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Tax Insights Series

Presenter:

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September 2021 | Online

Overview of session

- Legislative update
- NANE treatment of COVID-19 support payments
- State and Territory COVID-19 business support measures
- ATO rulings and guidance products:
 - LCR 2021/2 — NALI and expenditure under non-arm's length arrangements
 - PBR — Main residence exemption
- STP update



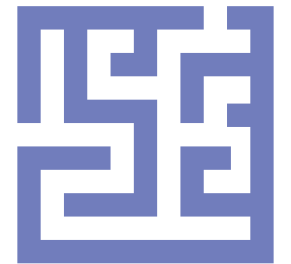
Enacted on 13 September 2021

Removal of actuarial certificate when calculating ECPI

- [Treasury Laws Amendment \(2021 Measures No. 6\) Act 2021](#)
- **Schedule 3** amends the ITAA 1997 to remove the requirement for superannuation trustees to obtain an actuarial certificate when calculating exempt current pension income (**ECPI**), where all members of the fund are fully in retirement phase for all of the income year
- Such funds are permitted to use the segregated method to calculate ECPI
- **Measure starts on 1 July 2021**



COVID-19 business support measures declared tax-free



A support payment is non-assessable non-exempt (**NANE**) income where:

- Payment is received under an eligible State or Territory grant or Commonwealth support program (first announced on or after 13 September 2020)
- Aggregated turnover is **less than \$50 million** in the income year the payment was received
- Payment was received in 2020–21 or 2021–22 for eligible State or Territory grants, or 2021–22 for eligible Commonwealth programs

Tax treatment of government payments

- **No deduction for expenses** incurred by businesses receiving government support payments that are NANE income:
 - Cannot claim a deduction for expenses incurred solely to get a non-taxable government grant
 - Expenses incurred both to gain assessable income and to get a non-taxable government grant — need to apportion on a fair and reasonable basis
- Distribution of NANE amount is a **frankable (but unfranked) distribution**:
 - If benchmark franking percentage varies by more than 20% — disclose by **31 October**
 - If breach the benchmark rule — liable for franking deficit tax by **31 July**



Income tax treatment of payments

Program	NANE	Program	NANE
NSW CB Grant ¹	✓	VIC Small Business COVID Hardship Fund ¹	✓
JobSaver ¹	✓	Business Costs Assistance Program Round Four	?
MB Grant ¹	✓	Business Continuity Fund ¹	✓
Small business fees and charges rebate	?	Commercial Landlord Hardship Fund 3	?
ACT COVID-19 Business Support Grant	?	QLD 2021 COVID-19 Business Support Grant	?
COVID-19 Small Business Hardship Scheme	?	Tourism & Hospitality Sector Hardship Program	?
SA COVID-19 Business Support Grant — July 2021 ²	✓	NT Territory Business Lockdown Payment Program	?
COVID-19 Additional Business Support Grant ²	✓	TAS Micro & Small Business — Critical Support Grant	?
COVID-19 Tourism & Hospitality Support Grant	?	WA Small Business Lockdown Assistance Grant	?
COVID-19 Business Hardship Grant	?	Tourism and Travel Agent Support Fund 2021	?
Major Events Grant	?		

¹ Declared NANE income under s 59-97 of the ITAA 1997 by the Treasurer

² Will be declared NANE income by the Treasurer

COVID-19 business support measures

Measure	Annual turnover	Decline in turnover	Amount
NSW: COVID-19 Business Grant	\$75,000 to \$50m	≥ 30%, ≥ 50%, ≥ 70%	\$7,500 – \$15,000
NSW: JobSaver	\$75,000 to \$250m	≥ 30%	\$1,500 – \$100,000 p/w
	> \$250m to \$500m ¹	≥ 50%	Up to \$300,000 p/w
	> \$500m to \$1b ¹	≥ 70%	Up to \$500,000 p/w
	\$75,000 to \$250m	≥ 30%	\$1,000 p/w non-employing
	\$75,000 to \$250m	≥ 15 to < 30% ²	Same as for ≤ \$250m
NSW: Micro-business Grant	> \$30,000 to < \$75,000	≥ 30%	\$1,500 per fortnight
NSW: Small business fees and charges rebate			\$1,500 digital voucher

