April 2018

TaxTalk Monthly

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

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Corporate Tax Update

Senate Inquiry into Corporate Tax Avoidance public hearing

The Senate Economics Committee inquiry into Corporate Tax Avoidance is continuing. A public hearing was held on 14 March 2018 at which various parties, including Treasury and the Australian Taxation Office (ATO), appeared. Discussion at the hearing was focused on the proposed mandatory disclosure regime, the Petroleum Resource Rent Tax (PRRT) and the broader issue of corporate tax avoidance. The ATO also provided a compliance and staff update, discussion of the corporate tax gap and an update on lodgment of Country by Country (CbC) reports.

In addition, the ATO, in its supplementary submission presented to the Committee, highlighted the high level of tax compliance large companies have in Australia, noting in this context, the Multinational Anti-Avoidance Law (MAAL) has provided a permanent improvement in mitigating tax avoidance, whilst the Chevron case and the ATO's PCG 2017/4 on cross-border related party financing arrangements have resulted in a significant improvement. Other ATO areas of work which were highlighted included compliance in the oil, gas and pharmaceutical industries, fragmentation of businesses into stapled group structures, the transfer of intellectual property offshore, the examination of CbC reporting, new legislation to deal with significant hybrid risk and implementation of the Diverted Profits Tax (DPT). The submission also discussed ATO compliance activity and year to date results and improvements in ATO capability.

Tribunal finds companies were not 'associates'

The Administrative Appeals Tribunal (AAT) in *MWYS and Commissioner of Taxation [2017] AATA 3037* has found for the taxpayer and held that the Commissioner of Taxation had incorrectly included 'tainted sales income' in the assessable income of a company under the Controlled Foreign Company (CFC) provisions. The Tribunal found that the Australian subsidiaries of a company incorporated in the United Kingdom (UK) that made sales of commodities to the CFC were not 'associates' for the purposes of section 318 of the *Income Tax Assessment Act 1936* (Cth) (ITAA 1936) as the 'sufficiently influenced' test was not satisfied.

The 'sufficiently influenced' test is set out in section s318(6)(b) of the ITAA 1936 as follows:

"(b) a company is sufficiently influenced by an entity or entities if the company, or its directors, are accustomed or under an obligation (whether formal or informal), or might reasonably be expected, to act in accordance with the directions, instructions or wishes of the entity or entities (whether those directions, instructions or wishes are, or might reasonably be expected to be, communicated directly or through interposed companies, partnerships or trusts);"

The Tribunal made reference to the taxpayer group's Dual-listed Structure Sharing Agreement, which the Commissioner had used to draw an inference that the taxpayer was obliged, or might reasonably be expected, to act in accordance with the UK listed group's directions, instructions or wishes (and vice versa). The Tribunal also considered various other factors including:

- There was no abrogation by any party to the dual listed arrangement of an 'effective control', either by the shareholders or the board of directors of the respective corporate parties of either the company concerned or its subsidiaries. The boards of each of the entities (and the CFC) each met and exercised independent judgments rather than 'rubber-stamping decisions actually made elsewhere by others'.
- Even though the taxpayers' and the UK listed groups' boards were comprised of the same individuals, those individuals acted in a separate capacity as directors of the relevant entity, and the duality of the role is not indicative of the application of the 'sufficiently influenced' definition. The individuals concerned were obliged to act in the interests of each of the companies based on obligations imposed under the relevant constituent documents of each company.
- The directors were authorised and directed to make their decisions in a way to advance the 'single unified economic entity' principle under the sharing agreement. The agreement also allowed the directors to cause each company (or its respective subsidiaries) to enter into transactions for the benefit of the overall group. The Tribunal stated that this ability to act in concert is consistent with the submission that the arrangement is similar to a joint venture and that does not make them 'associates' as defined.

Let's talk

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

Pete Calleja, Sydney
Australian Tax Leader
+61 (2) 8266 8837
pete.calleja@pwc.com

David Ireland, Sydney
Financial Services Corporate Tax Leader
+61 (2) 8266 2883
david.ireland@pwc.com

Kirsten Arblaster, Melbourne
Infrastructure & Urban Renewal Corporate Tax Leader
+61 (3) 8603 6120
kirsten.arblaster@pwc.com

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

Julian Myers, Brisbane
Brisbane Corporate Tax Leader
+61 (7) 3257 8722
julian.myers@pwc.com

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

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

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

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

Employment Taxes Update

No payroll tax on amounts distributed via express trust (VIC)

The Victorian Civil and Administrative Tribunal (the Tribunal) in *The Optical Superstore Pty Ltd & Ors v Commissioner of State [2018] VCAT 169* has held that payroll tax was not payable on certain net consultation payments made to optometrists by the owner of the clinic and premises at which that the optometrists used to treat their customers. The case also dealt with the application of de-grouping discretion and penalties and interest on payroll tax liabilities, with the Tribunal finding that the Commissioner was correct in disallowing de-grouping, as well as not allowing the remission of penalties or interest in respect of payroll tax underpayments.

The proceedings were brought before the Tribunal as a result of a challenge by the Applicant against payroll tax assessments issued by the Victorian State Revenue Office in respect of payments made by the Applicant to optometrists who treated customers from the Applicant's facilities. Under agreement with the optometrists, the Applicant would collect gross consultation fees on the optometrists' behalf from customers before deducting occupancy fees payable by the optometrists to the Applicant for use of the facilities. The net consultation fees would then be paid to the optometrists.

While finding that the contracts between the Applicant and the optometrists were 'relevant contracts', the Tribunal agreed with the Applicant that the net consultation fees paid by the Applicant to the optometrists were generally not wages for payroll tax purposes. This was on the basis that the net consultation fees were effectively held on trust for the optometrists, and the payments were therefore not considered to be for, or in relation to, services provided to the Applicant. Instead, only a small number of payments made by the Applicant to optometrists based directly on hours worked by the optometrists were considered wages for payroll tax purposes.

