The 2015/16 Federal Budget – key Tax announcements for business
14 May 2015

Executive summary

On 12 May 2015, the Treasurer Joe Hockey delivered the 2015/16 Federal Budget. The Budget includes a number of tax announcements affecting Australian businesses and multinational businesses doing business in Australia.

The tax announcements reflect two major Budget themes on taxation:

- First, the Federal Government sees small business as a way to grow the Australian economy, and has focused on providing tax benefits and concessions to small business (including farmers) to encourage spending, investment and growth;

- Secondly, the Federal Government is prepared to take targeted unilateral action in relation to multinationals and profit shifting while the OECD continues its work on the Base Erosion and Profit Shifting (BEPS) project (for further detail about the BEPS Project see Tracking the changes to Base Erosion and Profit Shifting).

The table below sets out a summary of the key tax issues affecting business announced in the Budget. Major announcements are also elaborated on in more detail in our commentary below.

If you need further information about any of the key issues we have identified, please do not hesitate to contact our expert team noted below.
### Proposal

<table>
<thead>
<tr>
<th>Small business and start ups¹</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Who is affected</strong></td>
</tr>
<tr>
<td><strong>What should you do?</strong></td>
</tr>
</tbody>
</table>

#### Employee share and option plans

Legislation has already been introduced to change the employee share scheme tax regime. Under the proposed changes, which will apply to awards granted from 1 July 2015:

- the taxing point for options will be when they are exercised, not when they vest;
- a real risk of forfeiture will no longer be needed to access tax deferral;
- the maximum tax deferral will be 15 years not 7 years;
- shares and options granted by eligible start-ups will only be taxed when the underlying shares are sold and CGT will apply to the sale. However, the options must be 'out of the money' and the shares must not be issued at a discount of more than 15% and cannot generally be sold for at least 3 years from when the options are granted).

Following consultation, further concessions were introduced for eligible start-ups:

- eligible venture capital investments will be excluded when determining whether a company meets the start-up 'gateway' conditions;
- employees of eligible start-ups will be able to access

- Start-ups
- Venture capital limited partnerships
- Companies that operated option plans prior to 2009
- Employees who hold unvested and tax-deferred options on 1 July 2015

- Companies should consider revisiting suspended or abandoned option plans.
- Companies should consider deferring upcoming grants until 1 July 2015, but be careful not to create pre-1 July 2015 entitlements.
- Companies should re-test values for unvested options granted before 1 July 2015.

