**FORM C: ABDC 2013 JOURNALS LIST REVIEW**  
**RATING UPGRADE SUBMISSION**

***PLEASE NOTE THAT:*** FORM C is designed to formalise requests to the ABDC Journals Review Panel 2013 seeking an upgrade in rating of an academic journal which is currently included and rated in the ABDC 2010 list e.g. seeking to raise a rating from a "B" to an "A" journal. Please complete a separate form relating to each journal for which you wish to make a submission of this type.

### Journal Title:
Australian Tax Review

### QC1. FIELD of RESEARCH (FoR) PANEL to which this request is directed (tick one box only):
- [ ] 0806 Information Systems
- [ ] 1401-1499 Economics
- [ ] 1501 Accounting
- [ ] 1502 Finance
- [ ] 1503 Management
- [ ] 1504-07 Marketing/Tourism/Logistics
- [ ] 180105/1801025 Business and Taxation Law

### QC2. WHAT ABDC 2013 RATING DO YOU PROPOSE FOR THIS JOURNAL?
- [ ] A*
- [ ] A
- [ ] B
- [ ] C

### QC3. WHAT ABDC 2010 RATING WAS THIS JOURNAL ASSIGNED?
- [ ] A*
- [ ] A
- [ ] B
- [ ] C

### QC4. WHAT ERA 2010 RATING WAS THIS JOURNAL ASSIGNED?
- [ ] A*
- [ ] A
- [ ] B
- [ ] C
- [ ] not applicable

### QC5. NOMINATE "THE BEST" COMPARATOR JOURNAL (journal from the ABDC 2010 list that is most similar in research quality):  
Australian Tax Forum

### QC6. JOURNAL INFORMATION

**Editor’s Name:** Prof C. Evans & Prof M. Walpole  
**Institution:** University of NSW  

### NATURE OF SUBMISSION

### QC7. Primary submitter type (tick one box only)
- [ ] Higher Education Institutional Submission (e.g. formal submission from Business Faculty/School)
- [ ] Peak Body Submission (e.g. AFAANZ, ANZAM)
- [ ] Individual Submission

### QC8. Primary submitter:  
BTL panel  
**Institutional Affiliation:**

### QC9. Are there other signatories to this submission?  
- [ ] Yes  
- [ ] No  

If yes, how many signatories are there (including the primary submitter)?
The BTL panel predicted this journal would be upgraded to an 'A' ranking and received three submissions to the same effect. It is noted that this journal was rated 'A' by the College of Law Deans in 2009. The panel supports and agrees with the comprehensive submission by the Editor, Professor Chris Evans (BTL_FC_F_018) as attached.
SUPPLEMENTARY INFORMATION: APPENDIX CHECKLIST

The ABDC invites further supplementary and supporting information to be submitted by way of appendices.

QC11. What supplementary information are you supplying (by way of appendices) to support your submission?

The following documents are attached in support of this application (please tick boxes as relevant):

- [x] Appendix C1: List of Editorial Board Members
- [x] Appendix C2: Description and Scope of Journal
- [x] Appendix C3: Recommendations from eminent scholars in the relevant field
- [x] Appendix C4: Comparisons with existing rated journals
- Appendix C5: Coverage in review articles
- Appendix C6: Impact Factors: SSCI or others
- Appendix C7: Other supporting documentation
- [x] Appendix C8: Signatory Details – in cases where there are more than one signatory to the submission, list all signatory names and their university or relevant affiliations (this appendix should articulate with the answer given to QC9 above).
FORM C: ABDC 2013 JOURNALS LIST REVIEW
RATING UPGRADE SUBMISSION

*** PLEASE NOTE THAT: *** FORM C is designed to formalise requests to the ABDC Journals Review Panel 2013 seeking an upgrade in rating of an academic journal which is currently included and rated in the ABDC 2010 list e.g. seeking to raise a rating from a "B" to an "A" journal. Please complete a separate form relating to each journal for which you wish to make a submission of this type.

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<td>QC2. WHAT ABDC 2013 RATING DO YOU PROPOSE FOR THIS JOURNAL?</td>
<td>A* ☐ A ☐ B ☐ C</td>
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<td>QC3. WHAT ABDC 2010 RATING WAS THIS JOURNAL ASSIGNED?</td>
<td>A* ☐ A ☐ B ☐ C</td>
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<tr>
<td>QC4. WHAT ERA 2010 RATING WAS THIS JOURNAL ASSIGNED?</td>
<td>A* ☐ A ☐ B ☐ C ☐ not applicable</td>
</tr>
<tr>
<td>QC5. NOMINATE “THE BEST” COMPARATOR JOURNAL (journal from the ABDC 2010 list that is most similar in research quality):</td>
<td>Australian Tax Forum</td>
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<tr>
<td>QC6. JOURNAL INFORMATION</td>
<td>Editor’s Name: Prof C. Evans &amp; Prof M. Walpole</td>
</tr>
<tr>
<td>Web Address:</td>
<td><a href="http://sites.thomsonreuters.com.au/journals/category/australian-tax">http://sites.thomsonreuters.com.au/journals/category/australian-tax</a></td>
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</tbody>
</table>

NATURE OF SUBMISSION

QC7. Primary submitter type (tick one box only)
☐ Higher Education Institutional Submission (e.g. formal submission from Business Faculty/School)
☐ Peak Body Submission (e.g. AFAANZ, ANZAM)
☒ Individual Submission

QC8. Primary submitter: Prof Chris Evans
Institutional Affiliation: School of Tax & Business Law, ASB, UNSW

QC9. Are there other signatories to this submission? ☐ Yes ☐ No
If yes, how many signatories are there (including the primary submitter)? 2
QC10. Executive Summary (word limit: 250 words fully presented on this page only). In the space below succinctly highlight the key elements of your case for upgrading the rating of the designated journal. Please use a “bullet point” style where possible.

- The journal has a national and international reputation for the excellence of its content and its research impact: see Appendix C3, which contains an unsolicited and detailed submission to ARC in 2010 signed by 35 of the 36 full time professors/associate professors who teach and research in taxation, suggesting an A ranking for the journal.

- It received an A ranking in the last available Committee of Australian Law Deans listing, and is held in the highest scholarly regard by academics and professionals engaged in publication and research in the field. Peers suggest it is comparable to British Tax Review (A*), Australian Tax Forum (A), and Canadian Tax Journal (A): see Appendix C3.