ATO's compliance approach to Superannuation Guarantee

The Australian Taxation Office (ATO) has released a fact sheet which explains its compliance and penalty approach in relation to employer superannuation guarantee (SG) obligations. This approach applies to employers who are unable or unwilling to meet their SG obligations, including non-payment, under-payment, or late payment of SG contributions on behalf of an eligible employee.

The guidance indicates that the ATO is unlikely to impose additional penalties for employers who engage with them and have a compliance history that demonstrates general compliance with their superannuation obligations.

Single Touch Payroll ATO update

The ATO has released a Single Touch Payroll communication resource pack, which contains, among other things, detailed information on payments employers should report through Single Touch Payroll and information for employees.

The ATO has also started contacting employers to remind them about the need to start reporting using a Single Touch Payroll-enabled solution from 1 July 2018. This applies to employers with 20 or more employees, unless a deferral is in place. The test date for reporting the number of employees was 1 April 2018.

New Visa - Global Talent Scheme

The Government has announced that a new visa scheme to attract highly skilled global talent and deliver innovation to Australia will be piloted from 1 July 2018, for 12 months. The Global Talent Scheme will consist of two components:

- Established businesses with an annual turnover of more than AUD 4 million will be able to sponsor highly skilled and experienced individuals for positions with earnings above AUD180,000 into Australia.
- Technology-based and Science, Technology, Engineering and Mathematics (STEM)-related start-up businesses will also be able to sponsor experienced people with specialised technology skills.

The Government will consult further on the details of the scheme over the next few months.

Taxable payments reporting system and contractors in courier and cleaning industries

The *Treasury Laws Amendment (Black Economy Taskforce Measures No.1) Bill 2018*, which is currently before Federal Parliament, seeks to extend the taxable payments reporting system to businesses in the courier and cleaning industries from 1 July 2018. In readiness for this, the ATO has updated its draft guidance on the proposed expansion of the taxable payments reporting system. Comments were due on 23 March 2018.

New payroll tax bill to restrict trainee exemption (WA)

The *Pay-roll Tax Assessment Amendment (Exemption for Trainees) Bill 2018* has been introduced into the WA Parliament. The Bill proposes to amend the *Pay-roll Tax Assessment Act 2002* (WA) to limit the existing payroll tax exemption to new employees who do not have any previous training contract with an employer's payroll tax group, and to a particular period for training qualification. The changes seek to close a loophole in the current exemptions with retrospective effect from 1 December 2017, with transitional rules in place for training contracts entered into before that date.

Let's talk

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

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

Stephen Baker-Smith, Melbourne
Partner
+61 (3) 8603 0045
stephen.baker-smith@pwc.com

Rohan Geddes, Sydney
Partner
+61 (2) 8266 7261
rohan.geddes@pwc.com

Katie F Lin, Sydney
Partner
+61 (2) 8266 1186
katie.f.lin@pwc.com

Stephanie Males, Canberra
Partner
+61 (2) 6271 3414
stephanie.males@pwc.com

Maria Ravese, Adelaide
Partner
+61 (8) 8218 7494
maria.a.ravese@pwc.com

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

Penelope Harris, Perth
Partner
+61 (8) 9238 3138
Penelope.harris@pwc.com

Global Tax Update

Latest news from international tax and transfer pricing

US tax reform developments

To keep up to date with the latest developments, news and implications of tax reform in the United States (US), visit PwC's dedicated website at www.pwc.com.au/ustaxreform. The website is regularly updated, and brings together insights from business specialists across the globe for US inbound and outbound organisations navigating change.

Some recent updates to note include:

- Tax reform readiness - Foreign-derived intangible income.
- Tax reform readiness - Repatriating previously taxed income/Accessing foreign cash.
- Tax reform readiness - Understanding the impact on human capital investments and mobility.
- Tax reform legislation makes significant changes to depreciation provisions.
- IRS provides 'toll tax' reporting guidance.
- Taxpayers should revisit internal policies and procedures due to tax reform changes related to meal and entertainment expenditures.

PwC US has been hosting a tax reform readiness webcast series, covering everything from financial reporting implications to workforce strategies and business preparedness. You can view past webcast recordings, and register for upcoming topics by following this link: www.pwc.com.au/ustaxreform.

Addressing hybrid mismatch arrangements

The Australian Government has released revised exposure draft legislation to address hybrid mismatch arrangements. The proposed rules are designed to prevent companies doubling up on certain taxation benefits and will operate by either denying deductions or including relevant amounts in assessable income (refer to the Government's media release). This latest exposure draft updates the incomplete draft legislation previously released for comment in November 2017, and also incorporates rules to address branch mismatch arrangements and to introduce a targeted integrity rule designed to discourage foreign interposed zero or low tax entities (where the rate of foreign income tax in the country of the interposed entity is 10 per cent or less) lending to Australia.

Comments on this latest exposure draft are due 4 April 2018. This TaxTalk Alert, which was published on 9 March 2018, discusses the revised draft law in further detail.

Australia – Singapore tax treaty

The Prime Minister, in a press conference with the Singaporean Prime Minister, has indicated that the double tax treaty between the two nations will be updated, and is subject to relevant discussions. The treaty was last updated in 2009.

OECD and BEPs developments

The Secretary-General of the Organisation for Economic Cooperation and Development (OECD) has released his report to the G20 Finance Ministers and Central Bank Governors that met in Argentina. A key challenge noted in the report is the taking of unilateral action by members which pose a threat to multilateralism, and which could affect the level of co-operation between G20 countries. The report contains two parts:

- Part I is a report on the activities and achievements of the OECD's tax agenda, and looks ahead at the further progress needed, in particular through the Inclusive Framework on Base Erosion and Profit Shifting (BEPS).
- Part II is a progress report to the G20 by the Global Forum on Transparency and Exchange of Information for Tax Purposes.

