PwC's Monthly Tax Update

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

August 2024

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Corporate Tax Update

Tax residency approach for consolidated entity disclosure statement

The Australian Securities and Investment Commission (ASIC) has released information in relation to the requirement for all public companies to include a 'consolidated entity disclosure statement' (CEDS) about each entity that is part of the consolidated entity at the end of the financial year, including information about tax residency, in their annual financial reports for annual reporting periods. This obligation applies in relation to reporting periods beginning on or after 1 July 2023.

The information also refers to the media release by the Assistant Minister for Competition, Charities and Treasury, Andrew Leigh, who has indicated that entities 'will be able to determine tax residency in accordance with the Commissioner of Taxation's existing public guidance. Entities that apply this guidance in good faith may declare that the tax residency status of a subsidiary is true and correct for the purposes of the new consolidated entity disclosure statement.'

Production Tax Incentives for Critical Minerals and Renewable Hydrogen

Consultation papers on the Government's 2024-25 Budget announcement for a Critical Minerals Production Tax Incentive (CMPTI) and Hydrogen Production Tax Incentive (HPTI) have been released.

Broadly, the CMPTI will allow eligible producers of processed and refined critical minerals (as published on the Government's Critical Minerals list) between 2027-28 and 2039-40 to claim ten per cent of eligible expenditure for processing and refining through each eligible facility as a refundable offset. The claim for the CMPTI applies where a final investment decision is taken (or production has already started) by 1 August 2030 in respect of each eligible facility. Eligible expenditure is proposed to exclude the costs of raw materials, as well as the capital costs of depreciation, and financing. The CMPTI will also only be payable where minerals are processed to specified purity levels, or outputs.

In relation to the HPTI, eligible producers of renewable hydrogen will receive $2 per kilogram of eligible hydrogen produced, provided as a refundable tax offset for a maximum of ten years between 2027-28 and 2039-40. The HPTI will only be available to producers who meet the eligibility criteria, which will include verification of hydrogen production volumes and the emissions intensity of the hydrogen produced through the Guarantee of Origin Scheme, administered by the Clean Energy Regulator.

Comments for both consultations closed 12 August 2024. For further information, refer to our Tax Alert.

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New guidance for Top 100 program

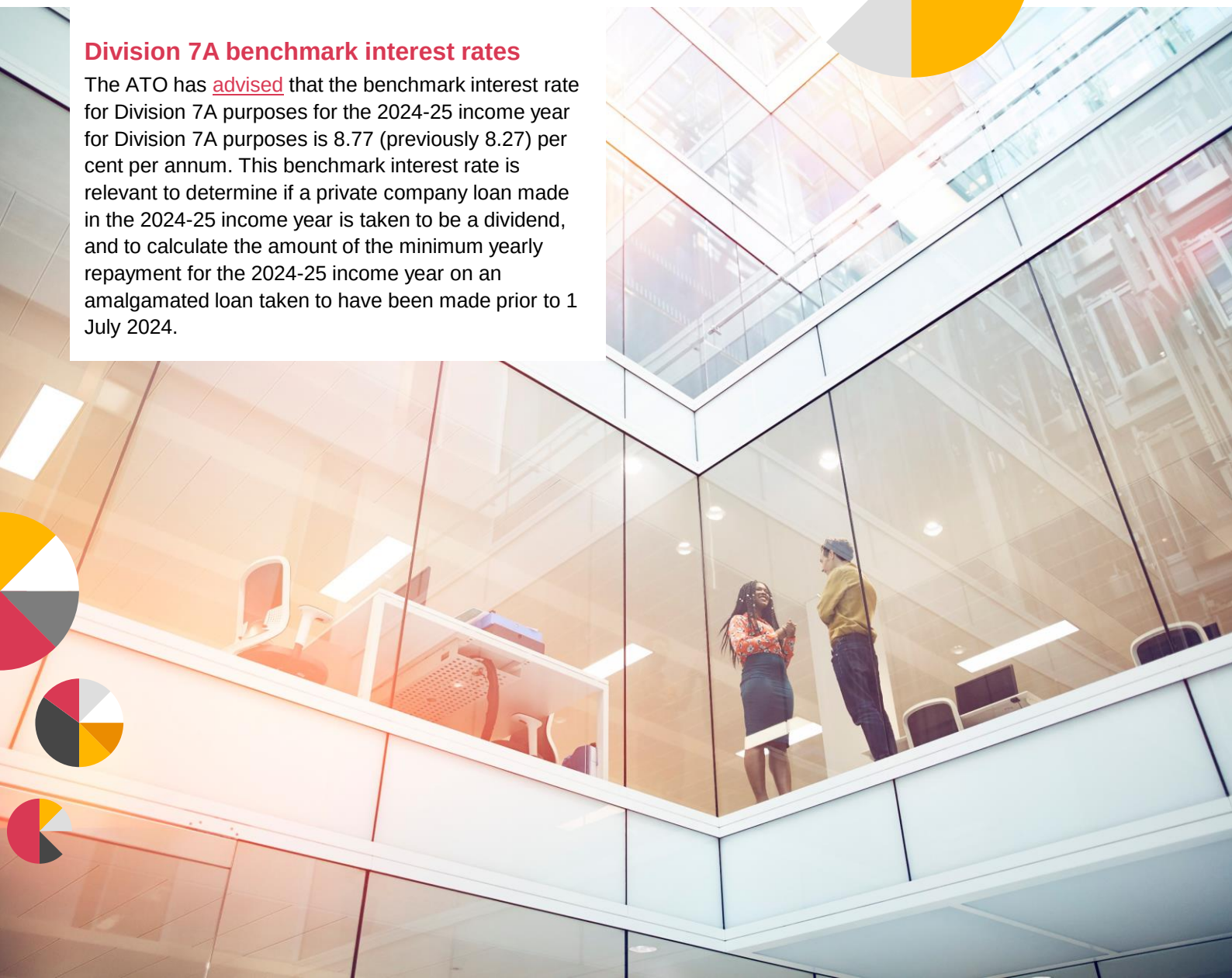
The Australian Taxation Office's (ATO) Top 100 income tax and goods and services tax (GST) assurance programs seek to provide assurance, through the justified trust methodology, that the Top 100 income tax/GST population respectively is reporting and paying the right amount of income tax or GST in Australia.