- It has an unblemished pedigree of uninterrupted quarterly publication of quality articles since 1971 under only 6 distinguished general editors drawn from the senior ranks of academia and the profession.

- Its active Editorial Board currently comprises senior professors from seven of the world’s leading universities, a former Chief Justice of the High Court of Australia, current judges and senior barristers, and a former Commissioner of Taxation: see Appendix C1.

- Contributors to the journal include leading Australian and international academics, judges, senior tax practitioners and tax administrators: see Appendix C3.

- There is rigorous double blind peer review process for all articles, with a very high rejection rate: see Appendix C3.

- Articles are regularly and extensively cited in judicial cases around the world, parliamentary debates and documents and other leading journals: see Appendix C3.
SUPPLEMENTARY INFORMATION: APPENDIX CHECKLIST

The ABDC invites further supplementary and supporting information to be submitted by way of appendices.

QC11. What supplementary information are you supplying (by way of appendices) to support your submission?

The following documents are attached in support of this application (please tick boxes as relevant):

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Appendix C1 List of Editorial Board members Australian Tax Review

Professor Catherine Brown, Faculty of Law, University of Calgary
Former Commissioner Michael D’Ascenzo AO, Australian Foreign Investment Review Board
Professor Judith Freedman, Faculty of Law, Oxford University
The Hon Justice Michelle Gordon, Federal Court of Australia
Peter Hill, Tax Writer
Professor Richard Krever, Department of Business Law and Taxation, Monash University
The Hon Sir Anthony Mason AC, KBE, Former Chief Justice of the High Court of Australia
Professor Ann O’Connell, Melbourne Law School, The University of Melbourne
The Hon Justice Tony Pagone, Supreme Court of Victoria
Professor John Prebble, Faculty of Law, Victoria University, Wellington
Professor Joel Slemrod, School of Business, University of Michigan
Tony Slater QC, Ground Floor, Wentworth Chambers, Sydney
Appendix C2: Description and Scope of Journal

The Australian Tax Review provides in-depth analysis of current tax issues in the Australian tax environment in all areas of tax law, recent cases and legislative developments.

The journal has a national and international reputation which services both the academic and professional tax law markets. Contributors include Justices of the Federal Court, the Commissioner of Taxation, and senior practitioners and academics from Australia and overseas.

It is a fully refereed journal, articles are only accepted for publication after a rigorous peer review process. Appropriate referees (a minimum of two for each article submitted) are selected by the editors from the ranks of senior Australian and international tax academics and practitioners.
Appendix C3 Submission by leading Scholars

[Note: this submission was uninvited and was made by leading scholars in Taxation Law to the ARC. The strength of its arguments and observations remains as strong in 2013 as it was when submitted in 2010.]

Professor Margaret Sheil
Chief Executive Officer
Australian Research Council

8 August 2010

Dear Professor Sheil,

Excellence in Research Australia rating of Australian Tax Review

This letter is submitted on behalf of the Taxation Professors and Associate Professors from Law, Economics and Business Faculties at Australian universities. We are drawn from various backgrounds but are united by our focus on teaching and researching in the field of taxation. Most of us are also members of the Australasian Tax Teachers Association (ATTA). A full list of the academics who have signed this letter is in the attached spreadsheet. The list comprises all but one of the full time academics at levels D and E who teach and research in taxation in Australian universities at the present time (or with future appointments already confirmed). The co-editors of the journal were not asked to be party to the letter.

We wish to express our deep concern about the inappropriately low ranking that was given to the Australian Tax Review (AT Rev) in the last Excellence in Research for Australia (ERA) list of journal rankings. There was widespread concern amongst tax academics in Australia and beyond when AT Rev was ranked only B, as it had been commonly anticipated that AT Rev would follow the ranking accorded in the Council of Australian Law Deans list and be rated as an A. It is our hope that this letter will ensure that a more appropriate ranking can be given to the journal.

The consensus of the signatories to this letter is that AT Rev should be re-classified as an ‘A’ ranking journal. AT Rev has a national and international reputation for the excellence of its content, which services both the academic and professional tax law market. It is highly regarded nationally but also has an international reputation for quality. It is regarded as the Australian equivalent of the British Tax Review which is currently ranked an ‘A*’. Further, AT Rev is generally seen as the ‘sister’ journal to the Australian Tax Forum which has been ranked an ‘A’. The AT Rev is generally viewed as a more prestigious journal than the other ‘B’ ranked Australian tax journals such as the eJournal of Tax Research, the Journal of Australian Taxation and the Revenue Law Journal.

1 Australian Tax Forum is Australia’s leading tax policy journal whereas AT Rev is Australia’s leading tax law journal.
**Credentials of the Australian Tax Review**

*AT Rev* is the leading specialist tax law journal in Australia. It publishes articles of a very high calibre and is one of the few tax law journals available to Australian academics seeking to publish high quality legal research on taxation to an Australian and international audience. Contributors to the journal include leading tax academics, senior tax practitioners and tax administrators, members of the judiciary, and emerging academics, not only from Australia but from around the world. The journal is also read by Commonwealth, European, and US lawyers.

While *AT Rev* does publish research in accounting and economics, its primary focus is on legal scholarship on taxation. In a global legal environment divided between civil and common law countries, and with a high level of insularity in US legal tax scholarship, the failure to appropriately rank *AT Rev* is highly problematic. Many highly ranked tax journals in the previous ERA rankings were US journals which focus narrowly on matters of US State and/or Federal taxation. Such journals are often simply of no relevance to non-US scholars. We believe that it cannot have been the intention of the ERA process to conclude that only US scholarship on US tax law achieves ‘excellence’ in legal research, and that only US tax academics are leaders in their fields. If the aim of the ERA rankings is to identify and reward (through recognition and funding) the very best of Australian legal scholarship in taxation law and practice, then appropriate rankings must be given to journals such as *AT Rev*, because they provide a forum in which our work can compete, contribute to, and become part of the global scholarship on tax matters.

**Editors and editorial board**

There have only been six editors since the journal was first published in 1971. Professor Chris Evans (Australian School of Taxation (Atax), Faculty of Law, UNSW) has been General Editor of *AT Rev* since 2004 and has been joined as co-editor in July 2010 by Professor Michael Walpole also of Atax. Both Professors Evans and Walpole are International Research Fellows at Oxford University.

