



PwC's Monthly Tax Update

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

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Corporate Tax

ATO updates guidance on Div 7A

The Australian Taxation Office (ATO) has updated the following guidance products to reflect the publication of [TD 2022/11](#) on unpaid present entitlements and private company deemed dividends under the rules in Division 7A of the Income Tax Assessment Act 1936:

- [TD 2011/15](#) Income tax: Division 7A – unpaid present entitlements – factors the Commissioner will take into account in determining the amount of any deemed entitlement arising under section 109XI of the Income Tax Assessment Act 1936
- [TD 2015/20](#) Income tax: Division 7A: is a release by a private company of its unpaid present entitlement a “payment” within the meaning of Division 7A of Pt III of the Income Tax Assessment Act 1936?
- [TR 2015/4](#) Income tax: CGT small business concessions: unpaid present entitlements and the maximum net asset value test, and
- [PCG 2017/13](#) Division 7A – PS LA 2010/4 sub-trust arrangements maturing in or after the 2016–17 income year.

Annual corporate tax transparency data

Each year, the ATO is required to publish corporate tax transparency reports which contain information reported to it by:

- Australian public and foreign-owned corporate tax entities with income of AUD 100 million or more
- Australian-owned resident private companies with income of AUD 200 million or more, and
- entities that have petroleum resource rent tax (PRRT) payable.

The information published includes the relevant entity's total income, taxable income, total tax payable and PRRT amount payable (if applicable).

The ATO has [indicated](#) that it plans to release this year's annual report of entity tax information earlier than in previous years. The ATO will be writing to companies included in this report during September and October to give them an opportunity to check, and if needed, correct their information before the report is published. The next report due to be released will include information reported in 2020-21 income tax returns and returns from 2018-19 and 2019-20 if they were lodged or processed after 1 September 2021 and not published previously.

In further developments, [amendments](#) were recently made to the existing legislation such that with effect from the 2023 income year onwards, the ATO will include in its corporate tax transparency reports, information reported to it by Australian-owned resident private companies with an income of AUD 100 million or more (i.e. in place of the currently applicable threshold of AUD 200 million).

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More companies required to lodge financial statements with ASIC

Amendments were also made to remove the relief in the *Corporations Act (2001)* which exempted certain grandfathered large proprietary companies (i.e. 'exempt proprietary companies') from lodging financial statements with Australian Securities and Investments Commission (ASIC). This means all large proprietary companies will now have to lodge their financial statements with ASIC in respect of financial years ending on or after 10 August 2022.

A consequence of this change is that these companies that are country-by-country reporting entities (CbCREs) for tax purposes will no longer need to lodge their GPFS with the ATO since these accounts will be required to be lodged with ASIC.

The removal of the relief will not change what type of financial report that is prepared by these entities, noting that the lodgment of special purpose financial statements with ASIC is no longer permitted for financial years beginning on or after 1 July 2021. Companies that previously prepared special purpose financial statements will have to transition to general purpose financial statements (GPFS), but may be able to apply the new simplified disclosure standard (AASB1060 General Purpose Financial Statements – Simplified Disclosures for For-Profit and Not-for-Profit Tier 2 Entities).



Employment Taxes

Application of superannuation to annual leave loading

On 27 July 2022, the Federal Circuit and Family Court of Australia handed down a decision in the matter of *Finance Sector Union of Australia v Commonwealth Bank of Australia* [2022] FedCFamC2G 409. The key question before the Court in these proceedings was whether annual leave loading forms part of ordinary time earnings (OTE) and therefore, requires superannuation contributions under the superannuation guarantee (SG) regime. In this case, the employer had not made superannuation contributions in respect of the annual leave loading paid to the employee. Under the employer's applicable enterprise agreements, annual leave loading was calculated at a 17.5 per cent rate on the "employee's Base Rate of Pay for the period of annual leave". The "Base Rate" was, in turn, defined to be the ordinary rate of pay, excluding additional payments such as bonuses, loadings, allowances, etc.

In concluding that the relevant annual leave loading did not form part of OTE, his Honour noted that the loading was not paid at the ordinary rate of pay (i.e. it was an additional loading on top thereof) and also, was not paid by reference to ordinary hours worked (rather, it was paid on annual leave).

Of significant note, Justice Driver's reasoning did not make any reference to the requirement within *SGR 2009/2* that, in order for leave loading to be excluded from the OTE base, it must be "demonstrably referable to a notional loss of opportunity to work overtime". For more in depth analysis of this decision, please see our article [What's Emerging? Recent decision raises questions over the application of superannuation to annual leave loading](#)

Appeal lodged in employee/contractor case

The taxpayer has lodged an appeal to the Full Federal Court against the recent decision in *JMC v Commissioner of Taxation* [2022] FCA 750, where the Federal Court found that a lecturer was engaged as an employee and not a contractor under both the ordinary meaning of employee and for the purposes of the extended definition of employee established within SG legislation.

