# PwC's Monthly Tax Update

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

October 2022

# Corporate Tax Update

## Draft law to prevent frankable distributions arising out of certain capital raising activity

The Treasury has released exposure draft legislation which seeks to give effect to the former Government's announcement to prevent the distribution of franking credits where a distribution to shareholders is funded by particular capital raising activities. Specifically, this is the first time we have seen the detail of how this integrity measure applies since it was first announced in the Mid-Year Economic and Fiscal Outlook 2016-17. Comments can be made on the draft law by 5 October 2022.

The exposure draft legislation operates to treat a relevant distribution as unfrankable. Significantly, the legislation (if introduced in its current form) will apply with retrospective effect to a relevant distribution made on or after 12 pm, by legal time in the Australian Capital Territory, 19 December 2016. In broad terms, a distribution will be caught by the provision where:

- the distribution is not consistent with an established practice of the entity making distributions of that kind on a regular basis
- there has been an issue of equity interests in the entity or another entity (importantly, this equity issuance can occur at any time before or after the time of the distribution), and
- it is reasonable to conclude in the circumstances that either:
  - the principal effect of the issue of any of the equity interests was to directly or indirectly fund some or all of the distribution; or
  - any entity that issued or facilitated the issue of any of the equity interests did so for a purpose (other than an incidental purpose) of funding the distribution or part of the distribution.

The exposure draft legislation is quite broad in its scope - broader than first announced in the Mid-Year Economic and Fiscal Outlook 2016-17 (in which the focus of the measure was said to be special dividends identified by the ATO as problematic in Taxpayer Alert TA 2015/2 Franked distributions funded by raising capital to release franking credits to shareholders). There is therefore the risk that the application of the law will extend beyond its original intended scope.

In high-level terms, dividends paid as part of an ordinary (and regular) dividend cycle should generally not be caught by the provisions. This should generally also be the case in relation to any dividend reinvestment plans (whether underwritten or not) that apply to ordinary regular dividends. However, the measures are likely to pose greater problems for companies paying ordinary dividends where there is not a regular pattern or cycle of such dividends (which is likely to be more of an issue for private, rather than public companies).

Special dividends will always need to be considered as, prima facie, they are the target of the provisions. As such, whenever a special or one-off dividend is paid it will almost always be necessary to consider the dividend and any equity raisings having regard to the "principal effect" and "purpose" tests (see above). This will also be the case for any off-market share buy-back which will effectively be treated in the same way as a special dividend for the purposes of this test.

Finally, as the measures will apply from 2016 (if introduced in their current form), companies will need to consider whether previous distributions may be caught by the provisions with any consequences also falling on shareholders if they are required to make amendments to their historic assessments. There may also be additional consequences if previous distributions were made to non-resident shareholders, where withholding tax would otherwise have applied to an unfranked dividend.

PwC has prepared a submission on the exposure draft legislation which will be submitted to the Treasury.

**Let's talk**

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

**Chris Morris**
Sydney
Australian Tax Leader
+61 (2) 8266 3040
chris.morris@pwc.com

**Michael Bona**
Brisbane
Global Tax Leader
+61 (7) 3257 5015
michael.bona@pwc.com

**Warren Dick**
Sydney
Tax Reporting & Strategy Leader
+61 (2) 8266 2935
warren.dick@pwc.com

**Sarah Hickey**
Sydney
Financial Services Tax Leader
+61 (2) 8266 1050
sarah.a.hickey@pwc.com

**James O'Reilly**
Brisbane
Brisbane Tax Leader
+61 (7) 3257 8057
james.oreilly@pwc.com

**Jason Karametos**
Melbourne
Industries Tax Leader
+61 (3) 8603 6233
jason.karametos@pwc.com

**Kirsten Arblaster**
Melbourne
Melbourne Tax Leader
+61 (3) 8603 6120
kirsten.arblaster@pwc.com

**Rob Bentley**
Perth
Perth Tax Leader
+61 (8) 9238 5202
robert.k.bentley@pwc.com

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

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

**Sophia Varelas**
Melbourne
National Leader, R&D and Government Incentives
+61 417 208 230
sophia.varelas@pwc.com

## Correct reporting by stapled groups

The Australian Taxation Office (ATO) has raised concerns with some entities with transitional managed investment trust (MIT) cross staple arrangements not correctly reporting income. From 1 July 2019, the MIT withholding rates on fund payments attributable to non-concessional MIT income (NCMI) is 30 per cent (including MIT cross staple arrangement income). An exception is allowed for stapled groups which have made a valid choice to apply the transitional provisions. However, the ATO still expects these entities to disclose the trust's MIT status and full details of the trust's NCMI at Items 32 and 57 of the trust income tax return, including excluded amounts. The ATO has identified instances of non-disclosure and amounts not reconciling in trust income tax returns, Annual Investment Income Report (AIIR) and distribution statements for NCMI.

Any entity or custodian who fails to make the required disclosures the ATO will consider to have a weakness in their tax risk management and governance framework and as a result may be subject to additional scrutiny.

