

NOVEMBER 2013

# AUSTRALIAN TAX ALERT

## GOVERNMENT UPDATE ON PREVIOUSLY ANNOUNCED TAX MEASURES

Over the past 12 years, 96 tax related measures have been announced by former governments which have not been legislated. These outstanding tax measures have created uncertainty for taxpayers, of varying degrees. Where a tax measure has not been implemented, taxpayers have needed to decide whether they will arrange their tax affairs based on an announced measure or based on existing tax legislation. This uncertainty is exacerbated in circumstances where either the announced measure is intended to apply retrospectively, or where the measure was intended to apply prospectively but the intended commencement date has long since passed.

In a joint media release issued on Wednesday, 6 November 2013, Treasurer Joe Hockey and Assistant Treasurer Arthur Sinodinos outlined the Government's intentions in relation to 92 of these measures. The remaining four outstanding tax measures have already been addressed as a part of the Government's recently announced packages of reforms relating to the repeal of the Carbon and Mining taxes.

In summary it was announced that:

- 18 measures will proceed as announced, with commencement dates ranging from 1 July 2011 to 1 July 2016;
- 3 measures will proceed with amendment, with commencement dates ranging from 17 August 2012 to 1 July 2014;
- 7 measures will not proceed; and

- 64 measures are being further reviewed by the Assistant Treasurer, with the assistance of the Board of Taxation. The media release indicates that the Assistant Treasurer has a "disposition not to proceed" with these measures.

The outstanding measures deal with a broad range of issues including: personal tax, corporate tax, research and development incentives, Managed Investment Trust ("MIT") rules, superannuation, GST, FBT, Luxury Car Tax, Tobacco excise and customs matters.

We have extracted below those measures that we consider to be most important and relevant to businesses. The tables on the pages that follow outline:

- the item number for each measure (corresponding to the numbering in the media release);
- the measure title and description, as outlined in the media release;
- the status and date of effect, where relevant; and
- our high level comments on each measure.

Some of these changes may necessitate changes to existing arrangements, as current structures may not achieve the preferred or expected tax outcomes, after certain changes are implemented. If you have queries in relation to how this can be achieved, our Tax Team would be pleased to assist. Our contact details are provided at the end of this document.

## Income Tax Measures

Item	Measure Title and Description	Status / Date of Effect	DLA Piper Comment
3	<p><b>R&amp;D</b></p> <p><b>A plan for Australian jobs - research and development tax incentive - better targeting.</b></p> <p>Denies access to the R&amp;D tax incentives for large companies with income of \$20 billion or more.</p>	<p>Proceed as announced, with effect from 1 July 2013.</p>	<p>Companies and groups with assessable income in Australia of \$20 billion or more will no longer be eligible to access the 40 per cent non-refundable tax offset from 1 July 2013.</p> <p>Therefore, companies and groups with assessable income in Australia of \$20 billion or more and who have been eligible to access the 40 per cent non-refundable tax, should review their financials and consider the impact of this change post 1 July 2013. The R&amp;D aggregation and grouping rules are very important in this regard.</p>
9	<p><b>CGT for foreign residents</b></p> <p><b>Protecting the corporate tax base from erosion and loopholes - improving the integrity of the foreign resident capital gains tax regime: withholding tax regime and technical amendments.</b></p> <p>Address issues in administering Australia's foreign capital gains tax regime; and also clarifies for managed investment trusts which will increase certainty and reduce compliance costs.</p>	<p>Proceed as announced, with effect from 14 May 2013 in respect of the capital gains tax regime and 1 July 2016 in respect of the withholding tax regime.</p>	<p>The following changes have a two-fold purpose. Firstly, to broaden the Australian capital gains tax net in respect of foreign residents especially in respect of indirect mining interests. Secondly, to ensure that foreign residents pay capital gains tax in Australia by imposing a withholding tax.</p> <p><b>Foreign resident capital gains tax regime</b></p> <p>The changes are to the "principal asset test", which is used to determine whether an interest is an indirect Australian real property interest.</p> <p>Broadly, these changes:</p> <ul style="list-style-type: none"> <li>▪ determine the value of the Taxable Australian Real Property assets of the entity in which the interest is held - intangible assets connected to the rights to mine, quarry or prospect for natural resources are treated as part of the rights to which they relate; and</li> <li>▪ ensure that inter-company dealings between entities in the same tax consolidated group will not form part of the principal asset test calculations which means that assets cannot in effect be counted multiple times and thereby diluting the true asset value of the group.</li> </ul> <p><b>Withholding tax regime</b></p> <p>A 10% non-final withholding tax levied on the gross proceeds payable to foreign</p>