In this regard the ATO has provided the following new guidance for the Top 100 income tax and GST taxpayers as to its approach under its Top 100 program:

- Top 100 program – Tailored approach to obtaining, maintaining and refreshing assurance
- Top 100 GST refresh review
- Top 100 Income tax refresh review
- Top 100 Pre-lodgment disclosure framework
- Frequently asked questions – GST analytical tool
- Future GST engagement after initial GST assurance review
- Monitoring and Maintenance Approach (income tax)

Division 7A benchmark interest rates

The ATO has advised that the benchmark interest rate for Division 7A purposes for the 2024-25 income year for Division 7A purposes is 8.77 (previously 8.27) per cent per annum. This benchmark interest rate is relevant to determine if a private company loan made in the 2024-25 income year is taken to be a dividend, and to calculate the amount of the minimum yearly repayment for the 2024-25 income year on an amalgamated loan taken to have been made prior to 1 July 2024.



Employment Taxes Update

ATO draft guidance on extended definition of "employee" for superannuation guarantee

The Australian Taxation Office (ATO) has released a draft update to Taxation Ruling TR 2023/4. The draft updated ruling seeks to provide consolidated guidance on the meaning of 'employee, by expanding upon the ATO's existing views on the common law interpretation of "employee" and providing guidance on the extended meaning of "employee" for superannuation guarantee (SG) purposes (with the previous Superannuation Guarantee Ruling SGR 2005/1 now withdrawn).

The changes in the new Appendix 2 compared to SGR 2005/1 relate primarily to the following extended "employee" definitions:

- *Updated guidance on labour contracts*: The new guidance clarifies when a contract is wholly or principally for the labour of the person (section 12(3)), reflecting the three elements set out in the *Dental Corporation Pty Ltd v Moffet* [2020] FCAFC 118 decision. It also incorporates key principles related to 'results' and the 'right to delegate' from the Full Federal Court decision n JMC Pty Ltd v CoT [2023] FCAFC 76 (see our previous summary).
- *Expanded guidance for entertainers and others*: The guidance for entertainers, artists, musicians, sports persons, etc., under section 12(8) has been expanded. It clarifies that payments to such persons are to be separately examined, with particular attention given to whether a payment is being made to a workers "in connection with" the aforementioned activities.

Reasonable travel and meal allowances for 2024-25 income year

The Commissioner of Taxation has outlined in TD 2024/3 the amounts considered reasonable for claims made by employees for the 2024-25 income year. This includes the following:

- *Overtime Meal Expenses*: $37.65 for food and drink when working overtime.
- *Domestic Travel Expenses*: Reasonable amounts for accommodation, food and drink, and incidentals when travelling away from home overnight for work. Specific amounts are provided for employee truck drivers, office holders covered by the Remuneration Tribunal, and Federal Members of Parliament.
- *Overseas Travel Expenses*: Reasonable amounts for food and drink, and incidentals when travelling overseas for work.

Payroll tax: ACT Budget 2024-25

The ACT 2024-25 State Budget was delivered on the 25 June 2024. In addition to duties and land tax measures (see State Taxes section), key points relevant to payroll tax that formed part of the Budget include:

- The payroll tax threshold will remain at $2 million.
- The payroll tax surcharge to be introduced for large national and multinational businesses operating in the ACT will be brought forward by one year, to 2024-25, and the surcharge will be increased in 2025-26, resulting in:
  - A 0.25 percentage surcharge for businesses with Australia-wide wages above $50 million and a 0.5 percentage surcharge for businesses with Australia-wide wages above $100 million in 2024-25.
  - A 0.5 percentage surcharge for businesses with Australia-wide wages above $50 million and a 1 percentage surcharge for businesses with Australia-wide wages above $100 million from 2025-26.
- Universities with a campus in the ACT will not be subject to the additional payroll tax surcharge.

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Furthermore, the Taxation Administration (Amounts and Rates—Payroll Tax) Determination 2024 (Disallowable instrument DI2024–173) specifies the threshold amounts and rates under the *Payroll Tax Act 2011* (ACT) that apply from 1 July 2024. The general payroll tax rate is 6.85% per annum for the 2024-25 financial year.

Victoria: Payroll tax COVID-19 Relief measure to end

A payroll tax relief measure introduced by the Victorian Government in response to COVID-19 ended on 30 June 2024. Eligible employers were entitled to a waiver of their 2020-21 and 2021-22 Victorian payroll tax after applying the New Jobs payroll tax credit against their liability for each of the financial years.

According to the Victorian State Revenue Office (SRO), further relief is not available after 30 June 2024, except in relation to the lodgment or amendment of taxable wages for the relevant years resulting from a request made by an employer or their representative to the Victorian SRO or an investigation commenced by them before 1 July 2024.

Victoria: Payroll tax guidance for the medical industry

The Victorian State Revenue Office has updated guidance on payroll tax relevant to the medical industry. This includes information on:

- The May 2024 measure for Victorian general practice businesses
- The payroll tax implications of engaging practitioners and the application of the "relevant contract" provisions in Division 7 of Part 3 of the *Payroll Tax Act 2007* (Vic) to deem certain practitioners to be employees and related contractor exemptions; and
- Revenue Ruling PTA041: Relevant contracts – Medical centres.

Payroll tax: NSW and Victorian Revenue Rulings dealing with Paid Parental Leave Scheme

The Federal Government recently made changes to the paid parental leave scheme, increasing the entitlement period from 18 to 20 weeks. Further amendments were also made to increase the entitlement period by an additional two weeks each year from 1 July 2024 to a maximum of 26 weeks from 1 July 2026.

Updated revenue rulings were released by each of NSW and Victoria State Revenue Offices to give effect to these changes for paid parental leave:

- NSW - new ruling PTA 037v2
- Victoria - updated ruling PTA 037v2.

