



PwC's Monthly Tax Update

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

November 2022



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Corporate Tax Update

ATO's reports on its compliance programs

The Australian Taxation Office (ATO) has issued its findings reports from the Top 100 and Top 1,000 income tax and goods and services tax programs completed to 30 June 2022.

Under the [Top 100 income tax and GST assurance program](#), in 2022 it was reported that there were 82 economic groups in the top 100 population with over half (51 per cent) reported as having attained overall high assurance (justified trust) for income tax while the number of taxpayers at overall low assurance has continued to decrease in 2022.

Under the [Top 1,000 income tax and GST assurance program](#), which broadly represents members of large public and multinational corporate groups with a group turnover greater than \$250 million and not covered by the Top 100 Program, of the 1,031 taxpayers reviewed, 23 per cent achieved overall high assurance for income tax as at their last review with most taxpayers (61 per cent) having achieved an overall medium assurance rating. In relation to governance, 63 per cent of taxpayers were at a stage 1 rating, with 30 per cent being at a stage 2 or 3 overall rating.

One of the most common areas identified as part of the Top 1,000 program that requires intervention through ATO next action includes profit shifting through transfer mispricing and tax avoidance where approximately 40 per cent of the ATO next action cases that result in an audit are reportedly due to transfer pricing (other than financing). More ATO reviews are focussing on the hybrid mismatch rules as an assurance area.

For further information, refer to our [Insight](#) into the Top 1,000 report.

Deadline looming for director identification numbers

Any person who is a director or alternate director of a company, registered Australian body or registered foreign company under the *Corporations Act 2001* must have a director identification number (Director ID).

This is a unique identifier, issued by [Australian Business Registry Services \(ABRS\)](#), to promote good corporate governance and deter illegal phoenixing, fraud and corporate misconduct. All persons who were directors of companies registered with ASIC (including registered foreign companies) on or before 31 October 2021 have until 30 November 2022 to apply for a Director ID, else be subject to penalty. Refer to our further [Insight](#) for more information.

ATO report into RTP Schedule Category C disclosures

The ATO has issued a report into the [Reportable tax position \(RTP\) schedule Category C disclosures](#) made in the 2020-21 income year. The report indicates that there has been a significant increase in taxpayers making disclosures and an upward trend in low-risk disclosures, and that high-risk or arrangements of concern are not prevalent among large public and multinational businesses.

Software development not considered core or supporting R&D activities

In the matter of [Absolute Vision Technologies Pty Limited and Innovation and Science Australia \(Taxation\) \[2022\] AATA 2319](#), the Administrative Appeals Tribunal (AAT) has affirmed a decision which was under review by Innovation and Science Australia (ISA) that a taxpayer's software development activities were not "core" or "supporting" research and development (R&D) activities.

The Tribunal found that the activities did not meet the definition of eligible "core" or eligible "supporting" activities as the taxpayer must be seen to have engaged in research (i.e. hypotheses identified and tested through a set of experiments or evaluations). The results of such experiments/evaluations are required to advance knowledge in the particular discipline. Based on the evidence before the Tribunal, none of these requirements have been met.

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Employment Taxes Update

Super guarantee guidance updated and withdrawn

Superannuation Guarantee Ruling [SGR 2009/2](#) provides the Commissioner's view on the meaning of "ordinary times earnings" and "salary or wages" for the purposes of superannuation guarantee. The Australian Taxation Office (ATO) has recently updated this ruling to reflect the removal of the \$450 per month salary or wages threshold for calculating an individual superannuation guarantee shortfall for quarters commencing on or after 1 July 2022.

The amendments also reflect the repeal of the *Superannuation Guarantee (Administration) Regulations 1993* and its remake via the *Superannuation Guarantee (Administration) Regulations 2018*.

QLD payroll tax measures

Queensland has introduced the [Betting Tax and Other Legislation Amendment Bill 2022](#) which proposes to amend the Payroll Tax Act 1971 (Qld) to accommodate the introduction of the mental health levy from 1 January 2023 so that it reflects the new administrative, machinery and transitional arrangements. The significant elements of the mental health levy such as the wages that attract the levy, the rate of the levy, the employer responsible for payment of the levy and the permitted use of proceeds from the levy remain unchanged.

For more information on the Queensland mental health levy refer to our [July 2022 Monthly Tax Update](#).