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			<p>residents on disposal of certain taxable Australian property.</p> <p>This measure will not apply to residential property transactions under AU2.5 million or to disposals by Australian residents.</p>
10	<p><b>Managed investment trusts ("MITs")</b></p> <p><b>Government response to Board of Taxation Review.</b></p> <p>Introduces a new tax regime for managed investment trusts which will increase certainty and reduce compliance costs.</p>	<p>Proceed as announced, with effect from 1 July 2014.</p>	<p>The new tax regime is intended to improve and simplify the administration of MITs by fund managers and to provide greater certainty regarding the tax consequences of investing in MITs for investors. In particular, the MIT regime was intended to provide for a new "attribution" system of taxation on trust income and provide certainty regarding the status of MITs as "fixed trusts" for tax purposes.</p> <p>These changes have been much anticipated by fund managers and will affect all MITs once introduced.</p>
11	<p><b>Dividend washing</b></p> <p><b>Protecting the corporate tax base from erosion and loopholes - preventing "dividend washing".</b></p> <p>Closes a loophole that enables sophisticated investors to "double dip" on franking credits.</p>	<p>Proceed as announced, with effect from 1 July 2013.</p>	<p>There is some debate whether a specific integrity measure is required to prevent "dividend washing" or if this result could have been achieved using an existing anti-avoidance provision.</p>
15	<p><b>Foreign Account Tax Compliance Act ("FATCA") - Australia and US commence discussions.</b></p> <p>To work towards signing and enacting a treaty-status Inter-Governmental Agreement ("IGA") with the US to enable the financial sector to comply with US FATCA reporting rules.</p>	<p>Proceed as announced, with effect from the date of Royal Assent.</p>	<p>Broadly, FATCA will require Australian financial institutions to report certain information back to the IRS in the US. The IGA is designed to facilitate this process whereby information is reported locally and provide concessions compared to the US FATCA Regulations. Proceeding with the discussions and enactment of an IGA is very important to those affected.</p>
17	<p><b>Managed investment trust withholding tax - providing certainty for foreign pension funds.</b></p> <p>Allows pension funds to access the managed investment trust withholding tax regime (as intended).</p>	<p>Proceed as announced, with effect from 1 July 2008.</p>	<p>This change proposes to amend the existing provisions as they originally intended to operate in respect of foreign pension funds.</p>
18	<p><b>International tax - investment manager regime</b></p>	<p>Proceed as</p>	<p>Proceeding with this measure is good news as otherwise the rules could give rise to</p>