NSW: Payroll tax Budget measures affecting GPs now law

The legislation (Revenue Legislation Amendment Act 2024 (NSW)) to implement several revenue measures announced in the NSW 2024=25 State Budget received Royal Assent on 24 June 2024. This has resulted in amendments to the *Payroll Tax Act 2007* (NSW) providing for a rebate of payroll tax (either a refund or offset against other payroll tax liabilities) on eligible wages paid on or after 4

September 2024 for wages of general practitioners (GPs) who work in a medical centre that bulk-bills for most of the services (at least 80% for Metropolitan Sydney and 70% for elsewhere).

There will also be an exemption from payroll tax on eligible wages relating to certain GPs paid before 4 September 2024 where the tax remains unpaid as at 4 September 2024. The bulk-billed services threshold requirement does not apply to the exemption.

Taxable Payments Annual Report – Check if you have a filing obligation

A Taxable Payments Annual Report (TPAR) for the year ended 30 June 2024 must be lodged by 28 August 2024. This is relevant to entities providing services for building and construction, cleaning, courier, road freight, information technology (IT), or security, investigation, or surveillance that use contractors or subcontractors to undertake those services for their customers.

The ATO is focussed on administering this obligation and will issue penalties for late lodgment as it has done so in prior years. Potentially affected entities should check whether the ATO is expecting a TPAR to be lodged and if so, take steps to meet their obligation as and when due as soon as possible. For entities that do not need to lodge a TPAR for 2024 or in the future, a non-lodgment advice (NLA) form should be complete.

Global Tax and Trade Update

Australian Pillar Two legislation introduced into Parliament

On 4 July 2024, the following Bills were introduced into the House of Representatives, which collectively implement the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting to Address the Tax Challenges Arising from the Digitalisation of the Economy under the Two-Pillar Solution by introducing a global and domestic minimum tax in Australia:

- Taxation (Multinational – Global and Domestic Minimum Tax) Imposition Bill 2024 - imposes top-up tax, namely Australian Domestic Minimum Tax (DMT), Australian Income Inclusion Rule (IIR) tax and Australian Undertaxed Profits Rules (UTPR) tax.
- Taxation (Multinational – Global and Domestic Minimum Tax) Bill 2024- to implement the framework for imposition of top-up tax for the IIR, UTPR and the DMT, consistent with the GloBE Rules.
- Treasury Laws Amendment (Multinational – Global and Domestic Minimum Tax) (Consequential) Bill 2024 - contains consequential and miscellaneous provisions necessary for the administration of top-up tax, consistent with the existing administrative framework under Australian tax law and the Global Anti-Base Erosion (GloBE) Rules.

Once legislated, Australian DMT tax and Australian IIR tax will apply for fiscal years beginning on or after 1 January 2024. Australian UTPR tax will apply for fiscal years beginning on or after 1 January 2025.

With the rules already in effect for some taxpayers in certain jurisdictions and Australia's law now getting closer, it is imperative that multinational groups that are within the scope of the regime consider the legislation and determine the impact on their group.

ATO's latest on Pillar Two

The Australian Taxation Office (ATO) has updated its website to provide some more context regarding the implementation of Pillar Two for multinational businesses in Australia. As part of the new Pillar Two obligations, it is expected that four new filing obligations will be introduced:

- GloBE Information Return (GIR)
- Foreign lodgment notification
- Australian IIR/UTPR Tax Return (AIUTR)
- Domestic Minimum Tax Return (DMTR)

The ATO's update confirms that the ATO is currently developing three of the four new return forms to meet Australia's global and minimum tax filing obligations for affected entities, being the foreign lodgment notification, the AIUTR, and the DMTR. It is expected that these forms will be subject to future consultation and will be available to taxpayers in advance of the first lodgments due by 30 June 2026. The update also indicates that the ATO will consider the need for guidance on the various excluded entity definitions and on the application of penalties to the global and domestic minimum tax.

In a keynote speech to the TP Minds International (London), Deputy Commissioner Hector Thompson also mentioned that, in recognition of the increased compliance burden faced by in-scope taxpayers, the ATO's client engagement activities in the lead up to the first Pillar Two lodgments will be focussed on supporting taxpayers to get the basics right in terms of lodgment and payment obligations, with the ATO seeking to apply transitional relief, including in respect of penalties, in accordance with the OECD's recommended approach.

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No royalty withholding tax

The Full Federal Court has handed down its judgment in the appeal against the Federal Court decision late last year concerning royalty withholding tax and diverted profits tax (DPT). The matter before the Court was whether payments were partly royalties for the use of the intellectual property and subject to withholding tax, or alternatively, that there were schemes to avoid withholding tax such that the arrangement was subject to DPT.

On the question of whether the payments comprised royalties, the Full Court allowed the taxpayer's appeal, reversing the decision of the single judge on the basis that the payments made did not include any element for the license to use the trademarks or other intellectual property, and hence were not royalties. The majority of the Full Court also held that DPT did not apply as there was no reasonable alternative postulate that would have resulted in a tax effect, such as a liability to withholding tax, in the absence of the scheme.

Final tax determination on concepts relevant to hybrid mismatch rules

The Australian Taxation Office (ATO) has finalised Taxation Determination TD 2024/4, which sets out the Commissioner's final view ruling on the following two separate but related issues in relation to the hybrid mismatch rules:

- hypothetical income or profits within the tax base of a country can be used to identify a 'liable entity' or entities in the country for the purpose of section 832-325 of the Income Tax Assessment Act 1997 (ITAA 1997), and
- a 'non-including country' for the purpose of subsection 832-320(3) of the ITAA 1997 of the 'hybrid payer' definition can be a jurisdiction other than the country where the payee of the relevant payment is located or resides.

Specifically, the Determination rules that the identification of a 'liable entity' for the purpose of section 832-325 can be based wholly on hypothetical income or profits within the tax base of the country (e.g. when an entity has not actually derived any income or profits in a particular period). Furthermore, section 832-325 does not restrict when hypothetical income or profits within the tax base of a country can be used to identify a liable entity in the country. For example, there is no requirement that the entity being tested as a liable entity in the country must:

- be a tax resident of the country
- have previously carried on, currently carry on, or propose to carry on, activities that produce or may produce income or profits within the tax base of the country, or
- normally derive income or profits within the tax base of the country.

