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TAX LAWYERS

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Australian Case update

Treaty shopping & Coca-Cola royalty disputes

Australia's first "treaty shopping" case is understood to have been filed in the Federal Court. It disputes the inclusion of more than AUD$4bn in income, and the levying of interest of about a quarter of a billion dollars. It appears to involve companies associated with the European Vitol petrolium group and the Abu Dhabi Investment Council. This will be a significant precendent if it proceeds to trial. And Coca-Cola finds itself in a similar situation to PepsiCo, a dispute with the ATO over distributor payments.

A. Treaty shopping: Vitol

Part 1 - Background

In February 2014, Royal Dutch Shell agreed to sell its Australian downstream business — excluding aviation — to a consortium of the oil trader Vitol and the Abu Dhabi Investment Council for about A$2.9 billion. The deal completed in August 2014, when the business was launched as Viva Energy Australia. It comprised Shell's Geelong refinery and an 870-site retail network together with its bulk fuels, bitumen, chemicals and part of its lubricants businesses. Viva retained the right to sell Shell-branded products under licence.

Vitol, is a Swiss-based Dutch energy and commodity trading group founded in Rotterdam in 1966, operating from more than 40 offices worldwide and privately held by around 400 employee-partners. It ships more than 350 million tonnes of crude oil a year and handles over 7.3 million barrels a day of oil and products. It has been involved in a number of global controversies.

In 2016, ahead of the operating company's own public float, Viva Energy carved out its service-station property portfolio in a sale-and-leaseback and listed it separately as Viva Energy REIT (Real Estate Investment Trust) ,now Waypoint REIT. That REIT listed on the ASX on 3 August 2016 at $2.20 per security, implying a market capitalisation of about $1.5 billion, as Australia's only listed REIT owning solely service stations. Viva Energy retained a minority interest and leased the sites back, remaining the dominant tenant, and later sold its 35.5% stake to Charter Hall and Charter Hall Long WALE REIT in February 2020. The trust was later renamed Waypoint REIT. The operating business was floated two years after the REIT.

Viva Energy Group Limited (VEGL) debuted on the ASX on 13 July 2018, raising about A$2.6 billion in Australia's biggest IPO in nearly four years. The stock opening at $2.43 against a $2.50 issue price and valuing the company at about $4.7 billion. The consortium (Vitol Investment Partnership Limited, Jersey) retained ~45%, holding through the Netherlands company Viva Energy B.V., which was the registered holder and the disposer of the Australian shares. The float ranked as the largest oil and gas IPO globally in 2018 and one of the largest non-privatisation IPOs in Australian history.

Part 2 — The court actions

There are four related Federal Court proceedings (Victoria Registry) which involve the same two foreign group members. Two are income tax appeals against substantive assessments — Vitol Investment Partnership Limited v Commissioner of Taxation (VID1201/2025) and VIP Holding S.à r.l. v Commissioner of Taxation (VID1200/2025); each names the Commissioner alone (the form a Part IVC appeal takes), and the documents are not presently publicly available. Two are judicial review challenges to the shortfall interest charge (SIC) — VIP Holding S.à r.l. v Andrew Orme & Anor (VID1255/2025) and Vitol Investment Partnership Limited v Andrew Orme & Anor (VID1256/2025), filed 19 September 2025.

The SIC proceedings establish: an amended assessment for the year ended 30 June 2019, issued 1 May 2024. SIC of $271,409,526.53 was imposed.; partial remission to $207,730,398; and a decision of 26 August 2025 refusing further remission. This decision has been challenged on administrative-law grounds (failure to weigh audit delay, irrelevant considerations, inflexible application of PS LA 2006/8). The ATO's internal paper is headed "VIP Energy Australia B.V. and related entities." We understand that the primary assessments raise taxable income of just over $4 billion, also in relation to the 2019 year.

Part 3 — The treaty issue

The case has been described informally as a "treaty shopping" case. This note considers the facts that might fit such a description and reconciles them with the available public information.

Only very limited court filings by the parties are available for review at this time. The material that follows considers public information to try to identify the possible nature of the treaty dispute.

