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TaxTalk Monthly

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

May 2020



Corporate Tax Update

COVID-19 and R&D incentive

The Department of Industry, Science, Energy and Resources have provided the following research and developments (R&D) updates in light of COVID-19:

- [Advance & Overseas Findings and COVID-19](#) – The Department will accept a ‘provisional’ Advance or Overseas Finding application for the 1 July 2019 – 30 June 2020 income year, due on 30 June 2020.
- [COVID-19 and R&D registration extensions](#) – The Department will accept registration applications for 30 June 2019 (otherwise due on 30 April 2020) until 30 September 2020.

Reportable tax position 2020

The ATO has released the [2020 Reportable Tax Position \(RTP\) instructions](#) which includes changes to the definition of a public company, the term foreign-owned company and the term majority controlling interest have also been defined. The 2020 RTP Schedule is required to be completed if the company is:

- lodging a company tax return for the year ending 30 June 2020 or later
- is a public company or a foreign-owned company
- has total business income of either
 - AUD250 million or more in the current year
 - AUD25 million or more in the current year and is part of a public or foreign owned economic group with total business income of AUD250 million or more in the current year or the immediate prior year.

If the company meets the criteria it will need to lodge the schedule even if it has no disclosures. Note also that the ATO is no longer notifying taxpayers of their obligation to lodge the RTP Schedule.

Inquiry into the Development of the Australian Corporate Bond Market

The Standing Committee on Tax and Revenue will [inquire](#) into and report on the Development of the Australian Corporate Bond Market. The Inquiry will examine:

- the tax treatment of corporate bonds for both issuers and investors to determine whether there are any impediments in the tax system to the issue of corporate bonds compared to other forms of debt financing for business;
- related impediments within the Corporations Act to the further development of the corporate bond market, including how they interact with the tax system; and
- comparable policy settings in other jurisdictions, with a focus on those jurisdictions that are major sources of debt finance for companies operating in Australia.

The Committee is seeking submission by 28 May 2020.

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Employment Taxes Update

JobKeeper measures now apply

On 30 March 2020, the Federal Government announced the “JobKeeper” program, which broadly comprises a wage subsidy to help businesses keep staff employed in the midst of the economic challenges arising from Coronavirus (COVID-19). The subsidy of AUD1,500 per fortnight, per eligible employee, will be paid to many affected employer types (including not-for-profits and charities) and self-employed individuals (businesses without employees), with effect from 30 March 2020, who qualify.

Following the enactment of the relevant legislation and Rules, the JobKeeper program is now operative. Potentially affected employers should assess their eligibility, as well as for their employees, and if applicable, take steps to enrol in the program and implement and satisfy the various conditions which must be satisfied in order to remain eligible.

For the latest up to date information refer to our [JobKeeper payments](#) webpage.

Payroll tax relief measures in response to COVID-19

The States and Territories of Australia have announced their own stimulus packages to support businesses impacted by COVID-19, with all offering some form of relief in relation to payroll tax deferrals and/or waivers. In addition, [South Australia](#) and [Western Australia](#) have moved to ensure that the Federal Government’s JobKeeper payments will be exempt from payroll tax

For the latest up to date information refer to our [State Tax COVID-19 updates](#) webpage.

Cash Flow Boost measures for small to medium employers

As noted in our Legislative Update, the “cash flow boost” program (enacted by the [Boosting Cash Flow for Employers \(Coronavirus Economic Response Package\) Act 2020](#)) is now available to provide to a small or medium business employer entity with aggregated turnover of less than AUD50 million, or a charity or other not-for-profit employer entity of equivalent size, with an automatic payment or credit of at least AUD20,000 and up to AUD100,000 on activity statement obligations from March 2020 through to September 2020.

For further details refer to our [COVID-19 business measures](#) webpage.

Superannuation Guarantee amnesty now law

Legislation providing the once-off amnesty for Superannuation Guarantee (SG) non-compliance, backdated to the original amnesty start date of 24 May 2018 has been enacted. Affected employers can take advantage of the amnesty which will cover SG contribution entitlements referable to the period from 1 July 1992 through to 31 March 2018 provided that voluntary disclosure is made to the Australian Taxation Office (ATO) in the period up to 7 September 2020. For further details on the SG amnesty refer to our [TaxTalk Alert](#).

However, as a result of COVID-19, an employer’s circumstances may change that might result in them not being able to pay the resulting SG liability. In this respect the ATO has [indicated](#) that it will work with an affected employer to establish a flexible payment plan which may include the ability to extend the payment plan to beyond 7 September 2020 (although it is important to note that only SG shortfall payments made under the amnesty by 7 September 2020 will be deductible).

Salary sacrifice arrangements and super guarantee

The ATO has issued [Guidance Note GN 2020/1](#) for employers, payroll software providers and intermediaries who may need to change the way they calculate SG due to new law that ensures employers cannot reduce their SG obligations by taking advantage of contributions made by employees who have salary sacrifice arrangements.

Specifically, under the new law which applies from 1 January 2020, the minimum amount of SG is calculated on an employee’s ordinary time earnings (OTE) base which is the sum of the employee’s OTE and any OTE amounts they sacrifice in return for super contributions. Additionally, super contributions to an employee’s fund under an effective salary sacrifice arrangement no longer count towards the SG obligations.

Update on draft ruling on car parking fringe benefits

The ATO has indicated that it will [defer](#) the application of Draft Taxation Ruling [TR 2019/D5](#) which provides revised guidance on car parking fringe benefits. Any changes in the ATO view from TR 96/26 will now apply from 1 April 2021. The ATO has recognised that employers will require time to implement these changes following finalisation of

the Ruling. For a summary of the key issues raised by TR 2019/D5 refer to our [TaxTalk Alert](#).

FBT rates and thresholds for 2020-21

The Australian Taxation Office (ATO) has released the following tax determinations which provide the fringe benefits tax (FBT) rates and thresholds for the 2020-21 FBT year commencing on 1 April 2020:

- [TD 2020/3](#) which provides the rates to be applied on a cents per kilometre basis for calculating the taxable value of a fringe benefit arising from the private use of a motor vehicle other than a car.
- [TD 2020/4](#) which sets out the amounts that the Commissioner of Taxation considers reasonable for food and drink expenses incurred by employees receiving a living-away-from-home allowance (LAFHA) fringe benefit.

