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The International Comparative Legal Guide to:

Corporate Tax 2019

15th Edition

A practical cross-border insight into corporate tax work

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EDITORIAL

Welcome to the fifteenth edition of *The International Comparative Legal Guide to: Corporate Tax*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of corporate tax

It is divided into two main sections:

Two general chapters, offering an insight into tax and state aid, and tax in relation to the digital economy.

Country question and answer chapters. These provide a broad overview of common issues in corporate tax laws and regulations in 34 jurisdictions.

All chapters are written by leading corporate tax lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor William Watson of Slaughter and May for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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Chapter 5

Australia

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1 Tax Treaties and Residence

1.1 How many income tax treaties are currently in force in your jurisdiction?

Australia has comprehensive income tax treaties with 45 countries, including the US, UK, most Western European countries, most East and South-East Asian countries and New Zealand.

Australia has also concluded Tax Information Exchange Agreements with a number of countries, including many low-tax jurisdictions such as the Cayman Islands. It is a signatory to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (**MLI**), and to the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (Common Reporting Standard or **CRS**). Australia has entered into a "Model 1" intergovernmental agreement with the US and enacted domestic legislation to give effect to the US *Foreign Account Tax Compliance Act* (**FATCA**).

1.2 Do they generally follow the OECD Model Convention or another model?

Australia's income tax treaties generally follow the OECD model. However, the US treaty follows the US model and some differences exist in some other treaties. Australia's treaties vary as to the allocation of rights to tax alienation of interests in land-rich entities.

The US, UK, Finnish, New Zealand, Norwegian, Japanese, French, South African, Swiss and German treaties provide withholding concessions and exemptions for interest paid to unrelated financial institutions and dividends paid to holding companies and significant corporate shareholders. For details, please see questions 3.1 and 3.3.

Australia's most recently signed double tax treaty – its treaty with Germany, signed in November 2015 – largely gives effect to the OECD's Base Erosion and Profit Shifting (**BEPS**) recommendations.

1.3 Do treaties have to be incorporated into domestic law before they take effect?

Treaties must be incorporated into Australia's domestic law before they take effect. Each time a treaty is concluded, the *International Tax Agreements Act 1953* (**Agreements Act**) is amended to give force of law to the treaty.

1.4 Do they generally incorporate anti-treaty shopping rules (or "limitation on benefits" articles)?

Australia's tax treaties traditionally did not incorporate anti-treaty shopping rules. However, limitation of benefits articles are included in some of Australia's more recently negotiated treaties, including its treaties with the US, Japan and Germany. Other new treaties contain specific provisions within the dividend, interest, and royalty articles. In addition, Australia's domestic general anti-avoidance rules and the new diverted profits tax (see question 9.1 below) may apply to prevent treaty shopping.

Australia's treaty with Germany includes a simplified anti-treaty shopping rule that incorporates a BEPS-style principal purpose test.

1.5 Are treaties overridden by any rules of domestic law (whether existing when the treaty takes effect or introduced subsequently)?

Yes, occasionally. The Agreements Act gives treaties the force of Australian law. To the extent that a treaty provision conflicts with domestic legislation, the treaty provision takes precedence. However, specific overriding provisions found in the Agreements Act allow Australia's general anti-avoidance rule to operate unaffected by a treaty.

1.6 What is the test in domestic law for determining the residence of a company?

A company is tax-resident in Australia if it is incorporated in Australia, or if it carries on business in Australia with central management and control in Australia or its voting power is controlled by shareholders resident in Australia. Most of Australia's tax treaties include a tie-breaker for dual residency, usually by reference to the place of effective management, though this will be removed for some treaties pursuant to the MLI.

The Tax Office has updated its guidance on the meaning of these tests in a recent ruling (TR2018/5), following 2016 Australian High Court decisions in *Bywater Investments* and *Hua Wang* Bank.

2 Transaction Taxes

2.1 Are there any documentary taxes in your jurisdiction?

Yes. Stamp duty is a documentary tax.

Stamp duty is levied by the various Australian States and Territories. Although largely aligned, the duty regimes differ between the States and Territories.

Stamp duty is levied on transfers of interests in land (including on the value of plant and equipment transferred with land), the creation of beneficial interests in land, transfers of shares and units in landholder entities, motor vehicle transfers and insurance contracts at rates of up to 7%. Victoria, New South Wales, South Australia, Tasmania and Queensland have introduced a foreign purchaser surcharge of up to 8% on foreign purchases of residential land; a similar surcharge is also proposed in Western Australia to commence on 1 January 2019.