Former editors include an eminent QC (Tony Slater) and a current Justice of the Supreme Court of Victoria (Tony Pagone).

The journal has a strong editorial board of senior academics and legal practitioners. Members of the Editorial Board have included senior legal professors (H A J Ford, R W Parsons), High Court judges (F G Brennan, W P Deane), Federal Court judges (D G Hill), eminent QCs (F R Fisher, A C Aickin, K W Ryan, AJ Myers) and senior partners from the country’s leading legal and accounting firms (eg K Pose: Allens Arthur Robinson; W D M Cannon: Blake Dawson Waldron; J Edstein: Mallesons Stephen Jaques; P Le Huray: PricewaterhouseCoopers; M Evans: KPMG).

The Editorial Board is currently in the process of being re-constituted and from 1 October 2010 will include a former Chief Justice of the High Court of Australia, a leading Australian QC, two eminent tax practitioners and administrators, and four senior Australian and international academics, drawn from key Australian universities, Oxford and a leading North American university.
**Contributions and publication criteria**

Contributors are leaders in the Australian and international tax communities and include senior academics from Australia and overseas, Justices of the Federal Court, the Commissioner of Taxation, and leading practitioners. Acceptance of an article in *AT Rev* is considered a pinnacle of achievement in the tax and legal professions.

Analysis of the 74 accepted contributions to the seven volumes (Volumes 33 to 39) between 2004-2010 shows the following breakdown of articles by author:

- 5 by Federal Court judges or equivalent (eg Commissioner of Taxation)
- 14 by barristers including 9 by QCs or SCs
- 30 by GO8 academics (including 19 at professorial level)
- 9 by non-Go8 academics (including overseas professors)
- 10 by top tier legal and accounting firm partners
- 6 by miscellaneous others (Judge’s associates, solicitors etc).

By way of more specific example, Volume 36 (2007) contained ten articles as follows:

- One by a justice of the Federal Court
- One by Australia’s leading taxation QC
- Three by professors at GO8 universities
- Two by Senior Lecturers at GO8 universities
- One by a Senior partner at a Big Four accounting firm
- One by a Manager and PhD at one of the Big Four
- One by a Judge’s Associate.

All unsolicited articles submitted to *AT Rev* are subject to a rigorous double blind referee process. Refereeing is fully anonymous and the referees are the top specialists in the field, not only from Australia but also from abroad, as appropriate for the subject matter. At a 60% rejection rate for unsolicited submissions, *AT Rev* has a high level of rejections, particularly when one considers that those writing in tax law constitute a relatively small group and that *AT Rev* is published four times a year.

**Impact of *AT Rev***

Work published in *AT Rev* is thought provoking and wide ranging; covering domestic, international and comparative topics across the whole field of tax law. In addition, *AT Rev* offers current notes on topical matters and case notes on relevant judicial decisions and reviews on major new taxation publications. *AT Rev* seeks only to publish commentary that will stand the test of time, making it a journal of record. For these reasons *AT Rev* is unequalled in terms of its influence in the field of taxation in courts and is one of Australia’s most significant journals in terms of influence on law making and academic scholarship. It has been cited by Commonwealth courts at the highest level, including the High Court of Australia, the House of Lords, the Court of Appeal and Supreme Court of New Zealand, and the Supreme Court of India.
Attachment A lists just some of the judicial cases in which *AT Rev* articles have been mentioned.

Attachment B sets out some of the many scholarly articles that cite *AT Rev* papers.

Attachment C provides an indicative list of Australian parliamentary documents citing *AT Rev* articles.

Virtually all Australian universities subscribe to the journal, as well as many international universities. These include: Oxford University, Cambridge University, University of Canterbury, University of British Columbia, University of Iowa, University of London, New York University, Florida Coastal School of Law, University of the West Indies, University of California, Harvard Law School Library, University of Michigan, University of Minnesota, University of Ottawa, University of Toronto, University of Victoria, University of Virginia, University of Chicago, Northwestern University, University of Auckland, Victoria University of Wellington, University of Witwatersrand, University of Otago and University of Waikato (the list is indicative only).

**Conclusion**

In conclusion, *AT Rev* has been established as the leading Australian title in this area of taxation law for nearly 40 years and we recommend that *AT Rev* be appropriately rated at the A level in recognition of its high standing and the quality of the scholarship it publishes. We will be happy to provide any further information that you may require in order to re-appraise the current inappropriate ranking.

Yours Sincerely

See separate page for signatories
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<th>POSITION</th>
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<td>Ashiabor, Hope</td>
<td>Associate Professor</td>
<td>Macquarie University</td>
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<td>Barton, Glen</td>
<td>Professor</td>
<td>Curtin University of Technology</td>
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<tr>
<td>Bentley, Duncan</td>
<td>Professor and PVC</td>
<td>Curtin University of Technology</td>
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<td>Boccabella, Dale</td>
<td>Associate Professor</td>
<td>University of New South Wales</td>
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<td>Burns, Lee</td>
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<td>The University of Sydney</td>
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<td>Burgess, Philip N</td>
<td>Senior Visiting Fellow</td>
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<td>Woellner, Robin H</td>
<td>Pro-Vice Chancellor</td>
<td>James Cook University</td>
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Attachment 1 - Sample of AT Rev citations in Commonwealth Court Judgments

Note that this list is indicative rather than exhaustive.

High Court of Australia

Per Gummow, Hayne, Heydon and Crennan JJ in FCT v Word Investments Ltd [2008] HCA 55 at [70]:

“Section 50-50 contrasted with ss 50-57, 50-60 and 50-65: The explanatory memorandum did not explain why, in s 50-60 (and ss 50-57 and 50-65), there was a requirement that the fund claimed to be exempt was “applied for the purposes for which it was established,” while there was no equivalent requirement in s 50-50. [Footnote: This has occasioned surprise: O’Connell, “The Tax Position of Charities in Australia - Why does it have to be so complicated?” (2008) 37 AT Rev 17 at 23-24.]”

