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Tax highlights

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Key developments this week

Is the Murray report a road-map to the Tax White Paper? The Financial System Inquiry final report was handed down on 7 December 2014. Amidst the focus on the wider financial system, there were a number of key observations on the tax system. The Report concluded that unless they are already under active Government consideration, the tax issues listed below should be considered as part of the Tax White Paper process.

Dividend imputation: The case for retaining dividend imputation is less clear than in the past (the benefits of dividend imputation, particularly in lowering the cost of capital, may have declined as Australia's economy has become more open and connected to global capital markets). To the extent that dividend imputation distorts the allocation of funding, a lower company tax rate would likely reduce such distortions. Dividend imputation acts as a subsidy to domestic equity holders, including superannuation funds, and provides little benefit to non-residents. Refundable franking credits (e.g. for superannuation funds) were also seen to be an issue to be reconsidered.

Goods and services tax (GST): GST is not levied on most financial services. This may not be the optimal model to ensure effective delivery of financial services. Due to higher prices (financial service providers cannot claim input tax credits and so pass the GST cost on), households could be over-consuming financial services, and because businesses cannot claim input tax credits, businesses may be consuming fewer financial services than otherwise would be the case.

Negative gearing and capital gains tax: Housing is a potential source of systemic risk for the financial system and the economy. Negative gearing and the capital gains tax discount are likely leading to a less than efficient allocation of funding in the economy. All else being equal, the tax benefit is larger for individuals on higher marginal tax rates. The tax treatment of investor-housing tends to encourage leveraged and speculative investment.

Tax treatment of superannuation – tax concessions: Tax concessions in the superannuation system are not well targeted to achieve the provision of retirement incomes. This increases the cost of the superannuation system to taxpayers and increases inefficiencies arising from higher taxation elsewhere in the economy, and the distortions arising from the differences in the tax

treatment of savings. A whole chapter of the report is dedicated to superannuation and retirement incomes.

Tax treatment of superannuation – differentiated tax rates on earnings: Earnings are taxed at 15 per cent in the accumulation phase, but are untaxed in the retirement phase. Aligning the earnings tax rate between accumulation and retirement would reduce costs for funds, help to foster innovation in whole-of-life superannuation products, facilitate a seamless transition to retirement and reduce opportunities for tax arbitrage.

Interest withholding tax: Withholding taxes may affect the funding decisions of Australian entities and place Australia at a competitive disadvantage internationally. Lower, more uniform withholding tax rates would unwind these distortions.

Differentiated tax treatment of savings: The tax system treats returns from some forms of saving more favourably than others. For example, interest income from bank deposits and fixed-income securities are taxed relatively heavily. A more neutral tax treatment would likely increase productivity.

Tax treatment of Venture Capital Limited Partnerships (VCLPs): Simplifying the tax rules for VCLPs and streamlining Government administration of the regime would reduce barriers to fundraising.

Tax treatment of funds management vehicles: In 2009, the Johnson Review (*Australia as a financial centre: Building on our strengths*) recommended changes to the tax treatment of funds management. Typically, offshore investors require an investment vehicle that allows flow-through of any tax liabilities from the vehicle to the end investor. A broader set of appropriate vehicles would better facilitate the management of foreign funds.

Research and development (R&D) tax incentive: Submissions broadly support the regime, although some argue that more frequent access to tax offsets would help alleviate firms' cash flow constraints, particularly for new ventures.

Tax treatment of non-operating holding companies (NOHCs): A NOHC structure may provide financial institutions with greater flexibility in their activities. For regulators, a NOHC structure may facilitate supervision and resolution. However, restructuring carries significant costs for corporate groups, including tax implications. Making a move to a NOHC structure tax neutral would reduce disincentives to adopt this corporate structure.

Duties on insurance: Reducing duties on insurance would assist in dealing with underinsurance.

Miscellaneous tax bill – EDI, superannuation, CGT and tax complaints: On 4 December 2014, Tax and Superannuation Laws Amendment (2014 Measures No. 7) Bill 2014 (the Bill) was introduced into the House of Representatives.

Key amendments proposed in the Bill include:

- **Exploration Development Incentive (EDI)**: the Bill, together with the *Excess Exploration Credit Tax Bill 2014,* introduces an exploration development incentive to encourage

investment in small mineral exploration companies undertaking greenfields mineral exploration in Australia. Australian resident investors of eligible companies will receive an exploration credit in the year following the year in which the company incurs the eligible expenditure where the company chooses to give up a portion of its losses relating to its exploration expenditure in an income year. The total value of the tax incentives available in respect of expenditure in an income year is capped to:
    - $25 million in 2014-15
    - $35 million in 2015-16 and
    - $40 million in 2016-17.