¹ Only for larger businesses in the hospitality, tourism and recreation sectors

² Only for certain registered charities

COVID-19 business support measures

Measure	Annual turnover	Decline in turnover	Amount
VIC: Small Business COVID Hardship Fund [closed]		≥ 70%	\$20,000
VIC: Business Costs Assistance Program Round Four			\$2,800 to \$8,400 p/w where payroll ≤ \$10m
VIC: Business Continuity Fund			\$5,000
VIC: Commercial Landlord Hardship Fund 3			\$6,000
VIC: Commercial Tenancy Relief Scheme	< \$50m	≥ 30%	Rent waivers, reductions, remissions or deferrals

COVID-19 business support measures

Measure	Annual turnover	Decline in turnover	Amount
ACT: COVID-19 Business Support Grant	> \$75,000	≥ 30%	Employing: \$20,000 Non-employed: \$7,500
ACT: COVID-19 Small Business Hardship Scheme	\$30,000 to \$10m	≥ 30%	Up to \$10,000 in form of credit
NT: Territory Business Lockdown Payment Program – Lockdown (round 2) payment [closed]	\$75,000 to < \$10m	≥ 50%	Payment 1: \$1,000 (closed) Payment 2: \$1,000 (closed) Extended closure payment: \$1,000
QLD: 2021 COVID-19 Business Support Grant	> \$75,000	≥ 30%	Employing: \$10,000 to \$30,000 Non-employed: \$1,000

COVID-19 business support measures

Measure	Annual turnover	Decline in turnover	Amount
QLD: Tourism and Hospitality Sector Hardship Program		≥ 30%	\$15,000 to \$50,000 (employing only)
SA: COVID-19 Business Support Grant — July 2021	≥ \$75,000	≥ 30%	Employing: \$3,000 Non-employing: \$1,000
SA: COVID-19 Additional Business Support Grant ¹		≥ 30%	Employing: \$3,000 Non-employing: \$1,000
SA: COVID-19 Tourism and Hospitality Support Grant	No limit		Employing: \$20,000 Non-employing: \$1,000
SA: COVID-19 Business Hardship Grant		≥ 50%	Employing: \$6,000 Non-employing: \$2,000

COVID-19 business support measures

Measure	Annual turnover	Decline in turnover	Amount
SA: Major Events Grant			Up to \$25,000 (> 1,000) Up to \$100,000 (> 10,000)
TAS: Micro and Small Business – Border Closure Critical Support Grant	≥ \$25,000 to \$10m (varies by size)	≥ 30%	\$7,000 to \$110,000
WA: Small Business Lockdown Assistance Grant: Round Two, June 2021 [closed]	≥ \$75,000	≥ 30%	\$3,000
WA WA Tourism and Travel Agent Support Fund 2021	≥ \$50,000 to \$10m	≥ 30%	\$2,000 to \$10,000

LCR 2021/2 | NALI and expenditure under non-arm's length arrangements

Issued on 28 July 2021

LCR 2021/2 — ATO position on NALI and NALE

- Income of a complying superannuation fund will be taxed under s 295-550 of the ITAA 1997 as NALI at the rate of 45% where:
 - Trustee of the fund incurs non-arm's length expenditure (**NALE**) (or where expenditure is not incurred) in gaining or producing ordinary or statutory income
 - Parties do not deal with each other at arm's length
- **Unallocated NALE** (even minor amounts) will generally trigger NALI tax on **all** of the income of the fund for that particular year
- As SISA prevents a trustee or director of a corporate trustee from receiving remuneration, the NALE provision will not apply in circumstances where a trustee or director does not charge for the services performed in relation to the fund when **acting in a trustee capacity** (see **Example 7**)