In addition, the interim report on the Tax Challenges Arising from Digitalisation was also released. This interim report is a follow-up to the work delivered under BEPS Action 1 on addressing the tax challenges of the digital economy. It sets out the Inclusive Framework's agreed direction of work on digitalisation and describes how digitalisation is also affecting other areas of the tax system, providing tax authorities with new tools that are translating into improvements in taxpayer services, improving the efficiency of tax collection and detecting tax evasion.

The OECD has also issued new model disclosure rules that require lawyers, accountants, financial

advisors, banks and other service providers to inform tax authorities of any schemes they put in place for their clients to avoid reporting under the OECD/G20 Common Reporting Standard (CRS) or prevent the identification of the beneficial owners of entities or trusts.

In other BEPS-related developments:

- Anguilla has joined the Inclusive Framework on BEPS.
- The OECD has released the third round of peer reviews on the implementation of BEPS Action 14 minimum standards on improving tax dispute resolution mechanisms which relate to Czech Republic, Denmark, Finland, Korea, Norway, Poland, Singapore and Spain. The OECD is also calling on taxpayers to provide input (due 9 April 2018) for the fifth round of BEPS Action 14 Stage 1 peer reviews of Estonia, Greece, Hungary, Iceland, Romania, Slovak Republic, Slovenia and Turkey.

OECD working paper on loss carryover provisions

The OECD has released a working paper on Loss carryover provisions - Measuring effects on tax symmetry and automatic stabilisation. Using detailed country-level information, this paper presents two tax policy indices capturing the effects of carryover provisions on tax symmetry and stabilisation across a total of 34 OECD and non-OECD countries. The report shows that only 18 countries provide unlimited loss carry-forwards and most countries do not index tax losses to inflation; and only nine countries provide carry-backs, while eight countries limit the amount of tax losses which can be offset in any given year.

EU tax proposals for digital economy

The European Commission (EC) has proposed new measures to ensure 'fair and effective taxation' for digital business activities in the European Union (EU). The two distinct legislative proposals are as follows:

- Reforms to the corporate tax rules so that profits are registered and taxed where businesses have significant interaction with users through digital channels. This forms the Commission's preferred long-term solution. This proposal would enable Member States to tax profits that are generated in their territory, even if a company does not have a physical presence there. The new rules would ensure that online businesses contribute to public finances at the same level as traditional 'bricks-and-mortar' companies.
- Introducing an interim Digital Services Tax (DST) for the taxation of digital activities in the EU. The DST proposal sets out a rate of 3 per cent, which would apply to gross revenue derived in the EU from selling online advertising; from the sale of data collected and generated from users' activities on digital interfaces, and from making available to users a multi-sided digital interface which allows users to find and interact with other users, and which may also facilitate the provision of goods or services directly between users.

The legislative proposals will be submitted to the Council for adoption, and to the European Parliament for consultation. The EC states that it will continue to actively contribute to the global discussions on digital taxation within the G20/Organisation for Economic Cooperation and Development (OECD), and push for international solutions. Refer to PwC's Global Tax Insights for further information.

EU Commission finds that Luxembourg granted unlawful State aid

The European Commission has published the non-confidential version of its final decision, issued on 4 October 2017, concerning a State aid investigation. This decision is the latest in a number of related high-profile cases that concern the EC's approach on State aid, in particular in relation to tax rulings and transfer pricing. Refer to PwC's Global Tax Insights for further information.

Dutch Government provides guidance on EU anti-tax avoidance directive implementation

The Dutch Government has provided additional guidance on its proposed measures addressing tax avoidance and the Dutch interpretation of the EU anti-tax avoidance directive. The guidance is in line with the Dutch Government's previously proposed tax plans for the coming years, which aim to increase the Netherlands' attractiveness for multinational enterprises doing business in the Netherlands. The Government still intends to reduce the general Dutch corporate income tax rate to 21 per cent and abolish the current Dividend Withholding Tax Act. Refer to PwC's Global Tax Insights for further information.

In addition, the Dutch corporate income tax for fiscal unities will be amended in response to the EU Court of Justice 'per-element approach'. This may have an impact on the tax position of multinational enterprises whose Dutch entities currently are

included in a fiscal unity. Refer to PwC's Global Tax Insights for further information.

Canadian Federal Budget 2018

The Canadian Government has released its 2018 Federal Budget, which includes various international tax developments such as cross-border surplus stripping using partnerships and trusts, investment business definition, controlled foreign affiliate status, reporting requirements and reassessments. Refer to PwC's Global Tax Insights for further information.

Explore PwC's global tax research and insights

Let's talk

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

Pete Calleja, Sydney
Australian Tax Leader
+61 (2) 8266 8837
pete.calleja@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

Eddy Moussa, Sydney
Partner
+61 (2) 8266 9156
eddy.moussa@pwc.com

Indirect Tax Update

ATO finalises rulings on application of GST to low value goods

The Australian Taxation Office (ATO) has finalised and issued the following taxation rulings in relation to the application of the goods and services tax (GST) on low value imported goods:

- Law Companion Ruling LCR 2018/1, which discusses the new rules which apply from 1 July 2018, and ensures that Australian GST is payable on offshore supplies of low value goods that are purchased by Australian consumers.
- Law Companion Ruling LCR 2018/3, which discusses the amendments that make a 'redeliverer' responsible for GST on an offshore supply of low value goods brought to the indirect tax zone.

In addition, Law Companion Ruling LCR 2018/2 was finalised, and explains how GST will apply to supplies made through electronic distribution platforms (EDPs). This ruling applies to supplies of digital services and digital products for tax periods starting on or after 1 July 2017, and in respect of offshore supplies of low value goods for tax periods starting on or after 1 July 2018.

For further information concerning the application of the GST to imported low value goods, see our TaxTalk Alert, which was published on 29 March 2018.

Australia signs Trans-Pacific Partnership Agreement

Australia has signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11). This Agreement is a separate treaty that incorporates, by reference, the provisions of the earlier TPP Agreement (signed on 4 February 2016 in Auckland, New Zealand, but not yet in force), with the exception of a limited set of provisions to be suspended.