In relation to subsection 832-320(3), the Determination indicates that a non-including country can be a jurisdiction other than the country where the payee of the relevant payment is located or resides. Accordingly, the laws of a jurisdiction other than the country where the payee is located or resides may fall for consideration in determining whether there is a hybrid payer within the meaning given by section 832-320.

A range of alternative views are set out in the Determination which the Commissioner does not accept.

The Determination, which finalises the draft Taxation Determination TD 2024/D1, applies both before and after its date of issue (3 July 2024).

Pillar Two - Belgium extends initial registration obligation

The Belgian Tax Authorities extended the 15 July 2024 deadline (as reported in the July 2024 Monthly Tax Update) to complete the relevant registration to comply with the Pillar Two compliance formalities for groups with a fiscal year starting on or before 14 June 2024 until 16 September 2024. This extension is only applicable to multinational groups that will not (intend to) carry out advance payments in 2024 for the domestic top-up tax or the IIR. For further information, refer to PwC's Tax Insight.

OECD's Corporate Tax Statistics 2024

The OECD has published its Corporate Tax Statistics 2024 report, which is an annual publication that brings together information on corporate taxation and base erosion and profit shifting (BEPS) practices. This includes data on corporate tax rates, revenues, effective tax rates, tax incentives for research and development (R&D) and innovation, and withholding taxes amongst other data series.

Corporate Tax Statistics also includes anonymised and aggregated Country-by-Country Reporting (CbCR) data providing an overview of the global tax and economic activities of thousands of large multinational enterprise groups operating worldwide. The 2024 edition also includes a new dataset on Income-based tax incentives for R&D and innovation, an update to the Interest Limitation Rules and Controlled Foreign Company rules datasets and an expansion of the CbCR data on effective tax rates.

Indirect Tax Update

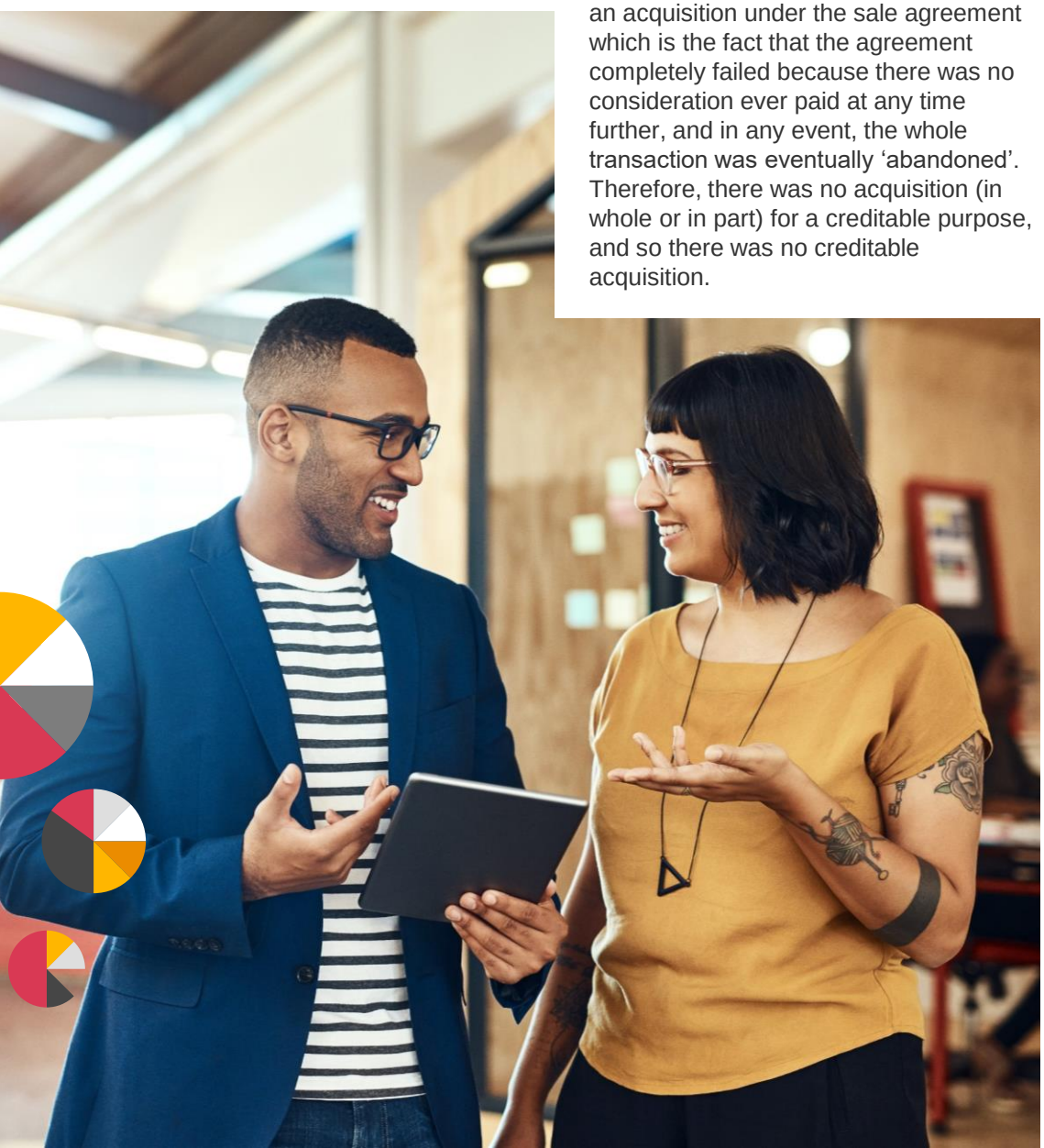
No input tax credit allowed for 'abandoned' transaction

In Ecosse Group Holdings Pty Ltd and Commissioner of Taxation (Taxation) [2024] AATA 2073, the Administrative Appeals Tribunal (AAT) upheld the Commissioner's assessments, finding there had been no acquisition to permit the taxpayer to claim an input tax credit.

The taxpayer operated an investment management business and accounted for goods and services tax (GST) on an accruals basis. The taxpayer's sole director and co-shareholder was the sole director and shareholder of another corporate entity, which held assets used by the taxpayer in its business.

