



Tax highlights

5 May 2014

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Key developments this week

FATCA - Australian intergovernmental agreement (IGA) and exposure draft (ED) legislation

released: On 28 April 2014, the Treasurer [announced](#) the signing of an [intergovernmental agreement](#) (IGA) between the United States and Australia to reduce the burden on Australian financial institutions in complying with the United States' Foreign Account Tax Compliance Act (FATCA). Australian FIs will be treated by the U.S. as complying with FATCA (and not subject to withholding) in the period until the IGA formally enters into force (which is expected to be by 30 September 2015).

As expected, the main changes from the model IGA and the Australian IGA are the list of entities and accounts that are exempt or deemed to comply with FATCA, which are listed in Annex II. Importantly, governmental entities and Australian retirement funds (including a superannuation entity defined in the SIS Act, pooled superannuation trusts defined in the *Income Tax Assessment Act 1997* (ITAA 1997) and certain entities wholly owned by such entities) are exempt from FATCA and excluded accounts include retirement and pension accounts, employee share schemes, first home saver accounts, funeral policies and scholarship plans. The accompanying Memorandum of Understanding also contains important information regarding securities registered in an Australian clearing and settlement facility and not-for-profit entities that are exempt from tax under Division 50 of the ITAA 1997.

The Treasurer also released [ED legislation \(and explanatory memorandum\)](#) to give effect to Australia's obligations under the IGA which will apply from 1 July 2014. The exposure draft is focused on the reporting of information to the ATO, record keeping and penalties for non-compliance under domestic legislation. Under the exposure draft legislation, reports would be required to be lodged with the ATO on a calendar year basis by 31 July of the following year. The procedures for determining the information to be reported (including due diligence procedures for new and existing accounts) would be required to be in writing and retained for five years after the report is lodged with the ATO. The explanatory memorandum contemplates that the procedures could be contained in broader internal guidelines or documents. Any elections to use definitions or procedures in the U.S. FATCA regulations must be made before a report is lodged and will be evidenced by the way the report is prepared and the written procedures. The "approved form" for reporting is yet to be determined.

Significantly, draft guidance to address interpretation issues and address any gaps between the IGA and the US regulations has not yet been released.

If you have any questions, or would like to provide a submission on the exposure draft legislation, please contact your usual Deloitte tax adviser or Alison Noble, Deloitte FATCA Lead Director Australia.

Commission of Audit report released: On 1 May 2014, the Government released the [report](#) of the National Commission of Audit, *Towards Responsible Government*. The report provides advice and recommendations on what the Commission believes should be done to ensure that spending is placed on a sustainable long-term footing, although it was specifically [noted](#) that tax was not considered in detail because it is to be reviewed through the tax white paper process. The Commission made 86 recommendations, which broadly include:

- Reducing the degree of vertical fiscal imbalance in the Federation by providing the States with access to the Commonwealth's personal income tax base. To facilitate this, it is recommended that the Commonwealth should reduce its personal income tax rate by an equivalent percentage point amount to a new State surcharge to ensure that taxes do not rise overall
- Establishing a new benchmark for the age pension and tighter targeting of eligibility
- Increasing the superannuation preservation age
- Requiring higher income earners to take out private health insurance for basic health services in place of Medicare and precluding them from accessing the private health insurance rebate
- Introducing co-payments for all Medicare funded services, such as \$15 per service up to a safety net threshold of 15 visits or services per year in which \$7.50 per service would apply
- Lowering the paid parental leave (PPL) wage replacement cap to average weekly earnings (currently \$57,460), indexed annually.

The Treasurer [announced](#) that, while the Government would not be providing an immediate response to each recommendation made in the report, its response would be contained in the Federal Budget on 13 May 2014.

Prior to the release of the National Commissioner of Audit report, in an [address](#) to the Sydney Institute on 28 April 2014, the Prime Minister indicated that there would be no changes to the pension during this term of Parliament but there should be changes to indexation arrangements and eligibility thresholds in three years' time. However, he noted that there are other social security benefits where indexation arrangements and eligibility thresholds could be adjusted now. The Prime Minister also commented that changes in this year's Federal Budget would make personal tax cuts much more likely in four or five years' time.