Evidence available

In a Pre-IPO Restructure, Viva Energy Group Limited ("VEGL" the Listco) acquired all the shares in Viva Energy Holding (the Australian operating company) from Viva Energy B.V. (Netherlands) for VEGL shares plus a Promissory Note satisfied out of the Offer proceeds. This was a disposal by a Netherlands resident of shares in an Australian company, for scrip plus cash The assessed year (YE 30 June 2019) captures the July 2018 listing. This appears to be the event giving rise to the assessments.

The prospectus describes Viva Energy B.V. as "an indirectly wholly owned subsidiary of Vitol Investment Partnership," and refers to "Vitol Investment Partnership (through Viva Energy B.V.)" The 2018 substantial-holder notices name the holding group as Viva Energy B.V. (NL, registered holder), Viva Energy Holding S.à r.l. and VIP Holding S.à r.l. (Luxembourg), Vitol Investment Partnership Limited (Jersey), Vitol Holding S.à r.l. (Switzerland) and Vitol Holding B.V. (NL).

A parallel substantial-holder notice records Abu Dhabi Investment Council and Portman Limited holding the same parcel through the same registered holder (Viva Energy B.V.) The holding appears to be a roughly 50/50 Vitol/Abu Dhabi consortium, consistent with the 2014 acquisition reporting.

Surplus real property was transferred out of the Viva Energy Group to a subsidiary of Viva Energy B.V. outside the group, in part by dividend.

On the available material this was a transfer and (at least in part) leaseback, rather than an outright exit of the land's use. Australian tax treaties preserve

Australia's right to tax "land rich" companies (Division 855). While this step might have the effect of reducing the value of "land" assets in the group, it does not seem the ATO has taken issue with it.

The entities assessed and appealing (VID1200/1201) are the non-treaty Luxembourg and Jersey companies; the Netherlands disposer (the BV) is not a party, though it heads the Australian Taxation Offices "related entities" group).

Australia has comprehensive treaties with the Netherlands and Switzerland, but not with Luxembourg or Jersey.

On the facts above, the gain was legally derived by the BV, the Netherlands disposer. Assuming BV was not "land rich", any gain it made would likely be protected as a business profit under article 7, with no PE. If the Commissioner's only complaint were the real-property step (a Division 855 / principal-asset test point), the natural assessment would be on the BV. It has not landed there. The liabilities sit on the non-treaty Luxembourg and Jersey entities. To reach them, the Commissioner must re-attribute the BV's gain up the chain, presumably using our GAAR, Part IVA, since the Australia/Netherlands treaty lacks a "treaty abuse clause" at that time and the MLI had not yet commenced operation. If the ATO is successful in this matter, the risk is likely to be even greater in future matters where the MLI treaty abuse language and our Diverted Profits Tax are in focus.

It seems likely, then, that this is the focus of the "treaty shopping issue". The choice of taxpayer to assess is itself the indication that the Commissioner is running a treaty-denial argument.

Possible case theory

If the case is treaty denial, the Commissioner must identify the basis on which he re-attributes the BV's gain.

If he were to argue Part IVA (the BV was interposed; but for it the gain is a non-treaty owner's), the Commissioner must still prove a s 177C tax benefit against a s 177CB counterfactual, and the counterfactual must be assessed against each investor group.

In the case of the Vitol group, the group's alternative upstream holders may themselves be treaty-resident — Vitol Holding B.V. (Netherlands) and Vitol Holding S.à r.l. (Switzerland). So a realistic alternative to the BV holding the Vitol interest may also be a treaty resident, leaving little or no incremental Australian tax and undercutting the benefit. To be effective for the Commissioner, the treaty-denial theory has to assume a non-treaty counterfactual holder, and for the Vitol portion the evidence of their structure would seem to make that difficult.

In the case of the Abu Dhabi interests, the position is less clear. The substantial-holder notices establish that an Abu Dhabi interest (Abu Dhabi Investment Council and Portman Limited) co-invested through the same registered holder, Viva Energy B.V., but the jurisdiction of Portman Limited and of the holding line above the BV for that interest is not ascertainable from the public sources.

