Tax Update

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1. Tax Update Pitstop

The Tax Update Pitstop provides a quick reference to the top 5 tax matters from the month as determined by our experts.

Tax Update Matter	Impact Summary	Further Detail
Item 2.1 Waitara Linx	The Federal Court has found that a purchaser of land was required to pay the purchase price to the ATO, ahead of the registered mortgagee, in accordance with garnishee notice that had been issued by the ATO in respect of the tax liabilities of the vendor. This case reinforces that garnishee notices are a powerful tool in the ATO's debt recovery armoury and can go as far as defeating the interests of a registered mortgagee in the proceeds of sale of property. There has been an increasing use of garnishee notices by the ATO over the past 6-12 months and it is important for clients to act quickly and obtain advice when a garnishee notice is issued.	Page 7
Item 2.3 SEPL Pty Ltd	The Federal Court has found that 3 unpaid directors of a trustee company were 'employees' for the purposes of FBT and that the trustee company, in letting them use luxury cars owned by the trustee, was providing benefits to them in connection with their employment. This case, arguably, extends the understanding of the deemed employee rules for FBT and, as a result, widens the scope of FBT.	Page 12
Item 2.4 Hall	The ART has found that a radio announcer who was were required to work from home during the COVID-19 lockdown was entitled to deduct occupancy expenses as his use of the home for work went beyond mere convenience. While the reasoning in the case appears to be limited to the period of the government mandated lockdowns, it has wider implications, particularly in relation to the main residence exemption for owner-occupiers.	Page 15
Item 2.6 David & Ros Carr Holdings	The Court of Appeal of the Supreme Court of New South Wales has considered a unitholder dispute and one unitholder's desire to wind up the unit trust. The Court concluded there is no general statutory or legal right of a single unitholder to seek the winding up of a trust. The Court also held that the 'relevant criteria' for a fixed trust for land tax in New South Wales, which includes providing the unitholders with a power to have the trust wound up, did not provide an individual right for each unitholder to have the trust wound up;	Page 21
Item 8.3 ATO top 5 end of financial year checklist for trustees	The ATO has published a top 5 end of financial year checklist for trustees that outlines the key areas for where the ATO considers common mistakes are made by trustee. Review of the validity of trust distributions remains a key area of focus of the ATO in reviews.	Page 53

2. Detailed case summaries

2.1 Waitara Linx – enforcement of ATO garnishee notice

Facts

Waitara Linx Pty Ltd acting as trustee of the Park Avenue Trust, became the registered proprietor of land at Park Avenue, Waitara. The Waitara land was the principal asset of the Trust and was mortgaged to MCH Agency Services Pty Ltd (**Metrics**), securing debts exceeding $116 million owed by a related company, Settlers Estate Pty Ltd.

In September 2024 Waitara Linx entered into a contract to sell the land for $56 million to Anglicare, which paid a 10% deposit held by Waitara Linx's solicitor.

The contract settlement was scheduled for March 2025. However, about six weeks prior to this date, the Commissioner of Taxation issued a notice of assessment to Waitara Linx, giving rise to a tax debt of $27 million. At the same time, garnishee notices were issued to Anglicare and its solicitor under section 260-5 of the TAA 1953, requiring them to account for monies owed to Waitara Linx by paying those monies to the Commissioner.

The Commissioner lodged a caveat over the Waitara land. The Commissioner claimed that he should be subrogated to Waitara Linx's right to be indemnified from the Park Avenue Trust's assets. That is, since Waitara Linx was liable for the tax debt in its capacity as trustee, and it had a right to recover its costs, including tax debts, from the Park Avenue Trust's assets, the Commissioner should be able to "step into" that right and claim against the land too.

Waitara Linx intends to object to the tax assessment, which included substantial penalties.

On 21 March 2025, the Commissioner commenced proceedings in the Supreme Court of New South Wales, seeking judgment for the tax debt and a declaration regarding subrogation rights over the Park Avenue Trust's assets.

On 28 March 2025, Waitara Linx filed a cross-claim seeking declarations that would allow settlement to proceed without paying the tax debt to the Commissioner, removal of the caveat and compensation for its lodgement.

Metrics indicated it was willing for the sale to proceed even though the sale price was less than the amount secured by its mortgage, provided it received the full purchase price. However, Metrics refused to discharge the mortgage without full payment on settlement.

For settlement to proceed, Waitara Linx needed to direct Anglicare to pay the purchase monies to Metrics. While Waitara Linx was prepared to give that direction to reduce interest owed to Metrics, Anglicare was concerned that doing so would breach the Commissioner's garnishee notice and expose it to a $27 million liability and potential criminal offence.

This resulted in an impasse, as Metrics required full payment to discharge the mortgage, while Anglicare, concerned about potential liability under the garnishee notice, was unwilling to proceed with the payment.

Issues

1. Was Anglicare obligated, under the tax garnishee notice issued by the Commissioner, to withhold and pay part of the purchase price to satisfy Waitara Linx's tax debt upon settlement?

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2. Did Metrics, as mortgagee, hold an equitable interest in the purchase monies that would prevail over the Commissioner's garnishee notice?
3. Was the Commissioner entitled to a subrogated interest in the Trust's assets to recover the tax debt?
4. Should declaratory relief be granted to allow settlement without Anglican, Waitara Linx, or the solicitors being required to account to the Commissioner for the tax debt?

Decision

Was Anglicare required to pay the Commissioner on settlement?

The Court held that, under section 260-5 of Schedule 1 of the *Taxation Administration Act 1953* (Cth) (**TAA**), a garnishee notice only becomes operative when money is "due and payable" to the taxpayer. Although the garnishee notice was served before settlement, Anglican's contractual obligation to pay Waitara Linx only arose upon settlement, once Waitara Linx had delivered clear title. The Court accepted the Commissioner's argument that once that payment obligation crystallised at settlement, Anglicare became bound to pay to the Commissioner the lesser of the tax debt or the "available money", being the amount payable on settlement. The fact that payment and transfer occurred simultaneously in the PEXA system did not negate the existence of a debt for the brief instant required.

Did Metrics, as mortgagee, take priority over the Commissioner's garnishee notice?

Metrics and Anglicare submitted that Metrics had an equitable interest in the sale proceeds due to its registered mortgage, which should take priority over the Commissioner's interest. The Court considered this argument in light of the decision in *Federal Commissioner of Taxation v Park* (2012) 205 FCR 1. The Court held that, although the mortgage was registered, Metrics did not have a proprietary interest in the proceeds of sale upon settlement.

The Commissioner's garnishee notice operated directly on Anglicare' obligation to Waitara Linx, not on the mortgagee's rights. The Court declined to depart from the reasoning in *Park* and was not persuaded that Metrics' equitable interest defeated the Commissioner's claim.

Was the Commissioner entitled to a subrogated interest in the land?

The Commissioner argued that because Waitara Linx, as trustee, had a right to be reimbursed from the Park Avenue Trust's assets for paying tax debts, he should be allowed to step into that position and exercise the same right. He said this gave him a legal claim over the Park Avenue Trust's main asset, the land, which supported his decision to lodge a caveat to prevent the sale. The Court noted that this right is limited and may not extend to penalties included in the assessment. While the matter of subrogation was part of the broader relief sought, the Court did not issue a final determination on this claim at this stage. The issue was deferred, recognising that it required further argument and could be affected by resolution of other matters.

Would the Court allow settlement to proceed without payment to the Commissioner?

Waitara Linx asked the Court to make declarations that would render the garnishee notice ineffective, allowing the property settlement to proceed without any obligation to divert funds to the Commissioner. Anglicare supported this, arguing that compliance with Waitara Linx's payment direction could expose it to liability under the notice, including potential penalties. The Court found that the garnishee notice was legally valid and became enforceable at the moment of settlement, when the purchase price became payable. It rejected the submission that the simultaneous transfer of title and payment under electronic settlement meant no debt was ever owing. As a result, granting the declarations would have been inconsistent with the operation of section 260-5 of Schedule 1 of the TAA.

TIP - garnishee notices under section 260-5 of Schedule 1 of the TAA provide the ATO with a powerful tool to obtain payment of outstanding tax debts. These notices allow the ATO to intercept funds payable to a taxpayer by directing third parties, such as purchasers, solicitors, or banks, to redirect payments directly to the ATO. Anecdotally, there has been an increasing use of garnishee notices by the ATO over the past 6 to 12 months.

COMMENT – the decision reaffirms that, while the ATO cannot take priority over secured creditors like mortgagees, the garnishee notice process can still effectively capture sale proceeds if they become payable to the taxpayer at settlement. However, the Court made clear in this case that the ATO's garnishee notice only attaches to funds that are legally payable *to the taxpayer*, and if a mortgagee is entitled to the sale proceeds, such as by exercising a power of sale, the ATO cannot intercept those funds.

Citation *Commissioner of Taxation (Cth) v Waitara Linx Pty Ltd* [2025] NSWSC 581 (Parker J, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2025/581.html

2.2 KRBM – partnership income

Facts

KRBM was an equity partner of an accounting firm partnership between 1 July 2012 and 30 October 2016.

There were three main documents relevant to KRBM's position as a partner in the partnership:

1. the Partnership Agreement;
2. the Partnership Retirement Deed; and
3. the Partner Handbook.

The Partnership Agreement required former partners to assist with the collection of work-in-progress and debtors on their outgoing ledgers for a period of one year after ceasing to be a partner. It included the 'Partner Termination Deed', which provided for the payment of 'taxation timing differences' to outgoing partners and their taxable treatment and provided for a 'Termination Payment' to be paid to retiring equity partners.

On 30 October 2016, KRBM retired from the partnership. As required by the terms of the Partnership Agreement, he executed a Partnership Retirement Deed on 11 November 2016. Under this deed, he acknowledged $313,008 in taxation timing differences, which were to be returned as assessable income in five equal parts across the financial years ending 30 June 2018 through 30 June 2022.

The Partnership Retirement Deed included an acknowledgement by KRBM that he remained bound by the Partnership Agreement and provided for the Partnership to assist in the preparation of his income tax returns up to and including the financial year ending 30 June 2023.

'Taxation timing differences' was not a defined term in either the Partnership Agreement or the Partnership Retirement Deed but was instead referred to in the Partner Handbook. It was defined as amounts which were taxed in different years from the year in which they were recognised as income or expenses for accounting purposes. Work in Progress (WIP) time was a category of these timing differences amounts.

On 10 May 2019, KRBM's income tax return for the year ended 30 June 2018 was lodged, including $62,602 as partnership income. The notice of assessment followed on 17 May 2019. Around this time, KRBM expressed his surprise in internal emails, asserting he believed only the reversal of timing differences (and not an additional cash amount) should be taxable.

Upon retirement, he was classified as a Retired Partner and he claimed he could not negotiate aside from non-compete clauses. He gave evidence that once he exited the partnership, he no longer had any interest in partnership assets, including WIP, even if he had contributed to them. He emphasised that he never physically received the $62,602 reported as income in his tax returns during the relevant years and was shocked to discover it had been included in his assessable income.

KRBM acknowledged a Termination Payment totalling $269,778, to be paid in six instalments of $44,962.96. He understood these payments to be the “retiring gracefully” amounts. His belief was that only the WIP reversal amount of $62,602 should be assessable and not the additional cash payments. He explained that he thought the cash would be distributed through a trust and that the taxable income should only include the WIP timing adjustment.

When questioned, KRBM admitted he was confused about the treatment of the cash versus the WIP reversal, and expressed in emails to the partnership’s in-house legal counsel (Mr AB) that he felt blindsided by being taxed on both amounts. KRBM cited tax principles that suggested one cannot be taxed on partnership income without a continuing interest in the partnership. AB responded that the ATO was aware of the approach and accepted it, even though the legal position remained unclear. The firm also offered to amend his tax returns, giving him the option to return the full amount of the WIP timing difference in one year or continue using the concessional method of spreading it over five years.

In the end, KRBM accepted the inclusion of the WIP reversal in his returns but continued to dispute being taxed on both the WIP amount and the cash payment, which he believed contradicted his understanding of the deed and relevant tax laws.

Section 92 of the ITAA 1936 provides that a partner's assessable income includes their individual interest in the net income of a partnership for a particular income year.

On 15 June 2021, KRBM's income tax return for the year ended 30 June 2020 was lodged, with the corresponding notice of assessment issued on 22 June 2021.

On 16 May 2022, KRBM’s income tax return for the year ended 30 June 2021 was lodged, and a notice of assessment followed on 23 May 2022. Each return included the $62,602 allocation under “distributions from partnerships,” pursuant to the agreed timing differences.

On 8 May 2023, KRBM lodged an objection against the assessments. The objection was to the inclusion of $62,606 of 'distributions from partnerships' in KRBM's assessable income for each of the relevant years, which he argued was excessive.

On 13 December 2023, the Commissioner allowed KRBM an extension of time to lodge the objection for the financial year ended 30 June 2018 but otherwise disallowed the objections. On 10 February 2024, KRBM applied to the ART for a review.

KRBM contended that he was not a partner in the Partnership in the relevant years and did not have any interest as a partner in the net income of the Partnership of the relevant years. Section 15-50 of the ITAA 1997, which provides that a taxpayer's assessable income includes "work in progress amounts that you receive" did not apply to KRBM, because he did not receive a WIP amount during the relevant years. KRBM submitted that on a proper construction of the section, the "taxation timing differences" should have been assessed in the year payment was "received" which was not during the relevant years.

The Commissioner contended that the amounts of $62,602, assessed to KRBM in each of the relevant years, was assessable as it represented his interest, as regulated by the Partnership Agreement, and the Partner Retirement Deed, in the Partnership's taxable income in each of the relevant years.

Further, the Commissioner submitted that KRBM did not actually have to be partner in the Partnership in the relevant years to have assessable income included in the assessments under section 92 of the ITAA 1936 as there were no temporal restrictions contained in that section as to when he was a partner in the Partnership.

The section operated to ensure that he is assessed on that part of the income that is attributable to him according to his interests in the Partnership.

Issues

1. Was KRBM assessable under section 92 of the ITAA 1936 for the $62,602 attributed to him in each of the 2018, 2020, and 2021 financial years, despite no longer being a partner in the accounting firm during those years?
2. Did KRBM derive the $62,602 amounts in the relevant years either by receipt or by application on his behalf or at his direction, within the meaning of section 6-5(4) of the ITAA 1997?
3. Did section 15-50 of the ITAA 1997 apply to include the timing difference amounts in KRBM's assessable income for the relevant years, as "work in progress amounts" received in those years?

Decision

<u>Application of section 92</u>

The ART concluded that section 92 of the ITAA 1936 applied to KRBM even though he was not a partner during the relevant years. The key reasoning was that the assessability under section 92 does not require an individual to be a partner at the time the income is assessed. Instead, what matters is whether the income in question relates to the individual's interest in the partnership's net income. KRBM had agreed, through the Partnership Retirement Deed, to return timing differences from his time as a partner over five years, including the relevant years. These amounts were considered part of his share of the partnership's net income accrued during his partnership years. This arrangement allowed KRBM to defer tax liabilities he would have otherwise incurred during his time as a partner, during which his taxable income was about 10% less than his accounting draw due to WIP deductions.

The ART accepted that, while KRBM had retired from the general law partnership, he remained in a "tax law partnership" under the ITAA 1997 because he continued to receive statutory income jointly with the firm. The ART considered that the definition of a tax law partnership included individuals in receipt of statutory income jointly, and found that KRBM's entitlement to timing difference amounts met this criterion. The ongoing obligations and entitlements set out in the Partnership Agreement and Retirement Deed supported the finding that he continued to be part of an arrangement that constituted a tax law partnership.

<u>Actual or constructive receipt</u>

The ART also accepted the Commissioner's submission that the actual or constructive receipt of part of the assessable income of the Partnership in the relevant years was not required. Rather, the relevant enquiry was based on the wording in section 6-5(4) of the ITAA 1997, regarding whether the amount in question received is "applied or dealt with in any way on your behalf or as you direct." Although KRBM claimed he did not physically receive the amounts, the ART found that the amounts were dealt with in accordance with his direction under the contractual agreements he entered. The ART emphasised that actual receipt was not necessary. The inclusion of these amounts in his returns prepared by the Partnership, in line with the Retirement Deed, satisfied the derivation test under section 6-5(4).

<u>Exclusion of WIP amounts</u>

The ART rejected KRBM's argument that section 15-50 applied to deal with WIP and, as he had not received an amount for WIP in Relevant Years, there was no amount to include is his assessable income. However, the ART agreed with the Commissioner that the timing difference amounts were attributable to WIP and prepayments from KRBM's time as a partner. Although the evidence did not precisely identify the derivation of WIP income, the ART accepted that the figures were consistent with established practice in professional firms for deferring and later reversing timing benefits.

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Ultimately, the ART found that KRBM had not proven the tax assessments were excessive and affirmed the Commissioner’s decision to disallow the objection. The ART concluded that the concessional timing difference treatment aligned with common professional services tax practices and that KRBM had misunderstood, but not been unfairly taxed under, those terms.

Citation *KRBM v Commissioner of Taxation* [2025] ARTA 556 (General Member Darian-Smith, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/556.html

2.3 SEPL Pty Ltd – fringe benefits tax and cars provided to directors

SEPL Pty Ltd was the corporate trustee of the SFT Trust, which was established in 1987.

The SFT Trust was in the business of operating convenience stores with petrol stations and fast food restaurants, and tobacco and convenience stores. Tthe trust’s business included 130 to 160 petrol stations and 100 to 200 tobacco and giftbox stores, with between 3,000 and 4,000 employees.

The directors of SEPL are three brothers. The SFT trust was established by the brothers' parents. The trust deed allowed for distributions to a wide class of eligible beneficiaries, including family members and associated entities.