The ATO recommends that affected entities that have already lodged trust tax returns and did not complete the MIT and NCMI related disclosures required by the instructions, should take steps to ensure reporting is in place for future lodgments and consider revising past disclosures.

## Capital allowance deduction allowed for joint venture participant

The High Court dismissed the Commissioner's application for special leave in appealing against the Full Federal Court decision of Commissioner of Taxation v Shell Energy Holdings Australia Limited [2022] FCAFC 2. This means that the taxpayer's claim for capital allowance deductions for costs incurred in acquiring additional proportional interests in statutory titles that conferred authority to explore petroleum were allowed. The taxpayer was a joint venture participant in relation to a petroleum project and had increased its proportional interest in statutory titles through purchase of additional proportional interest pursuant to an asset exchange agreement.

## Part IVA and structuring arrangement involving stapled groups

The Federal Court has held in Minerva Financial Group Pty Ltd v FC of T 2022 ATC 20-839 that a taxpayer (a member of a group of companies and trusts known as "Liberty") which carried on a financial services business entered into two schemes for the dominant purpose of obtaining a tax benefit which were subject to the general anti-avoidance provisions in Part IVA of the *Income Tax Assessment Act 1936*. Liberty Financial carried on a financial services business and implemented steps to conduct an initial public offering (IPO) for "stapled securities".

Under the structuring arrangements, the income from securitisation trusts flowed to another Australian trust with two beneficiaries being the Australian corporate group (the other part of the staple) and another trust whose beneficiaries are the non-resident unitholders. The fact that the Australian group was a beneficiary (i.e. as well as the non-resident unitholders) was ultimately very important to the decision.

The Commissioner alleged that there were three schemes for Part IVA purposes. The Commissioner's view was that the establishment of the securitisation trusts had the effect of removing income that would have been derived within the "corporate silo" and instead had the income flow through the newly established "trust silo", the effect of which was that the income flowed through the trust to non-resident owners that were subject to 10 per cent withholding tax rather than a 30 per cent corporate tax rate which would have otherwise applied.

The first scheme identified by the Commissioner comprised the establishment of corporate and trust silos, i.e. the existence of the stapled structure. The Court found that under that scheme there was no dominant purpose to obtain a tax benefit. Relevantly, the judge accepted that there were commercial purposes/benefits for the existence of the stapled structure – the main one being the fact that investors could receive a gross return rather than receiving a franked dividend. His Honour also found that the group had consistently acted on the advice of investment bankers who told them that a stapled structure was more attractive to investors and therefore was a preferred IPO structure.

The second scheme comprised of the transfer of ownership from the taxpayer to the ultimate parent and the failure of the applicant, as trustee, to distribute more than only nominal amounts of the trust's distributable income to the corporate silo, instead distributing the majority of income to the trust silo. The third scheme was similar to the second, except it did not involve the transfer of ownership. The Court held in both that there was a dominant purpose to obtain a tax benefit. His Honour found that Part IVA applied to these two schemes where almost all of the income was distributed to the non-resident unitholders (rather than a larger proportion also being distributed to the corporate group).

For further details regarding this case, see our Tax Alert.

# Employment Taxes Update

## STP is prime example of ATO's 2030 digital strategy

On 8 September 2022, the Commissioner of Taxation, Chris Jordan AO, announced that the Australian Taxation Office (ATO)'s Executive Group had endorsed a new digital strategy, which sets out the 2030 vision for enhanced digital administration of tax compliance, through integrated, real-time reporting.

The ATO's digital strategy is aligned to the Organisation for Economic Co-operation and Development (OECD)'s Tax Administration 3.0: The Digital Transformation of Tax Administration discussion document, which was published in 2020. That document includes a digital maturity model that outlines recommended steps to achieve digitisation for tax administration.

Although the ATO's documented digital strategy might not be released to the public for some time, it is expected that the strategy will be underpinned by the following five key principles which are broadly based on integrating tax administration into taxpayer's existent systems, focused on real-time compliance coinciding with the relevant taxable event:

1. leverage natural systems
2. imagine the possible
3. sustainable digitalisation and benefits
4. integrity by design and
5. design for the user.

While the 2030 digital strategy and principles may initially appear to be largely hypothetical, we have already witnessed the first steps in this space. The real-time reporting of payroll data to the ATO under Single Touch Payroll – Phase 2 (STP2) is a key example.

With the ATO's commitment to enhanced digitisation of tax administration, it would be prudent for taxpayers to consider any current tax processes that necessitate significant out-of-system intervention to enable compliance and keep this front of mind in relation to any future enhancement/upgrade projects. As the ATO moves towards integration into native systems, taxpayers will be encouraged to invest in their internal environment to enable seamless (and real-time) flow into tax compliance. For example, in a Fringe Benefits Tax (FBT) context, where expense management systems and general ledger data cannot be relied upon to enable reporting due to the absence of accurate or tailored configuration, investment in this regard will align to the ATO's 2030 digital strategy.

