

FOUNDATIONS OF TAXATION LAW 2022

14TH EDITION

Foundations of Taxation Law 2022 provides a clear and comprehensive introduction to the policy, principles and practice that underpin the Australian taxation system.

Designed as an introductory guide for law and business students as well as tax practitioners, the text blends policy issues, taxation theory, black letter law and commercial practice into a succinct general principles text.

Topics are presented in a logical and structured order and are cross-referenced to specific provisions in the legislation and relevant cases so that readers are able to easily find the source of the law. The text includes approximately 400 examples as well as dozens of diagrams and tables that condense the law and help clarify difficult concepts.

This edition has been substantially revised and restructured to take account of the many important legislative reforms, case law developments, administrative changes and policy announcements that have occurred over the last 12 months. It contains extensive analysis of both the October 2020 and May 2021 Budget measures, including discussion of the new tax rates, capital write-off, loss carry back, superannuation and R&D reforms.

New cases to this edition include: *FC of T v Bogiatto & Ors*, *Carter & Ors v FC of T*, *Coal of Queensland Pty Ltd v ISA*, *Dessent v FC of T*, *Eichmann v FC of T*, *FC of T v Healius Ltd*, *MWWD v FC of T*, *McCarthy v FC of T*, *Mussalli & Ors v FC of T*, *Norman v TPB*, *FC of T v Pike*, *FC of T v Rowntree & Ors*, *Virgin Australia Airlines Pty Ltd v FC of T* and *ZCSB v FC of T*.

Foundations of Taxation Law 2022 is designed to be used in conjunction with *Core Tax Legislation and Study Guide 2022* which contains extracts of legislative provisions.

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STEPHEN BARKOCZY

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FOREWORD TO THE FIRST EDITION

Foundations of Taxation Law is an impressively ambitious project impressively executed. The aim of the book is said in the preface to be to provide a ‘concise’ introduction to the policy, principles and practice of the Australian federal taxation system. Anyone acquainted with that system will appreciate how large and difficult a task that is. Stephen Barkoczy has brought to bear many years of teaching and practice in tax in the production of this substantial contribution to the literature on tax law, policy and practice in Australia. His teaching skills are evident in the exposition of complex and difficult issues in a systematic and clear language reflecting the kinds of questions which students might frequently have asked him. The text, however, is thoroughly informed by many years of practice and experience in tax law, policy and practice. The value of this book lies not only in its clarity and breadth of coverage. Readers will find throughout the book further references to pursue in more detail the many concepts and issues considered by the author. Teachers in taxation will undoubtedly find useful as a teaching tool both the text and the many detailed further references. They will also find particularly useful the study questions helpfully provided throughout the text at the end of various sections. They are designed to assist students in their understanding of the issues explained in the text and, as a teaching tool, will be very useful to the other teachers of taxation in Australia as a vehicle for discussion and application of principles.

It is particularly heartening to see a text of this kind directed to the student. There are many texts on tax law for practitioners designed, with varying degrees of success, to provide practical answers to difficult problems. Some publications for practitioners can do little more to assist the practitioner than gather together as much relevant information as possible and provide some statement of the law. *Foundations of Taxation Law* is directed to a different kind of enquiry, namely, that of the student wishing to understand what the rules are about. Tax law has developed over the years to become a complex system of many interacting rules. The complexity and size of the rules makes its teaching as a system a difficult task. The practitioner consulting a practice text or commentary may be presumed to have sufficient knowledge before looking up the text. For the student the task is different and more difficult. It is that enterprise that Stephen Barkoczy has undertaken with impressive results in this text.

On a personal note, it is particularly gratifying that this text should be written by one’s own former student of many years ago. The text is a great credit to the author and I commend it to students of taxation in Australia.

