

Monthly Tax Update

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

Corporate Collective Investment Vehicle Framework and Other Measures Bill 2021

The **Corporate Collective Investment Vehicle Framework and Other Measures Bill 2021** has received assent as Act No 8 of 2022 on 22 February 2022.

The bill:

- establishes the tax and regulatory framework for the corporate collective investment vehicles (CCIV)
- updates the list of deductible gift recipients;
- removes cessation of employment as a taxing point for employee share scheme interests which are subject to deferred taxation
- extends the loss carry back tax offset measure for an additional year to allow the offset to be claimed in the 2022-23 income year
- inserts a new covenant that requires trustees of registrable superannuation entities to develop a retirement income strategy for beneficiaries who are retired or are approaching retirement.

Treasury Laws Amendment (Enhancing Superannuation Outcomes For Australians and Helping Australian Businesses Invest) Bill 2021

The **Treasury Laws Amendment (Enhancing Superannuation Outcomes For Australians and Helping Australian Businesses Invest) Bill 2021** has received assent as Act No 10 of 2022 on 22 February 2022.

The Act includes amendments to:

- remove the \$450 monthly threshold for superannuation guarantee
- increase the first home super saver scheme maximum releasable amount
- reduce the eligibility age for downsizer contributions
- implement work test reforms for superannuation contributions
- allow superannuation trustees to choose to treat all of a fund's assets as not being segregated current pension assets in certain circumstances, and
- extend temporary full expensing of depreciating assets to 30 June 2023.

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OECD Updates – Transfer Pricing

OECD releases third batch of transfer pricing country profiles

The OECD has released the third batch of 2021/2022 updates to the transfer pricing country profiles, reflecting the current transfer pricing legislation and practices of 28 jurisdictions.

New information on countries' legislations and practices regarding the transfer pricing aspects of financial transactions and the application of the Authorised OECD Approach (AOA) on the attribution of profits to permanent establishments have been added to the updated country profiles. In addition, the country profiles reflect updated information on a number of transfer pricing aspects such as methods, comparability, intra-group services, cost contribution agreements, transfer pricing documentation and administrative approaches to prevent and resolve disputes.

Last year in August and December, the OECD had released the first and second batches of updated transfer pricing country profiles.

With this third batch, the profiles for Brazil, Canada, Chile, China, Croatia, Dominican Republic, Estonia, Finland, Greece, Hungary, Israel, Korea, Liechtenstein, Lithuania, Luxembourg, Malta, Panama, Portugal, Slovenia, the United Kingdom, Uruguay and the United States have been updated, and 6 new country profiles from OECD/G20 Inclusive Framework on BEPS Members (Honduras, Iceland, Jamaica, Papua New Guinea, Senegal and Ukraine) were added, bringing the total number of countries covered to 91.

Please refer [here](#) for the latest transfer pricing country profiles.

ATO Rulings and Activity

ATO Decision Impact Statement concerning the interpretation of 'primary place of employment'

The ATO released an impact statement regarding the Full Federal Court's decision in *Commissioner of Taxation v Virgin Australia Regional Airlines Pty Ltd* [2021] FCAFC 209.

This Decision impact statement outlines the ATO's response to the Full Federal Court's decision concerning the interpretation of 'primary place of employment' in subsection 136(1) of the Fringe Benefits Tax Assessment Act 1986 when read with the extended meaning of 'business premises' in subsection 136(2) of that Act.

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

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ATO Rulings and Activity (Cont.)

Draft legislative instrument on payment summary deferral: Employment termination and Departing Australia Superannuation Payments deferral

The ATO has issued a draft legislative instrument (LI 2022/D6) continuing the deferral of the payment summary due date for employment termination and departing Australia superannuation payments.

The instrument which is made under TAA sch 1 s 388-55, defers the due date for providing a copy of payment summaries to the Commissioner in respect of employment termination payments and departing Australia superannuation payments to 14 August following the financial year in which the payment was made.

Payers do not have to provide copies of summaries to the Commissioner within the required 14 days of making employment termination payments or departing Australia superannuation payments where they have withheld amounts from payments in accordance with Subdiv 12-C, s 12-85 or Subdiv 12-FA, s 12-305 of sch 1 to the TAA. They are however required to provide copies but within a timeframe aligned with their other reporting obligations.

This instrument commences on 1 April 2022.

The closing date for comments is 7 March 2022.

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

Draft legislative determination on car expenses cents per kilometre rate

The ATO has issued a draft legislative determination (LI 2022/D8) that proposes to set the cents per kilometre rate for calculating work-related motor vehicle expense deductions at 75 cents per kilometre for the income year commencing 1 July 2022.

This determination applies to the eligible taxpayers who use the cents per kilometre method to calculate the work-related car expenses tax deductions.

