

February 2019

TaxTalk Monthly

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



Corporate Tax Update

Draft regulations on debt-equity for mutually-owned ADIs

Treasury has released [draft regulations](#) to facilitate the debt treatment of capital instruments issued by mutually-owned authorised deposit-taking institutions (ADIs). The draft regulations propose to rectify the current disadvantage experienced by mutually-owned ADIs, in comparison to their competitors in relation to capital instruments. Specifically, the draft regulations propose amendments to the *Income Tax Assessment Regulations 1997* to align the tax treatment of Tier 2 capital instruments convertible into mutual equity interests with those convertible into ordinary shares. Comments are due on 11 February 2019.

ATO's corporate tax data reports

The ATO has released its [corporate tax transparency report](#) for the 2016-17 income year which contains the name, Australian Business Number (ABN), total income, taxable income and tax payable for:

- Australian public and foreign-owned companies with an income of AUD100 million or more; and
- Australian-owned resident private companies with an income of AUD200 million or more.

It also contains the name, ABN and tax payable for 14 entities that had a petroleum resource rent tax (PRRT) payable amount for the 2016-17 year.

The ATO also released tax gap analysis for the 2015-16 income year covering both the [large corporate groups income tax gap](#) and the [PRRT gap](#). In 2015-16, large corporate groups reported AUD1.7 trillion in gross income and paid approximately AUD40 billion in tax, the net income tax gap is estimated to be AUD1.8 billion in 2015-16 (4.4 per cent). ATO Second Commissioner Jeremy Hirschhorn in a [statement](#) confirmed that the estimated level of compliance of large corporate groups has increased from 94 per cent to over 95 per cent and also confirmed high levels of compliance with PRRT obligations, with the PRRT gap estimate for the 2015-16 income year showing 98 per cent of PRRT is paid voluntarily.

ATO updates 2018 RTP Schedule

The ATO has updated the [Category C Reportable Tax Position \(RTP\) questions](#) to include hybrids (Q22), cross-border related party derivative transactions (Q23) and related party dealings inbound distribution arrangements (Q24). The updated questions apply to income years ended on or after 31 December 2018. Refer to our [TaxTalk](#) for further information about the RTP.

ATO guidance on company tax rate change

The ATO has finalised the Practical Compliance Guideline [PCG 2018/8](#) which sets out the ATO's compliance and administrative approaches for small business corporate tax entities that have faced practical difficulties in determining their corporate tax rate and corporate tax rate for imputation purposes in the 2015-16 to 2017-18 income years.

The Commissioner acknowledges that uncertainty may have arisen as a result of changes to the tax laws, and the subsequent release of Draft Taxation Ruling [TR 2017/D7](#) which deals with the 'carrying on a business' requirement which applied to the 2015-16 and 2016-17 income years. In light of this uncertainty, the Commissioner will apply the following two approaches to assist affected corporate tax entities:

- For the 2015-16 and 2016-17 income years, a facilitative compliance approach will apply to the 'carrying on a business' test for corporate tax rate purposes
- For the 2016-17 and 2017-18 income years, a practical administrative approach will apply that allows corporate tax entities to choose a simplified method to inform members of the correct franking credit to which they are entitled on dividends paid in those years.

This means that the Commissioner will not generally allocate compliance resources specifically to conduct reviews of whether corporate tax entities have applied the correct rate of tax or franked at the correct rate in the 2015-16 and 2016-17 income years.

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Employment Taxes Update

Employment tax measures in MYEFO

The Federal Government released the [2018-19 Mid-Year Economic Fiscal Outlook](#) (MYEFO) on Monday 17 December 2018. As part of the MYEFO, the following measures relevant to employment tax issues were announced:

- Whilst the Government announced the superannuation guarantee (SG) 12-month amnesty will apply from 24 May 2018, please note that the relevant legislation to give effect to this measure is still before Parliament. It was indicated in the MYEFO materials that the minimum penalty will be increased from 50 per cent to 100 per cent of the SG charge for non-compliant employers who do not come forward under the SG amnesty.
- From 1 July 2019, the age below which individuals can receive genuine redundancy payments is proposed to be aligned with the Age Pension qualifying age to align access to the tax concession that makes part of any genuine redundancy payment free of income tax.

ATO guidance on expanded taxable payments reporting system

The taxable payments reporting system (TPRS) requires certain businesses to report payments they make to contractors for certain specified services to the Australian Taxation Office (ATO). With the recent expansion of the TPRS to road freight, security, investigation or surveillance, and

information technology services from 1 July 2019, the ATO has issued draft Law companion ruling [LCR 2018/D8](#). This draft LCR sets out the Commissioner's position on how he will apply the law to entities that provide road freight, security, investigation or surveillance, and information technology services, including various examples and information regarding when a reporting exemption might apply. Comments are due on 1 February 2019.

PAYG withholding credits allowed

The Full Federal Court in [Commissioner of Taxation v Cassaniti \[2018\] FCAFC 212](#) has dismissed the Commissioner's appeal against the decision of the [Federal Court](#) and held that the taxpayer was entitled to PAYG withholding credits for amounts withheld from salary paid by former employers even though the amounts were not remitted to the Commissioner.

South Australia payroll tax changes

From 1 January 2019, South Australian businesses with annual taxable Australian wide wages of up to AUD1.5 million are no longer liable for South Australian payroll tax, and those with taxable wages between AUD1.5 million and AUD1.7 million will benefit from a reduced payroll tax rate. This updated edition of the South Australian [Payroll Tax Guide to Legislation](#) reflects these changes.