The Hon. Tony Pagone QC

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PREFACE

AIMS AND OBJECTIVES

Taxation law is a vast and complex area of law that is continually evolving. As a consequence, it can be an overwhelming and challenging subject to study and research. The aim of this book is to provide a concise introduction to the policy, principles and practice that underpin the Australian taxation system. The book focuses on the key components covered in many introductory and advanced taxation law courses studied at Australian universities. It is designed to be used by undergraduate and postgraduate students as well as students undertaking professional qualifications with accounting bodies, law societies and the Taxation Institute of Australia. The book is also intended to serve as a general reference guide for taxation academics and researchers, as well as practising lawyers and accountants who require a succinct and user-friendly explanation of fundamental taxation law concepts.

CONTENT AND STRUCTURE

The main emphasis of the book is on Commonwealth taxes, particularly income tax, goods and services tax, fringe benefits tax and superannuation taxes. It also examines various state and territory taxes, as well as a number of levies and charges. The book is divided into 15 parts containing 45 chapters. The more fundamental material is covered in the earlier chapters, so that students who are undertaking basic courses are able to focus on those chapters. Students who are undertaking advanced courses, on the other hand, will have more use for the later chapters, which are more specialised and deal with more technically complex issues.

To make the book more accessible to readers, I have adopted the approach of focusing on general principles. My objective is to provide a broad overview of the foundations of the taxation system rather than an exhaustive explanation of all its intricate principles and exceptions. In this regard, I have been selective in the topics covered and have intentionally divided them into ‘consumable chunks’ that can be easily digested by a reader. At the same time, I have tried to ensure that the book addresses most areas of general importance and does not over-simplify the law or skirt around harder issues. The book is therefore more comprehensive than many other introductory guides and goes into deeper detail on several topics. I have purposely tackled difficult areas of law that I believe are of significant practical importance and are not always adequately covered in other general textbooks. For instance, the book has chapters dealing with topics such as superannuation, employee share schemes, consolidated groups, special entities, investment incentives, international taxation, Double Taxation Agreements, accruals taxation and the taxation of financial transactions. Although these areas are outside the scope of most basic tax courses, they are important for advanced courses and are critical for obtaining a broad understanding of the Australian taxation regime. They are also particularly important areas for academics and practitioners.

While the book does not purport to provide a complete picture of Australia’s tax laws, it covers a lot of ground, including discussion of many hundreds of legislative provisions, cases and rulings. The discussion in the chapters should serve as a solid set of principles around which readers can

progressively build their general understanding of the law. The discussion should also provide a useful road map for navigating the complex web of interconnected provisions in the tax legislation and for making sense of the extensive body of case law in the field. Hopefully, by using this book, readers will be able to tread more confidently through the tax law maze and be able to better ‘see the wood for the trees’.

The book is the product of many years of researching, practising and lecturing in the field of taxation law, and it undoubtedly demonstrates my own biases about what I think is important for students, academics and practitioners to understand about the subject. I have tried to blend policy issues, taxation theory, technical ‘black letter law’ and commercial practice into a succinct, principled text. Although the book is primarily a legal text, it does not focus exclusively on legal issues. The discussion in the chapters also touch on a wide range of social, economic, political and international comparative issues. Taxation law, perhaps more than any other area of law, is affected by these broader considerations, and I firmly believe that it needs to be approached with these perspectives in mind.

In writing the book, I have been conscious of the pressures placed on students and practitioners who have to grapple with large amounts of complex information located in different places in short time frames. For this reason, I have not only endeavoured to write succinctly and directly, but I have also tried to develop topics in a logical and structured order from the ground up. In this regard, I have tried to clearly signpost and break up core concepts into their constituent elements. I have also cross-referenced the discussion in the topics to specific provisions in the legislation and relevant cases so that readers are able to easily find the source of the law. The book is peppered with examples, diagrams and tables that condense the law and help clarify difficult concepts. It has been designed to be used in conjunction with *Core Tax Legislation and Study Guide* (which contains extracts of the legislative provisions covered in the book) and the *Australian Tax Casebook* (which contains detailed summaries of the cases covered in the book).

STUDY QUESTIONS AND ADDITIONAL REFERENCES

To assist students with their exam preparation, the book contains a set of study questions at the end of each chapter linked to the specific topics covered in that chapter. The questions test fundamental issues that students need to understand in order to properly grasp key concepts. They can also be used by lecturers as a basis for tutorial discussions. The questions have been designed in such a way that they examine core issues from both a practical (calculation and problem-based) perspective as well as a conceptual (theoretical and policy-based) perspective.

