

Tax highlights

29 September 2014

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Key developments this week

MRRT repeal – start date proclaimed: On 18 September 2014, the Governor-General made a [proclamation](#) fixing 30 September 2014 as the commencement date for certain schedules contained in the [Minerals Resource Rent Tax Repeal and Other Measures Act 2014](#). As a result, the following measures contained in the Bill will have the following dates of effect for most taxpayers:

- Abolition of the MRRT from 1 October 2014 (with taxpayers final MRRT year (even if it is a part year) ending on 30 September 2014)
- Abolition of the company loss carry-back from 1 July 2013
- Reduction of the instant asset write-off from 1 January 2014
- Abolition of accelerated depreciation for motor vehicles from 1 January 2014, and
- Abolition of geothermal energy concessions from 1 July 2014.

BEPS – OECD Actions Items – ATO perspective: On 25 September 2014, ATO Deputy Commissioner Mark Konza delivered a speech, [Base erosion and profit shifting - a progress report on G20/OECD action](#), which outlines the ATO's perspectives on the OECD base erosion and profit shifting (BEPS) action items that were delivered at the G20 Finance Ministers conference on 20-21 September 2014. During this speech Mr Konza discussed the compliance actions and strategy the ATO will employ to tackle each of those BEPS action items. Key points from the speech are noted below:

- **International collaboration:** Mr Konza said that because multinationals are operating across borders seamlessly by taking a global, top down view to structure their operations across countries, tax administrators and policy makers need to do the same. He said, "We must move from a single, isolated country view and replace it with a global view. Unprecedented international collaboration is needed to help build this view."
- **Implementation of BEPS actions:** Mr Konza said it was unrealistic to consider that BEPS could be 'solved' during the two years of the OECD Action Plan and implementation will ultimately be a matter for each G20/OECD member post-2015. Each country will need to assess what changes to apply to domestic legislation and how existing tax treaties will be affected. The OECD is seeking to call an international conference to develop a multilateral convention that would amend the network of existing bilateral tax treaties at one time.

- **BEPS Action Item 1: tax challenges of the digital economy:** As a member of the OECD's Taskforce on the Digital Economy, Mr Konza said Australia contributed to the development of the Report on the Digital Economy and agrees with its findings that it is not possible to define a separate digital economy which can be ring-fenced. Mr Konza said the intelligence the ATO had gained through an e-commerce project has been used as a basis to instigate a multilateral working party, with five tax agencies coming together to investigate the global tax planning of e-commerce multinational enterprises. Intelligence from each country was used to develop an Aggregated Risk Report to identify generic global e-commerce business structures and risks, as well as patterns and trends.

Mr Konza noted that the broader digital economy is also being addressed through the ATO's four-year dedicated compliance program to address International Structuring and Profit Shifting (ISAPS), which continues to focus on companies that have undertaken international restructures or have significant levels of cross-border related party arrangements. The ATO is currently investigating 86 multinationals over their tax planning arrangements.

Another ATO compliance initiative currently underway is the internal review of the effectiveness and efficiency of the ATO's Advance pricing arrangement (APA) and Mutual Agreement Procedure (MAP) programs. The ATO wants to replicate the advantages of early engagement in the rulings program to streamline APAs, especially in the information gathering stage.

- **BEPS Action item 2 – hybrid mismatches:** Although the ATO has a number of audit cases involving potential hybrid instrument and entity mismatch arrangements, Mr Konza noted Australia does not currently have anti-hybrid mismatch rules (hybrid mismatch arrangements seek to exploit the cross-border tax treatment of financial instruments or entities creating a mismatch in tax outcomes). He said the ATO is currently seeking feedback from its operations teams to identify and consolidate examples of hybrid mismatch in order to establish the level of risk, before identifying any potential action required.

Mr Konza indicated that both the ATO and Treasury support the approach that the rules should only apply to deliberate mismatches (for example, related party and structured arrangements) and exclude unintended mismatches and any recommendations made dealing with hybrid mismatch arrangements will need to be considered in light of work already underway in Australia on related anti-avoidance measures (e.g. the Board of Taxation reviews into the debt/equity rules, with recommendations due to Government in March 2015 and the thin capitalisation arm's length debt test, with recommendations due in December 2014).

- **BEPS Action item 5 – counter harmful tax practices:** Mr Konza noted that Australia has been involved in the Forum on Harmful Tax Practices work which is focused on the distortionary influence of taxation on the location of mobile financial and service activities. He said that the ATO has set up an Integrated Tax Design team to blueprint and implement the OECD's compulsory exchange of tax rulings initiative by the end of this calendar year.

