



## Tax highlights

20 October 2014

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### Key developments this week

**Employee share schemes – changes announced:** As part of its [Industry Innovation and Competitiveness Agenda](#) released on 14 October 2014, the Government has [announced](#) changes to the tax treatment of ESS.

Broadly, the proposed changes to the tax treatment of ESS are as follows:

- Reversal of the changes made in 2009 to the taxing point for options. This is proposed to apply to all companies and would mean that discounted options are generally taxed when they are exercised (converted to shares), rather than when the employee receives the options
- ESS options or shares that are provided at a small discount by eligible start-up companies will not be subject to up-front taxation, provided the shares or options are held by the employee for at least three years. The options will have taxation deferred until sale (under certain conditions) and shares issued at a small discount will have that discount exempt from tax. The conditions to be satisfied in order to qualify for this concessional treatment will include that the company has an aggregate turnover of not more than \$50 million, is unlisted and has been incorporated for less than 10 years. Further, the maximum time for tax deferral will be extended from seven years to 15 years
- Update to the 'safe harbour' valuation tables, which are used by companies to value their options, so they reflect current market conditions.

The integrity provisions introduced in 2009 and the \$1,000 up-front tax concession for employees who earn less than \$180,000 per year will be retained.

The Government is expected to consult with industry on draft legislation, with legislation proposed to come into effect on 1 July 2015.

**Revised ATO Code of Settlement released:** On 15 October 2014, the ATO released a revised [Code of Settlement](#) (the Code). The Code replaces the *Code of Settlement Practice*, and sets out ATO policy on the settlement of tax and superannuation disputes, including disputes involving debt.

The Code broadly outlines:

- **Settlement considerations** that should be taken into account in determining whether or not to

settle. The range of factors is narrower than in the previous Code of Settlement Practice. These factors include the relative strength of the parties' position and whether it is in the public interest to litigate

- **How settlement decisions** are made by the ATO which "will be based on an informed understanding of the relevant facts and issues in dispute and any advice of a settlement advisory panel, or legal or other expert opinions relevant to the matter being considered."
- **Responsibilities** for both the ATO and the taxpayer to disclose relevant and material facts and to sign a written settlement agreement.

In comparison to the single Model Deed of Settlement within the previous Code of Settlement Practice, the Code contains four [model settlement deeds](#):

1. Full model deed - used for a complex income tax dispute
2. Short model deed - used for a less complex income tax dispute
3. GST model deed - used for a GST dispute
4. Short deed for Administrative Appeals Tribunal (AAT) cases - used for an income tax dispute that is currently with the AAT.

To provide taxpayers with further guidance on the Code, the ATO has also released a [Practical Guide to the ATO Code of Settlement](#), which includes additional detail, links and examples which illustrate key elements of the Code.

**Senate inquiry into corporate tax avoidance:** Last week, the Committee Chairman of the Senate Economics Reference Committee, Senator Sam Dastyari, wrote to approximately 40 ASX listed companies to request an explanation as to why their effective tax rate (based on their accounting profit) is below the 30 percent company tax rate – see [media release](#) of 15 October 2014.

The Senate Economics Reference Committee is conducting an [inquiry](#) into the tax avoidance and aggressive minimisation by corporations registered in Australia and multinational corporations operating in Australia, with specific reference to:

- a) the adequacy of Australia's current laws
- b) any need for greater transparency
- c) the broader economic impacts of this behaviour, beyond the direct effect on government revenue
- d) the opportunities to collaborate internationally and/or act unilaterally to address the problem
- e) the performance and capability of the ATO to investigate and launch litigation, in the wake of budget cuts
- f) the role and performance of the Australian Securities and Investment Commission in working with corporations and supporting the ATO to protect public revenue
- g) any relevant recommendations or issues arising from the Government's White Paper process on the 'Reform of Australia's Tax System' and
- h) any other related matters.

The Committee is accepting public submissions to the inquiry until 2 February 2015.

