The Tax Institute

Tax Update

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About Brown Wright Stein

Brown Wright Stein is a medium-sized commercial law firm based in Sydney. We provide legal advice in the following areas:

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At Brown Wright Stein, we believe in excellence in everything we do for our clients. It's this commitment that enables us to develop creative, innovative solutions that lead to positive outcomes.

Contents

Our tax training notes are prepared by Matthew McKee, Marianne Dakhoul, Jane Harris, Gillian Tam, Hayden Rudd, Aritree Barua, Emily Halloran, Amy Burriss, Luke Hermez, Samiksha Vaidya and Aaditya Kadam.

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 Ultimate Vision	A taxpayer has been unsuccessful in the ART in relation to an appeal against a decision by the Department of Industry, Innovation and Science Australia that none of their activities constitute core R&D activities for the purpose of the R&D tax offset. The case is a reminder that registration with the IISA is a self-assessment process and does not mean that the IISA has endorsed the registration as an R&D entity.	Page 8
Item 2.2 PCQT	The ART has concluded that payments made to a spouse were salary and wages of the spouse and superannuation contributions should have been made. The decision is a reminder of the high recordkeeping requirements for employers in relation to their employer obligations and also that superannuation contributions need to be made for owners and family members.	Page 13
Item 2.3 Williams v Robba	The Queensland Supreme Court has concluded that the trustees of a self-managed superannuation fund properly exercised their discretion to pay death benefits 50% between a spouse and a child of the deceased member. The decision demonstrates that the courts will not ordinarily consider the merits of a discretionary decision by a trustee but, instead, will consider whether the trustee has given real and genuine consideration. The case is also relevant to decisions of trustees of discretionary trusts.	Page 15
Items 5.2 and 5.3 Superannuation non-arm's length income and contributions	The ATO has finalised its ruling on non-arm's length expenditure. Of particular note is the ATO's view on the impact of a superannuation fund trustee acquiring an asset for less than market value. The ATO considers that this will result in all of the income from the asset being NALI, unless there was a clear intent to treat the difference between the price paid and the market value as a contribution.	Pages 33 and 34
Item 6.7 Double death	The ATO has issued a private ruling that confirms the ATO's position on "double" death and the application of Division 128. That is, where a person who is entitled to an asset from a deceased estate dies before probate is granted for the first estate. In such circumstances, the ATO considers that where an asset of the first estate is subsequently transferred to a beneficiary for second deceased estate, it does not pass to the beneficiary for the purpose of Division 128 of the ITAA 1997 as for the second deceased it was not an asset they owned at the time of his or her death.	Page 51

2. Detailed case summaries

2.1 Ultimate Vision – R&D tax incentives

Facts

In July 2012, Ultimate Vision Inventions Pty Ltd was incorporated, with Werner Nicolau as its sole director and shareholder.

On 1 July 2013, Ultimate Vision entered into a service agreement with Akyman Investments Pty Ltd, a company directed by Werner's father, Mark Nicolau. Akyman was registered with the Department of Industry, Innovation and Science Australia (**IISA**) as a research service provider under the *Industry Research and Development Act 1986* (Cth) (**IRD Act**). The agreement engaged Akyman to undertake research and development activities on behalf of Ultimate Vision in relation to a proposed Health and Fitness System.

The Health and Fitness System was described as a complex digital system integrating dietary, fitness and wellbeing programs using artificial intelligence, decision support systems (**DSS**), and secure cloud-based technologies, including Implicit Key Management (**IKM**) and Point Over End (**POE**) architecture. The project aimed to develop algorithms capable of personalising health and fitness programs based on individual user profiles, including age, activity habits and health conditions.

Between 2014 and 2016, Ultimate Vision lodged R&D registration applications with IISA for activities conducted in the 2014, 2015 and 2016 income years. Each application identified specific "core" and "supporting" activities and claimed expenditure on those activities. The applications were submitted online and included declarations by Werner affirming the accuracy of the information and the maintenance of substantiating records.

R&D tax incentive

Division 355 of the ITAA 1997 provides a tax offset for eligible entities for expenditure incurred on eligible R&D activities. The object of Division 355 is to encourage industry to conduct research and development activities that might otherwise not be undertaken due to uncertain returns, where the knowledge gained is likely to benefit the wider community.

To be eligible for the incentive, an entity must be an "R&D entity". This includes a body corporate incorporated under Australian law. The entity must also be registered under section 27A of the IRD Act for the relevant income year in respect of one or more specified activities as core or supporting R&D activities conducted during that year.

Section 355-20 of the ITAA 1997 defines "R&D activities" as either "core R&D activities" or "supporting R&D activities". Core R&D activities are defined as follows:

> *experimental activities:*
>
> *(a) whose outcome cannot be known or determined in advance on the basis of current knowledge, information or experience, but can only be determined by applying a systematic progression of work that:*
>
> *(i) is based on principles of established science; and*
>
> *(ii) proceeds from hypothesis to experiment, observation and evaluation, and leads to logical conclusions; and*
>
> *(b) that are conducted for the purpose of generating new knowledge (including new knowledge in the form of new or improved materials, products, devices, processes or services).*

Supporting R&D activities are defined as activities directly related to core R&D activities.

The entitlement to a tax offset arises under section 355-100 of the ITAA 1997, which requires the R&D entity to have incurred expenditure on R&D activities for which it is registered under section 27A of the IRD Act. Section 355-205(1) of the ITAA 1997 allows a deduction for expenditure incurred on R&D activities conducted during the income year, provided the entity is registered for those activities and, where the expenditure is incurred to an associate, it must be paid to the associate during the income year.

R&D registration applications

For the 2014 income year, Ultimate Vision registered three core activities: the design of fitness management algorithms for calorie consumption measurement, the design of health management algorithms for calorie intake measurement, and the conceptual design and evaluation of a cloud-based DSS. Each core activity was accompanied by a corresponding supporting activity. The total R&D expenditure claimed for the 2014 year was $456,500.

In the 2015 income year, Ultimate Vision registered improvements to the fitness and diet monitoring algorithms developed in the previous year, as well as enhancements to the cloud-based anti-collision DSS using smoothing algorithms. Each core activity was paired with a supporting activity. The total R&D expenditure claimed for the 2015 year was $310,000.

For the 2016 income year, Ultimate Vision registered two core activities: the development and testing of cloud-based emulations of payment applications using POE, IKM and tokenisation methods, and the development and testing of cloud-based DSS and AI engines integrating dietary, fitness and drug prescription programs. Each core activity was supported by a corresponding supporting activity. The total R&D expenditure claimed for the 2016 year was $336,000.

Although IISA initially approved the registration of these activities, it advised that registration did not itself establish eligibility for the R&D tax incentive under Division 355 of the ITAA 1997. Following a formal examination requested by the Commissioner of Taxation, IISA issued certificates under section 27J of the IRD Act finding that none of the registered activities qualified as core or supporting R&D activities. These findings were confirmed on internal review.

Review of decisions

In March 2017, Ultimate Vision applied to the AAT for review of the decisions relating to the 2014 and 2015 years. A separate application was lodged in October 2018 for the 2016 year. The AAT conducted a three-day hearing in October and November 2018. Ultimate Vision was self-represented at the hearing, with Werner and Mark presenting the case and cross-examining expert witnesses.

The AAT affirmed the decisions of IISA, finding that none of the registered activities were conducted in the relevant years and that the activities did not meet the statutory definitions of core or supporting R&D activities. Ultimate Vision appealed to the Federal Court, which dismissed the appeal in May 2022. The Federal Court held that the AAT had not made any error of law and had properly considered the evidence.

Ultimate Vision then appealed to the Full Federal Court, which allowed the appeal in March 2023. The Full Court found that the AAT had failed to properly exercise its jurisdiction and had not conducted the review required under the *Administrative Appeals Tribunal Act 1975* (Cth). The matter was remitted to the newly established ART, which replaced the AAT in October 2024.

Matter before the ART

The ART conducted a seven-day hearing in February and April 2025. Ultimate Vision was this time represented by senior counsel. The hearing involved extensive lay and expert evidence.

Ultimate Vision relied on evidence from Werner and Mark, supported by expert reports from Dr Paul Nash, a consultant and former academic with expertise in software architecture and systems design. Dr Nash prepared two detailed expert reports and gave oral evidence at the hearing. Dr Nash's analysis focused on mapping “deliverables” to registered activities using a custom framework of content types and development phases. He argued that the Health and Fitness System project followed an industry-standard iterative waterfall methodology and that the documentation evidenced a systematic progression of work. Dr Nash contended that the activities were conducted in each relevant year and met the statutory criteria for core R&D activities, including experimentation and the generation of new knowledge.

IISA relied on expert reports from Professor Deborah Kerr, a Professor of Nutrition and Dietetics at Curtin University, and Professor Jean-Guy Schneider, a Professor of Software Engineering at Monash University. Both had previously provided reports for the first tribunal and submitted updated reports for the remitted hearing.

Professor Kerr, an accredited practising dietitian and researcher in mobile dietary assessment technologies, opined that the activities described by Ultimate Vision lacked scientific rigour. She found no evidence of hypothesis-driven experimentation, systematic methodology, or evaluation. The experiments described were anecdotal, involved only Werner and Mark, and did not meet the standards of established science in nutrition and exercise. She concluded that the outcomes of the activities could have been known in advance and that no new knowledge was generated.

Professor Schneider, an expert in software engineering and systems architecture, reviewed the technical documentation and found that it lacked key artefacts such as source code, executable software, and standard engineering notation. He concluded that the activities remained at a conceptual stage and did not involve technical uncertainty. He distinguished between “high-level” algorithms and implementable algorithms, noting that the documentation did not support the existence of the latter. He also found that the claimed experimentation lacked detail and that the activities did not proceed beyond design sketches and flowcharts.

The ART accepted that Ultimate Vision had produced a large volume of documents, but found that these materials did not demonstrate the conduct of registered activities as required by the legislation. From a technical perspective:

1. the absence of source code, test logs, or executable prototypes meant the ART could not verify that any algorithm progressed beyond conceptual diagrams. Without these artefacts, the claimed “testing” could not be distinguished from theoretical design work;
2. the ART noted that the flowcharts and diagrams lacked recognised software engineering notation, making it impossible to confirm systematic implementation or adherence to established development standards;
3. assertions of “experimentation” were unsupported by repeatable test cases, controlled variables, or documented outcomes. The ART agreed with Professor Kerr that recording personal diet and exercise logs for two individuals did not amount to hypothesis-driven experimentation;
4. the ART was persuaded by Professor Schneider’s evidence that the work described did not address technical uncertainty. Tasks such as integrating decision-support logic or adapting known encryption methods were characterised as routine engineering rather than experimental activities under Division 355; and
5. while Dr Nash argued that an iterative waterfall methodology was followed, the ART found that his mapping relied heavily on assumptions and retrospective interpretation rather than contemporaneous records. The methodology appeared aspirational rather than evidenced in practice.

On this basis, the ART concluded that none of the registered activities were conducted as claimed, nor did they meet the statutory definition of core R&D activities.

Ultimate Vision appealed the decision.

Issues

1. Were the activities described in Ultimate Vision's R&D registration applications for the 2014, 2015 and 2016 income years actually conducted in those respective years?
2. If so, did the activities meet the statutory definition of "core R&D activities"?
3. If any activities were found to be core R&D activities, were the corresponding supporting activities directly related to those core R&D activities?

Decision

Were the activities conducted in the relevant income years?

The ART applied a year-by-year analysis, consistent with the statutory framework under the IRD Act and Division 355 of the ITAA 1997. It rejected the applicant's "whole of project" approach, finding that registration under section 27A of the IRD Act requires activities to have been conducted in the specific income year for which registration is sought.

Activities in respect of the 2014 year

The ART found that the core activities registered for the 2014 year, being design of fitness and health management algorithms and conceptual design of a cloud-based decision support system, were not conducted. The evidence relied upon by Ultimate Vision, including the H&F Test Manual and personal logs, showed only anecdotal monitoring of Werner and Mark. The ART accepted the expert evidence of Professor Kerr and Professor Schneider that this did not constitute experimentation or a systematic progression of work. The activities lacked diversity in test subjects, scientific methodology, and documentation of hypotheses, observations, and conclusions.

Supporting activities were also found not to have been conducted, as they were contingent on the existence of core activities. The ART noted that industry surveys and feasibility studies provided by the applicant were either unrelated to the Health and Fitness System or prepared for other entities.

Activities in respect of the 2015 year

The ART found that the 2015 activities, described as improvements to the algorithms and systems developed in 2014, could not have been conducted because the foundational 2014 activities were not undertaken. The claim that experimentation had progressed to include eco factors was unsupported by reliable documentation. The ART found that the documents cited by Dr Nash, including conceptual designs and ecosystem factor diagrams, were speculative and lacked evidence of testing or evaluation.

Supporting activities for 2015 were similarly rejected. The ART found that the industry surveys and other documentation did not support the testing or expansion of parameters as described in the registration forms. The surveys were largely compilations of publicly available information and lacked analytical depth.

Activities in respect of the 2016 year

The ART found that the 2016 activities, being development and testing of cloud-based payment applications and DSS/AI engines, were not conducted. The ART noted that the activities described in the registration application focused heavily on financial transaction processing and lacked a clear link to the Health and Fitness System. The supporting documentation, including functional specifications and test plans, referenced other unrelated projects.

Supporting activities for 2016 were also found not to have been conducted. The ART noted that the descriptions were vague and prospective, and the documentation did not evidence the development or testing of mobile applications as claimed. Screenshots and design diagrams were found to be high-level and lacked timestamps or links to the registered activities.

Generally

The ART considered that the opinions of Professors Kerr and Schneider were more persuasive and aligned with the statutory framework under Division 355. It noted that Dr Nash's analysis relied heavily on assumptions, including the validity of unregistered activities and the completeness of documentation. The ART concluded that the expert evidence supported a finding that the registered activities were not conducted.

Did the activities meet the statutory definition of "core R&D activities"?

Although the ART found that the activities were not conducted, it still considered whether they would have met the statutory definition of core R&D activities under section 355-25(1) of the ITAA 1997. The ART found that:

1. the outcomes of the claimed activities could have been known or determined in advance based on existing knowledge;
2. the activities did not reflect a systematic progression of work. Dr Nash's mapping of deliverables was found to be based on assumptions and lacked evidentiary support; and
3. the activities did not generate new knowledge. The documentation relied on existing public information, and the algorithms described were either high-level or speculative. The ART accepted the expert evidence that the activities did not result in novel outcomes or contribute to the advancement of knowledge in the relevant fields.

The ART concluded that no core activities were conducted.

Were the corresponding supporting activities directly related to the core R&D activities?

As no core activities were found to have been conducted, the ART concluded that the supporting activities could not meet the definition under section 355-30(1) of the ITAA 1997. Supporting activities must be directly related to core activities, and in the absence of any core activities, the ART found that the supporting activities were not eligible.

COMMENT – the detailed analysis by the ART demonstrates the importance of evidencing the actual conduct of R&D activities for the specific income year claimed. The rejection of the "whole of project" approach reinforces the need for contemporaneous records and an alignment between registered activities and the work performed.

TIP – registration of activities with Industry, Innovation and Science Australia (IISA) does not mean that those activities meet the definition of a core R&D activities or supporting R&D activities. Registration if a self-assessment regime, unless a finding is obtained from IISA under section 27J of the IRD Act that the activities are core R&D activities or supporting R&D activities. Both a taxpayer and the ATO can request finding to be made by IISA. A finding could either a positive or negative.

TRAP – tax agents who attach R&D schedules to tax returns are making a statement, or facilitating a statement being made, to the Commissioner of Taxation. It is necessary for the tax agent to be satisfied of the claims made in the R&D schedule, even if it is prepared by a specialist R&D advisor.

Citation *Ultimate Vision Inventions Pty Ltd v Industry, Innovation and Science Australia* [2025] ARTA 1813 (General Member C. Willis, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/1813.html

2.2 PCQT - employment relationship and SG obligations

Facts

PCQT is an individual who operated a business and employed Ms M, who was, at the relevant time, his spouse.

Ms M's duties included general bookkeeping and management of PCQT's financial affairs. While some superannuation contributions were made on Ms M's behalf during the early stages of her employment, PCQT claimed to be unaware of these payments.

The duration and nature of Ms M's employment were disputed. PCQT variously asserted that it ended in 2011, 2012/13, 2015, 2018 or 2019. He described her as "underemployed" or a casual employee from 2012 onwards. Ms M maintained that she remained employed until 30 June or 1 July 2017, although she stepped back from certain responsibilities in 2016. PCQT relied on sworn statements made by Ms M in prior family law proceedings but did not accept her stated end date.

Between 30 September 2009 and 30 June 2017, PCQT lodged various tax documents, including income tax returns, BAS and PAYG payment summaries. These documents recorded salary or wages paid to employees, including Ms M, and deductions for superannuation. PCQT did not dispute the accuracy of these documents but submitted that Ms M had prepared or signed them, and that he had relied on her representations. He argued that these documents could not be relied upon as evidence of employment or payment.

In prior family law proceedings, Ms M had given sworn evidence that she was not paid wages or salary, except possibly for a brief period. PCQT relied heavily on this evidence, as well as an email Ms M had sent to a mortgage broker stating she could not provide evidence of wages. However, Ms M did not appear as a witness in the ART proceedings, and PCQT elected not to call her, citing concerns about the acrimony between them.

On 26 August, 27 August and 1 September 2021, the Commissioner issued default assessments to PCQT in respect of each of the 32 quarters within the relevant period of 30 September 2009 to 30 June 2017. These assessments related to alleged shortfalls in the payment of SGC concerning Ms M.

On 25 October 2021, PCQT lodged an objection, which was disallowed by the Commissioner on 31 July 2023. PCQT subsequently commenced proceedings in the ART on 29 August 2023.

During the hearing, the nature of payments made to Ms M was examined. PCQT argued that lump sum withdrawals made by Ms M from PCQT's accounts could not constitute salary or wages, as they were irregular and lacked systematic structure. The Commissioner maintained that, while the payments may not definitively be salary or wages, the ART could not be satisfied that they were not, and the burden of proof rested with PCQT.

PCQT submitted that there was no evidence of regular payments to Ms M in his bank statements. He challenged the Commissioner's reliance on the tax lodgments and argued that the limited bank statements available did not show regular wage payments. PCQT stated that he did not know whether the payments were wages or whether Ms M had appropriated funds without his knowledge.

PCQT sought remission of the SGC penalties. He argued that Ms M had control over the bank accounts and financial affairs, including responsibility for paying her own salary and superannuation, and that he had trusted her to do so. PCQT submitted that these extenuating circumstances warranted further remission beyond the 150% already accepted by the Commissioner. He also contended that any additional SGC should be reduced to nil or no more than 12.5%. The ART noted that PCQT's reliance on his personal relationship with Ms M was framed as a reason for remission, but no further written submissions were provided to clarify this point.

Issues

1. Were salary or wages paid to Ms M during the period from 30 September 2009 to 30 June 2017, such that PCQT was liable to pay SCG?
2. Were the penalties imposed by the Commissioner correctly applied, or was further remission warranted?

Decision

Were salary or wages paid to Ms M?

The ART noted that PCQT relied heavily on Ms M's prior sworn statements in family law proceedings, but did not call her as a witness in the present matter. Her prior statements were treated as hearsay, and the ART observed that PCQT had relied selectively on her evidence. The existence of the email to the mortgage broker did not materially alter the weight of her evidence.

While some of Ms M's prior statements suggested that she was not paid a salary, this was contradicted by the existence of bank statements showing payments made to her. The ART found that PCQT had not demonstrated that no salary or wages were paid to Ms M, nor that any payments were confined to a short period. PCQT's own witness evidence largely consisted of assertions that he did not know whether payments were wages, which the ART found insufficient to discharge the burden of proof.

The ART also found that there was no clear evidence that Ms M's employment ended prior to 2017. The limited bank statements provided showed payments to Ms M, and the absence of complete statements did not establish that payments were not wages. The ART noted that the SGAA does not require payments to be made at regular intervals, and that irregular payments may still constitute salary or wages. The ART concluded that PCQT's inability to identify the nature of the payments did not establish that they were not wages.

Further, PCQT's tax filings, including BAS and PAYG summaries, supported the conclusion that salary or wages were paid to Ms M. These documents are prima facie evidence under taxation law, and PCQT could not disclaim responsibility for them merely because Ms M had prepared or signed them.