¹ Note that the "annual aggregate turnover" test to access a number of changes for small businesses is likely to only include ordinary income the entity derives in the course of carrying on a business. The Budget Papers do not make it clear whether that is a test based just on the current year, or whether broader tests considering earlier income years (such as those in Subdivision 328-C of the *Income Tax Assessment Act 1997* (Cth)) might apply.
<table>
<thead>
<tr>
<th>Proposal</th>
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<td>the 50% CGT discount, even where they sell their shares within 12 months of exercising options.</td>
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<td>The safe harbour tables for valuing unlisted options have also been amended and can now result in more favourable taxable values. The new tables commence on 1 July 2015, and can apply to options granted before that date and which are subject to tax deferral on 1 July.</td>
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<td>From 1 July 2015 a <strong>reduction in the corporate tax rate</strong> to 28.5% for small business.</td>
<td>Small business ie any company which carries on a business with annual aggregate turnover from that business of less than $2m</td>
<td>Further consider merits of deferring derivation of business income to after 30 June 2015 and bringing forward of deductions to before 30 June 2015 (taking account of the immediate write-off depreciation proposals referred to below). It is unclear from the Budget papers whether the reduced company tax rate will only apply to business income of such companies, to be consistent with the 5% discount for unincorporated entities, or whether it will extend to all income derived by the company.</td>
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<td>From 1 July 2015 a <strong>discount of 5% of income tax</strong> payable on business income derived by a sole trader or via a partnership or trust, capped at $1,000 per individual per year</td>
<td>Small business ie any unincorporated entity (sole trader, partnership or trust) which carries on a business with annual aggregate turnover from that business of less than $2m</td>
<td>Further consider allocation of trust distributions from discretionary trusts to spread $1,000 cap among a greater number of individuals</td>
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<td>From 1 July 2016 <strong>CGT rollover</strong> (but not revenue asset rollover).</td>
<td>Small business ie businesses with aggregate annual turnover of less than $2m, including if converting from a sole trader to a trust</td>
<td>Wait until legislation has been announced and seek guidance to determine how the rules are proposed to work, including for example with discretionary trusts.</td>
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<td>From 1 April 2016 <strong>extend the FBT exemption</strong> for portable electronic devices so that it is not limited to one portable electronic device per employee per FBT year</td>
<td>Small business ie all businesses with aggregate annual turnover of less than $2m</td>
<td>Have regard to the removal of the limit when considering whether to provide an employee with more than one portable electronic device from 1 April 2016.</td>
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<td>For depreciating assets installed ready for use between</td>
<td>Small business ie all businesses with aggregate annual</td>
<td>Ensure that the depreciating asset is acquired by the</td>
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<td>7:30pm on 12 May 2015 and 30 June 2017, an immediate write-off for depreciating assets (including motor vehicles but excluding horticultural plants and in-house software) with a cost for depreciation purposes of $20,000 or less (ie cost net of GST input tax credits).</td>
<td>turnover of less than $2m</td>
<td>entity which operates the eligible business. Consider further asset investment. This measure may mean it is beneficial to own or hire purchase assets rather than lease assets.</td>
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<td>From 1 July 2015, allow an immediate income tax deduction for professional fees in establishing a business structure</td>
<td>All start-ups (ie not restricted to small business).</td>
<td>Separately identify such expenditure so that it can be captured in preparing income tax returns. This measure may also be a factor in considering whether to restructure your business.</td>
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<tr>
<td>From 1 July 2015 a discount of 5% of income tax payable on business income derived by a sole trader or via a partnership or trust, capped at $1,000 per individual per year</td>
<td>Any unincorporated entity (sole trader, partnership or trust) operating a small business ie with annual aggregate turnover from that business of less than $2m</td>
<td>Further consider allocation of trust distributions from discretionary trusts to spread $1,000 cap among a greater number of individuals.</td>
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<td>From 1 July 2016 CGT rollover (but not revenue asset rollover) for businesses with aggregate annual turnover of less than $2m to change their business structure</td>
<td>Small business ie aggregate annual turnover of less than $2m - including if converting from a sole trader to a trust</td>
<td>Wait until legislation has been announced and seek advice to determine how the rules are proposed to work, including for example with discretionary trusts (if applicable).</td>
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### Multinationals

From 1 July 2016, a new Multinational Anti-avoidance Law will apply. It is intended to target artificial avoidance by multinationals of a taxable presence in Australia. Tax will be imposed on deemed income, plus a 100% penalty and interest.

<table>
<thead>
<tr>
<th>Multinationals</th>
<th>Companies with a global revenue of $1 billion or more where:</th>
<th>This measure is intentionally targeted at what is stated to be 30 multinationals but may have wider impact.</th>
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<td>• revenue from Australian sales is booked offshore in another entity in the global group (ie an entity which would be consolidated according to accounting standards)</td>
<td>Affected multinationals need to consider risk governance. One of the most critical matters from a risk governance perspective is documenting the purpose for a multinational structure. This becomes even more critical, following this announcement. If the offshore entity carries out substantial functions which add value to the Australia sales, this also needs to be documented and recorded.</td>
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<td>• Australian customers deal mainly with Australian employees of an Australian entity of the global group</td>
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<td>• the revenue is subject to no or low tax globally</td>
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<td>• it is reasonable to conclude that the scheme entered</td>
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### Proposal

- A plan was designed to avoid the non-resident entity from deriving Australian income that could be attributed to a permanent establishment (such as the Australian entity) in Australia
- A principal purpose of the scheme was to avoid a taxable presence in Australia or obtain another tax benefit in Australia or offshore.