Significant benefits have been obtained through the Agreement for the agricultural sector, such as the Australian beef market which will benefit from further tariff cuts in a new bilateral agreement the Government has secured with Canada through a side letter. Also, Canada will eliminate its 26.5 per cent tariff on Australian beef imports over five years, instead of the 10 years agreed under the original TPP deal. Another key side letter outcome for

Australia is Japan's tendering process for rice, which will now offer tenders six times a year.

Update on Trusted Trader programme

The Mutual Recognition Arrangement with Hong Kong under the Australian Trusted Trader programme came into effect on 1 March 2018. More than 140 accredited Australian international traders will now potentially have access to faster, more secure, and more reliable border clearance for their exported goods. For further information about the Trusted Trader programme, refer to our TaxTalk Alert, which was published on 5 March 2018.

Let's talk

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

Michelle Tremain, Perth
Indirect Tax Leader
+61 (8) 9238 3403
michelle.tremain@pwc.com

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

Ross Thorpe, Perth
Partner
+61 (8) 9238 3117
ross.thorpe@pwc.com

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

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

Matt Strauch, Melbourne
Partner
+61 (3) 8603 6952
matthew.strauch@pwc.com

Gary Dutton, Brisbane and Sydney
Partner
+61 (7) 3257 8783
gary.dutton@pwc.com

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

Personal Tax Update

Government response to Inquiry into Tax Deductibility

The Government has released its response to the report produced by the House of Representatives Standing Committee on Economics' inquiry into tax deductibility. The Government agreed that Treasury should, as a priority, provide a clear estimate of the cost of work-related expenses to Government revenue in order to properly inform policy. In accepting the recommendation, the Government noted that denying these deductions would likely result in lost revenue as individuals affected, and their employers, would likely adjust their behaviour in response to the changes.

In addition, the Australian Taxation Office (ATO) agreed with the Committee's recommendation to review its compliance activity in relation to work related expenses, noting that it currently undertakes a range of activities to consider how compliance can be further improved. The ATO also agreed to continue with technological development and progress on pre-filling of returns to simplify taxpayers' interaction with the tax system, with the eventual goal being to minimise, and ultimately remove, the need for taxpayers to amend pre-filled returns.

Review of the Identity-matching Services Bill

The Parliamentary Joint Committee on Intelligence and Security has commenced a review of the *Identity-matching Services Bill 2018*. The Bill, which does not amend taxation legislation, will enhance identity sharing for a range of national security, law enforcement, community safety and related purposes. It will also help to mitigate the impact of the 'black economy', and make it more difficult to use fraudulent identities to avoid legitimate taxation and other financial obligations.

Taxpayer fails to prove loans were made to companies

The Federal Court in *Rowntree v Commissioner of Taxation FCA 182* has dismissed the taxpayer's appeal, finding that the taxpayer had failed to prove that the challenged assessments concerning receipts from companies the taxpayer controlled were excessive. In particular, the taxpayer had failed to prove that he had made contracts for loans with the companies he controlled for which he did not create, or have a contemporaneous record.

Tribunal decisions on whether foreign employment income was exempt from tax

The Administrative Appeals Tribunal (AAT) has considered whether the taxpayer was exempt from Australian income tax on their foreign service income in the following cases:

- *Coventry v Commissioner of Taxation [2018] AATA 175*. In this case, the Tribunal found that the taxpayer, an Australian public servant working on an aid project overseas, was exempt from income tax under section 23AG of the *Income Tax Assessment Act 1936 (Cth)* (ITAA 1936) in respect of salary and allowances. The Tribunal concluded that the taxpayer's foreign employment income was exempt from income tax in Australia on the basis that the taxpayer was posted to Pakistan under the terms of the Development Agreement between the two countries, and covered by the definition of 'Australian project personnel' in the Agreement.
- *PZTL v Commissioner of Taxation [2018] AATA 461*. The Tribunal affirmed the Commissioner's decision and held that the taxpayer's income was not exempt under section 23AG(1AA)(d) of the ITAA 1936, as the taxpayer's period of continuous foreign service was not directly attributable to his deployment 'by' the Commonwealth or a Commonwealth, State or Territory authority, but rather was from his employment with an external government contractor.

Tribunal revokes taxpayer's departure prohibition order

The AAT in *Walsh v Commissioner of Taxation [2018] AATA 235* has revoked a departure prohibition order, finding that the departure of the taxpayer from Australia will not make it less likely that his tax liability will be discharged either in whole or in part, or that the ability of the Commissioner to recover the tax will be impaired. The order had been in place for more than two and a half years, had not resulted in any contribution to the revenue, and the taxpayer had no assets to pay the tax debts.

Tribunal makes adverse findings: Overseas fund was not a super fund

The AAT in *LLUN v Commissioner of Taxation AATA 3058* has made adverse findings against the taxpayers, a married couple involved in 'complicated and confusing' arrangements. The Tribunal addressed various issues in dispute, finding that the issued amended assessments were not out of time and could be amended by the Commissioner as there had been a positive finding of fraud or evasion. The Tribunal also identified that a Samoan fund was not a superannuation fund for Australian tax purposes, but a resident trust estate. As such, the taxpayers were presently entitled to a proportionate share of the income of the trust estate under section 97 of the ITAA 1936.

Let's talk

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

Bruce Ellis, Melbourne
Partner
+61 (3) 8603 3303
bruce.ellis@pwc.com

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

Chris Lowe, Brisbane
Partner
+61 (7) 3257 8561
chris.h.lowe@pwc.com

Murray Evans, Newcastle
Partner
+61 (2) 4925 1139
murray.evans@pwc.com

Cesare Scalise, Perth
Partner
+61 (8) 9238 3417
cesare.scalise@pwc.com

State Taxes Update

Government to support innovation in South Australia

The Australian Government has announced that it will pilot a new visa initiative in South Australia, before a national rollout in 2019. Under this initiative, new visa arrangements will allow State Governments to partner with business incubators in attracting foreign entrepreneurs.