Productivity Commission recommendations on remote area concessions

Given the challenges faced by regional Australia, including as a result of the impacts of the recent drought, bushfires and the Coronavirus, the Federal Government has [announced](#) that it will not be acting on the various recommendations made by the

Productivity Commission in its [report](#) on remote area tax concessions and payments.

Single touch payroll exemption for certain small employers

Draft Taxation Administration – Single Touch Payroll – 2020-21 year Withholding Payer Number Exemption 2020 [STP 2020/D2](#) proposes to exempt certain entities that do not have an Australian business number (ABN) but instead have a withholding payer number (WPN) from reporting under Single Touch Payroll (STP). Once finalised the exemption is expected to apply from 1 July 2020. Comments are due on 14 May 2020.

High Court refuses special leave in SA payroll tax exemption case

The High Court has [refused](#) the taxpayer's application for special leave to appeal against the decision of the Full Supreme Court of SA in [South Australian Employers' Chamber of Commerce and Industry Incorporated v Commissioner of State Taxation](#). In this matter the Supreme Court dismissed the taxpayer's appeal against the disallowance of an objection concerning whether the taxpayer was exempt from payroll tax under the charitable purpose exemption in the *Payroll Tax Act 2009* (SA).

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Global Tax Update

Latest news from international tax and transfer pricing

Practical aspects of COVID-19 create new cross-border issues

COVID-19 presents significant challenges to people and organisations around the globe and the disruption continues to evolve. With international travel restrictions one of the first measures implemented not just in Australia, but globally, this created specific tax issues with individuals or businesses needing to relocate their work activities. Of particular relevance is the practical approach taken by the Australian Taxation Office (ATO) in relation to:

- Corporate tax residency – if the only reason a foreign company is holding board meetings in Australia or directors are attending board meetings from Australia, is because of impacts of COVID-19, then the Commissioner will not apply compliance resources to determine if the entity's central management and control is in Australia.
- Permanent establishments – if a foreign company did not otherwise have a permanent establishment in Australia before the impacts of COVID-19, and the presence of the employees in Australia is because they are temporarily relocated or restricted in their travel as a consequence of COVID-19, then the Commissioner will not apply compliance resources to determine if the foreign company has a permanent establishment in Australia.

Businesses are also impacted in relation to impairment of assets due to the economic consequences and/or seeking additional debt or equity, all of which can give rise to additional tax implications including with respect to thin capitalisation and transfer pricing.

For the latest up to date information refer to our [Other tax issues](#) webpage.

Navigate global measures in response to COVID-19

To help any multinational business cut through the complexity and pace of the changes made around the globe to deal with the economic challenges presented by COVID-19, PwC's team of specialists from across the globe have collaborated to create a [navigation tool](#) for you to stay abreast of the changes that impact your business across the globe. Users can select up to five territories to compare COVID-19 measures.

Temporary changes to Australia's foreign investment framework

In response to the COVID-19 crisis, the Australian Treasurer, the Hon Josh Frydenberg, [announced](#) that there is now no threshold amount which applies in determining whether a particular foreign investment made on or after 10:30 pm (AEDT) Sunday, 29 March 2020 is subject to Australia's foreign investment framework. Furthermore, to ensure sufficient time for screening applications, the Australian Foreign Investment Review Board (FIRB) will work with existing and new applicants to extend timeframes for reviewing applications from 30 days to up to six months. These are temporary measures that will remain in place for the duration of the current crisis. FIRB has also [published](#) Questions & Answers on these temporary changes.

High Court finds sufficient influence

On 11 March 2020, the High Court of Australia handed down its [decision](#) in BHP Billiton Ltd (now BHP Group Ltd) and Commissioner of Taxation, unanimously dismissing the taxpayer's appeal. This case concerned the application of the controlled foreign company (CFC) provisions to the taxpayer in respect of the activities of a Swiss marketing entity. Broadly, the Court had to consider whether the taxpayer, a UK based Plc, the marketing entity and the Australian subsidiaries of Plc were "associates" for tax purposes. The Court found that relevant group companies were "associates" because there was the requisite level of "sufficient influence". The ATO has also released a [statement](#) in response to the High Court's decision. For further details on the issues raised by this case, refer to our [TaxTalk Alert](#).

Thin capitalisation and valuing debt capital

The ATO has issued final Taxation Determination [TD 2020/2](#) which deals with the requirement that an entity complies with the accounting standards in calculating the value of its liabilities, which includes its debt capital. The Commissioner continues to take the view that an entity's debt capital must be valued in its entirety in the manner required by the accounting standards regardless of whether it comprises debt interests that are classified as financial liabilities, equity instruments or compound financial instruments under the accounting standards.

The Commissioner does not consider that the provisions operate to confine the calculation of value to that part of the debt capital that is classified as a financial liability under the accounting standards. The views expressed in the Determination apply to income years commencing both before and after its issue.

Synthesised texts of Australia's tax treaties

The ATO has released the synthesised text of the following tax treaties with Australia that are modified by the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (the MLI):

- [Synthesised Text of the MLI and the Agreement Between Australia and Belgium](#) which entered into force for Australia on 1 October 2019.
- [Synthesised Text of the MLI and the Agreement Between Australia and Canada](#) which entered into force for Australia on 1 December 2019.

Update to tax ruling on interpreting tax agreements

The ATO has released an [addendum](#) which updates Taxation Ruling TR 2001/13 that provides guidance on interpreting Australia's double tax agreements.

OECD guidance on COVID-19

The Secretariat of the Organisation for Economic Co-operation and Development (OECD) released [initial analyses](#) on tax issues arising from cross-border workers affected by the COVID-19 crisis, and some countries have also started publishing their own guidance. The guidance from the OECD and these countries provides welcome reassurance to taxpayers who were concerned that restrictions on travel or movement as a result of the pandemic would change corporate residence, create permanent establishments, or result in other undesirable tax consequences. For further details refer to PwC Global [Tax Policy Alert](#).

In addition, the OECD has also published the following:

- An [article](#) to address the COVID-19 crisis, discussing and developing solutions now and for the future.
- [Global reference guide](#) on the actions undertaken by tax administrations globally to support its taxpayers in light of COVID-19.