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	<p><b>prospective arrangements (Element 3).</b></p> <p>Extends the conduit income measure to exempt foreign funds from tax on gains from the disposal of foreign non-portfolio investments; and to exempt those funds from tax on gains from the disposal of certain portfolio Australian financial arrangements.</p>	<p>announced, with effect from 1 July 2011.</p>	<p>unexpected outcomes for foreign funds.</p>
19	<p><b>Protecting the corporate tax base from erosion and loopholes - addressing aggressive tax structures that seek to shift profits by artificially loading debt into Australia - proceed with amendments.</b></p> <ul style="list-style-type: none"> <li>▪ Tightening and improving the thin capitalisation rules is to proceed as previously announced;</li> <li>▪ Changes to the exemption for foreign non-portfolio dividends is to proceed as previously announced; and</li> <li>▪ The abolishment of the section 25-90 deduction will not proceed. Instead the Government will commence consultations on a targeted integrity rule to address certain conduit arrangements.</li> </ul> <p>Not proceeding with the abolishment of the section 25-90 deduction will reduce compliance cost and red tape.</p>	<p>Proceed with amendment, with effect from 1 July 2014.</p>	<p><b>Thin Capitalisation</b></p> <p>The safe harbour amount in the thin capitalisation rules will change as follows:</p> <ul style="list-style-type: none"> <li>▪ for general entities, a reduction from 75% to 60% on a debt to total asset basis;</li> <li>▪ for non-bank financial entities, a reduction from 95.24% to 93.75% on a debt to total asset basis; and</li> <li>▪ for ADIs, the capital limit will be increased from 4% to 6% of the risk weighted assets of their Australian operations.</li> </ul> <p>Also, the "worldwide gearing" limit for outbound investors will be reduced from 120% to 100%, with an equivalent change to the worldwide capital ratio for ADIs. Further, the new "worldwide gearing" limit of 100% will be extended to inbound investors.</p> <p>Finally, the <i>de minimis</i> threshold will increase from \$250,000 to \$2 million.</p> <p>Therefore, entities that have annual interest deductions greater than \$2M need to consider whether their debt funding satisfies the new thin capitalisation limits and whether refinancing is possible and preferred.</p> <p><b>Exemption for foreign non-portfolio dividends</b></p> <p>The income tax exemption for non-portfolio dividends received by Australian companies in relation to certain interests in foreign companies will be removed where that interest is classified as "debt" for Australian tax purposes (eg redeemable preference shares).</p>

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			<p>Therefore, companies need to apply the debt/equity rules to their overseas equity investments if they have previously qualified for the foreign non-portfolio dividend exemption and determine if they still qualify for this exemption. If not, it could be preferable to change the nature of this equity investment.</p> <p><b>Section 25-90 to remain</b></p> <p>The repeal of this section was considered by many as "taking a sledgehammer to a walnut" and would have required businesses to trace funds back to deductible and non-deductible sources (which is not currently required where funds are borrowed and partly used to subscribe for shares in non-resident companies).</p> <p>It is our view that the thin capitalisation rules, together with transfer pricing and anti-avoidance provisions, are the appropriate mechanisms to control excess debt loading in Australia.</p> <p>Accordingly, in our view the proposal to not go ahead with the repeal of section 25-90 is a sensible outcome.</p>
20	<p><b>Protecting the corporate tax base from erosion and loopholes - closing loopholes in the Offshore Banking Unit ("OBU") regime.</b></p> <p>Addresses integrity issues associated with related party dealings and better targets the regime to genuine mobile financial sector activities. The Government will not proceed with the measure to exclude all related party dealings but instead will develop targeted rules to address integrity concerns.</p>	<p>Proceed with amendment, with effect from 1 October 2013.</p>	<p>This is also a sensible approach adopted by the Government, to not wholly exclude all related party dealings but instead develop targeted rules to address integrity concerns in respect of the OBU regime.</p>
32	<p><b>Bad debts - ensuring consistent treatment in related party financing arrangements (symmetric treatment of bad debts).</b></p>	<p>Further consultation required. Intended</p>	<p>As part of the 2012-13 Budget, the Australian Government announced it would introduce measures to deny a creditor a tax deduction for a bad debt write-off, where the debtor was a related party (and not part of the same consolidated group as the</p>

