The Tax Institute

19 December 2022

Employment Taskforce
Treasury
Langton Crescent
PARKES ACT 2600

By electronic upload here.

Dear Sir/Madam

**Employment White Paper**

The Tax Institute welcomes the opportunity to make a submission to Treasury in respect of the Employment White Paper Terms of Reference (**Terms of Reference**) and the Jobs and Skills Issues Paper dated 17 August 2022 (**the Issues Paper**).

In the development of this submission, we have closely consulted with our National Technical Committees to prepare a considered response that represents the views of the broader membership of The Tax Institute.

It is pleasing that the Government has provided the opportunity for members of the community to contribute towards addressing Australia's economic challenges. The Tax Institute strongly supports a consultative model to ensure that the knowledge and experience of key stakeholders is understood and incorporated into Australia's labour market policies.

Our comments are mainly focused on how taxation and superannuation reforms can support and drive full employment, productivity growth, and wage equality. Our recommendations include measures to clarify certain employment obligations, addressing uncertainties and complications that create barriers to employment. Simplifying employment taxation obligations reduces the resources needed for compliance, allowing employers and employees to allocate their limited resources to more productive activities.

Our detailed response is contained in **Appendix A**.

We would be pleased to continue to work with the Treasury on how taxation and superannuation policies can be utilised to secure and enhance Australia's economy and productivity in the years to come.

L37, 100 Miller Street
North Sydney, NSW 2060
**T** 1300 829 338
**E** tti@taxinstitute.com.au
**taxinstitute.com.au**

ABN 45 008 392 372

The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all. Please refer to **Appendix B** for more about The Tax Institute.

If you would like to discuss any of the above, please contact our Tax Counsel, Julie Abdalla, on (02) 8223 0058.

Yours faithfully,

**Scott Treatt**

General Manager,
Tax Policy and Advocacy

**Jerome Tse**

President

## APPENDIX A

We have set out below our detailed comments and observations for your consideration. Our comments broadly follow the layout of the Terms of Reference. We have limited our responses to the questions that our members consider to be the most relevant and crucial.

# 2. The future of work and labour market implications of structural change, with a focus on:

### 2.2 The energy transition and tackling climate change to achieve net zero.

#### EXPANSION OF THE AUSTRALIAN PATENT BOX

We consider that the enactment and expansion of the Australian patent box could be used to encourage investment in certain industries or technologies that promote low emissions. The patent box regime, originally announced in the Federal Budget 2021–22,[1] proposed to tax income derived by corporate taxpayers from medical or biotechnology patents at a concessional tax rate of 17%. Broadly, the rules require that the underlying patents are registered in Australia, and that the concessional tax treatment will only apply to income and expenses attributable to research and development activities conducted in Australia. In the Federal Budget 2022–23, the former Government announced it would expand the scope of the patent box regime to cover the agricultural sector and low emissions technology innovations.[2] Further, it proposed to recognise patents granted under the United States and European regimes.

The proposed patent box regime as announced in the Federal Budget 2021–22, was introduced by the former Government by a Bill into Parliament, but lapsed when the 2022 federal election was called.[3] Although various submissions, including The Tax Institute's submission,[4] to the Treasury recommended that the patent box regime be extended to include low-emissions technologies,[5] the Bill introduced into Parliament did not include such a change.

Tax concessions have been proven to influence business and consumer behaviour. Creating a tax concession for new low-emission technologies can encourage the growth of businesses and jobs in this field. We recommend that the Government reintroduce the patent box regime into Parliament with the expanded scope as announced by the former Government. For further details, please refer to The Tax Institute's submission on the proposed patent box and our Incoming Government Brief.[6]

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1 The Hon Josh Frydenberg MP and the Hon Simon Birmingham, *Federal Budget 2021–22* (Report No. 2, 2021) 23.

