

Monthly Tax Update

In this edition of the Monthly Tax Update for November 2021, 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.

Legislation Update

- **Treasury Laws Amendment (2021 Measures No. 2) (Deductible Gift Recipients—Extended Application Date) Instrument 2021** was registered as a legislative instrument that prescribes the criteria that must be satisfied in order for deductible gift recipients (DGRs) registered before 14 December 2021 to access an extension to the transitional period for becoming a registered charity.
- **The Treasury Laws Amendment (2021 Measures No 7) Bill 2021** has been passed by the House of Representatives. The Bill includes amendments to the sharing economy reporting regime, facilitate the Australian Financial Complaints Authority (AFCA) replacing the Superannuation Complaints Tribunal (SCT), and remove the \$250 non-deductible threshold for work-related self-education expenses.

COVID-19 Stimulus Packages Updates

Fourth JobMaker claim period open

The ATO says the fourth claim period for JobMaker Hiring Credit payments is now open.

According to the ATO, eligible businesses can claim the JobMaker Hiring Credit for up to a year for each additional eligible employee hired between 7 October 2020 and 6 October 2021.

Resources have been made available to assist with claims including a guide, key dates and a payment estimator tool to help calculate the payment.

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

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Collaborating with Andersen Global in Australia

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OECD Updates

OECD update: tax progress report; BEPS Action 13 and 14 peer reviews

The OECD has issued the following:

- **Platform for Collaboration on Tax Progress Report 2021** - examines activities that the Platform for Collaboration on Tax has undertaken in 5 focus areas since July 2020, ie medium-term revenue strategies, COVID-19, tax and sustainable development goals, international taxation, and co-ordination.
- **Fourth annual peer review results of BEPS Action 13** — Compilation of 2021 Peer Review Reports which considers the implementation of the Country-by-Country reporting minimum standard by jurisdictions as of April 2020 and covers 132 Inclusive Framework members.
- **New peer review monitoring reports of BEPS Action 14** - Mutual Agreement Procedure peer review reports on improving tax dispute resolution mechanisms for Brazil, Bulgaria, China, Hong Kong, Indonesia, Russia and Saudi Arabia.

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

Other Updates

ASIC's Phoenix Surveillance Campaign

21 joint engagement consultations were conducted with corporate directors from 1 July 2020 to 30 June 2021, as part of Australian Securities and Investments Commission's (ASIC) Phoenix Surveillance Campaign.

The aim of the Phoenix Surveillance Campaign is to deter and prevent company directors from engaging in illegal phoenix activity. ASIC and the ATO engage with company directors to remind them of their director duties, discuss their taxation obligations, and encourage them to seek professional and reputable business advice early if they are experiencing financial distress.

The campaign was first implemented by ASIC in the 2013–14 financial year, with the ATO joining in the 2019–20 financial year. The 2 agencies share intelligence and undertake surveillance on directors that may be at risk of engaging in illegal phoenix activity.

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

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ATO Rulings and Activity

Applications open for director identification numbers

The ATO says applications are now open for director identification numbers (DINs) via the Australian Business Registry Services (ABRS) website.

According to the ATO, a DIN is required where an individual is an eligible officer of:

- a company, a registered Australian body or a registered foreign company under the Corporations Act 2001 (Corporations Act); or
- an Aboriginal and Torres Strait Islander corporation registered under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act).

The date the directors must apply for DIN varies, depending on the date they became a director:

Date they became a director	Date they must apply
On or before 31 October 2021	By 30 November 2022
Between 1 November 2021 and 4 April 2022	Within 28 days of appointment
From 5 April 2022	Before appointment

More information can be found on the [ATO website](#) or [ABRS website](#).

Draft Data standard and disclosure framework to support commencement of Director ID regime

The ATO has published draft legislative instruments made by the Commissioner, in his capacity as Registrar, on the new data standard and disclosure framework to support commencement of the Director ID regime.

■ ABRS 2021/D1 Draft Director Identification Number Laws (Application) Data Standard 2021

The ABRS 2021/D1 determines the information required to apply for a director ID under the Corporations Act, including how a director's data is provided, used and stored.

This instrument repeals Corporations Director Identification Number Data Standard 2021 ([F2021L00454](#)) registered on 16 April 2021.

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

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ATO Rulings and Activity (Cont.)

Draft Data standard and disclosure framework to support commencement of Director ID regime (Cont.)

■ ABRS 2021/D2 Draft Director Identification Number Laws (Other Government Bodies) Disclosure Framework 2021

ABRS 2021/D2 provides for a disclosure framework relating to the disclosure of protected information that is director ID information.

The Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020 authorises the disclosure of protected information (such as director ID information) to government entities. Some public governance, performance and accountability bodies, as well as courts and tribunals, are part of the workings of government, but do not fall within the definition of "government entity". The Draft Disclosure Framework sets out the circumstances in which the Registrar may disclose director ID information to these bodies, in the same way as government entities.

This instrument repeals Corporations (Director Identification Number) Disclosure Framework (PGPA Bodies, Courts and Tribunals) 2021 ([F2021L00455](#)) registered on 16 April 2021.

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

Updated guidance on base rate entities and aggregated turnover

The ATO has updated guidance on when a corporate tax entity will be a base rate entity under s 23AA of the Income Tax Rates Act 1986.

The addendum to Law Companion Ruling LCR 2019/5 clarifies the correct income year that must be used when calculating aggregated turnover for an entity to be a base rate entity. Unlike the small business entity aggregated turnover test under s 328-110(1)(b) of ITAA 1997, the aggregated turnover for any earlier income year is irrelevant for determining base rate entity status.

The addendum applies on and from 20 October 2021.

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

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ATO Rulings and Activity (Cont.)

Guidance on the meaning of “connected with” and aggregated turnover

The ATO has issued guidance on determining whether an entity is “connected with” another entity for the purposes of determining aggregated turnover under Subdiv 328-C of ITAA 1997.

The concept of aggregated turnover in Subdiv 328-C is relevant to a number of tax provisions, including the temporary loss carry back, temporary full expensing and access to a range of small business concessions. An entity is “connected with” another entity if either entity controls the other entity in a way described in s 328-125, or both entities are controlled by the same third entity.

■ Draft TD 2021/D2 - Partnerships, foreign hybrids and non-entity joint ventures

Draft TD 2021/D2 considers how the aggregation rules apply to partnerships, foreign hybrids and non-entity joint ventures. The draft determination sets out the Commissioner’s preliminary view and practical examples on determining whether an entity directly controls, or is directly controlled by, a partnership, foreign hybrid or non-entity joint venture under s 328-125(2).

The Commissioner considers Subdiv 328-C to apply to a partnership (excluding corporate limited partnerships) as though it were an entity separate to its partners. The partnership, rather than the individual partners, is the relevant entity when determining whether a partnership directly controls another entity under s 328-125(2). An entity that is directly controlled by a partnership may be indirectly controlled by entities controlling the partnership under s 328-125(7), including the individual partners in their capacity as partners.

Subdivision 328-C also applies to foreign hybrid limited partnerships and foreign hybrid companies as though they were a partnership. Accordingly, the specific test for determining direct control of a company under s 328-125(2)(b) does not apply to these entities. By virtue of being treated as a partnership for Australian tax purposes, these entities cannot be an affiliate of another entity within the meaning of s 328-130.

As non-entity joint ventures are not entities for Subdiv 328-C purposes, the ATO view is that, in applying the aggregation rules, the relevant entities are each of the parties to the joint venture, in their separate capacities. Further, joint venturers will not be affiliates merely because of the nature of their business relationship.

For further details, please refer to [TD 2021/D2](#).

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ATO Rulings and Activity (Cont.)

Guidance on the meaning of “connected with” and aggregated turnover (Cont.)

■ Draft TD 2021/D3 - Corporate limited partnerships

Draft Taxation Determination TD 2021/D3 sets out the Commissioner’s preliminary view and practical examples on determining whether an entity directly controls a corporate limited partnership under s 328-125(2). Corporate limited partnerships, as defined in s 94D of ITAA 1936, are treated as a company for income tax purposes.

The rules for determining aggregated turnover in Subdiv 328-C apply to a corporate limited partnership as though it were a company, rather than a partnership. Accordingly, the specific test for determining whether an entity directly controls a partnership under s 328-125(2)(a)(ii) does not apply to determining whether an entity directly controls a corporate limited partnership. By virtue of being treated as a company for Australian tax purposes, a corporate limited partnership is capable of being an affiliate within the meaning of s 328-130.

For further details, please refer to [TD 2021/D3](#).

■ Draft TD 2021/D4 - Public entity exception to indirect control test

Draft Taxation Determination TD 2021/D4 sets out the Commissioner’s preliminary view on how the public entity exception to the “indirect control test” in s 328-125(7) applies where a public entity is interposed in an ownership structure.

Where an entity (first entity) controls a second entity, and the second entity directly or indirectly controls a third entity, the first entity is taken to control the third entity under the “indirect control test” in s 328-125(7). The indirect control test does not apply if the second entity interposed between the first and third entities is of a kind listed in s 328-125(8) (broadly, public entities).

TD 2021/D4 provides that the mere presence of an interposed entity does not result in a control chain being broken. If a public entity is interposed in an ownership structure, the first entity may still control the third entity through direct control. The draft determination provides examples on determining control and aggregated turnover where there is an interposed public entity.

