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Recent developments in Australian taxation

Summary
Recent developments in Australia's tax laws have reflected a progressive shift towards the increased regulation of multinational enterprises and foreign investors, as well as a greater emphasis on revenue collection.

There remains legal and regulatory uncertainty in Australia regarding the proper tax treatment of particular forms of cross-border transactions, especially those involving intangibles, disposals of Australian real property, and the deductibility of interest under the new thin capitalisation and debt deduction creation rules. Some of these issues are expected to be addressed pending certain appellate decisions, but the re-election of the ruling Labor government means that policy shifts are unlikely in the near term.

It is expected that the future Australian tax landscape will present new and evolving challenges for international businesses that will require careful and strategic planning to navigate uncertainty and complexity.

OECD GloBE Rules and revised thin capitalisation and debt deduction creation rules

Revised thin capitalisation and debt deduction creation rules
Australia's revised thin capitalisation and debt deduction creation rules – which were introduced to generally align with the Organisation for Economic Co-operation and Development's (OECD's) recommended approach under Action 4 of the Base Erosion Profit Shifting (BEPS) Action Plan – commenced on 1 July 2023. As part of this reform, in late 2024, the Australian Tax Office (ATO) has released draft guidance on these new provisions: see Australia's new thin capitalisation regime and debt deduction creation rules (TR 2024/D3 and PCG 2024/D3). The guidance concerns the application of a 'third-party debt test' (TPDT) in circumstances including the holding of foreign assets, back-to-back swap arrangements, borrowing to pay dividends or distributions to investors, and other key commercial circumstances.

The ATO's draft guidance generally adopts a restrictive approach to the TPDT, such that it may be unavailable or unworkable for some multinationals operating in Australia. While the TPDT can facilitate the deduction of all 'third party' debt deductions, if the TPDT is failed, the alternative 'fixed ratio test' caps 'net interest deductions' at 30 per cent of a tax-adjusted earnings before interest, taxes, depreciation and amortisation (EBITDA) figure.

The recent rule changes are set out here. This guide contains a number of practical considerations that should be taken into account going forward. These rules may have significant implications for foreign businesses operating in Australia by substantially impacting their decision to use debt financing, given the limits being imposed on taxpayers who are subject to the thin capitalisation rules to claim debt deductions in Australia.

Pillar 2 GloBE legislation passed

The Australian Government has now passed legislation enacting the OECD's Pillar Two Global Anti-Base Erosion Rules ('GloBE Rules') which applies from 2024 onwards. The GloBE Rules place a 15 per cent floor on the tax that large multinationals will pay in any particular jurisdiction and may apply to multinational groups with a consolidated annual revenue of at least €750m (approx US$818m) in two of the preceding four fiscal years. The income inclusion rule and qualified domestic minimum top-up tax rule apply for tax years beginning on or after 1 January 2024, while the undertaxed profits rule will apply for tax years beginning on or after 1 January 2025.

Tax treatment of intangibles and intellectual property

Australian tax issues arising from the tax treatment of intangibles and the correct characterisation of cross-border payments for intellectual property rights have remained in dispute over the past two or more years, with at least 15 multinational entities under ATO review.

Ongoing appeals

PepsiCo, Inc. v Commissioner of Taxation [2024] FCAFC 86 (*PepsiCo*)

In April 2025, the High Court of Australia (Australia's highest level of appeal) heard the Commissioner of Taxation's appeal against the Full Federal Court's decision in *PepsiCo*. This matter concerned issues of PepsiCo's liability to Australian royalty withholding tax and the potential application of the diverted profits tax regime to PepsiCo's global manufacturing and distribution arrangements.

In particular, the appeal revisits the key issue of payment characterisation in an intangibles context, and whether the ATO's concept of an 'embedded' royalty is supportable at law. Significantly, in the proceeding below, the Full Federal Court bench was split on both issues involving royalty withholding tax and diverted profit tax. The High Court's decision is expected to be handed down in the second half of 2025. The decision will be the first time that the High Court has considered Australia's diverted profits tax, which was introduced in 2017.

Oracle Corporation Australia Pty Ltd v Commissioner of Taxation (Stay Application) [2024] FCA 1262 (*Oracle*)

In November 2024, the Federal Court denied a request by the Oracle group for a temporary stay of domestic tax proceedings pending the outcome of a mutual agreement procedure (MAP) under the Ireland–Australia double taxation agreement (DTA).

The Federal Court found that, on balance, it was in the public interest to refuse the application to stay proceedings in light of the need for there to be appellate judicial authority on the meaning of 'royalty' under Australia's DTAs. The Court noted that at least 15 other multinational taxpayers (likely multinational technology companies) were awaiting the Court's final decision.

