

December 2023

Monthly Tax Update

In this final edition of Andersen in Australia's Monthly Tax Update for 2023, we provide recent legislative updates and outline the latest developments in the areas of corporate tax, individual tax, indirect tax and international tax. We also examine the ATO's recent activities, publications, rulings and other guidelines and discuss the latest Australian tax cases.

Legislation Update

The following Bills have been introduced to Federal Parliament since our last update:

- [Administrative Review Tribunal Bill 2023](#)
- [Administrative Review Tribunal \(Consequential and Transitional Provisions No. 1\) Bill 2023](#)

The Federal Government has introduced a pair of Bills to Parliament that seeks to abolish the Administrative Appeals Tribunal (AAT) and establish the Administrative Review Tribunal (ART).

The two pieces of legislation, the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, will implement the Senate Legal and Constitutional Affairs Committee's recommendations to abolish the AAT and establish a new federal administrative review body.

The reform to Australia's system of administrative review aims to:

- implement a transparent and merit-based appointments process,
- appoint additional members to address existing backlogs,
- implement sustainable funding arrangements,
- implement a single, updated case management system to address critical business risks,
- introduce procedural efficiencies and process improvements,
- implement support services and emphasise early resolution where possible.

■ [Administrative Review Tribunal Bill 2023](#)

This Bill introduces amendments to replace the Administrative Appeals Tribunal (AAT) with a new federal administrative review body named the Administrative Review Tribunal. The Bill sets out the new Tribunal's objectives. The Tribunal would be required to pursue the objective of providing administrative review that:

- is fair and just,
- resolves applications in a timely manner, with as little formality and expense as is consistent with reaching the correct or preferable decision,
- is accessible and responds to the diverse needs of parties,
- improves the transparency and quality of government decision-making,
- promotes public trust and confidence in the Tribunal.

December 2023

Monthly Tax Update

The Administrative Review Tribunal Bill 2023 will establish the new Tribunal which will be responsible for conducting merits review of administrative decisions of the government, including that of the Commissioner of Taxation. A transparent merit-based appointment process for the Tribunal's members, and a new guidance and appeals panel to escalate systemic issues are among the features of the new Tribunal.

"Taxation and Business" will be one of eight jurisdictional areas of the Tribunal. Each jurisdictional area will be led by a President or a Non-Judicial Deputy President. Judicial Deputy Presidents will be appointed to the Tribunal from the Federal Court on a sessional basis, which is intended to benefit decision-making in legally complex or sensitive matters, and strengthen the link between the Tribunal and appellate courts.

Legislation Update (Cont.)

■ Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Bill 2023

The Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Bill 2023 accompanies the principal Bill and introduces numerous consequential amendments to over 100 Commonwealth Acts, including various tax and superannuation acts, particularly Div 4 of Pt IVC of the *Taxation Administration Act 1953*. The Bill includes amendments to ensure a range of the existing special rules for review of taxation matters are retained. It also repeals the *Administrative Appeals Tribunal Act 1975*.

It is intended the Tribunal will commence operations as soon as practicable in 2024, depending on the passage of the amending legislation. The government previously announced its intention to abolish the AAT on 16 December 2022. The proposed legislation is a result of significant consultation undertaken with stakeholders, including an expert advisory group which was chaired by former High Court Justice, Patrick Keane AC KC.

Other Legislation Update

The following Bills before Parliament have been referred to the Senate Economics Legislation Committee for review:

■ Treasury Laws Amendment (Making Multinationals Pay Their Fair Share – Integrity and Transparency) Bill 2023

The Treasury Laws Amendment (Making Multinationals Pay Their Fair Share – Integrity and Transparency) Bill 2023 was introduced into Parliament on 22 June 2023 and is currently before the Senate.

The government originally referred the Bill to the Senate Committee on 22 June 2023 which subsequently published its report on 22 September 2023. Please refer [here](#) for the report.

December 2023

Monthly Tax Update

The Senate recommended amendments to the Bill which ensured that the “new” thin capitalisation rules operated appropriately. Please refer to our monthly tax update for November for a discussion of the amendments. The Senate amendments were released as an exposure draft for public consultation in October 2023. Following the consultation in October the proposed amendments were incorporated into the final Bill which has now been returned to the Senate Committee for further review. The Committee is due to present its report by 5 February 2024. Both Houses of Parliament resume sitting on 6 February 2024.

