

Taxation and Inequalities: National Report of Australia

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1. Introduction

This report discusses the interaction of taxation and inequalities in Australia. The focus of this report is on Commonwealth (federal) tax legislation, as the Commonwealth levies most taxes, and the most important taxes, in the federation: the income tax and the Goods and Services Tax (GST). However, reference is made to State taxes where relevant.

2. Constitutional and Legislative Framework

2.1 Equality and Non-Discrimination Legislation

The Australian federation, comprising the Commonwealth (federal) government, six States and two Territories, was established in 1901 and is governed by a written constitution, the *Commonwealth of Australia Constitution Act 1900 (Constitution)*.¹ The Constitution is not limited by or subject to international organisations or treaties in any respect, although legislation to implement treaties is important in protecting equality and non-discrimination. Principles of common law and equity are also relevant to equality and non-discrimination because Australia is a common law jurisdiction (inheriting, and further developing, common law and equity from the United Kingdom, of which the States were former colonies). The Constitution (and validly enacted statutes) will override the common law.²

Equality is a “fundamental social value” in Australia’s democracy.³ However, the Constitution does not contain any direct guarantee or Bill of Rights to protect or advance the principles of equality and non-discrimination.⁴ The Constitution constrains the Commonwealth government’s legislative power to a set of enumerated subject matters, or ‘powers’ (including the power to make tax laws).⁵ Legislative power under s 51 of the Constitution must be exercised in making laws “for the peace, order, and good government of the Commonwealth” but this requirement has not been interpreted as a limitation in respect of equality. None of the Commonwealth legislative powers expressly relate to equality or anti-discrimination.⁶ Nonetheless, it has been argued that the Constitution establishes a framework for just

¹ AU: Commonwealth of Australia Constitution Act, 1900 [hereinafter *Constitution*]. The States are sovereign entities in the federation and have their own written constitutions, while the Territories are subject to Commonwealth power. In general, the Territories are given equal power to the States to legislate on most relevant matters.

² M. Stewart and K. Walker, *Restricting the Legislative Power to Tax: Australia – National Report*, 15 Mich. J. Int. Law 246, p. 199 (2007).

³ B. Gaze and B. Smith, *Equality and Discrimination Law in Australia: An Introduction* ch. 1 p.1 (Cambridge University Press 2016).

⁴ Gaze and Smith, *supra* n. 3, at ch 1.3 p. 13; D. Meyerson, *Equality and Discrimination Law in Australia*, in *The Oxford Handbook of the Australian Constitution* pp. 1054-5 (C. Saunders and A. Stone eds., Oxford University Press UK 2018).

⁵ These legislative powers are mainly contained in sec. 51 of the Constitution.

⁶ Meyerson, *supra* n. 6, at p. 1056.

and democratic legal, economic and social relations in Australia, including through the broad taxation and social welfare powers accorded to the Commonwealth.⁷

More specifically, the Constitution contains some provisions that support Australia's democracy, including the independence of the judiciary, and constrain Commonwealth legislative power and thereby protect individual rights.⁸ These Constitutional provisions provide protection for the right to vote;⁹ the right to trial by jury;¹⁰ and freedom of religion.¹¹ The Constitution also contains an implied and partial protection for free speech, specifically interpreted as freedom of political communication as an indispensable part of the system of representative and responsible government created by the Constitution.¹² This has been described as "a freedom from government restraint, rather than a right conferred directly on individuals".¹³ That is, it restricts laws which interfere or seek to limit political communication.

In contrast to the Commonwealth, the States have a broad sovereign power to legislate on all subjects unless that power is exclusively allocated to the Commonwealth by the Constitution. Some States and Territories have enacted human rights laws.¹⁴ Where a State law conflicts with a valid Commonwealth law (including a taxation law or an anti-discrimination law), the Commonwealth law prevails.¹⁵

Despite the lack of a Bill of Rights or explicit protection of equality in the Constitution, the Australian government has enacted significant legislation to protect equality and non-discrimination. Hotly contested politico-legal debates on the meaning of "equality" mean that it does not have a precise legal definition in Australia, making it susceptible to a "wide range of meanings".¹⁶ Consequently, Australian law focuses on targeting inequalities in the form of discrimination based on protected characteristics.¹⁷ Anti-discrimination legislation aims to protect the principle of equality to ensure all Australians "have equal chances in life, without disadvantages arising from attributed such as race or ethnicity, sex or

⁷ P. Emerton and K. James, *The Australian Constitution as a Framework for Securing Economic Justice*, 51 Federal Law Journal 3, p. 372-396 (2023).

⁸ Stewart and Walker, *supra* n. 2, at p. 193; Meyerson, *supra* n. 4, at pp. 1062-1066.

⁹ Sec. 41 Constitution.

¹⁰ Sec. 80. Constitution.

¹¹ Sec. 116 Constitution.

¹² AU: HCA, 30 Sep 1992, *Australian Capital Television Pty Ltd v the Commonwealth*, 177 CLR 106; AU: HCA, 30 Sep 1992, *Nationwide News Pty Ltd v Wills*, 177 CLR 1; AU: HCA, 18 Dec 2013, *Unions NSW v New South Wales* 252 CLR 530.

¹³ Australian Human Rights Commission, *Freedom of Information, Opinion and Expression* (accessed December 2023), available at: <https://humanrights.gov.au/our-work/rights-and-freedoms/freedom-information-opinion-and-expression#:~:text=Constitutional%20law%20protection,government%20created%20by%20the%20Constitution.>

¹⁴ E.g. Human Rights Act 2004 (ACT); Human Rights Act 2019 (Qld); Charter of Human Rights and Responsibilities Act 2006 (Vic).

¹⁵ Sec. 109 Constitution.

¹⁶ Gaze and Smith, *supra* n. 3, at ch 1.3 p.12.

¹⁷ *Ib.*

disability”.¹⁸ Thus, it has been suggested that Australian anti-discrimination law protects and advances substantive equality,¹⁹ as opposed to formal equality.²⁰

The primary Constitutional basis for Australian anti-discrimination legislation is the “external affairs” power under which the Commonwealth Parliament is empowered to make laws in respect to matters physically external to Australia or those affecting Australia’s relations with other nations.²¹ Most of Australia’s anti-discrimination legislation is constitutionally based in its international treaty obligations, which are enacted in Commonwealth legislation authorised under this external affairs power.²² Australia has a dualist system, so that international treaty obligations must be legislated by the Commonwealth Parliament before they become effective in domestic law (that is, treaty obligations do not have direct effect).²³

The foundational treaty of which Australia is a party is the *International Covenant on Civil and Political Rights* (ICCPR). Articles 2, 16 and 26 of the ICCPR uphold rights of equality and non-discrimination.²⁴ The *Australian Human Rights Commission Act*²⁵ establishes the Australian Human Rights and Equal Opportunity Commission (HREOC) which is required to identify and report on whether the Commonwealth has infringed “rights and freedoms” that are recognised in “relevant international instruments”, including the ICCPR.²⁶

Discrimination on the basis of race is unlawful under the *Racial Discrimination Act* (RDA).²⁷ The RDA is based on the *International Convention on the Elimination of all Forms of Racial Discrimination* (CERD)²⁸ and is Australia’s oldest anti-discrimination legislation.²⁹ The RDA protects people from unfair treatment on the basis of their “race, colour, descent, or national or ethnic origin”.³⁰ The RDA

¹⁸ Ib. See also M. Thornton, *The Liberal Promise: Anti-Discrimination Law in Australia* (Oxford University Press, 1990).

¹⁹ Law Council of Australia, *Policy Agenda: Anti-Discrimination Laws* (23 November 2016), available at: <https://lawcouncil.au/policy-agenda/human-rights/anti-discrimination-laws>. In Australia, “non-discrimination” laws are usually referred to as “anti-discrimination” laws and this nomenclature is adopted in this paper.

²⁰ Gaze and Smith, *supra* n. 3, at ch. 1.3 pp. 15, 18; C. Saunders and M. Donaldson, *Values in Australian Constitutionalism*, in *An Inquiry into the Existence of Global Values: Through the Lens of Comparative Constitutional Law* p. 36 (D. Davis, A. Richter and C. Saunders eds., Hart Publishing 2015); AHRC, *One Law for All*, available at: <https://humanrights.gov.au/about/news/speeches/one-law-al>.

²¹ Sec. 51(xxix) Constitution; Parliament of Australia, *Submissions to Senate Legal and Constitutional References Committee: Inquiry into Sexuality Discrimination* (2 December 1997), available at: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22publications%2Ftabledpapers%2FHSTP010609_1996-98%22;src1=sml.

²² AUS: HCA, 18 August 1991, *Horta v The Commonwealth*, 181 CLR 183; AUS: HCA, 14 August 1991, *Polyukhovich v The Commonwealth*, 172 CLR 531; AUS: HCA, 17 November 2005, *XYZ v Commonwealth*, 227 CLR 543.

²³ AU: HCA, 18 December 1985, *Kioa v West*, 159 CLR 550; *Polyukhovich*, *supra* n. 24, at p. 15.

²⁴ UN: International Covenant on Civil and Political Rights arts. 2, 16, 26 (16 December 1966).

²⁵ AU: Australian Human Rights Commission Act, 1986.

²⁶ Ib, sec. 3.

²⁷ AU: Racial Discrimination Act, 1975 [hereinafter RDA].

²⁸ UN: International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965).

²⁹ The Commonwealth Parliament is empowered to make laws that differentiate on the basis of people of any races: sec. s 51(xxvi) Constitution. However, this power does not appear to have been accepted by the High Court as supporting the enactment of the RDA: AU: HCA, 12 July 2023, *Fisher v Commonwealth of Australia*, [2023] FCAFC 106; AU: HCA, 11 May 1982, *Koowarta v Bjelke-Petersen*, 153 CLR 168; AU: HCA, 8 December 1988, *Mabo v Queensland (No 1)*, 166 CLR 186.

³⁰ Sec. 18C RDA.

has a close textual relationship with the CERD.³¹ Unlike other anti-discrimination legislation, the RDA does not define discrimination chiefly based on attributes or a comparator³² but rather as a broader distinction which has the “purpose or effect” of “impairing [a person’s]... human rights or fundamental freedom”.³³ Overall, a broad interpretation of human rights has been applied to the RDA, using the rights in the CERD and ICCPR to determine the content of this interpretation.³⁴

Discrimination on the basis of sex, gender and sexuality is unlawful under the *Sex Discrimination Act* (SDA).³⁵ The SDA is founded on the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW),³⁶ again by means of the external affairs power.³⁷ However, unlike CEDAW, the SDA extends the concept of discrimination on the basis of sex as against men *and* women.³⁸ The SDA originally had reservations with regard to Article 11(2) of CEDAW regarding paid maternity leave in Australia due to arguments concerning discriminating against “stay-at-home” mothers.³⁹ However, this issue has been rectified with the *Paid Parental Leave Act 2010*,⁴⁰ with the Paid Parental Leave Amendment (More Support for Working Families) Bill 2023 increasing the length of leave to 26 weeks from 1 July 2026.⁴¹

In 2013, protection from discrimination on the basis of gender identity and sexual orientation were added to the SDA.⁴² The courts recognise and protect sexual orientation “as a state of being”.⁴³ There are some religious exceptions to anti-discrimination in the context of sexual orientation.⁴⁴ The SDA definition of gender identity gave effect to the *Yogyakarta Principles*, whereby protections are offered to transgender people and emphasis is given to self-identification.⁴⁵ The Commonwealth Government has power to make laws with respect to marriage and in 2017, the *Marriage Act 1961* was amended to ensure equality in the right to marry irrespective of sex or gender.⁴⁶

³¹ A. Taylor, *Anti-Discrimination Law as the Protector of Other Rights and Freedoms*, 42 *Adelaide Law Review* 2, p. 408 (2021); AU: FCA, 5 December 2016, *Wotton v Queensland (No 5)*, 352 ALR 146, pp. 279-280 para. 516.

³² Taylor, *supra* 31, at p. 430.

³³ Sec. 9(1), 9(1A), 10(1) RDA.

³⁴ *Wotton*, *supra* n. 31, at pp. 281-282 para. 526.

³⁵ AU: Sex Discrimination Act, 1984.

³⁶ UN: *Convention on the Elimination of All Forms of Discrimination Against Women* art. 7 (18 December 1979); AU: Sex Discrimination Act, 1984, sec. 3(1) [hereinafter SDA].

