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FINANCIAL SERVICES UPDATE

August 2014

Japan-Australia Economic Partnership Agreement: What It Means for Australian Business?

In July 2014, Japan and Australia signed the Japan-Australia Economic Partnership Agreement (**JAEPA**). The JAEPA primarily benefits Australian agricultural and industrial exporters by eliminating or reducing certain tariffs and duties (including for coal and beef). The JAEPA also has key outcomes for Australian service providers and will remove all remaining tariffs on Japanese imports.

DID YOU KNOW?

Fee Disclosure Revamp

A recent ASIC report highlights the need for revised fees and costs disclosure by superannuation trustees and responsible entities and signals changes to RG 97.

FOFA Changes: What is the Law Now?

New regulations in force to implement the Government's interim FOFA changes until the new FOFA Bill is passed.

Financial Advisers No Longer Exempt from Tax Agent Services Law

Tax Agent Services Act 2009 (Cth) requires that all tax agents and BAS agents are registered and regulated. Financial Planners providing tax advice are now also caught.

ASIC Shuts Down Unlicensed Foreign Exchange Business

ASIC action serves as a warning for online financial services businesses operating in Australia operating without a current Australian financial services licence.

JAPAN-AUSTRALIA ECONOMIC PARTNERSHIP AGREEMENT: WHAT IT MEANS FOR AUSTRALIAN BUSINESS?

The Prime Ministers of Japan and Australia signed the Japan-Australia Economic Partnership Agreement (**JAEPA**) and its Implementing Agreement on 8 July 2014. The intention behind the execution of the JAEPA is to improve Australia's access to the Japanese market.

Entering into an agreement with Australia's second-largest trading partner brings substantial benefits to Australian agricultural exporters, industrial exporters and services suppliers by granting preferential access to the Japanese market and eliminating or reducing certain tariffs and duties. The JAEPA will also remove all remaining Australian tariffs on Japanese imports.

As anticipated, the JAEPA does not include Investor-State Dispute Settlement provisions.

The JAEPA will be implemented following domestic treaty processes in Australia and Japan. Below are some of the key outcomes of JAEPA:

Tariffs Removed for Australian Agricultural Exporters

The JAEPA includes the following key outcomes for Australian agricultural exporters:

- tariffs of up to 219% will be eliminated or significantly reduced on many exports including beef, cheese, horticulture, wine and seafood; and
- tariffs for wool, cotton, lamb and beer will be eliminated.

Australian Industrial Exports to Japan Will be Duty-free

The JAEPA will allow Australia's resource, energy and manufacturing products to be exported to Japan duty-free.

Products for which tariffs will be eliminated include:

- coke and semi coke of coal and non-crude petroleum oils;
- unwrought nickel and ferro-manganese; and
- paints, key plastic products and pearl jewellery.

Outcomes for Australian Service Suppliers

The JAEPA increases market access for Australian services exporters into Japan, including legal and financial services firms and telecommunications providers.

Key outcomes for Australian service suppliers include:

- Australian financial services providers will be able to supply a clearly defined list of financial services on a "cross-border" basis, enabling Australian providers to do business in Japan without the need to open a full commercial presence;
- guaranteed market access for Australian lawyers, including ensuring Australian law firms will be able to form Legal Professional Corporations under Japanese law;
- both governments will support work towards enhanced mutual recognition of professional qualifications;
- thresholds will be increased for private Japanese investment into non-sensitive sectors (these thresholds will be the same as those that apply to US investors under the *Foreign Acquisitions and Takeovers Act 1975* (Cth));
- Australian intellectual property protections will be broadly equivalent in Japan; and
- Australian telecommunications providers will benefit from commitments on non-discriminatory treatment, regulatory transparency, competitive safeguards and fair and reasonable access to telecommunications networks and services.

Removal of Australian Tariffs for Importers

On full implementation, all remaining Australian tariffs on Japanese imports will be eliminated, including for:

- Japanese motor vehicles;
- electronics; and
- white goods.