For further information about this decision refer to our [August 2022 Monthly Tax Update](#).

NSW payroll tax and Commissioner's discretion to exclude member from payroll tax group clarified

Revenue New South Wales (NSW) has released *Revenue Ruling PTA031v2*, which replaces and updates an earlier ruling, providing clarification as to when the Chief Commissioner will exclude a smaller payroll tax group from a larger group and the factors that will be considered when choosing to exercise this discretion. The business of all the members in the smaller group seeking exclusion must be substantially independent and not substantially connected with every other member of the larger group.

The updated ruling applies from 1 July 2022.

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FBT exemption for electric vehicles

Amendments are currently before Parliament to provide the legislative framework supporting the Government's pre-election policy announcement to provide a Fringe Benefits Tax (FBT) exemption for certain electric cars that were first held and used on or after 1 July 2022.

The exemption will only be available to zero or low emissions vehicles which are defined as either a battery electric vehicle, hydrogen fuel cell electric vehicle or plug-in hybrid electric vehicle. It is a further requirement that at the initial retail sale or importation of the vehicle, no amount of luxury car tax (LCT) was payable (e.g. for fuel efficient cars acquired in the 2022-23 financial year, its cost does not exceed the LCT threshold of AUD 84,916). Additionally, the Bill only applies to acceptable vehicles that were first held and used on or after 1 July 2022.

The amending Bill has been referred to the Senate Economics Legislation Committee which is due to report by 21 September 2022.

Read more about this proposed FBT exemption in our article [What's emerging? Labor Government's electric car discount policy introduced into Parliament](#)

Single Touch Payroll Phase 2

The mandatory start date for Single Touch Payroll Phase 2 (STP2) reporting was 1 January 2022, with a large number of digital service providers (DSPs) having been granted a deferral. As the expiry date approaches, there are a range of issues that employers should be considering which we explore in a series of articles:

- [STP Phase 2: Communications and stakeholder management](#)
- [Deep dive - STP Phase 2: The importance of accurate payroll system mapping](#)



Global Tax and Trade

Consultation under way on Government's multinational reforms

Treasury has released a [Discussion Paper](#) that seeks stakeholder views on the implementation of the Government's proposals to:

- amend Australia's existing thin capitalisation rules to limit interest deductions 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) program (Part 1);
- introduce a new rule limiting a multinational's ability to claim tax deductions for payments relating to intangibles and royalties that lead to insufficient tax paid (Part 2); and
- ensure enhanced tax transparency by multinationals (Part 3), through measures such as public reporting of certain tax information on a country-by-country basis; mandatory reporting of material tax risks to shareholders; and requiring tenderers for Australian government contracts to disclose their country of tax domicile.

This paper complements the Government's other multinational tax initiatives, including Australia's ongoing participation in negotiations on the OECD 'two-pillar' solution to address the tax challenges of the digitalisation of the economy, which includes a 15 per cent global minimum effective tax rate on the profits of large multinationals.

Further details on the Government's proposal to implement a public registry of beneficial ownership to improve transparency on corporate structures, to show who ultimately owns (or controls) a company or legal vehicle are expected to be announced in due course.

It is unknown when the details of the final decision regarding the operation and implementation of these measures will be seen, however the Government has indicated that some of these measures may apply as early as 1 July 2023.

Submissions may be made until 2 September 2022 on this paper after which the Government will issue and consult further on exposure draft legislation prior to introducing any legislation into Parliament.

Refer to PwC's [Tax Alert](#) for further details.

Consultation on taxation of service fees paid to Indian firms

Treasury has [released](#) exposure draft legislation and explanatory materials to prevent the taxation of income derived by Indian firms that provide remote technical services to Australian customers (other than through a permanent establishment) to give effect to the side letter to the Australia-India Economic Cooperation and Trade Agreement (AI-ECTA). Specifically, the payments that are covered by this proposal are those that are taxable in Australia that are covered by Article 12(3)(g) of the Australia-India double tax agreement and that are not a royalty within the meaning of the *Income Tax Assessment Act 1936*. This would potentially cover cross-border payments for engineering services, architectural services and computer software development.

The amendments are proposed to commence on the day the AI-ECTA enters into force or the day the legislation receives royal assent (whichever is later). Comments on the proposed changes were due by 8 August 2022

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OECD update on BEPS Action 5 harmful tax practices

The OECD has provided an [update](#) to its report on preferential tax regimes as part of the Inclusive Framework on Base Erosion and Profit Shifting (BEPS) Action 5. The report includes new conclusions on 12 regimes with a total of 319 regimes having been reviewed since the program commenced, with 112 of these regimes abolished.

