Coster Galgut
Chartered Accountants

Tax Update – August 2022

Inside

From Government ... **3**
Revival of the training and technology boost measures ... 3
Exclusions from the two-year amendment period ... 4
Review of cryptocurrency tax treatment ... 4
Multinational tax integrity developments ... 5
Tax relief for Indian firms providing technical services remotely to Australians ... 5
From the Regulators ... **6**
Second hand depreciating assets and rental properties ... 6
Process for requesting copies of tax documents ... 6
Holders of pandemic visas ... 6
Ending of relief for SMSFs ... 7
Reminder to check payroll systems in relation to super guarantee ... 8
Changes to corporate tax transparency income threshold ... 8
Draft guidance documents released by the TPB ... 8
Rulings, determinations & guidance ... **9**
Distributions of tax-free grants when a company is wound up ... 9
Capital gains distributed to non-resident beneficiaries ... 10
Cases ... **10**
Super fund withdrawals - pension or lump sum? ... 10
Whether amounts paid to a company are treated as share capital ... 11
Legislation ... **12**
Additional COVID-19 grants qualify for tax-free treatment ... 12
Removal of $250 self-education expenses threshold and other amendments ... 12
Tax exemption for payments relating to Cyclone Seroja and exemptions for the Women's World Cup ... 13

The Skills and Training and Technology Boosts announced in the 2022-23 Federal Budget have made a reappearance in exposure draft form – we explore the details of who can access the measures and what expenditure they support.

We also have a partial answer in the form of a private ruling to a common help desk question about whether a **company can distribute tax-free COVID grants to shareholders tax-free** (Michael explains the issue in our August Round Up video).

On the theme of COVID grants, the regulators have updated the list of grants that qualify for tax-free treatment.

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From Government

Revival of the training and technology boost measures

In the 2022-23 Federal Budget the former Government announced that it would introduce measures to provide certain business taxpayers with bonus tax deductions for expenditure relating to training employees or improving digital operations. As no legislation relating to these measures was introduced before the election was called it wasn't entirely clear whether the new Government would seek to implement these measures. However, on 29 August 2022 the Government announced that it will proceed with these measures and Treasury has released exposure draft legislation for public comment.

The Skills and Training Boost allows small businesses (aggregated turnover less than $50 million) to claim a 120% deduction for eligible expenditure incurred on external training for employees between 29 March 2022 and 30 June 2024. The key requirements to qualify are that the expenditure must be:

- Deductible under any provision of the tax law (e.g., the general deduction provisions in section 8-1 or the black hole provisions etc);
- For training employees, either in-person in Australia or online; and
- Charged, directly or indirectly, by a registered training provider and be for training within the scope (if any) of the provider's registration.

There are some specific exclusions, such as for in-house or on-the-job training and expenditure on external training courses for persons other than employees. The training boost is not available to sole traders, partners in a partnership, independent contractors (who are not employees), or associates of the business such as relatives or related entities.

The bonus deduction can only be claimed in the 2023 and 2024 tax returns. If a taxpayer incurred qualifying expenditure before 30 June 2022 the bonus deduction relating to these expenses would be claimed in the 2023 tax return.

The Technology Investment Boost provides a 120% deduction for eligible expenses that are incurred for the purposes of improving digital operations or digitising business operations. This can include the cost of depreciating assets. The boost is aimed at costs incurred between 29 March 2022 and 30 June 2023 and is limited to a maximum bonus deduction of $20,000 (i.e., $100,000 of expenses). Broadly, the eligible expenditure for this measure can include expenditure on:

- Digital enabling items – computer and telecommunications hardware and equipment, software, systems and services that form and facilitate the use of computer networks;
- Digital media and marketing – audio and visual content that can be created, accessed, stored or viewed on digital devices; and
- E-commerce – supporting digitally ordered or platform enabled online transactions.

For depreciating assets that are acquired, the bonus deduction can only be claimed where the business continues to hold the asset beyond 30 June 2023 (unless there is an involuntary disposal). The bonus deduction is claimed on the cost of depreciating assets regardless of the method used to claim deductions (e.g., whether an immediate deduction is available or deductions are claimed over a period of time under Division 40). Repair and improvement costs can also potentially qualify for the bonus deduction.

The following expenditure cannot qualify for the technology boost:

- Capital works costs under Division 43;
- Financing costs such as interest expenses;
- Salary or wage costs;
- Training or education costs; and
- Trading stock or the cost of trading stock.