  The incentive is not available for expenditure incurred in income years after 2016-17
- **Transferring the tax investigation function to the Inspector-General of Taxation (IGT)**: the Bill proposes to amend the *Inspector-General of Taxation Act 2003* by transferring the tax investigative and complaint handling function of the Commonwealth Ombudsman to the IGT and merging that function with the IGT's existing function of conducting systemic reviews. This change would provide taxpayers with a specialised complaint handling process for taxation matters and align the systemic review role of the IGT with the correlative powers and functions of the Ombudsman
- **CGT exemption for compensation and insurance**: the Bill proposes to amend the *Income Tax Assessment Act 1997* (ITAA 1997) to ensure that:
    - a capital gains tax (CGT) exemption is available to certain trustees and beneficiaries who receive compensation or damages
    - a CGT exemption is available to trustees of complying superannuation entities for insurance policies relating to illness or injury, and
    - the CGT primary code rule applies to capital gains and capital losses that are disregarded by complying superannuation entities arising from injury and illness insurance policies, life insurance policies and annuity instruments
- **Disclosing tax information relating to proceeds of crime orders:** the Bill proposes to amend the *Taxation Administration Act 1953* (TAA 1953) to allow taxation officers to record or disclose protected information to support or enforce a proceeds of crime order. It also proposes to clarify that all orders relating to unexplained wealth made under a state or territory law would be included in the definition of 'proceeds of crime order'
- **Miscellaneous amendments**: the Bill proposes to clarify that section 44(1A) of the *Income Tax Assessment Act 1936* (ITAA 1936) does not operate for the purposes of determining whether a payment made by a corporate limited partnership is taken to be a dividend under section 94L of the ITAA 1936.

The Bill also includes the proposed legislative provisions in respect of:

- Taxation of excess non-concessional contributions
- Superannuation fund mergers involving involuntary transfers of superannuation benefits.

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Weekly tax news

Business tax

Deloitte Tax Insights – offering comprehensive analysis and implications in respect of the latest tax developments: The following publication is now available on the Deloitte website:

- Your tax affairs in the public spotlight (issue 2) – Recent comments made by the Chair of the Senate Committee conducting the inquiry into corporate tax avoidance may indicate the areas of focus to be examined by the inquiry.

Japan-Australia Economic Partnership Agreement Bills receive Royal Assent: The following Bills which implement the Japan-Australia Economic Partnership Agreement (JAEPA) received Royal Assent on 4 December 2014: Customs Amendment (Japan-Australia Economic Partnership Agreement Implementation) Bill 2014 and Customs Tariff Amendment (Japan-Australia Economic Partnership Agreement Implementation) Bill 2014. For more information, refer to *Tax highlights 3 November 2014.*

Prospective application of ATO view of law – final amended Practice Statement PS LA 2011/27 released: The Commissioner has finalised his amended Practice Statement PS LA 2011/27: Matters the Commissioner considers when determining whether the ATO view of the law should only be applied prospectively. The original Practice Statement PS LA 2011/27 was amended as draft PS LA 2011/27 in July this year following the Macquarie Bank Limited case. The draft Practice Statement was finalised last week with only minor amendments and clarifies the intended operation of the original Practice Statement.

FX hedging transactions and foreign income tax offset limit – final tax ruling scheduled for release this week: Final Tax Ruling TR 2014/7 *Income tax: foreign currency hedging transactions – applying the foreign income tax offset limit under section 770-75 of the Income Tax Assessment Act 1997 and determining the source of foreign currency hedging gains* – scheduled for release on 10 December 2014 (previously issued as TR 2014/D2).

Changes to the Paid Parental Leave (PPL) scheme: In a doorstop interview on 7 December 2014, the Prime Minister confirmed that the Coalition will be restructuring the PPL scheme over the summer with a view to better "target" payments. In the interview, the Prime Minister confirmed that the payment will still be based on real wages, will include superannuation and will continue to be paid for via a levy on large companies. However scheme payments may be diverted into the childcare system, with the possibility that concessions could be provided in respect of in-home care.

