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# client alert

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### June 2015

### Commissioner's statutory remedial power on the way

Even though the Commissioner of Taxation endeavours to interpret the law to give effect to its purpose or object, there are instances where this is not possible. To address this, the Government has announced that it will provide the Commissioner with a statutory remedial power to allow for a more timely resolution of certain unforeseen or unintended outcomes in taxation and superannuation law.

In announcing the Government's plan, the Assistant Treasurer Josh Frydenberg said the power will be appropriately limited in its application and will apply to the extent that it has a beneficial outcome for taxpayers. It will only be available where the modification is not inconsistent with the purpose or object of the law and has no more than a negligible revenue impact.

### ATO ramps up face-to-face contact with wealthy individuals

The ATO has released details of its new approach to wealthy individuals and their private groups. The ATO is focusing on a "prevention-before-correction" approach and is ramping up its face-to-face interaction with key taxpayers.

According to the ATO, about 30% of wealthy individuals and their private groups are considered "high risk". Acting Second Commissioner Michael Cranston said that if taxpayers are open and transparent with the ATO, they can expect better services and faster turnaround of key decisions.

Mr Cranston also noted the ATO "will sign-off on the previous year's tax returns of taxpayers who have been open and transparent" about their affairs, have good compliance records and are considered low-risk. He said this will provide certainty for about 30,000 privately owned and wealthy groups that they will not be subject to an audit for specific income years.

**TIP:** Some of the risk areas that attract the ATO's attention include individuals with unreported foreign income or assets; certain types of remuneration arrangements used by members of professional firms; the egregious use of trusts; and mixing personal and company expenditure.

abn. 63 149 926 269 phone. +61 2 4929 5533  
email. mail@avcharteredaccountants.com.au  
address. PO Box 258 Waratah NSW 2298  
Unit 9, 57 Crescent Road Waratah NSW 2298  
www.avcharteredaccountants.com.au

### Sale of business earn-out arrangements – tax changes on the way

The Government is looking to provide clarity in relation to the capital gains tax (CGT) treatment of earn-out arrangements in connection with a sale or purchase of a business.

An earn-out arrangement is an arrangement whereby, as part of the sale of a business, the buyer and seller agree that subsequent financial benefits may be provided based on the future performance of the business. For example, two parties are negotiating the sale of the business where a significant part of the value of the business is tied to its customer base – that is its goodwill. There is considerable uncertainty about how the sale and other factors may impact upon this goodwill. The parties could agree to an earn-out arrangement under which part of the consideration for the sale is linked to the future economic performance of the business.

The proposed rules aim to provide "look-through" CGT treatment to earn-out arrangements. That is, under the changes, taxpayers may disregard capital gains or losses that arise in relation to the qualifying right to financial benefits. Instead, taxpayers must include financial benefits provided or received under or in relation to such rights in determining the capital proceeds of the disposal of the underlying asset (for the seller) or the cost base and reduced cost base of the underlying asset for the buyer.

It is proposed that the changes would apply from the exposure draft legislation release date (ie 23 April 2015).

### ATO data-matching eBay sellers

The ATO is collecting data from eBay Australia & New Zealand Pty Ltd of sellers who had sold more than \$10,000 worth of goods and services on the eBay online trading website during the 2013–2014 financial year.

The ATO said the data will be electronically matched with its records to identify possible non-compliance with the tax law.

The data-matching program is designed to enable the ATO to address the compliance behaviour of

AVCA Pty. Limited trading as AV Chartered Accountants  
Director - Antony J Vidray BCom FCA Chartered Tax Adviser  
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individuals and businesses selling goods and services via the online-selling site who may not be correctly meeting their taxation obligations, particularly those with undeclared income and incorrect lodgment and reporting for GST.

It is expected that records relating to between 15,000 and 25,000 individuals will be matched.

**TIP:** If you sell products or services online, you need to understand whether you are doing it as a hobby or carrying on a business. The ATO said the ongoing collection of online-selling data enables it to review online sellers who are transitioning from hobby status to potentially being “in business”. When selling online becomes a business, the income you earn from it is subject to tax. If this is the case, you may also be eligible for tax deductions.

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### Aggressive R&D claims under scrutiny

The ATO and AusIndustry are working closely with each other to identify taxpayers who may be involved in aggressive research and development (R&D) arrangements. In particular, the ATO and AusIndustry are seeking arrangements that are inconsistent with the requirements of the law, may have features of tax avoidance, and may be fraudulent.

In this regard, the ATO and AusIndustry have asked taxpayers to ensure that their claims for R&D expenditure are attributed to activities that are consistent with their AusIndustry registration – and, importantly, that expenses (eg labour costs) were actually incurred on R&D activities.

**TIP:** Companies should consider whether they have undertaken research and development (R&D) activities that may be eligible for the Government’s R&D Tax Incentive. Eligible R&D activities are experimental activities that are conducted in a scientific way for the purpose of generating new knowledge or information. To potentially claim the R&D Tax Incentive, the company’s R&D activities need to be registered with AusIndustry within 10 months of the end of the income year. Companies are required to maintain records to demonstrate, not only to AusIndustry, but also to the ATO, that the activities carried out are eligible R&D activities and that they incurred expenditure related to the activities.

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### No job, no pay for child benefits – Government immunisation requirement

The Government will end the conscientious objector exemption on children’s vaccination for access to taxpayer-funded Child Care Benefits, the Child Care Rebate and the Family Tax Benefit Part A end-of-year supplement from 1 January 2016.

Immunisation requirements for the payment of the FTB Part A end-of-year supplement will also be extended to include children of all ages. Currently, vaccination status is only checked at 1, 2 and 5 years of age. The Government will also end the exemption on religious grounds, leaving only the existing exemption on medical grounds.

**Important:** Clients should not act solely on the basis of the material contained in Client Alert. Items herein are general comments only and do not constitute or convey advice per se. Also changes in legislation may occur quickly. We therefore recommend that our formal advice be sought before acting in any of the areas. Client Alert is issued as a helpful guide to clients and for their private information. Therefore it should be regarded as confidential and not be made available to any person without our prior approval.