2 The Hon Josh Frydenberg MP and the Hon Simon Birmingham, *Federal Budget 2022–23* (Report No. 2, 2022) 24.

3 See *Treasury Laws Amendment (Tax Concession for Australian Medical Innovations) Bill 2022*.

4 The Tax Institute, *Patent Box Submission* (2021).

5 See, for example, ibid 4–5; Science and Technology Australia, *Patent Box Policy Design* (2021) 5–6.

6 The Tax Institute, (n 4); The Tax Institute, *Incoming Government Brief: June 2022* (2022) 21–22.

**BETTER INCENTIVES FOR ZERO AND LOW EMISSION VEHICLES**

The Treasury Laws Amendment (Electric Car Discount) Bill 2022 received Royal Assent on 12 December 2022 and introduced Fringe Benefit Tax (**FBT**) exemptions for certain low or zero emission vehicles (**ZEVs**). The FBT exemptions are limited to electric vehicles powered by batteries or hydrogen fuel cells and are purchased from 1 July 2022 at a value below the luxury car tax (**LCT**) threshold for fuel efficient vehicles (currently $84,916 for the 2022–23 income year).[7] Only certain ZEVs below the LCT threshold are eligible for the FBT exemption as the definition of car is taken from the *Fringe Benefits Tax Assessment Act 1986* and excludes:

- vehicles designed to carry 1 tonne or more;
- vehicles designed to carry more than 8 passengers; and
- some motorcycles and bikes powered by electric engines.

Consequently, many vehicles are not eligible for this FBT exemption. We consider that expanding the measure to apply to more vehicles and support the required infrastructure for ZEVs will further encourage take up of low emission technology. The adoption of these technologies can also support Australian businesses that are involved in the manufacturing or maintenance of these goods.

The expansion of this measure could:

- remove the LCT threshold;
- apply to vehicles that are not cars as defined in the FBTAA; and
- apply to infrastructure to support the charging of low or zero emission vehicles.

The expansion of this measure may also benefit employers overall by enabling them to provide salary packages for FBT exempt vehicles at a lower cost to their business. As the public demand for low emission vehicles grows, the flexibility for employers to offer a greater range of benefits to attract or retain key talent can be highly useful (especially during labour shortages).

## 2.3 The transformation associated with digitalisation and emerging technologies.

On 23 November 2022 the Treasury Laws Amendment (2022 Measures No. 4) Bill 2022 containing the small business technology investment boost (**the tech investment boost**) was introduced into Parliament. We support the tech investment boost as a means to allow Australia's workforce and economy to keep pace with advancements in technology.

This measure broadly allows businesses with an aggregated turnover of less than $50 million to deduct 120% of the value of business expenses and depreciating assets used to support their digital adoption. Eligible items include portable payment devices, cybersecurity systems or subscriptions to cloud-based services.[8] The measure is proposed to apply to eligible expenditure incurred between 7:30pm (AEDT) on 29 March 2022 until 30 June 2023.

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7 Australian Taxation Office, *Luxury car tax rate and thresholds* (Web Page, 1 June 2022).

