



# Tax highlights

7 July 2014

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## Key developments this week

**Exploration Development Incentive – operational details paper released:** Following the release in March 2014 of a [discussion paper](#) on the policy design for the Exploration Development Incentive (EDI), on 2 July 2014 the Government released a new paper which sets out [Operational details for the EDI](#). At a broad level, the EDI will allow certain investors to deduct a portion of the cost of eligible mining exploration against their taxable income. It is expected to apply to eligible "greenfields" exploration expenditure incurred in Australia from 1 July 2014.

New insights provided by the paper include:

- It would seem that the 'ex-post modulation' process will apply for the EDI scheme. Companies that choose to participate in the scheme will notify the ATO after the expenditure year of the lesser of their exploration expenditure and their tax loss from the financial year. The ATO will then advise those companies of the amount of exploration credits the company can distribute to its shareholders
- Companies will be able to make an irrevocable choice whether exploration credits are to be provided to all existing shareholders or only to shareholders involved in a capital raising after 30 June 2014. As a result, companies that choose to provide exploration credits to holders of shares issued after 30 June 2014 may need to create a separate class of shares to comply with the requirements of the Corporations Law
- Expenditure must relate to exploration within an Australian onshore exploration tenement. Exploration expenditure on any other mining tenement, including production licences and retention leases will be excluded, as will offshore exploration expenditure
- The EDI will only be available to disclosing entities under section 111AC of the *Corporations Act 2001*
- The EDI will apply to tax consolidated entities as a single group, with the activities of the whole group being taken into account and exploration credits being provided to the shareholders of the head company based on expenditure incurred by any member of the tax consolidated group
- Companies with substituted accounting periods will be excluded from the EDI.

Although the EDI is set to apply from 1 July 2014, it is currently still subject to consultation. It is hoped that an exposure draft will be released by the end of 2014. For further information, please contact your Deloitte tax advisor or [David Ocello](#), Partner, Tax Services (08 9365 7041).

**Thin cap changes expected to be introduced into Parliament in July:** The Treasurer [announced](#) in a speech on 3 July 2014 at the University of Melbourne [2014 Economic & Social Outlook Conference](#) that the thin capitalisation changes are expected to be introduced into Parliament in July 2014. The Treasurer said that the changes will “limit the ability to shift profits out of Australia by the allocation of excessive debt to Australian operations”. Broadly, the proposed thin capitalisation changes tighten the debt limits in the thin capitalisation regime, increase the *de minimis* threshold from \$250,000 to \$2 million of ‘debt deductions’ (e.g. interest expense) per annum and extend the worldwide gearing test to inbound investors. In addition, section 23AJ of the *Income Tax Assessment Act 1936* (ITAA 1936), which treats certain foreign non-portfolio dividends derived by an Australian resident company as non-assessable non-exempt income (NANE), will also be amended.

With reference to the previous Government’s decision to repeal section 25-90 of the *Income Tax Assessment Act 1997* (ITAA 1997), which allows a deduction for ‘debt deductions’ associated with the derivation of certain foreign NANE income, the Treasurer said that this had been rejected by the Coalition Government as it would “harm Australian businesses”. It is noted that at this stage, the Government has still not finalised its position on the need for a targeted integrity rule to address concerns related to section 25-90 of the ITAA 1997.

The House of Representatives will [resume](#) sittings on 14 July 2014 for the last week of the Winter sittings.

#### **Replacement for Australian Charities and Not-for-profits Commission (ACNC) – options paper:**

On 4 July 2014, the Government released an [options paper](#) setting out proposed replacement arrangements for the ACNC. Some of the new proposals include:

- Self-reporting requirements to ensure public accountability for charities’ operations
- Returning determination of charitable status to the ATO with a framework in place to ensure independence of decision making
- A proportionate compliance framework that would leverage existing powers
- Appropriate transitional arrangements to provide certainty for the sector.

Submissions on the options paper are due by 20 August 2014.