Read more of our Insights into the ATO's digital transformation strategy.

## PAYG withholding variation for low income minors

From 1 October 2022, Taxation Administration: Withholding Variation to Nil for Low Income Minors Legislative Instrument 2022 ensures that the amount of PAYG withholding on payments made to low income minors (i.e individual under 18 years of age at the time of payment),where no Tax File Number or Australian Business Number has been quoted will be varied to nil broadly when their earnings are below the tax-free threshold. This is a remake of a previous Legislative Instrument which sunsets on 1 October 2022.

### Let's talk

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

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

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

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

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

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

## Draft law to reduce FBT record keeping compliance

In acknowledging that the FBT record keeping requirements can result in a duplication of existing records that have already been captured by employers through other systems, new measures are proposed to reduce and simplify FBT record keeping whilst producing similar taxation outcomes with lower compliance costs. In this regard, the Treasury has released a package of Exposure Draft law on this proposal for public consultation.

The proposed law gives the Commissioner of Taxation the power to modify, by legislative instrument, existing FBT record keeping obligations. It aims to reduce the administrative burden for employers in respect of their FBT record keeping requirements by introducing an alternative method to record keeping by specifying the kind of 'adequate alternative' documents or records which reasonably satisfy an employer's required records for the various types of fringe benefits. Under this alternative method, employers may be able to rely on existing corporate records as opposed to employee declarations and other prescribed forms when preparing their FBT return. At this stage the draft legislative instruments have focused on alternative records in relation to travel diaries and relocation transport declarations.

Once enacted, the measures will commence in respect of FBT years that commence on or after the beginning of the quarter after Royal Assent is received. This means that the new rules cannot apply to the current FBT year.

For further information refer to our Insight.

# Global Tax and Trade Update

## Updated ruling on UK and US treaty exemption for interest of financial institutions

The Australian Taxation Office (ATO) has issued a draft update (TR 2005/5DC2) to its Taxation Ruling TR 2005/5 which deals with Australia's right to tax United States (US) and United Kingdom (UK) resident financial institutions under the US and the UK Taxation Conventions in respect of interest income arising in Australia. This latest update replaces a previous draft version which has since been withdrawn.

Under the US and UK Conventions, Australia has no taxing rights in respect of interest to which a 'financial institution' is beneficially entitled if unrelated to and dealing wholly independently with the payer. The ruling focuses on the definition of 'financial institution' contained in Article 11(3)(b) of the Conventions, which categorises US and UK resident financial institutions into those that are 'banks' and those that are 'other enterprises'. The updated ruling also makes specific reference to when an enterprise is substantially deriving its profits from carrying on a business of spread activities.

While the updated ruling specifically refers to the US and UK Conventions, it will also apply to those arrangements where interest arises in Australia and it is derived by residents of another country with which Australia has a double tax agreement (DTA) and:

- the interest is treated as interest for the purposes of the DTA
- it is derived by residents of that country that are financial institutions for the purposes of the DTA
- the residents of that country beneficially own, or are beneficially entitled to, the interest for the purposes of the DTA; and
- the relevant parts of the interest article in the DTA are similarly worded and have the same effect as those in the US or UK Conventions.

When the final Addendum issues, it is proposed to apply both before and after its date of issue. However, the Commissioner does not intend to take compliance action to the extent a taxpayer ascertained it was not liable to interest withholding taxes in respect of the derivation of interest that occurred before 28 November 2018 (the date of issue of the first draft Addendum to this Ruling) where the taxpayer:

- determined it was a financial institution on the basis that its spread activities was the largest contributor to its overall profits when compared with each of its other activities separately rather than combined, and
- has not undertaken or entered into an artificial or contrived arrangement affecting its interest withholding tax obligations or a tax avoidance scheme whose outcome depends, in whole or part, on reduced or no withholding taxes.

Comments can be made on the updated ruling by 11 November 2022.

## Compliance obligations for interest, dividends and royalties paid to foreign residents

Taxpayers who have paid interest and unfranked dividends not reported on an annual investment income report (AIIR) or royalties to a foreign resident during the last financial year ended 30 June 2022 are reminded of their compliance obligations in relation to the lodgment of a *PAYG withholding from interest, dividend and royalty payments paid to non-residents annual report* which is due to be lodged with the ATO by 31 October 2022. The PAYG withholding reporting year is 1 July to 30 June regardless of any substituted accounting period that the payer uses.

