

# Monthly Tax Update

Welcome to the first edition of Monthly Tax Update for 2022. We provide the recent updates in legislation along with tax developments in the areas of corporate tax, individual tax, indirect tax and international tax. We also include the ATO's recent activities, including its publications, rulings issued in the past month, latest Australian tax cases and other news in this edition.

- Covid-19 Stimulus Package Updates
- Australia - Mid-Year Economic and Fiscal Outlook for 2021–22

## Legislation Update

Legislation to exempt Stolen Generations redress payments from tax now law

Legislation to ensure no tax is payable on redress payments made to individuals under the Territories Stolen Generations Redress Scheme is now law.

The Territories Stolen Generations Redress Scheme (Consequential Amendments) Bill 2021 has received assent as Act No 141 of 2021 on 13 December 2021.

The Act introduces a new s 53-30 of ITAA 1997 to ensure that either lump sum or instalment payments made under the scheme are exempt from tax for the 2021–22 and later income years. Accordingly, such payments will also not affect a person's eligibility for other Commonwealth payments and benefits. For more details, please refer [here](#).

## COVID-19 Stimulus Packages Updates

COVID-19: extension to SME Recovery Loan Scheme

The SME Recovery Loan Scheme will be extended by a further 6 months to 30 June 2022 under varied terms.

The extension will make loans under the scheme available from 1 January 2022 to 30 June 2022, with a reduced government guarantee of 50%. Under the existing scheme, loans are available from 1 April 2021 to 31 December 2021 with a government guarantee of 80%.

The scheme allows eligible small and medium businesses with turnover less than \$250 million that have been impacted by COVID-19 to access loans of up to \$5 million over a maximum term of 10 years.

Other key features of guaranteed loans offered by participating lenders under the scheme include:

- lenders are allowed to offer borrowers a repayment holiday of up to 24 months
- loans can be used for a broad range of business purposes, including investment support
- loans may be used to refinance pre-existing debt of an eligible borrower, including those from the SME Guarantee Scheme
- loans can either be unsecured or secured (excluding residential property).

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

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## OECD Updates

### OECD releases BEPS Pillar Two model rules for domestic implementation of 15% global minimum tax – GloBE Rules

The OECD has on 20 December 2021 published detailed rules to assist in the implementation of a landmark reform to the international tax system, which will ensure Multinational Enterprises (MNEs) will be subject to a minimum 15% tax rate from 2023.

The Pillar Two model rules provide governments a precise template for taking forward the two-pillar solution to address the tax challenges arising from digitalisation and globalisation of the economy agreed in October 2021 by 137 countries and jurisdictions under the OECD/G20 Inclusive Framework on BEPS.

The rules define the scope and set out the mechanism for the so-called Global Anti-Base Erosion (GloBE) rules under Pillar Two, which will introduce a global minimum corporate tax rate set at 15%.

#### What you need to know – GloBE Rules >

The tax imposed under the GloBE Rules is a “top-up tax” calculated and applied at a jurisdictional level. The GloBE rules use a standardised base and definition of covered taxes to identify those jurisdictions where an MNE is subject to an effective tax rate below 15%. It then imposes a coordinated tax charge that brings the MNE’s effective tax rate on that income up to the minimum rate (after taking into account a substance-based carve-out).

The minimum tax will apply to MNEs with revenue above EUR 750 million and is estimated to generate around USD 150 billion in additional global tax revenues annually.

To access the full text of the model rules, including an overview, FAQs as well as fact sheets on the application of the rules, please refer [here](#).

## Other Updates

### IGTO releases latest quarterly reporting pack

The Inspector-General of Taxation and Taxation Ombudsman (IGTO) has released their Quarterly Reporting Pack Quarter 1 for 2021–22.

The pack covers high-level information on tax complaint investigations and the following key performance areas for the organisation:

- providing an independent, efficient and effective tax complaints service for taxpayers
- identifying and investigating priority areas for improved tax administration
- providing advice that is independent, timely and relevant to the administration of taxation laws in Australia
- cooperating and collaborating with relevant agencies and stakeholders — both domestically and internationally, and
- developing and fostering a diverse, engaged and resilient team.

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

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## Economic Update for Australia

### Australia - Mid-Year Economic and Fiscal Outlook for 2021–22

The Treasurer has released the 2021–22 Mid-Year Economic and Fiscal Outlook (MYEFO) on 16 December 2021.

The majority of tax and superannuation measures included in the MYEFO have previously been announced or implemented by the government. The list below includes measures in the MYEFO relating to tax and superannuation that were not previously announced.