The ART found that PCQT had failed to demonstrate that the SGC assessments were excessive or incorrect.

Were the penalties imposed by the Commissioner correctly applied?

The ART noted that remission requires the existence of exceptional circumstances that genuinely prevent an employer from providing relevant information to the Commissioner. The ART found no evidence that any circumstances prevented PCQT from providing information to the Commissioner. The ART concluded that PCQT had not demonstrated that further remission was warranted.

In assessing whether remission was appropriate, the ART considered PCQT's compliance with SGC obligations, lodgement of statements, tax compliance history, and mitigating circumstances. PCQT had failed to comply with SGC obligations over 32 quarters, had not lodged required statements, and had demonstrated ongoing disinterest in personal compliance. His reliance on Ms M did not mitigate his own culpability. While PCQT raised factors such as poor record keeping and inattention, these did not reduce his responsibility.

The ART found that PCQT had failed to show that the SGC penalties were excessive or that further remission was appropriate.

TIP – superannuation is a compulsory system. Where salary and wages are paid to owners and/or their family members, superannuation contributions need to be made. If superannuation contributions are not made, the fact that the employee was a family member will likely not be relevant to the level of the additional superannuation guarantee charge that is imposed.

COMMENT – this case highlights the evidentiary burden placed on employers disputing default SGC assessments, particularly where employment arrangements are informal or intertwined with personal relationships. It also confirms that reliance on a spouse or employee to manage financial affairs does not constitute exceptional circumstances for remission of penalties.

Citation *PCQT v Commissioner of Taxation (Taxation)* [2025] ARTA 1873 (General Member J Dunne, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/1873.html

2.3 Williams v Robba – payment of death benefit

Facts

On 28 December 2021, Anthony Williams passed away. Anthony had a self-managed superannuation fund, the Boosey Doherty Superannuation Fund, which was established by deed dated 1 July 2009 (**Deed**).

There was a residual death benefit in the Fund of approximately $550,000, being a commercial property in Benalla, Victoria. After Anthony's passing, Paul and Mark (Anthony's sons) were trustees of the Fund. On 14 July 2023, a court order removed them and appointed James Robba and Morgan Lane as trustees of the Fund (**Trustees**).

The Deed conferred upon the trustees an absolute discretion to pay out the residual death benefit to one or more of a member's dependants.

On 26 September 2023, Paul wrote to the Trustees confirming that the only dependants of Anthony were his four children (Paul, Mark, Peter, and Louise) and his second wife, Gayle.

From September to December 2023, the Trustees sought information from all five dependants to assess their needs, requesting detailed financial, medical, and personal information.

On 13 October 2023, the Trustees' lawyer wrote a letter to all five dependants requesting that each dependant "provide to our clients particulars of any facts or matters that you would like our clients to consider in determining whether to exercise their discretion to apply the death benefit to you or to any other Dependent".

In November 2023, more specific requests for information were made by the Trustees' lawyer via email to Paul, Mark and Louise, such as each person's financial status, assets and liabilities, needs such as medical needs, employment and income, details of Anthony's estate and its value to the dependant, and any special circumstances.

When some responses were given, the Trustees' lawyer asked more specific questions. For example, whether Louise owned any real property, more details concerning a property left to Peter from Anthony's estate, and each of the dependants' financial dependency.

In November and December 2023, detailed information was provided by Mark to the Trustees about Peter's health conditions, including the circumstances of and requirements of Peter's accommodation arrangements, and letters from occupational therapists, nurses and a mental health clinician describing Peter's health conditions and needs.

Gayle and Peter's circumstances can be described in summary as follows:

1. Gayle, aged 63 at the time, was a widow who had been diagnosed with ovarian cancer in December 2020 and underwent surgeries in 2021 and 2023. Due to her health, she was unable to work and was living on a full pension. Her financial position included owning an unencumbered house valued at

$570,000, a car worth $15,000, and holding approximately $12,500 cash in bank accounts. However, she also had $66,000 in legal fee liabilities. Her expenses reportedly exceeded her income, and before Anthony's death, Anthony had been transferring her $1,000 per fortnight to assist with living costs; and

2. Peter was diagnosed with schizoaffective disorder, a severe, lifelong mental illness that is treatment resistant. He is entirely dependent on the NDIS and family support and requires constant care. Multiple health professionals, including an occupational therapist, psychiatric nurse, mental health nurse, and hospital case manager, confirmed that Peter experiences daily distress from his symptoms and will require lifelong support. It was emphasised that he urgently needed secure, stable, supported accommodation, ideally a two-bedroom, two-bathroom unit, near the Alfred Hospital to maintain access to essential mental health services.

In correspondence with the Trustees, Mark contrasted Gayle's two years of partial financial dependency on Anthony with Peter's 43 years of total dependency. Under Anthony's will, Peter was left a property, although there was uncertainty about its value. Gayle estimated the property to be valued at $531,000, while Mark stated it was worth $450,000 and subject to a $90,000 mortgage.

Relevant terms of the Deed

Clause 15.2 of the Deed provides as follows (emphasis added):

> *"Subject to the Superannuation Conditions, the Trustees **in the exercise of the authorities, powers and discretions hereby vested in them have an absolute and uncontrolled discretion** and may exercise or enforce or delegate (by power of attorney or otherwise) all or any of the authorities, powers or discretions from time to time or may refrain from exercising all or any of such authorities, powers or discretions from time to time and their decision as to the interpretation and effect of this Deed is final and binding on all parties."*

Clause 24.4 of the Deed provides as follows (emphasis added):

> *"24.4 Application of benefits:*
>
> *The benefits payable to or in respect of Members, Dependants and Personal Representatives in accordance with the Deed must be paid or applied to or for the benefit of such one or more of those Beneficiaries in the form of lump sums, pensions or annuities as provided in the Rules **and in such manner as the Trustees may in their absolute discretion decide** provided that such payments do not cause the Fund to fail to satisfy the Superannuation Conditions, nor conflict with paragraph 3.2 and is subject to any valid notice given to the Trustees by a Member pursuant to paragraph 24.6."*

On 17 May 2024, the Trustees advised each of the dependants by letter of determination that the Trustees had exercised their discretion and determined that the residual death benefit under the Fund would be paid out as follows:

1. 50% of the residual death benefit (less the sum of $750) to Gayle;
2. the balance of the residual death benefit to Peter,

(the **Determination**).

The letter from the Trustee noted that the reduction of $750 from Gayle's share was to account for half the funds she had previously obtained on 3 January 2022 from the Fund's bank account, that totalled $1,500.

Proceedings by Mark and Paul were commenced in the Supreme Court of Queensland against the Trustees and Gayle was added as a respondent.

Mark and Paul's submissions effectively proceeded on two limbs:

1. the Trustees failed to give real and genuine consideration in making the Determination, specifically by failing to properly consider the greater interests and needs of Peter as compared to Gayle; and
2. the Trustees' decision-making process gave rise to a finding that they failed to exercise real and genuine consideration, namely by failing to conduct adequate inquiries.

Mark and Paul also argued that, because the Fund is a superannuation fund, the Trustees are subject to a higher standard of "real and genuine consideration" than ordinary trustees. Mark and Paul relied on *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, where the High Court held that decisions of superannuation trustees are subject to more judicial scrutiny due to the public importance of superannuation and the statutory framework governing it. The Court in *Finch* said the trustee's duty to be properly informed is more intense than under the standard in *Karger v Paul* [1984] VR 161.

Issues

1. Did the Trustees fail to give real and genuine consideration to the dependants in making the Determination?
2. Did the Trustees' decision-making process give rise to a finding that they failed to exercise real and genuine consideration, namely by failing to conduct adequate inquiries?

Decision

Real and genuine consideration

In cases where trustees are granted absolute discretion, the courts review their decisions in accordance with the principles established in *Karger v Paul* [1984] VR 161. According to McGarvie J, the exercise of such discretion will not be interfered with unless one of three essential conditions is lacking:

1. the decision was not made in good faith;
2. the trustee did not give real and genuine consideration to the decision;
3. the decision was not made in accordance with the purposes for which the discretion was conferred.

Additionally, if a trustee chooses to give reasons, the court may examine those reasons. However, courts will not intervene merely because the decision is unfair, unwise, or unreasonable.

The High Court in *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 reaffirmed this position and confirmed that an absolute discretion is not immune from review, even in the absence of bad faith. This was further supported in *Owies v JJE Nominees Pty Ltd* (2022) 22 ASTLR 89, where the Court clarified that bad faith is not a necessary finding to challenge a trustee's decision for failing to give real and genuine consideration.

The concept of "real and genuine consideration" requires trustees to actively turn their minds to the decision at hand. Courts are permitted to examine the inquiries that were made, the information available, and the process undertaken solely to determine whether the trustee genuinely considered the issue. However, courts cannot assess whether the content of the inquiries was sufficient or whether a different process should have been followed. They are not to substitute their own view of what the trustee should have done, nor assess whether the outcome was fair or wise.

This principle was further explored in *Owies*, where the court held that a complete absence of inquiry regarding certain beneficiaries could indicate a failure to give real and genuine consideration. Yet, the court did not assess the quality or adequacy of any inquiries, only whether inquiries were made at all.

The Court held that the *Finch* standard did not apply because the Determination involved a discretionary distribution of a residual death benefit to dependants, not a member's entitlement under the Fund.

The Court was not persuaded that the outcome reflected a lack of genuine consideration by the Trustees. While Peter's needs were substantial, Gayle also had legitimate needs. Both stood to benefit from the Fund.

The Trustees were aware that Peter had been left a property in Anthony's will specifically for his ongoing care and appeared to have family support. They also knew Gayle was a widow, had limited funds, and ongoing health issues. Both had financial needs, though of different levels. By dividing the benefit equally between them, each would receive around $250,000 (after costs), which is a significant amount.

Although a different decision could have reasonably been made, the Court held that the outcome did not suggest the Trustees failed to consider the competing circumstances of Peter and Gayle. The choice to split the benefit was not irrational or indicative of neglecting the relevant circumstances. Therefore, the Court found no basis to infer a failure to give real and genuine consideration solely from the outcome.

Adequate inquiries

The Court found that the Trustees had made sufficient inquiries, particularly through their legal representatives, who contacted all dependants and followed up with specific requests for financial and personal information. Unlike other cases (e.g., *Owies*), where inquiries had not been made at all to some beneficiaries, here the Trustees made efforts to collect relevant information over several weeks. The Court acknowledged that while the inquiries could have been more thorough, they were adequate under the principles established in *Karger v Paul*.

Even if a stricter standard as discussed in *Finch* applied, requiring trustees to make reasonable inquiries, the Court found this duty was satisfied. The Trustees had communicated with all dependants, requested relevant financial and health information, and ultimately had enough data to make an informed decision. The Court confirmed the law does not demand that trustees exhaust every possible line of inquiry.

Paul and Mark also argued that the Trustees had a duty to resolve inconsistent valuations of the property left to Peter. Gayle estimated its value at $531,000, while Mark estimated it at $450,000 with a $90,000 mortgage. The Court held that these were not significant enough discrepancies requiring further investigation, particularly since both were approximations without supporting expert evidence. Similarly, there were differences in the estimated value of Gayle's home, with her estimate being higher than Mark's. These variations were not material enough to invalidate the Trustees' decision.

The Court found that the Trustees had given real and genuine consideration to all relevant matters. The decision to split the death benefit did not reveal any legal error or failure to inquire adequately. Accordingly, the originating application was dismissed.

COMMENT – this case demonstrates that the court's role, in relation to discretionary decisions of trustees, is to determine, amongst other things, whether the trustee has given real and genuine consideration to the beneficiaries, and not to ascertain whether it agrees with the decision made by the trustee. In the context of a trust with a small class of beneficiaries, such as a self-managed superannuation fund, it will likely be easier to meet this standard. In the case of a discretionary trust, with a wide class of potential discretionary objects, it may be more difficult to show real and genuine consideration has been given to all discretionary objects.

TRAP – while the Court concluded in this case that the trustees had given real and genuine consideration, it is worth noting that the Court considered that the inquiries could have been more thorough. Given the inquiries that were actually made, this suggests a relatively high standard, at least in the case of a superannuation fund.

Citation *Williams v Robba* [2025] QSC 203 (Hindman J, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QSC/2025/203.html

2.4 Olow – unexplained withdrawals and expenses

Facts

Between 2013 and 2016, Abdulkadir Hussein Olow was the sole director and shareholder of Sunrising Family Day Care Pty Ltd, a childcare business based in Granville, Sydney. The company operated by coordinating carers who provided childcare from their homes, overseen by a central office staffed by Abdulkadir, his wife Ijaaba Hassan, and their children, Sakarija and Sumaya Hussein.

During the 2015 and 2016 income years, the business reported approximately $16 million in services and received $15.9 million in government childcare assistance. Abdulkadir reported taxable income of $129,242 in 2015 and $37,369 in 2016. His wife and children also reported income from the business, with PAYG withholding remitted accordingly.

In 2018, the Commissioner initiated concurrent audits of Abdulkadir and Sunrising Family Day Care Pty Ltd. The audits revealed significant unexplained cash withdrawals and payments for private expenses, including school fees, food, clothing, travel, and traffic fines. These transactions, totalling over $1 million across the two years, were made from company accounts for which Abdulkadir was the sole signatory.

The Commissioner concluded that these amounts constituted unreported assessable income in Abdulkadir's hands and issued amended income tax and penalty assessments for the 2015 and 2016 income years. The total tax shortfall and penalties amounted to $780,682.

Abdulkadir objected to the assessments, claiming the withdrawals were either salary payments to family members or repayments of loans he had made to the company. The Commissioner rejected these explanations due to insufficient documentation and a lack of clarity around the roles and remuneration of the family members.

On 29 May 2023, Abdulkadir applied to the ART to review the objection decision. He later narrowed his case to focus solely on the salary payments to family members and conceded that his financial records and recollections were inadequate. At the hearing on 8 May 2025, he no longer sought remission of penalties or challenged the penalty assessments beyond any reductions that might result from changes to the amended assessment

Alternatively, Abdulkadir argued that the Commissioner should be prevented from assessing amounts already assessed to family members, based on estoppel or *Wednesbury* unreasonableness. Estoppel, in this context, is a legal principle that prevents someone (here, the Commissioner) from taking a position that contradicts what they previously accepted, especially if someone else (Abdulkadir) relied on that earlier position. He argued that since the Commissioner had accepted and taxed the income in his family members' names, it would be unfair to now assess him for the same amounts.

Wednesbury unreasonableness comes from a UK case (*Associated Provincial Picture House v Wednesbury Corporation* [1948] 1 KB 223) and refers to a decision so irrational that no reasonable decision-maker could have made it. Abdulkadir claimed that taxing the same income twice was so unreasonable it should be struck down.

Issues

1. Were the unexplained withdrawals from the accounts of Sunrising Family Day Care Pty Ltd genuinely salary payments to family members or repayments of loans, as claimed by Abdulkadir?
2. Should the Commissioner be prevented from assessing the same income to Abdulkadir that had already been declared and taxed in the names of his wife and children, to avoid potential double taxation?

3. Did Abdulkadir Olow provide sufficient evidence to prove that the amended tax assessments issued by the Commissioner were excessive, and what the correct assessments should have been?

Decision

Were the unexplained withdrawals salary or loan repayments?

The ART found Abdulkadir's explanation for the cash withdrawals unconvincing. While he claimed the amounts were either salary payments to family members or repayments of loans he had made to the business, there was no supporting documentation for either. The ART noted the absence of loan agreements, repayment schedules, or any form of record-keeping that might substantiate the existence of loans. Similarly, the alleged salary payments lacked consistency in timing and amount, and there were no employment contracts or payroll records to clarify the roles or remuneration of family members.

Although Abdulkadir's wife and children had declared income in their tax returns, the ART was not satisfied that this alone proved the withdrawals were legitimate salary payments. The ART emphasised that the burden of proof rested with Abdulkadir, and without clear evidence, it was reasonable for the Commissioner to treat the withdrawals and private expenses as assessable income.

Further, the ART made the following comments about Abdulkadir's onus in Part IVC proceedings:

> *Importantly, it is worth making the observation at this stage of my reasons that save where the Respondent agrees to confine the issues on review the onus carries its full burden for the Applicant to discharge in proceedings brought pursuant to Pt IVC of the TAA 1953. The Applicant cannot simply and unilaterally decide to confine issues or parts of the assessment in a way that would, in practical terms, 'chip away' at the amounts assessed.*
>
> …
>
> > *Importantly, it is worth making the observation at this stage of my reasons that save where the Respondent agrees to confine the issues on review the onus carries its full burden for the Applicant to discharge in proceedings brought pursuant to Pt IVC of the TAA 1953. The Applicant cannot simply and unilaterally decide to confine issues or parts of the assessment in a way that would, in practical terms, 'chip away' at the amounts assessed.*

Are alternative assessments valid?

At the hearing, Abdulkadir argued that it was unfair for the Commissioner to assess him on income that had already been declared and taxed in the names of his wife and children. He claimed this amounted to "double dipping" and suggested the Commissioner should be legally prevented from doing so.

The ART rejected this argument, explaining that the Commissioner is permitted to issue alternative assessments when there is uncertainty about who is properly liable for the income. This means the same income can be assessed to more than one person, and it is then up to each taxpayer to prove why they should not be liable.

The ART found that neither estoppel nor *Wednesbury* unreasonableness applied in this context. The ART clarified that fairness-based arguments do not override the statutory framework for tax assessments. The Commissioner's actions were consistent with the law, and the responsibility remained with Abdulkadir to prove the assessments were incorrect.

Did Abdulkadir prove the amended assessments were excessive?

The ART emphasised that under section 14ZZK of the TAA, Abdulkadir bore the burden of proving not only that the Commissioner's assessments were excessive, but also what the correct tax liability should have been. This required a clear and comprehensive account of his income and expenses for the relevant years.

However, Abdulkadir conceded that his financial records were inadequate and that his recollections were limited. He did not attempt to establish the full extent of his income, nor did he provide a reliable alternative calculation of his tax liability. The ART noted that in cases involving amended assessments under section 167 of the ITAA 1936, the taxpayer must go beyond pointing out errors and must demonstrate the correct figures. Abdulkadir's failure to do so meant the assessments could not be overturned.

Citation *Olow and Commissioner of Taxation (Taxation)* [2025] ARTA 1924 (General Member M Abood, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/1924.html

2.5 Cambewarra Developments – fixed trust for land tax

Facts

On 30 March 2023, the Cambewarra Development Trust, a unit trust, was established.

Cambewarra Developments Pty Ltd, the trustee of the trust, was the registered owner of the land at Cambewarra in New South Wales.

On 22 August 2024, Revenue NSW informed Cambewarra Developments Pty Ltd that it had been assessed under section 3A of the *Land Tax Management Act 1956* (NSW) for the land it owned by it in New South Wales as at 31 December 2023 for being a "special trust".

Section 3A of the LTMA defines a "special trust" as follows:

"3A Special trust—meaning

(1) For the purposes of this Act, a trust is a special trust if—

(a) the trust property includes land, and

(b) the trustee of the trust is the owner of the legal estate in the land, and

(c) the trust is not a fixed trust.

(2) For the purposes of this section, a trust is a fixed trust if the equitable estate in all of the land that is the subject of the trust is owned by a person or persons who are owners of the land for land tax purposes (disregarding section 25 (3)).

(3) For the purpose of determining whether a trust is a fixed trust under this section, any equitable interest of the trustee as trustee of the trust is to be disregarded.

(3A) If a trust satisfies the relevant criteria, the persons who are beneficiaries of the trust under the trust deed are taken to be owners of an equitable estate in the land that is the subject of the trust and, accordingly, the trust is taken to be a fixed trust.

On 4 October 2024, Cambewarra Developments Pty Ltd objected to the assessment of liability to land tax.

On 15 December 2024, the terms of the deed of the Trust by deed of variation were amended as follows (**Variation Deed**):

1. a new clause 12.2 which provided as follows:

   All Unitholders shall be presently entitled to all Income, subject only to the payment of proper expenses by the Trustee in relation to administration of the Fund.

   Where a general reserve of funds for accumulated undistributed Income is created by the Trustee, the present entitlement referred to in subclause (a) above is still conferred over this accumulated undistributed Income of the Fund for the benefit of the Unitholders.

2. a new clause 8.1 which provided that:

   "All Unitholders are presently entitled to all of the assets of the Fund such that any unit holder may require the Trustee to wind up the Fund and distribute the trust property, or the net proceeds on the realisation of the trust property, to the Unitholders".