It is important to remind clients who might be able to take advantage of the boosts that these measures are not yet law.

More information

- Skills and Training Boost
- Technology Investment Boost

Exclusions from the two-year amendment period

Treasury has released draft regulations that would exclude certain taxpayers with complex tax affairs or significant international tax dealings from accessing the two-year amendment period for small and medium business entities. These taxpayers would be subject to the standard four-year amendment period instead.

The change is intended to apply to income tax returns for the 2022 income year and later years and is aimed at ensuring that the ATO has sufficient time to review the detail of the returns and gather information from other jurisdictions.

The draft regulations indicate that a taxpayer would not qualify for a two-year amendment period if they:

- Have transactions between related parties that relate to assets or non-cash benefits with a market value of at least $50,000.
- Derive assessable income of at least $200,000 from a foreign source. To prevent structuring arrangements being undertaken to avoid the four-year period, the $200,000 threshold would be assessed as a combined threshold including the assessable income from the relevant entity and certain related entities.
- Are either foreign controlled Australian entities (as defined for thin capitalisation purposes) or non-resident entities.
- Engage in schemes captured by either the Diverted Profits Tax (DPT) or Multinational Anti-Avoidance Law (MAAL).
- Have at least 10 other connected entities or affiliates.
- May be entitled to the R&D tax offset or certain related deductions, recoupments, and adjustments.
- Have applied CGT rollover relief under the interposed holding company rules in Division 615, the demerger rollover provisions or the Subdivision 126-B rollover rules.
- Are subject to Division 855 (which allows foreign residents to disregard a capital gain or loss in some circumstances).

More information

- Proposed exclusions from shorter period of review for small and medium entities

Review of cryptocurrency tax treatment

In late 2021 the former Government instructed the Board of Taxation to review the way that cryptocurrency and other digital assets are taxed in Australia. The Government asked the Board of Taxation to focus on emerging issues, the tax treatment of these items in other jurisdictions, the level of awareness of investors about how the tax system applies in this area and whether any changes should be made to the tax system.

A consultation paper has now been released which provides a brief overview of the types of assets being considered as part of the review (e.g. cryptocurrencies and NFTs) and how these are currently taxed in Australia.

The paper sets out a series of specific questions and submissions can be made by interested parties

up until 30 September 2022. Virtual consultation dates (and an in-person session in Sydney) are planned throughout September 2022. Practitioners who are active in this space or who have an interest in this area might consider lodging a submission or expressing their interest in taking part in the consultation sessions.

More information

- Review of the tax treatment of digital assets and transactions

Multinational tax integrity developments

In keeping with an election promise regarding the taxation of multinational companies, Treasury has released a consultation paper concerning proposed amendments to the thin capitalisation rules, the introduction of a new rule limiting deductibility of payments relating to intangibles and changes relating to tax transparency.

The proposed amendments to the thin capitalisation rules involve modifying the 'safe harbour debt amount' in line with an OECD proposal that directly limits net interest deductions to 30% of Earnings Before Interest, Taxes, Depreciation, and Amortisation (EBITDA). This would replace the existing asset-based safe harbour test (60% of net assets).

When it comes to the proposed new rule which would impact on deductions claimed for payments relating to intangibles and royalties the Government is seeking to address concerns that multinational groups can shift profits to low or no tax jurisdictions to avoid paying tax in Australia. The growth of the digital economy appears to have exacerbated the problem in this area.

The Government is also considering the enhancement of tax transparency by multinational groups by requiring the public reporting of certain tax information on a country-by-country basis, mandatory reporting of material tax risks to shareholders and requiring firms tendering for Australian Government contracts worth more than $200,000 (inclusive of GST) to state their country of domicile for tax purposes.

More information

- Multinational Tax Integrity and Tax Transparency

Tax relief for Indian firms providing technical services remotely to Australians

Currently, Australia is taxing payments or credits paid to Indian entities by Australian customers for technical services that are provided remotely. Australia taxes these payments or credits of Indian firms due to the operation of both the royalty definition and the Source Article (Article 23) under the double tax agreement between Australia and India.