³⁷ AU: FCA, 15 April 1988, *Aldridge v Booth*, 80 ALR 1, p. 77; H. Charlesworth and S. Charlesworth, *The Sex Discrimination Act and International Law*, 27 *UNSW Law Journal* 3, p. 858 (2017). Gaze and Smith, *supra* n. 3, at pp. 39-40 para. 29, explain that the SDA also relies on the Commonwealth Parliament’s power to legislate with respect to corporations, trade and commerce, and banking and insurance.

³⁸ Charlesworth and Charlesworth, *supra* n. 37, at p. 859.

³⁹ *Ib*, at p. 862.

⁴⁰ AU: Paid Parental Leave Act, 2010.

⁴¹ AU: Paid Parental Leave Amendment (More Support for Working Families) Bill, 2023.

⁴² AU: The Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013.

⁴³ AU: FCCA, 11 February 2015, *Bunning v Centacare*, [2015] FFCA 280, paras. 28-29. Also see sec. 4 SDA.

⁴⁴ Sec. 37-38 SDA.

⁴⁵ ICJ: The Yogyakarta Principles (March 2007), implemented in sec. 4(1) SDA: definition of “gender identity”.

⁴⁶ AU: Marriage Act, 1961, sec. 5.

Discrimination on the basis of disability is unlawful under the *Disability Discrimination Act* (DDA).⁴⁷ Though the *Convention on the Rights of Persons with Disabilities* (CRPD)⁴⁸ was not yet adopted at the time of the DDA,⁴⁹ the statute recognises the CRPD as a source to be complied with.⁵⁰ The DDA aims to eliminate discrimination based on disabilities⁵¹ in areas such as employment,⁵² education,⁵³ access to premises,⁵⁴ the provision of goods, facilities and services,⁵⁵ and accommodation.⁵⁶ The CRPD was also the catalyst for federal programs like Australia’s National Disability Strategy, which is a 10-year national strategic framework agreed by all Australian governments,⁵⁷ and the National Disability Insurance Scheme (NDIS), which provides individualised packages regarding access to health, housing, education and recreational activities to support people with disabilities.⁵⁸

Discrimination on the basis of age is unlawful under the *Age Discrimination Act* (ADA)⁵⁹ and *Fair Work Act* (FWA).⁶⁰ As for the DDA, the ADA was not directly based on the *Discrimination (Employment and Occupation) Convention* (DEOC),⁶¹ although it recognises the DEOC as a source to be complied with.⁶² The ADA makes age-based discrimination unlawful for younger and older Australians in areas of employment, education and housing.

2.2 Constitutional Links between Equality and Taxation

The Commonwealth Parliament has a broad power to enact laws with respect to taxation.⁶³ All federal revenues including taxation must go into consolidated revenue, which the Commonwealth Parliament may appropriate for expenditures on valid legislative “purposes of the Commonwealth”, including grants to the states.⁶⁴ The most important taxes are levied by the Commonwealth, including the income tax (on individuals, companies and other entities) and the GST, which is a value-added tax. The

⁴⁷ AU: Disability Discrimination Act, 1992 [hereinafter DDA].

⁴⁸ UN: Convention on the Rights of Persons with Disabilities (12 December 2006).

⁴⁹ See Gaze and Smith, *supra* n. 3, at p. 40: the DDA relied on every possible Constitutional basis of power for its validity. It was held to be valid in AU: HCA, 11 November 2003, *Purvis v NSW*, 217 CLR 92.

⁵⁰ Sec. 12(8) DDA.

⁵¹ *Ib*, sec. 3.

⁵² *Ib*, sec. 15.

⁵³ *Ib*, sec. 22.

⁵⁴ *Ib*, sec. 23.

⁵⁵ *Ib*, sec. 24.

⁵⁶ *Ib*, sec. 25.

⁵⁷ DSS: Australia’s Disability Strategy 2021–2031 (3 February 2022).

⁵⁸ AU: National Disability Insurance Scheme Act, 2013.

⁵⁹ AU: Age Disability Act, 2004 [hereinafter ADA].

⁶⁰ AU: Fair Work Act, 2009 [hereinafter FWA].

⁶¹ ILO: Convention (No 111) Concerning Discrimination in Respect of Employment and Occupation (25 June 1958).

⁶² Sec. 10(7) ADA. See also Gaze and Smith, *supra* n. 3, at p. 40 para. 29: the validity of the ADA has not yet been tested but the expansive history of the High Court’s interpretation of “corporations” power lends support to legislation that relates to the activities of commercial entities.

⁶³ Sec. 51(ii) Constitution.

⁶⁴ Sec. 81, 83, 96 Constitution. See further M. Stewart, *Australia*, in *Forum of Federations Handbook of Fiscal Federalism* p. 5 (J. Tremblay ed., Palgrave Macmillan 2023).

Commonwealth also has exclusive power over customs, tariffs and excises, interpreted broadly to refer to any tax on the manufacture, distribution or consumption of goods.⁶⁵ Most federal taxes, in particular the income tax and GST are administered by the Australian Taxation Office (ATO) under the Commissioner of Taxation.⁶⁶

Although the States have sovereign power to levy income taxes, and are not barred from doing so under the Constitution (unlike the prohibition on State governments levying excises), after the income tax was taken over by the Commonwealth in the middle of the twentieth century, no State has done so.⁶⁷ The Commonwealth monopolisation of the strongest tax bases combined with its power to grant monies to the States has led to significant vertical fiscal imbalance in the federation. States are sometimes described as having to “beg” the Commonwealth for funding, resulting in Commonwealth expanding its power to influence policy in areas where it does not have specified legislative power.⁶⁸

The Constitution prohibits taxation in a manner that will “discriminate between States or parts of States”.⁶⁹ This combines with the Constitutional prohibition on legislation that discriminates on the basis of State residency to protect the federal structure of government. The Constitution also prohibits the Commonwealth from taxing State governments or land,⁷⁰ and some aspects of the taxation of pensions of State judges have been found to be unconstitutional.⁷¹

A “tax” for Constitutional purposes is a “compulsory exaction of monies under statutory power, for public purposes, that are not a fee or penalty”.⁷² The Constitution requires tax laws to originate in the House of Representatives and not in the Senate and that they contain only “one subject” of taxation, so taxes are not bundled with other laws.⁷³ A person may challenge a Commonwealth impost on the basis that it is not a tax, and therefore is unconstitutional.⁷⁴ The High Court has held that a tax cannot be arbitrary, determined by examining the specific legislative criteria established for the tax liability.⁷⁵ The bar for determining arbitrariness of a tax is high: essentially, taxation must be sufficiently general and tax liability cannot be uncertain.⁷⁶

There is no constitutional protection for the principle of ability to pay, reference to vertical or horizontal equity or requirement for progressivity in taxation. It was stated by Latham CJ in the *First Uniform*

⁶⁵ AU: HCA, 5 August 1997, *Ha v New South Wales*, 189 CLR 465; AU: HCA, 18 October 2023, *Vanderstock v Victoria* [2023] HCA 30.

⁶⁶ Parliament of Australia, *Parliamentary Joint Committee on the ASIO: Submission No.8 by Commissioner of Taxation* (accessed December 2023), available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/pjcaad/pjcasio_archives/Subm8.

⁶⁷ The reasons why States do not levy either income taxes or consumption taxes are explained in: Stewart, *supra* n. 64, at p. 5.

⁶⁸ See, eg, *ib.*, at pp. 6-7.

⁶⁹ Sec. 51(ii) Constitution.

⁷⁰ *Ib.*, sec. 114.

⁷¹ AU: HCA, 5 February 2003, *Austin & Anor v Commonwealth*, 215 CLR 185.

⁷² AU: HCA, 9 August 1938, *Matthews v Chicory Marketing Board*, 60 CLR 263, p. 276.

⁷³ Sec. 53, 55 Constitution; E. Arcioni, *Section 53 of the Constitution: An Overlooked Reference to the Constitutional People*, 87 ALJ 11, p. 784 (2013).

⁷⁴ Stewart and Walker, *supra* n. 2, at pp. 210-211.

⁷⁵ AU: HCA, 24 November 1988, *Air Caledonie International v The Commonwealth*, 165 CLR 462; AU: HCA, 11 June 1985, *Federal Commissioner of Taxation v Truhold Benefit Pty Ltd*, 158 CLR 678; AU: HCA, 10 April 1984, *MacCormick v Federal Commissioner of Taxation*, 15 ATR 437.

⁷⁶ Stewart and Walker, *supra* n. 2, at pp. 214-215.

Tax Case that “it is not possible for the Court to impose limitations upon the Parliament as to the rate of tax which it proposes to impose upon the people.”⁷⁷ A tax is not unconstitutional simply because it has a high rate, is complex, unfair or oppressive.⁷⁸ In sum, the Constitution accords the Parliament primacy in deciding the rate and progressivity of taxation.

3. Tax Policy and Inequality

3.1 Tax Policy and Income Inequality

3.1.1 Personal income tax

The income tax is levied applying a progressive tax rate structure for individuals.⁷⁹ A progressive tax rate structure has been a feature of Australia’s personal income tax system since the first national income tax was established in 1915.⁸⁰ The income tax was described by Prime Minister Hughes on its introduction as a form of direct taxation “peculiarly appropriate to the circumstances of a moderate community; ... not only an effective means for raising money for the conduct of government, but serving as an instrument of social reform”.⁸¹ Today, the personal income tax is a mainstay of equity in Australia’s tax system.⁸²

The current personal income tax rate structure has four tax rates at different thresholds: 19%, 32.5%, 37% and 45%, with a zero-rate for taxable income under \$18,200; this is the equivalent of a personal exemption or allowance in the income tax law (*see* Table 1, in Section 3.1.5). Income inequality has been cited as one of the key considerations for progressive tax rates.⁸³ A low-income tax offset is also available for individuals who earn up to \$66,667, which has the effect of pushing up the tax-free threshold for low earners.⁸⁴ A taxpayer who earned \$37,500 or less was entitled to have the maximum offset of \$700 applied to tax owed.⁸⁵ There is also a tax offset for social security recipients to ensure those whose only incomes are from social security benefits are not taxed.⁸⁶ A seniors and pensioners

⁷⁷ AU: HCA, 23 July 1942, *South Australia v Commonwealth*, 65 CLR 373 (*First Uniform Tax Case*), p. 412 (per Latham CJ); Stewart and Walker, *supra* n. 2, at p. 226.

⁷⁸ *Ib*, at pp. 215-217. See, eg, AUS: HCA, 31 May 1911, *Osborne v Commonwealth*, 12 CLR 321: a steeply progressive land tax was not held to be unconstitutional simply because of its real purpose being to prevent the holding of large quantities of land by a single person.

⁷⁹ AU: Income Tax Rates Act, 1986, sch. 7.

⁸⁰ AU: Income Tax Act, 1915; G. Davis et al, *Australian Treasury: Recent Personal Income Tax Progressivity Trends in Australia* (3 September 2019), available at: <https://treasury.gov.au/publication/p2019-t396438>; J. Smith, *Taxing Popularity: The Story of Taxation in Australia* (Federalism Research Centre 2004): earlier colonial income tax laws were also levied at progressive tax rates.

⁸¹ B. Hughes, Second Reading Speech on Income Tax Act 1915 (12 November 1915), available at: <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=HANSARD80;id=hansard80%2Fhansardr80%2F1915-11-12%2F0026;query=Id%3A%22hansard80%2Fhansardr80%2F1915-11-12%2F0002%22>.

⁸² P. Emerton and K. James, *The Justice of the Tax Base and the Case For Income Tax*, in *Philosophical Foundations of Tax Law* p. 143 (Monica Bhandari ed., Oxford University Press 2017).

⁸³ Australian Treasury, *Australia's Future Tax System: Report to the Treasurer* (23 December 2009) p. 17, available at: https://treasury.gov.au/sites/default/files/2019-10/afts_final_report_part_1_consolidated.pdf.

⁸⁴ Sec. 61-110 ITAA 1997.

⁸⁵ *Ib*, sec. 61-115.