The PPL levy was proposed to commence from 1 July 2015, and to apply to companies with taxable incomes in excess of $5 million (large companies). Further, the levy was proposed to be applied only to the portion of taxable income in excess of $5 million. The policy was to pay mothers with 26 weeks of paid parental leave, at their actual wage or the national minimum wage (whichever was greater), plus superannuation capped at an annual income of $100,000. Fathers were to be eligible for two weeks out of the 26 weeks for dedicated parental leave at their actual wage or the national minimum wage (whichever was greater), plus superannuation.

Consultation Hub – list of matters under consultation updated: The ATO has updated its list of matters under consultation. The new matters added to the list or existing matters that have been updated are as follows:

Compliance	Progress
NEW: Understanding sources of taxpayer compliance costs in relation to the ATO's administration of Taxation of Financial Arrangements (TOFA)	Consultation in progress.
Improving the private groups and wealthy individuals client experience with the ATO	UPDATED: A meeting was held on 13 November 2014 with a business association relevant to the market to scope potential co-design/consultation activities.
Trusts	**Progress**
Small business CGT concessions and unpaid present entitlements	UPDATED: At a meeting of Closely Held Trust Working Group on 14 October 2014 members recommended taking a view that achieved symmetry. Their preferred approach was to ensure that UPEs be taken into account as relevant liabilities related to trust assets, and also as relevant (non-excluded) assets of the beneficiary. The ATO is currently analysing whether this approach is available and can be implemented
Alienation of income through discretionary trust partners	UPDATED: During November 2014, external sessions were delivered by senior ATO staff at conferences held by The Tax Institute, BDO and Personal and Corporate Insolvency (P&CI). These sessions have received favourable feedback. As a result of feedback from stakeholders, a short video has been produced to clarify some aspects of the guidelines which have been 'hot spots' in the feedback. This will be uploaded to the ATO's website. A Let's Talk webinar was scheduled for 3 December 2014.
Trustee nil assessments	UPDATED: Members of the Closely Held Trust Working Group have suggested that the ATO's approach to this issue be incorporated into a practice statement. A draft reflecting their suggestions has been prepared and circulated amongst the Group for further comment.
Income tax consolidation	**Progress**
Guidance on the application rules to the rights to future income amendments	UPDATED: TD 2014/D4, TD 2014/D5 and TD 2014/D6 will be finalised and published on 17 December 2014. Further internal discussions are underway to examine the feedback received on TD 2014/D2 and TD 2014/D3.
Indirect taxes	**Progress**
Financial supplies guidance product consultation	UPDATED: Based upon discussions with the Australian Bankers' Association (ABA) and the Australian Financial Markets Association, the ATO accepts that industry would face difficulties in practically applying initial Draft ATO views and is further developing its positions in light of the feedback provided. As a result of consultation GSTD 2014/D4 in relation to

	supplies of brokerage services involving overseas securities or futures has been released. The ATO are currently determining whether further discussion with industry will be required in relation to the development of a GSTR dealing with Foreign Exchange products, which was also the subject of this consultation.
GST refund verification process-potential changes to procedures & improvements to advice products	UPDATED: A preliminary meeting with The Tax Institute has taken place and the ATO are looking to undertake further consultation with industry representatives.
International	**Progress**
Assist in creation of new guidance products as to the application of the new transfer pricing laws (Division 815)	The ATO will next prepare a taxation ruling on consequential amendments under s815-45 and a tax determination to bridge the gap between the old and new transfer pricing law. Another meeting was held on 26 November 2014 to provide an update of the current work on hand.
Assist ATO and Border Protection in identify issues that require a co-ordinated approach in relation to income tax transfer pricing and customs duty	A further video conference meeting was held on 21 November 2014 to discuss issues and suggested options.
NEW: To understand current practices in applying the hedging method in Subdivision 230-E of the ITAA 1997 to a net investment in a foreign operation	Consultation in progress with major financial institutions, energy and resources taxpayers and relevant large industrial taxpayers.
NEW: To understand approach taken by ADIs when attributing equity capital and controlled foreign entity equity to permanent establishments (in relation to the thin capitalisation provisions)	A working group comprising of representatives from the ABA and ATO has been formed. The first meeting of this working group is scheduled was to be held on 3 December.
Superannuation	**Progress**
Superannuation excess contributions tax – contributions reserving	UPDATED: The ATO has provided The Tax Institute with an alternative proposal for review and feedback. Feedback has been received from The Tax Institute. A draft of the form has been sent to relevant SMSF members of the Superannuation Industry Relationship Network (SIRN) for their feedback by 3 December 2014. Any comments will be considered before finalising the form.
Taxation of financial arrangements	**Progress**
Application of the TOFA provisions in Division 230 to repurchase agreements	Consultation in progress.
Miscellaneous	**Progress**
NEW: Design of replacement guidance on the interpretation of section 215-10 of	The first meeting of the ABA-ATO working group on the interpretation of section 215-10 of the ITAA 1997 was due