Per Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ in CPT Custodian Pty Ltd v Commissioner of State Revenue [2005] HCA 53 at [31]:

“When Livingston had been before this court, Fullagar and Kitto JJ each had spoken to similar effect. Hence, perhaps, the development of the “dogma” respecting concurrent and exhaustive legal and beneficial interests which has been referred to earlier in these reasons and which was decisively discounted by the Privy Council in Livingston. Terms are used here which lack a universal contemporary or historical meaning, divorced from the context, particularly any statutory context in which they are employed. [Footnote: See Speed, “Beneficial Ownership” (1997) 26 AT Rev 34]”

Per Kirby J in SGH Ltd v FCT [2001] HCA 18 at [84]:

“They knew that, at the time shortly before Federation, this implied immunity had developed in the United States to a substantial degree - including so as to prohibit a State from taxing the whole or part of the stock of a corporation “if made up of ... public funds”. The explanation given in the cases for such a prohibition had been that, otherwise, “[I]f such power were recognized in the States it might be carried to such extent as to, in effect, destroy this power in Congress”. [Footnote: Quick and Garran at 949. See also The Collector v Day 78 US 113 at 127 (1870); Morabito, “Commonwealth Taxes, State Governments and the Doctrine of Intergovernmental Immunity”, (1997) 26 AT Rev 182.]”

Per Kirby J in FCT v Ryan [2000] HCA 4 at [58]:

“Course of authority: Even if it were assumed (contrary to the Commissioner’s primary argument) that the meaning of “assessment” and the operation of s 170(3) in the context were not strictly decided by the authority of Batagol, it was submitted that a long line of authority in this court, in the Federal Court and in other Australian courts had accepted the construction of the ITAA 1936 for which the Commissioner contended. In the words of Northrop J in Stuart [No 2] v FCT: “The law on this issue is clear. A nil assessment is an impossibility.” In light of such judicial remarks, assumptions and holdings to that effect, taxation practice had developed in Australia, so it was put, which must now be regarded as settled. [Footnote: Burges, “The Rights of Taxpayers and their Agents”, (1974) 9 Taxation in Australia 8 at 12. But see Pagone, “The Significance of Assessments”, (1990) 19 AT Rev 88; Barkoczy, “The Nature of an Income Tax Assessment”, (1999) Journal of
Australian Taxation 36 at 45; Barkocy, “FC of T v Ryan: the Full Federal Court’s View on ‘nil assessments’”, (1998) 20 CCH Tax Week 278.] Any change was the proper province of the Parliament and not of the courts.”

Per Gleeson C J, McHugh and Callinan JJ in FCT v Montgomery [1999] HCA 34 at [20]:

“It may be observed at this point that the principles stated in Myer are themselves not without their difficulties of application. [Footnote: See Hill, “A Pre-Bicentennial Reminder of our Heritage - Commissioner of Taxation v The Myer Emporium Ltd”, (1987) 22 Taxation in Australia 12; Spry, “The Implications of the Myer Emporium Case” (1987) 16 AT Rev 152]”

Per Kirby J FCT v Murry [1998] HCA 42 at[87]:

“It is possible to criticise these notions and to protest, against the background of general judicial exposition about the nature of goodwill, that they create difficulties because they involve erroneous assumptions. [Footnote: See eg AH Slater, “The Nature of Goodwill” (1995) 24 AT Rev 31; cf G Cathro, “Capital Gains Tax” (1996) 25 AT Rev 129.] Perhaps at a theoretical level they do. However, these are protests to which the judges must turn deaf ears. Their duty is to give effect to the purpose of the Parliament as expressed in the language which it has chosen. It is not to stamp on that language preconceptions about the meaning of goodwill which have been formulated in other and different contexts and to achieve distinguishable legislative purposes.”

Per Kirby J in Leask v Commonwealth of Australia [1996] HCA 29:

“Commentary on the Act has ranged from the sceptical and hostile [Footnote: Bostock, “Observations on the Cash Transactions Legislation” (1989) 18 AT Rev 147 at 154. Other critical observations appear in Senate Standing Committee on Legal and Constitutional Affairs, Checking the Cash - A Report on the Effectiveness of the Financial Transaction Reports Act 1988, 1993.] to the laudatory. [Footnote: Hewett and Kalyk, Understanding the Cash Transaction Reports Act, 1990, p 49. The authors say that by early 1989 there had been a successful prosecution of an offence against s 24 as a result of an account being opened in a false name: “Significantly, an amount of approximately $1.7m of unpaid taxes was recovered as a by-product of the prosecution.”] If the Act be within power, this court is not concerned, as such, with the merits of the legislation, with its wisdom, the need for it or the reasonableness of its provisions. Those questions are for the Parliament.”

Federal Court of Australia – Full Court

Per Perram J in St George Bank Ltd v FCT [2009] FCAFC 62 [108]

“Since dividends may be paid only out of profits and not out of capital it is not immediately apparent whence their status as an outgoing incurred in the course of earning assessable income might derive: cf FCT (WA) v Boulder Perseverance Ltd (1937) 58 CLR 223 at 234, [1937] ALR 649 at 652-653 per Latham CJ, Dixon and McTiernan JJ; Pondicherry Railway Co v Commissioner of Income Tax, Madras (1931) LR 58 Moo Ind App 239 at 251 per Lord Macmillan; Macquarie Finance Ltd v FCT (2004) 57 ATR 115 at 131-132 [55], 2004 ATC 4866 at 4879-4880 [55], 210 ALR 508 at 525 [55] per Hill J; R Upfold, “When Might Dividends be Deductible” (2001) 30 AT Rev 5. No occasion arose and no argument was advanced in the present proceedings as to the status of a dividend which was, as a matter of fact, paid in the course of earning assessable income.”

Per Hely J, in Macquarie Finance Ltd v FCT [2005] FCAFC 205 at [240]:
“On the primary judge’s findings, obtaining a tax benefit was not the sole purpose of a participant in the scheme, as other commercial advantages flowed from its adoption and implementation. There is no suggestion that the other commercial advantages which flowed from debt financing were inconsequential or immaterial. The question is whether the obtaining of a tax benefit was the dominant purpose of a participant, in the sense in which that term was explained in *Spotless*. In *Eastern Nitrogen*, Lee J emphasised (at FCR 27 [20]; ATR 474 [20]; ATC 4164 [20]; ALR 415 [20]) that it is important not to elide the question posed by Pt IVA, namely what was the dominant purpose of a relevant party in entering the transaction (or scheme), with the inquiry, would the transaction (or scheme) have been entered into “but for” the tax benefit? Maurice Cashmere, in an article entitled “Part IVA after Hart” (2004) 33 AT Rev at 131-149 describes (at 138) a “but for” test as “inevitably self-determining”.