The exposure draft legislation modifies the position so that Australia will no longer tax the income of Indian firms providing technical services remotely (i.e. not through a permanent establishment in Australia) to Australian customers where three conditions are satisfied:

- The payments relate to services involving technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or design (e.g. common examples would be engineering services and software development);
- The payments are not royalties within the meaning of the ITAA 1936; and
- The payments must only be subject to Australian tax currently because of the

operation of Article 12(3)(g) and Article 23 of the DTA.

More information

- Adjustment to tax on certain payments or credits paid to Indian firms

From the Regulators

Second hand depreciating assets and rental properties

The ATO has released a reminder on the treatment of second-hand depreciating assets used in residential rental properties.

The tax rules have been amended to ensure that taxpayers can't claim depreciation deductions for second-hand assets if the asset was acquired after 9 May 2017 or where the asset was acquired before this date but was not used at all for income producing purposes during the 2017 income year. The rules can also prevent depreciation deductions from being claimed if the asset was used by the taxpayer in a private residence.

Practitioners should be requesting sufficient detail from their clients to determine whether they are eligible to claim deductions for depreciating assets used in residential rental properties. This should include asking clients:

- When the client purchased the property?
- Was it a new or existing build?
- Did the client live in the property before renting it out?
- When did the client start renting the property out?
- Was the asset already in the rental property when the property was bought?
- Is the property used for business purposes?

More information

- Rental properties and second-hand depreciating assets

Process for requesting copies of tax documents

The ATO has provided some guidance on the correct process to follow when requesting copies of a client's existing tax records (for example, prior year information for new clients). Broadly, it is necessary to use Online services for agents (OSfA) and be authorised on the client's record.

Tax agents should be able to "self-serve" access to copies of:

- Income tax returns and notices of assessment for 2010 onwards; and
- Payment summaries or income statements (pre-fill) for 2009 onwards.

On the other hand, the ATO has produced a new form that needs to be submitted via Practice mail in OSfA to obtain copies of:

- Income tax returns and notices of assessment for 1997 to 2009;
- Payment summaries or income statements (pre-fill) for 2001 to 2008; and
- FBT returns from 2001.

From 1 October 2022 the ATO will be returning incorrect requests with details of how these should be correctly submitted.

More information

- Correct process for requesting copies of tax documents

Holders of pandemic visas

The Australian Government has introduced a new visa class (408) which allows certain individuals to legally stay in Australia and continue to work during the COVID-19 pandemic. Holding this visa should not generally

result in a change to an individual's tax residency status (i.e. as a resident or non-resident), however the ATO has provided some guidance on issues that can arise with respect to temporary residency.

Broadly, the ATO confirms that there should not generally be any direct impact on taxpayers who were already temporary residents (e.g. holders of most other temporary visas). However, if you have clients who were on 403, 417 or 462 visas (broadly seasonal workers and working holiday makers) it will be necessary to look at this more closely and review the ATO's guidance because there are a range of factors that need to be considered. Having said that, in most cases it seems like the existing special withholding rules applicable to those individuals should continue to apply.

More information

- 408 Pandemic event visa

Ending of relief for SMSFs

The ATO has indicated that many forms of relief available to SMSFs to mitigate the impact of COVID-19 have now ceased. The relief measures that are no longer applicable for the 2023 income year include:

Residency relief

During the 2020, 2021 and 2022 income years, if trustees of SMSFs were stuck overseas this could have had an impact on whether the fund met the conditions to be an Australian super fund. In particular, being overseas for an extended period may have affected whether the central management and control of the fund was ordinarily in Australia or whether fund satisfied the 'active member' test.

The ATO has indicated that provided there were no other changes in relation to the residency conditions it will not take any compliance action to determine whether the fund meets the residency test in those years.

Rental relief

A range of rental relief could be provided to tenants by SMSFs or their related parties during the 2020 to 2022 income years, often under specific State government programs. This could include rental waivers or deferrals, which would ordinarily cause issues with respect to certain superannuation provisions such as the sole purpose test. For those income years the ATO indicates that it not be undertaking compliance action where:

- The relief is on commercial terms, that is, it is provided on comparable terms to relief offered by other landlords to unrelated tenants in similar circumstances (having regard to the State and Territory COVID-19 support measures);
- The relief is offered due to the financial impacts of COVID-19; and
- You have properly documented the arrangement.

