

Monthly Tax Update

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

Legislation Update

The following are the Commonwealth revenue measures that were registered as legislative instruments or regulations recently. Federal Parliament will resume sitting from 11 May 2021 (2021-22 Federal Budget announcement day) and it is expected that more tax related Bills will be introduced to the Parliament.

Draft legislation: FBT exemption for employer-provided retraining and reskilling benefits

Treasury has released exposure draft legislation on the proposed exemption from fringe benefits tax (FBT) for employer-provided retraining and reskilling benefits for redundant, or soon to be redundant employees, where these benefits are not sufficiently connected to their current employment. The draft proposed legislation will give effect to the 2020-21 Federal Budget measure.

The new measures, which will apply to eligible benefits provided on and after 2 October 2020, are designed to remove any disincentive in the FBT system to employers retraining redundant employees to help them transition to new employment opportunities. The exemption will not extend to retraining provided through salary packaging arrangement or costs for which an income tax deduction is specifically denied, including Commonwealth supported places at universities or repayments towards Commonwealth student loans.

Submissions in response to the exposure draft legislation were due by 29 April 2021.

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

Draft determination: exemptions from third party reporting regime

An updated draft legislative instrument has been made to exempt certain entities from providing information to the ATO under the third party reporting regime in Subdiv 396-B of sch 1 to TAA 1953.

The types of affected entity are: companies listed on an Australian financial market, trustees of a unit trust and trustees of other trusts holding shares or units, in relation to transactions not reported in an income tax return.

The exemptions have been extended such that erroneous transactions and subsequent correction transactions as well as off-market transactions relating to shares listed on foreign exchanges are not required to be reported to the ATO.

The instrument, which is proposed to commence retrospectively on 1 July 2017, replaces Legislative Instrument No F2018L00473, registered on 9 April 2018. The updated draft supersedes an earlier draft instrument issued in 2020 (TPRE 2020/D2).

The last day for comments on the updated draft instrument is 31 May 2021.

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

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Legislation Update (Cont.)

Regulations made to update information exchange countries

To reflect the updated list of countries with which Australia has an exchange of information agreement, the Taxation Administration Regulations 2017 have been updated (Taxation Administration Amendment (Updating the List of Exchange of Information Countries) Regulations 2021) (the Regulations) to add 9 jurisdictions and remove one jurisdiction from the list of foreign countries and foreign territories, which are "information exchange countries".

The list of "information exchange countries" is relevant for calculating the amount to be withheld by the trustee of a withholding managed investment trust (MIT) or custodian, or by another entity, from a fund payment to a foreign resident. The Regulations amend s 34 of the Taxation Administration Regulations 2017 to:

- add Dominican Republic, Ecuador, El Salvador, Hong Kong, Jamaica, Kuwait, Morocco, Republic of North Macedonia and Serbia to the list of information exchange countries for the purpose of s 12-385(4) of sch 1 to the *Taxation Administration Act 1953*, and
- remove Kenya from the list of "information exchange countries".

The Regulations ensure that, if a fund payment is made to a recipient with the address or place of payment in a country or a territory added by the regulations as an "information exchange country", the lower MIT income withholding tax rate of 15%, under subdiv 840-M of ITAA 1997, would generally apply to those payments. Otherwise, the fund payment is subject to the default withholding tax rate of 30%.

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

COVID-19 Stimulus Packages Updates

JobMaker Hiring Credit reporting obligations amended

A legislative instrument amending the JobMaker Hiring Credit scheme reporting obligations will allow more employers to access the scheme.

The instrument amends the JobMaker Hiring Credit Reporting Obligations Instrument 2020 (F2020L01535) (primary instrument) to provide an alternative mechanism to meet reporting requirements for the scheme. The alternative option will only be available where the Commissioner is satisfied that an employer is unable to provide the information required in s 7(2) of the primary instrument due to single touch payroll (STP) software constraints.