LCR 2021/2 | NALI and expenditure under non-arm's length arrangements

- **Purchase of asset under a NAL arrangement** — ATO considers that there is still a sufficient nexus to treat all income derived from that asset, including capital gains derived on the disposal of the asset, as NALI even where the trustee subsequently refinances a borrowing arrangement on arm's length terms
- **Application of the market value substitution rule** will have no impact on whether a fund derives NALI, in circumstances where it acquires an asset for less than arm's length consideration — while a fund might have a MV cost base for an asset acquired through a NAL dealing that is used in calculating a capital gain on the disposal of the asset, the resulting gain will be treated as NALI if the asset was acquired through a NAL arrangement where the consideration given was less than would have been paid had the parties been dealing at arm's length



LCR 2021/2 | NALI and expenditure under non-arm's length arrangements

- Given the potentially severe consequences of the amendments to s 295-550, the ATO has allowed a grace period in [PCG 2020/5](#)
- ATO will not allocate compliance resources in determining whether the NALI general expenditure rule applies to the 2021–22 and earlier income years
- Ongoing concerns about disproportionate approach taken by ATO



PBR | Main residence exemption and foreign residents

[PBR No. 1051691843710](#) issued on 4 June 2020

Will the Commissioner provide a MRE extension of 6 months to sell the property where:

- It was the taxpayer's main residence until some years ago
- Taxpayer now resides in another country and is a foreign resident for tax purposes
- Taxpayer was not advised about the amendments to s 118-110 of the ITAA 1997, preventing foreign residents from accessing the MRE
- Taxpayer is in the process of selling the property, but the sale has been delayed due to COVID-19 restrictions
- Taxpayer does not satisfy any of the 'life events' tests as defined in s 118-110(5)

No. The Commissioner does not have the authority to not apply the law to your circumstances and the law does not give him any discretion in these matters



Update to PS LA 2011/15 (about Lodgment obligations, due dates and deferrals)

On 26 August 2021, [PS LA 2011/15](#) was updated to include STP and explain:

- Documents lodged electronically are considered lodged on the date they receive an ATO receipt number or lodgment confirmation via STP-enabled software
- Various reporting obligations under STP, including making a finalisation declaration by 14 July



Update on STP Phase 2

- Mandatory start date is 1 January 2022
- Digital service providers (**DSPs**) can apply for deferrals
- If your solution is ready for 1 January 2022, you should start Phase 2 reporting
- ATO has [advised](#) that if you are able to start Phase 2 reporting before **1 March 2022**, you will be considered to be reporting on time and you won't need to apply for more time



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Appendix

State and Territory business support measures

Program: [Small Business COVID Hardship Fund](#)

- **\$20,000** grant*
- Program opened on 27 May 2021 and **closed** on 10 September 2021

Eligibility

- DIT of at least **70%** for a minimum consecutive 2-week period from 27 May to 10 September 2021
- Comparison (benchmark) period:
 - **Actively trading in 2019:** 27 May 2019 to 10 September 2019
 - **Not actively trading in 2019:** 1 February 2021 to 28 July 2021
- DIT must be attested to by a 'qualified agent'
- Victorian payroll up to **\$10 million** in 2019–20 (ungrouped basis)
- Registered for GST on and from 28 July 2021
- Ineligible if business has received support under any COVID-19 support package launched on or after 27 May 2021

Program: [Business Costs Assistance Program Round Four*](#)

- Program open: Ongoing
- Payments made automatically (do not need to apply)

Eligibility

Available to eligible *Business Costs Assistance Program Round Two* and the *Business Costs Assistance Program Round Two July Extension* recipients ([Eligible ANZSIC classes](#)) based on the size of their annual payroll:

- For businesses with no payroll or an annual payroll below \$650,000: **\$2,800 per week**
- For businesses with an annual payroll between \$650,000 and less than \$3 million: **\$5,600 per week**
- For businesses with an annual payroll between \$3 million and \$10 million: **\$8,400 per week**

Program: [Business Continuity Fund*](#)

- Program open: Ongoing
- Payments made automatically (do not need to apply)

