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:

- Tax
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- Estate Planning
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Our lawyers specialise in working with business owners and their business advisors, such as accountants, financial consultants, property consultants and IT consultants – what we see as our clients' 'business family'. We develop long-term relationships which give our lawyers a deep understanding of our clients' business and personal needs. Over the years we have gained a unique insight into the nature of operating owner-managed businesses and the outcome is that we provide practical commercial solutions to business issues.

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 Hicks	The Full Federal Court has dismissed an appeal from the Commissioner of Taxation concerning the application of section 45B and Part IVA to a restructure involving a Division 615 rollover followed by an immediate capital reduction of the shares in the interposed company. One of the reasons the Court found that section 45B did not apply is that it considered section 45B is directed towards capital benefits made in substitute of a dividend and it did not consider there was any substituted dividend	Page 8
Item 2.5 Geocon	The Full Federal Court has allowed a taxpayer's appeal concerning the application of the passing on provisions in Division 142 of the GST Act. Importantly, the Full Court considered that Administrative Review Tribunal had erred at first instance by adopting the approach of the High Court in *Avon Products Pty Ltd v Commissioner of Taxation* [2006] HCA 29, which concerned the application of equivalent provisions in the former sales tax regime. The Full Court considered that this failed to have regard to the different statutory context of GST as compared with sales tax.	Page 21
Item 4.2 Division 296 Bill introduced	The amending Bill to introduce Division 296 of the ITAA 1997 has been put before Parliament. Division 296 provides for additional tax on earnings for superannuation accounts with balances above $3,000,000 and $10,000,000.	Page 58
Item 5.1 CGT and rights to occupy under a will	The ATO has issued new draft guidance on the meaning of a right to occupy under a will for the main residence concession in section 118-195 of the ITAA 1997. Importantly, the ATO draws a distinction between rights created under Will and rights created under the section of the Will governing a testamentary trust	Page 65
Items 5.2 and 6.1 Deductions for holiday homes	The ATO has issued a draft ruling and draft PCG on deductions for expenses incurred in connection with holiday homes, including the application of section 26-50 of the ITAA 1997, a provision that denies deductions for holidays homes in certain circumstances.	Pages 66 and 77

2. Detailed case summaries

2.1 Hicks – capital benefits, section 45B and Part IVA

Facts

On March 1985, the City Beach retail business commenced trading and was operated through the City Beach Trust, with Fewstone Pty Ltd acting as trustee under the direction of Melville Hicks and Carmelo Ierna.

Prior to 20 September 1985, Carmelo held 14 units in the trust and the William Hicks Family Trust held 15 units, while the Ierna Family Trust acquired one post-CGT unit in June 1991. Distribution of the trust's net income was made each year at the trustee's discretion to the Ierna Family Trust and the Hicks Family Trust, each of which then distributed income to related corporate beneficiaries.

On 30 June of each year between 2005 and 2011 and again in 2015, Mastergrove advanced a series of Division 7A-compliant loans to Carmelo, Melville and related property trusts. During 2009 to 2015, further loans were made to the individuals and their trusts, and interest-bearing Division 7A loan balances grew significantly.

On 30 June 2012, the Ierna Family Trust and the Hicks Family Trust stopped distributing to Mastergrove and instead distributed to new corporate beneficiaries, Ierna Beneficiary and Hicks Beneficiary. From 2012 to 2015, those companies also advanced Division 7A-compliant loans to the individuals and their trusts.

In October 2014 Carmelo and Melville's tax adviser recommended the following proposal under which the business would commence to be operated out of a company in manner that would enable the Division 7A loans to be repaid to the corporate beneficiaries.

The 2014 proposed restructure involved a transfer, at market value, of either:

1. the City Beach business from the trustee of the City Beach Trust to a new holding company; or
2. the units in City Beach Trust to a new holding company.

The proposal envisaged that the new holding company would primarily use debt payable to the unit holders to acquire the business or units. This debt would be sufficient to repay the outstanding Division 7A loans by assigning the debt to the creditor companies. Additionally, the new holding company would elect to form a consolidated group.

The 2014 proposal did not proceed.

By 2016, the outstanding Division 7A loans owed to Mastergrove, Ierna Beneficiary and Hicks Beneficiary totalled tens of millions of dollars, and the borrowers required a source of funds to meet the annual Division 7A repayment obligations. Mastergrove had accumulated retained earnings and large unpaid present entitlements originating from the City Beach Trust.

A new restructure was proposed, utilising the rollover in Division 615 of the ITAA 1997, and which would involve the following steps:

1. Step 1 – a transfer of the units in City Beach Trust to a new company in consideration for new shares in the company;
2. Step 2 – the undertaking of a selective share buy-back to allow, in substance, a realisation of pre-CGT capital gains to the shareholders in new company;
3. Step 3 – the assignment of the debt (loan) interests arising from the share buy-back as repayment of the Division 7A loans; and

4. Step 4 – an election by the new company to form a consolidated group with the City Beach Trust.

On 20 May 2016, Melville and Carmelo implemented the new restructure by interposing a holding company, Methuselah Holdings, between the unitholders and the City Beach Trust. The unitholders exchanged their units for shares in Methuselah under Division 615 rollover relief, leaving Methuselah as sole unitholder.

On 23 May 2016, Methuselah resolved to undertake a selective share capital reduction.

On 14 June 2016, shareholders approved cancellation of certain pre-CGT shares and a cancellation amount of $26 million became payable to each of Carmelo and the trustee of the William Hicks Family Trust. Each then lent that amount back to Methuselah under interest-free, unsecured loan agreements repayable on demand.

Immediately following the capital reduction, Carmelo and the trustee of the William Hicks Family Trust executed deeds of assignment under which the debts owed to them by Methuselah were assigned to Mastergrove, Ierna Beneficiary and Hicks Beneficiary in satisfaction of the outstanding Division 7A loans owed by Carmelo, Melville and their property trusts.

On 1 July 2016, Methuselah and the City Beach Trust entered a tax consolidated group, enabling future trust income to be accumulated in Methuselah rather than distributed through the family trusts.

The Commissioner issued amended assessments to Carmelo, Melville and Hicks Beneficiary on the basis that the capital reduction was either a dividend under section 45B or a tax benefit obtained under Part IVA, and each taxpayer lodged objections and subsequently appealed.

In the Federal Court at first instance, Logan J examined whether the selective share capital reduction undertaken as part of the 2016 restructure should be treated as an assessable dividend under section 45B of the ITAA 1936, and whether Part IVA applied to cancel an alleged tax benefit. Logan J concluded that neither provision applied, finding that the capital reduction was wholly attributable to Methuselah's share capital account and was not a substitution for profits or a dividend. Justice Logan accepted that Methuselah had no profits of its own and that the increase in value of the City Beach Trust was not a distributable profit capable of supporting a dividend.

Justice Logan also held that the step-plan did not give rise to any reasonable expectation of an assessable dividend under an alternative postulate. The Commissioner's proposed counterfactual, which assumed that Mastergrove would have paid a $52 million dividend to fund the repayment of the Division 7A loans, was rejected. The Court found no historical pattern of Mastergrove paying dividends for that purpose, no commercial rationale for such a dividend, and significant evidence that the dominant purpose of the restructure was to facilitate the repayment of the Division 7A loans using pre-CGT value rather than to avoid the inclusion of assessable income. The taxpayers' appeals were therefore allowed.

The Commissioner appealed to the Full Federal Court.

Issues

1. Did the primary judge err in finding that section 45B did not apply, that is, was there a purpose of enabling Carmelo or Hicks Beneficiary to obtain a tax benefit when the selective share capital reduction was undertaken?
2. Did the primary judge err in finding that Part IVA did not apply, particularly in rejecting the Commissioner's proposed alternative postulate and in concluding that there was no dominant purpose of enabling Carmelo or Melville to obtain a tax benefit?

Decision

The Commissioner's appeal was dismissed.

Section 45B

The Court held that section 45B is an anti-avoidance provision directed specifically at preventing capital returns being used in place of assessable dividends. Section 45B(1) was treated as an operative provision that informs the construction and application of the remainder of the section.

The Court confirmed that three conditions must be satisfied before s 45B applies:

1. the existence of a scheme involving a capital benefit;
2. the obtaining of a tax benefit; and
3. a purpose of enabling that tax benefit, assessed in light of the "relevant circumstances".

Scheme and capital benefit

It was uncontentious that the selective capital reduction constituted a scheme under which a capital benefit was provided.

Tax benefit

The Court held that section 45B(9) requires a purely statutory comparison between the actual tax position and the position that would have arisen if the capital benefit had instead been an assessable dividend. The provision does not require the dividend hypothesis to be realistic or reasonably expected. On that comparison, the relevant taxpayers would have paid more tax had an unfranked dividend been paid.

Purpose of enabling a tax benefit

The Court emphasised that the purpose inquiry must be informed by the statutory mischief: whether the capital return was made in substitution for a dividend that would have been assessable to the relevant taxpayers.

Having reviewed the factors in s 45B(8), the Court concluded that they did not support such a purpose:

1. *attribution to profits (s 45B(8)(a))* - the Court accepted that the units in the City Beach Trust had increased in value over time and that this unrealised increase was reflected in Methuselah's share capital account after the rollover. However, the unrealised gains within the CBT trust were trust profits, not company profits, and could never have been distributed as dividends. The capital return could not therefore be regarded as replacing any dividend the taxpayers might have received;
2. *pattern of distributions (s 45B(8)(b))* - Mastergrove had no pattern of paying dividends of comparable size, and nothing indicated the $52 million capital return was a substitute for any dividend that would have been assessable to the taxpayers;
3. *tax attributes (s 45B(8)(c)–(f))* - while the selective cancellation of pre-CGT shares gave rise to a favourable tax outcome, the ability to access pre-CGT value existed independently of the capital reduction and did not point to a dividend-substitution purpose;
4. *ownership changes (s 45B(8)(h))* - the capital reduction did not materially alter the relevant taxpayers' substantive economic interest, but this factor alone was insufficient to establish the requisite purpose; and
5. *other s 177D(2) matters* - the evidence demonstrated that the scheme was implemented to facilitate repayment of Division 7A loans and preserve the pre-CGT status of remaining shares. The steps were commercially driven, not tax-avoidance driven.

