



MERGERS AND ACQUISITIONS

Australia

Taxation of Cross-Border
Mergers and Acquisitions

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TAX

Australia

Introduction

Australia's tax system is now subject to one of the most far-reaching reviews for many years. This is likely to have a long term impact on mergers and acquisitions M&A transactions in Australia. In the shorter term, several significant developments in tax law have occurred since the last edition of this publication. The impact of these reforms will be discussed later.

These reforms will be taken into account when addressing the key structural areas most relevant to a purchaser:

- Asset purchase or share purchase
- Choice of acquisition vehicle
- Choice of acquisition funding

In addition, the Australian accounting and legal context of M&A transactions will be considered to highlight some key areas of to address when considering the structure of a transaction.

Recent Developments

Reform has proceeded apace in recent years in Australia. Many of the changes affect the M&A environment. Some of the key areas of focus have been:

- **Taxation of financial arrangements:** a statutory code has been introduced for the taxation of gains and losses arising from financial arrangements, principally on an accruals basis, unless one of the elective methodologies is adopted. It purports to be a comprehensive, overarching framework, which will address the economic substance of arrangements. This regime applies to new arrangements undertaken in income years commencing on or after 1 July 2010.
- The taxation of employee share schemes and earn-outs in Australia is in a state of flux. If such a scheme or arrangement is contemplated as part of a transaction, specific advice should be sought.
- New withholding arrangements apply to certain managed fund distributions to foreign residents.

This significantly reduces the withholding rate on distributions to recipients in 'information exchange countries' to 7.5 percent for income years commencing on or after 1 July 2010 (a 15 percent rate applies in the meantime).

- Australia is in the process of a fundamental review of its tax system (the Henry Review), which is expected to report in the coming months. This review may substantially alter the Australian tax system. Therefore, it is important to revisit advice in relation to specific acquisition structures following this report.

Asset Purchase or Share Purchase

The first threshold decision to be made by a foreign entity contemplating the acquisition of an existing Australian business is the choice between the acquisition of shares in an Australian company and the acquisition of assets presently owned by an Australian company.

It is worth noting that many small to medium-sized businesses in Australia are not operated by companies; trust and partnership structures are very common. In such cases the only choice available is usually the acquisition of the business assets. The company structure is, however, by far the most common structure for larger businesses. The commentary in this chapter, therefore, focuses on companies, although much of it is equally applicable to other business structures.

For Australian corporate groups, the distinction between a share and asset transaction is largely irrelevant for income tax purposes, because of the operation of the tax consolidation rules. Generally speaking these rules treat a sale of shares as if it were a sale of assets. The purchaser is then effectively able to push the purchase price of the target down to the underlying assets. The distinction retains more importance when dealing with other taxes, such as stamp duty and goods and services tax (GST).

Hence, the decision to acquire assets or shares is normally a commercial one, taking into account the ease of execution of the transaction and the history of the target.

Purchase of Assets

Asset acquisitions will often constitute a permanent establishment (PE) in Australia and those assets will form the whole or part of the business property of the PE. Accordingly, the disposal of the assets is likely to be subject to capital gains tax (CGT), whereas the disposal of shares by a non-resident will ordinarily not be subject to CGT.

Purchase Price

The total consideration must be apportioned between the assets acquired for tax purposes. It is common practice for the sale and purchase agreement to include an allocation in a schedule. This should be respected for tax purposes provided it is commercially justifiable. Note that there may be a tension in this allocation between assets providing a useful cost base for income tax purposes and the stamp duty payable on the acquisition.

Although there are no specific income tax rules for allocating the purchase price among the various assets purchased, it is arguable that the market value consideration provisions in the CGT rules in effect permit the Australian Tax Office (ATO) to determine an arm's-length transfer price different from that allocated to the asset by the parties.

Goodwill

Goodwill paid for a business as a going concern generally cannot be deducted or amortized.

Since the cost of goodwill generally cannot be deducted or amortized, the purchaser may wish to have the purchase and sale agreement worded to allocate all or most of the purchase price to the tangible assets to be acquired, thus reducing or eliminating any element of the purchase price assigned to goodwill. Note, however, that the lower price paid for goodwill will also represent its cost base for CGT purposes, and may therefore increase the CGT exposure of the purchaser in any subsequent sale. The impact on stamp duty liabilities should also be considered.

Depreciation

Most tangible assets may be depreciated for tax purposes, provided they are used, or installed ready for use, to produce assessable income. Rates of depreciation vary depending on the effective life of the asset concerned.

Capital expenditure incurred in the construction, extension, or alteration of a building that is to be used to produce income may be depreciated for tax purposes

using the straight-line method normally at the rate of 2.5 percent per year. Entitlement to this capital allowance deduction accrues to the current owner of the building even though the current owner may not be the taxpayer that incurred the construction costs; the current owner continues to write off the unexpired balance of the construction cost.

An important consideration in any acquisition of Australian assets or shares in an Australian company which joins a pre-existing tax consolidated group is that as part of the push down of the purchase price, depreciable assets can have their tax cost base reset to a maximum of their market value. In this scenario, any buildings acquired do not have their amortizable cost base increased, despite the fact that the tax cost base of the asset may be reset to a higher value. Capital allowances, in respect of expenditure on these assets, are capped at 2.5 percent per year of the original construction cost, regardless of the market value of the asset. The reset tax cost base of these assets is only relevant on a future disposal of the asset.

On the disposal of depreciable plant and equipment, the excess of the market value over the tax written-down value for each item of depreciable plant and equipment is included in the seller's assessable income. Conversely, where the purchase price is less than the tax written-down value, the difference is an allowable deduction to the seller.

Relatively few payments giving rise to intangible assets may be amortized or deducted for tax purposes. Presently, the main types of intangible assets that may be deducted or amortized are:

- Software, including software used internally in the business, may be amortized over four years.
- Cost of developing or purchasing patents, copyrights, or designs (amortized over effective life).
- Research and development (R&D) expenses incurred by eligible companies or a partnership of such companies. As noted earlier, the regime is in a state of flux. A new regime will apply from 1 July, 2010 to new and existing R&D activities, including the introduction of a 40 percent R&D tax credit for companies with turnover of AUD 20 million or more whilst a 45 percent refundable tax credit will apply for smaller companies/groups. The current deduction is at 125 percent of expenditure in the year incurred, with the ability to increase this to 175 percent where the company's R&D expenditure,

excluding plant expenditure, exceeds its average R&D intensity – R&D expenditure as a percentage of turnover – over a three-year period.