Originally, directors of SEPL were the parents and the oldest son. After the father's passing in 2009 and the mother's retirement from her directorship in 2014, the brothers became the directors and shareholders of The Trustee. The brothers, together with their mother, continued to be eligible beneficiaries under the family trust.

Under the trust deed, SEPL was permitted to allow beneficiaries to have custody of and use any immovable property or chattels forming part of the trust fund.

SEPL was the principal operating company within the wider network of operating vehicles and the profits of other companies were paid into the trust. SEPL employed most of the staff and paid for common services such as IT, finance and advisory services.

The brothers made collective board decisions for the group but also focused on different aspects of the operations. They employed executives to manage different functions, reporting primarily to one of the brothers. The directors were committed to the family business and devoted much of their time and effort into the business.

From 2016 to 2020, the three brothers served as the sole directors and shareholders of SEPL, operating in executive roles titled Chief Executive Officer, Managing Director, and Executive Director. They were actively involved in the day-to-day operations and worked around 60 hours per week, including weekends.

The trust deed empowered the trustee to employ individuals, including directors, and to remunerate them for services rendered. Clause 6(j) permitted the trustee to employ a person, including a director, as Manager of the business and to allow that director to retain the remuneration attached to the role. Clause 6(l)(vii) authorised the trustee to decide on hiring or employment, again including directors, at such salary or remuneration as it deemed appropriate. Additionally, clause 6(u) allowed the trustee to remunerate any discretionary beneficiary who was employed by the trustee for services performed.

During this time, the company’s constitution, specifically Article 97, provided that the remuneration of the Managing Director or any other executive director was to be fixed by the directors and could be structured in various forms, including salary, commission on profits, or participation in business turnover. Although no formal resolutions were passed under these provisions, they demonstrated that both the trust and corporate instruments contemplated and authorised the remuneration of directors in connection with business operations.

Despite these powers, the brothers were not paid remuneration for their duties. Instead, they benefited through two arrangements: first, the profits of the business were distributed to their respective family trusts; second, they had exclusive access to over 40 luxury and high-performance vehicles owned by SEPL, which they used for both personal and business purposes.

During this time, vehicle-related expenses were debited to their mother's loan account with the trust. These debits were later offset through distributions to the mother, which were grossed up to cover any income tax obligations.

In the 2016 to 2018 income years, SEPL made superannuation contributions on behalf of each brother, up to the concessional contributions cap, and claimed tax deductions. From 2019 onwards, contributions were treated as personal contributions to individual superannuation accounts.

The Commissioner included the taxable value of the private use of the cars in amended FBT assessments, on the basis that the directors were employees of SEPL as trustee of the SFT Trust and the non-cash benefit were paid to them as employees.

On 9 March 2022, the Commissioner of Taxation disallowed SEPL’s objection to the amended FBT assessments, taking the position that the benefits were conferred on employees.

SEPL applied to the AAT for review of the decision. SEPL contended that the directors managed its affairs, as directors, or as owners or beneficiaries under the trust, not as employed managers. SEPL further argued that, even if the directors were employees, the benefits were not made available to them in respect of their employment. Rather, the benefits were made available to them as directors, or as beneficiaries under the trust.

At hearing, there was limited evidence of formal decisions being made by SEPL to supply the vehicles to the directors as beneficiaries. The value of private use was not recorded as a distribution to the individual brothers. Benefits, such as the use of motor vehicles, were attributed to the mother's beneficiary account and debited accordingly.

The AAT found that the absence of formal written employment contracts, the lack of control, the directors' position at the apex of the company, and the overall indicia, did not support the characterisation of an employment relationship. The directors behaved as owners with substantial autonomy rather than employees, pointing towards a relationship based on shared ownership and collective management rather than employment.

Even if it was found that there was an employment relationship, the benefits would only be regarded as fringe benefits if they were provided in respect of employment. The AAT concluded the brothers had access to the motor vehicles not to reward them as directors or employees, but as beneficiaries.

The Commissioner appealed to the Federal Court.

The Commissioner argued that the AAT erred by failing to correctly apply the statutory definitions within the FTBTAA. Central to the Commissioner’s case was that the three brothers, by serving as the directors of SEPL and being heavily involved in its day-to-day operations, met the statutory criteria for being “employees” under section 136 of the FBTAA. The Commissioner contended that, although the brothers did not receive salaries in the conventional sense, they held office, performed duties, and carried out functions that should be treated as employment for the purposes of the FBTAA.

The Commissioner relied on section 137 of the FBTAA, which provides a deeming mechanism whereby non-cash benefits, such as exclusive use of luxury motor vehicles, are treated as if they were salary or wages if such benefits would have been assessable had they been paid in cash. The Commissioner asserted that this deeming provision applied to the benefits conferred on the brothers, making them “employees” for the purposes of FBT.

The Commissioner further submitted that the non-cash benefits were provided "in respect of" the brothers' employment, as the benefits were clearly linked to their executive roles and responsibilities within the business.

SEPL contended the AAT findings and application of the law were correct. SEPL also argued that benefits were accessed by the brothers as part of their long-standing entitlement as beneficiaries under the trust. It submitted that clause 5(f) of the trust deed authorised the trustee to permit eligible beneficiaries to use trust property (such as vehicles) without formal resolution, and that this discretion had been exercised over many years as part of a family practice. The directors did not receive the benefits as remuneration, but out of an informal understanding consistent with their status as family members and ultimate controllers of the business.

Issues

1. Were the directors' "employees" of SEPL for the purposes of the FBTAA?
2. If it was found that there was an employment relationship, were the cars a non-cash benefit paid to the directors in respect of their employment?

Decision

Were the directors employees?

The Federal Court began its analysis by addressing whether the three directors of SEPL qualified as "employees" under the *Fringe Benefits Tax Assessment Act 1986* (Cth) (**FBTAA**). It found that the AAT had erred by relying on common law concepts to assess the existence of an employment relationship. Specifically, the AAT's focus on the absence of formal contracts, board resolutions, and integration into a traditional organisational hierarchy was misplaced in light of the statutory framework of the FBTAA. The Court emphasised that the FBTAA contains its own definitions, and that common law employment principles have no role to play where the statutory text provides a complete and specific scheme.

Central to this reasoning was section 137 of the FBTAA, which operates as a deeming provision. Under section 137, where a benefit would, if provided in cash, constitute salary or wages under withholding provisions in the TAA, it is deemed to be salary or wages for the purpose of determining whether a person is an "employee." The Court found that this section must be applied to the facts as found by the AAT. The directors had exclusive and personal use of high-value motor vehicles provided by the company. Had the same value been provided to them as a cash allowance, it would have fallen within the withholding obligations under sections 12-35 or 12-40 of Schedule 1 to the TAA. On that basis, the requirements of section 137(1)(c) were satisfied. The Court held that each director must be treated as an employee under the FBTAA, notwithstanding the lack of formal salary arrangements or employment contracts.

Were the cars provided "in respect of" employment?

The Court noted that section 136(1) of the FBTAA defines the expression "in respect of" employment expansively to include benefits provided "by reason of, by virtue of, or for or in relation directly or indirectly to" employment. The AAT had found that the directors accessed the vehicles as a reflection of their status as beneficiaries and not as compensation for work performed. It relied on *J & G Knowles and Associates Pty Ltd v Commissioner of Taxation* [2000] FCA 196 to suggest that the provision of benefits was driven by personal belief in entitlement rather than any link to employment.

The Court rejected this reasoning. It found that the test under the FBTAA is objective, not subjective. The relevant question is not the motivation of the directors but whether there was a sufficient or material relationship between the benefit and the employment. The Court emphasised that the brothers were not passive beneficiaries. They held executive titles, managed the company's extensive operations, and their roles were defined and structured within a formal Delegation of Authority Policy. They did not receive distributions in their own names, and the vehicle benefits were not treated as trust distributions. Instead, the arrangement was structured so that vehicle expenses were charged to their mother's loan account, which was subsequently cleared through distributions grossed up to meet tax obligations. The personal and exclusive use of the vehicles arose "by reason of," "by virtue of," or "in relation directly or indirectly to" their employment.

Further support for the Court's conclusion was found in the company's constitution and trust deed, which contained provisions enabling the directors to be remunerated in ways other than fixed salary. The absence of the formal resolutions authorising the benefit did not prevent there being a clear and material relationship between the provision of the vehicles and the performance of the directors' functions.

The AAT's decision was set aside and the Commissioner's objection decision was affirmed.

COMMENT – the AAT decision was originally reported as *BQKD and Commissioner of Taxation (Taxation)* [2024] AATA 1796 (see our July 2024 Notes).

COMMENT – the critical test is whether there is a sufficient or material relationship rather than a causal connection or relationship between the benefit and employment. The Court emphasised that the statutory scheme, particularly section 137 of the FBTAA, allows for individuals to be deemed employees where they receive benefits that function as remuneration, even in the absence of formal employment arrangements. This approach significantly broadens the benefits that may be captured by the FBT regime beyond formal remuneration.

TRAP – if the business was run through a company rather than a trust, it would also be necessary to consider whether provision of the cars could give rise to a deemed dividend under section 109CA of Division 7A of the ITAA 1936. A payment will not be treated as a dividend under Division 7A where it is made by a private company to a shareholder or an associate of a shareholder, if the payment is made to the individual in their capacity as an employee or an associate of an employee. However, in respect of loans and forgiven amounts, Division 7A operates to the exclusion of FBT: see section 109ZB of the ITAA 1936.

Citation *Commissioner of Taxation v Sepl Pty Ltd as trustee of the SFT Trust* [2025] FCA 581 (O'Sullivan J, South Australia)
w http://classic.austlii.edu.au/au/cases/cth/FCA/2025/581.html

2.4 Hall – deductibility of occupation expenses and car expenses

Facts

Nathaniel Hall was employed full-time by the ABC in Melbourne as a sports presenter and producer. His position comprised two separate roles, being the 'Digital Role', which involved producing the ABC Sport Digital Radio station, and the 'Live Role', which involved producing and presenting live sports broadcasts, primarily NRL football. The Digital Role accounted for 75% of his work, and the Live Role accounted for 25% of his work.

Nathaniel and his wife lived in a two-bedroom apartment in Armadale, approximately 8 kilometres from the ABC's Southbank Studios.

During the 2021 income year, as a result of the COVID-19 pandemic, Nathaniel was prevented from attending the Southbank Studios. This followed both the declaration of a state of emergency by the Victorian Government in March 2020 under section 198(1) of the *Public Health and Wellbeing Act 2008* (Vic), and the implementation by the ABC of its internal "Recovery Roadmap" policies. Under those policies, only staff who performed essential duties or had specific approval could attend the workplace.

Nathaniel was not permitted to attend the studios for the Digital Role at any time during the 2021 year. He was only authorised to attend the Southbank Studios for rostered live sports broadcasts.

Nathaniel undertook the Digital Role exclusively from his home. The Live Role was undertaken from the Southbank Studios, except on one occasion when Nathaniel attended the A-League Grand Final at AAMI Park in Melbourne. The work done for the Live Role is of a nature that requires specialised and complex broadcasting equipment that could not be easily or conveniently replicated in a domestic environment.

When required to attend the Southbank Studios, Nathaniel drove in his personal vehicle. He did not use public transport, citing the ABC's policy preference that staff avoid public transport due to COVID-related risks, and the late-night nature of his shifts. The ABC provided access to a rostered staff carpark and a car parking reimbursement scheme to support the use of private vehicles.

Nathaniel claimed the following deductions in the 2021 income year:

1. occupancy expenses in the amount of $5,878.87, calculated as 16.18% of the rent paid for the apartment, which corresponded to the floor area of the spare bedroom used exclusively as a home office; and
2. car expenses in the amount of $1,148.40, being the expenses on a "cents per kilometre" basis associated with travel from his home office to the Southbank Studios to perform his Live Role duties.

In relation to his occupancy expenses, Nathaniel argued the spare bedroom in his apartment was used exclusively and necessarily for the performance of his duties in the Digital Role. Nathaniel argued that working from home was not a matter of convenience, but the result of ABC policy, which only allowed limited staff on site, and Victorian Government directions.

The Commissioner argued the rent was a private or domestic expense, and not deductible under section 8-1 of the ITAA 1997. The Commissioner sought to rely on the High Court cases of *Handley v Commissioner of Taxation* [1981] HCA 16, *Commissioner of Taxation v Faichney* [1972] HCA 67, and *Commissioner of Taxation v Forsyth* [1981] HCA 15, which supported the long-standing view that rent for a residence used partly as a workplace is usually not deductible unless the area has a distinct and separate business character. The Commissioner claimed the room was not exclusively identifiable as a workplace, and its domestic location made it inherently private in nature. The Commissioner also relied on the ATO's administrative practice that distinguishes between a place of convenience for occasional work, which is not deductible, and a place used in substitution for an employer-provided workspace, which is potentially deductible.

In relation to his car expenses, Nathaniel argued that he travelled between two workplaces, being his home office (for the Digital Role) and the ABC's Southbank Studios (for the Live Role). Nathaniel argued the travel was necessary to perform rostered duties at the Studios and he avoided public transport because of the ABC's COVID safety preferences, and the organisation supported private vehicle use with a reimbursement scheme and dedicated car park.

The Commissioner argued that the car expenses were not deductible as the travel was between Nathaniel's home and regular workplace, and thus private in nature. The Commissioner also argued that the fact that the ABC encouraged private vehicle use did not convert private travel into deductible work travel.

On 16 September 2022, Commissioner disallowed Nathaniel's objection to amendments to Nathanial's assessments that has been made to disallow the claims in his 2021 income tax return for deductions for the rent and car expenses. Nathaniel applied to the ART for review of the objection decision.

Issue

Is Nathaniel entitled to a deduction for his occupancy expenses and his car expenses?

Decision

<u>Are the occupancy expenses deductible?</u>

The ART noted that the nature of a workplace and the means of working which prevailed in the 1950s, 1960s, 1970s, and 1980s was not the way the modern world worked now, particularly when the COVID-19 pandemic occurred. As such, rather than looking at factors such as whether anyone else accessed the room, the room's separateness from the remainder of the residence or whether there were personal items stored in in the room, it was necessary to consider whether Nathaniel used the room as his actual workplace.

The ART held that Nathaniel had no choice as to where he worked and the choice to work from his spare bedroom was not one which was made as a matter of convenience. The combination of the ABC's policies and the Victorian Government's directives meant Nathaniel was obliged to use the spare bedroom of his rented apartment as his workplace for the 2021 year. Further, while Nathaniel's working arrangements from home were temporary, in that it would pass once the lockdowns finished and the ABC permitted him to return to the Southbank Studios on a full-time basis, it was a fixed part of Nathaniel's working life for the entire 2021 income year.

The ART allowed the deduction for rent for the home office for $5,878.87.

Are the car expenses deductible?

As Nathaniel was able to evidence that he commenced his working day at home undertaking the Digital Role before going into the Southbank Studios, and after completing his work at the Southbank Studios he returned home (a pattern that was followed on 99 occasions in the 2021 income year, with the exception of when he worked as a commentator at AAMI Park), the car expenses were deductible.

The ART allowed a deduction for car expenses of $1,148.40.

COMMENT – it is expected that the ATO will appeal this decision as it will have a significant impact for many taxpayers, including as to the availability of a full main residence exemption. While the ART relied heavily on the government directives during the COVID-19 lockdown, it difficult to see how the COVID-19 lockdown periods could impact on deductibility, given the prior High Court authorities held that occupancy expenses are generally excluded from deductibility on the basis that they are inherently domestic in nature.

Citation *Hall and Commissioner of Taxation (Taxation and business)* [2025] ARTA 600 (Deputy President Thompson SC, Perth)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/600.html

2.5 CMYT and JDRJ – unexplained income and joint bank accounts

Facts

In the 1990s, CMYT and JDRJ, a married couple, migrated to Australia. Both were employed in the family jewellery business operated by CMYT's father and brother.

At all times, CMYT was employed as a sales and marketing manager in the family business. Since 2019, CMYT has also been a 50% shareholder and director of his company and is also employed by the company. The company has operated as a business creating and selling luxury jewellery and watches since 2015. It conducts business from the same shopfront as the family business.

CMYT also engaged in his two other profit-making activities which he described as 'private'. The first related to the procurement of watches, gold bullion and jewellery for special customers (friends) and third parties. The second related to his dealings in silver bullion.

JDRJ worked full-time in the family business and shared key accounts with CMYT.

CMYT lodged income tax returns for the income years ending 30 June 2015 to 30 June 2018, reporting wages from both a family business and other employers. JDRJ lodged returns for the income years ending 30 June 2013 to 30 June 2018, declaring wages only from the family business.

After identifying unexplained deposits in CMYT and JDRJ's personal bank accounts, the Commissioner conducted covert audits. The Commissioner used the asset betterment method and found significant understatements of income, issuing default assessments with penalties on 2 August 2019 without prior notice. CMYT and JDRJ objected, leading to partial allowances on primary assessments but no remissions of penalties. Further amended assessments were issued, and both applicants later sought a review by the ART in October 2021.

In affidavits submitted to the ART, CMYT and JDRJ admitted to underreporting their taxable income, though JDRJ later retracted these admissions. CMYT's total declared income for the relevant years was $554,918, while the Commissioner assessed it at $1,449,166 and CMYT conceded $710,384.

JDRJ declared $229,328, was assessed at $1,186,542, and conceded $812,742. However, she later disavowed her affidavits, stating they had been prepared by someone else. The ART was cautious in accepting her written evidence, particularly on matters concerning CMYT's financial dealings, where she lacked direct knowledge.

The amended assessments were based on various unexplained bank deposits, which were categorised into four types: personal loans and repayments, silver bullion sales (subject to capital gains tax), profits from a side hobby of trading jewellery and watches, and business expenses claimed through AMEX cards.