Oracle has appealed the Federal Court's decision to the Full Federal Court, which is expected to be heard later in August 2025. The appeal itself will resolve important issues about the primacy of domestic tax provisions as against DTAs and will no doubt impact the strategic approach of taxpayers as to the implementation and timing of undertaking MAPs to resolve multinational tax disputes.

ATO guidance
As to regulatory guidance on some of these issues, the ATO has deferred finalisation of its draft tax ruling TR 2024/D1 (concerning the income tax character of receipts in respect of software) until the High Court appeal in *PepsiCo* is resolved. The ATO also announced in December of 2024 that it would publish a separate draft PCG concerning royalty withholding tax and software arrangements. A PCG, unlike a ruling, outlines the ATO's administrative (compliance) approach to a particular issue and is not binding on the ATO. This draft PCG is expected to build on TR 2024/D1 and will provide practical guidance to multinationals on the potential Australian tax liabilities involved with cross-border payments connected with software. It is currently expected to be completed in the middle of 2025 but may also be deferred pending *PepsiCo*.

Crypto-Asset Reporting Framework consultation paper release
The Australian Treasury recently consulted stakeholders regarding Australia's implementation of the Crypto-Asset Reporting Framework (CARF) and amendments to the Common Reporting Standard (CRS) ('OECD Crypto Rules'). Submissions closed on 24 January 2025 and the Treasury confirmed it was considering those submissions as of 21 March 2025.

Although no draft legislation has been released, we anticipate that the new requirements will commence from 2026 to enable the ATO and foreign taxation authorities to start exchanging information by 2027. Once implemented, information reporting by crypto asset service providers is expected to be an annual obligation.

The disputes and litigation landscape

ATO findings report – public and multinational business disputes and settlements
In November 2024, the ATO published its second *Public and Multinational Business Disputes and Settlements* findings report in respect of FY23/24. Key highlights include:

- the ATO issued income tax assessments to 124 public and multinational businesses, raising AU$2.76bn in liabilities. Of this, AU$2.5bn was raised in respect of 24 different taxpayers following intensive audit and review activities;
- the ATO has noted that global profit shifting risks continue to be a major focus in its audit programme. Around 65–70 per cent of current income tax audits involve global profit shifting issues. Transfer pricing, mischaracterisation of business activities and capital flows, and withholding tax avoidance issues are among some of the key profit shifting risks currently being investigated. Common dealings under audit also include related party finance, migration of intangibles, embedded royalties, inbound distributor arrangements and disposal of assets by foreign investors. Issues concerning real property, particularly in determining whether an asset is a fixture or chattel, remain controversial. This impacts not only the resource sector, but the renewables sector as well (wind farms, solar farms, etc);
- nearly 80 per cent of income tax litigation decisions relating to public and multinational businesses handed down in 2023–24 involved issues related to global profit shifting, including transfer pricing and the application of the general anti-avoidance provisions;
- where appropriate, the ATO continued to resolve disputes by way of settlement. Across all client groups, public and multinational businesses accounted for more than 20 per cent of all parties to settlement agreements (67) and around 92 per cent (AU$1.8bn) of the tax revenue secured; and
- the ATO also received significant funding from government for the Tax Avoidance Taskforce to ensure large businesses meet their tax obligations. Since the Taskforce commenced in June 2016, the ATO has raised AU$22.8bn in liabilities from public and

multinational businesses (as of 30 June 2024). Around AU$12.3bn of this has been attributed to the additional funding provided through the Tax Avoidance Taskforce, with the balance primarily attributable to base funding.

Key cases

In the past 12 months, a number of key tax decisions have been handed down – primarily concerning the proper application of tax integrity, transfer pricing and anti-avoidance provisions to complex tax structures.

Commissioner of Taxation v Bendel [2025] FCAFC 15 (*Bendel*)

This case concerned a corporate beneficiary that was entitled to unpaid present entitlements (UPEs) under a discretionary trust. The Commissioner argued that being a form of financial accommodation the UPEs were 'loans' within the meaning of Division 7A and consequently were assessable as deemed dividends in the hands of the corporate beneficiary.

On 19 February 2025, the Full Federal Court found in favour of the taxpayer holding that UPEs paid to corporate beneficiaries were not loans under Division 7A. A detailed summary of the decision can be found here. The Commissioner has since filed a special leave application with the High Court to appeal the decision.

On 19 March 2025, the Commissioner published an Interim Decision Impact Statement. Pending the outcome of the appeal process, the Commissioner has indicated that the ATO will maintain its previous position, treating UPEs as loans under Division 7A in accordance with TD 2022/11. The Commissioner noted that the ATO will not finalise objection decisions relating to past-year assessments and that any required decisions will be based on the ATO's existing view of the law.