The determination is proposed to commence on 1 July 2022 and will repeal ITAA 1997 — Cents per Kilometre Deduction Rate for Car Expenses 2020 (F2020L00676) registered on 5 June 2020.

The closing date for comments is 31 March 2022.

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

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ATO Rulings and Activity (Cont.)

TD 2022/D2 - Income tax: deductibility of expenses incurred in establishing and administering an 'employee share scheme'

The ATO has issued draft guidance on determining when expenses incurred in establishing and administering an employee share scheme (ESS) are deductible.

The draft Determination (TD 2022/D2) sets out the Commissioner's proposed view on the deductibility of expenses incurred by an employer to establish and administer an ESS. This expense often includes establishing and administering an employee share trust (EST) that holds shares or rights for employees participating in the ESS.

When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination

The last day for submitting comments is 25 March 2022.

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

Change in loss carry back choice

The ATO has provided information on how to change the loss carry-back choice previously made on a company tax return. The ATO has also explains whether a change will affect the assessments for subsequent income years.

According to the information available on the ATO website, the change needs to be made:

- in the approved form;
- within the time limit for amending a tax assessment; and
- will take effect from the day the original original loss carry back choice was made

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

Draft Luxury Car Tax Determination

The ATO has issued draft guidance on how to determine the principal purpose of a car for luxury car tax (LCT) purposes.

Draft Taxation Luxury Car Tax Determination (LCTD 2022/D1) sets out the Commissioner's preliminary view and practical examples on how to determine the principal purpose of a car for the purposes under the LCT Act.

The term 'principal purpose' is relevant in determining whether a car is a 'luxury car' on which LCT may be payable. LCT is not payable on the supply or importation of cars whose principal purpose is the carriage of goods rather than passengers.

The determination is proposed to apply both before and after its date of issue when finalised. The last day for submitting comments is 25 March 2022. For further details, please refer [here](#).

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ATO Rulings and Activity (Cont.)

Income tax: Division 7A: when will an unpaid present entitlement or amount held on sub-trust become the provision of 'financial accommodation'?

The ATO has issued draft Taxation Determination (TD 2022/D1) in relation to the treatment of unpaid present entitlements (UPE) and sub-trust arrangements under the deemed dividend rules in Division 7A of the ITAA 1936.

This draft determination describes when a private company provides financial accommodation where it is made presently entitled to income of a trust and either:

- that entitlement remains unpaid (an unpaid present entitlement (UPE)), or
- the trustee sets aside an amount from the main trust fund (main trust) and holds it on a new separate trust (sub-trust) for the exclusive benefit of the private company beneficiary.

The ATO's intention for TD 2022/D1 is for it to replace TR 2010/3 and PS LA 2010/4.

When the determination becomes final, it will apply from 1 July 2022.

The due date for submitting comments on the draft determination is 8 April 2022.

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

Taxpayer Alert - Parents benefitting from the trust entitlements of their children over 18 years of age

The ATO has issued a Taxpayer Alert - TA 2022/1 concerning parents benefitting from the trust entitlements of their children over 18 years of age.

This Alert sets out the Commissioner's concerns relating to arrangements in which adult children of the controller of a discretionary trust are made presently entitled to trust income in circumstances where those children are not intended to retain any benefit with respect to that income and the arrangements are predicated on avoiding tax.

The ATO is reviewing trust arrangements where parents enjoy the economic benefit of trust income appointed to their children who are over 18 years of age (Children).

The common feature of the arrangements is that trust income is appointed between members of the family group but in substance it is the parents who exercise control over and enjoy the economic benefit of the income.

In some arrangements, there is an understanding that trust income appointed to the Children will be paid to their parents or otherwise dealt with at their parents' discretion. In others, the trust income appointed to the Children is recorded as applied (with or without their knowledge) to repay amounts owed by them to their parents, being amounts owed in respect of expenses that benefit the children but are properly understood as parental expenses. Examples of these expenses are the costs of their upbringing as a minor or for the kinds of ongoing financial support parents would ordinarily provide their children.

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ATO Rulings and Activity (Cont.)

Taxpayer Alert - Parents benefitting from the trust entitlements of their children over 18 years of age (Cont.)

The ATO is concerned on the arrangements which are more properly explained by the tax outcomes obtained, including the accessing of tax-free thresholds and lower marginal tax rates of family members, rather than ordinary familial considerations. These arrangements, if effective, may have unintended tax consequences or may attract the application of specific or general anti-avoidance provisions.

