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PwC's Monthly Tax Update

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

November 2020

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Corporate Tax Update

Loss carry-back measures

To give effect to the 2020-21 Federal Budget measure, the Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Act 2020 implements the new loss carry-back measures. These measures are aimed at providing temporary cashflow support to companies that were previously in a tax paying position but now find themselves in a tax loss position.

The measures operate to allow companies with an aggregated turnover of less than AUD5 billion to effectively apply a tax loss for the 2019-20, 2020-21 or 2021-22 income years and offset it against tax paid in relation to the 2018-19 or later income years in the form of a refundable tax offset. Although it applies to a tax loss made as early as the 2019-20 income year, the earliest the offset can be claimed is at the time of lodging the 2020-21 income tax return.

There is no monetary cap on the amount of the tax offset that can be claimed, although there are rules that limit the amount that can be claimed in a year. For further details, refer to this PwC Insight.

R&D tax incentive update

To give effect to the 2020-21 Federal Budget measure to reform the research and development (R&D) tax incentive, the Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Act 2020 is now enacted. Under the new targeted R&D tax incentive, which broadly apply to income years commencing on or after 1 July 2021:

- The R&D expenditure threshold at which the higher R&D offset rate applies is increased from AUD100 million to AUD150 million.
- A refundable R&D tax offset of 18.5 percentage points above the company tax rate will apply to entities with aggregated turnover of less than AUD 20 million.
- The non-refundable R&D tax offset will be based on R&D intensity for entities with aggregated turnover of AUD20 million or more as follows:
  - 8.5 percentage points above the company tax rate for eligible R&D expenditure up to 2 per cent R&D intensity, and
  - 16.5 percentage points above the company tax rate for eligible R&D expenditure of more than 2 per cent R&D intensity.

For further details, refer to our Tax Alert.

ATO releases large corporate groups income tax gap

The Australian Taxation Office (ATO) has released the tax gap information for the 2017-18 year for large corporate groups (i.e. those with gross income of over AUD250 million in a financial year). According to the report, during the 2017-18 year, large corporate groups:

- reported AUD1.9 trillion in gross income
- generated AUD192 billion in taxable income, and
- paid around AUD53 billion in income tax.

The ATO estimated that, including the outcome of income tax reviews for the year, there is a net gap of 3.7 per cent (or AUD2 billion) which reflect the final amounts uncollected after impacts of ATO action. This translates to an assessment that large corporate groups paid over 96 per cent of the theoretical total amount of income tax payable by them in the 2017-18 financial year. This estimate continues the downward trend from the 2012-13 financial year, where the estimated shortfall was 6.4 per cent.

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Employment Taxes Update

FBT and Federal Budget highlights

There were a number of announcements made in the 2020-21 Federal Budget which relate to the application of the fringe benefits tax (FBT) law. This includes:

- a new FBT exemption for employers who provide retraining or re-skilling benefits for their employees whose roles are being made redundant, applicable with effect from 2 October 2020
- the FBT compliance burden is to be reduced by empowering the Commissioner of Taxation to accept existing corporate records rather than requiring declarations from employees, and
- for FBT years commencing from 1 April 2021 (already enacted by Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Act 2020), the following FBT exemptions that apply to small businesses with less than AUD10 million in aggregated turnover will be extended to those with up to AUD50 million aggregated turnover:
  - car parking, and
  - work-related portable electronic devices.

Refer to PwC's Federal Budget analysis on these and more measures.

JobMaker Hiring Credit

It was announced in the 2020-21 Federal Government that a new "JobMaker Hiring Credit" will be available to eligible employers from 7 October 2020 for each additional new job that is created for an eligible employee who is aged 35 years and under. To be eligible, employers must firstly demonstrate that the new employee will increase the overall employee headcount and payroll, using total headcount on 30 September 2020, and total payroll in the three months to 30 September 2020 as the base line.

The legislative detail of this measure is not yet available other than the introduction of legislation (Economic Recovery Package (JobMaker Hiring Credit) Amendment Bill 2020) to establish the legislative framework. In the interim, refer to the Treasury Fact Sheet for the proposed eligibility and approach.

COVID-19 and further payroll tax support

Since our last update, further COVID-19 support has been provided to assist some employers in relation to their applicable State or Territory payroll taxes:

- The New South Wales Government has announced that from 26 October 2020 all businesses will be able to establish a Stimulus Payment Arrangement which will allow them to defer payroll tax liabilities from the 2019-20 annual reconciliation and any monthly liabilities for the July, August and September 2020 return periods over 24 months and make weekly, fortnightly or monthly payment arrangements with Revenue NSW (with a 12 month interest free period).

- The Tasmanian Government announced that the payroll tax exemption for JobKeeper payments has been extended to 28 March 2021.
- The Northern Territory Government announced that payroll tax relief for eligible businesses has been extended for all payroll tax returns between March 2020 and April 2021.
- The South Australian Government has announced that businesses with grouped annual wages of less than AUD4 million will be granted an extra three-month payroll tax waiver for periods until the November 2020 return; and businesses with grouped annual wages of more than AUD4 million can apply for further payroll tax deferrals for liabilities due in October to December 2020 until 14 January 2021.
- In the ACT, Taxation Administration (Payroll Tax — Businesses Not Permitted to Operate) COVID-19 Exemption Scheme Determination 2020 exempts eligible employers from payroll tax on wages whose businesses are not permitted to operate due to ACT Government restrictions from 1 September 2020 to 30 November 2020.