the ITAA 1997 in relation to when certain non-share dividends paid by Authorised Deposit-taking Institutions (ADIs) are unfrankable	to take place on 8 December 2014. Further industry input will be sought as necessary.
NEW: Scope and examine approaches for dealing with the impact of APRA's new conglomerate rules on thin capitalisation calculations of outward investing ADIs	A working group has been established comprising representatives from the ABA, ATO, and APRA and the first meeting was held on 26 November 2014.

The following matters are currently under consideration to determine if consultation is the best approach to resolve them:

- Closure of etax and mytax
- Tax deductible business travel and travelling allowances – affecting medium term international postings of Australian employees
- Clarification of ATO treatment of 'draft' tax invoices.

Employee share schemes: On 3 December 2014, the ATO released the following final tax determination:

- TD 2014/21: The determination confirms that where a right granted to an employee to acquire a beneficial interest in a share is 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' for the purposes of the employee share scheme rules. The Determination applies to years of income commencing both before and after its date of issue.

Overseas R&D findings to last for the duration of the activity: Innovation Australia has recently released its latest guidance on the R&D tax incentive and of note was the announcement that the ATO and AusIndustry have agreed that Overseas Findings will apply for the duration of the activity. This means that R&D entities that already hold an Overseas Finding for particular ongoing activities need not reapply for those activities after three income years.

By way of background, to include non-incidental overseas expenditures in an R&D claim, the eligible R&D entity must firstly apply for an advance overseas finding (that the relevant overseas activities are eligible) by the end of the relevant income year. To obtain such a finding, the following conditions must be satisfied:

- The overseas activities themselves must be eligible R&D activities
- The overseas activities must complete the core R&D activities being conducted in Australia
- The overseas activities cannot be conducted in Australia for very specific defined reasons, for example, a lack of available facilities or a need for access to other populations, and
- The total actual and reasonably anticipated expenditure on all overseas R&D activities cannot exceed the total expenditure on all Australian R&D activities.

Effectively an entity can incur up to 50% of total project expenditure on overseas activities. However, if the 50% threshold is breached, only the Australian costs can be claimed.

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Indirect tax

GST treatment of leases clarified: The High Court has unanimously allowed the Commissioner's appeal against the decision of the Full Federal Court in *MBI Properties Pty Ltd v Commissioner of Taxation* [2013] FCAFC 112.

The High Court's decision is likely to be welcomed by many business taxpayers because it provides important clarification about how the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) applies to leases following the sale and purchase of premises subject to an existing lease (purchase of the reversion). Briefly, the High Court ruled that upon purchasing a reversionary interest, an incoming landlord makes a 'supply' of the premises to the tenant by way of lease throughout the remainder of the lease. This occurs by means of the incoming landlord assuming the express obligation under the lease to provide the tenant with the use and occupation of the premises. In practical terms, the High Court's decision is in line with the way that the GST law had generally been accepted as applying to landlords and tenants (after the purchase of a reversion), before doubts were raised by the decision of the Full Federal Court (in this and the related South Steyne litigation).

The High Court's decision has removed many of the concerns that arose from the Full Federal Court's decision. For the wider business community, the Full Federal Court's decision had resulted in considerable uncertainty about the GST obligations and entitlements of outgoing and incoming landlords, and tenants, once a reversion is sold.

Factual background

The taxpayer had acquired three apartments within a serviced apartment complex from South Steyne Hotel Pty Ltd (South Steyne). Each of the apartments was subject to an existing lease that had been granted by South Steyne to the serviced apartment operator (Operator), with the taxpayer agreeing to honour the Operator's rights under each lease. The taxpayer's purchase from South Steyne was treated by the parties as a GST-free 'going concern' under Division 38 of the GST Act. The primary issue in dispute was whether the taxpayer became liable to make a GST increasing adjustment under Division 135 because it intended that the supplies to be made through the apartment leasing enterprise would be neither taxable supplies nor GST-free supplies.

