



February 2021



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Monthly Tax Update

In this edition of Monthly Tax Update for February 2021, we provide the recent updates in legislative, 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

Senators and Members of Parliament returned to Canberra on Tuesday 2 February to begin sittings for 2021. At the time of writing, there was no tax legislation passed in the latest sitting.

COVID-19 Stimulus Packages Updates

COVID-19: ATO guidance on PE of foreign companies extended

COVID-19 has resulted in overseas travel restrictions and foreign companies may be concerned about potential effects on their business and tax affairs because of the presence of employees in Australia.

The ATO has updated its guidance on whether the presence of employees in Australia, due to the impacts of COVID-19, may create a permanent establishment (PE).

The updated guidance provides that the ATO will not apply compliance resources to determine if a foreign company has a PE in Australia where:

- the foreign company did not otherwise have a PE in Australia before the effects of COVID-19
- the temporary presence of employees in Australia continues to be solely as a result of COVID-19 related travel restrictions
- those employees temporarily in Australia will relocate overseas as soon as practicable following the relaxation of international travel restrictions, and
- the foreign company has not recognised those employees as creating a PE or generating Australian source income in Australia under the tax laws of another jurisdiction.

The ATO has extended its compliance approach for determining whether the temporary presence of employees in Australia due to COVID-19 has created a permanent establishment (PE) to 30 June 2021.

The ATO will not apply compliance resources to the circumstances outlined until 30 June 2021. The approach has been extended from the original date of 31 January 2021.

From 1 July 2021, a foreign company will be required to determine whether its ongoing arrangements give rise to a PE in Australia.

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

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COVID-19 Stimulus Packages Updates (cont.)

COVID-19: data-matching program for JobMaker

The Commissioner has issued a Gazette Notice to the COVID-19 economic response data-matching program to include the JobMaker Hiring Credit.

The ATO will acquire confirmation from Services Australia of income support payments made to additional employees nominated by applicants of the JobMaker Hiring Credit for the period from 7 October 2020 to 6 October 2021. The data items that will be obtained include details on the type of government income support payments received within the applicable period. The data-matching program to acquire details of incarcerated individuals has also been extended to 6 October 2021.

The ATO has also extended the data-matching program relating to temporary early access to superannuation from 24 September 2020 to 31 December 2020.

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

Other Developments

OECD policy responses to Coronavirus (COVID-19) – updated guidance on the tax treaties and the impact of the COVID-19 pandemic

The Organisation for Economic Cooperation and Development (OECD) Secretariat issued updated guidance on 21 January 2021 regarding the application of tax treaties in the context of the dislocation of individuals and disruption to economic activities resulting from the pandemic.

The guidance revisits the earlier guidance issued by the OECD Secretariat in April 2020 on the impact of the COVID-19 pandemic on tax treaties. It represents the Secretariat's view, supported by Working Party One of the BEPS Inclusive Framework, on the interpretation of the provisions of tax treaties intending to provide more certainty to taxpayers during this exceptional period when those measures were applicable.

The guidance reflects the general approach of Working Party One and illustrates how some jurisdictions have addressed the impact of COVID-19 on the tax situations of individuals and employers.

This updated guidance outlines the application of the existing rules and the OECD Commentary on concerns related to the creation of permanent establishments; the application of "tie-breaker" rules to dual residents; and the tax treaty treatment of income from employment.

The guidance contains a caveat that it does not necessarily represent the official views of OECD member countries, that it does not purport to replace the judgement of tax administrations in cases where factual determinations are required, and that each jurisdiction may adopt an approach that differs from that in the guidance.

The guidance, therefore, is not as authoritative as the Commentary on the OECD Model Treaty (Commentary). This makes it particularly important to obtain advice on specific cases in the countries involved

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

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ATO Rulings and Activity

Determination on single touch payroll approved form finalised

The ATO has finalised a legislative instrument on the information which the approved form may require to be reported through Single Touch Payroll (STP) for the purposes of s 389-5(2)(b) of sch 1 to the Taxation Administration Act 1953 (TAA).

Taxation Administration — Single Touch Payroll — Amounts to be Notified Determination 2021 provides that the following kinds of amounts must be in the approved form for STP reporting purposes:

an amount that is not a SGAA sacrificed ordinary time earnings amount (having the same meaning as the term “sacrificed ordinary time earnings amount” defined in the Superannuation Guarantee (Administration) Act 1992) but which, as the result of an effective salary sacrifice arrangement, reduces the ordinary time earnings of an employee:

- a. an amount that is not a SGAA sacrificed salary or wages amount but which, as the result of an effective salary sacrifice arrangement, reduces the salary and wages payable to an employee
- b. a superannuation liability amount
- c. a tax offset amount
- d. foreign tax paid amount
- e. an exempt foreign income amount
- f. a foreign employment income amount
- g. a lump sum D amount (the amount of a genuine redundancy payment or an early retirement payment)
- h. a payment made under the Community Development Employment Project scheme
- i. a voluntary agreement to withhold amount, and
- j. a labour hire arrangement amount.

The instrument reflects legislative changes made by the Treasury Laws Amendment (2019 Measures No 3) Act 2020 and the Treasury Laws Amendment (2018 Measures No 4) Act 2019 to the way superannuation guarantee is calculated and reported in relation to amounts salary sacrificed to superannuation. The instrument also enables voluntary reporting of child support obligations through STP to reflect legislative changes made by the Treasury Laws Amendment (2020 Measures No 2) Act 2020.

The instrument replaces the Commissioner’s previous determination (Legislative Instrument F2019L00122) that prescribed additional information the approved form may require using Standard Business Reporting enabled software.