## Let's talk

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


**Chris Morris**
Sydney
Australian Tax Leader
+61 (2) 8266 3040
chris.j.morris@pwc.com

**Michael Bona**
Brisbane
Global Tax Leader
+61 (7) 3257 5015
michael.bona@pwc.com

**Peter Collins**
Melbourne
International Tax Leader
+61 (3) 8603 6247
peter.collins@pwc.com

**Michael Taylor**
Melbourne
Partner
+61 (3) 8603 4091
michael.taylor@pwc.com

**Greg Weickhardt**
Melbourne
Partner
+61 (3) 8603 2547
greg.weickhardt@pwc.com

**Nick Houseman**
Sydney
Australian Transfer Pricing Leader
+61 (2) 8266 4647
nick.p.houseman@pwc.com

**Angela Danieletto**
Sydney
Partner
+61 (2) 8266 0973
angela.danieletto@pwc.com

**Jayde Thompson**
Sydney
Partner
+61 403 678 059
jayde.thompson@pwc.com

**Jonathan Malone**
Sydney
Partner
+61 (2) 8266 4770
jonathan.r.malone@pwc.com

**Gary Dutton**
Partner
Australian Trade Leader
+61 434 182 652
gary.dutton@pwc.com

## OECD public consultation meeting: Amount A of Pillar One

The Organisation for Economic Cooperation and Development (OECD) held a public consultation on the Progress Report on the rules to implement a new taxing right that will allow market jurisdictions to tax profits from some of the largest multinational enterprises (Amount A of Pillar One) on 12 September 2022. The Progress Report contains design rules for different building blocks relating to the new taxing right under Amount A. These rules include proposals, seen for the first time, for the marketing and distribution safe harbour and the elimination of double tax. Read our overview of the issues raised in the consultation meeting and some initial observations.

## OECD report on tax morality

A new report from the OECD – Tax Morale II: Building Trust between Tax Administrations and Large Businesses – reflects the results of a wide-ranging survey of over 1,200 tax officials from 138 jurisdictions on multinational behaviour and tax compliance. The survey shows that while multinationals are generally seen to demonstrate a formal commitment to co-operation with tax administrations, notably through on-time payment, perceptions of transparency and trust in the information provided by them are less positive.

## OECD report on tax policy reforms

The OECD has released its Tax Policy Reforms 2022 report which describes recent tax reforms across 71 countries and jurisdictions, including all OECD members and selected members of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting.

The report finds that reductions in taxes on labour and more generous corporate tax incentives were among the key policy tools that countries have used to stimulate growth and promote economic recovery from the COVID-19 pandemic.

Personal income taxes and social security contributions were reduced in 2021 in almost all countries covered in the report, with most reductions targeted at lower-income households to support employment and provide in-work benefits. Many countries also increased corporate tax incentives to stimulate investment and innovation.

The most significant VAT reforms focused on the digital economy and e-commerce, including strong growth in e-invoicing and digital reporting requirements.

This year's report also highlights how tax policy has been used by governments to provide significant support to households and businesses, shielding them from the impact of high energy prices.

## Change in director for tax policy at OECD

After 15 years at the OECD, including 10 years as the Director of the Centre for Tax Policy and Administration, Pascal Saint-Amans will retire from the organisation at the end of October 2022. Grace Perez-Navarro is appointed to the Director role at the Centre for Tax Policy from 1 November 2022 until 31 March 2023.

## Fuel taxation in Australia

The Parliamentary Budget Office (PBO) has released a document on fuel taxation in Australia. The document explains the various components of the Australian fuel tax system and how they impact on the Federal Budget.

# Indirect Tax Update

## GST and residential colleges

The Australian Taxation Office (ATO) has issued draft Practical Compliance Guideline PCG 2022/D3 which sets out the Commissioner of Taxation's compliance approach in respect of the goods and services tax (GST) treatment for universities and residential colleges supplying accommodation, meals, tertiary residential college courses and religious services to resident students and claiming input tax credits. The purpose of the Guideline is to assist residential colleges to determine if supplies of accommodation, meals, tertiary residential college courses and religious services can be treated as GST-free supplies. Specifically, it is designed to give residential colleges confidence that, if they calculate their GST position in accordance with the Guideline, the Commissioner will not allocate compliance resources to review the GST outcomes of the arrangement.

Comments were due to be made on the draft PCG by 30 September 2022. This Guideline, once finalised, will apply to tax periods starting on and from 1 January 2023.

## Draft GST determination for margin scheme valuation of real property

A draft legislative instrument proposes to specify the requirements for making valuations for the purposes of applying the margin scheme in Division 75 of the *A New Tax System (Goods and Services Tax) Act 1999* to real property. A valuation made in accordance with the requirements specified in the determination is an approved valuation for GST purposes and may be relied on by suppliers calculating the margin scheme for taxable supplies of real property and in calculating an increasing adjustment.

The instrument also provides transitional arrangements where, despite its repeal, the requirements contained in the A New Tax System (Goods and Services Tax) Margin Scheme Valuation Requirements Determination 2020 continue to apply to valuations a supplier already has at the commencement of this instrument for three months.

## No GST group

The Administrative Appeals Tribunal (AAT) has found in Adcon Resources Vic Pty Ltd v FC of T [2022] AATA 2629 that a group's GST registration failed because the group did not meet the ownership requirements to be able to form a GST group. The taxpayer had submitted that a nominee type of relationship where someone is essentially holding shares on behalf of somebody else because they were not supposed to be in their name is sufficient to allow GST grouping to occur. The Tribunal found there was no evidence that established that a nominee or trust relationship existed in relation to the shares in the taxpayer and that while there may have been an intention to have the shareholding reported differently, the onus was on the directors of a company to ensure that the details entered into the ASIC register were correct.

