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Banking on tax

Focusing on the core issues

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Articles:

Uncertainty in proposed changes to the OBU regime

The ATO and Government perceived that taxpayers were "shifting their domestic banking activities and profits into offshore banking units ('OBUs'), rather than attracting new mobile activity". The choices considered by the Government to deal with these perceived practices were:

- Terminate the OBU concession or
- Amend the OBU provisions to address arrangements which the Government considered to be outside the policy intent of OBUs.

The Government appears to be committed to the OBU regime; however, it proposed in the 2013 Budget that from 1 July 2013:

- Dealings between an OBU and a related party would be treated as ineligible for the OBU concession
- Dealings between OBUs would be treated as ineligible for the OBU concession
- The current list of eligible OBU activities would be "refined".

In the 2013 Budget, the Government stated that it would consult with industry to address concerns with the allocation of expenses between OBU and non-OBU activities and that it would also consult on issues raised in 2009 by the Australian Financial Centre Forum's report, "*Australia as a Financial Centre: Building on our Strengths*" (also known as 'the Johnson report').

Basically, the issues raised by the Johnson report were:

- Clarity should be provided around whether taxpayers had a choice to book transactions in either the OBU or the domestic bank
- The list and description of eligible OBU activities had become out of date and unclear and needed to be modernised
- The complexity and slowness associated with applying for OBU status should be reviewed and streamlined.

In June 2013, Treasury issued a discussion paper titled "*Improving the Offshore Banking Unit regime*", inviting submissions on the changes proposed in the Budget and the issues raised in the Johnson report. Treasury subsequently met with industry representatives in July 2013.

With the Government currently in caretaker mode, a number of important industry issues remain unresolved.

The commencement date for the proposed changes to the OBU regime set out in the Budget papers has already passed and there is no legislation or other guidance on how the proposed changes may, in fact, apply (or how the proposed changes may be modified based on the consultation undertaken with industry).

Issues that require urgent attention include, firstly, the proposed exclusion of related-party dealings from the OBU regime. This raises an obvious issue – what does “related” mean? However “related” is ultimately defined, numerous practical issues will arise, given the complexity of global financial institutions and the sophisticated manner in which they deal with various risks.

Secondly, the effective banning of inter-OBU transactions seems contrary to the policy of the OBU provisions. The result of such a ban may be to move one side of an OBU transaction outside of Australia (with a consequential impact on local OBU liquidity). For example, existing inter-OBU transactions may instead be undertaken with an offshore counterparty. Prior to 1 July 2013, if an OBU had surplus funds to invest, it might have placed those funds on deposit with another OBU. Post 30 June 2013, those funds may be deposited with an offshore counterparty.

Finally, the current list of eligible OBU activities is to be refined. No details have been provided on what the refined list of OBU activities might look like. Hopefully, the list of OBU activities will be principle based (say, similar to the way that “financial arrangements” are defined in Division 230), rather than a list of specific transactions.

If the Government is still of the view that changes need to be made to the OBU regime, then those changes should be targeted and specific in order to deal with identified issues, rather than a blanket approach, which could impair legitimate OBU activities.

Proposed changes to thin capitalisation and section 25-90 – the effect on ADIs

In the 2013 Budget papers, the Government announced changes to thin capitalisation (‘thin cap’) requirements for ADIs and also announced that sections 25-90 and 230-15(3) of the *Income Tax Assessment Act 1997* would be repealed. The changes to the thin cap requirements for ADIs need to be considered in the context of the repeal of sections 25-90 and 230-15(3) (debt deduction incurred in deriving foreign-sourced, non-assessable non-exempt income).

Basel III capital requirements and thin cap changes

From 1 January 2013, new capital standards started to be phased in under Basel III. Tier 1 capital rose from 4 per cent to 6 per cent and, ultimately, Common Equity Tier 1 capital will rise from 3 per cent to 7 per cent in 2016. Tier 2 capital is no longer classified as upper or lower, and has been reduced from a maximum of 4 per cent of total capital to 2 per cent of total capital.

In Australia, returns on Tier 1 capital are not deductible, but returns on Tier 2 have been deductible. With the changes to the capital ratios under Basel III, particularly the compression of Tier 2 capital, deductible regulatory capital for ADIs will be progressively reduced.