Inflation Reduction Act passed in the US

The recently enacted Inflation Reduction Act in the United States (US) imposes a 15 per cent corporate alternative book minimum tax (BMT) based on financial statement income, effective for tax years beginning after 31 December 2022. The BMT applies to corporations with average adjusted financial statement income over a three-tax year period in excess of USD 1 billion, but increases a taxpayer's tax only to the extent that the tentative minimum tax exceeds regular tax plus base erosion and anti-abuse tax (BEAT). Read more in PwC's [Tax Insight](#).

MLI update

The Australian Taxation Office has published the synthesised text of Australia's tax treaty with the [Republic of Hungary](#) as modified by the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (MLI).

Significant changes to UK R&D credits

The Government of the United Kingdom (UK) recently released [draft legislation](#) on its proposed changes to the UK research and development (R&D) regime. This follows last year's consultation on improving the R&D regimes, with the aim of ensuring the incentives are appropriately targeted and globally competitive. Key changes proposed include:

- restrictions on the eligibility of overseas costs (e.g. most overseas resource and subcontractor costs will no longer be eligible), but narrow exceptions still apply if it would be unreasonable to replicate the necessary conditions required to undertake the R&D activities in the UK (similar to the overseas finding process in the Australian R&D Tax Incentive regime)
- expansion of qualifying costs to include certain cloud computing and data acquisition costs (not restricted to UK-based costs), and the definition of R&D will also be expanded to include pure mathematics, and
- process and compliance changes to improve integrity measures, such as mandatory submission of supporting documentation, and requirement for pre-notification (for companies that have not claimed in the last three years) within six months after the accounting period, in order to be allowed to make an R&D claim.

These changes will not adversely impact the UK patent box regime, which will still allow overseas resource costs to be eligible as 'good' R&D for the purposes of the nexus fraction.

The new rules will apply for accounting periods beginning on or after 1 April 2023.

Global R&D Incentives

Many countries provide a R&D credit to businesses. Some credits are accounted for through the taxation system, while others are accounted for as direct above the line credits enhancing earnings before tax. PwC's global network of experienced R&D professionals can help businesses with their global R&D strategy, including advising on jurisdictional relief for R&D and ownership of intellectual property. We can also jointly develop effective strategies for obtaining grants, incentives for innovation (e.g. R&D credits and patent box regime), and alternative energy/green initiatives. Contact sophia.varelas@pwc.com to learn more.

AAT decision on anti dumping duties

The Administrative Appeals Tribunal (AAT) has held in [Electracom Pty Ltd v Comptroller-General of Customs \[2022\] AATA 2539](#) that certain aluminum extrusions, designed for use in offices to manage computer and power cables, were subject to anti-dumping duties. The applicant had argued that the goods were not simple aluminum extrusions because they were designed to interact with other components for mounting and were therefore parts of an incomplete good. The AAT held that the goods were plainly aluminum extrusions and did not have features that made them more than an aluminum profile.

Personal Tax

Consultation on measures to introduce non-refundable tax offset for veterans

Treasury has released exposure draft legislation that is intended to reverse the tax implications of the Full Federal Court decision in *Commissioner of Taxation v Douglas* [2020] FCAFC 220 (the Douglas Decision). In the Douglas Decision, the Court held that certain invalidity pensions were superannuation lump sums and not superannuation income streams. The proposed amendments change the definition of superannuation income stream to ensure certain defined benefit pensions are taxed as superannuation income streams and also introduce a non-refundable tax offset for veterans receiving certain invalidity pensions. The amendments are intended to apply from 1 July 2007. The closing date for submissions on the draft law was 5 August 2022.

Self-education expenses not deductible

The Administrative Appeals Tribunal (AAT) has held in YDXM v Commissioner of Taxation [2022] AATA 2382 that a taxpayer who was an officer in the Australian Army was not entitled to claim deductions for work-related self-education expenses incurred in earning a law degree. The taxpayer had submitted that the degree improved skills necessary to perform the taxpayer's role as a General Service Officer and has resulted in promotion and increased income. The AAT held that the taxpayer's study did not have a necessary relevant or incidental connection to gaining or producing income as an officer. While the studies were viewed favourably as part of the taxpayer's promotion, it was only one factor considered by the relevant promotion committee.

