

# AUSTRALIAN TAX REVIEW

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EDITORIAL – *General Editors: Kerrie Sadiq and Dale Pinto*  
*Special Guest Editors: Kathryn James, Sonali Walpola and Tamara Wilkinson*

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## ARTICLES

### **Optimal Tax Design: Choice of Tax Base and Rate Structure** – *Patricia Apps*

This article examines the distributional outcomes of the tax parameters of the Australian income tax system within the framework of modern tax theory. The analysis focuses first on the parameters of the Personal Income Tax and Low Income Tax Offset. The results show that Australia has moved towards an effective marginal tax rate scale on individual incomes that is less progressive and no longer strictly progressive, changes which have shifted the overall burden towards low and middle income earners. Turning to the impact of including Family Tax Benefit – Part A, the analysis identifies the resulting high effective marginal tax rates across low to average primary incomes and, in turn, on the income of the second earner with the potential for a strongly negative effect on female labour supply, human capital and fertility. These outcomes are supported by the results of empirical studies reported in the article. ....

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### **A History of Critical Tax in Australia** – *Kathryn James*

This article provides an historical overview and assessment of the contributions of the critical tax movement in Australia. Infanti and Crawford define critical tax as “an approach that treats taxpayers as more than the sum of their economic transactions” to examine “how tax law impacts individuals and groups along a variety of identity axes (eg, race, gender, ability and sexual orientation)”. On a broad reading of this definition, a critical tax movement can be characterised as one that is critical of tax. Under this broad view, Australia has a deep critical tax lineage that has variously highlighted the ways in which tax laws benefit some groups over others and the consequences that attach. However, on a narrower view of critical tax as one constituted by critical methods in analysing the ways in which tax laws intersect to further marginalise a wide range of groups, the history of Australian critical tax scholarship is more circumscribed. Under this measure only the work of feminist scholars and activists could lay claim to constituting a movement as such. The article takes stock of the contributions of the critical tax movement (broadly and narrowly conceived) including the movement’s scholarship, activism, policy achievements, limitations and blind spots especially in relation to race. It concludes by articulating a path forward for the development of a more coherent and deeply critical tax movement in Australia. ....

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**Tax Justice in Australia – Some Critical Considerations – Patrick Emerton**

This article offers a brief outline of what it would mean to consider, from a critical perspective, the topic of tax justice in contemporary Australia. The article’s approach is mostly theoretical, with a particular focus on methodological questions. Central to the article’s concerns are questions of political possibility and political reality. The article argues that it is not possible to take a genuinely critical approach to tax justice without determining which features of economic and social life are to be taken for granted, and which are to be considered as things that might be changed. A critical discussion of tax justice that is not connected to a broader discussion of political action therefore risks building in complacency and, ultimately, failure. To avoid such failure requires considering how to establish and support virtuous cycles in which taxation settings contribute to strengthening democracy and hence reinforce democratic political power as a basis for achieving economic justice more broadly. ....

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**A Critical Examination of the Tax-motivated Use of Discretionary Trusts: Evidence, Identifying Tax Avoidance, and the Efficacy of Legislative Tools – Sonali Walpola**

In Australia, discretionary trusts offer immense scope to obtain tax advantages, including in ways that constitute tax avoidance. This article draws on available evidence to critically examine the tax-motivated use of discretionary trusts, from apparently sanctioned income splitting to so-called egregious instances where trusts are used to obtain substantial economic benefits in a tax-free form. It contributes to the literature by drawing on established tax law positions and case law to provide a principled basis to identify when trust arrangements can be regarded as tax avoidant, and by examining the efficacy of the legislative mechanisms for addressing tax avoidance by discretionary trusts. This article seeks to comprehensively identify the court decisions where the main mechanisms – the general anti-avoidance provision in Pt IVA and s 100A of the *Income Tax Assessment Act 1936* (Cth) on reimbursement agreements – have been invoked in trust settings. There appears to be substantial under-utilization of both mechanisms. Based on an analysis of relevant case law, it is argued that s 100A has strong potential to effectively address tax avoidance in trust settings, and should be used in preference to Pt IVA. ....

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**Drivers of Economic Outcomes for Single Women without Children in Retirement – Myra Hamilton, Helen Hodgson and Bruce Bradbury**

Women, especially single women, are much more likely than men to live in poverty in old age and have lower median superannuation balances than men. This is generally attributed to interrupted workforce participation and the gender pay gap. This article examines the effects of Australian policy settings on a subgroup of older single women: older single women without children. Little is known about this group, including to what extent gender inequalities persist when the motherhood penalty is removed. The study included: a review of relevant legislation; an analysis of Australia’s Housing and Labour Dynamics in Australia (HILDA) Survey; qualitative research with an online community of 45 older single women and interviews with 10 financial services providers. Findings suggest that higher earning capacity did not translate into better financial security in old age, as being single resulted in lower household wealth, including home ownership. This group also experiences career interruptions associated with family care. This led to insecurity in later life. ....

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**Reviewing the Relationship between State and Taxpayer in the Light of the COVID-19 Pandemic: A Critical Commentary done through a Comparative Lens – Yvette Lind**

One of the most debated and controversial approaches among the various financial aid measures in connection to the COVID-19 pandemic has been the introduction of exclusion criteria based upon tax residence for companies. The exclusion of companies located/registered in tax havens has been widely debated among scholars, politicians, and the public. Other financial aid measures targeting individuals specifically, such as stimulus checks and reimbursement of lost income, employed similar grounds of justification. Consequently, for individuals and companies to be eligible for publicly funded financial aid there was some cases where they needed to prove a concrete previous tax payment alternatively satisfy an economic substance test. These requirements could be considered as an analogy to the unspoken contractual relationship between state and taxpayer. From a public finance perspective, this approach may be considered sensible as it efficiently limits the number of eligible recipients and consequently minimises the amount of financial aid payments. Thus, state funds can be preserved in harsh financial situations that are expected to deteriorate further as tax revenues decline in the aftermath of the pandemic and the inevitable financial crisis that follows. However, from the perspective of the potential recipient other concerns may be necessary to take into consideration when ensuring equality and equity. This study explores if and how policymakers have employed social contract argumentation in connection to financial aid measures awarded in connection to the COVID-19 pandemic. ....

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