Conclusion on 45B

The Court found that section 45B is engaged only where a capital return is, in substance, made in lieu of a dividend from the company or an associate. None of the statutory indicators suggested that the capital return was made in substitution for a dividend, nor that any participant entered into the transaction for the purpose of enabling the taxpayers to obtain a tax benefit as defined in the provision. On the facts, the capital return was

undertaken to fund the repayment of Division 7A loans and was not a substitute for any dividend that would have been assessable to the taxpayers.

Accordingly, section 45B did not apply.

Did the taxpayers obtain a tax benefit for the purposes of Part IVA?

The Court turned to whether, in the absence of the scheme, Carmelo or Melville might reasonably have been expected to receive a dividend that would have been included in their assessable incomes. This required identifying a reasonable alternative postulate under section 177C, informed by the High Court's recent guidance in *Commissioner of Taxation v PepsiCo Inc and Ors* [2025] HCA 30.

The Commissioner argued that Mastergrove could have paid a fully franked $52 million dividend to fund the repayment of all Division 7A loans. The Court rejected this on the evidence. Mastergrove had never paid dividends to fund repayments of Ierna Beneficiary or Hicks Beneficiary loans, had never declared dividends remotely approaching $52 million, and lacked the necessary cash resources. The evidence also showed no commercial rationale for Mastergrove to strip out such large amounts of capital.

The Court accepted the primary judge's finding that the reasonable alternative was the taxpayers' own postulate: that if the scheme had not been carried out in the form it took, the unitholders would still have transferred their CBT units to Methuselah for shares and a receivable, and that receivable would have been assigned to discharge the Division 7A loans. Under that alternative, no amount would have been included in their assessable income.

Because the Court found this reasonable postulate resulted in no tax benefit, it was unnecessary to decide the dominant purpose issue. The Court nevertheless observed that the scheme was commercially driven by the need to repay the Division 7A loans while preserving pre-CGT value, rather than by any intention to avoid the inclusion of a dividend.

The Full Court held that the taxpayers did not obtain a tax benefit within the meaning of Part IVA. Without a tax benefit, Part IVA could not apply, and the Commissioner's amended assessments could not stand.

KEY TAKEAWAYS

- This is a further case that reinforces the highly technical operation of Part IVA and that it does not simply apply when there is a motivation of saving tax. It was necessary for the Commissioner to identify a reasonable counterfactual that would have resulted in more tax being payable for there to be a tax benefit.
- Section 45B is a provision that needs to be considered when capital benefits (including through a share buy-back or capital reduction) are provided to shareholders. In this case, the Court held that section 45B did not apply as the capital reduction was not a substitute for dividends.

Citation *Commissioner of Taxation v Hicks* [2025] FCAFC 171 (Derrington, Feutrill and Hespe JJ)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2025/171.html

2.2 RRKC – carrying on a business of property sales

Facts

RRKC was a fruiterer.

In 2012 RRKC acquired land that in Melbourne that he sub-divided into 5 residential units, being 1A, 1B, 1C, 1D and 1E D Court, Melbourne. RRKC also owned a large number of other properties both before, during and after he owned 1A, 1B, 1C, 1D and 1E D Court.

Over various periods, RRKC owned approximately 33 properties. 15 of the 33 properties were rented before being sold. 6 of the 33 properties were not rented. 10 of the 33 properties were rented but there was no evidence that they had been sold. The position for the remaining 2 properties was unclear.

RRKC resided in the family home with his wife and children, with the family home being in his wife's name.

In 2014, RRKC and his former wife separated. It was a very acrimonious divorce and RRKC's mental health suffered greatly

In 2015, construction commenced on the residential units on 1A, 1B, 1C, 1D and 1E D Court.

In about late 2015, RRKC's former wife sought a property settlement involving the transfer of family home to RRKC and a transfer of a property at 21 A Street, Melbourne, which was owned by RRKC, to the former wife. RRKC accepted his former wife's terms and began finding ways to repay the mortgage on 21 A Street and refinancing the family home.

In late 2015 or early 2016, RRKC sought a rental appraisal of 1A, 1B, 1C, 1D and 1E D Court, which was obtained in March 2016.

In April 2016, RRKC decided to sell 1C, 1D and 1E D Court as part of the property settlement with this wife.

In May 2016, construction of the residential units at 1A, 1B, 1C, 1D and 1E D Court was completed.

In June 2016 and July 2016, agreements for the sale of the 1C, 1D and 1E D Court were entered into by RRKC and prospective buyers.

On around August to October 2016, settlement of 1C, 1D and 1E D Court occurred.

RRKC lodged his business activity statement for September 2016 and did not declare any GST payable on the sale of 1C, 1D and 1E D Court. RRKC filed his income tax return for the 2017 year and reported capital gains on the basis that 1C, 1D and 1E D Court were held on capital account.

On 3 November 2017, the ATO contacted RRKC informing him that the September 2016 BAS and the 2017 income tax return were selected for review. In a file note of a call with RRKC's tax agent, the ATO recorded that it took the view that RRKC was in business.

On 12 January 2018, RRKC was informed by the ATO that the review of the September 2016 BAS and the 2017 Tax Return had become an audit.

On 30 April 2018 and on 22 May 2018, RRKC made two separate voluntary disclosures during the audit process. The first voluntary disclosure declared the GST payable on the sale of the 1C, 1D and 1E D Court in the September BAS period and recorded RRKC's view that the circumstances around the sale of the Properties, including the matrimonial split, needed to be considered. The second voluntary disclosure did not deal with the 2017 year.

On 11 July 2018, the audit was finalised. The ATO concluded that higher GST was payable, increased GST input tax credits were claimable and the sales of 1C, 1D and 1E D Court were not on the capital account. The ATO issued amended income tax and GST assessments accordingly.

RRKC objected to both assessments and both objections were disallowed.

On 15 April 2024 and 18 June 2024, RRKC sought review in the ART.

RRKC argued that

1. he was not in the business of property development, rather he was undertaking an investment business;

2. the majority of the properties he owned were rented out for extended periods;
3. he sold properties only when he had to, that is, when he needed funding to purchase further properties or he needed funding to purchase a private property;
4. his purpose in investing properties was to leave something for his children; and
5. he did not prepare a business plan or financial statements, register a business name nor hold a property developer licence, and therefore his activities did not have the "hallmarks" of a business.

The Commissioner argued that RRKC did carry on a business. The Commissioner referred to the pattern of sales and RRKC's activities in subdividing and constructing property, and that the majority of the properties that had been held by RRKC were sold.

Issues

1. Were the gains from the sales of 1C, 1D and 1E D Court taxable as ordinary income?
2. Were the sales of 1C, 1D and 1E D Court taxable supplies?

Decision

Ordinary income

The ART noted that the sales proceeds would be on revenue account if either the properties were held and sold in the ordinary course of business or they were held as part of a profit-making undertaking or plan.

The ART found that RRKC was carrying on a business. This business involved acquiring properties, subdivision and construction of properties, obtaining approval sand permits, hiring trades, planners and real estate agencies, obtaining finance and obtaining advice. It was clear from these activities that RRKC was not a passive investor.

The ART found that the fact that RRKC did not prepare a business plan, prepare financial statements, register a business name, hold a property developer licence or keep business-like records were not determinative of whether RRKC was carrying on a business.

The ART noted that the real issue is the scope of the business and whether sale forms part of the business, not whether there is a business at all.

The ART also considered that 1C, 1D and 1E D Court were sold in the ordinary course of that business.

The ART had regard to the following:

1. the frequency or pattern of sales. 63% of the properties that owned or part-owned by RRKC were sold;
2. when RRKC was selling the properties to finance other properties, he was making a judgement that those new properties would be better for their yield or long term growth in value. He may not have planned to sell his properties, however he knew he may have to sell properties in the future and he needed to profit from such sales. This profit-making mindset indicated a business operation; and
3. the evidence suggested that RRKC was not making any income as a fruiterer and was just covering costs from his rental income. The ART inferred from this fact that RRKC would have needed other sources of funds, including by selling properties.

Accordingly, the sales of the 1C, 1D and 1E D Court were a sale in the ordinary course of RRKC's business and were 'trading stock'.

In its decision, the ART commented on RRKC's reference to the fact he rented properties and that 1C, 1D and 1E D Court were sold as part of his marital split. The ART noted that, while these facts are relevant, neither fact "immunised" RRKC from the profits being made in the ordinary course of business.

GST taxable supply

Consistent with the above, the ART found that the sales of the 1C, 1D and 1E D Court were in the course of RRKC's enterprise and were taxable supplies.

COMMENT – RRKC could never have succeeded for GST as, even on his own case, he was holding the properties in the course or furtherance of an enterprise, as renting a property is an enterprise. The fact that the renting never occurred due to the properties being sold upon completion of the construction likely does not detract from the enterprise having already commenced.

TRAP – RRKC's tax agent contended that the Commissioner applied a five year rule, and if the sale was of a property that had been held for five years or more, then it must be a capital transaction. There is no such five year rule. A property can be held (and rented) for an extended period, and still be regarded as being trading stock or held as part of a profit-making undertaking or plan. The tax treatment depends upon all the circumstances, which was the approach that the ART took in this case.

KEY TAKEAWAY

A key comment from the ART was its confusion as to whether RRKC considered he was not carrying on property development at all or just that these properties were not part of those property development activities. Had RRKC been able to clearly distinguish the acquisition of these properties from his wider property investment activities, he may have had more success.

Citation *RRKC and Commissioner of Taxation (Taxation and business)* [2026] ARTA 95 (General Member J Dunne, Melbourne)
w https://www7.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2026/95.html

2.3 Robinson – beneficial ownership of property

Facts

On 19 March 2013, Troy Robinson entered into a contract to purchase a coastal property in Victoria, referred to as the Parent Block, for $865,000. He paid a deposit of $86,500 that same day.

