While the AFL and NRL finals at the weekend had everyone on the edge of their seats in the final moments, we are now in the final quarter of 2016. Some of us have lost an hour thanks to daylight savings but the wheels keep turning here at TaxEd.

We would like to say a big welcome back to those members that have renewed and for those thinking of joining for the first time – get in touch, we would love to help.

With September wrapped up we take a look at some issues we feel are important for you to be aware of, particularly our article regarding the Commissioner's ability to modify a tax law.

Don't forget to join us on Monday (10 October) for the live session where will discuss these issues in more depth. (For those not affected by daylight saving, please note the start time will be 1pm AEDT).

Happy reading!

The TaxEd team

GST – GST and Council Rates

Why are Council Rates not subject to GST?

It is a longstanding and settled concept that Council rates are not subject to GST. Below is a brief analysis explaining why this is the case.

Taxable Supply

An entity makes a taxable supply where the following conditions are met:

(a) the supply is made for consideration;

(b) the supply is made in the course or furtherance of carrying on an enterprise;

(c) the supply is connected with the indirect tax zone (i.e. Australia); and

(d) the entity making the supply is registered or required to be registered.

However, a supply is not a taxable supply to the extent it is GST-free or input taxed.

Based on the above there are three types of supply mentioned: a taxable supply, GST-free supply and input taxed supply. A supply will only be a taxable supply where all the conditions are met, and the supply does not fall within the special rules to be either GST-free or input taxed. If a supply does not meet one (or more) of the taxable supply conditions they are often referred to as outside scope (or sometimes as exempt from GST) and not subject to GST.

Condition (a) is fundamental and requires that the supply be made for consideration. If there is no consideration, or insufficient nexus between the supply and consideration, then condition (a) will not be met and the supply will be outside scope.

Division 81

Division 81 of the GST law provides that:

> 'GST does not apply to payments of taxes, fees and charges that are excluded from the GST by this Division or by regulations. GST applies to certain taxes, fees and charges prescribed by regulations.'

Section 81-5(1) of the GST law states that:

> 'A payment, or the discharging of a liability to make a payment, is not the provision of consideration to the extent the payment is an Australian tax.'

'Australian tax' is defined in section 195-1 as follows:

> 'Australian tax means a tax (however described) imposed under an Australian law.'

Councils are generally capable of imposing rates on landholders via relevant legislation, typically the provisions of a Local Government Act (each State and Territory has their own Act). By way of example, section 156(1) of the *Local Government Act 1989* (Vic) states 'The owner of land is liable to pay the rates and charges on that land.'

The Explanatory Memorandum (EM) to the law that introduced the current version of Division 81 makes the following comments regarding Australian taxes:

> 'Australian taxes
>
> 4.20 Taxes are imposed as part of the general revenue raising activities of government and should not be subject to GST. Generally, taxes are not considered to be associated with a supply and are not subject to GST under the GST basic rules. However, given the expansive definition of 'supply' and 'consideration' contained within the GST Act, these amendments ensure all payments of taxes imposed under an Australian law will not be subject to GST at first instance.
>
> 4.21 The payment of an Australian tax, or the discharging of a liability to make such a payment, will not be treated as the provision of consideration (for any supply). Therefore, a supply (if any) will not be a taxable supply as the supply has not been made for consideration in accordance with paragraph 9-5(a) of the GST Act. Consequently, an Australian tax, imposed under an Australian law, will not attract GST. [Schedule 4, item 2, subsection 81 5(1)]
>
> 4.22 Examples of Australian taxes imposed under an Australian law include: income tax, stamp duty, fringe benefits tax, payroll tax, the Medicare Levy, local government 'ordinary rates' and various industry levies.'

Based on the above, the imposition of Council rates are a tax imposed under an Australian law, and therefore an Australian tax for GST purposes, and the reference in paragraph 4.22 of the EM clarifies this.

For completeness, we note that sections 81-5(2) and 81-5(3) provide that the GST Regulations may prescribe the extent to which certain payments may be treated as consideration, and that such payments are consideration for a supply made by the entity to which the tax is payable. However, there are no prescribed amounts in the GST Regulations for rates.

Accordingly, the effect of the above is that where Council charges rates these are not treated as consideration for a supply, and would be outside scope and not subject to GST.

Why do some landlords appear to impose GST on Council Rates to tenants?

Given the outcome above is reasonably clear that Council rates are not subject to GST, why do some landlords appear to impose GST when charging Council rates to tenants?

This issue arises mainly due to how entities refer to transactions compared to the technical nature or contractual characterisation of the transaction.