- Borrowing costs (amortized over the lesser of five years or the term of the borrowing).
- Capital expenditure incurred can be deducted over a five-year period, provided the expenditure is not otherwise taken into account (by being deducted under another provision of the tax law or capitalized into the tax cost base of an asset), the deduction is not denied under another provision of the tax law and the business is carried on for a taxable purpose. In this context, a taxable purpose broadly means for the purpose of producing assessable income in Australia. For example, expenditure incurred in relation to setting up a new foreign subsidiary, from which the dividend income will be exempt from Australian tax, would not be considered as being related to carrying on a business for a taxable purpose.
- There is currently a legislative proposal to permit as a deduction the cost of acquisition of contracts under which there is a right to future income. The breadth of this provision is unlikely to be known for some time. Nevertheless, it may permit the amortization of the cost of acquisition of contracts.

Tax Attributes

Whilst tax losses and franking (imputation credits) are not transferred as a result of an asset acquisition, and the cost of depreciable assets will generally be allocated in accordance with the discussion earlier, a number of other matters must be considered in this context:

- Trading stock: the disposal of the total trading stock will not be a sale in the ordinary course of the seller's trading. The seller will, therefore, be required to bring to account the market value of that stock as income on the date of disposal. The purchaser is deemed to have purchased the trading stock at that value. In practice, the ATO generally accepts the price paid as the market value of the stock; at least where the seller and buyer are dealing at arm's length or the transaction occurs as part of a corporate group reorganization.
- Debts should not normally be acquired when the assets of a business are acquired. This is because a deduction for bad debts will not generally be available to the purchaser, since the amount

claimed has never been brought to account as assessable income of the claimant.

- Prepayments: when a business is acquired, it is preferable that any prepayments remain with the seller, as they may not be deductible by the purchaser.
- Employee leave provisions: Australian income tax law provides that no deduction for employee leave provisions (such as holiday pay and long service leave) is available. A deduction in most cases becomes available only upon payment to the employee, though there are limited exceptions relating to certain employment awards where the transfer of the provision may be deductible/assessable.
- Work-in-progress: the profit arising from the sale of work-in-progress is assessable income to the seller. The purchaser will be assessable in full on the subsequent realization of that work-in-progress, but obtains a tax deduction for the cost of acquiring the work-in-progress.

Value-Added Tax (VAT)

The Australian equivalent of VAT, goods and services tax (GST) applies at a rate of 10 percent. The disposal of assets will have varying GST implications depending on the nature of the acquisition. If the sale of assets does not fall within the GST-free going concern exemption, the GST implications arising on the disposal of each asset need to be determined.

For example, the disposal of trading stock, goodwill, and intellectual property is normally treated as a taxable supply, whereas a transfer of debtors is an input taxed supply, and a transfer of property depends on the nature of the property. Commercial property will generally be a taxable supply, residential property input taxed and farmland may be GST-free.

Transfer Taxes

The transfer of assets may create a stamp duty liability under a range of categories, depending on the nature of the asset transferred. Stamp duty is imposed by the various state and territory jurisdictions, and exemptions and rates differ substantially between the jurisdictions. The main assets to which stamp duty may apply in the acquisition of an Australian business are land and buildings, chattels, business goodwill, and some other intangible assets (for example, debts). The rate of duty is sometimes quite high, for example, up to 6 percent of

the value of certain assets. There is an exemption from duty in most jurisdictions for the transfer of inventory.

Stamp duties often make reorganizations expensive. For this reason, it is often important to establish the optimum structuring of asset ownership at the outset to avoid further payments of duty on subsequent transfers. Some jurisdictions provide relief from duty for subsequent reconstructions, subject to various qualification and claw-back periods.

Purchase of Shares

Non-residents are not subject to CGT on the disposal of shares in Australian companies unless the company is considered to have predominantly invested in real property (see earlier in the chapter).

It is important to note that this exemption does not protect non-resident investors who hold their investments in Australian shares on revenue account. Broadly, the acquisition of shares with the primary intention of future re-sale, whether by trade sale or initial public offering (IPO), could be characterized as a revenue transaction, despite the fact that the sale would occur several years in the future.

Australia's double taxation agreements usually apply here, so that non-residents disposing of shares on revenue account are not subject to Australian tax if they have no permanent establishment in Australia.

Tax Indemnities and Warranties

In the case of negotiated acquisitions, it is usual for the purchaser to request, and the seller to provide, indemnities or warranties as to any undisclosed taxation liabilities of the company to be acquired. The extent of the indemnities or warranties is a matter for negotiation.

Where an acquisition is made without the agreement of the target (that is, a hostile acquisition) it is generally not possible, by virtue of the nature of the acquisition, to seek tax warranties or indemnities.

Tax indemnities present special problems in addition to the usual difficulty of obtaining an effective and enforceable indemnity. These include the time delays that usually occur before a tax dispute is settled and the uncertainties in the tax law. The ATO may propose an adjustment that is acceptable to the purchaser, but unacceptable to the seller.

Tax Losses

Where the target company is a standalone company or the head company of an Australian tax consolidated group, carried-forward tax losses may transfer along

with the company, subject to transfer and utilization rules.

Where an Australian target company has carry-forward tax losses, these generally continue to be available for recoupment only if there is greater than 50 percent continuity (with respect to dividends, capital, and voting rights) in the beneficial ownership of the company. If this primary test is failed, as would usually be the case in a takeover by a foreign entity, the pre-acquisition losses are available for recoupment only if the Australian company, at all times during the year of recoupment, carries on the same business as it did immediately before the change in beneficial ownership of its shares. This test is difficult to pass, because it requires more than mere similarity in the businesses carried on. Its effect is that no new types of businesses or transactions may be entered into without the likely forfeiture of the losses, particularly in the case of a tax consolidated group.

However, provided the transfer tests are satisfied, same business losses may be refreshed on acquisition by a tax consolidated group.

Similarly, no deduction for bad debts will be available to the Australian company after its acquisition by the foreign entity unless there is either:

- a more than 50 percent continuity of ownership in relation to the year the deduction is claimed and the year the debt was incurred; or
- a continuity of the same business at relevant times.