## GST liabilities not eligible for release

In FSYC v FC of T [2022] AATA 2680, the AAT held that the taxpayer's GST liabilities were not eligible for release. Specifically, the AAT found that the circumstances that led to the taxpayer's GST liabilities had no bearing on whether the debt could be released. GST debts or associated general interest charges are not subject to the debt release provisions in the *Taxation Administration Act 1953*. Furthermore, in spite of there being serious hardship there is no legislative discretion to release liabilities that are not listed in the law.

## Let's talk

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


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

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

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

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

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

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

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

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

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

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

## WET liability applied to container, goodwill and delivery elements of wine sold

The AAT held in the matter of Lubiana Family Trust (Trustee of) v FC of T [2022] AATA 2826 that the taxpayer was liable for wine equalisation tax on the “taxable value” of its sales of wine to wholesale and retail customers. The primary issue to be determined in the case was the construction and application of the expression “the price... for which the wine was sold”. The Tribunal was not satisfied that the invoiced amounts for wine sold for a single undissected amount should be reduced by amounts attributable to one or more of the Container, Goodwill and Delivery elements to determine the taxable value of the applicant’s wine.

# Personal Tax Update

## Robodebt class action settlement monies not taxable

The Australian Taxation Office (ATO) has confirmed that following the Federal Court's approval of the settlement payment in respect of the Services Australia income compliance (Robodebt) class action, any settlement payments are not taxable. The ATO advised that eligible participants of the class action receiving a settlement payment are not need to declare the settlement payment in their tax return, nor are they liable to pay tax on it.

## Non-commercial losses and flood, fire or other COVID-19 impacts

The ATO has issued Practical Compliance Guideline PCG 2022/1 which outlines a safe harbour approach for taxpayers affected by flood, bushfire or COVID-19 in relation to the non-commercial business loss rules whereby the Commissioner of Taxation is taken to have exercised his discretion that it would be unreasonable, by reference to the circumstances specified, to defer the losses. Specifically, if the conditions set out in the guideline apply, individuals can offset a non-commercial business loss resulting from flood, fire or COVID-19 impacts against other income without needing to seek a private ruling seeking the Commissioner's specific exercise of discretion. This Guideline applies to the 2019-20, 2020-21, 2021-22 and 2022-23 income years.

## Let's talk

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

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

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

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

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

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

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

# State Taxes Update

## Queensland Interstate Land Tax Aggregation Measures

On 30 September 2022, the Queensland Government announced that it will not proceed with its controversial interstate land tax aggregation measures which were to apply from 1 July 2023.

The effect of the measures would have been to aggregate the taxable value of interstate land holdings with the value of Queensland land holdings to determine the applicable land tax rate for the Queensland properties. However, following significant industry backlash and lobbying efforts and strong opposition to the measure from interstate leaders, the Queensland Government has announced that the measures will be repealed.

While this is yet to be confirmed in a formal announcement from the Queensland Revenue Office or Queensland Treasury, the expectation based on the announcements is that the previously passed legislation will now be repealed. This should mean that for the 2023 land tax year, assessments will be issued on the same basis as previous years and there should be no need to inform the QLD Revenue Office of interstate land holdings or undertake calculations on an interstate basis.

## WA land tax amendments

The Land Tax Assessment Amendment Bill 2022 was introduced into the Western Australian (WA) Parliament to amend the Land Tax Assessment Act 2002 (WA) to replace the current land tax exemption for caravan park (dwelling park) with an exemption for caravan parks and residential parks with retrospective effect from 1 July 2020. The provision creates an exemption for parks providing short-stay holiday accommodation, long-stay accommodation for permanent residents or a mixture of both.

The Bill also introduces a general land tax exemption for homeowners living in full-time care for residential property if the property is not rented.

In addition, the Bill introduces a general notification requirement for land owners receiving a land tax exemption or concession such that owners will be required to advise the Commissioner of an event or circumstances which may affect their exemption or concession.

## Let's talk

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


**Rachael Cullen**
Sydney
Partner
+61 409 470 495
rachael.cullen@pwc.com

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

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

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

**Matthew Sealey**
Partner
+ 61 400 684 803
matthew.sealey@pwc.com

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

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

## NSW: Duties Regulations prescribe excluded transactions

Following recent amendments made to the *Duties Act 1997* (NSW) by the State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022 transactions that result in a change in beneficial ownership of dutiable property, other than excluded transactions which are prescribed by Regulation, are subject to duty. The Duties Regulation 2022 (NSW) has now been made, with retrospective application to apply to transactions which have occurred in accordance with an agreement or arrangement entered into on and after 19 May 2022, to prescribe those instances when a change in beneficial ownership is an excluded transaction for the purposes of section 8(3) of the *Duties Act 1997* . The following transactions, among others, have been prescribed as excluded transactions:

- change in default beneficial interests under a discretionary trust
- change in beneficial ownership of dutiable property that occurs under a testamentary instrument or the laws of intestacy, or on the death of a person
- the grant, creation, variation or extinguishment of a mortgage, charge or other security over land
- the creation, variation or surrender, for no consideration, of a tenant's interest in fixtures that are fit-out for commercial premises
- a change in tenancy under a lease for no consideration
- the grant or termination of a life estate in dutiable property for no consideration.

