

TOP 10 TAX DEVELOPMENTS 2016

The pace of tax reform in Australia seems increasingly glacial. All is foreshadowed, debated, road-tested and then implemented on a deferred start. Not always inappropriate but tediously slow. 2016 saw new legislation emerge and some important final Court decisions. This note outlines our choice of 10 key tax developments during calendar 2016.



1. DIVERTED PROFITS TAX DOWN-UNDER

Australia will get a Diverted Profits Tax modelled on the UK version, with draft legislation released in November. A 40% DPT will apply from 1 July 2017 to profits diverted from Australia by significant global entities (\$1 billion global income), if a principal purpose of the diversion is the tax saving. The DPT will not apply if the diversion 'reasonably reflects the economic substance'.

2. DEBT-EQUITY BORDER PROTECTION

Draft legislation released in October will refine a troublesome anti-abuse rule protecting Australia's statutory debt-equity borderline. The rule will continue to aggregate interdependent instruments designed to operate with combined economic effect, but in clearer and more confined circumstances with innovative use of legislated examples.

3. RESIDENCE PANTOMIME

The Australian High Court confirmed in *Bywater Investments* that some private companies incorporated in the UK and elsewhere offshore were tax resident in Australia because their central management and control was located here. The judge at first instance colourfully described the activities of Swiss-based directors as 'a crooked pantomime'.

The High Court dismissed the contention that treating these companies as resident would turn on its head 40 years of commercial

practice whereby 'directors of foreign subsidiaries ... act as they were instructed to by their Australian parent companies, without fear that the central management and control of the subsidiaries would thereby be sited in Australia.'

4. NO RUSH ON FLEXIBLE FUNDS

Legislation to streamline the transparent tax treatment of managed funds commenced on 1 July 2016 but there's been no rush to take it up. Implementation is by fund election and most are opting for commencement next year, or later, in part to ensure harmonised industry distribution reporting.

5. FIRB MEETS BEPS

This year Australia's implementation of Base Erosion and Profit Shifting measures has extended beyond just tax legislation and the ATO.

Australia's Foreign Investment Review Board has long vetted significant foreign investment in nationally sensitive Australian assets and sectors, but this year announced new tax conditions on foreign investment, including up-front engagement with the ATO.

6. MULTILATERAL CONVENTION EMBRACED

Australia continues to embrace the OECD's BEPS project and has tentatively said it will sign-up to the Multilateral Convention released by the OECD in November.

The Convention will sit side-by-side with existing double tax treaties to harmonise throughout the OECD key areas such as the treatment of transparent and dual resident entities and anti-treaty shopping rules. However, the Convention will still contain significant optionality.

7. SUPER CONCESSIONS REINED IN

From 1 July 2017 the amount able to be paid into the concessional tax superannuation environment will fall, and the tax payable on what's in there will increase.

Annual super contribution limits, both tax deductible and non-deductible, will be reduced. In addition, two new balance limits will apply. A \$1.6m limit will be placed on the balance of tax free assets allocated to a pension, and non-deductible contributions to super will be prevented once the aggregate superannuation asset balance reaches \$1.6m.

8. PUSH FOR INNOVATION

The pace of technological development has seen numerous successful start-up businesses and Australia is keen to have its share of them.

Investments in 'Early Stage Innovation Companies' are now (from 1 July 2016) entitled to a 20% non-refundable tax offset, and also a tax exemption for capital gains made in the first 10 years of ownership.

9. TAX TRANSPARENCY THE NEW NORMAL

A 'Tax Transparency' code developed by the Board of Tax and endorsed by the Federal Government in May this year recommends public disclosures for businesses with more than \$100 million annual turnover in Australia. Adoption is at present voluntary but could be mandated if the take-up is low. Almost 70 groups, including banks and miners, have signed on so far.

Recommended disclosures include book to tax differences, tax strategy details and international related party dealing information.

10. BLANK CHEQUE TO THE ATO

The High Court's decision in *Blank v FCT* confirmed the assessment of a former Glencore employee on \$200 million cash. It was received after a period of employment in Australia but had accrued largely in respect of employment prior to his arrival. The question was whether the income was the rights themselves, acquired pre-arrival, or the cash.

Unfortunately for *Blank*, the High Court found that the cash was the income, noting that to conclude otherwise would mean 'every employee would be rendered an accruals-based taxpayer taxable on their wages and salary before they received it.'



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