Amounts determined in this instrument which were not previously required will not become amounts that are required by the approved form until the earlier of either:

- a) the date after 4 January 2021 that an entity chooses to commence reporting those amounts, or
- b) 1 January 2022.

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

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ATO Rulings and Activity (cont.)

Guidance on buy-backs or redemptions of certain hybrid securities

The ATO has issued guidance on determining the market value of certain hybrid securities for capital gains tax purposes when they are bought back or redeemed.

Practical Compliance Guideline PCG 2021/1 recognises practical problems faced by investors required to determine the market value of a hybrid security subject to a buy-back or redemption under the market value substitution rules set out in ss 116-30(2) or 159GZZZQ(2) of ITAA 1936.

The guideline will apply to a hybrid security that is an equity interest under Div 974 of ITAA 1997 where:

- the issuer has an option under which it may buy-back or redeem the hybrid security on a specified call date
- the hybrid security is listed on the Australian Securities Exchange, an overseas securities exchange or offered/held through a clearing system
- the terms of the hybrid security specify that the amount paid to buy-back or redeem the hybrid security must be equal to its face value
- the hybrid security will convert into ordinary shares in the issuer, or a connected entity of the issuer, if it is not bought back or redeemed on or before the specified call date
- the hybrid security carries a right to regular (at least annual) distributions calculated by reference to a fixed or floating market based coupon rate, and
- there is a strong and demonstrated market expectation prior to the announcement of a redemption or buy-back that the hybrid security will be redeemed or bought back on a date prior to the specified call date.

The ATO will accept that the market value for a hybrid security covered by the guideline on its specified call date is equal to its face value where all securities on issue are bought back or redeemed on the same date. For hybrid securities that feature a reinvestment date before its specified call date, the guideline sets out the methodology for calculating market value on the reinvestment date. This calculation will be accepted by the ATO if the result is within a tolerance of 2% of the amount received for the buy-back or redemption.

The guideline does not apply to an acquisition, buy-back or redemption of a hybrid security that is subject to the taxation of financial arrangements provisions under Div 230 of ITAA 1997.

The guideline applies both before and after its date of issue

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

Class rulings issued:

- Class Ruling [CR 2021/1](#) - Bank of Queensland Ltd — BOQ Capital Notes 2. The ruling applies from 1 July 2020 to 30 June 2029.
- Class Ruling [CR 2021/2](#) - Home Consortium Group — return of capital by way of in specie distribution. The ruling applies from 1 July 2020 to 30 June 2021.
- Class Ruling [CR 2021/3](#) - Intelematics Australia Pty Ltd CONNECT tracking and fleet management solution — use for FBT car logbook and odometer records. The ruling applies from 1 November 2020 to 31 March 2025.
- Class Ruling [CR 2021/4](#) - PM Capital Global Opportunities Fund Ltd — off-market share buy-back. The ruling applies from 1 July 2020 to 30 June 2021.
- Class Ruling [CR 2021/5](#) - PM Capital Asian Opportunities Fund Ltd — off-market share buy-back. The ruling applies from 1 July 2020 to 30 June 2021.
- Class Ruling [CR 2021/6](#) - National Australia Bank Ltd — NAB Capital Notes 5. The ruling applies from 1 July 2020 to 30 June 2031.
- Class Ruling [CR 2021/7](#) - Westpac Banking Corporation — Westpac Capital Notes 7. The ruling applies from 1 July 2020 to 30 June 2030.
- Class Ruling [CR 2021/8](#) - Australian Unity Ltd — mutual capital instruments. The ruling applies from 1 July 2020 to 30 June 2030.

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ATO Rulings and Activity (cont.)

Class rulings issued:

- Addendum to Class Ruling [CR 2020/71](#) - The University of Melbourne (issued on 27 January 2021) — early retirement scheme 2020. It amends the original CR 2020/71 (issued on 25 November 2020) to reflect a minor change in the scheme.
- Class Ruling [CR 2021/9](#) Bendigo and Adelaide Bank Ltd — Capital Notes. The ruling applies from 1 July 2020 to 30 June 2029.
- Class Ruling [CR 2021/10](#) Victorian Building Authority (Cladding Safety Victoria) — funding payments made to owners' corporations. The ruling applies from 19 November 2019 to 30 June 2025.
- Addendum to Class Ruling [CR 2021/8](#) Australian Unity Ltd (issued on 3 February 2021) — mutual capital instruments. It amends the original CR 2021/8 (issued on 27 January 2021) to correct several legislative references

Latest Australian Tax Cases

- **Research & Development** - The Federal Court has found no procedural unfairness in an AAT decision that a taxpayer's development of an on-line platform for trading water entitlements was not eligible for the R&D tax incentive. [*H2O Exchange Pty Ltd v Innovation and Science Australia* 2021 ATC - 22 January 2021]
- **CGT; disposal of goodwill** - The AAT has upheld default assessments that included a discount capital gain from the disposal of goodwill in a partnership and amounts representing work in progress profits in a retiring solicitor's assessable income. [*Hedges v FC of T* 2020 ATC - 23 December 2020]
- **Tax administration; JobKeeper** - The AAT has determined that a sole trader who reactivated his Australian Business Number (ABN) in June 2020 with a retrospective effective date was eligible for JobKeeper payments on the basis that he had an active ABN on 12 March 2020. [*Apted v FC of T* 2020 ATC - 21 December 2020]
- **Tax agents** - The Federal Court has ruled on the issues of penalty and other injunctive relief sought by the Board in regard to the respondents' contraventions of the Tax Agent Services Act 2009 and subsequent contempts of court established in *Tax Practitioners Board v Hacker* 2020 ATC and *Tax Practitioners Board v Hacker (No 2)* [2020] FCA 1048. [*Tax Practitioners Board v Hacker & Ors (No 3)* 2020 ATC - 18 December 2020]

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