It should be noted that this provision will not apply in certain circumstances. Those circumstances include if the offshore entity where the Australian income is booked is engaged in substantial activity which adds value in relation to the Australian sales (the burden of proof is on the relevant taxpayer to show that). In addition, the provision will not apply if the Australian customers deal with Australian independent agents, as opposed to staff engaged by an Australian entity.

### Who is affected

Multinational businesses

### What should you do?

Minter Ellison’s tax risk governance and tax litigation specialists can assist to provide a risk analysis— for example to analyse and assess the available evidence to ensure it is consistent with your risk governance policy and could meet evidential requirements.

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### Unilateral actions in relation to the Base Erosion and Profit Shifting (BEPS) project:

- Australia will implement new transfer pricing documentation standards set out by the OECD as part of the BEPS project from 1 January 2016. These standards will result in the ATO receiving country by country reports on a multinational’s global activities including income and taxes paid, a master file of containing an overview of global business, organisational structure and transfer pricing policies and a local file that details inter company transactions. Again this applies to multinationals with global revenue of $1 billion or more.

A number of these changes will require additional reporting and recording of tax information and tax transparency. Multinationals should review their tax risk governance policies to ensure that appropriate documentation is being drafted and maintained.
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<td>• Multinationals will be required to provide tax authorities with a global picture of their operations including income and tax paid in every country they operate in.</td>
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<td>• Australia will incorporate all <strong>OECD Treaty abuse rules</strong> into our Treaty practice</td>
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<td>• Australia will <strong>adopt the OECD draft plan on anti-hybrid rules</strong>. The Government has asked the Board of Taxation to consult on the implementation of these rules.</td>
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<td>• Australia has commenced <strong>exchange of information</strong> on tax deals provided to multinationals by other countries that may contribute to tax avoidance in Australia.</td>
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**Corporate Taxpayers**

**Voluntary Corporate Disclosure Code** this is being developed with the assistance of the Board of Taxation. It is intended to target multinational groups and encourage transparency in reporting of tax paid in Australia.

Larger corporate taxpayers and Multinational groups – scope as yet is unclear.

As part of corporate risk governance, multinationals should ensure they are engaged in and/or aware of the work in relation to this Code. It is unclear whether the ATO's position before the Senate inquiry as to an ETR model of disclosure (ie effective tax borne) could potentially form part of this Code.

**Banks and other Financial Service entities and Non-resident individuals and entities with accounts in Australia**

**Common Reporting standard**

Australia will implement the common reporting standard (CRS) from 1 January 2017. The CRS for the automatic exchange of information provides a common international standard for:

• the collection of financial account information by

Banks and financial institutions

Affected entities have recently prepared their systems for the introduction of FATCA. They will now need to extend these systems and due diligence processes for the CRS, which may or may be harmonised for these reporting purposes.
<table>
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<th>Proposal</th>
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<tbody>
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<td>financial institutions in participating jurisdictions on account holders who are residents in another jurisdiction; • the reporting of that information to the jurisdictions’ tax authority; and • the exchange of that information with the respective tax authorities of the non-residents. The CRS includes a requirement for financial institutions to look through certain entities and report on the relevant Controlling Persons. It will only apply where Australia has entered into information exchange agreements with affected jurisdictions.</td>
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**Offshore suppliers of digital services**

**GST to apply to supply of digital products and services to Australian consumers.**

All digital supplies made to *Australian consumers* (i.e. all residents that cannot otherwise claim back GST) will be caught.

Foreign digital providers will need to register for GST under limited registration system.

GST liability may shift to operators of electronic distribution services if they control delivery, price, or terms of the digital product being supplied.