The taxpayer entered into a sales agreement with the related company to purchase various business assets for a purchase price of $3.4 million less a 'deferred price' of $3.4 million (the effect being that the taxpayer would pay nothing on completion). The deferred price was to be paid 'on demand' by the related company, with a final date for payment included within the sale agreement, although it was not clear what the effect of this date was, nor whether any demand was ever made. Subsequently, the acquisition was 'abandoned'.

Ultimately, having regard to the evidence the AAT was not satisfied that anything was acquired under the sale agreement. Furthermore, there is another basis that resolved the issue of whether there was an acquisition under the sale agreement which is the fact that the agreement completely failed because there was no consideration ever paid at any time further, and in any event, the whole transaction was eventually 'abandoned'. Therefore, there was no acquisition (in whole or in part) for a creditable purpose, and so there was no creditable acquisition.



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Personal Tax Update

Residency case remitted back to AAT

The Federal Court of Australia has considered an individual taxpayer's tax residency status in Quy v Commissioner of Taxation (No 3) [2024] FCA 726, and has remitted the matter back to the Administrative Appeals Tribunal (AAT).

In considering the taxpayer's appeal against the AAT's decision where the Tribunal found that the taxpayer was Australian tax resident under both the ordinary concepts and domicile tests (for further details, see our April 2024 Monthly Tax Update), the Federal Court found that the taxpayer's grounds of appeal must succeed. That is, the AAT had erred in law by applying the wrong test when considering residency according to ordinary concepts. The Tribunal had equated ordinary concepts residence with domicile, particularly as regards the relevant intention, because it considered that the intention relevant for ordinary concepts residence was 'the intention of remaining in a place permanently or indefinitely' rather than the intention to treat a place as home for the time being, not necessarily forever.

The Court also found that the AAT had misunderstood the concept of 'permanent' when considering whether the taxpayer had a 'permanent place of abode' outside Australia. The Tribunal had, for example, considered whether the taxpayer had shown an intention of remaining overseas permanently or indefinitely, when such an intention was not required in order to have a permanent place of abode overseas.

A global minimum wealth tax for ultra-high net worth individuals?

A global minimum wealth tax is on the Organisation for Economic Co-operation and Development's (OECD's) and some international tax policy makers' agenda. The EU Tax Observatory, for example, recently published a report, as commissioned by the Brazilian presidency of the G20, which provides a blueprint for a co-ordinated minimum tax on ultra-high net worth individuals (UHNWI) equal to two per cent of their wealth.

At this stage, it is difficult to predict how such a measure would evolve, which international institution would take any such lead, and whether countries would ultimately support and find consensus on such a proposal. For further information, refer to PwC's Global Tax Policy Alert.

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State Tax Update

ACT: 2024-25 Budget

On Tuesday, 25 June 2024, Chief Minister and Treasurer Andrew Barr delivered the 2024-25 Budget for the Australian Capital Territory (ACT). Although the deficit position for the 2024-25 financial year (i.e. -$624.41 million) is expected to increase as against the 2023-24 Budget, the Headline Net Operating Balance position is expected to return to surplus in the 2026-27 ($79.7 million) and 2027-28 ($179.5 million) financial years.

The Budget, which focuses on public health services, targeted cost of living relief, and housing, among other measures, continued the government's commitment to its tax reform program, continuing the transition away from transaction-based taxes to broad-based land taxes. It also expanded access to stamp duty concessions and introduced measures so that more households will pay no stamp duty on their new homes.

In summary, key duty and general rates updates are as follows:

- The lowest marginal conveyance duty tax rate for home owner occupiers will decrease from 0.49% to 0.4%.
- From 1 July 2024, the Home Buyer Concession Scheme (HBCS) income eligibility threshold will increase from $170,000 to $250,000, and the additional income allowance per child will increase from $3,330 to $4,600.
- From 1 July 2024, the HBCS will define income eligibility as 'taxable income', and homebuyers must not have held an interest in property in the previous five years to qualify for the concession.
- People fleeing domestic and family violence can access the HBCS without regard to their previous property holdings or the income of the alleged perpetrator from 1 July 2024.
- The property price thresholds for off-the-plan and RZ1 unit duty exemptions will temporarily increase to $1 million from 1 July 2024 to 30 June 2025.
- From 1 July 2024, the Pensioner Duty Concession Scheme and Disability Duty Concession Scheme will provide a full concession up to the duty on a $1 million purchase.
- A new stamp duty exemption for persons with severe disability and their carers will begin on 1 July 2025.
- The average general rates for residential (unit titled and non-unit titled) and commercial properties will increase by 3.75% per year during the five years from 2021-22 to 2025-26.
- The Government will also restore a single set of tax rates for all commercial properties from 2025-26.

In relation to land taxes, the Government will introduce a new land tax threshold at $1 million average unimproved value (AUV), and marginal tax rates will be adjusted in 2024-25.

For payroll tax measures raised in the Budget, see the Employment Taxes section.

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ACT: Determinations effective 1 July 2024

Following announcements made as part of the 2024-25 ACT Budget, the following Determinations relevant to duties and land tax are effective from 1 July 2024:

- Duties (Pensioner Duty Deferral Scheme) Determination 2024
- Rates, Land Tax, Land Rent and Duties (Certificate and Statement Fees) Determination 2024
- Taxation Administration (Amounts Payable—Disability Duty Concession Scheme) Determination 2024
- Taxation Administration (Amounts Payable—Duty) Determination 2024
- Taxation Administration (Amounts Payable—Home Buyer Concession Scheme) Determination 2024
- Taxation Administration (Amounts Payable—Land Rent) Determination 2024
- Taxation Administration (Amounts Payable—Land Tax) Determination 2024
- Taxation Administration (Amounts Payable—Pensioner Duty Concession Scheme) Determination 2024
- Taxation Administration (Amounts Payable—Rates) Determination 2024
- Taxation Administration (Off the Plan Unit Duty Exemption Scheme) Determination 2024
- Taxation Administration (RZ1 Unit Duty Exemption Scheme) Determination 2024

NSW: New thresholds, base, and premium base amounts

The threshold amounts, base amounts and the premium base amount for relevant New South Wales (NSW) duties, adjusted in accordance with sections 33AC and 33AD of the Duties Act 1997 (NSW) have been published. The amounts apply from 1 July 2024.