In addition, to help students conduct research for their assignments and essays, I have included, at the end of each chapter, a set of references to selected books, articles, government reports and taxation rulings. These references should serve as a solid platform for commencing further research in particular subject areas.

ADDITIONAL RESOURCES FOR LECTURERS (SLIDES AND SOLUTIONS)

A special feature of the book is that it is supported by more than 1,000 PowerPoint slides that are directly cross-referenced to topics covered in the chapters. The slides are designed to serve as a handy teaching and learning aid for distilling the key points covered in the topics and can be edited by lecturers to meet their specific needs. There are also solutions to the study questions in the book (which have been independently prepared by Toni Brackin). The slides and solutions are available free of charge to lecturers who use the book from their Cambridge University Press sales consultant.

CHANGES IN THE FOURTEENTH EDITION

This book has evolved considerably over the years. The fourteenth edition has undergone considerable restructuring and has been substantially revised to take account of many important legislative reforms, case law developments, administrative changes and policy announcements that have occurred over the last 12 months. In particular, it includes extensive analysis of the 2020 and 2021 Budget measures introduced by the Government to deal with the economic effects of the coronavirus pandemic. The book includes discussion of the new tax rates, tax offsets, capital write-off concessions, granny flat exemption, loss-carry back rules, superannuation reforms and R&D tax concessions. It also contains discussion of many additional cases, including recent decisions such as *FC of T v Bogiatto & Ors*; *Carter & Ors v FC of T*; *Coal of Queensland Pty Ltd v Innovation and Science Australia*; *Dessent v FC of T*; *Eichmann v FC of T*; *FC of T v Healius Ltd*; *MWWD v FC of T*; *McCarthy v FC of T*; *Mussalli & Ors v FC of T*; *Norman v Tax Practitioners Board*; *FC of T v Pike*; *FC of T v Rowntree & Ors*; *Virgin Australia Airlines Pty Ltd v FC of T*; and *ZCSB v FC of T*. There is also expanded policy and technical discussion on several areas of law as well as many new and updated examples and questions. Unless otherwise stated, the chapters in the book are generally based on the law in force as at 1 August 2021. There is, however, also discussion of some important recent developments, such as the High Court decision in *Addy v FC of T* handed down on 3 November 2021.

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Stephen Barkoczy
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KEY TO ABBREVIATIONS

A\$	Australian dollars
AAT	Administrative Appeals Tribunal
ABA	Additional Benefits Agreement
ABLR	<i>Australian Business Law Review</i>
ABN	Australian Business Number
AC	Appeal Cases (House of Lords)
ACA	Allocable cost amount
ACC	Australian Crime Commission
ACCU	Australian carbon credit unit
ACNC	Australian Charities and Not-for-profits Commission
ADF	Approved deposit fund
ADI	Authorised deposit-taking institution
ADJRA	<i>Administrative Decisions (Judicial Review) Act 1977</i>
AFC	Applicable functional currency
AFCA	Australian Financial Complaints Authority
AFM	Available fraction method
AFOF	Australian fund of funds
AFP	Australian Federal Police
AFTS	Australia's Future Tax System
AGD	Attorney-General's Department
AGIS	Attorney-General's Information Service
AGS	Australian Government Solicitor
AJCL	<i>Australian Journal of Corporate Law</i>
ALJ	<i>Australian Law Journal</i>
All ER	All England Law Reports
AMIT	Attribution managed investment trusts
AMLCTFA	<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>
AMLCTFR	<i>Anti-Money Laundering and Counter-Terrorism Financing Rules</i>
ANTS	A New Tax System
APA	Advance pricing arrangement
APAIS	Australian Public Affairs Information Service
APRA	Australian Prudential Regulation Authority
APTB	<i>Asia-Pacific Tax Bulletin</i>
ASIC	Australian Securities and Investments Commission
ASX	Australian Securities Exchange
AT	Australian Tax
AT Rev	<i>Australian Tax Review</i>
ATC	Australian Tax Cases
ATD	Australian Tax Decisions
ATF	<i>Australian Tax Forum</i>