Council of Australian Governments (COAG) meeting – 2 May 2014: The [communique](#) from the COAG meeting held on 2 May 2014 has been released and includes the following points:

- All governments have signed a new agreement on Asset Recycling – click [here](#) to view. The Commonwealth will provide incentive payments to the States and Territories to privatise assets and reinvest proceeds into new infrastructure. The details on the specific asset sales and investments that qualify will be negotiated between the Commonwealth and each State and Territory

- COAG agreed that the States and Territories will work with the Commonwealth on interactions between the Commonwealth's new PPL scheme and existing State and Territory schemes
- Each jurisdiction will target specific small business sectors, with reforms to reduce regulation in the following areas to be brought back to the next COAG meeting: housing and commercial building and construction, road freight, exporters, food and dairy manufacturing, fish processing, agriculture, tourism business licensing, cafes and restaurants, clothing retail, eco-lodge and marine tour operators and native title in mining, gas and exploration
- COAG considered draft Terms of Reference for the Commonwealth's White Paper on the Reform of Federation and the draft themes for the White Paper on Taxation Reform, both of which are expected to be completed by the end of 2015. All jurisdictions committed to work closely and collaboratively on both White Papers. A Steering Committee, chaired by the Commonwealth and involving all States and Territories and the Australian Local Government Association, will be established to oversee the development of the Federation White Paper.

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Weekly tax news

Business tax

Taxation Determination (TD) released on dividend washing:

- [TD 2014/10](#): This TD sets out that section 177EA of the ITAA 1936 will generally apply to a 'dividend washing' scheme of the type as described in paragraphs 2 to 10 of the TD. As previously reported in last week's *Tax highlights*, with the release of TD 2014/10 the ATO has now [confirmed](#) that the deadline for the self-amendment period without penalties will be 28 May 2014 for any taxpayer who has received a letter advising them that the ATO holds information that indicates the recipient (or an associated entity) has participated in a franking credit arrangement (i.e. where two sets of franking credits have been claimed on what was effectively the same parcel of shares).

ATO taxation statistics 2011-12: The ATO has released [Taxation statistics 2011-12](#) which provides an overview of 2012 income tax returns for individuals, companies, superannuation funds, partnerships and trusts. The statistics also cover other aspects of the tax system such as the goods and services tax (GST) and excise systems, fringe benefits tax (FBT), pay as you go (PAYG) and the superannuation system, in relation to the 2012–13 financial year. Of interest is a range of [industry benchmarks](#) also available in the form of financial and activity statement ratios.

Progress of the Financial System Inquiry: In an [address](#) to the Australian Business Economists on 1 May 2014, the Chairman of the Committee of Inquiry into the Financial System provided an overview of the frequent issues raised in submissions received in response to initial consultation on the Inquiry's terms of reference. The Chairman announced that the Committee is working towards releasing an interim report in July.

Consultation Hub – new list of matters under consideration: The ATO has [listed](#) new matters which are currently under consideration to determine if consultation is the best approach to resolve them:

- Clarification on ATO view on deductibility of website development expenditure since the withdrawal of [TR 2001/6](#) on 5 August 2009
- Examination of the ATO's relationship with businesses that manage multiple tax entities.

Consultation Hub – list of matters under consultation updated: The ATO has [updated](#) its list of matters under consultation. The current list of consultation matters and their progress is as follows:

Compliance & Administration	Progress
ATO approach to reviewing governance and the associated review of PS LA 2004/14 (Access to corporate board documents on tax compliance risk)	UPDATED: Draft Practice Statement PSLA 2004/14 has been sent to relevant senior compliance leaders within the ATO for endorsement. A further meeting with external participants to table the final draft version is being planned
Use of standardised accounting data to improve compliance case selection	No further advised progress.
Feasibility of use of External Compliance Assurance Processes for basic ATO assurance work e.g. use of registered company auditors	The ATO intends to consult a sample of taxpayers in relation to the design, impact and potential user experience.
Streamlined tax return systems- 'low touch/no touch' system for individual taxpayers,	Consultation in progress. Interested representatives of tax profession associations were invited to participate in a teleconference on 27 February 2014. (See also the Treasurer's announcement on 4 May under <i>Individuals and Family Groups</i>).
Feasibility and potential operation of statutory remedial powers for the Commissioner of Taxation – working group will examine statutory remedial power (SRP) for the Commissioner to address technical deficiencies in the law in a manner that is favourable to the taxpayer	No further advised progress.
Tax secrecy and transparency legislation: how limited tax information of certain entities which the Commissioner must make publicly available under Sections 3C-3E Part 1A of the <i>Taxation Administration Act 1953</i> is published	No further advised progress.
Trusts	Progress
Alienation of income through discretionary trust partners – consultation on TA 2013/3 for the purpose of producing guidance in an online publication	UPDATED: A draft of the revised guidance publication will be circulated to the Professional Firms' Working Group for comment prior to a further meeting of the group in early May 2014