Per Hill, Sundberg and Goldberg JJ in *Belling Pty Ltd v FCT* (1998) 39 ATR 198 at 204:

“Subject to context, a starting point for the use of the word “ownership” is the acceptance of the view espoused by Mr Speed in an article “Beneficial Ownership” (1997) 26 AT Rev 34 that the word has neither an historical nor a contemporary universal meaning. While this may be so, the prima facie meaning of the word, but again subject to context, is the entire dominion of the thing said to be owned: *Union Trustee Co of Australia Ltd v Federal Comr of Land Tax* (1915) 20 CLR 526 at 530.”

Per Beaumont J (leading judgment) in *Selleck v FCT* (1997) 78 FCR 102; (1997) 36 ATR 558 at 581:

“The FCT’s case at first instance in the present matter was that the lease incentive payments themselves were income. The learned primary Judge held that the cash distributions to the partners were assessable income. It has never been suggested that a valuation exercise of the kind contemplated in *Lees & Leech* should be undertaken here. Rather, the FCT’s case has always centred on the lease incentive payments. (See also the discussion of the decision at first instance in the present case by L J Nethercott “Section 25(1) : More Myer Problems” (1997) 26 AT Rev 28).”

Per Gummow J (leading judgment) in *Barratt v FCT* (1992) 36 FCR 222; (1992) 23 ATR 339 at 348-350:

The passage in question from the judgment of the Chief Justice is as follows:

“When the service is so far performed that according to the agreement of the parties or in default thereof, according to the general law, a fee or fees have been earned and it or they will be income derived in the period of time in which it or they have become recoverable. But until that time has arrived, there is, in my opinion, no basis when determining the income derived in a period for estimating the value of the services so far performed but for which payment cannot properly be demanded and treating that value as part of the earnings of the professional practice up to that time and as part of the income derived in that period.

However, as has been pointed out by Professor Parsons, “Legal Recoverability and Accruals Tax Accounting” (1972) 1 AT Rev 219 p 223, the remarks of Barwick CJ must be read in their context, namely, the denial of the suggestion that an amount in respect of work in progress can be said to be income derived.

The passage which I have set out above was immediately preceded by the following:
In presenting figures before his Honour allowance was made for what was termed “work in progress”. But this, in my opinion, is an entirely inappropriate concept in relation to the performance of such professional services as are accorded in an accountancy practice when ascertaining the income derived by the person or persons performing the work.

His Honour later (at CLR 651) added:

I have used the word “recoverable” to describe the point at which income is derived by the performance of services. I ought to add that fees would be relevantly recoverable though by reason of special arrangements between the partnership and the client, time to pay was afforded.

One element in the reasoning of the Chief Justice in these passages is that an allowance was not properly made for “work in progress” because, as a matter of timing of the derivation of income, the income could not be derived until it had been earned by performance of the services. Windeyer J had made the same point at first instance.

The second strand in the reasoning of the Chief Justice is concerned with the necessity for the quantification of the claim to payment in respect of the services that have been rendered. Of this Professor Parsons (with whom I would, with respect, agree) says (as above p 223-4):

“Recognition of an item of income in accruals tax accounting requires that there be a claim, unqualified by any contingency, to an ascertained amount. It is submitted that it does not require that it be shown that a court would, if asked, order that the claim is recoverable by the taxpayer and Henderson’s case should not be taken to decide that it does so require. Recovery by a solicitor of the amount of a bill of costs rendered by him may be denied if the client has taken proceedings to have the bill taxed (cf Legal Practitioners Act 1898-1960 (NSW) s 21). Henderson’s case, it is submitted, would not be taken as authority that the amount of the bill will not be recognised as income until the period within which it might be taxed has expired. Nor would the case be taken as authority that an amount claimed in respect of goods, which are not necessaries, supplied by a trader to an infant will not be recognised as income until the infant has attained majority and affirmed the contract.”

In Firstenberg’s case McInerney J took the view that, at least in Victoria, a solicitor's costs would not be "recoverable” in the relevant sense until one month after delivery of a formal bill of costs which complied with the relevant legislation of that state. However, his Honour did point out (supra at ATC 4150-1) that in practice solicitor’s costs were frequently recovered without the need for the issue of a formal bill of costs, and that a signed bill was delivered only if it has become abundantly clear that the solicitor would have to sue to recover the fees.

In my view, Henderson’s case should not be understood as deciding that an amount cannot be derived unless presently recoverable by action. Nor is there anything in the authorities which denies the proposition put to us for the Commissioner that there was a derivation as bills were rendered by the taxpayers to patients, not later when the 6 months referred to in the state statute had expired.

The taxpayers have failed at all points on these appeals. They should be dismissed, with costs.”

Per Hill J, in Hepples v FCT (1990) 22 FCR 1; (1990) 21 ATR 42 at 65:
“There is force in the suggestion by Mr Muir in his article "Section 160M(6): Fundamental Misconceptions in Legal Theory", (1988) 17 AT Rev 176 at 182, that Lord Russell determined the case on the basis that para 22(3)(c) indicated that the statute was to have a wider application than merely to property that could be turned to account by transfer or assignment to another. See also the discussion by Warner J in *Zim Properties Ltd v Proctor* (1984) 58 TC 371 at 389-90.

In any event, what was said in the House of Lords as to the British legislation should not control the meaning of the Australian legislation. In the Act, there is not the same inter-relation between the relevant sections as there was between ss 19 and 22 of the British legislation.”

Per Beaumont J in *FCT v John* (1987) 19 ATR 150 at 171:

“Mrs John's case is not unlike that of the taxpayer, a solicitor, in *Loxton v FCT* (1973) 3 ATR 467; 47 ALJR 95, a decision of Gibbs J……See also William Deane QC: The Profit of Having to Pay Less Tax, Vol 1 Australian Tax Review (1971) at 75; Parsons: op cit at 147.”

