December 2021

Monthly Tax Update

In this edition of the Monthly Tax Update for December 2021, our last for this year, we provide the recent updates in legislation along with tax developments in the areas of corporate tax, individual tax, indirect tax and international tax. We also include the ATO’s recent activities, including its publications, rulings issued in the past month, latest Australian tax cases and other news in this edition.

## Legislation Update

# Treasury laws No 5 Bill now law

## The Treasury Laws Amendment (2021 Measures No 5) Bill 2021 has received assent as Act No 127 of 2021 on 7 December 2021.

The Act:

* increases the producer offset for films that are not feature films released in cinemas to 30 percent of total qualifying Australian production expenditure, and to make various threshold and integrity amendments across the three screen tax offsets;
* makes consequential amendments to integrate the corporate insolvency reforms across the Commonwealth statute book; and
* makes a number of other miscellaneous and technical amendments in the Act including the following:
	+ Country by Country (CBC) reporting — a CBC reporting entity is to provide details on the operations of entities that are members of the relevant CBC reporting group for all or part of the current income year, rather than the previous income year, for income years starting on or after 1 July 2020
* superannuation — from 7 December 2021, the Commissioner may, in certain circumstances, recover amounts overpaid under Pt 4B of the Superannuation (Unclaimed Money and Lost Members) Act 1999
* temporary loss carry back — the mechanism through which an entity may change its loss carry back choice is clarified
* imputation — ensures a franking credit arises where:
	+ a franking debit arises because the entity receives a tax offset refund
	+ the entity’s tax offset refund is subsequently reduced, and the entity is liable to pay the Commonwealth the amount of the excess mentioned in s 172A(2) of ITAA 1936, and
	+ the entity pays the amount of the excess
* depreciation — clarifies that, for the purposes of applying the alternative eligibility test for temporary full expensing, ss 40-45 and 40-215 of ITAA 1997 are disregarded when calculating an entity’s total cost of investment for the 2016–17 to 2018–19 income years.

For more details, please refer [here.](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6742)

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## Legislation Update (Cont.)

# Draft legislation **on intangible asset depreciation**

# The Treasury has released draft legislation for public consultation giving effect to a 2021 Budget measure that will allow taxpayers to self-assess the tax effective lives of certain depreciating intangible assets, such as patents, copyrights and in-house software.

The proposed legislation amends the tax law to allow taxpayers to choose whether to self-assess the effective life of eligible depreciating intangible assets or to continue to use the tax effective life set by the statute. This change will apply to assets acquired from 1 July 2023, after the temporary expensing measure has concluded.

Submission of feedback closes on 23 December 2021.

## For more details, please refer [here](https://treasury.gov.au/consultation/c2021-213422).

# Draft legislation: Miscellaneous amendments to Treasury portfolio laws 2022

# The Treasury has [released draft legislation](https://treasury.gov.au/consultation/c2021-226955%22%20%5Ct%20%22_blank), regulations and rules for consultation which propose to make minor and technical amendments to the Treasury portfolio law.

The amendments seek to ensure the law operates as intended by addressing unintended outcomes. The amendments are part of the government’s commitment to the ongoing care and maintenance of Treasury laws.

The proposed amendments include fixing an unintended outcome affecting income tax exempt not-for-profit private health insurers operating hospitals, in the *Fringe Benefits Tax Assessment Act 1986*. The legislation replaces the concept of rebatable employer in the case where a Fringe Benefits Tax (FBT) exemption is provided to employees by an employer that is a society or association carrying on a private hospital.

Submission of feedback closes on 15 December 2021.

## For more details, please refer [here](https://treasury.gov.au/consultation/c2021-226955).

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OECD Updates

OECD Economic Outlook

The Organisation for Economic Cooperation and Development (OECD) has released an Economic Outlook for December 2021.

OECD says the output in most OECD countries has now surpassed its late-2019 level and is converging on its pre-pandemic path but. However, the report also finds lower-income economies, particularly those where vaccination rates are low, are at risk of being left behind.