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Indirect Tax

Draft updates to GST Ruling on financial supplies and acquisitions

The Australian Taxation Office (ATO) has issued a [draft consolidation of proposed changes](#) to Goods and Services Tax (GST) Ruling [GSTR 2002/2](#) which deals with the GST treatment of financial supplies and related supplies and acquisitions. The draft updated ruling reflects changes in the GST law reflecting cross-border supplies and digital currency as well as new references to public guidance released relating to financial supplies, and some proposed changes to modernise parts of the Ruling. Comments can be made on the proposed updates by 23 September 2022.

Addendum to GST Ruling on aged care services and accommodation

The ATO issued an [addendum](#) to [GSTR 2012/3](#) which deals with the GST treatment of aged care services and accommodation in retirement villages and privately funded nursing homes and hostels. The addendum specifically considers the provision of daily meals and heavy laundry to residents of a serviced apartment within retirement villages. The ATO view has been broadened and principles provided to assist compliance with subsection 38-25(3A) of the *A New Tax System (Goods and Services Tax) Act 1999 (GST Act)* which sets out when services provided to a resident of a serviced apartment in a retirement village will be treated as provided in a 'residential setting' and accordingly GST-free. The amended ruling includes examples of different circumstances.

GST attribution for farm-out arrangements

The ATO has released for comment a [draft legislative instrument](#) that 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 draft instrument proposes to 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. Comments were due to be made on the draft instrument by 26 August 2022.

Information requirements for adjustment notes

The ATO has released for comment a [draft legislative instrument](#) that 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 the *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. Comments were due to be made on the draft instrument by 26 August 2022.

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State Taxes

ACT 2022-23 Budget

The 2022-23 Budget for the Australian Capital Territory (ACT) was handed down on 2 August 2022 by the Chief Minister and Treasurer, Andrew Barr, MLA. The budget forecast a deficit of AUD 483 million for 2022-23 with an expected improving fiscal position trend, predicting reducing deficits of AUD 344.9 million in 2023-24, AUD 299.5 million in 2024-25, and AUD million in 2025-26.

This budget builds on the tax reform pathway introduced in 2012-13, including the continuation of the scheduled phasing out of conveyance duty. In this regard, the Treasurer reiterated the commitment to ensure that the program is revenue neutral, with increases in general rates above the wage price index being used to reduce conveyance duty.

In 2022-23, the ceiling of the lowest conveyance duty tax bracket for residential owner-occupiers has been raised and a lower marginal tax rate on dutiable values under AUD 260,000 for owner-occupier residential transactions has been set at 0.6 per cent (non-owner occupier rate is 1.2 per cent). There is also an increase of AUD 100,000 in the tax-free threshold for commercial transactions, with a predicted progressive increase from AUD 1.5 million to AUD 2 million in 2025-26.

Additionally, from 1 July 2022, the ACT Home Buyer Concession Scheme income eligibility threshold has increased by AUD 10,000 from AUD 160,000 to AUD 170,000 and the Deferred Duty and Disability Duty Concession Schemes price eligibility thresholds have also been increased from AUD 750,000 to \$1 million is not to be used for any other purpose or distributed to any other party.

Land tax revenue is forecast to grow to AUD 172.1 million in 2022-23, reflecting an anticipated continuation of strong investment interest in the Territory's residential property market. Land tax assessments in 2022-23 are calculated on a valuation-based charge using the average unimproved value (AUV) for 2022 (which is the average of 2018, 2019, 2020, 2021 and 2022 unimproved land values), and a fixed charge of AUD 1,462. Foreign investors who own residential property in the ACT are also liable for a surcharge of 0.75 per cent of the property's AUV.

The ACT Fire and Emergency Services Levy (FESL) in 2022-23 will have the following elements:

- a fixed charge of AUD 361.38 for residential and rural properties with a pensioner rebate of AUD 98, and
- a valuation-based charge for commercial properties in 2022-23 with marginal rating factors applied to the AUV for 2022 (which is the average of 2018, 2019, 2020, 2021, and 2022 unimproved land values).

The ACT Government will increase the rate of the Betting Operations Tax (BOT) from 15 per cent to 20 per cent from 1 July 2022. The BOT, which commenced on 1 January 2019, is payable by all betting operators whose net ACT betting revenue exceeds the tax-free threshold of AUD 150,000 in a financial year.

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NSW duty and leases – Regulations Released

The recent changes to the *Duties Act 1997* (NSW) included an expansion of the types of dutiable transactions to include a new category, being a change in beneficial ownership. Earlier this month, Revenue NSW issued a [general statement](#) confirming that the grant or surrender of a lease can now be dutiable under these amended provisions unless it is an excluded or exempt transaction. This means that, among other things, the grant of a lease for non-monetary consideration is now dutiable in NSW under these amended provisions. The general statement also indicated an intention to release Regulations and a Commissioner's Practice Note which will contain a detailed explanation of the duty consequences of lease transactions following these amendments.