ATO employer guide – Car fringe benefits

The ATO has updated its [Fringe benefit tax - a guide for employers](#) by rewriting Chapter 7 - Car fringe benefits. Chapter 7 now contains a step-by-step guide to assist employers in identifying and calculating the taxable value of car fringe benefits.

The examples and edited information provide greater assistance to employers in that it is easier to follow and apply to specific circumstances.

Aged care registered nurses' grant excluded from super guarantee

Payments to employees under the Aged Care Registered Nurses' Payment will be excluded from the calculation of superannuation guarantee under the [Superannuation Guarantee \(Administration\) Amendment \(Aged Care Registered Nurses' Payment\) Regulations 2022](#) from 1 November 2022. Aged care providers may apply for the grant on behalf of their eligible employees from 1 November 2022. Eligible employees will then receive the grant as a payment from their employers.

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Global Tax and Trade Update

Federal Budget and multinationals

As expected, multinational tax measures were the main focus of the updated 2022-23 Federal Budget delivered on 25 October 2022. This included the following measures:

- changes to the existing thin capitalisation rules to limit net interest deductions for multinational enterprises (MNEs) to 30 per cent of Earnings Before Interest, Taxes, Depreciation, and Amortisation (EBITDA) (i.e. an earnings based 'safe harbour' test) in line with the Organisation for Economic Cooperation and Development (OECD)'s recommended approach under Action 4 of the Base Erosion and Profit Shifting (BEPS) Action Plan
- deny tax deductions for payments relating to intangibles made by Significant Global Entities that lead to insufficient tax paid outside of Australia, and
- enhanced tax transparency obligations.

For further insights into the issues for multinationals in the Budget, refer to our [in-depth analysis](#).

ATO's report on international related party dealings

The Australian Taxation Office (ATO) has issued [statistics for international related party dealings \(IRPDs\)](#) for the 2019-20 and earlier income years sourced from processed international dealings schedules (IDS) and local file part A. The findings include information such as total revenue and expenditures, jurisdictions, and loans.

Treasury consultation on Pillar One and Pillar Two measures

Treasury is seeking input on the Australian implementation issues associated with the proposed two-pillar multilateral solution to the tax challenges arising from digitalisation of the economy, i.e. the Pillar One and Pillar Two reforms. Comments can be made on the [Consultation Paper](#) by 1 November 2022.

'Pillar One' reallocates some of the taxing rights over the largest and most profitable multinationals to the countries where their goods and services are consumed ('market jurisdictions'). 'Pillar Two' puts a floor on global tax competition by including new taxing rights over undertaxed profits of entities within a multinational group with global revenue of at least EUR750 million per annum which are taxed below the globally agreed minimum tax rate of 15%. Pillar Two consists of the Global anti-Base Erosion (GloBE) Rules and the Subject to tax rule (STTR).

The Consultation Paper details the proposed measures and provides numerous questions relating to the design features, issues associated with the interaction of existing tax laws, the impact this will have on investment decisions, additional compliance requirements, business-readiness and the timelines associated with being an early or late adopter of the reforms.

Tax treaty with Iceland signed

The Australian Government has signed a new [tax treaty](#) with Iceland, the first of its kind between the two countries. Once in force, the treaty will facilitate cross-border trade and investment and also enhance the economic relationship between Australia and Iceland. Some key outcomes under the treaty include:

- The rates of withholding tax on dividends will not exceed 15 per cent. A zero per cent dividend withholding tax rate will apply to inter-corporate dividends paid to companies that hold at least 80 per cent or more of the paying company throughout a 365-day period, and dividends derived by governments, central banks, tax exempt Icelandic pension funds or Australian recognised pension funds and other Australian residents carrying out complying superannuation activities.
- The withholding tax rate for interest will not exceed 10 per cent which means for Australians conducting business in Iceland, the rates on interest will reduce by 2 per cent.

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- The withholding tax rate for royalties will not exceed 10 per cent.
- The treaty preserves Australia's source country taxing rights over income from natural resources, including exploration, exploitation, consultancy, and the use of substantial equipment.
- Rules to resolve dual claims in relation to the tax residency status of the individual and the source of income are provided.
- Avenues for taxpayers to present a case to relevant taxation authorities where a taxpayer considers there has been taxation not in line with the terms of the treaty are set out in the treaty.

The new treaty will enter into force after both countries have completed their domestic requirements and instruments of ratification have been exchanged.