In addition, when the target company becomes a member of the purchaser's tax-consolidated group as a result of the transaction, the tax attributes of the company are transferred to the head company of the consolidated group (that is tax losses, net capital losses, franking credits, and foreign tax credits). Broadly, these losses may be able to be transferred to the acquirer if the target has satisfied the modified same business test for the 12 months prior to the acquisition. There are limitation-of-loss rules that limit the rate at which such losses can be deducted against the taxable income of the consolidated group, based on the market value of the loss-making company as a proportion of the market value of the consolidated group as a whole.

This is a complex area on which it is critical that specific advice is obtained by a purchaser, especially if the intention is to value these losses on acquisition.

By contrast, where the target company is a subsidiary member of an Australian tax consolidated group the tax

attributes of the company leaving the tax-consolidated group (that is, tax losses, net capital losses, franking credits, and foreign tax credits) are retained by the head company of the tax-consolidated group and do not pass to the purchaser with the entity transferred.

Crystallization of Tax Charges

Under the corporate tax self-assessment regime, the ATO is generally subject to a limited review period of four years following the lodgment of the income tax return (except in the case of tax evasion or fraud)

Pre-Sale Dividend

Whilst a pre-sale dividend may be attractive to a seller in reducing any capital gain, complex anti-avoidance provisions apply in this area.

In addition, the High Court of Australia held in the Dick Smith case that where the share acquisition agreement stipulated that a dividend would be declared on shares prior to transfer and that the purchaser was to fund the dividend (with the purchase price calculated by deducting the dividend amount), the value of the dividend formed part of the consideration for the dutiable transaction for stamp duty purposes.

Stamp Duty

Stamp duty is imposed by some state and territory jurisdictions on transfers of unlisted shares at the rate of 60 cents per AUD 100, though this is being progressively abolished. There is no stamp duty on listed shares. A higher rate of duty (up to 6 percent) may apply where the shares transferred are in land-rich companies and trusts. In addition, certain states impose a landholder duty of up to 5.5 percent if the value of the land and buildings in that state exceeds AUD 2 million.

Tax Clearances

It is not possible to obtain a clearance from the ATO by giving assurances that a potential target company has no arrears of tax or advising as to whether or not it is involved in a tax dispute.

Choice of Acquisition Vehicle

After the choice between the purchase of shares and the purchase of assets has been made, the second threshold decision concerns the vehicle to be used to make the acquisition and, as a consequence, the position of the Australian operations in the overall group structure.

The following vehicles may be used to acquire the shares or assets of the target:

- Foreign company
- Australian branch of the foreign company
- Special-purpose foreign subsidiary
- Treaty country intermediary
- Australian holding company
- Joint venture
- Other special-purpose vehicles (such as partnerships, trusts, or unit trusts)

The structural issues in selecting the acquisition vehicle can usually be divided into two principal categories:

- the choice between a branch or a subsidiary structure for the acquired Australian operations; and
- whether there are, in the circumstances, advantages in interposing an intermediary company as the head office for the branch or the holding company for the subsidiary.

Local Holding Company

It is common to interpose an Australian holding company between a foreign company (or third-country subsidiary) and an Australian subsidiary. The Australian holding company may act as a dividend trap, because it can receive dividends free of further Australian tax and reinvest these funds in other group-wide operations. It is common to have an Australian holding company acting as the head entity of a tax consolidated group.

Foreign Parent Company

Where the foreign country of the parent does not tax capital gains, it may wish to make the investment directly. Non-residents are not subject to CGT on the disposal of shares in Australian companies unless the company is considered to have predominantly invested in real property (see earlier). However, while Australian interest withholding tax is generally 10 percent for both treaty and non-treaty countries, the dividend withholding tax is commonly limited to 15 percent on untaxed profits (un-franked or partly franked dividends – see Preserving Imputation Credits under Other Considerations) only when remitted to treaty countries (30 percent for non-treaty countries). The tax on royalties paid from Australia is commonly limited to 10 percent for treaty countries (30 percent for non-treaty countries). Therefore, an intermediate holding company in a treaty jurisdiction with lower withholding tax rates may be preferred, particularly if the foreign parent is

unable fully to offset the withholding tax as a foreign tax credit in its home jurisdiction.

Non-Resident Intermediate Holding Company

If the foreign country imposes tax on capital gains, locating the subsidiary in a third country may be preferable. The third-country subsidiary may also sometimes achieve a withholding tax advantage if the foreign country does not have a double taxation treaty with Australia. While Australian interest withholding tax is generally 10 percent for both treaty and non-treaty countries, the dividend withholding tax is commonly limited to 15 percent on untaxed profits (un-franked or partly franked dividends – see Preserving Imputation Credits under Other Considerations) only when remitted to treaty countries (30 percent for non-treaty countries). The tax on royalties paid from Australia is commonly limited to 10 percent for treaty countries (30 percent for non-treaty countries).

If the third-country subsidiary is located in a treaty country, these lower withholding tax rates may, therefore, be obtained. Note, however, that anti-treaty-shopping rules apply in some treaties. Another possible obstacle to the advantageous routing of income or gains through various treaty countries is the argument that the dividends or royalties, as the case may be, are not beneficially owned by the payee. Beneficial entitlement is a requirement in most of Australia's treaties.

Local Branch

Forming a branch may not seem to be an option where shares, rather than assets, are acquired, since the foreign entity has, in effect, acquired a subsidiary. However, if the branch structure is desired, but the direct acquisition of assets is not possible, the assets of the newly acquired company may be transferred to the foreign company post-acquisition, effectively creating a branch. Great care needs to be taken when creating a branch from a subsidiary in this way, including consideration of the availability of CGT rollover relief, potential stamp duties, and the presence of tax losses.

Forming a branch is not, however, usually the preferred structure for the Australian operations. Many of the usual advantages of a branch do not exist in Australia.

- There are no capital taxes on the introduction of new capital either to a branch or to a subsidiary.
- There is no withholding tax on the remittance of taxed branch profits to the head office or on the remittance of dividends out of taxed profits (that is, franked dividends, discussed later in Preserving

Imputation Credits under Other Considerations) from an Australian subsidiary.

- The profits of an Australian branch of a non-resident company are taxed on a normal assessment basis at the same rate as the profits of a resident company.

The branch structure has one main potential advantage. Where the Australian operations are likely to incur losses, these may in some countries be offset against domestic profits. Against this, the foreign acquirer should consider that deductions for both royalties and interest paid from branches to the foreign head office, and for foreign exchange gains and losses on transactions between the branch and head office, are much more doubtful than the equivalents for subsidiaries, except where it can be shown that the payments are effectively being made to third parties.