In-house asset relief

The downturn in the market due to COVID-19 may have caused a SMSFs assets to drop in value resulting in the value of a fund's in-house assets exceeding the 5% threshold. In that case, the super laws ordinarily require trustees to prepare and execute a written plan to reduce the market value ratio of the fund's in-house assets to below 5% by the end of the following income year. However, as the ongoing impacts of COVID-19 may have made this difficult, the ATO indicated that for 2020 – 2022 it will not take any compliance action against the fund, and that SMSF auditors will not need to report any contravention of the in-house asset rules to the ATO.

Loan repayment relief

In some cases trustees may have provided loan repayment relief to related or unrelated parties.

If the loan repayment relief was provided due to the financial impacts of COVID-19, the relief is offered on commercial terms and the changes to the loan agreement are properly documented, the ATO indicated that for 2020 – 2022 it will not take any compliance action against the fund, and that SMSF auditors will not need to report any contravention of the super laws to them.

As these relief measures are no longer applicable for 2023, SMSF trustees will need to ensure that funds comply with the superannuation laws as they ordinarily apply.

More information

- Support for self-managed super funds

Reminder to check payroll systems in relation to super guarantee

The ATO is reminding employers to check their payroll and accounting systems and confirm that they have been updated to reflect changes to the superannuation guarantee rules for salary and wages paid from 1 July 2022.

The key points to note are the increase in the SG rate from 10% to 10.5% and the removal of the $450 threshold (i.e. from 1 July 2022 employers must pay SG to eligible workers regardless of how much they earn).

More information

- Is your system updated for the latest SG changes?

Changes to corporate tax transparency income threshold

Each year the ATO is required to publish corporate tax transparency reports which contain information reported by large corporations. These reports previously included:

- Australian public and foreign-owned corporate tax entities with income of $100 million or more;
- Australian-owned resident private companies with income of $200 million or more; and
- Entities that have petroleum resource rent tax (PRRT) payable.

Following amendments to the legislation in this area, the threshold for Australian-owned resident private companies to be included in the reports has been reduced to $100 million for 2023 and later years.

More information

- Corporate tax transparency income threshold for resident private companies

Draft guidance documents released by the TPB

The Tax Practitioners Board (TPB) has released a range of exposure draft documents dealing with specific aspects of the code of professional conduct. These include updated guidance on maintaining the confidentiality of client information and how to determine whether an entity is providing a tax agent service or BAS agent service.

The first exposure draft relates to the obligations of tax agents with respect to the confidentiality of client information. Broadly, tax agents cannot disclose information relating to a client's affairs to third parties unless the practitioner has the client's permission or there is a legal duty to do so. The exposure draft explains the steps that agents might take to seek client permission and situations where practitioners need to be particularly mindful of their obligations (e.g. leaving client information in unsecured locations, disposing of IT equipment, using external service providers etc).

Other exposure draft documents relate to the requirement for entities that provide 'tax agent services' and/or 'BAS services' to be registered with the TPB. These draft documents provide updated guidance on how to determine whether an entity is providing these services.

More information

- 2022 exposure drafts

Rulings, determinations & guidance

Distributions of tax-free grants when a company is wound up

Private ruling 1051973166830

While we don't normally cover private rulings as part of the monthly tax round up, a recent private ruling issued by the ATO addresses an issue that has been causing confusion for practitioners and clients over the last few years. The key issue is whether government grants that are non-assessable non-exempt (NANE) income in the hands of a company can be paid out to shareholders in the form of a capital distribution if this happens in connection with winding up the company.

The ATO private ruling indicates that cash flow boost amounts distributed to shareholders of a company by a liquidator in connection with winding up the company should be taxed as dividends. Presumably, similar treatment would apply to the distribution of state government grants that qualify for tax-free treatment in the hands of the company.

While legislation was passed to ensure that cash flow boost amounts and specific state government grants relating to COVID-19 are treated as NANE income in the hands of the recipient (including a company), there is nothing in the tax legislation that specifically enables these amounts to be paid out of an entity tax-free.

The ATO previously issued guidance indicating that cash flow boost amounts received by a trust could be distributed to beneficiaries tax-free, but distributions of cash flow boost amount to shareholders of a company would generally be treated as a taxable dividend. However, there has been a lack of clear guidance on whether these amounts could be paid out as capital distributions in connection with winding up a company to potentially access more favourable tax treatment.

Section 47 ITAA 1936 can sometimes enable distributions made by a liquidator on winding up a company to be treated as capital amounts in the hands of the shareholders rather than being taxed as dividends. The key issue is whether the amount being distributed represents income derived by the company.

