bill 2023](#) (Bill) was introduced into Parliament. The Bill contains previously announced tax measures in relation to:

- amending the off-market share buy-back rules for listed public companies to align with the tax treatment of on-market share buy-backs, with effect for off-market buy-backs announced to the market by listed public companies after 7:30pm, by legal time in the Australian Capital Territory, on 25 October 2022; and
- preventing frankable distributions funded by certain capital raising activity with effect for distributions that occurred on or after 15 September 2022.

These changes are likely to have significant consequences for companies' capital management strategies, in particular for listed public companies. Companies should consider how these changes impact their ability to return funds to shareholders, including how to obtain certainty on the tax outcomes for 'out of cycle' franked distributions. Read more in our [Tax Alert](#).

## Decision impact statement on case concerning exploration rights

The Australian Taxation Office (ATO) has issued a [decision impact statement](#) following the Full Federal Court decision in [Commissioner of Taxation v Shell Energy Holdings Australia Limited \[2022\] FCAFC 2](#) which considered the availability of a deduction for mining, quarrying and prospecting rights (MQPRs) that are first used for exploration. Whilst this case was focused on deductions for MQPRs, it has ongoing relevance in relation to several issues, including what constitutes "exploration" for tax purposes, and when an intangible asset is considered to be held for "first use". As such, this case and the decision impact statement will be of

interest both for taxpayers in the resources sector and those who generally hold intangible assets. Further details in respect of the decision impact statement can be found in our [Tax Alert](#).

In addition, as noted in the decision impact statement, the ATO has withdrawn [TR 2019/1](#) on the basis that the guidance on "use" of a MQPR contained in the ruling is inconsistent with that in the decision in this case. In the withdrawal notice, the Commissioner highlighted that the Full Federal Court decision provides sufficient certainty on what constitutes "use" for MQPR, and therefore no new ruling is required.

## Junior Minerals Exploration Incentive cap increased for 2023–24

The annual exploration credits cap for the [Junior Minerals Exploration Incentive](#) (JMEI) has been increased by \$2.15 million for the 2023–24 income year. This represents credits that were allocated to junior explorers in the 2021–22 income year but were unused, and have been made available for allocation in the 2023–24 income year.

The JMEI provides an incentive for investment in junior explorers undertaking greenfields minerals exploration in Australia. The amount of exploration credits available each income year is capped, with unused credits able to be allocated in subsequent years.

## Let's talk

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

### Chris Morris

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

### Michael Bona

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

### Warren Dick

Sydney  
Tax Reporting & Strategy Leader  
+61 (2) 8266 2935  
[warren.dick@pwc.com](mailto:warren.dick@pwc.com)

### Trinh Hua

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

### James O'Reilly

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

### Jason Karametos

Melbourne  
Industries Tax Leader  
+61 (3) 8603 6233  
[jason.karametos@pwc.com](mailto:jason.karametos@pwc.com)

### Kirsten Arblaster

Melbourne  
Tax Leader  
+61 (3) 8603 6120  
[kirsten.arblaster@pwc.com](mailto:kirsten.arblaster@pwc.com)

### Rob Bentley

Perth  
Tax Leader  
+61 (8) 9238 5202  
[robert.k.bentley@pwc.com](mailto:robert.k.bentley@pwc.com)

### Alistair Hutson

Adelaide  
Partner  
+61 (8) 8218 7467  
[alistair.hutson@pwc.com](mailto:alistair.hutson@pwc.com)

### Sarah Hickey

Sydney  
Financial Services Tax Leader  
+61 (2) 8266  
[sarah.a.hickey@pwc.com](mailto:sarah.a.hickey@pwc.com)

### Amy Etherton

Newcastle  
Partner  
+61 (2) 4925 1175  
[amy.etherton@pwc.com](mailto:amy.etherton@pwc.com)

### Sophia Varelas

Melbourne  
National Leader, R&D and Government Incentives  
+61 417 208 230  
[sophia.varelas@pwc.com](mailto:sophia.varelas@pwc.com)

# Employment Taxes Update

## Increasing ATO reviews and audits focused on employer obligations

In recent months PwC has observed an increase in Australian Taxation Office (ATO) reviews and audits focused on PAYG Withholding (PAYG), Superannuation Guarantee (SG), Fringe Benefits Tax (FBT), and contractors. The increased audit activity appears to be in the form of either specific PAYG & SG audits on identified issues (for example, through data-matching and analytics), or through the ATOs 'Random Enquiry' employer obligations reviews.

### PAYG & SG audits

With respect to the PAYG & SG audits, a key driver appears to be data-integrity checks comparing data within Single Touch Payroll (STP) reporting, financial statements, income tax returns, activity statements and even employee PAYG credits claimed through personal income tax returns. Thus far, the ATO hasn't sought to make enquiries of underlying payroll PAYG and SG computations, however, with the advent of STP phase 2 and the increased focus on taxpayer governance, this may feature in future audits.