Queensland, Western Australia and the Northern Territory also levy duty on transfers of business assets such as goodwill.

A nominal amount of duty also applies to some documents, e.g. trust deeds in New South Wales and Victoria.

While stamp duty was historically a documentary tax, avoidance-type rules can also trigger duty if transactions are effected without documents.

2.2 Do you have Value Added Tax (or a similar tax)? If so, at what rate or rates?

Goods and services tax (**GST**) is imposed on supplies that are connected with Australia and on goods imported into Australia. The GST rate is 10%. GST is similar in scope and operation to the Value Added Tax systems of European Union Member States.

2.3 Is VAT (or any similar tax) charged on all transactions or are there any relevant exclusions?

Supplies that are classified as "GST-free" do not attract GST. These supplies include education, health-related services, most basic types of food, exports (of goods and services), and the supply of a business as a going concern.

Other supplies that do not attract GST are known as "input-taxed" supplies. These include financial supplies such as a transfer of shares in a company, residential rent and the sale of previously occupied residential premises.

The distinction is important because while neither class of supply is subject to GST, input tax credits cannot be claimed for GST included in the price of acquisitions that relate to input-taxed supplies.

2.4 Is it always fully recoverable by all businesses? If not, what are the relevant restrictions?

An entity is broadly entitled to claim input tax credits for things acquired in the course of its business, except to the extent that the acquisition relates to input-taxed supplies (for example, financial supplies such as money lending or other dealings with debt or equity interests). Input tax credits are offset against the taxpayer's own GST liabilities so that only a net GST amount is payable. Apportionment for "mixed use" acquisitions is required. Reduced input tax credits are available for some transactions that would otherwise be input-taxed supplies (for example, transaction banking and funds transfer services, securities brokerage and trustee and custodial services).

2.5 Does your jurisdiction permit VAT grouping and, if so, is it "establishment only" VAT grouping, such as that applied by Sweden in the *Skandia* case?

Australian GST law allows the grouping of multiple registered business entities if they are 90% commonly-owned. Both the head office of a company and its branch office are treated as a single entity for Australian GST purposes, although it is possible to register a branch as a separate taxpayer for GST purposes. A foreign company (whether or not it has an Australian branch) can join an Australian GST group.

2.6 Are there any other transaction taxes payable by companies?

Various States impose minor licensing fees.

2.7 Are there any other indirect taxes of which we should be aware?

Yes. Australia also imposes the following indirect taxes:

Excise duty

Excise duty is levied on some goods manufactured in Australia, including alcohol, tobacco and petroleum.

Land tax

Land tax is imposed by each State and the Australian Capital Territory on the value of commercial real estate. Agricultural land is excluded. Broadly, the liability for land tax rests with the landowner and the rates differ depending on the jurisdiction. The maximum rate is 3.7% *per annum* for land values in excess of A$1.231 million in South Australia.

Queensland, Victoria and New South Wales have each introduced a surcharge for foreign owners of residential property at rates of up to 1.5% *per annum*.

Customs duty

Goods imported into Australia may be subject to customs duty.

Major bank levies

A UK-style levy on Authorised Deposit-taking Institutions (**ADIs**) with licensed entity liabilities of at least A$100 billion commenced on 1 July 2017. Currently only five Australian banks have liabilities of that magnitude. The levy rate is 0.015% per quarter.

3 Cross-border Payments

3.1 Is any withholding tax imposed on dividends paid by a locally resident company to a non-resident?

Dividends paid by a resident company out of untaxed profits are subject to a 30% dividend withholding tax, unless the rate is reduced under an applicable treaty (generally to 15%). On the other hand, dividends paid by an Australian resident company out of post-tax profits are exempt from dividend withholding tax.

Under the US, UK, Japanese, Finnish, New Zealand, Norwegian, Swiss and German treaties (each a recently concluded or renegotiated treaty), dividend withholding tax is also reduced to nil where certain beneficially entitled companies (generally, listed companies, or companies that are wholly or mainly owned by a listed company or listed companies) hold at least 80% of the voting power in the Australian company paying the dividends, and a 5% rate applies where any beneficially entitled company holds at least 10% of the voting power. The second concession also applies under the French, Chilean, South African and Turkish treaties, which are also recently renegotiated treaties.