Summary of Court's decision

The first issue considered by the High Court was whether the taxpayer, as purchaser of the reversionary interest in the leased apartments, made a 'supply' to the Operator during the period remaining for each lease after the purchase.

The High Court held that the Full Federal Court had been wrong to rule that the only relevant supply was on the initial grant of each lease by South Steyne to the Operator. It also held that the Full Federal Court in *South Steyne Hotel Pty Ltd v Commissioner of Taxation* [2009] FCAFC 155 had been wrong to conclude that the taxpayer made no supply to the Operator.

The High Court stated that there was an input taxed supply of residential premises by way of lease which occurred at the time of the grant of each apartment lease by South Steyne to the Operator, and then a further input taxed supply of residential premises by way of lease which occurred by means of South Steyne observing its express obligation under the lease to provide the Operator with use and

occupation of the leased premises. Further, the taxpayer's assumption of that express obligation, by operation of law on its purchase of the apartments from South Steyne, resulted in the taxpayer becoming obliged to continue to make the same further input taxed supply of residential premises by way of lease to the Operator during the remaining term of each lease. Thus for the purposes of Division 135, at the time of purchase the taxpayer intended to make a supply, that was neither taxable nor GST-free, through the apartment leasing enterprise it had acquired from South Steyne as a going concern.

The High Court went on to consider a second issue, being whether there was any 'price' for the taxpayer's supply to the Operator, for the purpose of calculating the increasing adjustment under Division 135. This was relevant to the taxpayer's argument that no increasing adjustment could be calculated because the rent paid by the Operator was exclusively the price for the initial grant of the lease by South Steyne and could not also be the price for the supply made by the taxpayer to the Operator. The Court disagreed with the taxpayer, ruling that the taxpayer's supply to the Operator was for a price – being the rent payable by Operator pursuant to the operator's continuing obligation under each lease. The Court went on to find that the Commissioner was correct to have assessed the taxpayer for the increasing adjustment.

Entity entitlement to refund on GST and changes in net amount: The ATO has released Interpretative Decision ATO ID 2014/36 which provides the Commissioner's view that the four-year time limit in section 105-50 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) *does not apply* to prevent an amount of unpaid GST payable being taken into account in determining the entity's entitlement to a refund under section 105-55 of Schedule 1 to the TAA 1953.

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International tax

Deloitte Tax Insights – offering comprehensive analysis and implications in respect of the latest tax developments: The following publication is now available on the Deloitte website:

- BEPS Action 6 follow-up: Preventing treaty abuse - On 21 November 2014, the OECD released a follow-up Discussion Draft on Action 6 in relation to preventing treaty abuse. The Discussion Draft provides stakeholders with the opportunity to comment on how greater certainty could be provided through the model treaty and/or commentary in certain open areas.

Goods in transit and other considerations for business: On 3 December 2014, the Minister for Trade and Investment announced that the Korea-Australia Free Trade Agreement (KAFTA) will enter into force on Friday, 12 December 2014.

KAFTA is a comprehensive agreement that substantially liberalises trade between Australia and Korea, and offers significant customs tariff and non-tariff related economic benefits for each country. For Australian exporters, KAFTA will immediately ensure duty-free entry for 84% (by 2013 import value) of Australian exports to Korea. This is projected to increase to almost 96% within 10 years and 99.8% once KAFTA is fully implemented in 2034. Major exports to Korea include beef, wheat, sugar and other agricultural products; energy and resources products including coal, iron ore, and crude petroleum; and manufactured goods including car parts and pharmaceuticals.

For businesses importing goods into Australia, 86% of Korean goods will be duty-free from 12 December, increasing to 100% by the end of 2022.

Implications for business

Businesses trading with Korea will need to ensure that they understand and meet the requirements to secure preferential tariff treatment for their goods under KAFTA. This includes:

- Ensuring that the goods qualify as an 'originating good' (i.e. satisfy the rules of origin for Korea or Australia as the case requires)
- Having a Certificate of Origin for the goods
- Requesting preferential tariff treatment under KAFTA at the time of import.

Unlike some of Australia's other free trade agreements, KAFTA permits producers and exporters to prepare the Certificate of Origin themselves (although Australian producers and exporters will also have the option of obtaining Certificates of Origin from an authorised body such as the Australian Chamber of Commerce and Industry instead).