In short, the issue here is that while a landlord may state that it is charging the tenant for rates the reality is that it is only Council that can impose rates (via the legislative framework referred to above). What the landlord is doing from a technical viewpoint is charging rent - it's just that the amount of rent is often calculated by reference to a periodic rental base (e.g. weekly or monthly rent) plus amounts to recover other costs and outgoings incurred by the landlord. These amounts while referring to the costs incurred by the landlord, change their character when being charged to the tenant as outgoings.

By way of example, a retail tenancy lease agreement may include broad terms that the tenant is to pay rent plus outgoings. Let's also assume that the landlord and the tenant are both GST-registered, and that the lease is drafted on a 'plus GST basis' That is, the amounts specified in the lease agreement are exclusive of GST with an additional amount to be added equal to the amount of GST liability of the landlord. We refer to section 3 of the *Retail Leases Act 2003* (Vic), where the term 'outgoings' is defined as follows:

> ' "outgoings" means a landlord's outgoings on account of any of the following—
>
> (a) the expenses directly attributable to the operation, maintenance or repair of—
>
> (i) the building in which the retail premises are located or any other building or area owned by the landlord and used in association with the building in which the retail premises are located; or
>
> (ii) in the case of retail premises in a retail shopping centre, any building in the centre or any areas used in association with a building in the centre;
>
> (b) rates, taxes, levies, premiums or charges payable by the landlord because the landlord is—
>
> (i) the owner or occupier of a building referred to in paragraph (a) or of the land on which such a building is erected; or
>
> (ii) the supplier of a taxable supply, within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999* of the Commonwealth, in respect of any such building or land;'

Typical outgoings include Council rates, electricity, water and insurance.

The outgoings are, in effect, items for which an amount is to be added to the base rent. Assuming the only outgoings are Council rates, the landlord would seek to recover from the tenant the base rental amount plus an amount to ensure the landlord is not out of pocket for Council rates.

Assuming the annual rental (ex-GST) is $11,000 and annual Council rates payable by the landlord to Council is $1,000, the total annual rental plus outgoings the landlord would seek to recover from the tenant would be $12,000. As this excludes GST, and assuming the lease is a taxable supply, the landlord would want the lease to provide for these amounts to be grossed up so that the actual amount invoiced would be $13,200 (i.e. $12,000 plus GST of $1,200). It would not be uncommon for the tenant to receive an invoice for the monthly charge of $1,100 ($13,200/12 = $1,100) that looks as follows:

To: Tenant Pty Ltd Shop 1, 11 Graffiti Lane Melbourne VIC 3000	From: Landlord Pty Ltd 88 Smith St Melbourne VIC 3001 ABN 22 333 444 555		Tax Invoice 31 August 2016
Description	**Amount excluding GST**	**GST**	**Total including GST**
Monthly rental	$916.67	$91.67	$1,008.34
Outgoings (monthly): Council Rates	$83.33	$8.33	$91.66
Total	$1,000.00	$100.00	**$1,100.00**

While the invoice may appear to be charging the tenant Council rates plus GST, the amount being invoiced is not in fact Council rates, but a mechanism to calculate the rent due from the tenant.

Payroll – Payroll Issues Update – October 2016

PAYG - new withholding tax rates apply from 1 October 2016

The ATO website provides information on new PAYG withholding tax rates that apply from 1 October 2016.

The website includes tax tables for download (and a 'tax withheld for individuals calculator'). Alternatively, the ATO suggests that you contact your payroll software provider for an update.

In particular, employees earning more than $80,000 pa will be affected. The ATO specifically observes:

> 'The 32.5% tax threshold has increased from $80,000 to $87,000 in the withholding schedules. This is a result of the targeted personal income tax relief changes.'

Your attention is also drawn to the ATO's comment:

> 'If extra tax was withheld from employees before the rate change, they will be credited when they lodge their 2016–17 income tax return. [You] ... won't need to make any adjustments or refunds.'

Superannuation - SuperStream Compliance

The ATO has stated :

> 'As of 28 October 2016 all employers are required to be SuperStream compliant. Employers will send contributions electronically to super funds using the SuperStream standard. This includes self-managed super funds (SMSFs).
>
> All super funds (including SMSFs) that receive employer contributions have a requirement to be able to receive contribution payments and associated data electronically. ...
>
> Employers will need to collect some new information and update employee records in their payroll file to enable employee contributions to be sent electronically via the SuperStream standard.
>
> For employees with SMSFs this includes providing the fund's ABN and bank account details and a registered electronic service address to their employer.'