Finally, dividends will not be subject to dividend withholding tax where they are paid out of "conduit foreign income". Conduit foreign income is essentially foreign income of the Australian company that is not subject to Australian tax (for example, non-portfolio dividends – please refer to question 7.2 below) and is paid on to a foreign resident as a dividend rather than accumulated in Australia.

Dividends paid by an Australian company that are effectively connected with the Australian branch of a non-resident are taxed in Australia by assessment rather than by a withholding tax.

3.2 Would there be any withholding tax on royalties paid by a local company to a non-resident?

Royalties paid to a non-resident are subject to a 30% royalty withholding tax. If a treaty applies, royalty withholding tax is usually reduced to 10%. Royalty withholding tax is reduced to 5% under the US, UK, New Zealand, Finnish, South African, Japanese, Norwegian, French, Swiss and German treaties.

The term "royalty" is broadly defined in Australia's domestic legislation and includes fees paid for the use or supply of commercial property and rights. The term "royalty" is also defined in Australia's treaties and can differ from Australia's domestic legislation. In those cases, the treaty definition prevails.

More recently negotiated treaties exclude natural resource payments and equipment royalties from royalty withholding tax. However, interest withholding tax applies to rental payments to non-residents under arrangements in which cross-border leases are structured as hire-purchase arrangements.

Royalties derived by a resident of a country with which Australia has concluded a comprehensive income tax treaty, that are effectively connected with an Australian branch, are treated as business profits and are taxed in Australia on an income tax assessment rather than a withholding tax basis.

3.3 Would there be any withholding tax on interest paid by a local company to a non-resident?

Interest paid to a non-resident is generally subject to a 10% interest withholding tax, although interest paid on debentures and other debt instruments (such as Eurobonds) offered publicly is exempt from withholding tax.

If the tax applies, this rate may be reduced under an applicable treaty. Under Australia's recently concluded and renegotiated treaties (e.g. the US, UK, French, Japanese, Finnish, New Zealand, Norwegian, South African, Swiss and German treaties), interest paid to an unrelated financial institution is also exempt from withholding tax.

Interest that is effectively connected with an Australian branch of a non-resident is taxed in Australia on an income tax assessment rather than a withholding tax basis.

3.4 Would relief for interest so paid be restricted by reference to "thin capitalisation" rules?

Australia's thin capitalisation rules apply to foreign-controlled Australian groups (inward investors) and Australian groups that invest overseas (outward investors). The rules restrict interest deductions when the amount of debt used to finance the Australian operations exceeds specified limits (see question 3.5 below).

3.5 If so, is there a "safe harbour" by reference to which tax relief is assured?

Safe harbours are provided under *de minimis* exemptions and maximum allowable debt tests.

***De minimis* exemptions**

Exemptions from the thin capitalisation rules apply to:

- taxpayers with interest deductions of less than A$2 million; and
- outward investors whose Australian assets make up 90% or more of total assets by value.

Maximum allowable debt tests

Thin capitalisation rules will not deny any portion of an entity's interest deductions provided that the entity's debt is within the maximum allowable amount.

Entities that are not ADIs are allowed a "safe harbour" debt-to-equity ratio of 1.5:1. The safe harbour may be exceeded if a higher level of debt could reasonably be borrowed by the entity from commercial lenders. However, this "arm's length debt" level is judged according to strict statutory criteria (parent company support is disregarded).

Investors that are not ADIs are also allowed gearing of their Australian operations at up to 100% of the overall group's worldwide gearing.

Significantly higher debt levels are afforded to financial institutions, including a 15:1 safe harbour. ADIs are allowed gearing levels referable to their regulatory prudential capital requirements.

3.6 Would any such rules extend to debt advanced by a third party but guaranteed by a parent company?

The thin capitalisation rules apply to all debt interests, including debt advanced by related and unrelated parties, whether Australian or foreign-resident, and in the case of debt advanced by an unrelated party, whether or not it is supported by a related party.

3.7 Are there any other restrictions on tax relief for interest payments by a local company to a non-resident?

Any interest withholding tax due on interest payments by a local company to a non-resident must be remitted to the Tax Office before the local company is entitled to a tax deduction for the interest payments.

Australia's transfer pricing rules (see question 3.9 below) also require Australian operations to have an arm's length capital structure and can therefore also restrict interest deductions beyond the restrictions imposed by the thin capitalisation rules.