### 'Random Enquiry' reviews

Whilst the program itself is not new, the employer obligations emphasis highlights the regulator's drive to understand, on a more fulsome basis, taxpayer governance and ensuing compliance. Relevantly, compared to the afore-noted audits, the data requested under these reviews are wide-ranging, including background material such as declarations, forms, registers and schedules, etc. In this regard, often, under such reviews (even prior to receipt of the information requested), the regulator seeks to meet with key taxpayer personnel to understand the processes and controls in place to manage compliance and mitigate (and escalate, where required) risk.

See our [article](#) for a summary of the key takeaways for employers.

## Queensland payroll tax amnesty for contracted general practitioners

Following the recent release of Public Ruling PTAQ000.6.1 regarding the application of payroll tax to medical practices under the relevant contract provisions, the Queensland Revenue Office has formally announced an amnesty in relation to the requirement for taxpayers to pay payroll tax on payments made by a medical practice to general practitioners (GPs) under the 'relevant contract' provisions.

Broadly, the Queensland Revenue Office has indicated on its website that medical practices may be liable to pay payroll tax on contracted GPs to the extent that a service is being provided by the GP to the medical practice. Given a potential lack of awareness at present in the medical industry regarding this view on the payroll tax treatment of contractor payments to GPs, the Queensland Government will provide a payroll tax amnesty on payments made to contracted GPs until 30 June 2025.

Medical practices will be required to express their interest to opt in to the amnesty by 30 June 2023 and if successful the amnesty will allow payments made to contracted GPs up to 30 June 2025 and for the previous 5 years (ie 2018–25) to be exempt from payroll tax.

Further details on the Queensland payroll tax amnesty will be made shortly. At present no other state revenue authorities have announced an amnesty with respect to this issue.

Additional information regarding the amnesty can be found on the [Queensland Revenue Office's website](#).

## Let's talk

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

**Norah Seddon**  
Sydney  
Partner  
+61 (2) 8266 5864  
[norah.seddon@pwc.com](mailto:norah.seddon@pwc.com)

**Adam Nicholas**  
Sydney  
Partner  
+61 (2) 8266 8172  
[adam.nicholas@pwc.com](mailto:adam.nicholas@pwc.com)

**Greg Kent**  
Melbourne  
Partner  
+61 (3) 8603 3149  
[greg.kent@pwc.com](mailto:greg.kent@pwc.com)

**Anne Bailey**  
Melbourne  
Partner  
+61 (3) 8603 6818  
[anne.m.bailey@pwc.com](mailto:anne.m.bailey@pwc.com)

**Paula Shannon**  
Brisbane  
Partner  
+61 (7) 3257 5751  
[paula.shannon@pwc.com](mailto:paula.shannon@pwc.com)

## Car parking fringe benefits: Primary place of employment

Following the decision by the Full Federal Court in [Commissioner of Taxation v Virgin Australia Regional Airlines Pty Ltd \[2021\] FCAFC 209, TR 2021/2](#) which sets out when the provision of car parking result in a car parking fringe benefit has been amended to address the Commissioner's views on the meaning of primary place of employment.

The updated ruling outlines two tests to determine the primary place of employment:

- sole or primary place of employment of the employee, and
- business premises that are otherwise the sole or primary place from which, or at which, the employee performs duties of his or her employment.

## Draft FBT determinations on adequate alternative records

The ATO has released 4 draft FBT determinations dealing with adequate alternative records the Commissioner will accept as an alternative to an approved employee declaration in respect of expense payment fringe benefits.

The draft determinations are:

- [Draft Fringe Benefits Tax Assessment \(Adequate Alternative Records – Overseas Employment Holiday Transport\) Determination 2023](#) (LI 2023/D3) – which specifies records the Commissioner will accept as an alternative to an employee declaration in respect of expense payment fringe benefits where the employer seeks to reduce the taxable value of a benefit in respect of overseas employment holiday transport, the benefit consists in whole or part of a reimbursement of a “**Division 28 car expense**” incurred by the employee or family member in relation to a car they own or lease, and the reimbursement is calculated on a cents per kilometre basis.
- [Draft Fringe Benefits Tax Assessment \(Adequate Alternative Records – Car Travel to Employment Interview or Selection Test\) Determination 2023](#) (LI 2023/D4) – which specifies records that the Commissioner will accept as an alternative to an employee declaration in respect of expense payment fringe benefits where the employer seeks to reduce the taxable value of a benefit in respect of travel to an employment interview or selection test, the benefit consists in whole or part of a reimbursement of a “**Division 28 car expense**” incurred by the employee in relation to a car they own or lease, and the reimbursement is calculated on a cents per kilometre basis.