On 9 January 2025, the Chief Commissioner disallowed the objection for the 2024 land tax year.

On 21 March 2025 the Chief Commissioner assessed the trust as a special trust for the 2015 land tax year.

On 7 May 2025, Cambewarra Developments Pty Ltd forwarded the Variation Deed to the Chief Commissioner and lodged an objection for the 2025 land tax year. Cambewarra Developments Pty Ltd contended that the effect of the Variation Deed, satisfied the requirements in section 3A(3B) of the LTMA and consequently, the trust is taken to be a "fixed trust".

On 14 May 2025, Revenue NSW disallowed the objection for the 2025 land tax year.

Cambewarra Developments Pty Ltd appealed to the NCAT for review of the objections for the 2024 and 2015land tax years. Cambewarra Developments Pty Ltd later conceded that the trust has been properly assessed for the 2024 land tax year and, therefore, it was only the 2015 land tax year that remained in dispute.

Issue

Is the Trust a 'fixed trust' for land tax purposes?

Decision

The NCAT first considered whether the equitable estate in all of the land subject to the trust was "owned by a person or persons who are the owners of land for land tax purposes" under section 3A(2) of the LTMA.

Cambewarra Developments Pty Ltd conceded that the unitholders of the trust were not "owners" within the meaning of this provision - a concession the Tribunal found to be correct. Unitholders in a unit trust did not have beneficial ownership of trust property and, therefore. could not be regarded as owners for land tax purposes. Where there is a discretionary power of the trustee to apply trust income and assets, the unitholders' rights are too remote and contingent to amount to ownership.

The deed for the Cambewarra Development Trust granted extensive powers to the trustee, including rights to apply income and capital for trust expenses and liabilities, as well as general management and investment powers. These powers, combined with the trustee's right of indemnity, meant that the Cambewarra Development Trust operated in such a way that unitholders' interests remained subject to the Trustee's discretion, reinforcing the finding that unitholders did not hold equitable ownership.

Having failed to meet the requirements of section 3A(2), the next question was whether the trust satisfied the 'relevant criteria' under section 3A(3B) of the LTMA, which would allow it to be treated as a “fixed trust.” This required close examination of the trust deed.

The NCAT accepted that clause 12.2 of the deed of the Cambewarra Development Trust satisfied section 3A(3B)(a)(i), as it provided that the unitholders were presently entitled to the income of the trust, subject only to the Trustee paying proper administrative expenses.

The Chief Commissioner also argued that clause 8.1, which stated that unitholders were presently entitled to the “assets” of the Cambewarra Development Trust and could require the Trustee to wind up the Cambewarra Development Trust and distribute the property or proceeds did not meet section 3A(3B)(a)(ii), which refers specifically to entitlement to the “capital” of the trust.

However, although the term “assets" is not defined in the Deed, the ordinary meaning is broad enough to encompass the “capital” of the trust, especially when read in the context of the Deed as a whole. Other clauses, including clause 3.2 (which defined the “Fund”) and clause 16 (which referred to the trustee’s recourse to “capital”), indicated that “assets” and “capital” effectively referred to the same subject matter, being the trust property.

The NCAT held that the deed of the Cambewarra Development Trust did not need to replicate the exact wording of the statute and it was sufficient that its language achieved the substance of the statutory requirements.

Therefore, clause 8.1, when considered alongside other provisions of the Deed, was found to meet the requirement that unitholders be presently entitled to the capital of the trust and able to require the trust to be wound up and capital distributed.

Cambewarra Developments Pty Ltd trading as Cambewarra Developments Unit Trust v Chief Commissioner of State Revenue [2025] NSWCATAD 243 (EA MacIntyre, Senior Member)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/243.html

3. Cases in brief

3.1 Mangini – time limit to claim ITCs

In the ART a taxpayer has been unsuccessful in seeking to extend the 4 year period to income input tax credits.

David Mangini carried on an enterprise as a driver between 1 July 2016 and 30 September 2018. From 2017 until 2019 he worked for Uber and was required to register an ABN and register for GST. Subsequently he worked as a private driver.

Throughout this, David experienced various health issues, legal proceedings, family issues, financial hardship, and other difficult personal circumstances which impacted his ability to comply with his lodgement obligations. He received notices from the ATO regarding his overdue lodgment obligations.

David repeatedly contacted the ATO to notify them of his circumstances and was granted short extensions to lodge his income tax returns. However, he did not specifically request a deferral or extension of time to lodge his BAS. On several occasions, he requested that the ATO desist from sending notices of overdue lodgments due to the distress that these notices caused. He was granted suspensions of action regarding his overdue BAS lodgments for September 2016 to March 2019 until 18 September 2019.

In February 2023, David lodged his BASs for the 1 July 2016 and 30 September 2018 periods, claiming input tax credits totalling $1,550 and reporting GST payable of $2,588. The Commissioner claimed that the four-year period for claiming ITCs had expired, and that David had not been granted a valid deferral or extension before the period expired.

David represented himself at the hearing before the ART. He presented the following arguments:

1. the ART should retrospectively grant an extended due date for lodgment of the BAS, within the terms of section 31-8(1)(b) of the GST Act, as a result of the extenuating circumstances David had experienced;
2. David had been compelled to participate in the GST system under duress to comply with Uber's requirements that he be registered for GST. His contract with Uber, and therefore the Commissioner, is therefore void and he is not liable to pay GST as assessed; and
3. the ***ATO does not exist, the Deputy Commissioner was not validly appointed, the terms "taxpayer" and "income" are not properly defined, and Prime Minister Anthony Albanese is being indicted for war crimes.*** As a result, the tax laws and the tax systems are invalid, and the obligation to pay tax is voluntary. David is, therefore, not required to pay GST as assessed.

Grounds two and three were not raised by David in the objection to the Commissioner, and were first raised after he filed his submission with the ART. David requested that the ART exercise its discretion to expand the grounds of review pursuant to section 14ZZK(a) of the TAA. However, the ART determined that grounds two and three advanced by David proceeded on a misunderstanding of the Commissioner's statutory power and the ART's jurisdiction. The arguments were misconceived and the ART declined to exercise a discretion to extend the grounds of review.

In relation to ground 1, consistent with prior decisions, the ART noted the 'strict and inflexible nature' of section 93-5 of the GST Act operated to extinguish David's entitlement to the input tax credits as they were not claimed in an assessment lodged within 4 years of the due date. The fact that the Commissioner had not informed David of the four-year rule was irrelevant. The ART noted in a self-assessed tax regime, taxpayers are expected to inform themselves of their lodgment obligations.

On the evidence presented by David and the Commissioner, it appeared David had requested 'deferrals' in respect of his income tax returns and 'suspensions' in respect of his BAS lodgments. A suspension does not affect the time limit in section 93-5 of the GST Act. There was no evidence that the Commissioner granted an extension of time to David for his overdue BAS as to affect the four-year entitlement period in section 93-5 of the GST Act.

Therefore, David's entitlement to the input tax credits claimed in the BASs ceased due to the operation of the four-year time limit prescribed by section 93-5 of the GST Act.

Citation *Mangini v Commissioner of Taxation* [2025] ARTA 1788 (General Member R Smith, Adelaide)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/1788.html

3.2 R v Clarke – ATO oppression

Julie Clarke lodged an R&D tax offset claim of $3.67 million on behalf of a company in August 2017, which the ATO flagged as high risk. During its audit, the ATO suspected that invoices supporting the claim were falsified and that Clarke had attempted to obtain a financial advantage dishonestly. In January 2018, the ATO issued a compulsory notice under section 353-10 of the TAA. Julie was told the interviews were to clarify gaps in her claim. The day before the first interview, the audit team met with the ATO crime team and agreed to share information about suspected fraud. At the interviews, Julie was cross examined by audit team members about the alleged fraud. She was directed to answer questions and was advised that if she did not, she would be committing an offence

The audit team referred the matter to the ATO crime team, which began liaising with the Queensland Police Service. The audit team handed over folders and notes to the ATO crime team, and the transcript was later circulated internally and later to the Commonwealth Director of Prosecutions. A Joint Agency Agreement was prepared, and in August 2018, Queensland Police Service executed search warrants. Julie was later charged with a State fraud offence in August 2018 and with Commonwealth fraud in April 2019. She applied to the Supreme Court of Queensland under s 590AA of the *Criminal Code 1899 (Qld)* seeking a permanent stay of the Commonwealth prosecution on grounds of abuse of process, improper use of ATO powers, and oppressive conduct.

The Court considered whether the ATO's use of its compulsory powers under section 353-10 of the TAA was lawful and whether the prosecution was an abuse of process. It examined the purpose of the January 2018 interviews, the involvement of the ATO crime team, and the dissemination of interview material. The Court found that the interviews were conducted for the dominant purpose of investigating criminal fraud, not for administering taxation laws, and that the audit team acted as agents for the crime team. This meant Julie was forced to answer questions she would normally have the option to refuse to answer in a criminal matter, and she lost the chance to decide how and when to present her case in court. The Court concluded that Julie was unlawfully subjected to a hybrid audit/criminal interview because the audit team did not have the power to investigate a breach of the Commonwealth Criminal Code as agents of the crime team, or at all, and the crime team did not have the power to compel Julie to answer questions put to her concerning the criminal matter.

The Court found that the ATO's conduct went beyond simply sharing information. It relied on documents that had been altered and included misleading statements in its briefs. One example was the allegation that Julie claimed to have invented DBH (a chemical compound), which was not supported by the evidence. This allegation appeared in affidavits and briefing notes used to obtain search warrants and was repeated in both the Commonwealth and State prosecutions. The lead ATO criminal investigating officer was found to have:

1. failed to mention a key meeting on 22 January 2018 from his statements and audit records;
2. failed to disclose documents proving that meeting took place;

3. altered a spreadsheet prepared by Julie by removing words showing board approval of expenses, and gave the altered version to police, weakening Julie's defence;
4. helped prepare a false statement from a former contractor claiming she had not been paid, when she had, and included it in the evidence brief;
5. gave misleading information in statements and affidavits to obtain search warrants, alleging Julie claimed to have invented DBH;
6. withheld emails before the State fraud trial that showed Julie never claimed to invent DBH;
7. lied in a briefing note to senior counsel;
8. prepared a statement from another former contractor falsely asserting Julie claimed to invent DBH;
9. failed to disclose emails about his relationship with an external expert before the State trial; and
10. did not obtain evidence that could have helped Julie's defence in the ATO fraud case.

The Court concluded that these actions, combined with the continuation of two simultaneous fraud prosecutions and the concealment of evidence in Julie's favour, amounted to oppression and brought the administration of justice into disrepute. A permanent stay of the Commonwealth prosecution was ordered.

Citation *Clarke v Commonwealth Director of Public Prosecutions* [2025] QSC 317 (Applegarth J, Queensland)
w https://www.queenslandjudgments.com.au/caselaw/qscpr/2025/17

3.3 AUZ Taxation – TASA termination set aside

The ART reviewed the decision of the Tax Practitioners Board to terminate the registrations of Auz Taxation Pty Ltd and its sole director, Sumit Bagga, following serious breaches of the Code of Professional Conduct under the TASA. The breaches arose from Sumit' decision to share his own and his wife's myGovID credentials with an employee, Amit Kumar, who used them to lodge fraudulent activity statements on behalf of two companies and directed GST refunds from those companies to be paid into a bank account controlled by him. Despite being notified of the fraud by the ATO, Sumit retained Amit and later permitted him to access the portal using his wife's credentials. Sumit also signed a Statement of Relevant Experience for Amit that contained known errors and failed to ensure adequate supervision across multiple offices servicing thousands of clients.

The ART found that Sumit had breached several provisions of the Code, including the obligations to act honestly and with integrity, to comply with taxation laws in his personal affairs, and to ensure services were provided competently. It accepted that Sumit's conduct demonstrated a lack of integrity, particularly in relation to the misuse of portal access and the signing of the inaccurate SRE. However, the ART did not find breaches of the obligation to act in the best interests of clients or to respond to Board directions, noting that the affected entities were not clients of Auz Taxation and that Sumit had responded candidly and cooperatively to the Board's enquiries. The ART also found that the company did not meet the registration requirement to have a sufficient number of registered tax agents to ensure competent service provision and supervision.

Despite the seriousness of the breaches, the ART concluded that termination of registration was not warranted. It accepted that Sumit had taken corrective steps, including rectifying late lodgements, improving internal controls, and implementing new supervisory procedures. The ART also noted that no further misuse of portal access had occurred since Amit's dismissal and that the quality of client services appeared otherwise competent. Given the scale of the business and the potential disruption to over 5,000 clients, the ART found that termination would be punitive and disproportionate.

Instead, the ART issued written cautions to both Sumit and Auz Taxation and imposed remedial orders under section 30-20 of the TASA. These included compulsory training for staff on portal access protocols, governance reforms, notification obligations to clients and employees, and the appointment of additional registered tax agents to ensure proper supervision. Sumit was also required to complete further education in professional conduct and human resource management. The ART emphasised that these measures were necessary to

restore confidence in the integrity of the operations of Auz Taxation and to ensure future compliance with professional standards.

COMMENT – the decision highlights that inadequate supervision and credential misuse can expose firms to serious regulatory risk. While remedial action may avoid termination, the margin for error is narrow.

The TPB has appealed this decision to the Federal Court.

Citation *Auz Taxation Pty Ltd & Anor v Tax Practitioners Board* [2025] ARTA 1711 (Senior Member M Harrowell, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/1711.html

3.4 Chung – land tax boarding house exemption

A taxpayer was unsuccessful in claiming the boarding house exemption for land tax.

In October 2002, Lucy acquired a building which consisted of two levels. The upper floor contained six bedrooms and four bathrooms, while the lower floor contained a bedroom, three bathrooms, a kitchen, a common room, an open dining area, a storeroom, and a tiled terrace, all used as part of the boarding house. The remainder of the lower floor served as Lucy's private residence.

The issue in this case was whether Lucy had been validly issued with assessments for 2019 and 2023 years on the basis that she did not meet the requirements for the boarding house exemption. It was util 4 September 2023 that the house was registered as a boarding house under the *Boarding Houses Act 2012* (NSW). It appears that Lucy did not seek registration previously.

Following several years of correspondence and assessments, on 7 December 2023, the Chief Commissioner issued assessments for the 2019 to 2023 land tax years, maintaining that the land was subject to land tax and including interest charges.

Section 10Q of the LTMA allows an exemption from land tax for certain boarding houses. One of the requirements under section 10Q of the LTMA is that the *"Chief Commissioner is satisfied that the land is so used and occupied in accordance with guidelines approved by the Treasurer for the purposes of this section"*. Guidelines approved by the Treasurer for the purposes of section 10Q of the LTMA are set out in two sets of revenue rulings. One applies in respect of land in New South Wales used as a boarding house. The other applies in respect of land used for certain other low-cost accommodation.

The NCAT found that the guidelines for each relevant year clearly defined a "boarding house" as premises registered under the *Boarding Houses Act 2012* (NSW). As such, registration was not merely procedural but a substantive requirement embedded in the regulatory framework designed to ensure quality and accountability in low-cost accommodation.

The NCAT rejected the Lucy's argument that she had substantially complied with the registration requirement, noting that Australian law does not generally accept substantial compliance with clear statutory conditions, especially in taxation contexts.

The NCAT also considered whether interest charged on the unpaid land tax should be remitted. It upheld the market rate interest, stating that it compensates the government for the delayed payment and should rarely be waived unless the Chief Commissioner contributed to the default.

However, it partially accepted Lucy's argument regarding the premium rate interest. Given Lucy had presented evidence of significant health issues, including long-term physical and mental conditions and recent mobility

loss, which affected her ability to manage her affairs. While the NCAT acknowledged these circumstances, it also noted that Lucy had been aware of her land tax obligations since at least 2019 and had received multiple notices. Consequently, the NCAT agreed with the Chief Commissioner's concession to remit 50% of the premium interest.

Citation *Chung v Chief Commissioner of State Revenue* [2025] NSWCATAD 229 (Senior Member EA MacIntyre, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/229.html

3.5 Appeal Updates

Barth

The trustee for the Barth Family Trust has appealed to the Federal Court against the ART decision in Trustee for *Barth Family Trust v Federal Commissioner of Taxation* [2025] ARTA 1558. In that decision, the ART held that the trustee was not entitled to claim ITCs claimed in activity statements lodged more than 4 years after the date for lodgement.

Uber

Uber Australia Pty Ltd has applied for special leave to appeal to the High Court from the decision of the NSW Court of Appeal in *Chief Commissioner of State Revenue v Uber* [2025] NSWCA 172 (see our August 2025 Tax Training Notes). In that case, the Court of Appeal held that payments made to drivers under Uber's driver contracts were subject to payroll tax under the relevant contract provisions of the *Payroll Tax Act 2007* (NSW), and that no exemptions applied.

3.6 Other tax and super related cases from 13 Sept to 8 Oct 2025

Citation	Date	Headnote	Link
Deputy Commissioner of Taxation v Bundaberg Indoor Sports Pty Ltd [2025] FCA 1104	5 September 2025	TAXATION – ex parte application for freezing orders – where applicant was issuing notices of amended assessments to respondents – where notices of amended assessments would result in significant tax-related liabilities – consideration of limbs for issuance of freezing orders – where applicant had a good arguable case in relation to tax-related liabilities – where there was a real risk of dissipation of assets – where balance of convenience favoured grant of freezing orders – orders made.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2025/1104.html
Roen v Chief Commissioner of State Revenue [2025] NSWCATAD 226	9 September 2025	TAXES AND DUTIES — penalties and interest imposed on a surcharge purchaser duty assessment — amendments made to Applicant's declaration without her knowledge	https://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCATAD/2025/226.html
Amos v Commissioner of State Revenue [2025] QCA	16 September 2025	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS –	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/Q

Citation	Date	Headnote	Link
174		ENFORCEMENT OF JUDGMENTS AND ORDERS – EXECUTION AGAINST PROPERTY – WARRANTS OF SEIZURE AND SALE – PROCEDURE – OTHER CASES – where the respondent applied for an enforcement warrant under the Uniform Civil Procedure Rules 1999 (Qld) ('UCPR') for the seizure and sale of properties owned by the appellant – where the respondent applied for declarations that an enforcement officer may seize and sell properties in execution of the enforcement warrant – where the appellant applied to set aside the enforcement warrant on the basis that r 389(2) of the UCPR was not complied with – where the primary judge held that r 389(2) of the UCPR did not apply to enforcement proceedings under the UCPR – whether r 389(2) of the UCPR applies to enforcement proceedings	CA/2025/174.html
PJFX and Commissioner of Taxation (Practice and procedure) [2025] ARTA 1871	16 September 2025	Practice and Procedure – application for recusal – reasonable apprehension of bias	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/1907.html
Chalik v Chief Commissioner of State Revenue [2025] NSWCATAD 238	24 September 2025	COSTS	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/238.html
Skycorp Investments Pty Ltd v Commissioner of Taxation [2025] FCA 1184	26 September 2025	PRACTICE AND PROCEDURE - taxation - appeal under s 14ZZ of the Taxation Administration Act 1953 (Cth) (TAA) - where applicant alleges underclaimed deductions available under Division 43 of the Income Tax Assessment Act 1997 (Cth) for construction expenditure - where appeal proceeding includes lengthy procedural history - interlocutory application to strike out or remove Commissioner's responsive appeal statement on grounds of abuse of process and for the filing of substitute appeal statement - consideration of responsive appeal statement in light of submissions and procedural history - interlocutory application dismissed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2025/1184.html
Deputy Commissioner of Taxation v Peever (No 3) [2025] FCA 1187	26 September 2025	PRACTICE AND PROCEDURE — Applications for variation of freezing orders — Whether to increase exception to freezing orders to allow further payment of legal expenses — Whether variation is over assets over which	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2025/1187.html

Citation	Date	Headnote	Link
		proprietary claims have been made – Consideration of meaning of "reasonable legal expenses" — Whether "reasonable legal expenses" should be limited – Applications granted, in part.	
Ahmad and Commissioner of Taxation [2025] ARTA 1907	26 September 2025	**TAXATION** – income tax default assessments – administrative penalty assessments – whether the taxpayer could satisfy the onus of proof by establishing that the assessments were excessive and what they ought to have been – whether applicant was reckless as to the operation of a **taxation** law – whether remission of administrative penalty appropriate – objection decision affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/1907.html
Koh v Chief Commissioner of State Revenue [2025] NSWCATAD 242	30 September 2025	TAXES AND DUTIES — surcharge land tax – liability	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/242.html
Commissioner of State Revenue v Leicester Pty Ltd (in liq) [2025] VSC 622	1 October 2025	APPEAL — Supreme Court (General Civil Procedure) Rules 2025 (Vic) r 84.05 — Application to set aside winding up order — Where the company did not receive statutory demand or originating process at the time it was served — Where the company has now paid its outstanding debt to the Commissioner — Appeal allowed — Winding up order set aside.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2025/622.html
Yan v Chief Commissioner of State Revenue [2025] NSWCATAD 249	2 October 2025	TAXES AND DUTIES — Land tax — Surcharge land tax — Foreign person	https://www.caselaw.nsw.gov.au/decision/1999cc47a2d4b0873ea7c028

4. Legislation

4.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Treasury Laws Amendment (Payments System Modernisation) Bill 2025	30/7	2/9	4/9	4/9	
Treasury Laws Amendment (Strengthening Financial Systems and Other Measures) Bill 2025	4/9				

4.2 ESS safe harbour valuation methodologies

The ATO has finalised its Legislative Instrument 2015 (LI 2025/D16) in relation to methods for valuing unlisted shares for the employee share scheme start-up concession (see our July 2025 Tax Training Notes).