Eligibility

\$5,000 payment to recipients of the *Business Costs Assistance Program Round Two* and the *Business Costs Assistance Program Round Two July Extension* who are in 24 sectors that were affected by additional capacity limits when reopening in late July 2021 under COVID-19 restrictions

Program: [Commercial Landlord Hardship Fund 3](#)

- Program open: 13 September to 11:59pm on 15 January 2022

Eligibility

Grant up to **\$6,000** to eligible small landlords who experience hardship as a result of waiving rent for their tenant(s) between 28 July 2021 and 15 January 2022 (acute hardship: up to \$10,000)

Program: [Commercial Tenancy Relief Scheme](#)

- Program open: 28 July 2021 to 15 January 2022

Eligibility

Rent waivers, reductions, remissions or deferrals to businesses with an annual turnover of less than \$50 million that have suffered a DIT of at least **30%** due to COVID-19

Program: [COVID-19 Business Support Grant](#)

- Grants* of **\$7,500** (non-employing) and **\$20,000** (employing)
- Program open: 26 August 2021 to 5:00pm on 7 October 2021

Eligibility

- DIT of at least **30%** assessed by comparing a consecutive 7-day period from 13 August to 17 September 2021 with a comparable consecutive 7-day period in April 2021 to August 2021
- Annual turnover of more than \$75,000 in either 2019–20 or 2020–21
- Total annual Australian wages of less than \$10 million in 2019–20 or 2020–21 (if employing)
 - Specifically, an owner, partner, director or shareholder in a company is not considered to be an employee for the purpose of this grant
 - A beneficiary of a trust is also not considered to be an employee for the purpose of this grant
- Registered for GST on or before 1 April 2021 (and have valid and active ABN)

Program: [COVID-19 Small Business Hardship Scheme](#)

- Grants* of up to **\$10,000**
- Program open: October 2021

Eligibility

- Credits for payroll tax, utility charges, rates and other selected fees and charges up to a maximum of \$10,000 (inclusive of GST) per operator
- DIT of at least **30%** from June 2021 quarter to September 2021 quarter
- Annual turnover of \$30,000 to \$10 million
- Applicants for the COVID-19 Business Support Grant can also apply for the COVID-19 Small Business Hardship Scheme

Program's guidelines, including eligibility criteria, will be available soon

Program: [Territory Business Lockdown Payment](#)

- Lockdown payments of up to **\$3,000** (in addition to round one)
- Program **closed** on 27 August 2021

Eligibility

- DIT of at least **50%**
- Annual turnover of \$75,000 to less than \$10 million
- Fewer than 20 full-time equivalent employees
- Lockdown payment 1: **\$1,000**
- Lockdown payment 2: **\$1,000**
- Extended closure payment for eligible businesses: **\$2,000**
- Valid ABN as at the date of announcement of the lockdown

Program: [2021 COVID-19 Business Support Grant](#)

- Grants* of **\$1,000** (non-employing) and **\$10,000 to \$30,000** (employing) — extended to border businesses from 16 Sep 2021
- Program open: 16 Aug 2021 to 16 Nov 2021 (employing) and 31 Aug 2021 to 30 Nov 2021 (non-employing)

Eligibility

- DIT of at least **30%** for nominated 7-day period (must include at least 1 full day of a lockdown or border closure event)
- Comparison period — same 7-day period in July/August 2019 or same period in July/August 2020
- Annual payroll of no more than \$10 million (subject to exception below) in any of 2018–19, 2019–20 or 2020–21:
 - Small employing — annual payroll less than \$1.3 million: **\$10,000**
 - Medium employing — annual payroll \$1.3 million to \$10 million: **\$15,000**
 - Large employing (tourism and hospitality sector only) — annual payroll more than \$10 million: **\$30,000**
- Annual turnover of more than \$75,000 for any of 2018–19, 2019–20 or 2020–21
- Eligibility may need to be supported by a letter by an accountant (CAANZ, CPA Australia or IPA) or an RTA or RBA
- Registered for GST (and ABN held since 30 June 2021)