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## [Weekly tax news](#)

### [Business tax](#)

**Bills receive Royal Assent:** The following Bills received Royal Assent last week:

- [Tax Laws Amendment \(Implementation of the FATCA Agreement\) Bill 2014](#) (gives effect to Australia’s obligations under the agreement with the United States to implement the US *Foreign Account Tax Compliance Act*)
- [Tax and Superannuation Laws Amendment \(2014 Measures No. 2\) Bill 2014](#) (includes amendments to provide a legislative ‘protection’ for taxpayers who self-assessed on the basis of certain announced measures which will no longer proceed and amendments to address dividend washing arrangements)
- [Tax and Superannuation Laws Amendment \(2014 Measures No. 3\) Bill 2014](#) (includes amendments to limit deductibility of expenditure on mining rights and mining information first used for exploration).

**ATO Corporate Plan 2014-18 – Reinventing the ATO:** On 1 July 2014, the ATO released its [Corporate Plan for 2014-18](#). This plan includes both the ATO's priorities for 2014-15 and outlines what it wants to achieve over the planning period, being the 2014 to 2018 years. The strategies that the ATO is prioritising over the planning period are summarised as follows:

- Strategy 1: Build a culture that embodies the ATO's values and transforms the client's experience
- Strategy 2: Simplify interactions, maximising automation and reducing costs
- Strategy 3: Connect with the community and other agencies in meaningful ways
- Strategy 4: Influence policy and law design for more certain outcomes
- Strategy 5: Use data in a smarter way to improve decisions, services and compliance
- Strategy 6: Reshape the workforce to optimise capability and performance.

**Capital gains tax scrip-for-scrip roll-over relief not available to taxpayers – Decision Impact Statement (DIS) released on *Dickinson/Fabig*:** The Commissioner has released a [DIS](#) concerning the decision of the Full Federal Court in [Commissioner of Taxation v Fabig \[2013\] FCAFC 99](#). In that case, the Full Federal Court allowed the Commissioner's appeal, overturning the Administrative Appeals Tribunal's decision in [Dickinson and Commissioner of Taxation \[2013\] AATA 25](#) and [Fabig and Commissioner of Taxation \[2013\] AATA 26](#) and held that capital gains tax scrip-for-scrip roll-over relief was not available to two taxpayers who received a percentage of the consideration for the sale of shares that differed from the percentage of shares they held in the company. For more information, refer to [Tax highlights 2 September 2013](#).

The DIS states that in applying section 124-780(2)(c) of the *Income Tax Assessment Act 1997* (ITAA 1997), the ATO will evaluate whether participation was available on substantially the same terms by reference to the arrangement in question and other matters beyond the arrangement itself. This will include, in appropriate cases, any shareholders' agreement.

**Taxation Determination (TD) on thin capitalisation and special purpose entities released:**

- [TD 2014/18](#): The exemption in section 820-39 of the ITAA 1997 can apply to the special purpose entity (SPE) that seeks finance for the project which is established as part of the securitised licence structure used in some social infrastructure Public Private Partnerships (PPPs) provided the SPE satisfies the conditions in section 820-39(3) of the ITAA 1997. This TD was previously issued as [TD 2014/D8](#).

**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:

- Seeking an ATO public statement on permanent establishment in Australia – secondment arrangements
- Clarification of superannuation guarantee payments for defined benefits after 30 years of service
- Clarification of the ATO's view on establishment of appropriate minimum residual values for finance leases of cars.