The ATO has provided:

- general information for SMSFs regarding the need for an active electronic service address and the implications for not doing so, and
- an email template of notification for use by SMSFs.

Payroll – The Advent of Single Touch Payroll

Legislation providing for single touch payroll (STP) reporting and related matters has been enacted. These matters will start on the following dates:

- **STP reporting**: 1 July 2018 - for employers with 20 or more employees (substantial employers);
- **Choice of Super fund:** Disclosure of information and notices given on or after 1 January 2017;
- **Streamlined procedure for completing TFN declarations using the ATO's online service:** declarations and disclosures made on or after 1 January 2017; and
- **TFN Validation:** Information given to the Commissioner on or after 1 January 2017.

The ATO has also issued a consultation paper in relation to dealing with some administrative issues that STP reporting will raise. It is expected that some of the issues identified by the ATO will affect some of our readers.

The purpose of this note is to give a broad overview of STP reporting and to alert you to the opportunity for input into the administrative issues identified by the ATO. The content of the consultation paper also aids understanding of STP reporting. Readers seeking further discussion on STP are referred to the Explanatory Materials accompanying the Bill.

The Bill (as passed):

Budget Savings (Omnibus) Bill 2016 - the STP reporting provisions and related matters are contained in Schedule 23 (the Schedule).

Note: the Bill received Royal Assent on 16 September 2016. (The Act, as such, has not been published at the time of writing.)

Explanatory Materials:

- Revised Explanatory Memorandum
- Supplementary Explanatory Memorandum

STP reporting - Part 1 of Schedule 23 to the Act

Under STP reporting, substantial employers are required to automatically report payroll and superannuation information to the Commissioner of Taxation at the time it is created. (This occurs pursuant to Part 1 of Schedule 23 of the Act inserting a new Division 389 in Schedule 1 to the *Taxation Administration Act*.)

Entities that report under STP will not have to comply with a number of existing reporting obligations under the taxation laws.

The Schedule also contains a number of related amendments to streamline an employer's payroll and superannuation choice processes by allowing the ATO to pre-fill and validate employee information.

Implications: STP will create a reporting regime that aligns with business processes (such as payroll cycles) for employers to report PAYG withholding and superannuation guarantee contributions to the ATO through Standard Business Reporting (SBR) enabled software. This will have the effect that employers will be required to report transactions to the ATO earlier than they currently do.

(1) Which entities need to report?

Entities with 20 or more employees (substantial employers) at any time on or after 1 April 2018 will be required to report under STP from 1 July 2018. Entities that become substantial employers on 1 April in a subsequent year will be required to report under STP from 1 July of that calendar year.

Key points:

- For the purposes of determining whether an employer is a *substantial employer*, the number of employees is calculated using a headcount, rather than a full-time equivalency.
- The term 'employee' has its ordinary meaning — i.e. contractors will not be included in the relevant headcount.
- An employer that is a member of a wholly-owned group will be a substantial employer if the group has 20 or more employees in total.
- Entities that are not substantial employers are not required to report under STP, but may choose to do so.
- The Commissioner may grant exemption from STP reporting for one or more income years, either on a class of entity basis or an individual basis.

(2) Amounts to be reported

Amounts that must be reported and the required timing are summarised in the table below:

Substantial employers must report through STP ...	**Timing requirement**
Withholding amounts and associated withholding payments usually reported on a BAS	On or before the day by which the amount is required to be withheld — generally this will be when the employer makes the payment to the employee.
Salary or wages and ordinary time earnings information	On or before the day on which the amount is paid.
Superannuation guarantee contribution information	On or before the day on which the contribution is paid. **Note:** For employers using SuperStream compliant software packages, clearing houses or intermediaries to produce contribution transaction reports under the SuperStream regime, the Commissioner envisages that the information contained in these reports would satisfy the

	employer's obligations under STP.

Implications: In practice, this will require substantial employers to report using SBR-enabled software.

(3) Effect on other reporting requirements

A reporting entity that has met all of its STP reporting obligations for an income year will not need to comply with the reporting obligations set out in the table below:

Notification of withholding amounts **[s. 16-150]**	It is expected that the ATO will pre-fill this information on the BAS for reporting entities, based on the information reported under the STP.
Payment summaries [s.16-155 - Annual payment summaries; s. 16-160 – part-year payment summaries; s. 16-165 – payment summaries for superannuation lump sums and payments for termination of employment]	The Commissioner will be able to make the information that is currently recorded on an annual payment summary progressively available online (ATO Online via myGov) to employees throughout the income year. Employers may still choose to provide an annual payment summary if requested by an employee, however they will only be obliged to provide payment summaries for amounts not reported through STP. It is not mandatory for reportable employer superannuation contribution (RESC) and reportable fringe benefit (RFB) amounts to be reported through STP, however an employer may choose to do so by 14 July. In these circumstances, the employer would not be obliged to provide an annual payment summary covering these amounts.
Annual reports [s. 16-153 – annual reports re other payment]	Reporting entities will no longer be required to provide an annual report to the Commissioner in relation to amounts reported under STP, including RESC and RFB amounts voluntarily reported by 14 July after the end of a financial year (this is one month earlier than required under the existing law).

