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Collaborating with Andersen Global in Australia

# Monthly Tax Update

In this edition of November 2020 Monthly Tax Update, 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

### Budget measures now law — COVID-19 economic recovery Bill

The Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Bill 2020 has been enacted as Act No 92 of 2020 on 14 October 2020. It gives effect to the following measures:

- Personal income tax cuts: increase to low income tax offset and changes to income tax thresholds brought forward, low and middle income tax offset retained for 2020/21 — applicable from 2020/21.
- Temporary full expensing of depreciating assets: businesses with an aggregated turnover less than \$5b will be able to deduct the full cost of eligible depreciable assets of any value in the year they are installed from 6 October 2020 to 30 June 2022.
- Expanded access to certain small business entity concessions: eligible entities with an aggregated turnover from \$10m to \$50m to have access to some existing small business GST, excise, FBT and income tax concessions in phases, with varying start dates.
- Temporary loss carry back: corporate tax entities with an aggregated turnover of less than \$5b to carry back a tax loss for the 2019/20, 2020/21 or 2021/22 income year and apply it against tax paid in a previous income year as far back as the 2018/19 income year — applicable for 2020/21 or 2021/22 assessments.
- Additional six months to 30 June 2021 for assets to be first used or installed ready for use and qualify under existing enhanced instant asset write-off rules.
- Research and development tax incentive changes: expenditure threshold increase, changes to the tax offset rate and thresholds, and amendments to the administrative framework — generally from 1 July 2021.

### Payment times reporting Bill now law

The Payment Times Reporting Bill 2020 has received assent as Act No 91 of 2020. Refer to the copy of the Act [here](#).

The Act establishes a Payment Times Reporting Scheme which requires businesses and government enterprises with an annual total income of over \$100m to biannually report on their payment terms and practices for their small business suppliers (entities with annual turnover of less than \$10m).

The Act was introduced with the Payment Times Reporting (Consequential Amendments) Bill 2020 which has already received assent as Act No 89 of 2020 on 17 September 2020. Read [here](#).

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## COVID-19 Stimulus Packages Updates

### COVID-19: draft rules on JobMaker Hiring Credit

The government has released draft rules to establish the JobMaker Hiring Credit scheme to support organisations to take on additional employees through a hiring credit.

The exposure draft Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No 9) 2020 amend the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 to specify details about the scheme, including the start and end date of the scheme, when an employer or business is entitled to a payment, the amount and timing of a payment, and other matters relevant to the administration of the payment.

The JobMaker Hiring Credit will be available to eligible employers over 12 months from 7 October 2020 for each additional new job they create for an eligible employee, with a maximum amount of \$10,400 per additional new position created.

Eligible employers who can demonstrate that the new employee will increase overall employee headcount and payroll will receive \$200 per week if they hire an eligible employee aged 16–29 years or \$100 per week if they hire an eligible employee aged 30–35 years.

To be eligible, the employee will need to have worked for a minimum of 20 hours per week, averaged over a quarter, and received the JobSeeker Payment, Youth Allowance (other) or Parenting Payment for at least one month out of the three months prior to when they are hired.

The JobMaker Hiring Credit scheme was announced in the 2020/21 Budget. The Economic Recovery Package (JobMaker Hiring Credit) Amendment Bill 2020 was subsequently passed by parliament to amend the Coronavirus Economic Response Package (Payments and Benefits) Act 2020 to allow the Treasurer to make rules for a kind of COVID-19 economic response payment that is primarily intended to improve the prospects of individuals getting employment or increase workforce participation.

Interested parties are invited to submit their comments by Friday, 27 November 2020. Refer [here](#) for further details

## Other Tax Developments

### R&D tax incentive guidance refreshed

In order to support companies to invest in research and development (R&D) and to help with planning and registration of R&D activities in line with legislative requirements, the Government has released a refreshed (R&D) tax incentive guidance on 4 November 2020.

The refreshed Guide to Interpretation, refreshed in consultation with business and tax agents, covers the meaning of core R&D activities and includes a case study and examples to assist with assessing whether activities are eligible for the incentive. It also takes into account recent Federal Court and Administrative Appeals Tribunal (AAT) decisions.