- [Draft Fringe Benefits Tax Assessment \(Adequate Alternative Records – Remote Area Holiday Transport\) Determination 2023](#) (LI 2023/D5) – which specifies records the Commissioner will accept as an alternative to an employee declaration in respect of expense payment fringe benefits where the employer seeks to reduce the taxable value of a benefit in respect of remote area holiday transport, the benefit consists in whole or part of a reimbursement of a “**Division 28 car expense**” incurred by the employee in relation to a car they own or lease, and the reimbursement is calculated on a cents per kilometre basis.
- [Draft Fringe Benefits Tax Assessment \(Adequate Alternative Records – Car Travel to Certain Work-Related Activities\) Determination 2023](#) (LI 2023/D6) – which specifies records that the Commissioner will accept as an alternative to an employee declaration in respect of expense payment fringe benefits where the employer seeks to reduce the taxable value of a benefit in respect of car travel for a work-related medical examination, work-related medical screening, work-related preventative health care, work-related counselling or migrant language training, and the benefit consists in whole or part of a reimbursement of a “**Division 28 car expense**” incurred by the employee or their associate in relation to a car they own or lease, and the reimbursement is calculated on a cents per kilometre basis.

Feedback on the draft FBT determinations can be provided to the ATO by 17 March 2023.

## Employment agency contract provisions and the security industry

In *Infinity Security Group Pty Ltd v Chief Commissioner of State Revenue [2023] NSWCATAD 28*, the Tribunal has considered the application of the employment agency contract provisions to a business operating within the security industry, primarily in the context of providing security services to licensed venues such as pubs and clubs. In order to provide their services Infinity used its own employees as well additional guards supplied by third party contractors. The Commissioner had sought to apply payroll tax to payment made under these arrangements in accordance with the employment agency contract provisions.

Following on from the earlier decision of the NSW Supreme Court in *E Group Security Pty Ltd v Chief Commissioner of State Revenue [2021] NSWSC 1190*, the Tribunal found in favour of the taxpayer in that the arrangements with their security guards were not considered to fall within the employment agency contract provisions for payroll tax purposes.

In reaching this decision, the Tribunal applied the same tests that were considered in *E Group Security Pty Ltd v Chief Commissioner of State Revenue [2021] NSWSC 1190* for the purpose of determining whether the security guards engaged by Infinity Security Group were working in and for the conduct of the business of Infinity's clients. Relevantly, the main considerations that led to this conclusion were:

- The extent of interaction and supervision with or by the client's staff (and where relevant, the client's customers);
- The process by which Statement of Operating Procedures (SOPs) are developed, and the processes and performance of security services and level of client involvement in this process;
- Whether the favor security personnel are separately identifiable from the client's staff; and
- Whether the security personnel have access to client facilities.

It should be noted that while Ward CJ had noted in the *E Group* decision that a lack of control and direction existed by virtue of the licensing regime as provided in the *Security Industry Act 1997 No 57* (NSW), the Tribunal commented in its decision that the licensing regime "does not determine the questions as to whether as a matter of fact the guards were added to the workforce of the clients for the conduct of the business." Instead, it observed that the primary test remains a fact sensitive one which takes factors listed above into account when determining whether there is requisite integration of the service providers into the relevant client's workforce.

# Global Tax and Trade Update

## Draft law to streamlining excise and customs administration

In the March 2022 Federal Budget, the former Government announced a package of measures to streamline the administration of fuel and alcohol excise. The current Government is now [consulting](#) on proposed legislation to deliver the following two components of this package:

- Small-scale repackaging of beer into smaller containers – to provide a targeted exemption from excise licensing requirements to venues repackaging duty-paid beer from kegs (and other large containers of specific kinds) into other sealed, non-pressured containers of up to 2 litres, that are intended for short-term storage. This exemption will apply only to small-scale operations, with a maximum of 10,000 litres per premises per year that can be repackaged.
- Aligning excise and customs reporting with other indirect taxes – to permit fuel and alcohol businesses with an annual aggregated turnover of less than \$50 million to apply to lodge returns, and pay excise and excise-equivalent customs duty, on a quarterly basis rather than weekly or monthly. This will help to ensure that the reporting schedule for businesses lodging returns for excise and excise-equivalent goods is aligned with other indirect taxes.

Submissions to this consultation closed on 16 February 2023.

## ATO settles dispute over procurement hub

The ATO has [indicated](#) that it is continuing to closely scrutinise offshore structures and dealings of multinationals to ensure the right amount of profit is being taxed in Australia, following the settlement of a dispute involving procurement hubs, transfer pricing and the operations of Australia's controlled foreign company (CFC) regime.

The ATO's Tax Avoidance taskforce has focussed on offshore procurement hubs in recent years. In these fact patterns, an offshore entity of a multinational group (the procurement hub) is used to procure goods from third party suppliers and then on-sells these goods to the Australian entity, with the procurement hub being located in a low or no tax jurisdiction. The ATO has stated that it is keen to ensure that procurement hubs are not used as a mechanism to shift profit from Australia by charging excessive prices for imported goods and services in an effort to reduce tax paid in Australia.

## OECD dispute resolution updates

A [new methodology](#) for dispute resolution peer reviews has been agreed by the Organisation of Economic Co-operation and Development (OECD)/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) to increase efficiencies and improve the timeliness of the resolution of double taxation disputes. A simplified peer review process will apply from January 2023 for jurisdictions that do not have a "meaningful MAP (mutual agreement procedure) experience", with the aim of assisting these jurisdictions to set up a more robust MAP programme for future MAP cases. A full peer review process will be in place for jurisdictions that are considered to have "meaningful MAP experience, with this process to start from January 2024.