(4) Penalties – transitional relief

An entity that fails to provide a report on time, or in the approved form, may be liable for failure to lodge (FTL) penalty under s. 286-75 in Schedule 1 to the *Taxation Administration Act 1953* . However, for the first year that an entity is required to report under STP, that entity will not be subject to FTL penalty unless the Commissioner first issues the employer with a non-compliance notice.

Implications: This transitional rule recognises that employers will need time to adjust to STP, and anticipates that during the first 12 months the Commissioner will provide support and help prior to issuing a non-compliance notice.

(5) Grace periods for correcting errors

The amendments allow the Commissioner to provide reporting entities with an ongoing grace period for correcting false or misleading statements in relation to STP reports, without penalty.

Key Points – correcting errors:

The Commissioner will have:

- the flexibility to allow, for example, that corrections be given in a subsequent STP report;

- power to determine the timeframe for reporting entities to correct errors, and to specify that different timeframes apply to different classes of entities — e.g. different periods may apply depending on the size of the withholder and the size of the correction; and
- power to provide by notice a different period for an individual reporting entity — this will be a reviewable decision.

Important: Regardless of any grace period specified by the Commissioner, reporting entities will need to make any corrections within 14 days after the end of the financial year to which the relevant report relates. This is because the grace period is only available for correcting statements related to the financial year in which the statement was made.

(6) Commissioner's power to retain refunds

The Commissioner will be allowed to retain a refund where an entity is required to notify, or voluntarily notifies, under STP and the Commissioner has formed a reasonable belief that an STP report is outstanding.

The Commissioner may retain a refund until any one of four specified circumstances occur, whichever circumstance (if any) occurs first:

1. the entity gives the Commissioner an STP notification;
2. the Commissioner is reasonably satisfied that the entity is not required to give an STP notification;
3. the Commissioner is reasonably satisfied that the entity does not have a PAYG withholding liability; or
4. the Commissioner otherwise ascertains the entity's total PAYG withholding liability.

Choice of Fund – Part 2 of Schedule 23 to the Act

Part 2 of Schedule 23 to the Act contains amendments to the *Superannuation Guarantee (Administration) Act 1992* (SGA Act) to allow the ATO to implement a voluntary streamlined procedure for completing superannuation standard choice forms through myGov.

Implications: An employer may inform an employee that the employee can choose a superannuation fund using the Commissioner's online service rather than completing and returning the standard choice form to them. This means that:

- the employee could take advantage of pre-filled information and could choose one of their existing superannuation funds as their chosen fund; and
- the employer would receive this validated information from the Commissioner directly into their business management software — i.e. it would not need to be re-keyed.

We note that these proposed amendments do not:

- affect the scope of employees entitled to superannuation choice (s. 32C of the *SGA Act*);

- affect an employee's superannuation fund choice applying separately to each employer (s. 32X of the *SGA Act*); or
- change an employer's obligation to provide a standard choice form to employees within 28 days of the employee commencing employment (s. 32N(2) of the *SGA Act*).

TFN declarations – Part 3 of Schedule 23 to the Act

Part 3 of Schedule 23 to the Act contains amendments to the *ITAA 1936* and the *Superannuation Industry (Supervision) Act 1993* to enable the ATO to implement a voluntary streamlined procedure for completing TFN declarations using the Commissioner's online service.

As with choice of fund forms, this means that employees will be able to make TFN declarations online, and the Commissioner will make the relevant information available to the employer.

Employers will need to continue to keep a record of the TFN declaration information provided to them by the Commissioner.

TFN validation – Part 4 of Schedule 23 to the Act

Part 4 of Schedule 23 to the Act contains amendments to the *ITAA 1936* to allow the Commissioner to provide employers with both positive and negative validation of a person's personal details, including their TFN, where the Commissioner is satisfied that the person is an employee of the employer and that the employee has given a TFN declaration to the employer.