The Instrument maintains the position that companies can use a different valuation method, as long as it gives a market value that's at least as high as what they would get using one of the approved methods. If it does, that alternative method will be binding on the Commissioner.

The Instrument commences on 1 October 2025.

w https://www.legislation.gov.au/F2025L01085/asmade/text

4.3 Build-to-rent land tax concessions made permanent

The *Land Tax (Build-to-Rent Concessions) Amendment Bill 2025* (NSW) has received assent. The Bill extends the land tax concessions available to new build-to-rent (BTR) developments by removing the previous end date of 2039. From the 2026 land tax year, eligible developments will be able to access a concession providing a 50% reduction in the assessable land value of qualifying BTR properties with no cap on the number of years the concession can be claimed. To qualify for this concession:

1. construction must have commenced on or after 1 July 2020;
2. the building must not have been used for another purpose; and
3. the properties cannot be subdivided or have their ownership divided within the first 15 years of accessing the concession.

The Bill will amend the *Land Tax Management Act 1956* (NSW) to establish a new ongoing BTR concession scheme, while also preserving the existing time-limited scheme. Under the new framework, the land value of eligible properties is reduced by 50% where a building is used and occupied for BTR in line with guidelines issued by the Treasurer. Schedule 3 to the Bill sets out the eligibility criteria, rules for reducing or ceasing concessions, how both concession schemes apply, and the policies that may be prescribed in the Treasurer's guidelines.

In addition, the Bill amends the *Duties Act 1997* (NSW) and the *Land Tax Act 1956* (NSW) to provide for exemptions or refunds of surcharge purchaser duty and surcharge land tax. These will be available to foreign developers who qualify for the new ongoing scheme, while preserving the existing refund entitlements under the time-limited scheme.

w https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=18795

5. Rulings

5.1 Guarantees by private companies – section 109U

On 24 September 2025, the ATO issued *Taxation Determination* TD 2025/6, which confirms that section 109U of the ITAA 1936 applies to arrangements where a private company provides a guarantee to any entity as part of a broader arrangement involving a payment or loan to a shareholder or associate. The final Determination (which was previously in draft form as TD 2024/D3) clarifies that while the recipient of the guarantee (the first interposed entity) may be any entity, including a public company or bank, the entity that ultimately makes the payment or loan to the target entity must be a private company.

The accompanying compendium reflects several changes and clarifications made in response to stakeholder feedback on the draft version of the Determination. Notably, the ATO:

1. added a compliance approach confirming that where a genuine section 109N compliant loan is made to the target entity, it will not devote compliance resources to applying section 109U. This recognises that banks commonly require guarantees from related entities when lending to private companies;
2. clarified that the mischief targeted by section 109U is relevant to the exercise of discretion under section 109V, and that where an arrangement is not objectively designed to circumvent Division 7A, the deemed payment may be determined to be nil;
3. declined to extend the Determination to cover conduit financing arrangements, court-ordered payments, or provide safe harbours for in-house financing structures, noting that such cases require fact-specific analysis;
4. rejected submissions suggesting that section 109U should only apply where the guarantee is given to a private company, reaffirming that the legislation does not impose such a restriction; and
5. confirmed that section 109U may apply even where the guarantee has not been called upon, and that it operates independently of section 109UA, which deals with actual liabilities arising under guarantees.

ATO reference *TD 2025/6*
w https://www.ato.gov.au/law/view/document?docid=TXD/TD20256/NAT/ATO/00001
ATO reference *TD 2025/6EC – Compendium*
w https://www.ato.gov.au/law/view/document?docid=CTD/TD2025EC6/NAT/ATO/00001

5.2 Non-arm's length income rules

The ATO has finalised updates to *Law Companion Ruling* LCR 2021/2 and *Taxation Ruling* TR 2010/1 to reflect amendments to the non-arm's length income (**NALI**) rules in section 295-550 of the ITAA 1997, as introduced by Schedule 7 to the *Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Act 2024* (the **2024 Amendments**).

LCR 2021/2

The LCR 2021/2 clarifies how the 2024 Amendments operate in schemes where parties do not deal at arm's length, and a small complying superannuation fund (including SMSFs and small APRA-regulated funds) incurs non-arm's length expenditure, or fails to incur expenditure, in gaining or producing income.

Key details of the finalised guidance include:

1. the 2024 Amendments apply to income and expenditure from the 2018-19 income year onwards (superseding the 2019 amendments);

2. the amount of income that is NALI from a general expense breach for a small complying superannuation fund is calculated as twice the difference between the amount actually incurred and the amount that would have been expected to be incurred if the parties had been dealing at arm's length;
3. the total non-arm's length component (**NALC**) for an income year is capped at the lesser of:
   (a) the sum of NALI amounts (including those from general expenses) less deductions attributable to that income; and
   (b) the fund's taxable income less assessable contributions plus any deductions attributable to those contributions;
4. large APRA-regulated funds are excluded from the operation of the non-arm's length expenditure rules, though they remain subject to other NALI provisions; and
5. specific and general expenses are distinguished, with general expenses being those not related to a particular asset.

The update to LCR 2021/2 was released in draft form as LCR 2021/2DC and the ATO has issued a compendium (LCR 2021/2EC2) on feedback received.

TR 2010/1

The finalised TR 2010/1 explains the interaction between the amended NALI rules and the rules concerning superannuation contributions. Key updates include:

1. the removal of maximum earnings test for deducting personal contributions, effective from 1 July 2017;
2. clarification that in-specie contributions must be recorded at market value in the fund's accounts and member interests;
3. where an asset is acquired under a contract at less than market value, the difference is not treated as an in-specie contribution, but rather as non-arm's length expenditure under section 295-550 of the ITAA 1997;
4. contributions made by value shifting to fund-owned assets are addressed:
   (a) if parties deal at arm's length, the value shift is treated as a contribution; and
   (b) if not, the NALI provisions may apply to income derived from the asset;
5. the compliance approach proposed in TR 2010/1DC, which would have allowed trustees to avoid contribution recognition in certain value-shifting arrangements, has been removed; and
6. no compliance approach will apply from 28 November 2024 onwards, whereas arrangements between 28 July 2021 and 27 November 2024 will only be considered on a case-by-case basis upon application by a trustee.

The update to Draft Taxation Ruling TR 2010/1 was released in draft form as TR 2010/1DC2 and the ATO has issued a compendium (TR 2010/1EC2) on feedback received.

ATO reference *LCR 2021/2*
w https://www.ato.gov.au/law/view/document?docid=COG/LCR20212/NAT/ATO/00001
ATO reference *TR 2010/1*
w https://www.ato.gov.au/law/view/document?DocID=TXR/TR20101/NAT/ATO/00001

5.3 Superannuation contributions

On 24 September 2025, the ATO released an addendum to TR 2010/1A4 to update and clarify its guidance on the income tax treatment of superannuation contributions. The changes reflect legislative developments, stakeholder feedback, and the interaction between contribution rules and the non-arm's length income (**NALI**) provisions in section 295-550 of the ITAA 1997.

The addendum confirms that a contribution is generally made when funds are received by the superannuation provider. This includes cash payments, electronic transfers, and cheques, with timing determined by receipt and clearance. The addendum also expands guidance on in-specie contributions, clarifying that where an asset is acquired under a sale contract, the transaction is not a contribution. However, a mixed arrangement may occur where part of the asset is purchased and the remainder is contributed in-specie. In such cases, the in-specie component must be recorded at market value in the fund's accounts and member's superannuation interest. The trustee must update the accounts if the recorded value is below market value.

Importantly, the ATO has confirmed that where an asset is acquired under a contract at less than market value, the shortfall does not constitute an in-specie contribution. Instead, the arrangement may give rise to non-arm's length expenditure and trigger the NALI provisions. The compendium supports this position and rejects stakeholder suggestions to treat the shortfall as a contribution.

The addendum also introduces new guidance on value shifting. Where value is shifted to an asset owned by the fund and the parties are dealing at arm's length, the increase in value is treated as a contribution. Where the parties are not dealing at arm's length, the NALI provisions may apply to income derived from the asset.

Paragraph [138] of the ruling was revised to clarify that insurance payments made to a superannuation provider may be treated as contributions if the purpose of the payment is to benefit a member. Payments made directly to members are not contributions, as they do not increase the capital of the fund.

The addendum removes outdated references to the maximum earnings test, which was repealed from 1 July 2017, and updates the treatment of personal contributions. A new paragraph outlines examples of contributions that are not deductible, including downsizer contributions, recontributions under the First Home Super Saver Scheme, and COVID-19 recontributions. The compendium confirms that this list is inclusive rather than exhaustive.

Finally, the ATO has clarified its compliance approach to value shifting arrangements. For arrangements occurring between 1 July 2018 and 27 July 2021, the ATO will not allocate compliance resources where the value shift is not recognised as a contribution but the income is treated as NALI. For arrangements between 28 July 2021 and 27 November 2024, the approach will be considered on a case-by-case basis. From 28 November 2024, no compliance concession will apply, reflecting the ATO's view that non-arm's length dealings should not circumvent contribution cap rules.

ATO reference *TR 2010/1A4 – Addendum*
w https://www.ato.gov.au/law/view/document?docid=TXR/TR20101A4/NAT/ATO/00001
ATO reference *TR 2010/1EC2 - Compendium*
w https://www.ato.gov.au/law/view/document?docid=CTR/TR2010EC1-2/NAT/ATO/00001

5.4 Ruling on thin capitalisation third party debt test

The ATO has finalised its guidance on the third party debt test (**TPDT**) by issuing *Taxation Ruling* TR 2025/2. This ruling replaces the earlier draft TR 2024/D3, which was released for public comment in December 2024. It has also finalised *Practical Compliance Guideline* PCG 2025/2, previously released as PCG 2024/D3 (see page 53 of these notes).

The TPDT is part of the thin capitalisation rules and determines when debt deductions can be claimed for borrowings from unrelated lenders. It was introduced to replace the arm's length debt test, aiming for a simpler approach for asset-heavy sectors such as property and infrastructure. To satisfy the TPDT, debt interests must meet strict conditions, including that lenders have recourse only to Australian assets and that borrowed funds are used for commercial activities connected with Australia.

Key changes to finalised TR 2025/2

Under the TPDT, the obligor group refers to the set of entities whose assets a lender can access to recover the debt. This concept is critical because the TPDT requires that recourse be limited to Australian assets held by the issuer or members of the obligor group. If recourse extends to offshore assets or foreign associate entities, the debt interest will fail the TPDT conditions.

The ruling now explicitly links the concept of "recourse" in paragraph 820-427A(3)(c) to paragraph 820-49(1)(b) of the ITAA 1997, which defines the obligor group.

Example 6 (Third Party Guarantee) adds a note that Head Trust is excluded from the obligor group because of subsection 820-49(3) of the ITAA 1997.

Diagrams in Examples 5, 6 and 8 have been updated to clearly label the obligor group and show which entities are included or excluded.

The ruling emphasises that this is a continuous test. The obligor group and recourse conditions must be satisfied for the entire period the debt interest is on issue.

Definitions of Australian assets

The ruling now provides a structured approach to determining whether an asset qualifies as an Australian asset. It lists factors such as physical location, governing law, and use in Australian operations, and distinguishes between tangible assets, intangible assets, and membership interests.

New Example 12 illustrates this:

> *Finance Trust holds units in Asset Trust, which owns Australian real property and a minor offshore asset. The units are Australian assets because the non-Australian asset is minor or insignificant.*

Recourse

The final ruling draws an important distinction between two provisions that deal with non-Australian assets. Under paragraph 820-427A(3)(c), recourse to minor or insignificant assets is disregarded when determining whether a lender's recourse is limited to Australian assets. This means that if a lender technically has recourse to a foreign asset of negligible value, the debt interest can still satisfy this condition.

However, paragraph 820-427A(4)(b) operates differently. It prohibits recourse to membership interests in an entity if that entity has any legal or equitable interest (direct or indirect) in a non-Australian asset, regardless of whether that asset is minor or insignificant. This creates a stricter rule for membership interests compared to other asset types.

> ***Example 13 – Interaction with Paragraph 820-427A(4)(b)***
> *Finance Trust borrows $50 million from an unrelated lender. The lender has recourse to Finance Trust's membership interests and its underlying assets. Finance Trust indirectly holds a minor offshore asset through Asset Trust. While the offshore asset would be disregarded under paragraph 820-427A(3)(c) for being minor, paragraph 820-427A(4)(b) prevents recourse to Finance Trust's membership interests because of that indirect interest in a non-Australian asset. As a result, the debt interest fails the TPDT.*

This clarification means that entities cannot rely on the "minor or insignificant" concession when membership interests form part of the lender's recourse.

Commercial activities in connection with Australia

One of the core conditions of the TPDT is that the entity must use all, or substantially all, of the proceeds of issuing the debt interest to fund its commercial activities in connection with Australia. This requirement ensures that the TPDT only supports borrowings genuinely tied to Australian business operations, rather than offshore investments or shareholder distributions. It applies continuously throughout the life of the debt, not just at the time of issue.

The final ruling removed a qualification that Australian real property will "generally" qualify. Australian real property is now treated as always qualifying. The final ruling clarifies this concept by introducing a positive and negative list of activities:

Acceptable uses include:

1. acquiring or constructing Australian real property, plant, or infrastructure;
2. funding Australian overheads such as payroll, insurance, and legal costs; and
3. refinancing debt that was originally used for Australian operations.

Unacceptable uses include acquiring offshore assets (directly or indirectly), holding foreign debt or equity, and paying distributions or capital returns to investors.

The ATO also describes this as a tracing rule, meaning entities must be able to demonstrate that the proceeds remain connected to Australian activities over time.

This expanded guidance makes it clear that the TPDT is narrowly focused on financing Australian business operations and excludes arrangements that divert funds offshore or to shareholder returns.

ATO reference *TR 2025/2*
w https://www.ato.gov.au/law/view/document?docid=TXR/TR20252/NAT/ATO/00001

5.5 Exempt income of international organisations

The ATO has released its finalised *Taxation Ruling* TR 2025/1. TR 2025/1 replaces Draft Taxation Ruling TR 2024/D2 and earlier guidance. A summary of the draft TR 2024/D2 can be found in our June 2024 Tax Training Notes.

The ruling considers exempt income of international organisations and persons connected with them. Relevantly, income is made exempt by section 6-20 of the ITAA 1997 because of the *International Organisations (Privileges and Immunities) Act 1963* (**IOPI Act**). The IOPI Act provides for the conferral of privileges and immunities, including tax exemptions, for international organisations.

The finalised ruling considers when an international organisation is covered by the IOPI Act and provides a detailed framework for determining whether a person is connected with an international organisation. The ruling also includes a compliance appendix outlining acceptable documentary evidence of a person's connection to an international organisation.

ATO reference *TR 2025/1*
w https://www.ato.gov.au/law/view/document?docid=TXR/TR20251/NAT/ATO/00001
ATO reference *TR 2025/1EC – Ruling Compendium*
w https://www.ato.gov.au/law/view/document?docid=CTR/TR2025EC1/NAT/ATO/00001

5.6 Payroll tax and medical practitioners (SA)

RevenueSA has updated Revenue Ruling PTASA004 to clarify the operation of the retrospective payroll tax amnesty and bulk-billing exemption for general practitioners under the *Payroll Tax Act 2009* (SA) *and Payroll Tax Regulations 2025* (SA). The updated ruling, PTASA004v3, replaces version 2 and provides further guidance, including clarification in Example 3 on how the bulk billing percentage is calculated where services are provided across multiple practices.

The amnesty applies only to contractor GP services for the period prior to 1 July 2024, while the bulk-billing exemption applies to both contractor and employee GP services from 1 July 2024, subject to specific conditions.

w https://www.revenuesa.sa.gov.au/resources/publications/revenue-rulings/revenue-rulings/ptasa004/revenue-ruling-ptasa004v3

6. 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.

6.1 Changing main residence

Facts

The taxpayer jointly owned two properties:

Property A was their original main residence.

Property B was acquired as an investment property (60% and 40% ownership split) and initially leased out.

Property B was later redeveloped into a new four-bedroom home. After entering into a contract to sell Property A, the taxpayer moved into Property B and established it as their main residence. They claimed the full main residence exemption on Property A and used the "absence choice" provision to continue treating it as their main residence until settlement on the sale of Property A completed.

Property B was sold after being used as the taxpayer's main residence for a limited period.

Question

Will the taxpayer be entitled to partially disregard the capital gain made on the disposal of Property B in accordance with section 118-185 of the ITAA 1997?

Ruling

Under CGT event A1 (section 104-10 of the ITAA 1997), a capital gain or loss arises when a property is sold. Section 118-110 allows a full exemption if the property was the taxpayer's main residence for the entire ownership period and was not used to produce income. However, because Property B was leased before becoming the main residence, the full exemption does not apply.

Section 118-185 provides for a partial exemption where the property was the main residence for only part of the ownership period. The taxpayer qualifies for this partial exemption for their respective ownership interests in Property B.

Section 118-140 of the ITAA 1997 provides transitional relief when a taxpayer changes their main residence. It allows both the existing and new dwellings to be treated as the taxpayer's main residence for a limited overlap period, which is critical for determining eligibility for the CGT main residence exemption.

This overlap period is the shorter of:

1. six months ending when the ownership interest in the original main residence ends; or
2. the period between acquiring the new residence and disposing of the original one.

However, this concession only applies if two conditions are met:

1. the original residence (Property A) was the taxpayer's main residence for at least three continuous months in the 12 months before its disposal; and
2. the original residence was not used to produce assessable income during any part of that 12-month period when it was not the main residence.

In the taxpayer's case, these conditions were satisfied. Property A was continuously used as the main residence and not rented out in the final 12 months. Therefore, both Property A and Property B could be treated as the taxpayer's main residence for the six-month overlap period.

The taxpayer also made the "absence choice" under section 118-145 to continue treating Property A as their main residence after moving out. This choice supports the full exemption claim on Property A and defines the start of the partial exemption period for Property B.

The CGT liability on Property B will be apportioned based on the period it was not the taxpayer's main residence.

ATO reference *Edited Private Advice Authorisation No. 1052427217658*
w https://www.ato.gov.au/law/view/document?docid=EV/1052427217658

6.2 Main residence exemption for adjoining units

Facts

The taxpayer, an Australian resident and citizen, purchased two residential units with separate titles, intending to use them together as a single home. The purchase contract was signed prior to the COVID-19 pandemic, but settlement was delayed due to pandemic-related disruptions and increased construction costs.

After selling their previous home, the taxpayer rented an apartment while awaiting completion of the units. Due to ongoing delays, they purchased a house and later moved into the units with their children once settlement was finalised, several months later than originally expected.

The taxpayer began renting out the house and used both units as their main residence, occupying one while the children lived in the other. To enhance functionality and privacy, each unit was fitted with lounge and dining areas. A contract variation fee was paid to install interconnecting doors, effectively creating a single functional residence. Supporting documents included a marked-up floor plan and a special conditions agreement.

The taxpayer updated their address with relevant authorities and provided utility bills for both units in their name. Despite efforts to adapt, they found unit living unsuitable due to limited space, environmental noise, and lack of outdoor amenities for pets.