Employers eligible for the alternative option will be required to report employee information that would otherwise be reported through STP using an additional form within ATO online services.

The instrument also clarifies that an employer can update its financial institution details after a JobMaker claim period has ended.

The amendments apply to JobMaker periods commencing on or after 7 October 2020.

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

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OECD Updates

OECD invites public input on proposed changes to Commentaries in the OECD Model Tax Convention on Article 9 and on related articles

Article 9 of the OECD Model Tax Convention deals with the taxation of transactions between associated enterprises. Working Party 1 on Tax Conventions and Related Questions (which is the subgroup of the OECD Committee on Fiscal Affairs in charge of the Model Tax Convention), in consultation with Working Party 6 and the Forum on Tax Administration's MAP Forum, has recently undertaken work on the Commentary on Article 9 to clarify its application, especially as it relates to domestic laws on interest deductibility. This work is closely linked to the report Transfer Pricing Guidance on Financial Transactions published on 11 February 2020. Please refer [here](#) for a copy of the report.

This public discussion draft includes proposals for changes to the Commentary on Article 9 and other related articles. The changes put forward in this discussion draft are expected to be included in the next update to the OECD Model Tax Convention. Please refer [here](#) for details on the proposed changes included in the Public Consultation Document.

Comments on the discussion draft should be sent by email to taxtreaties@oecd.org before 28 May 2021. These comments will be examined at the following meeting of Working Party 1.

COVID-19: OECD reports on tax administration

The OECD has released the following documents:

- Tax Administration: Digital Resilience in the COVID-19 Environment provides an overview of the impact of digitalisation of tax administration in dealing with the COVID-19 pandemic. It focuses on taxpayer services, compliance risk management, remote working, IT systems and provides support for the wider government. Please refer [here](#) for a copy of the OECD document.
- Tax Policy Reforms 2021: Special edition on Tax Policy during the COVID-19 Pandemic provides an overview of the tax measures introduced amid the COVID-19 pandemic across almost 70 jurisdictions, including all OECD and G20 countries and 21 additional members of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting. It offers guidance on the adaptation of tax policy responses to address short-term challenges. It also sets out future work that the OECD will undertake to help countries reassess their long term tax and spending policies. Please refer [here](#) for a copy of the tax policy.

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ATO Rulings and Activity

Reportable tax position schedule instructions 2021

The ATO has published the Reportable tax position (RTP) schedule instructions 2021. There have been significant changes made to the instructions, including:

- simplified Category B
- additional and altered Category C questions
- guidance on the RTP schedule expansion to large private companies.

The requirement to lodge has been extended to Australian owned private companies that have been notified by the ATO that they must lodge the schedule with their 2021 income tax return. All other public companies or foreign-owned companies must continue to self-assess their obligation to lodge the RTP schedule against the ATO's thresholds

The form is required to be lodged online as part of company's income tax return.

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

Draft GST determination on certain beds and mattresses

The ATO has issued a draft GST determination ([GSTD 2021/D1](#)) which discusses when the supply of an adjustable bed, pressure management mattress, pressure management overlay or spare part is GST-free under ss 38-45(1) and 38-45(2) of the GST Act.

Draft GST Determination GSTD 2021/D1 provides guidance on the GST treatment for an adjustable bed, pressure management mattress or pressure management overlay. A medical aid or appliance covered by sch 3 of the GST Act is GST-free if it is specifically designed for people with an illness or disability and not widely used by people without an illness or disability.

The draft determination sets out an essential character test to determine whether a bed, mattress or overlay and associated spare parts are GST-free by examining its basic nature, composition, function, and other factors.

The ATO is aware of the practical difficulties a supplier may encounter in determining the extent to which the item supplied is used by people without an illness or disability and has outlined a practical compliance approach in the draft Determination. When finalised, the determination is proposed to apply both before and after its date of issue. It 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.