These amendments are intended to improve the Commissioner's capacity to validate TFN information. This will have increasing importance for the ATO's data-matching activities to support streamlined commencement procedures and STP reporting.

STP reporting - Consultation Paper

On 1 September 2016, the ATO released for comment a consultation paper titled *Single Touch Payroll: ATO consultation paper* seeking input on the Commissioner's proposed administrative approach to STP reporting.

The paper contains the following consultation questions:

Consultation questions	Overview
1. In what circumstances should the Commissioner grant an exemption from STP reporting on a class basis?	As standard business reporting-enabled software (SBR software) is essential to reporting under STP, the Commissioner will have regard to common circumstances where people may find it difficult to report electronically — for example: • because of remote locations with no or unreliable internet connection; • cultural or religious reasons; or • the impacts of natural disaster. The Commissioner is seeking input on other circumstances in which he should consider granting a class exemption.

2. In what circumstances should the Commissioner grant an exemption to a particular employer?	For example, the Commissioner may decide to provide an exemption to an employer that becomes a substantial employer on 1 April as a result of temporarily employing 20 or more individuals — e.g. seasonal workers.
3. In what circumstances should the Commissioner exercise his discretion to allow an employer to defer the STP reporting of a payment to an employee? For example, should fortnightly payers be able to report all payments on a fortnightly basis?	The paper contains an example of an employer who pays employees fortnightly, but makes an employment termination payment (ETP) to an employee outside the fortnightly cycle. Under the Bill, the employer would be required to report this payment on or before the date of the ETP. However, the Commissioner may exercise the discretion to allow the employer to report the ETP at the time of its next regular fortnightly payroll cycle.
4. What materiality thresholds should be specified in the legislative instrument about correcting errors? For example, what are appropriate time limits and error value limits for small, medium and large withholders?	In general, subject to materiality thresholds, employers will be able to correct STP reporting errors in a later STP report (rather than having to amend the earlier incorrect report). The Commissioner will determine by legislative instrument the circumstances (such as materiality and the length of time since the error was made) which determine when an error can be corrected in a later report. This is similar to the current approach for correcting GST errors.
5. When should the Commissioner give an employer a warning notice about failing to lodge STP reports on time?	The Bill provides transitional penalty relief from the failure to lodge (FTL) penalty during the first 12 months an employer is required to report under STP. An employer will not be subject to an FTL penalty unless the Commissioner has previously issued a warning notice in relation to earlier missed STP reports. The Commissioner anticipates that warning notices will be rare in the first 12 months, and that there will not be a minimum number of late lodgements before a warning notice is issued. The Commissioner will consider the circumstances and behaviour of employers on a case-by-case basis.

The Commissioner has sought comments and submissions by 30 September 2016. While the period for accepting submissions has been limited and is not a good fit with the publication dates of this newsletter, it is anticipated that the Commissioner would continue to be receptive to input in the short term.

Contact officer details are:

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Email	singletouchpayroll@ato.gov.au

FBT – Valuation of Housing Fringe Benefits

The FBT Act provides that the taxable value of non-remote housing located within Australia — other than non-remote accommodation provided in a hotel, motel, hostel, guesthouse, caravan or mobile home — is the '*statutory annual value'* of the right to occupy the accommodation.

The *statutory annual value* is the market value of the right to occupy the accommodation for the whole of the fringe benefits tax year where that year is a 'base year of tax'. This is reduced proportionately if the housing right did not exist for the whole of the tax year. The taxable value is also reduced by any rent paid by the employee.

In subsequent years, to obtain the taxable value of the housing right, index the base year value by the relevant State's indexation factor for the subsequent nine income years.

A year of tax will be a 'base year of tax' in relation to the recipient's current housing right where:

(i) the accommodation was not used in the preceding year to provide the housing right;

(ii) the employer elects to treat the current year as a base year;

(iii) there is a 10% change in the market value of the housing right; or

(iv) the unit of accommodation has been used to provide housing benefits in each of the preceding nine years, none of which was a base year.

MT 2025 provides guidelines for determining the market value of accommodation for the purposes of calculating the taxable value of housing fringe benefits, in particular where particular units of accommodation being occupied by employees are not readily comparable with units for which there is a rental market.

The guidelines are set out for a range of accommodation types and situations, under the following headings:

- Dormitory housing;
- Shared room housing;
- Single room accommodation;
- Single room accommodation with two bathrooms;
- Houses in rural areas;
- Hotel and motel accommodation;
- Holiday resorts;
- Mining towns;
- Caretakers;
- Accommodation provided by funeral directors; and
- Remoteness.