**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 and Administration	Progress
<p>ATO approach to reviewing governance and the associated review of PS LA 2004/14 (Access to corporate board documents on tax compliance risk)</p>	<p>At a workshop on 5 June 2014, the ATO presented a near final version of PSLA 2004/14. Following discussion, more refinements have been made to the draft practice statement.</p> <p>The ATO will now prepare examples to provide a better understanding of how it applies in practice. The examples will be circulated to the group for feedback. The ATO will update guidelines concerning conduct of tax governance reviews to explain how the practice statement operates in practice, and what type of information the ATO will be requesting in the first instance to risk assess matters.</p>
<p>Feasibility of use of External Compliance Assurance Processes for basic ATO assurance work i.e. use of registered company auditors</p>	<p>The concept design and proposed pilot has been approved and the ATO is now moving to the pilot stage.</p> <p>A small steering group is being set up comprising both ATO and external members. Information regarding ECAP is now available on <a href="http://ato.gov.au">ato.gov.au</a></p>
<p>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</p>	<p>A process for consultation is being determined</p>
<p>NEW: ABN Proof of Identity requirements for non-individual entities non-resident associate issues</p>	<p>A meeting was held on 16 June 2014 as to the certification process and whether alternative arrangements could be made to facilitate businesses setting up in Australia more quickly and easily.</p>
<p>Review of the ATO pre-lodgment compliance review (PCR) product</p>	<p>A high level design has been prepared following a workshop held on 28 May 2014 and has now been sent to external participants for comment on the practicalities of the proposed new approach. The design is the starting point on determining a new pre-lodgment compliance review product approach. Further workshops will be held as consultation moves into the next phase.</p>

Feasibility and potential operation of statutory remedial powers for the Commissioner of Taxation	The working group has produced a joint statement of intent about what the proposal for a statutory remedial power is trying to achieve. The ATO is now working with Treasury to put a proposal to the Government, to progress this concept.
<b>International</b>	<b>Progress</b>
Banking: Attribution and inter-branch derivatives – discussion of TR 2001/11 and TR 2005/11 and banking industry practice	A workshop was held on 6 June 2014 where the ATO provided a revised version of a draft discussion paper which was aligned with the principles set out in <a href="#">TR 2005/11</a> . A final set of guidelines is being prepared for publishing on the ATO website.
Banking: Application of Subdivision 820-D of the ITAA 1997 to ADIs and its interaction with the consolidation regime and APRA's prudential standards	On 23 May 2014, the ATO provided members of the working group with the draft Arm's-Length Capital Amounts (ALCA) Guidelines for comment and feedback. Once feedback is obtained, a workshop will be scheduled to refine the guidelines.
Taxation Exemptions for Foreign Governments (Sovereign Immunity) – consultation on guidance in the form of a practice statement	A telephone meeting was held on 28 May 2014 with the consultation group to obtain input on a guidance document drafted by the ATO. The document will be finalised having regard to comments received and is expected to be published on the ATO's website in July 2014.
<b>Indirect taxes</b>	<b>Progress</b>
NEW: GST treatment of motor vehicle incentive payments	On 23 April 2014, the ATO published draft ruling <a href="#">GSTR 2014/D1</a> on motor vehicle incentive payments. The ATO met with the Federal Chamber of Automotive Industries (FCAI) on 19 May 2014 and the Australian Motor Industry Federation (AMIF) and Victorian Automobile Chamber of Commerce (VACC) on 21 May 2014 to discuss the draft ruling.
Financial supplies guidance products in respect of GST	Consultation is continuing.
<b>Resource Rent Tax</b>	<b>Progress</b>
Petroleum resource rent tax (PRRT): Meaning of exploration	The final ruling is expected to issue by the end of July 2014 (draft ruling was <a href="#">TR 2013/D4</a> ).
<b>Trusts</b>	<b>Progress</b>
Alienation of income through discretionary trust partners	The Professional Firms Working Group convened on 7 May 2014 to discuss the draft guidance publication. Subsequently, a joint submission from the group was received and considered. A revised publication was issued to

	the group in late May 2014 for final comment. It is anticipated that the co-designed publication will be issued early in the new financial year.
Australian custodians' tax return obligations in respect of trustee liabilities under section 98 of the ITAA 1936	On 28 May 2014, the Australian Custodial Services Association's members were invited to comment on a proposal which entails custodians lodging a single return with sufficient information to enable multiple assessments to be issued in recognition of potential multiple trust estates under global custodian arrangements. The proposal provides streamlined lodgment and processing procedures to reduce compliance costs and simplify collection of custodians' section 98 liabilities.

