

---

# THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

---

THIRD EDITION

EDITOR  
TIM SANDERS

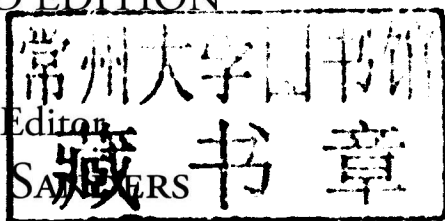
LAW BUSINESS RESEARCH

# THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

---

THIRD EDITION

Editor  
TIM SALTERS



LAW BUSINESS RESEARCH LTD

PUBLISHER  
Gideon Robertson

BUSINESS DEVELOPMENT MANAGERS  
Adam Sargent, Nick Barette

MARKETING MANAGER  
Katherine Jablonowska

PUBLISHING ASSISTANT  
Lucy Brewer

PRODUCTION CO-ORDINATOR  
Lydia Gerges

HEAD OF EDITORIAL PRODUCTION  
Adam Myers

PRODUCTION EDITOR  
Anne Borthwick

SUBEDITOR  
Caroline Rawson

EDITOR-IN-CHIEF  
Callum Campbell

MANAGING DIRECTOR  
Richard Davey

Published in the United Kingdom  
by Law Business Research Ltd, London  
87 Lancaster Road, London, W11 1QQ, UK  
© 2013 Law Business Research Ltd

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of

January 2013, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the publisher – [gideon.roberton@lbresearch.com](mailto:gideon.roberton@lbresearch.com)

ISBN 978-1-907606-53-3

Printed in Great Britain by  
Encompass Print Solutions, Derbyshire  
Tel: 0844 2480 112

# THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW  
THE RESTRUCTURING REVIEW  
THE PRIVATE COMPETITION ENFORCEMENT REVIEW  
THE DISPUTE RESOLUTION REVIEW  
THE EMPLOYMENT LAW REVIEW  
THE PUBLIC COMPETITION ENFORCEMENT REVIEW  
THE BANKING REGULATION REVIEW  
THE INTERNATIONAL ARBITRATION REVIEW  
THE MERGER CONTROL REVIEW  
THE TECHNOLOGY, MEDIA AND  
TELECOMMUNICATIONS REVIEW  
THE INWARD INVESTMENT AND  
INTERNATIONAL TAXATION REVIEW  
THE CORPORATE GOVERNANCE REVIEW  
THE CORPORATE IMMIGRATION REVIEW  
THE INTERNATIONAL INVESTIGATIONS REVIEW  
THE PROJECTS AND CONSTRUCTION REVIEW  
THE INTERNATIONAL CAPITAL MARKETS REVIEW  
THE REAL ESTATE LAW REVIEW  
THE PRIVATE EQUITY REVIEW  
THE ENERGY REGULATION AND MARKETS REVIEW  
THE INTELLECTUAL PROPERTY REVIEW  
THE ASSET MANAGEMENT REVIEW  
THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW  
THE MINING LAW REVIEW  
THE ANTI-BRIBERY AND  
ANTI-CORRUPTION REVIEW  
THE EXECUTIVE REMUNERATION REVIEW

[www.TheLawReviews.co.uk](http://www.TheLawReviews.co.uk)

# ACKNOWLEDGEMENTS

---

A&L GOODBODY  
ABOU JAOUDE & ASSOCIATES LAW FIRM  
ADVOKATFIRMAN VINGE KB  
ÆLEX  
AFRIDI & ANGELL  
BIRIŞ GORAN SCPA  
BLP ABOGADOS  
BÜTZOW ATTORNEYS LTD  
CHIOMENTI STUDIO LEGALE  
CLIFFORD CHANCE LLP  
CUATRECASAS, GONÇALVES PEREIRA & ASSOCIADOS, RL  
DAVID GRISCTI & ASSOCIATES  
D'EMPAIRE REYNA ABOGADOS  
DESPACHO PARÁS, SC  
ENS (EDWARD NATHAN SONNENBERGS)  
ESTUDIO BERGSTEIN  
ESTUDIO GRAU ABOGADOS  
FASKEN MARTINEAU DUMOULIN LLP  
GORRISSEN FEDERSPIEL  
GREENWOODS & FREEHILLS  
GRETTE DA  
HERGÜNER BILGEN ÖZEKE ATTORNEY PARTNERSHIP  
HERZOG FOX & NEEMAN  
HOMBURGER AG