The Inclusive Framework has also agreed new data points to be reported in the annual MAP Statistics and the creation of a new annual framework for reporting Advance Pricing Arrangement (APA) Statistics, which will commence in 2023.

In addition, the OECD has [published](#) a *Manual on the Handling of Multilateral Mutual Agreement Procedures (MAPs) and Advance Pricing Arrangements (APAs)*, intended to be abbreviated as the MoMA. The MoMA is intended as a guide to multilateral MAP and APA processes from both a legal and procedural perspective and suggests different approaches based on the practices of jurisdictions, without imposing a set of binding rules.

## Let's talk

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

### Chris Morris

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

### Michael Bona

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

### Michael Taylor

Melbourne  
Partner  
+61 (3) 8603 4091  
[michael.taylor@pwc.com](mailto:michael.taylor@pwc.com)

### Greg Weickhardt

Melbourne  
Partner  
+61 428 769 169  
[greg.weickhardt@pwc.com](mailto:greg.weickhardt@pwc.com)

### Nick Houseman

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

### Angela Danieletto

Sydney  
Partner  
+61 (2) 8266 0973  
[angela.danieletto@pwc.com](mailto:angela.danieletto@pwc.com)

### Jayde Thompson

Sydney  
Partner  
+61 403 678 059  
[jayde.thompson@pwc.com](mailto:jayde.thompson@pwc.com)

### Jonathan Malone

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

### Gary Dutton

Partner  
Australian Trade Leader  
+61 434 182 652  
[gary.dutton@pwc.com](mailto:gary.dutton@pwc.com)

## OECD Pillar Two updates

[Technical guidance](#) to assist governments in implementing the Pillar Two Global Anti-Base Erosion (GloBE) rules, designed to ensure a minimum effective tax rate of 15 per cent has been paid by large multinational enterprises, has been released by the OECD.

The guidance addresses a wide range of issues identified by Inclusive Framework members as most in need of immediate clarification and simplification. It clarifies the interpretation of the rules and their application for businesses in providing greater certainty. Among other things, this includes guidance on the treatment of the United States' minimum tax (Global Intangible Low-Tax Income or "GILTI") under the GloBE rules, provides a mechanical allocation formula for GILTI and other 'Blended CFC Tax Regimes,' and provides guidance on Qualified Domestic Minimum Top-up Taxes (QDMTT) and the treatment of (some) credits and incentives. Read more in our [Tax Policy Alert](#).

The OECD has also published [public comments](#) received on compliance and tax certainty aspects of the Pillar Two GloBE rules.

## Trans-Pacific Partnership – entry into force for Chile

A [notifiable instrument](#) has been made to announce that the Comprehensive and Progressive Agreement for Trans-Pacific Partnership which will enter into force for Chile on 21 February 2023.

## India Budget 2023

On 1 February 2023, the Indian Finance Minister handed down the last full Union Budget for 2023–24. From a tax perspective, the Finance Minister continued the theme of a predictable tax regime, promoting ease of compliance, widening of the tax base, reducing litigation and maintaining the overall tax structure. There were no specific announcements in respect of BEPS Pillar 2 implementation.

The Budget contained a range of proposed tax measures, including:

- extending the application of anti-abuse provisions on issue of shares to non-resident shareholders
- introduction of a new taxation regime for online gaming
- clarifying the cost of acquisition or improvement of an intangible asset or any other right for which no consideration is paid for at the time of the acquisition is nil
- introducing a new provisions to all a taxpayer to claim a refund of withholding taxes where the corresponding income has been taxed on an accruals basis in prior years
- extending the current exemption from the thin capitalisation rules for banking and insurance companies to non-banking financial companies
- pay-outs by infrastructure investment trusts or real estate investment trusts to unitholders from proceeds of repayment of debt in underlying investments will be considered taxable in the hands of unitholders as income from other sources
- changes to the taxation of market-linked and listed debt instruments, and
- Reducing the timeframe for furnishing transfer pricing documentation to the tax authorities upon enquiry.

Read more about the proposals in the 2023–24 India Budget and its impact on foreign investors and multinationals, in this [Tax Insight](#).

# Indirect Tax Update

## GST data tests for financial services and insurance industry

The Australian Taxation Office (ATO) has updated its industry-specific goods and services tax (GST) data tests for the financial services industry, releasing the [publication](#) on the ATO legal database. The data tests are typically undertaken by the ATO (or an independent third party advisor) as part of a GST Assurance Review.

## Crackdown on GST fraud

The ATO-led Serious Financial Crime Taskforce undertook a series of enforcement activities this month as part of [Operation Protego](#). The ATO has called it a crackdown on the biggest GST fraud in Australia's history. The fraud was first identified in early 2022 and involved fake businesses and ABN applications, with offenders submitting Business Activity Statements to obtain a false GST refund. As at 31 December 2022, the ATO has stopped approximately \$2.5 billion in fraudulent GST refund claims being paid.