Small business capital gains tax (CGT) concessions and unpaid present entitlements – technical clarification of calculation of trust's maximum net asset value	No further advised progress
Australian custodians' tax return obligations in respect of trustee liabilities under section 98 of the ITAA 1936- consideration of streamlined lodgement and processing procedures	No further advised progress
Income tax consolidation	Progress
Guidance on the application rules to the rights to future income amendments	No further advised progress
International	Progress
Application of the new transfer pricing laws (Division 815 of the ITAA 1997) – consultation on new rulings and practice statements	<p>UPDATED: The ATO on 16 April 2014 released two draft public rulings</p> <ul style="list-style-type: none"> • TR 2014/D4: Transfer pricing: documentation requirements • TR 2014/D3: Transfer pricing: the application of s815-130 ITAA 1997; and two Law Administration Practice Statements • PS LA 3672: Administration of transfer pricing penalties for income years commencing on or after 29/6/13 • PS LA 3673: Guidance for transfer pricing documentation <p>Comments on the draft advice products are due on 30 May 2014</p>
Attribution and inter-branch derivatives – discussion of TR 2001/11 and TR 2005/11 and banking industry practice	No further advised progress
Application of Subdivision 820-D of the ITAA 1997 to ADIs and its interaction with the consolidation regime and APRA's prudential standards	No further advised progress
Market support payments – consultation in respect of rulings TD 2013/D3(superseded) & TD 2014/D7	No further advised progress
2014 International Dealings Schedule (IDS) and 2014 IDS Instructions – consultation on changes	No further advised progress
Taxation Exemptions for Foreign Governments (Sovereign Immunity)- consultation on guidance in the form of a practice statement	Taxpayers and representatives have provided examples of guidance required. These are currently being considered.

Capital allowances	Progress
Income tax treatment of exploration expenditure – develop the ATO view of exploration and prospecting in the context of a rewrite of TR 98/23	No further advised progress
Resource Rent Tax	Progress
PRRT - Meaning of exploration – consultation on TR 2013/D4	Final ruling expected 25 June 2014
Minerals Resource Rent Tax (MRRT): Cultural heritage payments	Final tax determination is on hold following the government's announcement that it will seek to repeal the MRRT law from 1 July 2014.
Indirect taxes	Progress
Inform the industry of the ATO's compliance focus in respect of the wine equalisation tax (WET) producer rebate	UPDATED: A second meeting to discuss the ATO's compliance strategy with the Wine Makers Federation Board and other key industry stakeholders will be held on 16 May 2014.
Superannuation	Progress
Apportionment of expenses incurred by a superannuation entity only partly in gaining its assessable income – consultation on draft ruling TR 2013/D7	No further advised progress
Other Matters:	Progress
Guidance on ensuring that a partner in a limited partnership is not subject to double taxation – guidance on administration of section 94M(2) of the ITAA 1936	No further advised progress

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Individuals and family groups

Division 7A – common errors: The ATO has released [information](#) on common errors that occur in relation to Division 7A when preparing tax returns.

Paid parental leave (PPL) – capped at \$100,000: In a [press conference](#) on 30 April 2014 in Victoria, the Prime Minister confirmed that the wage replacement cap under the PPL scheme will be reduced from \$150,000 to \$100,000. Broadly, under the [PPL scheme](#), mothers will be provided with 26 weeks of PPL at their actual wage or the national minimum wage (whichever is greater and subject to an upper limit wage cap now of \$100,000), plus superannuation. The PPL scheme is expected to commence from 1 July 2015.

Board of Taxation review on small business: As reported in [Tax highlights 31 March 2014](#), the Minister for Small Business [announced](#) that the Government has requested that the Board of Taxation conduct a fast-track review of impediments in the tax system that unreasonably affect small business. Further to this announcement, the Board of Taxation has now [released](#) the terms of reference for review, and indicated there will be a focus on the aspects of the tax system that unreasonably impede the goals of a broad cross section of businesses, with a particular emphasis on impediments to growing into medium and large business. Submissions on the review are due on Friday 23 May 2014.