OECD Secretary-General Tax Report

The OECD-Secretary General provided a [report](#) to the recent meeting of the G20 Finance Ministers and Central Bank Governors in Indonesia. This report provides an overview of the latest developments in the OECD's international tax agenda, including an update on Pillar One and Two measures, tax transparency efforts including automatic exchange of information (AEOI) and a new [tax transparency framework on crypto-assets](#) (see below) agreed among OECD and G20 countries, as well as a [new report](#) analysing tax policy efforts to address climate change.

OECD's progress report on the Administration and Tax Certainty Aspects of Amount A of Pillar One

After consultation on the operative provisions for Amount A of Pillar One, the OECD is seeking further input on the [Administration and Tax Certainty of Amount A](#). Amount A relates to a new taxing right over multinationals given to the jurisdictions where their customers and users are located.

This latest consultation covers the administration process for Amount A (including detailed procedures of compliance, from the filing of the relevant information to payment of tax and access to relief from double taxation); the tax certainty framework for Amount A and tax certainty for issues related to Amount A. The last day for comments is 11 November 2022.

Read more in our global [Tax Policy Bulletin](#).

OECD issues global tax transparency framework for crypto-assets

The OECD released a new [global tax transparency framework](#) with model rules to provide for the reporting and exchange of information relating to crypto-assets, including amendments to the Common Reporting Standard (CRS). Read more in our global [Insight](#) publication.

Multinational tax administration in OECD FTA meeting

The OECD Forum on Tax Administration (FTA) made progress in its [meeting on 30 September 2022](#) to support tax capacity building in developing nations, the digital transformation of tax administrations and the implementation of the OECD Two-Pillar Solution seeking to address tax issues resulting from the digitisation of the economy.

The ATO met with key regional partners to discuss its Official Development Assistance to highlight the importance of collaborative assistance, in addition to sharing insights and intelligence. The key ongoing focus is for digital transformation of tax administration (both domestically and globally).

The following reports were released at the Forum:

- [Tax Administration 3.0 and the Digital Identification of Taxpayers](#)
- [Tax Administration 3.0 and Connecting with Natural Systems](#)
- [Tax Administration 3.0 and Electronic Invoicing](#)
- [Digital Services - Supporting SMEs to Get Tax Right, and](#)
- [Bilateral Advance Pricing Arrangement Manual](#).

Further trade actions in response to Russia's illegal invasion of Ukraine

The Australian Government is extending the application of its punitive tariff of an additional 35 per cent on goods imported from Russia and Belarus for a further 12 months until 24 October 2023 (see [Notice of Intention to Propose Customs Tariff Alterations \(No 7\) 2022](#)).

Pacific Agreement on Closer Economic Relations for Vanuatu enters into force

The Pacific Agreement on Closer Economic Relations Plus for Vanuatu [entered into force](#) on 11 October 2022. The agreement [entered into force for Australia](#) on 13 December 2020.

Federal Budget customs and trade issues

As expected, there was no announcement in the updated 2022-23 Federal Budget to extend or provide further cost of living relief through reductions in the excise and excise-equivalent customs duty rate on fuel. There were however some customs and trade related measures - for details refer to our [in-depth analysis](#).

Indirect Tax Update

ATO's findings report on assurance programs

The Australian Taxation Office (ATO) has issued its findings report from the following income tax and digitization goods and services tax (GST) assurance program completed to 30 June 2022.

- **Top 100** – in 2022 there were 82 economic groups in the top 100 population.
- **Top 1,000** – broadly members of large public and multinational corporate groups with a group turnover greater than \$250 million and not covered by the Top 100 Program.

Under the top 100 GST assurance program, the ATO will complete a GST assurance review for each top 100 taxpayer by 30 June 2023. The review will generally focus on the last complete financial year. Most top 100 taxpayers who had a GST assurance review finalised have attained an overall medium level of assurance (68 per cent). The remaining 32 per cent of taxpayers attained an overall high level of assurance that the right amount of GST was reported for the period reviewed.

The Top 1,000 population is the largest contributor to GST and makes up about 36 per cent of the total GST collections. The ATO reports that it has completed 444 reviews for GST through the following Top 1,000 programs:

- the GST assurance program, and
- the combined assurance reviews.

The majority of taxpayers were reported as having achieved a medium or high assurance overall rating for GST. However, in the past 12 months no taxpayers achieved a stage 3 rating for governance (i.e. evidence that the documented tax control framework is both designed and operating effectively in practice).