ATI	Adjusted tainted income
ATO	Australian Taxation Office
AUSTRAC	Australian Transaction Reports and Analysis Centre
BAS	Business Activity Statement
BCT	Business continuity test
BEPS	Base erosion and profit shifting
BIFD	<i>Bulletin for International Fiscal Documentation</i>
BIT	<i>Bulletin for International Taxation</i>
BTO	Beneficiary tax offset
BTWG	Business Tax Working Group
CA	<i>Customs Act 1901</i>
CFC	Controlled foreign corporation
CFE	Controlled foreign entity
CGC	Commonwealth Grants Commission
CGT	Capital gains tax
CLR	Commonwealth Law Reports
COAG	Council of Australian Governments
COT	Continuity of ownership test
CPB	Capital protected borrowing
CPI	Consumer Price Index
CR	Class Ruling
CRS	Common reporting standard
CSLJ	<i>Company and Securities Law Journal</i>
CTA	<i>Customs Tariff Act 1995</i>
DASP	Departing Australia superannuation payment
DBTP	Death benefit termination payment
DIS	Decision Impact Statement
DPP	Director of Public Prosecutions
DPT	Diverted profits tax
DTA	Double Taxation Agreement
EA	<i>Excise Act 1901</i>
ECCC	Excess concessional contributions charge
ECCT	Excess concessional contributions tax
EDCI	Eligible designated concession income
eJTR	<i>eJournal of Tax Research</i>
ENCCT	Excess non-concessional contributions tax
ERF	Emissions Reduction Fund
ESIC	Early stage innovation company
ESS	Employee share scheme
ESVCLP	Early stage venture capital limited partnership
ETA	<i>Excise Tariff Act 1921</i>
ETBT	Excess transfer balance tax
ETP	Employment termination payment
ETS	Emissions trading scheme
EU	European Union
EVCII	Eligible venture capital investment
FATCA	<i>Foreign Account Tax Compliance Act</i>
FBT	Fringe benefits tax

FBTA	<i>Fringe Benefits Tax Act 1986</i>
FBTAA	<i>Fringe Benefits Tax Assessment Act 1986</i>
FBTACA	<i>Fringe Benefits Tax (Application to the Commonwealth) Act 1986</i>
FC of T	Federal Commissioner of Taxation
FCR	Federal Court Reports
FDT	Franking deficit tax
Fed LR	<i>Federal Law Review</i>
FIF	Foreign investment fund
FITO	Foreign income tax offset
FLA	<i>Family Law Act 1975</i>
FLP	Foreign life assurance policy
FMD	Farm Management Deposit
FRE	Forex realisation event
FRG	Forex realisation gain
FRL	Forex realisation loss
FTC	Foreign tax credit
G20	Group of 20 Finance Ministers and Central Bank Governors
GDP	Gross domestic product
GFC	Global financial crisis
GIC	General interest charge
GST	Goods and services tax
GSTA	<i>A New Tax System (Goods and Services Tax) Act 1999</i>
GSTD	Goods and Services Tax Determination
GSTICA	<i>A New Tax System (Goods and Services Tax Imposition—Customs) Act 1999</i>
GSTIEA	<i>A New Tax System (Goods and Services Tax Imposition—Excise) Act 1999</i>
GSTIGA	<i>A New Tax System (Goods and Services Tax Imposition—General) Act 1999</i>
GSTR	Goods and Services Tax Ruling
GSTTA	<i>A New Tax System (Goods and Services Tax Transition) Act 1999</i>
HELP	Higher Education Loans Program
HESA	<i>Higher Education Support Act 2003</i>
HFE	Horizontal fiscal equalisation
IAS	Instalment Activity Statement
ICIJ	International Consortium of Investigative Journalists
ID	Interpretative Decision
IGT	Inspector-General of Taxation
IGTO	Inspector-General of Taxation and Taxation Ombudsman
IMF	International Monetary Fund
IMR	Investment manager regime
IPO	Initial public offering
IRDA	<i>Industry Research and Development Act 1986</i>
IRS	Internal Revenue Service
ISA	Innovation and Science Australia
IT	Income Tax Ruling
ITA	<i>Income Tax Act 1986</i>
ITAA22	<i>Income Tax Assessment Act 1922</i>
ITAA36	<i>Income Tax Assessment Act 1936</i>
ITAA97	<i>Income Tax Assessment Act 1997</i>
ITAR15	<i>Income Tax Assessment (1936 Act) Regulation 2015</i>