Victoria payroll tax changes

The Victorian State Revenue Office (SRO) has withdrawn Revenue Ruling [PTA-021](#). This ruling provided guidance on the exemption from payroll tax available under s 32(2)(b)(iv) of the *Payroll Tax Act 2007* for contractors ordinarily rendering services to the public. The ruling will be replaced and in the meantime, the SRO [website](#) has information on the factors the Commissioner may take into consideration when considering this exemption.

NSW payroll tax debt applies to all payroll group members

The Supreme Court of NSW - Court of Appeal in [Fyna Projects Pty Ltd v Chief Commissioner of State Revenue \[2018\] NSWCA 331](#) has dismissed the taxpayer's appeal against the decision of the Supreme Court of NSW which refused to grant declaratory and injunctive relief sought by the taxpayers in relation to the outcome of an audit, assessment and reassessment of liability under the *Payroll Tax Act 2007* (NSW). The Court of Appeal held that every member of a payroll tax group, by reason of an employer's default, was a person who is liable to pay tax of the amount that the defaulting taxpayer had failed to pay.

Data matching program for Temporary Skilled Visa Program

The Department of Home Affairs will [exchange data](#) with the ATO to identify whether business sponsors are complying with their sponsorship obligations (e.g. paying visa holders correctly) and whether temporary skilled visa holders are complying with their visa conditions (e.g. to work only for an approved employer, and to work only in the approved occupation). Where non-compliance is identified further compliance action may be taken (such as the cancellation of a visa or the approval of a sponsor).

Consultation on reporting regime for sharing economy

The Federal Government seeks to implement a new reporting regime for information on taxpayers who earn income from sharing economy websites or platforms, sometimes known as "giggers". Treasury has released a [discussion paper](#) to seek stakeholders' views on the design of the reporting regime.

The new regime was recommended by the Black Economy Taskforce, which raised concerns that sellers involved in the sharing economy may not be paying the right amount of tax, despite the ATO having powers to collect data from these platforms. The paper acknowledges that the reporting regime would support ongoing initiatives by the ATO to educate taxpayers about their tax obligations and considers key options such as whether reporting would be done by sharing economy platforms or by financial institutions.

Submission of comments are due by 22 February 2019.

Annual Taxation Determinations (TDs)

The ATO currently publish 12 Taxation Determinations (TDs) every year on indexation factors, rates, thresholds, reasonable amounts and certain values relating to fringe benefits tax (FBT), income tax and luxury car tax.

The ATO have released a consultation paper seeking feedback on a proposal to replace annual Taxation Determinations with content published on the ATO's website. Responses to the consultation questions and other feedback should be provided by 15 February 2019.

Single Touch Payroll (STP) for all employers

From 29 January 2019, the ATO will write to employers with 19 or less employees who already use payroll software to advise them about Single Touch Payroll. The ATO will also be hosting a series of webinars to help and support employers as they transition to, and commence Single Touch Payroll reporting.

The legislation to extend STP to include employers with 19 or less employees is currently before Parliament. The bill has been passed by the Senate with a number of proposed amendments. It has been referred to the House of Representatives to consider the amendments put forward.

A range of simple, low-cost Single Touch Payroll solutions are also expected to be available in the market from early 2019. These solutions will best suit micro employers (with one to four employees) who need to report through STP, but do not currently have payroll software. The ATO has published a list of companies intending to offer these solutions on its [website](#).

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Global Tax Update

Latest news from international tax and transfer pricing

ATO finalises guidelines on corporate tax residency

The Australian Taxation Office (ATO) has finalised its Practical Compliance Guideline [PCG 2018/9](#) on identifying where a company's central management and control is located under the central management and control test of corporate residency. The Guideline contains practical guidance to assist foreign incorporated companies to apply the principles set out in Taxation Ruling [TR 2018/5](#).

Notably, the PCG indicates that the Commissioner will not apply his resources to review or seek to disturb a foreign-incorporated company's status as a non-resident during the transitional period which has been extended to 30 June 2019 in certain circumstances. This includes, among other things, a key requirement that the company changes its governance arrangements so that its central management and control is exercised outside of Australia by the end of the transitional period. For further insights, refer to our [TaxTalk Alert](#).

ATO draft guidance on hybrid mismatch rules

The ATO released Draft Law Companion Ruling [LCR 2018/D9](#) and Draft Practical Compliance Guideline [PCG 2018/D9](#) which both provide guidance in the context of the scope of the hybrid mismatch rules in relation to certain payments that are made between related or unrelated parties under a "structured arrangement". Comments are due by 15 February 2019. For further insights, including the

significance of the guidance, refer to our [TaxTalk Alert](#).

ATO concerns about accrual deductions and deferral or avoidance of withholding tax

The ATO released Taxpayer Alert [TA 2018/4](#) on cross-border financing arrangements that result in accrual deductions under Division 230 of the *Income Tax Assessment Act 1997* (Cth) and a deferral or avoidance of withholding tax. The ATO is currently reviewing these arrangements and engaging with taxpayers who have entered into, or are considering entering into these arrangements.

According to the Taxpayer Alert, to be seen as low risk, the taxpayer should be able to convincingly demonstrate, with evidence, that deferral of the entitlement to interest is driven by commercial non-tax factors, and withholding tax is paid when the entitlement becomes due.

Draft update to ruling to clarify definition of 'financial institution'

The ATO has released a draft update to [TR 2005/5](#) which deals with ascertaining the right to tax United States (US) and United Kingdom (UK) resident financial institutions under the US and the UK tax agreements in respect of interest income arising in Australia. The update seeks to clarify certain aspects of the second limb of the definition of 'financial institution' as used in those and similarly worded

double tax agreements. Comments on the draft consolidated ruling were due on 11 January 2019.