Citing use of clearer language, particular changes to the earlier version of the guidance includes a change to the definition of a “hypothesis” — now defined as “an idea or proposed explanation for how you could achieve a particular result and why that result may or may not be achievable”. It is still expected the variables being tested in experiments must be described, along with other evidence. “New knowledge” is described in the guide as a new or improved material, device, product, process or services, or a new practical or theoretical understanding of a subject.

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## Other Tax Developments (cont.)

OECD releases new methodology for the peer review of BEPS Action 13

On 29 October 2020, the Organisation for Economic Cooperation and Development (OECD) has released the new methodology for the peer review of base erosion and profit shifting (BEPS) Action 13 country-by-country (CbC) reporting.

According to the OECD, the report forms the basis on which the continuing BEPS Action 13 peer review processes will be undertaken.

The Action 13 standard on CbC reporting—like the other four BEPS minimum standards—is subject to peer review to determine there is timely and accurate implementation.

All members of the Inclusive Framework on BEPS have committed to implementing the minimum standards and participating in the peer reviews.

In October 2019, the Inclusive Framework extended the mandate for peer reviews beyond the original 2020 date.

More information can be found [here](#).

## Other Updates

ASIC 2019/20 Annual Report

The Australian Securities & Investments Commission (ASIC) has released details of its activities and performance for 2019/20.

ASIC recalibrated regulatory priorities to focus on the impact of the COVID-19 pandemic. It increased markets supervision work to assist fair and orderly operation of markets, enhanced support for consumers who may be vulnerable to scams or who needed assistance, and supported business by facilitating timely completion of capital raisings and other urgent transactions.

Key highlights of ASIC's 2019/20 annual report include the following:

- Over 1250 surveillances undertaken and 134 investigations completed;
- 11% increase in the number of investigations;
- 48% improvement in the time taken to file civil penalty proceedings;
- an increase in the total civil penalties imposed from \$12.7m to \$25m;
- 57% increase in the number of custodial sentences imposed (including those fully suspended);
- 30 people were convicted of financial crime, with 22 people receiving custodial sentences (including fully suspended);
- 79 people or companies banned, removed or restricted from providing financial services, 29 people or companies from providing credit services, and disqualified or removed 51 people from directing companies;
- two infringement notices with a total value of \$526,000;
- 44 industry reports published which promote changes in industry behaviour and inform government policy and law reform, and
- 100% increase in the number of civil penalty proceedings commenced and a 25% increase in matters referred to the Commonwealth Director of Public Prosecutions regarding major financial institutions (the four big banks and AMP Ltd).

There was also an enhanced focus on individual accountability in ASIC's enforcement work in 2020, resulting in:

- 35% increase in the number of individuals charged with non-summary criminal offences, and
- 40% increase in the number of civil penalty claims made against individuals.

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## ATO Rulings and Activity

### ATO releases tax gap program summary findings

The ATO has released tax gap summary findings for all 15 income and transactional based taxes to provide useful insights into the longer term operation of the tax and superannuation systems.

The tax gap is the difference between the total amount of tax collected and the amount the ATO estimates it would have collected if every taxpayer were fully compliant with the tax law. The gross gap is based on the tax that taxpayers have self-assessed, and the net gap is based on what taxpayers have paid additionally following ATO compliance activity.

Across the whole base of taxes and duties that the ATO administers, the aggregate gap was estimated at \$31.1 billion for 2017/18.1b against the total expected tax of \$454b, representing a net tax gap of 7%. The ATO estimates that in 2017/18, the overall:

- corporate income tax gap was 5.6% (\$2b)
- individual income tax gap was 7.7%
- GST gap was 7.3% (\$5b)
- medium business income tax gap was 6.2% (\$860m), and
- fringe benefits tax gap was 21.2% (\$1b).

Small business taxpayers and individuals accounted for 54% of the total expected income tax collected (\$245b). The net income tax gap for 2017/18 of small businesses was derived from the ATO's estimates of 11.5% (\$11.1b).

More information can be found [here](#).

### ATO restarts small business taxpayer audits

The ATO has recommenced its work to address tax compliance risks in the small business segment, continuing ongoing and new taxpayer audits, having been focused on the COVID-19 stimulus measures for much of the year.

