

Monthly Tax Update

In this edition of the Monthly Tax Update for September 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

Since our last update, the following Commonwealth tax legislation were introduced into Parliament and currently awaits assent:

Paid Parental Leave Amendment (COVID-19 Work Test) Bill 2021

A Bill containing changes to the Paid Parental Leave scheme has completed its passage through parliament and awaits assent. The Bill amends the Paid Parental Leave Act 2010 to provide that a person in receipt of a COVID-19 Australian Government payment or the COVID-19 disaster payment will be considered to be performing qualifying work for the purpose of the paid parental leave work test.

The amendments apply from the day after assent.

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

Treasury Laws Amendment (COVID-19 Economic Response No 2) Bill 2021

The Bill was introduced into the House of Representatives on 3 August 2021 and since enacted, amends the:

- Income Tax Assessment Act 1997 to require a fund, authority or institution to be a registered charity or an Australian government agency, or be operated by a registered charity or an Australian government agency, to be entitled to a deductible gift recipient endorsement;
- Income Tax Assessment Act 1936 and Income Tax Assessment Act 1997 to remove the concessional tax treatment for offshore banking units (OBU); and
- Income Tax Assessment Act 1936 to: remove the ability of the minister to issue determinations or declarations that a person or entity is an OBU; and remove the withholding tax exemption for OBUs for interest (including interest consisting of gold) paid on or after 1 January 2024.

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

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Legislation Update (Cont.)

Treasury Laws Amendment (2021 Measures No 6) Bill 2021

The Treasury Laws Amendment (2021 Measures No 6) Bill 2021 has completed its passage through parliament and awaits assent. Once enacted, it will amend the:

- Income Tax Assessment Act 1997 to:
 - make refunds of large-scale generation shortfall charges exempt from income tax; and
 - remove the requirement for superannuation trustees to provide an actuarial certificate when calculating exempt current pension income using the proportionate method, where all members of the fund are fully in the retirement phase for all of the income year;
- Competition and Consumer Act 2010 to:
 - increase the maximum amount of penalty units that can be included in regulations that prescribe an industry code from 300 to 600 penalty units;
 - clarify that if regulations prescribe an industry code, the industry code may confer on a person or body functions and powers in relation to the code.
- Family Law Act 1975 and Taxation Administration Act 1953 to:
 - create an information sharing mechanism to allow the family law courts to access certain superannuation information held by the Commissioner of Taxation for the purpose of permitting family law proceedings.

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

Other Updates

Treasury, Reserve Bank, APRA, ASIC release corporate plans

Treasury, the Reserve Bank of Australia (RBA), the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) have all released corporate plans for the 2021-22 financial year.

Further information on the corporate plans can be assessed on the respective website, as below:

- Treasury Corporate Plan 2021-22 [website](#)
- RBA 2021-22 Corporate Plan [website](#)
- ASIC 2021-25 Corporate Plan [website](#)
- APRA 2021-25 Corporate Plan [website](#)

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Other Updates (Cont.)

Committee report on tax treatment of Employee Share Schemes

The House of Representatives Standing Committee on Tax and Revenue has presented its report on the tax treatment of Employee Share Schemes (ESS).

The report makes 18 recommendations to support the uptake and use of ESS in Australia. The Committee's overarching recommendation is that ESS be treated as capital for tax purposes, and that a tax liability would arise on the disposal of the assets granted, using the current capital gains tax regime.

Other recommendations by the Committee include:

- regulatory relief to reduce disclosure requirements in certain situations
- enhanced collection and sharing of data
- a public awareness program
- an investigation by the Productivity Commission to identify how Australia's existing arrangements can be improved, and
- proposed amendments to Tax and Superannuation Laws Amendment (Employee Share Schemes) Act 2015 and the ITAA 1997 to simplify the complicated and restrictive current tax arrangements and support more individuals to access tax concessions for ESS.

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

Draft legislation for Corporate Collective Investment Vehicles regime

The government has released for public consultation revised exposure draft legislation (with explanatory materials) that implements the tax and regulatory components of the Corporate Collective Investment Vehicle (CCIV) regime.

A CCIV is an investment vehicle with a corporate structure, designed to be an alternative to a trust-based managed investment scheme. A single CCIV can offer multiple products and investment strategies within the same vehicle.

The proposed new draft legislation includes:

- new measures in the Corporations Act 2001 containing the core provisions outlining the establishment of CCIVs and their operational and regulatory requirements
- amendments to the income tax law, which align the tax treatment of CCIVs to the existing treatment of attribution managed investment trusts (providing investors with the benefits of flow-through taxation), and
- amendments to other legislation to support the implementation of CCIVs (such as amendments to the Australian Securities and Investments Commission Act 2001 and the Personal Property Securities Act 2009).