Further to the above, on 26 August 2016, the ATO issued Practical Compliance Guideline PCG 2016/14 entitled *Discount to the valuation of housing fringe benefits provided by retirement village operators.* The Guideline sets out the acceptable discount to the valuation of housing fringe benefits provided to live-in-managers in a retirement village.

Practical Compliance Guideline PCG 2016/14 provides that a retirement village operator can apply a valuation discount of 10 per cent to work out the statutory annual value of a live-in manager's annual current housing right for the purposes of determining the taxable value of the housing benefit provided. PCG 2016/14 applies both before and after its date of issue.

Through our Q&A service we are aware that a number of members provide housing benefits to employees in 'non-traditional' circumstances. If housing is provided in such a scenario, reference should be made to MT 2025 for guidance so as to ensure a taxable value in excess of the guidelines in the ruling indicate is not being applied.

Salary Packaging – Can RDO Entitlements Paid Out on Termination be Salary Sacrificed?

A 'salary sacrifice arrangement' (SSA) means an arrangement under which an employee agrees to forgo part of the total remuneration that he/she would otherwise expect to receive as salary or wages in return for the employer or an associate of the employer providing benefits of a similar value.

The Commissioner states in TR 2001/10 that an SSA will be effective where the benefit is negotiated before the employee has earned the entitlement to receive the relevant amount as salary or wages. That is, if the remuneration that is forgone is that which the employee has *already* earned, the SSA is ineffective.

For the purposes of the ruling, the ATO regard SSAs as remuneration arrangements involving PAYG withholding amount payments covered by the following sections of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953):

- s.12-35 (salary, wages, commission, bonuses or allowances paid to an individual as an employee)
- s. 12-40 (remuneration of company directors) or
- s. 12-45 (salary, wages, etc. paid to certain office holders)

In relation to unused rostered day off (RDO) entitlements paid out on termination, based on edited private rulings of which we are aware the Commissioner's view is that these amounts are employment termination payments (ETP) and, as such, is it is not possible for such amounts to be sacrificed at that stage. PAYGW in regards to an ETP payment is required by s. 12-85 of Schedule 1 to the TAA 1953. This PAYGW provision does not fall within those listed in TR 2001/10 and so is presumably not considered 'salary or wages' for the purposes of entering into an effective salary sacrifice arrangement.

Is this ATO view correct?

What is interesting in considering the ATO ruling is that it is accepted that annual leave and long service leave entitlements can be salary sacrificed provided the SSA is entered into prior to the leave entitlement accruing - refer paragraphs 89 to 92 of TR 2001/10.

Accrued leave entitlements paid out on termination are excluded from the definition of ETP. However, such payments are subject to PAYGW under s. 12-90 of Schedule 1 to the TAA 1953. This is not one of the PAYGW provisions listed for the purposes of TR 2001/10.

The acceptance of the ability to salary sacrifice future leave entitlements seems at odds with the inability to salary sacrifice future RDO entitlements simply because of the classification of such payments when paid out on termination.

Accrued RDO payments are an ETP whereas accrued leave entitlement payments are not. However, both payments are subject to PAYGW provisions that are not specifically considered 'salary or wage' PAYGW provisions for the purposes of TR 2001/10.

We consider this issue would make for a very interesting ATO private binding ruling request.

We would also like to hear from anyone that might have a ruling confirming you can salary sacrifice RDOs in a termination scenario, provided an effective SSA is in place.

Eligibility – The Commissioner's Power to Modify Operation of a Tax Law - A New Source of Law

The Problem

The pace of commercial change is outstripping the pace at which Parliament can consider the need for amendments to legislation which the Commissioner of Taxation administers (Tax Laws).

Tax Laws are being forced to deal with situations that were not envisaged when they were drafted. As a result, there is a risk that Tax Laws will produce 'unintended or unforeseen outcomes' and associated 'significant uncertainty and compliance cost impacts for entities'.

The Proposed Solution

The proposed solution is to empower the Commissioner to react to commercial change by making disallowable legislative instruments. The aim is to quickly adapt application of a Tax Law to achieve its intended purpose by enabling the Commissioner to modify its operation - the Commissioner is not empowered to alter either the text of a Tax Law or the purpose/intent of a Tax Law.

Disallowable legislative instruments enable Parliament to oversee the changes and to manage unacceptable actions by preventing (where Parliament considers appropriate) the Commissioner's modifications taking effect.

