

January 2023

Monthly Tax Update

Welcome to the first edition of Monthly Tax Update for 2023. In this edition of the Monthly Tax Update, 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

Draft Legislative Instrument - Taxation Administration (Reporting by Electronic Distribution Platform Operators) Legislative Instrument 2022.

A draft legislative instrument (LI 2022/D27) that will amend the reporting period for electronic distribution platform operators has been published by the ATO.

LI 2022/D27 proposes to substitute the default annual reporting period that will apply to electronic platform operators with an alternative 6-monthly reporting period. The 6-month periods will apply from 1 January to 30 June and from 1 July to 31 December.

The instrument is expected to take effect from different dates, depending on the type of transaction. It will apply to transactions entered into on or after:

- 1 July 2023, for transactions that relate to a supply of taxi travel (within the meaning of the GST Act);
- 1 July 2023, for transactions that relate to a supply of short-term accommodation; and
- 1 July 2024, for all other transactions to be reported under item 15 of the table in section 396-55 of Schedule 1 to the Taxation Administration Act 1953.

The instrument will not change reporting lodgement deadlines, with the submission deadline to the Commissioner of on or before the 31st day after the end of each reporting period to be retained.

The ATO will consult with electronic distribution platform operators on the design and implementation of supporting administrative processes.

Comments on the draft instrument and accompanying explanatory statement are to be submitted by Friday 3 February 2023.

For further information, please refer [here](#).

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OECD Updates – International Tax

OECD releases results that show further progress in countering harmful tax practices

The Organisation for Economic Co-operation and Development (OECD) has released new results on preferential tax regimes and substantial activities in no or only nominal tax jurisdictions.

The OECD Forum on Harmful Tax Practices (FHTP) reached new conclusions on 13 regimes as part of the implementation of the BEPS Action 5 minimum standard on harmful tax practices. Since the beginning of the OECD/G20 BEPS project addressing international tax avoidance, close to 320 regimes have been reviewed.

The FHTP has also released conclusions from its annual monitoring process of the effectiveness in practice of the substantial activities requirements in no or only nominal tax jurisdictions. Recommendations for substantial improvement were made for 4 jurisdictions and areas for focused monitoring were identified for another 4 jurisdictions. The next annual monitoring exercise for no or only nominal tax jurisdictions will be undertaken in the second half of 2023.

For more information, please refer to the OECD website [here](#).

OECD guidance and consultation documents on implementation of Pillar One and Pillar Two

The OECD has released guidance and consultation documents related to implementation of Pillar One and Pillar Two.

Under Pillar One, the Inclusive Framework has released a public consultation document on the Draft Multilateral Convention (MLC) Provisions on Digital Services Taxes (DSTs) and other Relevant Similar Measures. The draft MLC has been released in order to obtain public comments, but the substance of the document does not reflect consensus.

Consultation on this document closes on 20 January 2023.

Under Pillar Two, the Inclusive Framework has released an implementation package relating to the Global Anti-Base Erosion (GloBE) Rules to facilitate a global minimum corporate tax. The implementation package includes the following:

- Guidance on safe harbours and penalty relief
- Public consultation document on the GloBE Information Return
- Public consultation document on Tax Certainty for the GloBE Rules

Comments on the Pillar Two public consultation documents are invited until Friday 3 February 2023.

The Inclusive Framework expects to release the first package of administrative guidance on the global minimum tax in early 2023. Work is also being undertaken to finalise the subject to tax rule and the related multilateral instrument to assist its implementation.

For more information, please refer to OECD website [here](#).

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ASIC updates – Corporations Law

ASIC registers two pieces of legislation related to ESS provisions

The Australian Securities and Investments Commission (ASIC) has registered two legislative instruments related to employee share schemes (ESS) provisions:

- **ASIC Corporations (Employee Share Schemes) 2022/1021**

This instrument is meant to facilitate reliance on the ESS provisions in Division 1A of Part 7.12 of the Corporations Act 2001 and reduce the need for individual relief applications.

- **ASIC Corporations (Amendment) Instrument 2022/1022**

With entities now able to operate under the ESS legislative provisions, this instrument terminates the ability for entities to make new offers under the employee incentive schemes (EIS) class orders from 1 March 2023.

ASIC says this instrument does not terminate other relief provided by the EIS class orders because financial products issued under the class orders continue to require relief for secondary sales and licensing.

According to ASIC, the ESS regime contains broad, conditional regulatory exemptions for employee share schemes and is intended to replace the EIS class orders.

Other updates

Treasury consults on digital platform regulatory reform recommendations

Treasury has released a consultation paper on the Australian Competition and Consumer Commission's (ACCC) regulatory reform recommendations for digital platforms.

The consultation paper follows the ACCC's inquiry into digital platform services and its fifth interim report released in November 2022 that provided recommendations to address competition and consumer issues.

According to the paper, the views gathered from this consultation will be considered by the Federal Government in developing its response to the interim report and ensuring Australia has the right regulations in place.

Responses to this consultation close on 15 February 2023.

For more information, please refer [here](#).

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Other updates (Cont.)