Taxpayers await the outcome of the appeal process to gain clarity on the tax consequences of UPEs in Australia – a broad-ranging issue that will affect a number of individuals and private groups that have adopted similar structures. The appeal might also be relevant to the definition of loan, which may have broader implications for corporate taxpayers.

Singapore Telecom Australia Investments Pty Ltd v Commissioner of Taxation [2024] FCAFC 29 (*SingTel*)

This case concerned several amendments to a loan note issuance agreement (LNIA) made between Singapore Telcom Australia Investments Pty Ltd (an Australian tax resident) (STAI) and its parent company Singtel Australia Investment Ltd (a Singaporean tax resident) (SAI) in the course of acquiring Singtel Optus Pty Ltd.

Critically, the LNIA was amended by the parties to: (1) introduce a profitability benchmark (with retroactive effect) with the effect that STAI was relieved of an obligation to pay approximately AU$286m; and (2) replace the variable interest rate with a fixed rate for the remaining loan term. The central issue in dispute was whether STAI had obtained a 'transfer pricing benefit' in respect of interest deductions available to it under the LNIA, which the Commissioner argued was not 'arm's length' following amendment.

On 8 March 2024, the Full Court handed down its decision in *SingTel*, finding against the appellant taxpayer and in favour of the Commissioner. In upholding the Commissioner's determination that STAI had obtained a 'transfer pricing benefit', the Full Court found that: (1) Division 13 of the Income Tax Assessment Act 1936 (Cth) (ITAA 1936) and Subdivision 815-A of the Income Tax Assessment Act 1997 (Cth) (ITAA 1997) contain an ability to reconstruct transactions; and (2)

transfer pricing analysis is considered year by year. Ultimately, the taxpayer failed to establish that the amendments to the LNIA would have occurred if the parties had been dealing at arm's length.

The *SingTel* decision highlights the difficulty for taxpayers in discharging their onus of proof in transfer pricing cases. The decision adds to the limited but evolving judicial precedent on Australian transfer pricing rules. As an interesting aside, the ATO has succeeded in most (if not all) recent financing transfer pricing cases heard by Australian courts (*Chevron*, *SingTel*), but has been similarly unsuccessful in most (if not all) commodity transfer pricing disputes (*Glencore*, *Alcoa*). We await a transfer pricing case concerning intangibles.

MINERVA FINANCIAL GROUP PTY LTD V COMMISSIONER OF TAXATION [2024] FCAFC 28 *(MINERVA)*
This case concerned a corporate restructure featuring establishment of unit trusts and intra-group unit transfers resulting in income distributions flowing to non-resident unitholders at a reduced withholding tax rate. The Commissioner alleged these arrangements constituted a 'scheme' under the Australian general anti-avoidance rules (Part IVA) designed to obtain a tax benefit by reducing the rate of tax payable on distributions.

On 8 March 2024, the Full Court handed down its decision finding in favour of the taxpayer in determining that Part IVA did not apply to discretionary distributions made by the trustee of a securitisation trust.

The key takeaways from *Minerva* are summarised as follows:

- transactions between entities in a wholly owned or commonly owned group effected by entries to intragroup loan accounts (rather than transfers of cash) are not unusual and should not of themselves suggest a dominant purpose of a scheme to obtain a tax benefit;
- the adoption of a stapled structure (and more specifically trusts holding passive assets) is not necessarily an arrangement to which anti-avoidance (Part IVA) should apply; and
- taxpayers should have evidence surrounding the rationale for any scheme so it is not found that the scheme has a dominant purpose of obtaining a tax benefit.

Federal government announcements and ongoing reform

The 2025–26 Federal Budget
Looking ahead, the 2025–26 pre-election Budget was announced on 25 March 2025 and focused primarily on domestic 'pinch point' issues (eg, personal tax cuts and commitments to ongoing spending measures) rather than announcing any major reforms to Australia's existing corporate or international tax policies. Key issues that were top of mind for the government included cost-of-living and housing affordability issues – issues that are likely common to many other parts of the world.

For tax practitioners, key changes have been to reaffirm commitment to certain yet-to-be implemented legislative changes, including the managed investment trust (MIT) concessions, denial of deductions for interest on disputed tax debts, and 15 per cent tax on gains (including unrealised gains) made by superannuation funds with balances over AU$3m.

Of some interest is the increased funding allocated in the Budget to fund the ATO's Tax Avoidance Task Force, which generally focuses its efforts on multinational businesses and other large taxpayers. In particular, the government has specifically allocated AU$717.8m over a period of four

years to extend and expand the taskforce's tax compliance activities. This allocation forms part of a wider AU$999m government package to strengthen tax integrity and clearly indicates an intention to ramp up anti-avoidance and compliance activities.

