TPTs TRANSFER PRICING & TAX SOLUTIONS

Australia & New Zealand

Transfer pricing update

MEMBER OF TPA Global

Agenda

- Comparison on NZ and Australia regimes
- Documentation requirements
- Areas of focus
- Pillars I and II
- Inbound loans
- APAs
- Australian case law

Comparing Australia and NZ regimes

Australia transfer pricing regime

- Numerous TP rulings and Practical Compliance Guides
- 7 non-statutory safe harbours to simplify compliance
- Annual dealings disclosure it total transactions >$2m
- 4 important cases in the last 13 years.
- Not adopted the OECD AOA for PE profit attribution
- Self-assessment regime. Onus of proof on taxpayer.

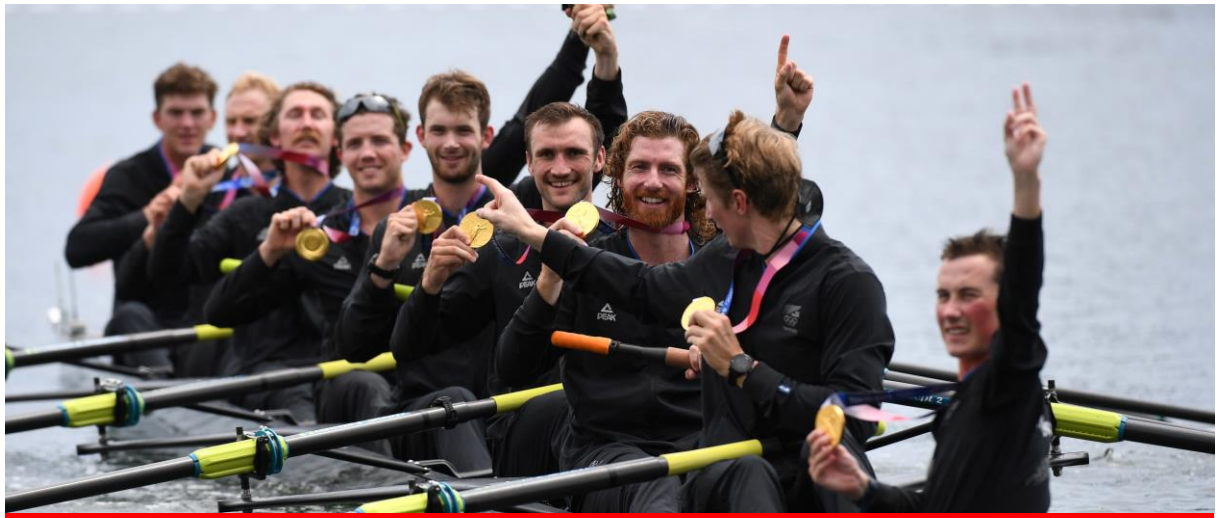
- Aligned to OECD Guidelines in 2013 (backdated to 2004)
- Is there a TP benefit through non-arm's length conditions (no control threshold)
- OECD TPG methods can be used
- TPD aligns to OECD standard, not mandatory
- SGEs (over A$1b) have CBCR reporting obligations.
- "Local file" is different to OECD local file (a significant disclosure form for SGEs)

Other international tax rules in Australia

- **Diverted profits tax**
  - Applies to SGEs (over A$1b)
  - 40% tax rate
  - Prevent diversion of income offshore through related parties (e.g setting up a marketing hub)
  - Principal purpose to obtain a tax benefit
  - Not apply if:
    - Income under $25m; or
    - Foreign tax is at least 80% Australian tax; or
    - Non-tax financial benefits outweigh the tax benefit

- **Multinational anti-avoidance law (MAAL)**
  - Foreign entity selling goods/services in Australia
  - With assistance of an Australian entity directly related to goods
  - No PE exists;
  - Principal purpose to obtain a tax benefit; and
  - Is an SGE
  - ATO can cancel a tax benefit and charge penalties

New Zealand transfer pricing regime



- Self-assessment regime. Onus of proof on taxpayer.
- Reform post BEPS. Aligned to OECD Guidelines only from 2019 onwards.
- Must be a minimum degree of association (e.g. 2 companies with at least 50% common ownership).
- TPD aligns to OECD standard, not mandatory
- NZ companies (over NZ$1.3b) have standard CBCR reporting obligations.