Areas of concern or areas of focus identified during ATO GST assurance reviews include incorrect reporting, financial supplies, food classification, property and recipient created tax invoices (RCTI).

Information requirements for an adjustment note

A new [legislative instrument](#) sets out the additional information requirements for a document to be an adjustment note or recipient created adjustment note under subsection 29-75(1) of A New Tax System (*Goods and Services Tax*) Act 1999 (GST Act). Unless an exception applies, a supplier or a recipient must hold an adjustment note to attribute a decreasing adjustment from an adjustment event when completing their GST return for a tax period. The determination commences on 30 September 2022.

GST and deferred transfer farm-out arrangements

A [final legislative determination](#) sets out attribution rules for certain deferred transfer farm-out arrangements. Under a typical deferred transfer farm-out arrangement, the owner of an interest in a mining tenement (farmor) transfers a percentage of that interest to the farmee if the farmee meets specified exploration commitments or makes monetary payments.

The determination sets out rules that override the basic attribution rules (outlined in section 29-5 of the GST Act) to attribute GST payable if a farmor receives an exploration benefit as consideration (or part consideration) for the supply of an interest in a mining tenement, before the farmee exercises the right to acquire that interest. The determination also sets out the attribution rules that apply instead of the basic attribution rules to attribute input tax credits if the farmee exercises the right to acquire the interest in the mining tenement and this is a creditable acquisition for the farmee.

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Personal Tax Update

Draft ruling on individual tax residency tests

The Australian Taxation Office (ATO) has issued draft ruling [TR 2022/D2](#) which sets out its interpretation of the individual tax residency rules. The draft ruling consolidates the ATO views on the three statutory tests for tax residency of an individual including the ordinary concepts test, the domicile test and the 183-day test and reflects recent case law dealing with residency (such as *Harding v Commissioner of Taxation* [2019] FCAFC 29).

Importantly, this draft ruling does not reflect a change in the existing tax residency rules, but rather it reframes the Commissioner of Taxation's view of those rules and how they should be applied to an individual's facts and circumstances. It also will replace older rulings IT 2650 relating to permanent place of abode outside Australia and TR 98/17 which related to residency status of individuals entering Australia.

The key takeaway is that individual residency is a question of fact based on an individual's connection to Australia (including the intention, motivation and life circumstances). The factors considered will include the physical presence in Australia, intention of presence, ties with Australia, maintenance of assets, length of stay overseas, nature of accommodation, and existence of a place of abode outside of Australia.

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

When the final Ruling is issued, it is proposed to apply both before and after its date of issue. Comments can be made on the draft ruling by 25 November 2022.

Capital gains tax guidance on main residence of deceased estate updated

The ATO has updated its Practical Compliance Guideline [PCG 2019/5](#) relating to the Commissioner's discretion to extend the two year period allowed to

dispose of the main residence of the deceased without triggering capital gains tax (CGT). Specifically, the updated guidance considers the need to extend the period in circumstances where real estate restrictions were imposed by the government in respect of the COVID-19 pandemic.

Income from the use of a person's fame

The ATO has released draft Taxation Determination [TD 2022/D3](#) relating to income from the use of an individual's fame under an arrangement with a related entity (such as a family trust or company) for the use of their name, image, likeness, identity, reputation and signature.

It is the ATO's preliminary view that such income will be ordinary income of the individual and be assessable. This is on the basis that an individual with fame has no property (or proprietary right) in that fame and cannot transfer any property in their fame to another entity. Where a related entity is allowed to use a famous person's name, image, likeness, identity, reputation and signature, income received for this will be taken to be derived by the individual.

Although the determination, once finalised, is proposed to apply to years of income commencing both before and after its date of issue, this is subject to a compliance approach whereby the ATO will not allocate compliance resources until after the 2022-23 income year in respect of arrangements entered into in good faith that are consistent with the principles outlined in PCG 2017/D11 and entered into before 5 October 2022 (being the date of publication of this draft Determination). This is because the draft view expressed in this determination differs to the previous guidance in PCG 2017/D11 which related to income received which related to a professional sportsperson and allowed a "safe harbour approach" where a portion (up to ten per cent) of such income was able to be apportioned to the related entity.

Comments can be made on the draft determination by 4 November 2022.