Consistent with the Basel III changes, the 2013 Budget papers stated that the minimum capital requirements for ADIs (for thin cap purposes) would be increased from 4 per cent to 6 per cent. However, the thin cap change would only apply from 1 July 2014.

The consequence of the proposed thin cap change is that if an ADI is at the current thin cap limit, the proposed change would result in a 2 per cent disallowance of interest. Furthermore, if the Government also adopts the Basel III change recommended for 2016, then the interest disallowance would increase to 4.5 per cent.

Thin cap changes in the context of the proposed repeal of sections 25-90 and 230-15(3)

Historically, if an ADI had equity capital equal to its controlled foreign entity equity (CFE Equity) and 4 per cent of its Australian assets, thin cap generally wasn’t an issue. Now, with the changes to thin cap, but more importantly, the proposed repeal of sections 25-90 and 230-15(3), a series of problematic outcomes could arise (although the outcomes may not be symmetrical for inbound compared to outbound ADIs).

Take a simple example. Assume half of the assets of an ADI are CFE Equity and the other half are Australian assets. Furthermore, assume that all assets are debt funded, except for the new minimum capital requirement amount of 6 per cent.

Historically, the result would have been that half of the interest expense would have been disallowed under the thin cap provisions, as half of the assets were CFE Equity. In the future, on the facts of this simple example, half of the interest would be disallowed because the CFE Equity is debt funded, and the other half of the interest would be disallowed under the thin cap provisions as the Adjusted Average Equity Capital would be significantly less than the Minimum Capital Amount.

Post the proposed repeal of sections 25-90 and 230-15(3), the limitations on deductibility of interest would be determined by both the thin cap provisions and sections 8-1(2)(c) and 230-30(3). To determine the deductibility of interest under sections 8-1 and 230-15(3) would require either a tracing of funds or some other method to apportion interest expense between assessable income-producing purposes and non-assessable income-producing purposes.

The tracing of funds to determine interest deductibility would seem difficult to justify in a modern economy.

In the absence of any transitional provisions, it will be necessary to undertake an analysis of historical events against a background where records might not have been kept to identify the relevant source of funds.

Finalised hedge accounting requirements

The hedge accounting requirements in IAS 39 have been criticised by some for having too many rules which are not connected with the entity's risk-management activities. Not only have the complex rules in IAS 39 made it difficult for entities to apply hedge accounting, but IAS 39 has also made it difficult for entities to explain the results of applying hedge accounting in the context of the entity's business and its risk-management activities.

The IASB undertook a project to address these concerns and released the general hedge accounting exposure draft ED/2010/13 Hedge Accounting in the fourth quarter of 2010, followed by a 'review draft' of the hedge accounting section of IFRS 9 Financial Instruments, published on 7 September 2012, and dealing with general hedge accounting.

The finalised requirements are expected to be issued in the second half of 2013 and, based on the 'review draft', would represent a significant change to the current hedge accounting approach under IAS 39.

Macro hedging

The macro hedging rules are still being considered and these rules will be critical for banks which generally perform interest rate hedging at a portfolio level. The IASB will consider feedback on the general hedge accounting exposure draft; however, the focus so far has been on understanding different risk-management approaches and initially discussing macro hedging for interest rate risk before extending it to other risks.

At the May 2012 IASB meeting, it was tentatively agreed that accounting for macro hedging would be decoupled from IFRS 9. Accounting for macro hedging is now expected to be issued as a separate standard. The IASB continues to deliberate issues surrounding macro hedge accounting and expects to issue a Discussion Paper in the second half of 2013. The draft general hedge accounting standard permits application of IAS 39 instead of the new hedge accounting model for fair value hedge accounting for portfolio hedges of interest rate risk until the macro hedge accounting project is finalised and becomes effective.

Summary of major changes to hedge accounting

Hedging instruments

- Expansion of the instruments that qualify as eligible hedging instruments
- Reduced profit or loss volatility when accounting for the undesignated time value of an option contract and forward points in a forward contract.