For the latest up-to-date information on payroll tax relief in ACT and other States and Territories, refer to our State Tax COVID-19 updates webpage.

Updated PAYG withholding schedules

Following the passage of the Federal Government's personal income tax cut plan (Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Act 2020) as announced in the October 2020 Budget, the Australian Taxation Office (ATO) has released the updated PAYG withholding schedules that can apply to relevant payments made from 13 October 2020. However, in recognition of the required system changes needed, employers have been given until 16 November 2020 to update their payroll systems to reflect these changes.

Employee or contractor?

The AAT has found in MWWD and Commissioner of Taxation [2020] AATA 4169 that the party contracting with the taxpayer was not an employee in the period under review. In this case, the company provided repair and maintenance services to businesses operating a particular type of machinery. Some of the service technicians were employed by the company under conventional contracts of employment, while other technicians were described as independent contractors. The issue under consideration was whether in respect of a particular technician's arrangement the company was liable to pay superannuation guarantee. After considering the facts, including that the technician performed all of the work himself, the applicable contract made it clear he had the right to delegate the work to others and there was no reason on the evidence to suppose the company would have unreasonably prevented the technician from taking on an apprentice, hiring an employee or engaging a subcontractor, it was concluded that it was not a contract "wholly or principally for the labour of the person...".

Late contributions unable to offset superannuation guarantee charge

The AAT in Jordyn Properties Pty Ltd and Commissioner of Taxation (Taxation)[2020] AATA 3805 held that late contributions to a superannuation fund were unable to be offset against superannuation guarantee charges (SGC) payable after the SGC notice of assessment was issued.

The Tribunal concluded that it was possible to offset late contributions for the relevant quarters between 1 April 2016 and 31 December 2016 where these contributions were made before the time (10 November 2017) that the notice of assessment for SGC charges payable was issued, however, it was not possible to offset the SCG thereafter. This was because section 23A(4A) of the *Superannuation Guarantee (Administration) Act 1992* (Cth) only allows for an assessment to be amended if a valid election was made for late contributions to offset SGC charges prior to the SCG notice of assessment. Accordingly, any late contributions made after 10 November 2017 could not be offset against SCG charges due during the relevant period.

Discretionary payment connected with employee's termination

The Administrative Appeals Tribunal (AAT) in VGDW and Commissioner of Taxation (Taxation) [2020] AATA 3745 held that payments made to an employee following the employee's termination of employment were made in consequence of that termination and therefore considered a 'genuine redundancy payment' within the meaning of section 83-175 of the *Income Tax Assessment Act 1997* (Cth).

Under the employee's contract of employment, it was stipulated that where the employer chooses to pay the employee their commission after termination, each payment made will be ex gratia. The Commissioner argued that the ex gratia payment was merely a payment of what the taxpayer would have received under the contract of employment if he had remained employed, and there was no causal connection between the

payment and the termination, meaning that it could not be taxed as a genuine redundancy payment.

The Tribunal held that there was a causal connection between the termination and the payment because under the terms of the contract, the firm's obligation to pay a departing employee any amount ceased upon termination. Therefore, the decision to make the payment was referable to the employee's termination. It did not make a difference that the quantum of the payment was calculated by applying a formula to the amount of fees the employee had generated, so the payout mirrored what they would otherwise have been paid as salary if the contract had continued.

JobKeeper update

Since our last update, the ATO has issued an addendum to Law Companion Ruling LCR 2020/1 to clarify that the Ruling addresses the original decline in turnover test introduced by the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*. It does not, however, cover in detail the actual decline in turnover test which applies to JobKeeper fortnights from 28 September 2020, and includes minor updates to reflect legislative amendments to the original decline in turnover test following the amendments to extend the JobKeeper program beyond 27 September 2020 according to Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 8) 2020.

The Coronavirus Economic Response Package (Payments and Benefits) Alternative Decline in Turnover Test Amendment Rules 2020 was issued to amend the *Coronavirus Economic Response Package (Payments and Benefits) Alternative Decline in Turnover Test Rules (No. 2) 20*20 which sets out alternative decline in turnover tests for the purposes of the JobKeeper Rules for JobKeeper fortnights beginning on or after 28 September 2020. This latest instrument adds an additional alternative decline in turnover test that can be applied by entities that temporarily ceased trading and were not trading for some or all of the relevant comparison period, due to events or circumstances outside of the ordinary course of business.

For the latest up-to-date information, refer to our JobKeeper payments webpage.

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Global Tax Update

Latest news from international tax and transfer pricing

Corporate tax residency

In the 2020-21 Federal Budget, the Government announced that it would reform the current corporate tax residency rules to provide that a foreign incorporated company will be treated as an Australian tax resident if it has a 'significant economic connection to Australia'. This test will be satisfied where both the company's core commercial activities are undertaken in Australia and its central management and control is in Australia. This measure is proposed to apply from the first income year after the date of Royal Assent of the enabling legislation which has not yet been released. However, taxpayers will have the option of applying the new law from 15 March 2017 (being the date on which the Australian Taxation Office (ATO) withdrew its Taxation Ruling TR 2004/15).

Subsequently, the Board of Taxation's report to the Government on the corporate tax residency rules

were released. The key recommendation of the Board for a foreign incorporated company and the 'significant economic connection to Australia' requirement was taken up by the Government in the Budget. The Board also recommended that in respect of the requirement for "core commercial activities" of a company to be conducted in Australia, guidance should be provided in the legislation and extrinsic materials, and also supplemented with administrative practical guidance that includes the treatment of 'holding companies' and the need for a de minimis threshold. The Board also recommended that any new rules should be subject to a Government review three years after their enactment.

