

AUSTRALIAN TAX REVIEW

Volume 53, Number 2

2024

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ARTICLES

The New Architecture of International Tax – Hope and Hype – *Graeme S Cooper*

This article is about the first decade of Base Erosion and Profit Shifting (BEPS) projects and their impact on the architecture of international tax. The two BEPS projects promised fundamental shifts to the allocation of taxing rights between nations, abandoning fundamental building blocks of international tax such as the company as a separate entity, the PE threshold for asserting taxing rights and arm’s length pricing of intra-group transactions. This article argues the base erosion projects have failed to deliver a new architecture of international tax, and what will be delivered instead is not especially appealing. 79

The Business of Goodwill: A Reconciliation of Goodwill with the Going Concern Value of a Business – *Nick Gangemi*

Goodwill as a concept is relevant across several areas of the law. Goodwill is inherently linked to a business and its value derives from the business. However, in recent times, the courts have recognised the concept of a “going concern value” of a business, which is distinguished from the goodwill of the business and represents the value of the business operating as a going concern. This article analyses these concepts by considering the nature of a business and way in which businesses are transferred. It also considers the “excess value” of a business, being the value over and above the values of identifiable assets, and notes that this is difficult to determine, partly because it is difficult to determine the methodologies for valuing the identifiable assets. The treatment of the excess value, as either goodwill or the “going concern value” of a business can be reconciled by identifying what is made up in the “excess value” of a business. In order to do this, this article identifies how one would go about determining what portion of the excess value relates to goodwill and what relates to the going concern value of the business; some may be allocated to the separate concept of the synergistic value of a business. In this regard, the portion that is allocated to the going concern value of the business is actually allocated to the non-goodwill assets of the business. 98

Domestic Preferential Tax Regimes in a Post BEPS Project World: After 25 Years Is It Time for the OECD to Change Its Approach in Determining “Harmful Tax Competition”? – *Michael Dirkis and Brett Bondfield*

Since the 1960s many jurisdictions have sought to create financial service centres to attract mobile capital by using tax incentives. In June 1996 the G7 raised concerns about the distortionary effects of such tax preferences. In 1998 the OECD responded by creating the Harmful Tax Practices project aimed at identifying jurisdictions as tax havens and classifying tax preferences in other jurisdictions as harmful, with the aim of exerting

pressure on those jurisdictions to amend or abolish the offending schemes. This article examines the OECD’s process for assessing whether a tax preference is harmful or not. It notes that, the OECD’s approach does not deal with harmful tax competition arising from the cumulative impact of a suite of tax preferences, harmful or not, aimed at attracting mobile capital. The need counter this form of harmful competition, in respect of jurisdictions where the establishment of a financial centre is based on multiple tax incentives, is briefly explored. 121

Tribute to Rick Krever: Personal Recollections – Neil Brooks

Rick Krever has had a distinguished career as a brilliant tax scholar, passionate tax reformer, inspired educator, and trusted mentor to countless graduate students and tax officers. As his law school professor, sometimes collaborator, partner on a few overseas tax missions, and consumer of his prolific output, I have had a ringside seat in observing the development of his multi-faceted career. This article recounts a few of my personal recollections. 142