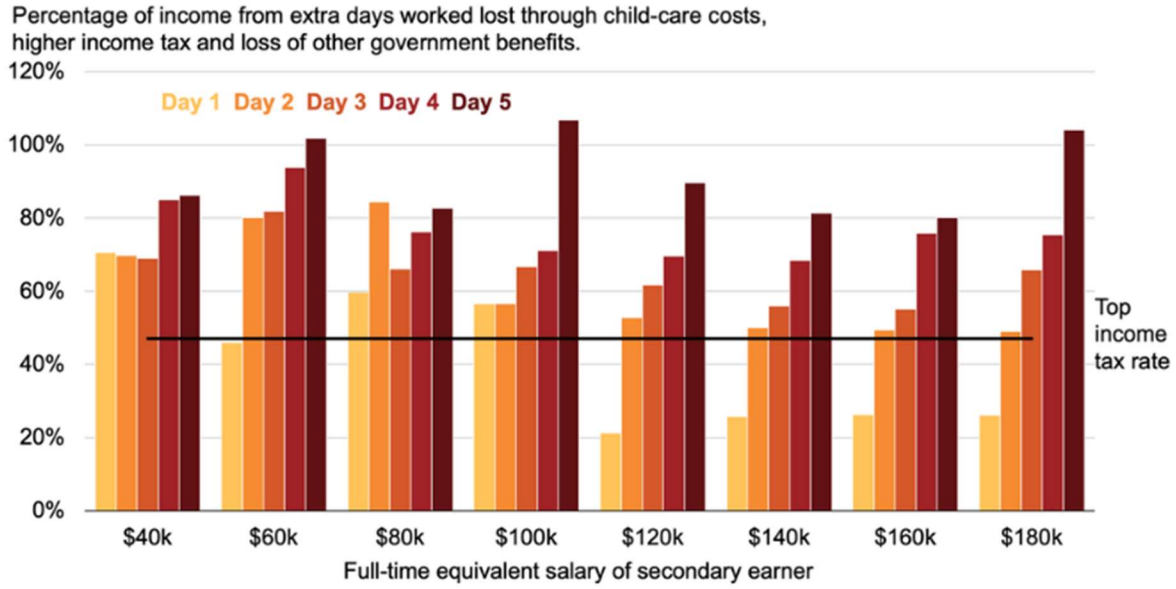
8 Australian Taxation Office, *Small Business Technology Investment Boost and Small Business Skills and Training Boost* (Web Page, 17 October 2022).

As this measure has yet to receive Royal Assent and come into force, businesses may be hesitant to invest in additional digital operations until the measure has the force of law. We recommend that an extension of the measure until 30 June 2024 will enhance its effectiveness by providing small businesses with additional time to invest in eligible digital technology and better achieve its policy intent.

## 4. Pay equity, including the gender pay gap, equal opportunities for women and the benefits of a more inclusive workforce.

The Tax Institute considers that there need to be changes to the current family tax benefit and rebate thresholds in order to improve workforce participation by secondary income-earners in Australian households. Under the current marginal tax rates system for individuals, secondary income-earners are taxed on their personal income but may incur higher childcare costs and lose family tax benefits. These costs are often weighed against the potential income of the secondary earner (usually the woman) rather than that of the primary earner or the collective family income. Thus, the interaction between Australia's marginal tax and transfer payment systems results in secondary income-earners being penalised and disincentivised from joining or returning to the workforce. Secondary income earners in family units are often female, with 46% of females employed on a part-time basis compared to 17% for males.[9]

The following chart[10] illustrates the effective marginal tax rate for secondary income-earners compared to the headline marginal tax rates.




9 Miranda Stewart, *Tax, Social Policy And Gender: Rethinking Equality And Efficiency* (ANU Press, 2017) 3.

10 Danielle Wood, Kate Griffiths and Owain Emslie, 'Cheaper Childcare: A Practical Plan To Boost Female Workforce Participation' (Grattan Institute, 9 August 2020) 26.

The data shows that the extremely high effective marginal tax rates deter women from working more, especially those with young children.[11] For example, a secondary earner on a full-time annual equivalent salary of $60,000 faces an effective marginal tax rate of over 80% when they increase working days from 1 day per week to 2–3 days per week (compared to the top marginal personal income tax rate of 47%). Similarly, for secondary earners working on a full-time basis, the effective marginal tax rate is at or above 80%, regardless of the full-time equivalent salary level. At some income levels, the effective marginal tax rate exceeds 100%.

We recommend that the Government reviews and reforms the current system to remove such barriers to workforce participation. This would create equal opportunities, reduce the gender pay gap for all Australians who engage in employment, and improve the overall productivity of the economy.

# 5. Labour force participation, labour supply and improving employment opportunities.

## 5.1 Reducing barriers and disincentives to work, including the role of childcare, social security settings and employment services.