- **BEPS Action item 6 – prevent treaty abuse:** Mr Konza said that Australia is supportive of the work in developing internationally agreed anti-treaty abuse rules that all countries can apply. He noted that while a minimum standard would help ensure treaty shopping and other treaty abuses were not possible, jurisdictions would have the flexibility to include the most appropriate instrument to their situation. Mr Konza said that the ATO has a strong interest in the development of a Principal Purpose test (PPT) because of the difficulties in applying the general anti avoidance provisions of Part IVA of the *Income Tax Assessment Act 1936* to complex offshore arrangements. According to Mr Konza, both the ATO and Treasury are conscious to ensure any proposed anti-treaty abuse rules do not restrict the ability for cross-border trade and investment both in and out of Australia, and that they only deal with instances of intended treaty abuse.
- **BEPS Action item 8 – transfer pricing of intangibles:** Action item 8 seeks to assure that transfer pricing outcomes are in line with value creation in regard to intangibles. Mr Konza said the ATO supports the OECD's stance against artificial profit shifting to no or very low tax jurisdictions, mainly where there is a separation between the location of the return on the intangible and the location where the economic activities take place and value is created. However, any Governmental consideration of law change would be in the context of new transfer pricing laws under Division 815 of the *Income Tax Assessment Act 1997* (ITAA 1997).
- **Action item 13 – re-examine transfer pricing documentation:** Mr Konza noted that the OECD has released the 2014 Guidance on Transfer Pricing Documentation and Country-by-Country (CbC) reporting which recommends a two-tiered approach, including a master file of standardised information relevant to all multinational enterprise (MNE) group members, and a local file containing material transactions referable to the local taxpayer. He said the ATO is supportive of CbC reporting as an important transparency measure but the ATO is also conscious of the balance required between information that is useful to tax administrations, maintaining confidentiality, and ensuring requirements do not cause excessive compliance costs for taxpayers. The ATO is currently reviewing the impact of CbC reports on its administrative and compliance products, to see how they would operate together and to minimise these risks. Other issues being considered include the inclusion of a materiality threshold (i.e. a minimum global MNE turnover before being obliged to report), and the best mechanism for sharing the reports.
- **Broader transparency issues:** Mr Konza noted that the implementation of the Common Reporting Standard (CRS), endorsed by the G20 Finance Ministers in February 2014, is a fundamental shift in data sharing and utilisation. Australia intends to implement the CRS in a staged process from 1 January 2017, subject to further consultation with financial institutions and a final Government decision on implementation. Mr Konza said that the global transparency measures are supported by the ATO's domestic compliance approaches including the international dealings schedule, reportable tax positions disclosures, Project DO IT, and the reporting of large company financials which will require the ATO to publish limited information about the tax affairs of corporations with a reported total income of \$100 million or more – the first data is expected to be made publicly available on the ATO website in late 2015.

Bill awaiting Royal Assent: [Tax and Superannuation Laws Amendment \(2014 Measures No. 4\) Bill 2014](#) (which includes amendments to the thin capitalisation rules and introduces new rules governing the tax treatment of distributions and non-share dividends received from foreign companies and new integrity measures in respect of the capital gains tax (CGT) provisions applying to non-residents) has passed both Houses of Parliament and is now awaiting Royal Assent.

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Business tax

Lodgment exemption for MRRT returns: In the light of the repeal of the MRRT (refer above), the following legislative instruments were registered on 24 September 2014 which exempt certain entities from having to lodge an MRRT return:

- [large volume non-payers](#) for the 2014 or 2015 MRRT years where:
 - the entity is required to lodge an MRRT return for that MRRT year
 - the entity did not pay an MRRT instalment in respect of any instalment quarter during that MRRT year, and
 - the Commissioner has made a determination, in writing, that the entity is a large volume non-paying entity for that MRRT year
- [low volume non-payers](#) for the 2013, 2014 or 2015 MRRT years where the entity:
 - is required to lodge an MRRT return for that MRRT year
 - did not pay an MRRT instalment in respect of any instalment quarter during that MRRT year, and
 - was not a 'major producer' as defined in the legislative instrument for any of the 2013, 2014 or 2015 MRRT years.

Both legislative instruments took effect on 25 September 2014.