Hedged items

- A risk component is eligible as a hedged item as long as it is separately identifiable and reliably measurable, irrespective of whether it resides in a financial or non-financial item and irrespective of whether it is contractually specified or not
- A hedged item designated in a hedging relationship may include a derivative combined with an eligible non-derivative (sometimes referred to as a 'synthetic exposure')
- Groups and net positions can be designated as hedged items
- Equity investments classified as fair value through other comprehensive income under IFRS 9 are eligible hedged items.

Qualifying criteria for hedge accounting

- The 80-125 per cent offset requirement is replaced by principles-based hedge effectiveness assessment criteria
- Hedge effectiveness assessment criteria are applied prospectively only.

Accounting for qualifying hedges

- Basis adjustment is required when cash flow hedging forecast transactions that result in the recognition of a non-financial item
- A hedging relationship may be amended ('rebalanced') in certain circumstances without causing a discontinuation and redesignation of the hedge (e.g. to change the amount of a hedged item or hedging instrument)
- Once designated, a hedging relationship shall be discontinued only if it is no longer eligible or there is a change in the risk-management objective.

Hedging credit risk

- Expansion of fair value option accounting to accommodate credit risk hedging.

Disclosures

- More disclosure requirements that require the hedging strategy to be explained for each type of hedge and for each category of risk, supplemented with quantitative disclosures of the effect of hedge accounting on the financial statements.

Transition

- Prospective application with limited exceptions (e.g. time value of options and forward points amortisation).

Summary of retained features of hedge accounting

- Applying hedge accounting remains a choice
- Terminology from IAS 39 is retained in many cases (e.g. hedged items, hedging instruments, fair value hedges, cash flow hedges, hedge ineffectiveness, etc.)
- Fair value, cash flow and net investment hedge accounting alternatives are retained
- With the exception of hedge ineffectiveness related to hedges of equity investments designated as at fair value through other comprehensive income, all hedge ineffectiveness is recognised in profit or loss
- The "lower of" test continues to apply for the equity component of cash flow hedges
- General restriction on hedge accounting with written options is retained.

What's next?

The IASB intends to publish a final standard during the second half of 2013. When finalised, the standard was expected to be mandatorily applicable from 1 January 2015. However, during the July IASB meeting, the board proposed a further delay in the mandatory application date for IFRS 9. The standard will still be available for early adoption.

Taxation of financial arrangements (TOFA)

The changes to hedge accounting may have implications for banks that have elected to use the hedging method under the TOFA provisions in Division 230 of the *Income Tax Assessment Act 1997*. As set out in *Issue 6 of Banking on Tax*, the hedging method requirements in the TOFA provisions and the Explanatory Memorandum are linked to the current accounting standards and guidance.

> Changes to the TOFA hedging method may be required to ensure that it continues to operate as intended following the changes to the accounting standards outlined above.

Submissions on the discussion paper, "*Improving the operation of the tax hedging provisions*", closed more than 12 months ago on 25 April 2012. The Government has not yet issued a response. The amendments to the hedging method in *Tax and Superannuation Laws Amendment (2013 Measures No 2) Act 2013* did not address the issues raised in the discussion paper. So, it is unclear whether or not Treasury is currently considering changes to the hedging method TOFA provisions as a result of the changes to hedge accounting. Until there is some clarity on possible changes to the TOFA hedging provisions, banks will need to consider the tax impacts of the accounting changes and monitor developments to understand any differences between accounting and tax, and to contribute to the question of whether the bank should adopt the accounting standard early.

ATO disclosure of tax information

A significant issue for major banks and financial institutions in Australia is the new regime that will result in the publication of the annual tax and income amounts of large corporations. On 29 June 2013, *Tax Laws Amendment (2013 Measures No. 2) Act 2013 ('the Act')* received Royal Assent. The Act requires the Commissioner to make public specific information relating to the tax affairs of all corporate tax entities that have a reported total income of $100 million or more.

The information to be made publically available includes the taxpayer's name, ABN, total income, taxable income and tax payable. The total income is based on gross (accounting) income currently reported at item 6(S) in the company tax return, not amounts in the financial statements. For entities with a tax loss, the Commissioner will not publish the quantum of the loss.

The release of this information is likely to raise questions from media, academia, social commentators and politicians if the reported levels seem low compared to reported company profits. Based on recent experience in the UK, US and here in Australia, the debate can be heated and emotional, particularly when based on a lack of context or understanding as to how the amounts tie together.