The finalised amendments are generally favourable and include:

- deferring the start date of the debt deduction creation rules for all arrangements until 1 July 2024,
- limiting the scope of the debt deduction creation rules to ensure legitimate commercial arrangements are not unduly impacted,
- allowing companies, partnerships, and unit trusts to transfer their excess Tax EBITDA to certain eligible holding entities, and
- broadening the scope of the third party debt test by extending various exemptions.

Legislation Update (Cont.)

Other Legislation Update (Cont.)

■ Treasury Laws Amendment (Tax Accountability and Fairness) Bill

The Bill contains the measures that were announced in response to the PwC tax leaks scandal and caps the deductions available to entities undertaking offshore gas projects for the purposes of calculating their petroleum resource rent tax (PRRT) liabilities.

Schedule 1 to the Bill will amend the *Taxation Administration Act 1953* (TAA 1953) with respect to the promoter penalty provisions to increase the time the ATO has to bring an application for civil penalty proceedings to the Federal Court, increase the maximum penalties applicable, and expand the application of the promoter penalty laws.

Schedule 2 to the Bill will amend the TAA 1953 to extend whistleblower protections to eligible whistleblowers who make disclosures to the Tax Practitioners Board (the TPB), as well as disclosures to certain other entities who may support or assist the whistleblower. It will also reverse the burden of proof for certain claims of protection under Pt IVD of the TAA 1953.

Schedule 3 to the Bill will implement the second tranche of amendments arising from the TPB Review. The proposed amendments will improve the TPB register and boost the TPB's investigative powers. Schedule 3 proposes to increase the information published on the TPB register, remove the 12-month time limit for certain information to remain on the register, extend the timeframe that the TPB has to conduct an investigation, and better target the TPB's delegation powers.

December 2023

Monthly Tax Update

Legislation Update (Cont.)

Other Legislation Update (Cont.)

■ Treasury Laws Amendment (Tax Accountability and Fairness) Bill (Cont.)

Schedules 1, 2 and 3 will commence on the later of 1 July 2024 or the first 1 January, 1 April, 1 July or 1 October after the date of Royal Assent. The expanded timeframe for TPB investigations will apply to investigations that are in progress at commencement where a decision has not yet been made or taken to have been made.

Schedule 4 to the Bill will amend the TAA 1953 and the TAS Act to allow taxation officers and TPB officials to share protected information with Treasury concerning misconduct arising out of breaches or suspected breaches of confidence by intermediaries engaging with the Commonwealth. It will also allow taxation officers and TPB officials to share protected information with prescribed disciplinary bodies of professional organisations to enable them to perform their disciplinary functions.

Schedule 4 will commence on the day after Royal Assent. It will apply in relation to records and disclosures of information made on or after commencement, whether the information was obtained before, on or after the date of commencement.

Schedule 5 to the Bill will amend the *Petroleum Resource Rent Tax Assessment Act 1987* to effectively cap the deductions that can be claimed by taxpayers in a particular income year with respect to certain offshore projects. The proposed amendments will result in taxpayers within the offshore LNG industry having their tax liabilities brought forward.

Schedule 5 will commence on the first 1 January, 1 April, 1 July or 1 October after the date of Royal Assent.

■ Digital ID Bill 2023

The government has introduced legislation to put in place a framework to create an economy-wide Digital ID system in Australia. The proposed amendments will also allow the Commissioner of Taxation to offer accredited identity provider services and accredited attribute provider services.

A Digital ID is a secure, convenient and voluntary way to verify your identity online by referencing existing government-held identity documents without having to hand over any physical information. A Digital ID is not a card or a unique number.

The existing, unlegislated Australian Government Digital ID System (myGovID) is well established with more than 10.5 million myGovIDs. The current system can be used to access more than 130 government services. However, the current system has limitations. For example, myGovID can only be used to access government services. Private sector providers cannot currently use myGovID to verify their customers.

December 2023

Monthly Tax Update

Legislation Update (Cont.)

Other Legislation Update (Cont.)

The Digital ID Bill provides a legislative basis for broader use of Digital IDs via a phased expansion of the Australian Government Digital ID System to include state, territory and private sector entities who choose to participate. Consistent with the phased approach to expansion, the Bill provides for the Digital ID Regulator to manage arrangements for other matters including statutory contracts between participants, liability and charging for providers and connected services.

The Australian Government Digital ID System is based on the principle that people can choose which Digital ID provider they use to access any website, app or other service that is connected to the system. In the legislation this is called the interoperability obligation. The Minister will however have discretion to exempt some government services from this obligation and only allow access through a single Digital ID provider. Exemptions will be granted in circumstances where there is potential for identity fraud to have a significant impact on the financial circumstances of individuals or businesses in Australia.