## Indian government proposes to expand the coverage of OIDAR services

The Indian Government presented its Budget for 2023-24 on 1 February 2023 which includes a proposal to expand the coverage of online information database and access retrieval ('OIDAR') services on which non-resident entities will have to pay GST in India.

OIDAR services (eg cloud services, online digital content, online gaming, online advertising) provided by non-resident entities from outside India to unregistered GST users (such as individual consumers in India) are liable to GST in India. The law was interpreted in a manner that the GST applied only if the services were completely automated. The Budget now seeks to expand the application of GST by proposing that OIDAR services shall be liable to GST irrespective of whether services are automated or whether any human intervention is involved. In addition, the proposal seeks to extend coverage to include all unregistered customers, whether individuals or businesses. Read more about the proposals in the 2023–24 India Budget and its impact on foreign investors and multinationals, in this [Tax Insight](#).

## Let's talk

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

**Matt Strauch**  
Melbourne  
Indirect Tax Leader  
+61 (3) 8603 6952  
[matthew.strauch@pwc.com](mailto:matthew.strauch@pwc.com)

**Michelle Tremain**  
Perth  
Partner  
+61 (8) 9238 3403  
[michelle.tremain@pwc.com](mailto:michelle.tremain@pwc.com)

**Adrian Abbott**  
Sydney  
Partner  
+61 (2) 8266 5140  
[adrian.abbott@pwc.com](mailto:adrian.abbott@pwc.com)

**Jeff Pfaff**  
Brisbane  
Partner  
+61 (7) 3257 8729  
[jeff.pfaff@pwc.com](mailto:jeff.pfaff@pwc.com)

**Brady Dever**  
Sydney  
Partner  
+61 (2) 8266 3467  
[brady.dever@pwc.com](mailto:brady.dever@pwc.com)

**Mark Simpson**  
Sydney  
Partner  
+61 (2) 8266 2654  
[mark.simpson@pwc.com](mailto:mark.simpson@pwc.com)

**Suzanne Kneen**  
Melbourne  
Partner  
+61 (3) 8603 0165  
[suzanne.kneen@pwc.com](mailto:suzanne.kneen@pwc.com)

**Shagun Thakur**  
Perth  
Partner  
+61 (8) 9238 3059  
[shagun.thakur@pwc.com](mailto:shagun.thakur@pwc.com)

**Andrew Howe**  
Sydney  
Partner  
+61 (4) 1464 1438  
[andrew.s.howe@pwc.com](mailto:andrew.s.howe@pwc.com)

**Mark De Luca**  
Sydney  
Partner  
+61 (2) 8266 2461  
[mark.de.luca@pwc.com](mailto:mark.de.luca@pwc.com)



# Personal Tax Update

## New method for calculating additional running costs while working from home

The Australian Taxation Office (ATO) has finalised a revised fixed rate method for calculating deductions for certain additional running expenses while working from home in [PCG 2023/1](#). The revised fixed rate method, which is available from 1 July 2022, allows taxpayers to claim at a rate of 67 cents per hour for each house worked from home for the following additional running costs:

- energy expenses (electricity and gas) for lighting, heating, cooling and electronic items used while working from home
- internet expenses
- mobile and home phone expenses, and
- stationery and computer consumables.

Unlike [PCG 2020/3](#), which no longer applies after 30 June 2022, the revised fixed rate method contained in [PCG 2023/1](#) does not include the decline in value of depreciating assets used for work purposes such as a computer, laptop or similar device, therefore a deduction for the decline in value of these items can be claimed separately to the rate per hour method. [PS LA 2001/6](#) has also been amended to remove references to home office running methods and the fixed-rate method that applied until 30 June 2022.

Taxpayers are able to calculate and claim a deduction for the actual additional expenses they incurred as a result of working from home from 1 July 2022, or use the fixed rate method set out in [PCG 2023/1](#).

## Taxpayer Alert on interposing a holding company to access tax-free profits

The ATO has released Taxpayer Alert [TA 2023/1](#) in respect of arrangements where an individual accesses profits of a private company in tax-free form through an interposed holding company.

The types of arrangements that the ATO is concerned with typically involve a company being interposed between a

private company with retained profits and its shareholder, where a CGT rollover is applied to enable the shareholder to disregard a capital gain arising from the disposal of shares in the private company. The private company then pays a franked dividend to the interposed company which uses the proceeds to fund a loan to the individual shareholder on favourable terms which do not meet the minimum interest and term requirements under Division 7A of the *Income Tax Assessment Act 1936*. However, no part of the loan is treated as a deemed dividend as neither the private company nor the interposed company have a distributable surplus for the purposes of Division 7A. As a result, the individual may be able to access the retained profits of the private company in a tax-free form.

Aspect of these arrangements that the ATO is focusing on include whether:

- there is any intention for the purported "loan" to the individual to be repaid, or if the amount may be taken to be an assessable deemed dividend paid to the individual under other provisions of Division 7A relating to payments from private companies
- the arrangement comprises of "dividend stripping" scheme or operation, and
- the general anti-avoidance provisions in Part IVA of the *Income Tax Assessment Act 1936* may apply to the scheme.

