



## Tax highlights

18 August 2014

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### Key developments this week

**ATO Practice Statement Program update – transfer pricing guidance:** The ATO has updated its [Practice Statement Law Administration Program](#) as at 14 August 2014. Included in the list of practice statements scheduled for release are final versions of two draft practice statements to provide guidance on the application of the transfer pricing rules, both expected to be issued on 15 October 2014:

- Administration of transfer pricing penalties for income years commencing on or after 29 June 2013 (Draft Practice Statement Law Administration [PS LA 3672](#))
- Guidance on the steps in the process for transfer pricing documentation (Draft Practice Statement Law Administration [PS LA 3673](#)).

*Consultation on the development of guidance products on the application of the transfer pricing rules is being conducted through the Division 815 Technical Working Group – see latest report from the [ATO Consultation Hub](#). The draft guidance released to date includes the two draft practice statements mentioned above, together with Draft Taxation Ruling [TR 2014/D3](#) which deals with the ATO's power to reconstruct transactions between related parties and Draft Taxation Ruling [TR 2014/D4](#), which together with [PS LA 3673](#), sets out the ATO's views on the transfer pricing documentation an entity should prepare and keep. These two draft rulings are currently scheduled for release, according to the latest [ATO Public Rulings Program](#), on 29 October 2014.*

*In preparing transfer pricing documentation, [TR 2014/D4](#) and draft [PS LA 3673](#) require taxpayers to do much more than was necessary under the old transfer pricing rules. This is because the rules now operate on a self-assessment basis, with the onus on taxpayers to show how they have applied the rules. Further, the reconstruction provisions in the new transfer pricing rules in particular require additional documentation considerations.*

*With regard to penalties, draft [PS LA 3672](#) confirms that penalties for taxpayers getting transfer pricing wrong are steep and that the guidelines for remission are tougher than under the old rules. Taxpayers that have no supporting transfer pricing documentation at the time of lodging their tax returns are automatically into a higher minimum base penalty amount of 25 per cent, with no chance of remission.*

**ATO audits and reviews of super funds in 2014:** In a [speech](#) delivered to the Tax Institute National Superannuation Conference on 14 August 2014, Peter O'Reilly, Assistant Commissioner, Public Groups and International set out the ATO's strategy objectives for the superannuation industry. In particular, these included:

- supporting the willing participation from APRA regulated superannuation funds to comply with the tax law and pay the correct amount of tax, and
- the identification of new or emerging issues and the provision of assurance, assistance and clarification of the law or its administration where there is uncertainty.

To achieve these objectives, the ATO will use two complementary approaches:

1. *Risk assessment approach:* The ATO will use a variety of risk assessment products, and risk filters and metrics based on tax return and other quantitative data
2. *Focus areas:* These areas are qualitative in nature and may reflect areas of new or changing law, new ATO views, private ruling requests, current or emerging issues for industry, or systemic issues identified through risk assessment and verification work. The 10 broad focus areas addressed in the Assistant Commissioner's speech were: isolated and/or significant transactions, exempt current pension income, merger issues, post-tax reporting, expenses issues, imputation issues, international issues, capital gains, financial products and pay-as-you-go instalments deferral.

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## [Weekly tax news](#)

### [Business tax](#)

**Exempt entities – special conditions – TR 2014/D5 released:** The ATO has released its preliminary views regarding two of the special conditions to be satisfied before certain entities are exempt from income tax: compliance with all substantive requirements in the entity's governing rules and the application of income and assets solely for the purpose for which the entity is established.

**ATO targets dividend washing:** From mid-August 2014, the ATO will [progress](#) to the next stage of its dividend washing compliance program by issuing letters to 500 taxpayers who did not respond to the ATO's initial letters, and sending up to 1,500 letters to other taxpayers who the ATO's updated data analysis suggests may have entered into dividend washing transactions. Concessionary treatment will be provided to those taxpayers who self-amend their tax returns by certain due dates.

**Effective life review – assets in surveying/mapping industry:** The ATO is [seeking](#) industry participation in a review of assets used in the surveying and mapping services industry in order to make new effective life determinations for tax depreciation purposes.