NSW legislative developments

The following New South Wales (NSW) legislative developments have occurred since the March edition of TaxTalk Monthly:

- The *State Debt Recovery Bill 2017 (NSW)* has passed the NSW Parliament, and was given Assent on 21 March 2018. The Bill authorises the Chief Commissioner of State Revenue to take certain actions to recover various State debts without taking court action.
- The NSW Governor-General has proclaimed that the un-commenced provisions of the *State Revenue Legislation Amendment (Surcharge) Bill 2017* commenced on 5 March 2018. This includes the provisions relating to:
  - the exemption from, and refunds of, surcharge purchaser duty and surcharge land tax payable in respect of residential land by a foreign person that is an Australian corporation when the land is used for the construction of new homes or is subdivided and sold for the purposes of the construction of new homes, and
  - the manner of the small business declaration required for the purposes of the small business exemption from duty on an insurance policy.

Revenue NSW issues guidance on exemption from land tax surcharge

Revenue NSW has issued Revenue Ruling No. G 013, which relates to the surcharge concessions that are provided to Australian-based developers who are foreign persons, and sets out the matters which the Chief Commissioner will consider in determining whether an exemption from surcharge purchaser duty and surcharge land tax liability should be granted. The ruling also provides guidance on the circumstances in which the exemption may be revoked, and on the provision of refunds for surcharges where an exemption is granted after the surcharge has been paid.

WA introduces legislative amendments to restrict land tax exemption

The *Land Tax Assessment Amendment Bill 2017* is currently before the Western Australia (WA) Legislative Council and seeks to propose amendments to the *Land Tax Assessment Act 2002* (WA) to ensure that the land tax exemption is only available to organisations established for a public purpose and that perform a statutory function on behalf of the WA Government.

NSW Court dismisses valuation appeal

The NSW Land and Environment Court in *Olefines Pty Ltd v Valuer-General of New South Wales [2018] NSWLEC 18* has dismissed the Applicant's appeal against the Valuer General's decision on the basis the company failed to discharge the onus that the relevant land value determinations were too high in accordance with section 40(2) of the *Valuation of Land Act 1916* (NSW).

Victorian tribunal finds land transfers not exempt from duty

The Victorian Civil and Administrative Tribunal in *MD Commercial Pty Ltd v Commissioner of State Revenue [2018] VCAT 333* has confirmed the decision of the Commissioner and held that transfers of land for development purposes pursuant to the terms of a trust deed were not exempt from duty under section 35 of the *Duties Act 2000* (VIC). Section 35 is concerned only with transactions which arise in the course of property being placed into, or removed out of, a bare trust by the owner of the property ('the transferor'). In this case, the trust deed empowered the trustee not only to hold the land for the beneficiary, but also to sell, develop, and subdivide the land to third parties if it was so directed by the beneficiaries. The Tribunal found that the inclusion of the power for sale of the property by the trustee, when directed by the beneficiary, went beyond 'holding' the land for the transferor. As such, the exemption was unavailable.

WA taxpayer not entitled to land tax exemption

The State Administrative Tribunal of WA in *EAMES v Commissioner of State Revenue [2018] WASAT 14* has affirmed the Commissioner of State Revenue's decision, finding that the taxpayers were not entitled to an exemption under section 24A of the *Land Tax Assessment Act 2002* (WA) which deals with 'private residential property' on land that was subdivided. Although the taxpayers and their spouses commenced occupancy of apartments on lots registered on the strata plan, by the time the building in this case was fit to be occupied as a place of residence, the Certificate of Title for the land in question had been cancelled and replaced with four strata lots.

Let's talk

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

Costa Koutsis, Sydney
Partner
+61 (2) 8266 3981
costa.koutsis@pwc.com

Rachael Cullen, Sydney
Partner
+61 (2) 8266 1035
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

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

Superannuation Update

ATO's new SMSF advice and guidance product

The Australian Taxation Office (ATO) has created a new public advice and guidance product specifically for self-managed superannuation fund (SMSF) trustees and their advisors - SMSF Regulator's Bulletin (SMSFRB). The Bulletins will outline the ATO's concerns about new and emerging arrangements that pose potential risks to SMSF trustees and their members from a superannuation regulatory and/or income tax perspective.

The first SMSFRB issued by the ATO is about the use of reserves by SMSFs. According to SMSFRB 2018/1, the use of reserves by SMSFs outside limited and legitimate circumstances may suggest that the reserves are being used as part of a broader strategy to circumvent current restrictions imposed by superannuation and income tax legislation. This may include attempts to reduce an individual's total superannuation balance or transfer balance account. The ATO will closely scrutinise arrangements where amounts within an SMSF are held in a reserve as opposed to being allocated directly to a member's superannuation interest. The ATO will consider whether the trustee is acting in accordance with their obligations under the *Superannuation Industry (Supervision) Act 1993* (such as meeting the sole purpose test) and the general anti-avoidance provision in the income tax law.

Journey through reform for ATO and APRA superannuation funds

In a speech recently, ATO Deputy Commissioner James O'Halloran discussed the journey of super reform, the importance of continued engagement with the superannuation sector and the road ahead.

In the coming weeks, the ATO expects to release its annual ATO APRA Fund Diagnostic Report. It will hold a webinar in April 2018 with fund trustees and administrators to discuss the diagnostic report and overall results for the industry, as well as executive-level led meetings with key clients' fund executives. It was also indicated that the ATO is planning a small number of information systems risk assessments (ISRAs) and specific issue reviews.

In addition, it was noted that successor fund transfers (SFTs) present a significant risk to the integrity of super fund data and accordingly, a high priority this year is for the ATO to support funds going through not only a successor fund transfer, but also a change in administrator or a change in IT platforms.