The only provisions that might restrict the deduction in the case of a subsidiary are the arm's-length pricing rules applicable to international transactions and the thin-capitalization provisions.

Reorganizations and expansions in Australia are likely to be simpler if an Australian subsidiary is already present.

Some important Australian tax incentives, such as the 125-percent and 175-percent deductions for research and development (R&D) costs, are not available to branches. An Australian subsidiary would probably have a much better local image and profile and gain better access to local finance than a branch. The repatriation of profits may be more flexible for a subsidiary, in that it may be achieved either by dividends or by eventual capital gain on sale or liquidation (this can be especially useful where the foreign country tax rate is greater than 30 percent; in such cases, the Australian subsidiary may be able to act as a dividend trap). Finally, although, as noted earlier, Australian CGT on the sale of the subsidiary's shares might be avoided, this is not possible on the sale of assets by a branch, which is, by definition, a permanent establishment.

Two other frequently mentioned advantages of subsidiaries are limited liability (that is, inaccessibility of the foreign company's funds to the Australian subsidiary's creditors) and possible requirements for less disclosure of foreign operations than in the branch structure. However, both these advantages can also be achieved in Australia through the use of a branch, by interposing a special-purpose subsidiary in the foreign country as the head office of the branch.

Joint Ventures

Where the acquisition is to be made in conjunction with another party, the question arises as to which is the most appropriate vehicle for this joint venture. In most cases, a limited liability company will be the preferred choice, as it offers the advantages of incorporation (separate legal identity from that of its members) and limited liability (lack of recourse by creditors of the Australian operations to the other resources of the foreign company and the other party). Where the foreign company has, or proposes to have, other Australian operations, its shareholding in the joint venture company will usually be held by a separate wholly-owned Australian subsidiary, which can be consolidated with the other operations.

It is common for large Australian development projects to be operated as joint ventures, especially in the mining industry. Where the foreign company proposes to make an acquisition in this area, it will usually have to make an initial choice between the acquisition of an interest in the joint venture (assets) and the acquisition of one of the shares of the joint ventures (usually a special-purpose subsidiary). This decision and decisions relating to the structuring of the acquisition can usually be made in accordance with the preceding analysis.

Choice of Acquisition Funding

Where an Australian holding company is used by a purchaser in an acquisition, the form of this investment must be considered. Funding may be by way of debt or equity. A purchaser should be aware that Australia has a codified regime for determining the debt or equity classification of an instrument for tax purposes. This is, broadly, determined on a substance over form basis.

Debt

Generally, interest is deductible for income tax purposes, subject to the commentary later, but dividends are not. Additionally, the non-interest costs incurred in borrowing money for business purposes, such as the costs of underwriting, brokering, legal fees and procurement fees, may be written off and deducted over the lesser of five years or the term of the borrowing.

Whether an instrument is debt or equity for tax purposes is a key consideration in the implementation of a hybrid financing structure, discussed later.

Deductibility of Interest

Interest payable on debt finance will generally be deductible in Australia, provided that the borrowed funds are used in the assessable income-producing

activities of the borrower or used to fund the capitalization of foreign subsidiaries. No distinction is made between funds used as working capital and funds used to purchase capital assets. In contrast, dividend payments on equity finance are not deductible in Australia.

The major exceptions to this general rule are:

- where the thin-capitalization rules are breached, a portion of the interest is not deductible;
- interest expenses incurred in the production of certain tax-exempt income are not deductible; and
- interest expenses incurred in the holding of a capital asset are not deductible where the only prospective assessable income in Australia is the capital gain potentially available upon sale (the interest expenses may be included in the cost base for CGT purposes).

The thin-capitalization rules apply to inbound investing entities with respect to all debt that gives rise to tax deductions and will deny interest deductions where the average amount of debt of a company exceeds both the safe-harbor debt amount and the alternative arm's-length debt amount.

The safe-harbor debt amount is essentially 75 percent of the value of the assets of the Australian company (that is a debt-to-equity ratio of 3:1). For financial institutions, this ratio is increased to 20:1. The arm's-length debt amount is the amount of debt that the Australian company could reasonably be expected to have borrowed from a commercial lending institution dealing at arm's length.

The thin-capitalization rules, subject to additional safe-harbors, also apply to Australian groups operating overseas (outbound investing entities) in addition to Australian entities that are foreign-controlled and Australian operations of foreign multinationals.

As the thin-capitalization rules apply with respect to all debt that gives rise to tax deductions, no distinction is made between internal and external financing or between local and foreign financing.

Withholding Tax on Debt and Methods to Reduce or Eliminate

Australia generally imposes withholding tax on all payments of interest, including amounts in the nature of interest (for example, deemed interest under hire purchase agreements or discounts on bills of exchange), at the rate of 10 percent. This rate applies to all

countries whether or not Australia has concluded a double taxation treaty with the country in question. However, there are provisions that reduce the applicable interest withholding tax rate on certain payments to 0 percent in the U.S. and U.K. double taxation treaties. Very few techniques to eliminate withholding tax on interest are available. Interest paid on widely held debentures issued outside Australia for the purpose of raising a loan outside Australia and where the interest is paid outside Australia is exempt from withholding tax. As Australian withholding tax cannot usually be avoided, the acquisition should be planned to ensure that credit will be available in the country of receipt.

Australia does not impose withholding tax on franked dividends. Australia imposes withholding tax with respect to the un-franked part of a dividend at a rate that varies from 15 percent, the rate generally applicable in Australia's double taxation treaties, to 30 percent for all non-treaty countries. In the case of the U.S. and U.K. treaties the rate of dividend withholding imposed may be as low as 0 percent.

Australia is progressively renegotiating its double taxation agreements with its preferred trading partners with a view to extending the concessional rates of withholding applicable in the U.S. and U.K. treaties.

Checklist for Debt Funding

- Interest withholding tax at 10 percent ordinarily applies to cross-border interest, except to banks in the U.K. and U.S., unless the interest is paid in relation to a publicly offered debenture.
- Third party and related party debt are treated in the same manner for Australian thin-capitalization purposes.
- Interest expense in a financing vehicle can be offset against income of the underlying Australian business when it is part of an Australian tax consolidated group.

Equity

Alternatively, equity may be used to fund an acquisition. In particular, this may take the form of a scrip-for-scrip exchange whereby the seller may be able to defer any gain, although detailed conditions must be satisfied.