After a short period, the taxpayer listed the units for sale as a combined home, but buyers preferred to purchase them separately. The units have not been leased for any other purpose since acquisition. The taxpayer plans to relocate after the sale.

Questions

1. Can the taxpayer claim the CGT main residence exemption on two adjoining units used together as their principal place of residence if they are sold separately to different buyers at different times?
2. Does the CGT main residence exemption apply if the taxpayer sells both adjoining units, used as their principal place of residence, in a single transaction to one buyer?
3. Is the taxpayer eligible for the CGT main residence exemption if the two adjoining units are sold after being occupied as their principal place of residence for only a short period?

Decision

Sale to different buyers at different times

Under section 118-110 of the ITAA 1997, the CGT main residence exemption applies to a dwelling used as the taxpayer's main residence. A dwelling is defined in section 118-145 to include anything used wholly or mainly for residential accommodation. However, section 108-5 treats each unit as a separate CGT asset if held under distinct legal titles.

Even if the units were physically integrated and functionally used as one residence, selling them separately constitutes the disposal of two separate CGT assets. The exemption must be considered individually for each asset. If the sales occur at different times, and particularly if the taxpayer no longer resides in one or both units at the time of sale, the exemption may only apply to one unit. The taxpayer may need to make an election under section 118-170 to nominate which property is treated as the main residence, but cannot claim full exemption on both.

Sale in a single transaction to one buyer

Selling both units in one transaction supports the view that they were used as a single dwelling. The physical integration (e.g. interconnecting doors) and functional use as one home strengthen the argument under section 118-115 of the ITAA 1997, which allows the exemption to apply to adjacent land or buildings used as part of the main residence.

The full exemption under section 118-110 can apply, provided the following conditions are met:

1. the combined property was used as the taxpayer's main residence;
2. it was not used to produce assessable income; and
3. the land is less than 2 hectares.

Section 118-145 allows the property to continue being treated as the main residence for up to six years after the taxpayer vacates, provided it is not used to derive income.

Does main residence exemption apply, given short occupation?

The CGT main residence exemption does not require a minimum period of occupancy. What matters is whether the property was genuinely used as the taxpayer's main residence. Factors considered by the Commissioner include:

1. actual occupation;
2. intention to reside;
3. modifications to suit residential use; and
4. absence of income-producing activity.

Even a short period of residence can qualify if supported by evidence of genuine use. Under section 118-110, the exemption applies if the dwelling was the taxpayer's main residence during ownership. Furthermore, section 118-145 allows the taxpayer to treat the property as their main residence for up to six years after moving out, provided it is not rented or used to produce income.

ATO reference *Edited Private Advice Authorisation No. 1052419336277*
w https://www.ato.gov.au/law/view/document?docid=EV/1052419336277

6.3 Legal vs beneficial ownership

Facts

The taxpayer, their spouse, and their child jointly acquired a residential property as joint proprietors under a contract of sale dated March 20XX, with settlement occurring in June 20XX. The property was intended to serve as the main residence for the taxpayer's child.

At the time of acquisition, the child had recently commenced a business that had been operating for less than X years. The child also held an existing loan on a prior residence—later converted into an investment property—which had been acquired solely in their name in 20XX.

Due to concerns about the child's ability to service a new mortgage independently, the bank declined to lend funds solely to the child. Correspondence between the child and the bank indicated that the child initially attempted to secure the loan independently, but was advised that the taxpayer's details would need to be added to the loan.

The taxpayer and their spouse agreed to become co-borrowers. The bank required that both the taxpayer and their spouse be listed on the loan and the property title.

Bank statements provided by the taxpayer show that the child redrew funds from an existing account to use as the deposit for the property. The taxpayer stated that neither they nor their spouse made any financial contributions toward the property following its acquisition.

Since settlement, the child and their partner have resided in the property and have:

1. made all mortgage repayments using their personal income;
2. undertaken partial renovations shortly after acquisition using their own funds; and
3. covered all ongoing property-related expenses, including council rates, water charges, utilities, and insurance.

Supporting documentation was provided to substantiate these claims.

In 20XX, the child and their partner sought to refinance the property to fund renovations and structural repairs due to water damage. To obtain a joint loan, the property title needed to be transferred into their names. Accordingly, the taxpayer and their spouse transferred their respective one-third ownership interests to the child and their partner.

No consideration was received by the taxpayer or their spouse for the transfer, and all associated costs were borne by the child and their partner.

An email from the bank dated June 20XX confirmed that the arrangement was not a guarantor arrangement, as the taxpayer's income was used to service the loan. The taxpayer and their spouse were therefore equally responsible for loan repayments.

Question

Did CGT Event A1 occur when the taxpayer transferred legal interest in the property to their child and their child's partner?

Ruling

Under section 102-20 of the Income Tax Assessment Act 1997 (ITAA 1997), a capital gain or loss arises only if a CGT event occurs to a CGT asset. A property is a CGT asset under section 108-5.

CGT Event A1 under subsection 104-10(1) occurs when a taxpayer disposes of a CGT asset. However, if only legal ownership changes and equitable ownership remains unchanged, CGT Event A1 does not apply.

Section 108-7 treats joint tenants as holding separate CGT assets in equal shares, as if they were tenants in common.

Legal vs equitable ownership

Legal ownership is determined by title registration under state property law. Equitable (beneficial) ownership refers to the person entitled to the benefits of the asset. A person may hold legal title without equitable interest if the property is held on trust.

To rebut the presumption that legal and equitable ownership are aligned, the taxpayer must provide clear contemporaneous evidence of a trust arrangement. This includes:

1. documentation showing intent at the time of purchase (e.g. bank correspondence, contracts);
2. evidence of treatment of the property consistent with that intent; and
3. unambiguous records created at or near the time of acquisition.

Resulting trusts and presumption of advancement

A resulting trust may arise where legal title does not reflect contributions to the purchase price. The law presumes the contributor intended to retain equitable interest.

This presumption may be rebutted by:

1. the presumption of advancement, which applies in close familial relationships (e.g. parent-child), and presumes a gift of both legal and equitable interest; or
2. evidence of contrary intention at the time of purchase.

The ATO referred to the High Court decision in *Calverley v Green* (1984) 155 CLR 242, which confirmed that the presumption of advancement applies where the relationship suggests an intention to confer equitable interest. The onus to rebut lies with the person alleged to have made the gift.

Application to the taxpayer's circumstances

The taxpayer, their spouse, and their child were joint proprietors on title. Although the child intended to purchase the property independently, the bank required the taxpayer and spouse to be co-borrowers. Their names were added to the contract in handwriting, indicating a late change.

Despite the taxpayer not contributing cash to the deposit, they were co-borrowers and jointly liable for the loan. This constitutes a contribution to the purchase price, giving rise to a purchase money resulting trust, unless rebutted.

The taxpayer did not provide contemporaneous evidence of an intention to hold the property on trust for the child. Post-acquisition actions (e.g. child paying mortgage and expenses) do not affect the original ownership structure.

Therefore, the taxpayer held both legal and equitable ownership of one-third of the property. Upon transferring their interest to the child and their partner, CGT Event A1 occurred.

CGT discount and apportionment

Under Division 115, the taxpayer may be eligible for the 50% CGT discount, having held the asset for more than 12 months.

The ATO acknowledged that the child contributed the deposit, which may reduce the taxpayer's interest in the property for CGT calculation purposes.

ATO reference *Edited Private Advice Authorisation No. 1052415056669*
w https://www.ato.gov.au/law/view/document?docid=EV/1052415056669

6.4 Disposal and reversal of CGT events

In 19YY, the taxpayer purchased a property at the time that the taxpayer was already married to Person A.

A letter from a real estate agent regarding the purchase was addressed to the taxpayer, with the salutation including both the taxpayer and Person A.

A partial deposit of $X was initially paid for the property, followed by the remaining deposit. These funds were withdrawn from a joint savings account held by the taxpayer and Person A. This account was opened after their marriage and became their primary transaction account for depositing both incomes and paying household expenses.

The bank approved a residential investment loan in the taxpayer's name. The loan was secured by a registered second mortgage over another property. A bank receipt was issued to the taxpayer and Person A for a fee required under the loan approval.

A solicitor's letter regarding the purchase was addressed to the taxpayer. Additionally, a letter from the real estate agent acknowledged the trust account receipt for the deposit and was addressed to the taxpayer only.

The taxpayer signed the contract to purchase the property. The contract listed the taxpayer as the sole purchaser; Person A's name did not appear on the title.

After settlement of the purchase, the property was rented out. The tenancy agreement listed the lessor's address for notices as Person A c/- the real estate agency, as Person A managed dealings with the agent. A subsequent letter from the same agent was addressed to both the taxpayer and Person A.

Rental income and expenses were declared by the taxpayer in line with legal ownership. During a review of records, the taxpayer found tax returns for some years where an accountant incorrectly split rental income and expenses between the taxpayer and Person A. This error was limited to that accountant.

The taxpayer and Person A later retired to the property. The taxpayer decided to transfer a 50% ownership interest to Person A so their name would appear on the title. The transfer was completed. The taxpayer engaged a law firm to prepare the transfer documents from sole ownership to joint tenancy.

The taxpayer did not receive tax advice regarding this transfer and was unaware of the capital gains tax implications.

Questions

1. Did CGT event A1 occur when the taxpayer transferred a 50% ownership interest in the property to Person A?
2. Can the property transfer be reversed so that the CGT event never occurred?
3. Can the CGT event be deferred until a time when the property is sold or transferred as part of the estate?

Ruling

The ATO noted that the purchase contract was solely in the taxpayer's name and that the taxpayer had acted advice that the property only be in the taxpayer's name.

The ATO considered whether Person A had a beneficial interest in the property.

The ATO considered whether there was a resulting trust in favour of Person A, but noted that only the 5% deposit came from the joint account, meaning that Person A would have only had a 2.5% interest under the principles for a resulting trust. Accordingly, the ATO did concluded there was no resulting trust.

The ATO noted that, other than the transfer itself, there were no actions or evidence to indicate that Person A had any legal ownership of the property. Further, as there were no court orders, the ATO concluded that there was no constructive trust.

The ATO noted that the circumstances where legal and equitable interests differ are extremely limited and considered that, in this case, there was sufficient evidence to establish that the equitable interest aligns with the legal title. The ATO stated that, where taxpayers are related (e.g., husband and wife), we assume the equitable interest mirrors the legal title.

The ATO noted that the taxpayer was unable to provide contemporary evidence showing an intention to hold a 50% interest on behalf of Person A, and the actions taken at the time of purchase were not consistent with the existence of a trust.

The ATO noted that, except for the period that an accountant made an error, the taxpayer declared rental income and claimed deductions in their individual tax returns.

The ATO concluded that, although it accepted that the taxpayer intended at the time of purchase to treat the property as jointly owned with Person A, the taxpayer was in fact the sole legal and equitable owner from the date of purchase until transferring a 50% legal interest.

Therefore, CGT event A1 occurred when the taxpayer transferred a 50% ownership interest in the property to Person A.

The ATO noted that has no discretion regarding the application of CGT: disposing of an interest in a property triggers a CGT event, and once it occurs, it cannot be reversed. A CGT event occurred even though the taxpayer did not understand the tax implications at the time.

The ATO noted that there is no ability to defer the CGT as the event has already happened. Although CGT rollover provisions exist, none apply to this situation.

COMMENT – the ATO's acceptance that from the time of purchase the taxpayer intended to treat the property as jointly owned with Person A should likely have led to the conclusion that the taxpayer held 50% of the property on trust for Person A.

ATO reference *Edited Private Advice Authorisation Number: 1052420296575*
w https://www.ato.gov.au/law/view/document?docid=EV/1052420296575

6.5 Residency of an individual

The taxpayer was born in Country A.

The taxpayer is a citizen of both Australia and Country A. The taxpayer previously emigrated to Australia with his or her parents.

The taxpayer departed Australia to accompany his or her spouse who was seconded to work in Country A. The secondment period was for a fixed period of 2 years.

The taxpayer's spouse entered Country A on a visa sponsored by their employer and will return to their position with the employer in Australia upon completion of the secondment.

The taxpayer has a right of abode in Country A as a holder of a Country A passport. The taxpayer's spouse is not a citizen or permanent resident of Country A.

The taxpayer intends to return to Australia at the conclusion of the spouse's secondment. The spouse's employer will fund the taxpayer's return flights.

For a period of time, the taxpayer stayed in hotel accommodation provided by the spouse's employer. Following this, the taxpayer and their spouse leased an apartment in London, which is presumably in Country A.

The taxpayer has not returned to Australia since departure. However, following the recent passing of a parent, the taxpayer, as executor of the estate, will travel to Australia if required.

The taxpayer and spouse will travel to Australia to attend a wedding and will remain in Australia for a short period of time.

The taxpayer and spouse will travel to Australia to attend another wedding and will remain in Australia for a short period of time.

The taxpayer declares Australian residency on incoming and outgoing passenger cards and provides the in-laws' address.

The taxpayer does not own any overseas assets.

The taxpayer owns an apartment in Australia where they and their spouse lived until departure. The apartment has been rented under a 12-month lease.

The taxpayer owns a motor vehicle stored at the in-laws' home.

The taxpayer's household effects have been placed in storage.

The taxpayer holds three Australian bank accounts and has not opened any accounts in Country A.

The taxpayer holds investments in shares and receives rental income and dividend income in Australia.

The taxpayer has not advised any Australian financial institutions that they are a foreign resident for non-resident withholding purposes.

The taxpayer earns employment income in Country A under a 12-month contract.

The taxpayer has opted out of the Country A employment pension scheme and will deposit concessional contributions from Country A income into his or her Australian superannuation fund.

The taxpayer continues to service their Australian mortgage.

The taxpayer t is not registered to practise in Country A and will return to Australia to further their career.

The taxpayer has relatives and family in Australia.

The taxpayer is registered with the Australian Electoral Commission as an overseas elector.

The taxpayer did not advise Medicare of his or her departure.

The taxpayer has not lodged any income tax returns in Country A and will lodge Australian income tax returns while residing in Country A.

The taxpayer has retained his or her Australian mobile phone number.

Question

Is the taxpayer a resident of Australia for taxation purposes from 1 July 2024 to 30 June 2026?

Ruling

The ATO noted that a person can be a resident of Australia under 1 of 4 statutory tests as follows:

1. resides test (also known as the ordinary concepts test);
2. domicile test;
3. 183-day test; and
4. Commonwealth superannuation fund test.

Resides test

The ATO noted that the resides test asks whether an individual "resides" in Australia according to the ordinary meaning of the word. Courts have interpreted "reside" as:

> *"To dwell permanently or for a considerable time; to have one's settled or usual abode" (Commissioner of Taxation v Miller (1946) 73 CLR 93).*

The ATO noted that the Macquarie Dictionary similarly defines it as "to dwell permanently or for a considerable time; have one's abode for a time."

The ATO considered that the key principles from case law include the following

1. physical presence and intention usually coincide, but absence does not necessarily end residency;
2. a person remains a resident if they maintain a continuity of association with Australia and intend to return, treating Australia as "home"; and
3. a change in intention can be decisive.

Factors considered under the resides test:

1. Length and frequency of physical presence in Australia
2. Intention or purpose of presence
3. Behaviour while in Australia
4. Family and employment/business ties
5. Location and maintenance of assets
6. Social and living arrangements

The ATO noted that no single factor is determinative; the weight given depends on individual circumstances. Importantly, having ties to another country does not negate Australian residency if strong connections to Australia remain.

The ATO considered that the taxpayer does not satisfy the resides test because:

1. departed Australia to accompany spouse on overseas secondment;
2. Has employment in Country A and no employment in Australia;
3. will only visit Australia for short periods;
4. household goods placed in storage; home leased out; and
5. leased accommodation overseas.

Domicile Test

If the resides test is not satisfied, the domicile test applies. A person with an Australian domicile is a resident unless the Commissioner is satisfied that their permanent place of abode is outside Australia.

"Permanent" does not mean forever, but it must be more than temporary or transitory. The concept of "permanent place of abode" refers to the physical surroundings where the person lives—typically a town or country, not multiple countries or regions.

The key considerations in ascertaining whether a person has a permanent place of abode outside of Australia include the following:

Has the taxpayer abandoned living in Australia in a permanent way?

1. is the taxpayer living overseas in a permanent way?;
2. intended and actual length of stay abroad;
3. whether the taxpayer plans to return to Australia at a definite point;
4. whether a home has been established overseas;
5. whether any residence in Australia has been abandoned;
6. duration and continuity of overseas presence; and
7. ongoing ties to Australia (assets, family, memberships, government notifications).

Domicile of taxpayer

The ATO noted that a taxpayer's domicile is determined by the *Domicile Act 1982* (Cth) and common law principles. A person's domicile is generally their domicile of origin (usually the father's domicile at birth), unless they have a domicile of dependence or have acquired a domicile of choice elsewhere.

To acquire a domicile of choice in another country, the taxpayer must:

1. be lawfully present in that country, and
2. hold a positive intention to make that country their home indefinitely.

A domicile continues until a new domicile is acquired. Whether a change has occurred depends on an objective assessment of all relevant facts.

The ATO noted that the taxpayer was born in Country A and retains a domicile of origin in Country A. The taxpayer is a citizen of both Australia and Country A. It is considered that the taxpayer did not abandon their domicile of origin. The taxpayer holds a Country A passport and has a right to reside there indefinitely, while remaining an Australian citizen.

The ATO concluded that the taxpayer's domicile is Country A.

Permanent place of abode

The ATO then, oddly, considered whether the taxpayer has a permanent place of abode outside of Australia.

The ATO noted that it was not satisfied that the taxpayer's permanent place of abode is outside Australia because:

1. the taxpayer has been overseas since DD MM 20YY accompanying their spouse on a finite two-year secondment;
2. the taxpayer intends to return to Australia when the spouse's contract ends;
3. the taxpayer has short-term employment in Country A and continues to earn Australian-sourced income;
4. the taxpayer rents accommodation overseas but owns a residence in Australia, which is leased temporarily to service the mortgage;
5. household possessions remain in storage for use upon return;
6. the taxpayer maintains an Australian driver's licence, electoral registration, and bank accounts;
7. investments remain in Australia, and no financial institutions have been notified of foreign residency;
8. the taxpayer will visit Australia for short periods and stay with family.

The ATO concluded that taxpayer's permanent place of abode remains in Australia, based on intention to return and continued connections. The overseas stay has a defined start and end date, with no intention to extend beyond the secondment.

183-Day Test

An individual is a resident if they are physically present in Australia for 183 days or more in an income year, unless:

1. their usual place of abode is outside Australia, and
2. they do not intend to reside in Australia.

The taxpayer would not be in Australia for 183 days in each income year and, therefore, is not a resident under the 183 day test.

Commonwealth superannuation fund test

This applies to certain Commonwealth government employees and members of specified superannuation schemes (PSS or CSS). If applicable, the individual is automatically treated as a resident.

The taxpayer is not a member of the PSS or CSS and, therefore, is not a resident under the Commonwealth superannuation fund test.

Conclusion

The ATO concluded that the taxpayer satisfied the domicile test and is therefore a resident of Australia for income tax purposes for the income years.

COMMENT – the decision in this ruling is puzzling. The ATO considered that the taxpayer never acquired an Australia domicile but then concluded that the taxpayer was a resident under the domicile test as they did not have a permanent place of abode outside of Australia. That is not how the domicile test works. If a person does not have an Australian domicile, they cannot be a resident under the domicile test.

ATO reference *Edited Private Advice Authorisation Number: 1052432150051*
w https://www.ato.gov.au/law/view/document?docid=EV/1052432150051

6.6 Present entitlement to income from deceased estate

Facts

The taxpayer is the executor and sole beneficiary of the estate of the deceased. The deceased passed away on a specified date, and probate was subsequently granted. The estate comprises a residential property, a unit in a commercial building, a motor vehicle, cash, and shares and units in managed funds.

A trust tax return was lodged for the estate with no beneficiary presently entitled to the income. At various points during the income year, the trust's bank account received deposits including proceeds from a life insurance policy, the sale of a parcel of shares, and the sale of the motor vehicle. A withdrawal was made to pay a margin lending liability of the estate. The remaining shares and managed funds were transferred to the taxpayer, along with associated income.

Throughout the income year ending 30 June 20XX, the taxpayer received distributions of income from the trust, mainly in small, consistent amounts. By the end of the income year, the trust's bank account had a closing balance of $XX, with no remaining liabilities other than ongoing costs related to the commercial unit, which remains the sole asset of the estate.