In a speech addressing the Chartered Accountants Australia and New Zealand, Deputy Commissioner Deborah Jenkins said the ATO was conscious of the pandemic's impact on this segment, and will deal with each taxpayer according to their circumstances. She encouraged tax professionals to look out for common errors, such as taxpayers failing to declare cash sales or incorrectly claiming personal expenses.

The ATO will continue using Taxable Payments Reporting system data to check that contractors in the cleaning, courier, building and construction industries are meeting their income tax and GST obligations in full. Tax agents with clients in these industries who have under-declared income in the 2019 tax return can expect to be contacted by the ATO starting from November 2020.

As part of its black economy program, the ATO will identify tax agents with higher than normal levels of risk in their client base, and will engage with agents accordingly. Other areas of focus are taxpayers with loss claims, and the extraction of funds from small business companies that are not reported. The ATO will also revise its GST risk model to ensure high risk refunds are detected before any payments are made.

The ATO's future focus will be around digital tools and more data analysis to ensure compliance. Among other things, a new Online Services for Business tool will be rolled out in 2021, as well as the final digital version of its cash flow coaching kit to assist small businesses better manage their cash flow.

More information can be found [here](#).

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## ATO Rulings and Activity (cont.)

### ATO data matching program

According to the Notice of Data Matching Program (Commonwealth Gazette C2020G00872), the ATO will continue its data-matching program to acquire visa data and match it with its data holdings to identify and address taxation risks in the visa population, including eligibility for the JobKeeper Payments scheme.

The ATO will acquire visa data, such as details of visa holders and migration agents, visa status and travel movements, from the Department of Home Affairs for 2020–21 through to 2022–23. Particularly, visa data from 1 March 2020 to 28 March 2021 will be used to assist pre-issue and post-issue compliance checks on potentially false or misleading declarations in relation to JobKeeper. The data will also be used for other compliance checks, eg employers' tax treatment of visa holders for PAYG, FBT and superannuation guarantee purposes, tax residency status, assessing eligibility for ABNs, and cancelling inappropriate ABNs.

The objectives of the program include promoting and improving voluntary tax and superannuation compliance in the visa population and identifying new or emergent approaches to fraud and entities controlling or exploiting the visa framework.

### ATO fact sheet on taxation arrangements of seasonal workers

The ATO has provided guidance on the taxation arrangements of seasonal workers who have changed from a Temporary Work (International Relations) subclass 403 visa (subclass 403 visa) to a different temporary visa and the obligations of their approved employers in the seasonal worker programme (SWP).

Seasonal workers who have previously been on a subclass 403 visa and are now on a different temporary visa (eg, a Bridging visa E or Temporary Activity COVID-19 Pandemic subclass 408 visa) continuously participating in the SWP are not required to lodge a tax return if they are:

- a foreign resident for tax purposes
- earning income only from the SWP (including salary, wages, commission, bonuses, or allowances) or bank interest from an Australian bank, and
- subject to tax being withheld at 15% by approved employers on their behalf.

The change of visa from a subclass 403 visa to a different temporary visa will not of itself change the seasonal workers' residency status.

The ATO is making arrangements to ensure that the previous taxation arrangements under the subclass 403 visa continue to apply to the SWP workers holding a different temporary visa without changing their tax obligations.

Once the arrangements are complete, the ATO will issue a notice of assessment to SWP workers who have recently lodged their 2019/20 tax returns and will contact those SWP workers who have already received the notice of assessment.

Approved employers are required to continue to withhold and remit 15% tax from foreign resident SWP employees who continue to work while holding a different temporary visa. The ATO will not undertake compliance activities of an approved employer who continues such withholding while arrangements are being made.

Participants in the SWP must advise their employers about their residency status changes.

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## ATO Rulings and Activity (cont.)