OECD update on reporting by sharing economy

The OECD has published the [public comments](#) received on its [draft Model Rules](#) for Reporting for Platform Operators with respect to Sellers in the Sharing and Gig Economy. Comments were due on 20 March 2020.

The OECD draft Model Rules for Reporting for Platform Operators with respect to Sellers in the Sharing and Gig Economy was issued against the background of a number of jurisdictions that have already introduced certain reporting obligations on platform operators, while others (including Australia) are planning to introduce similar measures in the near future. In addition to the Model Rules, the OECD Forum on Tax Administration has developed a Code of Conduct on providing information and support to sellers on their tax obligations while minimising compliance burdens. The code is intended to supplement the Model Rules, in particular, where sellers are not subject to reporting under the Model Rules.

Other OECD developments

The following OECD developments have occurred since our last update:

- The OECD has released the [public comments](#) received on the 2020 Review of Country-by-Country Reporting (BEPS Action 13) Minimum Standard.
- The OECD has also [released](#) the stage 1 peer review reports on dispute resolution (BEPS Action 14) for Brunei Darussalam, Curaçao, Guernsey, Isle of Man, Jersey, Monaco, San Marino and Serbia. It has also released the [second peer review report](#) assessing countries' efforts to implement the Action 6 minimum standard (on preventing the granting of treaty benefits in inappropriate circumstances).
- The OECD has [released](#) BEPS Action 14 reports for Austria, France, Germany, Italy, Liechtenstein, Luxembourg and Sweden. The results from the peer review and peer monitoring process demonstrate positive changes across all seven jurisdictions, although not all show the same level of progress.
- The Global Forum on Transparency and Exchange of Information for Tax Purposes has [released](#) the peer review reports for Brunei Darussalam, Macau (China), Switzerland, Barbados, Seychelles, Liberia, Peru and Tunisia assessing compliance with the international standard on transparency and exchange of information on request (EOIR).

US COVID-19 measures

A number of COVID-19 economic stimulus and targeted tax payment relief developments have occurred in the United States (US), from a Federal, State and local level. Impacted taxes generally include corporate income tax, individual income tax, and sales and use tax.

- Tax relief measures for businesses in the ‘Coronavirus Aid, Relief, and Economic Security Act’ (the CARES Act) include a five-year net operating loss (NOL) carryback and a change in interest deduction limitations. For further details refer to our [Global Tax Insights](#).
- The Internal Revenue Service (IRS) provides administrative relief related to COVID-19 to US taxpayers in addition to various relief measures provided by the CARES Act. For further details refer to our [Global Tax Insights](#).
- Several US states and localities are providing relief to taxpayers with tax payments due over the next several months. PwC provides a [matrix](#) that summarises select state and local tax relief relating to COVID-19.

2020-21 Hong Kong Budget

The Hong Kong Financial Secretary Paul Chan Mo-po announced the 2020-21 Hong Kong Budget on 26 February 2020 which outlined the Hong Kong Government’s plan for the economy and proposals for taxation developments. The Budget contains a range of measures designed to boost Hong Kong’s financial services sector. Notable among these are proposals to waive stamp duty for exchange-traded fund market makers and proposed tax concessions on carried interest to encourage the setting up of private equity funds in Hong Kong. Refer to the [PwC Hong Kong Budget website](#) for further details.

2020-21 UK Budget

The United Kingdom (UK) Chancellor Rishi Sunak delivered the 2020-21 UK Budget on 11 March 2020. Alongside a £30bn package of emergency measures to mitigate the short term economic impact of Covid-19, the government announced major investment plans as it formalised promises to ‘level up’ the country. The Budget also contained a range of measures including a stamp duty surcharge for non-UK residents, review of the UK funds regime and additional compliance resources for Her Majesty’s Revenue and Customs (HMRC). As previously announced, a 2 per cent tax will be introduced on the revenues certain digital businesses earn from 1 April 2020. Refer to the [PwC UK Budget website](#) for further details.

UK’s approach to tackling profit diversion

The UK HMRC has introduced a number of different approaches to address what it sees as shortcomings in the application of the arm’s length principle by some taxpayers. This initiative has resulted in a series of guidelines and compliance processes for multinational entities (MNEs) with a UK presence, including the Diverted Profits Project (DPP), which seeks to minimise profit diversion arrangements by MNEs. MNEs with UK entities should take heed of the HMRC’s increased focus on tackling profit diversion. Refer to this [Global Tax Insights](#) for further details.

EU revises list of blacklisted jurisdictions

The European Union (EU) has [revised](#) its list of non-cooperative tax haven jurisdictions to include Cayman Islands, Palau, Panama and Seychelles. This will have implications for the viability of many Cayman fund and holding structures, particularly for those funds that invest into Europe. Refer to this [article](#) from PwC Switzerland for more detail.

Federal Court allows custom tariff concession order application

The Federal Court in [Alstom Transport Australia Pty Ltd v Comptroller-General of Customs \[2020\] FCAFC 43](#) has allowed the taxpayer’s appeal against the decision of the Administrative Appeals Tribunal which had found that the taxpayer’s imported driverless trains were substitutable goods that were produced in Australia at the time the application was lodged, as such, the application did not meet the tariff concession order (TCO) criteria and were subject to duty. The Court found that the Tribunal had adopted an incorrect approach in arriving at its conclusion and set aside the decision. Specifically, the Court found that the Tribunal failed to consider the use of the actual goods described in the TCO application. The Court ordered the matter to be remitted to the Tribunal for re-determination according to law. The Court also observed that upon remittal “it may well be found that the uses to which the applicant’s trains, as described in the TCO application, can be put are those described by the applicant as being “to transport passengers on a high capacity, high frequency, driverless metropolitan train line system”.

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Indirect Tax Update

Guidance on expansion of estimates regime to GST, LCT and WET

The Australian Taxation Office (ATO) has released Practical Compliance Guideline [PCG 2020/2](#) which explains how the Commissioner of Taxation will administer the recent changes made by the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* (Cth). These amendments, which apply from 1 April 2020, bring goods and services tax (GST), luxury car tax (LCT) and wine equalisation tax (WET) within the existing estimates and director penalty regimes that have historically applied to PAYG withholding or superannuation guarantee charge liabilities. This Guideline focuses on the expansion of the estimates regime which enables the Commissioner to make an estimate of certain unpaid and overdue tax-related liabilities and recover the amount of the estimate. The Guideline includes the relevant factors that the Commissioner is to take into account in making a reasonable estimate of an unpaid net amount.