The matters under consultation that did not report progress from the previous update are as follows:

- Compliance and Administration
  - Use of standardised accounting data to improve compliance case selection
  - Streamlined tax return systems
  - Tailored Business Returns project – consultation with software developers
  - Settlement code
- Trusts
  - Small business capital gains tax concessions and unpaid present entitlements
- Consolidation – Guidance on the application rules to the rights to future income amendments
- International
  - Application of new transfer pricing laws (Division 815 of the ITAA 1997)
  - Administrative approach to income tax transfer pricing and customs duty
  - 2014 International Dealings Schedule (IDS) and 2014 IDS Instructions
- Taxation of financial arrangements (TOFA) – Application of Division 230 of the ITAA 1997 (TOFA provisions) to securitisation transactions
- Capital allowances – Income tax treatment of exploration expenditure
- Minerals Resource Rent Tax – Cultural heritage payments
- Superannuation – Apportionment of expenses incurred by a superannuation entity only partly in gaining its assessable income
- Other – Guidance on ensuring that a partner in a limited partnership is not subject to double taxation.

**Australian branches of foreign banks – administrative solution for deduction based on LIBOR:**

The ATO has released details of an administrative solution for the application of section 160ZZZA of the ITAA 1936 which allows an Australian branch of a foreign financial entity to claim a deduction on the notional interest payment arising from an intra-bank loan. The amount of the deduction is limited to the interest amount calculated by reference to the London Interbank Offered Rate (LIBOR). As the AUD LIBOR is no longer quoted, the ATO has released an [administrative solution](#) which provides for proxy rates for the AUD LIBOR the purposes of section 160ZZZA of the ITAA 1936.

**Dividend washing integrity rule:** As reported above, amendments to introduce new integrity provisions to address dividend washing arrangements have received Royal Assent and are now law. The ATO has [released](#) a guide to these new provisions which apply to distributions received on or after 1 July 2013. The ATO notes that for distributions made before 1 July 2013, the Commissioner may apply section 177EA of the ITAA 1936 to deny franking credits received through dividend washing arrangements (see [TD 2014/10](#)).

**Test Case Litigation Register:** The ATO Test Case Litigation Register has been [updated](#) as of 1 July 2014.

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## Individuals and family groups

**'Paid' includes payment by direction for purposes of section 44:** The Administrative Appeals Tribunal (AAT) has found that 'paid' for the purposes of section 44 of the ITAA 1936 includes a payment by direction and therefore dividends paid to a limited partnership at the direction of the applicants were assessable to the applicants.

The applicants were the only shareholders in Rocbit Pty Ltd (Rocbit). The applicants were also limited partners in the Rocbit Limited Partnership (Rocbit LP), with Vilworth Pty Ltd (Vilworth) named as the general partner. The applicants signed a Limited Partnership Agreement (LP Agreement) and a Partnership Capital Contribution Agreement (CC Agreement) which indicated that the applicants would each contribute their shares in Rocbit to the Rocbit LP and that this contribution would be made by providing a Power of Attorney to Vilworth to deal with the shares on behalf of the applicants and apply any income or proceeds of sale from the shares to the business of the Rocbit LP. In the relevant income years, Rocbit passed resolutions to declare the payment of dividends to its shareholders and to "credit the dividend to the loan accounts of the respective shareholders". The Register of Members of Rocbit indicated that the applicants were the only shareholders, yet under the heading "Distribution", the recipient nominated was the Rocbit LP.

Following an audit of the tax affairs of the applicants, the Commissioner issued notices of amended assessment to include the amount of dividends (and associated franking credits) in their assessable income and imposed a penalty of 50% of the shortfall amount on the basis that the applicants and their tax agent had been reckless as to the operation of the relevant taxation laws. The applicants lodged objections to both the amended assessments and the penalty assessments and these objections were disallowed.

The first issue before the AAT was whether the dividends were derived and assessable in the hands of the Rocbit LP or in the hands of the applicants individually. The applicants contended that the shares in Rocbit became partnership property of the Rocbit LP, with the consequence that any dividend paid on those shares was assessable to the Rocbit LP and not to the applicants individually. By contrast, the Commissioner contended that the shares in Rocbit never became partnership property of the Rocbit LP.