The main conditions for rollover relief to be available include:

- all selling shareholders can participate in the scrip-for-scrip exchange on substantially the same terms;

- the selling shareholders hold their shares in the target company on capital account (that is, the shares are not trading stock);
- the selling shareholders acquired their original shares in the target company on or after 20 September 1985; and
- apart from the rollover, the selling shareholders would make a capital gain on the disposal of their shares in the target company as a result of the exchange.

Additional conditions apply where both the target company and the purchaser are not widely held companies or where the selling shareholder, target company and purchaser are commonly controlled.

Where the selling shareholders receive only shares from the acquiring company (the replacement shares) in exchange for the shares in the target company (the original shares) and elect for scrip-for-scrip rollover relief, they will not be assessed on any capital gain with respect to the disposal of their original shares at the time of the acquisition. Any capital gain on the shares will be taxed when they dispose of their replacement shares in the acquiring company. If the sellers receive both shares and other consideration (such as cash), only partial CGT rollover will be available. The cost base of the original shares is apportioned on a reasonable basis between the replacement shares and the other consideration, and the selling shareholders will be subject to CGT at the time of the share exchange to the extent that the value of the other consideration received exceeds the allocated portion of the original cost base of the original shares.

Where the selling shareholders acquired their original shares prior to 20 September 1985 (pre-CGT shareholders), they will not, subject to transitional provisions, be subject to CGT on the disposal of the original shares and therefore, prima facie, do not require rollover relief. However, such shareholders will lose their pre-CGT status, and as a result they will be subject to CGT on any increase in the value of the replacement shares between the acquisition and any subsequent disposal of the replacement shares. The cost base of the replacement shares that a pre-CGT shareholder receives will be the market value of those shares at the time of issue.

Provided the target company or the purchaser is a widely held company, the cost base of the shares in the target company that are acquired by the purchaser is the market value of the target company at the date of

acquisition. The CGT cost base of the target shares acquired by the purchaser is limited to the selling shareholders' cost base in the target company (that is no step-up to market value is available) if there is either:

- a substantial shareholder who holds a 30 percent or more interest (together with associates) in the target company; or
- common shareholders in the target company and the purchaser company, who, together with associates, hold an 80 percent or more interest in the target company prior to the acquisition and an 80 percent or more interest in the purchaser after the acquisition.

Generally, a company is widely held if it has at least 300 members, but there are special rules that prevent a company from being treated as widely held if interests are concentrated in the hands of 20 or fewer individuals.

De-merger relief rules are also available to companies and trusts where the underlying ownership of the divested assets is maintained on a totally proportionate basis. Note that these rules are not available to assets held on revenue account. In an M&A context, there are safeguards contained in the anti-avoidance provisions to prevent demergers occurring where transactions have been pre-arranged to effect change in control. However, it is possible for demerged entities to be combined with subsequent schemes of arrangement to change the ownership of the spin-off and/or original entity provided the separate transactions are not inter-conditional. This is a focus area of the ATO and as such transactions of this nature are generally subject to advance rulings.

The de-merger relief available is as follows:

- CGT relief at the shareholder level providing for cost base adjustments between the original membership interests and the new membership interests.
- CGT relief at the corporate level by providing for a broad CGT exemption for the transfer or cancellation of membership interests in the demerged entity.
- Deeming the divestment of shares to shareholders not to be a dividend, subject to anti-avoidance rules.

In addition, due to Australia's thin-capitalization regime, a purchaser will usually finance through a mix of debt and equity and may consider certain hybrid instruments.

Australia does not impose stamp duty on the issue of new shares in any state, nor is there a capital duty.

Australia operates an imputation system of company taxation where shareholders of a company gain relief against their own tax liability for taxes paid by the company. Resident companies must maintain a record of the amount of their franking credits and franking debits to enable them to ascertain the franking account balance at any point in time, in particular when paying dividends. This franking account is a notional account maintained for tax purposes and reflects the amount of company profits that may be distributed as franked dividends.

There are detailed rules for determining the extent to which a dividend should be regarded as franked. A dividend may be partly franked and partly un-franked. In general, a dividend will be franked if the distributing company has sufficient taxed profits from which to make the dividend payment.

Dividends paid to Australian resident shareholders carry an imputation rebate that may reduce the taxes payable on other income received by the shareholder. In addition, shareholders who are Australian resident individuals and complying superannuation funds can obtain a refund of excess franking credits.

For non-resident shareholders, however, franked dividends do not result in a rebate or credit, but instead are free of dividend withholding tax (to the extent to which the dividend is franked).

No dividend withholding tax is levied on dividends paid by a resident company to its resident shareholders. Tax assessed to an Australian resident company, broadly speaking, results in a credit to that company's franking account equivalent to the amount of taxable income less tax paid thereon.

The franking account balance is not affected by changes in the ownership of the Australian company. As non-resident companies do not obtain franking credits for tax paid, an Australian branch has no franking account or capacity to frank amounts remitted to a head office.

Hybrids

- As noted earlier in the chapter, the characterization of hybrids (such as convertible instruments, preferred equity instruments, and other structured securities) as either debt or equity is governed by detailed legislative provisions which have the overriding purpose of aligning tax outcomes to the economic substance of the arrangement.

- However, these provisions contain complex, inter-related tests which, in practice, enable these instruments to be structured such that subtle differences in terms can decisively alter the tax characterization in some cases. Examples of terms which can affect the categorization of an instrument include the term of the instrument, the net present value of the future obligations under the instrument and the degree of contingency/certainty surrounding those obligations.
- Accordingly, the careful structuring of hybrid instruments is a common focus in Australian business finance and, in some cases, this extends to cross-border hybrids, which are characterized differently in different jurisdictions.

Discounted Securities

Historically, a complex specific statutory regime has applied which, broadly, seeks to tax discounted securities on an accruals basis. This treatment will essentially be preserved under the expanded TOFA reforms, discussed earlier. Note that interest withholding tax at 10 percent may apply when such a security is transferred for more than its issue price.

Deferred Settlement

If settlement is to be deferred on an interest-free basis, any CGT liability accruing to the seller continues to be calculated from the original disposal date, and upon the entire sale proceeds.

Where interest is payable under the settlement arrangements, it does not form part of the cost base. Rather, it is assessable to the seller and deductible to the purchaser to the extent that the assets or shares are capable of producing assessable income, other than the prospective capital gain on resale.

Note that the taxation of earn-outs in Australia is in a state of flux with the ATO having issued a draft ruling which advocated a treatment which was contrary to long-standing practice. This ruling has not been finalized and lobbying in support of the previous position continues.