The [Regulations](#) were subsequently released on 26 August 2022 and apply retrospectively to any transactions entered into since the amendments came into force on 19 May 2022. The Regulations include a number of exclusions from these new provisions, including changes of default beneficiaries of discretionary trusts, interests under testamentary instruments, creation of security interests and certain dealings relating to leases for no consideration (e.g. certain dealings in fit out, changes in tenant). The Commissioners Practice Note has not yet been released.

NSW ruling on exemption from surcharge for certain developments

NSW Revenue has issued an updated version of [Revenue Ruling G 013 - Exemption from Surcharge for Certain Development by Australian Based Developers that are Foreign Persons](#). This is the ruling that sets out in further detail the matters which the Chief Commissioner of State Revenue will consider in determining whether an exemption from NSW surcharge purchaser duty and surcharge land tax liability should be granted to an Australian-based developer that is a foreign person.

The ruling has been updated to take into account recent amendments to the *Duties Act 1997* (NSW), which extend the relief to land which is used for residential purposes at the time of acquisition but is intended to be used for commercial or industrial purposes post acquisition. The ruling confirms that the exemption can be granted before the change in use actually occurs.

NSW landholder duty

The NSW Supreme Court in [Meridian Energy Australia Pty Ltd v Chief Commissioner of State Revenue \(NSW\) \[2022\] NSWSC 1074](#) has set aside a landholder duty assessment in relation to the acquisition of all the shares in a company that operated power stations because the power stations were not land or interests in land.

The key issues for consideration are as to the nature of the interest in the power stations or how the power stations are to be characterised. The taxpayer contended that the interest in the power stations is an innominate sui generis property interest which cannot be classified as land or goods, which was created by virtue of a statutory Vesting Order. The Chief Commissioner argued that the power stations are fixtures (being part of the leased land) as the effect of the statutory Vesting Orders was not to enact a statutory severance of the power stations from the land upon which they were situated, but rather had the effect of transferring the existing assets of the tenant of the leased land to the future tenant of the leased land.

The Court concluded that the dutiable value of the acquisition is nil on the basis that the power stations were not landholdings in the relevant sense, nor was the Pacific Hydro Methodology (i.e. the approach to valuation adopted by Payne JA in *SPIC Pacific Hydro Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 395) applicable in valuing the company's leases, and that therefore the acquisition was not a relevant acquisition within the meaning of the *Duties Act 1997* (NSW).

The case highlights the importance of understanding the specific nature and legal characterisation of assets or arrangements in applying stamp duty legislation.

NSW surcharge duty applied

The Civil and Administrative Tribunal of NSW found that a taxpayer was liable for surcharge purchaser duty in respect of an off-the-plan residential-related property he and his partner agreed/contracted to purchase, on 28 February 2017 (Frietman v Chief Commissioner of State Revenue [2022] NSWCATAD 265).

The Tribunal agreed that the dutiable transaction is an agreement for sale of dutiable property, and the date on which liability for duty arises is the date on which the agreement was entered into. Furthermore, the liability for surcharge purchaser duty arises on the same day, if, as of that day the purchaser is a 'foreign person' falling within the terms of section 104J of the *Duties Act 1997*. The fact that the taxpayer was a permanent resident was not sufficient on its own to establish that the applicant was not a 'foreign person'. The undisputed evidence is that the taxpayer was not actually present in Australia during 200 or more days in the period of 12 months prior to 28 February 2017 and accordingly the Tribunal was satisfied that, as at the date of the agreement/contract, the taxpayer was liable, under section 104L of the *Duties Act 1997* for surcharge purchaser duty on the purchase of his share of the property.

Although the Tribunal accepted the taxpayer was absent from Australia due to work commitments made at the direction of his employer, this is not a factor relevant to the determination as whether the applicant was or was not a 'foreign person' and the provisions of the *Duties Act 1997*, as they applied on the date the liability for surcharge duty arose, do not contain a discretion to waive or grant an exemption from surcharge duty, where the statutory criteria of being ordinarily resident were not met.

NSW surcharge land tax

In the matter of Monisse v Chief Commissioner of State Revenue [2022] NSWCATAD 276 the Civil and Administrative Tribunal of NSW affirmed the decision of the Chief Commissioner of State Revenue to issue an assessment of surcharge land tax. The Tribunal agreed that the taxpayer's liability could not be reduced by reason of failure of Revenue NSW to alert the taxpayer to legislative changes that imposed surcharge land tax on the taxpayer in his capacity as trustee of a discretionary trust. The relevant trust deed was not amended in time to expressly exclude foreign persons from the class of eligible beneficiaries to avoid the surcharge land tax imposed.