In relation to other aspects of corporate tax residency, the Board recommended that:

- the 'voting power test' should be retained at this time and that any change from the wording "carries on business" to referencing core commercial activities in the 'central management and control test' should likewise be applied to the 'voting power test'
- basing residency solely on a place of incorporation test should not be adopted, and
- it is not appropriate to adopt a corporate residency test based on place of management or place of effective management.

Treaties update

In the 2020-21 Federal Budget, it was also announced that the list of jurisdictions that have an effective information sharing agreement (EOI) with Australia will be updated with effect from 1 July 2021 to include Dominican Republic, Ecuador, El Salvador, Hong Kong, Jamaica, Kuwait, Morocco, North Macedonia and Serbia. Kenya will be removed from the list. Residents of a listed jurisdiction are eligible to access the reduced Managed Investment Trust (MIT) withholding tax rate of 15 per cent on certain distributions, instead of the default rate of 30 per cent. Furthermore, in the Budget Factsheet, there is an indication that the Government will support the recovery from COVID-19 by modernising and expanding our tax treaty network.

Furthermore, the ATO has issued synthesised texts of Australian's tax treaties that are modified by the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (MLI) for the following treaties:

- Agreement between Australia and the Czech Republic
- Australia and the Republic of Korea, and
- Australia and the Russian Federation.

Practice Statement on "purpose test" in treaties

The ATO has issued Law Administration Practice Statement PS LA 2020/2 which provides guidance to ATO staff on the administrative process of applying a principal or main purposes test included in any of Australia's tax treaties. The "purpose test" in this context applies to the following:

- the principal purposes test under paragraph 1 of Article 7 of the MLI as it applies to a Covered Tax Agreement (CTA)
- a principal purposes test in an Australian tax treaty that is not a CTA, and
- a main purposes test in an Australian tax treaty that is yet to be, or will not be, modified by the MLI.

Of particular interest in this guidance is the framing questions and documentation that may be relevant when a taxpayer is considering the application of a purpose test. The ATO guidance notes that the questions and documentation that may be relevant will depend on which purpose test is being considered and whether the relevant arrangement or transaction involves treaty shopping, or the conversion of one type of income into another, or other changes in the circumstances in which income is derived in order to obtain a treaty benefit.

Foreign resident CGT withholding – mortgage transaction

The Commissioner has issued a legislative instrument to vary to nil the amount that would otherwise have to be paid to the Commissioner under the foreign resident capital gains tax (CGT) withholding rules when a person acquires land in a transaction where a mortgagee exercises a power of sale over the land owned by a foreign resident mortgagor and the sales proceeds are insufficient to discharge the mortgage. In the absence of a variation, either separately sought or as made under this instrument, when a person acquires land in such a transaction, an amount is required to be paid to the Commissioner equal to 12.5 per cent of the purchase price, where the value of the land exceeds AUD750,000.

Specifically, the variation to nil will apply to the land transaction in the following circumstances:

- the mortgagee who is an authorised deposit-taking institution under section 5 of the *Banking Act 1959* exercises a power of sale over the land
- the mortgagee has determined that the residue from the sale proceeds will be zero or less than zero; and

- the mortgagee has provided the transferee with a written declaration stating that the amount to withhold is varied to nil under this instrument.

Digitalisation of the economy

The Organisation for Economic Co-operation and Development (OECD)/G20 Inclusive Framework on base erosion and profit shifting (BEPS) has released a statement on its progress on work in developing a consensus-based long term solution to the challenges arising from the digitalisation of the economy. The Inclusive Framework has also issued its reports on the Pillar One (focused on nexus and profit allocation) and Pillar Two (focused on a global minimum tax) Blueprints.

The Inclusive Framework is working towards an agreement on these by mid-2021 following agreement to swiftly address the remaining issues and to resolve technical issues, develop model draft legislation, guidelines, and international rules and processes as necessary to enable jurisdictions to implement a consensus based solution.

The latest OECD economic impact analysis based on illustrative assumptions on the design and parameters of Pillar One and Pillar Two indicates a gain of up to 3.2% percent of global corporate income tax revenues, or USD 81 billion of revenue gains annually.

For further insights into the key aspects arising from the Pillar One and Pillar Two Blueprints, refer to this global PwC Insight.

Taxing virtual currencies

With increased interest in virtual currencies, this asset class is now getting serious attention from tax policy makers and regulators. The OECD has released a paper on an Overview of Tax Treatments and Emerging Tax Policy Issues which provides key insights and a number of considerations to help policymakers wishing to improve their tax policy frameworks for virtual currencies. While the report does not provide specific recommendations, it highlighted a few key areas for further considerations:

- the need for clearer, consistent and regularly updated guidance for this rapidly emerging asset class
- the importance of simplified rules that take into account the different use cases and the types of users, and
- the benefits of better alignment of the existing and future tax guidance with the broader policy objectives.

Staying on the forefront of these emerging issues is key for any company navigating these issues. A PwC Tax Insight publication summarises the key issues arising from this paper

Corporate taxation and investment of multinational firms

This OECD paper explores the effect of corporate taxes on the investment of multinational enterprises (MNEs), and whether this effect differs across MNE groups depending on their profitability rate. The report shows that analysis conducted on a cross-country panel of MNE entities confirms an earlier finding that MNE investment in a jurisdiction is negatively affected by effective corporate tax rate increases in that jurisdiction. However, it also showed that entities belonging to groups with negative profitability or relatively high profitability rates are found to be relatively less sensitive than those belonging to groups with lower but positive profitability rates.