Progress of legislation:

- [Tax and Superannuation Laws Amendment \(2014 Measures No. 5\) Bill 2014](#): This Bill (which includes amendments to reduce the tax offset available under the research and development tax incentive) was introduced into the Senate on 25 September 2014
- [Customs Amendment \(Korea-Australia Free Trade Agreement Implementation\) Bill 2014](#) and [Customs Tariff Amendment \(Korea-Australia Free Trade Agreement Implementation\) Bill 2014](#): These Bills were passed by the House of Representatives on 25 September 2014 and will now move to the Senate. The Senate Legal and Constitutional Affairs Legislation Committee [report](#) on these Bills, released on 24 September 2014, has recommended that the Bills be passed. The legislative program for the Senate indicates that these Bills are scheduled for debate in the Senate this week.

Report – tax practices of ASX 200: On 29 September 2014, the United Voice and the Tax Justice Network Australia released a report, [Who Pays for Our Common Wealth? Tax Practices of the ASX 200](#) which examines taxes paid over the last decade by the top 200 companies on the Australian Stock Exchange.

The report identifies the following measures as signs of tax aggressiveness: secrecy jurisdiction subsidiaries, effective tax rates, debt and transfer pricing. The report contains various lists including a company-by-company list of ASX 200 groups showing:

- number of subsidiaries in “secrecy jurisdictions”, and
- average annual “effective tax rates” (ETR).

Key findings in the report:

“The research presented here suggests that the tax planning activities of the ASX 200 allow Australia’s largest publicly listed companies to avoid up to an estimated **\$8.4 billion in corporate tax annually**.

Other key findings on ASX 200 companies include:

- nearly one-third have an average ETR of 10% or less
- 57% disclose having subsidiaries in secrecy jurisdictions, [and] a combined total of 1,078 disclosed subsidiaries registered in secrecy jurisdictions, and
- 60% report debt levels in excess of 75% of equity, suggesting that high levels of debt may artificially lower taxable profits.”

Recommendations in the report:

“The Australian Government should:

- Require large corporations to provide more public disclosure and transparency
- Increase fines for tax evasion and extend laws to effectively cover the full range of corporate tax avoidance strategies
- Eliminate or restrict the use of stapled securities for tax arbitrage, according to global norms
- Ensure that the Australian Tax Office is adequately funded and staffed
- Lead the G20 to adopt tough and effective global rules to combat corporate tax dodging.”

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Employment taxes

Employee share schemes – ‘indeterminate right’: The ATO has released Draft Tax Determination [TD 2014/D16](#) which sets out the Commissioner’s preliminary view that where a right to acquire a beneficial interest in a share is granted subject to shareholder approval and the employee acquires only a right to have the matter put to the shareholders and nothing more, that right is not an ‘indeterminate right’ within the meaning of section 83A-340(1) of the ITAA 1997.

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Individuals and family groups

CGT exemption for compensation and insurance – exposure draft: On 23 September 2014, the Government released [exposure draft legislation](#) to give effect to minor amendments to the operation of the capital gains tax (CGT) provisions in the *Income Tax Assessment Act 1997*. Broadly, the proposed amendments:

- Ensure that a CGT exemption is available to trustees and beneficiaries who receive compensation, damages or certain insurance proceeds
- Ensure the CGT exemption is available to a trustee of a complying superannuation entity for certain insurance policies relating to illness or injury.

This measure was originally announced by the former Government in the [2012-13 Federal Budget](#) and on 14 December 2013, the Coalition Government [announced](#) it would proceed with this measure.

Generally, the amendments are proposed to apply to CGT events happening in the 2005-06 and later income years. However, the amendments relating to insurance policies concerning payments made by trustees (other than trustees of a complying superannuation entity) to beneficiaries are proposed to apply to CGT events happening after the day of Royal Assent.

Submissions on the exposure draft are due by 21 October 2014.

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Superannuation

Superannuation fund mergers – exposure draft: On 23 September 2014, the Government released [exposure draft legislation](#) to ensure that where an individual's superannuation benefits are involuntarily transferred from one superannuation plan to another without their request or consent, the individual will remain in the same taxation position as if the transfer had not occurred.

In addition, the amendments propose to remove the need for the provider of the original superannuation plan to provide a roll-over benefit statement to each former member, depositor or account holder in these circumstances.

This measure was originally announced in the former Government's [Mid-Year Economic and Fiscal Outlook 2012-13](#) and on 14 December 2013, the Coalition Government [announced](#) it would proceed with this measure. The amendments are proposed to apply in relation to superannuation benefits paid on or after 1 July 2015.

Submissions on the exposure draft are due by 20 October 2014.