Updated PCG on simplified transfer pricing record keeping options

The ATO has published an update to Practical Compliance Guideline [PCG 2017/2](#) which sets out simplified transfer pricing record keeping options that reflect the types of transactions or activities the ATO believe are low-risk in the context of international related party dealings. Some of the changes made in this update include:

- the management and administration services simplified transfer pricing record-keeping option has been consolidated into the new low value adding intra-group services option
- an increase in the small taxpayers turnover threshold from AUD25 million to AUD50 million
- introduction of a new AUD500,000 combined threshold for royalties, licence fees or research and development dealings for small taxpayers and distributors
- removal of the 'related-party dealings with entities in specified countries' criterion
- a reduction in the interest rate applying to low level (less than AUD50 million) inbound loans to no more than 3.76% in the 2019 income year. Previously this was a higher rate, set by reference to a published Reserve Bank of Australia indicator lending rate for small business

The changes apply to income years beginning on or after 1 July 2018 (or substituted accounting period). For further insights, refer to our [TaxTalk Alert](#).

In addition the ATO has also updated its Practice Statement [PS LA 2014/3](#), which provides guidance on the application of the simplified transfer pricing record-keeping options, to reflect the changes.

US tax reform developments

Some recent developments, news and implications of tax reform in the United States (US) to note include:

- [House passes year end tax package](#)
- [Treasury issues proposed BEAT rules](#) which require certain corporations to pay a minimum tax on payments to non-US related parties
- [Tax reform readiness the section 163\(j\) proposed regulations](#) which limits business interest expense deductions to the sum of business interest income, 30 per cent of adjusted taxable income, and the taxpayer's floor plan financing interest for the tax year.

- [Tax reform readiness: Foreign Tax Credit regulations](#)
- [Preliminary highlights of the proposed anti-hybrid regulations](#)

OECD's Corporate Tax and Revenue Statistics

The Organisation for Economic Cooperation and Development (OECD) has [released](#) the first edition of [Corporate Tax Statistics Report and database](#) which provides internationally comparable statistics and analysis from around 100 countries worldwide on four main categories of data:

- corporate tax revenues
- statutory corporate income tax (CIT) rates
- corporate effective tax rates, and
- tax incentives related to innovation.

The analysis shows that corporate income tax remains a significant source of tax revenues for governments across the globe. In 2016, corporate tax revenues accounted for 13.3 per cent of total tax revenues on average across the 88 jurisdictions for which data is available. The OECD analysis also shows a clear trend of falling statutory corporate tax rates over the last two decades with the average combined (central and sub-central government) statutory tax rate falling from 28.6 per cent in 2000 to 21.4 per cent in 2018.

In addition, the OECD has also released the [2018 Revenue Statistics](#) publication which shows that the OECD average tax-to-GDP ratio rose slightly in 2017, to 34.2 per cent, compared to 34.0 per cent in 2016. Tax revenues in advanced economies have continued to increase, with taxes on companies and personal consumption representing an increasing share of total tax revenues.

OECD and BEPS developments

The OECD Inclusive Framework has released [new global standards](#) that apply to 'no or only nominal tax' jurisdictions and that require 'substantial activities' in order for the tax regime not to be considered a 'harmful tax practice.' The objective is to prevent such low-tax jurisdictions from attracting profits from certain mobile activities without corresponding economic activity. The types of mobile activities covered include headquarters, distribution centres, service centres, financing, leasing, fund management, banking, insurance, shipping, holding companies, and the provision of intangibles. Barbados, Bermuda, and Cayman Islands have already announced new domestic laws intended to meet the substance requirements. For further details refer to PwC [Global Tax Insights](#).

The OECD has also released [2017 Peer Review Reports on the Exchange of Information on Tax Rulings](#). The report contains 60 jurisdiction-specific recommendations on issues such as improving the timelines of the exchange of information and ensuring that exchanges of information are made with respect to preferential tax regimes that apply to income from intellectual property. The Inclusive Framework has now assessed 92 individual jurisdictions' progress in spontaneously exchanging information on tax rulings, in accordance with ongoing implementation of base erosion and profit shifting (BEPS) Action 5 of the OECD/G20 BEPS package.

In other developments:

- Belize and Qatar have signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the [MLI Convention](#))
- Malta, Singapore and Monaco have deposited their [instrument of ratification](#) for the Convention which means that the MLI has effect in relation to Australia's tax treaty with Singapore and Malta as early as 1 April 2019.
- The Cook Islands, Faroe Islands and Greenland have [joined](#) the Inclusive Framework on BEPS.

New EC State aid investigation

The European Commission (EC) [announced](#) that it has opened a formal State aid investigation into the Netherlands' tax treatment of two Dutch Nike affiliates. According to the press release, the EC's formal investigation focuses on five tax rulings that were granted endorsing a method to calculate the royalty to be paid for the use of the intellectual property. Two of these rulings are still in force. For further details refer to PwC's [Global Tax Insights](#).

 [Explore PwC's global tax research and insights](#)

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French budget introduces ATAD and BEPS provisions

The French Parliament approved its Finance Act for 2019 which includes corporate tax measures that transpose into French law Articles 4 and 6 of EU anti-tax avoidance directive (ATAD) no. 2016/1164 with respect to interest limitations and general anti-abuse rules. It also amends the French tax consolidation rules, the participation exemption, and the French patent box regime pursuant to the nexus approach set out by OECD BEPS Action 5. Most of the measures apply as of 1 January 2019, and affect multinational enterprises with French operations or subsidiaries. For further insights refer to PwC's [Global Tax Insights](#).

Changes proposed to Luxembourg law to implement ATAD

The Luxembourg Government tabled draft law that would implement the EU anti-tax avoidance directive (ATAD 1) into Luxembourg domestic law. For further information refer to our [Global Tax Insights](#).