3.8 Is there any withholding tax on property rental payments made to non-residents?

Generally, no. Income derived by non-residents from real property located in Australia is subject to tax in Australia on an income tax assessment basis. However, there are two significant exceptions. Net rental income distributed by an Australian-managed investment fund (i.e. an Australian REIT – please refer to question 8.3 below) is subject to 15% or 30% withholding tax depending on the country of residence of the investor. In addition, rent paid to a non-resident for the use of industrial, scientific or commercial equipment can constitute a royalty subject to the withholding tax regime (with some treaty-based exceptions as described in question 3.2 above).

3.9 Does your jurisdiction have transfer pricing rules?

Australia has transfer pricing rules that are modelled on the OECD Transfer Pricing Guidelines. The rules are contained in Australia's domestic legislation and its tax treaties. The rules apply to "non-arm's length" cross-border transactions. Guidance on what is considered "arm's length" is provided by the Tax Office via a number of public rulings.

The rules give the Tax Office the discretion to adjust non-arm's length pricing of transactions to increase taxable income in Australia. Conversely, treaties can require Australia to reduce taxable income.

The preferred methods applied in Australia to determine the appropriate arm's length pricing of cross-border transactions are:

- the Comparable Uncontrolled Price method;
- the Resale Price method;
- the Cost Plus method;
- the Profit Split method; and
- the Transactional Net Margin method.

To confirm that international prices are arm's length, taxpayers can apply for an advanced pricing agreement with the Tax Office.

Legislation enacted in 2012 also allows taxation of profits on an independent entity basis, having regard to OECD principles, rather than on a purely transaction-by-transaction basis.

4 Tax on Business Operations: General

4.1 What is the headline rate of tax on corporate profits?

The headline rate of company tax is currently 30%. A reduced 27.5% tax rate applies to companies with an annual turnover of up to A$50 million in the 2018–19 income year. However, legislation before the Australian Parliament will deny the lower tax rate to companies with at least 80% of their turnover comprising passive income such as dividends, interests, royalties and rent.

Companies are generally required to pay tax under a "Pay As You Go" (**PAYG**) collection system which requires large companies (and most other large taxpaying entities) to pay monthly or quarterly instalments of estimated tax, calculated by reference to the amount of income derived during that period. Any difference in tax payable from the estimate is due, in the case of a company, five months after the year's end.

4.2 Is the tax base accounting profit subject to adjustments, or something else?

Broadly, Australian taxpayers are taxed on their worldwide "taxable income", typically for the year ending 30 June.

Taxable income comprises "assessable income", as defined by statute, less allowable tax deductions. The amount of assessable income and tax deductions often varies from the amount of income and expenses recognised for accounting purposes. Tax adjustments often therefore produce differences between a company's taxable income and its reported profits.

4.3 If the tax base is accounting profit subject to adjustments, what are the main adjustments?

Taxable income often differs from commercial accounting profit because of:

- different tax depreciation rates for plant and equipment;
- differences in the timing of recognition of income and deductions for tax purposes compared to revenue and expenses for accounting purposes;
- tax concessions for certain research and development expenditure;
- recognition of some taxable capital gains not recognised for accounting purposes;
- capitalisation of some expenses for tax purposes;
- in the case of consolidated groups (see question 4.4 below), different calculations of the tax cost of assets; and
- elimination from taxable income of impairment, fair value and mark-to-market type adjustments made for commercial accounting purposes.

4.4 Are there any tax grouping rules? Do these allow for relief in your jurisdiction for losses of overseas subsidiaries?

Special grouping rules apply in respect of income tax and GST.

Income tax consolidated group

An Australian resident head company may irrevocably elect to form an income tax consolidated group. A consolidated group consists of a head company and all its wholly-owned Australian subsidiary companies, trusts and partnerships. The consolidated group is taxed as a single entity and intra-group transactions are ignored. The head company is primarily liable for the group income tax although subsidiaries may be jointly and severally liable if it fails to pay. Broadly, the tax consolidation regime allows group restructuring, pooling of losses and other tax attributes and movement of assets within the group, without tax consequences. The tax costs of a subsidiary member's assets are set at the time of joining the group and the tax costs of shares in the subsidiary are set on leaving the group.

Losses made by overseas subsidiaries cannot be brought onshore. This is the case irrespective of income tax consolidation.

First-tier Australian companies in a wholly-owned multinational corporate group that has multiple entry points into Australia may irrevocably elect to form a "Multiple Entry" consolidated (**MEC**) group for income tax purposes.