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	Ensures that if a lender claims a deduction for writing off a debt, then the borrower would recognise a similar amount of income.	start date of 8 May 2012.	creditor). In addition, the corresponding gain to the debtor would be disregarded. These measures were aimed at preventing inappropriate shifting of deductions/losses between related parties that are not part of the same consolidated group through the writing off of debts. However, some of the proposals in the Discussion Paper issued by Treasury on July 2012 raised questions as to whether such changes are required (due to the inability to transfer losses outside of a consolidated group) and may potentially create unintended adverse consequences for related party debt.
34	<p><b>Capital gains tax - strengthening certain integrity measures in the scrip for scrip roll-over.</b></p> <p>Tightens the law to make it harder for companies and trusts to avoid capital gains tax when they sell subsidiary companies other than as part of a genuine merger or restructure of a business.</p>	Further consultation required. Intended start date of 8 May 2012.	<p>These changes, if enacted, will prevent entities, including trusts, from obtaining certain tax benefits when they sell a subsidiary, not a part of a genuine takeover.</p> <p>The proposed amendments will tighten the integrity measures, in response to issues raised in <i>FCT v AXA Asia Pacific Holdings Ltd</i> [2010] FCAFC 134.</p> <p>Integrity measures will be strengthened such that:</p> <ul style="list-style-type: none"> <li>▪ entities will not be able to bypass the stakeholder provisions by, for example, holding convertible preference shares in the target company instead of ordinary shares;</li> <li>▪ the CGT liability will be deferred indefinitely for the on-sale of the target entity by the acquiring entity; and</li> <li>▪ CGT liabilities that have arisen from intra-group debt will not be able to be reduced.</li> </ul>
44	<p><b>International tax - review of the foreign source income anti-tax-deferral (attribution) regimes.</b></p> <p>Modernises Australia's controlled foreign company rules to ensure Australian residents cannot accumulate income in offshore entities and thereby defer, or even avoid Australian tax.</p>	Further consultation required. Intended start date of 1 July 2014.	These rules have taken a very long time to be re written and we hope that the consultation and implementation can occur relatively quickly, as the proposed changes avoided some unexpected and unfair outcomes.
46	<b>Capital gains tax - look-through treatment for earn</b>	Further	There has been considerable uncertainty in relation to these rules, since the draft

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	<p><b>out arrangements.</b></p> <p>Treats earn out payments as part of the value of the business assets for CGT purposes.</p>	<p>consultation required. Intended to start from the date of Royal Assent.</p>	<p>Taxation Ruling TR 2007/D10 was released and then reversed. Issues have arisen in relation to the ability to claim the small business CGT exemption and in relation to Allocable Cost Amount Calculations. The current situation does not fully address these concerns and we welcome further consultation in relation to the way earn-outs are treated for the purchaser and the vendor.</p>
58	<p><b>Taxation exemptions for foreign governments (sovereign immunity).</b></p> <p>Clarifies and codifies the exemption currently provided to foreign governments and their investment bodies for dividend and interest income from passive investment in Australia.</p>	<p>Further consultation required. Intended to start from the date of Royal Assent.</p>	<p>Currently, the administration of the sovereign immunity exemption by the Australian Taxation Office (by way of a private binding ruling process) creates uncertainty in respect of when a foreign government or their investment body will qualify for this exemption.</p> <p>The codification of the sovereign immunity exemption will be a welcome change where it provides certainty and transparency.</p>
59	<p><b>Loss recoupment rules - multiple classes of shares.</b></p> <p>Improves the operation of the tax loss rules in a limited range of circumstances (ie where a company has non-standard classes of shares or when it joins a consolidated group).</p>	<p>Further consultation required. Intended start date of 1 July 2002.</p>	<p>As part of the 2007-08 Budget, the Australian Government announced it would to improve the operation of the company loss recoupment rules and to remove uncertainty. In particular, the changes were intended to ensure that companies do not fail the continuity of ownership test ("<b>COT</b>") merely because of having multiple classes of shares on issue, or because of having special arrangements in place in respect of dividends and capital returns. Exposure Draft legislation for these measures were first introduced in September 2009.</p> <p>These proposed changes are an important measure in ensuring that companies do not fail COT merely because of having multiple classes or shares, or special rights attaching to certain shares. It has been over 6 years since these changes were first announced and more than 10 years after the proposed start date of 1 July 2002, thus the implementation of these rules will provide affected taxpayers with long-awaited certainty in respect of COT.</p>
74	<p><b>Debt / equity tax rules - limiting scope of integrity rules.</b></p> <p>Limits the scope of an integrity provision in the debt /</p>	<p>Further consultation required. Intended</p>	<p>Section 974-80 was included in the debt/equity provisions in Division 974 as an integrity provision to allow the re-characterisation of instruments that satisfy the debt test in that Division but are used to fund an effective equity interest held by an</p>