For Australia, the report projected real GDP to grow by 3.8% in 2021, 4.1% in 2022 and 3% in 2023. Based on the report, the Australian economy is recovering as strict containment measures first imposed in some states in mid-2021 have now been lifted. As the recovery continues, labour market conditions will improve and spare capacity will be absorbed. Wage and price pressures will subsequently build, even though they are expected to remain contained.

Please refer [here](https://www.oecd-ilibrary.org/sites/66c5ac2c-en/1/3/2/2/index.html?itemId=/content/publication/66c5ac2c-en&_csp_=9b4ecb1aafc11518f34da944ee244a5b&itemIGO=oecd&itemContentType=book) for details regarding Australia.

For full report, please refer [here](https://www.oecd-ilibrary.org/sites/66c5ac2c-en/index.html?itemId=/content/publication/66c5ac2c-en&_csp_=9b4ecb1aafc11518f34da944ee244a5b&itemIGO=oecd&itemContentType=book).

## ATO Rulings and Activity

## ATO Reportable Tax Position Schedule findings report – high risk tax arrangements / arrangements of concern not prevalent among large corporate taxpayer segment

## The ATO released its findings report regarding disclosures in the Reportable Tax Position (RTP) Schedules for the 2017-18 to 2019-20 income year, and this signals some welcome relief for corporate taxpayers operating both in and from Australia.

## The ATO has concluded that high risk tax arrangements or arrangements of concern are not prevalent among large public and multinational businesses.

As context, the RTP Schedule is an attachment to the company income tax return that must be completed by taxpayers that are part of a group with Australian revenues of $250 million or more.

The Schedule requires disclosures of a range of uncertain tax positions and arrangements that the ATO considers pose a systemic risk to the corporate tax base. The ATO uses the RTP Schedule as part of its assurance work, to aid in detecting and preventing high risk tax arrangements and tax avoidance schemes. The findings report provides aggregated disclosures made by companies for the 2017-19 to 2019-20 income years under Category C of the Schedule, with the ATO noting a significant increase in taxpayers making disclosures and an upward trend in low-risk disclosures.

For more details, please refer [here.](https://www.ato.gov.au/Business/Large-business/Compliance-and-governance/Reportable-tax-positions/Findings-report-Reportable-tax-position-schedule-Category-C-disclosures/)

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## ATO Rulings and Activity (Cont.)

# CBC reporting lodgment deferral

# In its media release on 18 November 2021, the ATO says the lodgment deferral is available for Country-by-Country (CBC) reporting entities that have a CBC reporting obligation due by 31 December 2021.

December balancers will now have until 4 February 2022 to lodge their CBC reporting statements, including:

* Local file
* Master file, and
* CBC report.

Lodgments can only be made electronically through Online services for business or Online services for agents using the file transfer facility, or by SBR using SBR-enabled software. The ATO will not accept lodgments via email.

The ATO reminded that the lodgment deferral does not change the due date for payment and penalties may apply where statements are not lodged by 4 February 2022.

## For more details, please refer [here.](https://www.ato.gov.au/Business/Business-bulletins-newsroom/Tax-Time-and-reporting/CBC-reporting-lodgment-deferral-for-December-balancers/)

# ATO updated guidance on simplified transfer pricing

# The ATO has updated the Practical Compliance Guideline PCG 2017/2 on simplified transfer pricing record-keeping options.

The update provides the maximum interest rate for low-level inbound loans and the minimum interest rate for low-level outbound loans for the 2022 income year. The new interest rate for both options is 1.83%.

For further details, please refer [here](https://www.ato.gov.au/law/view/document?DocID=COG/PCG20172/NAT/ATO/00001).

Loss carry back claims

The ATO has noted errors with claims for the loss carry back (LCB) refundable tax offset in income tax returns lodged by taxpayers to date. In particular, ATI has noted errors or omissions in certain labels on the company tax return, which can prevent or delay the processing of claims. These include the following labels:

* the loss carry back labels in item 13;
* the opening and closing franking account balance in item 8; and
* the refundable tax offset labels in the calculation statement at label E.