If the Abu Dhabi interest was held through a non-treaty vehicle then the realistic counterfactual holder is itself non-treaty, which supplies the Commissioner the non-treaty counterfactual the Vitol analysis may deny him.

It is worth noting that a genuine 2014 consortium vehicle holding a single strategic asset for four years through a substantive Rotterdam company is not the classic thin conduit, and the conduit doctrine is far from settled in Australia.

If the arguments proceed on this basis, it will be interesting to see the Commissioner's approach to the argument that the Vitol group might have otherwise simply used another treaty entity. It may involve denying this was possible because of the needs of the Abu Dhabi "joint venturers".

For completeness: if Viva Energy Holding had been land-rich and the disposal was of the direct Australian company, Article 13 of the Australia–Netherlands treaty as extended by s 3A of the International Tax Agreements Act 1953 preserves Australia's taxing right. The domestic law applies and the treaty shields nothing, and there would simply be an assessment of BV.

The treaty only shelters a non-TARP gain on revenue account, shielded by the

Business Profits article (Article 7) absent a PE.

This note is general information based on the court filings and public sources, not legal advice. The substantive basis of the actions is not disclosed in any document we hold, and the court file is not accessible to us.

B. ATO attacks on "no royalty" distribution arrangements — what PepsiCo and Coca-Cola tell us

The ATO has issued assessments to The Coca-Cola Company for the years 2014-2017 (Part IVA, our GAAR) and 2018-2019 (Diverted Profits Tax assessments). DPT was not available to the ATO in the earlier years. The Federal Court filings available for the earlier years do not contain "tax benefit" numbers that allow us to calculate the tax at stake. In relation to the later two years, the total Diverted Profits Tax was just over AU$170m, implying a "tax benefit", or adjustment to income of just under half a billion Australian dollars. It is important to note that if the ATO had argued that Coca-Cola simply failed to pay withholding tax on a "hidden" royalty to TCCC the liability would have been about AU$11m. The difference gives Coca-Cola a strong motivation to defend the assessments. It has done so by arguing that the conditions for Part IVA/DPT do not exist, but also (interestingly) that our transfer pricing rules should be the sole determinant of such issues.

In its pleadings it argues that there is an extensive history and an industry practice of not charging the bottler for IP use, and that this supports a view the structure was not designed to avoid Australian tax. While there are some group agreements for products where a royalty is charged, these are minor parts of the business and fundamentally different products.

In relation to the earlier Part IVA years the adjustment is likely to be only the amount of the "unpaid" withholding tax, together with substantial penalties. So, substantially less than the DPT years.

Both the PepsiCo case and the ongoing Coca-Cola dispute involve the same basic target: arrangements where a distributor pays a price for goods (concentrate, in both cases), and is separately given the right to use valuable trademarks and know-how. But where no royalty is charged for that use of IP. The IP access is necessary in order for the distributor to be able to conduct the business of creating bottles in the trade marked shape, bearing the logos of the IP owner. The price paid is explicitly said to be for the goods alone.

How the ATO initially attacked Coca-Cola, and how that has changed

In PepsiCo, the ATO argued the price paid for concentrate wasn't just for concentrate. It said that on a proper reading of the contracts part of the consideration was legally a consideration for use of the IP, and therefore a royalty. Withholding tax was then payable. Or, alternatively, the anti-avoidance provisions could recast part of the payment to be a royalty. The Full Federal Court and then the High Court rejected these arguments, with key findings on the evidence being that the price had genuinely been fixed as a price for goods alone, and the absence of a contention that the price for goods was excessive.

Coca-Cola commenced while PepsiCo was still awaiting its first judgement. After the final High Court decision in PepsiCo was handed down, the ATO changed direction and amended its pleadings. It is no longer arguing that a proper reading of the contracts means part of the price is legally a royalty. Instead, it is arguing the price paid for concentrate was too high, inflated above what an unrelated buyer would pay for the goods themselves, with the excess representing indirect payment for the IP. It is no longer about contract interpretation, but is an argument based on expert valuation evidence. It is not a dispute about transfer pricing under the transfer pricing provisions of the tax act, but similar economic evidence will be relevant. It is relying on the general GAAR (in the earlier years) and the DPT provisions in our GAAR (later 2 years) to argue that the amount attributable to the use of IP is a "tax benefit" which can be adjusted under Part IVA, and taxed under the DPT.