### THE ROLE OF THE CHILD CARE SUBSIDY

#### Background to the Child Care Subsidy

The *Family Assistance Legislation Amendment (Cheaper Child Care) Bill 2022* (**the Child Care Bill**) received Royal Assent on 29 November 2022. The measures introduced by the Child Care Bill will improve child care affordability, helping to ease cost of living pressures on families. This measure will also support parents and carers, particularly women, in their choice to enter the workforce or increase their workforce participation. This will have wider benefits for the economy, particularly in terms of its recovery following the disruptions caused by COVID-19.

Irrespective of the changes implemented by the Child Care Bill, the Child Care Subsidy (**CCS**) regime contains significant complexity in its design, making it difficult to implement changes that best give effect to the policy. The Tax Institute considers that further steps are needed to support families who need it the most. Although the rate of the subsidy is important, there are fundamental concerns with other aspects of the CCS that may limit its effectiveness. These include the current thresholds and formulas used in determining a family's eligibility to the CCS. Below, we have outlined recommendations that, in our view, will ensure that the CCS is most effective at lowering the cost of child care for families and encouraging workforce participation.

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[11] M Stewart, 'Mothers have little to show for extra days of work under new tax changes', *The Conversation*, (online, 20 June 2018), cited in The Tax Institute, 'Case For Change' (The Tax Institute, July 2021) 135.

### Review of the hourly rate cap

The hourly rate cap is a prescribed rate that limits the amount a family is eligible to receive under the CCS. It is currently set at a national rate of $12.74 per hour for centre based child care. The cap does not factor in the different costs of living across Australia. Table 1 below illustrates the potential differences in the cost of child care services across Australia.

**TABLE 1** — Hourly child care costs

| Hourly fee | NSW | VIC | QLD | WA | SA | TAS | NT | ACT |
|---|---|---|---|---|---|---|---|---|
| **Stated Government Average ($)**[12] | 11.20 | 11.30 | 10.35 | 11.20 | 10.80 | 10.10 | 9.80 | 12.30 |
| **Average cost in metro areas – other sources ($)**[13] | 15.18 | 13.55 | 9.73 | 13.55 | 10.27 | 8.64 | 9.45 | 11.36 |

The Tax Institute is of the view that a comprehensive review of the hourly rate should be undertaken to update the legislation so that there are tailored rates for each state and territory, and for the metropolitan and regional areas, rather than a single national rate.

### Update of the activity test

The activity test may impact the hours of subsidised care a family is eligible for per fortnight, further reducing or limiting the amount a family is entitled to receive. Broadly, it is designed to ensure that the recipients of the CCS are using the funds for recognised purposes, such as work or study. However, as it currently operates, the activity test is one of the largest disincentives preventing individuals from returning to work on a full-time basis.

The 'result' of the activity test is a maximum number of hours which are eligible for the CCS, this being 100 hours of subsidy per fortnight per child. These hours are based on the hours the relevant centre is open, rather than the hours the child is actually in care. Accordingly, for a centre that is only open 10 hours a day, an individual working full time and eligible to 100 hours of subsidised care, will receive subsidised care for each of the 10 days in a CCS fortnight. However, if the relevant centre is open 11 hours per day, an individual in the same circumstances will only receive subsidised care for 9 days in the CCS fortnight. The tenth day of child care is not subsidised under the current formula.

Travel times for people commuting to and from their place of work means it is not unusual for centres to accommodate parents' needs and remain open for more than 10 hours a day. For families requiring more than the maximum 100 hours determined by the activity test, this will result in a shortfall of hours that are not covered by the CCS and the primary caregiver having an effective marginal tax rate that is at or above 80%. The activity test penalises the primary caregiver by adding a practical barrier to entering the workforce on a fulltime basis.

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[12] Department of Education, Skills and Employment (DESE), *Child Care in Australia report September quarter 2021*, (Web Page, 30 September 2022).

[13] Toddle, *Child care costs — how much does it cost?*, (Web Page, 2 August 2021).