On 20 May 2013, Troy incorporated TCR Group Pty Ltd, becoming its sole director and shareholder. On 28 June 2013, settlement occurred and title to the Parent Block was transferred to TCR, funded partly by Troy's personal funds and partly by a NAB business loan to TCR.

On 18 July 2014, a building permit was issued to TCR for construction of a residence on the Parent Block. From January 2014 through November 2015, Speedie Development Consultants Pty Ltd undertook subdivision work for TCR. On 27 January 2016, registration of a four-lot subdivision (plus common property) was completed.

On 6 January 2016, TCR entered into a contract to sell one lot for $2.4 million, settling in April 2016. On 7 December 2016, TCR entered a contract to sell a second lot for $600,000, settling in January 2017.

On 25 January 2017, TCR entered into a building contract with Russell Constructions Pty Ltd for a new home on another subdivided lot (**Property**). On 11 February 2017, Urban Property Australia prepared a valuation for lending purposes estimating the Property at $1 million "as is" and $2.5 million "as if complete". On 5 April 2017, NAB's mortgage over the broader subdivision was discharged and TCR refinanced with LaTrobe Financial, obtaining a 15-month construction loan.

On 13 March 2018, power was first connected to the Property, and in May 2018 broadband services were established.

On 24 May 2018, Preston Rowe Paterson prepared a valuation of the Property at $2.25 million.

On 21 June 2018, TCR received an Occupancy Permit for the Property.

On 27 June 2018, Troy appointed One Agency Peninsula as selling agent, with an estimated selling range of $3.9 to $4.3 million.

On 14 July 2018, Troy signed a contract to sell the Property to T Co for $4.128 million.

On 24 September 2018, LaTrobe approved a new $1.835 million loan to Troy personally, requiring that title to the Property be transferred into his name. On 9 October 2018, TCR transferred title to Troy for stated consideration of $2.25 million.

On 15 October 2018, settlement occurred for Troy's sale of the Property to T Co.

On 28 August 2019, the Commissioner informed TCR that a GST review had commenced for periods spanning 1 July 2017 to 30 June 2019. From late 2019 to 2020, Troy's advisers lodged multiple revised BAS and tax returns for both TCR and Troy. On 10 February 2021, the Commissioner commenced an audit of TCR regarding the sale of the Property, issuing amended GST and income tax assessments and penalty assessments between 1 and 3 September 2021.

On 18 November 2021, the Commissioner commenced a review of Troy's 2019 income tax return, later issuing an amended assessment and penalty assessment on 27 April 2022 on the basis that Troy had derived a deemed dividend under Division 7A of the ITAA 1997 when the Property was transferred to him.

On 14 June 2023, Troy and TCR each lodged objections to their amended assessments. These objections were disallowed on 2 July 2024. Troy and TCR applied to the ART for review.

The Commissioner argued that TCR was both the legal and beneficial owner of the Parent Block and the later subdivided Property, and that no trust existed in favour of Troy. The Commissioner said that when TCR transferred the Property to Troy in October 2018, this constituted a taxable disposal made in the ordinary course of TCR's property development business. According to the Commissioner, the stated consideration of $2.25 million did not reflect the Property's true market value. The Commissioner assessed the market value at $4.128 million, matching the price later paid by T Co, and said that TCR should have returned both income tax and GST based on that market value rather than the lower transfer price.

The Commissioner further argued that Troy received a benefit equal to the difference between the Property's GST exclusive market value and the amount he paid, and that this benefit constituted a deemed dividend to him under Division 7A of the ITAA 1936. The Commissioner also submitted that Troy could not rely on the main residence exemption because there was insufficient evidence that he actually lived in the Property as his home after construction was completed.

The Commissioner contended that both Troy and TCR made false or misleading statements by not reporting the taxable disposal, the GST liability, or the deemed dividend. The Commissioner said that they, or their advisers, acted recklessly in doing so, and that penalties of 50% of the shortfall were correctly imposed.

Troy and TCR referred to the decision in *Calverley v Green* (1984) 155 CLR 242, which determined that a resulting trust emerges where financial contributions are provided by more than one parties in respect of property that is put into the name of one party. Troy had provided financial contributions in respect the Property, including toward the LaTrobe Property Construction Loan. Troy argued that, while TCR had claimed the full amount of interest as a deduction in respect, that loan had only related to the three lots from the subdivision other than the Property.

Troy and TCR argued that a 'resulting trust' had arisen in relation to the Parent Block proportionate to Troy's financial contribution to the purchase (being 36.5%). Once the plan of subdivision for the Parent Block had been registered, the resulting trust 'crystallised' and his 36.5% beneficial interest in the Parent Block became a 100% beneficial interest in the Property, essentially becoming a 'bare trust'.

Troy and TCR maintained:

1. Troy had always had the beneficial ownership of the Property, as TCR had acquired and held the Property merely as nominee or as trustee for Troy. There was accordingly no disposal or change in ownership of the Property when the legal title transferred from TCR to Troy;
2. since there was no change in ownership of the Property, there was no deemed dividend as a result of the payment of consideration by Troy to TCR;
3. the market value of the Property when sold to Troy was as it was set out in the Preston Rowe Paterson Valuation dated 24 May 2018 ($2.25 million);
4. Troy had met the conditions for the main residence exemption in respect of the Property; and
5. neither Troy nor TCR was required to include in their assessable income any amounts in respect of the transfer of title from TCR to Troy.

Issues

1. Did TCR hold the Parent Block and the later subdivided Property on trust for Troy, or was TCR both the legal and beneficial owner?
2. If TCR was the beneficial owner, was the October 2018 transfer of the Property from TCR to Troy a taxable disposal for income tax and GST purposes, and should the market value of $4.128 million be applied?
3. Did the difference between the Property's market value and the amount Troy paid constitute a Division 7A deemed dividend?
4. Was Troy entitled to rely on the main residence exemption for any resulting capital gain?
5. Did Troy or TCR make false or misleading statements, and if so, were they reckless, thereby justifying the administrative penalties imposed?

Decision

Did TCR hold the Property on trust for Troy?

The ART examined the evidence surrounding the purchase of the Parent Block and the later development. It noted that TCR, not Troy, was the contracting party for the acquisition, subdivision and construction. TCR borrowed funds in its own name, engaged contractors, and assumed the risks and responsibilities normally associated with a property development business. The ART considered Troy's claim that he could not obtain finance personally and therefore put the land in TCR's name, but concluded that such an arrangement did not, on its own, establish a trust.

The ART found no written trust deed, no contemporaneous records describing a trust, and no clear consistent conduct indicating that TCR was merely a nominee. The financial records showed that TCR treated the project as its own business activity, and Troy, as sole director, had authorised these transactions. Personal financial contributions by Troy were viewed as capital injections rather than evidence of beneficial ownership.

The ART referred to significant documentation which referred to TCR as owner of the Parent Block and the Property including transfer instruments, contracts of sale, loan documentation, security documentation, insurance policies, and the Occupancy Permit. Apart from Troy's contribution to the deposit for the Parent Block, the ART was unable to trace funds provided by him personally. The ART referred to evidence regarding the transfer of the Property from TCR to Troy which did not appear to reference any trust arrangements.

The ART was not convinced by the argument regarding the transformation of a 'resulting trust' over the Parent Block into a 'bare trust' over the Property in favour of Troy. They concluded that TCR held both the legal and beneficial title of the Property prior to the transfer to Troy in 2018.

Was the October 2018 transfer to Troy a taxable disposal based on market value?

Because TCR was found to be the beneficial owner, the ART treated the October 2018 transfer to Troy as a disposal for tax purposes. It reviewed the contemporaneous valuations, listing history and subsequent sale to T Co. The ART found that although TCR transferred the Property to Troy for $2.25 million, the most reliable evidence of market value was the contract price of $4.128 million agreed with T Co shortly afterwards.

The ART considered Troy's argument that the earlier valuation supported the lower figure, but held that the arm's length sale to T Co was more probative. It also found that TCR was conducting a property development and sale activity, and the disposal formed part of that business, meaning both income tax and GST applied.

Did Troy derive a deemed dividend under Division 7A?

Given that the Property had a market value of $4.128 million but Troy only paid $2.25 million, the ART considered whether the difference constituted a benefit provided by TCR to Troy. Once the ART concluded that TCR was the true owner and that no trust existed, the remaining question was whether TCR conferred a financial advantage on Troy.

The ART found that Troy did receive a benefit equal to the shortfall between the market value and the amount he paid. Because Troy was the sole shareholder of TCR, and because the benefit was not otherwise assessable or documented as a complying loan, Division 7A operated to treat that benefit as a deemed dividend in the income year ended 30 Jue 2019.

Was the Property Troy's main residence?

Troy made submissions to the ART regarding using the Property as his main residence including his intention and efforts to make it 'habitable', and evidence of having resided at the Property and paying for utilities. The Commissioner argued that Troy and TCR's financial situation was such that it would not have been possible for Troy to retain the property as his main residence and that he would have always intended to sell the Property as with the other lots.

The ART was not convinced by the evidence Troy put forward regarding using the Property as his main residence. Witness statements only demonstrated at a general level some intentions to live at the Property. The email of instructions sent by Troy's father requesting the 24 May 2018 valuation indicated that Troy's residential address was his parents' home, and the Occupancy Permit issued in June 2018 was issued after Troy claimed to have commenced living at the Property. The ART concluded that the Property was not used as Troy's main residence, and he was not eligible to apply the exemption on the sale of the Property to T Co.

Penalties for false and misleading statements

The ART considered the conduct of both TCR and Troy in lodging returns that excluded the taxable disposal, GST liability and deemed dividend. It acknowledged that Troy said he relied on advisers, but found that he failed to provide complete information to those advisers and that he was aware of the relevant valuations and sale negotiations. The ART also noted inconsistencies in explanations provided during the review and audit processes.

Because the ART found that TCR was clearly undertaking a commercial development activity and that the legal and beneficial ownership sat with TCR, it concluded that the omission of the taxable disposal and resulting tax liabilities amounted to reckless disregard of tax obligations. The ART determined that both TCR and Troy made false or misleading statements, acted recklessly, and that the penalties imposed were correctly applied.