**Federal Court of Australia**

Per Gordon J, in *Secretary to the Department of Transport (Victoria) v FCT* [2009] FCA 1209, at [40]:

“For a discussion of recourse to foreign authority in dealing with Australian tax cases see Edmonds J*, *Recourse to foreign authority in deciding Australian tax cases* (2007) 36 AT Rev 5 and …”

*Justice of the Federal Court of Australia*

Per Edmonds J in *Elsinora Global Ltd v Healthscope Ltd (No.2)* [2006] FCA 18 at[5]:

“Underlying the current dispute is the substantive dispute between ECMI and the Deputy Commissioner as to whether ECMI is liable to pay Australian income tax on the capital gain it made on the sales of shares in Gribbles, as the Deputy Commissioner claims, or whether Australia is denied the right to tax that gain by virtue of the provisions of art 7 of the Double Taxation Agreement between Australia and Belgium (Schs 13 and 13A of the Income Tax (International Agreements) Act 1953 (Cth)), as ECMI claims: see generally, I V Gzell QC, Treaty Protection from Capital Gains Tax (2000) 29 AT Rev at 25-49; by the same author, Treaty Application to a Capital Gains Tax Introduced after Conclusion of the Treaty (2002) 76 Australian Law Journal at 309-327.”
Per Hill J in *Macquarie Finance Ltd v FCT* [2004] FCA 1170 at [55]:

“It is accepted without question in the Australian income tax system and indeed in most other systems that a deduction is not available for dividends paid by a taxpayer company on its share capital. *It may not be possible to give a clear logical answer as to the reasons:* cf Upfold, “When might Dividends be Deductible” (2001) 30 AT Rev 5.”

Per Gyles J in *Hart v FCT* [2001] FCA 1547 at [57]:

“The decision of the High Court in *Spotless Services* was something of a watershed in relation to tax minimisation, marking a decisive break from the authorities as to the scope and effect of the former s 260 of the ITAA 1936, influenced as they were by the Duke of Westminster doctrine. This was recognised by various commentators, although there was doubt as to all of the ramifications of the decision (see D Mossop, “Tax Avoidance Legislation and the Prospects of Pt IVA” (1997) AT Rev 70; A Greenbaum, Anti-Avoidance Principles - New Directions for Tax and Business Resulting from the High Court Decision in Spotless (1997) 25 Australian Business Law Review 142; J Azzi, Spotless: A Lesson in Form and Substance but not in Substance over Form (1998) 8 Revenue Law Journal 175; M J Watts, Part IVA of the Income Tax Assessment Act after Spotless - a Brave New World? (1998) 72 Australian Law Journal 303). For present purposes, any doubts are set at rest by *Consolidated Press.*”

Per Merkel J in *Belling Pty Ltd v FCT* (1998) 38 ATR 350 at 361:

“In a recent article, “Beneficial Ownership” ((1997) 26 AT Rev 34), Robin Speed examined the long standing legislative usage in the ITAA 1936 of words such as “beneficial ownership” and their derivations like “ownership” and concluded (correctly, in my view) that they have no historical or contemporary universal meaning.”


Per Hill J in *Davis v FCT* (1989) 20 ATR 548 at 575-576:

Supreme Court of Western Australia – Court of Appeal

Per Steytler P in Commissioner of State Revenue v Serana Pty Ltd [2008] WASCA 82 at [133]:

“"In CPT Custodian, Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ referred to the observations of Viscount Radcliffe in Livingston and Lord Wilberforce in Gartside, and then said (at AC 31):

When Livingston had been before this court, Fullagar J and Kitto J each had spoken to similar effect: Livingston v Commissioner of Stamp Duties (Qld) (1960) 107 CLR 411 at 438 per Fullagar J, (at 450) per Kitto J. Hence, perhaps, the development of the “dogma” respecting concurrent and exhaustive legal and beneficial interests which has been referred to earlier in these reasons and which was decisively discounted by the Privy Council in Livingston. Terms are used here which lack a universal contemporary or historical meaning, divorced from the context, particularly any statutory context in which they are employed: see Speed, Beneficial Ownership, Australian Tax Review (1997) vol 26 at 34.”

Supreme Court of Victoria – Court of Appeal

Per Redlich JA (leading judgment) in Lygon Nominees Pty Ltd v Commissioner of State Revenue [2007] VSCA 140 at [32]:

“It is common usage in relation to trusts of land to speak of a beneficiary having an equitable estate in the land so as to reflect the beneficiary's equitable rights which are sufficiently extensive to invite analogy with the rights of the holder of a legal estate in land and possess most of the characteristics of the ownership of legal title to property. Rights of beneficial ownership generally import a notion of ownership for a person's benefit and the exclusion of a holding for the benefit of others. Under common law and equitable principle it may be that only the holder of a legal title to trust property can be said to be the owner of that property so that a beneficiary cannot properly be described as the beneficial owner of the trust property. Hence the difficulty adverted to by some commentators in treating a beneficiary as "the owner of a trust asset" unless the beneficiary was absolutely entitled to an asset against the trustee. [Footnote: R Speed, “Beneficial Ownership” 26 At Rev 34 at 50; see also Sir Moses Montefiore Jewish Home v Howell & Co (No 7) Pty Ltd [1984] 2 NSWLR 406 at 411] Only limited assistance can be gained from the use and meaning of such terminology outside the statute but the proprietary characteristics of ownership are not usually to be found in such discretionary trusts.”

Supreme Court of Victoria

Per Phillips J in DCT v Manners (1985) 16 ATR 726 at 733:

“Mr De Wijn submitted the assessments were default assessments of Manners, the basis of which the plaintiff has never explained. He referred me, in this connection, to a decision of Evatt J, FCT v Trautwein (1936) 56 CLR 211 and to an article by Mr Castan of counsel, in Vol 5 of the Australian Tax Review, which in turn referred to an unreported decision of McInerney J, DCT (Vic) v Krew, where a stay had been granted. True it is, Krew clearly involved a default in assessment and in Trautwein Evatt J refers to a stay having previously been granted but I do not regard either case as really supporting Mr De Wijn's submission that the fact, if it be so, that an assessment is a default assessment assumes any special significance in this discretionary exercise.

Per McGarvie J in Fortuna Holdings Ltd v DFCT (1976) 6 ATR 620 at 635:
“The article by Mr A R Castan, *Enforcement of Payment in Contested Tax Cases* (1976) 5 AT Rev 4, to which I was referred, discusses a number of cases in which, in actions to recover assessed tax, Courts have exercised their discretion by granting a stay and a number where a stay has been refused.”