Section 47(1A) ensures that amounts are treated as income for this purpose if:

- They are income under ordinary concepts.
- They have been included in the assessable income of the company (except net capital gains).
- They relate to a net capital gain that would be included in the company's assessable income if the net capital gain was calculated in a specific way.

When it comes to cash flow boost amounts and other state government grants that are classified as NANE income the position really depends on whether they are classified as income under ordinary concepts.

While cash flow boost amounts and other COVID grants are sometimes classified as NANE income and are not assessable income for tax purposes, this doesn't necessarily mean that they are not classified as income under ordinary concepts.

Our concern has been that payments like this could potentially be treated as ordinary income if they are received in connection with the company's business activities (see the approach taken by the ATO in TR 2006/3).

The private ruling published on the ATO legal database concludes that the cash flow boost amount received by the company in question should be treated as income under ordinary concepts.

This means that distributions sourced from this amount should be taxed as dividends in the hands of the shareholders, even though the amounts have been distributed by a liquidator in connection with winding up the company and the cash flow boost amount was tax-free in the hands of the company.

We hope that the ATO will provide clear public guidance on this issue given this is likely to impact on many taxpayers.

Capital gains distributed to non-resident beneficiaries

TD 2022/12

TD 2022/13

These determinations are the finalised versions of TD 2019/D6 and TD 2019/D7 which set out the ATO's approach when an Australian resident trust distributes capital gains to non-resident beneficiaries.

TD 2022/12 confirms that the source concept is no longer relevant in determining whether a capital gain is taxed in the hands of a non-resident beneficiary of a trust. The tax outcome is determined solely under the capital gains tax provisions. This means that a non-resident beneficiary can potentially be subject to tax in Australia when they receive a distribution that includes capital gains, even if the gain has a foreign source.

TD 2022/13 confirms the ATO's view that non-resident beneficiaries of Australian resident discretionary trusts will normally be taxed in Australia if they receive a distribution which includes capital gains, regardless of whether the asset in question is classified as taxable Australian property (TAP) or not. Only non-resident beneficiaries of resident trusts that are classified as fixed trusts are able to disregard capital gains relating to non-TAP assets.

Ultimately, the final determinations confirm that non-resident beneficiaries of Australian resident discretionary trusts will normally be taxed in Australia on their share of capital gains made by the trust, regardless of whether the capital gain relates to non-TAP assets or whether the gain has a foreign source. Having said that, the position can be more complex in situations where the beneficiary is a resident of a country that has a double tax agreement with Australia.

Cases

Super fund withdrawals - pension or lump sum?

Prescott v FC of T [2022] AATA 2478

This case concerned the payment of benefits from a superannuation fund and whether they should be classified as payments of an allocated pension or as superannuation lump sums, which attract different tax treatment.

Broadly, the taxpayer had established an allocated pension in their superannuation fund

and was receiving monthly set payments, however they had received additional payments in several income years. The question here was whether the taxpayer had made an election as required under Regulation 995-1.03 of the *Income Tax Assessment Regulations 1997* in order to treat those payments as superannuation lump sums (taxed at a maximum of 16.5%, compared to the maximum rate of 31.5% for the pension).

The AAT found that a valid election had not been made and that the additional withdrawals should be treated as pension payments for tax purposes. The decision highlights the importance of maintaining appropriate records in the superannuation context, and particularly, ensuring that any necessary requirements have been satisfied before making payments from the fund.

The issue in this case was that the specific regulation required that there be 'words, acts and or deeds' that demonstrate that the taxpayer (the super fund member) had made a choice that the payment was a superannuation lump sum. Based on the facts (e.g. lack of documentation, bank statements, records of discussions with the investment manager) it was not evident, nor able to be implied, that the withdrawals were to be treated as superannuation lump sums.

On this point, the AAT noted that simply being aware that they were requesting additional payments was not of itself evidence of a choice as to the form of the payment. In these cases the regulations require there to be something in the 'words, action or deeds' indicating that the choice has been made.

Whether amounts paid to a company are treated as share capital

Decision impact statement - Aurizon Holdings Limited v Commissioner of Taxation

The ATO has released a decision impact statement with respect to the Federal Court decision in *Aurizon Holdings Limited v Commissioner of Taxation* [2022] FCA 368. The Federal Court looked at whether an amount paid to a company, which was not specifically made in exchange for an issue of shares, could be treated as 'share capital' of the company for tax purposes.