GST determination for margin scheme valuation requirements

[A New Tax System \(Goods and Services Tax\) Margin Scheme Valuation Requirements](#)

[Determination 2020](#) specifies the requirements for making valuations for the purpose of applying the margin scheme. The requirements apply to valuations for taxable supplies of real property made on or after 1 March 2010. This determination also specifies requirements for the Commissioner to make valuations for the purposes of applying the margin scheme in specified circumstances for taxable supplies of real property made before and on or after 1 March 2010.

Taxpayer not entitled to Input tax credits

The Administrative Appeals Tribunal in [Dobie v Commissioner of Taxation \[2020\] AATA 292](#) has held that a taxpayer, which operated a hairdressing business, was not entitled to input tax credits and was also liable to an administrative penalty for failing to exercise reasonable care and behaving recklessly. The taxpayer failed to prove that any creditable acquisitions were made during the relevant periods. The Tribunal also found that the taxpayer failed to discharge their onus of proof in terms of demonstrating, on the balance of probabilities, that they were carrying on an enterprise from 30 June 2011 and that they were entitled to be registered for GST.

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Personal Tax Update

Claiming deductions for running expenses while working from home due to COVID-19

The Australian Taxation Office (ATO) has released [PCG 2020/3](#) which provides a simpler alternative for claiming deductions for additional running expenses incurred whilst working from home due to COVID-19. The new arrangement will allow people to claim a rate of 80 cents per hour for all their running expenses, rather than calculating costs for specific running expenses. Multiple people living in the same house can claim this new rate. For example, a couple living together could each individually claim the 80 cents per hour rate. Under this guidance, it is also not a requirement to have a dedicated work from home area.

Deductions for work expenses

The ATO has released Taxation Ruling [TR 2020/1](#) which provides an updated view on circumstances where work-related expenses will be deductible to an employee. This ruling considers the deductibility of work expenses in a number of scenarios and provides illustrative examples of how to practically apply these principles under a range of different fact patterns. Refer to our PwC [TaxTalk Alert](#) for further details.

Draft work-related car expense deductions rate determination

The ATO has issued draft legislative determination [MVE 2020/D1](#) which sets out the cents per kilometre rate for calculating work-related motor vehicle expense deductions at 72 cents per kilometre for the income year commencing 1 July 2020. Comments were due on 14 April 2020.

ATO releases high wealth private groups tax gap

The Commissioner of Taxation Chris Jordan has announced the income tax performance for [high wealth private groups](#) for the first time. The ATO estimates the 2016–17 high wealth private groups net income tax gap to be 7.7 per cent or approximately AUD770 million. Having regard to the tax performance information already released across other markets, the results reveal that over 92 per cent of the high wealth private groups' income tax was paid voluntarily or with little intervention from the ATO in 2016-17.

Full Federal Court allows deductions for share losses and legal fees

The majority of the Full Federal Court in [Greig v Commissioner of Taxation \[2020\] FCAFC 25](#) has granted the taxpayer's appeal and held that the taxpayer was entitled to claim a deduction for losses on shares that was incurred by reason of the compulsory transfer and cancellation of the taxpayer's shareholding, and also for the associated legal fees incurred following the relevant company being put into voluntary administration.

Tribunal finds foreign citizen is not Australian tax resident

The Administrative Appeals Tribunal (AAT) in [Schiele v Commissioner of Taxation \[2020\] AATA 286](#) has held that a foreign citizen from Germany, that came to Australia on a Working Holiday visa (subclass 417), was not a 'resident' for Australian income tax purposes. The Tribunal found that the taxpayer did not satisfy the relevant residency tests and that their usual place of abode was in Germany and not Australia. There was also no evidence provided to the Tribunal to establish

that the taxpayer intended to take up residency in Australia. Accordingly, as the taxpayer was a foreign

citizen and not an Australian tax resident, they were not entitled to claim the tax-free threshold.

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State Taxes Update

State tax measures in response to COVID-19

The States and Territories of Australia have announced various stimulus packages to support businesses impacted by COVID-19, with all offering some form of relief in relation to land tax and some offering some form of waiver or refunds of rates and licencing fees.

For the latest up to date information refer to our [State Tax COVID-19 updates](#) webpage.

Relief measures for bushfire victims

The following States have announced stamp duty and land tax relief measures for bushfire victims:

- The NSW Government has [announced](#) that it will provide stamp duty relief for people who have lost their homes in the NSW bushfires, and choose to buy a home elsewhere in NSW instead of rebuilding. Purchasers of replacement homes will only start paying stamp duties when the amount of duty payable exceeds AUD55,000. Eligible people who have already paid their stamp duty will be able to apply for a refund.
- RevenueSA has released Revenue Ruling [SDALT001](#) which details a number of stamp duty and land tax measures for those impacted by the bushfires in a specified bushfire area. Notably, individuals purchasing a home to replace a property destroyed by the bushfires in SA have up to 20 January 2024 to access stamp duty relief.
- Victoria has [enacted tax relief measures](#) for bushfire victims which include a 50 per cent land transfer duty concession on transfers entered into on or after 27 January 2020 for the acquisition of commercial or industrial property in

bushfire affected local government and alpine resort areas.

Victoria Duties rulings

The State Revenue Office of Victoria has issued the following Duties Rulings:

- Revenue Ruling [DA-055v2](#) identifies the concessions and assistance available to taxpayers in meeting their obligations under the Duties Act 2000 (Vic). The ruling sets out various lodgment concessions and examples on the calculation of duty, it also identifies certain duty concessions that may apply, including where a landholder's land holdings include leasehold estates, fixtures owned separately from land, and/or primary production land. This ruling replaces DA-055 to clarify the operation of the anomalous duty outcome concession under s89E of the Duties Act 2000 on relevant acquisitions in landholders whose Victorian land holdings comprise interests in fixtures held separately from the land on which they are located.
- Revenue Ruling [DA-056v2](#) explains the meaning of the term "interest" and explains how and when an interest may be acquired. The ruling also sets out who may be liable for duty on an acquisition of an interest in a landholder and in what circumstances an acquisition may be exempt from duty under the Duties Act 2000 (Vic). This ruling replaces DA-056 to clarify the operation of s89D(a) of the Duties Act 2000 and confirm the continued availability of the exemption under s42 of the Duties Act 2000 in light of the decision in *GJ Grantham Pty Ltd v Commissioner of State Revenue* [2019] VCAT 1275.