The Tax Institute recommends that the activity test should be updated to better reflect the hours of care required by families, rather than in its current form which is based on the centre's opening hours.

## 5.3 Skills, education and training, upskilling and reskilling, including in transitioning sectors and regions.

### EXTENDING THE SMALL BUSINESS SKILLS AND TRAINING BOOST

On 23 November 2022 the small business skills and training boost (**skills and training boost**) was introduced into Parliament in schedule 4 of the Treasury Laws Amendment (2022 Measures No. 4) Bill 2022. This measure was first announced by the former Government as part of the Federal Budget 2022–23.[14] Broadly, the skills and training boost allows businesses with an aggregated turnover of less than $50 million to claim 120% of the value of external training costs as a deduction and applies from 7:30pm AEDT on 29 March 2022 until 30 June 2024. This measure allows businesses to upskill their workforce to meet current and future business needs.

The skills and training boost is important as it incentivises businesses to continue investing in their staff. This measure also benefits the economy more broadly as it supports businesses to be more effective and productive. In addition, as many employees will inevitably move businesses as their careers progress, they are able to apply their training and experience in new environments and contexts as the economy requires.

The former Government released a Discussion Paper that consulted on allowing individuals to claim deductions for training and education expenses that will prepare the individuals for future employment.[15] The Discussion Paper recognised that factors, such as technological advancement and the changing nature of work, are driving the need for taxpayers to continually upgrade their skills. The law currently allows individuals to only claim deductions for education and training expenses with a sufficient connection with their current employment.[16]

Many industries are facing a critical shortage of skilled workers that will take some time to resolve. Extending the operation of this measure recognises that the shortage of skilled workers is an ongoing process as workers require continuous training and upskilling. As the needs and demands of Australia's economy continues to evolve and shift, empowering Australians to continue educating themselves will help to ensure a skilled and qualified workforce. This may also reduce future worker and skills shortages in certain areas, as more people are likely to have undertaken training and education due to the tax incentive.

### DEDUCTIONS FOR SELF-EDUCATION EXPENSES

The Tax Institute recommends that the Government should consider expanding the self-education deduction to allow a broader range of training and self-education costs to be claimed by individuals in their tax return.

Currently, individuals can only claim certain self-education costs as deductions in their individual tax return where the education either:

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[14] The Hon Josh Frydenberg MP and the Hon Simon Birmingham, (n 2) *26—27*.

[15] Treasury, *Education and training expense deductions for individuals* (Web Page, 22 January 2021).

[16] Australian Taxation Office, *Self-education expenses* (Web Page, 1 August 2022).

- maintains or improves the knowledge or skills of an individual in performing their current employment activities; or
- results in or is likely to result in, increased income from the individual's current employment activity.

Self-education costs are not deductible for individuals where the education does not have a sufficient connection to the individual's current employment activities, or the costs were incurred when the individual was not employed.

We propose that the eligibility criteria for claiming self-education costs is expanded to allow individuals who are unemployed or seeking to retrain in another occupation, to claim deductions for costs that are either:

- conducted through a registered training provider; or
- a prerequisite for an occupation under Australia's skilled occupation list.[17]

This measure would support unemployed individuals to upskill and improve their employment opportunities. Further, we consider this measure would assist to reduce labour shortages.

## 6. The role of collaborative partnerships between governments, industry, unions, civil society groups and communities, including place-based approaches.

### Unification of state-based payroll taxes under the Commonwealth

The Tax Institute has long advocated that payroll taxes should be administered and regulated at a Federal level, rather than at the State and Territory level, as is currently the case. At present, it is difficult for employers based in multiple states and territories to navigate the complexities and idiosyncrasies of each set of payroll tax laws and how they interact with one another.

We recognise that implementing a payroll tax system under the Commonwealth requires agreement across each of the states and territories, which may be challenging in the shorter-term. However, we consider that harmonisation of certain concepts, such as consistent thresholds and rates, within each of the State payroll tax regimes could be a preliminary step towards full unification and simplification of the payroll tax system.