German government passes 2018 tax bill

Germany recently passed a tax bill that includes measures to extend non-resident capital gains taxation treatment to shares in foreign 'real estate-rich' corporations; narrowing of the German change-in-ownership rules/loss forfeiture rules; and the acceptance of variable compensatory payments for outside shareholders in a German Organschaft subsidiary that are based on the profit of the subsidiary. For further information refer to PwC's [Global Tax Insights](#).

Indirect Tax Update

Taxpayer alert on GST implications of certain development lease arrangements

The Australian Taxation Office (ATO) has issued Taxpayer Alert [TA 2018/3](#) on the goods and services tax (GST) implications of certain development lease arrangements. The ATO is currently reviewing arrangements involving property developers acquiring land from government entities, specifically where the developer purportedly provides certain development works to the government entity as payment for the land. The ATO is aware of instances where the developer and the government entity are not reporting the value of their supplies under these arrangements in a consistent manner, resulting in the underpayment of GST.

GST and financial institutions that issue credit cards

The ATO has released Draft GST Determination [GSTD 2018/D1](#) which considers the Commissioner's preliminary view on the analysis required to determine whether acquisitions in the context of a credit card issuing business are made solely or partly for a creditable purpose. Specifically, the draft Determination provides guidance on the application of paragraph 11-15(2)(a) of the *A New Tax System (Goods and Services) Tax Act 1999* (GST Act) to acquisitions in a credit card issuing business of a financial supply provider. Comments are due 15 February 2019.

In addition, the ATO has [released](#) various questions for consultation to assist it developing an apportionment method that can be applied by all financial institutions that issue credit cards. Comments are also due on this by 15 February 2019.

ATO updates to GST rulings

The ATO has issued addenda to the following GST guidance to, amongst other things, reflect amendments made to the GST Act in relation to the GST treatment of digital currency:

- [GSTD 2003/1A2 - Addendum](#) - Goods and Services Tax: Is the payment of judgment interest consideration for a supply?
- [GSTR 2000/19A8 - Addendum](#) - Goods and Services Tax: Making adjustments under Division 19 for adjustment events
- [GSTR 2004/9A6 - Addendum](#) - Goods and Services Tax: GST consequences of the

assumption of vendor liabilities by the purchaser of an enterprise

- [GSTR 2006/9A8 - Addendum](#) - Goods and Services Tax: Supplies

AAT reverses GST registration cancellation

The Administrative Appeals Tribunal in [Qian v Commissioner of Taxation \[2019\] AATA 14](#) has set aside the Commissioner of Taxation's decision to cancel a taxpayer's GST registration. After considering the facts and circumstances of the taxpayer's operations, the Tribunal found that the taxpayer who was a courier driver was carrying on an enterprise as independent contractor and was therefore not an employee.

Draft GST Regulations

Treasury has released [draft GST regulations](#) (the *A New Tax System (Goods and Services Tax) Regulations 2019* and the *Treasury Laws Amendment (Goods and Services Tax) Regulations 2019*) and explanatory materials to replace the current GST Regulations which are due to sunset, and which must be remade before 1 April 2019. The draft regulations propose to remake and update the existing GST regulations by omitting redundant provisions, updating obsolete references, simplifying language and restructuring the regulations for ease of navigation. Comments are due by 8 February 2019.

New Australia-UK trade agreements

The Governments of Australia and the United Kingdom (UK) have [signed](#) a new bilateral Wine Agreement and Mutual Recognition Agreement which will help ensure the flow of trade post-Brexit. The Wine Agreement replicates an agreement already in place with the European Union (EU), meaning the UK will accept Australian labelling standards and certification standards as well as winemaking practices. The Mutual Recognition Agreement would ensure Australia and the UK continue to recognise the test reports and certificates issued by each other's designated conformity assessment bodies.

Full Federal Court dismisses customs tariff

The Full Federal Court in [Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd \[2018\] FCAFC 237](#) found that the [AAT](#) had not erred

at law in classifying the vitamins and garcinia preparations as medicaments and dismissed the Comptroller's appeal. The Court affirmed that vitamins and weight loss products were both

classifiable as medicaments (free from duty) and not as food supplements for the purposes of imposing customs tariffs.

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Personal Tax Update

Taxation of income for an individual's fame or image

Treasury has released a [consultation paper](#) on its proposed approach to implementing the 2018-19 Federal Budget measure which aims to ensure that all remuneration (including payments and non-cash benefits) provided for the commercial exploitation of a person's fame or image will be included in the assessable income of that individual from 1 July 2019.

The measure is intended to apply to all individuals, including sportspeople, entertainers, actors, entrepreneurs and other public figures, and apply to all fame or image income that is taxable in Australia (including benefits). The proposed changes will ensure that affected individuals will not be able to take advantage of lower tax rates by licensing their fame or image to another entity. Comments were due on 31 January 2019.

Home office running expenses and electronic device expenses

The Australian Taxation Office (ATO) has updated its Law Practice Statement [PS LA 2001/6](#) which sets out principles for ATO officers to apply when examining taxpayer claims for deductions for home

office running expenses and electronic device usage expenses. Notably, the update provides an updated home office running expenses hourly rate which is set at 52 cents per hour effective from 1 July 2018.

Board of Taxation review into granny flat arrangements

The Government has [requested](#) the Board of Taxation to undertake a review of the tax treatment of granny flat arrangements. The review, which is in response to the *2017 Australian Law Reform Commission's Report: Elder Abuse - a National Legal Response* which identified the development of formal and legally enforceable family agreements as a measure to prevent elder abuse, will consider and make recommendations on the appropriate tax treatment of these arrangements, while considering the interactions between the current tax laws and treatment of 'granny flat interests' under the social security rules.

Under current tax laws, a homeowner may be subject to capital gains tax where there is a formal agreement for a family member to reside in their home.