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## Weekly tax news

### Business tax

**Thin cap and foreign dividends – bill receives Royal Assent:** On 16 October 2014, [Tax and Superannuation Laws Amendment \(2014 Measures No. 4\) Act 2014](#) (the Act) received Royal Assent.

This Act contains various measures including:

- **Thin capitalisation:** The thin capitalisation measures commence for years of income starting on or after 1 July 2014
- **Foreign distributions:** The changes in respect of foreign distributions apply to distributions and non-share dividends made after the day of Royal Assent. Accordingly, the eligibility for non-assessable non-exempt treatment in respect of distributions and non-share dividends made by a foreign resident to an Australian resident corporate tax entity on or after 17 October 2014 will need to be determined under Subdivision 768-A of the *Income Tax Assessment Act 1997* (ITAA 1997). Section 23AJ of the *Income Tax Assessment Act 1936* (ITAA 1936) has been repealed. Broadly, Subdivision 768-A will apply in respect of distributions made by a foreign company in respect of an equity interest where the Australian resident corporate tax entity has a participation interest of at least 10% in the foreign company
- **Foreign resident capital gains tax (CGT) integrity measures:**
  - Technical changes to ensure foreign residents are subject to capital gains tax (CGT) in relation to CGT assets used in carrying on a business through a permanent establishment in Australia are effective from the start of Division 855 of the ITAA 1997 (12 December 2006)
  - The measure to prevent double counting of assets applies to:
    - o For consolidated groups – CGT events occurring after 7.30pm on 14 May 2013
    - o Otherwise – CGT events occurring on or after 13 May 2014
- **Tax receipts:** The amendments require the Commissioner of Taxation to provide a breakdown to individuals of how their tax has contributed towards Government expenditure. The amendments are proposed to apply with respect to assessments for the 2014-15 and later income years
- **Miscellaneous amendments:** These amendments address technical deficiencies and legislative uncertainties within several taxation and superannuation provisions.

**Parliamentary sittings – 2015:** The [Parliamentary sitting calendar for 2015](#) has been released. The 2015 Autumn sittings will commence on 9 February 2015.

**Second Commissioner's speech to National Resource Tax Conference:** Mr Andrew Mills, Second Commissioner, Law Design and Practice [delivered](#) a speech on 16 October 2014 to The Tax Institute's National Resource Tax Conference where he outlined the reinvention of law design and practice within the ATO. The Second Commissioner made the following key comments:

- Starting in October, the Public Groups and International division within the ATO will be providing each client who has an Advance Compliance Agreement the opportunity to have a senior Tax Counsel Network officer assigned to them. These clients will benefit from direct access to senior TCN thinking as soon as an issue is emerging.

- In response to recent media and political commentary about the amount of tax certain taxpayer groups pay and the capability of the ATO, the Second Commissioner acknowledged that “most taxpayers – and that includes our largest companies, are trying to do the right thing and willingly comply”. He expressed concern that the “uninformed commentary” about the tax performance of taxpayers and the performance of the ATO did nothing to increase transparency or effectiveness of the tax system, and actually worked to undermine confidence in the system. Whilst debate about tax was welcome, the debate should deal with facts, not supposition and innuendo.
- The ATO’s compliance approach focuses on a number of issues in the energy and resources sector: transfer pricing, permanent establishments, mergers, acquisitions and divestments, thin capitalisation, research and development, capital allowances, exploration expenditure, and PRRT risks. The ATO is also examining the economic versus tax performance of sub-industries such as utilities and petroleum.

**Electronic payments – data matching program:** The Commissioner of Taxation has advised that the ATO will be requesting and collecting data relating to electronic payments made to businesses through specialised payment systems for the period from 1 July 2013 to 30 June 2014 from certain entities (listed in the [gazette notice](#)) that provide on-line payment systems (such as BPAY and PayPal).