Accordingly, the ATO has shared its LCB tax offset tool which is designed to help prevent errors and help complete the LCB labels in company tax returns correctly.

The ATO stated that the LCB tax offset tool will help taxpayers to work out if they are eligible to claim the refundable tax offset. The tool also calculates the maximum amount can be claimed if eligible. For more details, please refer [here.](https://www.ato.gov.au/Calculators-and-tools/Loss-carry-back-tax-offset-tool/)

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## ATO Rulings and Activity (Cont.)

Small business CGT concessions eligibility

The ATO has found that some larger businesses are mistakenly claiming small business capital gains tax (CGT) concessions when they are not entitled to.

The ATO will be sending letters to tax advisers and their clients who have claimed one or more of the small business CGT concessions in recent income tax returns asking that the claims be checked to ensure eligibility.

To avoid administrative time in correcting mistakes and ensure eligibility, tax advisers can contact the ATO for an early engagement discussion to obtain advice on a client’s small business complex transaction. Tax advisers can also seek a pre-lodgment compliance agreement for their client’s commercial deals and restructure events, or apply for a private ruling for certainty on their client’s application of the small business CGT concessions.

For more details, please refer [here.](https://www.ato.gov.au/Tax-professionals/Newsroom/Your-practice/Small-business-capital-gains-tax-concessions/)

## ATO guidance on COVID-19 vaccination incentives and rewards

## The ATO has released a fact sheet which details the tax implications for employers that may be providing incentives or rewards to employees who receive their COVID-19 vaccinations.

## The ATO has summarized its views of the consequences of providing different kinds of incentives or rewards, including pay as you go withholding, super guarantee, and fringe benefit tax. It covers cash rewards, paid leave, and non-cash benefits including vouchers and prize draws.

## For more details, please refer [here](https://www.ato.gov.au/law/view/document?DocID=AFS/VACC_INC-COVID-19).

ATO data matching program – Medicare Exemption Statement

The has provided notice that, as part of its data matching program, it will acquire Medicare Exemption Statement (MES) data from Services Australia for the 2021 financial year up to and including the 2023 financial year.

The data items include:

* full name, date of birth, residential address, postal address, and client reference number identification details, and
* entitlement status, and approved entitlement period details.

The MES data will help the ATO compare taxpayers’ claims made in their income tax returns for the Medicare levy and Medicare levy surcharge.

For more details, please refer [here](https://www.legislation.gov.au/Details/C2021G00864).

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## ATO Rulings and Activity (Cont.)

## **Remission of additional superannuation guarantee charge**

The ATO has released an updated law administration practice statement (PS LA 2021/3) outlining the ATO’s revised decision-making principles for the remission of additional superannuation guarantee charge (also known as Part 7 penalty) that may be imposed where an employer is liable for super guarantee charge.

The new released Practice Statement replaces PS LA 2020/4, which previously set out the ATO’s approach for quarters ending on 31 March 2018 or earlier. PS LA 2021/3 provides an approach to remission that recognises the full range of compliance behaviours in super guarantee matters, and differentiates between those who have a good compliance history and those who repeatedly pay late or fail to pay.

# For more details, please refer [here.](https://www.ato.gov.au/law/view/document?DocID=PSR/PS20213/NAT/ATO/00001)

### GST: adjustable beds, pressure management mattresses and pressure management overlays

The ATO has released a taxation determination which explains when the supply of an adjustable bed, a pressure management mattress and a pressure management overlay is GST-free.

The ATO is issuing this Determination because the market for these products has developed and in some cases there is now uncertainty whether the products meet the criteria to be GST-free. This Determination does not cover hospital-type beds, as these are GST-free under table item 61 of Schedule 3.

For more details, please refer [here](https://www.ato.gov.au/law/view/document?DocID=GSD/GSTD20212/NAT/ATO/00001#H26).