WA duty and farm-in arrangements

The Duties Amendment (Farm-in Agreements) Bill 2022 (WA) was introduced into the Western Australia (WA) Parliament to amend the *Duties Act 2008* to address issues with the transfer duty concession for farm-in agreements involving mining tenements, to maintain the long-standing concessions. The amendments also update the concession to accommodate, where possible, the different ways in which farm-in arrangements may be structured. The Bill will also clarify that the duty concession does not apply where the exploration amount involves capital expenditure on mining operations or mining infrastructure in respect of farm-in agreements entered into from 28 November 2018.

A farm-in agreement is an agreement between a holder of a mining tenement or a derivative mining right (the farmor) and another person (the farmee), which entitles the farmee to acquire an interest in the tenement or right after spending an amount on exploration of the tenement.

Most of the amendments in the Bill commence from the day after Royal Assent with transitional rules to support concessions that applied from 1 July 2008 in accordance with the Commissioner of State Revenue's assessing practices and to allow the concession for agreements entered into before the Bill is enacted.

WA duties ruling on connected entities exemption updated

Revenue Ruling DA 19.2 is an updated ruling which sets out the Commissioner's interpretation of certain terms relevant to applying for a connected entities exemption for WA duties purposes. The exemption from duty applies to relevant transactions between corporations and unit trust schemes that are members of a family.

WA duty and de facto couples and superannuation

Consequential amendments have been made to the *Duties Act 2008* (WA) by the Family Court Amendment Bill 2022 which allows separating de facto couples in WA to split their superannuation in the same manner as married couples.

Superannuation

More super data to be released

The Australian Prudential Regulation Authority (APRA) has announced that it intends to release further superannuation data, including fees, costs, asset allocation and performance data for superannuation fund products. The release of the data will begin in September 2022 with aggregate quarterly data on industry structure, demographics and investments. APRA then intends to release quarterly product level data in the fourth quarter of 2022, followed by an annual publication covering industry and product data in early 2023. APRA has made available its responses to stakeholder concerns raised during consultation earlier in the year.

Annual performance test deferred for trustee-directed products

The Superannuation Industry (Supervision) Amendment (Your Future, Your Super—Addressing Underperformance in Superannuation) Regulations 2022 have been made to defer the application of the annual *Your Super, Your Future* performance test for trustee-directed superannuation products to 1 July 2023 (from 1 July 2022). The regulations are intended to allow extra time for consultation on how the performance test will apply to trustee-directed products.

Additional amounts withdrawn from SMSF were not lump sum amounts

The Administrative Appeals Tribunal (AAT) has held in Prescott v Commissioner of Taxation [2022] AATA 2478 that payments received by the taxpayer from his self-managed superannuation fund (SMSF) were superannuation income stream benefits in the absence of an election by the taxpayer. The taxpayer had reached preservation age and elected to draw a certain amount each month from the SMSF. However, additional to the regular monthly payments, the taxpayer often withdrew additional funds above his elected amount. In dispute was whether the taxpayer had elected for those payments to be 'superannuation lump sum' payments as defined in relevant legislation.

The Commissioner contended that the taxpayer had not made an election for the payments to not be treated as a superannuation income stream benefit and were therefore subject to tax accordingly. The taxpayer contended that while no formal election had been made, email correspondence with the investment manager of the SMSF supported the position that an election had effectively been in place. The AAT affirmed the decision of the Commissioner in finding that email correspondence did not constitute a valid election and the payments were therefore to be taxed as superannuation income stream payments.

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Disqualification as responsible office for SMSF

The AAT has found in Gouloupoulos v Commissioner of Taxation [2022] AATA 2540 that an individual should be disqualified from being a responsible officer of a corporate trustee of an SMSF following a number of serious contraventions of the *Superannuation Industry (Supervision) Act 1993* (SIS Act). The Tribunal found that it was evident from the facts that the contraventions, especially those involving the unauthorised drawings or member loans from the fund (i.e. virtually depleted of all of its funds), the failure to lodge returns for multiple years, especially in the context of the other contraventions, are particularly serious matters.

Although the applicant offered to undertake a trustee education course with an eligible provider, to provide an enforceable undertaking to stop the behaviour that led to the contraventions, and put in place strategies to prevent contraventions again, the Tribunal was not satisfied that they would mitigate the risk of future contraventions if the applicant were allowed to act as a trustee, investment manager or custodian or as a responsible officer of a corporate trustee of an SMSF in the future.

In all the circumstances the Tribunal was satisfied that the applicant is not a fit and proper person to be a trustee, investment manager or custodian, or a responsible officer of a body corporate that is a trustee, investment manager or custodian within the meaning of the SIS Act, and for this reason also, should be disqualified.