Other Considerations

Concerns of the Seller

Non-residents are broadly exempt from CGT in respect of the disposal of Australian assets held on capital account, including a disposal of shares in a company or interests in a trust. The key exception is where a non-resident has a direct or indirect interest in real property,

which is defined broadly to include leasehold interests, fixtures on land and mining rights. The provisions which seek to apply CGT in these circumstances are extremely broad and carry an extra territorial application, in that non-residents disposing of interests in upstream entities that are not residents of Australia may also be subject to CGT.

It should be noted that the CGT exemption for non-residents does not apply to assets used by a non-resident in carrying on a trade or business wholly or partly at or through a permanent establishment in Australia.

When a purchase of assets is contemplated, the seller's main concern is likely to be the CGT liability with respect to any assets acquired after 19 September 1985. If the sale is of a whole business or a business segment that was commenced prior to CGT, the seller will normally seek to allocate as much of the price as possible to goodwill, because payment for goodwill in these circumstances will generally be free from Australian income tax, subject to a key exception where there has been a majority change in underlying ownership of the assets.

The CGT liability may also be minimized by favorably spreading the overall sale price of the assets in such a way that above-market prices are obtained for pre-CGT assets and below-market prices obtained for post-CGT assets. Such an allocation may be acceptable to the purchaser, as it may not substantially alter the CGT on sales. However, the prices for all assets should be justifiable; otherwise, the ATO may attack the allocation as tax avoidance. The purchaser would also be keen to review the allocation, with particular reference to those assets that have the best prospects for future capital gains.

The seller will be concerned about the ability to assess the amount of depreciation recouped where depreciable assets (other than buildings) are sold for more than their tax written-down value.

The excess of consideration over the tax written-down value is included in assessable income in the year of sale as a balancing adjustment and taxed according to the normal income tax rules. If a depreciable building is sold, no such balancing adjustment is generally made. Where a depreciable asset (other than a building) is sold for less than its tax written-down value, the loss is deductible as a balancing deduction in the year of sale. This balancing deduction is not treated as a capital loss.

Strictly speaking, the seller would also be required to include as assessable income the market value of any trading stock sold, notwithstanding that a different sale price may be specified in the sale agreement. But as noted earlier, the ATO's usual practice is to accept the price paid as the market value.

Stamp duty is payable by the purchaser, but will inevitably affect the price received by the seller.

If the seller company has carry-forward losses, the sale of business assets will not ordinarily jeopardize its entitlement to recoup those losses. The seller company may, however, be relying on satisfaction of the same-business test (see Using Pre-acquisition Losses) to recoup the losses (for example, due to changes in the ownership of the seller since the year(s) of loss). Care is then required, as the sale of substantial business assets could jeopardize satisfaction of this test and so leads to forfeiture of the losses.

In the event that a purchase of shares is contemplated, the seller may have several concerns, depending on the seller's particular situation. Potential concerns include the following:

- The existence of current or carry-forward losses that will remain with the company and would, therefore, be unavailable to the seller if the shares in the company were sold. If the seller currently has an entitlement to such losses without recourse to the same-business test, this entitlement is not forfeited when the business assets are sold, and the seller may be able to inject new, profitable business to recoup these losses. Note, however, that if the target company is included within the seller's tax-consolidated group prior to sale, the seller will retain the tax losses.
- If the seller acquired all or part of its shareholding after 19 September 1985, the sale of shares will have CGT consequences, and a capital gain or loss may accrue. When the acquisition is achieved by way of a share swap, CGT rollover relief may be available. Where the target company forms part of the seller's tax-consolidated group, the seller will be treated as if it disposed of the assets of the target company and any gain will be calculated as the excess of the sale proceeds over the tax cost base of the assets (less liabilities) of the target company. If the liabilities of the target company exceed the tax cost base of the target's assets, a deemed capital gain will arise to the seller.
- Indemnities or warranties requested by the purchaser (usually subject to negotiation).
- Any gain on the sale of pre-CGT shares may also be assessable in the event that the seller is dealing in shares, or if the seller purchased the shares with either the intention of sale at a profit or as part of a profit-making endeavor.
- In the case of shares in a private company or interest in a private trust acquired before 19 September 1985, when the value of the underlying assets of the company or trust which has been acquired after 19 September 1985 represents 75 percent or more of the net worth of the company or trust, CGT may be payable

Company Law and Accounting

The Australian Corporations Act 2001 governs the types of company that can be formed, on-going financial reporting and external audit requirements, and the repatriation of earnings (either as dividends or returns of capital).

Australian accounting standards are the equivalent of International Financial Reporting Standards (IFRS). The acquisition of a business, regardless of whether it is structured as a share acquisition or asset acquisition, is accounted for using purchase accounting.

Under purchase accounting, all identifiable assets and liabilities are recognized at their respective fair values on the date that control of the business is obtained. Identifiable assets may include intangible assets that are not recognized on the target's balance sheet. These intangible assets may have limited lives and require amortization. In a business combination, liabilities assumed include contingent liabilities. These contingent liabilities are also recognized on the balance sheet at their estimated fair value.

The difference between consideration paid and the ownership interest in the fair value of acquired net assets represents goodwill. Goodwill is not amortized but is tested for impairment annually. Any negative goodwill is recognized immediately in the income statement.

Transaction costs associated with business combinations occurring in fiscal years commencing on or after 1 July, 2009 are expensed as incurred.

The reorganization of businesses under the control of the same parent entity is outside the scope of accounting standards. Typically these restructurings

occur at book values, with no change in the carrying value of reported assets and liabilities, and no new goodwill. Again, transaction costs associated with these common control transactions are generally expensed as incurred.

Generally, all substantial Australian companies have an obligation to file audited financial statements with the Australian Securities and Investment Commission (ASIC). ASIC monitors compliance with the Australian Corporations Act. These financial statements are publicly available. Filing relief may be available for subsidiaries of other Australian entities.

The Australian Corporations Act only permits the payment of dividends from profits. The term profits is not defined in the legislation. Case law indicates that profits are determined in accordance with accounting standards and may include current year profit and carried forward retained earnings.

The assessment of available profit and declaration of dividends is determined on a stand-alone, legal entity by legal entity basis, not the consolidated position. This entity by entity assessment requires planning to avoid dividend traps – the inability to stream profits to the ultimate shareholder due to insufficient profits within a chain of companies. Appropriate pre-acquisition structuring will help to minimize this risk.