KEY TAKEAWAY

Where the length of time between when an occupancy certificate is granted and a property is sold is short, the ATO will examine critically whether the property ever became the owner's main residence. In such circumstances, compelling evidence will be required to satisfy the ATO that it was the owner's main residence.

COMMENT – the ART found that Troy did not live in the Property as his main residence, so no CGT main residence exemption was available. However, there is also a question about whether Troy held the Property on capital account at all, or whether it was held on revenue account – either as trading stock in a business of property development or as part of a profit-making undertaking. Where a property is held on revenue account, no capital gains tax concessions or exemptions reduce the resulting assessable income.

Citation *Robinson and Commissioner of Taxation (Taxation and business)* [2026] ARTA 50 (General Member C Willis, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2026/50.html

2.4 Sunna – timing of reporting of CGT event

Facts

On 6 March 2002, Edward Sunna purchased commercial property on Pitt Street in Sydney.

On 28 June 2019, he entered into a contract to sell the property for $5,516,500. Under the contract, he received a deposit of $2,596,000 in the 2020 income year.

On 8 May 2020, Edward lodged his tax return for the year ending 30 June 2019, reporting no net capital gain. On 15 May 2020, the Commissioner issued the corresponding 2019 assessment on that basis.

On 16 October 2020, Edward lodged his tax return for the year ending 30 June 2020, reporting a capital gain of $492,807 linked to the deposit, applying prior-year capital losses, and declaring a net capital gain of $354,678. On 23 October 2020, the Commissioner issued the 2020 assessment reflecting that return.

On 2 August 2022, the property sale settled. Edward transferred the property to the purchaser and received the balance of the price, less a foreign resident capital gains withholding amount that was remitted to the Commissioner.

On 3 July 2023, Edward lodged his 2023 tax return, declaring a net capital gain of $893,652 and claiming the foreign resident capital gains withholding credit.

Under section 104-10(3) of the ITAA 1997, CGT event A1 is taken to occur when the contract is entered into, or when the change in ownership occurs if there is no contract.

The Commissioner commenced an audit of Edward's treatment of the sale across the relevant years. During the audit, Edward acknowledged that his capital gain calculations in both the 2020 and 2023 years were incorrect. He provided the Commissioner with corrected calculations showing a total capital gain of $3,531,621 and a net capital gain of $2,390,625 assessable in the 2019 income year.

Under section 170(1) of the ITAA 1936, the Commissioner generally has only two years from the date an assessment is issued to amend it, unless a specific exception applies. The 2020 assessment was issued on 23 October 2020, which meant the 2 year amendment period expired in October 2022.

Section 170(10AA) of the ITAA 1936 gives the Commissioner an unlimited power to amend an assessment if the amendment is made for the purpose of giving effect to specified provisions in the ITAA 1997, including section 104-10(3).

On 20 December 2023, after finalising the audit, the Commissioner issued an amended 2019 assessment that included a net capital gain of $2,390,624 and, separately, the 2023 assessment which recorded no net capital gain. On 5 January 2024, the Commissioner issued an amended 2020 assessment that removed the previously assessed net capital gain of $354,678. The amendments created a position in which the entire capital gain was placed into the 2019 year and removed from all others.

Edward objected against the amended assessments and the objections were disallowed.

On 3 December 2025, Edward appealed to the Federal Court, challenging both amended assessments.

Edward argued that while the Commissioner may be able to amend the 2019 assessment to give effect to section 104-10(3), there was no power to amend the 2020 assessment. He said the 2020 assessment therefore remained legally conclusive, including its underlying assumption that part of the capital gain from the property sale was taxable in that year.

Both Edward and the Commissioner relied on the Full Court's decision in *Metlife Insurance Ltd v Federal Commissioner of Taxation (2008) 170 FCR 584* to support their competing interpretations of section 170(10AA). Edward argued that *Metlife* confirmed the narrow operation of the provision, contending that amendments can only be made to the assessment for the income year in which the deemed CGT event occurs, and that the decision makes clear that section 170(10AA) does not permit amendments that merely correct independent errors in other years. The Commissioner, by contrast, pointed to *Metlife* as authority for the broader principle that section 170(10AA) is a remedial power designed to prevent the deeming rule in section 104-10(3) from being rendered ineffective. The Commissioner argued that it allows amendments whenever necessary to give practical operation to the earlier deeming of a CGT event, including removing inconsistencies created by earlier assessments issued before the true facts were known.

Edward also referred to section 350-10 of Sch 1 of the TAA which provides, among other things, that the production of a notice of assessment under a taxation law "is conclusive evidence" that the assessment was properly made and "*except in proceedings under Part IVC of this Act on a review or appeal relating to the assessment—the amounts and particulars of the assessment are correct*". He maintained that because the 2020 assessment was final, the Commissioner was prevented from issuing an amended 2019 assessment that relied on a conflicting set of taxable facts.

In Edward's view, allowing the 2019 amendment to stand would result in the same capital gain being assessed in two different income years, which he said the tax legislation does not permit.

Issues

1. Can the Commissioner's amendment of Edward's 2020 assessment properly be characterised as having been made for the purpose of giving effect to the CGT timing rule in section 104-10(3)?
2. Did the original 2020 assessment preclude the Commissioner from amending the 2019 assessment?
3. Can the same taxpayer be assessed twice in respect of the same income in different income years.

Decision

Could the 2020 assessment be amended?

The parties agreed and the Court accepted that, in principle, section 170(10AA) of the ITAA 1936 clearly authorised the amendment of Edward's 2019 assessment, because settlement of the Pitt Street contract in August 2022 triggered section 104-10(3), which in turn deemed the disposal to have occurred in June 2019. The original 2019 assessment did not include any capital gain on that disposal, so an amendment was needed to give effect to the deeming rule.

In contrast, the original 2020 assessment had been issued before settlement and was based on Edward's incorrect return, which treated the deposit as giving rise to a 2020 capital gain. That factual premise was always wrong, and it became demonstrably inconsistent with the deemed timing once settlement occurred and section 104-10(3) operated to provide that the time of the event was taken to be the time of the contract. The Court held that the proposed changes to the 2020 assessment to remove that incorrect disclosure would not be "giving effect" to section 104-10(3). Therefore, the Commissioner did not have an unlimited period to amend the 2020 assessment under section 170(10AA) of the ITAA 1936.

Does the existence of the 2020 assessment prevent amendment of 2019 assessment?

The Court held that the role of section 350-10 of Sch 1 of the TAA is to establish that in the amount of the taxpayer's taxable income and amount of tax payable are those stated in the notice of assessment and that a tax debt arises upon issue of the assessment. The objective purpose of section 350-10 is not served by attributing to a notice of assessment any effect that would restrict or otherwise constrain the Commissioner, in performing his statutory functions, from issuing assessments for different income years based on the actual taxable facts as later identified. Therefore, there is nothing in section 350-10 that prevents the Commissioner from making a correct assessment of Edward's tax liability for 2019.

Can the same taxpayer twice in respect of the same income in different income years?

The Court held that, although the tax system generally aims to ensure a person does not ultimately pay tax twice on the same income, this does not prevent the Commissioner from issuing more than one assessment relating to the same amount. This is because the assessment process is administrative in nature, and the Commissioner may need to act on incomplete information without having definitively established all relevant facts. The fact that an earlier assessment contains an error that can no longer be corrected does not stop the Commissioner from issuing correct assessments for other income years, even if this results in the same transaction being assessed again. The Commissioner is not required to continue applying an error in subsequent years or to treat incorrect facts as though they were true.

COMMENT – Edward could object against the 2020 assessment and request that the Commissioner deal with the objection as if it had been lodged within the objection timeframe. The Court noted that it is uncertain how the Commissioner would exercise his discretion if Edward later sought an extension of time to object to the 2020 assessment, but there appears to be no obvious reason the Commissioner would refuse such a request. The Commissioner has consistently acted to ensure that Edward is taxed only on the correct CGT amount, and granting an extension would allow the 2020 assessment to be brought into line with that objective. If, for any reason, the Commissioner declined to exercise the discretion, Edward would be entitled to appeal that decision to the ART.

COMMENT – This decision has been appealed to the Full Federal Court.

KEY TAKEAWAYS

- The time of the CGT event for a disposal of a CGT asset, where the disposal occurs under a contract, is the date of the contract, irrespective of where settlement occurs in a subsequent income year. The Commissioner is able to amend an assessment at any time to give effect to time of the CGT event being the income year of the contract.
- Where the time limit to amend an assessment has expired, a taxpayer can object and request that the objection be treated as having been made within time. The Commissioner's approach to extension of time requests for objections are set out in PS LA 2003/7.

Citation *Sunna v Commissioner of Taxation* [2025] FCA 1499 (Derrington J, Queensland)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2025/1499.html

2.5 Geocon – GST and passing on

Facts

Geocon Land Holdings No. 5 Pty Ltd contracted on 1 October 2014 to acquire ACT land for $5.4 million plus development services as non-monetary consideration. On the same day it entered a Project Delivery Agreement requiring it to design and construct residential units. Between March 2015 and May 2021, Geocon sold units under contracts applying the margin scheme, with settlements occurring from September 2017 to June 2021.

On 3 July 2015, Geocon was granted a 99-year Crown Lease, with a requirement to complete the development within 48 months. Geocon lodged its September 2015 BAS without reporting any supply of development services, claiming a small net credit.

In June 2016, Geocon engaged PwC for GST advice and a private ruling. Although Geocon believed the development services formed part of its acquisition price for margin-scheme purposes, it adopted a conservative reporting position until the ruling issued. On 13 December 2017, the ATO ruled that the development services were non-monetary consideration for the land and a taxable supply by Geocon. Geocon then invoiced the ACT Suburban Land Agency on 21 December 2017 for $113,460,254 (including $10,314,569 GST). The Agency paid only the GST component under a gross-up clause.

The units plan was registered on 8 September 2017. Despite the private ruling, Geocon did not include the non-monetary consideration in its margin calculations for the September 2017, December 2017 or March 2018 BASs. From June 2018 onward, it did include the non-monetary consideration but did not initially report the taxable supply of the development services at all, using the GST-inclusive value of $113,460,254 when calculating the margin.