⁸⁶ TEIS, *infra* n. 122, at p. 39.

tax offset reduces income tax for those who receive the age pension or are over retirement age, based on marital status and income.⁸⁷

The Medicare levy is applied on top of the income tax rates to assist in funding the cost of Australia's public health system (although like other taxes, it is paid into consolidated revenue).⁸⁸ It is payable at a flat rate of 2% by most Australian residents on their total taxable income, above certain thresholds.⁸⁹ It does not apply to those who fall below prescribed thresholds, covering most low income earners.⁹⁰ Different thresholds also apply to families, seniors and pensioners.⁹¹ The Medicare levy surcharge is an additional rate levied on those whose personal and family incomes exceed certain thresholds and who do not have private health insurance,⁹² the aim of which is to reduce pressure on the public Medicare system.⁹³

It is usual to consider progressivity of the income tax together with the transfer, or social security (welfare) system. Overall, there is a greater role for Australia's transfer system, rather than income tax rates, exemptions or concessions, to delivering on the promise of equality in Australia. Welfare payments are primarily established under the *Social Security Act 1991* (SSA).⁹⁴ The SSA establishes encompasses unemployment benefits, youth allowance, rent assistance and age, disability and sole parent pensions. Other family payments and childcare subsidy are provided under the *Family Assistance Act 1999*.⁹⁵ The system provides payments are based on need that are targeted by income and tapered as income rises. This differs significantly from other OECD countries as social security payments are not funded by a social security tax but out of general revenue, primarily the income tax. The combined tax-transfer system is highly progressive.⁹⁶ Despite this, it has been suggested that Australia's income inequality as measured in the Gini coefficient reveals that Australia is not redistributing tax revenues as effectively as some other countries.⁹⁷

The definition of taxable income is set out in the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* (Cth), which together operate like a code. Taxable income is assessable income,

⁸⁷ Sec. 160AAAA ITAA 1936.

⁸⁸ ATO, *What is the Medicare Levy?* (27 July 2023), available at: <https://www.ato.gov.au/individuals-and-families/medicare-and-private-health-insurance/medicare-levy/what-is-the-medicare-levy#:~:text=The%20Medicare%20levy%20is%20an,2%25%20of%20your%20taxable%20income.>

⁸⁹ AU: Medicare Levy Act, 1986, sec. 6, 7.

⁹⁰ *Ib.*, sec. 7.

⁹¹ *Ib.*, sec. 8; ATO, *Medicare Levy Reduction for Low-Income Earners* (3 July 2023), available at: <https://www.ato.gov.au/individuals-and-families/medicare-and-private-health-insurance/medicare-levy/medicare-levy-reduction/medicare-levy-reduction-for-low-income-earners>; ATO, *Medicare Levy Reduction – Family Income* (25 August 2023), available at: [https://www.ato.gov.au/individuals-and-families/medicare-and-private-health-insurance/medicare-levy/medicare-levy-reduction/medicare-levy-reduction-family-income.](https://www.ato.gov.au/individuals-and-families/medicare-and-private-health-insurance/medicare-levy/medicare-levy-reduction/medicare-levy-reduction-family-income)

⁹² 8B-8G Medicare Levy Act 1986.

⁹³ Commonwealth Ombudsman, *Medicare Levy Surcharge* (accessed December 2023), available at: https://www.privatehealth.gov.au/health_insurance/surcharges_incentives/medicare_levy.htm#:~:text=The%20surcharge%20aims%20to%20encourage.for%20Medicare%20Levy%20Surcharge%20purposes.

⁹⁴ AU: Social Security Act, 1991 [hereinafter SSA].

⁹⁵ AU: A New Tax System (Family Assistance) Act, 1999.

⁹⁶ P. Whiteford, *Is Australia's Tax and Welfare System Too Progressive?* (1 June 2018), available at: <https://insidestory.org.au/is-australias-tax-and-welfare-system-too-progressive/> .

⁹⁷ K. Lahey, *Australian Tax-Transfer Policies and Taxing for Gender Equality: Comparative Perspectives and Reform Options*, in *Tax, Social Policy and Gender: Rethinking Equality and Efficiency* p. 46 (M. Stewart ed., ANU Press 2017).

less allowable deductions.⁹⁸ The main category of assessable income is “income according to ordinary concepts” which includes employment income, business income and investment income. Concessions apply to some types of capital income and gain. Dividends may be franked with company tax, which provides a refundable credit for the investor. Capital gains are included in an individual’s assessable income,⁹⁹ but a 50% discount applies for capital gains of individuals who held an asset for at least 12 months before sale.¹⁰⁰ A capital gain in relation to a taxpayer’s main residence is exempt,¹⁰¹ unless the dwelling was used to produce assessable income.¹⁰² Some of the largest tax concessions relate to Australia’s private retirement superannuation system, discussed in section 3.2.6.

The revenue foregone from tax concessions and from widely used deductions and tax planning approaches is reported annually in the *Tax Expenditures and Insights Statement* (TEIS).¹⁰³ A tax expenditure arises when the tax treatment for activities or classes of taxpayers differs from the standard tax benchmark that would otherwise apply. This includes tax exemptions, deductions, rebates, offsets and deferrals of tax liability.¹⁰⁴ The government publishes the distributional impact of larger tax expenditures based on income level, age, gender and industry.¹⁰⁵

While some tax expenditures, such as the Medicare levy thresholds, are progressive, many are regressive, as the largest benefit is obtained by top income earners who derive most of their income from capital. This undermines the nominal progressive tax rate structure.¹⁰⁶ There are also differential impacts on other dimensions, such as age. Older, wealthier Australians have relatively low incomes, but higher assets; they pay significantly lower taxes than younger Australians with similar incomes due to concessions for retirement savings and capital gains.¹⁰⁷ The capital gains tax discount disproportionately benefits the top 10% of taxpayers, as well as men who represent 61% of those who benefit.¹⁰⁸ A similar analysis applies for deductions for gifts and donations, costs associated with managing tax affairs, and rental property losses.

3.1.2 Corporate and business income tax

Sole proprietors or partners in a business partnership pay tax at individual progressive tax rates. However, many small and medium businesses operate in private companies or trusts that permit a lower tax rate. Corporate income tax is levied at a flat rate of 25% for small companies with a turnover of

⁹⁸ Sec. 995-1(1) ITAA 1997.

⁹⁹ Sec. 102-5 ITAA 1997.

¹⁰⁰ Sec. 115-100(a) ITAA97.

¹⁰¹ *Ib*, sec. 118-190.

¹⁰² *Ib*, sec. 118-192.

¹⁰³ Australian Treasury, *2023-24 Tax Expenditures & Insights Statement* (31 January 2024) p. 1 [hereinafter TEIS], available at: <https://treasury.gov.au/publication/p2024-489823#:~:text=The%202023%E2%80%9324%20Tax%20Expenditures,features%20of%20the%20tax%20system.>

¹⁰⁴ *Ib*, at p. 2.

¹⁰⁵ *Ib*, at p. 9.

¹⁰⁶ *Ib*.

¹⁰⁷ M. Grundoff, R. Denniss and D. Richardson, *Principles of a Good Tax: Evaluating Our Taxation Choices* pp. 1, 8 (The Australia Institute 2021).

¹⁰⁸ TEIS, *supra* n. 103, at pp. 13, 14.

less than \$50 million that earn active business income.¹⁰⁹ An unincorporated small business tax offset seeks to deliver horizontal equity to individuals who conduct small businesses directly.

An attempt by a previous government to lower the corporate tax rate to 25% for all companies was based on arguments that a lower corporate tax rate would encourage mobile investment, raise real wages and living standards. The attempt was opposed in the Parliament, and ultimately failed, in large part because of opposition on the basis of unfairness and the need for large multinational enterprises to pay a fair share of tax.¹¹⁰

There are well-known approaches that taxpayers can take to plan their tax affairs to reduce their income tax burden.¹¹¹ These include splitting income between high- and low-rate taxpayers in a family or otherwise associated entities and sheltering income through intermediary company, trust and partnership structures. Trusts are taxed on a partial flow-through basis, and enable well-advised high-income taxpayers to reduce their tax burden through income splitting with family members, flow through of capital gains concessions, and retaining income indefinitely in a corporate beneficiary.¹¹² Other approaches include deriving gains in a low-taxed or tax-free capital gains; deferring the realisation of gains and therefore the tax liability; or increasing deductions especially the use of debt finance for rental property investments, to arbitrage an up-front deduction for interest against a deferred and low-taxed capital gain (so-called “negative gearing”).¹¹³ While interest deductibility is not a tax concession, negative gearing is a tax arbitrage that most benefits high income earners who derive a substantial after-tax return from such debt structuring.¹¹⁴ The many legal opportunities for tax planning may be contrasted with tax avoidance, which could be subject to the General Anti-Avoidance Rule, or tax fraud which is subject to criminal and civil penalties.¹¹⁵

3.1.3 GST

The GST is a broad-based consumption tax imposed at a flat rate of 10% on supplies of most goods and services in Australia, structured as an invoice-credit value-added tax.¹¹⁶ Under an intergovernmental agreement,¹¹⁷ all GST revenues are distributed as grants to the States by the Commonwealth government, applying principles of horizontal fiscal equalisation.¹¹⁸

¹⁰⁹ Sec. 23AA ITRA 1986.

¹¹⁰ K. Murphy, *Coalition Postpones Corporate Tax Cut Bill after Failing to Secure Support* (27 March 2018), available at: <https://www.theguardian.com/australia-news/2018/mar/27/coalition-postpones-corporate-tax-cut-bill-after-failing-to-secure-support>; P. Karp, *Business Council Says Australia's Failure to Pass Corporate Tax Cuts a 'Colossal Mistake'* (31 October 2018), available at: <https://www.theguardian.com/australia-news/2018/oct/31/business-council-says-australias-failure-to-pass-corporate-tax-cuts-a-colossal-mistake>.

¹¹¹ T. Sainsbury and R. Breunig, *The Australian Tax Planning Playbook*, 1/2020 TTPI (2020).

¹¹² AU: HCA, 14 August 1920, *Purcell v DFCT*, 28 CLR 77; AU: HCA, 12 August 1921, *DFCT v Purcell*, 29 CLR 464; AU: HCA, 27 February 1980, *Everett v FCT*, 143 CLR 440.

¹¹³ Sainsbury and Breunig, *supra* n 131, at p. 8.

¹¹⁴ *Ib.*

¹¹⁵ G. Cooper et al., *Income Taxation: Commentary and Materials* p. 1143 (Thomson Reuters Australia 2022).

¹¹⁶ AU: A New Tax System (Goods and Services Tax) Act, 1999, sec. 9.70.

¹¹⁷ Sch. 2, *A New Tax System (Commonwealth-State Financial Agreements) Act 1999*.

¹¹⁸ Stewart, *supra* n. 64, at p. 25.

The political case for the GST was to replace older sales taxes for a “more egalitarian and fairer Australian society”¹¹⁹ by reducing the income tax burden on families and average wage earners.¹²⁰ It was many years before the reform was successful, as there was significant political opposition to the GST on the basis of equity, in particular, that the GST is regressive with respect to income.¹²¹ This opposition contributed to limiting the rate to 10% (considerably lower than European VATs), and enactment of many exemptions in the tax base, including basic foods, education, healthcare and water, while financial services and some residential properties are input-taxed.¹²²

The main reason for the exemption of basic food, in particular, was to improve equity for lower income groups.¹²³ Out of 9 million households in 2015–16, 8.9 million benefited from the GST-food exemption,¹²⁴ 3.1 million from the GST-education exemption,¹²⁵ and 8.1 million from the GST-healthcare exemption.¹²⁶ However, there may also be adverse effects from these GST exemptions on horizontal and vertical equity. People who can afford to spend more on private schools or healthcare, generally higher income earners, pay significantly less GST than they otherwise might, because these services are exempt.¹²⁷

The expansion of the GST base and increasing the GST rate has been a matter of public debate. This is frequently advocated to improve revenue collection and efficiency, given the many exemptions and relatively low rate.¹²⁸ The issue of revenue has grown in importance since the COVID-19 pandemic when governments incurring significant public expenditures.¹²⁹ Some members of Parliament have urged an increase in the GST rate to 15%; however, they were representatives of wealthy electorates that also aim to reduce income tax rates, partly funded by an increased GST.¹³⁰ Suggested goods and services for expanding the GST base include unhealthy and environmentally unfriendly food

¹¹⁹ Australian Treasury, *Tax Reform: Not a New Tax, a New Tax System* (1 August 1998) pp. 1, 9, available at: <https://treasury.gov.au/publication/tax-reform-not-a-new-tax-a-new-tax-system>.

¹²⁰ P. Costello, Second Reading Speech on A New Tax System (Goods and Services Tax) Bill 1998 (2 December 1998), available at: <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F1998-12-02%2F0002%22>.