JDRJ claimed CMYT controlled the primary joint account (NAB4857) and that she had minimal involvement with it. However, she conceded under cross-examination that she was aware of cash deposits into the account and often received cash from CMYT for personal expenses. Her evidence was contradictory, claiming both lack of involvement and knowledge of specific transactions.

In respect of the personal loans and repayments, the following are two examples:

1. CMYT and RI claimed CMYT had loaned RI $11,000 to fund gambling habits, with repayments made over several years. Again, there were no written records or clear documentation of terms or a repayment schedule. Their testimonies were inconsistent particularly about the amounts, method of repayment, and timing. CMYT also admitted he initially doubted whether RI would repay the money, undermining the mutual intention required for a valid loan;
2. a $70,000 transfer from NAB4857 in 2016 was said to be a loan to SA (a commercial painter) to assist his employer SVP, a painting business in financial trouble. Conflicting accounts were given about who the true borrower was: SA, SVP, or its director, VS. There was no written agreement or coherent explanation of repayment terms. Although deposits totalling $90,225 from SVP were made to NAB4857 later, the lack of consistency and transparency in both parties' evidence weakened their credibility.

In respect of the silver bullion sales:

1. over decades, CMYT had accumulated silver bullion through both gifts and purchases but kept no records of his acquisitions, cost base, or past sales. He claimed to have received some silver as a wedding gift in 1996 and brought silver with him when he migrated to Australia in 1990, yet no documentation was provided for these assertions;
2. in 2016, CMYT sold 216.521 kg and 299.344 kg of silver on two separate dates, receiving over $380,000 in total. However, he failed to declare these sales in his tax returns, arguing they involved gifted property and thus were non-taxable;
3. CMYT acknowledged under cross-examination that some of the bullion sold had been purchased by him, and that he was aware of silver's investment value. Due to the absence of records, the Commissioner

assessed CMYT on 50% of the total proceeds, resulting in capital gains assessments of $79,920 and $111,177.86;

4. CMYT proposed alternative calculations using 1990 or 2006 as acquisition dates, suggesting much lower capital gains, but offered no evidence to justify those specific years. He argued that he was entitled to a 50% capital gains tax discount;
5. regarding the 1996 wedding gift of silver bullion, several family members gave conflicting testimony and there was no evidence to substantiate whether the silver sold in 2016 was the same bullion gifted in 1996.

In respect of the purported business expenses claimed through AMEX cards:

1. although used for alleged company expenses, the cards were issued to CMYT personally and used for both personal and business purposes. Statements were addressed to his home and lacked company identifiers;
2. CMYT's current accountant, Ms Huang, relied heavily on CMYT's oral instructions to categorise transactions due to missing source documents. She admitted this method was inadequate and that errors were likely;
3. CMYT did not maintain proper financial records such as ledgers or travel diaries. He reconstructed expenses from credit card statements and some receipts, often based on memory; and
4. CMYT claimed over $400,000 in expenses across five categories, including ATO payments, costs of sales, MJ's expenses (who was a joint director/shareholder), travel, and miscellaneous items. Except for ATO payments, most claims lacked full documentation.

In respect of the purported hobby of trading jewellery and watches:

1. CMYT contended that various transactions involving the sale of watches, jewellery, and precious metals were personal hobby-related dealings with friends and acquaintances, and thus not assessable as income. However, during the ART proceedings, CMYT admitted that he had profited from some of these transactions, and his explanations were inconsistent and lacked adequate supporting documentation;
2. many of the transactions were conducted from the same shop where he was employed and where the family business operated, using similar processes and sometimes even company stock. CMYT often referred to the items sold as "stock," implying a business-like approach. Records relating to these sales were incomplete, and CMYT largely relied on reconstructions using his bank statements to justify the transactions, rather than producing contemporaneous documentation.

Issues

1. Is there reason to find on the facts that JDRJ did not share equally with CMYT any monies deposited into their joint primary bank account (NAB4857)?
2. Have CMYT and JDRJ demonstrated that the amended assessments issued to them or each of the financial years in dispute are excessive as well as their correct taxable income for each year and what the assessments should have been?
3. Are CMYT and JDRJ each liable for administrative penalty, including whether it should be applied at the base rate of 75% for each year and uplifted by 20% for the financial years in dispute?
4. Should the discretion to remit any penalty be exercised?

Decision

<u>Should JDRJ be treated as having an equal interest with CMYT in monies deposited into NAB4857?</u>

In *Taxation Determination* TD 2017/11 the Commissioner takes the view that there is a rebuttable presumption of beneficial ownership in equal shares arises in the case of joint bank account holders which can be shifted by evidence to the contrary.

The ART rejected JDRJ's argument that she had no beneficial interest in funds deposited into NAB4857. Though she argued the deposited amounts were solely CMYT's income, the evidence showed her salary was deposited into the same account, and that she benefited from the funds for household expenses and joint mortgage payments.

The ART concluded she shared equally in the funds and, as such, her income tax liability included those amounts.

<u>Personal loans and repayments</u>

The ART considered whether various deposits into the joint bank account NAB4857 were non-taxable loan repayments or assessable income. CMYT and JDRJ claimed these deposits were repayments of loans CMYT had made or received from personal acquaintances or "friends." The ART evaluated three key loan-related transactions in detail, focusing on their compliance with legal characteristics of genuine loan arrangements.

In all three cases, the ART found that the applicants failed to meet the burden of proof required to demonstrate that the deposits into NAB4857 were genuine loan repayments and not assessable income. The transactions lacked key features of valid loans, including documented terms, evidence of mutual intention to repay, and consistent, credible testimony. Therefore, the amounts in question were found to be taxable income.

<u>Silver bullion sales</u>

This issue concerned how capital gains should be calculated on two silver bullion sales made by CMYT in May 2016. The ART was unconvinced by the vague and contradictory evidence about acquisition dates and cost base. Further, the ART found the inconsistencies and lack of evidence too great to establish that the silver sold in 2016 was the same bullion received as a gift.

The ART also noted CMYT's implausible claim that he considered his bullion activity merely a hobby and had not consulted his tax agent or kept any records. Given the significant value of his holdings, this lack of documentation undermined his credibility and statutory obligations. The ART ultimately accepted the Commissioner's treatment of the entire proceeds as assessable to CMYT and JDRJ, especially as the funds were deposited into joint accounts and later used for non-business purposes, including a purported loan to SA.

<u>Purported business expenses claimed through AMEX cards</u>

The ART accepted that CMYT may have incurred some genuine company expenses, but his lack of records, vague memory-based assertions, and inconsistent evidence undermined the credibility of his claims. Apart from the ATO payments, the ART was not persuaded that the other credit card transactions were valid business expenses or that they were properly reimbursed. The ART also noted CMYT and MJ's failure to understand or meet their legal record-keeping obligations.

<u>Purported hobby of trading jewellery and watches</u>

The ART examined specific transactions to test the credibility of CMYT's assertions. One example involved a Rolex watch purchase for $23,000 by LC, a long-time friend. Although CMYT claimed it was a hobby sale, there were no purchase records, invoices, or reliable documentation, and LC could not recall key details, making the transaction implausible. Another case involved MJK, who allegedly purchased a $70,000 diamond. MJK contradicted his affidavit during cross-examination and admitted his statements were based solely on reconstructed bank entries.

The ART found that over $939,000 in unexplained deposits had been made into CMYT's NAB4857 account across six financial years. CMYT admitted these deposits stemmed from his "hobby" sales, but could not account for them fully. He also conceded that some transactions were conducted in cash and were not disclosed in his affidavits. Given the frequency, volume, and manner in which these transactions were carried out, the ART concluded that CMYT's activities extended beyond a personal hobby. They closely resembled his professional activities, were conducted in a business-like manner, and demonstrated an intention to make a profit. CMYT's reference to "stock," the use of business premises, and the regular nature of the transactions all supported the finding that he was carrying on a business.

Due to the absence of adequate records and the unreliability of CMYT's evidence, the ART was unable to calculate any deductible expenses or profit margins and treated the unexplained deposits as assessable income. CMYT argued that if the ART found these were business transactions, he should only be taxed on the profit, not the gross income. However, the ART found that he failed to provide reliable evidence of the costs, sale prices, or profit margins associated with these transactions.

<u>Onus of proof</u>

The ART concluded that CMYT and JDRJ failed to discharge their evidentiary burden. To succeed, they needed to both show the Commissioner's assessments were excessive and positively establish their actual taxable income for the years in dispute. The ART found that CMYT and JDRJ failed to adequately explain the nature of large amounts of money deposited into their accounts or provide a coherent, credible account of their income. As such, they did not discharge their burden of proof, and the Commissioner's assessments were upheld.

<u>Penalty tax</u>

For CMYT, the ART found his actions demonstrated deliberate disregard of tax obligations. He failed to report substantial income from silver bullion, watches, and jewellery sales, did not maintain proper records, and did not disclose these transactions to his tax agent. His conduct over several years, including intentional "off the books" dealings, supported a finding of intentional disregard rather than a mere lack of understanding.

Similarly, JDRJ was found to have knowingly benefited from and participated in CMYT's undeclared income arrangements. She managed multiple accounts, received and used unexplained cash, and chose not to question or report the sources of funds despite being aware of CMYT's activities. Her conduct showed more than negligence and did not warrant a lower penalty.

The ART also found no grounds to remit the penalties, concluding that the full penalties were not unjust or inappropriate in the circumstances. Thus, both CMYT and JDRJ remained liable for the penalties as assessed.

Citation CMYT JDRJ and Commissioner of Taxation [2025] ARTA 551 (Senior Member Lye, Brisbane) w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/551.html

2.6 David & Ros Carr Holdings – winding up a unit trust

Facts

In 1987 David Carr and Ivan Ritossa met and by 2007 had become close friends. In 2010, they decided to jointly acquire rural property in Australia. Early communications show David's proposal to pool resources and manage the properties professionally. Various ownership structures were considered, with a unit trust recommended by accountants for tax and operational benefits. The Darbalara Property Trust was established for this purpose, with discretionary trusts associated with David and Ivan owning 50% of the units each.

Despite advice recommending a detailed unitholders agreement addressing exit strategies and dispute resolution, none was executed. Repeated reminders and communications occurred over the following year, but no agreement was finalised.

Darbalara Holdings Pty Ltd became trustee of the Darbalara Property Trust in November 2010, replacing the initial trustee. David and Ivan each owned one share in Darbalara Holdings and there were four directors, being David and Ivan and each of their respective spouses, Rosalind Carr and Marina Ritossa.

The Darbalara Property Trust initially purchased "The Junction" near Gundagai to be operated as a commercial farming business.

On 16 December 2016, Darbalara Holdings entered into a contract to purchase "Bogolara" for $5.7 million. Ivan lent Darbalara around $6.8 million to fund the purchase. This was formalised in a loan agreement in August 2017.

In 2018, Ivan's loan was refinanced when Darbalara Holdings obtained a $4.9 million facility from ANZ. ANZ advanced $3.8 million, and both families loaned additional funds to repay Ivan's loan. These unit holder loans were interest-free and undocumented.

Distributions to unit holders occurred in 2014, 2016, and 2017, totalling $1.28 million split evenly between the families. These payments were referred to as "dividends" in emails but were formally recorded as reductions in loan accounts. From mid-2017 to mid-2020, drought affected the properties. Despite a net profit in 2020, accumulated past losses prevented further distributions. The 2020 balance sheet showed assets of over $19 million and liabilities of nearly $12 million, leaving net assets of just over $7 million, although the properties had likely appreciated in value by the time of trial.

On 28 November 2018, David & Ros Carr Holdings Pty Ltd as trustee for the Carr's family trust agreed to purchase a property called "Gilla Willa" for $13.8 million. This deal settled in December and was largely funded by a $12.8 million ANZ loan and additional funds from David's Singapore pension. The Ritossas argued that this purchase placed financial strain on the Carrs, motivating them to seek distributions from the Darbalara Property Trust despite drought conditions and eventually to push for selling their interest.

The families experienced a major falling-out during a breakfast meeting on 7 December 2019, after which David and Rosalind expressed their desire to sell. While some disputes regarding management and operational issues were resolved through recorded board meetings, the core disagreement of whether the Darbalara Property Trust should be wound up remained unresolved.

On 24 July 2020, David and Rosalind's lawyers proposed either a unit redemption or termination of the trust. Ivan and Marina rejected both proposals on 27 July 2020, citing financial exposure and disagreement with winding up the venture.

In 2020, the Carrs commenced proceedings in the Supreme Court of New South Wales seeking the winding up of the Darbalara Property Trust on the basis that:

1. clause 2 of the Darbalara Property Trust deed allowed a unit holder to unilaterally call for a winding up;
2. Darbalara Holdings' conduct was oppressive so as to justify orders under section 233 of the *Corporations Act 2001* (Cth); or
3. a receiver should be appointed to wind up the Darbalara Property Trust given jeopardy to the trust assets.

Clause 2 of the Trust Rules states that "The Unit Holders" are presently entitled to the income and capital of the trust and may require the trustee to wind up the trust. The dispute centred on whether this phrase grants individual rights to each unit holder or collective rights requiring unanimity.

Ivan and Marina argued that clause 2 of the trust deed did not permit an individual unit holder to unilaterally wind up the Darbalara Property Trust. They submitted that the clause referred to unit holders acting collectively, not individually, and was designed to satisfy the criteria of a "fixed trust" under section 3A(3B) of the *Land Tax Management Act 1956* (NSW), rather than to grant substantive termination rights.

In response, David and Ros Carr argued that the plain language of the clause allowed each unit holder to require a winding up and relied on *Sayden Pty Ltd v Chief Commissioner of State Revenue* (2013) 83 NSWLR 700; [2013] NSWCA 111, where a similarly worded clause was interpreted as granting such a right.

The primary judge concluded that clause 2 does not confer an individual right to wind up the trust. He reasoned that its wording must be read in context, particularly alongside clauses 9, 15, 16, and 17 of the Trust Rules and deed. Clause 9 specifically requires a unanimous resolution to terminate the trust, which the judge viewed as coherent with clause 2. He found no conflict that would engage the paramountcy provision in clause 2.3. The judge also noted that the deed's purpose was to ensure fixed trust status under land tax legislation, not to provide individual wind-up rights.

The Carrs also relied on sections 232 and 233 of the Corporations Act to argue that the Darbalara Property Trust should be wound up on the grounds of oppression. Section 232 allows the court to intervene where a company's conduct, proposed actions, or member resolutions are contrary to the interests of members as a whole or oppressive, unfairly prejudicial, or discriminatory to a member or members. Section 233 enables the court to make broad orders in response, including winding up the company, appointing a receiver, or ordering share buy-backs. However, the Corporations Act refers to the "company" rather than the "trust," raising questions about the court's power when the company is acting solely as a trustee.

The Carrs alleged that the Ritossas' refusal to facilitate a redemption or agree to winding up the Trust constituted oppression under sections 232(d) or (e) of the Corporations Act. The Ritossas contended that their conduct did not amount to oppression and that the trust continued to function through regular board meetings. They maintained that commercial disagreements or personal conflict did not meet the statutory threshold. The Carrs countered that the refusal to permit redemption of units, unresolved deadlocks, and the deterioration of the relationship had caused the corporate trustee to act in a manner that was oppressive, unfairly prejudicial, and contrary to the interests of members.

The primary judge found that the evidence did not establish deadlock. Even if there was deadlock, that would not be a sufficient basis for a realisation of the trust assets under section 233 of the *Corporations Act 2001* (Cth).

The Carrs argued that, based on the *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 principle which allows winding up a company on "just and equitable" grounds due to a breakdown of mutual trust and confidence, similar equitable grounds should apply to appoint a receiver to wind up the Darbalara Property Trust. They claimed the trust was effectively a "quasi-partnership" where irreparable breakdown between unit holders made ongoing management unworkable and jeopardised trust assets, justifying winding up by appointing a receiver to realise and distribute assets.

The primary judge found that the assets were being adequately managed in monthly board meetings between the directors, and as such there was no jeopardy to the trust assets justifying the appointment of a receiver to liquidate the trust assets and make final distributions to unit holders.

The Carrs appealed to the Court of Appeal.

Issues

1. Did clause 2 in the Darbalara Property Trust deed, which provided for unit holders to be able to require the trustee to wind up the trust, mean the unit holders could collectively rather than individually wind up the trust?
2. Was Darbalara Holdings' conduct oppressive so as to justify orders under section 233 of the Corporations Act?
3. Should a receiver be appointed to wind up the Darbalara Property Trust given jeopardy to the trust assets?

Decision

Legal consequences of the structures established by the Carrs and the Ritossas

The Court of Appeal considered the legal consequences of the structures established by the Carrs and Ritossas. As the trust assets were held indirectly through discretionary family trusts, neither party held beneficial ownership of the units. This setup had tax benefits but limited either party's ability to unilaterally end the investment. The use of corporate and trust structures meant typical remedies like partnership dissolution or shareholder rights under company law did not apply. In addition, the Carrs could not rely on statutory provisions like section 66G of the *Conveyancing Act 1919* (NSW) or seek winding up as if they were partners or company shareholders.

Clause 2 of the Darbalara Property Trust deed

The Court of Appeal stated that clause 2.1 provides three powers to the unit holders: entitlement to trust income, entitlement to trust capital, and the power to require the trustee to wind up the trust and distribute its property. While the first two entitlements (income and capital) are familiar legal concepts, the right to demand winding up raises interpretative challenges, particularly whether this right is held individually or collectively by the unit holders.

The Court of Appeal observed that individual unit holders cannot be "presently entitled" to all of the trust's income or capital, but only their proportionate shares. Therefore, the phrase "unit holders" in this context must refer to the collective group. The Carrs' attempt to interpret the clause as providing individual rights to wind up the trust requires an inconsistent reading: collective interpretation for income and capital entitlements, but individual interpretation for the winding-up power. This inconsistent construction was not compelling to the Court of Appeal.