Draft superannuation regulations released for consultation

Treasury has released for consultation draft superannuation regulations, which will replace the following regulations approaching their sun-setting dates:

- *Superannuation (Self-Managed Superannuation Funds) Supervisory Levy Imposition Regulations 1991* (1 October 2018).
- *Superannuation (Self-Managed Superannuation Funds) Taxation Regulations 1999* (1 April 2019).
- *Small Superannuation Accounts Regulations 2002* (1 October 2019).

The new regulations make no alteration to the substantive meaning or operation of the existing regulations. However, minor technical changes have been made to adopt current drafting practices and to remove redundant references. Comments were due on 23 March 2018.

Let's talk

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

David Ireland, Sydney
Financial Services Corporate Tax Leader
+ 61 (2) 8266 2883
david.ireland@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

Peter Kennedy, Sydney
Partner
+ 61 (2) 8266 3100
peter.kennedy@pwc.com

Jeff May, Melbourne
Partner
+ 61 (3) 8603 0729
jeffrey.may@pwc.com

Matthew Strauch, Melbourne
Partner
+ 61 (3) 8603 6952
matthew.strauch@pwc.com

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

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

Legislative Update

Federal Parliament concluded its Autumn sittings on 28 March 2018, with a number of tax and superannuation related Bills introduced into Federal Parliament. It will next sit on 8 May 2018, which is also the day on which the 2018-19 Federal Budget will be handed down.

Since the March edition of TaxTalk Monthly, the following tax or superannuation related Bills were introduced into the House of Representatives on 28 March 2018:

- *Treasury Laws Amendment (OECD Multilateral Instrument) Bill 2018*, which contains amendments to the *International Tax Agreements Act 1953* (Cth) to give force of law in Australia to the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*.
- *Medicare Levy Amendment (Excess Levels for Private Health Insurance Policies) Bill 2018* together with the *Private Health Insurance Legislation Amendment Bill 2018* and *A New Tax System (Medicare Levy Surcharge—Fringe Benefits) Amendment (Excess Levels for Private Health Insurance Policies) Bill 2018*, which seek to increase the maximum voluntary excess levels for private health insurance products providing individuals an exemption from the Medicare levy surcharge.
- *Treasury Laws Amendment (2018 Measures No. 4) Bill 2018*, which proposes to implement measures to strengthen compliance with taxation and superannuation guarantee obligations, enable the sharing and verification of tax file numbers, make a number of miscellaneous amendments to taxation, superannuation and other laws, and allow certain entities to be deductible gift recipients (DGRs) under income tax law.
- *Corporations Amendment (Asia Region Funds Passport) Bill 2018*, which aims to provide a multilateral framework that allows eligible funds to be marketed across economies participating in the Asia Region Funds Passport

(ARFP) with limited additional regulatory requirements.

- *Treasury Laws Amendment (Tax lntegrity and Other Measures) Bill*, which proposes a number of amendments to income tax law, including the previously announced small business integrity measures, extends the application of the Multinational Anti-avoidance Law (MAAL) to arrangements involving trusts and partnerships, and ensures that the venture capital tax concessions can apply to fintech investments.
- *Customs Amendment (Illicit Tobacco Offences) Bill 2018*, which proposes to amend the *Customs Act 1901* (Cth) to create two new offences in respect of imported illicit tobacco based on recklessness; and allow Customs officers to investigate certain new illicit tobacco offences.

Commonwealth revenue measures registered as legislative instruments or regulations since the March edition of TaxTalk Monthly include:

- The following guidelines and instruments in relation to Export Market Development Grants:
  - *Export Market Development Grants (Information and Document Requirements) Instrument 2018*. This instrument details the information and documents which must be provided by certain applicants concerning its export performance measure, for the purposes of paragraphs 70(2C)(f) and (g) of the *Export Market Development Grants Act 1997* The Instrument is made to repeal and replace the *Export Market Development Grants (Information and Document Requirements) Determination 2008*, which is due to sunset on 1 October 2018. The Guidelines apply when working out entitlement to a grant in respect of a grant made on or after 1 July 2018.
  - *Export Market Development Grants Regulations 2018*, which repeal and replace the *Export Market Development Grants Regulations 2008* (due to sunset on 1 October 2018). The Regulations are the same in substance as the *Export Market Development Grants Regulations 2008*, with the exception of three redundant provisions which have been removed. The Regulations apply when calculating entitlement to a grant in respect of an application for a grant made on or after 1 July 2018.
- *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Regulations 2018*, which amends tax regulations to support the measures introduced by the *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Act 2017 (Cth)*. In particular, the Regulations make changes to prescribe the withholding amount applicable to the First Home Super Saver Scheme released amounts, and ensure that superannuation entities are able to accept downsizer contributions.
- *Petroleum Excise (Prices) Regulations 2018*, which sets out the manner in which the price of crude petroleum oil and condensate is determined for the purposes of imposing excise under the E*xcise Tariff Act 1921*. The Regulation remakes and improves the *Petroleum Excise (Prices) Regulations 1988,* which sunset on 1 April 2018. The new regulations are not intended to affect the substantive meaning or operation of the *Petroleum Excise (Prices) Regulations 1988*. The key changes include the consolidation of defined terms in a single section for ease of reference, and the reference to provisions as sections rather than regulations.

It is also worth noting that the following key tax Bills have now completed their passage through Parliament:

- *Treasury Laws Amendment (Income Tax Consolidation Integrity) Bill 2018*, which proposed various changes to improve the integrity and operation of the tax consolidation regime by implementing a range of measures relating to deductible liabilities, deferred tax liabilities, securitised assets, cost setting for foreign owned groups ('anti-churn' rules) and intra-group assets and liabilities. For further information on the key aspects of the Bill, refer to our TaxTalk Alert, which was published on 16 February 2018.
- *Treasury Laws Amendment (2018 Measures No. 1) Bill 2018*, which extends the loss relief and asset roll-over for merging superannuation funds until 1 July 2020, and which will require (from 1 July 2018) purchasers of new residential premises and new subdivisions of potential residential land to make a payment of part of the purchase price representing the goods and services tax directly to the Australian Taxation Office.
- *Treasury Laws Amendment (Junior Minerals Exploration Incentive) Bill 2017*, which introduces the Junior Minerals Exploration Incentive (JMEI) for those who invest in small minerals exploration companies undertaking greenfields minerals exploration in Australia.