In October 2018 the Commissioner commenced a review, escalating to audit in August 2019. Issues included whether Geocon had correctly calculated GST and whether excess GST for the September 2017–March 2018 periods should be refunded under section 142-15 of the GST Act.

On 20 February 2020, Geocon sought amended assessments, reporting the development-services supply in the September 2017 period.

On 16 October 2020, the Commissioner issued amended assessments instead attributing the supply to September 2015 (when the Crown Lease was granted) and refused to exercise the section 142-15 discretion.

Geocon objected but on 23 March 2023 its objections disallowed. Geocon sought review in the ART.

<u>Geocon's contentions</u>

The position of Geocon was as follows:

1. attribution of the supply of the development services:
   (a) that the GST payable on its development services was attributable to the September 2017 tax period, as the consideration for the supply was only received upon the registration of the units plan, which created saleable individual units. The grant of the Crown Lease was not consideration as it could be terminated if certain covenants were not met; and
   (b) alternatively, the total consideration was not known in September 2015, and the GST should be attributed to the period when it became certain in September 2017 in accordance with *A New Tax System (Goods and Services Tax) (Particular Attribution Rules Where Total Consideration Not Known) Determination (No 1) 2000* (Cth).
2. refund of the excess GST:

(a) there was no "excess GST" within the meaning Division 142 because the over-reported GST on residential unit sales offset the under-reported GST on development services and Division 42 required there to be an excess net amount reported in a BAS;
(b) it did not pass on the excess GST as its pricing was market-driven and independent of GST considerations, and purchasers would have paid the same prices regardless of GST treatment; and
(c) that refunding the excess GST would not result in a windfall gain, as it had consistently acted on the belief that it was entitled to include the development services in its GST calculations.

Geocon also maintained that the GST liability on the development services should be included in the value of the non-monetary consideration for its acquisition of the land, claiming the full $113,460,254 (including GST) represented the proper calculation under the GST margin scheme.

Commissioner's contentions

The position of the Commissioner was as follows:

1. attribution of the supply of the development services- the Commissioner maintained that Geocon's taxable supply of development services was attributable to the September 2015 tax period as the grant of the Crown Lease on 3 July 2015 was consideration for the development services.
2. refund of excess GST issue
   (a) excess GST must be determined on a per-supply basis and cannot be offset against under-reported amounts on other supplies. As such, there were excess GST amounts for the September 2017, December 2017, and March 2018 tax periods;
   (b) Geocon had passed on the excess GST to the purchasers of the residential units because its pricing strategy ensured it recovered its costs, including GST. The Commissioner emphasised that Division 142 of the GST Act applies when the economic burden of excess GST is transferred to the purchasers, regardless of whether Geocon explicitly accounted for GST in its pricing; and
   (c) refunding the excess GST to Geocon would result in a windfall gain, as Geocon had passed on the GST to purchasers and not reimbursed them. The discretion under section 142-15 of the GST Act is reserved for exceptional cases where denying a refund would lead to unintended consequences, which was not applicable in this case.

At first instance, the ART agreed with the Commissioner on all issues.

The ART found that Geocon's GST liability on its development services was attributable to the September 2015 tax period. The grant of the Crown Lease on 3 July 2015 was consideration for the services: it had substantial economic value and was directly connected with Geocon's obligation to design and construct the units. Conditions attached to the lease did not delay receipt of consideration; any later non-compliance would simply trigger an adjustment event under s 19-10.

Given the correct attribution, Geocon's "no excess GST" argument necessarily failed. The ART also held that, regardless, Geocon had over-reported GST on its unit sales in the September 2017, December 2017 and March 2018 periods. Applying section 142-5 of the GST Act, excess GST must be assessed per supply, not by netting off against under-reported amounts.

The ART found that Geocon passed on the excess GST: its pricing recovered all costs (including GST), and there was no evidence that Geocon bore the economic burden. The ART made the following observations:

1. it will be "comparatively seldom" that "a taxpayer will succeed in proving, on the balance of probabilities, that excess GST was not passed on";

2. "[t]he ‘usual position’ is that profitable businesses recover all of their costs, which includes amounts paid as GST, in the prices charged to their customers” and “[Geocon] was, by all accounts, operating a profitable business and it undertook the Development to make a profit”.

The ART considered that a refund would therefore create a windfall gain, and the Commissioner’s refusal to exercise the section 142-15 discretion was upheld.

The ART determined that the GST on Geocon’s development services was not part of the non-monetary consideration for the land under the margin scheme. The correct value was the GST-exclusive amount of $103,145,685. The GST component was merely reimbursed under the gross-up clause and was not consideration for the land. This approach was consistent with the Commissioner’s ruling.

Geocon appealed to the Federal Court.

Issues

1. Was the GST payable on Geocon’s taxable supply of development services was attributable to the September 2015 or September 2017 tax period?
2. Should the "excess GST" be refunded to Geocon?
3. Was the GST liability on Geocon’s development services included in the value of the non-monetary consideration for the purpose of determining its acquisition costs under the margin scheme?

Decision

Was the GST attributable to September 2015 or September 2017?

The Court considered that the GST was attributable to September 2015 as the grant of the Crown Lease was consideration and the fact that the Crown Lease may be terminated did not mean that the consideration was not known.

Given these conclusions, it was unnecessary for the Court to consider whether excess GST is a supply-by-supply question or based on the net amount for the period. However, the Court would have found against Geocon on this issue.

Should the excess GST be refunded?

Was the GST passed on?

The Court began by noting that Div 142 is a comprehensive statutory code that displaces any common-law claim for recovery of mistaken payments. Under the Division, excess GST cannot be refunded where it has been passed on, unless it would not result in a windfall gain.

The Court noted that the expression “passed on” bears its ordinary meaning and is ultimately a question of fact. The Court noted that ART had relied on the decision of the High Court in *Avon Products Pty Ltd v Commissioner of Taxation* [2006] HCA 29 as providing a presumption that that those who have overpaid GST will rarely succeed in proving that overpaid GST has not been passed. The Court observed that *Avon Products* concerned sales tax, a different statutory regime and a different market (discounted wholesale sales of consumer goods).

The Court held that the ART proceeded on an incorrect legal approach by treating profitability as giving rise to a presumption that Geocon must have passed on the excess GST, and requiring Geocon to point to something “unusual” to displace that presumption. The Court considered that this approach improperly elevated the factual observations *Avon Products* into rules of law.

As a result, the Tribunal wrongly treated several matters as irrelevant, including:

1. evidence that Geocon priced units solely by reference to market value, not costs or GST;
2. evidence that Geocon believed the GST in dispute was not payable, which was relevant to whether it would have factored that cost into its pricing;
3. evidence that purchasers were indifferent to GST treatment and would have paid the same price regardless; and
4. evidence showing that feasibility analyses, while considering overall costs, did not dictate the actual sale prices of units.

The Court held that the Tribunal's reliance on Geocon's overall profitability, and its conclusion that profitability meant all costs (including mistaken GST) must have been recovered, misunderstood the nature of residential property markets and improperly displaced the factual inquiry required by Div 142.

The Court declined, however, to substitute its own conclusion because it considered factual findings were insufficiently developed to determine whether the excess GST had in fact been passed on. The matter was remitted for redetermination, with directions permitting the parties to adduce further evidence.

Would the retention of any excess GST result in a windfall gain for Geocon?

The Court noted that section 142-15(1) provides that section 142-10 (the rule deeming passed-on excess GST to be always payable) be treated as never having applied where the Commissioner is *satisfied* that refunding the excess GST would not result in a windfall gain.

Geocon submitted that a "windfall gain" requires a refund that the taxpayer could not reasonably have expected. The ART essentially adopted this formulation, describing a windfall as an "unexpectedly large" gain. The Court held that "windfall gain" bears its ordinary meaning, and although expectation may be relevant, lack of expectation is not a necessary condition for the application of section 142-15.

The ART concluded that a refund would give Geocon a windfall gain because Geocon was a profitable developer that had recovered all its costs (including GST) and had not proved that the excess GST was not passed on to purchasers. The Court held that this reasoning was flawed in two respects.

First, profitability alone does not determine whether a refund is a windfall gain. Secondly, the ART finding that Geocon had passed on excess GST was affected by the same errors identified earlier in its analysis of "passed on" under Div 142. Because section 142-15 can only operate where excess GST has been passed on, the ART's misapplication of the "passed on" test infected its reasoning on windfall gain.

The Court emphasised that the windfall gains exception in section 142-15 must be capable of applying even where excess GST has been passed on, as it only applies if GST has been passed on

The Court noted that, depending on proper factual findings, it was open that refunding Geocon would not constitute a windfall gain. If the purchasers would have paid the same price regardless of GST, and if Geocon's proceeds were unaffected by the overpayment, then the refund would merely restore Geocon to the profit position it should have been in, rather than conferring an undeserved benefit.

Was the value of non-monetary consideration GST inclusive?

The Court held that section 75-10(2) requires identifying the consideration given by the developer to acquire its interest in the land, but does not prescribe any special rule for valuing non-monetary consideration. The provision must be read consistently with the structure of the GST Act, including the general concepts of "price", "value" and the GST payable on a supply.

The Court held that the GST component was not part of the consideration given by Geocon for its acquisition of the Crown Lease. The GST was payable by the ACT Land Development Agency to Geocon under the Project Delivery Agreement and then remitted by Geocon to the Commissioner; it was not an amount given by Geocon to acquire the land. The only consideration moving from Geocon to the LDA was the value of the development services themselves and the cash component.

Accordingly, section 75-10(2) permitted Geocon to reduce the margin only by the value of the development services, not by the GST payable on those services.

KEY TAKEAWAY

The first instance decision by the ART provided a very narrow construction as to when excess GST can be refunded. As the Court observed here, applying principles formulated in the context of sales tax, a much narrower regime, could lead to anomalous outcomes for GST. The Court noted that there could be good reasons for taxpayers to report GST on a conservative basis to avoid penalties and interest but with the intention of then objecting to the assessment. This was essentially what Geocon did.