KEMPHOOGSTAD, SRO

LEE & KO

LOYENS & LOEFF

MKONO & CO, ADVOCATES IN ASSOCIATION WITH SNR  
DENTON

MOCHTAR KARUWIN KOMAR

MORGAN & MORGAN

MOTIEKA & AUDZEVIČIUS

MULLA & MULLA & CRAIGIE BLUNT & CAROE

NAGASHIMA OHNO & TSUNEMATSU

PEPELIAEV GROUP

QUEVEDO & PONCE

RÖDL & PARTNER

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

SOŁTYSIŃSKI KAWECKI & SZŁĘZAK

URÍA MENÉNDEZ

XAVIER BRAGANÇA ADVOGADOS – XBA

# EDITOR'S PREFACE

---

The downturn in economic activity has led to increased competition in the global market as jurisdictions compete to encourage inward investment. Businesses are increasingly receptive to moving to more business-friendly jurisdictions, and are more mobile than ever. One significant factor for any business considering where to locate its headquarters, offices and production facilities is the impact that choosing a particular location has on its effective tax rate. This requires not only a detailed evaluation and comparison of the tax benefits and incentives available in competing jurisdictions, but also consideration of the tax consequences of moving capital and income flows across international borders, and increasingly widespread and complex rules intended to penalise domestic businesses for moving jobs and economic activity elsewhere. Consideration of such cross-border tax opportunities, issues and conflicts between tax systems requires business tax advisers to be more aware than ever before of tax laws beyond the geographical boundaries of the country where they practice.

The aim of this book is to provide a starting point for readers, and to assist businesses and advisers by providing topical and current insights from leading experts on the tax issues and opportunities in their respective jurisdictions (or, in one case, in the European Union). While specific tax advice is always essential, it is also necessary to have a broad understanding of the nature of the potential issues and advantages that lie ahead; this book provides a guide to these.

I would like to thank the contributors to this book for their time and effort, and above all for their expertise. I would also like to thank the publisher and the team for their support and patience. I hope that you find the work useful, and any comments or suggestions for improvement that can be incorporated into any future editions will be gratefully received.

The views expressed in this book are those of the authors and not those of their firms, the editor or publishers. Every endeavour has been made to ensure that what you read is the latest intelligence.

**Tim Sanders**

Skadden, Arps, Slate, Meagher & Flom LLP

London

January 2013



# CONTENTS

---

|                         |   |
|-------------------------|---|
| <b>Editor's Preface</b> | .....ix   |
|                         | <i>Tim Sanders</i>                              |
| <b>Chapter 1</b>        | AUSTRALIA ..... 1                               |
|                         | <i>Adrian O'Shannessy and Andrew Mills</i>      |
| <b>Chapter 2</b>        | BELGIUM ..... 15                                |
|                         | <i>Christian Chéruy and Marc Dhaene</i>         |
| <b>Chapter 3</b>        | BRAZIL ..... 34                                 |
|                         | <i>Silvania Tognetti</i>                        |
| <b>Chapter 4</b>        | CANADA ..... 47                                 |
|                         | <i>Alain Ranger and Thomas Copeland</i>         |
| <b>Chapter 5</b>        | COSTA RICA ..... 66                             |
|                         | <i>Alonso Arroyo and Vittoria Di Gioacchino</i> |
| <b>Chapter 6</b>        | CZECH REPUBLIC ..... 78                         |
|                         | <i>Bohdana Pražská and Filip Dostál</i>         |
| <b>Chapter 7</b>        | DENMARK ..... 91                                |
|                         | <i>Jakob Skaadstrup Andersen</i>                |
| <b>Chapter 8</b>        | ECUADOR ..... 109                               |
|                         | <i>Alejandro Ponce Martínez</i>                 |
| <b>Chapter 9</b>        | EUROPEAN UNION ..... 120                        |
|                         | <i>David Harkness and Etienne Wong</i>          |
| <b>Chapter 10</b>       | FINLAND ..... 137                               |
|                         | <i>Kirsi Hiltunen and Jussi Aranne</i>          |
| <b>Chapter 11</b>       | FRANCE ..... 152                                |
|                         | <i>Philippe Derouin</i>                         |