Interested parties are invited to submit responses until 24 September 2021.

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

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ATO Rulings and Activity

ATO consultation on changes to LIBOR and other interest rate benchmarks

The Australian Taxation Office (ATO) is undertaking consultation to seek input for proposed high level guidance on common tax implications of changes that will be required to certain financial instruments as a result of the transition of various interest rate benchmarks, including the London Inter-bank Offered Rate (LIBOR), the Euro Inter-bank Offered Rate (EURIBOR), the United States of America's Effective Federal Funds Rate and other Inter-bank Offered Rate (IBOR) benchmarks, to alternative risk-free rates (RFRs).

Although the change is of particular relevance to financial institutions, taxpayers outside the financial sector may also be impacted as LIBOR is used to determine the interest rate for a large number of loans, derivatives and other financial instruments.

The paper notes that the tax consequences of IBOR reform will largely depend on the legal effect of any amendments made to legacy contracts in response to IBOR reform and specifically whether the relevant amendments cause a mere variation or rescission to the existing legal contract. In order to illustrate some of the more common tax issues that may arise as a result of changes made to financial arrangements driven by IBOR, the principles discussed in this discussion paper are provided in a series of examples. Comments in response to the discussion paper are due by 10 September 2021.

A&A has previously published two articles in respect of reforms to IBOR. For further information, please refer to the respective article below:

- [Preparing for the reforms to LIBOR-type interest rate benchmarks](#); and
- [Goodbye LIBOR-type interest rate benchmarks](#).

Practice statement on default assessment penalties updated

The ATO has updated its practice statement on the administration of default assessment penalties.

The updates to Law Administration Practice Statement PS LA 2014/4 reflect the ATO's new format for practice statements and do not contain any policy changes.

PS LA 2014/4 was previously titled "Administration of the penalty imposed under subsection 284 75(3) of Schedule 1 to the Taxation Administration Act 1953".

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

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ATO Rulings and Activity (Cont.)

Updated ATO tax residency guidance for individuals

The ATO has updated its tax residency guidance on 10 August 2021. Under the updated guidance, unless there are specific circumstances preventing a taxpayer leaving Australia and returning to their usual overseas home, they will likely have become Australian tax residents.

The following are factors the ATO has indicated would be considered in a determination of whether or not a taxpayer has been able to leave Australia:

- Government restrictions preventing you from leaving Australia or entering your usual country of residence.
- A lack of commercial flights available to your home country.

Proof of application of a declined travel exemption to leave Australia or enter a taxpayer's home country may, for example, be important to substantiate an inability to leave.

Similarly, proof of flight cancellations, or evidence that flights into a certain country simply are not available may help demonstrate an inability to leave.

The ATO has not indicated whether consideration would be given to the heightened costs of international flights during the COVID-19 pandemic.

Such costs may be prohibitively expensive for an individual, thereby preventing them from leaving Australia without suffering serious economic hardship.

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

Ruling on foreign employment income exemption amended

The ATO has issued an addendum to Taxation Ruling TR 2013/7 dealing with the interpretation of s 23AG(1AA) of ITAA 1936 on foreign employment income exemption.

The addendum amends TR 2013/7 to reflect that para 23AG(1AA)(a) of ITAA 1936 does not apply where the person's employer is an Australian government agency. Amendments are also made to reflect changes to website documentation and linkages and updates to case citations and other content issues.

The addendum applies from 25 August 2021.

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

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ATO Rulings and Activity (Cont.)

ATO released guidance on deductions for employee travel expenses

The ATO has finalised guidance explaining when an employee can deduct travel expenses for income tax and fringe benefit tax (FBT) purposes.

■ Taxation Ruling TR 2021/4

Taxation Ruling TR 2021/4 considers the income tax and fringe benefits tax implications of food and drink expenses incurred by employees while travelling for work. The Taxation Ruling also sets out the criteria for when an allowance is a travel allowance or a living-away-from-home allowance (LAFHA) benefit.

The final ruling provides further guidance on circumstances where the period an employee is away from home is unexpectedly extended and on determining whether an employee has relocated.

The ruling applies both before and after its date of issue. The Commissioner will have regard to any conflict between TR 2021/4 and the earlier draft rulings TR 2017/D6 and TR 2021/D1 in deciding whether to apply compliance resources for income years to which the earlier draft rulings applied. The ATO has published a compendium on the feedback it received.

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

■ Practical Compliance Guideline PCG 2021/3

Practical Compliance Guideline PCG 2021/3 outlines the ATO's compliance approach to determine if employees in certain circumstances are travelling on work or living at a location away from their normal residence.

PCG 2021/3 is intended to provide practical guidance to assist employers with determining whether an allowance is paid for travelling on work or living at a location and also whether amounts reimbursed or paid by an employer would have been deductible to the employee had they purchased the goods or services.