Let's talk

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

Pete Calleja, Sydney
Australian Tax Leader
+61 (2) 8266 8837
pete.calleja@pwc.com

David Ireland, Sydney
Financial Services Corporate Tax Leader
+61 (2) 8266 2883
david.ireland@pwc.com

Kirsten Arblaster, Melbourne
Infrastructure & Urban Renewal Corporate Tax Leader
+61 (3) 8603 6120
kirsten.arblaster@pwc.com

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

Julian Myers, Brisbane
Brisbane Corporate Tax Leader
+61 (7) 3257 8722
julian.myers@pwc.com

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

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

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

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

Other News

Final Ruling on treatment of long term construction contracts

The Australian Taxation Office (ATO) has finalised Taxation Ruling TR 2018/3, which considers the income tax treatment of long term construction contracts. Specifically, the Ruling explains the methods acceptable to the Commissioner of Taxation for returning income derived from, and recognising expenses incurred in, long term construction projects and acknowledges the new accounting standard *AASB 15 Revenue from contracts with customers*. The Ruling, which applies to years of income commencing both before and after 7 March 2018, is a rewrite and update of IT 2450, which was withdrawn on 18 October 2017, and consolidates the views contained in various other tax determinations.

The Ruling affirms that the completed contracts method remains unacceptable under income tax law. The Ruling confirms that the introduction of AASB 15 does not necessarily bring into line the accounting recognition of revenue with the tax law. The Commissioner of Taxation also indicates that the emerging profits basis is unacceptable. Instead, it indicates that the principles and practices which apply in recognising, for income tax purposes, the income derived from, and expenses incurred in, long term construction contracts are:

- All progress and final payments received in a year are to be included in assessable income and income tax deductions allowed for losses and outgoings to the extent permitted by law (the 'basic approach').
- Any method of accounting which has the effect of allocating, on a fair and reasonable basis, the ultimate profit or loss on a contract over the years taken to complete the contract ('estimated profits approach') will be acceptable.

The Ruling is substantially the same as the previously issued draft taxation ruling TR 2017/D8.

Senate Estimates Committee hearings

In his opening statement to the Senate Estimates Committee, Mr John Fraser, the Secretary to the Treasury, provided a Budget update and fiscal outlook reporting that the Budget bottom line has improved across the forward estimates from last year's Budget to the Mid-Year Economic and Fiscal Outlook (MYEFO). The result reflects both lower payments, as well as higher total receipts. As such, the Budget is now projected to return to AUD 10.2 billion surplus in 2020-21. The Secretary noted the passage of the tax reform package in the United States as an important development impacting global growth and policy. He also noted that following these reforms and other planned global corporate tax rate reductions, Australia will have one of the highest corporate tax rates amongst advanced economies.

Treasury, the ATO and the Board of Taxation also appeared before the committee (refer to the transcript of the hearing). Key highlights included:

- Discussion on proposed corporate tax rate cuts and potential impact on the budget and economy.

- ATO focus on work-related expenses and preliminary observations from country-by-country reports.
- Public transparency of corporate tax information, noting the Commissioner's inability to publish tax loss data.
- Board of Taxation process for selecting issues for inquiry and matters concerning the proposed mandatory disclosure rules.

Commissioner's address to the Tax Institute National Convention

The Commissioner of Taxation, Chris Jordan AO, delivered the keynote address to the Tax Institute's 33rd National Convention. Mr Jordan spoke about the increased ATO attention on undeclared income, unexplained wealth or lifestyle for individuals and small businesses, incorrectly claimed private expenses, unpaid super guarantee, and concentrations of cash-only businesses or those with low usage of merchant banking facilities.

The Commissioner also highlighted the ATO's recent achievements including:

- The Tax Avoidance Taskforce. Between July 2016 and December 2017, the ATO has raised AUD 5.2 billion in liabilities against public groups and multinationals.
- The Multinational Anti-avoidance law (MAAL). This is a significant impact on goods and services (GST) collections with AUD 290 million of additional GST paid in 2016-17 by taxpayers who have restructured to recognise an Australian taxable presence. An additional AUD 206 million in GST has already been collected in 2017-18.
- Cross-border financing. Building on the decision in the Chevron case, and the cross-border financing practical compliance guideline (PCG), around AUD 80 billion of related party loans have been brought within the PCG framework, with a reduction of about AUD 1.4 billion in interest deductions in 2017-18.
- Black economy. The ATO visited more than 2,600 businesses across eight locations last year. In the first six months of 2017–18, 5,020 reviews and audits were conducted which resulted in approximately AUD 143 million in tax and penalties.

Opposition to reform dividend imputation system

The Australian Labor Party has announced that it will prevent resident individuals and superannuation funds from obtaining cash refunds for excess franking credits. Charities and not-for-profit institutions, such as universities, are expected to be exempt from these changes. If elected, the policy is proposed to apply from 1 July 2019. For further information on the Labor Party's policy, refer to this fact sheet.

In addition, the Shadow Treasurer in an address has reiterated the Labor Party's commitment to reforming negative gearing, capital gains discounts and family trusts, as part of its approach to structural budget repair.

Opposition to provide incentives for new capital equipment investments

The Australian Labor Party has announced that it will create an Australian Investment Guarantee (AIG) that provides accelerated depreciation incentives for new capital equipment investments. If elected, under the AIG, it is proposed that from 1 July 2020, businesses will be able to deduct up to 20 per cent of the value of new eligible investment valued at over AUD 20,000 (with no pooling of assets allowed) in the first year, with the balance depreciated in line with normal depreciation schedules from the first year. Eligible assets include tangible machinery, plant and equipment, non-passenger motor vehicles and intangible investments in knowledge assets such as patents and copyrights. For further information on the Labor Party's policy, refer to this fact sheet.