|                   |  |     |
|-------------------|--|-----|
| <b>Chapter 12</b> | GERMANY.....   | 177 |
|                   | <i>Hans R Weggenmann</i>   |     |
| <b>Chapter 13</b> | INDIA .....  | 189 |
|                   | <i>Hormazdiyaar Vakil</i>  |     |
| <b>Chapter 14</b> | INDONESIA .....  | 209 |
|                   | <i>Mulyana and Sandi Adila</i>   |     |
| <b>Chapter 15</b> | IRELAND.....   | 224 |
|                   | <i>Peter Maher</i>   |     |
| <b>Chapter 16</b> | ISRAEL.....  | 244 |
|                   | <i>Meir Linzen</i>   |     |
| <b>Chapter 17</b> | ITALY .....  | 256 |
|                   | <i>Paolo Giacometti and Giuseppe Andrea Giannantonio</i>   |     |
| <b>Chapter 18</b> | JAPAN .....  | 270 |
|                   | <i>Yuko Miyazaki</i>   |     |
| <b>Chapter 19</b> | KOREA.....   | 283 |
|                   | <i>Mee-Hyon Lee and Young-uk Park</i>  |     |
| <b>Chapter 20</b> | LEBANON .....  | 296 |
|                   | <i>Souraya Machnouk, Hachem El Housseini, Ziad Maatouk,<br/>Halim Abou Rjaily and Rima Akoum</i> |     |
| <b>Chapter 21</b> | LITHUANIA .....  | 310 |
|                   | <i>Mantas Juozaitis and Edvinas Lenkauskas</i>   |     |
| <b>Chapter 22</b> | LUXEMBOURG.....  | 325 |
|                   | <i>Pieter Stalman and Chiara Bardini</i>   |     |
| <b>Chapter 23</b> | MALTA .....  | 342 |
|                   | <i>David Griscti</i>   |     |
| <b>Chapter 24</b> | MEXICO .....   | 358 |
|                   | <i>Jorge Covarrubias Bravo and Carl E Koller Lucio</i>   |     |
| <b>Chapter 25</b> | NETHERLANDS .....  | 376 |
|                   | <i>Marc Klerks, Louis Lutz and Renée van der Maat</i>  |     |

|                   |   |     |
|-------------------|---|-----|
| <b>Chapter 26</b> | NIGERIA.....  | 391 |
|                   | <i>Theophilus I Emuwa, Chinyerugo Ugoji and Kingsley Amaefule</i> |     |
| <b>Chapter 27</b> | NORWAY .....  | 401 |
|                   | <i>Thomas E Alnæs and Stine Kraft</i>                             |     |
| <b>Chapter 28</b> | PANAMA .....  | 414 |
|                   | <i>Enrique Jiménez Boyd and Adolfo Campos Barranco</i>            |     |
| <b>Chapter 29</b> | PERU.....   | 431 |
|                   | <i>César Castro Salinas and Rodrigo Flores Benavides</i>          |     |
| <b>Chapter 30</b> | POLAND.....   | 447 |
|                   | <i>Jarosław Bieroński</i>   |     |
| <b>Chapter 31</b> | PORTUGAL .....  | 471 |
|                   | <i>Gonçalo Bastos Lopes and Sónia Fernandes Martins</i>           |     |
| <b>Chapter 32</b> | ROMANIA .....   | 486 |
|                   | <i>Gabriel Biriş and Ruxandra Jianu</i>                           |     |
| <b>Chapter 33</b> | RUSSIA.....   | 503 |
|                   | <i>Andrey Tereschenko</i>   |     |
| <b>Chapter 34</b> | SOUTH AFRICA.....   | 514 |
|                   | <i>Peter Dachs, Bernard du Plessis and Magda Snyckers</i>         |     |
| <b>Chapter 35</b> | SPAIN.....  | 534 |
|                   | <i>José Gabriel Martínez Paños</i>                                |     |
| <b>Chapter 36</b> | SWEDEN .....  | 547 |
|                   | <i>Lennart Larsson</i>  |     |
| <b>Chapter 37</b> | SWITZERLAND .....   | 564 |
|                   | <i>Reto Heuberger and Stefan Oesterhelt</i>                       |     |
| <b>Chapter 38</b> | TANZANIA .....  | 578 |
|                   | <i>Nimrod E Mkono and Ofotsu A Tetteh-Kujorjie</i>                |     |
| <b>Chapter 39</b> | TURKEY .....  | 590 |
|                   | <i>Yeşim Api Şamlı</i>  |     |