### Class rulings issued:

- Class Ruling [CR2020/55](#) - University of Newcastle — early retirement scheme 2020 which applies from 22 October 2020 to 31 December 2021.
- Class Ruling [CR 2020/56](#) - University of Notre Dame Australia — early retirement scheme 2020 which applies from 22 October 2020 to 30 September 2021.
- Class Ruling [CR 2020/57](#) - Viva Energy Group Ltd — return of capital and share consolidation. The ruling applies from 1 July 2020 to 30 June 2021.
- Class Ruling [CR 2020/58](#) - St Vincent's Institute of Medical Research — deductibility of donations. The ruling applies from 30 June 2021 to 30 June 2026.
- Class Ruling [CR 2020/59](#) - The University of New England — early retirement scheme 2020. The ruling applies from 29 October 2020 to 30 June 2021.
- Class Ruling [CR 2020/60](#) - The University of South Australia — early retirement scheme 2020. The ruling applies from 29 October 2020 to 9 April 2021.
- Class Ruling [CR 2020/61](#) - University of Tasmania — early retirement scheme 2020. The ruling applies from 29 October 2020 to 30 June 2021.
- Class Ruling [CR 2020/62](#) - Marine Scalefish Fishery reform — voluntary licence surrender program. The ruling applies from 24 May 2020 to 30 June 2021.

## Latest Australian Tax Cases

- **Assessable income** - The Full Federal Court has partly allowed the taxpayer's appeal from the decision reported at 2019 ATC, finding no error in the primary judge's characterisation of certain cash contributions and customer contributions made to electricity distributors but disagreeing with the amount that needed to be included in assessable income as a non-cash business benefit pursuant to s21A of ITAA 1936. [Victoria Power Networks Pty Ltd v FC of T 2020 ATC - 21 October 2020]
- **Superannuation guarantee** - The AAT has held that a service technician who was engaged as an independent contractor with a repair and maintenance company was not an "employee" within the meaning of s12 of the Superannuation Guarantee (Administration) Act 1992. [MWWD v FC of T 2020 ATC - 6 October 2020]
- **Deductions** - The Federal Court has held that the repayment of borrowings by a property development business to acquire trading stock was not on revenue account as the original borrowings were not an incident of the process by which the taxpayer operated to purchase its trading stock. [Advanced Holdings Pty Ltd as trustee for The Demian Trust & Ors v FC of T 2020 ATC - 15 October 2020]
- **Residency** - A taxpayer who returned to Australia after a seven-month contract position in Kuwait has been held to be a resident of Australia by the AAT, resulting in his foreign source income being included in his assessable income for the 2016 year. [Arjunan v FC of T 2020 ATC - 13 October 2020]
- **GST** - A company operating a sheep grazing business has been found liable for GST on the sales of vacant land after the company failed to prove that the sales were not made in the course or furtherance of its enterprise. [San Remo Heights Pty Ltd v FC of T 2020 ATC - 9 October 2020]



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## Latest Australian Tax Cases (cont.)

- **Deductions - lump sum payments.** The Full Federal Court has held that the lump sum payments made by an operator of medical centres to doctors to conduct their practice at those centres were on capital account and not deductible from the operator's assessable income, thereby allowing the Commissioner's appeal against the decision reported at 2019 ATC. [FC of T v Healius Ltd 2020 ATC - 9 October 2020]
- **Collection and recovery** - The AAT has fully released a taxpayer from his eligible tax liabilities as it would be impossible for him to fully repay his tax debts in his lifetime and, if required to do so, would suffer substantial and long-term serious hardship. [Cox v FC of T 2020 ATC - 2 October 2020]
- **GST** - The Australian Taxation Office (ATO) is facing a budget black hole of more than \$1.15 billion and the spectre of a class action after it lost the landmark case on 6 November 2020, relates to defunct refiner EBS & Associates – which was formerly part of the country's second-biggest gold refiner. The landmark case, heard by the full bench of the Federal Court in front of justices Nye Perram, Mark Moshinsky and Thomas Thawley, unanimously overturned a decision made in the Administrative Appeals Tribunal in relation to GST assessments issued to an entity in the precious metals industry. The Federal Court decision means up to \$500 million of assessments and penalties issued by the ATO will be set aside. [6 November 2020]
- **Transfer Pricing** - The Commissioner of Taxation's appeal in the 'Glencore case' was unanimously dismissed by the Full Federal Court (save for a minor issue regarding freight). The Court upheld the Federal Court in taking a pragmatic approach in applying Australia's complex transfer pricing laws. The majority explained that care must be taken "not to make the task of compliance with Australia's transfer pricing laws an impossible burden when a revenue authority may, years after the controlled transaction was struck, find someone, somewhere, to disagree with a taxpayer's attempt to pay or receive arm's length consideration." [Commissioner of Taxation v Glencore Investment Pty Ltd [2020] FCAFC 187 - 6 November 2020]

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