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Value of goods removed from stock for private use

The ATO has updated amounts it will accept as estimates for the value of goods removed from trading stock for private use for taxpayers of certain industries. Taxation Determination [TD 2022/15](#) sets out the acceptable amounts applicable to the 2022-23 income year. It is recognised that in certain instances, greater or lesser values may be appropriate.

Family tenancy and rental expenses

The Administrative Appeals Tribunal (AAT) has upheld amended assessments in [Rizkallah and Commissioner of Taxation \(Taxation\) \[2022\] AATA 3081](#) for unsubstantiated rental expenses for a property leased to the taxpayer's husband below market rate.

The taxpayer had initially resided in the property for a period of eight months following acquisition and later moved out and rented the property to their spouse. Whilst the taxpayer rented the property to their spouse, they undertook repairs/maintenance work for which they sought to claim a tax deduction and a deduction for capital allowances.

Based on the evidence before it, the Tribunal found that the tenancy agreement entered into whilst the taxpayer and their spouse were separated attempting to address their marital problems was of a familial nature. Accordingly, the Tribunal found that the explanation for the low rent paid lies in the familial and domestic relationship between him and the taxpayer and based on private or non-income earning considerations. As a consequence, the whole of the outgoings for the property cannot be said to have the character of expenses incurred in gaining or producing assessable income. Based on the evidence before it and applying the working rule suggested in TR 2167, the Tribunal found that the deductions for losses and outgoings incurred in connection with the rental property be allowed up to the amount of the rental income in the relevant years.

The AAT also agreed that the taxpayer be liable to administrative penalties for acting reckless in making claims for substantial rental deductions without proper substantiation or verification for the amounts claimed, but the AAT exercised discretion in remitting the penalties imposed by 25 per cent.

Deductions for rental property repairs

The AAT in [Wulf and Commissioner of Taxation \[2022\] AATA 3094](#) held that only certain expenses which related to extensive water damage to a rental property were allowed as a tax deduction on the basis the work undertaken constituted a repair.

The taxpayer claimed deductions for all costs associated with the bathroom, ensuite, laundry and toilet following significant water ingress both to the fittings (for example, the vanities) as well as structural damage to the floor, walls and ceiling following the tenant's deliberate blockage of water drainage in the property. The taxpayer relied on the assertion that none of the repairs did more than restore the efficiency of the properties functions. However, the Commissioner disagreed on the basis that the expenditure appeared capital in nature as the work amounted to improvements.

The AAT upheld the taxpayer's claims in part. The AAT accepted that in order to examine the damage, it was necessary to remove wall coverings and this work was necessary and the work conducted had little value on the rental value of the house. However, the AAT found that the wet areas were completely rebuilt with contemporary new fittings and cabinetry which was a significant improvement on the property prior to the water damage. The AAT found that the significant portion of the materials was capital in nature and the labour cost was to be apportioned in accordance with TR 97/23.

Equitable concept of a presumption of advancement

The High Court of Australia has delivered judgment in [Bosanac v Commissioner of Taxation \[2022\] HCA 34](#) and unanimously allowed the taxpayer's appeal holding the presumption of resulting trust will not arise where there is evidence from which it may be inferred that the parties' objective intention is inconsistent with the person providing the purchase money obtaining an interest in the property (i.e. the wife is held to be the sole legal and beneficial owner of the property). In this matter, the home was funded by way of a joint loan and a mortgage taken out in both names, however the property was solely in the wife's name. This matter arose following an audit by the ATO where the husband was found liable to substantial debts due to the ATO.

The Commissioner sought a declaration from the Court in relation to the outstanding debt basing his claim on the existence of a resulting trust presumed to have arisen from the circumstance that Mr Bosanac contributed equally with Ms Bosanac to her purchase of the property.

The High Court rejected the Commissioner's request to abolish the presumption of advancement.

State Taxes Update

NSW first home buyer choice to pay property tax

The [Property Tax \(First Home Buyer Choice\) Bill 2022](#) (NSW) was introduced into the NSW Parliament on 11 October 2022 and seeks to give first home buyers a choice when buying a first home as to whether to pay an up-front stamp duty or to opt in to a smaller annual property tax. The choice will apply to first home buyers purchasing a dwelling for up to \$1.5 million and for those buying vacant land, with the intention of building their first home, the purchase price can be up to \$800,000. Farmland will be excluded from the First Home Buyer Choice.