|                   |  |     |
|-------------------|--|-----|
| <b>Chapter 40</b> | UNITED ARAB EMIRATES .....                             | 605 |
|                   | <i>Gregory J Mayew and Silvia A Pretorius</i>          |     |
| <b>Chapter 41</b> | UNITED KINGDOM .....                                   | 621 |
|                   | <i>Tim Sanders</i>                                     |     |
| <b>Chapter 42</b> | UNITED STATES .....                                    | 643 |
|                   | <i>Hal Hicks, Daniel McCall and Robert C Stevenson</i> |     |
| <b>Chapter 43</b> | URUGUAY .....  | 667 |
|                   | <i>Jonás Bergstein and Domingo Pereira</i>             |     |
| <b>Chapter 44</b> | VENEZUELA .....  | 683 |
|                   | <i>Alberto Benshimol</i>                               |     |
| <b>Appendix 1</b> | ABOUT THE AUTHORS .....                                | 699 |
| <b>Appendix 2</b> | CONTRIBUTING LAW FIRMS' CONTACT DETAILS ...            | 727 |

## Chapter 1

---

# AUSTRALIA

*Adrian O'Shannessy and Andrew Mills<sup>1</sup>*

### I INTRODUCTION

Australia is keen to attract foreign investment with an efficient and competitive taxation regime. Income taxes have been falling, and other tax bases, for example, Australia's goods and services tax ('GST') and the new mineral resources rent tax, have been broadening. Australia is also increasingly falling in line with the tax systems and concepts used in other countries. At the same time the government has unwittingly discouraged foreign investment by:

- a* a heightened propensity to make tax law amendments retrospectively operative; and
- b* applying the new mineral resources rent tax to pre-existing ore deposits – itself effectively a retrospective measure.

The Australian Taxation Office also seems increasingly aggressive in its use of avoidance measures, such as the general anti-avoidance provision, Part IVA and Australia's thin capitalisation rules.

Notwithstanding the foregoing, Australia remains a net capital importer. In addition, the tax system seems constantly under review if not by the federal Treasury Department, then by the more independent (but still government-funded and appointed) Board of Taxation. Taxpayer representative involvement in lawmaking and administration is, if anything, also growing. These things augur for a more efficient taxation regime in future.

---

1 Adrian O'Shannessy and Andrew Mills are directors at Greenwoods & Freehills.

## **II COMMON FORMS OF BUSINESS ORGANISATION AND THEIR TAX TREATMENT**

The most common business entities used in Australia are companies, trusts and partnerships. Of these, the company is probably the default vehicle.

Companies are taxable entities whereas most trusts and partnerships are tax-transparent. The company tax rate is currently 30 per cent; however, although companies are taxed, dividends can be 'franked' such that Australian shareholders obtain a credit for taxes paid by the company, and non-resident shareholders are free of dividend withholding tax (regardless of their treaty status).

Wholly owned groups of resident companies can be 'consolidated' and taxed as a single entity, with inter-company transactions ignored.

Australian limited partnerships are becoming increasingly common in cross-border structuring arrangements. They are generally taxed as companies in Australia.

Although trusts are generally tax-transparent, that requires distribution of their income each year, and trust losses are not distributed but carried forward.