The net income of the trust for the year was $XX, which has been distributed to the taxpayer. As of a specified date, the commercial unit had not been sold due to a non-functioning lift that must be repaired before the property can be marketed. The estate is expected to be fully administered in the following income year, pending a decision by the deceased's child regarding a potential purchase of the unit.

Question

Is there any income of the estate to which no beneficiary is presently entitled?

Ruling

The ATO considered the application of Division 6 of the ITAA 1936 to the income of a deceased estate, focusing on whether the taxpayer (Person A) was "presently entitled" to trust income during the relevant income year. The ATO began by outlining the operation of section 99, which applies to a trust estate only where section 99A does not. Under subsection 99(2), the trustee is assessed on the net income of a resident trust estate where no part of that income is included in a beneficiary's assessable income under section 97, assessed to the trustee under section 98, or attributable to a non-resident beneficiary from foreign sources.

Section 97 applies where a beneficiary is presently entitled to a share of the income of the trust estate and is not under a legal disability. The ATO noted that "present entitlement" is not defined in the legislation and must be interpreted in accordance with common law principles. The ATO referred to *Federal Commissioner of Taxation v Whiting* (1943) 68 CLR 199, where the High Court held that a residual beneficiary of a deceased estate cannot be presently entitled to income until the estate has been fully administered. The Court emphasized that Division 6 must be construed in light of general principles of estate administration in law and equity, and that a beneficiary's entitlement depends on the terms of the will and the status of administration.

The ATO also considered *Taylor & Anor v Federal Commissioner of Taxation* (1970) 119 CLR 444, where Kitto J held that a beneficiary is presently entitled to income if it is legally available for distribution, the beneficiary has an absolutely vested beneficial interest in possession, and the beneficiary could demand payment but for any legal disability. These cases establish that present entitlement requires both legal availability of income and a non-contingent right to receive it.

In addition, the ATO relied on Taxation Ruling IT 2622, which provides guidance on distributions during the intermediate stage of estate administration. Paragraph 14 of the ruling states that where it becomes apparent to

the executor that part of the net income will not be required for debts or administration, and the executor exercises discretion to pay income to a beneficiary, the beneficiary is considered presently entitled to the extent of the amount actually paid. The fact that the estate has not been fully administered does not preclude present entitlement in such cases.

Applying these principles, the ATO concluded that a large payment made to Person A before any income was derived for the year could not be a distribution of income and did not give rise to present entitlement. However, other payments made during the year occurred after debts had been settled and only minor liabilities remained. The executor exercised discretion to distribute income to Person A, who was not under any legal disability. Accordingly, the ATO considered Person A to be presently entitled to those amounts, and section 97 applied to include them in Person A's assessable income.

Finally, the ATO noted that a portion of the net income of the estate remained undistributed at year-end. As no beneficiary was presently entitled to this income, the ATO considered that it was assessable to the trustee under section 99 of the ITAA 1936, assuming section 99A did not apply.

ATO reference *Edited Private Advice Authorisation No. 1052417035842*
w https://www.ato.gov.au/law/view/document?docid=EV/1052417035842

6.7 CGT and multiple deceased estates

Facts

The taxpayer is acting as administrator of the estate of the First Deceased and executor of the estate of the Second Deceased.

The husband of the First Deceased acquired a farming property in Australia comprising a substantial acreage. From the time of acquisition, the First Deceased and her husband used part of the property as their main residence and farmed the surrounding land.

Upon the husband's death, the property was transferred to the First Deceased under the terms of his will, and she became the registered owner. She continued to reside in the house and use approximately five acres as her main residence until her own death.

The First Deceased was the mother of the Second Deceased, her only child. Probate was granted in respect of her estate, and relevant documents including the will and inventory of assets were provided.

Under the First Deceased's will:

1. the Second Deceased was appointed executor and trustee;
2. the residue of the estate, including the property, was left to the Second Deceased after payment of debts, funeral and testamentary expenses, and any duties; and
3. a substitution clause provided that if the Second Deceased predeceased the First Deceased, any surviving children of the Second Deceased would inherit his share equally.

The property was listed in the estate inventory filed with the Supreme Court of Victoria and formed part of the residuary estate. The Second Deceased paid all relevant expenses from the estate and held the remaining assets, including the property, on trust for himself as sole beneficiary. However, he did not obtain probate of the First Deceased's will, and the property remained registered in her name.

The Second Deceased treated the property as his own, paid all associated expenses, and used the land for stock grazing until his death.

The Second Deceased had two children: Child 1 and Child 2. Child 1 has two children (Grandchild 1 and Grandchild 2); Child 2 has no children.

Probate was granted in respect of the Second Deceased's estate, and relevant documents including the will and inventory of assets were provided.

Under the Second Deceased's will:

1. the property was bequeathed to any grandchildren living at the time of his death, to vest upon them reaching a specified age;
2. if no grandchildren were living at his death, the property was to pass to Child 1 and Child 2 in equal shares or to the survivor;
3. until the property vested in the grandchildren, Child 1 was entitled to use the property and retain any income earned from it.

At the time of the Second Deceased's death, both grandchildren were living and have since reached the specified age. The property was listed in the estate inventory filed with the Supreme Court.

A dispute arose between Child 1 and Child 2, which was resolved by a deed of family arrangement. A copy of the deed was provided.

Questions

1. Does Division 128 of the ITAA 1997 to disregard any capital gains made upon the transfer of the Property to the grandsons as tenants in common in equal shares?
2. Will the grandsons' cost base for the Property be the same as their great grandmother's which is market value of the property in 19XX (plus any later capital expenditure less an adjustment on account of the use of the house on the land as her main residence)?

Ruling

Division 128 exception

Division 128 of the ITAA 1997 provides CGT relief when a CGT asset owned by a deceased person just before death passes to a legal personal representative (LPR) or a beneficiary. Under subsection 128-15(3), any capital gain or loss made by the LPR on the transfer of such an asset is disregarded, provided the asset was owned by the deceased at the time of death and passed to the beneficiary under section 128-20.

In this case, the Second Deceased was the sole residual beneficiary of the First Deceased's estate and took steps to administer the estate, including paying debts and expenses. However, probate was not obtained during his lifetime, and the Property remained registered in the First Deceased's name at the time of his death. According to *Commissioner of Stamp Duties (Qld) v Livingston* (1964) 112 CLR 12, a beneficiary does not acquire a proprietary interest in estate assets until the estate is fully administered. This principle is reinforced in *Taxation Ruling* IT 2622, which states that probate must be obtained before a beneficiary's interest in estate assets can crystallise. Therefore, the Second Deceased did not legally own the Property just before his death, and the asset did not pass to him in the manner required by section 128-20.

As a result, Division 128 does not apply to disregard the capital gain or loss arising from the transfer of the Property to the grandsons under the Second Deceased's will. The CGT event that occurs on the transfer must be recognised for tax purposes.

Cost base in property

Establishment of a Testamentary Trust

Under the Second Deceased's Will, a testamentary trust was created. The Will provided that Child 1 could use the Property and retain income until both grandsons reached a specified age, at which point the Property would vest in them. This arrangement created equitable and remainder interests, with Grandson 1 holding a vested interest and Grandson 2 holding a contingent interest until he reached the required age. Because there were multiple beneficiaries with interests in the trust asset, neither grandson was considered absolutely entitled to the Property, consistent with the reasoning in *Taxation Ruling* TR 2004/D25, paragraph 23.

Triggering CGT Event E7

Once both grandsons attained the specified age, the Property vested in them and was transferred in equal shares. This transfer triggered CGT event E7 under section 104-85, which applies when a trustee distributes a CGT asset to a beneficiary in satisfaction of their interest in the trust capital. Division 128 does not apply to this event because the Property was not owned by the Second Deceased just before death and did not pass in accordance with section 128-20.

CGT consequences for the trustee

The trustee makes a capital gain if the market value of the Property at the time of transfer exceeds its cost base, or a capital loss if the market value is less than the reduced cost base. The trustee's cost base is determined under subsection 128-15(4), which refers to the First Deceased's cost base at the date of her death. Any capital gain or loss is included in the trust's net income under subsection 95(1) of the *Income Tax Assessment Act 1936* and taxed under Subdivision 115-C.

CGT consequences for the beneficiaries

Although beneficiaries may make a capital gain or loss under CGT event E7, paragraph 104-85(6)(a) provides an exception where the beneficiary acquired the asset for no expenditure. Since the grandsons received the Property under the will without consideration, any capital gain or loss they make is disregarded.

Determining the cost base for the grandsons

Under section 112-20, the market value substitution rule applies where an asset is acquired for no expenditure. Therefore, the cost base for each grandson is 50% of the market value of the Property at the time of acquisition (i.e. when the Property was transferred to them). This market value becomes the first element of their cost base for future CGT purposes.

ATO reference *Edited Private Advice Authorisation No. 1052401863203*
w https://www.ato.gov.au/law/view/document?docid=EV/1052401863203

6.8 Declaring foreign sourced income

Facts

The taxpayer is an Australian resident for taxation purposes and engages a registered tax agent to prepare their Australian income tax returns. A significant portion of the taxpayer's income is derived from Country Z, primarily in the form of investment income from foreign trusts and companies.

Due to regulatory and reporting requirements imposed by Country Z authorities, the taxpayer's Country Z tax accountants require additional time after the foreign year end to collate and report the relevant income

information. This delay affects the ability of the Australian tax agent to obtain the necessary data in a timely manner, making it difficult to prepare the taxpayer's Australian tax return by the due date.

The process of aligning Country Z income with the Australian financial year significantly increases the complexity and time required to prepare the return. It involves:

1. dissecting income reported on a Country Z year-end basis to determine the portion attributable to the Australian income year. This often requires arbitrary allocation and may not accurately reflect the taxpayer's actual income pattern once adjusted to the Australian year end; and
2. allocating Country Z tax paid across Australian financial years to calculate the correct Foreign Income Tax Offset (FITO). The current method assumes tax is paid evenly throughout the year and allocates it accordingly. This is further complicated by the legislative requirement under section 770-10 of the ITAA 1997, which permits a FITO only where foreign tax has actually been paid.

Question

Will the Commissioner allow the taxpayer to return their foreign sourced income on a foreign country's income year basis on their Australian income tax return for the relevant income years?

Ruling

Under Australian tax law, individual taxpayers are generally required to report foreign income based on the Australian financial year (ending 30 June). However, complications can arise when the foreign income is reported on a different basis, such as a calendar year, particularly where foreign regulatory and reporting requirements delay the availability of income information.

The ATO acknowledges these practical difficulties and has addressed them in Taxation Ruling IT 2498. This ruling allows individual taxpayers to report foreign income on the foreign income year basis in their Australian tax return, provided they can demonstrate genuine difficulty in dissecting and aligning the income with the Australian financial year.

The taxpayer receives foreign investment income from Country Z, where the tax year does not align with Australia's. Due to regulatory delays in Country Z, the taxpayer cannot obtain the necessary income details in time to meet Australian lodgment deadlines. The Commissioner accepts that these circumstances fall within the scope of IT 2498 and has permitted the taxpayer to report the foreign income on the Country Z income year basis. However, Australian-sourced income and other foreign income that is subject to final withholding tax and can be readily attributed to the Australian financial year must continue to be reported on that basis.

If the taxpayer's difficulties in obtaining timely foreign income information cease, the taxpayer will be required to revert to reporting on the Australian financial year basis.

ATO reference *Edited Private Advice Authorisation No.* 1052430294861
w https://www.ato.gov.au/law/view/document?docid=EV/1052430294861

6.9 Sale of going concern

Facts

The taxpayer, acting as trustee for a trust registered for GST, acquired land in a joint venture but later held it in its own right. The land was purchased with the intention of developing a retail shopping centre for lease to commercial tenants. The acquisition was financed by a bank loan, with development costs funded by equity.

The taxpayer engaged consultants and obtained development approval for a shopping centre, including site preparation, construction, and associated works. Some preliminary works were undertaken, such as storm drainage redirection and pipework adjustments, and a new easement was granted. No construction contract was executed, and the land remained vacant throughout ownership.

The taxpayer decided to sell the property as it was considered a non-core asset. A contract of sale was entered into for vacant land with development approval in place. The contract stated the sale was intended to be a GST-free supply of a going concern, with the purchaser registered for GST. The contract included provisions for transferring development documents and required the taxpayer to carry on its enterprise until settlement. However, the contract also warranted that there were no current leases or agreements for lease.

The taxpayer had engaged in negotiations with potential tenants and prepared draft agreements, letters of intent, and offers to lease, but no binding agreements were executed. At the time of sale, there were no leases or agreements for lease in place, and the property had never been leased.

Question

Was the supply of the property a GST-free supply of a going concern under section 38-325 of the *GST Act*?

Ruling

Under section 38-325 GST Act, a supply of a going concern is GST-free if the following requirements are met:

1. Basic conditions (s 38-325(1)):
    (a) the supply is for consideration;
    (b) the recipient is registered or required to be registered for GST; and
    (c) both parties agree in writing that the supply is of a going concern.
2. Additional conditions (s 38-325(2)):
    (a) the supplier provides all things necessary for the continued operation of an enterprise; and
    (b) the supplier carries on the enterprise until the day of supply.

In this case, the basic conditions in section 38-325(1) were satisfied: the sale was for consideration, the purchaser was registered for GST, and the parties agreed in writing that the supply was of a going concern.

However, the critical issue was whether the requirements in section 38-325(2) were met.

The first step was to identify the relevant enterprise. Two possibilities were considered: a property development enterprise and a leasing enterprise. The taxpayer had undertaken activities such as obtaining development approval (DA), performing drainage works, and modifying easements. These steps were consistent with property development but were limited in scope and largely completed years before settlement. For leasing, the taxpayer engaged in negotiations and prepared draft agreements, but no binding lease or agreement for lease was executed. Under GSTR 2002/5, para 151, a leasing enterprise does not commence until at least one tenant enters into an agreement to lease or occupies the property. Therefore, no leasing enterprise was operating.

The ATO then considered whether all things necessary for the continued operation of the development enterprise were supplied. While the land and DA were transferred, there was no transfer of an operating structure or ongoing business processes such as construction contracts or active project management. The supply resembled a transfer of assets rather than a functioning enterprise (see GSTR 2002/5, para 75). The decision in *Aurora Developments Pty Ltd v FCT* [2011] FCA 232 supports this view, noting that something more than partially developed land and plans is required to constitute a going concern.

Finally, the requirement to carry on the enterprise until the day of supply was not met. The taxpayer's substantive development activities had ceased years earlier, and general vendor obligations (e.g., property

maintenance) do not amount to carrying on an enterprise. Consequently, the sale was not a GST-free supply of a going concern.

ATO reference *Edited Private Advice Authorisation No. 1052416218612*
w https://www.ato.gov.au/law/view/document?docid=EV/1052416218612

6.10 15 year exemption – in connection with retirement

Facts

The taxpayer operated a business through Company A. Since incorporation, Person A has served as the sole director and shareholder of the company.

The taxpayer's aggregate turnover is below $2 million, and its net assets are under $6 million, satisfying the small business entity thresholds under Subdivisions 152-A and 328-C of the ITAA 1997.

A business sale agreement was executed with Company B, which included the transfer of the client list, plant, and equipment. The sale proceeds are structured over a two-year period, to be paid in three instalments, beginning at settlement.

As part of the sale arrangement, Person A accepted a full-time employment position with Company B until a specified date, as outlined in the agreement. Prior to the sale, Person A worked full-time for Company A. Post-sale, Person A ceased all financial responsibility for the business and transitioned into a support role for the new owner during the handover period.

At the time of the CGT event, Person A was over 55 years of age. Person A does not own any other businesses of the same type or any other businesses generally.

Question

Does the taxpayer qualify for the small business CGT concessions 15-year exemption under Subdivision 152-B of the ITAA 1997?

Ruling

To access the 15-year exemption, the taxpayer must satisfy both the basic conditions under Subdivision 152-A and the specific requirements of Subdivision 152-B. The basic conditions include:

1. the occurrence of a CGT event (in this case, the sale of the business);
2. the asset being an active asset;
3. the taxpayer being a small business entity or satisfying the maximum net asset value test; and
4. the CGT asset being owned for at least 15 years.

The taxpayer met these conditions. The goodwill of the business, which was disposed of, had been held for over 15 years and was actively used in the business for more than 7.5 years. The taxpayer also satisfied the small business entity test, with aggregate turnover under $2 million and net assets below $6 million.

In addition, the exemption requires that the CGT event occurs in connection with the retirement of a significant individual. Person A, the sole director and shareholder, was over 55 years old at the time of the CGT event and had been a significant individual for more than 15 years. The sale of the business marked a substantial change in Person A's responsibilities, as they ceased financial control and transitioned to a temporary employee role solely for handover support. This change was considered sufficient to establish that the CGT event occurred in connection with retirement.

The ATO noted that Person A's continued employment with Company B was limited to a specified date and was not intended to extend beyond that. The ATO considered that this contractual limitation was critical in demonstrating that the CGT event was genuinely connected to retirement, rather than ongoing business involvement.

The ATO concluded that the taxpayer qualifies for the small business 15-year CGT exemption under Subdivision 152-B of the Income Tax Assessment Act 1997 (ITAA 1997), subject to the condition that Person A does not continue working for the purchaser, Company B, beyond the date specified in the sale agreement.

COMMENT - the legislation only requires that the CGT event occur "in connection with retirement", but does not define the term. There is no prescribed timeframe for ceasing employment. However, a lengthy or indefinite continuation may suggest the event is not sufficiently connected to retirement.

ATO reference *Edited Private Advice Authorisation No. 1052422493736*
w https://www.ato.gov.au/law/view/document?docid=EV/1052422493736

6.11 CGT on end of franchise

Facts

The taxpayer is a company engaged in mortgage brokering, acting as a financial intermediary to match borrowers with lenders. It operated under a franchise agreement with a franchisor that distributes financial products through franchisees. The franchisor is a subsidiary of Company X, which is the credit provider for the products.

Under the franchise agreement:

The taxpayer was granted a non-exclusive licence (without sub-licensing rights) to operate within a designated marketing area.

The taxpayer earned trailer income—accrued commission payments—as its primary source of assessable income.

All goodwill and customer relationships developed by the taxpayer were owned by the franchisor.

Upon termination, the taxpayer was required to provide the franchisor with a list of all customers it had interacted with.

The taxpayer's business turnover for the relevant year was below $2 million, and it had no connected or affiliated entities.

During the relevant income year, the franchisor terminated the franchise agreement. A termination deed was executed, under which the taxpayer agreed to cease receiving commission payments in exchange for:

An upfront payment representing active trail commissions.

An ex-gratia payment.

Following termination, the taxpayer was no longer entitled to any payments under the franchise agreement. The receipt of these payments resulted in a capital gain.

Questions

1. Will the payments received by the taxpayer in respect of the termination and release of its rights to operate under the franchise agreement be treated as CGT event C2 under section 104-25 of the ITAA 1997?
2. If the answer to Question 1 is "Yes", will the taxpayer satisfy the basic conditions for small business CGT concessions under section 152-10 of the ITAA 1997?

Ruling

CGT Event C2 Treatment

The taxpayer received two categories of payments under a termination deed: an active trail commission payment and an ex-gratia payment. Both were considered capital receipts arising from the loss of rights under a franchise agreement. The active trail commission payment compensated for the cancellation of the taxpayer's intangible rights to receive trailer income, while the ex-gratia payment compensated for the loss of the taxpayer's right to continue operating the franchise business.

The ATO applied a "look-through" approach, as outlined in *Taxation Ruling* TR 95/35, to identify the most relevant CGT asset affected by the termination. This approach involves analysing the underlying asset that suffered permanent damage or loss of value due to the event that triggered compensation.

The taxpayer's rights under the franchise agreement, including the right to receive trail commissions and access to customer relationships, were deemed part of its profit-yielding structure. These rights were comparable to an insurance register, which is treated as a capital asset under *Taxation Ruling TR 2000/1*.

CGT event C2 under section 104-25 of the ITAA 1997 occurs when ownership of an intangible CGT asset ends due to cancellation, surrender, or release. In this case, the execution of the termination deed resulted in the cessation of the taxpayer's rights under the franchise agreement, triggering CGT event C2. The payments received under the deed were therefore treated as capital proceeds from the ending of those rights.