Tax treatment of cryptocurrencies

The ATO has updated its guidance on the tax treatment of cryptocurrencies to address some of the common enquiries in relation to cryptocurrency transactions. The guidance addresses issues such as:

- cryptocurrency as an investment;
- cryptocurrency and personal use-asset rules;
- record-keeping;
- carrying on a business;
- cryptocurrency for business transactions;
- paying cryptocurrency as wages or as a salary to employees; and
- exchanging cryptocurrency.

In addition, the ATO has also commenced public consultation on substantiating cryptocurrency transactions, specifically record-keeping as it relates to cryptocurrency transactions, and practical compliance issues with exchanging one cryptocurrency for another cryptocurrency. Under the ATO's proposed requirements for record-

keeping, taxpayers will need to note the date, the value of the cryptocurrency on the transaction date, what the transaction was for and the identity of the other party to the transaction for every transaction involving cryptocurrency, including exchanging one cryptocurrency for another. Comments are due on 20 April 2018.

We welcome the ATO's consultation and its updated guidance. There remains a number of matters that are still to be addressed, including issues such as source of gains and losses (relevant for temporary residents), and the taxation of proceeds raised from Initial Coin Offerings (ICOs).

Board of Taxation CEO update

The CEO of the Board of Taxation has released the March update, where the Board's agenda of work was discussed, including:

- Post implementation review of contingent consideration rules (earn out arrangements).
- A review of small business tax concessions.
- A comparison of taxing rights for real property under Australia's double tax agreements and domestic laws.
- A review of tax measures to promote ASX listings of innovation companies.
- Reviewing fringe benefits tax (FBT) compliance costs, including international comparisons.
- Taxation and the digital economy; and
- Reviewing aspects of the taxation of the not-for-profit sector.

The Board also highlighted progress on the contingent consideration project, Sounding Board ideas, the release of the Board's report on Bare Trusts, the take-up of the Tax Transparency Code (126 organisations have indicated intention to adopt the code and 99 have published reports), and an Australian Accounting Standards Board update on accounting developments and the additional accounting guidance to support the Tax Transparency Code.

ASEAN – Sydney declaration

In a joint statement from the Special Summit – The Sydney Declaration, Australia and the leaders of the Association of Southeast Asian Nations (ASEAN) have agreed to boost trade, investment and business links between Australia and ASEAN.

Tribunal finds that payment made could not be included in CGT cost base

The Administrative Appeals Tribunal (AAT) in *Bosanac v Commissioner of Taxation [2018] AATA 472* has affirmed the Commissioner's decision that a payment made by the taxpayer for 'consulting' or 'completion fee' was not an incidental cost which could be included in the capital gains tax (CGT) cost base of an investment property as there was a lack of credible evidence to support the claim. The Tribunal also found that, although the base penalty amount which was issued for intentionally disregarding taxation law was not excessive, the Commissioner's decision to increase the base penalty amount was not justified. The taxpayer has since lodged an appeal to the Federal Court against the Tribunal's decision.

Let's talk

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

Pete Calleja, Sydney
Australian Tax Leader
+61 (2) 8266 8837
pete.calleja@pwc.com

David Ireland, Sydney
Financial Services Corporate Tax Leader
+61 (2) 8266 2883
david.ireland@pwc.com

Kirsten Arblaster, Melbourne
Infrastructure & Urban Renewal Corporate Tax Leader
+61 (3) 8603 6120
kirsten.arblaster@pwc.com

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

Julian Myers, Brisbane
Brisbane Corporate Tax Leader
+61 (7) 3257 8722
julian.myers@pwc.com

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

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

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

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

Contacts

To discuss how recent updates in the areas of corporate tax, employment tax, international tax, indirect tax, personal tax, state taxes, superannuation or legislation might affect you, please contact:

Pete Calleja, Sydney
Australian Tax Leader
+61 (2) 8266 8837
pete.calleja@pwc.com

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

David Ireland, Sydney
Financial Services Corporate Tax Leader
+61 (2) 8266 2883
david.ireland@pwc.com

Julian Myers, Brisbane
Brisbane Corporate Tax Leader
+61 (7) 3257 8711
julian.myers@pwc.com

Kirsten Arblaster, Melbourne
Infrastructure & Urban Renewal Tax Leader
+61 (3) 8603 6120
kirsten.arblaster@pwc.com

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

Hayden Scott, Brisbane
Tax Controversy & Dispute Resolution Leader
+61 (7) 3257 8678
hayden.scott@pwc.com

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

Warren Dick, Sydney
Tax Reporting & Strategy Leader
+61 (2) 8266 2935
robert.k.bentley@pwc.com

Norah Seddon, Sydney
People & Organisation Tax Leader
+61 (2) 8266 5864
norah.seddon@pwc.com

Chris Morris, Sydney
M&A Tax Leader
+61 (2) 8266 3040
chris.j.morris@pwc.com

Michelle Tremain, Perth
Indirect Tax Leader
+61 (8) 9238 3403
michelle.tremain@pwc.com

Editorial

TaxTalk Monthly is produced by the PwC's Financial Advisory Marketing and Communications team, with technical oversight provided by the Tax Technical Knowledge Centre.

Editorial

Erin Richardson
Director – Marketing & Communications
+61 (3) 8603 0360
erin.richardson@pwc.com

Kate Fawcett
Manager – Communications
+61 (3) 8603 0986
kate.a.fawcett@pwc.com

Lynda Brumm
Principal, Tax Technical Knowledge Centre
+61 (7) 3257 5471
lynda.brumm@pwc.com

Abdur Mohamed
Manager, Tax Technical Knowledge Centre
+61 (2) 8266 2176
abdur.mohamed@pwc.com

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