## Victorian duty and acquisition of economic entitlements in relation to land

The economic entitlement provisions in the *Duties Act 2000* (Vic) apply if a person acquires an economic entitlement in relation to relevant land, other than by a transaction that is already a dutiable transaction under Chapter 2 of the Act. The State Revenue Office of Victoria has issued a draft revenue ruling to provide clarification on the Commissioner's view regarding the application of the economic entitlement provisions to ordinary fees for service. The ruling also sets out the Commissioner's view on how the economic entitlement provisions under Chapter 2 can also apply to acquisitions of shares in companies and units in unit trust schemes that may be outside the scope of Chapter 3 of the Act.

The ruling expands on the guidance currently provided on the website in relation to fees to third party service providers whose fees may be tied to the proceeds associated with land and/or its development and provides some examples of when these may or may not be an economic entitlement.

Comments were due on the draft ruling by 6 October 2022.

## Victoria land tax exemption for rooming houses

The State Revenue Office of Victoria has issued updated guidelines for the rooming house land tax exemption. The guidelines describe the types of persons to whom the accommodation must be provided, the circumstances in which, and the arrangements under which, the accommodation is provided and the maximum tariffs for the accommodation in order for the exemption to apply. Notwithstanding that a rooming house may satisfy statutory definitions and other requirements, the rooming house must be used and occupied primarily as low-cost accommodation by people on a low income in accordance with these guidelines for the land to be exempt for the relevant tax year.

## QLD updated rulings on unpaid taxes

Queensland Treasury has updated the following rulings for references to the new *Taxation Administration Regulation 2022* (Qld):

- Public Ruling TAA060.1.9 Remission of unpaid tax interest which provides guidance on matters that may be relevant when the Commissioner of State Revenue decides whether or not to exercise the discretion to remit unpaid tax interest
- Public Ruling TAA060.4.4 Impact of a refund on unpaid tax interest for another outstanding liability which clarifies how the Commissioner will exercise the discretion to remit unpaid tax interest on an amount of primary tax payable and unpaid, if the taxpayer becomes entitled to a refund because of a reassessment decreasing a taxpayer's liability for tax under a separate assessment.
- Public Ruling DA000.2.10 Self assessors, the Duties Act 2001 and the Taxation Administration Act 2001 which explains the rights and obligations of a self assessor who is required to lodge transaction statements with the Commissioner.

The rulings take effect from 2 September 2022.

# Superannuation Update

## Review on Your Future, Your Super laws

Treasury has released a consultation paper on the *Your Future, Your Super* laws which were introduced in 2021. The paper is part of the Government's commitment to consider whether there have been any unintended consequences and implementation issues arising from any of the following elements of these measures:

- Performance test
- YourSuper comparison tool
- Stapling
- Best financial interests duty

This review is intended to provide an opportunity to assess the extent to which there have been implementation issues or unintended consequences of the test for MySuper products, and whether there are likely to be issues as the test is extended to other products. The focus of the review is on ensuring that Australian superannuation funds perform better, delivering dignity in retirement, and avoiding perverse outcomes for members.

Submissions can be made on the paper by 14 October 2022.

## Draft law to improve first home super saver scheme

The Treasury has released for comment draft legislation which, among other things, underpins the first home super saver scheme (FHSSS) which aims to give effect to the former Government's 2021-22 Budget announcement to improve its operation and users' experience with it. The technical changes involve:

- increasing the discretion of the Commissioner of Taxation to amend and revoke FHSSS applications
- allowing individuals to withdraw or amend their FHSSS applications prior to them receiving a FHSSS amount, and allow those who withdraw to re-apply for FHSSS releases in the future
- allowing the Commissioner of Taxation to return any FHSSS amounts to superannuation funds, provided the amount has not yet been released to the individual, and
- clarifying that FHSSS amounts returned by the Commissioner of Taxation to superannuation funds are treated as funds' non-assessable non-exempt income and does not count towards individuals' contribution caps.

## Draft Regulations for superannuation performance test treatment of faith-based products

Legislation to allow the Australian Prudential Regulation Authority (APRA) to consider the religious affiliation of a superannuation fund when applying the annual performance test is currently before Parliament. The Treasury has released for consultation, draft regulations which will support this new law once it is enacted. The regulations include amendments that support the implementation of a supplementary performance test by specifying:

- when APRA must conduct the supplementary performance test
- how APRA may determine and apply alternative indices for the purposes of conducting the supplementary performance test; and
- additional information that must be included in an application for faith-based status.