**Supreme Court of New South Wales**

Per Hunt J in *Allied Pastoral Holdings Pty Ltd v FCT* (1983) 13 ATR 825 at 832-833:

“So far as I am aware, this was the first time that the suggestion has ever been made expressly that a “statutory” onus of proof requires a different degree or standard of proof to the ordinary civil action, although Mr Fairleigh’s statement is in my view clearly consistent with what is widely believed to be the approach of certain of the Boards of Review; see “The Independence of Boards of Review”, an editorial published in the *Australian Tax Review* (March, 1980), at p 2.”

Per Needham J in *Re Norper Investments Pty Ltd* (1977) 7 ATR 488 at 491:

“Other cases where a stay has been granted or refused are referred to at 5 *Australian Tax Review* et seq.”

**Supreme Court of South Australia**

Per Gray J in *Cyril Henschke v Commissioner of State Revenue* [2008] SASC 360, at [29]:

“As pointed out earlier in these reasons, s 160A defines “asset” to include “goodwill,” but neither Pt IIIA nor the Act generally attempts to define goodwill. That is not surprising because, as Dawson J pointed out in this court in *Hepples v FCT*, ‘‘goodwill’ is notoriously difficult to define.” One reason for this difficulty is that goodwill is really a quality or attribute derived from other assets of the business. [Footnote: Cf, Slater, “The Nature of Goodwill” (1995) 24 AT Rev 31].”

Per Zelling J, in *Tilley v FCT* (1977) 7 ATR 139 at 142-143:

“Here it is not a question of disbelieving Tilley. He was a witness of credit and was so treated by the Board, but an honest witness may still be wrong or mistaken without giving intentionally wrong evidence and one does not need to disbelieve a witness on his oath to reject parts of his testimony which are not in accord with or do not satisfactorily explain parts of the factual situation out of which the statements arise: see also an article *The Significance of Gauci’s case* by J D Davies in 5 AT Rev 215 especially at 216-7.”

Per Hogarth ACJ in *RG Williams v FCT* (1974) 4 ATR 676 at 690:

“The recent authorities on the second limb of the section are conveniently collected and discussed by Professor K W Ryan in an article “Profit-Making Undertakings or Schemes” in the *Australian Tax Review* Vol 2 (1973), p 183, when he points to the difficulties which beset the courts in applying the second limb.”

**Administrative Appeals Tribunal**

Per Block SM in *Re North Ryde RSL Community Club Ltd and FCT* [2001] AATA 368; (2001) 47 ATR 1034 at 1067-1068:
“Reference could also be made, in this connection, to “Substance Versus Form in Tax Disputes - An Analysis of Recent Developments”, Michael Flynn (1995) *Australian Tax Review* 171 from which two relevant conclusions, at p 188, may be quoted:

(2) If the parties have embodied their agreement in a formal written contract, the court will generally confine itself to the document when determining the meaning or legal affect of the terms of the contract. However, in interpreting those terms, the court must place itself in the same factual matrix as that in which the parties were when the contract was made: *Parol Evidence Rule; Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337

(4) When determining whether a receipt or outgoing is on revenue or capital account, it is appropriate to consider the entire context in which the payment was made. In particular, if it can be said that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, the nature of the payment or receipt should be determined by reference to the series or combination rather than to the particular contract under which the payment was made or received: *Europa Oil (No 1) v IRC* (1971) 1 ATR 737; *Ramsay v IRC* [1982] AC 300; *FCT v Cooling* (1990) 22 FCR 42; *J B Chandler Investment Co Ltd & Chandler’s Rental Pty Ltd v FCT.*

Per Block SM in *Re Clean Investments Pty Ltd and FCT* [1999] AATA 764 at [117]:

“(a) Mention was made during the hearing of an article entitled *Goods Used for Household Purposes* by A. H. Slater QC and S. Callanan which appeared in the *Australian Tax Review* (December 1993).

(b) It was suggested during the hearing that that article was in some respects critical of the approach taken by Gummow J in *Hygienic Lily*. However a careful reading of that article indicates that it notes only that Davies J appeared to reject the approach of Gummow J, without expressly referring to it; …”

Per Block SM in *AAT Case 11,874* (1997) 36 ATR 1001 at 1013:

“This case is often put forward as authority for the proposition that travelling expenses between two places of work, even though the employment or business at each place may be unrelated, are deductible: see eg E Wallace, “The Deductibility of Travelling Expenses”, *Australian Tax Review*, No 1 1972, p 87 at 87, 92, 94.
(a) The manner in which s 159GZE is to be interpreted was the subject of an article by Mr I C F Spry QC, “Thin Capitalisation: Foreign Controllers and Discretionary Trusts” which appeared in the March 1989 issue of the *Australian Tax Review*, p 13. As regards s 159GZE(3)(b)(ii) (third test) Mr Spry said:

This provision depends upon whether a relevant person “would” receive the whole or a fraction of a distribution, but it does not set out any assumptions as to whether or not particular discretions of trustees have been exercised. In the case of a discretionary trust, should it be assumed that no discretions have been exercised positively, so that the presumptive beneficiaries (that is, the default beneficiaries) are deemed to have taken?

This approach is more reasonable than a second approach involving an assumption that the relevant discretions have been exercised positively in a particular way, since it is not possible to establish any legislative intention in favour of preferring one way of exercising discretions over another. A third approach involves an argument that this subsection cannot apply at all in the case of discretionary trusts if both non-residents and residents are within the relevant class of potential recipients of benefits. On this argument it is put forward that since the application of the subsection depends on a hypothetical distribution, and since it is not possible to know in advance how on that distribution the trustees of the trust would exercise their discretions, it cannot properly be said that a non-resident or non-residents “would” receive the whole or any part of that distribution.

Subsection 159GZH(3) is relevant to another question relating to the construction of s 159GZE(3)(b)(ii). The latter sub-paragraph does not refer to a “right” to or “beneficial ownership” of at least 15 per cent of corpus or income, but rather merely to a “beneficial interest” in at least that percentage. But many persons may, for example, have a beneficial interest in a given percentage without having a definite right to receive more than a small share of that percentage or indeed, in some cases, with only a contingent right or a right subject to divestment. On a strict view those in these latter categories are capable of falling within the sub-paragraph, although there is an argument of weight that this is not so if they are merely persons with a possibility or spes that a discretionary power will be exercised in their favour. (It has been held in the contest of English revenue legislation that such persons are not properly described as having “interest”: *Gartside v IRC* [1968] AC 553. Whether this analysis is correct in any particular case depends however on the context in which the term "interest" is used. That term is not of such a definite meaning that it is incapable of applying to those with a mere possibility or spes if a sufficient intention that it should so apply is found in its context). However, in the present case the fact that s 159GZH(3) in dealing with indirect beneficial interests, apparently is concerned with whether or not there is a right to receive the whole or the relevant fraction may well be found to provide sufficient support for the view that a similar analysis applies in relation to direct beneficial interests.