Remarks on retirement income covenant

APRA has published a joint speech given by senior APRA and Australian Securities and Investments Commission (ASIC) personnel on the retirement income covenant. The speech highlighted the role of APRA and ASIC in helping Australians use their superannuation in retirement, with the regulators working together more closely. The key focus for ASIC has been to assist trustees in providing information and tools to members, through relief from financial advice laws. Based on summaries published by trustees on their websites, ASIC has determined that trustees are at different phases of their implementation of the retirement income covenant, some trustees are developing new products in response to the covenant and some trustees are taking time to understand and engage their members to form tailored cohorts. Both APRA and ASIC have been pleased to see progress made by trustees and plan to conduct a joint thematic review of the strategies of a sample of trustees. The review will focus on assessing what has been done well, what should be improved and where trustees will focus their attention. Further details will be communicated over the coming months.

Legislative

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

- Treasury Laws Amendment (2022 Measures No. 2) Bill 2022, which was introduced into the House of Representatives on 3 August 2022, proposes a number of measures contained in legislation before the previous Parliament or in pre-election commitments, including:
 - allowing the Commissioner of Taxation to require an entity to complete an approved record-keeping course as an alternative to financial penalties where the Commissioner reasonably believes the entity has failed to comply with its tax-related record keeping obligations
 - the introduction of a sharing economy reporting regime which will require electronic platform operators to provide certain information on certain transactions to the Australian Taxation Office (for more details, see the Other News section in this Update)
 - removing the AUD 250 non-deductible threshold for work-related self-education expenses
 - providing increased powers to the Administrative Appeals Tribunal (AAT) to stay or otherwise affect debt recovery actions by the ATO in relation to small business where the matter is being reviewed by the AAT, and
 - expanding eligibility for the downsizer contribution scheme by allowing individuals aged 55 years and above to make contributions to their superannuation fund from the proceeds of selling their main residence.
- Defence, Veterans' and Families' Acute Support Package Bill 2022, which was introduced into the House of Representatives on 3 August 2022, proposes to provide more vulnerable veterans and their families with support under the Defence, Veterans', and Families' Acute Support Package, and

The following tax-related legislation has completed its passage through Parliament and is now law:

- Treasury Laws Amendment (2022 Measures No 1) Act 2022, that contains the following measures:
 - making associated grants made under Category C of the Disaster Recovery Funding Arrangements 2018 to small businesses and primary producers impacted by Cyclone Seroja non-assessable and non-exempt income
 - providing income tax and withholding tax exemptions for FIFA and its wholly owned subsidiary for activities associated with delivering the 2023 FIFA Women's World Cup
 - making minor and technical amendments to various legislation including the Fringe Benefits Tax Assessment Act 1986 to address unintended consequences and restore access to FBT exemptions for certain tax exempt not-for-profit societies and associations inadvertently excluded and prevent overlap between employees covered by the exemption caps
 - delay the commencement of the Modernising Business Registers program, and
- the following amendments which were made during the Bill's passage through Parliament:
- lowering the reporting threshold for ATO tax transparency measures to AUD 100 million (previously AUD 200 million) for Australia-owned private companies and
 - removing the grandfathering arrangements for large proprietary companies that provided an exemption for lodging financial reports with the Australian Securities and Investments Commission.

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The following measures have been registered as legislative instruments since our last update:

- Superannuation Industry (Supervision) Amendment (Your Future, Your Super—Addressing Underperformance in Superannuation) Regulations 2022 which defers the application of the annual performance test required under the *Your Super*, *Your Future* reforms for trustee-directed superannuation products to 1 July 2023.

Other News

Board of Taxation's review of tax treatment of digital assets and transactions underway

The Board of Taxation has released its [Consultation Guide](#) for its review of the tax treatment of digital assets and transactions in Australia. The Guide not only provides an overview of crypto assets and their current taxation treatment, but also outlines recent relevant government reports and announcements and poses a series of questions for interested parties to consider when formulating input to the review.

Written submissions in response to this Consultation Guide are due by 30 September 2022. The Board is due to report back to the Government by the end of 2022.

Sharing economy reporting update

The [Treasury Laws Amendment \(2022 Measures No. 2\) Bill 2022](#) has been introduced into Federal Parliament to require operators of online marketplaces to report seller identification and payment details to the Australian Taxation Office (ATO) under an extension to the existing Taxable Payments Reporting System (TPRS) provisions.

Although the amendments which are now before Parliament are identical to what was introduced into the previous Parliament before they lapsed with the calling of the 2022 Federal election, in a welcome move, the applicable start dates have been extended by a further year, but this means there is still less than 12 months for affected businesses to look at how existing systems might need to be adapted and to plan for the implementation of these new reporting obligations before the first reportable transactions occur. Specifically, electronic platform operators in the taxi travel and short term accommodation industries will be required to report certain transactions to the ATO from 1 July 2023 with electronic platform operators in all other industries to report on transactions from 1 July 2024.