Some foreign investors operate through a branch in Australia but that is not common. The same 30 per cent tax rate applies to foreign companies as well as Australian companies.

### **i Corporate**

Australian companies may be registered either as a public or 'limited' company, or as a private or 'proprietary limited' company. A proprietary limited company generally cannot engage in public capital raisings but, because the public is not at risk, is exempt from various investor protection (e.g., disclosure) requirements.

A limited partnership, which is taxed as a company, is a partnership wherein the liability of at least one of the partners is limited. Each Australian state allows for the creation by registration of limited partnerships. The limited partner must not participate in the management of the partnership. A limited partnership does not have separate legal personality. Some states and the Australian territories also make provision for incorporated limited partnerships.

### **ii Non-corporate**

A trust is the relationship of a legal titleholder (trustee) of an asset to a person for whose benefit the asset is held (beneficiary). The trustee must file an income tax return separately for the trust as if it was a taxpayer, but tax on the income is payable by the beneficiary presently entitled to the income. In the case of a discretionary trust where the trustee has a power to 'appoint' beneficiary entitlements to income, the trustee is taxed on any income to which no beneficiary is entitled by year-end. The rate of tax payable by the trustee in these cases is the maximum personal rate (currently 46.5 per cent).

Income tax returns must also be filed separately for partnerships, but the partners are taxed on the partnership income regardless of current distribution entitlements. Unincorporated joint ventures in which the joint venture parties are not jointly and severally liable for liabilities and are not in receipt of income jointly (i.e., they divide the

product of the venture) are disregarded for tax purposes. This is common in the mining industry.

### **III DIRECT TAXATION OF BUSINESSES**

#### **i Tax on profits**

Australian taxpayers are taxed on worldwide income, 'taxable income', typically with a 30 June tax year-end. Substituted periods can be approved for foreign-owned entities to match foreign parent balance dates.

Taxable income is 'assessable income' less allowable 'deductions', both as defined by statute. Income and expenses recognised for tax and accounting purposes are often different, mainly as to timing but also as to amount. Tax adjustments, therefore, often produce differences between a company's taxable income and its reported profits. Common differences between them arise from:

- a* differences in the timing of recognition of income and expenses (or depreciation);
- b* special tax incentives available from time to time, for example an additional capital expenditure deduction ('investment allowance') implemented to encourage investment during the 2008 global financial crisis;
- c* in the case of tax consolidated groups, different calculations of the tax cost of assets; and
- d* elimination from taxable income of certain impairment, fair value and mark to market-type adjustments made for accounting purposes.

Although Australian companies are generally subject to Australian tax on worldwide income, a capital gain or loss made by a resident company on shares in a foreign company may be reduced (in some cases to zero) under a 'participation exemption'. The Australian company must have held a 10 per cent or greater direct voting interest in the foreign company for a continuous period of 12 months in the preceding two years. In that case, the capital gain or loss is reduced by the proportion of the foreign company's active business assets to its total assets.

Australia also has complex rules to attribute income earned by controlled foreign companies to their Australian owners. The Australian owners generally are not attributed active business income, and dividends paid into Australia are exempt from tax. Foreign active business income derived directly is also generally exempt. These rules are in the process of revision.

#### ***Capital and income***

Comprehensive rules within the income tax legislation include capital gains (net of capital losses) in assessable income. The rules also contain capital gains tax exemptions and concessions, including the ability to index the cost basis until 19 September 1999.

Since 12 December 2006, non-residents have broadly only been subject to capital gains tax on assets that are 'taxable Australian property'. These assets include direct and indirect interests in Australian real property and the business assets of Australian branches. A non-resident investor is not subject to capital gains tax on a sale of shares in

an Australian company, unless its shareholding exceeds 10 per cent and the Australian company's value is mostly attributable to Australian real property.

The capital gains tax rate for a company is the same as the income tax rate.

### *Losses*

Companies can carry forward losses indefinitely subject to a continuity of majority ownership rule, or if that rule is failed, a same business rule. Carry back of losses is not currently permitted, but draft legislation was released recently to allow the carry back of 2012-13 and later losses, subject to a A\$1 million cap. Initially a one-year carry-back period will apply, with a two-year carry-back period applying to 2013-14 and later losses.