Both types of attack remain available to the ATO in future cases. The PepsiCo result doesn't close off either avenue, it simply means the ATO lost on the particular facts of that case, on the first type of attack.

The calculation of the claimed royalty, and evidence this is not an Australian one-off

Although we do not yet have all the evidence that is before the court in Coca-Cola, we reasonably estimate that in both cases the numbers the ATO puts forward for the "true" royalty are broadly similar. In the order of high-single-digit percentages of revenue, or somewhere around 28-30% of what's paid for the goods themselves. We might expect a similar picture when we see numbers for the earlier years.

This is not a type of dispute that is peculiar to Australia. Coca-Cola itself refers to the US Internal Revenue Service work which ran essentially the same style of attack against Coca-Cola's global concentrate pricing for 2007-2009, and won a US Tax Court judgment for roughly US$2.7 billion in tax plus US$3.3 billion in interest. The IRS's methodology potentially exposing a further US$14 billion across 2010-2025 if applied to later years. That decision has been appealed. Notably, the ATO's own expert in the Australian proceedings, Dr Brian Becker, also appeared as an expert witness for the IRS in that US litigation, although he does not appear to have been the key witness for the primary methodology the US court ultimately relied on. Taken together, this suggests Coca-Cola's global concentrate-pricing structure is under scrutiny from revenue authorities in more than one jurisdiction and payments (or lack thereof) for IP use are topical.

Why PepsiCo won, and whether Coca-Cola has the same protection

The key conclusions on the evidence that led to PepsiCo's win were:

- The price was found to be genuinely fixed for the goods alone, with no evidence it was inflated.
- The arrangement was between genuinely unrelated commercial parties, dealing at arm's length.
- Not charging a royalty was the ordinary, established way this business model had been conducted internationally.

Coca-Cola's position differs slightly on the second point. There is a meaningful shareholding link between the trademark owner and the local distributor. It may still be able to establish the parties were "acting at arm's length". The first and third points are being disputed using expert valuation evidence.

There is an interesting conclusion in the US litigation that touches on the third point. The US court appeared to accept evidence indicating that bottlers using TCCC's trademarks for free, without a separate royalty, was simply the ordinary and unremarkable state of affairs and did not lead to a conclusion of underpayment. The evidence was in relation to the question of whether the profit levels of the bottlers were relevant to a CPM calculation for the "supply points" (the concentrate manufacturers). The court held it was, with one factor being that both bottler and supply point had similar levels of access to TCCC intangibles. And in fact using the bottlers as a comparable may slightly overstate the profit permitted to the supply points (to the taxpayer's advantage), since they lacked the "own" intangibles that the bottlers had developed. This conclusion arose in a part of the decision rejecting an argument Coca-Cola had made.

What to focus on

The two different attacks give some insight into how to prepare for an ATO review:

- A DPT attack is different to a transfer pricing or "characterization" attack and carries a significantly higher financial risk.
- The ATO is obviously continuing its attack on arrangements where no royalty is charged for use of trademarks, know-how, or other IP where use of the IP is necessary for the distributor's business.
- Previous advice in relation to group agreements around whether IP is actually used, and whether the total relationships between the parties could give a basis for apportionment remains important. These cases do not prevent questions of actual or deemed licence to use.

- Evidence that the price paid for the underlying goods or services has been independently benchmarked against genuinely unrelated transactions will be extremely helpful. Experts should be carefully briefed with the precise issues raised by the relevant Australian avoidance rules and the ATO arguments, not just the OECD transfer pricing principles.
- Groups must understand industry practice in their sector in relation to IP use and must document and explain other similar arrangements within the same corporate family that do charge a royalty for comparable IP.
- The absence of a royalty is strongest when backed by commercial documented business rationale that predates the Australian operation. But if that is not available, the logic should be documented now.
- Global experts are relevant but must be briefed on Australian rules.