- Tax and superannuation
  - ✓ Digital games tax offset
  - ✓ Tax free treatment of certain COVID-19 business grants
  - ✓ Tax free treatment of qualifying grants — Cyclone Seroja
  - ✓ Income tax exemptions — FIFA 2023 Women's World Cup
  - ✓ Deductible gift recipient category for pastoral care in schools
  - ✓ Updates to specifically listed deductible gift recipients
  - ✓ Changes to Seasonal Worker Programme
  - ✓ Superannuation — defence force invalidity benefits
  - ✓ Access to Indirect Tax Concession Scheme extended
  - ✓ ATO compliance programs
  - ✓ ATO IT systems
- Customs
  - ✓ Extension to COVID-19 tariff concession
  - ✓ Duty deferral benefit
- Other
  - ✓ Age pension to continue for people overseas
  - ✓ Pension loan scheme settings

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

## ATO Rulings and Activity

TR 93/25DC1 : Income tax: assessability of proceeds from illegal activities, treatment of amounts recovered and deductibility of fines and penalties

The ATO has issued TR 93/25DC1 on 17 December 2021 as a proposed refresh to TR 29/25. The ruling is a draft consolidation outlining proposed changes to TR 93/25 to take into account developments in the law since it was issued. It confirms that income from illegal activities that is gained by an entity directly in pursuit of its own income producing activities is assessable. It also sets out the treatment of amounts forfeited, recovered from or repaid.

The closing date for comments is 25 February 2022. For more details, please refer [here](#).

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## ATO Rulings and Activity (Cont.)

### R&D tax offset guidance finalised

The ATO has finalised the R&D offset guidance to clarify on what expenses can and cannot be claimed as part of the R&D Tax Incentive with the release of the ATO's finalised Ruling on the application of the 'at risk' rule and a Determination on notional deductions for R&D activities subsidised by JobKeeper payments.

The R&D Tax Incentive provides tax offsets, designed to encourage more companies to engage in R&D. It allows companies to claim a tax offset for eligible R&D expenditure via their annual company income tax return. Smaller companies may claim the R&D tax incentive as a refundable tax offset.

- The R&D 'at risk' rule – TR 2021/5

**TR 2021/5** Income tax: research and development tax offsets – the 'at risk' rule: This Ruling explains the Commissioner's view on the scope and operation of the 'at-risk' rule in section 355-405 of the Income Tax Assessment Act 1997.

- Notional deductions for R&D activities subsidised by JobKeeper

**TD 2021/9** Income tax: JobKeeper payments received or expected as a result of research and development expenditure sets out how the 'at risk rule' applies to JobKeeper payments received by a R&D entity:

- for paid employees who are wholly or partially engaged in R&D activities
- under the business participation entitlement.

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

### ATO administration of R&D tax incentive

According to the findings on the Audit Performance Report published by the Australian National Audit Office, the joint administration of the research & development tax offset could be improved. The audit concluded that administration of the program was largely effective but weaknesses were identified in the ATO's process of withholding taxpayer refunds for verification, and the ATO's monitoring and reporting of compliance was not commensurate with risk.

The ATO has agreed to the recommendation to establish monitoring and reporting arrangements to assess the effectiveness of its compliance approach including implementation of its 2021 R&D compliance strategy, high risk refund process and other R&D compliance activities.

In 2019, Australian businesses spent \$18.2 billion on R&D while the average value of R&D registered for the tax incentive in 2019–20 was \$1.36 million.

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

# Monthly Tax Update

## ATO Rulings and Activity (Cont.)

### PCG 2021/4 : Allocation of professional firm profits - ATO compliance approach

The ATO has finalised a guidance on 16 December 2021 setting out a practical administration approach to assist taxpayers in complying with relevant tax laws.

Practical Compliance Guideline PCG 2021/4 explains how the ATO will determine whether there is a risk that income earned by an individual professional practitioner (IPP) is not appropriately taxed in order to tailor their engagement. The ATO is particularly concerned about arrangements where returns are linked to the individual performance of an IPP but are not reflected in the actual direct compensation to the individual.

PCG 2021/4 also provides a risk assessment framework to assist IPPs in self-assessing their risk. Broadly, the guideline applies where 2 gateways are passed, ie where an IPP's arrangement for allocating their professional firm profits has a genuine commercial basis and does not contain high risk features. Where an IPP's circumstances satisfy both gateways, the framework may be used by the practitioner and the ATO to understand whether further attention may be given to the arrangement.