ITAR21	<i>Income Tax Assessment (1997 Act) Regulations 2021</i>
ITC	Input tax credit
ITDIRWTA	<i>Income Tax (Dividends, Interest and Royalties Withholding Tax) Act 1974</i>
ITRA	<i>Income Tax Rates Act 1986</i>
ITTPA	<i>Income Tax (Transitional Provisions) Act 1997</i>
ITZ	Indirect tax zone
JAT	<i>Journal of Australian Taxation</i>
JATTA	<i>Journal of the Australasian Tax Teachers Association</i>
JBFLP	<i>Journal of Banking and Finance Law and Practice</i>
JITSIC	Joint International Tax Shelter Information Centre
L&I	<i>Labour and Industry</i>
LBTP	Life benefit termination payment
LCBTO	Loss carry back tax offset
LCR	Law Companion Ruling
LCT	Luxury car tax
LCTA	<i>New Tax System (Luxury Car Tax) Act 1999</i>
LCTICA	<i>A New Tax System (Luxury Car Tax Imposition—Customs) Act 1999</i>
LCTIEA	<i>A New Tax System (Luxury Car Tax Imposition—Excise) Act 1999</i>
LCTIGA	<i>A New Tax System (Luxury Car Tax Imposition—General) Act 1999</i>
LIC	Listed investment company
LITO	Low-income tax offset
LLC	Limited liability company
LTBR	Long-term bond rate
MAP	Mutual agreement procedure
MBLA	<i>Major Bank Levy Act 2017</i>
MEC	Multi-entry consolidated
MIS	Managed investment scheme
MIT	Managed investment trust
ML	Medicare levy
MLA	<i>Medicare Levy Act 1986</i>
MLI	<i>Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting</i>
MLS	Medicare levy surcharge
MLSFBA	<i>A New Tax System (Medicare Levy Surcharge—Fringe Benefits) Act 1999</i>
MNE	Multinational enterprise
MRRT	Minerals resource rent tax
MRRTA	<i>Minerals Resource Rent Tax Act 2012</i>
MT	Miscellaneous Taxation Ruling
MULR	<i>Melbourne University Law Review</i>
NAI	Notional attributable income
NFRC	National Federation Reform Council
NRAS	National Rental Affordability Scheme
NZJTL	<i>New Zealand Journal of Taxation Law and Policy</i>
NZLR	New Zealand Law Reports
OBU	Offshore banking unit
OECD	Organisation for Economic Cooperation and Development
OECD MTC	<i>OECD Model Tax Convention on Income and on Capital</i>
PAYG	Pay As You Go