QLD updated Revenue Rulings

The Queensland Office of State Revenue has updated the following rulings:

- Public Ruling [DA105.4.3](#) which deals with the concession for transfer duty for dutiable transactions involving transfers of property used to carry on a family primary production business to certain relatives. The ruling clarifies the terms of an administrative arrangement whereby the concession operates such that “defined relatives” include a first cousin or the spouse of a first cousin. The meaning of “first cousin” for this purpose is also provided. On 3 February 2020, the expanded administrative arrangement was approved for an additional 12 months commencing 23 May 2019. All other conditions of the concession continue to apply.
- Public Ruling [TAA060.2.5](#) which sets out the general manner in which the Commissioner of State Revenue will decide whether to remit penalty tax and the extent of any remission. According to the ruling, each case would be considered on its merits with regard to a taxpayer’s conduct and the circumstances surrounding the case. It does not apply to reassessments of transfer duty and mortgage duty relating to concessions for homes.

WA duty concession for strata titles subdivisions

The WA Treasurer, the Hon Ben Wyatt, has [announced](#) that amendments will be introduced to ensure transfer duty relief will continue for Western Australians who subdivide their property using a strata titles scheme and there is no change in land ownership. The amendments follow a State Administrative Tribunal decision in February 2019 that changed how duty applied to these transactions. These changes will apply from the date the strata titles reforms come into operation, which is proposed to occur on 1 May 2020.

High Court finds WA duty payable on dissolution of partnership

The High Court by majority, has allowed the Western Australian Commissioner of State Revenue’s [appeal](#) from the Court of Appeal of the Supreme Court of Western Australia in [Rojoda Pty Ltd V Commissioner of State Revenue \[2018\] WASCA 224](#) and found that duty was payable in relation to the winding up of two partnerships. The majority held that, in relation to the two partnerships, a partner held title to partnership property on trust for their fellow partners, each of whom had a non-specific interest in relation to all of the partnership property. The majority also held that

after the partnerships had dissolved, declarations that title to particular partnership property was held on trust in the relevant proportions for each former partner were dutiable transactions within the meaning of s 11(1) of the *Duties Act 2008* (WA).

NSW – Taxpayer not liable to pay duty as no goodwill transferred

The Supreme Court of NSW in [Favotto Family Restaurants Pty Ltd v Chief Commissioner of State Revenue \(NSW\) \[2020\] NSWSC 120](#) found for the taxpayer and held that it did not have an obligation to pay duty under the *Duties Act 1997* (NSW) as there was no transfer of goodwill in the transaction in respect of two McDonald’s restaurant businesses. The Court instead found the transaction resulted in the taxpayer having a contractual right or conferring of authority to operate the business and use of the McDonald’s system, and as such, was not liable to pay duty. Specifically, the transactions generated new contractual rights in the forms of limited licences and did not (whether in terms or in their effect) convey any pre-existing proprietary rights.

No primary production land tax exemption applied

Two recent cases have considered whether the relevant primary production land tax exemptions applied:

- The Supreme Court of NSW in [Young v Chief Commissioner of State Revenue \[2020\] NSWSC 330](#) has held that the taxpayer, a family trust trustee registered as proprietor of land parcels, failed to prove that the dominant use of the land was for the maintenance of horses to sell them or their natural increase or bodily produce in accordance with s10AA(3)(b) of the *Land Tax Management Act 1956* (NSW). As such, each parcel of land did not qualify for primary production land tax exemption. There was insufficient objective indication that the dominant purpose of the use of the land during the tax years was for the purpose of selling horses or their progeny, and instead the evidence tended to strongly favour the conclusion that the horses were maintained on the land during tax years for recreational or lifestyle reasons.
- The Supreme Court of Victoria has found in [Annat Pty Ltd as trustee for the Annat Family Trust v Commissioner of State Revenue \[2020\] VSC 108](#) that although around 50 per cent of the land was used for primary production, such use was not sufficient to impart the whole of the land with the requisite character of being used *primarily* for the business of primary production.

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Superannuation Update

Covid-19 and early release of superannuation

As noted in the Legislative Update, the [Coronavirus Economic Response Package Omnibus Act 2020](#), among other things, provided for the early release of superannuation to allow affected individuals to have up to AUD10,000 released from their superannuation during the 2019-20 financial year and another AUD10,000 in the 2020-21 financial year from 1 July 2020 until 24 September 2020. To apply for early release, an Australian or New Zealand citizen or permanent resident must satisfy one or more of the following requirements:

- be unemployed
- be eligible to receive a job seeker payment, youth allowance for jobseekers, parenting payment (which includes the single and partnered payments), special benefit or farm household allowance, or
- on or after 1 January 2020, either the individual:
 - was made redundant
 - had working hours reduced by 20 per cent or more, or
 - was a sole trader whose business was suspended or had a reduction in turnover of 20 per cent or more.

In addition, [Treasury Laws Amendment \(Release of Superannuation on Compassionate Grounds\) Regulations 2020](#) was made to allow the following temporary residents affected by the adverse economic effects of coronavirus to have up to AUD10,000 released from their superannuation or retirement savings account on compassionate grounds:

- those who hold a student visa that has been held for 12 months or more and are unable to meet immediate living expenses
- those who hold a Subclass 457 (Temporary Work (Skilled)) or Subclass 482 (Temporary Skill Shortage) visa who have had their working hours reduced to zero but are still employed by their employer, or
- other temporary visa holders who are unable to meet immediate living expenses

Temporary residents may only make an application for release in the financial year ending 30 June 2020 and only apply for one payment of up to AUD10,000.

Eligible individuals who wish to access the [early release of super](#) for COVID-19 can do so from

20 April 2020 via ATO Online through myGov. Any amounts released from a fund are tax-free. It is strongly recommended that individual financial advice be sought before applying for early release of superannuation.