The drafting of clause 2.1 closely mirrors section 3A(3B) of the *Land Tax Management Act 1956* (NSW), suggesting the primary aim of clause 2 is to ensure the trust qualifies as a fixed trust for land tax purposes. Courts generally presume that such clauses are drafted with statutory compliance in mind, unless the text clearly contradicts this assumption. Therefore, clause 2's language should be understood in light of the statute it mirrors, though it must still be interpreted in the context of the deed as a whole.

Clause 2.3, which states that clause 2.1 prevails over inconsistent provisions in the deed, only resolves actual conflicts and does not presume that a conflict exists. Courts must first interpret the deed harmoniously to avoid invoking such override clauses prematurely. Accordingly, clause 2 should be read together with clause 9, which requires a unanimous resolution to wind up the trust. Clause 9 prescribes the exclusive mechanism for winding up, suggesting that clause 2 does not confer an individual right to demand a winding up.

From a practical standpoint, the Court of Appeal held that accepting the Carrs' interpretation would produce commercially unreasonable outcomes. For instance, allowing a unit holder with a trivial interest to unilaterally terminate the trust. The Court of Appeal held that such fragility would undermine the stability and commercial utility of unit trusts. The Court of Appeal firmly rejected this interpretation, citing the dangers it poses to both fairness among unit holders and the continuity of trust structures.

In conclusion, clause 2 did not grant individual unit holders the power to compel a winding up of the trust. The unit holders must act collectively, consistent with the broader context of the trust deed and associated statutory provisions. Ground 1 of the appeal was dismissed.

Oppression

A key issue addressed was whether "deadlock" between the Carrs and the Ritossas in the corporate trustee's decision-making amounted to oppression. The Court of Appeal noted that deadlock alone did not meet the threshold for oppression under section 232. Deadlock is common in joint ventures with equal ownership and

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only constitutes oppression if it leads to detrimental consequences beyond mere disagreement, such as paralysis of trust operations or harm to a party's interests due to bad faith.

The Court of Appeal found that the Carrs' pleadings focused more on terminating the joint venture than redeeming units, and it highlighted the important distinction between the two. As such, the refusal to redeem was not oppressive, nor a breach of directors' duties. Although the Carrs described board meetings as unpleasant and claimed they had lost confidence in the working relationship, the evidence showed that the board continued to function effectively. The structure of the Darbalara Property Trust gave both families 50:50 control and veto rights, which inevitably created the risk of deadlock. The Carrs could have appointed alternate directors to ease their burden but did not. The Court of Appeal noted that this equal control arrangement was voluntarily adopted and its limitations, including the potential for disagreement, were foreseeable and accepted by both parties at the outset.

While the Carrs expressed frustration about being unable to liquidate their investment on favourable terms, evidence showed that they had received multiple third-party offers for their units. These offers aligned with expert valuations, and the difference between unit value and net asset value was attributable to the chosen trust structure, which limited marketability but provided tax and control advantages.

Importantly, there was no evidence that the Ritossas attempted to force the Carrs out or acquire their interest at an unfair discount. The Carrs were not financially pressured to sell, and their claim of oppression was rooted more in personal dissatisfaction than in demonstrable unfairness or exclusion. The Court of Appeal concluded that merely failing to agree or being unable to exit the investment on preferred terms does not amount to oppression, especially where the underlying structure was jointly established.

Another complication involved David's standing. His interest in the trust was held through a discretionary family trust, raising the question of whether he could claim oppression as a mere discretionary beneficiary. The Court of Appeal acknowledged that in some cases a discretionary object might suffer from oppressive conduct, but in this instance, there was no evidence that David suffered specific prejudice. Therefore, his claim failed on that basis as well.

Ultimately, while the Court of Appeal confirmed its broad powers under sections 232 and 233, including the ability to intervene in trust structures where the trustee is a company, it stressed that such orders would only be made in rare and appropriate cases. The Carrs failed to establish that the conditions for such intervention were met in this instance.

In conclusion, the appeal grounds relating to oppression failed. The Court of Appeal reiterated that the legal structure chosen by the parties was central to determining rights and remedies and could not be disregarded for convenience or perceived fairness, and that the trust structure, though now inconvenient to one party, was a product of mutual design. This ground of appeal was dismissed.

<u>Winding up the Darbalara Property Trust</u>

The Court of Appeal held that the decision in *Ebrahimi* is tied to the statutory language of the Corporations Act and not to any broad principle applicable to trusts. Namely, company winding up addresses dysfunction in a corporate entity, while trust law allows for removal or replacement of trustees to preserve the trust, not to wind it up.

The Court of Appeal rejected the Carrs' reliance on the *Ebrahimi* principle and the inherent jurisdiction of equity courts to justify appointing a receiver to wind up a trust. While the *Ebrahimi* principle allows courts to prevent the abuse of powers in quasi-partnerships or fiduciary relationships, it does not support dissolving trusts or winding them up, which is a distinct legal structure from companies or partnerships. Equity courts focus on supervising and preserving trusts, not destroying them, and the power to appoint a receiver is typically an interlocutory remedy to aid administration, not to terminate a trust.

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Furthermore, unlike companies, trusts are not legal entities and lack statutory provisions for winding up; courts cannot simply dissolve a trust absent express power in the trust deed or relevant legislation. New South Wales does not recognise a general power to vary or revoke trusts for beneficiary advantage, and appointing a receiver cannot circumvent this limitation. The Carrs' argument to extend the *Ebrahimi* doctrine to trusts conflicts with established equitable principles and parties' autonomy in choosing trust arrangements. Ultimately, any change to allow such winding up of trusts should come from legislation, not judicial intervention. Therefore, this ground of appeal was dismissed.

COMMENT – Prior to this decision, it was thought that the effect of making a trust a fixed trust for the purposes of section 3A of the *Land Tax Management Act 1956* (NSW) by inserting the "relevant criteria" was to confer on each unitholder a unilateral right to wind up the trust. That is certainly the position that has been adopted by Revenue NSW when considering whether trust deeds meet the "relevant criteria". While the Court of Appeal made clear that it was not determining the approach to the construction of section 3A(3B) of the LTMA, it did make strong comments that it would be "strange" if a construction that provided a minority unitholder with a unilateral right to wind up the trust was correct.

COMMENT - Had the Carrs and the Ritossas each purchased the farmland directly through their respective family trusts, instead of via a jointly held unit trust, they could have potentially relied on section 66G of the *Conveyancing Act 1919* (NSW) to force a partition or sale of the land. Section 66G enables co-owners of real property to apply to the Supreme Court for the appointment of trustees to sell the property and distribute the proceeds. This remedy is well-established and relatively straightforward compared to the complex and uncertain path the Carrs faced in seeking to unwind a unit trust structure. For co-investors desiring greater exit flexibility, direct co-ownership (with clearly documented arrangements) may offer a more effective legal avenue if relations later sour.

Citation *David & Ros Carr Holdings Pty Ltd v Ritossa* [2025] NSWCA 108 (Leeming JA, Stern JA and Griffiths AJA, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA/2025/108.html

2.7 FKG01 – Duty and cancelled contracts

Facts

On 25 May 2022, FKG01 Pty Ltd (as the purchaser) entered into a contract with Jeteld Pty Ltd (as the vendor) to purchase a commercial property situated at 122 Margaret Street, Toowoomba for $10 million. At the time of exchange, the property was tenanted by Suncorp, whose lease was to expire on 19 June 2022. Prior to settlement, Suncorp agreed to make a payment of $50,000 to the then-lessor in lieu of satisfying its 'make good' obligations. The contract originally contemplated settlement before the lease expired, in which case FKG01 would have received the $50,000 (and not Jeteld).

On 14 June 2022, the original contract was stamped, and transfer duty of $555,525 was paid by FKG01.

On 15 June 2022, Jeteld proposed to rescind the original contract and enter a new contract with another related company, 122 Margaret Street Pty Ltd (**122Marg**) as there were income tax advantages for Jeteld if the contract was entered into on or after 1 July 2022.

On 31 August 2022, FKG01, Jeteld and 122Marg executed a deed of rescission, under which the original contract was rescinded. The deed contained the following:

a condition that Jeteld and 122Marg enter into a replacement contract; and
an indemnity in favour of FKG01, given by Jeteld, for any duty payable on the original contract.

Jeteld and 122Marg entered into a replacement contract on 31 August 2022. The contract retained the $10 million purchase price but included a special condition which reduced the balance purchase price by $50,000 to reflect that 122Marg would not receive the payment from Suncorp.

On 29 September 2022, the replacement contract was stamped, and transfer duty of $555,525 was paid.

On 11 October 2022, an application for a refund under section 115 of the *Duties Act 2001* (Qld) was made in respect of the cancelled contract. Section 115 of the Duties Act relevantly provides:

(1) Transfer duty is not imposed on a dutiable transaction that is an agreement for the transfer of dutiable property (the cancelled agreement) if -

...

(d) the agreement is ended with the consent of the parties to it and there is no resale agreement.

(2) For subsection (1)(d), an agreement is a resale agreement if –

(a) under the agreement, any of the dutiable property the subject of the cancelled agreement is or will be transferred or is agreed to be transferred; and

(b) the transferee under the cancelled agreement or a related person of the transferee receives, or will receive, directly or indirectly a financial benefit other than -

(i) the release of the transferee from the transferee's obligation under the cancelled agreement; or

(ii) an interest in the dutiable property to the extent that the unencumbered value of the interest does not represent a profit for the transferee because of the resale agreement.

On 8 February 2023, the Commissioner of State Revenue refused the application, stating the replacement contract was a "resale agreement" and citing the $50,000 adjustment and indemnity as financial benefits.

On 24 March 2023, an objection was lodged by Jeteld's solicitors acting under a power of attorney for FKG01.

On 27 October 2023, the Commissioner disallowed the objection. FKG01 then appealed to the Supreme Court of Queensland.

The Commissioner of State Revenue contended that the replacement contract was a resale agreement. It was not in dispute that 122Marg was a 'related person' of FKG01. As to whether there was a disqualifying financial benefit, the Commissioner argued that there were two alleged financial benefits, as follows:

firstly, the reduction of $50,000 in the purchase price under the replacement contract was a financial benefit to 122Marg. The Commissioner argued that 122Marg obtained the same property for a lower net price; and
secondly, the indemnity granted under the deed of rescission was a financial benefit to FKG01.

FKG01 argued that the price reduction in the replacement contract merely reflected the commercial position that would have existed had the original contract proceeded. That is, because the settlement of the replacement contract occurred after the lease had ended and the payment had already been made to Jeteld, the reduction simply ensured that 122Marg did not pay twice for the same benefit.

As to the indemnity, FKG01 submitted that this was a standard commercial protection. The indemnity had not been called on and was included in the deed of rescission to ensure that there was no detriment to FKG01, given that it was not acquiring the property under the replacement contract. It did not result in any actual financial gain or advantage.

Issue

Was the replacement contract a 'resale agreement'?

Decision

Justice Hindman found that there was no resale agreement within the meaning of section 115 of the Duties Act. While 122Marg was a related party to FKG01, there was no disqualifying financial benefit.

The Court accepted that the $50,000 reduction simply reflected that Jeteld, not 122Marg, received the payment from Suncorp. If the original contract had proceeded, FKG01 would have received that payment. The adjustment in the replacement contract merely maintained the commercial position that could have existed had the original contract settled. It did not result in a profit or windfall to FKG01 or 122 Marg.

The Court also rejected the argument that the indemnity granted to FKG01 was a financial benefit, holding that an indemnity which does not result in any actual financial advantage is not a financial benefit.

The appeal was allowed.

Citation *FKG01 Pty Ltd v Commissioner of State Revenue* [2025] QSC 105 (Hindman J, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QSC/2025/105.html

3. Cases in brief

3.1 Omibiyi – superannuation trustee disqualification

Oladokun Omibiyi is an accountant and has a financial services licence. Oladokun sought review of the Commissioner's decision to disqualify him under section 126A(2) of the SIS Act from acting as a responsible officer of a superannuation entity.

In September 2014, Oladokun established a self-managed superannuation fund. Oladokun and his wife were the members of the fund and Omibiyi Pty Ltd was the corporate trustee. Between June 2017 and June 2023, Oladokun made 117 unauthorised withdrawals from the SMSF, totalling $121,834.92, which he primarily used to meet personal mortgage obligations and property-related expenses. These withdrawals gave rise to contraventions of multiple provisions of the SIS Act, including sections 34 (failure to comply with prescribed operating standards), 35D (late lodgment of annual returns), 62 (sole purpose test), 65 (financial assistance to a member), 83 and 84 (in-house asset rules) and 109 (non-arm's length investment rules). The contraventions were repeatedly identified in auditor reports between 2017 and 2023 and were not fully rectified until after the Commissioner intervened.

The Commissioner argued the scale and persistence of the contraventions demonstrated a pattern of deliberate non-compliance. Despite being advised by the auditor of the fund as early as December 2017 that loans from the fund were impermissible, Oladokun continued to access the fund over a six-year period, each year increasing his indebtedness to the fund. The Commissioner argued that the SMSF was used as a personal "safety net" in clear disregard of the fund's governing rules and the SIS Act. The Commissioner also relied on the fact that repayments to the fund occurred only after an audit was commenced by the Commissioner in November 2023.

Oladokun did not dispute that the contraventions had occurred but sought review of the disqualification on compassionate grounds. Oladokun argued that his financial position had deteriorated after failed investments in 2017 and that the situation worsened during COVID-19, leaving him unable to meet mortgage payments. Oladokun explained that he always intended to repay the amounts borrowed, which he ultimately did in full by May 2024. Oladokun also gave evidence that he now had a better understanding of his responsibilities under the SIS Act, having consulted with legal and financial professionals and undertaken some online training. Oladokun said he had taken steps to ensure the fund would remain compliant and sought a "second chance", noting that disqualification would adversely affect his accounting business and other financial roles.

The ART accepted that Oladokun acted under financial stress but found that he knowingly breached the SIS Act and continued to do so over a sustained period. The ART noted that because Oladokun held tertiary qualifications, he would have understood the seriousness of his actions. Deputy President Britten-Jones was particularly critical of the fact that Oladokun did not repay any meaningful portion of the withdrawn amounts until after the Commissioner signalled an intention to disqualify him. The Deputy President was also unimpressed with Oladokun's improved understanding, noting that while he claimed to have undertaken online learning and spoken with advisors, he had not completed any formal training, and his assertions of insight were not substantiated by action. In the ART's view, this suggested a lack of genuine engagement with the compliance obligations associated with SMSF management.

The ART concluded that the volume and duration of the contraventions, the failure of Oladokun to act upon professional warnings, the belated attempts at repayment and remediation, and the lack of evidence of genuine reform all weighed in favour of disqualification. While the ART accepted that disqualification may have financial and professional consequences, the ART considered that maintaining the integrity of the superannuation system outweighed the Oladokun's personal interests.

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The decision to disqualify Oladokun was affirmed.

Citation *Omibiyi and Commissioner of Taxation (Taxation and business)* [2025] ARTA 553 (Deputy President P Britten-Jones, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/553.html

3.2 HWFX – fraud or evasion

HWFX, a 56-year-old woman originally from China, migrated to Australia in 2007 and became a permanent resident by 2010. She began working as an independent escort around 2011. She was paid largely in cash or direct deposits into her Australian bank accounts.

Between 2016 and 2021, HWFX declared modest amounts of income of between approximately $16,700 and $25,600 per year. However, during an audit initiated before July 2021, the ATO reviewed 11 Australian bank accounts under her control and found deposits totalling more than $920,000 above her declared income. These deposits came from both Australian and overseas sources and appeared to be assessable income.

In 2014, HWFX purchased a Western Sydney property for $880,000 using a $704,000 Westpac loan, which she rapidly paid down. In 2018, she bought an additional property for $798,000 entirely in cash. The financial capacity shown in these purchases, combined with the significant unexplained bank deposits, prompted the ATO to raise concerns.

On 22 February 2022, the Commissioner made a formal finding of evasion for the years 2016 to 2019 and issued amended assessments and administrative penalties totalling more than $650,000, including shortfall interest and uplift penalties for repeated non-compliance.

HWFX objected to both the amended assessments and the penalties. In her objections, she admitted to underreporting some income but claimed many deposits were not assessable. She identified funds as gifts from relatives, capital transfers from Chinese property sales, or loans to be invested in Australia. For the 2017 income year, the Commissioner accepted one such explanation regarding a returned property deposit and partially allowed the objection, but disallowed the rest. The penalty objection was wholly disallowed.

HWFX applied to the ART for review, claiming that the deposits were not income, that she was entitled to work-related deductions, and that the penalties were disproportionate. She maintained that her former accountant misled her into thinking she could nominate a taxable income level to avoid paying tax and that her lack of English and understanding of tax laws contributed to the underreporting.

The ART heard from HWFX, her accountant representative, and four China-based witnesses. The evidence included declarations and some bank statements, but lacked contemporaneous records or independent corroboration. HWFX did not keep records of her earnings, client interactions, or deductible expenses, instead asserting that all her income was banked and that unexplained deposits reflected her true taxable income.

The ART found that HWFX failed to discharge her statutory burden under section 14ZZK of the TAA. It was not enough to prove the Commissioner's assessments were wrong; she also had to demonstrate what the correct assessments should have been. Her inability to account for the full extent of her income, particularly cash earnings not deposited, and lack of documentation rendered her case unconvincing.

The ART accepted the ATO's submission that HWFX's evidence was superficial, self-serving, and not corroborated by reliable documents. It noted inconsistencies in her explanations about overseas funds and found the statements from family members lacked detail and documentary support. Notably, some foreign transactions originated from unexplained cash deposits in Chinese accounts, further undermining her credibility.

Regarding evasion, the ART concluded HWFX engaged in blameworthy conduct by knowingly understating her income. While she claimed reliance on her accountant, the ART found she demonstrated sufficient business acumen in her property dealings and sex work operations to understand her tax obligations. The assertion that she believed she could simply choose how much income to declare was implausible.