According to TA 2022/1 the arrangements may display all or most of the following features:

- the trustees of a discretionary trust (Trust), or the directors of a corporate trustee, are either one or two individuals who are the parents in a particular family (Parents)
- income derived by the Trust is used during the year of derivation to meet the expenses of the Parents. These may be recorded as beneficiary loans made from the trustee to the Parents throughout the year
- resolutions of the trustee for the year show one or more of the Children presently entitled to a share of the income of the Trust
- the entitlements are for substantial amounts but do not generally result in the Children's taxable income exceeding the threshold for the top marginal tax rate (\$180,000).
- amounts are not paid to the Children. Rather, at the actual or purported direction of the Children, the entitlements are satisfied by the amounts being either
 - paid to their Parents, or
 - applied against any beneficiary loans owed by the Parents
- the parties contend that the entitlements are paid or applied in this manner because
 - the Children are required to repay their Parents for expenses incurred in relation to their upbringing or while they were minors (for example, school fees, school uniform costs or their share of the family holidays)
 - the Children are required to pay or repay their Parents amounts to meet their share of family costs for the current year in excess of amounts it would reasonably be expected an adult child would meet for their personal living expenses while they remain living at home or otherwise supported to some extent by their Parents (those amounts being, for example, a reasonable rate for their board, lodgings or rent if living away from home, or car expenses), or
 - there is an agreement that the Parents will manage the pooled family members' entitlements from the Trust for the benefit of the family members
- there is no expectation or understanding that the Children's income they derive from sources other than the Trust distributions will be used to either repay their Parents for expenses incurred when they were a minor or pay more than their reasonable share of the household expenditures, or be placed in a pool to be managed by the Parents for the benefit of the family members.

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

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ATO Rulings and Activity (Cont.)

ATO guidance on trust reimbursements agreements

The ATO has issued the following draft guidance products on its views on the application of section 100A of the Income Tax Assessment Act 1936 (ITAA 1936) which deals with trust “reimbursement agreements”.

■ TR 2022/D1 - Income tax: section 100A reimbursement agreements

In this draft Taxation Ruling, the Commissioner’s preliminary views cover the basic requirements for s 100A to apply, including the important carve out for dealings that are “ordinary family or commercial” dealings, and the consequences if s 100A applies.

The four basic requirements for section 100A to apply include the:

- 'Connection requirement' - for section 100A to apply, broadly stated there must be a present entitlement, or deemed present entitlement, of a beneficiary (other than a beneficiary under a legal disability)^[2] to a share of trust income, which has arisen out of, in connection with or as a result of a reimbursement agreement (being an agreement, understanding or arrangement that has the three qualities described in the following dot points).
- 'Benefit to another requirement' - the agreement must provide for the payment of money or transfer of property to, or provision of services or other benefits for, a person other than that beneficiary.
- 'Tax reduction purpose requirement' - a purpose of one or more of the parties to the agreement must be that a person would be liable to pay less income tax for a year of income.
- 'Ordinary dealing exception' - the agreement must not be one that has been entered into in the course of 'ordinary family or commercial dealing'.

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

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ATO Rulings and Activity (Cont.)

ATO guidance on trust reimbursements agreements (Cont.)

■ PCG 2022/D1: Section 100A reimbursement agreements - ATO compliance approach

The use of trusts as business and investment vehicles in Australia is common. The ATO understands the scope of arrangements involving trust distributions for which section 100A of the Income Tax Assessment Act 1936 (ITAA 1936) may be relevant is also broad and therefore recognises the importance of explaining the ATO's compliance approach when considering the application of section 100A.

Broadly, section 100A does not apply to a trust distribution unless there is a related payment or other benefit provided to a person other than the beneficiary. For trust entitlements of beneficiaries under 18 years of age or otherwise under a legal disability, section 100A has no application.

PCG 2022/D1 sets out how the ATO differentiates risk for a range of trust arrangements to which section 100A might apply and how we tailor our engagement. In doing so, it also provides more certainty to taxpayers and their advisers to:

- assess the level of risk regarding your trust distribution arrangements based on the risk framework;
- determine the level of engagement to be expected from the ATO;
- decide whether to contact the ATO to discuss how the risk profile of the arrangement can be reduced.

The purpose of this Guideline is designed to give confidence that, if a taxpayer's circumstances align with the low-risk ratings set out in this Guideline, the ATO will generally not allocate compliance resources to test the tax outcomes of the arrangement.

The Guideline should be read together with, draft Taxation Ruling TR 2022/D1 Income tax: section 100A reimbursement agreements which sets out the ATO's interpretative position on the application of section 100A.

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

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ATO Rulings and Activity (Cont.)

Taxation Administration Excluded Classes of Transactions and Entities for Third Party Reports on Shares and Units Determination 2022.

A draft legislative instrument was released which proposes to exempt certain companies and trusts from reporting specified transactions under the third party reporting regime.

This instrument applies to:

- companies whose shares are listed for quotation in the official list of an Australian financial market
- trustees of a unit trust, and
- trustees of a trust (other than a unit trust) who hold shares in a company or units in a unit trust to which one or more beneficiaries of the trust are absolutely entitled, in relation to transactions in an income year for which the trustee does not give the Commissioner of Taxation an income tax return.