Comments can be made on the draft regulations by 7 October 2022.

## SMSF trustees final warnings to lodge outstanding annual returns

The Australian Taxation Office has identified a number of self-managed superannuation fund (SMSF) trustees that have failed to lodge their SMSF annual return by the due date. Reminders and final warnings have been issued to those trustees who are yet to lodge the return, if earlier reminders have been ignored. The SMSF trustees may be disqualified and risk further enforcement action if obligations continue to remain outstanding.

## Let's talk

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

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

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

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

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

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

**Allister Sime**
Melbourne
Director
+61 3 8603 1195
allister.sime@pwc.com

**Sharyn Frawley**
Melbourne
Director
+61 3 8603 1217
sharyn.frawley@pwc.com

# Legislative Update

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

- Treasury Laws Amendment (2022 Measures No. 3) Bill 2022, which was introduced into the House of Representatives on 8 September 2022, among other things, amends the *Superannuation Industry (Supervision) Act 1993* to provide for an alternative annual performance test for faith-based products, and amends the *Taxation Administration Act 1953* to enable the provision of information to be disclosed by the Australian Taxation Office (ATO) to Australian Government agencies in administering major disaster support programs
- Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2022 which was introduced into the House of Representatives on 8 September 2022, seeks to double the maximum penalties for contraventions of the *Foreign Acquisitions and Takeovers Act 1975* which relate to residential land and update the fee cap for indexation
- Income Tax Amendment (Labour Mobility Program) Bill 2022, which was introduced into the House of Representatives on 8 September 2022, reduces the tax rate applicable to certain income earned by foreign resident workers who participate in the Pacific Australia Labour Mobility Scheme.

The following measure was registered as a legislative instruments since our last update:

- Taxation Administration: Withholding Variation to Nil for Low Income Minors Legislative Instrument 2022 which enables the variation of PAYG withholding for certain low income minors to nil.

Federal Parliament will next sit on 25 October 2022, which is also the date of the updated 2022–23 Federal Budget to be delivered by the new Government.

## Let's talk

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

**Chris Morris**
Sydney
Australian Tax Leader
+61 (2) 8266 3040
chris.morris@pwc.com

**Michael Bona**
Brisbane
Global Tax Leader
+61 (7) 3257 5015
michael.bona@pwc.com

**Warren Dick**
Sydney
Tax Reporting & Strategy Leader
+61 (2) 8266 2935
warren.dick@pwc.com

**Sarah Hickey**
Sydney
Financial Services TaxLeader
+61 (2) 8266 1050
sarah.a.hickey@pwc.com

**Trinh Hua**
Sydney
Tax Leader Tax Market Leader
+61 (2) 8266 3045
trinh.hua@pwc.com

**James O'Reilly**
Brisbane
Tax Leader Tax Leader
+61 (7) 3257 8057
james.oreilly@pwc.com

**Jason Karametos**
Melbourne
Industries Tax Leader
+61 (3) 8603 6233
jason.karametos@pwc.com

**Kirsten Arblaster**
Melbourne
Melbourne Tax Leader
+61 (3) 8603 6120
kirsten.arblaster@pwc.com

**Rob Bentley**
Perth
Perth Tax Leader
+61 (8) 9238 5202
robert.k.bentley@pwc.com

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

# Other News

## Law to progress Technology Investment Boost underway

Although the current Government has not announced that the former Government's Technology Investment Boost measure that was announced in the last 2022-23 Federal Budget will proceed, it would appear that it has their support following the release by Treasury for comment draft law that seeks to give effect to the measure. The Technology Investment Boost is a bonus 20 per cent tax deduction available to small businesses (i.e. those with aggregated annual turnover of less than $50 million) on eligible expenditure incurred for the purposes of their digital operations or digitising their operations.

Eligible expenditure must be in respect of the amounts incurred from 7:30pm (AEDT) on 29 March 2022 until 30 June 2023 and if the expenditure is on a depreciating asset, the asset must be first used or installed ready for use by 30 June 2023. The Boost is capped such that it applies to the total of eligible expenditure of up to $100,000 per income year or specified time period with a maximum bonus deduction of $20,000 per income year or specified time period.

## Draft law for Skills and Training Boost

Similarly, it would seem that the current Government will progres with the former Government's Skills and Training Boost that was announced in the last 2022–23 Federal Budget. The Treasury has released for comment draft law that seeks to give effect to the Skills and Training Boost which will apply to small businesses (i.e those with aggregated annual turnover of less than $50 million).

The Skills and Training Boost is a bonus 20 per cent tax deduction for eligible expenditure incurred on external training delivered to their employees by providers registered in Australia. The eligible expenditure must be incurred from 7:30 pm (AEDT) on 29 March 2022 until 30 June 2024.