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	equity rules to prevent unintended outcomes.	to start date was 1 July 2001.	<p>ultimate investor - particularly relevant for stapled structures.</p> <p>After consultation, the Government announced as part of the 2011/12 Federal Budget to restrict the application of section 974-80 to intended circumstances only.</p> <p>There has been much uncertainty created by the Australian Taxation Office's release of Taxation Ruling TR 2012/D5 in relation to the application of section 974-80 in the stapled entity context.</p> <p>However, the delay in amending section 974-80 has also created uncertainty for many organisations using these structures. Any changes need to carefully consider the impact on relevant businesses.</p>
76	<p><b>Off-market share buybacks - implementing the Board of Taxation recommendations.</b></p> <p>Implements the recommendations of the Board of Taxation's 2008 report on modifying the taxation treatment of off-market share buy backs.</p>	Further consultation required. Intended start date from date of Royal Assent.	<p>The changes contained in the exposure draft legislation, which implement the recommendations of the Board of Taxation, should provide greater certainty and reduced complexity and compliance costs and enable buy-backs to be conducted in a more timely and commercial manner.</p> <p>However, one of the key changes in respect of a listed company conducting an off-market share buyback is that a franking debit will arise in the franking account where the company has foreign resident shareholders. This is to ensure that there is effectively no streaming of franking credits from foreign resident shareholders to Australian shareholders.</p>
78	<p><b>Improvements to the company loss recoupment rules.</b></p> <p>Modifies company loss recoupment rules to correct minor technical issues.</p>	Further consultation required. Intended start date of 1 July 2011.	As part of the 2011-12 Budget, the Australian Government announced it would introduce measures to improve the operation of the company loss recoupment rules by simplifying the continuity of ownership test ("COT") in certain circumstances and removing some minor technical defects. The proposed changes including extending the concessional tracing rules for certain shareholders (eg complying superannuation funds) and improving the operation of the concessional rules in respect of interposed entities. These changes will provide affected taxpayers with greater certainty on the application of the COT tracing rules and correct some of the minor technical deficiencies in the current law.



## GST Measures

Item	Measure Title and Description	Status / Date of Effect	DLA Piper Comment
21	<p><b>Proceed with previously announced measure to restrict GST refunds - proceed with amendments.</b></p> <p>Restrict refunds of overpaid GST. Amendments will address a recent Administrative Appeals Tribunal finding that it doesn't have jurisdiction to consider refund matters.</p>	Proceed with amendment, with effect from 17 August 2012.	Presently rules relating to restrictions on GST refunds are set out in s105-65 in Schedule 1 of the Taxation Administration Act 1953. The proposed amendments will repeal those provisions and introduce new provisions into the GST Act. The new provisions will be broader and capture a wider range of GST overpayments, resulting in further restrictions on GST refunds.
29	<p><b>Low value import threshold - set threshold by regulation - do not proceed.</b></p> <p>Does not proceed with the separation of the low value import threshold for customs duty and GST purposes as the Government has not yet considered the business case on the low value import threshold.</p>	Not proceeding.	The GST-free and customs duty threshold for the import of low value goods via parcel delivery is currently \$1,000. It had been proposed to separate the threshold applying for GST and customs duty purposes, so that the GST-free threshold could potentially be reduced. The Government is not proceeding with this measure while it considers whether the GST-free threshold should be reduced.
40	<p><b>GST - Government response to Board of Taxation report: GST administration - changes in use adjustments.</b></p> <p>Amends the GST change of use provisions to provide higher thresholds, and fewer and shorter adjustment periods.</p>	Further consultation required. Intended start date based on Royal Assent.	If a GST entity changes its use of an acquisition, this can potentially trigger GST adjustments. The number of years over which an entity needs to monitor its use of an acquisition varies based on value - with a maximum of 10 adjustment periods for acquisitions valued at \$500,000 or more. It was proposed to increase the thresholds and decrease applicable adjustment periods.
41	<p><b>GST - Government response to Board of Taxation report: GST administration - review treatment of vouchers.</b></p> <p>Reviews the GST treatment of vouchers having regard to international developments.</p>	Further consultation required. Intended start date based on Royal Assent.	There are special rules relating to the GST treatment of vouchers. It had been proposed that those rules be reviewed in light of international developments in other jurisdictions.
42	<p><b>GST - Government response to Board of Taxation report: GST administration - review multi-party</b></p>	Further consultation	The GST treatment of two party transactions can be relatively straightforward. However, complexities can arise if three or more parties are involved. It had been