- No public rulings. Some practical guidance on IRD website.
- IRD has very few safe harbours. No *de minimis* to prepare documentation.
- No disclosure of TP as part of tax return. Information is collected via separate questionnaires, usually as part of routine desk-top audit.
- Have been no TP cases in NZ. Most difficult audits eventually get settled by parties or occasionally through MAP.
- Has not adopted the OECD AOA for PE profit attribution.

New Zealand PE avoidance law

- Introduced effective 2019 income year
- Applies to groups with revenue over €750m
- Like the MAAL in Australia
  - Foreign entity is selling goods in NZ
  - Related NZ entity facilitates the sales related activity
  - More than merely incidental purpose of tax avoidance
  - DTA does not have revised PE definition

  Then a PE deemed to exist

Documentation requirements

New Zealand

- Not mandatory but expected
- Disclosure only on request.
- CBCR for groups over NZ$1.3b.
- IRD have powers to get information from NZ subsidiary about any entity in the group.
- 20% penalty for lack of reasonable care and 40% for gross carelessness.
- Australia/NZ comparables preferred

Australia

- Not mandatory but expected
- Disclosure on request. However annual IDS required.
- CBCR (including separate “local file”) for SGEs over A$1b
- 25% penalty risk if no documentation in place that gives a reasonably arguable position (RAP)
- Australian comps preferred.

Focus areas

New Zealand

- Inbound distributors
- Inbound financing
- Intangibles
- Market support payments
- Loss companies