For further details, please refer to [TD 2021/D4](#).

The 3 determinations are proposed to apply both before and after their date of issue when finalised. The last day for submitting comments is 12 November 2021.

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ATO Rulings and Activity (Cont.)

TD2021/D5 – Employee share schemes and genuine disposal restrictions

The ATO on 14 October 2021 released Draft TD 2021/D5 : Income tax: when are you genuinely restricted from immediately disposing of an interest provided under an employee share scheme (ESS)?

The draft determination sets out the ATO's preliminary views on when interests received under an employee ESS are subject to genuine disposal restrictions.

Under Div 83A of ITAA 1997, amounts relating to discounted ESS interests (ie shares or rights to shares) can be deferred to a later point of time rather than being included in the income year in which the ESS interest was obtained (the "ESS deferred taxing point"). One ESS deferred taxing point occurs if, at the time ESS interest was acquired by an employee (or "holder"), the scheme "genuinely restricted you immediately disposing of the interest". In those circumstances, the ESS deferred taxing point arises when the holder is no longer so restricted.

Draft Taxation Determination TD 2021/D5 sets out principles for working out whether genuine disposal restrictions existed within an ESS and, if so, when an employee ceased to be under the restrictions for the purpose of determining their ESS deferred taxing point. The draft determination does not consider the "real risk of forfeiture" test, which is another condition relevant to this ESS deferred taxing point.

In determining whether a restriction on disposal of an ESS interest constitutes a genuine disposal restriction, TD 2021/D5 provides that:

- The scheme's disposal restrictions must be sufficiently identifiable, certain and legally enforceable, with serious consequences enforced when a breach occurs.
- The requirement for an employee to make an application to their employer or a company discretion to allow trade does not necessarily constitute a genuine disposal restriction.
- A restriction that may be lifted at the discretion of a company board applying clear, fixed and objectively measured criteria may constitute a genuine disposal restriction.
- A restriction will not be precluded from being a genuine disposal restriction if it is able to be lifted in exceptional and extraordinary circumstances (such as severe financial hardship).

TD 2021/D5 also discusses how genuine disposal restrictions may be documented and restrictions relating to price sensitive information. Once finalised the determination is proposed to apply both before and after its date of issue.

The last day for submitting comments is 12 November 2021.

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

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ATO Rulings and Activity (Cont.)

COVID-19 working from home deductions extended

The ATO has updated its guidance on claiming deductions for additional running expenses incurred whilst working from home due to COVID-19. The availability of the “shortcut” rate set out in Practical Compliance Guideline PCG 2020/3 for claiming work-from-home running expenses now applies from 1 March 2020 to 30 June 2022.

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

Taxpayer alert - Structured arrangements that avoid luxury car tax

The ATO is reviewing arrangements involving sales of both new and second-hand luxury cars between participating entities designed to improperly obtain refunds of luxury car tax (LCT) and evade LCT on the retail sale of the cars.

According to the taxpayer alert issued (TA 2021/4), the arrangements typically involve the following features:

- the supply of a luxury car to a pre-determined recipient identified by the controlling mind of the arrangement
- a number of wholesale sales of the car are purportedly made, along a chain of participating entities often acting in collusion, prior to the final retail sale to the pre-determined recipient
- one of the entities claims a refund of LCT while creating a consequential liability to another entity in the supply chain
- one or more of the participating entities (described as a “missing trader”) does not correctly report and pay their purported LCT liabilities to the Commissioner.

The arrangements may also involve artificially embedding LCT in the price of the car that is not otherwise subject to LCT. One of the participating entities will then seek to recoup this LCT as a refund. The corresponding and artificially-created LCT liability is never reported and paid.

The ATO is concerned that entities are using these types of arrangements to improperly obtain LCT refunds and to evade LCT. These arrangements can also result in luxury cars being sold without income tax and GST obligations being met. Entities in the supply chains liquidate to circumvent ATO compliance or recovery action.

The ATO is engaging with taxpayers to ensure that all parties have correctly met their LCT, GST and income tax obligations. Taxpayers who adopt these types of arrangements, and their advisers, will be subject to increased scrutiny from the ATO.

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

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ATO Rulings and Activity (Cont.)

Guidance for GST assurance reviews

The ATO has published new guidance for Top 100 and Top 1000 taxpayers subject to a Goods and Services Tax (GST) assurance review.

The ATO's Guide to Independent Data Testing by Third Party Advisors provides practical guidance to taxpayers on ATO expectations for third party advisors undertaking data testing to be relied upon in a GST assurance review. The purpose of the Guide is to explain the ATO's expectations and conditions for top 100 and top 1,000 taxpayers when engaging a third-party advisor to undertake the independent data testing as part of a GST assurance review.

