

Transfer Pricing Country Profile
(to be posted on the OECD Internet site www.oecd.org/taxation)

Name of Country: Australia Date of profile: November 2006

No.	Item	Reference to and wherever possible text of the provisions; Wherever needed and possible, a translation into one of the OECD official languages would be welcome
1	Reference to the Arm's Length Principle	<p>Division 13 Income Tax Assessment Act 1936 - International agreements and determination of source of certain income</p> <p>SECTION 136AD ARM'S LENGTH CONSIDERATION DEEMED TO BE RECEIVED OR GIVEN</p> <p>136AD(1) [Supply of property: less than arm's length consideration]</p> <p>Where-</p> <p>(a) a taxpayer has supplied property under an international agreement;</p> <p>(b) the Commissioner, having regard to any connection between any 2 or more of the parties to the agreement or to any other relevant circumstances, is satisfied that the parties to the agreement, or any 2 or more of those parties, were not dealing at arm's length with each other in relation to the supply;</p> <p>(c) consideration was received or receivable by the taxpayer in respect of the supply but the amount of that consideration was less than the arm's length consideration in respect of the supply; and</p> <p>(d) the Commissioner determines that this subsection should apply in relation to the taxpayer in relation to the supply,</p> <p>then, for all purposes of the application of this Act in relation to the taxpayer, consideration equal to the arm's length consideration in respect of the supply shall be deemed to be the consideration received or receivable by the taxpayer in respect of the supply.</p> <p>136AD(2) [Supply of property: no consideration]</p> <p>Where-</p> <p>(a) a taxpayer has supplied property under an international agreement;</p> <p>(b) the Commissioner, having regard to any connection between any 2 or more of the parties to the agreement or to any other relevant circumstances, is satisfied that the parties to the agreement, or any 2 or more of those parties, were not dealing at</p>

arm's length with each other in relation to the supply;

(c) no consideration was received or receivable by the taxpayer in respect of the supply; and

(d) the Commissioner determines that this subsection should apply in relation to the taxpayer in relation to the supply,

then, for all purposes of the application of this Act in relation to the taxpayer, consideration equal to the arm's length consideration in respect of the supply shall be deemed to have been received and receivable by the taxpayer in respect of the supply at the time when the property was supplied or, as the case requires, any of the property was first supplied, or at such later time or times as the Commissioner considers appropriate.

136AD(3) [Acquisition of property: excessive consideration]

Where-

(a) a taxpayer has acquired property under an international agreement;

(b) the Commissioner, having regard to any connection between any 2 or more of the parties to the agreement or to any other relevant circumstances, is satisfied that the parties to the agreement, or any 2 or more of those parties, were not dealing at arm's length with each other in relation to the acquisition;

(c) the taxpayer gave or agreed to give consideration in respect of the acquisition and the amount of that consideration exceeded the arm's length consideration in respect of the acquisition; and

(d) the Commissioner determines that this subsection should apply in relation to the taxpayer in relation to the acquisition,

then, for all purposes of the application of this Act in relation to the taxpayer, consideration equal to the arm's length consideration in respect of the acquisition shall be deemed to be the consideration given or agreed to be given by the taxpayer in respect of the acquisition.

136AD(4) [Arm's length consideration: Commissioner's determination]

For the purposes of this section, where, for any reason (including an insufficiency of information available to the Commissioner), it is not possible or not practicable for the Commissioner to ascertain the arm's length consideration in respect of the supply or acquisition of property, the arm's length consideration in respect of the supply or acquisition shall be deemed to be such amount as the Commissioner determines.