This program, called the [Specialised payment systems data matching program](#), is a new program which will complement and expand upon the ATO’s current ongoing credit and debit card matching program. The specialised payment systems data matching program is designed to support the ATO’s objectives of creating a level playing field for business and detecting non-compliance and to assist the ATO to build intelligence about businesses including broader risk, trend and strategic analysis.

**ATO Practice Statement Program – updated:** The ATO has updated its [Practice Statement Law Administration Program](#) as at 13 October 2014. Changes from the last update of the program include:

- Administration of transfer pricing penalties for income years commencing on or after 29 June 2013 – last planned issue date was 15 October 2014, but the updated program indicates that this Practice Statement is now scheduled for 12 November 2014
- Guidance on the steps in the process for transfer pricing documentation – last planned issue date was 15 October 2014, but the updated program indicates that this Practice Statement is now scheduled for 12 November 2014.

**ATO Public Rulings Program – updated:** The ATO has updated its Public Rulings Program as at [13 October 2014](#). Changes from the last update of the Public Rulings Program include:

***Draft tax determinations:***

- Goods and services tax: is the supply of brokerage services that facilitates the sale or purchase of financial products on overseas securities or futures exchanges, a GST-free supply under paragraph (a) of item 4 in the table in subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act)? Planned issue date 29 October 2014
- Income tax: Will paragraph 974-80(1)(d) of the ITAA 1997 be satisfied merely because a non-resident entity has chosen to invest indirectly in a debt interest issued by an Australian resident company and there is one or more equity interests interposed between the non-

resident entity and the entity holding the debt interest? Planned issue date 26 November 2014

- Income tax: Is the reference to 'the interest' as it appears in the phrase at the end of subsection 974-80(2) of the ITAA 1997 a reference to the interest held by the 'ultimate recipient'? Planned issue date 26 November 2014
- Income tax: When is a contribution made by an employer to the trustee of an employee remuneration trust, that is capital or of a capital nature, deductible under section 40-880 of the ITAA 1997? Planned issue date 10 December 2014.

***Draft rulings:***

- Goods and services tax: foreign currency products – supply of rights for use outside Australia - paragraph (a) of item 4 in subsection 38-190(1) of the GST Act. Planned issue date 10 December 2014.

***Final rulings:***

- Income tax: transfer pricing - the application of section 815-130 of the ITAA 1997. Planned issue date had been 29 October 2014, but the updated Rulings Program indicates that its release will now be 12 November 2014.
- Income tax: transfer pricing - documentation requirements. Planned issue date had been 29 October 2014, but the updated Rulings Program indicates that its release will now be 12 November 2014.
- Goods and services tax: treatment of ATM service fees, credit card surcharges, and debit card surcharges. Planned issue date 17 December 2014.

**ATO releases Class Rulings:** On 15 October 2014, the ATO issued the following Class Rulings:

- [CR 2014/85](#) - Income tax: Macquarie Atlas Roads International Limited Return of Capital
- [CR 2014/86](#) - Income tax: Macquarie Bank Limited - Macquarie Bank Capital Notes
- [CR 2014/87](#) - Income tax: Challenger Limited: Challenger Capital Notes.

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## Indirect tax

**Inbound tour operator refused special leave to appeal GST decision :** The High Court has refused the taxpayer's application for special leave to appeal against the decision of the Full Federal Court in [ATS Pacific Pty Ltd v Commissioner of Taxation \[2014\] FCAFC 33](#). In that case, the Full Federal Court held that the taxpayer (an inbound tour operator) made one supply only to its non-resident travel agent clients, and that this supply was properly characterised as the supply of a promise to the non-resident travel agent that the various components of the tour packages booked would be supplied to the non-resident tourists during their Australian tour. The Court found that this supply was wholly taxable, and that no part of the supply was GST-free.

**Refund of excise duty – ATO Interpretative Decision:** The ATO has released [ATO ID 2014/30](#) which states that the owner of tobacco products is not entitled to a refund of excise duty under section 78 of the Excise Act if the products are destroyed after delivery for home consumption, that is, after they have left the owner's licensed premises.