## Personal Services Income PAYG variation

The ATO has released draft [Taxation Administration \(Withholding Variation for Personal Services Income\) Legislative Instrument 2023](#), which varies to nil the amount of Pay-As-You-Go (PAYG) withholding required from certain alienated personal services income payments. This instrument is intended to continue, from 1 April 2023, existing arrangements which are currently covered under a [legislative instrument](#) which is due to sunset.

The closing date for comments was 21 February 2023.

## Let's talk

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

**Martina Crowley**  
Melbourne  
Partner  
+61 (3) 8603 1450  
[martina.crowley@pwc.com](mailto:martina.crowley@pwc.com)

**Glen Frost**  
Sydney  
Partner  
+61 (2) 8266 2266  
[glen.frost@pwc.com](mailto:glen.frost@pwc.com)

**Amy Etherton**  
Newcastle  
Partner  
+61 (2) 4925 1175  
[amy.etherton@pwc.com](mailto:amy.etherton@pwc.com)

**Samantha Vidler**  
Brisbane  
Partner  
+61 (7) 3257 8813  
[samantha.vidler@pwc.com](mailto:samantha.vidler@pwc.com)

**Matt Gurner**  
Perth  
Partner  
+61 (8) 9238 3458  
[matthew.gurner@pwc.com](mailto:matthew.gurner@pwc.com)

**Alistair Hutson**  
Adelaide  
Partner  
+61 (8) 8218 7467  
[alistair.hutson@pwc.com](mailto:alistair.hutson@pwc.com)

# State Taxes Update

## NSW: surcharge duty and land tax inconsistent with certain international tax treaties

Revenue NSW has [determined](#) that the NSW foreign surcharge provisions are inconsistent with certain international tax treaties entered into by the Federal Government. The determination is effective from 21 February 2023 for the Federal Government's international tax treaties with New Zealand, Finland, Germany and South Africa and provides that:

- individuals who are citizens of the specified nations are no longer required to pay surcharge purchaser duty or surcharge land tax on residential-related property or land acquired or held in their capacity as individuals, and
- where surcharge is imposed due to a non-individual's affiliation with the specified nations, the liability to surcharge purchaser duty or surcharge land tax may also be affected by the international tax treaties.

Refunds of surcharge purchaser duty or surcharge land tax already paid may be available for purchasers or landowners from the specified nations who paid the relevant surcharge on or after 1 July 2021.

The State Revenue Office of Victoria has released a [statement](#) acknowledging Revenue NSW's determination with regards to this issue, and have stated that they are considering the implications of this announcement and will provide updates as required.

## SA: land tax and duty relief for flood victims

The South Australian (SA) Government has [announced](#) significant tax relief for residents and businesses whose properties and cars have been destroyed or substantially damaged by floodwaters. Specifically, the following relief is to be provided in relation to land taxes and duties:

- 2022–23 land tax liabilities for business properties and long-term residential rentals that are substantially damaged or destroyed will be waived
- holiday rental properties will be eligible for land tax relief where an owner can demonstrate a loss of bookings/income due to the property being substantially damaged or destroyed due to the flood
- refunds will be provided for those eligible for relief where 2022-23 land tax liabilities have already been paid
- homeowners whose principal places of residence are substantially damaged or destroyed will be eligible for stamp duty relief of up to \$48,830 on the purchase of a new home, and
- stamp duty relief will apply to vehicles purchased to replace another destroyed or lost in the flood of up to \$2,816 on the purchase of a non-commercial vehicle and \$2,127 for a commercial vehicle.

## Let's talk

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

**Rachael Cullen**  
Sydney  
Partner  
+61 409 470 495  
[rachael.cullen@pwc.com](mailto:rachael.cullen@pwc.com)

**Barry Diamond**  
Melbourne  
Partner  
+61 (3) 8603 1118  
[barry.diamond@pwc.com](mailto:barry.diamond@pwc.com)

**Stefan DeBellis**  
Brisbane  
Partner  
+61 (7) 3257 8781  
[stefan.debellis@pwc.com](mailto:stefan.debellis@pwc.com)

**Cherie Mulyono**  
Sydney  
Partner  
+61 (2) 8266 1055  
[cherie.mulyono@pwc.com](mailto:cherie.mulyono@pwc.com)

**Matthew Sealey**  
Partner  
+ 61 400 684 803  
[matthew.sealey@pwc.com](mailto:matthew.sealey@pwc.com)

**Jess Fantin**  
Brisbane  
Partner  
+61 (7) 3257 5501  
[jess.fantin@pwc.com](mailto:jess.fantin@pwc.com)

**Rachael Munro**  
Perth  
Partner  
+61 (8) 9238 3001  
[rachael.munro@pwc.com](mailto:rachael.munro@pwc.com)

# Superannuation Update

## Transfer balance cap indexation

The general transfer balance cap, which limited the total amount of superannuation that can be transferred into retirement phase, is due to increase on 1 July 2023 by an increment of \$200,000 due to indexation.