The Bill is proposed to commence on a day(s) to be appointed by proclamation. The scheme itself is proposed to formally commence for contracts signed on or after 16 January 2023 but home buyers that sign contracts between when the Bill commences and 15 January 2023 should be able to retrospectively 'opt-in' to the scheme and obtain a refund of any stamp duty paid once the scheme commences (up to 30 June 2023).

Conditions apply in relation to the property including that occupation of the property must commence within 12 months of the first home buyer taking possession and must continue for a continuous period of at least six months. The Chief Commissioner will have the discretion to vary or to waive the residency requirement if there are extenuating circumstances.

For owner-occupiers, the initial property tax rates will be \$400, plus 0.3 per cent of the home's land value as determined by the Valuer General and do not include the value of the buildings on the land. If a property tax dwelling is rented out, an initial investor rate of \$1,500, plus 1.1 per cent of land value, will apply. These tax rates will remain unchanged during the first two financial years of the scheme. For 2024-25 and subsequent financial years, the tax rates will be indexed each year.

Some possible amendments have been proposed for consideration by the Legislative Council and the Bill has been referred to a Parliamentary Committee for review. Accordingly, it is possible that there may be some changes to the proposed scheme.

At this stage, the scheme above is limited to first home buyers. However, this ability for taxpayers to choose between stamp duty and an annual property tax on an 'opt-in' basis is based on the reform model previously proposed by the NSW Government for most NSW land in 2020 and so will provide an interesting test case for potential future reform.

NSW surcharge duty validly imposed

In [Aparekka v Chief Commissioner of State Revenue \[2022\] NSWCATAD 333](#) the Civil and Administrative Tribunal of New South Wales found that a person's liability for NSW surcharge purchaser duty was valid and did not contravene section 117 of the *Australian Constitution 1900* (Cth) which states that a person cannot be subjected to any discrimination because of a law that exists in one State but not another. The Tribunal affirmed the assessment because the liability is not based on the person's state of residence but rather whether the person is a 'foreign person' at the relevant time. That is, even if applicants were residents of Tasmania at the time of their 2020 purchase of the relevant NSW property, the applicant's liability for surcharge purchaser duty would be the same as if she were a resident of NSW.

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QLD betting tax changes

The [Betting Tax and Other Legislation Amendment Bill 2022](#) was introduced into the Queensland (QLD) Parliament on 12 October 2022, and, among other things, makes amendments to QLD's betting tax rules. Specifically, from 1 December 2022, the Bill proposes to:

- apply a 5 per cent racing levy in addition to the 15 per cent betting tax rate
- incorporate free bets into the calculation of betting tax; and
- provide for the hypothecation of 80 per cent of annual betting tax revenue to the Racing Queensland Board.

ACT land tax and foreign ownership surcharges

In the Australian Capital Territory (ACT) the [Taxation Administration \(Amounts Payable—Land Tax\) Determination 2022](#) sets out the fixed charge and percentage rates (i.e. marginal rating factors) for land tax and a flat percentage rate for the foreign ownership surcharge from 1 October 2022.

Specifically, the following components will apply for land tax purposes from 1 October 2022:

- a fixed charge of \$1,462 (increased from \$1,392 for 2021-22), and
- specified marginal rating factors, which remain unchanged from 2021-22.

The rate for the foreign ownership surcharge remains unchanged from 2021-22 at 0.75 per cent of the property's base value.

Victorian land tax draft rulings on primary production exemptions

The State Revenue Office of Victoria has issued the following draft rulings which consider the Victorian land tax primary production exemptions:

- [LTA-010](#) which provides the Commissioner's interpretation of key terms and elements relating to the primary production land exemption in the context of sections 64, 65 and 66 of the *Land Tax Act 2005* (Vic). It explains the activities that amount to primary production, the meaning of "used primarily for primary production" and the onus of proof for establishing that a relevant primary production land exemption applies.
- [LTA-011](#) which sets out the requirements for the primary production land exemption under section 67 of the *Land Tax Act 2005* (Vic). Land is eligible for this exemption if the Commissioner determines that the land is located wholly or partly in greater Melbourne that is wholly or partly in an urban zone, and the land is used solely or primarily for the business of primary production and the owner of the land has satisfied the relevant ownership tests. The draft also provides explanations of the key elements in the ownership tests.

Comments are due by 10 November 2022.



Superannuation Update

ATO review of large super funds

Large superannuation funds are a key focus of the Australian Taxation Office's (ATO) next [combined assurance review \(CAR\) program](#). The ATO is seeking to provide confidence that these funds are meeting their tax and reporting obligations.