■ Digital ID (Transitional and Consequential Provisions) Bill 2023

The Digital ID (Transitional and Consequential Provisions) Bill 2023 has also been introduced and includes consequential amendments to ensure that the principal Bill operates as intended.

Consequential amendments are proposed to the *Taxation Administration Act 1953* to give the Commissioner powers that allow the Commissioner to offer accredited identity provider services and accredited attribute provider services to non-Commonwealth participants in the Australian Government Digital ID System.

The *Administrative Decisions (Judicial Review) Act 1977* will also be amended to exclude from judicial review decisions made by the Digital ID Regulator under the principal Bill with respect to the security assessment of foreign entities provided by the Australian Security Intelligence Organisation (ASIO). This will mean that decisions made to protect Australia's national security cannot be challenged under that Act.

Since the last update, the following tax and superannuation related Bills have completed their passage through Federal Parliament and have received Royal Assent:

■ Treasury Laws Amendment (2023 Measures No 1) Act 2023

Treasury Laws Amendment (2023 Measures No 1) Act 2023 contains measures:

- to implement the recommendations resulting from the Independent Review of the Tax Practitioners Board;
- to align the tax treatment of off-market share buy-backs undertaken by listed public companies with the tax treatment of on-market share buy-backs. It will also amend the income tax law in respect of selective share cancellations to ensure alignment of tax treatment across capital management activities for listed public companies, and
- to prevent certain distributions that are funded by capital raisings from being frankable. This ensures that arrangements cannot be put in place to release franking credits that would otherwise remain unused particularly where the arrangements do not significantly change the financial position of the entity

November 2023

Monthly Tax Update

The Bill was amended in the Senate by the Government and the Australian Greens. The amendments introduced by the Greens are as follows:

- Effective from 1 October 2024, partners/principals of tax firms with more than 100 employees will be ineligible to be appointed to the Tax Practitioners Board (TPB). This new restriction effectively prohibits current and some former partners/principals of large professional services firms from being appointed to the TPB.
- Effective from 1 July 2024, a registered tax agent will be subject to mandatory notification requirements where:
 - they have committed, or have reasonable grounds to believe they have committed, a significant breach of the TASA Code of Professional Conduct, or
 - they become aware of a significant breach committed by another registered tax agent.

Legislation Update (Cont.)

Other legislation update (Cont.)

■ Social Security and Other Legislation Amendment (Supporting the Transition to Work) Act 2023

The Social Security and Other Legislation Amendment (Supporting the Transition to Work) Act 2023 smooths the transition to work for income support recipients by doubling the employment income nil rate period and extending access to the nil rate period for recipients who enter full time work.

From 1 January 2024, all pensioners over Age Pension age and eligible Veterans will have a maximum Work Bonus balance limit of \$11,800, instead of \$7,800.

All new Age Pension recipients will have a starting Work Bonus income balance of \$4,000 (currently nil).

From 1 July 2024, income support recipients will be able to retain their concession cards for up to 24 weeks (currently 12 weeks) after securing employment.

December 2023

Monthly Tax Update

Other updates

Australia to implement the OECD's Crypto Asset Reporting Framework

Treasury has released a joint statement with 47 other jurisdictions outlining their intention to implement the OECD's Crypto-Asset Reporting Framework (CARF) and, if applicable, amendments to the existing Common Reporting Standard (CRS).

The CARF provides for the automatic exchange of tax-relevant information on crypto-assets and is a key component of the [International Standards for Automatic Exchange of Information in Tax Matters](#) developed by the OECD.

To ensure consistency and a smooth implementation of the CARF for both business and governments, Australia, as one of the signatory jurisdictions to the CRS will also implement amendments to the existing standard. Treasury intends to activate information exchange agreements in respect of the CARF with the view that exchanges with other jurisdictions will commence by 2027.

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

Registration terminated for serious Code breaches

The Board Conduct Committee (BCC) of the Tax Practitioners Board (TPB) has terminated the registration of an individual tax agent and tax agent company and applied a 5-year ban against them from reapplying for registration for seriously breaching the Code of Professional Conduct.

The BCC found that the individual tax agent and tax agent company obstructed the proper administration of taxation laws by knowingly hiring an individual who had their tax agent registration terminated, to provide tax agent services on behalf of the company.