Looking to the future, we recommend that the Government strongly consider reforming the payroll tax system to bring it under the Commonwealth government's jurisdiction. Chapter 11.1 of our Case For Change discussion paper canvases options that could be implemented as an alternative to state based payroll tax. These options include a business turnover tax, state income tax or a combination of the two.[18] This would simplify the compliance costs borne by employers in understanding and complying with the current rules. Further, depending on the pathway chosen, it can mean that employers generally only need to interact with a single agency, rather than with multiple agencies across different states and territories when dealing with payroll tax issues.

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[17] The skilled occupation list can be found here.

[18] Tax Institute, 'Case For Change' (The Tax Institute, July 2021) 199.

# 7. Other relevant topics and approaches.

## 1. Improving employment outcomes for victims of domestic violence

The Tax Institute considers that victims of domestic violence should be supported to have equal employment rights where they have debts that have arisen from a domestic violence relationship. Our members have suggested that this could be implemented by:

- making reforms to broaden the powers of the Commissioner to forgive tax debts of victims of domestic violence; and
- amending the current bankruptcy laws so that victims of domestic violence do not retain a permanent record on the National Personal Insolvency Index (**NPII**).

This will enable them to re-enter the workforce and establish a strong foundation for their livelihoods. We have detailed how these issues may impact domestic violence victims below.

### 1.1 WIDER DISCRETION FOR COMMISSIONER OF TAXATION TO WAIVE TAX DEBTS OWED BY VICTIMS OF DOMESTIC VIOLENCE

Our members have shared examples where their clients indicated that they were coerced into signing documents for the transfer of real property. The transfer of property triggers capital gains tax, that is, the tax paid on the profit of the disposed asset at the taxpayer's marginal rate. In some cases, the capital gains tax can be exempt from tax when certain requirements are met or under court orders. However, if a taxpayer is coerced into this transaction, they may not have been able to go through the necessary steps to ensure that there is no tax payable on the transfer of assets. The transfer of the property may result in a significant tax liability owing to the ATO and if this liability is unable to be paid by the due date, the ATO may have limited options available but to commence recovery action against the affected individual, potentially resulting in a declaration of bankruptcy.

In certain circumstances, the ATO can release the tax debt. However, it can be a time consuming and resource intensive process to engage with the Commissioner to exercise the discretion to release the these debts in accordance with Practice Statement *PS LA 2011/17 Debt relief*. Accordingly, it would be beneficial for the victims of domestic violence if the Commissioner had broader discretion to forgive these debts.

### 1.2 REMOVING NAMES OFF THE NATIONAL PERSONAL INSOLVENCY INDEX FOR VICTIMS OF DOMESTIC VIOLENCE

Currently, if a person declares bankruptcy, their name is listed on the National Personal Insolvency Index (**NPII)**. Depending on how their debt was finalised, that person's name generally remains on the NPII for 5 years after a debt agreement is made or in some cases, it is never removed.[19] The *Bankruptcy Act 1966* does not impose restrictions on the types of employment that these individuals can retain, however, many licensing authorities or industry associations can impose certain restrictions or conditions on these individuals.[20] We consider that this results in unfairness against those individuals whose debt has arisen as a result of a domestic violence relationship, as it limits their employment opportunities.

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[19] Australian Financial Security Authority, *What happens after my agreement ends?*, (Web Page).

[20] Australian Financial Security Authority, *Employment restrictions*, (Web Page).

## 2. Superannuation obligations of employers

The vast majority of businesses are subject to superannuation guarantee (**SG**) obligations for their employees. However, the superannuation system has many areas of inefficiency, creating substantial compliance costs for employers and uncertainties for employers in trying to meet their obligations. The Tax Institute considers that it would be beneficial for the Government to undertake a broad review of the current SG system. Specific areas requiring reforms are detailed below.