In respect of penalties, the ART upheld the Commissioner's decision to impose the highest penalty of 75 percent for intentional disregard of the law, plus a 20 percent uplift for subsequent periods. It agreed that HWFX intentionally omitted income from her returns and rejected arguments that she was merely negligent or misinformed. The ART also declined to remit any portion of the penalties, stating that hardship alone was insufficient and that remission would undermine the deterrent function of the penalty regime.

Citation *HWFX and Commissioner of Taxation* [2025] ARTA 680 (General Member M Abood, Sydney)
w http://classic.austlii.edu.au/au/cases/cth/ARTA/2025/680.html

3.3 ZFPR – default assessments

ZFPR, a Chinese-born businessman, moved to Perth in 2004 to study at university. Whilst he did not complete his studies, he established a number of successful businesses in the mining and shipping industries. ZFPR accumulated substantial wealth, including interests in real property.

ZFPR was the director of L Company, through which much of his business activity in Australia was conducted. ZFPR derived the primary source of his income from L Company. He was also the controlling mind of various companies registered overseas, including M Company and G Company. These entities made substantial payments to or on behalf of ZFPR between 2008 and 2016.

The Commissioner audited ZFPR's tax returns for the years ended 30 June 2008 to 30 June 2017 and assessed him as having omitted assessable income totalling approximately $3.6 million, imposed administrative penalties of approximately $1.5 million for intentional disregard of the law, and levied shortfall interest charges (**SIC**) of about $780,000.

ZFPR objected to the assessments in March 2021, and when the objection was disallowed, he applied to the ART for review.

ZFPR argued that many of the payments made to or on his behalf were not assessable income, but instead reimbursements or repayments of loans he had previously made, or gifts from family members in China. ZFPR, who bore the onus of proof that the assessments were excessive, provided inadequate and often vague explanations for the source of numerous payments and failed to corroborate his claims with contemporaneous documentation or reliable witness testimony. Much of the evidence ZFPR relied on, such as AUSTRAC records and MYOB accounts and financial statements, were found to be insufficient or unreliable. The ART was not persuaded that certain funds constituted loan repayments or gifts, particularly where no proper documentation existed. The ART found an extraordinary lack of documentary evidence and noted ZFPR's failure to call relevant witnesses, including bookkeepers or family members purportedly involved in the transactions.

The ART confirmed the penalty assessments made, applying the 75% base penalty rate. Deputy President Thompson found that ZFPR made false statements in his tax returns, including falsely declaring that he had no foreign assets or interests, despite his clear control of offshore entities and bank accounts. The ART rejected the submission by ZFPR that reliance on agents excused his conduct, noting that ZFPR had not provided his agents with accurate or full information.

The ART refused to remit the penalties. ZFPR did not point to any real basis for remission and conceded he had not established proper business systems or retained adequate records. The ART accepted that ZFPR engaged bookkeepers and accountants, but noted he failed to seek or follow competent professional advice.

The ART concluded that remission of the SIC was not appropriate given the seriousness of the non-compliance and ZFPR's concession that the assessments were based on fraud or evasion.

Overall, the ART found ZFPR's oral evidence to be evasive and, at times, deliberately false. At one point, Deputy President Thompson observed that ZFPR "plainly lied". The ART noted extensive inconsistencies between ZFPR's oral evidence, written statements, and other materials before the ART.

The Commissioner's decision was largely affirmed, with minor adjustments to 2014 and 2015 assessments to reflect conceded overstatements.

Citation *ZFPR v Commissioner of Taxation* (Taxation and business) [2025] ARTA 572 (Deputy President Thompson SC, Perth) w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/572.html

3.4 MXSN – FBT and work vehicle

MXSN is a company providing taxation services. The sole director and shareholder is Mr P, a registered tax agent and former ATO employee. In 2023, the Commissioner issued default assessments for FBT relating to a Ferrari California purchased by MXSN and used by Mr P as a work vehicle.

On 30 October 2024, after an unsuccessful objection decision, MXSN applied to the ART for review of the decision. While the company's challenge progressed in the ART, the Commissioner was also separately reviewing Mr P's personal tax affairs, which involve related issues.

MXSN sought to introduce four new arguments (C3-C6) in the ART which had not been raised in the original objection.

The additional grounds were as follows:

1. C3 and C4 related to Mr P's personal tax affairs, and requested that the ART make factual and legal determinations regarding Mr P's personal taxation position;
2. C5 concerned a 10% discrepancy in the vehicle's purchase price, challenging the Commissioner's calculation; and
3. C6 asserted that it was Mr P, not MXSN, who was the beneficial owner of the vehicle under a resulting trust, as Mr P made the final balloon payment on the vehicle's purchase agreement

The ART was asked to consider whether to give leave to MXN to raise these additional grounds. Each ground was considered.

C3 and C4

The ART found that it lacked jurisdiction to make findings concerning Mr P's personal tax affairs as these were not before the ART. Under Part IVC of the TAA 1953, the ART review is limited to the matters raised in a taxpayer's objection. Mr P's affairs, though under an objection, were not yet subject to the ART proceedings.

Furthermore, even if jurisdiction existed, any findings would be non-binding on the Commissioner regarding Mr P's affairs, making the exercise of discretion to allow these grounds pointless. MXSN's constitutional incontestability argument, that the refusal renders the tax incontestable, was dismissed as both MXSN and Mr P were exercising their right to object, meaning that the tax is not incontestable.

C5

The ART accepted that MXSN sought to challenge the Commissioner's calculation of the cost base of a 2010 Ferrari California, which formed the subject of the FBT assessment under review. Although the ART noted that

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MXSN had not yet provided direct evidentiary support for the asserted 10% discrepancy in cost base, it found that this issue was capable of being substantiated and, if established, could materially affect the outcome of the FBT determination. The ART found that MXSN's position as properly grounded in section 136(1)(ii)(A) of the FBTAA, which permits certain amounts to be excluded when determining the cost price of a car for FBT purposes. The ART was satisfied that the issue raised was both legally relevant and directly connected to MXSN's own tax affairs.

C6

The ART accepted that MXSN raised a legal argument involving the potential existence of a resulting trust in favour of Mr P who was MXSN's sole director and shareholder. The ART accepted that, if the matter was substantiated, this may bear upon whether the car was provided by MXSN to Mr P in respect of his employment. Furthermore, the ART had jurisdiction to consider this matter as it would be appropriate for the ART to examine as it related to MXSN's ownership interest.

Citation *MXSN and Commissioner of Taxation* [2025] ARTA 557 (Deputy President Thompson SC, Perth)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/557.html

3.5 Simich – principal place of residence exemption

In 2020, Sonia Simich purchased land with existing development consent for a mixed-use building, intending to build and reside in a four-storey residence while leaving required commercial spaces on the ground floor vacant.

During construction, she was assessed for land tax for the 2021 and 2022 land tax years. Despite not yet occupying the property, Sonia claimed the principal place of residence exemption under clause 6(1) of Schedule 1A of the *Land Tax Management Act 1956* (NSW), arguing that she intended to solely use the property as her residence.

Sonia acknowledged that the building was required to include designated commercial spaces under the development consent and the Local Environment Plan, and that those spaces could not be used for residential purposes. However, her argument was that she intended to use the entire property as her residence by leaving the commercial areas vacant. She claimed this was not unlawful because, at the relevant time, the law did not require her to obtain an occupation certificate for those commercial spaces; only to construct them, not occupy them.

While the NCAT accepted that she genuinely intended to use the land as her principal place of residence, it held that her intention to leave the commercial spaces vacant effectively meant she intended to use them for residential purposes which was an unlawful use under local planning instruments.

The NCAT's decision was upheld by the Appeal Panel, which found that clause 6(2)(c) of Schedule 1A to the LTMA requiring that the intended use not be unlawful, was not satisfied. Sonia had argued that leaving the commercial spaces vacant did not constitute an unlawful use, but the NCAT disagreed, concluding that her overall residential intention extended to those areas. The Appeal Panel accepted that some grounds raised questions of law but dismissed the appeal in full.

Sonia subsequently sought leave to appeal to the Supreme Court of New South Wales against the Appeal Panel's decision.

Sonia brought five grounds of appeal to the Supreme Court, arguing that the Appeal Panel and the original NCAT had misinterpreted the statutory requirements under clause 6(2)(c) by improperly framing the legal question and substituting the statutory test with an impermissible gloss.

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However, the Court granted leave only on one ground (Ground 4), which directly addressed whether the Appeal Panel had misapplied the law in upholding the NCAT's finding under clause 6(2)(c). The Court dismissed the appeal. It reasoned that both the NCAT and the Appeal Panel were entitled to proceed on the agreed fact that residential use of the commercial areas was unlawful. Sonia had not attempted to challenge or withdraw from this agreed position during proceedings.

As such, the NCAT's conclusion, that even vacant commercial spaces, when reserved for future residential use, formed part of an unlawful residential plan, was valid. The Court found no legal error in the Appeal Panel's reasoning or conclusion and emphasised that the case had limited broader significance since the tax assessments related only to two years during construction and Sonia was now lawfully occupying the property. The appeal was dismissed.

Citation *Simich v Chief Commissioner of State Revenue* [2025] NSWSC 559 (Hmelnitsky J, New South Wales) w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2025/559.html

3.6 Appeal updates

Charles apartments

Charles Apartments Pty Limited as appealed to the Full Federal Court from the decision of Wheatley J in *Charles Apartments Pty Limited v Commissioner of Taxation* [2025] FCA 461 (see our May 2025 Tax Training Notes). Wheatley J held that no amount of interest on a loan by Suncorp was deductible for Charles Apartments under the re-financing principle.

Aitken

Michael Aitken has appealed to the Full Federal Court from the decision of Bromwich J in *Aitken v Commissioner of Taxation* [2025] FCA 372 (see our May 2025 Tax Training Notes). Bromwich J held that Aitken was assessable in respect of two CGT events in relation to his interest in a forestry managed investment scheme, being the exercise of a put option, and the subsequent novation of the timber rights component to the scheme manager.

Morton

The Commissioner has appealed to the Full Federal Court from the decision in *Morton v Federal Commissioner of Taxation* [2025 FCA 336. In *Morton*, the Federal Court ruled in favour of Morton, finding that the proceeds from the sale of a 10-acre property subdivided into residential and commercial lots were capital receipts from the realisation of a pre-CGT asset.

The Commissioner had argued that Morton was either carrying on a business (making the land trading stock and the income assessable under ordinary concepts) or that the proceeds were profits from a profit-making scheme assessable as statutory income under section 15-15 of the *ITAA 1997*. The Commissioner emphasised Morton's involvement in development activities and the intent to maximise profits.

However, the Court held that Morton neither conducted a business nor entered into a profit-making scheme. Morton's actions reflected a cautious approach aimed at risk minimisation, rather than maximising returns. The professional conduct of the development group engaged to carry out the subdivision did not alter the personal and passive nature of Morton's role. The Court further noted that the scale of the subdivision and the absence of repetition were important indicators that the sales were not part of a business or commercial enterprise.

3.7 Other tax and super related cases from 13 May to 10 June 2025

Citation	Date	Headnote	Link
West-Trans Equipment v Comptroller-General of Customs [2025] ARTA 554	13 May 2025	CUSTOMS – Tariff Concession Order – Tariff Classification – Interpretation of Tariff Concession Order – composite goods – essential character – full description of the goods, any of the following – refund application –Red Line processing – subordinated legislation – statutory interpretation – whether ordinary rules of construction apply to Tariff Concession Orders- meaning of cover, words given ordinary meaning – taxing statutes construed beneficially – decision under review set aside	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/554.html
Whitehaven Coal Mining Limited v Chief Commissioner of State Revenue [2025] NSWSC 488	16 May 2025	TAXES AND DUTIES – Plaintiffs are members of a corporate group and are miners and sellers of coal, and hold mining leases – Under the Mining Act, the holders of such leases are liable to pay royalty to the Crown on publicly owned minerals recovered by them – Application for review of decision of the Chief Commissioner of State Revenue to disallow (in part) Assessment Notices for royalty under the Mining Act plus interest and penalty tax – Whether the giving by the Chief Commissioner of a “confirmation” on a Royalty Online Service (ROS) for the making of royalty returns is the making of an assessment of the tax liability of a taxpayer with the consequence that the Assessment Notices were reassessments to which a five year limitation period under the TA Act applies – HELD: the “confirmation” is not a making by the Chief Commissioner of an assessment of the tax liability of the Plaintiffs – Where the Plaintiffs submitted royalty returns on the basis of an intra-group arrangement (the Return Arrangement) which permitted the making of negative royalty returns and set-off within the group against positive returns of members of the group – Royalty was returned and paid on this basis with the knowledge and cooperation of senior members of the government department then responsible for the administration of the royalty system and was subject to audits which were passed – The Return Arrangement is not permissible under the Mining Act as a basis for rendering royalty returns – Whether the only	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2025/488.html

Citation	Date	Headnote	Link
		assessments that were permissible for the Chief Commissioner to make was a nil one because the Crown waived the right to claim royalty on any other basis or was party to a binding agreement with the Plaintiffs not to do so or was estopped from claiming royalty on another basis – HELD: waiver, even if available, not established, binding agreement not established, and estoppel not available and, in any event, not established	
Peach Tree Bay Pty Ltd v Commissioner of Taxation [2025] ARTA 589	20 May 2025	TAXATION – Coronavirus Economic Response Package – Eligibility for Cash Flow Boost – whether Applicant discharged burden of proof under s. 14ZZK(b(ii) TAA 1953 – Payments giving rise to withholding obligations under s.5(1)(a)(i) BCF Act 2020 – Decision to disallow affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/589.html
Deputy Commissioner of Taxation v Kate's Cooking Pty Ltd (in liq); in the matter of Kate's Cooking Pty Ltd (in liq) [2025] FCA 529	22 May 2025	CORPORATIONS – interlocutory process seeking appointment of liquidator of corporation as receiver of trust assets – liquidator appointed as receiver	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2025/529.html
Guo v Chief Commissioner of State Revenue [2025] NSWCATAD 115	23 May 2025	ADMINISTRATIVE LAW - reviewable decision - correct and preferable decision - Civil and Administrative Tribunal - objection - appeal - administrative review STATE REVENUE - land tax - surcharge land tax – foreign person - owner - equitable estate TRUSTS – resulting trust - presumption of advancement - constructive trust - beneficial ownership LEGAL PROFESSIONAL PRIVILEGE - dominant purpose - confidential communication - Purchaser/Transferee Declaration - Provision of information - Chief Commissioner of State Revenue - Australian Taxation Office	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/115.html
Sharma v Commissioner of State Revenue (Review and Regulation) [2025] VCAT 478	29 May 2025	Review and Regulation List – Land Tax Act 2005 (Vic), ss 54 and 56 – Availability of principal place of residence (PPR) exemption for property in circumstances where applicant resided in rental property and leased the relevant property during the entirety of the calendar year preceding the relevant land tax year – Whether impact of COVID-19 related restrictions relevant to assessment of PPR exemption – Whether any basis for remission of penalty tax imposed –	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2025/478.html

Citation	Date	Headnote	Link
		Assessment confirmed.	
Webb v Commissioner of State Revenue [2025] QCAT 210	2 June 2025	TAXES AND DUTIES AND HOME OWNERS GRANT – ADMINISTRATIVE DIRECTION – QUEENSLAND – where applicant entered into a building contract for a new dwelling to be constructed on land where there was an existing dwelling – where the contract did not involve any renovation work to the existing dwelling – where the existing dwelling was not to be demolished – where the applicant applied for the HomeBuilder grant on the basis that the building contract for the new dwelling was a substantial renovation contract – where application for Grant rejected on the grounds that the building contract was not a contract for a substantial renovation – whether building contract was entered into was a substantial renovation contract as defined s 19 of the Administrative Direction – whether Grant payable to the applicants	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCAT/2025/210.html
Nova Security Group Pty Ltd v Chief Commissioner of State Revenue [2025] NSWCATAD 124	3 June 2025	TAXES AND DUTIES – payroll tax – employment agency contracts - whether services were provided in and for the conduct of the clients' businesses	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/124.html
Burke v Commissioner of State Revenue (Review and Regulation) [2025] VCAT 493	3 June 2025	CATCHWORDS Review and Regulation List – Land Tax Act 2005 (Vic), s 34C – Imposition of vacant residential land tax ('VRLT') in respect of a property in Yarraville for the 2019 land tax year – Admissions by applicant that he did not reside in the property between 1 January and 31 December 2018 – Irrelevant that the property subsequently became uninhabitable – No evidence of reasonable care or other basis for remission of the penalty – Assessment confirmed – Land tax and VRLT imposed for other land tax years not before the Tribunal.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2025/493.html

4. Federal Legislation

4.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023	30/11	9/10	10/10		
Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023	30/11	9/10	10/10		

5. State legislation

5.1 VIC – State taxes amendments

The *State Taxation Acts Amendment Bill 2025* (Vic) introduces a series of legislative amendments across key Victorian tax laws. The Bill seeks to amend the following acts:

1. *Commercial and Industrial Property Tax Reform Act 2024* (Vic): allows the Commissioner to provisionally determine qualifying land use.
2. *Duties Act 2000* (Vic):
   (a) extends the eligibility period for the temporary off-the-plan concession to apply for a further 12 months, for contracts entered into up to 21 October 2026;
   (b) inserts new sections 57JB(3) and (4) to enable persons affected by family violence to, in certain circumstances, requalify for a first home buyer duty exemption or concession under section 57JA of the Duties Act;
   (c) clarifies duty on transactions involving subdivided tax reform scheme land.
3. *First Homeowner Grant and Home Buyer Schemes Act 2000* (Vic): Provides family violence-related exemptions from grant conditions.
4. *Land Tax Act 2005* (Vic):
   (a) insert a new section 56(1C) which provides that land is taken to be used as the principal place of residence of a natural person (not acting in the capacity of trustee of a trust) despite their absence from the land if the Commissioner is satisfied that the absence is because another person subjected the person or a family member of the person to family violence, and no other land is exempt as their principal place of residence;
   (b) addresses build-to-rent dwellings, notification obligations for trust-held land, and principal place of residence exemptions.
5. *Payroll Tax Act 2007* (Vic): defines when an employee qualifies as a 'regional employee'.
6. *Taxation Administration Act 1997* (Vic): Introduces a new 50% base rate penalty tax rate for recklessness by taxpayers or their agents.

w https://www.legislation.vic.gov.au/bills/state-taxation-acts-amendment-bill-2025

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6. Rulings

6.1 Representatives of incapacitated entities and GST

On 14 May 2025, the ATO published *Draft Legislative Instrument* LI 2025/D5 to allow representatives of incapacitated entities to choose to account on a cash basis under section 29-40 of the GST Act. It repeals and replaces the instrument made in 2015, which would otherwise sunset on 1 October 2025.