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## Individual and family groups

**Changes to 457 and Significant Investor Visa programs:** As part of its [Industry Innovation and Competitiveness Agenda](#) released on 14 October 2014, the Government has [announced](#) changes to the 457 visa program for skilled migrants and the Significant Investor Visa (SIV) program.

Broadly, the following changes are proposed to the 457 visa program for skilled migrants, consistent with recommendations of an Independent Integrity Review:

- Streamlining of the processing of sponsorship, nomination and visa applications and a refocus of compliance and monitoring activities on high risk applicants
- Increasing the sponsorship approval period from 12 to 18 months for start-up businesses
- Providing greater flexibility in relation to English language testing and skill requirements for 457 applicants
- Retention of the Temporary Skilled Migration Income Threshold at \$53,900, ahead of a review within the next two years.

In addition, proposed changes to the SIV program include:

- Streamlining and speeding up visa processing, further promoting the program globally and strengthening integrity measures
- Aligning the criteria for eligible investments with the Government's national investment priorities. The investment eligibility criteria will be determined by Austrade in consultation with key economic and industry portfolios
- Introducing a Premium Investor Visa (PIV), offering a 12 month pathway to permanent residency for those meeting a \$15 million threshold
- Tasking Austrade to become a nominating entity for the SIV (complementing the current State and Territory governments' role as nominators) and to be the sole nominating entity for the PIV.

The changes to the SIV program will take effect during 2014-15, with the Premium Investor Visa to be introduced from 1 July 2015.

The Government is expected to make further announcements soon on the recommendations of reviews into both the 457 and SIV programs.

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## R&D and government incentives

**Industry Growth Centres initiative:** As part of its [Industry Innovation and Competitiveness Agenda](#) released on 14 October 2014, the Government has [announced](#) that it will provide \$188.5 million to fund Industry Growth Centres in five sectors:

- Food and agribusiness
- Mining equipment, technology and services
- Oil, gas and energy resources
- Medical technologies and pharmaceuticals, and

- Advanced manufacturing sectors.

The Minister for Industry will seek expressions of interest from business-led consortia to establish the five non-profit Industry Growth Centres. Project funding will focus on market, value chain or technology issues to deliver commercial outcomes with sector-wide impact.

Consultation sessions will be held over the coming weeks with industry and research communities regarding the implementation of the Industry Growth Centres Initiative, followed by a staged roll-out of the Centres from early 2015.

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## States taxes

**NSW: Revenue laws amended:** On 14 October 2014 the [State Revenue Legislation Further Amendment Bill 2014 \(NSW\)](#) passed both houses and now awaits Royal Assent.

When assented to, the Act will amend the *Duties Act 1997* (NSW), commencing from the date of Assent, to:

- prevent avoidance, by imposing duty on certain transactions involving options to purchase NSW land
- prevent avoidance, by imposing duty on the novation of a lease of NSW land as if it were a transfer of dutiable property
- make provision for duty payable on transactions involving SMSFs, including imposing fixed duty of \$500 on declarations of trust by custodians of SMSFs holding property on trust for the trustee of a SMSF
- provide a registration duty exemption for same-owner transfers of heavy vehicle trailer registrations from another jurisdiction to NSW.

The Act will also amend the following revenue Acts

- the *Payroll Tax Act 2007 (NSW)*, i.e. amendments to the 'relevant contracts' provisions to clarify and restrict the payroll tax exemptions available for payments to contractors of various kinds including owner-drivers, door-to-door sellers, and insurance sellers. These amendments mainly commence from 1 July 2014, with one change to commence from a day to be proclaimed.
- the *Payroll Tax Rebate Scheme (Jobs Action Plan) Act 2011 (NSW)* – to allow the rebate to be claimed in respect of the employment of a transferred employee in circumstances where the former employer and the new employers are members of the same group for payroll tax purposes and/or the transfer occurs because the business or undertaking of the former employer is merged with, or taken over or otherwise acquired by, the new employer. This change will apply to transfers in employment occurring on or after 1 July 2011.
- the *Land Tax Management Act 1956 (NSW)* - to change the rules for the grouping of companies such that companies will be grouped for land tax purposes in cases where the person who has a controlling interest in each company is acting in a trustee/nominee capacity and the trusts concerned are fixed trusts, each with the same beneficiaries. These amendments commence from the date of Assent.