COMMENT – The Commissioner has applied for special leave to the High Court.

Citation *Geocon Land Holdings No. 5 Pty Ltd v Commissioner of Taxation* [2025] FCAFC 172 (Thawley, Wheelahan and Wheatley JJ, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2025/172.html

2.6 Smith – GST and carrying on an enterprise

Facts

Alexander Smith was a consultant contracted to a company based in New South Wales.

Alexander was also involved in a number of other activities including property investment and speculation, French bulldog breeding and photography.

Between 2018 and 2021 Alexander bred French bulldogs under a business name "Delish Frenchies". There were about 7 litters and between 18 to 22 puppies in this operation. Each dog was microchipped and registered and received pedigree certification. Alexander was licensed by the Australian National Kennel Club and also the Master Dogs Breeders and Associates.

Alexander conducted his French bulldog breeding operation from his home. His home had kennels, wet weather areas and dry areas and access to grass. Alexander maintained a website and a separate email address for this operation.

The puppies were sold under formal contracts. Under these contracts, a bond was required to be paid. The dog could be returned if certain conditions were met. There was no reference to GST on these contracts. There was also no evidence of GST invoices being issued to the purchasers of the dogs.

Alexander incurred various costs in the bulldog breeding operation, including costs to purchase breeding animals, costs in caring for the animals, such as food and veterinary costs and specialist vet costs for breeding and births.

Alexander lodged business activity statements for the quarters ended 30 September 2018 to 31 December 2021. On the business activity statements, Alexander disclosed GST on certain sales and claimed input tax credits. However, he did not include income from the sales of the French bulldogs from his French bulldog breeding operation in his business activity statements or income tax returns.

On 1 November 2022 and 11 November 2022, following an audit, the Commissioner issued amended assessments to the effect that further GST on sales was payable, the input tax credits claimed by Alexander were disallowed and penalties for recklessness were imposed. A 20% uplift to the base penalty was also imposed. The ATO's reasoning was that enterprises were not carried on, there was a lack of substantiation, and some of the expenditure consisted of entertainment expenses.

Alexander objected to the assessments, with the objections disallowed. On 12 April 2024 and 9 September 2024, Alexander sought review in the ART.

Issues

1. Was the French bulldog breeding operation an "enterprise" pursuant to section 9-20 of the GST Act?
2. Was Alexander entitled input tax credits for acquisitions made for his French bulldog breeding operation?
3. Should shortfall penalties be imposed at 50% for recklessness and be uplifted by 20%?
4. Should the penalties and/or the uplift should be remitted in whole or in part?

Decision

Was the French bulldog breeding operation an enterprise?

Under section 9-20(1)(a) of the GST Act, an enterprise may include:

1. any activity or series of activities in the form of a business; or
2. any activity or series of activities in the form of an adventure or concern in the nature of trade.

Section 9-20(2) contained exclusions to what could be an enterprise. For example, an enterprise does not include an activity, or series of activities, done as a private recreational pursuit or hobby.

In the form of a business

The ART found that Alexander was carrying on French bulldog breeding activities in the form of a business. The Tribunal did not decide on whether Alexander was actually carrying on a business, as there was insufficient evidence to make that assessment.

The ART noted that Alexander's activities had a commercial character, having regard to the following:

1. he was engaged in marketing;
2. he had distinct email addresses;
3. he entered into contractual arrangements with customers;
4. he entered into contracts with suppliers of dogs to acquire dogs and contracts to stud service his dogs;
5. he acquired stock;
6. he established kennels;
7. he registered as a breeder and maintained that registration;
8. he entered into arrangements with food and veterinary suppliers;
9. he sought pedigree certificates;
10. he maintained his stock with vet visits; and

11. he sold puppies and made a profit.

The ART also found that there was repetition and regularity in his activities. It did not matter that the operations were small.

In the form of an adventure or concern in the nature of trade

The ART considered the 'badges of trade' outlined in MT 2006/1 and applied them to Alexander's activities. The ART noted as follows:

1. a small scale operation like Alexander's French bulldog breeding operation can comprise an adventure or concern in the nature of trade;
2. there was sufficient evidence that Alexander intended to engage in commercial activity and intended to make a profit. This was evidenced by the website page, email address, acquisition of stock, sale contracts, marketing, supplier arrangements, registration as a breeder and the use of that registration number;
3. the operation did not have to be profitable, however Alexander did make a profit;
4. the operation was recurrent or regular;
5. the Alexander's operations were similar to other businesses; and
6. registering with the Master Dogs Breeders and Associates may have suggested that Alexander had the relevant skill or knowledge, however this factor was neutral given that there was no clear evidence how Alexander was tested or whether he continued with professional development.

However, Alexander did not maintain accounts, he did not have business plan and the evidence provided by Alexander to the ART was disorganised, which suggested that Alexander did not carry on the French bulldog breeding operation in a systematic, organised and business-like manner.

On balance, the ART found that the French bulldog breeding operation did have the badges of trade and it was in the form of an adventure or concern in the nature of trade.

A private recreational pursuit or hobby

The ART found that Alexander's French bulldog breeding operation was not a private recreational pursuit or hobby, having regard to the following:

1. he had a contractual arrangement with the purchasers;
2. the purchasers were unrelated to Alex;
3. there was registration and licensing;
4. Alexander incurred costs for the operation;
5. Alexander undertook marketing for the operation; and
6. based on the evidence provided before the ART, it appeared that Alexander had a reasonable expectation of profit.

Was Alexander entitled to input tax credits for the French bulldog breeding operation?

Entitlements to input tax credits arise on creditable acquisitions and creditable importations. To make a creditable acquisition, the taxpayer must have acquired something for a creditable purpose.

The ART accepted that costs such as vet fees, dog food and costs of registration were in respect of Alexander's enterprise and for a creditable purpose. However, the ART did not accept that vehicle expenses were claimed for Alexander's enterprise, as he did not demonstrate what those expenses were.

The question of the amount of input tax credits that could be claimed was remitted to the Commissioner for determination. The ART made the following recommendations for the Commissioner to make this determination:

1. costs that are vet fees, dog food, costs of registration as a breeder, puppy pads, and dog products should be, in principle, goods and services acquired in carrying on Alexander's dog breeding enterprise;
2. any claims that were supported by invoices or receipts should be allowed;
3. the Commissioner should not be rigid and should act sensibly when considering evidence of payment;
4. amounts evidenced by invoices should be considered, so if bank statements or visa statements demonstrate those amounts, the claim should be allowed; and
5. where there are no invoices supporting the claimed costs and no other evidence, the claim should not be allowed.

Penalties

The ART considered that a minimum 25% penalty should be imposed because Alexander made false and misleading statements and had failed to take reasonable care, having regard to the following:

1. his records were chaotic and some were lost;
2. the ART did not accept there were invoices to substantiate his claims;
3. even the reconstructed records showed that the claims were in error;
4. he accepted he was careless;
5. he did not return all his sales on his BAS;
6. he claimed food and consumables expenditure without basis;
7. he double claimed GST credits; and
8. he conceded input tax credits in relation to his photography which was a hobby.

The ART also noted that Alexander had basic tax understanding and he was experienced with various businesses, so he should have been expected to maintain coherent records. Alexander had not exercised reasonable care.

The ART ultimately held that a penalty of 50% was appropriately applied as Alexander's conduct amounted to recklessness having regarded to the numerous errors on the BASs, the claims for food and consumables expenditure were not linked to any enterprise, that invoices were altered his records were inadequate.

However, the ART considered that the 20% base penalty uplift should not have been applied.

KEY TAKEAWAY

It has long been understood that a person could be carrying on an 'enterprise' even where their activities do not amount to the carrying on of a 'business'. In recent times, the ATO appears to have adopted a stricter approach and ABN registration reviews have been conducted on the basis that a person needs to be carrying on a business to be carrying on an enterprise. This case suggests that this recent approach by the ATO is incorrect.

Citation *Smith and Commissioner of Taxation (Taxation)* [2026] ARTA 25 (General Member J Dunne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2026/25.html

2.7 Kilgour – market value of shares

Facts

Punters Paradise Pty Ltd carried on a gambling business in the horse racing industry.

The shares in Punters were held by three trusts associated with Lucas Pettett and his wife Melissa Pettett, Heath Kilgour and his wife Sarah Alice Kilgour, and Nathan Isterling and his wife Tamara Isterling.

Heath, the Chief Operating Officer of Punters, leveraged his prior experience in the gambling industry and assisted Punters in building relationships with racing authorities and media companies like News Corp. Heath was connected to Nick Babos, the Head of Product Strategy & Distribution in a News Corp Australian subsidiary. By 2014, Punters' content was being published on News Corp platforms, increasing its visibility.

In around 2015, Lucas, Heath and Nathan resolved to sell Punters or its business if an opportunity arose. Lucas considered that the Punters should be sold at a price that reflected a multiple of 10 x EBITDA.

On 1 January 2016, Punters engaged a sales agent, Daniel Bernstein, to prepare an information memorandum on Punters and to start setting up an online data room for the purposes of its sale.

On 17 February 2016, Nick initiated a meeting between representatives of Punters and News Corp, where Damien Eales, who was the Managing Director of News Corp's Australian operating companies, expressed interest in acquiring Punters.

Following a site visit to Punters' office in early March, News Corp executed a non-disclosure agreement relating to the possible acquisition of Punters on 22 March 2016.

In subsequent meetings between representatives of Punters and News Corp between March and April 2016, Simon Anderson, a representative of New Corp, also expressed enthusiasm for the acquisition.

Throughout mid-2016, detailed discussions and site visits took place, leading to several non-binding indicative offers from News Corp. In a meeting between Damien and Simon of News Corp, and Lucas and Heath of Punters, it was made clear that Punters sought a 100% cash deal and expected a valuation around $30 million.

Initially within News Corp, the acquisition team prepared a detailed internal document on 28 April 2016 outlining the potential acquisition strategy, benefits, risks, and financial implications of acquiring Punters. Importantly, this internal document identified the enterprise value for Punters to be $30 million.