¹²¹ R. Eccleston, *The Thirty Year Problem: The Politics of Australian Tax Reform* (Australian Tax Research Foundation 2004); R. Eccleston, *Taxing Reforms: The Politics of the Consumption Tax in Japan, the United States, Canada and Australia* (Edward Elgar 2007); K. James, *The Rise of the Value-Added Tax* (Cambridge University Press 2015); M. Stewart, *Reforming Tax for Social Justice*, 23 *Alternative Law Journal* 4, 157 (1998).

¹²² Div. 38 GST Act; L. Nelson, *Who Exempts What from Consumption Taxes?* (19 January 2015), available at: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2015/January/W_ho-exempts-what-from-consumption-taxes.

¹²³ R. Fera and M. Walpole, *The Impact of Public Perceptions on General Consumption Taxes*, 5 *British Tax Review* 637, p. 638 (2020).

¹²⁴ TEIS, *supra* n. 122, at p. 19.

¹²⁵ *Ib*, at p. 21.

¹²⁶ *Ib*, at p. 22.

¹²⁷ Grundoff, Denniss and Richardson, *supra* n. 107, at pp. 1, 8.

¹²⁸ OECD *Consumption Tax Trends – Australia* (OECD 2022).

¹²⁹ PBO, *Structural Trends in GST: Report No.02/2020* (2020), available at: <https://www.pbo.gov.au/sites/default/files/2023-04/Structural%20trends%20in%20GST%20-%20PDF.pdf>; K. James, *Reconsidering the Case for Tax Reform During a Crisis*, 47 *Monash University Law Review* 2, pp. 81-82 (2021); M.B. Evans, *GST: Where To Next?*, 18 *eJournal of Tax Research* 1, 45 (2020).

¹³⁰ J. Kehoe, *GST Rise and Income Tax Cuts ‘Help High-Income Earners* (3 September 2023), available at: <https://www.afr.com/policy/tax-and-super/gst-rise-and-income-tax-cuts-help-high-income-earners-20230901-p5e1d8>.

categories,¹³¹ private health and private education.¹³² Some argue that only the exclusion of basic food can be justified on solely equitable grounds.¹³³ Australia has extended the GST to sales of low value goods, digital products and other imported services to Australian consumers by non-resident entities on the basis of horizontal equity and to support revenue collection.

3.1.4 No wealth or inheritance taxes

Australia does not impose wealth or inheritance taxes at either Commonwealth or State level. Property (real estate) taxes are levied at State and local level, mainly to fund local goods and services rather than as an equalising device. Historically, the Commonwealth and all States had estate and gift duties but these were abolished in the early 1980s.¹³⁴ One commentator has suggested that this can be explained by the “monumental defects” of the system.¹³⁵ Problems with former estate and gift duties that led to their abolition included low basic exemptions; duplication of the tax; impact on farming properties; complexity; and ease of avoidance, which contributed to public cynicism. Trusts were used to hold property to avoid application of estate duties and some widows were hard hit by the tax.¹³⁶

The Commonwealth Parliament repealed the estate and gift duty in 1979, against the recommendations of the Asprey Review, a major tax policy review.¹³⁷ The Asprey Review concluded that a reformed bequest tax would support progressivity of the tax system and help limit the growth of large inherited fortunes, “a trend that most people would agree to have undesirable social consequences”.¹³⁸ It would also provide support to the income tax, by capturing appreciated value of assets on death that are not realised during the lifetime of taxpayers.

Today, Australians are among the richest people in the world.¹³⁹ There is growing concern about wealth inequality and an interest in some quarters potential for taxation of inheritance or wealth in Australia.¹⁴⁰ Wealth inequality declined in the first half of the 20th century, but has increased since the 1970s, with the share of the top 1% growing from below 10% to nearly 25% in the last 50 years.¹⁴¹ Ironically,

¹³¹ S. Hassan and M. Sinning, *GST Reform in Australia: Implications of Estimating Price Elasticities of Demand on Food*, 94 *Economic Record* 306, (2018).

¹³² James, *supra* n. 129, at p. 94.

¹³³ *Ib*, at p. 93.

¹³⁴ The Commonwealth Government enacted the *Estate Duty Assessment Act 1914* (Cth) and the *Estate Duty Act 1914* (Cth) before the first income tax. Probate duties had been the first direct taxes imposed by the Australian Colonies, and later all of the States.

¹³⁵ W.H. Pedrick, Oh, *To Die Down Under! Abolition of Death and Gift Duties in Australia*, 35 *Tax Lawyer* 1, p. 121 (1981).

¹³⁶ K. Strojek, *The Politics of Inheritance Taxation in Australia* (PhD Thesis, unpublished, August 2023).

¹³⁷ Commonwealth Taxation Review Committee, *Asprey Report* ch. 24 (AGPS 1975).

¹³⁸ *Ib*, at para. 24.4.

¹³⁹ Credit Suisse Research Institute, *Global Wealth Report 2022* (2022) table 2, available at: <https://www.credit-suisse.com/media/assets/corporate/docs/about-us/research/publications/global-wealth-report-2022-en.pdf>. M. Stewart, *Sharing the Wealth: Tax, Justice, Gender and Care*, Australian Feminist Studies, p. 3 (2023).

¹⁴⁰ R. Breunig and K. Sobeck, *Wealth inequality and the tax system* (ANU Tax and Transfer Policy Institute, May 2023), available at: taxpolicy.crawford.anu.edu.au/taxpolicy-publications/reports; D. Richardson, *The Australia Institute Discussion Paper: The Intergenerational Report Ignores Booming Wealth and Capital Gains* (August 2021) p. 15, available at: <https://australiainstitute.org.au/wp-content/uploads/2021/08/P1107-IGR-ignores-wealth-and-capital-gains-WEB.pdf>; D. Ingles, *Does Australia Need an Annual Wealth Tax (And Why Do We Now Apply One Only To Pensioners)*, 3/2016 *TTPI*, pp. 1, 4 (2016).

¹⁴¹ P. Katic and A. Leigh, *Top Wealth Shares in Australia 1915–2012*, 62 *Review of Income and Wealth* 2, (2015).

Australia applies an “asset test” for eligibility for the age pension, which operates as a kind of upside-down wealth tax on those who are eligible for the pension but also have some private savings. Despite this, it appears that an inheritance or wealth tax remains unpopular. No major political party has proposed such a tax, although in 2021, the Greens Party proposed a “Billionaires” wealth tax levied at 6% on net wealth of resident taxpayers and Australian wealth of non-resident taxpayers (including assets held by the taxpayer’s children) worth \$1 billion or more, calculated at the end of each financial year.¹⁴² The proposed wealth tax was estimated by the Parliamentary Budget Office to generate revenue of \$11.37 billion over the four year forward estimates period.¹⁴³

3.1.5 Heated debate about progressive income tax rates

There has been considerable debate about personal income tax rates in Australia in the last decade, which has culminated in a Bill to modify the rate structure under the current Government. Some have argued that Australia’s income tax rates are too high and the rate structure is too progressive.¹⁴⁴ Arguments against progressive tax rates include that they generate disincentives to work and save, discourage inbound migration of talented and skilled individuals, and lead to excessive tax planning. On the other hand, the progressive nature of the income tax system is a means to share the economic increment from growth on the basis of ability to pay, thereby upholding vertical equity.

In 2018, legislation to reduce the number of tax brackets to three was passed by the Parliament under the previous Morrison Liberal/National Coalition Government, to take effect in 3 stages.¹⁴⁵ The “Stage 3 tax cuts” were legislated to take effect from 1 July 2024. The PBO estimated the distributional effects of Stage 3 to mainly benefit top income earners, as they would provide a tax cut of about \$9,075 annually for the highest income earners and \$0 to minimum wage earners.¹⁴⁶ Many experts had reacted negatively to the “Stage 3” cuts, stating that they would be biased towards top income earners, add to inflationary pressures and is fiscally unaffordable.¹⁴⁷ From a gender perspective, the “Stage 3” tax cuts give two thirds of the benefit to men and one third to women, a consequence of men earning higher

¹⁴² The Australian Greens, *Australia’s Economic System is Rigged. This Election, It’s Time to Make Billionaires and Corporations Pay* (accessed December 2023), available at: <https://greens.org.au/tax-billionaires>.

¹⁴³ PBO, *Billionaire’s Tax: Policy Costing Report PR21/00056* (25 March 2021) p. 1, available at: <https://www.pbo.gov.au/sites/default/files/2023-03/Billionaires%20tax%20PDF.pdf>.

¹⁴⁴ C. Tran and N. Zakariyya, *Tax Progressivity in Australia: Facts, Measurements and Estimates*, 97 *Economic Record* 316, pp. 1, 2, 11 (2021).

¹⁴⁵ Australian Treasury, *Budget 2018-19 Paper No.2* (8 May 2018) p. 33, available at: <https://archive.budget.gov.au/2018-19/bp2/bp2.pdf>; Australian Treasury, *Lower Taxes For Hard-Working Australians: Building On the Personal Income Tax Plan, Budget 2019-20 Budget Paper No.2* (2 April 2019) p. 17, available at: <https://archive.budget.gov.au/2019-20/bp2/download/bp2.pdf>.

¹⁴⁶ PBO, *Stage 3 Tax Cuts Distributional Analysis* (17 May 2022) p. 1, available at: <https://www.pbo.gov.au/sites/default/files/2023-05/Distributional%20analysis%20of%20the%20Stage%203%20tax%20cuts%20-%20May%202023.pdf>.

¹⁴⁷ R. Dennis, B. Fraser and J. Quiggin, *100+ Economists, Tax Experts Call for Stage 3 Overhaul in Full-Page Adverts* (14 December 2022), available at: <https://australiainstitute.org.au/post/100-economists-tax-experts-call-for-stage-3-overhaul-in-full-page-adverts/#:~:text=More%20than%20100%20economists%20and,the%20SMH%20%26%20The%20Age%20today.>

incomes.¹⁴⁸ Polls also indicated that almost twice as many Australians support repealing Stage 3 compared to those who oppose it.¹⁴⁹

In February 2024, the Albanese Labor Government took a significant step in introducing a Bill to modify the already-legislated Stage 3 tax cuts to make them more progressive.¹⁵⁰ The Government has risked opprobrium for breaking an election promise (to leave the cuts in place), and has published Treasury advice about the change, arguing it improved fairness, supported cost of living relief for 85 per cent of Australian taxpayers (making them better off than under the legislated proposal) and is efficient, encouraging labour supply and not contributing to inflation.¹⁵¹ It seems likely that the Bill will pass and so a moderated version of tax cuts will be introduced effective 1 July 2024. The current marginal tax rate structure, Stage 3 legislated rate structure, and current Government’s proposed reform are set out in Table 1.

Table 1: Current income tax structure compared with Stage 3 tax cuts and 2024 Bill

Tax rates, 2023/24		Tax rates, “Stage 3” tax cuts legislated for 2024/25		Tax rates, Albanese Labor Government Bill (Jan 2024)	
Taxable income	Tax on income	Taxable income	Tax on income	Taxable income	Tax on income
0 – \$18,200	Nil	0 – \$18,200	Nil	0 – \$18,200	Nil
\$18,201 – \$45,000	19%	\$18,201 – \$45,000	19%	\$18,201 – \$45,000	16%
\$45,001 – \$120,000	32.5%	\$45,001 – \$200,000	30%	\$45,001 – \$135,000	30%
\$120,001 – \$180,000	37%			\$135,001 – \$190,000	37%
\$180,001 and over	45%	\$200,001 and over	45%	\$190,001 and over	45%

A broader question of tax reform remains untouched. The debate about tax cuts is rather narrow, being only concerned with returning “bracket creep” or “fiscal drag” in an environment of higher inflation, as Australia’s system does not index rate brackets. There have been calls by Independent members of Parliament for a ‘brave’ conversation on tax reform, including addressing tax concessions and planning opportunities for high income earners, while also potentially increasing the GST.¹⁵²

¹⁴⁸ *Ib*, at p. 3; M. Grudoff, *Rich Man’s World: Gender Distribution of the Stage 3 Tax Cuts* (17 February 2022) pp. 2-3, available at: <https://australiainstitute.org.au/wp-content/uploads/2022/02/220214-Rich-mans-world-Stage-3-Tax-Cuts-Gender-Distribution-web.pdf>.

¹⁴⁹ *Ib*.

¹⁵⁰ AU: Treasury Laws Amendment (Cost of Living Tax Cuts) Bill 2024.

¹⁵¹ Australian Treasury, <https://treasury.gov.au/tax-cuts>.