The BCC also found that the individual tax agent and tax agent company failed to ensure a tax agent service provided on their behalf was provided competently by allowing the terminated agent to access ATO taxpayer records on behalf of the company prior to the commencement of their employment with the company. The terminated agent was also allowed to deposit the company's ATO taxpayer refunds into their own personal bank account and a joint bank account held with the individual tax agent.

The BCC further found that the individual tax agent did not act honestly and with integrity by making false reports to the TPB regarding courses listed in their continuing professional education (CPE) log. This meant that the agent failed to complete the minimum level of CPE to meet registration requirements.

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

Monthly Tax Update

ATO Rulings and Activity

ATO Interim Decision Impact Statement on the recent Bendel case

The ATO has released an interim decision impact statement on the AAT decision of *Bendel & Anor v Commissioner of Taxation* [2023] AATA 3074.

In that case, the AAT held that unpaid present entitlements to income or capital of a trust estate did not constitute loans to the trust so as to be included in the assessable income of the discretionary beneficiaries of the trust as deemed dividends under Div 7A of ITAA 1936. This position runs contrary to the ATO's longstanding position regarding UPEs and Division 7A. The Commissioner has since appealed against this decision.

Until the appeal process is finalised, the Commissioner does not intend to revise the current ATO views relating to private company entitlements to trust income set out in Taxation Determination [TD 2022/11](#) *Income tax: Division 7A: when will an unpaid present entitlement or amount held on sub-trust become the provision of 'financial accommodation'?* Pending the outcome of the appeal process, the ATO is administering the law in accordance with [TD 2022/11](#).

The ATO also notes that, in addition to the application of section 109D Income Tax Assessment Act 1936, the basis on which private company beneficiaries deal with unpaid entitlements to trust income may have implications under other taxation laws, for example section 100A of ITAA 1936.

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

Withdrawal of taxation determination on value of goods taken from stock for private use for the 2017–18 income year

The ATO has withdrawn Taxation Determination [TD 2018/10](#) *Income tax: value of goods taken from stock for private use for the 2017–18 income year* with effect from 30 November 2023.

TD 2018/10 is being withdrawn as its period of effect has passed. It will continue to be legally binding on the Commissioner for the relevant period to which it relates.

Monthly Tax Update

ATO Rulings and Activity (Cont.)

Tax treatment of off-market share buy backs

The ATO has published a guide on the “new” tax treatment of off-market share buy-backs undertaken by listed public companies. The ATO notes that the new rules provide that where a listed public company undertakes an off-market share buy-back after 7:30 pm AEDT on 25 October 2022, the tax treatment for its shareholders will be the same as a shareholder selling their shares on-market. This means the entire buy-back price will be treated as capital proceeds on a disposal rather than part of the buy-back price being treated as a dividend.

Additionally, the changes will affect distributions received for selective share cancellations offered by a listed public company, which will now be treated as unfrankable distributions. However, the tax treatment of off-market share buy-backs offered by companies that are not listed public companies will remain the same. In addition, shareholders who have sold their shares as part of an off-market buy-back (prior to commencement of the new rules) should continue to refer to the dividend or distribution statements issued by the company, or relevant class ruling if applicable.

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

ATO updated guidance on application of market value substitution rules involving hybrid securities

The ATO has updated Practical Compliance Guideline [PCG 2021/1](#) which sets out its approach for determining the market value of certain hybrid securities for CGT purposes where the securities are bought back or redeemed.

The updated [PCG 2021/1](#) provides clarification in relation to the process of calculating the modified volume weighted average price (VWAP). This clarification confirms the existing ATO view that a reference in [PCG 2021/1](#) to stripping out an accrued coupon is a reference to the grossed-up coupon, and that regard should be given to the ASX Listing Rules 19.12 definition when calculating the VWAP.

The updated guideline applies before and after its date of issue.

Monthly Tax Update

ATO Rulings and Activity (Cont.)

Determination on value of goods taken from stock for private use for the 2023-24 income year

Taxation Determination [TD 2023/7](#) provides the amounts that the Commissioner will accept in the 2023–24 income year as estimates of the value of goods taken from trading stock for private use by taxpayers.