In particular, it proposes to exempt the companies and trusts stated above from reporting on certain transactions which change the composition of assets held by the company or trust, as set out in items 6, 7 and 8 of the table in s 396-55 of sch 1 to the Taxation Administration Act 1953.

It also clarifies that where a company has shares listed for quotation on both an Australian financial market and a foreign financial market, then only the off-market transactions relating to the shares listed for quotation on the official list of an Australian financial market need to be reported.

The draft instrument would apply retrospectively from 1 July 2017 to ensure that those entities which, at the time, wrongly assumed that they did not have to report on these transactions, are now not obliged to report on these excluded transactions.

The closing date for comments is 14 March 2022. For more details, please refer [here](#).

Administrative penalties for electronic sales suppression tools

The ATO has released a law administration practice statement (PS LA 2022/1) in relation to penalties for electronic sales suppression tools (ESSTs).

This Practice Statement provides guidance on the application and remission of administrative penalties for the production, supply, possession and use of an electronic sales suppression tool (ESST), including:

- what is an ESST?
- when an ESST penalty applies
- factors to consider when deciding whether to remit an ESST penalty
- notifying a taxpayer of their penalty.

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

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ATO Rulings and Activity (Cont.)

Class rulings issued:

- Class Ruling [CR 2022/11](#) Huon Aquaculture Group Ltd — scheme of arrangement and special dividend. The ruling applies to the income year beginning 1 July 2021 and ending 30 June 2022.
- Class Ruling [CR 2022/12](#) Victorian Department of Treasury and Finance — early retirement scheme 2021–2022. The ruling applies from 17 February 2022 to 31 December 2022.
- Class Ruling [CR 2022/13](#) Paralympics Australia — medal payments. The ruling applies from 1 July 2021 to 30 June 2024.
- Class Ruling [CR 2022/14](#) Cardno Ltd — return of capital and special dividend. The ruling applies from 1 July 2021 to 30 June 2022.
- Class Ruling [CR 2022/15](#) BHP Group Ltd — unification of the BHP Group dual listed company structure. The ruling applies from 1 July 2021 to 30 June 2022, or any substituted accounting period which includes 31 January 2022 AEDT (Implementation Date) within the period.
- Class Ruling [CR 2022/16](#) BHP Group Plc — exchange of BHP Group Plc shares for BHP Group Ltd shares. The ruling applies from 1 July 2021 to 30 June 2022, or any substituted accounting period which includes 31 January 2022 AEDT (Implementation Date) within the period.
- Class Ruling [CR 2022/17](#) AusNet Services Ltd — employee share scheme — shares disposed of under scheme of arrangement. The ruling applies from 1 July 2018 to 30 June 2022.
- Class Ruling [CR 2022/18](#) Revolver Resources Pty Ltd — exchange of shares for shares in Revolver Resources Holdings Ltd. The ruling applies from 1 July 2021 to 30 June 2022.
- Class Ruling [CR 2022/19](#) Boral Ltd — return of capital. The ruling applies from 1 July 2021 to 30 June 2022.
- **Addendum** to Class Ruling [CR 2013/66](#) - Fringe benefits tax: employers who use the Navman Wireless Australia telematics system for car log book records and for odometer records. It amends CR 2013/66 to reflect enhancements made to the Navman Wireless Australia telematics system, which provides customers with an additional option to use a mobile device application to declare the purpose of their journey.

Other rulings issued:

- Product Ruling [PR 2022/1](#) Tax consequences for Australian policyholders of a Kenforth international insurance policy. The ruling applies from 1 July 2021 only to the specified class of entities that enter into the scheme and are a resident of Australia for tax purposes from 1 July 2021 to 30 June 2024, being its period of application.

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Latest Australian Tax Cases

- **JobKeeper scheme** - The AAT has confirmed that a taxpayer was not eligible for JobKeeper payments in respect of 9 employees who were employed by it in August 2020 but employed by an associated company on 1 July 2020, with the AAT rejecting the taxpayer's argument that the 2 entities were simultaneously carrying on the same business. [North Australian Contracting Pty Ltd v FC of T 2022 ATC - 16 February 2022]
- **Assessable income** - The AAT has held that a taxpayer who entered into a complex commercial arrangement overseas in order to exchange shares of nominal value for valuable shares had a not insignificant purpose of obtaining profit, notwithstanding that the shares received were to be held for an extended period. [Whiddon v FC of T 2022 ATC - 16 February 2022]
- **Assessable income** - The AAT has affirmed a decision of the Commissioner that director's fees, and share issues in lieu of director's fees, that were paid to a taxpayer's consultancy company were assessable income of the taxpayer rather than that of the company. [Mobbs v FC of T 2022 ATC - 10 February 2022]

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