More importantly, the proposed legislation conferring the modification power (the Remedial Power) imposes limits on the Commissioner and provides some protection for the entities affected by its exercise. The key features of the legislation before Parliament are:

(a) the Commissioner's modifications to a provision in a Tax Law must be 'not inconsistent with the intended purpose or object' of that provision;

(b) the Commissioner must consider 'the modification to be reasonable, having regard to both the intended purpose or object of the relevant provision and whether the costs of complying with the provision are disproportionate to achieving the intended purpose or object';

(c) 'an entity (the first entity) must treat a modification made under the power as not applying to it and any other entity if the modification would produce a less favourable result for the first entity' than if the modification had not been made;

(d) prior to exercise of the power, the Commissioner must undertake certain consultations (including consulting with a technical advisory group that will include private sector experts and consulting with the Board of Taxation); and

(e) exercise of the power is to be a last resort - to be used after considering the proper interpretation of a Tax Law to give effect to its purpose or object, to be used after considering application of the Commissioner's general powers of administration, and to be used where it is considered Parliamentary legislative amendment is not more appropriate.

As a financial integrity measure, before exercising the Remedial Power, the Commissioner is required to obtain Treasury/Finance Department certification that the modification will have negligible impact on the Commonwealth budget.

While the phrase 'not inconsistent with' in the expression quoted in item (a) above might appear clumsy to apply and broad in nature, the Explanatory Memorandum accompanying the proposed legislation (EM) explains its significance at para 1.29. Persons seeking to have the Commissioner exercise the Remedial Power (see below) should be aware of its role and the significance of 'intended' in the phrase 'intended purpose or object' as explained at paras 1.30 and 1.31 of the EM.

The EM (e.g. at para 1.28) notes that exercise of the Remedial Power will be subject to judicial control (at the behest of a person affected by it) as to whether the Commissioner has exceeded the ambit of the power.

The EM also notes the Remedial Power is modelled on similar subordinated legislative powers conferred on ASIC and APRA.

The Process of Exercising the Remedial Power

A member of the public, as well as persons involved in government, can raise the need/desirability for exercise of the Remedial Power. However, the Commissioner has complete discretion as to whether it will be exercised on any occasion.

The EM envisages that a detailed transparent process will be developed in relation to exercise of the power. In particular, the EM states that:

> 'Consultation and governance arrangements will be established by the Commissioner to assist him or her in managing consideration of issues that may potentially be addressed with the power. The governance arrangements will establish the administrative processes that the Commissioner will follow in exercising the Remedial Power and outline how a member of the public may raise an issue for consideration by the Commissioner. It is expected that the public would be able to raise issues for consideration with the ATO via a central area. It is anticipated that the consultation and governance arrangements would be published by the Commissioner in the interests of transparency and accountability.'

An Illustration of the Remedial Power

The EM contains the following illustration of the use of the Remedial Power in the context of FBT:

> 'Example 1.4
>
> The Fringe Benefits Tax Assessment Act 1986 provides for the taxation of various fringe benefits. Residual fringe benefits are those benefits that do not fit into other more specific fringe benefit rules. In-house residual fringe benefits can arise when an employer, their associates or a third party provides their employee with something the employer produces and sells to others in the course of their business. There was an error in the way the in-house residual fringe benefit provision was worded in relation to particular benefits, meaning the benefit provided to an employee must be property. The intention was that goods or services could be an in-house residual fringe benefit, not just property. Indeed, prior Explanatory Memoranda indicated in house residual fringe benefits would include goods or services. A modification to the operation of the relevant provision to allow entities to treat benefits broadly, rather than just property, as in-house

> residual fringe benefits would not have been inconsistent with the intended purpose or object of the provision. This would have allowed concessional in-house residual fringe benefit valuation rules to apply to the benefit. Therefore the Remedial Power could have been used to address this issue, provided the Commissioner considered it reasonable and had received advice that any budget impact would be negligible.'

What is the significance of the Remedial Power to the NFP Sector?

One might anticipate that the 'for-profit' sector will be the focus of attention in Tax Laws, with the Tax Laws containing adjustments to accommodate the not-for-profit sector (NFP sector). These adjustments may not always be complete or anticipate quirks within parts of the NFP sector. The proposed creation of the Residual Power may provide an avenue to redress any shortcomings, especially as it is envisaged that the Commissioner will establish a pathway for the public to bring matters warranting exercise of this power to his attention. The NFP sector should be mindful of this avenue to deal with deficiencies in legislative drafting.