Australia

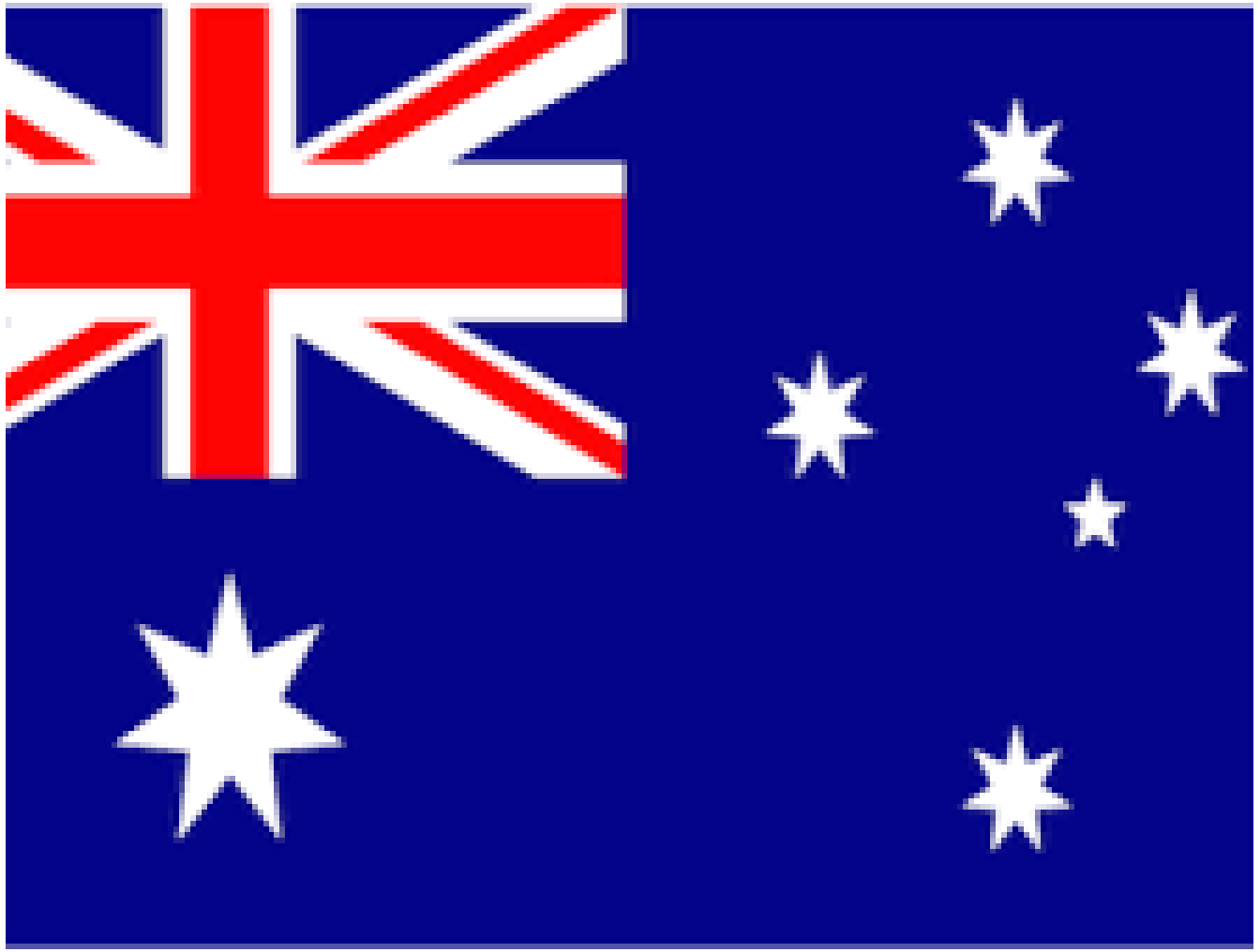
- Inbound distributors (PCG 2019/1).
  - General distributors medium risk 2.1% - 5.3% ROS
  - Life sciences (lowest level med risk is 3.6% - 5.1% ROS)
  - ICT basic med risk is 3.5% - 4.1% ROS
  - Automotive 2.0% - 4.3% ROS
- Financing arrangements
- Intangibles (PCG 2021/D4)
- Marketing hubs in low tax countries