In instances where goods are currently in transit between Australia and Korea and will not arrive in Australia until 12 December or later, importers should take steps to determine whether KAFTA would provide a more favourable tariff treatment than would otherwise apply.

The Department of Foreign Affairs and Trade has released *Guide to using KAFTA to export and import goods* which includes customs procedures, and step-by-step advice for business about relying on KAFTA.

People movement issues connected with the China-Australia Free Trade Agreement: On 17 November, the Minister for Trade and Investment, Andrew Robb, and Chinese Commerce Minister, Gao Hucheng, signed a Declaration of Intent in the presence of Prime Minister Abbott and Chinese President Xi. This process formalised the conclusion of the China-Australia Free Trade Agreement (ChAFTA) negotiations.

The ChAFTA commitments on the movement of natural persons are aimed at supporting increased trade and investment, reducing barriers to labour mobility and improving temporary entry access. ChAFTA will provide improved access for a range of Chinese skilled service providers, investors and business visitors.

Changes

Under the ChAFTA Australia will provide guaranteed access to Chinese citizens under the following categories:

- Intra-corporate transferees and independent executives for up to four years, including executives, managers and specialists
- Contractual service suppliers for up to four years; this will include guaranteed access for up to a combined total of 1,800 per year in four occupations: Chinese chefs, WuShu martial arts coaches, Traditional Chinese Medicine practitioners and Mandarin language tutors
- Installers and servicers for up to three months, and
- Business visitors for up to 90 days, or six months for business visitors who are service sellers.

There is a commitment from both China and Australia to increase transparency with the procedures and requirements of the immigration process and to process applications expeditiously.

To better facilitate the entry of temporary workers associated with trade and investment, there will also be increased co-operation in the areas of skills recognition and licensing.

Work and holiday arrangement

Australia and China have also completed negotiations on a Work and Holiday Arrangement (WHA) under which Australia will grant visas for up to 5,000 Chinese work and holiday makers annually.

The WHA will increase demand for tourism services and support the development of Australia's tourism sector, particularly in rural Australia.

Investment Facilitation Arrangements

Through a Memorandum of Understanding allowing for Investment Facilitation Arrangements ("IFA") Chinese owned companies registered in Australia undertaking large infrastructure development projects above $150 million will be able to negotiate certain workforce requirements for specific projects. The negotiation of these agreements will mirror the arrangements for Australian business, being done on a case-by-case basis under arrangements similar to the former Enterprise Migration Agreements.

IFAs will provide flexibility for companies to respond to the specific economic and labour market challenges related to large infrastructure development projects. They reflect the Government's focus on strengthening infrastructure development and attracting investment, leading to the creation of jobs and increased economic prosperity for Australian nationals.

IFAs will operate within the framework of Australia's existing Temporary Work (Skilled) visa (subclass 457) system. The nationalities of eligible overseas workers under IFAs will be non-discriminatory and an IFA will not allow Australian employment laws or wages and conditions to be undermined.

Implementation timeframe

There are several steps that must be undertaken in accordance with normal Australia treaty-making processes and these will take some time. Once these are completed the ChAFTA will enter into force and Deloitte will provide a further update at that time.

Changes to the Temporary Work (Short-Stay Activity) visa (subclass 400): The Australian Government has announced changes to the Temporary Work (Short-Stay Activity) visa, which will extend the period of time the holder of a subclass 400 visa may perform highly specialised work in Australia in a non-ongoing role. The Temporary Work (Short-Stay Activity) visa is for people who want to travel to Australia for up to three months to do short-term, highly specialised, non-ongoing work, or participate in non-ongoing cultural or social activities at the invitation of an Australian organisation, or in limited circumstances, participate in an activity or work relating to Australia's interests.

Changes

Currently, a subclass 400 visa holder may work in Australia for up to three months in any 12-month period. However, from 23 November 2014, individuals making an application for a subclass 400 visa

may request a period of stay of up to six months in any 12 month period.

This change will provide greater flexibility to businesses requiring foreign nationals to work in Australia on short-term assignments of up to six months duration.

For the grant of a subclass 400 visa, it is important that the duties to be performed will be completed within the period of stay granted, which is normally up to three months. However, if there is a demonstrated need for the applicant to work in Australia for more than three months in any 12-month period and the case officer assessing the application determines that the purpose of stay warrants a longer period, a stay of up to six months may be approved.