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Indirect taxes

GST – meaning of 'passed on' and 'reimburse': The ATO has released Draft GST Ruling [GSTR 2014/D4](#) which sets out the Commissioner's preliminary view on the meaning of the terms 'passed on' and 'reimburse' for the purposes of determining whether section 142-10 of the *A New Tax System (Goods and Services Tax) Act 1999* applies to an amount of excess GST.

GST – motor vehicle incentive payments – final GST Ruling GSTR 2014/1 scheduled for release on 1 October 2014: This final GST Ruling will finalise draft [GSTR 2014/D1](#) which sets out the Commissioner's preliminary view on the goods and services tax (GST) consequences of incentive payments made by motor vehicle manufacturers, importers and distributors to motor vehicle dealers, applicable to tax periods starting on or after 1 May 2014.

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International tax

Tax agreements bill relating to Switzerland treaty receives Royal Assent: On 24 September 2014, [International Tax Agreements Amendment Bill 2014](#) received Royal Assent. This Bill amends the *International Tax Agreements Act 1953* to give the force of law in Australia to the revised [double tax agreement](#) between Australia and Switzerland and its Protocol which was [signed](#) in Sydney on 30 July 2013.

Highlights of the new treaty are:

- The definition of “person” includes a trust
- The definition of “permanent establishment” no longer includes assembly projects
- The default withholding tax rate on dividends is limited to 15%, and reduced as follows:
 - 0% for inter-corporate dividends on non-portfolio holdings where the recipient holds more than 80% of the distributing company (subject to certain conditions)
 - 0% for dividends beneficially owned by a body carrying out government functions (including a central bank), complying Australian superannuation funds and tax-exempt Swiss pension schemes that have holdings not exceeding 10% in the distributing company, and
 - 5% for inter-corporate dividends on other non-portfolio holdings of at least 10%
- The withholding tax rate on interest is limited to 10%, but reduced to nil for interest derived by an unrelated financial institution resident in the other country, a body carrying out government functions (including a central bank), complying Australian superannuation funds and tax-exempt Swiss pension schemes
- The withholding tax rate on royalties is limited to 5%.

The Protocol contains a general anti-abuse rule to disallow treaty benefits if one of the principal purposes of a person in creating or assigning property or rights in respect of which income was paid, or in becoming a resident of Australia or Switzerland, was to take advantage of treaty benefits.

Further details are available in the [latest edition](#) of the Deloitte World Tax Advisor.

BEPS – Deloitte UK comments on OECD Action 1 – Digital Economy: Deloitte UK has issued a Business Tax Briefing discussing the paper released by the OECD Digital Task Force (Task Force) on [BEPS Action 1: Addressing the Tax Challenges of the Digital Economy](#). The OECD paper concludes that there is no separate digital economy, distinct from other more traditional areas, and does not recommend a specific separate digital tax regime at this stage. Instead, the Task Force recognises that work being undertaken by the OECD in relation to other BEPS areas may address concerns in relation to the digital economy, notably the work on permanent establishments and transfer pricing of intangibles. The OECD will consider the attribution of profit to permanent establishments or the transfer pricing profit split methodology for digital businesses, in particular where significant people functions exist in countries other than the market (customer) country – [click to view the Deloitte UK Business Tax Briefing](#).

BEPS – OECD supporting developing countries to tackle BEPS issues: On 22 September 2014, the OECD [reported](#) on the [mandate](#) it has received from the G20 following the G20 Finance Ministers and Central Bank Governors meeting on 20-21 September 2014 to develop toolkits to support developing countries addressing base erosion and profit shifting (BEPS) and to launch pilot projects to

assist such countries to move towards automatic exchange of information.

This mandate, given to the OECD and its Global Forum on Transparency and Exchange of Information, comes in response to two reports to the G20 Development Working Group:

- a [Report](#) on the Impact of Base Erosion and Profit Shifting in Low Income Countries (Part 2), and
- a [Roadmap](#) for developing country participation in the new global standard for the automatic exchange of information between jurisdictions.

The OECD will report to the G20 Leaders in November 2014 on its plan to deepen the involvement of developing countries in the OECD/G20 BEPS project and ensure that their concerns are addressed.

World Tax Advisor (WTA): The latest edition of the Deloitte WTA highlights the release by the OECD on 16 September 2014 of the first set of BEPS deliverables and provides links to various resources prepared by member firms in the Deloitte network. Click to view the [World Tax Advisor](#), the [World Tax Advisor archive](#), or [subscribe](#).

Dbriefs Bytes: Deloitte Dbriefs Bytes is a short weekly video summary of the significant international tax developments impacting the Asia Pacific region – click to view the latest [Dbriefs Bytes](#).

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