Program: [Tourism and Hospitality Sector Hardship Program](#)

- Grants* of **\$30,000 to \$100,000** (employing only)
- Program open: October 2021

Eligibility

- DIT of at least **30%** for at least 7 consecutive days between 1 July and 30 September 2021
- Small employing (including employing sole traders) — annual payroll less than \$1.3 million: **\$30,000**
- Medium employing — annual payroll \$1.3 million to \$10 million: **\$50,000**
- Large employing — annual payroll more than \$10 million: **\$100,000**

Program's guidelines, including eligibility criteria and FAQs will be available soon

Program: [COVID-19 Business Support Grant – July 2021](#)

- Grants of **\$1,000** (non-employing) and **\$3,000** (employing)
- Program open: 29 July 2021 to midnight on 30 September 2021

Eligibility

- DIT of at least **30%** in the week of 20 July to 26 July 2021 (inclusive) compared to the prior week
- Annual turnover of more than \$75,000 for 2019–20 or 2020–21
- Total Australian payroll of less than \$10 million in 2019–20 (employing)
 - To be considered an employee, staff must be under the control of the business, receive regular PAYG salary or wages, and have PAYGW amounts as well as superannuation paid by the employer
 - An owner, partner, or beneficiary of a trust is not considered to be an employee for the purpose of this grant
- Registered for GST on or before 20 July 2021 (and have valid and active ABN)

Program: [COVID-19 Additional Business Support Grant](#)

- Grants of **\$1,000** (non-employing) and **\$3,000** (employing)
- Further grant of **\$1,000** if operate from a commercial premise in the Adelaide CBD (postcode 5000)
- Program open: 13 August 2021 to midnight on 17 October 2021

Eligibility

- DIT of at least **30%** over the 2 weeks from 28 July to 10 August 2021 compared to average fortnightly turnover in the June 2021 quarter
- Total Australian grouped payroll of less than \$10 million in 2019–20 (employing)
 - To be considered an employee, staff must be under the control of the business, receive regular PAYG salary or wages, and have PAYGW amounts as well as superannuation paid by the employer
 - An owner, partner, or beneficiary of a trust is not considered to be an employee for the purpose of this grant
- Registered for GST on or before 28 July 2021 (and have valid and active ABN)
- Operate in an eligible industry sector identified in the list of [eligible ANZSIC classes](#)

Program: [COVID-19 Tourism and Hospitality Support Grant](#)

- Grants* of **\$1,000** (non-employing) to **\$20,000** (employing)
- Program open: 17 September 2021 to midnight on 31 October 2021

Eligibility

- Recipient of *COVID-19 Additional Business Support Grant*
- Operate in an [eligible tourism and hospitality sector](#)
- Employing:
 - Annual turnover of up to \$2 million: **\$3,000**
 - Annual turnover of more than \$2 million to \$5 million: **\$10,000** (automatic payment of \$3,000 + additional top-up grant of \$7,000)
 - Annual turnover of more than \$5 million: **\$20,000** (automatic payment of \$3,000 + additional top-up grant of \$17,000)
 - To be considered an employee, staff must be under the control of the business, receive regular PAYG salary or wages, and have PAYGW amounts as well as superannuation paid by the employer
 - An owner, partner, or beneficiary of a trust is not considered to be an employee for the purpose of this grant

Program: [COVID-19 Business Hardship Grant](#)

- Grants* of **\$2,000** (non-employing) and **\$6,000** (employing)
- Program open: 17 September 2021 to midnight on 31 October 2021

Eligibility

- Not received support under any SA Government COVID-19 support package launched on and after 20 July 2021
- DIT of at least **50%** for a consecutive 2-week period in the period from 20 July 2021 to 31 August 2021 compared to:
 - For businesses that were actively trading in 2019 — from 20 July 2019 to 31 August 2019
 - For businesses that were not actively trading in 2019 — from 1 January 2021 to 30 June 2021
- Total Australian grouped payroll of less than \$10 million in 2019–20 (employing)
 - To be considered an employee, staff must be under the control of the business, receive regular PAYG salary or wages, and have PAYGW amounts as well as superannuation paid by the employer
 - An owner, partner, or beneficiary of a trust is not considered to be an employee for the purpose of this grant
- Registered for GST on or before 20 July 2021 (and have valid and active ABN)