Visa holders may travel to Australia within six months of the grant of the visa and remain in Australia for no more than six months cumulatively, after their first entry to Australia on the subclass 400 visa. Visas may be granted with single or multiple entry.

It is important to note that departure and re-entry to Australia on a multiple-entry subclass 400 visa does not trigger a new period of stay. The six months is a cumulative stay in Australia in any 12-month period.

The total period of stay in Australia will be determined by the initial date of entry following the grant of the subclass 400 visa. For example, if the subclass 400 visa was granted on 1 December 2014, for a stay of six months, and the initial date of entry to Australia was on 1 May 2015, the visa holder would be permitted to remain in Australia for six months from 1 May 2015, as long as the total cumulative period of stay does not exceed six months during the 12-month period from their initial date of entry to Australia.

A strong business case must be presented to show that the 457 visa program is not being circumvented and there is a need for a subclass 400 visa for more than three months. The following is the type of information, which should be provided in support of a request for a period of stay longer than three months:

- Activities undertaken by the visa holder will not adversely affect Australian workers
- Nature, size, duration, and importance of the project
- Evidence that specialist advice/expertise from overseas is required
- The number of Australians being employed on the project and/or by the business
- Time needed to train an Australian to do the proposed work over a longer period
- Evidence that a search for Australians to do the proposed work was unsuccessful

The subclass 400 visa is neither an appropriate substitute to avoid the more stringent 457 visa requirements, including market salary requirements nor should it be used to allow someone awaiting a decision on another visa application to commence work in Australia. Visa holders must be paid in accordance with relevant Australian workplace legislation, including Awards, the Temporary Skilled Migration Income Threshold (TSMIT), etc.

Applications can be lodged electronically for qualifying passport holders, or alternatively must be lodged at an Australian Consulate or Embassy overseas. The visa applicant must be outside Australia at the time the subclass 400 visa application is lodged.

Deloitte's view: The introduction of greater flexibility for accommodating short-term business activity in Australia is welcomed by Deloitte. There are a number of businesses, which employ project-related labour in Australia where the skills are not available locally, and where the nature of the work is not ongoing. The changes to the subclass 400 visa will provide these businesses with greater flexibility to deploy their skilled foreign national workforce to meet local operational needs.

Given that the subclass 400 visa is not sponsored by the employer, it will be necessary for the visa holder to closely monitor their period of stay in Australia on a subclass 400 visa to ensure that the holder does not inadvertently overstay beyond the approved period. In this regard, Deloitte recommends that employers consider deploying systems to track and monitor immigration compliance of their business traveller population.

It will not be possible to identify precisely the extent of supporting documentation required by overseas missions until after the implementation of this change on 23 November 2014. Deloitte is concerned that Australian missions in certain locations may apply a higher threshold of supporting documentation required where the period of stay requested is greater than three months.

UK 2014 Autumn Statement contains BEPS measures: On 3 December 2014, the UK Chancellor delivered the 2014 Autumn Statement. The Chancellor reaffirmed the UK government's continued support for the OECD's work on base erosion and profit shifting (BEPS) and the modernization of the international framework for taxing multinational companies. The Chancellor announced a consultation process on new rules to counter "hybrid mismatches" (arrangements where a multinational can claim a tax deduction in one country without equivalent taxable income in another country). An announcement also was made with respect to country-by-country reporting of information to tax authorities. A surprise measure is the introduction of a "diverted profits tax." The proposed tax would be targeted at "complex structures" between connected parties that have been entered into to achieve a tax advantage and will seek to tax diverted profits at a rate of 25%. For the Deloitte UK analysis of the business tax measures included in the 2014 Autumn statement, click here.

BEPS – What's Happened So Far? And What's Next? Deloitte Asia Pacific Dbrief: A Deloitte Asia Pacific Dbrief was held on 2 December 2014 providing a good summary of where the BEPS process is at now that we are nearing the end of 2014. The Dbrief is available for download at the Asia Pacific Dbriefs archive.

OECD update on BEPS project: On 15 December 2014, 3.00pm CET (Paris time), the OECD Centre for Tax Policy and Administration will be hosting a live webcast regarding the latest information about the BEPS Project. The webcast will include a Questions & Answers session. Questions can be sent in advance to the panel via email to CTP.BEPS@oecd.org.

BEPS Central: For a one-stop shop for information on the OECD BEPS Project, with links to all the official documents and Deloitte's comments, visit Deloitte BEPS Central.

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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