# AUSTRALIAN TAX REVIEW

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**TOFA: The unfinished agenda** – *Richard Krever*

Financial arrangements have played an important role in commercial transactions since long before the adoption of Commonwealth income taxation in Australia. The ad hoc, inconsistent and often arbitrary tax rules that apply to them cause considerable confusion and add greatly to complexity. Commercial enterprises hoped the proposal for a comprehensive TOFA (taxation of financial arrangements) regime announced 17 years ago would bring an end to continuous change and complexity. The first two tranches of TOFA reforms failed comprehensively to achieve this aim and tranche three, scheduled to be implemented this year, also looks destined to fail. Rules to deal with embedded debt, discounted instruments, finance leases, foreign exchange gains and losses, and tax minimisation schemes that promise borrowers the ability to deduct loan principals look to be inadequately designed and poorly drafted. Complexity and confusion may be exacerbated, not reduced, by the changes. ..... 91

**Undoing a trustee's mistake** – *A H Slater QC*

This article examines the alternatives available to an adviser when confronted with an apparently disastrous action taken by trustees. Because the action concerned is usually an act at law (as distinct from a physical act such as accidentally burning papers), a solution is often found in examining: whether the act really happened; whether what was done had the apprehended legal effect; whether if otherwise effective it can be undone. As always, the best solution is more care – and more understanding – beforehand. ..... 110

**International taxation of cross-border equipment leasing** – *Mark Brabazon*

Australia's tax and treaty rules for taxing cross-border equipment leasing have developed opportunistically, but with consistent preference for the taxing rights of source countries. The decision in McDermott Industries that mere leasing can give rise to a substantial equipment PE is orthodox and consistent with treaty policy and history. It confirms that source taxation applies to equipment leasing under most Australian treaties if the equipment is "substantial". Without a PE, most cross-border equipment leasing is subject to more-than-single taxation under gross basis royalty withholding; the deemed PE avoids this, but attracts collateral problems of compliance and international consistency. Analysis of current and historical tax rules and treaties suggests that these problems can be ameliorated by changes in treaty policy focusing on differential withholding rates and/or election between source taxation and split taxation. ..... 127

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