



## Tax highlights

14 April 2014

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### *Key developments this week*

**Corporations law amendments – exposure draft (ED) legislation released:** On 10 April 2014, the Minister for Finance [released ED legislation and explanatory material](#) setting out proposed improvements to the corporations law. The ED includes the following amendments to the test for payment of dividends (section 254T of the *Corporations Act 2001*):

- Replace the net assets test with a pure solvency test, and exempt dividend payments from the capital maintenance provisions to the extent that they are 'equal reductions' in capital
- Require directors to include details about the source of dividends paid and the company's dividend policy in the Annual Director's Report when paid out of sources other than profits.

Submissions on the ED are due by 16 May 2014.

**US Foreign Account Tax Compliance Act (FATCA) update – Australia now treated as having an IGA 'in effect':** As reported in [Tax highlights 7 April 2014](#), on 2 April 2014, the U.S. Treasury Department issued [Announcement 2014-17](#) to indicate that it will treat more than a dozen countries that have agreed in substance on the terms of an intergovernmental agreement (IGA) with the United States as having an IGA 'in effect' until 31 December 2014. The IGA must be signed by this date in order for this status to continue without interruption.

Australia is [listed](#) as one of the countries that is now treated as having an IGA in effect. While the list indicates that Australia has agreed in substance on an IGA based on the model 1 IGA, the text of the Australian IGA will not be published until the IGA is signed.

In addition, the U.S. Treasury Department announced it is extending the FFI registration deadline from 25 April to 5 May 2014, giving institutions 10 more days to register with the IRS. Registration by this date will still enable the institution to be listed on the FFI list to be released by the IRS on 2 June. In addition, FFIs that submit their registration by 3 June 2014 should be included on the list to be released on 1 July 2014.

This announcement means that:

- Australian financial institutions (FIs) can finalise their entity classifications and confirm the entities that are required to register with the IRS based on the text of the model 1 IGA. However, any expected modifications to Annex II of the model 1 IGA (which sets out the entities and accounts that are exempt from, or deemed to comply with aspects of FATCA) for Australian FIs cannot be applied until the IGA is signed. Accordingly, some uncertainty will continue for some entities, as their status may not be able to be finalised until the Australian IGA is signed and the text of the IGA is available
- Australian FIs that are required to register will register as a Reporting Model I FFI, but do not need to register until December 2014. They may, however, choose to do so prior to this date
- Australian entities (including those that do not need to register) can confirm the entity classification to be provided to U.S. withholding agents and other entities on a W8-BEN-E or similar form, based on the model 1 IGA.

This announcement does not alter any other FATCA deadlines.

Australian FIs are still required to meet all other FATCA deadlines, such as having FATCA-compliant onboarding for new account holders operational from 1 July 2014. However, as Australia is treated as having an IGA in effect, Australian FIs can continue to progress FATCA implementation projects with certainty that they should be applying the rules in the model 1 IGA in complying with FATCA from the 1 July 2014 "go-live" date.

If you have any questions or require any further information, please contact one of our FATCA specialists.

**Free trade agreements – Japan and Korea:** The Prime Minister and the Minister for Trade and Investment have jointly announced the conclusion of negotiations for the Japan-Australia Economic Partnership Agreement (JAEPA). The ['Key outcomes' statement](#) indicates that the JAEPA will provide benefits to both Australian exporters and Australian consumers. Significantly, the JAEPA will provide preferential access or duty-free entry for more than 97% of Australia's exports to Japan by the time it is fully implemented. Significant export benefits are expected for Australian agricultural producers, whose products are currently subject to tariffs of up to 219%. The announced outcomes for Australian exports include:

- Reductions in the tariff on beef imports (currently 38.5%) to 19.5% (frozen beef) and 23.5% (fresh beef)
- Tariff elimination and/or preferential access to the Japanese market for Australian sugar, dairy products, horticulture products (i.e. fruits, vegetables, juices, nuts), wine, certain seafood products, chocolate, barley, vegetable oils, honey and pork products
- Tariff elimination for Australian resources imports that currently attract a tariff – including immediate elimination on JAEPA's entry into force for coking coal, petroleum oils, aluminium hydroxide and titanium dioxide
- Immediate elimination of tariffs (currently up to 30%) on imports of Australian manufactured goods, when the JAEPA enters into force
- Australian services suppliers to have guaranteed access to the Japanese market in key areas including financial, education, telecommunications, legal services and the Japanese government procurement market
- Increased levels of protection for Australian intellectual property.