Victoria: Key rates and thresholds for 2024-25

The State Revenue Office of Victoria has also published Revenue Estimates, Rates and Grants 2024-25, which provides a snapshot of key rates and thresholds for Victorian duties and land taxes for the 2024-25 year.

Victoria: Guidelines to calculate drive-away duty

The amount of motor vehicle duty depends on the dutiable value of a motor vehicle. The Victorian State Revenue Office (SRO) has published guidelines to calculate the dutiable value of new and used motor vehicles sold as part of a 'drive-away' deal, where the date of registration or transfer of registration is on or after 1 July 2024.

South Australia: Duty on motor vehicles

RevenueSA has released Information Circular 108, which concerns the registration of motor vehicles, dutiable value and dealer exemptions. The purpose of this Circular, which replaces Information Circular 87, is to:

- clarify the correct value of a motor vehicle for stamp duty purposes (the definition of which includes a motor car, a passenger vehicle, a motorcycle and a commercial vehicle)
- clarify the correct application of dealer exemptions
- outline future RevenueSA activity that will be conducted to ensure compliance with the guidelines contained in the Information Circular; and
- provide advice on voluntary disclosure of tax defaults and applicable payment methods.

Victoria: Duty applied following acquired control of landholder unit trust

In Tao v Commissioner of State Revenue (Review and Regulation) [2024] VCAT 637, the Victorian Civil and Administrative Tribunal considered whether an individual taxpayer obtained control of a landholder unit trust when he acquired all of the shares in, and became the sole director of, the corporate trustee of the trust which was a relevant landholder.

The Tribunal found that the taxpayer made a relevant acquisition in the unit trust, under section 82 (acquisition of control) of the *Duties Act 2000* (Vic), as he acquired the capacity to determine or influence the outcome of decisions about the financial and operating policies of the unit trust, and therefore obtained control of the unit trust for section 82 purposes. The Tribunal also found having regard to the text, context and purpose of the provisions, it was not necessary that the taxpayer also obtained an interest equivalent to a beneficial interest in the unit trust to engage section 82.

However, the Tribunal did find that the relevant acquisition deemed to have occurred under section 82 should be reduced to reflect the pre-existing economic interest held by the taxpayer, namely from 100% to 85%.

NSW: Land tax threshold did not apply to a trust

In Nawaf Mualla ATF N Mualla Trust v Chief Commissioner of State Revenue [2024] NSWCATAD 159 the New South Wales Civil and Administrative Tribunal found that the trust was correctly characterised as a special trust such that the land tax threshold did not apply to the property held.

Having regard to the terms of the trust, the Tribunal was not satisfied on the evidence that each person who was a beneficiary of the trust was a person under the age of 18 years, a person in respect of whom a guardianship order was in force or a person in the target group within the meaning of the *Disability Inclusion Act 2014*. As such it could not be satisfied that the trust was a concessional trust.

Accordingly, as the trust was not a fixed trust and the taxpayer did not establish that it was a concessional trust, the trust was correctly classified as a special trust.

NSW: No principal residence land tax exemption for unoccupied land

In Vatner v Chief Commissioner of State Revenue [2024] NSWSC 769, the New South Wales Supreme Court has dismissed a taxpayer's appeal, finding that the unoccupied land they held was not eligible for the principal private residence (PPR) land tax exemption.

The taxpayer, following substantial construction work and reconfiguration, amalgamated three lots of a unit complex into one lot of a strata plan of subdivision. The taxpayer claimed that the land was exempt from land tax under the PPR exemption, as the property was intended (after completion of the construction works) to be their principal place of residence.

Ultimately, the question for determination before the Supreme Court was whether the taxpayer had the intention at the relevant taxing dates to use and occupy the cubic meterage of air space as his principal place of residence once the permitted building works were complete. In the Court's opinion, the answer to that question was no – the taxpayer did not intend at each of the relevant taxing dates to use and occupy all of the unoccupied land as their PPR. What the taxpayer intended to occupy as their PPR occupied a significantly different cubic meterage of air space than the previous three lots, as a result of both a transfer of part of the common property to the new lot and the excision of cubic meterage of air space from the original three lots. Among other matters, the Court noted that, at the very least, the proposed residence must be intended to be located on all the land owned by the taxpayer on the taxing date.

NSW: Surcharge land tax cases

A number of cases have been considered by the New South Wales Civil and Administrative Tribunal in respect of assessments to surcharge land tax.

- In Chen v Chief Commissioner of State Revenue [2024] NSWCATAD 164, the NSW Civil and Administrative Tribunal affirmed the assessments to surcharge land tax, noting that the Tribunal had no discretion to override the 200 day 'in Australia' requirement, despite the impact of COVID-19 border closers on the taxpayer's movements.
- In Rossi v Chief Commissioner of State Revenue [2024] NSWCATAD 172, the taxpayer was similarly found liable to surcharge land tax assessments over three years, having not spent the requisite 200 days in Australia in each of the relevant years.
- In Fleuren v Chief Commissioner of State Revenue [2024] NSWCATAD 177, the taxpayer was found liable to surcharge land tax with the Tribunal noting that difficulty in comprehension of provisions of a statute was not a basis for non-compliance. There was no discretion for the Tribunal in the circumstances to allow relief from taxation, including in cases where conditions for exemption were not satisfied.

Superannuation Update

Non-arm's length expenditure changes receive royal assent

Amendments to the non-arm's length expense (NALE) rules for super funds have now been enacted via the *Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Act 2024*. These amendments limit the amount of potential non-arm's length income (NALI) that is assessable to a superannuation fund in respect of non-arm's length general expenses. For further information, see our Superannuation Update.

NALI and CGT - Determination finalised

The Australian Taxation Office (ATO) has finalised Taxation Determination TD 2024/5, which outlines the ATO's views as to how the NALI and capital gains tax (CGT) provisions interact in determining the amount of statutory income that is NALI where a capital gain arises as a result of non-arm's length dealings.