The ATO referenced *Commrs of Inland Revenue v. Fleming & Co. (Machinery), Ltd.* (1951) 33 T.C. 57 to distinguish between income and capital receipts. Where the cancellation of a contract materially disrupts the profit-making structure of a business, the compensation is considered capital in nature. This principle supported the classification of the payments as capital receipts.

The ATO determined that the capital proceeds from CGT event C2 were the payments received by the taxpayer under the termination deed. Specifically, these included:

1. the active trail commission payment, which was treated as compensation for the cancellation of the taxpayer's intangible rights to receive trail income under the franchise agreement; and
2. the ex-gratia payment, which was treated as compensation for the loss of the taxpayer's right to continue operating the franchise business.

Small Business CGT Concessions

The taxpayer satisfied all basic conditions for accessing the small business CGT concessions under section 152-10 of the ITAA 1997. These conditions include:

1. CGT event (C2) occurred in relation to a CGT asset;
2. the event resulted in a capital gain;
3. the taxpayer was a CGT small business entity, with turnover below $2 million and no connected or affiliated entities; and

4. the CGT asset (the franchise rights) was an active asset, inherently connected with the taxpayer's mortgage broking business.

The active asset test under section 152-35 was also satisfied. The taxpayer held the asset for less than 15 years and used it in the course of carrying on a business for at least half of the test period. The asset met the definition of an active asset under section 152-40(1), being an intangible asset inherently connected with the taxpayer's business.

As all four basic conditions were met, the taxpayer was eligible to apply the small business CGT concessions to the capital gain arising from CGT event C2.

COMMENT – in the ruling, the ATO notes that the capital proceeds from CGT event C2 for the taxpayer are the amount received for the surrender of the license. However, there is an automatic market value substitution rule for CGT event C2, and as a result of which a taxpayer is deemed to receive capital proceeds equal to the market of the asset that has come to an end, on the assumption that the CGT event had not occurred, irrespective of whether the taxpayer is dealing at arm's length: see section 116-30(2)(b) of the ITAA 1997.

TRAP – the ATO's ruling here provide a principled basis for holding that the receipt was capital in nature and not revenue. A lump sum payment for a future right to receive income may be regarded as being revenue in nature and not capital. In such case, the small business CGT concessions could not apply to the revenue gain, which would simply be ordinary income.

ATO reference *Edited Private Advice Authorisation No. 1052346916601*
w https://www.ato.gov.au/law/view/document?docid=EV/1052346916601

6.12 No deduction for funeral expenses

Facts

The taxpayer was solely responsible for paying for their parent's funeral.

The taxpayer received a superannuation death benefit comprising both taxed and tax-free components, with tax withheld.

The superannuation fund reimbursed the taxpayer for the funeral expenses.

Question

Is the taxpayer entitled to claim a deduction for funeral expenses under section 8-1 of the ITAA 1997?

Ruling

Section 8-1 of the ITAA 1997 permits deductions for losses or outgoings to the extent they are incurred in gaining or producing assessable income, provided they are not capital, private or domestic in nature, or incurred in earning exempt income.

The High Court in *Commissioner of Taxation v Payne* (2001) 202 CLR 560 held that the phrase "in gaining or producing assessable income" requires that the expense be incurred "in the course of" income production, not merely "in connection with" or "for the purpose of" deriving income. This principle was further clarified in *Ronpibon Tin NL v Federal Commissioner of Taxation* (1949) 78 CLR 47, which stated that the occasion of the outgoing must be found in what is productive of assessable income.

The ATO considered that, although the funeral costs could be regarded as being in connection with or a prerequisite to receiving the taxed element income component of the superannuation death benefit, the private nature of a funeral means that the expense is not deductible under section 8-1 of the ITAA 1997.

The ATO also considered that a taxpayer is unable to claim a tax deduction for any expenses that have been reimbursed by a third party.

ATO reference Edited Private Advice Authorisation No. 1052419256736
w https://www.ato.gov.au/law/view/document?docid=EV/1052419256736

6.13 Benchmark franking percentage

Facts

The taxpayer is a private company. It has issued a number of ordinary shares, which are held by a mix of corporate and individual shareholders, including Company A, Director A, Individual A, Individual B, and Individual C.

Each share was issued at a nominal value of a specified amount per share. A shareholder (the Deceased) passed away, and under the terms of their will, Director A was appointed as the executor and trustee of the estate. The residual beneficiaries of the estate include Director A and five other individuals.

Individual A, one of the beneficiaries and shareholders, was in poor health and sought to receive consideration for their shares. A Deed of Settlement and Release was executed between Individual A and Director A, under which the taxpayer agreed to undertake a selective share buy-back of all shares held by Individual A.

The settlement amount for the buy-back was determined with reference to the taxpayer's balance sheet as at 30 June of the relevant income year. The total buy-back consideration was split into a capital component and a market value component. The capital amount was calculated using the average capital per share method outlined in PS LA 2007/9, while the market value amount was based on the taxpayer's net asset value as at 30 June of the relevant year.

The taxpayer's assets comprised managed funds with published market values, bank accounts, and related party loans, none of which required valuation. The taxpayer's franking credits represented a specified percentage of its retained earnings.

Prior to the share buy-back, the taxpayer resolved to pay a frankable dividend to all shareholders, including Individual A. This was the first dividend for the income year and was unfranked at 0%. Subsequently, in the same income year, the amount attributable to the share buy-back was allocated between a capital component (under section 159GZZZP of the ITAA 1936) and a market value component, with the latter also being unfranked at 0%.

Question

1. Pursuant to Division 203 of the ITAA 1997, after the payment of a frankable dividend to all shareholders (unfranked at 0%), is the taxpayer's benchmark franking percentage for the franking period 0%?
2. If the answer to Question 1 is yes, must the dividend attributable to the market value component of the share buy-back be unfranked at 0% in accordance with the benchmark rule under Division 203 of the ITAA 1997?

Ruling

Determining benchmark franking percentage

Under Division 203 of the ITAA 1997, a corporate tax entity must apply a consistent franking percentage to all frankable distributions made within a franking period. This is known as the benchmark rule, and its purpose is to ensure equitable treatment of shareholders by preventing selective franking.

For private companies, the franking period aligns with the income year. The benchmark franking percentage is determined by the franking percentage of the first frankable distribution made during that period. The franking percentage itself is calculated using the formula in section 203-35(1):

Franking credit allocated ÷ Maximum franking credit × 100.

In this case, the taxpayer paid a frankable dividend to all shareholders that was unfranked (0%). As this was the first frankable distribution in the income year, the benchmark franking percentage for the entire franking period is set at 0%.

Application to share buyback

Once the benchmark franking percentage is established, all subsequent frankable distributions within the same franking period must be franked at that percentage. This includes dividends arising from off-market share buy-backs, where part of the consideration may be treated as a dividend under s159GZZZP of the ITAA 1936.

In the taxpayer's case, the selective share buy-back occurred later in the same income year. The amount attributable to the market value component of the buy-back was treated as a frankable dividend. Given the benchmark franking percentage was already set at 0%, this dividend must also be unfranked at 0% to comply with the benchmark rule.

TRAP - If the intention is to keep a share buy-back unfranked, this sets the benchmark franking percentage at 0% for the entire franking period under Div 203 of the ITAA 1997. This restricts the ability to frank any subsequent dividends in that income year, even if franking credits are available.

TIP - If a company breaches the benchmark franking rule it must report the breach to the ATO. This is done via the *Franking account tax return* (NAT 1382), and the entity may be liable for franking deficit tax. Advisers should ensure clients understand that even inadvertent breaches trigger compliance obligations and potential liabilities.

TIP - If a company's benchmark franking percentage changes by more than 20% between franking periods, it must report this change to the ATO. This requirement is designed to help the ATO monitor potential dividend streaming or manipulation of franking credit allocations.

ATO reference *Edited Private Advice Authorisation No. 1052418889826*
w https://www.ato.gov.au/law/view/document?docid=EV/1052418889826

6.14 Minimum holding period of ESS shares for takeover or restructure

Domain Holdings Australia Limited (**Domain**) was listed on the ASX on 16 November 2017. Domain issued up to $1,000 of shares to eligible employees (**Eligible Employees**) of Domain and its subsidiaries, under one of the following plans:

1. on 6 December 2022 – 2023 Share Plan; and

2. on 11 December 2023 – 2024 Share Plan (collectively, the **Share Plans**)

Domain share allocated under each of the Share Plans were subject to either 1) a minimum 3 year holding lock period from the date the shares were allocated, or 2) a holding lock until the cessation of the Eligible Employees' employment (whichever occurred earlier). The Domain Board did not have discretion to remove the holding lock.

Section 83A-35 of the ITAA 1997, the Eligible Employees were entitled to reduce the amount included in their assessable income in relation to the Domain shares issued under the Share Plans by an amount of up to $1,000.

CoStar Group, Inc (**CoStar**) is a company incorporated in the USA and listed on the Nasdaq. Andromeda Australia Subco Pty Limited (**Andromeda**) is a wholly owned indirect subsidiary of CoStar incorporated in Australia, established to acquire all of the Domain shares on issue. On 20 February 2025, Andromeda acquired 16.96% of Domain shares.

On 21 February 2025, Domain received an unsolicited, non-binding indicative proposal from CoStar to acquire all the issued capital of Domain by way of a scheme of arrangement. The scheme of arrangement was approved by 4 August 2025 by the requisite majority of Domain's shareholders. On 27 August 2025, all remaining shares were acquired by Andromeda under the scheme of arrangement.

Issues

1. Will the Commissioner exercise the discretion under paragraph 83A-45(5)(a) of the ITAA 1997 to allow the minimum holding period to end at the earlier time of the acquisition of the Domain shares held by the Eligible Employees?
2. Will the Eligible Employees who hold Domain shares issued under the Share Plans remain entitled to reduce the amount included in their assessable income in accordance with section 83A-35 of the ITAA 1997?

Decision

Commissioner's discretion under paragraph 83A-45(5)(a) of the ITAA 1997

Division 83A of the ITAA 1997 governs the taxation of ESS interests acquired by taxpayers under employee share schemes. The default position under subdivision 83A-B is that a taxpayer who acquires an ESS interest under an employee share scheme at a discount to market value is taxed on the discount at the time of acquisition (known as 'upfront' taxation).

Section 83A-35 of the ITAA 1997 allows taxpayers to reduce the otherwise assessable amount by up to $1,000 when certain requirements are met, including the further conditions set out in section 83A-45. The relevant ESS interest must have been acquired by the taxpayer under an ESS scheme which operates to ensure that the taxpayers are not able to dispose of the interests during the 'minimum holding period', starting from when the ESS interest was acquired and ending at the earlier of 1) 3 years later, or 2) when the taxpayer who acquired the interest ceases to be employed by the relevant employer.

The Commissioner has discretion in the event of a takeover or restructure to deem the minimum holding period to have ended at an earlier time under subsection 83A-45(5):

> *(5) An ESS interest's minimum holding period is the period starting when the interest is acquired under the employee share scheme and ending at the earlier of:*
>
> *(a) 3 years later, or such earlier time as the Commissioner allows if the Commissioner is satisfied that:*

(i) the operators of the scheme intended for subsection (4) to apply to the interest during the 3 years after that acquisition of the interest; and

(ii) at the earlier time that the Commissioner allows, all membership interests in the relevant company were disposed of under a particular scheme; and

(b) when the acquirer of the interest ceases being employed by the relevant employer.

The Commissioner permitted the minimum holding period to end at the earlier time of 27 August 2025, being the date when Andromeda acquired all of the remaining shares in Domain under the scheme of arrangement.

Will the Eligible Employees be able to reduce their assessable income in accordance with section 83A-35?

As the Commissioner had allowed for the minimum holding period to end at the earlier time when the takeover of Domain by the CoStar group was completed, the Eligible Employees who held Domain shares as issued under the Share Plans remained entitled to reduce the amount included in their assessable income in accordance with section 83A-35 of the ITAA 1997.

ATO reference *CR 2025/63*
w https://www.ato.gov.au/law/view/document?docid=CLR/CR202563/NAT/ATO/00001

7. ATO and other materials

7.1 Education directions for breaches of the SISA

Draft Practice Statement PS LA 2025/D2 offers guidance to ATO staff on when it is appropriate to issue an education direction under section 160 of the SISA. It applies to trustees of self-managed superannuation funds and directors of corporate trustees. The aim is to address and correct non-compliance related to a lack of understanding of trustee duties.

An education direction is a formal notice requiring an SMSF trustee or director to:

1. complete an approved education course within a specified timeframe;
2. provide proof of completion; and
3. sign (or re-sign) a trustee declaration within 21 days after completing the course, confirming they understand their responsibilities.

Education directions can be issued for contraventions of the SISA or associated regulations (excluding Part 3B about collective investment vehicles and pooled superannuation trusts), occurring on or after 1 July 2014. They may be given to current individual trustees or directors of a corporate trustee if the ATO reasonably believes a contravention has occurred. However, directions cannot be issued to individuals no longer serving as trustee or director or to those who became a trustee or director after the breach occurred.

The ATO may issue an education direction when it has a reasonable belief that a contravention occurred, A reasonable belief of contravention must be based on more than mere suspicion and should ideally be supported by reports or evidence.

When deciding whether to issue an education direction, ATO officers must consider both general principles (such as fairness, legality, and consistency with the ATO Charter) and case-specific factors. Education directions are generally suitable when the breach stems from knowledge gaps. However, they may not be appropriate where the person is already well-informed, has undertaken similar education voluntarily, has previously received such a direction, or where disqualification may be more suitable due to serious conduct. PS LA 2025/D2 sets out some illustrative examples as to when education directions will and will not be appropriate.

The timeframe provided in an education direction must be reasonable based on individual circumstances, with a minimum of 28 days usually considered sufficient. Longer timeframes may be granted where necessary.

Failure to comply with an education direction attracts an administrative penalty of 5 penalty units (currently $1,650). Non-compliance also constitutes a strict liability offence carrying up to 10 penalty units (currently $3,300). Penalties may be remitted fully or partially, depending on circumstances.

When finalised, the practice statement is proposed to apply from 2 October 2025. Comments are invited on draft PS LA 2025/D2 until 31 October 2025.

w https://www.ato.gov.au/law/view/document?docid=DPS/PSD20252/NAT/ATO/00001

7.2 ESS news and updates

The ATO has provided a summary of relevant news and updates for lodgement of ESS reports on its website.

The updates include:

1. updated approved valuation method for accessing the ESS start-up concession: the new legislative instrument *LI 2025/16: Methods for Valuing Unlisted Shares for the Employee Share Scheme start-up concession* has been introduced to ensure continuity of approved valuation methods for companies offering Employee Share Scheme (ESS) interests under the ESS start-up concession. The new LI 2025/16 continues to provide 2 approved safe harbour valuation methods (now known as 'Method One (comprehensive method)' and 'Method Two (net tangible assets method)'), and maintains the position that companies can use a different valuation method, provided it gives a market value that is at least as high as what they would determine using one of the approved methods.
2. new reporting specification for 2017-18: for electronic reporting specification (**ERS**) reporters, the 2017-18 and subsequent financial years ESS reports must be lodged using the ESS annual report specification v3.1.2; and
3. online form: the online form for lodgement of ESS annual reports has been updated and includes new reporting requirements for the 2017-18 financial year. The online form option is only available to employers reporting up to 50 employees with no more than three schemes to be reported for any employee.

The ATO has also set out responses to common reporting questions raised by taxpayers and tax agents regarding ESS reports. Common reporting questions include the difference between acquisition and plan date for ESS interests and whether reports can aggregate share purchases for the year where shares are acquired on a monthly basis.

The ATO has provided updates for common lodgement questions and issues faced by taxpayers and tax agents, including issues regarding the ESS online form. Finally, the ATO updates page notes the following common errors that appear in ESS reports lodged by taxpayers:

1. TFNs must not be used as the employee identifier;
2. common errors in reports for foreign providers; and
3. when requesting extensions of time to lodge for overseas providers, the requesting email must state the overseas reporting party's name, not the Australian entity.

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/employee-share-schemes/in-detail/ess-news-and-updates

7.3 PCG on thin capitalisation third party debt test

The ATO has finalised Schedule 3 of PCG 2025/2, providing guidance for when the ATO will apply compliance resources to reviewing taxpayers applying the third party debt test (**TPDT**) under section 820-427A of the ITAA 1997 (see page 26 of these tax training notes for the accompanying Taxation Ruling).

Commercial activities in connection with Australia

The TPDT requires that debt proceeds be used for commercial activities connected with Australia. The ATO now offers clearer guidance on what this means in practice. Activities such as property development, infrastructure projects, and operational funding within Australia generally satisfy the requirement. However, using debt to fund offshore acquisitions or distributions will not meet the test. This clarification helps taxpayers assess whether their financing arrangements align with the TPDT conditions.

Targeted approach for trust distributions

A new example addresses situations where trust distributions have been funded by third-party debt. Under Example 34, the ATO will not allocate compliance resources if:

1. distributions funded by debt are limited to 10% of the facility balance at the time of payment;
2. the trust repays the facility from Australian business revenues equal to or exceeding the distributions; and
3. governance documents are amended so that debt is no longer used for distributions before the compliance period ends.

This approach provides practical relief for trusts that temporarily used debt for distributions but intend to comply with TPDT requirements going forward.

Credit support agreements

Further guidance is provided on amending credit support agreements to meet TPDT conditions. Example 31 illustrates that if a cost overrun support deed is amended so that rights apply only during the development phase of an Australian CGT asset, the arrangement can satisfy subparagraph 820-427A(5)(a)(iii). This ensures compliance without requiring wholesale restructuring, provided changes are commercially driven and documented.

Back-to-Back Lending Facilities

The ATO clarifies in Example 37 that it will not apply compliance resources to arrangements involving back-to-back lending facilities where:

1. the on-lent debt mirrors the terms of the external loan;
2. any internal interest rate swaps are closed out, and costs align with the external facility; and
3. the restructure does not alter the commercial purpose or increase financing costs.

Compendium

The ATO has also published

Several new examples were introduced in the final Guideline based on stakeholder feedback:

1. Example 3: Shows compliance approach after a project moves from development to income generation;
2. Examples 15–17: Demonstrates tracing and apportionment methodologies for debt deductions, including refinancing and cash pooling;
3. Examples 20 & 21: Sets out low-risk scenarios where related party debt is replaced with third-party debt due to commercial necessity;
4. Example 31: Covers amending credit support agreements to satisfy subsection 820-427A(5);
5. Example 34: Provides for targeted compliance approach for trust distributions funded by third-party debt; and
6. Example 37: Clarifies when ATO will not apply compliance resources to back-to-back lending facilities.

The ATO declined to prescribe methods like FIFO or LIFO for tracing debt use. Instead, it expects fair and reasonable approaches based on facts.

The ATO referred to TR 2025/2 for interpretive guidance on “commercial activities” under s 820-427A(3)(d) (see page 26 of these notes), but added a compliance approach for trust distributions as noted above.

ATO reference *PCG 2025/2*
w https://www.ato.gov.au/law/view/document?docid=COG/PCG20252/NAT/ATO/00001
w https://www.ato.gov.au/law/view/document?docid=COG/PCG20252EC1/NAT/ATO/00001

7.4 Finalised guidance on franked distributions funded by capital raising

The ATO has released its final *Practical Compliance Guideline* PCG 2025/3, setting out its compliance approach to arrangements where capital is raised to fund franked distributions. Under section 207-159 of the ITAA 1997, franking credits may be denied if capital raising is used to fund a substantial part of a franked dividend and the arrangement satisfies specific purpose and effect tests.

This final version introduces several substantive changes from the earlier draft (PCG 2024/D4).

Higher threshold for low-risk arrangements

The most significant change is the increase in the green zone threshold. Previously, arrangements were considered low risk if the capital raised was less than 5% of the franked distribution. The final guideline raises this threshold to 20%, meaning more transactions will now fall within the low-risk category.

Proportional denial of franking credits

The ATO has clarified that section 207-159 of the ITAA 1997 applies proportionally. If only part of a distribution is funded by capital raising, only that portion becomes unfrankable. For example, if $70 million of equity funds a $100 million distribution, only $70 million is affected. This explicit guidance was not in the draft.

Greater emphasis on substance and documentation

While documentation was always important, the final guideline emphasises that records must reflect the substance and conduct of the arrangement, not just stated intentions. New examples illustrate how businesses can demonstrate genuine commercial purpose, even where dividend practices were disrupted by external factors such as economic or geopolitical events.