Your attention is also directed to the use of the Residual Power as a means to control costs arising from Tax Law compliance - see the considerations noted in requirement (b) above. The EM (para 1.39) states:

> 'These considerations enable the Commissioner to modify the operation of a provision of a taxation law so he or she can:
>
> - administer the law in accordance with its intended purpose or object, where the outcome provided by the unmodified law is inconsistent with its intended purpose or object; or
> - provide an outcome that reduces compliance costs where the outcome provided by the unmodified law is consistent with the intended purpose or object of the law, but in achieving that outcome, the application of the law imposes compliance costs that are disproportionate to achieving its intended purpose or object.'

At a day to day level, tax practitioners working in the NFP sector need to be aware that it may not be sufficient to consider the provisions of a Tax Law. It will be necessary to check for a relevant legislative instrument. The matter raised in requirement (c) above, vis. the ability to disregard a modification made under the Remedial Power where compliance with the modification produces a less favourable result, suggests self-interest is best served by checking for any modification and taking advantage of any benefit it presents.

The concept of 'favourable' can be problematic and is analysed in the EM at para 1.57 *et seq*. If an entity intends to disregard a modification on the basis of it not being favourable, consideration should be given to this analysis before making the decision to do so.

Practicalities - where, when, and how long?

As noted above, a legislative instrument is the mechanism by which the Commissioner implements a modification.

Four additional practical points should be noted:

- **where found** - Legislative instruments must be registered on the Federal Register of Legislation (accessible at: https://www.legislation.gov.au). Failure to register a legislative instrument renders it unenforceable.
- **when operative** - A legislative instrument made by the Commissioner in exercise of the Remedial Power can only take effect on or after the first day that the relevant instrument ceases to be subject to disallowance by Parliament.

  (The House of Representatives and the Senate are each able to bring a notice of motion to disallow a legislative instrument within 15 sitting days following the tabling of the instrument. If the motion is not withdrawn or a decision made on the motion within a further 15 sitting days, the instrument is deemed to be disallowed.)

- **when operative** - A modification may be formulated so that it has retrospective effect - i.e. it applies to circumstances pre-dating the process described in the previous dot point, where the process has not resulted in disallowance. However, 'purported retrospective effect will not apply in relation to a person to the extent that it would disadvantage the rights of a person' - see the EM at para 1.78.
- **how long operative** - As a legislative instrument can be repealed or amended by the Commissioner, it should not be assumed that once made, the instrument will continue unchanged over its otherwise *prima facie* statutory life of approximately 10 years from registration.

FBT Q&A – Non-Salary Packaged Entertainment of PBI Employers

Question:

With the introduction of the $5,000 cap in regards to salary packaged meal entertainment and entertainment facility leasing expense benefits commencing from 1 April 2016, what impact does this have for a PBI employer where, for example, meal entertainment is provided directly to employees not via salary packaging. Is this now potentially subject to FBT, or does a meal entertainment exemption still apply?

Answer:

Non-salary packaged meal entertainment and entertainment facility leasing expenditure provided on or after 1 April 2016 is still eligible for existing exemptions that PBI employers are entitled to.

Salary packaged meal entertainment and entertainment facility leasing expenditure provided from 1 April 2016 is now subject to a grossed up cap of $5,000 - any excess over this amount is counted towards existing cap thresholds and therefore could result in a PBI employer being subjected to FBT.

Further, the 50/50 method or 12 week register methods are not able to be used in respect of such salary packaged entertainment benefits. Salary packaged meal entertainment and entertainment facility leasing expenses are included for payment summary reporting purposes.

However, meal entertainment and entertainment facility leasing expenses that are not provided as part of a salary packaging arrangement remain non-reportable and are still eligible for FBT exemption for a PBI employer.

GST Q&A – GST on Employee Contributions to Fringe Benefits

Question:

Can you please help with a question regarding GST liability on employee contributions for fringe benefits received.

Our employees make contributions for several benefits. I understand that contributions towards car fringe benefits are deemed to be a taxable supply and require GST to be paid on the contributions. However, my question is: Is the employer liable to pay GST on contributions that employees make towards other fringe benefits including for exempt benefits?

Answer:

Where an employee pays an amount to the employer in relation to a car fringe benefit these are referred to as a 'recipient's payment'.

Where an employee pays an amount to the employer in relation to other fringe benefits these are referred to as a 'recipient's contribution'.

Both types of payment from an employee are treated as consideration for a taxable supply made by the employer, and are subject to GST. See s. 9-75(3).

The definition of recipient's contribution is as per the FBT legislation but is further expanded for GST purposes and includes 'any consideration paid in respect of the provision of a benefit that is an exempt benefit'. Unfortunately, this expanded definition results in any contributions made by an employee towards an exempt fringe benefit to also be subject to GST.