This means that individuals who start their first retirement phase income stream from this date will have a transfer balance cap of \$1.9 million. The Australian Taxation Office (ATO) has provided [information](#) regarding the entitlement to indexation of the transfer balance cap for individuals who have a transfer balance account in existence before 1 July 2023 and where the highest balance in this account has at no time reached or exceeded the relevant personal transfer balance cap.

## Consultation on the objective of superannuation

The Government has released a [consultation paper](#) with regards to legislating the objective of superannuation. The aim of legislating the objective of superannuation is to provide stability and confidence to policy makers, regulators, industry and the community such that changes made to superannuation policy are aligned with the purpose of the system.

The consultation paper provides context about the history of Australia's superannuation system, the rationale for enshrining the objective of superannuation in law and provides some options on potential framing. It also sets out how a legislated objective could improve accountability and transparency in policy development.

The paper is seeking feedback on the following proposed objective of superannuation, noting that as there will be a range of views on the inclusion of key concepts, there are alternatives to the sentence structure as well as the precise wording that may be appropriate:

"The objective of superannuation is to preserve savings to deliver income for a dignified retirement, alongside government support, in an equitable and sustainable way".

Submission on the issues raised in the consultation paper can be made until 31 March 2023.

## Regulation regarding annual member meeting notices disallowed

The [Superannuation Industry \(Supervision\) Amendment \(Annual Members' Meetings Notices\) Regulations 2022](#), which was registered on 2 September 2022, has been disallowed by the Senate. The regulations were to amend the information required to be included in a notice for an annual members' meeting prescribed by the *Superannuation Industry (Supervision) Regulations 1994*.

Specifically, the amendments, which were to apply in relation to annual members' meeting notices for a registrable superannuation entity given on or after 9 September 2022 in relation to an income year ending on or after 30 June 2022, were to:

- remove itemised disclosure of certain expenditure
- remove the double-counting of certain expenditure, and
- align the definition of 'related party' to the definition in the Australian Accounting Standards.

## Let's talk

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

**Naree Brooks**  
Melbourne  
Partner  
+ 61 (3) 8603 1200  
[naree.brooks@pwc.com](mailto:naree.brooks@pwc.com)

**Marco Feltrin**  
Melbourne  
Partner  
+ 61 (3) 8603 6796  
[marco.feltrin@pwc.com](mailto:marco.feltrin@pwc.com)

**Abhi Aggarwal**  
Brisbane  
Partner  
+ 61 (7) 3257 5193  
[abhi.aggarwal@pwc.com](mailto:abhi.aggarwal@pwc.com)

**Alice Kase**  
Sydney  
Partner  
+ 61 (2) 8266 5506  
[alice.kase@pwc.com](mailto:alice.kase@pwc.com)

**Ken Woo**  
Sydney  
Partner  
+ 61 (2) 8266 2948  
[ken.woo@pwc.com](mailto:ken.woo@pwc.com)

**Allister Sime**  
Melbourne  
Director  
+61 3 8603 1195  
[allister.sime@pwc.com](mailto:allister.sime@pwc.com)

**Sharyn Frawley**  
Melbourne  
Partner  
+61 3 8603 1217  
[sharyn.frawley@pwc.com](mailto:sharyn.frawley@pwc.com)

# Legislative Update

Federal Parliament resumed sittings for 2023 on 6 February 2023.

Since our last update, the following tax and superannuation related Bills were introduced into Federal Parliament:

- [Treasury Laws Amendment \(2023 Measures No 1\) Bill 2023](#), which was introduced into the House of Representatives on 16 February 2023, seeks to implement the recommendations of the 2019 Independent Review of the Tax Practitioners Board, and proposes amendments to aligns the tax treatment of off-market share buy-backs undertaken by listed public companies with the tax treatment of on-market share buy-backs and to prevent certain distributions that are funded by capital raisings from being frankable. Refer to the *Corporate Tax* section for further details on the measures relating to capital management.
- [Australia Council Amendment \(Creative Australia\) Bill 2023](#), which was introduced into the House of Representatives on 15 February 2023, provides measures to support the implementation of the Government's decision to transfer the functions of Creative Partnerships Australia Limited to the Australia Council, and from a tax perspective, makes consequential amendments to remove Creative Partnerships as a deductible gift recipient.

Since our last update, [Treasury Laws Amendment \(2022 Measures No. 5\) Bill 2022](#), which contains amendments to the list of deductible gift recipient entities, has received Royal Assent.

In addition, [Superannuation Industry \(Supervision\) Amendment \(Annual Members' Meetings Notices\) Regulations 2022](#), which were registered in September 2022, have been disallowed by the Senate. The regulations were to amend the information required to be included in a notice for an annual members' meeting prescribed by the Regulations. Refer to the *Superannuation* section for further details.