> Australian banks will need to be prepared to respond to the debate or risk reputational damage and are well advised to develop a clear communication strategy before the new regime commences in 2014.

Similar disclosure rules are also being introduced in other jurisdictions, with the European Commissioner for the Internal Market and Services recently announcing that profit and tax reporting rules for banks would be extended to large companies and groups. In addition, the OECD, G8 and G20 have all indicated their support for further tax disclosure rules, meaning that the debate and commentary can easily develop momentum regionally and globally.

ATO 2013-14 compliance program released

On 16 July 2013, the ATO released its compliance program for the coming financial year: *Compliance in focus 2013-14*. It sets out the Commissioner of Taxation's strategies and target areas to manage the most significant risks to the tax and superannuation systems for the next 12 months. In line with the Commissioner's recent publications, this year's compliance program is more concise than in prior years and is designed to be updated throughout the year in response to emerging risk areas.

The Commissioner's focus for 2013-14 will have an impact on banks and financial institutions with these issues:

- **Profit shifting and e-commerce:** In line with the Government's recent focus on cross-border dealings involving multinationals and 'base erosion and profit shifting', the ATO will be paying close attention to:
  - Multinational entities that have inappropriate pricing of international related-party transactions
  - Multinational entities that have undertaken complex restructures, including those with offshore marketing or service hubs in low-tax jurisdictions and
  - The ATO also indicated that it will be actively engaging and working with other jurisdictions on multilateral compliance action
- Compliance with the **Offshore Banking Unit** provisions
- **Misuse of trusts,** including an additional $67 million in funding being allocated to the Trusts Taskforce
- Incorrect application of the **consolidation cost-setting rules** when an entity joins or leaves a group.

Large banks may be denied access to R&D tax incentive

The 2013-14 Budget papers reconfirmed previous announcements that, with effect from 1 July 2013, large Australian banks were expected to be denied access to the R&D tax incentive. This change was estimated to provide a gain to revenue of $1.1 billion over the four-year forward estimates period and, given it would likely affect approximately 14 large groups, the total impact for the Big Four banks could be in the region of $400M-$500M.

The proposed new test would mean that multinational companies and groups with assessable income in Australia of $20 billion or more would no longer be eligible to make a claim for the R&D incentive after the income year ended 30 June 2013, removing access to an additional 10 per cent net tax benefit available in respect of eligible R&D expenditure. Notably, the new test would still allow multinational groups with a turnover of more than $20 billion, but less than $20 billion of assessable income in Australia, to access the Australian R&D tax incentive.

Submissions on exposure draft legislation were made on the basis that there was a real concern that Australian-based multinational groups, including large banks, would relocate their R&D activities to another jurisdiction.

Submissions closed on 20 May 2013, but largely unchanged draft legislation intended to enact the proposed measure was introduced into Parliament on 28 June 2013 in *Tax Laws Amendment (2013 Measures No 4) Bill 2013.* However, with the calling of the federal election and the proroguing of Parliament, this bill has now lapsed. The result of the election may determine whether this significant change proceeds in the next Parliament. Given the need for all sides of the political spectrum to secure tax expenditure savings, and the Coalition's need to fund their announced company tax rate cuts, if elected, the proposed change might well proceed.

Recent tax changes in New Zealand

There have been a number of recent tax changes in New Zealand. Some changes have followed consultation with taxpayers before proceeding through the law-making process. Other changes have been quite swift and subtle, by being included in a bill or enacted without much policy discussion. The changes outlined below should be on the tax management plan of each bank with operations in New Zealand, so that banks can participate in discussions to help educate policy-makers, and so they are cognisant of potential tax changes that might be enacted without a consultative process.

Thin capitalisation for securitisation trusts

The Inland Revenue released two papers on thin capitalisation, one in January 2013 and another in June 2013. As banks have their own thin capitalisation regime, it was not anticipated that these papers should impact banks.

However, part of the focus has been to extend the thin capitalisation rules to apply to trusts. In the January paper, submissions were made that this would make securitisation trusts subject to thin capitalisation –

which would be inappropriate without further changes to reflect the heavily geared nature of these structures. The Inland Revenue specifically considered this, and responded in its June paper clearly stating that it thought it was appropriate for thin capitalisation to apply to securitisation trusts, and that it was more a matter of how the rules should apply. Further submissions are being made on this change.