PDF	Pooled development fund
PDV	Post, digital and visual
PE	Permanent establishment
<i>PILR</i>	<i>Pace International Law Review</i>
PR	Product Ruling
PRRT	Petroleum resource rent tax
<i>PRRTAA</i>	<i>Petroleum Resource Rent Tax Assessment Act 1987</i>
<i>PRRTICA</i>	<i>Petroleum Resource Rent Tax (Imposition—Customs) Act 2012</i>
<i>PRRTIEA</i>	<i>Petroleum Resource Rent Tax (Imposition—Excise) Act 2012</i>
<i>PRRTIGA</i>	<i>Petroleum Resource Rent Tax (Imposition—General) Act 2012</i>
PS LA	Practice Statement Law Administration
PSB	Personal services business
PSE	Personal services entity
PSI	Personal services income
PST	Pooled superannuation trust
PTG	Policy Transition Group
QAPE	Qualifying Australian production expenditure
QFA	Qualifying forex account
R&D	Research and development
RBA	Running balance account
RBL	Reasonable benefit limit
RBT	Review of Business Taxation
<i>Rev LJ</i>	<i>Revenue Law Journal</i>
RPS	Redeemable preference shares
RSA	Retirement savings account
<i>RSAA</i>	<i>Retirement Savings Accounts Act 1997</i>
<i>RSAR</i>	<i>Retirement Savings Account Regulations 1997</i>
RSE	Registrable superannuation entity
RSPT	Resource super profits tax
SAM	Simplified accounting method
SAPTO	Seniors and pensioners tax offset
SBE	Small business entity
SBSCH	Small Business Superannuation Clearing House
SBT	Same business test
SCD	Superannuation Contributions Determination
SCR	Superannuation Contributions Ruling
<i>SECCCA</i>	<i>Superannuation (Excess Concessional Contributions Charge) Act 2013</i>
<i>SENCCTA</i>	<i>Superannuation (Excess Non-Concessional Contributions Tax) Act 2007</i>
<i>SETBTIA</i>	<i>Superannuation (Excess Transfer Balance Tax) Imposition Act 2016</i>
SG	Superannuation guarantee
<i>SGAA</i>	<i>Superannuation Guarantee (Administration) Act 1992</i>
SGC	Superannuation guarantee charge
<i>SGCA</i>	<i>Superannuation Guarantee Charge Act 1992</i>
<i>SGCLIEA</i>	<i>Superannuation (Government Co-contribution for Low Income Earners) Act 2003</i>
SGD	Superannuation Guarantee Determination
SGR	Superannuation Guarantee Ruling
SHASA	Superannuation Holding Account Special Account
<i>SISA</i>	<i>Superannuation Industry (Supervision) Act 1993</i>

SISR	<i>Superannuation Industry (Supervision) Regulations</i>
SJLS	<i>Singapore Journal of Legal Studies</i>
SME	Small and medium sized enterprise
SMSF	Self-managed superannuation fund
SMSFR	Self-Managed Superannuation Funds Ruling
SR (NSW)	State Reports (New South Wales)
SSA	<i>Social Security Act 1991</i>
SSRN	Social Science Research Network
SSSCCIA	<i>Superannuation (Sustaining the Superannuation Contribution Concession) Imposition Act 2013</i>
STP	Single touch payroll
Syd LR	<i>Sydney Law Review</i>
TAA	<i>Taxation Administration Act 1953</i>
TAR17	<i>Taxation Administration Regulations 2017</i>
Tax Spec	<i>Tax Specialist</i>
TBRL	Temporary budget repair levy
TCSA	Tax cost setting amount
TD	Taxation Determination
TFN	Tax file number
TIA	<i>Taxation in Australia</i>
TIEA	Tax Information Exchange Agreement
TLIP	Tax Law Improvement Project
TNI	<i>Tax Notes International</i>
TOFA	Taxation of financial arrangements
TR	Taxation Ruling
TSA	Tax sharing agreement
UN	United Nations
UN MTC	United Nations <i>Model Tax Convention Between Developed and Developing Countries</i>
UNSWLJ	<i>University of New South Wales Law Journal</i>
US MTC	United States <i>Model Income Tax Convention</i>
UWALR	<i>University of Western Australia Law Review</i>
VAT	Value added tax
VCA	<i>Venture Capital Act 2002</i>
VCLP	Venture capital limited partnership
VCMP	Venture capital management partnership
WET	Wine equalisation tax
WETA	<i>New Tax System (Wine Equalisation Tax) Act 1999</i>
WETICA	<i>A New Tax System (Wine Equalisation Tax Imposition—Customs) Act 1999</i>
WETIEA	<i>A New Tax System (Wine Equalisation Tax Imposition—Excise) Act 1999</i>
WETIGA	<i>A New Tax System (Wine Equalisation Tax Imposition—General) Act 1999</i>

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