No Dispute Settlement Provisions

The JAEPA does not include Investor-State dispute settlement (**ISDS**) provisions. Such provisions are intended to protect against political and cross-border risks. The reason for the exclusion of ISDS provisions may be the ongoing negotiations in relation to the Trans-Pacific Partnership (**TPP**). As Japan and Australia are party to the TPP, investors may be able to rely on the provisions of the TPP to protect their investments.

The JAEPA includes a provision to review the inclusion of an ISDS provision.

Timeline for Implementation

Both Japan and Australia need to carry out domestic approval processes to implement the JAEPA. For Australia, this includes having the agreement considered by Parliament and the Joint Standing Committee on Treaties before Australian laws are changed.

The government has announced that both countries aim to complete domestic treaty processes this year. Following this, Diplomatic Notes will be exchanged and the JAEPA will enter into force after 30 days.

The JAEPA has been described as "the most ambitious trade deal Japan has ever concluded with anyone" and covers a broad range of services. Australian businesses should consider the impact of the JAEPA in their industry and how they can advantage of related opportunities.

For further details on the JAEPA, you can read the Australian government's announcement on the Department of Foreign Affairs and Trade website. If you have any queries in relation it the JAEPA, please contact Vinod Kumar.

DID YOU KNOW?

Here is a snapshot of key regulatory issues and case studies in June and July 2014.

MANAGED INVESTMENT SCHEMES

Fee Disclosure Revamp

Superannuation trustees and responsible entities should be braced for revised guidance from ASIC on fee and cost disclosure in FY2015. In recently issued Report 398 *Fee and cost disclosure: Superannuation and managed investment products,* ASIC reports that its review of fee and cost disclosure practices of superannuation and managed investment product issuers indicates that there are significant variations (including under-disclosure) in the disclosure of fees and costs. ASIC reports the main causes of variation include the treatment of fees and costs associated with investing through underlying investment vehicles, quality of data used for calculating fees and costs, disclosure of fees net of income tax, the different practices used in estimating performance fees, and incorrect treatment of some management costs as transaction costs. ASIC states it has already published its views (in ASIC Regulatory Guide 97 (**RG 97**) and Information Sheet 197 (**INFO 197**)) on certain of these issues as follows:

- fees and costs associated with investing through underlying investment vehicles should be disclosed;
- fees should be disclosed gross of tax;
- performance fees should be disclosed based on reasonable estimates.

ASIC foreshadows a review of RG 97 through a consultation process, which will likely result in revised guidance and modifications to the law by way of class order(s) in FY2015. A copy of each of Report 398, Information Sheet 197 and RG 97 are available on ASIC's website. ASIC has also announced it will continue with its facilitative approach to compliance with fee and cost disclosure requirements until 1 July 2015 for superannuation funds and managed investment schemes. If you need any assistance regarding fee disclosure rules, please contact Michelle Segaert.

FINANCIAL SERVICES REGULATION

FOFA Changes: What is the Law Now?

The Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014 (Cth) has been registered to give effect to the Government's proposed amendments to the FOFA legislation on an interim basis until the *Corporations Amendment (Streamlining of Future Advice) Bill 2014* is passed by the Australian Parliament. These regulatory amendments have made the following changes to the FOFA legislation, effective 1 July 2014:

- removal of the Opt-In requirement;
- requiring Fee Disclosure Statements to apply prospectively – for new clients from 1 July 2013 only;
- effectively removing the requirement to satisfy section 961B(2)(g) (the 'catch-all' provision) from the best interests duty;
- specifically providing for scaled advice;
- banning commissions on personal advice for investment and superannuation products and eliminating the possibility of a re-introduction of these commissions through the previously proposed general advice exemption; and
- amending the grandfathering regulations in order to remove the current restrictions on trade for financial advisers who may change employers/licensees, and enable fair market competition for financial advisers selling their business.

With the exception of the grandfathering regulations, the regulations for each of the above measures are required to be implemented through legislation by 31 December 2015. The regulations can be read on the Australian Government's ComLaw website. If you need any assistance in understanding current FOFA measures, please contact Michelle Segaert.