¹⁵² L. Maskiell, *Teals seek ‘brave’ conversation on tax reform* Australian Financial Review (Jan 30, 2024).

3.2 Tax Policy and Other Inequalities

3.2.1 Gender equality, the tax unit and tax reform

Australia's tax laws are formally gender-neutral but in substance and effect, the tax-transfer system is discriminatory against women.¹⁵³ To see this requires consideration of the interaction of income tax with the social security system. The income tax system has an individual unit for the personal income tax, while the transfer system applies on the basis of need and is means tested based on joint family (couple) income, in general.¹⁵⁴ Benefits for families with children include the childcare subsidy, paid parental leave, rent assistance and family payments, called Family Tax Benefit (FTB).¹⁵⁵ Australia provides substantial support for single parents, who benefit from Parenting Payment Sole and are also eligible for FTB in respect of dependent children.

Despite transfers for families with children, the costs of children and caring fall more significantly on women than men in Australia, mostly through a contribution of time spent out of the labour force. Consequently, Australia's childcare subsidy and paid parental leave are particularly important policy levers to rectify gender inequality in work and care. There have been many reforms to expand the childcare subsidy in the last decade by governments from both ends of the political spectrum. In 2016, the Turnbull Liberal/National Government boosted the childcare subsidy.¹⁵⁶ The current Albanese Government has increased the maximum subsidy rate to 90% further for families with their first child in care, while also increasing the subsidy for families with joint income less than \$530,000, supporting the broad middle class with this childcare subsidy.¹⁵⁷

While the income tax is based on an individual unit (which is positive for gender equity), a "quasi-joint" tax unit applies for families with children.¹⁵⁸ The means tested structure of the welfare system, combined with the marginal income rate structure, still results in high effective marginal tax rate on labour income of the secondary earner (usually the woman), for many families with children.¹⁵⁹ Fundamentally, this stems to a systemic issue of conceptualising women and their income and labour contribution as part of a marital unit, or as a parent caring in the home, rather than as a fully equal economic agent.¹⁶⁰ The difference in labour force participation of women and men (especially with children) is shown in the following two Treasury charts.

Figure 1 Labour force participation of women and men¹⁶¹

¹⁵³ M. Stewart, *Gender Inequality in Australia's Tax-Transfer System*, in *Tax, Social Policy and Gender: Rethinking Equality and Efficiency* p. 11 (M. Stewart ed., ANU Press 2017).

¹⁵⁴ James, *supra* n. 192; Stewart, *supra* n. 183, at p. 9.

¹⁵⁵ M. Stewart, E. Porter, D. Bowman, E. Millane, *Growing pains: Family Tax Benefit issues and options for reform* (Report, Brotherhood of St Laurence, 2023), available www.bsl.org.au/research/publications/growing-pains-ftb-issues-and-options-for-reform/).

¹⁵⁶ M. Turnbull, *Childcare Relief for Australian Families* (2 July 2018), available at: <https://www.malcolmturnbull.com.au/media/childcare-relief-for-australian-families>.

¹⁵⁷ *Ib.*

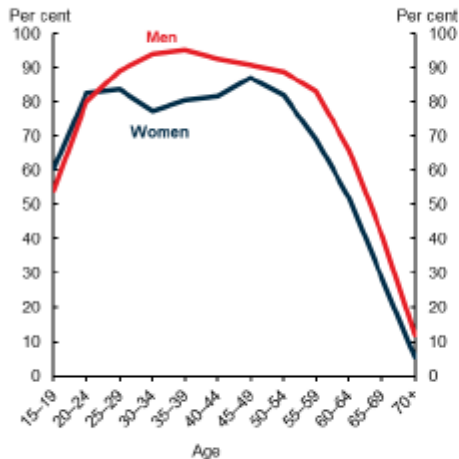
¹⁵⁸ G. Kalb, *Taxes, Transfers, Family Policies and Paid Work Over the Female Life Cycle*, in *Tax, Social Policy and Gender: Rethinking Equality and Efficiency* pp. 134-135 (M. Stewart ed., ANU Press 2017);

¹⁵⁹ Stewart, *supra* n. 153, at p. 19.

¹⁶⁰ Kalb, *supra* n. 158, at p. 57.

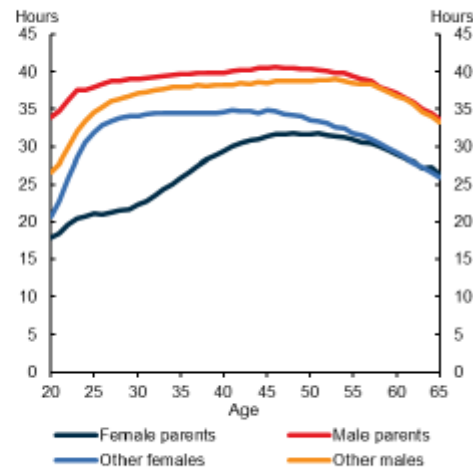
¹⁶¹ Australian Treasury, *Advice on amending tax cuts to deliver broader cost-of-living relief* (January 2024) available <https://treasury.gov.au/tax-cuts/treasury-advice>.

Chart A2: Labour force participation



Source: Treasury; ABS Labour Force Survey. 2022–23.

Chart A3: Average weekly hours worked



Source: Treasury; ABS Census of Population and Housing. 2021.

Australian Treasury analysis indicates that the revised tax cuts (see 3.1.5 above) will be good for gender equality, reducing marginal tax rates for more than 90 per cent of women.¹⁶² However, the effect is dominated by the withdrawal of childcare subsidies (so that childcare is still expensive for many families) and targeting of family payments.

Public debate on the topic of ‘taxing for gender equality’ arose from the intersection of gender budgeting and growing women’s rights recognition in domestic and international law around the 2000s.¹⁶³ Information about women’s inequality in the tax system can be found in evidence-based gender equality reports, such as the Status of Women Report Cards¹⁶⁴ and Workplace Gender Equality Agency reports.¹⁶⁵

3.2.2 Gender advocacy and the campaign to abolish the “tampon tax”

There has also been gender equality advocacy in respect of other taxes, although these generally have less gender impact than the combined income tax and transfer system. In 2018, the government came under strong pressure from civil society activists to remove the so-called “tampon tax” from the GST base.¹⁶⁶ The GST applies in general to supplies of all goods and services unless exempt; tampons and other “feminine hygiene products” were not exempt. The campaign commenced as a reaction to the tax-free treatment of condoms that gained momentum when the then-Treasurer was criticised by a high school student on national television.

Ultimately the campaign succeeded. The Commonwealth government consulted with State treasurers and the Treasury undertook a public consultation that resulted in the exclusion of “feminine hygiene

¹⁶² *Ib.*

¹⁶³ See *ib.*, at pp. 35, 38.

¹⁶⁴ Department of Prime Minister and Cabinet, *Status of Women Report Card* (8 March 2023), available at: <https://www.pmc.gov.au/resources/status-women-report-card-2023>.

¹⁶⁵ See, eg, M. Grudnoff and E. Littleton, *Rich Men and Tax Concessions* (April 2021), available at: <https://australiainstitute.org.au/wp-content/uploads/2021/04/P911-Income-wealth-an-gender-distribution-of-tax-concessions-WEB.pdf>.

¹⁶⁶ See K. James, *Removal of the Tampon Tax: A Costless or Pyrrhic Victory?*, 48 *Australian Feminist Law Journal* 2, pp. 201-202 (2022).

products” from the GST base.¹⁶⁷ Feminine hygiene products were added to the list of GST-free, health-related goods and services by exercise of the power of the Health Minister.¹⁶⁸

The campaign, and GST exemption, were popular among girls and women (and feminist activists). However, some criticised the campaign as a narrow achievement that left the underlying economic structures that undermine women left unchallenged, and as a distraction from more substantial and broad-based equality-oriented reform.¹⁶⁹ It is women who benefit most from a well-resourced tax and transfer system; the exemption would threaten the funding of necessary public goods and services for women, such as childcare and public education.¹⁷⁰

3.2.4 Tax and transfers for people with disabilities, or other vulnerable social groups

The transfer (social welfare) system is generally responsible for providing assistance to people with disabilities or other vulnerable social groups. There are no specific legislative tax rules for tax allowances or reduced tax rates for people with disabilities. The NDIS establishes various support payments to people with disabilities. Payments received by participants are exempt from income tax.¹⁷¹ Carer payments for eligible individuals who are unable to maintain employment due to caring responsibilities are also exempt from income tax.¹⁷² A medical expenses offset was offered between 2015 to 2019 which applied to net eligible expenses related to disability aids, attendant care and aged care, but this has been repealed.¹⁷³ However, other income earned by people with disabilities such as salary or wages, or a disability support pension, would be subject to income tax at individual marginal rates.

Special disability trusts may be established pursuant to the Social Security Act and benefit from concessional tax treatment. From 1 July 2008, income in a special disability trust is taxed at the principal beneficiary’s marginal rates,¹⁷⁴ even if not distributed or paid out, rather than being taxed at the highest marginal tax rate.¹⁷⁵

3.2.5 Tax residence and nationality requirements

A “resident” of Australia is subject to tax on worldwide income, while a non-resident is subject to tax on Australian-source income and gains only.¹⁷⁶ An individual is a resident for tax purposes if: they “reside” in Australia in the ordinary meaning of the word;¹⁷⁷ or they are domiciled in Australia and do not have a permanent place of abode elsewhere; or they have been in Australia for more than 183 days

¹⁶⁷ AU: A New Tax System (Goods and Services Tax) (GST-Free Health Goods) Determination, 2018, sec. 5 sch 1 item 1.

¹⁶⁸ AU GST Act, subdiv. 38-B: the Health Minister is able to add to this list under section 38-47.

¹⁶⁹ James, *supra* n. 166, at p. 208.

¹⁷⁰ J. Irvine, *Why You Should Keep Paying the ‘Tampon Tax’* (18 June 2018), available at: <https://www.smh.com.au/politics/federal/why-you-should-keep-paying-the-tampon-tax-20180618-p4zm81.html>.

¹⁷¹ Sec. 52-180 ITAA 1997.

¹⁷² Sec. 52-10 item 4.3 ITAA 1997.

¹⁷³ Sec. 159P ITAA 1936 (as at 18 March 2014); AU: Tax and Superannuation Laws Amendment (2014 Measures No.1) Bill, 2014, sec. 1.

¹⁷⁴ See generally sec. 95AB ITAA 1936.

¹⁷⁵ Sec. 99A ITAA 1936.

¹⁷⁶ AU: Income Tax Assessment Act 1936, sec 6(1).

¹⁷⁷ AU: ATO, *TR 2023/1* (7 June 2023) para. 17.

in a calendar year and do not have a usual place of abode elsewhere or an intention to reside in Australia; or they are a member of a Commonwealth superannuation fund.

A non-resident is denied the benefit of the tax-free threshold and the lowest marginal rate, paying tax at 32.5 per cent in 2023-24 from the first dollar, in respect of Australian source income. Foreign residents are not taxable on capital gains except in relation to Australian real property, but are not eligible for the CGT 50% CGT discount (removed in 2012),¹⁷⁸ on the view that this discount was not necessary to attract foreign investment into taxable Australian property that are immobile, such as real estate and mining assets.¹⁷⁹ Further, changes enacted in 2019 removed the main residence CGT exemption for foreign residents on property sold after 30 June 2020.¹⁸⁰

Working holiday makers are temporary residents on a specific visa, and are subject to a specific tax rule under which only the wages they earn in Australia are subject tax, and they face a tax rate of 15% from the first dollar.¹⁸¹ Workers who participate in the Seasonal Worker Programme introduced in Australia in 2012 are treated similarly for income they earn in Australia.

Australia's social security system has a range of more restrictive rules. There are many different limits for different kinds of payment, based on the individual's length of residency or type of visa. To be eligible for most payments under the Social Security Act, an individual must reside in Australia and be an Australian resident, hold a permanent visa or be a special category visa-holder.¹⁸²

3.2.6 Intergenerational equity and retirement saving

Australia has two systems to support retirement saving.¹⁸³ All employed Australians benefit from the Superannuation Guarantee, which requires employers to contribute into individual workers' private retirement savings in regulated superannuation funds.¹⁸⁴ Australia also has a public need-based age pension that is subject to age, income and asset tests. Superannuation contributions by employers are tax-deductible up to a cap, while contributions and earnings are taxed in the fund at a rate of 15%.¹⁸⁵ Individuals aged between 18 and 75 can also make deductible voluntary contributions to superannuation funds if they are self-employed or have other income.¹⁸⁶ Contributions by self-employed people in excess of \$27,500 each year are subject to a higher tax rate.¹⁸⁷ All superannuation payouts, whether taken as a lump sum or a pension, are exempt from income tax, and earnings in the superannuation fund in "pension phase" are also exempt.