### 2.1 ADDRESSING SUPERANNUATION GUARANTEE NON-COMPLIANCE

We recommend that the Government reforms the *Superannuation Guarantee (Administration) Act 1992* (**SGAA**) to ensure that penalties for non-compliance by employers with their SG obligations are fair and encourage compliance with the system.

Currently, employers who are late by just one day in lodging or failing to lodge an SG statement are subject to a penalty equal to 200% of the SG charge under Part 7 of the SGAA. The Commissioner of Taxation (**Commissioner**) has the discretion to remit the Part 7 penalty in full or in part (although this may be limited in some cases) as part of the assessment of the penalty (the original assessment stage) or after the penalty is assessed (through an objection decision). An employer who pays an SG contribution only one day late and fails to report this to the ATO is treated the same as an employer who deliberately evades their obligations to their employees.

The nominal interest is intended to compensate the employee's superannuation account for the lost earnings while the SG contribution remained unpaid. However, the nominal interest is calculated from the beginning of the quarter until the later of the date on which the SG statement is due for lodgment and the actual date of lodgment, rather than the date of payment of the contribution. The Part 7 penalty operates to penalise the employer for not lodging an SG statement, so the combination of the Part 7 penalty and the nominal interest component operates as a double penalty for employers that disincentivises them from rectifying historical SG shortfalls.

As a result, the current rules have the opposite effect of what is intended — they discourage employers who have made a genuine mistake or an oversight from coming forward to rectify the error, and do nothing to change the behaviour of an employer who is intent on disregarding or ignoring their SG obligations.

The penalty is draconian and ineffective in promoting voluntary compliance. Further, it is completely disproportionate to other remedies for unmet workplace obligations like unpaid wages. We therefore recommend that the Government amends section 59(1) of the SGAA to reduce the maximum Part 7 penalty, so it aligns with penalties imposed under the Fair Work Act 2009. Further, the Government should update section 31 of the SGAA to calculate nominal interest from the first day of the quarter in question until the date the contribution is received in the employee's superannuation account. The integrity of the tax system would be enhanced by a fairer penalty system that reduces barriers for employers to comply with their current, and rectify outstanding historical, obligations.

### 2.2 DEFINING EMPLOYEES V INDEPENDENT CONTRACTORS

Cases concerning whether an individual is an employee or independent contractor continue to appear in the Administrative Appeals Tribunal and courts due to the ambiguity of the current legal rules and principles. The concept of a 'worker' also varies between the states and with the federal level. With the emergence of non-traditional ways of working and changing employee–employer relationships, it is imperative that this important concept of a 'worker' keeps pace with these changes.

We recommend that a broad and inclusive concept of a 'worker' is adopted at both state and federal level, and is defined in the relevant legislation. This term should encompass various classifications such as an employee, contractor and be future proofed to include other non-traditional relationships that may arise over time. Further, creating a bright-line test for determining whether an individual is an employee or contractor would greatly reduce the number of disputes between employers and the ATO, and provide employers with greater certainty on their SG obligations.

### 2.3 CLARIFYING THE BASE FOR CALCULATING SUPERANNUATION GUARANTEE

SG is calculated using ordinary time earnings (**OTE**) rather than the total salary and wages paid. Employers often find it difficult to establish the appropriate base for determining their SG liability in respect of each employee, as it generally excludes overtime payments, certain allowances and certain leave payments, which are included in salary and wages.[21] The concept of ordinary pay for ordinary hours of work may differ across different industries and businesses, as the ordinary hours may be determined by the award or agreement underlying the employment arrangement. What may be regarded as regular in one setting may be unreasonable or unusual in another.

We consider that employers and employees alike would benefit from having the SG base reviewed with the view to aligning it more closely with salary and wages. This will provide certainty for employers and employees about the SG entitlements that must be paid in respect of the employment arrangement.