[TD 2023/7](#) sets out the following amounts applicable for the 2023–24 income year:

Type of business	Amount (excluding GST) for adult or child over 16 years old	Amount (excluding GST) for child 4 to 16 years old
Bakery	\$1,520	\$760
Butcher	\$1,030	\$515
Restaurant or café (licensed)	\$5,160	\$2,090
Restaurant or café (unlicensed)	\$4,180	\$2,090
Caterer	\$4,410	\$2,205
Delicatessen	\$4,180	\$2,090
Fruiterer or greengrocer	\$1,040	\$520
Takeaway food shop	\$4,290	\$2,145
Mixed business (includes milk bar, general store and convenience store)	\$5,200	\$2,600

The ATO recognises that greater or lesser values may be appropriate in particular cases. Taxpayers may be able to justify a lower value for goods taken from stock than that shown in the schedule. In that case, the lower amount should be used.

December 2023

Monthly Tax Update

ATO Rulings and Activity (Cont.)

ATO finalises employee vs independent contractor guidance

The ATO has finalised guidance on when an individual is an “employee” of an entity for the purposes of PAYG withholding. Taxation Ruling [TR 2023/4](#) has been issued alongside Practical Compliance Guideline [PCG 2023/2](#), which outlines the Commissioner’s compliance approach for businesses that engage workers and classify them as either employees or independent contractors.

■ TR 2023/4 - Income tax: pay as you go withholding - who is an employee?

This Ruling outlines the Commissioner’s view on when an individual is an ‘employee’ for the purposes of section 12-35 of Schedule 1 to the *Taxation Administration Act 1953*. That section requires an entity to withhold an amount from salary, wages, commission, bonuses or allowances it pays to an employee, irrespective of whether that entity is their employer.

The expressions ‘employee’ and ‘employer’ in the *Superannuation Guarantee (Administration) Act 1992* have both their ordinary meaning and an extended meaning. The non-binding section of the Ruling also provides guidance to taxpayers on the ordinary meaning of an ‘employee’ for the purposes of subsection 12(1) of the *Superannuation Guarantee (Administration) Act 1992*. The ATO has published a [compendium](#) of the feedback it received on the draft ruling.

This Ruling is being published following the High Court of Australia’s worker classification decisions in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2. These cases focused on the establishment of the legal rights and obligations which govern the relationship between the worker and the engaging entity in determining the nature of the relationship. These legal rights and obligations may or may not be contained within a written contract.

[TR 2023/4](#) was previously released as Draft Taxation Ruling [TR 2022/D3](#), which replaced Taxation Ruling [TR 2005/16](#). The finalised ruling incorporates the decision in *JMC Pty Ltd v FC of T* 2023 ATC; [2023] FCAFC 76 and provides further clarity on:

- situations where the Commissioner will need to review evidence outside a written contract to establish the legal rights and obligations between parties;
- the importance of the written contract in outlining the legal rights and obligations of the employee and engaging entity;
- casual employment being an example of when an employer’s control does not extend to “when” work is done; and
- when clauses of a contract are operative terms that represent more than mere labels reflecting the parties’ opinion of the nature of their relationship.

[TR 2023/4](#) applies both before and after its date of issue, to the extent that it does not conflict with the terms of a settlement of a dispute agreed to before 6 December 2023.

December 2023

Monthly Tax Update

ATO Rulings and Activity (Cont.)

ATO finalises employee vs independent contractor guidance (Cont.)

- [PCG 2023/2](#) - Classifying workers as employees or independent contractors – ATO compliance approach

This Guideline sets out the Commissioner's compliance approach for businesses that engage workers and classify them as employees or independent contractors, providing a risk framework for worker classification based on the actions of the parties when entering into the arrangement. The guideline explains when the ATO will allocate compliance resources to investigate a worker's classification.

[PCG 2023/2](#) covers federal tax and superannuation obligations administered by the ATO. It does not extend to payroll tax, workers' compensation insurance or the Fair Work Act 2009. The guideline 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 personal services income rules).

[PCG 2023/2](#) was previously released as Draft Practical Compliance Guideline [PCG 2022/D5](#). The finalised guidelines outline the criteria that must be satisfied in order for an arrangement to fall into one of the risk zones. An explanation of key concepts relating to the criteria for each risk zone has also been added to [PCG 2023/2](#).

[PCG 2023/2](#) applies in respect of the Commissioner's application of compliance resources from 6 December 2023.

December 2023

Monthly Tax Update

ATO Rulings and Activity (Cont.)

Draft guidance on deductibility of payments made by a superannuation fund to its trustee

The ATO has issued draft guidance outlining the Commissioner's view on the deductibility, under section 8-1 of the *Income Tax Assessment Act 1997* of certain payments made by the trustees of superannuation funds (in their capacity as trustee) to the trustees in their own capacity.