## Let's talk

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

### Chris Morris

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

### Michael Bona

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

### Warren Dick

Sydney  
Tax Reporting & Strategy Leader  
+61 (2) 8266 2935  
[warren.dick@pwc.com](mailto:warren.dick@pwc.com)

### Trinh Hua

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

### James O'Reilly

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

### Jason Karametos

Melbourne  
Industries Tax Leader  
+61 (3) 8603 6233  
[jason.karametos@pwc.com](mailto:jason.karametos@pwc.com)

### Kirsten Arblaster

Melbourne  
Tax Leader  
+61 (3) 8603 6120  
[kirsten.arblaster@pwc.com](mailto:kirsten.arblaster@pwc.com)

### Rob Bentley

Perth  
Tax Leader  
+61 (8) 9238 5202  
[robert.k.bentley@pwc.com](mailto:robert.k.bentley@pwc.com)

### Alistair Hutson

Adelaide  
Partner  
+61 (8) 8218 7467  
[alistair.hutson@pwc.com](mailto:alistair.hutson@pwc.com)

### Sarah Hickey

Sydney  
Financial Services Tax Leader  
+61 (2) 8266  
[sarah.a.hickey@pwc.com](mailto:sarah.a.hickey@pwc.com)

### Amy Etherton

Newcastle  
Partner  
+61 (2) 4925 1175  
[amy.etherton@pwc.com](mailto:amy.etherton@pwc.com)

### Sophia Varelas

Melbourne  
National Leader, R&D and Government Incentives  
+61 417 208 230  
[sophia.varelas@pwc.com](mailto:sophia.varelas@pwc.com)

# Other News

## Discretionary trust distribution, reimbursement agreements and Part IVA

The Full Federal Court has confirmed in [Commissioner of Taxation v Guardian ALT Pty Ltd ATF Australian Investment Trust \[2023\] FCAFC 3](#) that there was no “reimbursement agreement” within the meaning of section 100A of the *Income Tax Assessment Act 1936* in a case concerning a private company (whose sole shareholder was a discretionary trust) that was established to receive the benefit of the discretionary trust’s income. In this case, the corporate beneficiary’s entitlement to the trust distribution was left as an unpaid present entitlement (UPE), which was then discharged the following year by firstly drawing on the UPE to pay its tax liability, and then declaring a fully franked dividend to the trust to discharge the remaining UPE. The trustee of the trust then set aside the full franked dividend for the benefit of a non-resident individual, with the company being made presently entitled to the remainder of the trust income for that year. This pattern continued for two more years.

Whilst the Full Court held that there was no relevant “reimbursement agreement” to trigger the application of section 100A, the Commissioner was successful on appeal in his claim that the general anti-avoidance provisions (Part IVA of the *Income Tax Assessment Act 1936*) applied to cancel tax benefits arising from the arrangements with respect to the 2013 income year.

For further details of the original Federal Court judgment, see our [summary](#). It should be noted that ATO guidance on section 100A has now been finalised in [TR 2022/4](#) and [PCG 2022/2](#) – for further details, refer to our [summary of this guidance](#).

## Let’s talk

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

### Chris Morris

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

### Michael Bona

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

### Warren Dick

Sydney  
Tax Reporting & Strategy  
Leader  
+61 (2) 8266 2935  
[warren.dick@pwc.com](mailto:warren.dick@pwc.com)

### Trinh Hua

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

### James O’Reilly

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

### Jason Karametos

Melbourne  
Industries Tax Leader  
+61 (3) 8603 6233  
[jason.karametos@pwc.com](mailto:jason.karametos@pwc.com)

### Kirsten Arblaster

Melbourne  
Tax Leader  
+61 (3) 8603 6120  
[kirsten.arblaster@pwc.com](mailto:kirsten.arblaster@pwc.com)

### Rob Bentley

Perth  
Tax Leader  
+61 (8) 9238 5202  
[robert.k.bentley@pwc.com](mailto:robert.k.bentley@pwc.com)

### Alistair Hutson

Adelaide  
Partner  
+61 (8) 8218 7467  
[alistair.hutson@pwc.com](mailto:alistair.hutson@pwc.com)

### Sarah Hickey

Sydney  
Financial Services Tax  
Leader  
+61 (2) 8266  
[sarah.a.hickey@pwc.com](mailto:sarah.a.hickey@pwc.com)

### Amy Etherton

Newcastle  
Partner  
+61 (2) 4925 1175  
[amy.etherton@pwc.com](mailto:amy.etherton@pwc.com)

### Sophia Varelas

Melbourne  
National Leader, R&D and  
Government Incentives  
+61 417 208 230  
[sophia.varelas@pwc.com](mailto:sophia.varelas@pwc.com)

## Editorial

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

### Jannette Krezel

Senior Manager, Tax Markets  
jannette.krezel@pwc.com

### Lynda Brumm

Principal, Tax Markets & Knowledge  
+61 (7) 3257 5471  
lynda.brumm@pwc.com

### Natalie Stewart

Senior Manager, Tax Markets & Knowledge  
+61 (3) 8603 2336  
natalie.a.stewart@pwc.com

### Jason Dutt

Senior Associate, Employment Taxes  
jason.dutt@pwc.com



[pwc.com.au](http://pwc.com.au)

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