Comments on the draft is welcome and should be made by 21 May 2021.

The closing date for comments is 21 May 2021.

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ATO Rulings and Activity (Cont.)

Practice statement on ATO discretion to retain refunds

The ATO has finalised guidance on how they will exercise the discretion to retain tax refunds under amendments made in sch 4 of the Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020 (the Amending Act).

Law Administration Practice Statement [PS LA 2021/2](#) outlines the administrative approach for the Commissioner's extended discretion to retain a refund where a taxpayer has an outstanding notification that is required under a taxation law and may affect the amount of the refund. This discretion was previously limited to outstanding notifications under business activity statement (BAS) and petroleum resource rent tax (PRRT) provisions.

The Amending Act commenced on 1 April 2020 and does not limit the application of the extension to the Commissioner's discretion to retain refunds.

The guidance provides that the Commissioner will only exercise this discretion where there are reasonable grounds to believe a taxpayer is engaging in high-risk behaviour including, but not limited to, phoenix-type activities. While not required by law, ATO officers are expected to issue written communication notifying a taxpayer of the amount retained and outstanding notifications to be lodged.

[PS LA 2011/22](#) and [PS LA 2012/6](#) will continue to apply in relation to the Commissioner's discretion to retain a refund under BAS and PRRT provisions or where verification of information in a notification is required.

The date of effect for the guidance is 22 April 2021.

Superannuation update Key superannuation thresholds and rates

The ATO has published key superannuation rates and thresholds for the 2021-22 income year.

The following key thresholds apply for the forthcoming financial year commencing from 1 July 2021:

- the concessional contributions cap is AUD 27,500 (up from AUD 25,000)
- the non-concessional contributions cap is AUD 110,000 (up from AUD 100,000)
- the capital gains tax cap amount for non-concessional contributions is AUD 1.615 million (up from AUD 1.565 million)
- the Division 293 tax threshold amount is AUD 250,000
- the maximum super contribution base is AUD 58,920 per quarter
- the low-rate superannuation benefit cap is AUD 225,000
- the general transfer balance cap is AUD 1.7 million (up from AUD 1.6 million)
- the defined benefit income cap is AUD 106,250
- the employment termination payment (ETP) cap for life benefit termination payments and death benefit termination payments is \$225,000, and
- the tax-free part of genuine redundancy payments and early retirement scheme payments is AUD 11,341, and for each complete year of service is AUD 5,672.

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

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ATO Rulings and Activity (Cont.)

ATO data-matching program — passenger movements

The ATO will access data from the Department of Home Affairs on passenger movements from 2016–17 to 2022–23.

The data will be electronically matched with certain sections of ATO data holdings to identify taxpayers that can be provided with tailored information to help them meet their tax and superannuation obligations, or to ensure taxation and superannuation compliance.

The data items will include:

- full name
- personal identifier (PID)
- date of birth
- gender
- arrival date
- departure date
- passport information, and
- status types (visa status, residency, lawful, Australian citizen)

The objectives of the passenger movements data-matching program are to:

- promote voluntary compliance and increase community confidence in the integrity of the tax and superannuation systems
- improve knowledge of the overall level of identity and residency compliance risks, including registration, lodgment, reporting and payment obligations
- gain insights from the data to help develop and implement administrative strategies to improve voluntary compliance, which may include educational or compliance activities
- identify ineligible tax and superannuation claims
- refine existing risk detection models and treatment systems to identify and educate individuals and businesses who may be failing to meet their registration, lodgment and payment obligations and help them comply, and
- identify potentially new or emerging non-compliance, and entities controlling or exploiting those methodologies.

A protocol document describing the program has been developed in consultation with the Australian Information Commissioner's Office.

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

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ATO Rulings and Activity (Cont.)