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	<p><b>transactions.</b></p> <p>Provides further examination of the treatment of multi-party transactions in order to eliminate unrecoverable tax, having regard to overseas work in this area.</p>	<p>required. Intended start date based on Royal Assent.</p>	<p>proposed that the GST Act be reviewed and potentially amended to better address multi-party transactions.</p>
48	<p><b>GST - Cross border transactions - "connected with Australia" rules.</b></p> <p>Reduces the number of non-residents who are unnecessarily drawn into Australia's GST system, improving the competitiveness of Australian suppliers.</p>	<p>Further consultation required. Intended start date based on Royal Assent.</p>	<p>Non-resident entities that make supplies which are "connected with Australia" may be required to register for GST purposes. It was proposed that some of the "connected with Australia" tests be relaxed in certain circumstances, to reduce the number of non-resident entities required to be registered.</p>
55	<p><b>GST - Government response to Board of Taxation report: GST administration - reverse charge for going concerns and farm land and supplies of farmland for farming.</b></p> <p>Replaces the GST-free concessions for the supply of going concerns and farm land supplied for farming with a reverse charge mechanism.</p>	<p>Further consultation required. Intended start date based on Royal Assent.</p>	<p>Presently the sale of farm land, or the sale of an operating enterprise, may be GST-free (under the farm land and going concern exemptions). It had been proposed that such transactions instead be treated as taxable supplies, but with the GST being "reverse charged" so that it is payable by the purchaser.</p>
79	<p><b>GST - Government response to Board of Taxation report: GST administration - simplify grouping rules.</b></p> <p>Broadens and simplifies the GST grouping membership rules and enables holding companies to be entitled to register and group for GST purposes.</p>	<p>Further consultation required. Intended start date based on Royal Assent.</p>	<p>The GST grouping rules are complex and potentially exclude entities that should arguably be eligible to join a GST group. It was proposed that the rules be simplified, and that the rules also be extended to cover entities that may presently be excluded (and in particular passive holding companies).</p>
80	<p><b>GST - Government response to Board of Taxation report: GST administration - clarify treatment of general law partnerships.</b></p> <p>Clarifies the treatment of general law GST</p>	<p>Further consultation required. Intended start date based on Royal Assent.</p>	<p>For GST purposes partnerships are treated as separate GST entities, albeit a partnership is not a legal entity (unlike a company or natural person). This artificial entity status can give rise to additional GST complexities. It had been proposed that the GST Act be amended to clarify the treatment of general law partnerships.</p>

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	partnerships.		
82	<p><b>GST - Government response to Board of Taxation report: GST administration - clarify treatment of bare trusts.</b></p> <p>Clarifies the GST treatment of bare trusts.</p>	Further consultation required. Intended start date based on Royal Assent.	Bare trusts are commonly used in managed funds businesses (Custodians are generally treated as bare trusts in a GST context). It had been proposed that the GST Act be amended to clarify the treatment of transactions involving bare trusts.
92	<p><b>GST - Government response to Board of Taxation report: GST administration - clarify treatment of tax law partnerships.</b></p> <p>Clarifies the GST treatment of tax law partnerships, including where a tax law partnership is formed or dissolved and with it makes a supply or an acquisition.</p>	Further consultation required. Intended start date based on Royal Assent.	Entities that are in joint receipt of income may be considered to be involved in a tax law partnership, even if they are not involved in a general law partnership. This can be relevant for co-owners of property that jointly receive rental income. This can again give rise to additional GST complexities. It had been proposed that the GST Act be amended to clarify the GST treatment of tax law partnerships.

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