Given the Inland Revenue's policy response, submissions are likely to focus on how the rules should apply to securitisation transactions.

Normally, securitisation trusts would benefit from the onlending concession. However, there will be assets to which the onlending concession won't apply, for example, in-the-money derivatives and trade debtors (and other excepted financial arrangements).

The manner in which these rules are proposed to work could also present some issues. Thin capitalisation normally works on the basis of a taxpayer's 'New Zealand group'. However, for a trust, the group is deemed to include only the trust. There are restrictions on the amount of 'associated party' debt that the trust would be allowed, which could have a direct impact on any equity/credit enhancement that an originator provides to the securitisation trust. Concerns would also arise if the trust deed were structured such that the funding bank was also associated with the trust.

All banks should review their securitisation model and any legacy deals. A significant concern is the lack of discussion to date about transitional provisions. It could also become quite problematic if a trust is disallowed an interest deduction, but there is no flexibility in the deed.

Removal of financial arrangements election for excepted financial arrangements

Many banks have been unaware of the ending of the election for certain excepted financial arrangements (e.g. trade debtors, leases, etc.) to be treated as financial arrangements. This change became law on 17 July 2013 as part of the *Taxation (Livestock Valuation, Assets Expenditure, and Remedial Matters) Act*.

The amendment was aimed at the perceived mischief of a taxpayer's deduction of the cost of a valuable supply contract. This deduction was achieved by making an election for the contract to be treated as a financial arrangement, so that only the net consideration was recognised for tax purposes.

These changes may have an unintended impact for banks that have acquired excepted financial arrangements. Many banks will have acquired 'non-traditional' debt (e.g. trade debtors or rent receivables) and followed their IFRS accounting treatment for tax purposes. There would be no reason to distinguish this from other 'loan' books that are acquired. In order to follow the accounting treatment, those debts need to be within the financial arrangement rules. The removal of the election could mean that there are some complicated tax calculation adjustments that will be required. There could also be a timing advantage that arises – if the correct answer is to recognise any gain/interest on a realised basis.

A last-minute exemption was introduced for debt-factoring companies, but it is unclear whether it should apply to banks. Unfortunately, if 'collections' is not a part of the bank's business (e.g. it is outsourced), then the exemption would be difficult for a bank to apply. In our view, there is a case for an exemption for banks too, but this would now require a further law change to be introduced, given that the removal of the election has been enacted.

The change also brings into focus a grey area of the law, as to what constitutes a financial arrangement, compared to what constitutes acquiring an excepted financial arrangement.

Transactions should be considered carefully, as this distinction is difficult to apply, with only a few examples having been considered. This is an area in which the industry might wish to lobby the Inland Revenue to clarify its views.

Bad debt deduction limitation for secondary purchasers of debt

The *Taxation (Annual Rates, Foreign Superannuation, and Remedial Matters) Bill* will introduce a new bad debt limitation for secondary purchasers of debt, among other changes to the bad debt rules. This change has highlighted potential flaws in how the bad debt provisions currently interact with the financial arrangement rules and the base price adjustment ('BPA') calculation (which is the 'wash up' when a taxpayer ceases to be party to a financial arrangement).

The mischief that the Inland Revenue saw was 'secondary debt purchasers' who were taking a bad debt deduction for the face value of a loan where they only paid a small amount for it. However, when the detail of the financial arrangement rules and the BPA calculation is overlaid, there are some absurd results. This is because the BPA calculation includes as part of its formula, "the amount remitted by operation of the law" as being income. This will generally be the face value of the debt. The picture becomes clouded as it looks like there is a legitimate policy basis for taxpayers' taking a bad deduction for the face value to offset this BPA income.

The issue is compounded by the Inland Revenue's proposal of retrospective application of the legislation to create deemed income if a taxpayer has taken a bad deduction in previous years that it would not have obtained under these new rules.

Submissions have been made on these points and we expect that there will be a change in approach. However, this could take a number of paths. Banks should be ready with example transactions in hand – and a clear understanding of their technical position – to assist the Inland Revenue to make its determination. The complexity in this area seems unnecessary and our view is that there should be a policy discussion prior to the legislative process – as with the thin capitalisation rules – to agree a sensible approach.