US Presidential debate highlights differing approaches to tax policy

In the lead up to the United States presidential election on 3 November 2020, the first presidential debate between President Trump and former Vice President Biden demonstrated the many differences between the two candidates on tax policy and other issues. This PwC Insight provides a brief overview of key business and individual tax proposals offered by President Trump and former Vice President Biden. It also includes a side-by-side comparison of current-law tax provisions and the candidates' tax proposals.

2021 Dutch tax package

The 2021 Dutch tax package presented on 15 September 2020 contains measures which are of particular relevance to multinationals including modifications to the corporate income tax rate, clarifications of the interest deduction limitation rules, a restriction in the liquidation loss regime, and the announcement of a wage tax discount for investments in the Netherlands. For further details, refer to this PwC Insight.

2021 French draft budget

The French government on 28 September 2020 released its draft budget for fiscal year 2021 which focuses on economic recovery and job creation. Notably, it includes tax measures designed to increase the attractiveness of the French business environment and local companies' competitiveness. The French government decided not to include any changes to the previously enacted and already scheduled corporate income tax reduction in the draft budget. Consequently, the modifications do not impact the 26.5 per cent and 27.5 per cent tax rates scheduled for tax years beginning on or after 1 January 2021. For further details, refer to this PwC Insight.

Extended small business excise concessions

Measures to give effect to the 2020-21 Federal Budget proposal to increase the eligible aggregated turnover threshold from AUD10 million to AUD50 million for various small business entity concessions including in relation to excise have now been enacted (Treasury Laws Amendment (A Tax Plan of the COVID-19 Economic Recovery) Bill 2020). Specifically, eligible entities with less than AUD50 million aggregated turnover will be eligible to defer settlement of excise duty for eligible goods and excise-equivalent customs duty to a monthly reporting cycle. These amendments apply in relation to applications made under section 61C(1) of the *Excise Act 1901 (Cth)* and section 69(1) of the *Customs Act 1901 (Cth)* respectively on or after 1 July 2021

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Indirect Tax Update

Online BASchool

For most businesses, managing the goods and services tax (GST) has increasingly become a burden. This means it is more important than ever to get it right, first time and every time. PwC has recently released its online training platform BASchool which is designed to support those who prepare, review or approve the Business Activity Statement. The course features all you need to know on managing liabilities and claiming credits, as well as navigating special rules and preparing returns. In addition, there are specialist sessions available on areas such as property, financial supplies and dealing with the Australian Taxation Office (ATO).

You can register for the BASchool training modules here, or for any queries or questions please email baschool@pwc.com.au.

Expansion of GST small business concessions

Measures to give effect to the 2020-21 Federal Budget proposal to increase the eligible aggregated turnover threshold from AUD10 million to AUD50 million for various small business entity concessions including the ability to use a simplified accounting method for the purposes of GST have now been enacted (Treasury Laws Amendment (A Tax Plan of the COVID-19 Economic Recovery) Bill 2020). Under these new measures, an eligible entity may account for GST on either a cash basis or a non-cash basis (accruals) from 1 July 2021.

Third party adjustment note information requirements

The ATO has made a determination (A New Tax System (Goods and Services Tax) Third Party Adjustment Note Information Requirements Determination) that sets out the information requirements for a third party adjustment note issued under subsection 134-20(1) of *A New Tax*

System (Goods and Services Tax) Act 1999 (Cth) (GST Act). The determination, which applies from 1 October 2020, provides that a third party adjustment note must contain enough information to enable the following to be clearly ascertained:

- the payer's identity, as specified in the in a form other than the payer's ABN.
- the payee's identity or the payee's ABN
- a description of the thing that the payee acquires (including the quantity) and to which the payment relates
- the amount of the payment that represents a third party payment under Division 134 of the GST Act
- the amount of the payer's decreasing adjustment, and
- the date the adjustment note is issued.

The determination repeals *A New Tax System (Goods and Services Tax) Third Party Adjustment Note Information Requirements Determination (No. 1) 2010*.

GST and transaction accounts

The ATO has issued the following guidance, which apply from 1 October 2020, in relation to various GST issues associated with transaction accounts:

- GSTR 2020/1 which deals with the determination of the creditable purpose of acquisitions in relation to transaction accounts provided by an Australian Authorised Deposit-taking Institution (ADI), and
- GSTD 2020/1 which considers the extent to which the supply of a transaction account is GST-free where the account can be used outside of Australia.

A 'transaction account' in this context refers to a supply of an interest in or under an account covered by table item 1 of subsection 40-5.09(3) of the *A New Tax System (Goods and Services Tax) Regulations 2019* (GST Regulations) and includes accounts such as everyday, savings, cheque, deposit, transaction accounts, term deposit accounts and loan or mortgage offset accounts. It does not include accounts that are primarily also a supply of a credit arrangement or right to credit, purchased payment facilities or accounts denominated in foreign currencies.

GSTR 2020/1 considers the application of the Commissioner of Taxation's views on determining the extent of creditable purpose for financial supply providers within the context of acquisitions made in a transaction accounts business. Particularly, the Ruling focuses on whether acquisitions are partly for a creditable purpose because they have a relevant connection to the account provider making taxable supplies of interchange services. This Ruling also provides illustrative examples.