GST Group

As a separate election, groups with 90% common ownership may be registered as a GST group. A GST group must nominate a representative member who is responsible for the GST liabilities of the whole group. Supplies and acquisitions made within the group are ignored for GST purposes.

4.5 Do tax losses survive a change of ownership?

Companies and stock-exchange-listed trusts can utilise losses following a change of majority ownership if they continue to carry on substantially the same business and do not undertake a new business or transactions of a kind not undertaken before the change. Unlisted trust losses do not survive a change of ownership.

4.6 Is tax imposed at a different rate upon distributed, as opposed to retained, profits?

Australian tax is generally imposed on company profits, regardless of distributions. In addition, "conduit foreign income" rules allow the active foreign business income and foreign non-portfolio dividends of an Australian resident company to be passed on to foreign investors (as dividends) free of Australian tax.

4.7 Are companies subject to any significant taxes not covered elsewhere in this chapter – e.g. tax on the occupation of property?

Fringe benefits tax

Fringe benefits tax (**FBT**) is a tax on employers on the value of non-cash "fringe benefits", provided to their employees. Fringe benefits typically include the use of motor vehicles, expense payments and low-interest loans. Employees are not taxed on these benefits.

The FBT rate is currently 47% of the "grossed-up" value of benefits (that is, grossed-up so that the tax payable is equivalent to the tax that would be payable on an equivalent amount of salary).

Petroleum resource rent tax

Petroleum resource rent tax is imposed on income from the recovery of petroleum products from offshore petroleum projects and, since 1 July 2012, also from onshore petroleum projects.

Various other natural resource royalties are also applied by the Federal Government and the States.

Luxury car tax

Luxury car tax is levied at 33% of the excess of the retail value of a new car sold in or imported into Australia over (A$66,331 (indexed) or A$75,526 (indexed), for specified fuel-efficient cars).

Wine equalisation tax

Wine equalisation tax is levied at 29% of the wholesale value of wine for consumption in Australia.

Payroll tax

Payroll tax is a tax imposed by each State and Territory, on aggregate wages, salaries and other employee benefits above annual threshold amounts ranging from A$650,000 to A$2 million, at rates of up to 6.85%.

5 Capital Gains

5.1 Is there a special set of rules for taxing capital gains and losses?

A comprehensive set of statutory rules within the income tax legislation includes capital gains (after netting off capital losses) in assessable income.

These rules also contain capital gains tax exemptions and concessions, including the ability to index cost bases until 19 September 1999 and, alternatively, reductions of taxable gains made by individuals, trusts, life insurance companies and complying superannuation funds (but not companies) on assets held for at least 12 months. The reduction does not apply to gains accrued after 8 May 2012 by foreign individuals, either directly or as trust beneficiaries. However, non-residents are only taxable on gains from real property interests (see question 5.2 below).

The rate of tax imposed on capital gains made by a company is the same 30% tax rate imposed on income. Companies are not eligible for the gain reductions ("CGT discounts") available to individuals and complying superannuation funds.

5.2 Is there a participation exemption for capital gains?

Different exemptions from capital gains tax apply to non-resident and resident investors.

Non-resident investors

A non-resident investor is not subject to capital gains tax on a sale of shares in an Australian company, unless the investor's shareholding exceeds 10% of the company and the Australian company's value is mostly attributable to Australian real property.

Resident investors

Australian resident companies are *prima facie* subject to Australian tax on their worldwide income. However, a capital gain or loss made by a resident company on shares in a foreign company may be reduced (in some cases to nil) under a "participation exemption". The resident company must have held a 10% or greater direct voting interest in the foreign company for a continuous period of 12 months in the last two years. In that case, the capital gain or loss is reduced by the value of the foreign company's active business assets as a percentage of the value of its total assets.

5.3 Is there any special relief for reinvestment?

Relief for reinvestment is not available in Australia *per se*. However, the CGT provisions contain some "replacement asset" rollovers which allow deferral of tax on capital gains. They are generally targeted at restructures and takeovers. A commonly used rollover ("scrip-for-scrip" rollover) is available where the bidder acquires at least 80% of the shares in the target company and pays sellers in scrip. A reinvestment rollover is available where the ownership of a capital asset ends due to compulsory acquisition by the Government or where an asset is lost or destroyed provided it is replaced within 12 months.