## 3. Tax treatment of employee share-based remuneration

The Tax Institute recommends that Government should consult on a redesign of the employee share scheme (**ESS**) concessions contained in Division 83A of the *Income Tax Assessment Act 1997* (**ITAA 1997**). The policy intent of Division 83A is to ensure that the discount employees receive on ownership interests is included in the employee's assessable income. However, the provisions are complex to understand and apply, and in some cases, are ineffective for certain ESS that are utilised by private entities. Further the ESS concessions may differ according to the size and stage the business is at in its lifecycle, which can cause anomalous outcomes.

Providing employees with ownership interests in the businesses in which they work can help to attract and retain talent. This can also provide support and assistance for companies to invest in innovation and development, particularly in the case of start-up businesses.

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[21] Australian Taxation Office, *List of payments that are ordinary time earnings* (Web page, 24 October 2022).

We consider that redesigning Division 83A will better encourage employees to hold ownership interests in the businesses in which they work. Our Case For Change discussion paper provides greater detail on some of the issues and options for reform in respect of ESS.[22]

## 4. Simplification of the Fringe Benefits Tax regime

The Tax Institute's longstanding view is that the current FBT regime should be abolished, and a principle-based approach be applied in the drafting of the new rules (recommendation 112 of the Henry review).[23] Further information on this approach is contained in our Case For Change discussion paper.[24]

If the FBT regime is not abolished, we recommend that the Government consult on simplifying the FBT regime. FBT was enacted as an integrity measure to ensure that tax was paid on non-cash benefits provided to employees in respect of their employment. However, the FBT regime has created significant complexity and costs for businesses.

This complexity is apparent in the burdensome substantiation requirements of the FBTAA. In an attempt to mitigate this, the Treasury Laws Amendment (2022 Measures No. 4) Bill 2022 was introduced into Parliament on 23 November 2022. Although this is one step closer to assisting employers to utilise their existing records to substantiate their FBT returns, it does not address the underlying issue, which is, an overly complex regime that generates minimal revenue in comparison to the costs of administering it.

FBT has one of the highest tax gaps, estimated to be approximately $991 million or 20.3% of its revenue in 2019–20.[25] This gap is largely a result of the underlying complexity in understanding, calculating, reporting, and paying FBT on relevant benefits. We consider that simplifying the FBT regime will help employers reduce their compliance costs and provide them with certainty as to their actual employment costs. Further, this certainty of employment costs and reduced compliance costs, will free up resources to enable businesses to invest more in improving the skills and productivity of their employees.

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[22] The Tax Institute (n 18) 63–81.

[23] Ken Henry et al, 'Australia's future tax system' (Final Report: Part 1 - Overview, December 2009) 102.

[24] The Tax Institute (n 18) 87–100.

[25] Australian Taxation Office, Latest estimate and trends (Web Page, 31 October 2022).

## APPENDIX B

### About The Tax Institute

The Tax Institute is the leading forum for the tax community in Australia. We are committed to representing our members, shaping the future of the tax profession and continuous improvement of the tax system for the benefit of all, through the advancement of knowledge, member support and advocacy.

Our membership of more than 11,000 includes tax professionals from commerce and industry, academia, government and public practice throughout Australia. Our tax community reach extends to over 40,000 Australian business leaders, tax professionals, government employees and students through the provision of specialist, practical and accurate knowledge and learning.

We are committed to propelling members onto the global stage, with over 7,000 of our members holding the Chartered Tax Adviser designation which represents the internationally recognised mark of expertise.

The Tax Institute was established in 1943 with the aim of improving the position of tax agents, tax law and administration. More than seven decades later, our values, friendships and members' unselfish desire to learn from each other are central to our success.

Australia's tax system has evolved, and The Tax Institute has become increasingly respected, dynamic and responsive, having contributed to shaping the changes that benefit our members and taxpayers today. We are known for our committed volunteers and the altruistic sharing of knowledge. Members are actively involved, ensuring that the technical products and services on offer meet the varied needs of Australia's tax professionals.