The finalised guideline provides further clarification on:

- the types arrangements to which the guideline applies, including the definition of "professional firms"
- applying the risk assessment framework for part-time IPPs
- accounting for components of remuneration, fringe benefits tax and superannuation when calculating the total effective tax rate paid by an IPP and their associated entities
- applying the risk assessment framework for IPPs in relation to a partnership, company and trust structure.

The ATO will continue to identify taxpayers whose circumstances fall outside of the guideline or who wish to nominate themselves as a test case to obtain further judicial guidance.

PCG 2021/4 applies from 1 July 2022. The ATO will review the use and application of the guideline from and during the 2022–23 income year.

The guideline was previously issued as draft PCG 2021/D2 with a prospective application date of 1 July 2021. The ATO has published a compendium on the feedback it received.

The guideline replaces the ATO's Assessing the Risk: Allocation of profits within professional firms guidelines and Everett Assignments online guidance, which were suspended in December 2017. Commercially driven arrangements that do not exhibit any of the high-risk features outlined in PCG 2021/4 can continue to rely on the suspended online guidance up to the year ended 30 June 2022.

Transitional arrangements apply for IPPs whose arrangements were low risk under the suspended online guidance but have a higher risk rating under PCG 2021/4.

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

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## ATO Rulings and Activity (Cont.)

### International Tax - PCG 2021/5 : Imported hybrid mismatch rule - ATO's compliance approach

The ATO has finalised guidance on how it will assess levels of tax compliance risk associated with hybrid mismatches addressed by Subdiv 832-H of ITAA97.

Practical Compliance Guideline PCG 2021/5 sets out the Commissioner's approach to reviewing whether a taxpayer has undertaken reasonable enquiries regarding the imported hybrid mismatch rule for non-structured arrangements. The finalised guideline also explains what it means for a payment to be made directly and indirectly to an offshore deducting entity.

PCG 2021/5 also contains a hybrid mismatch rule risk framework to assist taxpayers in self-assessing their compliance risk in relation to international related-party dealings. The finalised guidelines provide an outline of how the ATO expects to engage with taxpayers based on their risk zone.

The ATO will consider reducing shortfall penalties and shortfall interest charge to the base rate for the first 18 months from 16 December 2021 (the guideline's date of issue) where a taxpayer makes a voluntary disclosure in respect of their arrangements. The voluntary disclosure must be in relation to all income years where the relevant arrangements are in place. The guideline applies both before and after its date of issue. The guideline will be under continuous review for 2 years from the date of issue.

The ATO has published a [compendium](#) on the feedback it has received.

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

### Corporate Tax - ATO 2019–20 corporate tax transparency report

The ATO has released its 7th annual report on corporate tax transparency covering 2019–20 and says voluntary tax compliance among the large corporates in Australia has improved. This is the first report that reflects the economic impact of COVID-19 but does not include information on government subsidies, such as JobKeeper payments.

The annual report is required by s 3C of the *Taxation Administration Act 1953* and includes tax information from 2,370 corporate entities, including 479 private companies with income of \$200 million or more. The latest report shows a combined income tax paid of \$57.2 billion with growth in total income (2.6%), taxable income (0.1%) and tax payable (2.0%). The ATO attributes the greater value placed on tax compliance by corporates to the work of the Tax Avoidance Taskforce and its Justified Trust program.

The proportion of companies that have paid no income tax was 33% in 2019–20. Companies may pay no income tax due to legitimate business or economic factors including operating losses, utilising losses from prior years or projects operating in a start-up phase. The data may also show single entities as not paying tax but that may be part of a tax paying corporate group. Importantly, the data is sourced from lodged tax returns, and does not reflect any post-lodgment compliance activities. The full data sets can be downloaded from the [data.gov.au](#) website [here](#).

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

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## ATO Rulings and Activity (Cont.)

### Private Clients - ATO draft guidance on superannuation benefits in breach of rules

The ATO has issued draft guidance on the Commissioner's discretion to exclude a superannuation benefit paid in breach of legislative requirements from an individual's assessable income under s 304-10(4) of ITAA97.

Superannuation benefits received by members of a fund are generally taxed at lower rates than ordinary assessable income. This concessional tax treatment does not apply to payments from a superannuation fund in breach of legislative requirements. In these circumstances, the benefit is included in the individual's assessable income under Div 304 and taxed at the relevant marginal rate. The benefit is not included in an individual's assessable income under Div 304 to the extent that the Commissioner is satisfied this would be unreasonable, having regard to the matters set out in s 304-10(4).