5.4 Does your jurisdiction impose withholding tax on the proceeds of selling a direct or indirect interest in local assets/shares?

Purchasers of Australian real property or interests in land-rich entities must withhold 12.5% of the purchase price if payable to a non-resident vendor. This is a non-final withholding tax, and does not apply to transactions valued at less than A$750,000 or on-market securities transactions. Non-resident vendors can provide purchasers with Tax Office clearance certificates confirming that tax need not be withheld.

An Australian agent can also be required to answer for tax payable by a non-resident principal on profits derived through the agent, and the Commissioner can, by notice, require any person controlling money belonging to a non-resident to account for tax due by the non-resident.

6 Local Branch or Subsidiary?

6.1 What taxes (e.g. capital duty) would be imposed upon the formation of a subsidiary?

No tax is imposed on the formation of a subsidiary. A nominal administrative charge is levied by the Australian corporate regulator

(**ASIC**) on incorporation of a company and also applies to the registration of a branch of a foreign company.

6.2 Is there a difference between the taxation of a local subsidiary and a local branch of a non-resident company (for example, a branch profits tax)?

Australia's tax rules generally do not differentiate between conducting Australian operations through a subsidiary or a branch. Both forms of operation are subject to the same 30% corporate tax rate.

However, an Australian resident subsidiary with offshore investments would *prima facie* pay Australian corporate tax on its worldwide income (subject to a participation exemption for the income of a foreign branch or subsidiary as mentioned in question 5.2 above and questions 7.1 and 7.2 below, and the conduit foreign income rules mentioned in question 3.1 above), whereas a branch of a non-resident company would be taxed only on its Australian-sourced income.

Subsidiary company profits on which tax has been paid in Australia are able to be repatriated as dividends free of Australian dividend withholding tax, and Australia does not impose a branch profits tax.

6.3 How would the taxable profits of a local branch be determined in its jurisdiction?

A foreign company with an Australian branch is taxed on its Australian-sourced income that is attributable to that branch. Arm's-length transfer pricing rules apply to allocate profits between a branch and its offshore head office or other foreign branches.

6.4 Would a branch benefit from double tax relief in its jurisdiction?

Generally yes, but Australia's tax treaties broadly allow full taxing rights to the source country where a treaty resident company carries on business through a permanent establishment in Australia. The treaties invariably require arm's-length principles to be applied in determining the taxable income of the branch. In these respects, Australia's treaties broadly follow OECD treaty principles. However, the branch of a non-resident generally would not be able to take advantage of Australia's treaties with a third country.

6.5 Would any withholding tax or other similar tax be imposed as the result of a remittance of profits by the branch?

No withholding tax or other tax is imposed on the remittance of profits by a branch.

7 Overseas Profits

7.1 Does your jurisdiction tax profits earned in overseas branches?

Income derived by an Australian resident company in carrying on business at or through a permanent establishment in a foreign country generally will not be subject to Australian tax. Likewise, a capital gain or loss made by an Australian resident company on an asset used in carrying on business at or through a permanent establishment in a foreign country generally will be disregarded.

Australian resident companies are unable to deduct costs incurred to derive income earned through an offshore branch if the income is exempt.

7.2 Is tax imposed on the receipt of dividends by a local company from a non-resident company?

A "non-portfolio" dividend paid by a foreign company to an Australian resident company is not subject to Australian tax, whether received directly or through an interposed partnership or trust. A non-portfolio dividend is a dividend from a company in which one holds at least 10% of the voting power. The exemption is restricted to dividends paid on shares that are "equity" under Australian tax law. Dividends on legal form shares that are "debt" under Australian tax law, such as some redeemable preference shares, are not exempt.

Other dividends received from non-resident companies are taxed in Australia, subject to a credit for any foreign tax imposed on the dividend.

7.3 Does your jurisdiction have "controlled foreign company" rules and, if so, when do these apply?

Australia's "controlled foreign company" rules attribute to Australian residents a share of income earned or gains made by foreign companies they control, even though the foreign income or gains may not be distributed.

A foreign company is a "controlled foreign company" if:

- a group of five or fewer Australian entities, each individually controlling at least 1% of the company, collectively controls at least 50% of the company shares;
- a single Australian entity (and its associates) controls 40% or more of the company, unless it is controlled by another person or group; or
- a group of five or fewer Australian entities (either alone or together with their associates) otherwise controls the company.

To be attributable, the taxpayer must hold at least 1% within a group of five controllers, or hold 10% itself.

