

September - October 2020



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Monthly Tax Update

In this edition of Tax Update, we summarise the Bills which have received assent and a Bill which is awaiting assent. Since our last update, a legislative instrument has been made to provide an additional alternative decline in turnover test to be eligible for JobKeeper payments. We also include other updates on Fringe Benefits Tax, Corporate tax residency, R&D incentive, Australia Taxation Office's (ATO's) latest publications and latest Australian tax cases in this edition.

Federal Budget 2020/21

You can read the A&A Federal Budget 2020/21 tax update [here](#).

Legislation Update

Tax, superannuation and JobKeeper Bills now law

The following bills received assent on 3 September 2020:

- Treasury Laws Amendment (2020 Measures No 2) Bill 2020 as Act No 79 of 2020. The Act contains amendments related to the hybrid mismatch rules, Single Touch Payroll reporting, deductible gift recipient status and tax secrecy provisions. The Senate's proposed amendments to require grandfathered large proprietary companies to lodge financial reports with ASIC were rejected and excluded from the Bill.
- Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019 as Act No 80 of 2020. The Act gives employees under workplace determinations or enterprise agreements the right to choose their superannuation fund, and
- Coronavirus Economic Response Package (Jobkeeper Payments) Amendment Bill 2020 as Act No 81 of 2020. The Act revises the existing "prescribed period", which otherwise ends on 31 December 2020, to facilitate the extension of the JobKeeper Payment scheme to 28 March 2021.

COVID-19 economic recovery Bill awaits assent

The COVID-19 economic recovery Bill containing several 2020/21 Federal Budget measures has completed its passage through parliament on 9 October 2020 and now awaits assent.

The measures in the Treasury Laws Amendment (A Tax Plan For The COVID-19 Economic Recovery) Bill 2020 include those relating to personal income tax cuts, temporary loss carry back, increasing the small business entity turnover threshold, the research and development (R&D) tax incentive and expensing of depreciating assets.

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COVID-19 Stimulus Packages Updates

JobKeeper Payments updates

Since our last update on JobKeeper Scheme, a legislative instrument has been made to provide an additional alternative decline in turnover test where there is not an appropriate relevant comparison period in 2019 for the purpose of an entity in the class of entities satisfying both the actual decline in turnover test and the decline in turnover test to be eligible for JobKeeper payments.

- The Coronavirus Economic Response Package (Payments and Benefits) Alternative Decline in Turnover Test Rules (No 2) 2020 (the primary instrument) sets out alternative decline in turnover tests where there is not an appropriate relevant comparison period in 2019. The tests apply for both the “original” or “projected” decline in turnover test in s 8 and 8A of the Rules and the actual turnover test in s 8B of the Rules for JobKeeper fortnights on or after 28 September 2020.
- The Coronavirus Economic Response Package (Payments and Benefits) Alternative Decline in Turnover Test Amendment Rules 2020 (the amending legislative instrument) amends the primary instrument to provide an additional alternative decline in turnover test for entities that temporarily ceased trading and were not trading for some or all the relevant comparison period. For present purposes, trading must cease due to events or circumstances outside of the ordinary course of business.

As a result of the amending legislative instrument, the entity can use either of the following tests:

1. The first alternative test compares the entity’s current GST turnover (or projected GST turnover) for the applicable turnover test period with the current GST turnover for the same period in the year immediately before the business temporarily ceased trading. The earlier period will be a more appropriate period to use than the relevant comparison period in 2019 due to the temporary cessation of trade.
2. The second alternative test compares the entity’s current GST turnover (or projected GST turnover) for the applicable turnover test period with the current GST turnover of the three whole months immediately before the month that the business temporarily ceased trading (or the whole month where the relevant comparison period is a month rather than a quarter).

Each alternative test can apply in regard to a relevant comparison period that is a calendar month or a quarter. A monthly relevant comparison period applies only to the decline in turnover test in s8 (including as modified by s 8A) of the Rules. For the actual decline in turnover test under s 8B of the Rules, entities must use a relevant comparison period that is a quarter ending on 30 September 2019 or 31 December 2019.

The amending legislative instrument commences on 10 October 2020 and applies to JobKeeper fortnights beginning on or after 28 September 2020.

Other Federal Government measures

JobMaker Plan

As part of the 2020/21 Budget measures, the Government has announced the JobMaker Plan as a key element of its Economic Recovery Plan for Australia, in the following areas:

- Temporary loss carry-back to support cash flow
- Bringing forward the Personal Income Tax Plan and retaining the low and middle income tax offset
- JobMaker Hiring Credit
- JobMaker Plan - boosting apprenticeships wage subsidy
- JobMaker Plan - global business and talent attraction taskforce
- JobMaker Plan - Research and Development Tax Incentive

For further details, please refer to our Federal Budget 2020/21 tax update [here](#).

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COVID-19 Stimulus Packages Updates (cont.)

More businesses to access small business tax concessions

Businesses with turnover between \$10m and \$50m will have access to some existing small business tax concessions as part of the 2020/21 Federal Budget measures. This was discussed in our A&A Federal Budget 2020/21 tax update [here](#).

FBT exemption and deductions for retraining and reskilling

As part of the 2020/21 Federal Budget measures, employer-provided retraining and reskilling for redundant, or soon to be redundant, employees will be exempt from fringe benefits tax. When enacted, the exemption will apply from 2 October 2020.

Please refer to our A&A Federal Budget 2020/21 tax update [here](#) for further details.