Class rulings issued:

* Class Ruling [CR 2021/74](https://www.ato.gov.au/law/view/document?DocID=CLR/CR202174/NAT/ATO/00001" \t "_blank) Woolworths Group Ltd — demerger of Endeavour Group Ltd — employee share scheme. The ruling applies from 1 July 2020 to 30 June 2024.
* Class Ruling [CR 2021/75](https://www.ato.gov.au/law/view/document?DocID=CLR/CR202175/NAT/ATO/00001" \t "_blank) Australian Unity Ltd — Mutual Capital Instruments (2021 Issue). The ruling applies from 1 July 2021 to 30 June 2031.
* Class Ruling [CR 2021/76](https://www.ato.gov.au/law/view/document?DocID=CLR/CR202176/NAT/ATO/00001" \t "_blank) Viva Energy Group Ltd — return of capital and share consolidation. The ruling applies from 1 July 2021 to 30 June 2022.
* Class Ruling [CR 2021/77](https://www.ato.gov.au/law/view/document?DocID=CLR/CR202177/NAT/ATO/00001" \t "_blank) Horizon Oil Ltd — return of capital. The ruling applies from 1 July 2021 to 30 June 2022.
* Class Ruling [CR 2021/78](https://www.ato.gov.au/law/view/document?DocID=CLR/CR202178/NAT/ATO/00001" \t "_blank) Templeton Global Growth Fund Ltd — off-market share buy-back and scrip for scrip roll-over. The ruling applies from 1 July 2021 to 30 June 2022.
* Class Ruling [CR 2021/79](https://www.ato.gov.au/law/view/document?DocID=CLR/CR202179/NAT/ATO/00001" \t "_blank) Woolworths Group Ltd — off-market share buy-back. The ruling applies from 1 July 2021 to 30 June 2022.

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## ATO Rulings and Activity (Cont.)

Class rulings issued (Cont.):

* Class Ruling [CR 2021/80](https://www.ato.gov.au/law/view/document?DocID=CLR/CR202180/NAT/ATO/00001" \t "_blank) Two10degrees Pty Ltd — use of Global Alerting Platform In-Vehicle Management System for fuel tax credits. The ruling applies from 1 November 2021 to 31 December 2022.
* Class Ruling [CR 2021/81](https://www.ato.gov.au/law/view/document?DocID=CLR/CR202181/NAT/ATO/00001" \t "_blank) Liontown Resources Ltd — demerger of Minerals 260 Ltd. The ruling applies from 1 July 2021 to 30 June 2022.
* Class Ruling [CR 2021/82](https://www.ato.gov.au/law/view/document?DocID=CLR/CR202182/NAT/ATO/00001" \t "_blank) Youfoodz Holdings Ltd — employee share scheme — shares disposed of under scheme of arrangement. The ruling applies from 1 July 2021 to 30 June 2022.
* Class Ruling [CR 2021/83](https://www.ato.gov.au/law/view/document?DocID=CLR/CR202183/NAT/ATO/00001" \t "_blank) Victorian Department of Jobs, Precincts and Regions — early retirement scheme 2021–22. The ruling applies from 2 December 2021 to 31 December 2022.
* Class Ruling [CR 2021/84](https://www.ato.gov.au/law/view/document?DocID=CLR/CR202184/NAT/ATO/00001" \t "_blank) Faethm Holdings Pty. Ltd — Employee Option Plan — Commissioner’s discretion to reduce the minimum holding period in relation to options acquired. The ruling applies from 1 July 2020 to 30 June 2022.
* Class Ruling [CR 2021/85](https://www.ato.gov.au/law/view/document?DocID=CLR/CR202185/NAT/ATO/00001" \t "_blank) Department of Education and Training — early retirement scheme 2021–23. The ruling applies from 2 December 2021 to 28 February 2023.
* Class Ruling [CR 2021/86](https://www.ato.gov.au/law/view/document?DocID=CLR/CR202186/NAT/ATO/00001" \t "_blank) Flinders Adelaide Container Terminal Pty Ltd — early retirement scheme. The ruling applies from 2 December 2021 to 31 December 2023.
* Class Ruling [CR 2021/87](https://www.ato.gov.au/law/view/document?DocID=CLR/CR202187/NAT/ATO/00001" \t "_blank) Wesfarmers Ltd — return of capital. The ruling applies from 1 July 2021 to 30 June 2022.
* Class Ruling [CR 2021/88](https://www.ato.gov.au/law/view/document?DocID=CLR/CR202188/NAT/ATO/00001" \t "_blank) Thales Australia Ltd — early retirement scheme 2021. The ruling applies from 9 December 2021 to 31 July 2022.
* Class Ruling [CR 2021/89](https://www.ato.gov.au/law/view/document?DocID=CLR/CR202189/NAT/ATO/00001" \t "_blank) NSW Police Force — optional disengagement scheme. The ruling applies from 1 January 2022 to 30 June 2024.
* Class Ruling [CR 2021/90](https://www.ato.gov.au/law/view/document?DocID=CLR/CR202190/NAT/ATO/00001" \t "_blank) Victorian Department of Transport — early retirement scheme 2021–22. The ruling applies from 9 December 2021 to 31 December 2022.
* Class Ruling [CR 2021/91](https://www.ato.gov.au/law/view/document?DocID=CLR/CR202191/NAT/ATO/00001" \t "_blank) Victorian Department of Environment, Land, Water and Planning — early retirement scheme 2021–22. The ruling applies from 9 December 2021 to 31 December 2022.
* Class Ruling [CR 2021/92](https://www.ato.gov.au/law/view/document?DocID=CLR/CR202192/NAT/ATO/00001" \t "_blank) Victorian Department of Justice and Community Safety — early retirement scheme 2021–2023. The ruling applies from 9 December 2021 to 28 February 2023.
* Class Ruling [CR 2021/93](https://www.ato.gov.au/law/view/document?DocID=CLR/CR202193/NAT/ATO/00001" \t "_blank) Encounter Resources Ltd — demerger of Hamelin Gold Ltd. The ruling applies from 1 July 2021 to 30 June 2022.