In making the recommendations, the review will consider how any changes could raise awareness

and provide incentives for older people and their families to enter formal and legally enforceable family arrangements. The Board is expected to commence the review in early 2019, including broad consultation with stakeholders, with a final report due to the Government in the second half of 2019.

Tax treatment of payments received under Redress Scheme

The ATO has released a Tax Determination [TD 2018/16](#) which provides guidance on the tax treatment of payments received under *National Redress Scheme for Institutional Child Sexual Abuse Act 2018*. According to the determination, if an application made under the National Redress Scheme for people who have experienced institutional child sexual abuse is approved, neither the lump sum redress payment nor any payment for counselling and psychological services will be assessable income of the recipient and neither of the payments will be subject to tax as a capital gain.

Taxpayer not exempt from tax on termination payment

The Administrative Appeal Tribunal (AAT) in [Lochtenberg and Commissioner of Taxation \[2018\] AATA 4667](#) has affirmed the Commissioner's

decision and held that the taxpayer was taxable in Australia on the total amount received under an employee incentive profit participation plan following the taxpayer's resignation. The taxpayer was entitled to receive the amount that was payable to him irrespective of his period of foreign service or the value of the services he performed overseas. Accordingly, since there was no correlation or nexus between the payment and his foreign service, because the taxpayer received the payment when he was a resident of Australia, section 23AG(1) of the *Income Tax Assessment Act 1936* (Cth) did not exempt the amount or any part of it.

Taxpayer did not satisfy PSI provisions

The AAT in [Fortunatow and Commissioner of Taxation \[2018\] AATA 4621](#) has held that the company through which the taxpayer provided services to third parties was a "personal services business" as the "unrelated clients test" was not satisfied. Accordingly, the personal services income (PSI) provisions applied. Under the PSI rules, the PSI is included as assessable income of the individual whose personal efforts or skills generated the income, notwithstanding that the income may have been alienated to another interposed company.

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State Taxes Update

RevenueSA releases circular and rulings

RevenueSA has released the following circulars and rulings in relation to South Australian duties:

- [Information Circular No 103](#): Stamp Duty on Conveyances or Transfers of Non-residential and Non-primary Production Real Property (Qualifying Land) replaces Information Circular 86 and provides further clarity on information about different types of land use.
- [Revenue Ruling SDA009\[V2\]](#): Conveyance by Direction further amends and updates RevenueSA's practices in relation to a Direction given by the Purchaser to the vendor directing the vendor to transfer the property to the Transferee.
- [Revenue Ruling SDA012](#): Foreign Ownership Surcharge Ex Gratia Relief Guidelines for Significant Developments sets out guidelines regarding the *ex gratia* scheme that provides relief from the foreign ownership surcharge for

acquisitions of residential land for the purpose of undertaking significant developments of new residential homes.

WA State tax legislative developments

The following Bills were introduced into the Western Australian (WA) Parliament on 29 November 2018:

- [Revenue Laws Amendment Bill 2018](#) which seeks to address significant duty leakage, ensure certain taxpayer exemptions and concessions apply correctly, and improve the efficiency of the State's taxation legislation (*Duties Act 2008 (WA)*, *Land Tax Assessment Act 2002 (WA)* and *Pay-roll Tax Assessment Act 2002 (WA)*). The measures in the Bill to address duty leakage are very comprehensive and include new linked entity and grouping provisions for landholder duty, introducing a fixed to land model, and restoring duty on contractual mining rights. The Bill also modernises the duties family farm exemption, prescribes the conditions for nominal duty to apply to a transfer to and from a bare trustee and transfers to facilitate a subdivision, and ensures land tax residential exemptions apply to land that is subdivided during an assessment year. Importantly for any (direct or indirect) holders of Pastoral Leases, these will now be treated as "land" with retrospective effect to the commencement of the Duties Act on 1 July 2008, meaning that historic transactions may also become subject to duty following the commencement of the Bill.
- [Taxation Administration Amendment Bill 2018](#) which aims to improve the administrative and enforcement arrangements in the *Taxation Administration Act 2003 (WA)*.

In addition, the WA Treasurer has [announced](#) that amendments will be made to exclude access to the farm-in agreements concession where the exploration amount involves capital expenditure in connection with mining operations as defined in the *Mining Act 1978* or to establish, construct or improve mine infrastructure to allow mining operations to be carried out. These amendments apply from 28 November 2018. Other amendments will ensure duty is assessed on all consideration paid for a farm-in transaction other than the exploration amount. A number of amendments will be backdated to 1 July 2008 to support concessions that have previously been approved and allow the concession to apply to new transactions.

High Court grants Commissioner's appeal in WA mining valuation case

The Commissioner of State Revenue WA in [Commissioner of State Revenue v Placer Dome Inc \[2018\] HCA 59](#) was successful in an appeal to the High Court of Australia against the decision of the Supreme Court of WA Court of Appeal's decision in [Placer Dome Inc v Commissioner of State Revenue](#). This case primarily concerns the valuation of a gold mining company for the purpose of determining if it is was a 'listed land-holder corporation' for WA stamp duty purposes, and the appropriate valuation methodology to be used. However, the discussion by the HCA regarding the legal concept of goodwill and valuation methodologies will also have broader application outside a stamp duty context. For further insights refer to our [TaxTalk Alert](#).

Tasmania to extend housing duty concessions

The Tasmanian Government has [announced](#) that duty concessions for first home buyers and pensioners looking to downsize will be extended by one year to 30 June 2019. The first home buyers concession relates to 50 per cent duty discount on established homes costing up to AUD400,000, while the pensioner downsizing discount relates to a 50 per cent duty discount to eligible pensioners who sell their existing home and downsize to a home or unit at a lower cost of up to AUD400,000.