Revenue account losses can be offset against both income and capital gains. Capital losses can only be offset against capital gains.

### *Rates*

The headline rate of company tax is currently 30 per cent. A proposal to reduce the rate to 29 per cent for smaller companies was recently dropped.

### *Administration*

Companies are generally required to pay tax under a 'pay-as-you-go' collection system. This requires large companies and other large taxpayers to pay quarterly instalments of tax estimated by reference to income derived during the quarter. Any variance from the estimate is due, in the case of a company, five months after year-end.

### *Tax grouping*

Australian resident companies may form a tax-consolidated group. A group consists of an Australian resident 'head' company (which cannot be a wholly owned subsidiary of another Australian resident company) and all its wholly owned Australian subsidiary entities. The consolidated group is taxed as a single entity, and intra-group transactions are ignored. The head company is primarily liable for group income tax, but subsidiaries may be jointly and severally liable if it fails to pay. The regime allows pooling of losses and tax-free movement of funds and assets within the group without income tax consequences. The cost of a subsidiary company's assets is set on joining the group by reference to the cost of its shares and its liabilities; the cost of shares in a subsidiary company are set on leaving the group by reference to the cost of its assets and liabilities.

Foreign-owned groups that have multiple entry points into Australia may form a 'multiple entry' consolidated group, with the head company chosen by the group from those entry point or 'tier 1' entities.

## **ii Other relevant taxes**

### *Goods and services tax*

GST applies to supplies connected with Australia, and to the importation of goods and services into Australia. The rate is 10 per cent. Australian GST is similar to the European VAT regimes.

Supplies classified as 'GST-free' do not attract GST. They include education, health-related services, most basic types of food, exports of goods and services, and



certain supplies to businesses. Other supplies that do not attract GST are known as 'input-taxed' supplies. These include financial supplies, residential tenancies and sales of residential premises other than new constructions.

This distinction is important: input tax credits cannot be claimed for the GST incurred on acquisitions that relate to input-taxed supplies, but can be claimed for credits that relate to GST-free supplies. Input tax credits are generally otherwise available for GST paid with acquisitions in the course of a business.

Input tax credits are offset against the taxpayer's GST liabilities so that only a net GST amount is payable, usually on a calendar-month basis. Examples of financial supplies in relation to which input tax credits are not available include money lending, and other dealings with debt and equity interests. Apportionment for 'mixed use' acquisitions is required.

Corporate groups with 90 per cent common ownership may be registered as a single GST group. The group is separate from any consolidated income tax group and requires a separate election. A GST group may include non-corporate entities such as trusts and partnerships. A nominated member is responsible for the GST payable by the whole group. Supplies and acquisitions within the group are ignored.

### *Fringe benefits tax*

Fringe benefits tax ('FBT') is payable by employers on the value of non-salary 'fringe' benefits provided to employees. Taxable benefits include motor vehicles, housing, expense reimbursements and low-interest loans. Superannuation benefits are not subject to FBT.

The FBT rate is 46.5 per cent (i.e., the maximum personal tax rate) of a 'grossed up' value of the benefit. The gross up ensures that the FBT payable is equivalent to the income tax that would have been paid in respect of an equivalent amount of after-tax salary.

### *Petroleum resource rent tax*

Petroleum resource rent tax is imposed on income from the recovery of petroleum products from offshore petroleum projects. The government recently extended the tax to onshore oil and gas projects, and North West Shelf projects that were previously excluded, with effect from 1 July 2012.

### *Mineral resource rent tax*

A new 'minerals resources rent tax' was applied to iron ore and coal, as well as gas extracted in conjunction with coal mining, from 1 July 2012. It applies to both new and existing projects at an effective rate of 22.5 per cent, but with an allowance for proven reserves at 1 May 2010.

### *State royalties*

Various natural resource royalties are applied by state governments. Royalties can be credited against the new minerals resources rent tax.

### *Payroll tax*

Payroll tax is imposed by each state and territory on wages, salaries and other employee benefits, up to a rate of 6.85 per cent depending on the jurisdiction.