Program: [Major Events Grant](#)

- Grants* of up to **\$25,000** (expected attendance of more than 1,000) and up to **\$100,000** (expected attendance of more than 10,000) — grant is equal to the lesser of the non-recoverable financial loss and the amount above
- Program open: 16 August 2021 (applications for the larger grant of up to \$100,000 opened on 17 September 2021) to midnight on 17 October 2021

Eligibility

- Event was a one-off, catering for a combined capacity of over 1,000
- Incurred a non-recoverable financial loss from cancellation or postponement of the event as a result of restrictions from 20 July to 10 August 2021
- Total Australian grouped payroll of less than \$10 million in 2019–20 (employing)
 - To be considered an employee, staff must be under the control of the business, receive regular PAYG salary or wages, and have PAYGW amounts as well as superannuation paid by the employer
 - An owner, partner, or beneficiary of a trust is not considered to be an employee for the purpose of this grant
- Registered for GST on or before 20 July 2021 (and have valid and active ABN)

Program: [COVID-19 Micro and Small Business – Border Closure Critical Support Grant](#)

- Grants* of **\$7,000 to \$110,000**
- Program open: 2:00pm on 3 September 2021 to 2:00pm on 8 October 2021

Eligibility

- DIT of at least **30%** for minimum 2-week period from 26 June to 7 October 2021 compared to the same dates in 2019 or 2020
- Annual turnover in 2018–19, 2019–20 or 2020–21 financial year, or the 2020 calendar year, of:
 - Tier 1 — \$25,000 to \$49,999: **\$7,000**
 - Tier 2 — \$50,000 to \$1 million (non-employing): **\$14,000**
 - Tier 3 — \$50,000 to \$1 million (employing): **\$35,000**
 - Tier 4 — more than \$1 million to \$5 million (employing): **\$60,000**
 - Tier 5 — more than \$5 million to \$10 million (employing): **\$110,000**
- ‘Registered for tax purposes’ in Australia with a continuously active ABN on or before 1 May 2021

Program: [Small Business Lockdown Assistance Grant: Round Two, June 2021](#)

- Grants of **\$3,000**
- Program **closed** on 31 August 2021

Eligibility

- DIT of at least **30%** in the week of 29 June to 5 July 2021 (inclusive) compared to the prior week
- Annual turnover of \$75,000 or more
- Australian payroll of less than \$4 million
- Specified industries for Perth, Peel and Rottnest regions
- Registered for GST on or before 20 July 2021 (and have valid and active ABN)

Program: [WA Tourism and Travel Agent Support Fund 2021](#)

- Grants* of **\$2,000 to \$10,000**
- Program closes at 3:00pm on 30 September 2021

Eligibility

- DIT of at least **30%** in the 6-week period from 10 July to 20 August 2021 compared to the 6-week period from 15 May to 25 June 2021
- Tourism business that operates within at least one of 5 categories (not available for privately-owned residences rented out for short stay accommodation (e.g. holiday homes, apartments))
- Sole traders or non-employing (no minimum or maximum annual turnover): **\$2,000**
- Annual turnover of more than \$50,000 to \$100,000 (employing): **\$2,000**
- Annual turnover of more than \$100,000 to \$1 million (employing): **\$5,000**
- Annual turnover of more than \$1 million to \$10 million (employing): **\$10,000**
- Valid and active ABN prior to 15 May 2021



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Robyn Jacobson, CTA is the Senior Advocate at The Tax Institute.

Her role is a key engagement and advocacy contact for Tax Institute members, government, non-government organisations, regulators and other stakeholders. She brings to the role her 23 years' experience as a professional tax trainer, and preceding roles in public practice.

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