8 Taxation of Commercial Real Estate

8.1 Are non-residents taxed on the disposal of commercial real estate in your jurisdiction?

Yes. Gains on the disposal of Australian commercial real estate are currently subject to tax on an income tax assessment basis. In addition, as mentioned in question 5.4 above, a non-final 12.5% withholding tax applies to the proceeds of substantial real estate sales by non-residents.

8.2 Does your jurisdiction impose tax on the transfer of an indirect interest in commercial real estate in your jurisdiction?

Yes, capital gains tax applies to these sales, and the 10% non-resident withholding tax mentioned in questions 5.4 and 8.1 above also applies to them.

An indirect interest is an interest in a resident or non-resident entity with more than 50% of its assets comprising Australian real estate, held either directly or indirectly. However, only indirect interests of at least 10% held for 12 of the past 24 months are subject to tax. Treaty relief may also be available for residents of Germany.

A revenue account gain on transfer of an indirect interest in Australian real property is also subject to tax in Australia if sourced in Australia, applying common-law source-of-income rules.

8.3 Does your jurisdiction have a special tax regime for Real Estate Investment Trusts (REITs) or their equivalent?

Australia uses the term "managed investment trust" (**MIT**) to describe domestic REITs. These trusts (or their managers) are required to be regulated by Australian-managed fund laws, to be sufficiently widely held (there are varying thresholds for retail and wholesale funds) and to satisfy non-trading conditions.

Distributions to non-residents of MIT rental income and capital gains are subject to a final withholding tax of 30%, or 15% if the non-resident is a resident of a country with which Australia has concluded an information exchange agreement. (To the extent that a distribution includes interest and dividends, those components are subject to interest and dividend withholding taxes.) An MIT can also make an election for gains on property to be taxed on capital account rather than revenue account.

Investors in MITs with a single unitholder class or that are registered with (and therefore regulated by) the Australian Securities and Investments Commission, are taxed on amounts attributed to them, rather than distributions. Withholding tax applies to income that is attributed but retained by the fund.

9 Anti-avoidance and Compliance

9.1 Does your jurisdiction have a general anti-avoidance or anti-abuse rule?

Australia has a general anti-avoidance rule, contained in Part IVA of the tax legislation. It supplements other, more specific anti-avoidance rules dealing with, for example, franking credit streaming and dividend stripping.

The provisions of Part IVA are extremely broad and extend to schemes entered into with the sole or dominant purpose of obtaining a tax benefit. A tax benefit is essentially a reduction of assessable income, an increase in allowable tax deductions (including tax deferral beyond what would be reasonably expected), a reduction in withholding tax or access to a tax credit. The application of Part IVA is dependent on the Commissioner's discretion, which is generally reserved for schemes that the Commissioner considers artificial or contrived. Part IVA prevails over other provisions of the Australian tax legislation and Australia's tax treaties. Where it is applied, the tax benefits are denied and administrative penalties are generally imposed.

In December 2015, the Part IVA was extended to schemes for the avoidance of Australian permanent establishments. It applies from 1 January 2016 to groups with worldwide income in excess of A$1 billion.

In May 2016, Australia introduced a UK-style, 40% diverted profits tax (**DPT**). This tax commenced on 1 July 2017 and also applies to groups with worldwide income in excess of A$1 billion.

9.2 Is there a requirement to make special disclosure of avoidance schemes?

Australia does not yet have a special disclosure rule imposing a requirement to disclose avoidance schemes to the Tax Office in advance of the company's tax return being submitted, although a regime is being developed by the government. However, large company tax returns are required to report any tax position that is only "as likely as not to be correct", or which is both uncertain and disclosed in the company's or a related party's financial statements, e.g. pursuant to the US Fin 48 accounting rule.

Taxpayers may seek a Tax Office ruling for assurance about the tax treatment of a potentially contentious transaction. Rulings are binding on the Tax Office.

9.3 Does your jurisdiction have rules which target not only taxpayers engaging in tax avoidance but also anyone who promotes, enables or facilitates the tax avoidance?

Australian law prohibits an adviser or another person promoting a scheme for the dominant purpose of a tax benefit that is not reasonably arguable (a "tax exploitation" scheme), or promoting any scheme on the basis of its conformity with a Tax Office "product" ruling if the scheme actually implemented is materially different to the scheme ruled on.