Class rulings issued:

- Class Ruling [CR 2021/27](#) - Macquarie Group Ltd — Macquarie Group Capital Notes 5. The ruling applies from 1 July 2020 to 30 June 2031.
- Class Ruling [CR 2021/28](#) - RXP Services Ltd — scheme of arrangement and special dividend. The ruling applies from 1 July 2020 to 30 June 2021.
- Class Ruling [CR 2021/29](#) - Commonwealth Bank of Australia — CommBank PERLS XIII Capital Notes. The ruling applies from 1 July 2020 to 30 June 2030.
- Class Ruling [CR 2021/30](#) - Navman Wireless Australia Pty Ltd — use of FTC Manager for fuel tax credits. The ruling applies to taxable fuel acquired from 1 July 2020 to 30 June 2022.
- Class Ruling [CR 2021/31](#) - The Citadel Group Ltd — scheme of arrangement and payment of special dividend. The ruling applies from 1 June 2020 to 30 June 2021.
- Class Ruling [CR 2021/32](#) - Ampol Ltd — off-market share buy-back. The ruling applies from 1 July 2020 to 30 June 2021.
- Class Ruling [CR 2021/33](#) - Red Hot Australia HoldCo Pty Ltd — scrip for scrip roll-over. The ruling applies from 1 July 2020 to 30 June 2021.
- Addendum to Class Ruling [CR 2015/19A1](#) - Income tax: grants provided by the Australian Sports Commission under dAIS. It amends [CR 2015/19](#) to reflect amendments to the dAIS Guideline and extension of the application of the ruling.

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Latest Australian Tax Cases

- **R&D activities** - The Full Federal Court has affirmed a decision of the that a series of activities undertaken by a taxpayer with the aim of making the mining, processing and handling of highly banded coal seams economically viable were not eligible to be core R&D activities or supporting R&D activities.[Coal of Queensland Pty Ltd v Innovation and Science Australia 2021 ATC 23 April 2021]
- **Tax agents** - The AAT has upheld the termination of a tax agent's registration after finding that he had breached numerous provisions of the Code of Professional Conduct but reduced the period of time he was prohibited from reapplying for registration in line with existing case law. [Norman v Tax Practitioners Board 2021 ATC - 13 April 2021]
- **Land tax (Vic)** - The Victorian Supreme Court has overturned a land tax assessment that taxed land owned by the University of Melbourne used to provide student accommodation and services. [University of Melbourne v Commissioner of State Revenue (Vic) 2021 ATC - 1 April 2021]
- **R&D activities** - The AAT has set aside a decision of Innovation and Science Australia and held that the applicant's activities concerning the application of pyrolysis technology to the processing of municipal solid waste were core R&D activities or supporting R&D activities within the meaning of s 355-25 or 355-30 of the Income Tax Assessment Act 1997. [PKWK v Innovation and Science Australia 2021 ATC – 24 March 2021]
- **Promoter penalties** - The Federal Court has imposed substantial penalties under s 290-50 of Sch 1 to the Taxation Administration Act 1953 on the promoters of the schemes dealt with in the decision reported at 2020 ATC; [2020] FCA 1322 (in which Rares J held that all 3 respondents were promoters of tax exploitation schemes involving the sale of interests in carbon credits in one or more of the 2009 to 2012 income years). [FC of T v Rowntree & Ors 2021 ATC - 12 March 2021]
- **Asset betterment assessments** - The Federal Court has allowed the taxpayers' appeal from the AAT decision of NGFZ v FC of T [2019] AATA 5410 after agreeing that the AAT failed to advert to one of the taxpayers' central arguments as to why in each year the amount in the amended assessment was excessive, which amounted to a failure to undertake its statutory review function. [Le & Anor v FC of T 2021 ATC – 30 March 2021]
- **JobKeeper** - The Full Federal Court has dismissed the Commissioner's appeal from a decision of the AAT reported at 2020 ATC and allowed a sole trader with a backdated ABN to keep his JobKeeper payments. [FC of T v Apted 2021 ATC - 24 March 2021]