On 13 May 2016, a memorandum was submitted by News Corp's internal team to News Corp's Executive Chairman and to the CFO on the potential acquisition of Punters. In early July 2016, News Corp Australia executives prepared another memorandum for the Office of the Chief Executive Officer in New York.

By July 2016, the internal review in News Corps Australia and News Corp head office in New York had culminated in a recommendation to proceed with the acquisition.

On 4 October 2016, the Share Sale Agreement was executed, marking the formal acquisition of Punters by News Corp's Australian subsidiaries for a total consideration of $30 million, paid entirely in cash.

In the 2017 income year, the trusts that had held the shares in Punters made distributions of the capital gains arising from the sale to Lucas and Melissa, Heath and Sarah, and Nathan and Tamara.

The tax returns of the beneficiaries were lodged based on the capital proceeds actually received. The beneficiaries then objected to their income tax assessments on the basis that Punters and News Corp did not deal at arm's length and the market value substitution rules should apply to modify the capital proceeds of the shares from $30 million to $18.2 million.

Sarah and Tamara sought to apply the small business CGT concessions to reduce or eliminate their capital gains.

The Commissioner disallowed the objections. The beneficiaries sought review of the objection decisions in the Federal Court.

Justice Logan observed that when determining if parties were dealing at arm's length, the considerations are:

1. what connection existed between the parties "in connection with" the dealing; and

2. if so, to what extent, there was any connection between the parties.

In the context of News Corp's acquisition of Punters, the evidence was that News Corp and the vendor shareholders of Punters were unrelated parties who formed their views independently and dealt with each other based on their own assessments of the share value.

Justice Logan also noted if the capital proceeds deviate from the market value, this may suggest non-arm's length dealings. An examination of the circumstances, including the asset's features, market conditions, and comparable sales, may reveal whether the price is aberrant. However, merely proving that a disposal was at or below market value is not sufficient to demonstrate whether the dealing was at arm's length.

In relation to market value, Logan J concluded that the actual sale proceeds from the arm's length transaction accurately reflected the market value of the shares. Therefore, even if the price included a "special" or "strategic" element, Logan J considered that it formed part of the "market value" as understood in the relevant provisions. Justice Logan cited authorities including *Inland Revenue Commissioners v Clay* [1913] UKLawRpKQB 227 and *Commissioner of Taxation v Miley* [2017] FCA 1396; (2017) 106 ATR 779, and observed that hypothetical market attributes of an asset that are of value to a specific purchaser should be included in valuing the shares in Punters.

News Corp's decision, made at the highest level and remote from Australia, was influenced by its strategic commercial interests and perceived synergistic benefits of owning Punters. The evidence demonstrated that the negotiations were conducted independently, with genuine bargaining and strategic commercial considerations. The lack of any pre-existing relationship, the thorough internal decision-making process within News Corp, and the multiple rounds of offers and counteroffers all supported the conclusion that the transaction was at arm's length.

On this basis, Logan J concluded that the vendor shareholders in Punters and News Corp dealt with each other at arm's length in the disposal of all the shares in Punters.

The market value substitution rule did not apply, and the strategic premium specific to News Corp was considered part of the market value. As a result, the tax assessments based on the actual sale proceeds were upheld, and Sarah and Tamara did not qualify for the small business CGT concessions due to exceeding the maximum net asset value threshold.

Sarah and Tamara appealed to the Full Federal Court.

Issues

1. Was the primary judge correct to include the advantages (or "synergies") that News Corp would obtain from acquiring full ownership when determining the market value of the minority parcels of shares?
2. Did the primary judge correctly apply the principles in Spencer v Commonwealth when relying on the actual purchase price in the Share Sale Agreement as evidence of market value at the valuation time?

Decision

Relevance of "synergies"

The Court considered the real commercial situation at the time the shares had to be valued. By that stage, all three owners had already agreed to sell 100% of Punters to News Corp for about $31 million, and there was no real doubt that the deal would go ahead. The Court held that this was an existing market condition, so it was relevant to what a rational buyer and seller would have considered when deciding the value of a 20% holding.

Because the shareholders were jointly offering the whole company for sale, the Court found it unrealistic to value each 20% parcel as if it were being sold on its own. The ability to take part in a single 100% sale was itself a valuable feature of the shares.

The taxpayers also argued that the valuation should exclude any benefits News Corp expected to gain from full ownership, such as strategic advantages. The Court rejected this, finding that these advantages were not unique to News Corp and could have been recognised by any similar buyer in the market. They were part of the real-world value of the business when sold as a whole.

Determination of sale price

The Court rejected the taxpayers' contention that the Court was not allowed to consider the agreed sale price in the Share Sale Agreement, because the valuation had to occur at the moment immediately before the contract was executed. The Court held that the timing rule does not stop a valuer from looking at real-world evidence that already existed at that point in time. By the valuation moment, the parties had completed their negotiations, exchanged drafts, settled on the price, and there was no real uncertainty that the deal would be signed. These were not future events, but present commercial circumstances that informed what a reasonable buyer and seller would have thought the shares were worth.

The Court noted that when a transaction is negotiated at arm's length and is effectively ready to be signed, the agreed price can be powerful evidence of the asset's true value at that point in time. This meant the primary judge was entitled to treat the sale price as the best available indicator of what the shares were worth "just before" the contract was executed.

COMMENT – this should not have been a case about the market value substitution rule, which required News Corp to have not been dealing at arm's length with the sellers, but instead simply about what was the value of the shares for the purpose of the MNAV test. If it was accepted that the market value of the shares was less than what was paid for them, it could follow that the market value was used for the MNAV test but that the actual proceeds received was used for the taxpayers' capital proceeds.

COMMENT – the taxpayer has applied for special leave to appeal to the High Court.

KEY TAKEAWAY

The courts have routinely held that the price paid for an asset is the best indication of its market value. A taxpayer will be hard pressed if they seek to contend that the market value is lower because the purchaser was a "special buyer".

Citation *Kilgour v Commissioner of Taxation* [2025] FCAFC 183 (Charlesworth, O'Sullivan and Horan JJ)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2025/183.html

2.8 Applebee – home office expenses

Facts

Todd Applebee, a senior technical solutions consultant, was employed by Manpower (Services) Australia Pty Ltd and contracted to Hewlett Packard Enterprises during the relevant period.

Due to COVID-19 restrictions, Todd worked from home in Maitland from March 2020 and, after June 2020, continued to work from home three days per week.

In his 2021 tax return, Todd claimed deductions for home-office expenses, mobile phone and internet usage, motor vehicle expenses, occupancy expenses and certain stationery and software costs. The ATO disallowed many of those deductions and, following audit, issued an amended assessment.

Todd objected to the amendment assessment. The Commissioner partially allowed the objection and issued a further amended assessment. The items remaining in dispute were as follows:

Expense Category	Allowed by Commissioner	Amount Claimed
Mobile phone	$523	$2,143
Internet	$983	$1,566
Car expenses	$3,600	$9,443
Occupancy	$0	$2,210
Stationery, subscriptions, software	$0	$392

Todd sought review in the ART.

Issue

Was Todd was entitled to the deductions claimed?

Decision

The ART noted that the deductibility of his home-office, motor-vehicle, phone, internet and other expenses was governed principally by section 8-1 of the ITAA 1997 and, for car expenses, the special rules in Division 28 of the ITAA 1997.

The ART noted that section 8-1(1)(a) of the ITAA 1997 permits a deduction for a loss or outgoing "incurred in gaining or producing assessable income" and that, whether a loss or outgoing is incurred in the course of producing income is question of fact and degree, referring to *Charles Moore & Co (WA) Pty Ltd v Federal Commissioner of Taxation* (1956) 95 CLR 344.

The ART also noted that the negative limbs in section 8-1(2) prohibit deductions for expenses that are:

1. capital in nature;
2. private or domestic (section 8-1(2)(b));
3. related to exempt or NANE income; or
4. otherwise denied.

The ART observed that where expenses have both income-producing and private elements, apportionment is required and the apportionment must be fair and reasonable in the circumstances.

<u>Motor vehicle expenses – Division 28 of the ITAA 1997</u>

Because car expenses are subject to special rules, Todd had to satisfy the rules in Division 28, including:

A car expense is "a loss or outgoing to do with a car": section 28-13.

Travel is deductible only if it constitutes "business kilometres", defined in section 28-90 as travel:

1. in the course of producing assessable income; or
2. between workplaces, but excluding travel between home and the office (section 28-100).

The ART noted that there are two available methods to deduct under Division 28, being the cents-per-kilometre method or the logbook method. These methods required:

1. contemporaneous logbooks (section 28-125);
2. statutory odometer records (section 28-140); and
3. written evidence of all car expenses.

The ART noted that the ATO had allowed $3,600 using the cents-per-kilometre method but that Todd sought a substantially higher deduction using the logbook method. However, the ART noted the following:

1. three inconsistent versions of the logbook were produced;
2. entries did not align with work-from-home diaries or employer attendance records;
3. odometer records were not contemporaneous;
4. no sworn evidence was given to explain discrepancies.

As the taxpayer bears the burden under section 14ZZK(b)(i) of the TAA 1953, the ART was not satisfied the logbooks were reliable. Consequently, no logbook-based expenses (including insurance and lease interest) were allowed.

Occupancy Expenses – Home Office

Todd claimed his home office was a place of business, entitling him to deduct occupancy costs such as rent (a type of expense ordinarily private or domestic).

The ART considered established authorities, including *Handley v Commissioner of Taxation* (1981) 148 CLR 182, *Commissioner of Taxation v Forsyth* (1981) 148 CLR 203 and *Swinburne v Commissioner of Taxation* (1984) 84 ATC 4803. The ART also referred to the recent analysis in *Hall and Commissioner of Taxation* [2024] AATA, which departed from the older cases in the COVID-19 context.

Considering the principles set out in *Hall*, the ART noted that, although Todd regularly worked from home and had a dedicated workspace, after June 2020 he was not required by COVID-19 restrictions to work from home and, in fact, his employer allowed and encouraged office attendance from mid-June 2020. Accordingly, at least from that time, his home office was an adjunct to—not a substitute for—his actual workplace. The space in his home did not have the “character of a place of business.”