**Queensland extends insurance duty exemption:** On 14 October 2014, the Office of State Revenue changed the way it administers the provision in the *Duties Act 2001* (Qld) that provides insurance duty exemption for contracts of insurance entered into in the course of an insurer's health insurance business (as defined in s.121-1 of the *Private Health Insurance Act 2007* (Cth)). The changed administrative practice means that overseas student health cover and temporary visa holder health cover offered by private health insurers is exempt from Queensland insurance duty. The change brings Queensland into line with most other jurisdictions in respect of such insurance cover, pending legislative amendment to the Duties Act. Details of the administrative arrangement are set out in [revenue ruling DA375.1.1](#).

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## International tax

**Irish budget announcement on double Irish structure** - On 14 October 2014, Ireland's Minister for Finance presented *budget 2015*. The budget reaffirms the Government's commitment to the 12.5% corporate tax rate, but also includes an announcement that the "double Irish" structure will be abolished and a broad range of measures introduced to provide a competitive alternative to the double Irish regime.

The double Irish structure exploits different tax rules, particularly in the context of the US and Irish tax law. To address the reputational concerns arising from the intense focus on the double Irish structure, the Minister has announced that, with effect from 1 January 2015, no new structures will be able to avail of the double Irish regime. A grandfathering period of six years will be available for structures in existence on 31 December 2014, which will allow companies to continue to benefit from the existing double Irish regime up to 31 December 2020 and also provide companies with a timeline to explore alternative IP structures.

In addition the Minister announced details of a "knowledge development box" similar to IP and patent box regimes across the EU. Click to view [Ireland Tax Alert](#).

**RCF III – taxpayer's application for special leave refused:** The High Court has refused the taxpayer's application for special leave to appeal against the Full Federal Court decision in [Commissioner of Taxation v Resource Capital Fund III LP \[2014\] FCAFC 37](#). The Full Federal Court held that a Cayman Islands limited partnership was an independent taxable entity that is liable to tax for Australian tax purposes and the Australia/United States double tax agreement does not preclude the limited partnership's liability to tax.

The ATO is [scheduled](#) to issue an addendum to [TD 2011/25](#) on 22 October 2014. It would appear likely the addendum will reflect the tax implications arising from the RCF III litigation.

**BEPS Central:** For a one-stop shop for information on the OECD BEPS Project, with links to all the official documents and Deloitte comments, visit Deloitte [BEPS Central](#).

**ATO ID on Japanese construction company PE status:** The ATO has released Interpretative Decision [ATO ID 2014/29](#) which clarifies the ATO's view of Australia's taxing rights under Article 5 of the *Convention between Australia and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* (the Japanese Convention) in respect of certain construction or installation projects.

Specifically, the ATO ID sets out its view as to the circumstances in which a company incorporated in Japan will have a permanent establishment (PE) in Australia, where it has a contract to undertake a construction or installation project in Australia and subcontracts the construction or installation to an Australian resident entity.

ATO ID 2014/29 broadly states that the Japanese entity will have a PE in Australia, under:

- Article 5(3) of the Japanese Convention where it uses an Australian subcontractor to perform the construction or installation duties for which it is contractually responsible, and the subcontractor spends more than 12 months on the construction site
- Article 5(4)(a) of the Japanese Convention because of its supervisory activities in connection with the construction or installation project.

Accordingly, in the ATO's view the income earned by the Japanese entity from the construction or installation project in Australia is assessable under section [6-5 of the ITAA 1997](#).

**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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