Please refer [here](#) for further details.

Furthermore, the ATO has issued the following guidance in relation to its GST Analytical Tool which is one of the tools the ATO uses to obtain greater assurance as to whether the right amount of GST has been paid. The examples provide an overview of how the ATO looks at the taxpayer's BAS and accounting summary to make conclusions and the next course of action, if necessary.

- **GST Analytical Tool FAQ** - explains the ATO's use of the GST Analytical Tool, including its context in terms of the assurance process, the objective evidence that will be accepted and how the ATO assesses variances that are found.
- **GST Analytical Tool – Top 100 example** - provides an example of how analysis from applying the GST Analytical Tool will be shown in the Tax Assurance Report for a Top 100 taxpayer.
- **GST Analytical Tool – Top 1000 example** - provides an example of how analysis from applying the GST Analytical Tool will be shown in the Tax Assurance Report for a Top 1000 taxpayer.

Data matching with AUSTRAC transaction report: ATO notice

The ATO has registered a notice that it will acquire AUSTRAC transaction report information data from AUSTRAC for the period of 17 June 2021 through to 30 June 2027.

The data items specified include information reported to AUSTRAC for:

- international funds transfer instructions
- threshold reports (excluding gambling)
- threshold reports (including gambling)
- solicitor transactions reports
- "suspicious matters"
- carry mail and physical cash
- bearer negotiable instruments.

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

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ATO Rulings and Activity (Cont.)

Value of goods taken from stock for private use for 2021–22

The ATO has updated the amounts it will accept as estimates of the value of goods taken from trading stock for private use by taxpayers for certain named industries in the 2021–22 year.

Taxation Determination TD 2021/8 sets out the amounts applicable for 2021–22 income year. Please refer to [TD 2021/8](#) for further details.

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. Where the value of goods ex-stock would be significantly greater, the actual amount should be used.

The ATO has also withdrawn the following taxation determinations with effect from 11 November 2021:

- Taxation Determination [TD 2014/2](#) Income tax: value of goods taken from stock for private use for the 2013–14 income year
- Taxation Determination [TD 2015/9](#) Income tax: value of goods taken from stock for private use for the 2014–15 income year, and
- Taxation Determination [TD 2016/9](#) Income tax: value of goods taken from stock for private use for the 2015–16 income year.

Class rulings issued:

- Class Ruling [CR 2021/70](#) Milton Corporation Ltd — scheme of arrangement, final dividend, and special dividend. The ruling applies from 1 July 2021 to 30 June 2022.
- Class Ruling [CR 2021/71](#) Commonwealth Bank of Australia — off-market share buy-back. The ruling applies from 1 July 2021 to 30 June 2022.
- Class Ruling [CR 2021/72](#) Neometals Ltd — demerger of Widgie Nickel Ltd. The ruling applies from 1 July 2021 to 30 June 2022.
- Class Ruling [CR 2021/73](#) Environment Protection Authority Victoria — early retirement scheme 2021–22. The ruling applies from 11 November 2021 to 30 October 2022.

Product rulings issued:

- Product Ruling [PR 2021/12](#) Challenger Lifetime Annuity (Liquid Lifetime). The ruling applies prospectively from 4 October 2021 only to the specified class of entities that enter into the scheme from 4 October 2021 until 30 June 2024, being its period of application.

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Latest Australian Tax Cases

- **Aus/UK DTA; backpacker tax** - The High Court has unanimously held that the “backpacker tax” contravened the non-discrimination clause in Art 25 of the Australia/UK double tax agreement (DTA), thereby allowing the taxpayer’s appeal against the Full Federal Court decision in *FC of T v Addy* 2020 ATC. [*Addy v FC of T* 2021 ATC - 3 November 2021]
- **Superannuation; notice of compliance** - The AAT has refused to exercise the discretion under s 42A(5) of the Superannuation Industry (Supervision) Act 1993 (Cth) to issue a notice of compliance to the trustee of a self-managed superannuation fund where the trustee’s contraventions during the relevant year included using the fund’s moneys to pay for the sole member of the fund’s attendance at a Church of Scientology course. [*Driscoll v FC of T* 2021 ATC - 25 October 2021]
- **Tax administration; serious hardship** - The Federal Court has affirmed a decision of the AAT (*ZCSB v FC of T* 2021 ATC) that a highly qualified medical doctor should not be granted release from his tax liabilities, after agreeing that he and his family would not suffer serious hardship if required to pay the tax debt in circumstances where there was scope for him to substantially reduce the family’s outgoings while maintaining a reasonable standard of living according to normal community standards. [*Wood v FC of T* 2021 - 13 October 2021]

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