Refinements to Risk Zones

Green zone scenarios, where the ATO is less likely to apply compliance resources, remain broadly similar but now incorporate the 20% threshold and clarify that each scenario operates independently. Red zone criteria have been tightened, with more detail on what constitutes an 'unusually large' distribution and exceptions where profit increases justify the payment. Dividend reinvestment plans (DRPs) undertaken for non-commercial purposes are now explicitly treated as red zone examples.

Expanded examples

The final guideline includes new examples, such as a public company halting dividends due to global supply chain disruptions and later resuming payments, and a private company restructuring after financial distress.

ATO compendium

The ATO has also published a compendium setting out the comments received in relation to consultation on the draft guideline.

Stakeholders suggested adding a green zone scenario where there is a 12-month gap between capital raising and dividend payment. The ATO rejected this, stating timing alone cannot determine risk because the principal effect and purpose test could still be satisfied even with a long delay.

Despite requests for a binding ruling, the ATO stated it will not issue one, preferring to provide practical guidance and maintain flexibility to update the guideline as commercial practices evolve.

ATO reference *PCG 2025/3*
w https://www.ato.gov.au/law/view/document?docid=TXR/TR20252/NAT/ATO/00001
w https://www.ato.gov.au/law/view/document?docid=COG/PCG20253EC/NAT/ATO/00001

7.5 Minor updates to ATO practice statements

The ATO has made minor updates to practice statement PS LA 2005/2 *Penalty for failure to keep or retain records* by updating references to the Su*perannuation Guarantee (Administration) Act 1992* and the *Petroleum Resource Rent Tax Assessment Act 1987* and noting record-keeping obligations superannuation guarantee and petroleum resource rent tax records. The updates also note that records must generally be kept for 8 years in relation to the global domestic minimum tax that applies to multinational enterprises operating in Australia with an annual global revenue of 750 million Euros.

The ATO has also updated practice statement PS LA 2011/20 *Payment and credit allocation* by removing a conflicting paragraph. Paragraph 31 previously instructed staff to allocate payments to director penalty amounts for SGC liabilities starting with the earliest period until all penalties were cleared. However, Attachment C already contained paragraph 1(b), which provides a detailed and specific hierarchy for allocating payments to SGC director penalties, including the order of nominal interest, shortfall, administration fee, and estimated liability. Having both provisions created overlapping guidance that could lead to inconsistent application. There is no change to how payments are applied in practice because paragraph 1(b) still governs the allocation of SGC director penalties.

w https://www.ato.gov.au/law/view/document?docid=PSR/PS20052/NAT/ATO/00001
w https://www.ato.gov.au/law/view/document?docid=PSR/PS201120/NAT/ATO/00001

7.6 FBT – personal use of work vehicles

On 11 September 2025, the ATO published a reminder for employers that the personal use of work vehicles provided to employees may constitute a fringe benefit and give rise to a fringe benefits tax (**FBT**) liability.

FBT applies when a vehicle is made available for private use, regardless of whether it is actually driven for that purpose. Private use includes travel unrelated to work, such as family trips, school drop-offs, personal errands, or parking the vehicle at the employee's home. Exemptions may apply depending on the vehicle type and the extent of private use, but employers must maintain accurate records, including logbooks and odometer readings, even where the benefit is exempt under the limited private use concession.

Where FBT applies, employers must calculate the taxable value, lodge and pay their FBT return by the relevant deadline, and report the reportable fringe benefits amount on the employee's income statement or payment summary. Monitoring vehicle use and maintaining proper documentation is essential to ensure compliance and avoid unexpected liabilities.

w https://www.ato.gov.au/businesses-and-organisations/small-business-newsroom/could-your-employee-s-personal-trips-cost-you-fbt

7.7 Top 1,000 income tax and GST assurance programs

On 18 September 2025, the ATO published its findings from its income tax performance, combined assurance review and GST assurance review programs for the income year ended 30 June 2025. The report shows that most large businesses in the Top 1,000 population continue to achieve high or medium assurance ratings,

giving the ATO confidence that the right amount of tax is being paid. Governance standards are improving, and only a small proportion of cases (6%) were escalated for further review. For GST, assurance levels remain strong, with 95% of taxpayers achieving high or medium assurance.

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/large-business/in-detail/findings-reports/findings-report-top-1000-income-tax-and-gst-assurance-programs

7.8 Eligible top 100 high assurance GST reporters

The ATO is seeking feedback on its proposed transition from GST refresh reviews to an assurance check-in every 4 years for eligible top 100 high assurance GST reporters. The ATO intends to transition its GST refresh reviews for high assurance reporters who prepare their own GST analytical tool (**GAT**) prior to lodgement of the SAGR to an assurance check-in every 4 years.

The closing date for comments is 29 September 2025.

w https://www.ato.gov.au/about-ato/consultation/consultation-paper-changed-approach-for-top-100-gst-reporters

7.9 Public and multinational business tax certainty programs

On 18 September 2025, the ATO published its insights and key observations from its tax certainty offerings for public and multinational businesses for the income year ended 30 June 2025. The report reviews how large businesses sought certainty on complex tax issues through private and class rulings, early engagement with the ATO, and advance pricing arrangements for cross-border transactions. It notes an increase in requests for withholding tax exemptions and capital management rulings, as well as a shift toward bilateral agreements in transfer pricing to reduce double taxation. The ATO also reported improvements in turnaround times for rulings and highlighted that early engagement significantly increases the likelihood of a favourable outcome.

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/public-business-and-international/excellent-working-relationships/public-and-multinational-business-tax-certainty-programs

7.10 R&D tax incentive transparency report

The ATO has published its annual Report of data about research and development tax incentives.

The report is split into two parts:

1. the data published on data.gov.au; and
2. an analysis of that data, which includes general information about the purpose of the report and how that data is sourced.

This report found that 12,956 companies invested a total of $16.2 billion in R&D during the 2022-23 financial year.

Public and multinational businesses accounted for the largest share at $8.7 billion, followed by privately owned and wealthy groups with $5 billion and small businesses with $2.4 billion. Small businesses are defined as companies with aggregated turnover of less than $10 million and represented 46% of claimants, or 6,016

companies. Privately owned and wealthy groups are companies and their subsidiaries with annual turnover greater than $10 million that are not public or foreign owned and made up 35% of claimants, or 4,507 companies. Public and multinational businesses represented 19% of claimants, or 2,428 companies.

The average claim per company in each business population is:

1. public and multinational businesses – $3,599,102
2. privately owned and wealthy groups – $1,111,133
3. small businesses – $403,232.

Under current legislation, there is a two-year delay between when an R&D claim is made and when the data is published. This delay helps address potential commercial sensitivities.

If a company has amended its R&D expenditure, the published data will reflect both the original and the amended amounts. However, any adjustments made by the Commissioner are not included.

w https://www.ato.gov.au/businesses-and-organisations/income-deductions-and-concessions/incentives-and-concessions/research-and-development-tax-incentive-and-concessions/research-and-development-tax-incentive/r-d-tax-transparency-reports

7.11 ATO focus areas for privately owned and wealthy groups

The ATO has released its 2025-26 compliance program for privately owned and wealthy groups, highlighting key risk areas identified through intelligence collection, casework, and data analysis. While oversight spans all tax and superannuation obligations, the following areas are receiving particular attention this year.

Core tax and compliance issues

Governance and record-keeping

Governance and record-keeping remain critical, with risks arising from inadequate documentation and insufficient professional advice. Private groups are expected to maintain proper records to support their tax positions and recognise when specialist advice is required.

Registration, lodgment and payment

Registering for obligations such as PAYG withholding and GST, choosing the correct accounting basis, lodging returns and activity statements on time, and paying tax debts when due.

Reporting risks

Omissions or under-reporting of income, sales or fringe benefits; incorrect claims for deductions, GST/fuel tax credits or R&D incentives; and misreporting of shareholder loans and other balance sheet items.

Capital Gains Tax

Misapplication of CGT discounts, small business concessions or roll-over relief, and misuse of Division 855 exemptions for foreign beneficiaries.

Trusts

High-risk trust arrangements, including distributions to lower-taxed beneficiaries where economic benefit flows elsewhere, circular trust distributions, incorrect application of family trust distribution tax and trustee-beneficiary non-disclosure tax, and misuse of franking credits without meeting the 45-day holding rule.

Using business money for other purposes

The ATO continues to focus on private groups where funds or assets are used outside their intended business purposes. This includes transactions between entities or for personal benefit that are not properly reported or characterised for tax purposes. Key areas of attention:

1. Division 7A compliance: Poor record keeping, unreported shareholder loans, non-complying loan agreements, and attempts to circumvent rules via third-party loan guarantees or re-borrowings; and
2. Lifestyle assets: Mischaracterising personal pursuits (such as vehicles, boats, or hobby farms) as business activities, leading to inappropriate deductions, GST credits, or Division 7A exposures.

Succession Planning

With private groups restructuring and transferring wealth, the ATO is focusing on the tax risks arising from succession planning, including:

1. movement of assets within groups;
2. restructuring family member interests;
3. accessing concessions, exemptions, and rollovers incorrectly;
4. settlement of loans to shareholders or associates; and
5. use of trusts for wealth transfer without proper compliance.

Specific industries and activities in focus

The ATO has identified particular risks in certain sectors and arrangements which will be areas of focus for the ATO:

1. tax advisers and professional firms:
   (a) failure to lodge partnership returns;
   (b) non-compliance with PCG 2021/4 on allocation of professional firm profits; and
   (c) high-risk behaviour by intermediaries (R&D, GST, FTC schemes).
2. property and construction
   (a) misclassification of property sales (capital vs revenue);
   (b) incorrect GST treatment (margin scheme, going concern); and
   (c) non-arm's length transactions and omissions flagged through TPRS;
3. private equity: tax risks across the full investment lifecycle, including cross-border financing and exit strategies;
4. retail: GST reporting risks, especially voucher sales, related-party transactions and omitted income;
5. Cross-border transactions: intangible migration, related-party financing, thin capitalisation. Incorrect SGE status and non-disclosure of international dealings;
6. crypto assets: under-reported gains/losses and business income;
7. tax-exempt or concessionally taxed entities: misuse of SMSFs or not-for-profits for private benefits;
8. retirement villages: incorrect GST treatment, related-party dealings and land-lease structures; and
9. GST refund fraud: artificial arrangements using contrived transactions or exaggerated invoicing to obtain refunds.

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/privately-owned-and-wealthy-groups/what-attracts-our-attention/areas-of-focus

7.12 Tax risks in property, construction and professional services

On 1 October 2025, the ATO released updated website guidance on common compliance risks affecting small businesses in the following sectors:

1. the property and construction industry – including builders, contractors and tradies.
2. the professional, scientific and technical services sector – such as engineering, design, IT, management and consulting professionals.

In these industries, the ATO has identified recurring issues due to mistakes, misunderstandings or deliberate behaviour. Common errors include:

1. incorrect claims for the R&D tax incentive (R&DTI), especially for activities that don't meet the eligibility criteria;
2. omitting sales and income in the BAS and tax returns, including income from related entities;
3. overclaiming expenses and GST credits;
4. private expenses incorrectly reported as business-related, or not properly apportioned between business and personal use;
5. failure to register for GST when required; and
6. not seeking independent advice from a registered tax agent, particularly in head contractor and subcontractor arrangements.

The ATO emphasised the importance of accurate reporting and record-keeping, and warned that non-compliance may result in penalties and interest. Advisers are encouraged to ensure client arrangements align with ATO guidance to avoid unnecessary scrutiny.

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/our-focus-areas-for-small-business/operating-outside-the-system/tax-risks-property-construction-and-professional-services

7.13 ATO spotlight

On 24 September 2025, Assistant Commissioner Scott Walker outlined the ATO's strategic focus on technology, transparency and risk mitigation in the Private Wealth sector. The ATO is expanding its use of data tools and pre-lodgment agreements to assist businesses in avoiding post-lodgment disputes, penalties and interest. Artificial intelligence is being closely monitored for its impact on business operations and tax compliance behaviours among Private Wealth clients. The ATO also plans to enhance decision-making through advanced analytics and tools like Power BI.

In 2026, the ATO will target foreign-resident capital gains and asset dissipation risks. Particular concerns include misapplication of CGT exemptions for foreign residents and movement of funds offshore following asset sales. In high-risk cases, the ATO may issue special or default assessments, garnishee notices or freezing orders.

The ATO expects, with judicial guidance on the concept of 'statutory severance' and the meaning of real property under Division 855, that it will be able to provide clearer guidance on this area of tax law in 2026. The

Federal Budget's commitment to tighten foreign resident CGT rules will is anticipated to align non-resident treatment with Australian residents, which is intended to improve certainty for investors.

w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/spotlight-on-assistant-commissioner-scott-walker

7.14 Review into remission of General Interest Charge (GIC)

The Tax Ombudsman has commenced a systemic review into the ATO's management of GIC remission decisions. The review follows a significant volume of complaints alleging inconsistency, lack of transparency, and inadequate reasoning in the ATO's approach to GIC remission.

The review will examine the clarity of ATO policy and guidance, the rationale for its stricter approach to debt collection, and whether remission decisions are fair, reasonable and consistent across similarly situated taxpayers. Particular attention will be given to the adequacy of reasons provided when remission is refused and the interaction between remission and payment plans. The review is also prompted by broader concerns, including the rising cost impact of interest charges, the removal of deductibility for GIC incurred after 1 July 2025, and the limited avenues for review, with the Federal Court being the only option.

Submissions are open until 10 October 2025, with a final report expected in early 2026.

w https://www.taxombudsman.gov.au/wp-content/uploads/2025/09/Media-release-Tax-debt-interest-under-investigation-12-September-2025.pdf
w https://www.taxombudsman.gov.au/reviews_reports/atos-management-of-remission-of-the-general-interest-charge/

7.15 Reducing red tape in the tax system

On 24 September 2025, Treasurer Jim Chalmers announced that the Government has tasked the Board of Taxation to identify substantial and measurable opportunities to reduce unnecessary compliance burdens and red tape in business tax law and administration. The objective is to support productivity growth across the economy without compromising revenue or integrity.

As part of its review, the Board will consult with businesses and the broader community and will provide the ATO with examples for administrative reform and make legislative recommendations to Government. The Board will also review previous red-tape reduction proposals.

The Board will provide more information on how to be involved in consultations soon.

w https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/reducing-red-tape-tax-system
w https://taxboard.gov.au/review/red-tape-reduction

7.16 ACNC updated guidance on public benevolent institutions

The ACNC has released an updated information statement on public benevolent institutions (**PBIs**), replacing its 2016 guidance. The update follows the Full Federal Court's decision in *Equality Australia Ltd v Commissioner of the ACNC* [2024] FCAFC 115, where it was held that the AAT did not misconstrue the expression "public benevolent institution" by requiring a test of sufficient proximity or directness between an organisation's activities and its benevolent ends.

The revised statement provides further guidance on the types of facts and evidence the ACNC will consider when determining PBI eligibility. The ACNC now expressly recognises that whether there is a "sufficiency of connection" between an organisation's activities and its benevolent relief is a matter of fact and degree. Importantly, the guidance clarifies that engagement in advocacy activities will not, of itself, disqualify an organisation from being recognised as a PBI.

Additional practical examples have been included to assist applicants in assessing their eligibility for PBI registration. The ACNC has also emphasised that the ordinary meaning of PBI is not fixed. The definition of PBI will evolve to adopt a contemporary interpretation that reflects modern methods of delivering benevolent relief, including collaborative models of working with other organisations.

w https://www.acnc.gov.au/media/news/acnc-publishes-updated-commissioners-interpretation-statement-public-benevolent-institutions-0

7.17 Board of Taxation annual report

The Board of Taxation has released its 2023-24 Annual Report, outlining its major activities, reviews, and priorities for the year ahead.

Major review on digital assets

In February 2024, the Board delivered its final report on the *Review of the Tax Treatment of Digital Assets and Transactions in Australia*. The review assessed the current tax framework for digital assets, investor awareness, and international practices, and considered whether changes to Australian tax laws or their administration are required. This comprehensive review spanned 26 months and involved nine public consultation sessions, 41 written submissions, and engagement with both domestic and international stakeholders.

Enhanced stakeholder engagement

The Board introduced an updated stakeholder engagement strategy during the year, focusing on regular events targeting specific tax topics such as tax transparency and small business issues. These sessions were held in Canberra, Sydney, and Melbourne, and complemented by the continued promotion of the *Sounding Board+* platform, which allows stakeholders to submit ideas for improving the tax system.

Voluntary tax transparency code

As at 30 June 2024, there were 219 signatories to the Voluntary Tax Transparency Code (VTTC), an increase from 211 in the previous year. Of these, 217 signatories had published at least one report. The Board continues to maintain the register and encourage participation to promote transparency and good governance in tax reporting.

Advisory role and ongoing work

Throughout the year, the Board provided regular advice to Treasury and the ATO on various tax and administrative measures and guidance products. It also began developing its future work program, informed by stakeholder feedback and aligned with government priorities.

Looking ahead

For 2024-25, the Board will focus on consolidating its engagement strategy, modernising its website, and enhancing transparency in both tax and governance. It will continue to host targeted stakeholder events and work closely with government and the tax community on emerging issues.

w https://taxboard.gov.au/sites/taxboard.gov.au/files/2025-09/2023-24-bot-ar.pdf

7.18 Joint submission on tax reform for the arts

On 25 September 2025, the NSW Government hosted the Art of Tax Reform Summit to explore tax measures aimed at strengthening the creative and cultural sector. Following the summit, several state ministers will make coordinated submissions to the federal government as part of the next National Cultural Policy.

Proposals discussed include exempting arts prizes from taxable income, introducing targeted refundable tax offsets for live performance, expanding incentives for philanthropic giving, and extending existing concessions for film, television and gaming to other cultural activities. Additional suggestions included fringe benefits tax relief for event tickets provided to staff, expanding the R&D tax incentive to cover creative work, a vacancy tax on unused commercial property and allowing landlords to claim a tax deduction for the gap between market rent and discounted rent when leasing creative spaces to artists, and relief from GST registration requirements following one-off income spikes.

Consultation on the next National Cultural Policy is expected to commence in 2026.

w https://www.nsw.gov.au/departments-and-agencies/dciths/art-of-tax-reform-summit
w https://www.nsw.gov.au/ministerial-releases/joint-communique-from-art-of-tax-reform-summit-at-sydney-opera-house

8. Tax professionals

8.1 New complaint service commitment

On 15 September 2025, the ATO announced a new complaint service commitment to provide clearer expectations of service standards for taxpayers and tax professionals. Under the new commitment, the ATO aims to resolve 80% of complaints within 28 business days. This revises the existing commitment to resolve 85% of complaints within 15 days, or within a timeframe negotiated with the complainant.

The ATO will keep complainants updated throughout the complaint process and will notify them if the timeframe is exceeded. Performance against this commitment will be reported on the ATO's website and in its Annual Report.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/new-complaint-service-commitment

8.2 ATO transition to new file sharing platform

On 1 October 2025, the ATO transitioned its secure file sharing platform from SIGBOX to Kiteworks.

For existing requests, tax practitioners should continue to use SIGBOX to submit information (as previously arranged) and files that are stored in SIGBOX that need to be retained should be removed as they will not be migrated to Kiteworks.

For new requests, the ATO will work with tax practitioners to set up Kiteworks, with user guides and further instructions to be released shortly.

w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/the-way-you-share-files-with-us-is-changing

8.3 Tax and BAS agent feedback and complaints process

The ATO has updated its website guidance about the options available for tax and BAS agents to give feedback or make a complaint to the ATO.

Registered tax and BAS agents can provide feedback or lodge complaints about ATO services through Online Services for Agents or by calling 13 72 86 (Fast Key Code 3-2-1). Agents are expected to first raise concerns with the relevant ATO officer or their manager before lodging a formal complaint.

The ATO aims to acknowledge complaints within three business days and resolve them within 28 business days. Agents are kept informed of the progress of the complaint via online services for agents, SMS, email, phone or letter. Complaints are handled by an independent team not involved in the original matter.

If dissatisfied with the outcome, agents may escalate the complaint to a senior officer or seek an independent investigation by the Tax Ombudsman, provided the ATO process has been completed.

The ATO states that lodging a complaint will not adversely affect an agent's relationship with the organisation.

COMMENT – this website update reflects the recent rebranding of the Inspector-General of Taxation and Taxation Ombudsman to "Tax Ombudsman".

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/your-practice/tax-and-bas-agents/feedback-and-complaints