Under the instrument, the representative of an incapacitated entity may choose to account on a cash basis, irrespective of the method of accounting originally adopted by the incapacitated entity prior to incapacitation, and does not need to request and receive permission from the Commissioner to do so.

ATO reference *LI 2025/D5* w https://www.ato.gov.au/law/view/document?docid=OPS/LI2025D5/00001

6.2 Attribution rules for collecting societies

On 4 June 2025, the ATO published *Draft Legislative Instrument LI 2025/D10* to update the GST attribution rules for collecting societies and copyright owners under the *Copyright Act 1968*. It will replace the determination made in 2015, which would otherwise sunset on 1 October 2025.

The new instrument modifies the timing of attribution for:

1. GST payable by collecting societies on supplies to copyright owners;
2. GST payable by copyright owners on supplies to third parties; and
3. Input tax credits for acquisitions made by copyright owners.

Comments on the draft instrument are due on 2 July 2025.

ATO reference *LI 2025/D10* w https://www.ato.gov.au/law/view/document?docid=OPS/LI2025D10/00001

6.3 Payroll tax and medical practitioner rulings issued by Revenue SA

On 16 May 2025, Revenue SA issued two rulings in relation to the application of the *Payroll Tax Act 2009* (SA) to medical practices and practitioners.

Payroll Tax Relief for Medical Practices

Section 17B of Division 3 of Part 3 of Schedule 2 of the Payroll Tax Act, and the *Payroll Tax Regulations 2025* (SA), were introduced to implement relief in the form of:

1. an amnesty for any unpaid payroll tax that was payable on wages paid or payable to relevant GP contractors prior to 1 July 2024; and
2. an exemption from payroll tax on wages paid or payable to GPs on or after 1 July 2024 when certain conditions are met.

Revenue Ruling PTASA004 explains the retrospective payroll tax amnesty and bulk-billing exemption on the wages of general practitioners.

While the amnesty only applies to contractor GP services (and does not extend to GPs engaged as employees and other staff such as nurses, reception, administration staff, pathology and allied health services), the bulk-billing exemption applies to contractor and employee GP services (and does not extend to other staff such as nurses, reception, administration staff, pathology and allied health services).

Medical Practitioners contracted by regional local health networks to deliver medical services

Revenue Ruling PTASA005 explains the application of the Payroll Tax Act to medical practitioners contracted by regional Local Health Networks (**LHN**) to deliver medical services in rural and regional hospitals.

Section 51 of the Payroll Tax Act provides that wages paid or payable by an employer who provides health services otherwise than for the purpose of profit or gain are exempt wages. Accordingly, payments made to GPs or GP registrars as relevant contractors, and therefore as deemed employees, for services performed by them to LHNs will be exempt. On-payments made between the medical practice and the GP are also exempt.

Additionally, the exemption under the relevant contract provisions in section 32(2)(c) of the Payroll Tax Act applies if a LHN contracts with a medical practice, and the medical practice engages more than one other person, employed by or who provides services for the medical practice, to perform the work required under the LHN contract.

Revenue SA reference *PTASA004 Payroll Tax Relief for Medical Practices*
w https://www.revenuesa.sa.gov.au/resources/publications/revenue-rulings/revenue-rulings/ptasa004/ptasa004
Revenue SA reference *PTASA005 Payroll Tax - Medical Practitioners contracted by regional local health networks to deliver medical services in rural and regional hospitals*
w https://www.revenuesa.sa.gov.au/resources/publications/revenue-rulings/revenue-rulings/ptasa005/ptasa005

7. Private rulings

Taxpayers cannot rely on private rulings obtained by other taxpayers. Private rulings are not binding on the Commissioner in relation to taxpayers other than the rulee(s) and provide no protection (including from any underpaid tax, penalty, or interest). Additionally, private rulings are not an authority for the purposes of establishing a reasonably arguable position for taxpayers to apply to their own circumstances. For more information on the status of edited versions of private advice and the reasons the ATO publishes them, refer to PS LA 2008/4.

7.1 Capital loss on deregistration

Facts

An individual was actively involved in a business and had lent multiple tranches of funds to two related discretionary trusts, each with a corporate trustee which the deceased was a sole director and shareholder of.

The loans provided to the trusts (**Loans**) were intended to provide working capital for the business and were made without formal documentation, however, there was an understanding that the Loans would be interest bearing and repayable when funds permitted. The Loans were used to support both the external borrowings for the original purchase of the business and for subsequent short-term capital requirements. The Loans were shown in the financial statements of the trusts.

Following the individual's death, the business failed. The assets of the related trusts were sold under contracts that had been entered into while the individual was alive.

The proceeds from the sale of the assets enabled part payment of the first registered secured creditor only.

Both trustee companies were placed into liquidation as there were insufficient trust assets to repay the outstanding debts and liquidation costs.

No funds from the Loans were recovered by the deceased estate. The liquidator confirmed that the Loans were unrecoverable and suggested that deregistration of the companies would give rise to a capital loss.

The companies were deregistered and no return was paid to the deceased estate by the liquidator.

Question

Will the Estate make a capital loss in respect of the Loans, upon liquidation and deregistration of the trustee companies?

Ruling

Under section 108-5 of the ITAA 1997, a loan constitutes a CGT asset. The estate, upon inheriting the loans from the deceased acquired the same cost base as the deceased. As the Loans were made in a commercial context and not for personal use, they were not personal use assets which are excluded under section 108-20 of the ITAA 1997.

As per section 104-25 of the ITAA 1997, CGT event C2 occurs when an intangible CGT asset, such as a debt, ends either by being discharged, abandoned, or becoming unrecoverable. According to *Tax Determination TD 2000/7*, deregistration of a company triggers CGT event C2 for related debts. In this case, the Loans effectively ended when the trustee companies were deregistered, as this formally terminated any prospect of repayment. As the estate received no payment from the trustee companies, the capital proceeds were nil.

Under section 116-30(3A) of the ITAA 1997, where no proceeds are received, the taxpayer is taken to have received the market value of the asset at the time of the CGT event.

The market value of the loans at the time of the event is worked out as if the CGT event had not happened and was never proposed to happen. However, as discussed in *Taxation Ruling TR 2001/9*, the market value of a debt that is irrecoverable due to insolvency is nil. In this case, the amount deemed to be capital proceeds under the market value substitution rule will be nil.

Therefore, the Estate will make a capital loss equal to the cost base of the loans.

ATO reference *Edited Private Advice Authorisation No. 1052368143608*
w https://www.ato.gov.au/law/view/document?docid=EV/1052368143608

7.2 Mortgage book trailing commissions

Facts

The taxpayer operates a business as a loan broker, primarily generating income through trailing commissions. These commissions arise from two sources: new loans the taxpayer brokers directly with financial institutions, and loan books acquired from unrelated third-party brokers.

Trailing commissions are earned when a loan is initiated and settled. They are paid monthly and calculated as a percentage of the average monthly balance of each loan. The commissions accumulate over time, depending on the duration that the loans remain within the taxpayer's loan book.

Although loans may have terms extending up to a specified maximum number of years, industry data indicates that the average duration before a loan is repaid or refinanced is shorter. Consequently, trailing commissions are generally received each month over this average period, and their amount is determined by the average monthly loan balance.

Payment of trailing commissions is facilitated through an independent service provider. This provider, engaged for a fee, aggregates and distributes the commissions owed to each mortgage broker.

There are no regulatory impediments to acquiring trailing commission rights or loan books. However, financial institutions that pay these commissions require that purchasers are members of the Mortgage Finance Association of Australia (MFAA) and hold appropriate professional indemnity insurance.

The taxpayer acquired a loan book from an unrelated mortgage broker. Their intention in making this acquisition was to secure the future right to receive the trailing commissions associated with the loans contained within that loan book.

The taxpayer anticipates selling the loan book for 2.5 to 3 times the annual trail income.

Questions

1. Can the taxpayer calculate taxable income, consisting of trailing commissions from purchased loan books, on an emerging profits basis?
2. Does the Commissioner have a preferred method of calculating the emerging profit generated from the loan books acquired?
3. Is a loan book a CGT asset and will the gain made on its disposal be assessed under the CGT provisions?
4. Is a loan book considered an active asset for the purposes of the CGT small business concessions?

Ruling

Emerging profits basis

The Commissioner agreed that using an emerging profits basis is appropriate where the taxpayer has acquired a right to future trailing commissions. These commissions are not ordinary income under section 6-5 of the ITAA 1997 because they include both a return of capital and a profit component.

In determining its profit for accounting purposes, it is appropriate that the taxpayer amortises the cost of the debt ledgers. It does not calculate its profit or loss by deducting from the year's collections the total cost it outlays in acquiring trailing commissions for that year for that would distort its true position for that year. Instead, its profits are effectively determined on an emerging basis taking into account that portion of the cost relevant to the acquisition of the trailing commissions that result in collected income over the period.

The approach aligns with judicial guidance in *XCO Pty Ltd v FCT* (1971) 124 CLR 343, where it was held that the emerging profit method may be suitable for long-term profit-making schemes. The method is also consistent with *Taxation Ruling* TR 98/1, which permits accounting approaches that reflect a true and fair view of income.

Method of calculating emerging profits

The Commissioner does not prescribe a particular calculation method for use under the emerging profit basis. Drawing on *The Commissioner of Taxes (SA) v The Executor Trustee and Agency Co of SA Ltd* (1938) 63 CLR 108, the ruling emphasises that any method may be acceptable provided it offers a substantially correct reflection of the taxpayer's true assessable income.

Several acceptable approaches were mentioned, including:

1. straight-line amortisation:
2. First In First Out (FIFO); or
3. a formula such as A − (A × B ÷ C), where A equals actual collections, B is the cost of the ledger, and C represents total anticipated collections.

The chosen method must be suitable to the taxpayer's circumstances and income stream.

CGT asset

Loan books are considered CGT assets under subsection 108-5(1) of the ITAA 1997. The ATO compared them to insurance registers, which are treated as capital assets in *Taxation Ruling TR 2000/1* due to their role in the profit-making structure of a business.

When a loan book is disposed of, the proceeds are capital in nature. Therefore, any gain realised on its sale must be assessed under the capital gains tax provisions, not as ordinary income.

Active asset

Under section 152-40(1) of the ITAA 1997, an asset qualifies as active if it is used or held ready for use in a business. For intangible assets, the key test is whether they are inherently connected with the business operations.

The loan book in question is used in the taxpayer's loan broking business and is inherently connected with that business activity. Accordingly, it qualifies as an active asset for the purposes of the CGT small business concessions, assuming the other basic conditions under Subdivision 152-A are satisfied.

ATO reference *Edited Private Advice Authorisation No. 1052377116288* w https://www.ato.gov.au/law/view/document?docid=EV/1052377116288

7.3 CGT – compulsory acquisition rollover

Facts

The taxpayer is an Australian resident for tax purposes and had owned an investment property for many years from which the taxpayer derived rental income.

During the year ended XX XXXX 20XX, a statutory authority of a relevant government informed the taxpayer that the property was required for a construction of a project. The statutory authority informed the taxpayer that it had powers to acquire land by a compulsory process.

The taxpayer was provided with an offer amount as compensation for this but did not agree to this amount.

During the year ended XX XXXX 20XX, the statutory authority compulsorily acquired the taxpayer's property.

During the year ended XX XXXX 20XX, it was determined that the taxpayer should receive an advanced payment amount which included statutory interest. This amount was deposited into the taxpayer's bank account some months after the property was compulsorily acquired. The taxpayer came to an agreement with the statutory authority on a final compensation amount.

During the year ended XX XXXX 20XX:

1. the taxpayer received the final payment which included statutory interest;
2. the taxpayer did not look for a replacement property as their main focus was to pay their debts;
3. the property market in the area was booming;
4. the taxpayer only monitored prices and did not make any offers;
5. the statutory authority announced that the property was no longer required;
6. the statutory authority offered to sell the taxpayer back the property at its current market value at the time.

During the year ended XX XXXX 20XX, the taxpayer was reminded of the statutory authority's offer to sell back the property. The taxpayer responded and was interested.

During the year ended XX XXXX 20XX, the statutory authority apologised for lack of communication and the taxpayer accepted the statutory authority's offer price to purchase the property back.

During the year ended XX XXXX 20XX, a letter was sent to the current tenants of the property to advise new ownership and settlement of the property occurred.

Question

Will the Commissioner exercise his discretion under subsection 124-75(3) of ITAA 1997 to extend the time required to obtain a replacement asset for a compulsorily acquired asset?

Ruling

CGT event A1 occurred in respect of the Property when it was compulsorily acquired.

Subdivision 124-B of the ITAA 1997 contains a roll-over for when assets are compulsory acquired, lost or destroyed. Section 124-70 of the ITAA 1997 sets out the circumstances in which the roll-over relief may be available. The taxpayer must make a positive choice to avail itself of the roll-over under section 124-70.

Section 124-70(1)(a) provides that the taxpayer may be able to choose a roll-over if a CGT asset owned is compulsorily acquired by an Australian government agency. Section 124-70(2)(a) provides that the roll-over is only available if the taxpayer receives either money or another CGT asset, or both, as compensation for the original asset being compulsorily acquired.

If the taxpayer receives money as compensation for the involuntary disposal of a CGT asset, the taxpayer must incur expenditure to acquire another CGT asset (but not certain depreciating assets) to avail itself of the roll-over. Generally, the expenditure must be incurred within a period starting one year before the compulsory acquisition event and ending one year after the end of the income year in which the event occurred.

If the original asset was used as an investment property earning rental income immediately prior to its compulsory acquisition, the newly acquired asset or assets must be used as an investment property earning rental income for a reasonable time after the taxpayer acquires it.

The ATO ruled that the taxpayer incurred expenditure to acquire a replacement CGT asset, being the original property re-purchased from the government, and this re-acquired asset was being used as an investment property earning rental income. However, the expenditure was not incurred within one year after the end of the income year in which the compulsory acquisition occurred, due to special circumstances. For a replacement-asset roll-over in subdivision 124-B to be available to the taxpayer, the Commissioner must exercise the discretion to allow a longer period due to the special circumstances.

The ATO found there were special circumstances to allow a longer period, including:

1. since the property was compulsorily acquired, and the taxpayer did not agree with the compensation amount the taxpayer engaged a solicitor;
2. the taxpayer came to an agreed amount within the X months after the property was compulsory acquired;
3. the taxpayer did not receive the final amount of the compensation payment until X months outside the end of the roll-over period for incurring expenditure on a replacement asset;
4. the taxpayer eventually re-purchased the property that had been compulsory acquired, which continues to be used as an investment property as the taxpayer did prior to the compulsory acquisition.

Due to the special circumstances, the Commissioner allowed further time under paragraph 124-75(3)(b) of the ITAA 1997, for the taxpayer to incur expenditure in acquiring another CGT asset.

ATO reference *Edited Private Advice Authorisation No. 1052363559866*
w https://www.ato.gov.au/law/view/document?docid=EV/1052363559866

7.4 Share capital account

Facts

Company A is a company incorporated in Australia.

Company A issued ordinary shares for $X per share.

For accounting purposes, Company A allocated part of the issue price of the shares to a reserve account.

Question

Does a reserve account in the audited financial reports of Company A form part of Company A's "share capital account" as defined in section 975-300 of the ITAA 1997?

Ruling

The ATO ruled yes.

COMMENT – whether an account is a "share capital account" can have important tax implications, including as to the application of the share buy-back rules and the rules concerning share capital account tainting.

ATO reference *Edited Private Advice Authorisation No. 1052371606696*
w https://www.ato.gov.au/law/view/document?docid=EV/1052371606696

7.5 Share buy-backs

Facts

A Company is undertaking an off-market share buy-back before an unrelated third party purchases all the shares in the Company.

The Share Buy-Back Price will include a Capital Component per share equal to the cost base of the shares that will be debited to the Company's capital account. The remaining Share Buy-Back Price per share will be a fully franked Dividend Component in accordance with the Average Capital Per Share (ACPS) methodology outlined in *Practice Statement Law Administration PS LA 2007/9*.

The Share Buy-Back Price (per share) will be approximately the same as the price per share being paid by the arm's length purchaser.

The Company will have sufficient franking credits to fully frank the Dividend Component.

The commercial reasons for implementing the Share Buy-Back prior to the Share Sale have been provided.

The Company and the shareholders are all Australian residents for tax purposes.

The shareholders do not have any carried forward capital or income tax losses.

It is assumed that the methodology to determine the market value of the Company shares at the time of the Share Buy-Back will be in accordance with ATO 'Market valuation for tax purposes' guidelines.