Financial Advisers no Longer Exempt from Tax Agent Services Law

Tax Agent Services Act 2009 (Cth) (**TAS Act**) came into effect on 1 March 2010 and required that all tax agents and BAS agents were registered and regulated. The TAS Act aims to ensure the services provided to the public by registered tax agents and BAS agents are of appropriate ethical and professional standards in order to protect consumers. The TAS Act requires that any person providing tax agent services (including giving tax advice) is required to register as a tax agent and meet the strict standards of professional and ethical conduct. There are strict educational requirements in order to be registered as a tax agent, and ongoing professional development standards.

Many financial planners wish to give tax advice to their clients as part of their services, but often do not have the level of education and experience in tax matters as required by the Tax Agent Services regime. Financial planners were initially exempted from the application of the Tax Agent Services regime. However, the *Tax Agent Services Amendment (Tax (Financial) Advisers) Regulation 2014* (Cth) was recently registered to bring financial planners within the Tax Agent Services regime administered by the Tax Practitioners Board. The Regulation does this by prescribing a tailored set of ongoing registration requirements for tax (financial) advisers, and listing tax (financial) advisers on the register of registered entities and tax practitioners.

The Regulation allows financial planners who provide tax (financial) advice services to register with the TPB with different qualification and experience requirements to tax agents. The Regulation recognises that tax (financial) advisers provide a subset of the services provided by tax agents. For example, tax (financial) advisers may not make representations to the Commissioner. The qualification and experience requirements have been tailored to reflect the different nature of the service offered, when compared to tax agents. However, many Tax Agents are concerned that the educational and ongoing professional development standards for financial planners are not sufficiently stringent to ensure the protection of consumers.

Financial advisers will continue to be licensed (or authorised under an Australian financial services licensee) by ASIC and adviser obligations under the Corporations Act remain unchanged. You can read more on the ASIC website.

Please contact Louise Boyce for more information.

ASIC Shuts Down Unlicensed Foreign Exchange Business

Online financial services businesses operating in Australia should be aware of the risks of operating without an Australian financial services licence (**AFSL**) or otherwise under a valid exemption. ASIC has recently commenced action against Vault Market Pty Ltd in the Supreme Court of NSW to prohibit this company and its sole director from continuing an online foreign exchange business under the domain name www.kiwifxbank.com (**KiwiFx Bank**). ASIC reported that the website appears to facilitate foreign exchange trading for users and is improperly using the word 'bank' in its name. ASIC has obtained interim court orders restraining the company and its sole director from carrying on a financial services business without holding an AFSL, or holding out that they hold an AFSL, and to use best endeavours to remove all content on the website and to publish a notice for clients and potential clients stating that the company is not licensed with ASIC and does not hold an AFSL and KiwiFx Bank is not a foreign bank regulated by APRA.

If you need assistance or advice in relation to applicable financial services laws in Australia for operating an online financial services business, including in relation to the application of the pass-porting exemptions and other exemptions, please contact Michelle Segaert.

ATO to Target Property Developers

The ATO has issued a Taxpayer Alert and indicated that it plans to investigate several hundred property developers using special purpose trusts to undertake developments. Taxpayer Alerts are designed to be an early warning to taxpayers of arrangements which the ATO considers to be high risk and are currently being targeted by the Tax Office.

The first Taxpayer Alert to be issued for 2014 is targeted at property developers who are undertaking developments in special purpose trusts. The type of arrangement highlighted involves a property developer using a new or special purpose trust to carry out a development. In some cases the trust deed specifies that the purpose of the trust is to develop and hold the asset to generate rental income. The property is in fact developed and sold soon after completion and the profit on sale is treated as a capital gain. The capital gain is distributed to the beneficiaries and those beneficiaries who are individuals or superannuation funds claim the capital gains tax discount to reduce the tax payable on the capital gain.

The Tax Office considers that the profit should in fact be treated as ordinary assessable income subject to full tax rates. They have commenced a number of audits and are issuing amended assessments. Any special purpose trust which has sold land which has been developed by the trust might be affected by the Tax Office's investigations. We can assist in determining the correct treatment of the arrangement and give advice on how to deal with the matter, including whether a voluntary disclosure should be made.

Please contact Louise Boyce for more information.

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