New migrant jobs and income data release

The Australian Bureau of Statistics (ABS) has released a new report on the employment outcomes of migrants with new information based on annual personal income tax data. New statistics, based on annual personal income tax data, have been added to the Jobs in Australia and Personal Income in Australia datasets for the first time.

According to the report, migrants held 26.3 percent of all jobs in Australia in 2019-20, or 5.3 million jobs worked by 3.6 million migrants, which is slightly below their 29.8 percent share of Australia's population.

Of the total number of jobs held by migrants:

- 56.6% were held by permanent migrants
- 29.5% were held by temporary migrants
- 12.9% were held by New Zealand citizens

According to Bjorn Jarvis, ABS Head of Labour Statistics, the largest employing industries of migrants were Administrative and support services with 14.1% of jobs held by migrants, Health care and social assistance (12.1%), and Accommodation and food services (11.3%).

Based on personal income tax data, almost 4 million migrant taxpayers earned more than \$230 billion in total personal income in 2019-20, with the median annual personal income for migrants being \$45,351 compared to \$52,338 for the population as a whole during the period.

For more information, please refer [here](#).

Corporations Amendment (Registration of Relevant Providers) Regulations 2022

Treasury has registered a legislative instrument that amends the Corporations Regulations 2001 to delay the requirement for financial services licensees to register financial advisers on the Financial Advisers Register (FAR) for six months to 1 July 2023.

The purpose of the Corporations Amendment (Registration of Relevant Providers) Regulations 2022 is to allow extra time for amendments to be made that will improve the operation of the stage one registration process with benefits for licensees and financial advisers.

For more information, please refer [here](#).

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Other updates (Cont.)

Treasury consults on further improvements to Corporations and Financial Services Law

The Government has released exposure draft legislation to reduce the complexity of Australia's corporations and financial services laws by making these laws more adaptive, efficient, and navigable within existing policy settings. Simplifying these laws will benefit industry and consumers and is critical to maintaining a strong financial sector.

According to Treasury, the draft legislation:

- implements a further two recommendations made by the Australian Law Reform Commission (ALRC) in Interim Report A of its Inquiry into the Legislative Framework for Corporations and Financial Services Regulation relating to improving navigability and readability of the law, to:
 - create a single glossary of defined terms in section 9 of the Corporations Act 2001 (Corporations Act); and
 - 'unfreeze' the Acts Interpretation Act 1901 (AIA) as it applies to the Corporations Act and Australian Securities and Investments Commission Act 2001 so the most current version of the AIA applies to both Acts.

- partially implements 3 recommendations from the ALRC's Interim Report B to:
 - repeal definitions that are no longer used, cross-references to repealed provisions and other redundant provisions;
 - amend the law to address unclear or incorrect provisions; and
 - simplify unnecessarily complex provisions, with a particular focus on terms defined as having more than one meaning and definitions containing substantive obligations.

The legislation further builds on the amendments contained in the Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2022, which was introduced to Parliament on 23 November 2022.

The Government welcomes comments or feedback from stakeholders on the draft legislation and explanatory material. Responses to this consultation closes on 15 January 2023.

For more information, please refer [here](#).

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ATO Rulings and Activity

PCG 2018/9: Central management and control test of residency: identifying where a company's central management and control is located

The ATO has further extended the transitional compliance approach period until 30 June 2023 for eligible foreign incorporated companies to change their governance arrangements so that their central management and control is exercised outside Australia. The ATO indicated that this period will not be extended any further beyond this date. The Commissioner will continue to monitor impacts on affected companies and provide further updates if necessary.

The former government had announced in the 2020–21 Budget that it would clarify the corporate residency test for companies incorporated offshore. This measure remains unenacted and is subject to consideration by the government. The ATO will provide further guidance should legislative amendments in relation to corporate residency be enacted.

For further details, please refer [here](#).

PCG 2022/3: Goods and Services Tax (GST) and residential colleges – ATO compliance approach

PCG 2022/3 sets out the ATO's compliance approach for universities and residential colleges supplying accommodation, meals, tertiary residential college courses and religious services (or a combination of any of these services) to resident students and claiming input tax credits.

The purpose of the Guideline is to assist residential colleges to determine if supplies of accommodation, meals, tertiary residential college courses and religious services satisfy section 38-250 of the A New Tax System (Goods and Services Tax) Act 1999 and can be treated as GST-free supplies.

This Guideline applies to tax periods starting on and from 1 January 2023. It broadly applies to university owned-or affiliated residential colleges that are endorsed charities. It was previously issued in draft form as PCG 2022/D3. The ATO has also published a compendium of the feedback it received.

Please refer [here](#) for a copy of the guideline.

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ATO Rulings and Activity (Cont.)

ATO draft guidance on employee vs independent contractor

The ATO has issued preliminary guidance, Draft Taxation Ruling TR 2022/D3 together with Draft Practical Compliance Guideline PCG 2022/D5, on the important question of whether a worker is an employee or an independent contractor for the purposes of PAYG withholding.