Questions

1. Will the proposed Share Buy-Back by the Company constitute a buy-back which is an 'off-market purchase' for the purposes of Division 16K of the ITAA 1936 under section 159GZZZK of the ITAA 1936?
2. Will the difference between the Share Buy-Back Price and the portion of the Share Buy-Back Price debited to the Company's share capital account be taken to be a dividend paid out of the company's profits under subsection 159ZZZP(1) of the ITAA 1936?
3. Will the Commissioner accept that the Share Buy-Back Price is not subject to adjustment under section 159GZZZQ of the ITAA 1936?
4. Will the Share Buy-Back result in a dividend assessable to the shareholders under subsection 44(1) of the ITAA 1936?
5. Will the Dividend Component under the Share Buy-Back be a frankable distribution and therefore capable of being franked under section 202-40 of the ITAA 1997?
6. Will the Commissioner conclude that none of the provisions of section 207-145 of the ITAA 1997 will apply to the Share Buy-Back?
7. Will the Commissioner accept that none of the provisions of sections 45A, 45B and 45C of the ITAA 1936 will apply to the Share Buy-Back?

Ruling

Off-market share buy-back

The ATO determined that the Share Buy-Back constitutes an off-market purchase for the purposes of Division 16K of the ITAA 1936. This is because the Company is not listed on any stock exchange, and therefore the buy-back cannot occur in the ordinary course of trading. As a result, it falls within the definition of an off-market purchase under paragraph 159GZZZK(d) of the ITAA 1936.

Amount of Dividend Component

The ATO concluded that the difference between the Share Buy-Back Price and the amount debited to the Company's share capital account constitutes a dividend under subsection 159GZZZP(1) of the ITAA 1936. This outcome arises because the dividend component exceeds the capital component, calculated using the ACPS methodology, and is therefore deemed to be paid out of profits.

No market value adjustment

Because the Share Buy-Back Price is approximately equal to the market value of the shares, as determined using ATO-approved valuation methods and consistent with the price agreed with an arm's length third-party purchaser, the ATO determined that no adjustment under section 159GZZZQ of the ITAA 1936 is required.

Assessability of Dividend Component

The Dividend Component of the Share Buy-Back is considered a dividend under subsection 159GZZZP(1) and is not excluded under the definition in subsection 6(1) of the ITAA 1936. Therefore, the ATO determined it is assessable to shareholders under subsection 44(1) of the ITAA 1936.

Franking Dividend Component

As the Share Buy-Back Price does not exceed the market value of the shares at the time of the buy-back, and none of the circumstances in section 202-45 of the ITAA 1997 apply, the ATO determined that the Dividend Component is a frankable distribution under section 202-40 of the ITAA 1997 and therefore capable of being franked.

No denial of franking credits

The ATO assessed whether any of the conditions under section 207-145 of the ITAA 1997 would deny shareholders a franking credit gross-up and tax offset. After considering factors including qualified person status, anti-avoidance rules, streaming, dividend stripping, distribution washing, and foreign income tax deductions, the ATO found none of these provisions applied. The shareholders had held their shares at risk for the required period, were not involved in dividend stripping or streaming, and no foreign tax deduction was involved. Therefore, franking credits will not be denied under section 207-145.

Integrity provisions

The ATO concluded that there was no intention to stream capital benefits or dividends selectively among shareholders, nor was the buy-back part of a dividend substitution scheme. Shareholders were not advantaged under section 45A, and although they did receive a tax benefit through preserved franking credits, it was incidental to the commercial purpose of facilitating the share sale. Thus, the ATO determined that neither section 45A nor 45B applies, and no part of the capital component should be treated as an unfranked dividend under section 45C of the ITAA 1936.

ATO reference *Edited Private Advice Authorisation No. 1052373416950*
w https://www.ato.gov.au/law/view/document?docid=EV/1052373416950

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7.6 Commercial debt forgiveness

Facts

In its financial statements for the 2016 financial year, Company A reported plant and equipment assets, net of accumulated depreciation and impairment, valued at a specific amount. It also disclosed director loans amounting to $XXX.

In its 2016 income tax return, Company A reported carry-forward tax losses amounting to $XXX.

As at 1 November 2016, Individual B was the sole director and sole shareholder of Company A. This had been the case from the company's establishment until the 2016 financial year. Throughout this period, Individual B was also employed elsewhere.

Due to the company's sustained losses over several years, Individual B supported Company A by providing personal funds through director loans. These contributions allowed the company to continue operating and meet its financial obligations.

On X November 20XX, Company A and Individual B executed a Deed of Forgiveness of Debt. he Deed forgave a debt of $XXX owed by Company A to Individual B.

Questions

1. Will the forgiveness of the loan owed by Company A to Individual B (its director) be a forgiveness of a commercial debt under Division 245 of the ITAA 1997?
2. Will the forgiveness of the loan owed by Company A to Individual B give rise to a deduction under section 8-1 of the ITAA 1997 for the lender?
3. Will the forgiveness of the loan owed by Company A to Individual B be a CGT event for the lender?

Ruling

<u>Commercial debt forgiveness</u>

The ATO considered whether the debt forgiven by Individual B was a "commercial debt" and whether the act of forgiveness met the criteria under Division 245. A debt qualifies as commercial if, had interest been payable on it, that interest would have been deductible by the debtor. Company A had used the loan to fund its operating expenses, and had interest been charged, it would have been deductible. Therefore, the loan met the definition of a commercial debt under section 245-10.

The debt was forgiven via a formal deed, satisfying the requirement under section 245-35(a) for a release or waiver of the obligation to repay. The market value of the debt at the time of forgiveness is considered under section 245-55, with assumptions depending on whether the creditor and debtor dealt at arm's length and whether the loan was part of a moneylending business.

Once the debt is forgiven, Subdivision 245-E sets out how the forgiven amount is applied. In Company A's case, it would first reduce any carried forward tax losses (section 245-115), then be offset against deductions for depreciable assets (section 245-145). Any remainder is disregarded (section 245-195). These adjustments affect not just the year of forgiveness but also future years.

Accordingly, the ATO determined that the forgiveness was a commercial debt forgiveness under Division 245 of the ITAA 1997.

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No deduction for lender

Section 8-1 allows a deduction for losses or outgoings incurred in gaining assessable income, provided the expense is not capital or private in nature. The Commissioner examined whether Individual B, as the lender, met these conditions.

The loan was not part of a business of lending money, nor did it generate any assessable income through interest. As such, it was considered capital in nature. Since none of the positive limbs of section 8-1 were satisfied and the expenditure was of a capital nature, the deduction is denied by the negative limb of the section.

Therefore, the ATO concluded that no deduction arises under section 8-1 for the lender due to the capital nature of the loan.

CGT event C2

The ATO examined whether forgiving the debt triggered a CGT event for Individual B. A debt is treated as a CGT asset. When a debt is forgiven, the lender disposes of the asset, triggering CGT event C2.

The capital proceeds are the market value of the debt at the time of the event determined as though the forgiveness had not occurred. Since Individual B received no consideration, the market value is used. The cost base of the debt is the amount loaned.

If the market value is less than the cost base, a capital loss results. If equal, there is no gain or loss. In this case, the ATO found that CGT event C2 occurred upon forgiveness, and the CGT consequences depended on the market value of the debt compared to its face value.

The ATO, therefore, considered that the loan forgiveness triggered CGT event C2 for Individual B.

ATO reference *Edited Private Advice Authorisation No. 1052112631537*
w https://www.ato.gov.au/law/view/document?docid=EV/1052112631537

7.7 Adjustments to employee options

Facts

The ruling concerned an arrangement for the adjustment of employee options that had been issued by Bravura Solutions Limited.

Option has been issued by Bravura in the income year ended 30 June 2024.

In January 2025 Bravura undertook a return of capital on its ordinary shares, resulting in a reduction of the total equity value of the company. Bravura adjusted the terms of the options by decreasing the exercise price so that the employees did not suffer a material detriment.

It was not clear from the class ruling whether the taxing point for the options had yet occurred.

Question

What are the income tax consequences for employees of the adjustment made to the options?

Ruling

The Commissioner ruled as follows:

1. CGT event A1 did not happen as the adjustment did not result in the disposal of a CGT asset;
2. CGT event C2 did not happen as the adjustment did not result in the ownership of an intangible asset to end; and
3. CGT event H2 happened upon the adjustment as the adjustment is an act, transaction or event which occurs in relation to the Options that does not result in an adjustment to the cost base or reduced cost base. However, the employees did not make a capital gain or a capital loss from CGT event H2 happening as there are no capital proceeds or incidental costs incurred from this adjustment (section 104-155(3) and section 116-20(2) of the ITAA 1997, and there are no relevant modifications under CGT event H2 (section 116-25 of the ITAA 1997).

ATO reference *CR 2025/30*
w https://www.ato.gov.au/law/view/document?docid=CLR/CR202530/NAT/ATO/00001

7.8 Personal superannuation contribution deduction

Facts

The taxpayer made a non-concessional contribution with intent to claim a personal superannuation contribution deduction.

On 30 October 20XX, the notice of intent to claim a personal superannuation contribution deduction was sent to the superannuation fund, however it was not dated.

On 8 November 20XX, the notice was received by the superannuation fund.

The superannuation fund rejected the notice as being invalid due to it not being dated.

On 15 November 20XX, a letter was sent to the taxpayer by the superannuation fund requesting the taxpayer complete a new notice.

On 21 November 20XX, the taxpayer's annual tax return was lodged without a valid notice of intent to claim being acknowledged by the superannuation fund.

Question

Is the taxpayer eligible to claim a personal superannuation contributions deduction despite not having a valid acknowledgement letter prior to the lodgment of the taxpayer's income tax return?

Ruling

Under section 290-150 of the ITAA 1997, a person can claim a deduction for personal contributions made to their superannuation fund. However, subsection 290-150(2) of the ITAA 1997 states that all of the conditions in sections 290-155, 290-165 and 290-170 of the ITAA 1997 must be satisfied before a deduction can be claimed for contributions made in that income year.

Relevantly, subsection 290-170(1) of the ITAA 1997 states:

> *To deduct the contribution, or a part of the contribution:*
> *(a) you must give to the trustee of the fund or the RSA provider a valid notice, in the approved form, of your intention to claim the deduction; and*
> *(b) the notice must be given before:*
> *(i) if you have lodged your income tax return for the income year in which the contribution was made on a day before the end of the next income year - the end of that day; or*
> *(ii) otherwise - the end of the next income year; and*
> *(c) the trustee or provider must have given you an acknowledgment of receipt of the notice.*

In the taxpayer's situation, while the notice was provided to the superannuation fund, it was not valid and, therefore, it was not accepted. Accordingly, the taxpayer is not eligible to claim a deduction for the contribution made in the income year.

The Commissioner does not have any discretion or administrative authority to change or disregard the prescribed requirement.

ATO reference Edited Private Advice Authorisation No. 5010111729592
w https://www.ato.gov.au/law/view/document?docid=EV/5010111729592

8. ATO and other materials

8.1 ATO guidance on lodgment deferral requests

The ATO is receiving a growing number of lodgment deferral requests that fail to provide enough information or only provide generic information that does not support the reason for the request. Such requests are more likely to be rejected. The ATO has published guidance on what to include in the deferral requests to improve chances of approval, including but not limited to:

1. the exceptional or unforeseen circumstances affecting the relevant clients;
2. when these circumstances occurred and whether they are ongoing or resolved;
3. how the circumstances have impacted the ability to lodge on time; and
4. if applying after the due date, provide an explanation for why the request is late.

If detailed information is not provided in the deferral request, then the ATO may not be able to consider the request under *Practice Statement Law Administration* PS LA 2011/15 and the request may be declined.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/get-your-deferral-request-right-the-first-time

8.2 ATO's top 5 end-of-financial-year checklist for trustees

The ATO has issued a checklist to assist trustees in ensuring compliance and avoiding common errors. The top 5 points include:

1. **understand how income is defined for the trust estate**: review the trust deed to determine the correct definition of income, and ensure distributions align with the requirements in the deed. Common errors seen by the ATO include mistaking accounting profit for distributable income, and misinterpreting trustee powers;
2. **identify the trust's beneficiaries**: confirm distributions are being made to eligible persons under the deed. Common errors seen by the ATO include making distributions to non-beneficiaries, or distributing outside of a family group where a family trust election (**FTE**) or interposed entity election (**IEE**) is in place;
3. **understand resolutions and present entitlement**: a failure by a trustee to make valid resolutions to distribute income before 30 June may result in the trustee being liable for tax on all income of the trust, and being taxed at the highest marginal rate;
4. **identify any FTEs or IEEs**: be aware of any FTEs or IEEs in place, as distributions outside the designated family group can trigger a 47% family trust distributions tax, with no discretion available to the Commissioner once triggered; and
5. **maintain clear and accurate records**: keep comprehensive records of all trust activities, as poor record-keeping is a common cause of compliance issues and trustees can be held personally liable for trust debts.

w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/attention-all-trustees-top-5-eofy-checklist

8.3 PAYG withholding variation for bankrupt estates to continue

A new legislative instrument has been released to update how external administrators and bankruptcy trustees handle PAYG withholding when paying out certain employee entitlements such as wages and leave, that were owed before their appointment.

This 2025 legislative instrument replaces the existing 2015 instrument which was due to expire on 1 October 2025. While the new instrument keeps the same purpose and framework, it updates the withholding rate from 34.5% to 32% to reflect the mid-point personal income tax rate from 1 July 2024. This update is intended to reduce the administrative burden when paying entitlements to employees of an entity under administration or bankruptcy. The instrument will take effect from 1 July 2025.

w https://www.legislation.gov.au/F2025L00607/asmade/text

8.4 Interim decision impact statement – *Shaw's* case

The ATO has issued an interim decision impact statement in response to the ART's decision in *Shaw and Commissioner of Taxation* [2025] ARTA 224 (see our April 2025 Tax Training Notes) which held that a long-haul truck driver was entitled to claim a deduction for meal expenses without full substantiation as there was sufficient linkage between the expenditure and the driver's work and that the substantiation provisions in sections 900-50 and 900-200 of ITAA 1997 applied.

The ATO is appealing the decision to the Federal Court but in the interim will continue to apply the existing interpretation of the law on substantiation and travel allowance deductions, including in Taxation Ruling *TR 2004/6*, *Taxation Ruling* TR 95/18, *Taxation Ruling* TR 97/24 and *Taxation Determination* TD 2020/5 .

w https://www.ato.gov.au/law/view/document?docid=LIT/ICD/2024/1049/00001

8.5 Provisional justified trust for Top 500

On 3 June 2025, the ATO updated its website page on the provisional justified trust framework for Top 500 groups.

This update introduces a formalised pathway for privately owned and wealthy Top 500 groups that have achieved full tax assurance but have not yet implemented an effective tax governance framework. The new *provisional justified trust* model allows eligible groups to pause assurance activities for a set period while they focus on embedding robust tax governance practices that align with ATO expectations.

Eligibility and entry requirements

A Top 500 group may enter provisional justified trust if all material tax issues for its income earning and wealth extraction activities have been assured up to the penultimate lodged year, and the group commits to implementing an effective tax governance framework within 12 months. Entry is available to groups achieving full tax assurance for the first time, as well as those completing a refresh assurance engagement. The aim is to provide groups with the space to prioritise governance design and implementation without the burden of concurrent assurance reviews.

Approaches based on group type

The ATO distinguishes between two types of groups for the purposes of the provisional justified trust pathway.

Passive investor groups are those that derive at least 90 percent of their income from passive sources such as interest, dividends, rental income, and similar investments. These groups are not required to demonstrate the operational effectiveness of their governance framework during the provisional period. They must, however, produce a draft framework within six months, finalise it following ATO feedback, and implement it within 12 months to enter justified trust and begin a three-year monitoring and maintenance phase.

Non-passive investor groups, on the other hand, must not only design but also demonstrate the effectiveness of their governance framework before being granted justified trust. These groups follow a similar drafting and review timeline, with an initial six-month window to submit a framework and receive ATO feedback, followed by a further two months for amendments. Additional time may be granted, if necessary, to accommodate the group's lodgment cycle. Importantly, effectiveness testing is required before the group can progress to justified trust.

Consequences and engagement timelines

Failure to implement an effective governance framework within the required timeframe results in the group being removed from the provisional program and re-entering active assurance reviews based on their last assured year. If successful, the group proceeds to a three-year monitoring and maintenance phase. The ATO has provided a sample timeline showing the typical engagement progression: full tax assurance in the 2023 lodgment year, provisional justified trust in 2024, monitoring and maintenance from 2025 to 2027, and a justified trust refresh in 2028 or 2029.

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/privately-owned-and-wealthy-groups/what-you-should-know/tax-performance-programs-for-private-groups/top-500-private-groups-tax-performance-program/provisional-justified-trust-for-top-500-groups

8.6 Application of intermediary arrangements to multi-media industry

A draft legislative instrument has been issued to specify that supplies or acquisitions of multi-media products will be taken to be supplies or acquisitions to which the arrangements in section 153-50 of the GST Act apply.

Section 153-50 of the GST Act provides that principals and their intermediaries may enter into an arrangement under which the intermediary will be treated as a supplier or acquirer in their own right (section 153-50 arrangement). The general effect of entering into a section 153-50 arrangement is that the intermediary, rather than the principal, is treated as the supplier or acquirer (as applicable) regarding the transaction with the third party. Entities may choose to enter into these arrangements to simplify their accounting for GST.

Under section 153-65 of the GST Act, the Commissioner may determine that certain supplies or acquisitions are taken to be supplies or acquisitions to which a section 153-50 arrangement applies. Where the Commissioner makes this determination, the section 153-50 arrangement will apply without the parties being required to enter into the arrangement in writing.