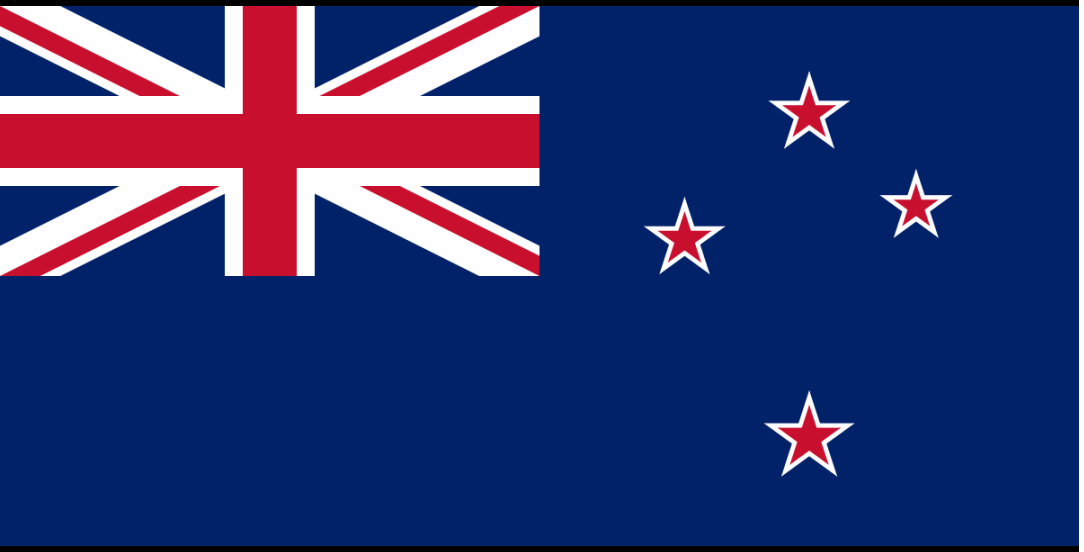
Pillars I and II

BEPS 2.0

Australia

- Australia opted for no DST.
- Exclusion of extractive and financial sectors is significant to Australia.
- No Government or Treasury releases about potential impact
- Will Amount B align with ATO's own view on distributor margins?
- Pillar 2- 30% corporate tax rate; CFC regime for passive income in 'unlisted' countries. Also Diverted Profits Tax, MAAL and anti-hybrid rules
- Timing differences. Also complexity and compliance.





New Zealand

- NZ Government prefer OECD consensus approach. NZ estimated around $60m more revenue from digital companies.
- Dan Neidle (Clifford Chance) suggested around $US112m based on world bank consumption data.
- No NZ parented companies large enough (by revenue) to be within Pillar 1.
- Some foreign companies (e.g. Google) will likely pay more NZ tax.
- Pillar 2- 28% tax rate. No real incentives or preferences. But no capital gains tax! Are a few large NZ groups with activities in low tax countries (profits not already caught under CFC rules).

Inbound loans

New Zealand: inbound loans

- "Restrictive transfer pricing" rule implemented from 2019 onwards:
  - Loans over $10m (aggregate); and
  - Thin cap 40% or higher; or
  - Lender subject to tax at 15% or less; then
  - Credit rating is group rating less 1 or 2 notches
  - If no parent, then rating is minimum BBB-; and
  - Must ignore subordination and terms more than 5 years.

- IRD Safe harbour:
  - Both inbound and outbound loans
  - Loans in aggregate cannot be more than $10m
  - Base rate plus 3.75% margin
  - Generally higher than benchmarked rates for BB rated entity

- Robust thin capitalisation rules. Safe harbour is 60% debt/total assets less non-debt liabilities.

Australia: inbound loans

- No specific statutory TP rules
- PCG 2017/4 risk assessment framework for related party debt
  - Guiding principle: Is debt cost lower than the parent of group could achieve?
  - Scoring assessment based on pricing and behavioural factors

- Safe harbour (PCG 2017/2) - Inbound loan under A$50m in AUD
  - Interest rate is no more than 1.79% (for 2021)
- Chevron case:
  - At arm's length, parental guarantee would have been given- lower interest.

APAs

New Zealand

- IRD complete around 15 per annum
- UAPA fairly streamlined and encouraged. Usually can be completed within 4 - 6 months.
- BAPA with only 7 countries
- Nominal application fee for UAPA.
- Summary of UAPA shared with counterparty country.

Australia

- ATO complete average 14 UAPA and 13 BAPA per annum.
- Average time to complete UAPA is 29 months and 37 for BAPA.
- ATO perform ‘triage’ on application. Will look at all associated tax issues.
- Can be expensive and time consuming

Australian cases

- Roche
  - Price for ethical drugs acquired from parent were not arm's length.
  - Raised a question as to whether DTAs could be used by ATO to reassess profits under transfer pricing.
  - Court favoured transactional methods over profit-based methods.

- SNF
  - Sustained losses from acquiring goods.
  - Taxpayer showed that prices paid were not less than those paid by unrelated parties and other factors lead to losses.
  - Court suggested OECD Guidelines not relevant to determine Australian TP law.
  - Court considered particular circumstances of the taxpayer not relevant in determining the arm's length price (such as loss-making history).

Australian cases

- Chevron
  - As discussed
- Glencore
  - Taxpayer won ATO's appeal
  - Australian company mined copper and sold to its Swiss related company for resale.
  - Pricing changed in 2007 to a discount to LME quoted prices and ATO argued the change to pricing made it non-arm's length.
  - Court highlighted that a practical and sensible approach to pricing was needed so as to not make compliance impossible.
  - Acknowledged that accepting lower profits to mitigate risk is feasible.

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