Draft Taxation Determination [TD 2023/D3](#) clarifies whether additional trustee fees and/or risk reserve payments made in relation to the amendments to s 56 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) are deductible to the fund under s 8-1 of ITAA 1997. These risk reserve payments may be made to address a trustee's risk of exposure to penalties as the trustee is prohibited from using trust assets to pay a criminal, civil or administrative penalty under s 56 of the SIS Act.

The ATO's preliminary view is that a payment made by the fund to the trustee will not be deductible under s 8-1 if it is in relation to building or maintaining a reserve to address s 56 of the SIS Act and the amount is separate to charges for trustee services. These payments will be considered capital in nature.

However, a payment made by the fund to the trustee will be deductible under s 8-1 if it is in relation to trustee services and the trustee has merely increased its existing charges for those services to reflect the increased cost of providing those services. Where some of the expenditure incurred by the fund is in relation to gaining or producing exempt income or non-assessable non-exempt income, a reasonable apportionment will be required by the fund in respect of its deduction under s 8-1(2)(c).

When the final determination is issued, it is proposed to apply both before and after its date of issue.

The last day for comments on draft [TD 2023/D3](#) is 19 January 2024.

ATO no-cost and low-cost STP product register has been removed

In 2018, the ATO created the no-cost and low-cost Single Touch Payroll (STP) product register to support micro employers (employers with 4 or fewer employees) to transition to STP by helping them find an affordable solution which met their payroll needs.

With so many micro employers reporting in STP each pay day, the ATO has decided to close its no-cost and low-cost STP product register, and added all products previously listed in its no-cost and low-cost STP product register to the full product register. Accordingly, the ATO will no longer be maintaining two separate STP product registers.

To help small business employers find a reporting solution that is right for them, the ATO has added a 'micro' target market label for STP products formerly listed in the no-cost and low-cost STP product register.

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

December 2023

Monthly Tax Update

ATO Rulings and Activity (Cont.)

ATO pauses debt awareness campaign

In the past, the ATO has excluded some debts from being recovered, such as when the debts are very small.

Tax debts on hold are debts that are payable but the ATO is not taking active steps to recover. During COVID-19, the ATO paused offsetting debts previously put on hold entirely, meaning debts were not deducted from tax refunds or credits.

However, upon review by the Australian National Audit Office (ANAO) it was found that excluding any existing debts from being offset was not consistent with the law, regardless of when the debt arose. The ATO has received clear advice that all debts must be offset against tax refunds or credits going forward.

The ATO has paused sending out letters reminding taxpayers of tax debts on hold and are reviewing their communication approach as the campaign caused unnecessary distress to taxpayers, particularly to taxpayers who incurred the debts several years ago.

The letters were only an information piece with no action required, but in response to concerns raised by the community, the ATO will review their overall approach about communicating debts on hold to taxpayers.

Taxpayers can still check whether they have a debt on hold by contacting the ATO.

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

ATO launches new protections against rising tide of fraud

To counter online identity theft and tax fraud, the ATO has launched a suite of new protections to help secure people's personal information.

ATO Deputy Commissioner and Chief of the Serious Financial Crime Taskforce (SFCT) John Ford said there had been an increase in the pace and scale of criminals using people's stolen personal information to attempt fraud.

According to Deputy Commissioner, John Ford, taxpayers will need to obtain a myGovID if they don't already have one and authenticate their identity using myGovID to link to the ATO. Individuals who use their myGovID to log in to the ATO will need to use that myGovID for future logins. Criminals will not be able to access an individual's account without it. Having access to stolen information will not be enough to gain access.

For businesses with an ABN who need to appoint a tax agent or change agents, they will now need to give permission to that agent to act on their behalf through ATO Online services.

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

December 2023

Monthly Tax Update

ATO Rulings and Activity (Cont.)

Tax Determination on tax incentives for early-stage investors

The ATO has finalised guidance on what an “expense” that is “incurred” is for the purpose of the tax incentive for early-stage investors. The object of the early-stage innovation company (ESIC) regime is to encourage new investment in small Australian innovation companies with high-growth potential, by providing a tax offset and modified capital gains tax treatment to qualifying investors. To be entitled to a tax offset, the investor must be issued with shares in a company that satisfies the tests in subsection 360-40(1) immediately after the shares are issued.

Subsection 360-40(1) consists of an early stage test and innovation test, reflecting Parliament's intent that the ESIC regime only apply to investments in recently established, innovative companies. The early stage test includes a requirement that the company issuing the shares, and any of its 100% subsidiaries, incurred total expenses of \$1 million or less in the income year preceding the issue of the shares

The ruling provides that the expense tests in ss 360-40(1)(a)(ii) and 360-40(1)(b) of ITAA 1997 require the company in which an investor is investing to take into account only “expenses” which have been “incurred” as at the test time.