Negotiations for a free trade agreement with the Republic of Korea were concluded in December 2013. The [Australia-Korea Free Trade Agreement](#) (KAFTA) was formally signed in Korea on 8 April 2014. The Australian Government anticipates that the KAFTA will enter into force by the end of 2014. Once in force, 84% of Australia's exports (by value) to South Korea will enter duty free, increasing to 99.8% on full implementation.

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## Weekly tax news

### Business tax

**Bill receives Royal Assent:** The following Bill received Royal Assent on 9 April 2014:

- [Export Market Development Grants Amendment Bill 2014](#).

**Progress of current bills:** At the conclusion of the Autumn Parliamentary Sittings on 27 March 2014, the following tax bills were still outstanding.

Bill	Intro	Passed HoR	Passed Senate
<a href="#">Tax Laws Amendment (Research and Development) Bill 2013</a> : For more information, refer to <a href="#">Tax highlights 18 November 2013</a>	14/11/2013	09/12/2013	
<a href="#">Omnibus Repeal Day (Autumn 2014) Bill 2014</a> : For more information, refer to <a href="#">Tax highlights 24 March 2014</a>	19/03/2014	26/03/2014	
<a href="#">Clean Energy Finance Corporation (Abolition) Bill 2013 [No. 2]</a> : For more information, refer to <a href="#">Tax highlights 24 March 2014</a>	20/03/2014	27/03/2014	
<a href="#">Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014</a> : For more information, refer to <a href="#">Tax highlights 24 March 2014</a>	19/03/2014		
<a href="#">Paid Parental Leave Amendment Bill 2014</a> : For more information, refer to <a href="#">Tax highlights 24 March 2014</a>	19/03/2014		
<a href="#">Tax Laws Amendment (2014 Measures No. 1) Bill 2014</a> : For more information, refer to <a href="#">Tax highlights 31 March 2014</a>	27/03/2014		

**Deductions refused for imposts paid by holder of electricity transmission licence:** In a 2:1 majority decision, the Full Federal Court (Edmonds and McKerracher JJ; Davies J dissenting) has dismissed the taxpayer's appeal and held that imposts paid by the taxpayer to the Victorian State Treasurer under section 163AA of the *Electricity Industry Act 1993* (Vic) (EIA) were not deductible under section 8-1 of the *Income Tax Assessment Act 1997* (ITAA 1997).

The taxpayer carried on a business of electricity transmission in Victoria, following its acquisition of the assets of Power Net Victoria (a State government-owned corporation that owned Victoria's electricity transmission network) in November 1997. The assets acquired by the taxpayer included the transmission licence required under section 159 of the EIA to transmit electricity in Victoria.

As a condition precedent to the transfer of the assets to the taxpayer under the relevant agreement (the Asset Sale Agreement), the State Government caused the Governor in Council to make an Order under section 163AA of the EIA imposing an obligation on the holder of the transmission licence to make certain payments, totalling \$177.5 million, to the Victorian State Treasurer (the section 163AA imposts).

Following its acquisition of the transmission licence, the taxpayer became liable to the section 163AA imposts as holder of the transmission licence and duly paid \$177.5 million to the Victorian State Treasurer over the 1998–2000 financial years. The Commissioner denied the deductions that the taxpayer claimed under section 8-1 of the ITAA 1997 for the payment of the section 163AA imposts. The Federal Court at first instance (Gordon J) held that the section 163AA imposts were not deductible under section 8-1 of the ITAA 1997 on the basis that they were “akin” to the State taking a share of the taxpayer’s profits and accordingly were not a cost of the taxpayer in deriving its assessable income. On this basis Gordon J held that the section 163AA imposts did not satisfy either of the positive limbs of section 8-1(1) of the ITAA 1997. Although strictly unnecessary, Gordon J went on to conclude that the section 163AA imposts were outgoings of capital or of a capital nature.

On appeal, the Full Federal Court (Edmonds, McKerracher and Davies JJ) disagreed with Gordon J’s finding that the section 163AA imposts did not satisfy either of the positive limbs of section 8-1(1). However, the majority (Edmonds and McKerracher JJ) considered that the section 163AA imposts were nevertheless not deductible under section 8-1 on the basis that they were outgoings of capital or of a capital nature.