¹⁷⁸ AU: Tax Laws Amendment (2013 Measures 3 No. 2) Bill, 2013: removed CGT discount for foreign individuals; see also sec. 115-105 ITAA 1997.

¹⁷⁹ D. Bradbury, *Consultation on Removing the Capital Gain Tax (CGT) Discount For Non-Resident Individual* (8 March 2013), available at: https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/2282428/upload_binary/2282428.pdf;fileType=application%2Fpdf#search=%22media/pressrel/2282428%22.

¹⁸⁰ AU: Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Act, 2019, sch. 1.

¹⁸¹ Sec. 768–910 Income Tax Assessment Act 1997.

¹⁸² Sec. 7 SSA.

¹⁸³ Cooper et al., *supra* n. 115.

¹⁸⁴ AU: Superannuation Guarantee (Administration) Act, 1992: as of 1 July 2023, the Superannuation Guarantee is 11% of an employee's wage.

¹⁸⁵ *Ibid*, at. sec. 248.

¹⁸⁶ Sec. 290-150 ITAA 1997.

¹⁸⁷ *Ib*, sec. 291-15.

Private superannuation tax concessions are the biggest tax expenditures (see 3.1.1 above) and the benefits are highly skewed towards top income earners.¹⁸⁸ In response, some restrictions have been applied to superannuation tax concessions in recent years. Division 293 of the ITAA97 applies a top up tax bringing the rate to 30% for contributions which exceed \$250,000 (this is still substantially below the top individual marginal rate of 47 per cent including the Medicare levy). In a novel measure, the Commonwealth government has introduced a Bill that applies a 15% tax on both realised and unrealised (accrued) gains in retirement (superannuation) funds that have net balances above \$3 million.¹⁸⁹ This additional tax will operate as an accrual capital gains tax on large superannuation balances if enacted.

The public age pension is included in the taxable income of recipients.¹⁹⁰ However, tax offsets (see 3.1.1) reduce the tax payable on the age pension depending on the taxable income of the recipient; if the aged pension is a recipient's only source of income, they will not be required to pay tax on that income.¹⁹¹

There is significant public debate in Australia about intergenerational equity, with a focus on Australia's ageing population and on the high cost of housing for young people. The Treasury publishes an *Intergenerational Report* every five years.¹⁹² The 2023 Report forecast that the number of Australians aged 65 and over will double in the next 40 years, and the number of Australians aged 85 or over will triple.¹⁹³ The Report expressed a view that although an aging population may increase long-term spending pressures in terms of the health and aged care, the superannuation system will increasingly fund retirement costs.¹⁹⁴ However, there is a public perception that an ageing population and slower growth in Australia's population may cause potentially higher burdens for individual working age taxpayers as they are subject to a higher tax burden than those with retirement savings and other assets.¹⁹⁵

House prices are very high and there is a lack of affordable housing for both owner occupiers and renters. There is concern about lack of affordable housing for older people who do not own their own home. Home ownership rates fell by 18 percentage points between 1981-2021 for those aged between 30-34 years, and 17 percentage points for those aged between 25-29 years.¹⁹⁶ The Intergenerational Report identified that this trend creates fiscal pressures and may impact on how superannuation is drawn down in the future, as people rely on it to pay down house mortgages.

3.2.7 Discrimination on the basis of sexuality, race or other characteristics

¹⁸⁸ TEIS, *supra* n. 122, at p. 16.

¹⁸⁹ AU: Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023, introduced on 30 November 2023. Referred to the Senate Economics Legislation Committee, report due 19 April 2024.

¹⁹⁰ Sec. 52-10 item 2.1 ITAA 1997.

¹⁹¹ Sec.160AAAA ITAA 1936.

¹⁹² Australian Treasury, *Intergenerational Report 2023 At a Glance: Factsheet* (24 August 2023) p. 1, available at: <https://treasury.gov.au/sites/default/files/2023-08/p2023-435150-fs.pdf>.

¹⁹³ *Ib.*

¹⁹⁴ *Ib.*

¹⁹⁵ J. Kehoe, *Why a Smaller Australia Means a Bigger Tax Bill For You* (6 January 2023), available at: <https://www.afr.com/politics/federal/why-an-older-and-smaller-australia-will-increase-your-tax-bill-20230104-p5ca9e#:~:text=Unless%20the%20tax%20system%20is,money%20to%20the%20tax%20office.>

¹⁹⁶ Australian Treasury, *supra* n. 236, at p. 172.

As explained in 3.2.1, there has been substantial policy, political and law reform focus on direct and indirect gender inequality and discrimination in the tax system. Legislation has also been enacted to deliver equal treatment irrespective of gender or sexuality. The definition of “spouse” for tax and social security law purposes includes a married or de facto couple irrespective of gender.¹⁹⁷ The law supports same-sex couples to have the same entitlements to tax and family benefits as other married or de facto couples.¹⁹⁸

However, there has been limited debate in Australia about other discriminatory effects of the tax system, for example on the basis of race. The Constitution does not provide any basis for claims about discrimination in taxation, but whether tax laws are limited by the anti-discrimination statutes summarised in section 2.1 is a more complex question. One potential avenue to address indirect racial discrimination in tax laws is s 10(1) of the RDA, expressed as to “Rights to equality before the law,” which states:

If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.¹⁹⁹

The provision was tested in *Melkman v Commissioner of Taxation*, in which the taxpayer sought to claim the benefit of an income tax exemption for a pension paid by a State of the Federal Republic of Germany by way of compensation to victims of Nazi persecution.²⁰⁰ Mr Melkman received a pension of that character paid by the Netherlands. The Federal Court held that the tax exemption rule did not draw any express or implied distinction between persons of different races. It may be noted that the German pensions to which the exemption applied were payable (in general at least) only to people of German national origin; consequently, the provision arguably granted an exemption that was only available to members of a particular race, although there may be an issue as to how the relevant “race” was to be identified. However, the taxpayer faced another “significant barrier”, being “the need to prove that the particular human rights to which he referred were enjoyed to a lesser extent by members of one or more races, as a result of a small number of members of a particular race having access to a tax exemption”.²⁰¹ Despite this, the reasoning in *Melkman* suggests that the RDA could apply to a racially discriminatory tax exemption, although it was not found to apply in that case.

The recent case of *Fisher* concerned the right to the age pension under the SSA.²⁰² Mr Fisher, an Aboriginal man aged 66, and therefore not yet eligible to qualify for the age pension (age 67), argued that because Indigenous men have shorter life expectancy than non-Indigenous men, he would “enjoy” the right for the age pension “to a more limited extent” than non-Indigenous men, and this treatment would breach s 10(1) of the RDA. Life tables compiled by the Australian Bureau of Statistics indicated that life expectancy at birth was 71.6 years for an Indigenous male and 80.2 years for a non-Indigenous male, while an Indigenous man of 65 years had a remaining life expectancy of 15.8 years, whereas a

¹⁹⁷ Sec. 995-1 ITAA 1997, definition of spouse; AU: Social Security Act, 1991, sec. 4.

¹⁹⁸ AU: Same-Sex Relationships (Equal Treatment in Commonwealth Laws - General Law Reform) Bill, 2008.

¹⁹⁹ Sec. 10 RDA.

²⁰⁰ AU: FCA, 13 May 1988, *Melkman v Commissioner of Taxation* (1988) 20 FCR 331.

²⁰¹ As explained by the Court in AU: HCA, 12 July 2023, *Fisher v Commonwealth of Australia*, [2023] FCAFC 106, at para. 57.

²⁰² AU: HCA, 12 July 2023, *Fisher v Commonwealth of Australia*, [2023] FCAFC 106.

non-Indigenous man of 65 years had a longer life expectancy of 19.0 years. The court found that the relevant human right is “the right to public health, medical care, social security and social services” as specified in art 5(e)(iv) of the CERD. It accepted that the gap in life expectancy was “a function of race” in the sense that it was “the product of disadvantages suffered by Indigenous Australians which, in turn, flow from their treatment by governments and by more powerful or fortunate Australians,” and stated further that this was “a matter of grave concern for a society that values equality of opportunity.”²⁰³

The court rejected the argument of the Commonwealth Government that s 10(1) of the RDA is engaged “only where the law in question either is expressed to apply differentially on the basis of race ... or is found to have adopted a facially neutral criterion as a conscious proxy for race”.²⁰⁴ Rather, s 10(1) of the RDA is “concerned with substance rather than form”, and should be given “a generous and non-technical construction”. Despite this, the court found against Mr Fisher because it characterised the “right” to the age pension as “a right to a level of income support, covering the period from when a person reaches “retirement age” until death, however long that period might be”.²⁰⁵ As the period (if any) for which the age pension is available “depends on the individual’s lifespan”, it is “equally available to either a person who lives for a relatively short period after retirement age or a person who lives for a longer period; “[t]he relevant connection is with life expectancy after becoming entitled to receive the pension, not with their race.”²⁰⁶ The fact that, statistically, an Aboriginal man “will probably qualify for the pension for a shorter period than a randomly selected non-Aboriginal man of the same age” did not change the analysis, as “[e]ach enjoys the right to the pension (subject to meeting payability criteria) for as long as he lives and thus as long as he needs it.”²⁰⁷ The inequality in *Fisher* was found by the court to be a consequence of social disadvantage rather than something intrinsic to Indigenous people. It seems likely that this logic that differential treatment is not a consequence of the protected characteristic but of broader economic or social disadvantage is likely to apply to many tax concessions or exemptions, similarly to social security provisions.

Section 10(1) of the RDA is not replicated in other Commonwealth anti-discrimination laws, however some laws state that an act in direct compliance with a taxation law is not unlawful.²⁰⁸ The application of s 40 ADA in these terms was explored in *Hartse v Commission of Taxation* where a 67-year old plaintiff sought to argue that his redundancy payment should not be taxable.²⁰⁹ The payment was made after Mr Hartse reached pension age, but eligibility for concessional taxation of a redundancy payment was dependent on the recipient being *below* pension age.²¹⁰ The Administrative Appeals Tribunal held that the tax law provisions prevailed by reason of s 40 ADA, despite the differential treatment based on age.²¹¹

²⁰³ *Ib*, at paras. 9, 10.

²⁰⁴ *Ib*, at para. 32.

²⁰⁵ *Ib*, at para. 130.

²⁰⁶ *Ib*.

²⁰⁷ *Ib*, at para. 131.

²⁰⁸ Sec. 40 ADA.

²⁰⁹ AU: AATA, 2 August 2013, *Harste v Commissioner of Taxation*, [2013] AATA 544, paras. 1-3.

²¹⁰ s 83-175 of the *Income Tax Assessment Act 1997*.

²¹¹ *Ib*, at para. 21.

In another context, a 4 per cent mining withholding tax that applies to royalties paid in respect of mining on Indigenous lands has been criticised as inequitable and discriminatory.²¹² However, there has been no court challenge to the provision, which would likely be supported by the Commonwealth's power to make special laws for the people of any race.²¹³ Reform therefore requires legislation.

3.3 Tax Competition and Inequality

3.3.1 Preferential personal tax regime for temporary residents

In general, Australia does not have targeted tax incentives to attract skilled or high-income or wealthy individuals to Australia. However, one preferential regime relates to temporary residents working in Australia, outlined above, was introduced in 2006. Individuals who have “relatively temporary ties”,²¹⁴ such as expatriate employees or people seconded to Australia for a limited period of time, may be a resident for tax purposes but instead of worldwide income taxation, they benefit from special rules that treat the foreign investment and retirement savings of temporary residents as exempt from income tax.²¹⁵ The taxing of labour income is thought to discourage multinational enterprises from bringing in skilled personnel and locating in Australia, while the tax concessions on foreign source capital and passive income is thought to align with the government policy to attract skilled workers and corporate investment into Australia.

3.3.2 Tax treaties and non-discrimination requirements

Some Australian tax treaties have a non-discrimination Article based on Article 24 of the OECD Model Tax Convention.²¹⁶ In recent years, there has been increasing action by taxpayers seeking to apply treaty non-discrimination Articles for equal treatment on the basis of nationality or residence in Australian federal and state tax laws.