Taxation Determination [TD 2023/6](#) also notes the following:

- “expenses” are amounts recognised as expenses under general accounting concepts;
- “incurred” has the same meaning as for the purposes of the general deduction provisions in s 8-1 of ITAA 1997, and
- “test time” means the time immediately after the company has issued shares to the investor.

[TD 2023/6](#) also outlines a practical administrative approach to alleviate the compliance burden for innovation companies and their investors in determining whether the expenses have been incurred.

[TD 2023/6](#) was previously released as Draft Taxation Determination [TD 2019/D5](#).

GST treatment of multi-purpose compression socks

The ATO has withdrawn its interpretative decision ([ATO ID 2003/953](#)) on the GST implications of supplies of multi-purpose compression socks as it requires clarification and may be misleading.

Compression socks will only be GST-free if they are specifically designed for people with an illness or disability and not widely used by people in the general community. Therefore, the sale of general-purpose compression socks or athletic compression socks would be a taxable supply.

The ATO also disclosed their approach to dealing with taxpayers who have incorrectly classified compression socks. The ATO will not devote compliance resources to reviewing the GST treatment of these items for tax periods up to and including 29 February 2024. The ATO expects taxpayers to consider making a voluntary disclosure on certain types of socks which were not covered in the ATO ID. The current ATO position on the supply of compression socks is set out in the [ATO's webpage](#).

December 2023

Monthly Tax Update

ATO Rulings and Activity (Cont.)

ATO Taxpayer Alert for tax exempt entities receiving franked distributions

The ATO is currently reviewing arrangements involving franked in-specie distributions (in the form of property) that are made to income tax exempt entities, including registered charities, deductible gift recipients, scientific institutions and public educational institutions.

Under these arrangements:

- an in specie franked distribution is made (or flows indirectly) to an income tax exempt entity, and
- there are restrictions placed on the distributed property that are imposed as part of the terms and conditions for the making of the franked distribution and which prevent the income tax exempt entity from receiving immediate custody and control of that property.

Taxpayer Alert [TA 2023/3](#) provides a summary of the ATO's concerns that income tax exempt entities may be inadvertently entering into arrangements that make them ineligible for franking credit refunds. Under s 207-122(b)(i) of ITAA 1997, an entity that receives a franked distribution in the form of property other than money will not be eligible for a refund of franking credits where the terms and conditions on which the franked distribution is made are such that the entity "does not receive immediate custody and control of the property".

Applications for franking credit refunds by income tax exempt entities will be monitored where the claim is in respect of an in specie franked distribution. The ATO is also looking to identify an appropriate case to test the application of s 207-122(b)(i). Entities that have entered into, or are considering entering into, an arrangement of this type are encouraged to engage with the ATO through the contact details provided at the end of the Alert or by seeking a private ruling. The ATO also encourages affected entities to seek independent professional advice and make a voluntary disclosure to reduce any penalties that may apply.

December 2023

Monthly Tax Update

ATO Rulings and Activity (Cont.)

Class rulings issued:

- Class Ruling [CR 2023/60](#) Teletrip Devices – car log book and odometer records. This ruling applies from 1 April 2023 to 31 March 2028.
- Class Ruling [CR 2023/61](#) Argo Investments Limited – dividend substitution share plan. This ruling applies from 1 July 2023 to 30 June 2028.
- Class Ruling [CR 2023/62](#) Argo Global Listed Infrastructure Limited – dividend substitution share plan. This ruling applies from 1 July 2023 to 30 June 2028.
- Class Ruling [CR 2023/63](#) Carbon Revolution Limited – employee share scheme – exchange of shares for Carbon Revolution plc shares. This ruling applies from 1 July 2020 to 30 June 2024.
- Class Ruling [CR 2023/64](#) Sunland Group Limited – return of capital. This ruling applies from 1 July 2023 to 30 June 2024.
- Class Ruling [CR 2023/65](#) Venus Metals Corporation Limited - in specie distribution of Rox Resources Limited shares. This ruling applies from 1 July 2023 to 30 June 2024.
- Class Ruling [CR 2023/66](#) Judo Capital Holdings Limited - Judo Capital Notes. This ruling applies from 1 July 2023 to 17 November 2031.
- Class Ruling [CR 2023/67](#) Two10degrees Pty Ltd - use of Global Alerting Platform In-Vehicle Management System for fuel tax credits. This ruling applies to taxable fuel acquired from 1 July 2023 to 31 December 2024.
- Class Ruling [CR 2023/68](#) Thorn Group Limited - return of capital. This ruling applies from 1 July 2023 to 30 June 2024.