The case focused on the treatment of an amount contributed by the Queensland Government as part of the process of privatising the relevant company. The Queensland Government basically forgave a $4.3 billion receivable that was owed to it by a subsidiary of the group by transferring the receivable to Aurizon. The transaction was referred to by the parties as the ‘State Contribution’ and was credited to a new equity account in Aurizon’s financial statements labelled a ‘Capital Distribution’ account.

While Thawley J noted that the term share capital almost invariably refers to the capital contributed to a company in exchange for shares, in this case the evidence suggested that the contribution was intended to be to share capital despite no new shares being issued.

While the facts of this case are unusual, it is worth noting an interesting point that arises from the case. The Court confirmed that it is possible that members of a company might make contributions to the equity of a company that are not treated as share capital, a gift or a loan. This ultimately comes back to the facts of the case.

When clients are contributing capital to a company it is important to ensure that there is contemporaneous documentation which explains the substance and nature of the contribution (e.g. as a loan, gift, consideration for shares etc) as this can be relevant in determining the tax treatment for the clients later. For example, this can impact on the risk of integrity rules such as those contained in section 45B applying when amounts are returned to clients. This can also impact on the ability of clients to claim a capital loss if they don't receive full repayment of the funds that have been invested int he company.

Legislation

Additional COVID-19 grants qualify for tax-free treatment

Income Tax Assessment (Eligible State and Territory COVID-19 Economic Recovery Grant Programs) Amendment Declaration (No. 4) 2022

See TaxBanter's blog The tax status of COVID-19 grants, for an updated consolidated list of grants that have been declared eligible for NANE treatment.

A new legislative instrument has been released that lists some additional State Government grants relating to COVID-19 that can qualify as non-assessable non-exempt (NANE) income in the hands of the recipient.

The following payments can now qualify as NANE income:

- Business Costs Assistance Program Round Two – Top Up (Victoria)
- Business Costs Assistance Program Round Three (Victoria)
- Business Costs Assistance Program Round Four (Victoria)
- Business Costs Assistance Program Round Four - Construction (Victoria)
- Business Costs Assistance Program Round Five (Victoria)
- Commercial Landlord Hardship Fund 3 (Victoria)
- Impacted Public Events Support Program Round Two (Victoria)
- Licensed Hospitality Venue Fund 2021 – Top Up Payments (Victoria)
- Live Performance Support Program (Presenters) Round Two (Victoria)
- Live Performance Support Program (Suppliers) Round Two (Victoria)
- HOMEFRONT 3 (ACT)

It is still necessary to check that the following basic conditions are satisfied to qualify for tax-free treatment:

- The recipient needs to carry on a business with aggregated annual turnover of less than $50m; and
- The payment must have been received in the 2021 or 2022 income year.

Removal of $250 self-education expenses threshold and other amendments

The Treasury Laws Amendment (2022 Measures No.2) Bill 2022 was introduced to Parliament on 3 August 2022 and contains the following proposed amendments:

- Removal of the non-deductible $250 self-education expenses threshold.
- Expanding eligibility for downsizer contributions to allow individuals aged 55 and above to make downsizer contributions to their superannuation from the proceeds of selling their main residence.
- Enabling the Commissioner to direct an entity to complete an approved record keeping course where the entity has failed to comply with record keeping obligations as an alternative to existing financial penalties.

- Sharing economy platform providers required to provide information on transactions undertaken on the platform to the ATO.
- Increased Tribunal powers for small business tax decisions. This would enable small business entities to apply to the Small Business Taxation Division of the AAT for an order staying, or otherwise affecting, the operation or implementation of decisions of the Commissioner that are being reviewed by the AAT.

Tax exemption for payments relating to Cyclone Seroja and exemptions for the Women's World Cup

Treasury Laws Amendment (2022 Measures No. 1) Bill 2022

This Bill has now passed through Parliament and received Royal Assent. The Bill contains a number of amendments including:

- Grants received in relation to Cyclone Seroja in April 2021 under Category C of the Disaster Recovery Funding Arrangements 2018 will be non-assessable and non-exempt (NANE) income for income tax purposes.
- The Bill provides income tax and withholding tax exemptions for FIFA and its wholly owned subsidiary in association with delivering the 2023 FIFA Women's World Cup in Australia.