The CAR program will assess the four pillars of justified trust – tax governance framework, tax risks flagged to the market, significant and new transactions and accounting and tax results variations. The program will also have a focus on governance over third party data and the fund's goods and services tax (GST) and member reporting obligations.

If a fund has been subject to an earlier income tax streamlined assurance review (SAR), the ATO uses existing understanding of the business and seek to 'top up' assurance and focus on what has changed since that review, including a review of any significant new transactions and the fund's progress on tax governance. The ATO recommends that any funds that were part of the Top 1,000 SAR program, it should review its Streamlined Tax Assurance Report, and be prepared to advise the ATO of the actions undertaken to address any recommendations from that review and any changes that have happened, with documented evidence.

SMSF compliance – What's on the regulator's radar?

Justin Micale, Assistant Commissioner, Self Managed Super Funds (SMSF) Risk and Strategy, ATO, delivered a [speech](#) at the CA ANZ National SMSF & Financial Advice Conference on 20 October 2022 where he spoke about the ATO's responsibilities as the regulator in protecting the integrity of the system. Although it was reported that the overall tax and regulatory performance of the SMSF sector continues to remain strong, the ATO is seeing indicators of heightened risk and as such is scaling up its compliance activities. These activities have a particular focus on behaviours that put retirement savings at risk or inappropriately take advantage of the concessional tax environment.

The key areas that will attract the ATO's attention are:

- ID fraud and investment scams
- Illegal early access
- Non-lodgment of SMSF annual returns
- Regulatory contraventions such as members accessing their retirement savings early which is often reported as a loan to member or a payment standards breach, group structures used to channel income or assets to an SMSF in a way that seeks to circumvent contributions caps and other tax and regulatory rules, and under-valuation of assets acquired from related parties, and income from property developments, private company dividends, unit trust distributions and personal services income being inappropriately diverted into the SMSF.

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Legislative Update

Federal Parliament resumed sittings on 25 October 2022, when the updated 2022-23 Federal Budget was handed down. Refer to our [in-depth analysis of the key tax measures](#) announced in the Budget.

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

- [Treasury Laws Amendment \(Australia-India Economic Cooperation and Trade Agreement Implementation\) Bill 2022](#), which was introduced into the House of Representatives on 28 September 2022, proposes amendments to prevent the Australian taxation of payments or credits made to Indian firms for providing certain technical services provided remotely (not through a permanent establishment) to Australian clients which are not royalties according to Australia's domestic law but are considered royalties under Article 12(3)(g) of the Australia-India Double Tax Agreement. The Bill will commence on the later of the day of assent and the day the Australia-India Economic Cooperation and Trade agreement enters into force in Australia.
- [Customs Amendment \(Australia-United Kingdom Free Trade Agreement Implementation\) Bill 2022](#) and [Customs Tariff Amendment \(Australia-United Kingdom Free Trade Agreement Implementation\) Bill 2022](#), which were introduced into the House of Representatives on 27 October 2022, prescribe new rules of origin for goods that are imported from the United Kingdom of Great Britain and Northern Ireland (the UK) and provide for preferential entry of goods that satisfy those rules in accordance with the Free Trade Agreement between Australia and the United Kingdom of Great Britain and Northern Ireland.

- [Customs Amendment \(India-Australia Economic Cooperation and Trade Agreement Implementation\) Bill 2022](#) and [Customs Tariff Amendment \(India-Australia Economic Cooperation and Trade Agreement Implementation\) Bill 2022](#), which were introduced into the House of Representatives on 27 October 2022, give effect to the preferential entry of goods under the India-Australia Economic Cooperation and Trade Agreement signed on 2 April 2022.

Since our last update, the following tax and related Bills have completed their passage through Parliament:

- [Defence, Veterans' and Families' Acute Support Package Bill 2022](#), which ensures that family support payments to veterans and their families are exempt from income tax and also not included as income for the purposes of social security law. These amendments will apply for the 2022-23 income year onwards.