9.4 Does your jurisdiction encourage "co-operative compliance" and, if so, does this provide procedural benefits only or result in a reduction of tax?

The Tax Office applies a "risk-differentiation framework" to assess taxpayer compliance risk. The framework is designed to identify the likelihood of tax positions being taken that the Tax Office disagrees with. It takes into account the Tax Office's perception of taxpayer behaviour, its approach to business (e.g. risk appetite), its governance, and its past compliance with tax laws.

The assessment outcomes determine the extent of Tax Office resources to monitoring ongoing taxpayer compliance. Higher-risk taxpayers are subject to continuous review, typically including comprehensive audit and intensive risk analysis.

In addition, the new DPT applies a 40% tax rate *in lieu* of the 30% general company tax rate, with an express intention that taxpayers conform to cross-border tax positions that the Tax Office considers acceptable and therefore avoid DPT assessments.

10 BEPS and Tax Competition

10.1 Has your jurisdiction introduced any legislation in response to the OECD's project targeting Base Erosion and Profit Shifting (BEPS)?

Australia has taken a number of initiatives directed at base erosion and profit shifting.

As mentioned in question 9.1 above, legislation was enacted in December 2015 to extend Australia's general anti-avoidance law to schemes for the avoidance of Australian permanent establishments. As also mentioned in question 9.1 above, legislation was enacted in June 2017 to introduce a DPT, and Australia has also introduced Country-by-Country Reporting requirements (discussed below) with effect from 1 January 2016.

Legislation to introduce anti-hybrid rules is currently before Parliament. These rules are to be modelled on the OECD's BEPS recommendations.

Australia's recent treaty practice has incorporated recommendations of the BEPS project and Australia's domestic transfer pricing rules have been amended to incorporate changes to the OECD Transfer Pricing Guidelines.

In June 2017, the Australian Government signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.

10.2 Does your jurisdiction intend to adopt any legislation to tackle BEPS which goes beyond what is recommended in the OECD's BEPS reports?

In addition to the measures discussed in questions 9.1, 9.2 and 10.1 above, the Australian Government has promoted a new tax transparency code (i.e. voluntary public disclosure of income and taxation statistics) for taxpayers with an annual turnover in excess of A$100 million.

Since a May 2016 Australian Government directive, Australia's Foreign Investment Review Board is also now actively imposing tax (e.g. capitalisation) conditions on approval of significant foreign investment into Australia.

10.3 Does your jurisdiction support public Country-by-Country Reporting (CBCR)?

Yes, Australia has signed the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports, and in December 2015 enacted legislation to introduce a CBCR regime.

Multinational entities with worldwide income in excess of A$1 billion are required to comply with CBCR requirements for income years commencing on or after 1 January 2016. Statements corresponding to the Local file, Master file and Country-by-Country Reports outlined in the OECD's BEPS recommendations are required within 12 months of year-end.

10.4 Does your jurisdiction maintain any preferential tax regimes such as a patent box?

Australia maintains a preferential tax regime for "offshore banking units" (**OBUs**). An OBU is a "unit" or notional division of (usually) a bank that conducts offshore banking activities. In broad terms the taxable profit of an OBU is effectively taxed at 10%, rather than the standard 30% company tax rate.

11 Taxing the Digital Economy

11.1 Has your jurisdiction taken any unilateral action to tax digital activities or to expand the tax base to capture digital presence?

Yes. The expansion of Australia's general anti-avoidance rule in 2015 (see question 9.1 above) was directed primarily at non-resident companies which carry on business but without a permanent establishment in the country. In addition, non-residents who sell digital products over the internet to Australian customers (and exceed the A$75,000 threshold) are required to register for the GST. The rules can also extend to companies which operate electronic platforms. Finally, in May 2018, the government announced that it will release a discussion paper to explore further options for taxing digital business in Australia.

11.2 Does your jurisdiction support the European Commission's interim proposal for a digital services tax?

Australian officials have been involved in work on this topic being undertaken by the G-20 and OECD and will likely follow the recommendations arising from that work very closely.

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Cameron has also been heavily involved in recent ATO and Treasury consultation on capital management, cross-border and employee share scheme issues.

Cameron is a member of The Tax Institute's Large Business and International Committee and NSW Technical Committee. He holds a Bachelor of Business (Hons) and Bachelor of Laws (Hons) from the University of Technology, Sydney, and a Master of Taxation from the University of Sydney. Cameron is admitted as a solicitor in New South Wales.

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