Other duty decisions

The following key duty decisions were also handed down since our last update:

- The Supreme Court of WA – Court of Appeal in [Rojoda Pty Ltd V Commissioner of State Revenue \[2018\] WASCA 224](#) upheld the taxpayer's appeal against the decision of the Western Australia State Administrative Tribunal finding that contrary to the Tribunal's findings, deeds executed in relation to the winding up of two partnerships merely acknowledged or recorded an existing obligation of the registered proprietor of the properties that had arisen under the general law, as such, no duty was payable.
- The Victorian Supreme Court in [Rotary Club of Melbourne Inc v Commissioner of State Revenue \[2018\] VSC 699](#) has dismissed the taxpayer's appeal finding that the Victorian Civil and Administrative Tribunal Tribunal did make an error in law when it determined that the taxpayer was not a body established for charitable purposes and as such was not exempt from duty under section 45 of the *Duties Act 2000* (VIC) at the time of the transfer of relevant property.

- The NSW Civil and Administrative Tribunal in [Nifuno Pty Ltd atf Stephen Forbes Pension Fund v Chief Commissioner of State Revenue \[2019\] NSWCATOD 3](#) has set aside the Chief Commissioner's assessment of duty on the transfer of the property by a Deed from Nifuno as trustee of one superannuation fund to itself as trustee of a separate fund. The Tribunal held that there is no explicit requirement for a fund member to cease to be entitled to all benefits in a superannuation fund in order for a transfer of dutiable property between complying superannuation funds to access concessional duty under section 61 of the *Duties Act 1997* (NSW). The Tribunal relevantly noted that both superannuation funds had the same sole member, both were complying funds, and the member was now receiving pre-existing pension benefits from the new fund rather than the old fund, funded by the transfer of the property. The Tribunal was of the view that it may be enough if a relevant transfer occurs in connection with a cessation of entitlement to part of the benefits from a fund.

Land tax decisions

The following key land tax decisions were handed down since our last update:

- The Victorian Civil and Administrative Tribunal in [Lions Club of Northcote Inc. v Commissioner of State Revenue \[2019\] VCAT 75](#) has confirmed land tax assessments and held that the taxpayer was not a charitable institution. Whilst acknowledging that some of the purposes and

activities of the taxpayer are charitable, that Tribunal found that the taxpayer had other significant and independent objects which are not charitable such as social activities for the benefit of its members; and the moral improvement of its members as they conduct themselves in their own personal, business and community lives.

- The NSW Civil and Administrative Tribunal in [Solfon Investments Pty Ltd atf Solfon Family Trust v Chief Commissioner of State Revenue \[2019\] NSWCATOD 11](#) has held that the taxpayer was not entitled to the principal place of residence exemption from land tax as the relevant property was owned by a trustee of a trust that was not a 'special trust' as defined in s 3A of the *Land Tax Management Act 1956* (NSW).
- The New South Wales Civil and Administrative Tribunal in [Craig v Chief Commissioner of State Revenue \[2019\] NSWCATOD 8](#) has affirmed land tax assessments and held that taxpayer was not exempt from land tax as the relevant land was not used for primary production as required by section 10AA(2) of the *Land Tax Management Act 1956*. The Tribunal was satisfied that the dominant use of the land was for the maintenance of cattle for purposes of sale, the Tribunal was not satisfied that the purpose of the taxpayer's cattle operation on the land was significant and substantial for the purpose of profit and as such the 'commerciality' test was not satisfied.

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Superannuation Update

Exemption from work test for super contributions

[Treasury Laws Amendment \(Work Test Exemption\) Regulations 2018](#) provide a one-year exemption from the work test for superannuation contributions

to allow recent retirees to boost their superannuation balances. The work test requires individuals aged 65 to 74 years to work a minimum number of hours during a particular period in the financial year in order to keep making voluntary contributions to superannuation.

The new Regulation ensures that individuals aged 65 to 74 years with total superannuation balances below AUD300,000 can make voluntary contributions to their superannuation for 12 months from the end of the financial year in which they last met the work test, without resulting in a regulated superannuation fund or RSA institution contravening relevant regulatory restrictions that would otherwise apply. The amendments apply in relation to contributions made in the 2019-20 financial year and later financial years. See also the Government's [media release](#).

Superannuation measures in MYEFO

The Government released the [2018-19 Mid-Year Economic Fiscal Outlook](#) (MYEFO) on Monday 17 December 2018. As part of the MYEFO, the following measures relevant to superannuation were announced:

- The Government will allow individuals to use the work test exemption to access up to three years of the non-concessional superannuation contributions cap in the year they turn 65 years old (applicable from 1 July 2019).
- Minor technical amendments will be made to clarify the law, correct technical defects and address unintended outcomes relating to implementation of the 2016-17 superannuation tax reform package, including amendments to the valuation of capped defined benefit income streams when commuted for purposes of the transfer balance cap and to ensure that life insurance proceeds are not taxed when death benefits are rolled over to a new fund.
- Early access to superannuation for victims of certain crimes which have unpaid or partially paid compensation orders will be able to access money held in their perpetrator's superannuation to pay the outstanding compensation (applicable from 12 months after the relevant legislation is enacted).

Treasury releases Retirement Income Disclosure Consultation Paper

Treasury has released a [consultation paper](#) on retirement income product disclosures. This consultation paper proposes a standardised, simplified document that outlines key metrics and features to help consumers compare different retirement income products. See also the Government's [media release](#). The Australian Government Actuary is also seeking views on the retirement income risk measure and the method of

calculation outlined in the technical paper. Comments due 28 March 2019.