Anyone outside of Australia providing services to anyone in Australia can be caught.

Specifically:
- Online / e-business, mainly music, applications, videos, streaming.
- Professional services – accounting / legal services

E-businesses not registered for GST should consider upcoming compliance burden, potential systems changes and impact on pricing structures, as Australian consumers will need to be distinguished from foreign consumers.

Distribution services (e.g. App market and website operators) will need to carefully consider the pricing terms of service offering, and ensure they have the right to recover any GST liability from the suppliers or their customers.

Professional services and other businesses providing information, advice, or documentation cross-border via online systems will need to prepare carefully for potential changes to GST treatment – do they have the right to recover GST from their customers?
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<th>Who is affected</th>
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</tr>
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<td><strong>Agriculture</strong></td>
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| Tax breaks and drought assistance for farmers to apply from July 2016: | Agriculture and business that supply agricultural equipment which is eligible for the concessional treatment | Businesses involved in the construction of ports, pipelines, electricity and water infrastructure on the Northern frontier should consider their eligibility for concessional loans under the Government/private sector partnership. Farmers should consider whether relief (such as concessional loans) is available under the soon to be released drought relief package.
Farmers should take advice on tax breaks available from July 2016. |
| • immediate deductions on capital expenditure on fencing and water facilities | Agricultural Infrastructure | |
| • depreciation claims available over 3 years for all capital expenditure on fodder storage assets | | |
| • Govt to partner with state government and the private sector to provide large concessional loans totalling as much as $5 billion for ports, pipelines, electricity and water infrastructure projects | | |
| | | |
| Further details will soon be released over the next few weeks regarding the $333M drought relief package announced prior to the budget, which included: | | |
| • $35 million for "shovel-ready" local infrastructure and employment projects | | |
| • $26 million for the control of weeds and animal pests | | |
| • $20 million for social and community programs and improving mental health | | |
| • An extra $250 million in concessional loans | | |
Multinational Anti-avoidance Law

There has been an unprecedented interest in recent times in global profit shifting. This includes Australia’s amendments to transfer pricing laws in 2013, the OECD BEPS project and the Senate Inquiry into corporate tax avoidance which commenced in April 2015. As foreshadowed by the Treasurer ahead of the Budget, draft legislation which provides targeted anti-avoidance laws for multinationals will be introduced.

From 1 January 2016 the multinational anti-avoidance law will apply, where it is reasonable to conclude that the division of activities between a non-resident entity that is making a supply to Australian customers, an Australian entity that deals with Australian customers, and any other parties in the global group has been designed so as to ensure that the relevant taxpayer is not deriving income from making supplies that would be attributable to a permanent establishment in Australia and taxed in Australia.

These laws are to be included as part of Australia’s existing anti-avoidance laws (Part IVA of the Income Tax Assessment Act 1936 (Cth)) but apply:

- only to foreign companies with gross revenue over $A 1 billion;
- where revenue from Australian sales is booked offshore in another entity in the global group (i.e., an entity which would be consolidated according to accounting standards)
- where Australian customers deal mainly with Australian employees of an Australian entity of the global group
- where the revenue from Australian sales is subject to no or low tax globally
- where it is reasonable to conclude that the scheme entered into was designed to avoid the non-resident entity from deriving Australian income that could be attributed to a permanent establishment (such as the Australian entity) in Australia
- where a principal purpose of the scheme was to avoid a taxable presence in Australia or obtain another tax benefit in Australia or offshore.

Where the multinational anti-avoidance law applies, the Commissioner will have the power to recover unpaid taxes on Australian income that ought have been returned in Australia (the Commissioner will determine the arm’s length profits attributable to Australia) and issue a penalty of an additional 100% of unpaid taxes, and apply interest. It should be noted that the 100% penalty will apply, even where the multinational’s position is a reasonably arguable position.