Historically, Australian accounting standards distinguished between dividends paid from pre- and post-acquisition profits. Effective 1 July, 2009, this requirement has been removed, ensuring that all dividends received by a parent entity will be reported in the income statement. The receipt of any dividend income from a subsidiary requires a mandatory assessment as to whether the investment in the subsidiary is impaired.

Australian law does not have a concept of par value for shares. The Australian Corporations Act prescribes how share capital can be reduced, including restrictions on the redemption of redeemable preference shares.

Group Relief/Consolidation

If the purchaser owns other Australian companies and has elected to form an Australian tax consolidated group, the target company will become a subsidiary member on acquisition. Only wholly-owned subsidiaries can join an Australian tax consolidated group.

Issues that arise as a result of the tax consolidation regime with respect to share acquisitions are the following:

- A principle underlying the tax consolidation regime is the alignment of the tax value of shares in a company with its assets. On acquisition, it may be possible to obtain a step-up in the tax value of assets of the newly acquired subsidiary, where it joins a consolidated group, by pushing down the purchase price of the shares to the underlying assets. The acquiring company will effectively be treated as purchasing the assets of the target company, including any goodwill reflected as a premium in the share price above the value of the net assets of the company.
- As the tax basis of a target's CGT assets is reset, the acquiring company can dispose of unwanted CGT assets acquired as part of the acquisition with no tax cost. However, the Government announced that as of 12 October, 2007, acquisitions that are financed by the issue of scrip in order to provide scrip for scrip CGT relief to vendor shareholders may result in a denial of inappropriate uplifts of cost bases in the target's assets. The scope of this measure may result in the inability to spin-off unwanted assets tax free to the extent that the purchaser has used scrip as consideration for the transaction.
- Each corporate member of a tax-consolidated group is jointly and severally liable for the tax liabilities of the whole group. This liability can be limited where the companies within the tax-consolidated group enter into a tax-sharing agreement. When acquiring a company that formed part of a tax-consolidated group, it is important to determine the extent of its exposure for the tax liabilities of its previous tax-consolidated group and mechanisms to reduce this exposure.
- Where an Australian entity is acquired directly by a foreign entity, and the foreign entity has other Australian subsidiaries that have formed a tax-consolidated group, there is an irrevocable choice as to whether or not the newly acquired Australian entity is included within the tax-consolidated group. Alternatively, where the Australian entity is acquired by an existing Australian entity that forms part of a tax-consolidated group, the newly acquired Australian entity will automatically be included in this existing tax-consolidated group.
- The historical tax expense and cash flow of the target company will no longer be a valid indicator for projecting future cash tax payments. The resetting of the tax base in the assets of the

company will mean that tax modeling for the cash outflows will acquire greater significance.

Transfer Pricing

Australia has a complex regime for the taxation of international related party transactions and these provisions specify significant contemporaneous documentation and record-keeping requirements.

It would be prudent to conduct a post-acquisition review of international related party transactions.

Ordinarily, cross-border related party loans should bear interest on arm's length terms.

Dual Residency

Dual residency is unlikely to give rise to any material Australian tax benefits and could significantly increase the complexity of any transaction.

Foreign Investments of a Local Target Company

Where an Australian target company holds foreign investments, the question arises as to whether those investments should continue to be held by the Australian target company, or whether it would be advantageous for the foreign investments to be held by a sister or subsidiary company of the foreign acquirer.

Australia has a comprehensive international tax regime that applies to income derived by controlled foreign companies (CFCs). The objective of the regime is to place residents who undertake certain passive or related party income earning activities off-shore on the same tax footing as those residents who invest domestically.

Under this regime, an Australian resident will be taxed on certain categories of income derived by a CFC if the taxpayer has an interest in the CFC of 10 percent or more. A CFC is broadly defined as a foreign company that is controlled by a group of not more than five Australian residents whose aggregate controlling interest in the CFC is not less than 50 percent. However, a company may also be a CFC in certain circumstances where this strict control test is not met.

Taxpayers subject to the CFC regime must calculate their income by reference to their interest in the CFC. The income is then attributed to the residents holding the interest in the CFC in proportion to their interests in the company – that is, the Australian resident shareholders are subject to tax in Australia on their share of the attributable earnings of the CFC. Any income of a CFC that has been subjected to foreign or Australian tax will have that amount offset (in the form

of a credit) against Australian tax payable. Any excess credits may be carried forward for up to five income years.

The income of a CFC will generally not be attributed if the company is predominantly involved in actively earning income.

Given the comprehensive nature of the CFC regime and the limited number of exemptions available, the Australian target company may not be the most tax-efficient vehicle to hold international investments.

However, as a result of a series of reform measures relating to conduit relief in recent years, Australia is now a favorable intermediary holding jurisdiction. In particular, Australia now has broad participation exemption rules which enable both dividend income sourced from offshore subsidiaries and capital profits on realization of those subsidiaries to be paid out to non-resident shareholders without the imposition of domestic income tax or non-resident withholding tax.

Comparison of Asset and Share Purchases

Advantages of Asset Purchases

- Step-up in the tax value of assets.
- A deduction is available for trading stock purchased.
- No previous liabilities of the company are inherited.
- It is possible to acquire only part of a business.
- Not subject to takeover legislation (but may be subject to stock exchange listing rules).

Disadvantages of Asset Purchases

- Complexity of renegotiating/transferring supply, employment, technology and other agreements.
- Higher rates of transfer (stamp) duties.
- The benefit of any losses incurred by the target company remains with the seller.

Advantages of Share Purchases

- Lower capital outlay (purchase net assets only).
- Potential to step up the tax value of assets in a 100 percent acquisition.
- Less complex contractually and likely to be more attractive to seller.

- May benefit from tax loss of the target company (unless the target company was a member of a tax-consolidated group).
- Lower or nil stamp duties payable (if not predominantly land).

Disadvantages of Share Purchases

- Liable for any claims or previous liabilities of the entity, including joint and several liability for tax debts of seller's consolidated group where no valid tax sharing agreement exists.
- Target company losses remain with the seller where the target company is leaving the seller's tax consolidated group.

Withholding Tax Rate Chart

The rate information and footnotes contained in this table are from the 2009 IBFD/KPMG Global Corporate Tax Handbook.