The respective decisions of Edmonds and McKerracher JJ pointed to certain clauses in the Asset Sale Agreement which acknowledged that the taxpayer would become liable to pay the section 163AA imposts following the transfer of the transmission licence, and on this basis, held that the imposts were capital or of a capital nature. Edmonds J stated that the liability to the section 163AA imposts “was assumed by [the taxpayer] on the transfer of the Transmission Licence, not by Order under section 163AA, and as such, forms as much part of the cost of acquisition of the Assets as the Total Purchase Price.” McKerracher J similarly stated that “the provisions of the Asset Sale Agreement imposed a separate contractual liability to pay [the section 163AA imposts] in order to acquire the Assets, including the Transmission Licence. The payment was therefore a capital amount.” – *SPI PowerNet Pty Ltd v Commissioner of Taxation* [2014] FCAFC 36 (7 April 2014).

#### **Appeals update – special leave applications:**

- **Pratt Holdings:** The taxpayer has [discontinued](#) its application for special leave to appeal to the High Court against the Full Federal Court decision in *Pratt Holdings Proprietary Limited v Commissioner of Taxation* [2013] FCAFC 82 (previously [scheduled](#) to be heard on 11 April 2014). The Full Federal Court dismissed the taxpayer’s appeal and upheld the Federal Court’s decision in *Pratt Holdings Proprietary Limited v Commissioner of Taxation (No 2)* [2012] FCA 1118 that in claiming a balancing adjustment deduction under Subdivision 330-J of the ITAA 1997, the calculation of the balancing adjustment did not include expenditure which was deemed to be ‘allowable capital expenditure’ under Subdivision 330-C of the ITAA 1997
- **Ludekens & Anor:** 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 Ludekens* [2013] FCAFC 100. The Full Court held that each respondent contravened section 290-50(1)

of Schedule 1 of the *Taxation Administration Act 1953* in dealing with their respective investors in a particular managed investment scheme and were accordingly liable to civil penalties under the promoter penalty regime.

**Deloitte alert – ATO wins appeal on treaty issues affecting Cayman limited partnership:** As reported in [Tax highlights 7 April 2014](#), the Commissioner was successful in his appeal before the Full Federal Court in [Commissioner of Taxation v Resource Capital Fund III LP \[2014\] FCAFC 37](#), in which the Full Court overturned the Federal Court's decision and held that a Cayman Islands limited partnership is an independent taxable entity that is liable to tax for Australian tax purposes and the Australia/United States double tax agreement (DTA) does not preclude the limited partnership's liability to tax. Deloitte has prepared an alert which summarises the decision and sets out implications for non-residents investing into Australia – click [here](#) to view.

**Taxation Determination (TD) expected to be released on 16 April 2014:**

- TD 2014/8: Does a franking credit arise in the franking account of a head company of a consolidated group when a franked distribution is made by an entity that is not a member of the consolidated group to a trust that is a subsidiary member of the consolidated group? Previously issued as [TD 2013/D10](#).

**ATO Interpretative Decision (ATO ID) released:**

- [ATO ID 2014/14](#): When an individual or trustee chooses a roll-over under Subdivision 122-A of the ITAA 1997 for the disposal of pre-CGT assets to a company, the cost base of the pre-CGT assets acquired by the company is worked out based on an acquisition time of before 20 September 1985 and not the day the pre-CGT assets were transferred. The cost base of the pre-CGT assets acquired by the company is the market value of the shares before 20 September 1985.

**ATO Public Rulings Program – business tax final determinations – updated as at 1 April 2014:**

Final determinations scheduled for release in the next two months	
Topic	Planned issue date
Can a financial report prepared by an entity in accordance with those accounting standards it is required to apply, but not in accordance with other relevant accounting principles, satisfy paragraphs 230-210(2)(a), 230-255(2)(a), 230-315(2)(a) or 230-395(2)(a) of the ITAA 1997?	28 May 2014
Are the capital support payments described in this Determination deductible under section 8-1, section 40-880, section 230-15(2) or section 230-15(3) of the ITAA 1997?	4 June 2014
Consolidation: under subitem 50(5) of Part 4 of Schedule 3 to <i>Tax Laws Amendment (2012 Measures No.2) Act 2012</i> , does the original 2002 law only apply to the particulars that form part of a head company's assessment for an income year in respect of a joining	4 June 2014