GSTD 2020/1 concludes that a supply of a transaction account is GST-free to the extent the account holder's effective use or enjoyment of the transaction account occurs outside of Australia. The account holder's presence outside of Australia is integral to determine the GST-free extent of the transaction account supply under table item 3 or table item 4(a) of subsection 38-190 of the GST Act.

Apportionment of acquisitions relating to transaction accounts

The ATO has released guidance in the form of an update to its Practical Compliance Guideline PCG 2019/8 which deals with its compliance approach for GST apportionment of acquisitions that relate to certain financial supplies. Specifically, new Schedule 2 of the Guideline sets out the framework for which the ATO will use to assess the risk associated with methods to determine the extent of creditable purpose of acquisitions relating to the supply of transaction accounts. It applies to Australian ADIs that supply an interest in, or under, an account covered by table item 1 in section 40-5.09(3) of the GST Regulations, i.e. 'transaction accounts'.

The updated Guideline applies with effect from the start of the first tax period commencing on or after 1 October 2020.

Input tax credits for home loan lenders relating to securitisation arrangements

The ATO has released an addendum to GSTR 2004/4 which deals with the GST aspects of an assignment of payment streams including under a typical securitisation arrangement. The update provides guidance on determining the creditable purpose of acquisitions made by a home loan originator that makes financial supplies of home loans and assignments of the related loan receivable. Specifically, it provides clarification on when home loan lenders are entitled to input tax credits on acquisitions relating to loans that are part of a securitisation arrangement. The Addendum applies on and from 25 September 2020.

Vacant land sale subject to GST

The Administrative Appeals Tribunal has found that the taxpayer in San Remo Heights Pty Ltd and Commissioner of Taxation [2020] AATA 4023 was liable for GST on sales of two lots of vacant land, as it was not satisfied the sales were not in the course or furtherance of an enterprise carried on by the

company. The taxpayer company operated a sheep grazing business and also held various rental properties, but had argued that it was not liable for GST on the vacant land sales because they were not made in the course or furtherance of either of those enterprises or any other enterprise. The Tribunal was not satisfied that the company established that the series of activities in connection with the vacant land did not constitute an enterprise at the relevant times and that the sales of the two lots were in the course or furtherance of that series of activities.

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Personal Tax Update

Personal income tax cuts apply from 1 July 2020

The 2020-21 Federal Budget announcement to bring forward personal income tax cuts has now been enacted (Treasury Laws Amendment (A Tax Plan For The COVID-19 Economic Recovery) Act 2020) and applies with effect from 1 July 2020. Specifically, under the new measures:

- certain income tax thresholds that were previously legislated to increase for the 2022-23 and 2023-24 income years now apply from 1 July 2020 (e.g. the 32.5 per cent marginal tax rate will apply to taxable income from AUD45,000 to AUD120,000)
- the low income tax offset (LITO) was increased from a maximum amount of AUD455 to AUD700 per annum; and
- the low and middle income tax offset (LMITO) continues to apply for the 2020-21 income year, but will cease to be available from the 2021-22 income year onwards.

Visit the PwC Federal Budget webpage for further technical analysis and insights.

No CGT on granny flat arrangements

In the lead up to the Federal Budget it was announced that there will be a targeted capital gains tax (CGT) exemption for granny flat arrangements where there is a formal written agreement entered into because of family relationships or other personal ties. Under the proposal, CGT will not apply to the creation, variation, or termination of a formal written granny flat arrangement providing accommodation for older Australians or people with disabilities. The measure is proposed to commence as early as 1 July 2021, subject to the passing of legislation.

The announcement follows the release of the Board of Taxation's report on its Review of Granny Flat Arrangements.

'Shortcut' method for working from home expenses due to COVID-19 extended

Australian taxpayers have several options to calculate their tax deductions in respect of working from home and incurring additional running expenses in relation to their income-producing activities. This includes the fixed rate of 52 cents per hour worked from home (to cover home office electricity, gas (heating), cleaning and the decline in value of home office items such as furniture and furnishings) and/or calculating the actual expenses whilst working from home or the most recent 'shortcut' method (which has applied since 1 March 2020).

The Australian Taxation Office (ATO) has extended its 'shortcut' method of a fixed rate of 80 cents per

hour for individuals claiming deductions for additional running expenses incurred whilst working from home due to COVID-19 up to 31 December 2020 (see the updated Practical Compliance Guideline PCG 2020/3).

Depending on the COVID-19 evolvement, the ATO may extend this method beyond 31 December 2020.

UK citizen on working holiday visa found to be an Australian tax resident

The Administrative Appeals Tribunal (AAT) in Gurney and Commissioner of Taxation (Taxation) [2020] AATA 3813 found that a citizen of the United Kingdom (UK) who was in Australia on a working holiday visa, was a tax resident of Australia while he was in Australia for ten months from February to November 2016. The individual, who had the intention to stay and work indefinitely in Australia, had previously applied for a long-term skilled entrant visa before withdrawing his application and applying for a working holiday visa instead. The taxpayer had a familial connection with England while he was present in Australia with his parents and a sibling for whom he did not have responsibility located there, he had nominal residual investments in the UK, and his life was in Australia (i.e he worked in Australia and was in a relationship with someone who was with him in Australia) and he intended to make his life in Australia on an indefinite basis but was unable to alter his visa and employment arrangements.

The AAT found that the taxpayer was a tax resident of Australia for the relevant period on the basis that the individual had the intention to live and remain indefinitely in Australia, and he was present in Australia for a sufficiently lengthy period.