Read more in PwC's [Tax Alert](#).

Consultation on Commonwealth procurement policy

Treasury has [released a consultation paper](#) on the Shadow Economy Procurement Connected Policy which commenced on 1 July 2019 for Commonwealth Government procurements valued over AUD 4 million (including the goods and services tax) for all goods and/or services, including for construction services.

The consultation is occurring to satisfy a requirement to conduct an annual review of procurement policies pursuant to the Commonwealth Grants and Procurement Connected Policies guide. A key focus of the consultation is around the requirement for a tenderer to provide a satisfactory Statement of Tax Record (STR) obtained from the ATO and whether the existing STR criteria are appropriate and sufficient to meet the policy objectives. The consultation is also intended to identify and resolve issues and for stakeholders to make suggestions for improvements. Submissions may be made until 23 September 2022.

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Consultation on extended period of review for small and medium businesses

Treasury has released for consultation [draft regulations](#) designed to extend the period of review for some entities from two to four years. The measure follows the 2020-21 Federal Budget measure that increased the aggregated turnover threshold for small and medium businesses to AUD 50 million (previously AUD 10 million), which had the effect of making these entities eligible for the shortened two year period of review for amending an assessment. The regulations propose to exclude certain entities with complex affairs or significant international tax dealings from the shortened period of review, including:

- those with transactions between related parties that relate to assets or non-cash benefits with a market value of at least AUD 50,000
- entities that derive more than AUD 200,000 of their assessable income from foreign sources
- Australian companies, trusts and partnerships that are controlled by foreign entities
- entities that engage in schemes captured by either the Diverted Profits Tax (DPT) or Multinational Anti-Avoidance Law (MAAL)
- entities that may be entitled to the R&D tax offset or certain related deductions, recoupments and adjustments, and
- entities that claim certain capital gains tax (CGT) relief such as restructure rollover relief or are foreign resident seeking the CGT exemption.

The amendments are proposed to apply to assessments made after the Regulations commence for income years starting on or after 1 July 2021. Submissions may be made until 13 September 2022.

PSLA on claims about invalid laws

The ATO has updated Law Administration Practice Statement [PS LA 2004/10](#) on how it will address claims by taxpayers that certain laws are invalid or do not apply to them. The updates reflect the escalation process that should be followed after a claim by a taxpayer and that it is not appropriate for ATO staff to spend time and resources producing detailed responses given that many claims have previously been rejected by courts.

ATO publishes details of 'tip-offs'

The ATO has published details of the most common tip-offs it received in the 2021-22 financial year concerning taxpayers potentially dealing in the shadow economy. The most common examples reported are asking for payments in cash, paying workers in cash or not declaring all sales. The industries most commonly related to tip-offs include construction, hairdressing and beauty services, cafes and restaurants, road freight and management and consulting services. The ATO is using these tip offs as part of its broader strategy for addressing shadow economy activities and the publication contains a number of case studies.

Scheme to access cashflow boost

The Administrative Appeals Tribunal (AAT) has held in [JC Mobile Sharpening Discretionary Trust \(Trustee of\) v Commissioner of Taxation \[2022\] AATA 2482](#) that a discretionary trust was not eligible for the cash flow boost stimulus measure. The taxpayer contended that it had decided to pay its sole worker a salary rather than make a distribution of trust income as it had done previous years. The AAT found that the only evidence of a salary of wage was created after announcement of the cash flow boost measure and that amounts paid to the worker were not actually amounts of salary or wages. While not necessary to decide, the AAT also found that on the basis of the evidence before it, the taxpayer failed to discharge its burden of proof to establish that it did not enter into or carry out a scheme for the sole or dominant purpose of obtaining the cash flow boost payments.

Growth in invoicing

The ATO has issued a [media release](#) stating that it expects significant growth in invoicing over the next year with 18,000 businesses already using invoicing. The media release highlights the benefits of invoicing, including administrative time saved, improved cashflow and reduced risk of fraud. It also contains details on how to check if a software provider has enabled invoicing.

Payment times reporting – consultation on updated guidance

Treasury has released for consultation updated guidance for the Payment Times Reporting Scheme which is intended to assist reporting entities to meet their obligations and understand expectations when the Payment Times Reporting Regulator undertakes compliance activities. The Payment Times Reporting Scheme requires businesses and government enterprises with an annual total income of over AUD 100 million to report on their payment terms and practices for their small business suppliers. Comments can be made on the updated guidance by 2 September 2022.

Editorial

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