Meaning of 'superannuation income stream benefit'

The Government has [amended](#) the Income Tax Assessment Regulations 1997 to confirm the meaning of 'superannuation income stream benefit'. This amendment allows superannuation funds to continue to claim the earnings-tax exemption on certain assets. The amendments will ensure that the provisions concerning superannuation income stream benefits have always operated, and will continue to operate, as intended. See also the Government's [media release](#).

ATO rulings on superannuation issues

The Australian Taxation Office (ATO) has released Draft Law Companion Ruling [LCR 2018/D10](#) which deals with the provisions affecting superannuation funds in connection with non-arm's length income and expenditure incurred under a non-arm's length arrangement. Specifically, the draft Ruling clarifies how the proposed amendments to s295-550 of the *Income Tax Assessment Act 1997* operate in a scheme where a superannuation entity incurs non-arm's length expenditure (or where expenditure is not incurred) in gaining or producing ordinary or statutory income. The proposed amendments are scheduled to apply in relation to fund income derived in the 2018-19 income year and later income years, regardless of whether the scheme was entered into prior to 1 July 2018.

In addition, the ATO has also released a draft update to Law Companion Ruling [LCR 2016/12](#) which deals with the concept of an individual's total superannuation balance, which is a method for valuing an individual's total superannuation interests. The draft update provides the ATO's preliminary view of proposed amendments in the *Treasury Laws Amendment (2018 Superannuation Measures No 1) Bill 2018* in relation to limited recourse borrowing arrangements.

Comments on both rulings are due by 22 February 2019.

SuperStream Benchmarking Annual report

The ATO has released the [SuperStream Benchmarking Report](#) for the income year ended 30 June 2018. Key findings include total contributions processed are approximately AUD138 million for 2017-18 (around AUD3 million or 2.2 per cent more than in 2016-17) and when exempt funds are removed from the reporting data, the current conformance rate remains at approximately 97 per

cent (non-complying transactions is 3.1 per cent and non-complying removing exempt funds is 2.9 per cent) indicating that exempt funds are starting to transact in conformance with the standard.

SMSF quarterly statistical report September 2018

The ATO has released its self-managed superannuation fund (SMSF) [quarterly statistical report](#) for September 2018. Highlights include:

- the total number of SMSFs is now 596,059
- the total number of members in SMSFs is now 1,125,994
- the total estimated SMSF assets is now AUD755 billion
- the top asset types held by SMSFs, by value, are listed shares and cash and term deposits, making

up 30 per cent and 23 per cent respectively of total estimated SMSF assets.

Productivity Commission final report into the super system

The Productivity Commission has released its [final report](#) of its review of the superannuation system. The report assesses the efficiency and competitiveness of Australia's superannuation system and whether better ways to allocate default funds are needed. Overall 31 recommendations have been made for Government to address which including high fees, unintended multiple accounts, chronic underperformance of certain funds and lack of competition in the default fund system. See also the Government's [media release](#) which indicates that the Government will carefully consider the recommendations and wait for the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry's Final Report before finalising its response.

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Legislative Update

Since the December 2018 edition of TaxTalk Monthly no Commonwealth revenue measures have passed through Parliament. Both Houses of Federal Parliament will resume on 12 February 2019.

Commonwealth revenue measures registered as legislative instruments or regulations since the December 2018 edition TaxTalk Monthly include:

- [Customs Amendment \(Product Specific Rule Modernisation\) Commencement Proclamation 2018](#) fixes 14 December 2018 as the day on which the *Customs Amendment (Product Specific Rule Modernisation) Act 2018* commenced. The Act amended the *Customs Act* to facilitate and

streamline the way in which the product specific rules of origin (PSRs) of the following free trade agreements (FTAs): the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA), the Japan-Australia Economic Partnership Agreement (JAEPA), the China-Australia Free Trade Agreement (ChAFTA) and the Singapore-Australia Free Trade Agreement (SAFTA). In addition, [consequential regulations](#) have also been made.

- [Consular Privileges and Immunities \(Indirect Tax Concession Scheme\) Amendment \(Costa Rica, Guatemala and Kazakhstan\) Determination 2018](#) creates new Indirect Tax

Concession Scheme (ITCS) packages for Costa Rica and Kazakhstan by providing indirect tax concessions to their respective consular posts in Australia and staff accredited to those posts.

- [Notice under Section 4A Specifying the Entry into Force of the Multilateral Instrument](#) gives notice that the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Multilateral Convention) entered into force for Australia on 1 January 2019.
- [Treasury Laws Amendment \(Miscellaneous Amendments\) Regulations 2018](#) makes a number of miscellaneous amendments to various competition, corporations, taxation and superannuation laws to correct technical and drafting defects, and remove anomalies and inoperative provisions so as to ensure that the law operates as intended.
- [Treasury Laws Amendment \(Work Test Exemption\) Regulations 2018](#) provides a one-year exemption from the work test for superannuation contributions to allow recent retirees aged 65 to 74 years with total superannuation balances below AUD300,000 can make voluntary contributions to their superannuation for 12 months from the end of the financial year in which they last met the work test to boost their superannuation balances.

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Other News

Mid-Year Economic and Fiscal Outlook 2018-19

The Federal Government released the [2018-19 Mid-Year Economic Fiscal Outlook](#) (MYEFO) on Monday 17 December 2018. Although no new tax measures were announced as part of the MYEFO, taxpayers should be aware of several important changes that were made by the Government to existing tax proposals, including the following general changes:

- confirmation that the Government will no longer proceed with its proposal to allow taxpayers to self-assess the effective life of intangible depreciating assets that were acquired from 1 July 2016
- deferral of the start date for the 2018-19 Budget measure to remove the capital gains tax (CGT) discount at the trust level for Managed Investment Trusts (MITs) and Attribution MITs from 1 July 2019 to 1 July 2020
- additional funding to support small business owners, including a pilot by the Australian Taxation Office (ATO) to have 10 tax clinics to support small business taxpayers with general taxation advice to help them meet their tax obligations and reporting requirements, and the creation of a dedicated Small Business Taxation Division of the Administrative Appeals Tribunal
- improve the transparency of outstanding business tax debts by increasing the threshold for ATO disclosure to credit reporting bureaus from AUD 10,000 to AUD 100,000 for tax debts that are overdue for more than 90 days; introduce a requirement that the Minister consult with the Australian Information Commissioner before changes to the reporting criteria are made; and

change the start date of the measure to the day after Royal Assent of the enabling legislation.