Australian resident despite seven-month overseas employment

The AAT in Arjunan and Commissioner of Taxation (Taxation) [2020] AATA 4024 (13 October 2020) found that a taxpayer was a tax resident of Australia while he was in Kuwait for seven months and had the intention to work there for up to ten years. The taxpayer left Australia in September 2015 while his family remained in Brisbane. Until his return in Australia in March 2017, the taxpayer received foreign income. During the 2016 tax year, the taxpayer spent 187 days in Australia. The Commissioner considered the taxpayer as an Australian tax resident and assessed his foreign income. The AAT affirmed the Commissioners' decision on the basis that various factors indicated he maintained an intention to return to Australia and an attitude that Australia remained his home during the relevant tax year. Moreover, the AAT did not find that the taxpayer had a connection with Kuwait other than his short-term employment contract. The taxpayer had neither abandoned his residence in Australia during 2016 nor established a permanent place of abode in Kuwait.

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State Taxes Update

WA 2020-21 Budget

The Western Australian Treasurer handed down the state's Budget for 2020-21 on 9 October 2020. Other than the previously announced COVID-19 payroll tax support measures, there have been no significant changes to the existing State tax framework, and no additional commentary in relation to areas such as tax reform, resource royalty changes or capital recycling.

The Budget includes, among other things, the following key measures:

- A record AUD27.1 billion of infrastructure investment over the four year forward period, including AUD5.5 billion of new investment under the WA Recovery Plan.

- AUD1 billion of relief for households delivered primarily through the AUD600 Household Electricity Credit and freezes to household fees and charges.
- AUD974 million of small to medium business relief under (previously announced) COVID-19 relief measures, such as bringing forward an increase to the payroll tax exemption threshold to AUD1 million, a four month payroll tax waiver to small and medium sized business from 1 March to 30 June 2020, and a number of other grants and offsets (such as the Land Tax Assistance grant program).
- AUD475 million of support for the housing construction industry, including an additional AUD30 million extension to the successful AUD20,000 Building Bonus grant, AUD8.2 million for the previously announced extension of the 75 per cent off-the-plan transfer duty rebate to multi-tiered developments.
- Announcements to accelerate and continue a number of previously announced significant infrastructure projects.

QLD duties exemption for small business restructures

The Queensland Commissioner of State Revenue has issued Public Ruling DA000.16.1 which explains when the exemption from transfer duty and vehicle registration duty will apply to certain transactions relating to particular small business restructures.

South Australian duties relief on vacant land for bushfire victims

RevenueSA has updated Revenue Ruling SDALT001[V2] which sets out the details of the administrative arrangements now in place to provide relief from stamp duty, land tax and other related charges to those impacted by the Bushfires in South Australia. This includes an expansion to allow stamp duty relief for the purchase of vacant land on which a replacement home will be built within three years from the date of purchase as a result of the Bushfires and will be available up to 20 January 2024. For replacement homes or land valued above AUD1 million, the duty relief is capped at AUD48,830, with the balance of the duty payable.

South Australia land tax relief

Revenue SA has advised that applications are now open for transitional relief for taxpayers who have an increase in their South Australian Land Tax Assessment for 2020-21, 2021-22 and 2022-23 as a result of the changes in the aggregation of land which came into effect from 1 July 2020. Relief applies if a Land Tax Assessment in 2020-21, 2021-22 or 2022-23 has increased by:

- greater than AUD2,500; and
- less than or equal to AUD102,500.

Applications for 2020-21 Land Tax Assessments must be received by 31 March 2021.

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Superannuation Update

Superannuation Federal Budget proposals

A number of measures were announced in the 2020-21 Federal Budget in relation to superannuation. This is part of the *Your Future, Your Super package* which will implement a number of key recommendations from the Productivity Commission review into superannuation and the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. The key reforms include:

- Systems developed by the Australian Taxation Office (ATO) so that new employees will be able to select a superannuation product from a table of MySuper products through the YourSuper portal;
- stapling an existing superannuation account to a member to avoid the creation of a new account following the change in employment;

- from July 2021, the Australian Prudential Regulation Authority (APRA) will conduct benchmarking tests on the net investment performance of MySuper products, with products that have underperformed over two consecutive annual tests prohibited from receiving new members until a further annual test that shows they are no longer underperforming. This will be extended to non-MySuper accumulation products from 1 July 2022; and
- improved transparency and accountability of superannuation funds by strengthening obligations on superannuation trustees to ensure their actions are consistent with members' retirement savings being maximised.

Satisfying work test under JobKeeper

APRA has released guidance concerning the interaction of JobKeeper with the "work test" which applies for purposes of a fund's acceptance of voluntary superannuation contributions made by individuals aged 65-74 years.

APRA's view is that where an employer is receiving the JobKeeper wage subsidy for an individual, the individual is taken to be 'gainfully employed' for the purpose of the 'work test', even if that individual has been fully stood down and is not actually performing work.

SMSFs and penalties under SISA

The ATO has issued a Law Administration Practice Statement PSLA PSLA 2020/3 which provides guidance to trustees of self-managed superannuation funds (SMSF) on when an entity becomes liable to one or more administrative penalties under the *Superannuation Industry (Supervision) Act 1993* (SISA). It also covers off on the Commissioner's remission considerations, and objection, review and appeal rights relating to the remission decision. The Practice Statement also includes a range of examples of various contraventions of the SISA and whether or not a penalty would apply and/or be remitted.