entity if the latest notice of assessment for that income year, which relates to section 701-55(6) of the original 2002 law in respect of that joining entity, is served on the head company before 12 May 2010?	
Consolidation: does the exception to the pre rules in paragraph 50(3)(a) of Part 4 of Schedule 3 to the <i>Tax Laws Amendment (2012 Measures No.2) Act 2012</i> apply to an assessment (the assessment for the later income year) in the circumstance described in paragraph 1 of this Taxation Determination?	4 June 2014
Consolidation: if the conditions in subitem 50(3)(a) of Part 4 of Schedule 3 to <i>Tax Laws Amendment (2012 Measures No.2) Act 2012</i> are satisfied and the interim rules apply to an assessment and, on or after 29 June 2012, that assessment was amended to alter a claim made under the original 2010 law, do the interim rules apply to the altered claim?	4 June 2014
Consolidation: if the conditions in subitem 50(5) of Part 4 of Schedule 3 to <i>Tax Laws Amendment (2012 Measures No.2) Act 2012</i> are satisfied and the original 2002 law applies to an assessment, will a subsequent request by the head company to amend that assessment result in the pre rules applying, by virtue of subitem 50(6), to the entire assessment or only to the subsequent amendment request?	4 June 2014
Consolidation: if the conditions in subitem 50(3)(a) of Part 4 of Schedule 3 to <i>Tax Laws Amendment (2012 Measures No.2) Act 2012</i> are satisfied and the interim rules apply to an assessment and, on or after 29 June 2012 that assessment is amended to include a new claim which was not previously made in the assessment, do the interim rules apply to the new claim?	4 June 2014

**Inspector General of Taxation (IGT) – new work program:** On 10 April 2014, the IGT [announced](#) his new work program for 2014 onwards. The new IGT program consists of the following reviews:

- Review into the ATO's Taxpayers' Charter and taxpayer protections
- Review into the ATO's approach to debt collection
- Review into the ATO's services and support for tax practitioners
- Review into the ATO's conduct of employer obligation compliance activities.

Further significant topics raised by stakeholders included reviews into the ATO's administration of the general anti-avoidance rules, the ATO's public consultation arrangements and the ATO's information gathering activities. However, the IGT considered that there would be benefits in allowing some time to elapse before these issues are reviewed.

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## Employment taxes

### TD expected to be released on 16 April 2014:

- TD 2014/9: Fringe benefits tax: reasonable amounts under section 31G of the *Fringe Benefits Tax Assessment Act 1986* for food and drink expenses incurred by employees receiving a living away from home allowance fringe benefit for the fringe benefits tax year commencing on 1 April 2014.

**Crew members on commercial fishing vessel not employees:** The Administrative Appeals Tribunal (AAT) has found that crew members on a commercial fishing vessel operated by the taxpayer were not 'employees' for superannuation guarantee purposes. During the period under review (quarter ended on 30 September 2009 through to the quarter ended on 30 June 2011), the crew members were engaged by the taxpayer by way of a 'Joint Fishing Adventure' agreement (the agreement). The issue before the AAT was whether the crew members were 'employees' of the taxpayer for the purposes of section 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA 1992).

The AAT had regard to the agreement and evidence of the parties, and concluded that the crew members were not 'employees' of the taxpayer at common law. In particular, the AAT noted that the terms of the agreement indicated that the taxpayer and crew members operated as joint venturers – independent business people who were co-operating for the limited purpose of catching and ultimately selling fish. Further, the agreement and evidence of witnesses indicated that there was little scope for the exercise of supervision and control by the taxpayer over the crew members, as the parties managed each voyage by consensus. The AAT went on to consider whether the crew members were 'employees' within the extended meaning in section 12(3) of the SGAA 1992 and concluded that they were not as the agreement was not wholly or principally for the labour of the crew member. Instead, it was a joint venture agreement that was intended to produce fish for sale – click here to view [Dominic B Fishing Pty Ltd and Commissioner of Taxation \[2014\] AATA 205](#) (10 April 2014).

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## Superannuation

### TD released:

- [TD 2014/7](#): This TD sets out the circumstances in which a bank account of a complying superannuation fund is a segregated current pension asset under section 295-385 of the ITAA 1997.

**ATO Public Rulings Program – superannuation draft determination – updated as at 1 April 2014:**

Draft determination scheduled for release in the next two months	
Topic	Planned issue date
Is a person who performs child care services an employee for the purposes of the <i>Superannuation Guarantee (Administration) Act 1992</i> ?	11 June 2014