In regard to direct beneficial interests also a special difficulty arises in regard to discretionary trusts, although the deeming provisions of s 159GZH(3) do not apply here, being concerned with indirect, as opposed to direct interests. Here, also, it may be argued that the relevant provisions should be applied on the basis that presumptive beneficiaries (that is, the default beneficiaries) are deemed to have a material direct interest and that this is not the less so because their rights may be detracted from by the adverse exercise of discretions. However, this
position is by no means clear, and this obscurity provides a further illustration of
the fact that thin capitalisation provisions have been drawn with sufficient
attention to the particular difficulties that are raised by discretionary trusts.

(b) Mr Spry’s article raises the possibility that because in a discretionary trust (as opposed
to a unit trust or fixed trust), no beneficiary has an interest which is quantifiable, the third
test threshold of 15 per cent may not be capable of being reached. We do not think that
this can be correct. A discretionary trust is a type of trust and we think that the legislation
must be interpreted having regard to the nature of such a trust. Although nothing much
turns on it, we note that this much was recognised by para 22 of IT 2479 and Exposure
Draft Ruling EDR 43, now withdrawn, in para 23.”

Per McMahon DP in AAT Case 10,363 (1995) 31 ATR 1190 at [17]:

“The “universal proposition” in relation to food was dealt with in an article by Mr J
W Durack SC in vol 23, Australian Tax Review 205 at 208, 209 in these words, which
I respectfully adopt:

There will be many kinds of personal expenditure which, while necessary if
income is to be derived, will not be incurred “in the course of” gaining the
income. It might be thought that expenditure on food would almost always be in
this category. After all, a taxpayer rarely earns income by the actual process of
eating! However, it seems that it is not necessary to go so far as to show that
income is earned by the actual process or function which is the immediate
occasion for the expenditure in order to establish deductibility. In Edwards’ case
it was not suggested that the taxpayer earned her income by actually wearing the
clothes the subject of the relevant expenditure; rather the wearing of the clothes
enabled her “to attend the wife, her employer, in the performance of her duties at
many types of functions as personal secretary” [Gummow J quoted in the Full
Court’s reasons at ATC 4257]. Although in Cooper’s case Lockhart J noted that
“the taxpayer was paid money to train for and play football, not to consume food
and drink” it is clear that it was not this circumstance alone which led to the
Commissioner’s appeal being allowed by him and Hill J, and the absence of
evidence as to the taxpayer’s having to incur additional expenditure over and
above his own or an average player’s expenditure on food seems to have been
regarded by both judges as of significance.”

Per Dr Gerber in AAT Case 8,728 (1993) 26 ATR 1114 at [73]

“In this case, I have had the advantage of a very detailed address on the subject by Mr
Searle who, for good measure, wrote a very learned article on the subject – “The
Onus of Proof in Asset Betterment Cases” 21 Australian Tax Review 250-258
(December 1992) - a contribution which deserves a wider readership than it is likely
to receive.”

Per Dr Gerber SM in Tribunal Case 113 (1987) 18 ATR 3825 at [8]:

“This case is clearly not without its difficulties, not least of which is the problem of
reconciling the earlier decisions in this area. I would feel more confident of the
correctness of the result if the Australian Tax Review had vigorously attacked the
line of cases exemplified by Klan and reached the opposite conclusion.”
Attachment 2: examples of articles citing Australian Tax Review

Note again that this list is indicative rather than exhaustive.


Colin Fong, “How to conquer tax research: making the most of online resources” (2005) 39(7) Taxation in Australia 362.


Adrian J. Sawyer, “Blurring the distinction between avoidance and evasion – the abusive tax position” (1996) 5 British Tax Review 483-504.


Summary of Parliamentary documents citing Australian Tax Review

Note again that this list is indicative rather than exhaustive.


TAXATION LAWS AMENDMENT BILL (No. 4) 1988 - INCOME TAX AMENDMENT BILL 1988 - MEDICARE LEVY AMENDMENT BILL 1988 - Senate Hansard - 8 November 1988, p 2197

AUSTRALIA CARD - Matter of Urgency - Senate Hansard - 15 September 1987, p 68

AUSTRALIA CARD BILL 1986 - Second Reading - House of Reps Hansard - 13 November 1986, 2996

INCOME TAX ASSESSMENT AMENDMENT (CAPITAL GAINS) BILL 1986 - House of Reps Hansard - 29 May 1986, p 4204

TAXATION - Matter of Urgency - Senate Hansard - 20 March 1985, p 492

BILLS RETURNED FROM THE SENATE - In Committee - House of Reps Hansard - 28 October 1982, p 2785

SALES TAX AMENDMENT BILLS - First Readings - Senate Hansard - 23 February 1982, p 279

Parliament of the Commonwealth of Australia, Report 410, Tax Administration, Joint Committee of Public Accounts and Audit (June 2008), cited in several Chapters, eg 1 and 3.


Submission by Pilch Connect (Public Interest Law Clearing House) Vic to Senate Standing Committee on Economic Inquiry into the Disclosure Regimes for Charities and Not for Profit Organisations (29 August 2008).

Chamber of Commerce & Industry Western Australia, Income Tax Self Assessment, Submission to the Joint Committee on Public Accounts and Audit Inquiry into “Certain Taxation Matters” (24 Feb 2006).

Submission of Tax Reform to the Senate Economics References Committee on the Structure and Distributive Effects of the Australian Tax System (11 April 2003).

Sherman T, Report of an internal review of the systems and procedures relating to private binding rulings and advance opinions in the Australian Taxation Office (7 August 2000).
Appendix C8: Signatory Details

Primary submitter: Professor Chris Evans, School of Taxation and Business Law, Australian School of Business, University of New South Wales, Sydney co-editor Australian Tax Review (cc.evans@unsw.edu.au)

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