According to the Determination, an amount of statutory income for the purposes of the NALI provision (i.e. subsection 295-550(1) of the *Income Tax Assessment Act 1997 (ITAA 1997)*) can include part of the net capital gain. This will arise when the amount of the capital gain is more than the amount the superannuation fund might have been expected to derive if the parties had been acting at arm's length in relation to the scheme (s295-550(1)(a)) and in the case of a self-managed superannuation fund (SMSF) or an APRA-regulated superannuation fund with no more than six members, in gaining or producing the capital gain, NALE is incurred (including nil expenditure) in respect of a CGT asset that is less than the amount of a loss, outgoing or expenditure that the superannuation fund might have been expected to incur if those parties were dealing with each other at arm's length in relation to the scheme (s295-550(1)(b) or (c)).

The NALI is determined by reference to the amount of the non-arm's length capital gain, which is subject to the relevant CGT market value substitution rules (if any) and reduced by any attributable deductions to calculate the non-arm's length component. However, in determining 'the amount' of statutory income that is NALI, the amount of NALI cannot exceed the superannuation fund's net capital gain as calculated under s102-5(1) of the *ITAA 1997* for the relevant income year. In circumstances where the non-arm's length capital gain made by the superannuation fund would otherwise exceed the superannuation fund's net capital gain, the amount of NALI equals the superannuation fund's net capital gain.

The Determination, which applies to years of income commencing both before and after its date of issue (17 July 2024), also puts forward a range of alternative views which the Commissioner does not accept.

Updated guidance on when a superannuation income stream commences and ceases

The ATO has issued an Addendum to Taxation Ruling TR 2013/5 which considers when a superannuation income stream commences and ceases. The Addendum reflects various legislative amendments, clarifies how the general principles in the Ruling apply in the context of successor fund transfers, and removes practical compliance approaches that are no longer current.

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Updated Regulation – Successor fund transfers for capped defined benefit income streams

The Income Tax Assessment Amendment (Superannuation) Regulations 2024 has been registered as a legislative instrument and deals with a successor fund transfer (SFT) in respect of an individual's capped defined benefit income streams (CDBISs). Without this amending Regulation a member's transfer balance may be unintentionally impacted due to the original income stream being treated as ceasing and a new one beginning. This could result in a higher value for transfer balance purposes and lead to adverse outcomes for some members.

The amended Regulations provide that, when a SFT occurs, the credit that arises in a CDBIS recipient's transfer balance account is equal to the debit that arises. This puts CDBIS recipients of funds who undergo an SFT in the same net position as if the SFT did not occur.

The amendments apply retrospectively from 1 July 2017 where a CDBIS recipient has been disadvantaged by a SFT that occurred before commencement in relation to their transfer balance. The ATO will be working closely with impacted superannuation funds to adjust the transfer balance accounts of recipients of CDBISs adversely affected. Where a CDBIS recipient has had their transfer balance reduced due to an SFT that occurred before commencement, they can retain that benefit and will not be impacted by the amendments in relation to that SFT.

Deductibility of adviser fees for member's interest

Legislation has recently been made which amends the *Superannuation Industry (Supervision) Act 1993* to facilitate better access to superannuation and retirement advice by clarifying the basis in which superannuation trustees pay advice fees from a member's superannuation account at the request of the member.

In addition, amendments were made to the *ITAA 1997* to provide legal certainty that payments of certain personal advice fees by a superannuation trustee from the member's interest in the fund are deductible from the superannuation fund's assessable income to the extent they are not incurred in gaining or producing the fund's exempt or non-assessable non-exempt income (subsection 295-490(1) and are not a superannuation benefit for the relevant members (section 307-10). The deduction is available in relation to the 2019-20 income year and later income years.

Legislative Update

The following tax or superannuation related Bills were introduced into Federal Parliament since our last update:

- The Customs Amendment (Strengthening and Modernising Licensing and Other Measures) Bill 2024, which was introduced into the House of Representatives on 26 June 2024, is part of the Government's Simplified Trade System (STS) agenda and seeks to modernises and strengthen the customs licensing regime and make amendments to streamline administrative processes, including the digitisation of forms.
- The Tax Laws Amendment (Incentivising Food Donations to Charitable Organisations) Bill 2024, which was introduced into the Senate on 2 July 2024, is a Private Member's Bill that proposes to introduce a temporary tax offset for companies for certain expenditure incurred in undertaking food donations activities for registered food charities.
- The Taxation (Multinational – Global and Domestic Minimum Tax) Imposition Bill 2024, the Taxation (Multinational – Global and Domestic Minimum Tax) Bill 2024, and Treasury Laws Amendment (Multinational – Global and Domestic Minimum Tax) (Consequential) Bill 2024, all of which were introduced into the House of Representatives on 4 July 2024, form a package of measures which implement a global and domestic minimum tax in Australia as part of the Organisation for Economic Co-operation and Development's (OECD's) Pillar Two solution. For further information, see the Global Tax and Trade Update.

Separately, on 2 July 2024, the Senate divided the Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024 (as reported in our June 2024 Monthly Tax Update) into two separate Bills, leaving the new Treasury Laws Amendment (Build to Rent) Bill 2024 also before the Senate. The Build to Rent Bill contains the measures that incentivise investors to support the construction of new build-to-rent developments, including an increase in the capital works deduction to four per cent per year and reducing the final withholding tax rate on eligible fund payments from eligible managed investment trust investments to 15 per cent.

The following tax and superannuation related Bills have now completed their passage through Parliament and are now law:

- The Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Act 2024, which increases the instant asset write-off threshold from $1,000 to $20,000 for small businesses with aggregated annual turnover of less than $10 million (see Other News for further information) and among other measures, broadly align tax requirements with the new accounting standard for insurance contracts, provide for the small business energy incentive and make changes to the application of the non-arm's length income (NALI) rules that apply to superannuation funds.