In respect of nationality, the High Court decision in *Addy* was a victory for the taxpayer, a working holiday maker from the United Kingdom who earned income while working in Australia for two years.²¹⁷ Ms Addy was on a working holiday maker visa, but was found to be a “resident” for tax purposes, despite her intention to return to study in the UK, and a room available in parents' home in the UK. She sought application of the tax-free threshold, which is not available for working holiday makers who face a 15% tax rate from the first dollar, before aligning with the progressive rate structure for higher incomes. Ms Addy relied on Article 25(1) of the Australia-UK treaty which stated:²¹⁸

"Nationals of a Contracting State [UK] shall not be subjected in the other Contracting State [Australia] to any taxation or any requirement connected therewith, which is other or

²¹² F. Martin and B. Tran-Nam, *The Mining Withholding Tax under Division 11C of the Income Tax Assessment Act 1936: It May Be Simple But Is It Equitable?*, 27 *Australian Tax Forum* 1, 149 (2012).

²¹³ Sec. 51(xxvi) Constitution.

²¹⁴ Cooper et al., *supra* n. 115, at sec.1025.

²¹⁵ AU: Sec 768-910 to section 768-980 of the ITAA 1997.

²¹⁶ OECD, *Model Tax Convention on Income and on Capital 2017* (OECD Publishing 2017), <http://dx.doi.org/10.1787/g2g972ee-en>, hereinafter "OECD MC".

²¹⁷ <https://www.ato.gov.au/Individuals/Coming-to-Australia-or-going-overseas/Coming-to-Australia/Taxation-of-Australian-resident-WHMs-from-NDA-countries/>

²¹⁸ Agreement between Australia and the United Kingdom for the Elimination of Double Taxation with respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance (2003) <https://www.austlii.edu.au/au/other/dfat/treaties/2003/22.html>

more burdensome than the taxation and connected requirements to which nationals of that other State [Australia] in the same circumstances, in particular with respect to residence, are or may be subjected."

The High Court found in favour of Ms Addy, stating that:²¹⁹

"the "same circumstances" that must be considered of the hypothetical comparator cannot include being or not being the holder of a working holiday visa just as they cannot include being or not being an Australian national. ... The question then is whether the more burdensome taxation imposed on those holding a working holiday visa, which depends upon being *not* an Australian national, contravenes Art 25(1). The short answer is "yes"."

In respect of State taxation, a case is pending in the Supreme Court of Queensland based on the non-discrimination Article 24(4) in the Australia-Germany tax treaty of 2015.²²⁰ The taxpayer objected to a foreigner surcharge of 2% on land tax imposed by the Queensland Government, on the grounds that it is discriminatory and therefore unconstitutional as it is inconsistent with the tax treaty that is incorporated into Commonwealth law. Similar claims have arisen in other States, where governments have taken different approaches. The NSW Revenue Office has issued a statement that foreigner surcharges will not apply to investors that can claim protection under a treaty non-discrimination Article, specifically New Zealand, Finland, Germany, India, Japan, Switzerland, Norway and South Africa.²²¹ On the other hand, the Victorian Revenue Office maintains the position that higher duties and land tax surcharges for foreign purchasers of land in the state apply to all foreign investors that fall within the terms of the State law.²²²

Australia has recently expanded its tax treaty program and is negotiating a number of new tax treaties, most of which will include a non-discrimination Article. In the recently adopted treaty with Iceland, the working holidaymaker tax is excluded from the non-discrimination provision.²²³ The ultimate policy response is likely to be a restriction on the application of the non-discrimination Article in Australia's tax treaties.

4. Tax Enforcement and Inequality

4.1 Enforcement of tax laws and income inequality

4.1.1 Approach to enforcement and compliance

The Australian Tax Office (ATO) is a statutory body which derives its functions from and operates according to income tax law and the *Tax Administration Act 1953*. While the ATO oversees and manages tax compliance, since 1986, the Australian tax system has relied on a model of self-assessment

²¹⁹ AU: *Addy v Federal Commissioner of Taxation* [2021] HCA 34, paras [30]-[31].

²²⁰ Agreement between Australia and the Federal Republic of Germany for the Elimination of Double Taxation with respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance (2015), <https://treasury.gov.au/sites/default/files/2019-03/GermanyDTA.pdf>; *GGLOBAL 120E T2 PTY LTD as trustee for the G Global 120E AUT v Commissioner of State Revenue (Queensland)*, case filed 11 March 2022.

²²¹ NSW State Revenue Office, <https://www.revenue.nsw.gov.au/news-media-releases/international-tax-treaties>.

²²² Victoria State Revenue Office, <https://www.sro.vic.gov.au/foreignpurchaser>.

²²³ Agreement between Australia and Iceland for the Elimination of Double Taxation with respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance (2022).

under which taxpayers are required to calculate the amount of taxes due and the amount of tax payable by lodging their tax returns.²²⁴

The ATO claims an active and fair approach to tax enforcement, and there have not been substantial findings of cases of selective enforcement which unfairly targets certain individuals or entities. For example, in 2023 a high-earning solicitor was fined by the NSW Local Court for failing to lodge 14 income tax returns; a similar failure of a carpenter to lodge five income tax returns was also fined and called a costly crime by the magistrate.²²⁵ However, concerns remain about the role of tax enforcement, digitalisation and automation, and potential for this to unfairly impact on people with low incomes. The ATO has a Charter that is named the “Charter: Our Commitment to You”.²²⁶ This is administrative only and is a guide for good tax administration and expectations for both the administrator and taxpayers but has no legal effect; there are no Constitutional or statutory statements of taxpayer rights. Despite this, the ATO takes taxpayer privacy seriously and there are stringent restrictions on sharing or release of taxpayer information, and there is a fairly robust objection, review and appeal process for tax disputes.

The Inspector General of Taxation and Taxation Ombudsman (IGTO) provides oversight of the ATO and conducts investigations into ATO conduct and taxpayer complaints, including how the Commissioner exercises its discretionary powers.²²⁷ The IGTO also publishes annual reports summarising its tax-related investigations and findings and is open to receive complaints from taxpayers about ATO administration and decisions. In 2015, the IGT prepared a report on the protection of taxpayer rights in Australia that surveys a wide range of rights to review, information, and due process.²²⁸

4.1.2 Countering tax evasion and avoidance

The ATO carries out various tax enforcement initiatives such as the Tax Avoidance Taskforce, which have a focus on large corporations and high-wealth individuals. Formed in 2016, the taskforce detects and reports on matters of tax avoidance.²²⁹ In 2021 the Taskforce has helped the ATO raise \$22.9 billion in tax liabilities. Between 2006 and 2015, the Commonwealth Government operated a cross-agency taskforce to investigate and combat international tax evasion.²³⁰ The taskforce, known as Project Wickenby, focused on taxpayers who may have concealed income in offshore tax havens.²³¹ At its conclusion, Project Wickenby netted \$2.29 billion in tax liabilities and recouped \$985.67 in outstanding

²²⁴ Cooper et al., *supra* n. 115, at sec. 1075-6.

²²⁵ See ATO, *Tax Crime Prosecution Case Studies* (10 January 2024), available at: <https://www.ato.gov.au/about-ato/tax-avoidance/the-fight-against-tax-crime/news-and-results/case-studies/tax-crime-prosecution-case-studies>.

²²⁶ ATO, *Our Charter: Our commitment to you*, www.ato.gov.au/about-ato/commitments-and-reporting/ato-charter/our-charter.

²²⁷ www.igt.gov.au

²²⁸ IGT, *The protection of taxpayer rights in Australia* (IBFD, 2015), available www.igt.gov.au; and see D. Bentley, *Taxpayer rights in Australia twenty years after the introduction of the Taxpayers’ Charter* (November 2016) *eJournal of Tax Research* 14(2), 291.

²²⁹ *Ib.*

²³⁰ J. Page, *Project Wickenby: White Hats at Work, or Witch Hunt?*, 27 *A Journal of Public Policy and Ideas* 1, p. 1 (2011). See also AGS, *Major Outcome For Project Wickenby* (2011), available at: <https://www.ags.gov.au/areasoflaw/case-studies/major-outcome-for-project-wickenby>.

²³¹ F. Anderson and P. Durkin, *ATO Amnesty on Tax Havens* (19 July 2007), available at: <https://www.afr.com/politics/ato-amnesty-on-tax-havens-20070719-jdou5>.

revenue.²³² The successful outcome of Project Wickenby also led to the establishment of the Serious Financial Crime Taskforce, led by the ATO, which continues to monitor activities for financial crime, offshore tax evasion and fraudulent activities.²³³

These taskforces are intended to ensure that tax avoidance is mitigated whilst placing heightened expectations of tax compliance on the Top 1,000 public businesses and MNEs and Top 500 privately-owned groups.²³⁴ More generally, the ATO takes a strong risk-based approach to enforcement of tax on large corporations, and both litigates and settles tax disputes, including with large corporations.²³⁵ The content of the settlements are protected under confidentiality laws, and may be reviewed by former Federal Court judges.

Several reports published by the ATO and related bodies give insight into the frequency of tax fraud in Australia and impact on the revenue collection. The Black Economy Taskforce report published in 2017 examined the impact and causes of the black economy in Australia. It addressed activities which take place outside of tax and regulatory systems,²³⁶ including most commonly under reporting or not reporting income, as well as GST fraud, Australian Business Number (ABN) fraud and evasion of tobacco and alcohol excises (such as the tobacco black market). The report estimated that the black economy may be as much as 3% of Australia's GDP.²³⁷ The report made several recommendations to combat the black economy, which include putting in place more scrutiny and tougher penalties, enacting reforms to ABN integrity, and moving to a near cash free economy.²³⁸ Some of these recommendations have been implemented by government.

For large fraud cases, the ATO has led a joint-agency taskforce known as The Serious Financial Crime Taskforce since 2015. As of 2023, the Taskforce has raised liabilities of over \$1.87 billion and completed close to 2,000 audits and reviews.²³⁹ The ATO has recently emphasised how the ATO is monitoring and stopping fraudulent GST claims. In its most recent annual report, the ATO estimates

²³² Commonwealth Director of Public Prosecutions, *Project Wickenby* (2015), available at: <https://www.cdpp.gov.au/crimes-we-prosecute/fraud/project-wickenby#:~:text=New%20Director%20appointed&text=Federal%20Attorney%2DGeneral%2C%20the%20Hon,Comm onwealth%20Director%20of%20Public%20Prosecutions>.

²³³ ATO, *Serious Financial Crime Taskforce* (18 December 2023), available at: <https://www.ato.gov.au/about-ato/tax-avoidance/the-fight-against-tax-crime/our-focus/serious-financial-crime-taskforce>.

²³⁴ ATO, *Tax Avoidance Taskforce* (13 July 2023), available at: <https://www.legacy.ato.gov.au/General/Tax-avoidance-taskforce/>.

²³⁵ ATO, *ATO Settles Dispute Over Singapore Hub* (20 February 2023), available at: <https://www.ato.gov.au/media-centre/ato-settles-dispute-over-singapore-hub>.

²³⁶ Australian Treasury, *Black Economy Taskforce Final Report* (8 May 2017) p. 12, available at: <https://treasury.gov.au/review/black-economy-taskforce/final-report>.

²³⁷ *Ib*, at p. 23.

²³⁸ *Ib*, at p. 6.