Affected funds should also refer to this [ATO information](#) in relation to the specific implementation measures associated with this relief.

Temporarily reducing superannuation minimum drawdown rates

In addition, the [Coronavirus Economic Response Package Omnibus Act 2020](#), provides temporary support for retirees by reducing superannuation minimum drawdown requirements for account-based pensions and similar products by 50 percent for the 2019-20 and 20-21 income years. This concession is intended to reduce the need for retirees to sell investment assets to fund minimum drawdown requirements.

Other COVID-19 superannuation developments

The following superannuation developments have occurred in response to COVID-19 including:

- Unclaimed super money reporting and payment deferral – The ATO has [announced](#) that it will be granting a deferral of the scheduled statement day and payment day for 31 December unclaimed money day accounts. This will be a deferral of the 30 April 2020 due date to 31 October 2020.
- Extension of self-managed superannuation fund (SMSF) annual return obligations – the ATO is automatically applying a deferral for the lodgment of 2019 SMSF annual returns that were ordinarily due on 15 May and 5 June 2020 until 30 June 2020.
- To help superannuation trustees understand their new and ongoing responsibilities during this period of disruption, Australian Prudential Regulation Authority ([APRA](#)) and [ASIC](#) have published superannuation frequently asked questions (FAQs) on each agency's website.
- APRA is launching a [new data collection process](#) to assess the progress and impact of the Government's temporary early release of superannuation scheme. From the week commencing 27 April 2020, registrable superannuation entity (RSE) licensees will be asked to complete and submit APRA's new Early Release Initiative (ERI) data collection form weekly until further notice.

Draft legislation to improve flexibility of super for older Australians

The Federal Government has released a package of [exposure draft legislation](#) to provide greater flexibility for individuals over 65 years of age in making voluntary superannuation contributions (concessional and non-concessional) from 1 July 2020. These measures were first announced in the 2019-20 Federal Budget and seek to amend the relevant tax and superannuation law to:

- increase the age at which the work test starts to apply for voluntary concessional and non-concessional superannuation contributions from the age of 65 to 67 years
- increase the cut-off age for spouse contributions from 69 to 74 years, and
- allow individuals aged 65 and 66 to make up to three years of non-concessional superannuation contributions under the bring-forward rule.

Comments on the draft law were due by 3 April 2020.

ATO concerns with SMSF and property development

The ATO has issued *SMSF Regulator's Bulletin SMSFRB 2020/1* which outlines its concerns regarding an increase in the number of self-managed superannuation funds (SMSFs) entering into arrangements, with related or unrelated parties, involving the purchase and development of real property for subsequent disposal or leasing.

In particular, the ATO is seeing a number of arrangements in which the investment activity is undertaken utilising joint venture arrangements, partnerships or investments through an ungeared related unit trust or company. According to the Bulletin, these types of investments can cause concerns where they are used to inappropriately divert income into the superannuation environment, or if SMSF assets are used to fund property development ventures in a manner that is inappropriate or detrimental to retirement purposes. The ATO notes that property development can be a legitimate investment for SMSFs where it complies with the *Superannuation Industry (Supervision) Act 1993* (Cth) and *Superannuation Industry (Supervision) Regulations 1994* (Cth).

ATO speeches on SMSF regulation

A number of speeches dealing with SMSFs were given by the ATO at the SMSF Association 2020 National Conference:

- ATO Deputy Commissioner James O'Halloran in a [speech](#) at the conference discussed the regulation of SMSFs in Australia, including discussion on the following topics: the Royal Banking Commission, the SMSF journey, technology and the SMSF sector, SMSF statistics, cybersecurity, real-time reporting and data, and areas of interest for SMSFs.
- ATO Assistant Commissioner Dana Fleming presented an [update](#) at the conference on practical issues within SMSFs including the ATO's current SMSF enforcement approach, and the SMSF trustee risk strategies and treatments.

Key super rates and thresholds

The ATO has released [key superannuation rates and thresholds](#) for the 2020-21 year. Some of these key superannuation rates and thresholds include:

- concessional contributions cap is AUD 25,000
- non-concessional contributions cap is AUD 100,000
- capital gains tax cap amount for non-concessional contributions is AUD 1.565 million
- the low-rate superannuation benefit cap is \$215,000
- the untaxed plan cap amount is AUD 1.565 million
- the general transfer balance cap is AUD 1.6 million
- the defined benefit income cap is AUD 100,000
- the Division 293 tax threshold is AUD\$250,000
- the superannuation guarantee maximum super contribution base is AUD\$57,090 per quarter
- the employment termination payments (ETP) cap amount for life benefit termination payments and death benefit termination payments is AUD 215,000, and
- the tax-free part of genuine redundancy payments and early retirement scheme payments is AUD 10,989 and AUD 5,496 for each complete year of service.

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Legislative Update

To give effect to the Government's first stimulus package in response to COVID-19, the Government introduced the following tax and superannuation related Bills (all of which are now enacted):

- [Boosting Cash Flow for Employers \(Coronavirus Economic Response Package\) Bill 2020](#), which was introduced into the House of Representatives on 23 March 2020, provides for the Commissioner of Taxation to make "cash flow boost payments" of at least AUD20,000 and up to AUD100,000 for a small or medium business employer entity, or a charity or other not-for-profit employer entity, for those employers which have aggregated turnover of less than AUD50 million.
- [Coronavirus Economic Response Package Omnibus Bill 2020](#), which was introduced into the House of Representatives on 23 March 2020, contains a number of measures including:
 - Instant asset write-off for businesses with aggregated turnovers of less than AUD500 million – increase the cost threshold below which business entities can access an immediate deduction for depreciating assets and certain related expenditure (instant asset write-off) from AUD30,000 to AUD150,000, from 12 March 2020 to 30 June 2020.
 - Backing business investment for businesses with aggregated turnovers of less than AUD500 million – additional accelerated first year depreciation deduction for *new* depreciation assets first held, and first used or installed ready for use between 12 March 2020 and 30 June 2021
 - Flexibility in the Corporations act to establish a temporary mechanism to provide short-term regulatory relief to classes of persons that,

due to the Coronavirus, are unable to meet their obligations under the Corporations Act or the Corporations Regulations