PCG 2021/3 does not apply to employees who work on a fly-in fly-out or drive-in drive-out basis. These employees are instead specifically addressed under ss 31A and 31E of the Fringe Benefits Tax Assessment Act 1986. The final guideline also clarifies that the number of days an employee is away for work purposes includes both the day of departure from the employee's residence and the day of departure from the work location.

The guideline finalises draft PCG 2021/D1 and applies both before and after its date of issue. The ATO has published a compendium on the feedback it received.

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

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ATO Rulings and Activity (Cont.)

Class rulings issued:

- Class Ruling [CR 2021/56](#) Aristocrat Leisure Ltd — non-executive director rights plan. The ruling applies to entities that enter into the scheme during 1 September 2021 to 30 September 2024.
- Class Ruling [CR 2021/57](#) - Primewest Group stapled securities — scrip for scrip rollover. The ruling applies from 1 July 2020 to 30 June 2022.
- Class Ruling [CR 2021/58](#) - Tennis Australia Ltd — payments to tennis officials. The ruling applies from 1 July 2020 to 30 June 2025.
- Addendum to Class Ruling [CR 2021/49A1](#) Cassini Resources Ltd — demerger and scrip for scrip rollover. It amends [CR 2021/49](#) to include 2 examples in Appendix 1 of the ruling

Latest Australian Tax Cases

- **Goods and Services Tax** - The Full Federal Court has allowed the Commissioner's appeal against the decision reported as *Crown Melbourne Ltd & Anor v FC of T 2020 ATC*, finding that commissions and rebates paid to junket tour operators by the taxpayer casinos, or by the junket tour operators to the casinos, were not consideration for or in connection with gambling supplies or monetary prizes and thus were not to be taken into account in calculating the global GST amounts under s 126-10 of the A New Tax System (Goods and Services Tax) Act 1999. [*FC of T v Burswood Nominees Ltd as trustee for Burswood Property Trust & Anor 2021 ATC - 20 August 2021*]
- **Objection to ruling withdrawn** - In proceedings relating to same ruling applicant in *Allen v FC of T 2021 ATC*, the AAT has remitted the matter to the Commissioner to request that the relevant taxpayer (a discretionary trust) make an application for another private ruling as material information wasn't considered by the Commissioner when determining the taxpayer's objection. [*Allzams Trust v FC of T 2021 ATC - 6 August 2021*]
- **Rental property business** - The AAT has partially allowed an objection to a private ruling issued by the Commissioner, finding that the taxpayer was carrying on a business of renting properties during 2 of the 5 tax years under consideration. [*Allen v FC of T 2021 ATC - 6 August 2021*]
- **COVID-19; cash flow boost** - A taxpayer has been held ineligible to receive the first cash flow boost payment as it had not entered into a voluntary withholding agreement with a contractor in the approved form and hence did not meet the requirement that it was obliged to withhold PAYG amounts from payments to the contractor. [*S & L Consulting Pty Ltd v FC of T 2021 ATC - 5 August 2021*]

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Latest Australian Tax Cases (Cont.)

- **FBT; remote housing benefits** - The AAT has found that money paid, declared and assessed as salary over 7 income tax years was in fact salary, after rejecting the taxpayer's belated claims that part of his remuneration should have been treated as either a remote area housing benefit or as expense payment benefits. [Hartley v FC of T 2021 ATC - 2 August 2021]
- **Deductions/trusts** - The Full Federal Court has unanimously dismissed the taxpayers' appeal from the Federal Court decision of *Advanced Holdings Pty Ltd as trustee for The Demian Trust & Ors v FC of T 2020 ATC*; [2020] FCA 1479 (as well as the appeal from the associated penalties decision), affirming that the first taxpayer, Advanced Holdings Pty Ltd was assessable in its own right on 100% of the net income of the Lewisham Estate Trust for the relevant year. [Advanced Holdings Pty Ltd as trustee for The Demian Trust & Ors v FC of T 2021 ATC - 4 August 2021]
- **Employment termination payment** - The AAT has held that a payment received in settlement of a claim for deceptive conduct and wrongful dismissal should be taxed as an employment termination payment after rejecting the taxpayer's claim that the payment was compensation for destruction of earning capacity and therefore capital in nature. [Stark v FC of T 2021 ATC - 29 July 2021]
- **COVID-19; JobKeeper** - The AAT has held that a taxpayer that was incorporated on 16 June 2020 and acquired an existing business on 1 August 2020 was not eligible for JobKeeper payments in respect of the employees of the acquired business under the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020. [Cessnock Holden Central Pty Ltd v FC of T 2021 ATC - 29 August 2021]