- **Draft Taxation Ruling TR 2022/D3: Income tax: pay as you go (PAYG) withholding - who is an employee?**

This draft Ruling explains when an individual is an 'employee' of an entity for the purposes of section 12-35 of Schedule 1 of the Taxation Administration Act 1953 (TAA). That section imposes an obligation on a paying entity to withhold an amount from salary, wages, commission, bonuses or allowances it pays to an employee, whether or not the paying entity is the employer.

This Ruling replaces Taxation Ruling TR 2005/16 Income tax: Pay As You Go - withholding from payments to employees. TR 2005/16 is withdrawn with effect from 15 December 2022.

TR 2022/D3 takes into account developments in case law, particularly the High Court's decision in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 (CFMMEU, or the Personnel Contracting case as referred to by the ATO) and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

Please refer [here](#) for a copy of the ruling.

- **PCG 2022/D5: Classifying workers as employees or independent contractors - ATO compliance approach**

This draft Guideline outlines the ATO's compliance approach for businesses that engage workers and classify them as employees or independent contractors. It sets out how the ATO allocates its compliance resources, based on the risk associated with the classification.

The classification of workers as either employees or independent contractors has far reaching implications for various obligations. In conjunction with releasing TR 2022/D3, the ATO has issued a draft practical compliance guideline to assist taxpayers assess their risk rating. The risk rating, in turn, determines how the ATO allocates its compliance resources which is helpful for scenarios where a classification is not clear cut.

PCG 2022/D5 covers federal tax and superannuation obligations administered by the ATO. It does not extend to payroll tax, workers' insurance or the Fair Work Act 2009. It also does not cover the income tax affairs of a worker (such as their eligibility to claim deductions or business concessions, or the potential application of the PSI rules).

In PCG 2022/D5, the ATO provides 4 zones ranging from very low risk, low risk, medium risk, to high risk. The PCG explains the extent of ATO engagement in respect of each zone where it either receives a complaint from a worker or proactively selects a case for review.

The risk ratings depend on several factors, including whether there is an agreement between the worker and engaging entity about their classification, and the extent of their intention and understanding of the tax and superannuation consequences of either classification. Whether professional advice was sought (from an expert or an ATO private ruling) is relevant, as is whether the engaging entity relying on the guideline had in fact met their obligations for the selected classification.

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ATO Rulings and Activity (Cont.)

ATO draft guidance on employee vs independent contractor (Cont.)

■ PCG 2022/D5: Classifying workers as employees or independent contractors - ATO compliance approach (Cont.)

A very low risk rating will apply where the entity demonstrates it has satisfied these requirements in the context of both the ordinary meaning of "employee" as well as the extended superannuation guarantee definition, or if, regardless of the classification, the entity voluntarily met the obligations of an employer.

At the other end of the spectrum, a high risk arrangement is one that had no agreement about the worker's classification, where the performance of the arrangement deviated significantly from the contractual rights and obligations of the parties, or where one party was coerced to accept a classification or was misled to believing they were falling within one classification or another.

Arrangements that are low or medium risk include scenarios where there is an agreement about a classification but no evidence of the worker understanding the tax and superannuation implications of this classification. The PCG sets out 6 examples illustrating how the risk ratings are likely to be applied.

When finalised, the PCG will apply from its date of issue.

The last day for comments on the draft ruling and guideline is 17 February 2023.

Please refer [here](#) for a copy of the guideline.

Class rulings issued:

- Class Ruling [CR 2022/111](#) Horizon Oil Ltd - return of capital and dividend. This ruling applies from 1 July 2022 to 30 June 2023.
- Class Ruling [CR 2022/112](#) BNK Banking Corporation Ltd - special dividend and return of capital. This ruling applies from 1 July 2022 to 30 June 2023.

Other ruling issued:

- Product Ruling [PR 2022/10](#) Swiss Life (Singapore) Pte. Ltd. Life Asset Portfolio Universal Asia. This ruling applies prospectively from 1 July 2022 only to the specified class of entities that enter into the scheme, and are a resident of Australia for tax purposes during the period 1 July 2022 to 30 June 2025.
- Product Ruling [PR 2022/11](#) Allianz Guaranteed Income for Life. This ruling applies prospectively from 14 December 2022 only to the specified class of entities that enter into the scheme from 14 December 2022 until 30 June 2025.

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Latest Australian Tax Cases

- **GST** - The AAT has affirmed that a newly constructed home unit leased by a developer ceased to be used only for making input taxed supplies when it was first marketed for sale. In any event, the developer was denied a refund of GST in relation to the sale of that unit as it failed to prove the GST had not been passed on to the relevant purchasers. [Domestic Property Developments Pty Ltd a/t for Dals Property Trust v FC of T 2022 ATC; [2022] AATA 4436 - 23 December 2022.]
- **GST** - The Full Federal Court has confirmed, for the purposes of the margin scheme, that where there was a sale of 4 freehold interests in land under a single contract that each sale was a separate supply. In so doing, it dismissed the Commissioner's appeal from the decision reported at 2022 ATC; [2022] FCA 510. [FC of T v Landcom 2022 ATC; [2022] FCAFC 204 - 22 December 2022]

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