The following measures have been registered since our last update:

- Legislative instrument [LI 2022/33](#) which applies to certain defence force invalidity benefits paid during the 2022-23 income year. Specifically, the instrument specifies an alternative method for calculating the tax-free component and taxable component of the superannuation lump sum. Under the alternative method, superannuation benefits are taken to have the same tax-free component and taxable component proportions as it would have been if it was a superannuation income stream benefit payment.
- The [Superannuation Guarantee \(Administration\) Amendment \(Aged Care Registered Nurses' Payment\) Regulations 2022](#) exempts payments made on or after 1 November 2022 to an employee under the Aged Care Registered Nurses' Payment Grant from being included in the "salary or wages" that are used to calculate an employer's superannuation guarantee charge.

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- The [Superannuation Legislation Amendment \(Broadening Contribution Rules\) Regulations 2022](#) ensure that downsizer contributions will be accepted by regulated superannuation funds and Retirement Savings Account (RSA) institutions for individuals who are aged 55 years or over once the legislation allowing that proposal commence (i.e. the first quarter after [Treasury Laws Amendment \(2022 Measures No. 2\) Bill 2022](#) receives assent).
- The [Australian Charities and Not-for-profits Commission Regulations 2022](#) remake the existing Regulation which is due to sunset on 1 April 2023 with revisions to update and remove redundant provisions. The new Regulations will commence on 1 April 2023.



Other News

Cost base of CGT asset to exclude deductible liabilities

The Australian Taxation Office (ATO) has released Taxation Determination [TD 2022/14](#) which outlines the Commissioner's view that if the cost base of a capital gains tax (CGT) asset includes a non-contingent liability to pay an amount and that amount has been deducted or can be deducted, then that amount is excluded from the asset's cost base.

The Determination explains that an item of expenditure could be either deductible for income tax purposes or included in the cost base of an asset for CGT purposes, but cannot be both.

For CGT assets acquired after 7:30pm ACT time on 13 May 1997, where a deduction for expenditure for a non-contingent liability is claimed, subsection 110-45(2) of the *Income Tax Assessment Act 1997* applies to exclude the expenditure from the assets cost base (provided an exception is not satisfied).

Review of Taxpayers' Charter

The ATO has invited taxpayers to provide [feedback on the Taxpayers' Charter](#). The ATO review is expected to help ensure the Charter operates effectively in the context of:

- meeting community expectations about how the ATO engages with people in its administration of the tax, super and registry systems
- accurate reflections on expectations when dealing with the ATO
- assisting ATO staff in their interactions with the community, and
- its purpose of informing the public of their rights when dealing with the ATO.

The last day for comments is 24 October 2022.

ATO guidance on market valuation

The ATO released an updated [guide on market valuation of assets](#). The guide includes the ATO's views on the meaning of market value, who can determine market value, and the processes and evidence the ATO expects to see to support a valuation.

Refer to our further [Insight](#) for more information.

Beneficiary not presently entitled to trust income under reimbursement agreement

In the matter of [Blood Enterprises Pty Ltd v Commissioner of Taxation \[2022\] FCA 1112](#) the Federal Court upheld the assessment which was issued to the trustee of a trust after a beneficiary had been deemed not to have been presently entitled to trust income.

The matter arose following a buy-back of shares in a company held by the trustee of a discretionary trust where the proceeds of the buy-back were deemed to be a dividend for tax purposes. However, the share buy-back dividend constituted the corpus of the trust for trust purposes. A newly introduced beneficiary was made presently entitled to the trust income, which included the share buy-back dividend, and which included franking credits that were allocated to the dividend.

The Court upheld the Commissioner's assessment on the basis that there was an agreement to carry out various steps, including a buy-back of shares, within the context of section 100A of the *Income Tax Assessment Act 1936* (reimbursement agreement) and it was an agreement that was not entered into in the course of ordinary family or commercial dealing. Since section 100A applied, the beneficiary is deemed to not be presently entitled to that income and accordingly the trustee is to be assessed. The Court further found if section 100A did not apply, the dividend was part of a "dividend stripping operation" and accordingly, the beneficiary was not entitled to the franking offset.

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Unregistered DGRs must seek extension of time to register as charity

Entities that are registered as deductible gift recipients (DGRs) that have not yet registered as a charity are [reminded](#) by the ATO to seek a three-year extension from the ATO to meet the new [registration requirements](#) which came into effect in September 2021. The initial 12 month extension to meet the additional requirements ends on 14 December 2022.

From 14 December 2021, certain entities (which were previously not required to be registered as a charity) are now required to become (or be operated by) a registered charity to maintain their DGR status else risk losing their DGR status. The [DGR categories](#) impacted by the amendments are outlined on the ATO website.



Editorial

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