Simpler tax returns – MyTax – announced: On 4 May 2014, the Treasurer [announced](#) that from 1 July 2014 the Government will introduce new and simpler tax returns – *MyTax* – that will allow taxpayers to lodge their tax return online through a smartphone, tablet or computer. The ATO will provide an online and substantially pre-prepared tax return for taxpayers who do not have complex tax affairs. Taxpayers will receive an SMS or email from the ATO advising if *MyTax* is suitable for them.

Commissioner able to obtain documents from Family Court proceedings: The Full Family Court has set aside the Family Court decision in [Commissioner of Taxation & Darling and Anor \[2013\] FamCA 118](#) and has allowed the Commissioner to obtain documents in a husband and wife's Family Court proceedings in relation to an audit of the husband's affairs.

At first instance, the Family Court found that the Commissioner remained under an "implied obligation" not to use the documents for a purpose which was not related to the Family Court proceedings. The Court held that the purpose of the implied obligation was to preserve the parties' privacy and to encourage full and frank disclosure.

Although the Full Family Court agreed that the Commissioner was not relieved from compliance with the implied obligation by the access powers under sections 263 or 264 of the *Income Tax Assessment Act 1936* (ITAA 1936) or the duty to make an assessment imposed under sections 166 and 167 of the ITAA 1936), the Full Family Court set aside the Family Court's decision and re-exercised the Court's discretion and found it was appropriate to release the Commissioner from the implied obligation not to make use of the documents from the Family Court file. The Full Court found that the discretion should be exercised in favour of the Commissioner for several reasons including that the Commissioner is performing an important public duty in conducting the audit and the audit was substantially targeted and not a 'random audit' – click to view [Commissioner of Taxation & Darling \[2014\] FamCAFC 59](#) (4 April 2014).

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Indirect taxes

Appeals update – *ATS Pacific*: The taxpayer has applied to the High Court 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](#). The taxpayer is an in-bound tour operator whose business involves booking (and paying for) Australian accommodation and tour components (Products) as requested by overseas travel agents on behalf of their clients (Tourists) who are planning to travel to Australia. In its decision, the Full Court ruled that the taxpayer made a single supply of a contractual right, being a promise by the taxpayer that it would ensure that when the Tourists came to Australia they would be provided with the Products that had been arranged and paid for. The Full Court ruled that the taxpayer's promise was excluded from being GST-free under section 38-190 of the *A New Tax*

System (Goods and Services Tax) Act 1999 (i.e. was a taxable supply). The Full Court overturned the decision of Bennett J at first instance, that the taxpayer also made a separate, GST-free, supply of booking and arranging services. The Full Court held that if the taxpayer's supply of the promise embodied a supply of booking and arranging services by the taxpayer, that further supply was ancillary and incidental to the supply of the promise and was therefore subject to the same GST treatment.

The ATO has issued an updated [Interim DIS](#) to inform affected taxpayers, including those who have previously lodged GST returns in accordance with Bennett J's decision, about its current approach in light of the Full Court's decision and until the special leave application and any subsequent appeal are finalised.

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International tax

Exchange of information – new reports released by the OECD: The OECD Global Forum on Transparency and Exchange of Information for Tax Purposes has released 12 new reports that highlight action being taken by jurisdictions to implement the international standard for exchange of information on request. Four Phase 1 reports were published assessing jurisdictions' legal and regulatory framework for transparency and exchange of information and four Phase 2 reports were published which review exchange of information practices. Four supplementary peer review reports were also published, assessing progress made by jurisdictions to address gaps identified in their legal frameworks and exchange of information practices since their previous reviews. To date, the Global Forum has completed 132 peer reviews and assigned [compliance ratings](#) to 54 jurisdictions that have undergone Phase 2 reviews. The Global Forum is currently revising its Terms of Reference for assessing jurisdictions in advance of a new round of reviews starting in 2016, with regard to the international standard of exchange of information on request. The Global Forum has also begun work on the implementation of the new standard for automatic exchange of information i.e. the [Common Reporting Standard](#), which was [released](#) by the OECD in February 2014.

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