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## ATO Rulings and Activity (Cont.)

Class rulings issued (Cont.):

* Class Ruling [CR 2021/94](https://www.ato.gov.au/law/view/document?DocID=CLR/CR202194/NAT/ATO/00001" \t "_blank) Nufarm Ltd — non-executive directors share rights plan. The ruling applies from 1 October 2021 to 30 September 2026.
* Class Ruling [CR 2021/95](https://www.ato.gov.au/law/view/document?DocID=CLR/CR202195/NAT/ATO/00001" \t "_blank) EROAD Australia Pty Ltd — Fuel Tax Credits Solution. The ruling applies from 1 June 2021 to 31 December 2022.
* Class Ruling [CR 2021/96](https://www.ato.gov.au/law/view/document?DocID=CLR/CR202196/NAT/ATO/00001" \t "_blank) Arnott’s Biscuits Ltd — early retirement scheme 2021. The ruling applies from 9 December 2021 to 30 September 2022.

Product rulings issued:

* Product Ruling [PR 2021/12](https://www.ato.gov.au/law/view/document?DocID=PRR/PR202112/NAT/ATO/00001" \t "_blank) Challenger Lifetime Annuity (Liquid Lifetime). The ruling applies prospectively from 4 October 2021 only to the specified class of entities that enter into the scheme from 4 October 2021 until 30 June 2024, being its period of application.
* Product Ruling [PR 2021/13](https://www.ato.gov.au/law/view/document?DocID=PRR/PR202113/NAT/ATO/00001" \t "_blank) Tax consequences for a borrower being charged a discounted home loan interest rate calculated under Loan Reducer. The ruling applies prospectively from 17 November 2021 only to the specified class of entities that enter into the scheme from 17 November 2021 until 30 June 2024, being its period of application.
* Product Ruling [PR 2021/14](https://www.ato.gov.au/law/view/document?DocID=PRR/PR202114/NAT/ATO/00001" \t "_blank) Tax consequences for a Participant in an Urbau joint venture project. The ruling applies from 17 November 2021 only to the specified class of entities that enter into the scheme from 17 November 2021 until 30 June 2024, being its period of application.
* Product Ruling [PR 2021/15](https://www.ato.gov.au/law/view/document?DocID=PRR/PR202115/NAT/ATO/00001" \t "_blank) Tax consequences for a Customer entering into a Prepay Plus Agreement with Nutrien Ag Solutions Ltd. The ruling applies from 1 July 2021 only to the specified class of entities that enter into the scheme from 1 July 2021 until 30 June 2024, being its period of application.
* Product Ruling [PR 2021/16](https://www.ato.gov.au/law/view/document?DocID=PRR/PR202116/NAT/ATO/00001" \t "_blank) ING Bank (Australia) Ltd — Orange Everyday Round Up to Charity. The ruling applies prospectively from 1 December 2021 only to the specified class of entities that enter into the scheme by activating the Round Up to Charity feature from 1 December 2021 until 30 June 2024, being its period of application.