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## Indirect taxes

**Appeals update – MBI Properties – High Court grants special leave to appeal:** The High Court has [granted](#) the Commissioner special leave to appeal against the decision of the Full Federal Court in [MBI Properties Pty Limited v Commissioner of Taxation \[2013\] FCAFC 112](#). In that decision the Full Court found that the taxpayer did not have a GST 'increasing adjustment' under section 135-5 of the *New Tax System (Goods and Services Tax) Act 1999* (GST Act) in relation to the enterprise it acquired from a vendor as a GST-free going concern (i.e. apartments leased to a serviced apartment operator) because the taxpayer did not intend that any input taxed supply of residential premises would be made through the enterprise. The Full Court ruled that the requirements of section 135-5(1)(b) were not satisfied because there were no supplies being made through the enterprise acquired by the taxpayer from the vendor. The Full Court held that the existence of a continuing lease did not equate to a continuing supply. It held that what was supplied by the vendor to the operator was the grant of the lease in each case, and that the supply was complete upon the lease coming into existence and did not continue beyond the grant. The Full Court's decision has raised significant GST issues for entities selling or purchasing property subject to lease as well as for tenants. The High Court has yet to fix a date for the appeal to be heard.

### Draft GST Determination (GSTD) released:

- [GSTD 2014/D2](#): This draft GSTD expresses the Commissioner's preliminary view that payments made by a vendor to a purchaser of real property because the rent received has fallen below a rental yield guaranteed by the vendor for a specified period, gives rise to an 'adjustment event' for the purposes of the GST Act. Accordingly, the vendor will have a 'decreasing adjustment' to the extent that its GST liability for the supply of the real property was attributable to a previous tax period, and the purchaser will have an 'increasing adjustment' to the extent that its entitlement to an input tax credit for the acquisition of the real property was attributable to a previous tax period. The draft GSTD only covers rental guarantees that are provided in the particular factual and contractual circumstances described in the draft GSTD. The due date for comments about the draft GSTD is 9 May 2014.

### ATO Public Rulings Program – indirect tax draft and final rulings – updated as at 1 April 2014:

Draft rulings and determinations scheduled for release in the next two months	
Topic	Planned issue date
GST treatment of the transport of passengers to, from or outside Australia or on domestic legs of international sea voyages – item 1 and item 4 in the table in section 38-355(1) of the GST Act	14 May 2014 but delayed
Foreign currency products – supply of rights for use outside Australia - paragraph (a) of item 4 in section 38-190(1) of the GST Act	14 May 2014 but delayed
Is the supply of brokerage services, that facilitates the sale or purchase of financial products traded on overseas securities and futures exchanges, GST-free under paragraph (a) of item 4 in section 38-190(1) of the GST Act?	14 May 2014 but delayed

GST consequences of motor vehicle incentive payments	28 May 2014
<b>Final WET ruling scheduled for release in the next two months</b>	
<b>Topic</b>	<b>Planned issue date</b>
Arrangements of the kind described in Taxpayer Alert <a href="#">TA 2013/2</a> Wine equalisation tax (WET) producer rebate schemes	11 June 2014

**Deloitte IndirectTV™: Overpaid GST – Refunds to be further restricted:** [Tax Laws Amendment \(2014 Measures No. 1\) Bill 2014](#) is currently before Parliament. Schedule 2 of the Bill contains amendments to change the rules governing refunds of overpaid GST. In [this episode of Deloitte IndirectTV™](#), Melbourne tax barrister Chris Sievers outlines the impact of the new rules if the Bill is passed.

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### International tax

#### Transfer pricing – Draft Taxation Rulings (TRs) expected to be released on 16 April 2014:

- TR 2014/D3: Transfer pricing – the application of section 815-130 of the ITAA 1997
- TR 2014/D4: Transfer pricing – documentation requirements.

#### Transfer pricing – Practice Statements expected to be released on 16 April 2014:

- PS LA 3672: Administration of transfer pricing penalties for income years commencing on or after 29 June 2013
- PS LA 3673: Guidance for transfer pricing documentation.

**ATO Public Rulings Program – international tax related draft and final rulings – [updated as at 1 April 2014](#):**

<b>Draft determination scheduled for release in the next two months</b>	
<b>Topic</b>	<b>Planned issue date</b>
Does FRE 4 happen to the debtor on repayment of a loan taken out prior to the effective date of a choice to use the applicable functional currency and denominated in the same non AUD currency that later becomes the applicable functional currency?	23 April 2014
<b>Final rulings scheduled for release in the next two months</b>	
<b>Topic</b>	<b>Planned issue date</b>
The application of the ships and aircraft article of Australia's tax treaties to taxable income derived under section 129 of the <i>Income Tax Assessment Act 1936</i> (ITAA 1936) by a non-resident shipowner or charterer	28 May 2014



Satisfying the 'carrying on a business at or through a permanent establishment' requirement in section 23AH of the ITAA 1936 where a company is taken to have a permanent establishment in relation to substantial equipment
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