Reporting and paying death benefits

The ATO has clarified how a fund should report death benefit rollovers following the recent retrospective law changes that applied from 1 July 2017 to ensure that any untaxed element determined in accordance with section 307-290 of the *Income Tax Assessment Act 1997* (ITAA 1997) is not included in the receiving fund's assessable income. Specifically, the Commissioner confirms that the transferring fund is still required to apply the provision to determine if there is an untaxed element in the lump sum being rolled over where they have claimed, or will claim in relation to the benefit, deductions for premiums for certain types of insurance. However, where a dependant beneficiary rolls over a death benefit, it is the Commissioner's view that there is insufficient connection between any deductions claimed by the transferring fund and any lump sum benefits paid by the receiving fund from the dependant beneficiary's new pension interest, for section 307-290 of the ITAA 1997 to apply to any of those subsequent payments.

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Legislative Update

Federal Parliament resumed sittings on 6 October 2020, which was also the day the 2020-21 Federal Budget was handed down.

Since our last update, the following new Commonwealth tax and superannuation legislation has been introduced into Federal Parliament:

- Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Bill 2020, which was introduced into House of Representatives on 7 October 2020 and subsequently enacted, amends the income tax law to give effect to a range of 2020-21 Federal Budget measures including amendments to:
  - reduce the tax payable by individuals in the 2020-21 income year and later income years by bringing forward to 2020-21 the changes to income tax thresholds that were to commence in the 2022-23 income year, bring forward the increase in the amount of the low income tax offset to AUD700 to the 2020-21 income year and retain the low and middle income tax offset for the 2020-21 income year;
  - allow corporate tax entities with an aggregated turnover of less than AUD5 billion to carry back a tax loss for the 2019-20, 2020-21 or 2021-22 income year and apply it against tax paid in a previous income year as far back as the 2018-19 income year;
  - enable eligible entities with an aggregated turnover of AUD10 million or more and less than AUD50 million to access a range of small business entity tax concessions in relation to deductions, amended assessment periods, fringe benefits tax, accounting for goods and services tax and payment of excise;
  - reform the research and development (R&D) tax incentive; and
  - allow businesses with an aggregated turnover of less than AUD5 billion to deduct the full cost of eligible depreciating assets that are first held, and first used or installed ready for use for a taxable purpose, between the 2020 budget time and 30 June 2022 and also deduct the full cost of improvements to these assets and to existing eligible depreciating assets made during this period.
- Economic Recovery Package (JobMaker Hiring Credit) Amendment Bill 2020, which was introduced into the House of Representatives on 7 October 2020, establishes the legislative framework (which will be by Rules, yet to be released) for the new JobMaker Hiring Credit program announced in the 2020-21 Federal Budget
- Export Market Development Grants Legislation Amendment Bill 2020, which was introduced into the House of Representatives on 7 October 2020, aims to ensure that export market development grants (EMDG) funding is provided to those small to medium enterprises where it will have the greatest impact and also to modernise and simplify the scheme.

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Other News

Extension of small business tax concessions

As part of the 2020-21 Federal Budget, it was announced that businesses with an aggregated turnover of between AUD10 million and AUD50 million will have access to existing small business tax concessions which previously only applied to businesses with turnover of less than AUD10 million. These measures, which have since been enacted by the Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Act 2020) include fringe benefits tax concessions (see Employment Taxes section in this update) and indirect tax concessions (see Indirect Taxes section in this update), in addition to the following income tax measures:

- For capital expenditure incurred on or after 1 July 2020, an immediate deduction to apply to certain start-up expenses relating to the structure or operation of a business in the income year in which the expenditure is incurred, rather than over five years as is the case for other businesses.
- From 1 July 2020, an immediate deduction to apply to certain prepaid expenditure relating to a service that will be provided across income years for a period of 12 months or shorter, but that ends in the following income year.
- For income years starting on or after 1 July 2021, ability to elect to have PAYG instalments calculated for them by the Australian Taxation Office (ATO) as a quarterly payer who pays on the basis of GDP-adjusted notional tax.
- For income years starting on or after 1 July 2021, ability to use simplified trading stock rules which allow the taxpayer to choose not to conduct a stocktake of trading stock if the difference between the value of stock on hand at the start of the year and the reasonable estimate of the value of stock at the end of the year is not more than AUD5,000.
- For assessments for income years starting on or after 1 July 2021, a two-year amendment period will apply instead of the current four-year period.

For guidance on determining aggregated turnover for the purposes of accessing these and other concessions, refer to this Tax Alert.

Instant asset write-off

To give effect to the Federal Budget measure announced on 6 October 2020, the Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Act 2020 implements the enhanced instant asset write-off which is aimed at incentivising businesses to undertake capital expenditure.

The measures are available to businesses with an aggregated turnover of less than AUD5 billion (refer to this Tax Alert) and will allow a deduction for the full cost of eligible depreciating assets that are first acquired after 7.30pm AEDT on 6 October 2020 and are first used or installed ready for use before 30 June 2022. Generally, to be eligible for the temporary full expensing incentive, a depreciating asset must be located in Australia and principally used in Australia for the principal purpose of carrying on a business and must not be excluded from the capital allowance rules in Division 40 of the *Income Tax Assessment Act 1997* (Cth) such as a building or other capital works or subject to the low value or software development pools. It also must not be a second-hand asset (other than certain intangible assets) or where aggregated turnover is under AUD50 million. Temporary full expensing also applies to allow entities to deduct the full amount of the second element of cost of both post-2020 Budget depreciating assets and existing depreciating assets. Furthermore, an entity cannot deduct the cost of a depreciating asset (including any second element of cost) under the temporary full expensing incentive if, before the 2020 Budget time, the entity has already entered into a commitment to incur the cost in relation to the asset.