- Super drawdowns – reduce the minimum payment amounts for account-based pensions by half for the 2019-20 and 2020-21 financial years
- Early release of super – provide for early release of superannuation to allow affected individuals to have up to AUD10,000 released from their superannuation during the 2019-20 financial year and another AUD10,000 in the 2020-21 financial year
- Cash flow assistance for employers of apprentices and trainees
- Stimulus payments to certain Government allowance and income support recipients
- Provide temporary relief for financially distressed individuals and businesses
- Increase the Medicare levy low-income thresholds for individuals and families in line with movements in the CPI for the 2019-20 and later income years.
- [Guarantee of Lending to Small and Medium Enterprises \(Coronavirus Economic Response Package\) Bill 2020](#), which was introduced into the House of Representatives on 23 March 2020, allows Commonwealth granting of guarantees to financial institutions in connection with loans made, or to be made, to SMEs if granting the guarantee is likely to assist in dealing with the economic impacts of the Coronavirus.

The Government also introduced its second COVID-19 response stimulus package in a special sitting of Parliament during which the following

tax-related Bills (now enacted) were introduced into the House of Representatives and passed by the Senate on 8 April 2020:

- [Coronavirus Economic Response Package \(Payments and Benefits\) Act 2020](#) which establishes a framework to administer the Coronavirus economic response payments. Under the framework, the Treasurer will be able to make rules to provide for payments administered by the Commissioner, including the new JobKeeper Payments program announced on 30 March 2020. This allows for flexibility of the payment arrangements and ensures the robustness of the eligibility criteria to appropriately respond to the impacts of COVID-19.
- [Coronavirus Economic Response Package Omnibus \(Measures No. 2\) Act 2020](#) which, among other things, contains measures to amend the Fair Work Act 2009 to support the practical operation of the JobKeeper scheme in Australian workplaces, and amends the tax secrecy provisions to allow de-identified protected information to be disclosed to the Treasury for the purposes of policy development, or analysis, in relation to COVID-19.

For further information on the various COVID-19 economic stimulus measures, refer to our [COVID-19 business measures](#) webpage.

The following key tax and superannuation related Bills were also given Royal Assent since our last monthly update:

- [Treasury Laws Amendment \(2018 Measures No 2\) Act 2020](#) which includes FinTech regulatory licensing exemptions, and proposes to make minor changes to venture capital and early stage investor tax concessions to ensure they operate as intended.
- [Treasury Laws Amendment \(Combating Illegal Phoenixing\) Act 2020](#) which implements various measures to address illegal phoenix activity that were announced in the 2018-19 Budget including a measure which allows the Commissioner of Taxation to collect estimates of anticipated goods and services tax (GST) liabilities including the luxury car tax and the wine equalisation tax, and importantly make company directors personally liable for their company's GST liabilities in certain circumstances.

- [Treasury Laws Amendment \(Recovering Unpaid Superannuation\) Act 2020](#) which implements the one-off amnesty to encourage employers to self-correct historical Superannuation Guarantee (SG) non-compliance. The amendments also limit the Commissioner's ability to remit penalties for historical SG non-compliance, where an employer fails to disclose information relevant to their historical SG shortfall.

Commonwealth revenue measures registered as legislative instruments or regulations since the last monthly update include:

- [Coronavirus Economic Response Package \(Payments and Benefits\) Rules 2020](#) provide the rules for the JobKeeper measure under the [Coronavirus Economic Response Package \(Payments and Benefits\) Act 2020](#) which together give effect to the JobKeeper wage subsidy of AUD1,500 per fortnight per eligible employee.
- [Customs \(Prohibited Exports\) Amendment \(COVID-19 Human Biosecurity Emergency\) Regulations 2020](#) provide a temporary prohibition on the export of goods that are essential to preventing the spread of COVID-19.
- [Customs \(Prohibited Imports\) Amendment \(Tablet Presses, Encapsulators and Other Measures\) Regulations 2020](#) amend the *Customs (Prohibited Imports) Regulations 1956* to extend the current provisions dealing with the granting of import permissions for tablet presses to complete or incomplete encapsulators and incomplete tablet presses from 1 May 2020.
- [Guarantee of Lending to Small and Medium Enterprises \(Coronavirus Economic Response Package\) Rules 2020](#) defines the term 'SME entity' for the purposes of the [Guarantee of Lending to Small and Medium Enterprises \(Coronavirus Economic Response Package\) Act 2020](#) to refer to a business or not-for profit that has an annual turnover that was less than AUD50 million in the prior year or is likely to be less than AUD\$50 million in the current financial year.

Federal Parliament is expected to next sit sometime in May 2020. The Government has [announced](#) that it will defer the 2020-21 Budget until 6 October 2020.

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Other News

ATO administrative concessions in light of COVID-19

The Australian Taxation Office (ATO) has [announced](#) that it will implement a series of administrative measures to assist Australians experiencing financial difficulty as a result of the COVID-19 outbreak. Options available to assist impacted businesses may include:

- deferring the payment date of certain amounts due through the business activity statement (BAS), income tax assessments, and fringe benefits tax (FBT) assessments
- allowing businesses on a quarterly reporting cycle for goods and services tax (GST) to opt into a monthly GST reporting in order to get quicker access to GST refunds they may be entitled to
- allowing businesses to vary Pay As You Go (PAYG) instalment amounts
- remitting any interest and penalties, incurred on or after 23 January 2020, that have been applied to tax liabilities, and
- working with affected businesses to help them pay their existing and ongoing tax liabilities by allowing them to enter into low-interest payment plans.

Our [Guidance on tax obligations and relief for businesses affected by COVID-19 website](#) which provides a summary of the relief currently available to businesses at both the Federal and State level, including the administrative concessions announced by the ATO.

Government's Coronavirus Business Liaison Unit

The Federal Government has [announced](#) the creation of a new Coronavirus Business Liaison Unit in the Treasury to build on existing efforts to support confidence, employment and business continuity. The role of the Unit will be to engage with peak business groups on systemic issues relating to Coronavirus to ensure these are being addressed by Government.

National COVID-19 Coordination Commission created

A new National COVID-19 Coordination Commission (NCCC) has been [created](#) to coordinate advice to the Government on actions to anticipate and mitigate the economic and social effects of the global coronavirus pandemic.