Other Tax Developments

Corporate tax residency rules - Board of Taxation report

In August 2019, the Treasurer wrote to the Board of Taxation (the "Board") asking the Board to conduct a review of the operation of Australia's corporate tax residency rules. The purpose of the review is to ensure that the rules are operating appropriately in light of modern, international and commercial board practices and international tax integrity rules.

Following the request, the Board has published 2 consultation papers for its stakeholders' comments and review. The Board completed its report in July 2020.

On 6 October 2020, the Government released the Board's report and, in the 2020/21 Budget, adopted the Board's key recommendation.

The Government will amend the law to provide that for a foreign incorporated company to be a tax resident in Australia, it must have significant economic connection to Australia. This can be demonstrated where both its core commercial activities are being undertaken in Australia and its central management and control is in Australia.

This change will mean the treatment of foreign incorporated companies will reflect the corporate residency position prior to the 2016 High Court decision in *Bywater Investments Ltd v Federal Commissioner of Taxation*.

It will have effect from the first income year after the date of Royal Assent of the enabling legislation, but taxpayers will have the option of applying the new law from 15 March 2017 (the date on which the ATO withdrew its ruling TR 2004/15).

Research and Development (R&D) tax incentive - consultation on updated draft guide for R&D tax incentive

The Department of Industry, Science, Energy and Resources (the Department) is seeking comments on an updated draft of its Guide to Interpretation for the Research and Development (R&D) tax incentive (the Guide).

According to the Department, whilst the scope of the refreshed Guide has not changed, its language and style have been refreshed so it is clearer and users are able to understand the eligibility requirements of the program. It also aligns with recent Federal Court and Administrative Appeals Tribunal decisions.

The Department would like to understand from businesses that currently or are considering accessing the R&D tax incentive program:

- whether the refreshed Guide is easy to read and understand
- if there is any further guidance it can provide to business to help them assess whether they are eligible, and
- if and when businesses will use the refreshed Guide.

The last day for comments was due on 25 September 2020.

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ATO Rulings and Activity

Updated PAYG withholding schedules for 2020/21

The ATO has published the updated withholding schedules and tax tables to be applied to payments made on and from 13 October 2020, following the passage of the reduced tax cuts for the 2020/21 year.

As the changes to withholding are made part way through the income year, the ATO has stated that employers and other payers who are unable to immediately implement these changes into their payroll will have until 16 November 2020 to do so.

Employees and other payees will receive their entitlement to the reduced tax payable for the entire 2020/21 income year when they lodge their income tax return.

ATO focus on capital gains from shares, property and cryptocurrency

As the ATO's data-matching capabilities increase and as they are paying close attention to capital gains made on shares, property and cryptocurrency, ATO has reminded tax agents to ensure their clients' capital gains and losses are worked out correctly, and they are paying close attention to capital gains made on shares, property and cryptocurrency.

Capital gains or losses may arise from the sale, loss or destruction of an asset. The type of Capital Gains Tax (CGT) event that applies can affect:

- how a capital gain or loss is calculated
- when it is included in a net capital gain or loss.

Generally the records relating to any CGT event, including asset disposals should be kept for at least five years after the year in which the event occurred. Records should also be kept of any net capital losses, which could offset against capital gains in a later year. Once a loss is offset against a capital gain, records of the CGT event that resulted in the loss should be kept for:

- two years (for individuals and small businesses), or
- four years (for other taxpayers).

Capital gains and foreign income tax offset limit – TD2020/7

The ATO has published Taxation Determination (TD) TD 2020/7 Income tax: Can capital gains be included under subparagraph 770-75(4)(a)(ii) of the Income Tax Assessment Act 1997 in calculating the foreign income tax offset limit?

The ATO said that the TD is in response to some taxpayers incorrectly including foreign capital gains where no foreign tax has been paid as 'disregarded income' in their calculation of the foreign income tax offset (FITO) limit and therefore over-claiming FITO. Over-claiming FITO is one of the drivers of the large superannuation fund income tax gap.

The ATO has finalised its view that capital gains are not included under s770-75(4)(a)(ii) of ITAA 1997 when calculating the foreign income tax offset limit. The ATO has indicated that the matters addressed in the TD are complex it has been finalised following extensive public consultation, including with industry, tax professions and interested associations.

ATO encourages those affected by the TD to read it in full and seek advice on how it applies to their situation.

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Latest Australian Tax Cases

Employment termination payment - The AAT has found that an “ex gratia” payment made to a taxpayer that was calculated to reflect the commission he would have been entitled to had he remained employed was received “in consequence of” the taxpayer’s termination of employment and thus attracted concessional tax treatment. [VGDW v FC of T - 29 September 2020]

Tax residency - The Full Federal Court has unanimously upheld the decision of Logan J, which applied the tie-breaker rule in the Australia/Thailand Double Tax Agreement (DTA) to deem a taxpayer to be a resident of Thailand for taxing purposes because his personal and economic relations were closer to Thailand than Australia. [FC of T v Pike - 23 September 2020]

CGT - active asset - The Full Federal Court has unanimously overturned the decision of Derrington J and held that a taxpayer was entitled to a small business CGT concession on the sale of land used by his family business because the land was an “active asset” used in the course of his business to store work equipment, tools and materials. [Eichmann v FC of T - 21 September 2020]

Personal services income - The Full Federal Court has allowed the Commissioner’s appeal against the Federal Court decision reported at 2019 ATC and held that the taxpayer did not satisfy the “unrelated clients test” under the personal services income provisions. [FC of T v Fortunatow & Anor - 25 August 2020]

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