Domestic Rates

	Dividends ¹		Interest ² (%)	Royalties (%)
	Individuals, Companies (%)	Qualifying Companies (%)		
Companies	0/30	0/30	0/10	30
Individuals	0/30		0/10	30

Treaty Rates

Country	Dividends ¹		Interest ² (%)	Royalties (%)
	Individuals, Companies (%)	Qualifying Companies (%)		
Argentina	15	10 ³	12	10/15 ⁴
Austria	15	15	10	10
Belgium	15	15	10	10
Canada	15	5 ³	10	10
China (People's Rep.) ⁵	15	15	10	10
Czech Republic	5/15 ⁶	15	10	10
Denmark	15	15	10	10
Fiji	20	20	10	15
Finland	15	0/5 ⁷	0/10 ⁸	5
France	15	15	10	10
France (New) [effective from 1 Jan 2010]	15	0 ²¹	10	5
Germany	15	15	10	10
Hungary	15	15	10	10
India	15	15	15	10/15 ⁹
Indonesia	15	15	10	10/15 ⁹
Ireland	15	15	10	10
Italy	15	15	10	10
Japan	15	15	10	10
Japan (New) ²⁰	10	0/5/15 ¹⁰	0/10 ⁸	5 ¹¹
Kiribati	20	20	10	15
Korea (Rep.)	15	15	15	15
Malaysia	15	0 ³	15	15
Malta	15	15	15	10
Mexico	15	0 ³	10	10
Netherlands	15	15	10	10
New Zealand	15	15	10	10
Norway	15	0/5 ⁷	0/10 ⁸	5
Papua New Guinea	15	15	10	10
Philippines	15/25 ¹²	15/25 ¹²	15	15/25 ¹³
Poland	15	15	10	10
Romania	15	5 ³	10	10
Russia	15	5 ¹⁴	10	10
Singapore	15	15	10	10 ¹⁵
Slovak Republic	15	15	10	10
South Africa	15	5 ³	10	5
Spain	15	15	10	10
Sri Lanka	15	15	10	10
Sweden	15	15	10	10
Switzerland	15	15	10	10
Taiwan	10/15 ¹⁶	10/15 ¹⁶	10	12.5
Thailand	- ¹⁷	15/20 ¹⁷	10/25 ¹⁸	15
Timor-Leste ¹⁹	15	15	10	10

Country	Dividends ¹		Interest ² (%)	Royalties (%)
	Individuals, Companies (%)	Qualifying Companies (%)		
United Kingdom	15	0/5 ⁷	10	5
United States	15	0/5 ⁷	10	5
Vietnam	15	15	10	10

Notes

- Many of the treaties state the application of a rate to franked dividends. It should be noted that the payment of a franked dividend does not attract dividend withholding tax in Australia regardless of whether there is a treaty or whether the treaty includes such a term. In practice, domestic dividend withholding rules apply only to the unfranked portion of the dividend.
- Many of the treaties provide for an exemption for certain types of interest, such as interest paid to public bodies and institutions or in relation to sales on credit. Such exemptions are not considered in this column. The Australian domestic rate for interest withholding tax is 10 percent. If a treaty provides for a higher rate, the domestic rate is levied instead.
- The rate generally applies with respect to participations of at least 10 percent of the voting power, as the case may be.
- The lower rate applies to copyright on literary and any other artistic work, scientific, industrial or commercial equipment or information.
- The treaty does not apply to Hong Kong or Macau.
- A rate of 5 percent applies for dividends where the rate of tax does not exceed 5 percent under Australian law.
- A rate of 5 percent applies where the beneficial owner is a company that holds directly at least 10 percent of the voting power in the paying company; a zero rate applies where the beneficial owner is a company that has owned shares representing 80 percent or more of the voting power in the paying company for a 12-month period ending on the date the dividend is declared (subject to conditions).
- 0 percent applies to interest derived by a financial institution (as defined), which is unrelated to and dealing wholly independently with the payer. However, 10 percent applies if the interest is paid as part of an arrangement involving back-to-back loans, or other arrangements that are economically equivalent and intended to have a similar effect.
- The lower rate applies to payments for the use of, the right to use or forbearance of the rights to use any industrial, commercial or scientific equipment, and the rendering of technical or consultancy services or technical assistance. In the treaty with Indonesia, the lower rate also applies to payments for the supply of scientific, technical, industrial or commercial knowledge or information.
- 0 percent applies to dividends paid to a company that has owned directly at least 80 percent of the voting power of the dividend-paying company for the 12-month period ending on the date on which entitlement to the dividends is determined, and the recipient company is a publicly traded company, or at least 50 percent of the aggregate vote and value of its shares is owned directly or indirectly by up to 5 such publicly-traded companies, or has received a determination of entitlement to the treaty benefits; 5 percent applies to dividends paid to a company that owns directly at least 10 percent of the voting power of the dividend-paying company. In the case of Australia, 15 percent applies to distributions from an Australian-managed investment trust other than to a Japanese beneficial owner which holds, or has held at any time in the 12-month period preceding the date on which the distributions are made, directly or indirectly, at least 10 percent of the capital in the investment trust.
- Royalties include forbearance payments and exclude payments for the use of spectrum licenses.
- The lower rate applies if double tax relief by way of a rebate or credit is given to the beneficial owner of the dividends (being a company) in accordance with Art. 24 of the treaty.
- The lower rate applies where the royalties are paid by an enterprise registered with the Philippine Board of Investments and engaged in preferred areas of activities.
- The rate applies to dividends paid to a company (other than a partnership) which holds directly at least 10 percent of the capital of the paying company, which invested at least AUD 700,000 or an equivalent amount in Russian Rouble in the payer's capital.
- The rate does not apply to payments in respect of the operations of mines, quarries, exploitation of natural resources, or payments for the use of, or the right to use, motion picture films, tapes for use in connection with radio broadcasting or films or video tapes for use in connection with television.
- The lower rate applies to franked dividends. In practice, domestic dividend withholding rules apply only to the unfranked portion of the dividend.
- Where the beneficial owner of the dividends is a company, excluding a partnership, which holds directly at least 25 percent of the capital of the dividend-paying company: 15 percent if the paying company is engaged in an industrial undertaking, 20 percent if otherwise. In all other cases, the domestic rate applies.
- A rate of 10 percent applies for interest paid to financial institutions.
- The Timor Sea Treaty in relation to the petroleum-related activities conducted in the Joint Petroleum Development Area. Special provisions apply to income of third country residents under the treaty.
- The treaty is effective from 1 January, 2009 with respect to withholding taxes on income, and from 1 July, 2009 for other taxes.
- In respect of shareholdings of greater than 10 percent when paid out of profits subject to the normal corporate tax rate.

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