Businesses with aggregated turnover between AUD50 million and AUD500 million can still deduct the full cost of eligible second-hand assets costing less than AUD150,000 that are purchased by 31 December 2020 under the existing instant asset write-off. However, these eligible businesses will have an extra six months until 30 June 2021 to first use or install those assets.

PAYG instalments can be varied without penalties and interest

As part of its response to the business impacts of COVID-19, the ATO has advised that it will not apply penalties or interest where a taxpayer incorrectly varies their pay as you go (PAYG) instalments for the 2020-21 income year, provided that the taxpayer has made its best attempt to estimate.

The penalty remission does not apply where the taxpayer knowingly varies their rate excessively and interest charges will still apply to outstanding PAYG instalment balances.

Land was an active asset eligible for CGT small business concession

The Full Federal Court in Eichmann v FC of T [2020] FCAFC 155 held that land used by the taxpayer was an active asset of the business for the purposes of determining eligibility for the small business capital gains tax (CGT) concession.

The taxpayer operated a family business of building, bricklaying and paving. The land which was sold by the taxpayer was adjacent to their family home and used for the purposes of storing work equipment, tools, work vehicles, trailers and materials.

The Court held that the small business CGT concession provisions should be interpreted broadly to give effect to the purposes of the rules. Applying this broad interpretation, the Court held that it was sufficient for the asset (being the land) to be "used at some point in the course of the carrying on of an identified business". In this respect, there was no requirement for the use of the relevant asset to take place within the day to day or normal course of the carrying on of a business nor that there be a direct link between the asset and the production of assessable income. Furthermore, the Court disagreed with the primary judge's characterisation of the use of the appellant's property as "preparatory" in nature – instead it concluded that the secure storage of the tools and materials of the business on a daily basis was very much part of the course of the carrying on of that business.

Full Federal Courts holds that lump sum payments to doctors were on capital account

The Full Federal Court in Commissioner of Taxation v Healius Ltd [2020] FCAFC 173 held that lump sum payments made to doctors under arrangements to conduct their medical practice from a medical centre for an agreed period, usually five years, were not deductible to the taxpayer who operated the medical centres.

The operators ran medical centres at a number of locations. To secure doctors to join their group, they would make upfront payments to doctors to acquire their existing practice, secure their services and restrict the ability of those doctors to operate within a specified radius.

The operators of the centres would advertise the centres within its group and manage the banking of fees. In return, the operators of the medical centres would receive 50 per cent of the fees generated by those doctors.

The Court held that the upfront payments had an enduring character in that they established the structures enabling the operators to generate fees and, by securing the sole services of doctors, contributed to the goodwill of the group. It was therefore found that the lump sum payments were on capital account and not deductible. The payments were found to not be simply payments to secure medical practitioners as customers but instead they were payments made for the practitioner (a) to cease operating an existing practice (or otherwise practising independently of the Centre); (b) to commence trading as part of the Centre in a manner that conformed to the taxpayer's mode of practice; and (c) during the arrangements and thereafter, accept a restraint on establishing a medical practice that would compete with the centre.

Non-lodgment advice for businesses

The ATO has advised that their systems will no longer accept non-lodgment advices for income tax returns, including Return not necessary (RNN) or Further return not necessary (FRNN) where the business has an active ABN for any part of the financial year. If an entity has an active ABN and has had no business income to report, they must still lodge an income tax return for the financial year.

It will be important to consider whether any dormant businesses, particularly where they are not part of an income tax consolidated group, should cancel their ABN to reduce tax compliance costs.

Payment times reporting obligations

New legislation (Payment Times Reporting Act 2020) requires certain large businesses and large government enterprises with an annual total income of over AUD100 million to publicly report on their payment terms and practices for their small business suppliers each six months of an income year. The new rules, which commence on 1 January 2021, will require reporting entities to prepare bi-annual reports to the Payment Times Regulator. The Payment Times Report will include aggregated data on the reporting entities payment terms and practices, identify the entity, and other relevant information, will apply in respect of payment time. The Department of Industry, Science, Energy and Resources is developing guidance and tools to assist businesses meet the scheme's reporting requirements and is expected to contact businesses before the end of 2020 with details about how to meet the reporting requirements. In the meantime, please reach out to your PwC contact who can assist you with assessing your obligations, including developing processes and systems in readiness for the new rules.

Exposure draft on new requirement for DGR status

The Federal Treasury has released an exposure draft legislation and explanatory material for a proposed reform announced in the 2017-18 Mid-Year Economic and Fiscal Outlook to require certain non-Government deductible gift recipients (DGRs), other than an ancillary fund, to be a charity registered with the Australian Charities and Not-for-profits Commission (ACNC) or operated by a registered charity.

This requirement currently applies to 41 of the 52 general DGR categories and brings the remaining 11 categories in line with this. The 11 general categories covered by the amendment includes health, education, welfare, environment and cultural organisations.

If the measures are enacted as outlined in the draft documents, the measures will apply from three months after receiving assent and will include transitional provisions to enable affected DGRs to meet the new requirements.

The Treasury is seeking comments on the proposal and responses can be submitted by 4 December 2020.

Annual Information Statement for Charities – 2020 Update

Each year, charities need to prepare an Annual Information Statement and lodge with the ACNC. Information to assist charities with preparing their 2020 Statement has been released by ACNC and is available at their website.

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PwC's Monthly Tax Update

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