²³⁹ ATO, *Tax Avoidance Taskforce* (13 July 2023), available at: <https://www.legacy.ato.gov.au/General/Tax-avoidance-taskforce/>.

that its activities prevented \$1.7 billion of GST refunds from being paid out in between mid-April 2022 and 30 June 2022²⁴⁰ and a further \$1 billion of unauthorised GST refunds in 2022/23.²⁴¹

The Tax Practitioners Board (TPB) regulates tax agents and has powers to suspend or ban practitioners.²⁴² There has been significant attention paid to this since a widely reported decision of the TPB that concerned the use by partners at PricewaterhouseCoopers (PwC) of confidential government information to enrich itself and its clients by advising on how to avoid paying taxes under the newly enacted Multinational Anti-Avoidance Law.²⁴³ The government has responded to the scandal with a swathe of legislative reforms to enhance powers of the TPB and fix various shortcomings of the regulatory framework. These include broadening the scope of tax promoter penalties, increase the period to six years for when the ATO can commence proceedings against tax exploitation schemes, and increased penalties under the *Corporations Act 2001*.²⁴⁴

4.1.2 Tax amnesties

Tax amnesties are rarely used but have been occasionally applied by the ATO. During Project Wickenby, the ATO offered a tax amnesty to encourage taxpayers to come forward for voluntary disclosure. Taxpayers who voluntarily disclosed that they had undeclared income or assets in an offshore account in a tax haven of up to \$20,000 or less in a year would pay tax on that income and any interest earned, and no penalties, while taxpayers who disclosed income that exceeded \$20,000 would pay a shortfall penalty of 5% of tax owed on the additional income, much lower than the usual penalty rate of 25%.²⁴⁵ The amnesty was available to taxpayers up until the point they received ATO correspondence about an audit into their tax affairs.²⁴⁶

In 2023, the Government established an amnesty program for businesses in relation to penalties for failing to file tax returns and other tax statements.²⁴⁷ The amnesty related to the COVID19 period and was open to businesses with annual turnover of less than \$100 million. It involved remission of penalties from failure to lodge tax statements due during the period from 1 December 2019 to 29 February 2022, if these statements were submitted in the period from 1 June 2023 to 31 December

²⁴⁰ ATO, *Annual Report 2021-22* (10 October 2022) p. 71, available at: https://caat-p-001.sitecorecontenthub.cloud/api/public/content/252482a3-684c-4927-8972-0739c6f36879_n0995_ATO_annual_report_2021_22_Digital_pdf.

²⁴¹ ATO, *Annual Report 2022-23* (9 October 2023), p. 17, available at: <https://caat-p-001.sitecorecontenthub.cloud/api/public/content/eba65257d7b04994bb5be907cb8add40>.

²⁴² Tax Practitioners Board, www.tpb.gov.au.

²⁴³ K. Ainsworth, *What Is the PwC Tax Scandal? Who Is Peter-John Collins? Who Knew About It? Why Does It Matter?* (4 June 2023), available at: <https://www.abc.net.au/news/2023-06-05/pwc-pricewaterhousecoopers-government-tax-leak-scandal-explained/102409528>.

²⁴⁴ J. Chalmers MP (Treasurer), *Government Taking Decisive Action In Response To PwC Tax Leaks Scandals* (6 August 2023), available at: <https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/government-taking-decisive-action-response-pwc-tax-leaks>; Australian Treasury, *Response to PwC – Tax Practitioners Board reforms*, <https://treasury.gov.au/consultation/c2023-444281-tpb>.

²⁴⁵ *Ib.*

²⁴⁶ *Ib.*

²⁴⁷ Australian Treasury, *Budget 2023-24 Budget Paper No.2* (9 May 2023) p. 30, available at: https://budget.gov.au/content/bp2/download/bp2_2023-24.pdf.

2023. The ATO stated that more than 14,000 businesses had taken advantage of the amnesty, with more than \$48 million in failure to lodge penalties being remitted.²⁴⁸

4.2 Tax Enforcement and Other Inequalities

4.2.1 Digitalisation of tax compliance and administration

There is increasing digitalisation of tax compliance and administration in Australia. The self-assessment tax filing process has now been fully digitalised so that individual taxpayers can complete and lodge their tax returns online via the ATO's website, myTax, with prefilling of key information such as salary payments and Pay-As-You-Go tax withheld, while tax agents also file electronic returns. Prefilling with information such as salary, whether they have received social security contributions, dividends and interest is achieved by significant automated data sharing between ATO and other third-parties, such as an individual's employer, other government agencies and banks.

A system called Single Touch Payroll connects salaries, tax withheld and (in future) Superannuation Guarantee payments for most employees and businesses in real time usually on fortnightly (when salary and wages are paid).²⁴⁹ The ATO increasingly uses data analytics to compare individual's tax return data with other taxpayers who are in similar circumstances. For individuals filing a tax return, if an individual's deductions claim is significantly different to what is expected (either an industry expectation or the individual's past tax returns), the ATO website may prompt the taxpayer with a message to check their figures.²⁵⁰

In terms of tax compliance activities, it has been reported that the ATO uses algorithms and machine learning to assist in processing data to identify unpaid tax bills and fraudulent tax claims. For example, it has been reported that the ATO used AI to identify GST fraud and take action against 53,000 clients and prevent \$2.5 billion fraudulent GST claims from being paid in December 2022.²⁵¹

4.2.2 Legal safeguards on the use of technology to protect minorities or the most vulnerable

There has been a growing recognition that while the implementation of technology and automation can be valuable for tax compliance and administration, it may also disadvantage minorities and the most vulnerable. The most important "wake up call" so far in Australia has related to social security debt enforcement in the so-called "Robodebt" scandal. Between 2015 and 2019, the statutory agency Centrelink, which administers welfare payments, operated an automated debt collection scheme that issued incorrect demands to many thousands of payment recipients, claiming they were overpaid.

The *Robodebt* automated debt recovery scheme was based on an incorrect algorithm established to compare data between Centrelink and the ATO to identify if an individual was eligible for benefits received. After it was finally shut down, the subsequent Government established a Royal

²⁴⁸ ATO, *Clock is ticking on small business lodgment penalty amnesty* (6 December 2023), <https://www.ato.gov.au/media-centre/clock-is-ticking-on-small-business-lodgment-penalty-amnesty>

²⁴⁹ ATO, *Single Touch Payroll*, <https://www.ato.gov.au/businesses-and-organisations/hiring-and-paying-your-workers/single-touch-payroll> .

²⁵⁰ ATO, *How We Use Data and Analytics* (14 September 2022), available at: <https://www.ato.gov.au/about-ato/commitments-and-reporting/information-and-privacy/how-we-use-data-and-analytics>.

²⁵¹ T. Bennett, *ATO Captures Billions of Dollars From Tax Cheats With AI* (1 August 2023), available at: <https://www.afr.com/technology/ato-captures-billions-of-dollars-from-tax-cheats-with-ai-20230727-p5drnf>.

Commission.²⁵² The *Robodebt* algorithm was legally incorrect because it did not recognise that Centrelink used fortnightly income estimates, whilst the ATO stored annual data. The algorithm averaged the ATO income figures into fortnightly figures and compared those with the Centrelink data. This resulted in an incorrect determination for around 416,000 vulnerable individuals, including those facing poverty or mental illness, that suggested they owed debts to the government.²⁵³ There was evidence that government officials knew early on that the algorithm was incorrect, but proceeded to operate the debt collection scheme in response to political pressure from the government of the day.

The Royal Commission found that it was difficult for affected individuals to object to the Centrelink decision or seek review.²⁵⁴ Its final report made several recommendations, including that where there is automated decision-making, there should be a legislative framework that enables affected individuals to seek review, and that the algorithms used in the process should be available for independent expert scrutiny.²⁵⁵ The report also recommended that an independent body should be set up as to review automated decisions.²⁵⁶ A successful class action was brought against the government in which the Federal Court approved a \$112 million settlement in favour of members of the class affected.²⁵⁷

In 2023, the ATO applied automated decision making to send out letters to tax practitioners about clients' past tax debts where the ATO had paused collection. Whilst these debts were correct and calculated in accordance with the law, the media quickly dubbed the process "Robotax" and reported widespread dissatisfaction with the automated process referring to debts that were many years old.²⁵⁸ The ATO paused the program and issued a statement that it would review its approach due to community feedback about the "unnecessary stress" caused.²⁵⁹

4.2.3 Tax compliance assistance for vulnerable communities

The ATO administers a program called Tax Help, which is available for eligible people earning \$60,000 or less. Tax Help is run by volunteers who may assist eligible taxpayers with lodging tax returns online or help taxpayers with creating the online account needed to lodge their tax returns. Australia is a multicultural society with many languages spoken besides English and many first and second generation migrants. Tax return information is published in a variety of languages in hard copy and on the ATO website.²⁶⁰

Tax compliance assistance is also available from tax clinics, funded by the ATO and administered by volunteer practitioners and University students. Various tax clinics have been set up at universities

²⁵² C. Holmes, *Royal Commission into the Robodebt Scheme* (7 July 2023), available at: <https://robodebt.royalcommission.gov.au/system/files/2023-09/rrc-accessible-full-report.PDF>.

²⁵³ C. Felstead, R. Stockdale, and H. Scheepers, *A Dignity Perspective On the Potential Harm of AI Technologies: The Case of Robodebt* (2023) p. 3, available at: <https://aisel.aisnet.org/cgi/viewcontent.cgi?article=1100&context=acis2023>

²⁵⁴ *Ib*, at vol. 1 pp. 328-330.

²⁵⁵ *Ib*, at vol. 1 recom. 17.1.

²⁵⁶ *Ib*.

²⁵⁷ *Katherine Prygodicz & Ors v Commonwealth of Australia* (No 2) [2021] FCA 634 (11 June 2021).

²⁵⁸ J. Barrett, *Robotax: why thousands of Australians are receiving tax debt notices dating back up to 15 years*, *The Guardian* (10 December 2023).

²⁵⁹ ATO, *ATO Pauses Debt Awareness Campaign* (28 November 2023), available at: <https://www.ato.gov.au/media-centre/ato-pauses-debt-awareness-campaign>.

²⁶⁰ ATO, *Other languages*, www.ato.gov.au/other-languages.

designed to assist vulnerable or underrepresented taxpayers.²⁶¹ The clinics operate on a pro-bono basis and are managed by students under the supervision of tax professions.²⁶² Clients come from diverse cultural backgrounds,²⁶³ are financially vulnerable,²⁶⁴ experiencing mental health problems,²⁶⁵ or people from regional or remote communities.²⁶⁶ Tax assistance in these clinics may involve helping an individual fill out their tax returns, reviewing draft tax returns, helping an individual navigate the online portal to manage their tax affairs, negotiating with the ATO on tax matters such as the outcome of an assessment, penalty notices or waivers.²⁶⁷

4.2.4 Discretion of the Commissioner of Taxation

The tax law empowers the Commissioner of Taxation with a discretion to relieve tax burdens in certain circumstances of financial hardship.²⁶⁸ No other factors are relevant for the discretion besides serious financial hardship. However, the ATO also exercises significant discretion in day to day administration, for example in offering payment plans and similar types of relief that can help taxpayers manage their obligations. For example, taxpayers who are experiencing financial difficulties may be able, upon application to the ATO, to receive extra time to complete their tax returns, set up a payment plan to help them pay their taxes, or have penalties or interest remitted at the ATO's discretion.²⁶⁹

5. Conclusion

In Australia, equality is generally considered to be a strong principle, whereby it is expected that all people “have the same rights and deserve the same level of respect”.²⁷⁰ Yet, in general, the principle of equality and non-discrimination is not constitutionally protected in Australia, and nor are there strong laws establishing taxpayer rights in respect of taxation law. Despite the lack of constitutional or legal basis focused on inequality and non-discrimination, this report shows how equity and progressivity are of central importance in Australian tax and transfer law and in political debates about taxation. Key challenges for Australia's tax system in future are wealth inequality, especially in respect of tax policy for housing and retirement saving; and ensuring that taxpayer rights are protected and due process is followed as the ATO moves inexorably towards more digitalisation, automation and artificial intelligence in tax administration.

²⁶¹ A. Morgan et al, *Pro Bono Tax Clinics: Aiding Australia's Tax Administration and Developing Students Self-Efficacy*, 24 J. Austl. Tax'n 76, pp. 75-110 (2022).

²⁶² *Ib.*, at pp. 75-110, 101.

²⁶³ M. Cull et al., *Work-Integrated Learning for International Students: Developing Self-Efficacy Through the Australian National Tax Clinic Program*, 17 JATTA 1, p. 31 (2022).

²⁶⁴ A. Kayis-Kumar et al., *Interprofessional Collaborative Practice In Pro Bono Tax Clinics: A Case Study Approach*, 22 J. Aust. Tax 2, p. 4 (2020).

²⁶⁵ *Ib.*, at p. 57.

²⁶⁶ *Ib.*

²⁶⁷ *Ib.*

²⁶⁸ AU: Div 340 of Schedule 1 of the *Tax Administration Act 1953*

²⁶⁹ ATO, *Tax Support For Individuals* (20 July 2022), available at: <https://www.ato.gov.au/individuals-and-families/financial-difficulties-and-disasters/support-to-lodge-and-pay/tax-support/tax-support-for-individuals>.

²⁷⁰ Australian Government Attorney-General's Department, *Rights of Equality and Non-Discrimination: Public Sector Guidance Sheet* (accessed December 2023), available at: <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/rights-equality-and-non-discrimination#:~:text=All%20people%20have%20the%20right,a%20discriminatory%20or%20arbitrary%20manner>.

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