## Crypto assets not taxed as foreign currency

The Treasury has released exposure draft law to give effect to the Government's announcement to exclude crypto assets from treatment as foreign currency for Australian income tax purposes. This draft law maintains the current tax treatment of assets such as bitcoin and removes the uncertainty associated with the decision of the Government of El Salvador to adopt Bitcoin as legal tender. The draft legislation relies on amending the existing definition of digital currency as applicable for GST purposes before adopting it as an exclusion from the definition of foreign currency for income tax purposes.

The proposed amendments will broadly apply in relation to income years that include 1 July 2021 and to subsequent income years.

Submissions on the draft were due by 30 September 2022.

## No scheme for cash flow boost

The Administrative Appeals Tribunal (AAT) has held in Robis Consulting Pty Ltd and Commissioner of Taxation (Taxation) [2022] AATA 283 that a company which became dormant in 2017 following the early retirement of one of the sole shareholders after a health scare, but which started paying directors again in March 2020 was entitled to the cash flow boost (CFB). The taxpayer commenced initiatives in November 2019 to attract work and disclosed director fees in its March 2020 activity statement. It was disputed that the taxpayer "paid" wages for the purposes of the CBF and whether a scheme was entered into. The Tribunal was satisfied that the director's explanations for the payment of wages were credible and consistent when he asserted that his decision to declare wages was not made mainly to obtain or increase the CFB.

## Let's talk

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


**Chris Morris**
Sydney
Australian Tax Leader
+61 (2) 8266 3040
chris.morris@pwc.com

**Michael Bona**
Brisbane
Global Tax Leader
+61 (7) 3257 5015
michael.bona@pwc.com

**Warren Dick**
Sydney
Tax Reporting & Strategy Leader
+61 (2) 8266 2935
warren.dick@pwc.com

**Sarah Hickey**
Sydney
Financial Services Tax Leader
+61 (2) 8266 1050
sarah.a.hickey@pwc.com

**Trinh Hua**
Sydney
Sydney Tax Market Leader
+61 (2) 8266 3045
trinh.hua@pwc.com

**James O'Reilly**
Brisbane
Brisbane Corporate Tax Leader
+61 (7) 3257 8057
james.oreilly@pwc.com

**Jason Karametos**
Melbourne
Industries Corporate Tax Leader
+61 (3) 8603 6233
jason.karametos@pwc.com

**Kirsten Arblaster**
Melbourne
Melbourne Tax Market Leader
+61 (3) 8603 6120
kirsten.arblaster@pwc.com

**Rob Bentley**
Perth
Perth Corporate Tax Leader
+61 (8) 9238 5202
robert.k.bentley@pwc.com

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

## COVID-19 Victorian and ACT business grants as NANE income

A determination has been made to declare some additional Victorian grant programs and ACT COVID-19 grant programs as "eligible programs" that means that grants paid under these programs will be non-assessable non-exempt (NANE) income.

## Non-resident beneficiaries of trust

The ATO released the following final tax determinations which provides its views on the treatment of distributions of foreign sourced capital gains distributed to non-resident beneficiaries of a discretionary trust:

- Taxation determination TD 2022/12 explains that the source concept is not relevant to determine whether a non-resident beneficiary or trustee of a resident trust is assessed on a trust capital gain. The same view applies in relation to a non-resident beneficiary's share of taxable Australian property (TAP) gains of a non-resident trust and a trustee's share of a capital gain.
- Taxation determination TD 2022/13 indicates that a capital gain is not disregarded for a foreign or temporary resident beneficiary of a resident non-fixed trust. Section 855-40 of the *Income Tax Assessment Act 1997* (ITAA 1997) only disregards a capital gain that a foreign-resident beneficiary has because of subsection 115-215(3) if the trust is a fixed trust.

## Games and sports exemption

The ATO has issued Taxation Ruling TR 2022/2 which finalises the ATO view as to when societies, associations or clubs are exempt from income tax under table item 9.1(c) of section 50-45 of the ITAA 1997 under the 'games and sports exemption'.

The Ruling states that as part of good governance practices, it is recommended that clubs self-review their entitlement to income tax exemption each year or when there is a major change in the structure or activities of the club. When conducting self-review, clubs should consider how the law explained in this Ruling applies to their circumstances. From 1 July 2023, clubs with an active Australian business number will need to complete an annual online self-review form.

## Proposed exemption from third party reporting

A draft legislative instrument (Taxation Administration: Classes of Electronic Payment System Transactions Exempt from Being Reported in Third Party Reports Determination 2022) proposes to exempt payment system administrators from including specific classes of transactions for third party reporting. Specifically, this will maintain exemptions for certain specified classes of transactions where the administrator of a payment system moves from a payment platform previously exempted to a new payment platform. It is proposed to apply with retrospective effect from 1 July 2022.

## Editorial

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

**Jannette Krezel**
Senior Manager
Tax Markets
jannette.krezel@pwc.com

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

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

**Jason Dutt**
Senior Associate, Employment Taxes
jason.dutt@pwc.com

**pwc.com.au**

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