**ATO Practice Statement Program update – administrative penalties:** The ATO [Practice Statement Law Administration Program](#) as at 14 August 2014 includes the following practice statement scheduled for release next month:

- Administration of the penalty imposed under section 284-75(3) of Schedule 1 to the *Taxation Administration Act 1953* (administrative penalty for the failure to provide a document to the Commissioner) – expected to be issued on 18 September 2014.

## Individuals and family groups

**Appeals update – Darling special leave application:** The High Court has [refused](#) the taxpayer's application for special leave to appeal to the High Court against the Full Family Court decision in [Commissioner of Taxation & Darling \[2014\] FamCAFC 59](#). The Full Family Court set aside the Family Court decision in [Commissioner of Taxation & Darling and Anor \[2013\] FamCA 118](#) and 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. For a summary of the Full Family Court decision, refer to [Tax highlights 5 May 2014](#).

**Equitable damages not received as constructive trustee – DIS released:** The Commissioner has released a [Decision Impact Statement \(DIS\)](#) concerning the decision of the High Court in [Howard v Commissioner of Taxation \[2014\] HCA 21](#). The taxpayer was a director of a company (Disctronics) who, together with two other directors of Disctronics and two other individuals (who were not directors of the company), explored the acquisition and lease of a golf course whereby Disctronics would be an 'equity participant'. Upon agreement of the terms of the joint venture between the five individuals, Disctronics was not named as a joint venturer. The two individuals who were not directors of Disctronics subsequently acquired the golf course through a company of which they were directors. The taxpayer (and the two other directors of Disctronics) then successfully sued the other two individuals for breach of fiduciary duties and received a share of equitable damages awarded as compensation for losses sustained in the joint venture.

The issues before the High Court included whether the taxpayer received the equitable damages as constructive trustee for Disctronics and, if not, whether the taxpayer had assigned the right to receive that amount such that the income was not derived by him beneficially. In dismissing the taxpayer's appeal, the High Court held that the taxpayer did not receive the equitable damages as constructive trustee for Disctronics because he did not receive the amount in circumstances where there was a conflict between his personal interest and his duties as a director of the company, nor did he obtain it by use or by reason of his fiduciary position. Further, the High Court held that the litigation agreement provided for the assignment of any proceeds of the action, not for the assignment of the taxpayer's right to receive equitable damages, and therefore the damages were derived by him beneficially.

The ATO has indicated that the views expressed by the High Court are consistent with the Commissioner's view and current practices.

**ATO Practice Statement Program update – deceased estates:** The updated ATO [Practice Statement Law Administration Program](#) as at 14 August 2014 includes the following practice statement scheduled for release next month:

- Deceased estates – expected to be issued on 30 September 2014.

## Superannuation

**Complying super fund – losses on traditional securities:** ATO Interpretative Decision [ATO ID 2014/26](#) states that a complying superannuation fund can claim a deduction under section 70B of the *Income Tax Assessment Act 1936* for the full amount of a loss it incurred on the disposal or redemption of a 'traditional security' where the traditional security is not a segregated current pension asset as defined in section 295-385(3) of the *Income Tax Assessment Act 1997* (ITAA 1997) and section 295-390 of the ITAA 1997 applies to exempt some of the income of the fund.

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## Indirect taxes

**GST – 'destination outside Australia' – Draft Goods and Services Tax Determination GSTD 2014/D3 – scheduled for release on 20 August 2014:** This determination will consider the meaning of 'destination outside Australia' for the transport of a passenger by sea under item 1(a) and item 4 of section 38-355(1) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).

**ATO Practice Statement Program update – GST groups:** The updated ATO [Practice Statement Law Administration Program](#) as at 14 August 2014 includes the following practice statement:

- Exercise of the discretions under sections 48-71 and 51-75 of the GST Act to approve an 'early day of effect' for membership of GST groups and participation in GST joint ventures – expected to be issued on 9 October 2014.

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## State and Territory taxes

**Victoria – transfer duty and development contributions:** The High Court has [granted](#) the Commissioner of State Revenue's application for special leave to appeal against the decision of the Victorian Court of Appeal in [Lend Lease Development Pty Ltd v Commissioner of State Revenue \[2013\] VSCA 207](#). The Court of Appeal ruled that the stamp duty payable on land purchased by the taxpayer in Melbourne's Docklands precinct should be calculated without including contribution payments, paid by the taxpayer under a development agreement, for external infrastructure and other matters not on the land transferred.

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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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