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- The Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Act 2024, which following minor amendments made by the Senate, contains measures that, among others:
  - make changes to the location and producer tax offsets
  - amend the general anti-avoidance provisions and clarify the meaning of 'exploration for petroleum' in the Petroleum Resource Rent Tax Assessment Act 1987
  - amend the income tax law to clarify that mining, quarrying or prospecting rights cannot be depreciated until they are used and the circumstances in which the issue of new rights over areas covered by existing rights lead to income tax adjustments
  - provide legal certainty that payments of certain personal advice fees by a superannuation trustee from the member's interest in the fund are deductible from the superannuation fund's assessable income, and
  - make technical corrections in relation to the indirect value shifting and transfer pricing rules.
- The Payment Times Reporting Amendment Act 2024, which implements the Government's response to the Statutory Review of the Payment Times Reporting regime and improve its operation to better achieve its objectives to improve small business payment times.
- The Excise Tariff Amendment (Tobacco) Act 2024 and Customs Tariff Amendment (Tobacco) Act 2024,which (in addition to current indexation) increase the excise and customs duty rate for all tobacco products by five per cent per year for three years, starting 1 September 2023. The Bills also align the treatment of tobacco products subject to the per kilogram excise and excise-equivalent customs duty.
- The Excise and Customs Legislation Amendment (Streamlining Administration) Act 2024, which streamlines licence application and renewal requirements for excise licences to store or manufacture certain excisable goods and for customs warehouse licences, and establishes a public register of entities that hold such licences.

The following Commonwealth revenue measures were registered as a legislative instrument since our last update:

- The Income Tax Assessment Amendment (Superannuation) Regulations 2024, effective 6 July 2024, removes the potential for recipients of capped defined benefit income streams to have their transfer balances impacted by involuntary fund transfers.

Other News Update

Revised Payment Times Reporting regime now applies

Changes were made to the Payment Times Reporting regime with effect for the first six-month reporting period commencing on or after 1 July 2024.

A summary of the key changes is set out below:

- Groups will now assess their requirement to report against the $100 million revenue threshold by comparing to their consolidated accounting revenue.
- Groups will be required to produce consolidated payment times reports, instead of an entity-by-entity approach.
- A new 'stick' has been introduced where the slowest 20 per cent of small business payers in each industry division (based on their last 12 months payment statistics) can be forced to publish that they are a 'slow small business payer' on their website, financial statements and other documentation. This will elevate the importance of the Payment Times Reporting regime with Boards of Directors and company management taking into account the reputational impact on their businesses.
- A new 'carrot' has also been introduced, whereby a list of all 'fast small business payers' (who have a qualifying payment time of 20 days or less) will be published publicly by the Regulator.
- Reporting entities will benefit from an automatic extension of time to lodge their first report under the new rules - where a report due date would be earlier than 1 July 2025, that due date will automatically be extended to 1 July 2025.

Full details on the amendments can be found in our PwC Insights Article, as well as on our PwC Payment Times Reporting website.

Data matching program for online selling

The Australian Taxation Office (ATO) has announced that it will obtain Australian sales data from online selling platforms for 2023-24 through to 2025-26. Data items include client identification and account details, with an estimated 20,000 and 30,000 of account records to be obtained each financial year.

Promissory note and bill of exchange could not discharge tax liabilities

In Mesha Feet Pty Ltd v Allen acting as Deputy Commissioner of Taxation [2024] FCA 680, the Federal Court has rejected the taxpayer's appeal finding that a promissory note and bill of exchange were not means by which the taxpayer could discharge its tax liabilities. The Court found that payment by such means was not a means of payment approved by the Commissioner of Taxation under regulation 21(2) of the *Taxation Administration Regulations 2017*.

Special price element was part of market value

In Kilgour v Commissioner of Taxation [2024] FCA 687, the Federal Court of Australia found that the parties to a share sale agreement dealt with each other at arm's length, such that the market value substitution rule applicable for capital gains tax purposes did not apply. The Court also concluded that any 'special' or 'strategic' price element should be simply part of an asset's 'market value' - a finding that was at odds with the Commissioner's valuation guidelines.

Let's talk

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Philanthropic giving review recommends DGR reform

The Productivity Commission's final inquiry report on philanthropic giving has been released. The report sets out a range of proposals for short and long-term reform, and includes 19 recommendations from the Commission that focus on four main areas:

- Improving the system that determines which charities have access to tax-deductible donations.
- Improving access to philanthropic networks for Aboriginal and Torres Strait Islander people.
- Enhancing the regulatory framework for charities and ancillary funds.
- Improving public information on charities and donations.

One finding by the Commission was that the deductible gift recipient (DGR) system is not fit for purpose and should be reformed, with the arrangements that determine which entities can access DGR status found to be poorly designed, overly complex and with no coherent policy rationale.

The Government will now consider the report's recommendations, however the Government has confirmed that, while it considers its response to the inquiry, the recommended changes to tax settings for donations to school building funds are not being considered.

Editorial

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

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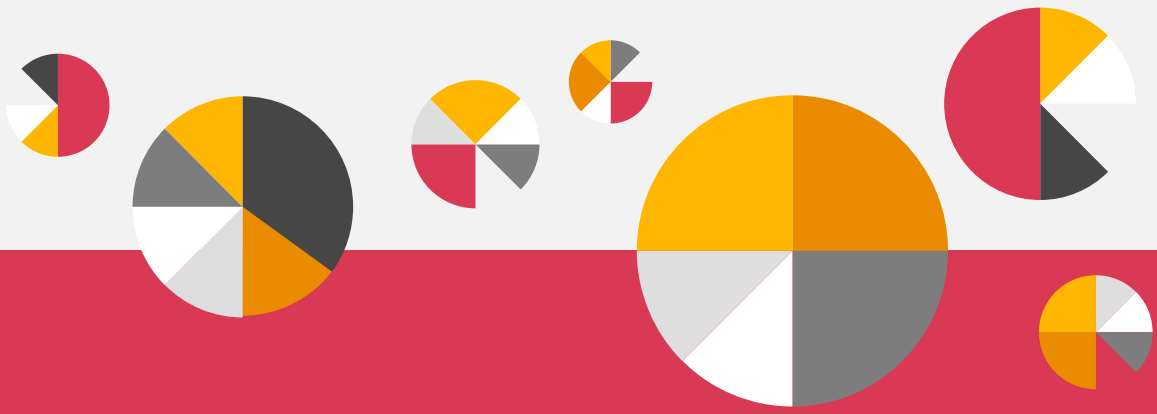

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