There are no budget estimates or forecasts of the revenue expected to be raised by these anti-avoidance rules. While it is stated that approximately 30 large multinational companies are suspected of diverting profits using artificial structures to avoid a taxable presence in Australia and it is clear that the provisions are intended to be targeted, those entities are not identified, and the provisions may have a wider reach.

Given the potential penalties involved, multinationals carrying on business in no tax or low tax countries will need to consider carefully whether their activities and profits are caught. As yet, there is little clarity about what is a ‘low tax’ country, and it will be important to consider common business jurisdictions such as Singapore and Hong Kong when the Government provides some clarity on that aspect.

Potentially affected multinationals need to consider risk governance. One of the most critical matters from a risk governance perspective is documenting the purpose for a multinational structure. This becomes even more critical following this announcement. If an offshore entity carries out substantial functions which add value to the Australia sales, this also needs to be documented and evidenced.

It is also notable that the Budget included an announcement that the ATO is to receive additional funding ($87.6 million over the next three years) to continue the investigation of multinational tax avoidance.

The Treasurer also confirmed that Australia would not replicate the UK Diverted Profits Tax after consultation with the United Kingdom.
GST integrity measure – aka the Netflix measure

Currently, digital products purchased by Australian consumers from overseas providers (such as e-books, music, applications, videos, and streaming services offered by the likes of Netflix) are not subject to GST in Australia, as the supplies are usually not connected with Australia.

In the Budget Papers, the Government confirmed that it change this outcome by imposing GST on supplies of digital products and services which Australian consumers purchase from overseas, as at 1 July 2017. Drafts of the proposed legislation propose to modify the meaning of connected with Australia to automatically include supplies of intangibles made to anyone defined as an Australian consumer. The definition of an Australian consumer includes all Australian residents to the extent they would not be able to claim back any GST.

The measures will also require the overseas supplier of the digital product to register for GST in Australia. According to the draft legislation, they will be assisted in doing so via a simplified limited registration scheme. Under the limited registration scheme, suppliers would not be able to claim input tax credits on related costs.

Perhaps in anticipation of the difficulty in enforcing such a mechanism on suppliers based overseas, the draft legislation contains a mechanism to shift the GST liability from the supplier of the digital product to the operator of the electronic distribution service used to provide the product. This will generally only occur in circumstances where the operator controls the delivery of the products, or is able to influence the price or terms and conditions under which the products are provided.

The proposed implementation mechanisms described above show that Treasury is still grappling with the real difficulties present in applying an indirect tax system designed for physical goods and local services on a virtually invisible and very complex digital world. The following issues will likely become important as the legislation is debated, refined, and implemented:

- **Which products are caught** – While the Budget announcement appears to focus on digital supplies of consumer services, the explanatory memorandum mentions that consultancy and professional services are also intended to be caught under the new measures. The potential scope of this is broad, and will need clarification prior to implementation, especially for multinational firms which routinely provide such services alongside their foreign partners.

- **Who is an Australian consumer** – While it is clear that the proposed legislation attempts to capture Australian end-users of digital products, it is difficult to reconcile this with the broad wording of the draft legislation. Treasury recognises that this may be an issue and provides a partial safeguard by permitting suppliers to treat a customer as not being an Australian consumer if the supplier takes reasonable steps to investigate and believes the customer is not an Australian consumer.

- **When is an operator liable** – In the digital world, it is particularly difficult to ascertain what the role of the electronic distribution service is compared to the supplier. There are widely varying extents to which service providers influence the delivery of products and its price, depending on the products offered. Experience with similar clauses in the European Union has proven confusing and difficult to apply.

- **Commercial issues** – Purportedly, one of the purposes of the legislation is to place Australian and foreign digital product providers on even footing. However, given the substantial compliance burden introduced by consumer exemption measures, operator liability, and registration mechanisms, it is likely that the balance will be skewed against foreign content providers. This may cause some to exit the Australia market.

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11 of 12