- **Draft Law Administration Practice Statement PS LA 2021/D3**

Draft Law Administration Practice Statement PS LA 2021/D3 sets out the circumstances in which the Commissioner will apply the discretion in s 304-10(4). The Commissioner must be satisfied that it would, on balance, be unreasonable for the superannuation benefit to be included in the individual's assessable income under Div 304 to exercise the discretion. The relevant facts and circumstances surrounding the receipt of a superannuation benefit are considered as a whole, rather than each factor in isolation.

When considering whether to exercise the discretion, the Commissioner must have regard to the nature of the fund the superannuation benefit was paid from. Members of APRA-regulated funds that have arm's length trustees or administrators are less likely to have effective control over the fund's management and payment of benefits. Discretion is more likely to be exercised where the benefit arose in circumstances that were genuinely out of the individual's control.

Factors that have little or no weight in determining whether discretion should be exercised include:

- whether the individual was suffering financial hardship or distress
- attempted rectification of the transaction
- disqualification of the individual from being a superannuation fund trustee
- the tax consequences under Div 304 being undesirable or difficult for the individual to meet, and
- events that occurred after the superannuation benefit was received.

The discretion will generally not be exercised in relation to superannuation benefits accessed under an illegal early release scheme.

When finalised, the practice statement is proposed to apply from the date of issue.

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

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## ATO Rulings and Activity (Cont.)

### ATO draft guidance on super benefits in breach of rules (Cont.)

- Draft Taxation Determination TD 2021/D6

Draft Taxation Determination TD 2021/D6 clarifies that the Commissioner's discretion under s 304-10(4) has the effect of restoring concessional tax treatment for the superannuation benefit paid to an individual member. The benefit remains assessable but is instead subject to the relevant tax treatment for superannuation benefits set out in Divs 301, 302 or 303. The Commissioner does not consider the discretion under s 304-10(4) to have the effect of excluding a benefit entirely from an individual's assessable income.

The determination is proposed to apply both before and after its date of issue when finalised, to the extent that it does not conflict with terms of settlement of a dispute agreed to before that date.

The last day for comments on the draft practice statement and determination is 4 February 2022.

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

### Class rulings issued:

- Class Ruling [CR 2021/97](#) Wingate Group Holdings Pty Ltd — demerger of Now Finance Group Holdings Pty Ltd. The ruling applies from 1 July 2021 to 30 June 2022.
- Class Ruling [CR 2021/98](#) Archer Materials Ltd — return of capital by way of in specie distribution. The ruling applies from 1 July 2021 to 30 June 2022 and will continue to apply after 30 June 2022 to all entities within the specified class that enter into the scheme during the term of the ruling.
- Class Ruling [CR 2021/99](#) Vortiv Ltd — return of capital. The ruling applies from 1 July 2020 to 30 June 2021.
- Class Ruling [CR 2021/100](#) Australian Sports Commission - dAIS athlete grants. This Ruling applies from 1 July 2021 to 30 June 2026.
- Class Ruling [CR 2021/101](#) Western I.V.F. Pty Ltd - scrip for scrip roll-over. This Ruling applies from 1 July 2021 to 30 June 2022.
- **Erratum** to Class Ruling [CR 2021/80](#) Two10degrees Pty Ltd — use of Global Alerting Platform In-Vehicle Management System for fuel tax credits. It corrects CR 2021/80 to replace all occurrences of the acronym "FTC" with "fuel tax credit".



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## Latest Australian Tax Cases

- **Disclosure of protected information** - The Supreme Court of New South Wales has refused to set aside a notice to produce documents served on the Commonwealth, finding that production of the documents in accordance with the rules of court was not inconsistent with the obligations placed on taxation officers since such production would be for the purpose of performing their duties as taxation officers. [Kupang Resources Pty Ltd v Commonwealth of Australia 2021 ATC - 7 December 2021]
- **Super contributions tax** - A Victorian Senior Crown Prosecutor has been found to be exempt from tax imposed for excess superannuation contributions by Div 293 of ITAA 1997 as she was a constitutionally protected state higher level office holder pursuant to Subdiv 293-E of ITAA 1997. [Rogers v FC of T 2021 ATC - 1 December 2021]
- **Deductions; carrying on business** - An ex-ATO auditor who claimed to be carrying on a business as a property developer as well as simultaneously running a direct selling business but who kept no records documenting either has failed to convince the AAT that either activity constituted the carrying on of a business. [Kwan v FC of T 2021 ATC 1 December 2021]
- **GST; overpaid amounts** - The AAT has held that a taxpayer was not entitled to a refund of the amounts it overpaid as GST because it passed on the excess GST to its customers. [M3K Services Pty Ltd v FC of T 2021 ATC - 26 November 2021]

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