Refer to our [TaxTalk](#) for a full summary of all the key MYEFO measures.

ATO discussion paper on earnout arrangements

The ATO has released a [discussion paper](#) on issues concerning the tax treatment of earnout arrangements (excluding arrangements that create look-through earnout rights). The discussion paper also seeks to highlight some of the issues which may need to be considered when a taxpayer enters into such an arrangement. It also will inform the ATO as to the need and priority for ATO public advice and guidance on any areas which are unclear or cause difficulties in understanding obligations, and whether any specific compliance approach ought to be adopted to help resolve the practical challenges of valuing earnout rights.

The ATO will consider the scope of non-qualifying earnout arrangements that would be covered by any guidance, including:

- whether it should be limited to arrangements that are contingent on the economic performance of an asset or business
- arrangements connected with the sale of a depreciating asset
- earnout arrangements which are long term or of indefinite duration (such as arrangements linked to the life of a business such as a mine), and
- royalty-like earnout arrangements linked to the production of commodities.

Comments on the paper are due 1 February 2019.

Draft law for CCIV tax framework

The Government has released [draft legislation and explanatory materials](#) which proposes measures to implement the tax and regulatory components of the Corporate Collective Investment Vehicle (CCIV) regime. A CCIV is an investment vehicle with a corporate structure, with the additional consumer protection of an independent depositary for retail funds that is responsible for the oversight of certain administrative functions undertaken by the fund.

The proposed amendments include:

- the new Chapter 8B in the *Corporations Act 2001* containing the core provisions outlining the establishment of CCIVs and their operational and regulatory requirements
- amendments to other legislation to support the implementation of CCIVs (such as amendments

to the *Australian Securities and Investments Commission Act 2001* and the *Personal Property Securities Act 2009*); and

- the tax legislation, which ensures the tax treatment of CCIVs broadly aligns with the existing treatment of attribution managed investment trusts, providing investors with the benefits of flow-through taxation.

Comments are due on 28 February 2019.

New initiative for small business tax disputes

The Government has [announced](#) that it is establishing a Small Business Concierge Service within the Australian Small Business and Family Enterprise Ombudsman's office to provide support and advice about the Administrative Appeals Tribunal (AAT) process before an application is made.

We will also create a dedicated Small Business Taxation Division within the AAT, with key features including: a case manager supporting taxpayers throughout the entire process, a standard application fee of AUD500, fast-tracked decisions to be made within 28 days of a hearing and if the ATO appeals the AAT decision to the Federal Court it will pay the small business reasonable costs.

Federal Court denies FITO

The Federal Court in [Burton v Commissioner of Taxation \[2018\] FCA 1857](#) has dismissed the taxpayer's appeal against the Commissioner of Taxation's decision to partially deny the taxpayer a foreign income tax offset (FITO) against their Australian tax liability on derived gains which were taxed in the United States (US).

The Court held that in the facts under consideration, the only income that formed part of the taxpayer's Australian assessable income is 50 per cent of the capital gain on which tax was paid in the US. As such, an amount cannot be said to have been doubly taxed where the discount was not an amount included in assessable income in Australia. The Court also held that where Article 22(2) of the Australia – US Double Tax Agreement refers to Australian tax payable in respect of income, the income is only 50 per cent of the capital gain.

Taxpayer assessable on profits from sale of shares

The Federal Court in [Ransley v Deputy Commissioner of Taxation \[2018\] FCA 1796](#) has held that profits from the exchange and sale of shares acquired as part of a business or commercial operation were assessable as ordinary income and not as capital gains, as such, the taxpayer was

unable to claim capital gains tax scrip for scrip rollover relief on the exchange of the shares. The Court held that profits made on the sale of the taxpayer's shares were not the result of a mere realisation of an investment but of a commercial transaction which was entered into for the purpose of making a profit.

Deductibility of management fees

The AAT in [Queensland Maintenance Services Pty Ltd \(In Liquidation\) and Commissioner of Taxation \[2018\] AATA 4525](#) has found that part of the management fees paid by taxpayer were a loss or outgoing of capital nature and not deductible. In the particular facts, the Tribunal concluded that part of the fees were not explicable as management fees for actual management of childcare centres but instead were capital expenditure for the acquisition of management rights. In addition, the Tribunal was not satisfied that separate renovation compensation payments were made for the purpose of commercial expediency, or for the purpose of safeguarding the

taxpayer's business, or any of the other basis, and accordingly those payments also were found to be non-deductible.

ATO updated guidance on mutuality and taxable income

The ATO has released an [updated guide](#) for not-for-profit clubs, societies and associations that are taxable and not exempt from income tax. The guide seeks to provide assistance to these organisations to work out if they need to lodge an annual income tax return and calculate their taxable income, including how to treat mutual dealings with their members.

Tax in a changing world

At the Australasian Tax Teachers' Association 31st annual conference in Perth, ATO Second Commissioner Andrew Mills delivered a [paper](#) which discussed tax in a changing world. The paper explores various topics relating to change and how it impacts on the ATO including the ATO's 2024 vision and future challenges and opportunities in dispute resolution.

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TaxTalk Monthly

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