

AUSTRALIAN TAX REVIEW

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Tax base erosion through thin capitalisation: Consequences of Australian reforms and the tax accounting interface – *Dean Hanlon and Les Nethercott*

Base erosion and profit shifting (popularly known as BEPS) is a pervasive issue reducing the tax collections of nations on a global scale. In response, the OECD has called for action by all governments to stem tax base erosion, with one idea being to curtail the use of debt financing as a means of obtaining excessive interest deductions. Australia, along with other nations, is responding in kind by tightening its thin capitalisation provisions, which deny the taxpayer a deduction for any finance expenses on excess debt. In determining whether a taxpayer has excess debt levels, calculations are based on asset, liability and equity capital values determined in accordance with accounting standards. The aim of this article is to highlight the techniques available to taxpayers, both within accounting standards and the thin capitalisation provisions, to cushion the impact of more stringent legislation. 219

Internal derivatives and the attribution of income and expenditure to permanent establishments of Australian banks – *Simon Croese*

After almost a decade of consultation with industry, the Australian Taxation Office (ATO) has undertaken to publish, on its website, guidance which endorses the use of internal derivatives as a means of attributing income and expenditure between an Australian bank's permanent establishments. While the guidance is light on technical detail, the Commissioner provides some commentary on the tax outcomes banks can expect in certain factual scenarios. This article raises some concerns about the accuracy surrounding these technical conclusions by the Commissioner. However, notwithstanding these concerns, the article supports the decision to recognise internal derivatives as a mechanism for attribution and considers it to be consistent with previous ATO publications and not in conflict with Australian tax law. 228

The constitutional validity of a statutory remedial power for the Commissioner of Taxation – *Nicole Wilson-Rogers*

Recently, the Commonwealth government proposed the incorporation of a statutory remedial power (SRP) into Commonwealth revenue legislation. The proposed SRP will take the form of a quasi-legislative power vested in the Commissioner of Taxation to alter or amend revenue law in appropriate circumstances. This article considers the foundational issue of whether the premise underlying an SRP is constitutionally valid and further considers the influence constitutional considerations should have on the legislative design of such a measure. This includes a discussion of how to characterise an SRP for

constitutional law purposes, whether an SRP complies with s 55 of the Commonwealth Constitution and its implications for concepts such as the separation of powers and the rule of law.	242
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