Ongoing reforms and focus areas – foreign investment

AMENDMENTS TO AUSTRALIA'S FOREIGN RESIDENT CAPITAL GAINS WITHHOLDING (FRCGW) TO EXPAND TO FOREIGN RESIDENTS

Recent amendments to Australia's FRCGW regime were passed and took effect on 1 January 2025. These changes are of relevance to foreign entities involved in Australian real property transactions in Australia (or transactions involving 'land rich' Australian entities). For contracts entered into from 1 January 2025, purchasers will be required to withhold 15 per cent (previously 12.5 per cent) of the contract price and remit it to the ATO unless the seller is able to provide appropriate documentation prior to settlement. The $750,000 property value threshold no longer applies.

The Federal Government has also deferred the start date of its 2024–25 Budget measure 'Strengthening the foreign resident capital gains tax regime'. Initially announced to apply to capital gains tax (CGT) events occurring from 1 July 2025, the new start date has been delayed to the later of 1 October 2025 or the first 1 January, 1 April, 1 July or 1 October after the relevant act receives Royal Assent. Once effective, the measure is expected to expand the scope of taxable Australian property, modify the indirect Australian real property test and introduce notification requirements for non-residents selling shares or units for over AU$20m irrespective of the nature of underlying assets held through the investment.

In this respect, in July 2024, Commonwealth Treasury released its consultation paper, titled *Strengthening the foreign resident capital gains tax regime*, which announced a series of proposed reforms to the FRCGW regime and is expected to guide the development of this legislative reform. The consultation paper foreshadowed expansion of the FRCGW regime to cover assets (including options or membership interests in respect of such) connected with Australian natural resources such as:

- leases or licences over land, especially those giving rise to the creation of emission permits;
- water entitlements in relation to land;
- infrastructure and machinery, especially where on land subject to a mining, quarrying or prospecting right, such as:
    - energy and telecommunications infrastructure (wind turbines, solar panels, batteries, transmission towers, etc);
    - transport infrastructure (railways, ports and airports); and
    - heavy machinery, especially where used for mining operations (mining drills and ore crushers).

MANAGED INVESTMENT TRUST (MIT) CONCESSIONS

On 7 March 2025, the ATO issued Taxpayer Alert TA 2025/1, highlighting its concerns about restructures aimed at accessing the Australian MIT regime. The MIT regime is a critical regime for foreign investors investing into Australia, as it can facilitate access to a number of concessions favourable to eligible foreign investors (eg, concessional withholding rates and deemed capital account treatment on certain assets). In response, the Assistant Treasurer announced forthcoming amendments to clarify that trusts ultimately owned by a single widely held investor, such as a foreign pension fund, can continue to access MIT concessions.

The ATO is particularly concerned with arrangements that restructure existing holding structures that are not 'MIT eligible', to new structures that are, and states that some restructures lacking commercial rationale may trigger the application of Australia's general anti-avoidance regime. While the Assistant Treasurer's announcement may provide some comfort, further specifics and the legislative timeline remain uncertain.

Federal government imposes a two-year ban on foreign investor landholding

The Federal Government has banned foreign persons (which includes temporary residents and foreign-owned companies) from purchasing established Australian residential dwellings for a period of two years effective from 1 April 2025. Certain exemptions apply, such as foreign investments that will significantly increase housing supply or support housing availability on a commercial scale and purchases by foreign companies to house workers (in limited circumstances). The ATO has been provided with additional funding in the amount of AU$5.7m over four years to enforce the ban.

Other recent updates to Foreign Investment Review Board regulation include:

- a new government policy which allows a bidder unsuccessful in a competitive bid process to receive a 75 per cent refund or a 100 per cent credit of their application fees;
- lower commercial land fee tiers to be imposed on build-to-rent investments; and
- increased scrutiny of tax arrangements with the imposition of additional tax conditions on certain foreign investment proposals, as set out in the updated tax conditions guidance note.

Ongoing reforms and focus areas – renewables transition

Clean building MIT measures

The Federal Government has also deferred the start of its 2023–24 Budget measure, 'Extending the clean building managed investment trust withholding tax concession'. Initially announced to start from 1 July 2025, the measure will now start from the first 1 January, 1 April, 1 July or 1 October after the relevant act receives Royal Assent. It is anticipated that this measure will extend the clean building MIT withholding tax concession to encompass data centres and warehouses, and will increase minimum energy efficiency requirements for existing and new clean buildings.

Critical mineral production tax incentives

The Australian Government has passed legislation implementing two tax offset incentives to enhance Australia's position as a 'renewable energy superpower'. The AU$7bn (US$4.4bn) critical minerals production tax incentive (CMPTI) targets companies engaged in critical minerals processing. The AU$6.7bn (US$4.2bn) hydrogen production tax incentive (HPTI) targets companies engaged in production of renewable hydrogen.