Multi-media products, as defined in the draft instrument, are products that combine various forms of media, such as text, images, audio, video, and interactive elements, to convey information or provide entertainment. Examples include print media, such as magazines or newspapers. Multi-media products are often sold through an intermediary, such as a newsagency or supermarket, which would result in principals having to obtain information from intermediaries to account for their GST obligations. Therefore, the Commissioner considers that a determination under section 153-65 is appropriate in relation to the multi-media industry to alleviate compliance costs and burdens.

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When issued, the draft instrument will repeal and replace the *Goods and Services Tax: Application of Agency Arrangements to the Multi-Media Industry Determination (No. 33) 2015*, which would otherwise sunset on 1 October 2025.

w https://www.ato.gov.au/law/view/document?docid=OPS/LI2025D6/00001

8.7 Corporate tax regime flagged as priority reform area

The Productivity Commission is seeking input on 15 priority reform areas under the five productivity inquiries commissioned by the Government:

1. creating a dynamic and resilient economy;
2. building a skilled and adaptable workforce;
3. harnessing data and digital technology;
4. delivering quality care more efficiently; and
5. investing in cheaper, cleaner energy and the net zero transformation.

The Productivity Commission has identified two policy reform areas within the inquiry aimed at 'creating a dynamic and resilient economy':

1. supporting business investment through corporate tax reform; and
2. reducing the impact of regulation on business dynamism

The Productivity Commission has highlighted the way that companies are taxed as a key determinant of businesses' investment decisions and their willingness to innovate. The inquiry will evaluate options to support business investment and productivity growth through changes to Australia's corporate tax arrangements. The inquiry will also consider the importance of fiscal neutrality, and the extent to which options are consistent with achieving an efficient and equitable tax system.

The inquiry will further consider Australia's regulation of businesses, including the institutional processes for introducing new regulation, and how existing harmful regulation can be improved or removed. The inquiry will review the arrangements for introducing new regulation, how to reduce the burden of existing regulations on businesses, and methods for streamlining and harmonising regulation across states and territories.

Responses to the questionnaire closed on 6 June 2025. The Productivity Commission will issue an interim report in July or August 2025 based on the initial stakeholder inquiry and undertake further consultation from August to September 2025. The Productivity Commission will provide its final inquiry report to the Government in December 2025.

w https://engage.pc.gov.au/projects/dynamic-resilient-economy

8.8 Policy for publishing edited versions of written binding advice

Practice Statement Law Administration PS LA 2008/4 sets out the ATO's policy in relation to preparing and publishing an edited version of written binding advice, sometimes referred to as the private binding ruling register. The ATO has recently released an updated statement as of 22 May 2025 updating its policy from 13 July 2022.

The Practice Statement provides guidelines for ATO staff taking steps to anonymise private rulings for public publication. Aside from general formatting and terminology updates, a few new statements have been added to the Practice Statement.

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At item 7, the Practice Statement has been updated to note when it is appropriate to add a note to the published rulings to reflect subsequent changes in the law or ATO position. The Practice Statement now notes:

> *[Edited Versions (**EVs**)] are not annotated if the reason for it being incorrect is due to a change of legislation, or where we have publicly changed our application of the law on a prospective basis.*
>
> *A decision to annotate an EV on the basis of it being incorrect or misleading must be approved by an Executive Level 2 staff member or above.*

Published rulings often use "X" or other placeholders to indicate dates and figures. The updated Practice Statement includes a new statement at Example 4 that says "[*t]here is no need to over-sanitise years in general. For the most part, simply indicating that a scheme existed in 2025, for example, will not pose a privacy risk*".

w https://www.ato.gov.au/law/view/document?DocID=PSR/PS20084/NAT/ATO/00001

8.9 Inbound, cross-border related party financing arrangements

The ATO has published *Draft Practical Compliance Guideline* PCG 2025/D2.

The draft PCG outlines the ATO's compliance approach to assessing the tax risk associated with the amount of taxpayer's inbound, cross-border related party financing arrangements under Subdivision 815-B of the ITAA 1997. The draft PCG applies to an entity that:

1. is a 'general class investor', or a 'financial entity' that has chosen to apply the 'third party debt test' in relation to an income year for the purposes of Division 820 of the ITAA 1997; and
2. has inbound, cross-border related party financing arrangements.

The draft PCG:

1. outlines the ATO's compliance approach and risk assessment framework;
2. identifies the general factors relevant in determining and testing the amount of a taxpayer's inbound, cross-border related party financing arrangement;
3. provides specific examples on how the ATO uses these factors in their compliance approach; and
4. provides an outline of the types of documentation and evidence that the ATO expects taxpayers to prepare in determining the amount of their cross-border related party financing arrangements.

The draft PCG is open for public comment until 30 June 2025.

w https://www.ato.gov.au/law/view/document?docid=DPC/PCG2025D2/NAT/ATO/00001

8.10 Updates to ATO website on global and domestic minimum tax

The ATO has published updates to its website regarding key aspects of the global and domestic minimum tax regime. The global and domestic minimum tax regime are part of the Global Anti-Base Erosion Model Rules (GloBE Rules).

On 10 December 2024, primary legislation which implemented the framework of the GloBE Rules in Australia received royal assent. On 23 December 2024, subordinate legislation containing detailed computational rules was registered as a legislative instrument. Updates to the ATO's website followed on from the implantation of the primary and subordinate legislation.

The information on the ATO's website is designed to help taxpayers who may be in-scope of Pillar Two to meet their obligations, as first lodgements are due by 30 June 2026.

The updates to the ATO's website include:

1. guidance about how the ATO will administer potential amendments to Australian law to address inconsistencies;
2. an overview of the mechanics for calculating top-up tax;
3. additional information on how the rules apply, including in respect of specific entities; and
4. additional information and examples.

The ATO will continue to update the website over the coming months to provide further information and guidance. Taxpayers are able to contact the 'Pillar 2 mailbox' regarding priority issues they are facing, or if they have any questions about the Australian Pillar Two rules.

w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/updated-information-about-global-and-domestic-minimum-tax
w https://www.ato.gov.au/businesses-and-organisations/international-tax-for-business/in-detail/multinationals/global-and-domestic-minimum-tax

8.11 Car limit for 2025-26

The car limit for depreciation purposes for 2025–26 remains unchanged from 2024-25 at $69,674.

w https://www.ato.gov.au/businesses-and-organisations/income-deductions-and-concessions/depreciation-and-capital-expenses-and-allowances/simpler-depreciation-for-small-business/assets-and-exclusions#ato-Cars

8.12 Car expenses cents per kilometre rate for 2025-26

The ATO has announced that from 1 July 2025, the cents per kilometre rate for calculating work-related car expense deductions will remain unchanged at 88 cents per kilometre.

w https://www.ato.gov.au/law/view/document?docid=OPS/LI202419/00001

8.13 Calculating electricity costs for plug-in hybrid electric vehicles

The ATO has released a draft update to PCG 2024/2, which relates to calculating electricity costs when a vehicle is charged at an employee's or individual's home. The draft update extends the guidance to plug-in hybrid electric vehicles (**PHEV**) and sets out a methodology for calculating the cost of electricity when a PHEV is charged at an employee's or individual's home.

If the methodology set out in the Practical Compliance Guideline is applied, the Commissioner would not have cause to apply compliance resources to review the taxpayer's calculation of electricity costs of charging a PHEV at a residential premises for FBT or income tax purposes.

The methodology is in paragraphs [17B] to [17K] of the guideline. At a high-level, it is as follows:

1. **Step 1:** calculate the actual petrol costs for the FBT or income year;

2. **Step 2:** calculate the actual quantity of petrol purchased in the year (either by determining actual quantity or by converting actual petrol cost to litres of petrol purchased in the year by dividing the Step 1 amount by the average petrol rate);
3. **Step 3:** calculate the total petrol kilometres (being the Step 2 amount divided by petrol consumption rate);
4. **Step 4:** calculate the total annual kilometres based on the odometer;
5. **Step 5:** calculate the total electricity kilometres (being the Step 4 amount (total annual km) minus the Step 3 amount (total petrol km));
6. **Step 6:** calculate the total electricity cost (being the Step 5 amount (total electricity km) × EV home charging rate per paragraph 16 of the PCG); and
7. **Step 7:** calculate the total fuel expenses (being the Step 1 amount (actual petrol costs) plus Step 6 amount (total electricity costs)).

The updated guidance also includes examples.

w https://www.ato.gov.au/law/view/document?docid=DPA/PCG20242DC1/NAT/ATO/00001

8.14 Flexible lodgment for those affected by NSW floods

The ATO has announced lodgment relief for taxpayers and agents impacted by the recent NSW floods, as recognised under the Australian Government Disaster Recovery Payment (**AGDRP**) framework.

Affected individuals and small businesses, including sole traders and trusts, within declared disaster areas will have until 26 June 2025 to lodge the following:

1. May 2025 monthly BAS (originally due 21 June); and
2. 2023–24 income tax returns with a lodgment due date between 29 May and 26 June 2025, including those with existing deferrals.

No penalties will apply for the above lodgments if lodged by the extended date. The concessions apply automatically i.e. there is no need to contact the ATO. Agents can identify eligible clients via the Outstanding Lodgment Report in Online Services.

Importantly, payment due dates remain unchanged, and GIC will apply if payments are late.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/flexible-lodgment-for-those-affected-by-nsw-floods

8.15 ATO guidance for businesses: starting, selling or closing

The ATO has published guidance on key tax and regulatory obligations when starting, selling, or winding up a business.

Starting up a business

The ATO launched its “Ready for Business” campaign to help new small businesses understand their tax, super and registry obligations. In the coming months, ABN holders will receive emails covering ABN obligations, business structures, registering for GST and understanding employer responsibilities.

The ATO encourages small businesses to:

1. set aside GST, as well as PAYG withholding and super if they have employer obligations; and

2. plan ahead to avoid a large tax bill when they lodge their first tax return.

Selling a business

The ATO states that, when disposing of a business, strong tax governance is essential. Taxpayers are encouraged to retain documentation evidencing the transactions, including contracts, asset registers, CGT calculations, and apportionment of the purchase price between assets.

The ATO expects more detailed documentation in complex transactions (such as earn-out arrangements, IPOs, scrip-for-scrip rollovers, restructures, and related-party sales), including commercial rationale and tax advice.

Winding up a business

In relation to winding up a business:

1. companies should document all transactions, including asset sales and loan forgiveness;
2. trustees must review the trust deed and document vesting, asset transfers, and valuations; and
3. partnerships must ensure final distributions are made and that the cost base of each partner's respective interest is well substantiated.

w https://www.ato.gov.au/media-centre/ato-announces-additional-support-for-new-small-business-owners
w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/privately-owned-and-wealthy-groups/tax-governance/tax-governance-guide-for-privately-owned-groups/exiting-a-business/disposing-of-your-business
w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/privately-owned-and-wealthy-groups/tax-governance/tax-governance-guide-for-privately-owned-groups/exiting-a-business/closing-your-business

8.16 ATO guidance on succession planning for private groups

The ATO has published guidance to assist privately owned groups in managing the tax aspects of succession planning.

Private groups are encouraged to develop a formal succession plan and review it regularly, particularly following significant changes in family or business circumstances. Succession planning should consider tax risks arising from changes in ownership, including rights to income, capital, and voting, asset acquisitions or disposals, restructures, and the formation or winding up of entities. Related-party transactions, such as loans, debt forgiveness, or guarantees, should also be carefully managed.

To support tax governance, the ATO recommends maintaining clear documentation for all transactions with current or future tax implications and obtaining market valuations where appropriate. Where the tax treatment of a transaction is uncertain, professional advice should be sought.

Circumstances that may affect the operation or appropriateness of a succession plan include marriage, divorce or relationship breakdowns, illness or incapacity, changes in family dynamics, and structural or operational changes in the business.

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/privately-owned-and-wealthy-groups/tax-governance/tax-governance-guide-for-privately-owned-groups/succession-planning

8.17 Superannuation on government-funded Parental Leave Pay

From 1 July 2025, the ATO will make superannuation contributions on government-funded Parental Leave Pay for children born or adopted on or after that date. The Paid Parental Leave Super Contribution will be:

1. calculated at the Superannuation Guarantee rate, with an interest component;
2. paid as a lump sum after the end of the relevant income year; and
3. paid to the recipient's usual super fund, including SMSFs.

Where Parental Leave Pay is shared, each person will receive a super contribution proportionate to their entitlement.

The first payments will be made in the 2026–27 income year. To receive it, individuals must apply via Services Australia and ensure their details match across the ATO, Services Australia and their super fund.

w https://www.ato.gov.au/tax-and-super-professionals/for-superannuation-professionals/super-funds-newsroom/superannuation-on-government-funded-parental-leave-pay

8.18 Upcoming personal transfer balance cap changes

The general transfer balance cap will be indexed to $2 million from 1 July 2025, up from $1.9 million.

Members who start a pension on or after 1 July 2025 will have a personal transfer balance cap of $2 million. However, members who started a pension before that date and have not used their full cap will receive a proportional increase based on their highest transfer balance and remaining cap space.

Updated personal transfer balance caps will not be displayed until 11 July 2025 in ATO Online Services and Online Services for Agents. Members' personal caps will reflect reported and processed data.

The ATO encourages timely reporting of transfer balance cap events, preferably before 1 July 2025, to ensure accurate cap entitlements. Between 1 and 11 July 2025, transfer balance cap events can still be reported, but members' balances will not reflect changes during this window.

w https://www.ato.gov.au/tax-and-super-professionals/for-superannuation-professionals/super-funds-newsroom/upcoming-personal-transfer-balance-cap-changes

8.19 ATO issues warning - superannuation preservation age

On 14 May 2025, the ATO issued a warning about misinformation circulating on some websites regarding changes to the superannuation preservation age and withdrawal rules. Deputy Commissioner Emma Rosenzweig confirmed no changes have been made to the preservation age and advised individuals to rely only on official ATO channels for accurate and up-to-date information. The ATO also advised individuals to be cautious about 'free expert' tax advice.

w https://www.ato.gov.au/media-centre/ato-warns-against-websites-sharing-fake-news-on-superannuation-preservation-age

8.20 Personal financial advice fees paid from superannuation accounts

The ATO has finalised PCG 2025/1, which provides guidance on how superannuation funds should determine the deductibility of personal financial advice fees and how to treat such payments under the PAYG withholding rules. The earlier draft guideline PCG 2025/D1 was summarised in our February 2025 tax training notes.

The guideline allows non-SMSF superannuation funds to use the simplified "account-based method" to apportion deductions for financial advice fees under section 295-490(1), table item 5(d) of the ITAA 1997. SMSFs cannot use the simplified method and must assess deductibility case by case, based on the content of each personal advice engagement.

For payments made before 1 July 2019, the ATO confirms it will not actively review whether such payments should have been treated as superannuation benefits or whether funds correctly withheld from them. Where issues are identified, the ATO will generally remit penalties, unless inappropriate to do so. This transitional PAYG compliance approach applies to all funds, including SMSFs, for the 2018–19 income year and earlier.

w https://www.ato.gov.au/law/view/document?docid=COG/PCG20251/NAT/ATO/00001

8.21 NSW mandatory trustee contact details for EDR

On 5 May 2025, an update was introduced to the Electronic Duties Return (EDR) system relating to the processing of *Trust Deeds - Establishment of a Trust Relating to Unidentified Property and Non-Dutiable Property*.

It is now mandatory to enter the contact details of at least one trustee. As the trustee is the liable party, their contact information is necessary for any future correspondence, compliance activity or recovery action for unpaid duty.

w https://www.revenue.nsw.gov.au/property-professionals-resource-centre/duties-guides/establishment-of-a-trust-relating-to-unidentified-property-and-non-dutiable-property

8.22 Northern Territory budget 2025-26

The Northern Territory has delivered its FY2025-26 budget. The are several initiatives in the budget which relate to payroll tax and stamp duty.

From 1 July 2025, the Northern Territory will remove the long-standing "commercial or competitive" restrictions on payroll tax and stamp duty exemptions for charities and not-for-profit (NFP) entities.

Previously, organisations had to demonstrate that their activities or use of land were not commercial in nature to access these exemptions. Under the new rules, charities and NFPs will be eligible for exemptions even if they generate income from their activities, however, they will need to ensure that staff qualifying for payroll tax exemptions are fully dedicated to charitable functions.

w
https://legislation.nt.gov.au/LegislationPortal/Bills/~/link.aspx?_id=5DB74A20AF244211BF6811E1FC39A87B&_z=z

8.23 Victoria budget 2025-26

As part of the FY2025-26 Victorian budget, the government has announced a 12-month extension of the temporary land transfer duty concession for off-the-plan residential properties, including apartments, townhouses, and units first introduced on 21 October 2024.

The concession will now apply to contracts signed between 21 October 2024 to 21 October 2026. This measure aims to reduce upfront costs for buyers, making it more affordable to purchase off-the-plan properties and encourage early sales. The extension is intended to stimulate construction activity, particularly for developments that have planning approval but are delayed by low pre-sales. The measure remains subject to the passage of legislation.

w https://www.budget.vic.gov.au/budget-papers

8.24 Queensland changes to First Home Owner Grant

The Queensland Government has extended its $30,000 First Home Owner Grant for new builds to 30 June 2026. The grant was otherwise due to cease on 30 June 2025. In addition, first home buyers purchasing or building new homes will now pay no stamp duty, a policy aimed at reducing upfront costs and boosting housing construction.

To qualify, contracts must be signed between 20 November 2023 and 30 June 2026, and the total value of the new home and land must be under $750,000. Owner-builders must have foundations laid within the same dates.

w https://statements.qld.gov.au/statements/102717

8.25 Threshold for Lump Sum E will be removed

Currently, back payments over 12 months old and exceeding $1,200 must be reported as Lump Sum E in Single Touch Payroll (STP).

From 1 July, the $1,200 threshold will be removed due to changes in lump sum payment laws.

w https://www.ato.gov.au/businesses-and-organisations/small-business-newsroom/the-way-you-treat-and-report-back-payments-is-changing