The AAT had regard to the totality of the LP agreement and the CC agreement and concluded that the agreements did not provide for a transfer of the shares in Rocbit, or even a transfer of the right to the dividends that flow from such shares. Rather, the agreements allowed for a right to use the shares for

certain purposes and a right to an application of the income of the shares. The AAT concluded that dividend income belonged at all times to the applicants, but upon derivation of that income, it was immediately applied to the Rocbit LP in accordance with the terms of the CC agreement.

The next issue was whether crediting of the dividends to Rocbit LP was capable of constituting a dividend 'paid' to the applicants for the purposes of section 44 of the ITAA 1936. Having regard to the finding that, under the CC Agreement, there was a direction by the applicants to apply all dividends paid to them in Rocbit to the Rocbit LP, the AAT was of the view that 'paid' for the purposes of section 44 should be interpreted to include a payment by direction and accordingly, the dividend was 'paid' to the applicants.

Contrary to the arguments put by the Commissioner, the AAT found that the evidence did not support a finding of recklessness by the advisors or applicants and reduced the penalty to 25% of the shortfall amount – click to view [Yazbek and Commissioner of Taxation \[2014\] AATA 423](#) (27 June 2014).

**Appeals update – Moignard:** The Commissioner has appealed to the Federal Court against the decision of the AAT in [Moignard and Commissioner of Taxation \[2014\] AATA 342](#). The AAT found that a taxpayer, who was trustee of a number of discretionary trusts that operated a wine merchandising business, was not presently entitled to an amount from the sale of a property which was transferred into the taxpayer's personal bank account.

**Tax Receipt:** The Treasurer has [confirmed](#) that from 1 July 2014, individual taxpayers will receive a one page personalised tax receipt. The tax receipt will provide a breakdown of how an individual's tax has contributed towards Government expenditure, and will also include information on the level of Australian Government debt.

**Trusts – ATO practical guidance on section 100A of the ITAA 1936:** The ATO has [released](#) practical guidance about the application of section 100A of the ITAA1936, an integrity measure which considers the present entitlement of beneficiaries to a share of trust income that arises in connection with a reimbursement agreement.

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## Indirect taxes

**Bills receive Royal Assent:** The following Bills received Royal Assent last week:

- [Excise Tariff Amendment \(Product Stewardship for Oil\) Bill 2014](#)
- [Customs Tariff Amendment \(Product Stewardship for Oil\) Bill 2014](#).

**Fuel indexation hearing:** The Senate Economics Legislation Committee conducted a public hearing on 2 July 2014 as part of its inquiry into the package of bills related to the re-introduction of fuel indexation (i.e. Fuel Indexation (Road Funding) Bill 2014, Excise Tariff Amendment (Fuel Indexation) Bill 2014, Customs Tariff Amendment (Fuel Indexation) Bill 2014 and Fuel Indexation (Road Funding) Special Account Bill 2014). Submissions addressed several matters including the reintroduction of fuel indexation, the level of fuel tax credit recovery, and whether the extra revenue derived from indexation should be spent solely on road infrastructure. Click to view a [transcript of the hearing](#) or to view the [written submissions](#) received by the Committee. The Committee is due to table its report on 7 July 2014.

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### State and Territory taxes

**ACT: Removal of employment agent payroll tax exemption delayed:** The ACT government has [announced](#) its intention to postpone the removal of the 'genuine employer' payroll tax exemption for employment agents (in Schedule 2, Part 2.3, section 2.14(1)(g)). The exemption is currently available for wages paid by an employment agent to a subcontractor, under a contract between them, for work performed by the subcontractor for a client of the employment agent, provided that the subcontractor can show that it is a bona fide employer of the individuals who perform the work. The exemption has presented difficulties in application and administration, and its removal will make the ACT's approach consistent with other jurisdictions. The removal of the exemption was originally planned for 1 July 2014, but is currently proposed to be delayed until 1 October 2014 to allow affected employers to adequately prepare for the change.

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### International tax

**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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