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## Latest Australian Tax Cases

* FBT; car parking - The Full Federal Court has allowed the Commissioner’s appeal from the decision reported at Virgin Australia Airlines Pty Ltd & Anor v FC of T [2021] FCA 523, holding that FBT did apply in respect of car parking fringe benefits provided by the relevant airline operators on the basis that their employees’ “primary place of employment” was their home base airport terminal, not the aircraft on which they performed the bulk of their duties. [FC of T v Virgin Australia Regional Airlines Pty Ltd & Anor [2021] FCAFC 209- 22 November 2021]
* Residency - The AAT had held that a taxpayer who spent 83 days in Australia during the 2016 income year was a resident of Australia under the ordinary concepts test as the objective evidence (including the maintenance of a home in Australia where his family resided and he visited frequently) illustrated a continuity of association with Australia. [Sanderson v FC of T [2021] AATA 4305 - 16 November 2021]
* COVID-19; JobKeeper - The Federal Court has ruled that 8 Australian resident sovereign entities that had initially been eligible employers under the JobKeeper scheme and which had made payments to employees in anticipation of being reimbursed by the government under that scheme, were not entitled to reimbursement for the payments made. The court held that the taxpayers did not at the relevant time have any rights capable of being affected by an amendment to the JobKeeper rules that retrospectively reversed their eligibility. [Airport Handling Services Australia Pty Ltd & Ors v FC of T [2021] FCA 1405 - 15 November 2021]
* Deductions - The Full Federal Court has allowed the taxpayer’s appeal from the decision reported at 2021 ATC, even though it rejected the taxpayer’s arguments and agreed with the primary judge that payments made to bring to an end options and rights held by employees were not wholly deductible in the year incurred under s 8-1. The full court held that, in accordance with the Commissioner’s concession that the amount was deductible over 5 years pursuant to s 40-880, the deemed assessment for the 2014 year was necessarily excessive, meaning that the taxpayer’s original appeal against the objection decision should have been partly allowed. [Clough Ltd v FC of T (No 2) [2021] FCAFC 197 - 12 November 2021]
* Tax agents - The AAT has upheld a decision of the Tax Practitioners Board to suspend a tax agent’s registration for 3 months in addition to imposing other sanctions after the agent repeatedly lodged returns over a 2-year period containing false declarations that they had been audited. [Vac Corporate Pty Ltd v Tax Practitioners Board [2021] AATA 4098 - 9 November 2021]
* R&D expenditure - A taxpayer company has been unsuccessful in claiming R&D expenditure associated with a business it carried on in its capacity as trustee of a discretionary trust because the amount claimed was not “incurred” by the taxpayer in its own right. Nevertheless, the AAT found that a partial remission of the penalties imposed was appropriate as the taxpayer acted on (and put in place structures based on) relevant professional advice. [XQDX v FC of T 2021 [2021] AATA 4070 - 5 November 2021]
* Exemptions; DGR status - The Federal Court has set aside the Commissioner’s objection decision in respect of a revocation of a taxpayer's deductible gift recipient status that had been based on the principles propounded in Taxation Ruling 2013/2, after the ruling was found to impose requirements additional to those set down in case law that a building must satisfy in order to be considered a “school or college”. [Buddhist Society of Western Australia v FC of T [2021] FCA 1363 - 4 November 2021]

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