Federal Senate Committee on COVID-19 established

Federal Parliament has established a [select committee](#) which will inquire into and report on the Australian Government's response to the COVID-19 pandemic and any related matters. The Committee will present its final report on or before 30 June 2022.

ATO appointments

The Hon Michael Sukkar MP Minister for Housing and Assistant Treasurer has [announced](#) the appointment of Jeremy Hirschhorn as a Second Commissioner of the Australian Taxation Office (ATO) for a seven-year period from 16 April 2020.

Board of Taxation appointments

The Hon Michael Sukkar MP Minister for Housing and Assistant Treasurer has [announced](#) that Ms Rosheen Garnon has been appointed as part-time Chair of the Board of Taxation for a three-year period from 25 March 2020. In addition, Mr Christopher Vanderkley of PwC has been appointed as a part-time Member of the Board for a three-year period.

Who might be required to lodge a 2020 income tax return?

The ATO has released the following draft legislative instruments, setting out which persons and entities might be required to lodge an income tax return for the year ending 30 June 2020.

- Draft legislative instrument [LODGE 2020/D1](#), which sets out which persons are required, and which persons are exempt, from the requirement to lodge an income tax return for the income year ended 30 June 2018, and
- Draft legislative instrument [LODGE 2020/D2](#), which provides notice to a liable parent or a parent receiving child support under a child support assessment of their obligation to lodge an income tax return for the income year ended 30 June 2018.

Comments were due on 8 April 2020.

Annual capacity charges held to be capital

The Federal Court [Origin Energy Limited v Commissioner of Taxation \(No 2\) \[2020\] FCA 409](#) has held that capacity charges incurred by the taxpayer, an energy company, under long term agreements in relation to power stations were capital in nature and therefore not deductible as the advantage sought by incurring the expenditure was an acquisition of a new or extended profit making structure. The Court found the capacity charges reflected expenditure to secure a profit-making structure in the form of the right to trade the entire output of the power stations, at levels controlled by the taxpayer, for substantial periods of time.

The Court also considered the blackhole expenditure provisions (s40-880(5)(d) of the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997)) and found that they did not apply because the rights acquired by the taxpayer fell within the concept of “other legal or equitable right” which is excluded from deduction under that provision. The Court also found the contractual rights, specifically the right to trade the generated output of the power stations were assets for capital gains tax purposes, and as such also excluded.

Private ruling on project pool expenditure upheld

The Federal Court in [BAC Holdings Limited v Commissioner of Taxation \[2020\] FCA 413](#) has dismissed the taxpayer’s appeal in a matter where the taxpayer had failed to obtain a favourable ruling in relation to capital expenditure incurred during the initial phases of construction of a new runway under the “project pool” rules in Subdivision 40-1 of the ITAA 1997. The Court found that the appeal was not competent because the scheme as ruled on in the ruling was not implemented and could never be implemented in the terms described in the ruling. The Court also found that if the appeal was competent, the initial construction phase of the airport runway was not a separate “project” and would not be deductible.

AAT considers revenue vs capital issues

Since our last update, the Administrative Appeals Tribunal (AAT) has considered the classification of income as revenue or capital in the following cases:

- [Doyle v Commissioner of Taxation \[2020\] AATA 345](#) – the AAT held that the taxpayer, which engaged in property development, was assessable on the net proceeds on the sale of parcel of land as ordinary income as it related to the taxpayer’s ordinary course of business
- [NQZG v Commissioner of Taxation \[2020\] AATA 379](#) – the AAT held that the taxpayer, which founded a financial services software company and received a “Founders Retention Amount” for the sale of his shares, was assessable on the proceeds as ordinary income, and not a capital gain as it related to the continuation of the taxpayer’s employment.

ATO draft effective lives of assets – supermarket and grocery stores

The ATO has [released](#) draft effective life determinations for depreciating assets used in the supermarket and grocery stores industry. It proposes to add a list of effective life determinations to the Commissioner’s schedule to apply to the assets purchased (or otherwise first used or installed ready to use) on or after 1 July 2020. Comments were due on 23 March 2020.

Update to effective life of oil and gas depreciating assets

The [Income Tax \(Effective Life of Depreciating Assets\) Amendment Determination 2020](#) has been made to update the Commissioner of Taxation’s

effective life schedule for depreciating assets. This instrument restores the previous description of certain depreciating assets in the oil and gas industry following feedback. The instrument commences on 1 July 2019.

PAYG withholding on foreign resident capital gains

The ATO has issued draft [Taxation Administration PAYG Withholding for Foreign Resident Capital Gains – No Residue after a Mortgagee Exercises a Power of Sale Variation 2020](#). This draft instrument seeks to vary to nil the amount that would otherwise have to be paid to the Commissioner of Taxation under the foreign resident capital gains tax (CGT) withholding regime when land is acquired in a transaction from an authorised deposit-taking institution exercising a mortgagee's power of sale over the land and certain other conditions are satisfied. In the absence of the variation as provided by this instrument, when a person acquires land in a transaction where a mortgagee exercised a power of sale, an amount equal to 12.5 per cent of the purchase price would have been required to be withheld by the purchaser and paid to the Commissioner. Comments were due on 26 March 2020.

ATO data matching program for ride-sourcing

The ATO's data matching program for ride-sourcing has been [extended](#) to include a further three

financial years of ride sourcing data, up to and including 2021–22. The ATO has been conducting the ride sourcing data-matching program since October 2015. The data acquired and matched under this program is used by the ATO to support engagement of ride sourcing drivers with their tax registration, lodgment, reporting and payment obligations.

Board of Taxation's review of rollovers

As previously reported, the Board of Taxation is undertaking a review into Australia's system of capital gains tax (CGT) rollovers and associated provisions with a focus on considering practical ways to simplify existing rollovers. The Board has extended the time for interested parties to lodge a submission in response to its [consultation guide](#) until 31 May 2020.

Inquiry into the Commissioner of Taxation's Annual Report 2018-19

The Standing Committee on Tax and Revenue is conducting an [inquiry](#) into the Commissioner of Taxation's [Annual Report 2018-19](#). Submissions were due on 17 April 2020.

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TaxTalk Monthly

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