More time to implement FATCA, but broader scope on the horizon

Status of the Australian IGA

Negotiations on an intergovernmental agreement (IGA) between Australia and the US to implement the Foreign Account Tax Compliance Act (FATCA) in Australia, which is based on a Model I IGA, are well progressed. The Australian Treasury is working towards having the IGA available for signing shortly; however, with the calling of the federal election, an IGA will not be able to be signed by Australia until the next government is formed and relevant ministers appointed.

If the IGA is signed by 1 July 2014 (as it is expected to be), the US Treasury and Internal Revenue Service (IRS) would then treat Australia as having an IGA in effect. As such, Australian financial institutions may then follow the IGA, even though the IGA may not have been ratified nor entered into force by enabling legislation in Australia. If it is not signed by that date, then the US Treasury regulations will need to be followed.

Extension of FATCA deadlines

On Friday, 12 July 2013, the IRS released *Notice 2013-43* pushing back the expected date by which the IRS FFI registration portal would open to enable foreign financial institutions (FFIs) to register as a FATCA compliant FFI and obtain a global intermediary identification number (GIIN).

The FATCA registration system was opened and registration guidance provided by the IRS on 19 August 2013 (www.irs.gov/Business/Corporations/FATCA-Registration).

The IRS also extended a number of FATCA compliance deadlines by six months, including those for withholding, onboarding, and pre-existing account remediation requirements.

These extensions will also be applied to current and future FATCA IGAs through the coordination provision included in IGAs. The extensions will therefore be applicable to an Australian IGA.

In light of the extensions announced in Notice 2013-43, financial institutions now have until 30 June 2014 to register with the IRS to comply with FATCA. However, the IRS has advised that registration will need to be finalised by 25 April 2014 in order for the financial institution to appear on the first IRS FFI list (the publicly available list of institutions that have registered with the IRS, which will be published monthly).

Furthermore, a reporting FFI in a country with a Model I IGA (or taken as having a model I IGA in effect) will still need to register with the IRS, but will register as a deemed compliant FFI. Model I financial institutions will have further time to register and obtain a GIIN, as they need to ensure that they are included on the IRS FFI list before 1 January 2015.

Release of UK guidance

On 31 May 2013, the UK released regulations and guidance notes for the implementation of FATCA by UK financial institutions and updated the regulations and guidance in August. The UK regulations adopt a number of provisions and definitions from the final US regulations. While the UK regulations are brief (16 pages in length), the guidance notes provide 142 pages of further details for implementation.

A key area for Model I IGA FFIs is the requirement for account-holders to provide self-certification as to their US status. The UK guidance in sections 4.8 to 4.13 sets out guidance on self-certification for UK financial institutions. Many aspects are not prescribed, such as the format and wording of the self-certification, provided it confirms the account-holder's country (or countries) of tax residency (for all account holders, not just US persons) and whether the account-holder is a US citizen. However, a number of examples are provided.

Australian banks may find the UK guidance useful for FATCA implementation as detailed Australian guidance is unlikely to be issued in the short term to assist banks to determine changes required to their various onboarding processes and systems.

More FATCA-like regimes on the horizon

The OECD released a report on 18 June 2013 on the steps needed to create a fairer and more transparent global tax system (prepared at the request of the G8). The report references FATCA and IGAs in providing a framework for multilateral exchange of tax information. Upon entering into an IGA, the signing country agrees (in article 6 of the Model I IGA) to work towards the development of a common reporting and information-exchange model.

On 21 July 2013, Treasurer Chris Bowen said Australia would join a scheme modelled on FATCA, which would require Australian banks to reveal financial information about their customers to the ATO, so it can be shared with tax authorities initially in Britain, France, Germany, Italy and Spain when investigating cross-border tax evasion.

Australian banks should expect a broadening scope of FATCA-like regimes in the future.

This should be taken into account when implementing FATCA to ensure that changes to systems and processes are not necessarily US specific, so as to minimise the need for future changes (e.g. asking an account holder to advise regarding their tax residency, rather than simply asking if they are a US tax resident or US citizen).

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