2	Reference to the OECD Transfer Pricing Guidelines (if any)	Reference is made to relevant parts of the OECD Guidelines in the following Taxation Rulings: TR 94/14 (General concepts); TR 97/20 (Arm’s length pricing methodologies); TR 98/11 (Documentation); TR 1999/1 (Intra-group services); TR 2004/1 (Cost Contribution Arrangements)
3	Definition of related parties	None; Division 13 of the Income Tax Assessment Act 1936 applies to non-arm’s length dealing under an international agreement irrespective of whether or not the parties are related or associated.
4	Transfer pricing methods	Taxation Ruling TR 97/20 recognises 5 generally accepted arm’s length pricing methods: 1. “traditional transaction methods” – Comparable Uncontrolled Price (CUP) method, Resale Price method and Cost Plus method; and 2. “transactional profit methods” – Profit Split method and Transactional Net Margin Method. TR 97/20 does not prescribe any hierarchy for use of these methods; the method to be used should be the most appropriate to give the most reliable estimate of an arm’s length outcome given the facts and circumstances and availability of data as to comparable uncontrolled transactions.
5	Transfer pricing documentation requirements	Taxation Ruling TR 98/11 details the contemporaneous documentation taxpayers should keep to evidence their efforts to comply with the arm’s length principle. In general terms the documentation should evidence that the taxpayer has followed the following 4 step process in setting and reviewing its transfer prices: Step 1: Accurately characterise the international dealings between the associated enterprises in the context of the taxpayer’s business and document that characterisation; Step 2: Select the most appropriate transfer pricing methodology or methodologies and document the choice; Step 3: Apply the most appropriate method, determine the arm’s length outcome and document the process; and Step 4: Implement support processes. Install review process to ensure adjustment for material changes and document these processes. Documentation is “contemporaneous” if it is brought into existence when the taxpayer is developing or implementing any arrangement that might raise transfer pricing issues or when reviewing these arrangements prior to or at the time of preparing the relevant tax return.
6	Specific transfer pricing audit procedures and / or specific transfer pricing penalties.	Audit Procedures Taxation Ruling TR 98/11 sets out how the Australian Taxation Office reviews compliance with the arm’s length principle. In short, the ATO will follow the same 4 step process that it expects taxpayers to use to document their compliance. Before deciding

		<p>to proceed to a transfer pricing audit, the ATO conducts a transfer pricing review which considers:</p> <ol style="list-style-type: none"> 1. the quality of the taxpayer's processes; 2. the extent of relevant and adequate contemporaneous documentation; and 3. whether the outcome of the international dealings with associated enterprises provides a commercially realistic result for the taxpayer. <p>Penalties</p> <p>In summary, Section 225 of the Income Tax Assessment Act 1936 and Division 284 of the Tax Administration Act 1953 provide for the following penalties relevant to transfer pricing adjustments:</p> <ol style="list-style-type: none"> 1. 50% of the tax avoided for transfer pricing arrangements entered into with the sole or dominant purpose of enabling a taxpayer to pay no or less tax; reducing to 25% if the taxpayer has a reasonably arguable position; and 2. 25% of the tax avoided for other transfer pricing arrangements; reducing to 10% if the taxpayer has a reasonably arguable position. <p>The Commissioner has a discretion to remit all or part of such penalties. Taxation Rulings TR 98/11 and TR 98/16 provide that taxpayers who have in good faith followed the 4 step process as above in the preparation of their tax returns and kept sufficient and relevant contemporaneous documentation to show compliance with the arm's length principle will not be subject to the above penalties.</p>
7	<p>Relevant regulations on Advance Pricing Arrangements</p>	<p>Taxation Ruling TR 95/23 provides guidance on APAs and an overview of the APA process. The ATO has also published a brief guide outlining Australia's APA program.</p> <p>Any taxpayer with related party international transactions, agreements, arrangements or interests may apply for an APA. However, the ATO reserves the right not to accept an application into the APA program if, for example, the dealings to be covered by the APA are immaterial or merely hypothetical, or the transfer pricing methodology proposed is inconsistent with Australia's transfer pricing rules and unlikely to reflect an arm's length result.</p> <p>Australia encourages bilateral APAs wherever possible.</p> <p>A formal APA application must incorporate the proposed terms and conditions that would govern how the transfer pricing methodology is applied. There is no prescribed format for an APA application and no processing fees apply.</p> <p>Taxpayers considering applying for an APA should contact the Competent Authority to arrange a pre-lodgment meeting.</p>

8	Link to relevant Government Internet sites	www.ato.gov.au
9	Other relevant information	

Note

1. Relevant provisions of domestic legislation referring to the Arm's Length Principle.
2. Reference if any to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations in domestic legislation or regulations.
3. Relevant legislation or regulations containing a definition of related parties or associated enterprises.
4. Relevant legislation or regulations containing guidance on transfer pricing methods including hierarchy among them if any.
5. Relevant regulations if any in relation to transfer pricing documentation requirements.
6. Relevant regulations if any on specific transfer pricing audit procedures and / or specific transfer pricing penalties.
7. Relevant regulations if any on Advance Pricing Arrangements.
8. Addresses of the Internet sites of the relevant authorities in charge of transfer pricing policy, its administration and Advance Pricing Arrangements.
9. Other relevant information, for instance having gone through a peer review, or having new transfer pricing regulations in preparation.