Monthly Tax Update

ATO Rulings and Activity (Cont.)

Other rulings issued:

- Product Ruling [PR 2023/23](#) Zurich Life Insurance (Hong Kong) Limited – Matterhorn life insurance policy. This ruling applies from 1 July 2023 to the entities specified in paragraph 4 of the Ruling that enter into a Policy from 1 July 2023 until 30 June 2026.
- Product Ruling [PR 2023/24](#) Allianz Guaranteed Income for Life. This ruling applies from 24 November 2023, to the entities specified in para 4 of the ruling that enter into Allianz Guaranteed Income for Life from 24 November 2023 until 30 June 2026.
- Product Ruling [PR 2023/25](#) XLD Commodities Pty Ltd - XLD Grain & Fertiliser Prepayment Program. This Ruling applies from 1 July 2023 to a customer specified in paragraph 4 of the ruling that enters into the Program from 1 July 2023 until 30 June 2026.
- **Addendum** to Product Ruling PR 2019/5 Income tax: taxation consequences of investing in the Westpac Protected Equity Loan. It amends PR 2019/5 to incorporate the application of ss 82KZM(1A) and 82KZMA(2A) of ITAA 1936. The addendum applies before and after its date of issue.

Latest Australian Tax Cases

- **Assessability of payment from foreign superannuation funds** – The taxpayer has successfully overturned the Commissioner’s decision to treat the applicable fund earnings of a foreign superannuation fund as assessable income of the taxpayer on the basis that the funds were not paid directly from the foreign superannuation fund into the complying superannuation fund of the taxpayer.

The taxpayer had made an election under s 305-80 of ITAA 1997 to transfer foreign superannuation funds via an Emigrant Capital Account into his Australian complying superannuation fund. The Commissioner sought to assess the taxpayer on the lump sum payment received from the foreign superannuation fund even though the amounts had been contributed by the taxpayer into a complying superannuation fund.

The AAT found in favour of the taxpayer on the basis that the Commissioner’s construction of the relevant provisions was strained. The Commissioner’s contentions that s 307-15 could not apply where a payment was actually received by a taxpayer but rather only applied where there was a “deemed receipt” and, furthermore, that “the other person or the entity” receiving the payment must be a complying superannuation fund, did not accord with the current legislation. The AAT agreed with the taxpayer that the provisions replacing s 27CAA made substantive and not just stylistic changes. The idea that a superannuation lump sum payment from a foreign superannuation fund must be paid directly to a complying superannuation fund for the taxpayer to make the relevant election was clearly expressed in s 27CAA. However, the same could not be said for the provisions in ITAA 1997 that replaced it. The 2007 amending Act evinced a legislative intention to bring about a change from the requirement, previously contained in s 27CAA, that there be a direct payment from a foreign superannuation fund to a complying superannuation fund. [*Came v FC of T* 2023 ATC; [2023] AATA 3951, 28 November 2023.]

December 2023

Monthly Tax Update

Latest Australian Tax Cases (Cont.)

- **Tax deductions** - The AAT has affirmed decisions of the Commissioner disallowing deductions claimed by a trust in respect of holding costs of land that, 17 years later, remained undeveloped, and also upheld the penalties that were imposed for recklessness, finding that gross carelessness was shown in persevering with the claims after the ATO had raised concerns over such and indicated they would not be allowed. [*Meakins & Anor v FC of T 2023 ATC*; [2023] AATA 3852, 17 November 2023.]
- **Assessable income** - The AAT has affirmed a decision of the Commissioner that a settlement payment made by an insurer under a deed of release was assessable as income to the taxpayer recipient. [*Sladden v FC of T 2023 ATC*; [2023] AATA 3815, 16 November 2023.]
- **Royalty withholding tax, Diverted profits tax** - The Federal Court has found that royalty withholding tax was payable in respect of payments under bottling agreements between PepsiCo and Schweppes Australia. The Federal Court also noted that diverted profits tax would apply in the alternative in respect of the "royalty-free" exclusive bottling agreements (EBAs). [*PepsiCo Inc & Anor v FC of T 2023 ATC*; [2023] FCA 1490, 30 November 2023.]

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