As a result, the occupancy expenses were private/domestic under section 8-1(2)(b) of the ITAA 1997 and not deductible.

Mobile phone expenses

The ART accepted that the phone use was integral to Todd's role and he frequently worked outside business hours. Given this, the Commissioner’s allowance of 30% work-related use was too low.

However, due to inconsistent statements and lack of sworn evidence, Todd failed to establish the claimed 90% business use. The ART settled on a 50% work-related proportion as fair and reasonable.

Internet Expenses

The Commissioner had allowed 60% of internet costs. Todd claimed 90% but his internet diary contained inconsistencies and he provided no evidence explaining them. Accordingly, the ART upheld the Commissioner's allowed percentage.

Subscriptions, Software, Stationery

The ART accepted that Office 365, Dropbox, Adobe Creative Suite and keyboard were all used for work and supported by the nature of the IT role, employer policies, and the supervisor's letter. These expenses therefore satisfied the positive limb of section 8-1 and were allowed.

Penalty for recklessness

The ART found that a taxpayer must positively prove the absence of recklessness. The ART noted that Todd had provided no evidence explaining how the flawed occupancy and motor-vehicle claims were made. Further, the significant errors and lack of substantiation suggested gross carelessness.

The ART concluded that Todd had failed to disprove recklessness, and the penalty stood. No further remission was justified.

Key Takeaway

The *Hall and Commissioner of Taxation (Taxation and business)* [2025] ARTA 600 decision (see our June 2025 Tax Training Notes), which is subject to appeal, received a lot of publicity when it was handed down. However, the reasons provided in the *Hall* decision itself indicated that the outcome was limited to the extraordinary circumstances of the COVID-19 lockdown. This decision reinforces the limits of the *Hall* decision.

Citation *Applebee and Commissioner of Taxation* [2025] ARTA 2625 (Senior Member J Lye, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/2625.html

2.9 Alphington Developments – duty and consideration

Facts

On 28 June 2013, Alphington Developments Pty Ltd and Alpha APM No 2 Pty Ltd jointly contracted with Amcor Packaging (Australia) Pty Ltd to purchase a large industrial site for $120 million (GST-exclusive). Alphington paid the $10 million deposit. The land comprised 60 titles, aggregated into six 'Superlots'.

The Contract provided for three staged land transfers:

1. 15 December 2015 – Superlots 1 and 2 to Alpha; Superlots 3 and 6 to Alphington
2. 15 December 2016 – Superlot 4 to Alphington
3. 15 December 2017 – Superlot 5 to Alphington

Under Special Condition 11 of the Contract, Alphington was required to procure all Demolition Works, Remediation Works and Consultant's Works.

Alphington had to use reasonable endeavours to minimise cost and complete works cost-effectively and to commercial standards. Alphington was expected to aim to keep total works below $14 million. Alphington was to allow Amcor step-in rights if Alphington defaulted.

Amcor, as the vendor, agreed to pay, $6,078,946 for demolition (per specified contract amounts), all properly incurred remediation and consultant costs, subject to caps, a "Surplus Payment" if Total Costs were under $14 million and up to $550,000 consultant costs (with a maximum overall contribution of $14.275 million).

Costs associated with works outside the defined scope, changes to Alphington's Master Plan, or additional works stemming from Alphington's decisions were not payable by the Amcor.

If contamination previously unknown was discovered, Alphington could notify Amcor with required expert documentation and Amcor was required to pay for remediation.

Between October 2013 and February 2019, Alphington issued 54 progress claims comprising 76 invoices for demolition and remediation. Some invoices were paid, some short-paid, and some unpaid. Legal proceedings were commenced. At first instance Alphington's claims for unpaid invoices were dismissed, but on appeal the Court of Appeal allowed the appeal and remitted the matter.

The payments by Amcor totalled $18,344,011.78 (GST-inclusive), with $5,411,483.48 related to Transfer 1 and $12,932,528.30 related to Transfer 3.

The duty for Transfer 1 and Transfer 3 was originally calculated as follows:

1. Transfer 1 – 15 June 2016 - Original dutiable value was calculated as:
   (a) deposit: $3,402,439.01;
   (b) plus contract balance: $31,000,000;
   (c) plus margin scheme GST: $770,866.70;
   (d) less Vendor's Works Costs (GST-exclusive): ($4,869,772.01); and
   (e) Total: $30,303,533.70,
   with duty of $1,666,694 assessed and paid.
2. Transfer 3 – 29 November 2017 - Original dutiable value was calculated as:
   (a) deposit portion: $5,597,561
   (b) plus contract balance: $51,000,000
   (c) plus margin scheme GST: $3,178,810.95
   (d) less Vendor's Works Costs (GST-exclusive): ($11,636,451.52); and
   (e) total: $48,139,920.43.
   with duty of $2,647,695.60 assessed.

On 19 October 2020 the Commissioner re-assessed Alphington for Transfer 1 and Transfer 3 on the basis that there should be no reduction for the Vendor's Works Costs. This resulted in additional duty of $640,004.40 plus a penalty of $128,000.88 and interest of $16,777.66. For Transfer 3, the additional duty was $267,838.00, the penalty was $53,567.60 and interest was $14,660.44.

Section 20 of the *Duties Act 1999* (Vic) defines the dutiable value as follows:

> *20 What is the dutiable value of dutiable property?*
>
> *(1) The dutiable value of dutiable property that is the subject of a dutiable transaction is the greater of—*
>
> *(a) the consideration (if any) for the dutiable transaction (being the amount of a monetary consideration or the value of a non-monetary consideration); and*
>
> *(b) the unencumbered value of the dutiable property.*
>
> *(2) In determining the dutiable value of dutiable property, there is to be no discount for the amount of GST (if any) payable on the supply of that property.*

Alphington subsequently contended that the Vendor's Works Costs for Transfer 1 should be increased to $5,411,483.48 (GST-inclusive), reducing the dutiable value to $29,761,822.23 and the Vendor's Works Costs for Transfer 2 should be increased to $12,932,528.30 (GST-inclusive), reducing dutiable value to $46,843,834.65.

On 17 November 2020, Alphington lodged objections to the re-assessments. On 21 May 2024, Commissioner disallowed the objections.

On 22 August 2024, the Commissioner filed the Notice of Objection and the Re-Assessments with the Supreme Court.

Alphington argued that "consideration" must take into account all payment obligations in the Contract, including the vendor's obligation to reimburse demolition/remediation costs. Amcor's payments were integral to the bargain; Alphington would not have paid the Purchase Price without those promises. The Commissioner wrongly focused only on payments to Amcor, whereas the statutory test is simply "the consideration for the transaction". *Resolute Mining v Commissioner of State Revenue* supports deducting vendor-to-purchaser payments when determining consideration. Ignoring Vendor payments creates a discrepancy between consideration and market value.

The Commissioner submitted only s 20(1)(a) is relevant and it focuses on what passed to the vendor. Consideration does not include payments made by the vendor. The only thing that "moved the transfer" was Alphington's payment of the Purchase Price. Alphington purchased land plus Amcor's funded remediation promise. Accordingly, the Purchase Price aligns with the value of what was acquired.

During the proceedings, Commissioner agreed to remit the penalties.

Issues

1. Should Alphington's consideration for Transfer 1 and Transfer be reduced by the Vendor's Works Costs?
2. Should interest be remitted?

Decision

Consideration for the transfers?

The Court noted the principles governing "consideration" under s 20(1)(a) were not in dispute, being that

1. "consideration" in the Duties Act is not the same as contractual consideration in contract law;
2. the term has a broader conveyancing meaning;
3. consideration is the money or value passing to the transferor that moves the conveyance.

The Court noted that the question is: what did the vendor receive that moved the transfer?

The Court also noted the High Court's reasoning in *PepsiCo Inc*: whether an amount is "consideration for" something turns on what the parties agreed, and requires a causal connection between the promise to pay and the receipt of the relevant property right.

The Court identified four relevant promises in the Contract:

1. Amcor to transfer land;
2. Alphington to pay the Purchase Price;
3. Alphington to procure remediation works; and
4. Amcor to repay Alphington for costs of those works

The Court held that Amcor's payments were not part of the consideration for the transfers as:

1. the Purchase Price alone "moved" the transfer: Even if Amcor had been relieved of its obligation to repay remediation costs, it still would have transferred the land. Thus only the payment to Amcor satisfies the "moving the conveyance" test;
2. consideration means what passes to the Vendor: Consideration refers to what the transferor receives, not what it pays out. Payments from Amcor to Alphington cannot be "consideration for" the transfer;
3. the payment obligations were not interdependent: unlike Resolute Mining, Alphington's payment obligation concerned acquiring land and Amcor's reimbursement obligation concerned remediation

works—a different subject matter. The payment timing was tied to invoices for works, not to settlement of transfers. There were no default clauses linking Amcor payment obligations with its obligation to transfer land.

Interest?

The Court noted that the discretion to remit interest is broad and must be exercised case-by-case. Reasonable care is not a basis for mandatory remission of market-rate interest. The Court concluded that there was no legal error in the Commissioner's decision not to remit interest.

KEY TAKEAWAY

The concept of consideration for duties purposes can be broader than simply the stipulated purchase price. For example, if the purchaser agrees to do something for the purchaser, that obligation may form part of the consideration. Similarly, payments from the vendor to the purchaser may not reduce the consideration, depending upon how the contract is drafted and whether it can be said to be a reduction in the purchase price.

Citation *Alphington Developments Pty Ltd v Commissioner of State Revenue* [2025] VSC 709 (Stynes J, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2025/709.html

2.10 51 Ochr – NSW land tax and grouping of related companies

Facts

27 companies (**Land Companies**) owned land in New South Wales. The shares in the Land Companies are held either by Addison TST Co Pty Limited (**Addison Co**) in its capacity as the trustee for the Addison Trust or Eveash TST Co Pty Ltd (**Eveash Co**) in its capacity as trustee for the Eveash Trust.

Jean Nassif was the named beneficiary and appointer of each of the Addison Trust and Eveash Trust. Jean was also the sole director of all of the Land Companies, Addison Co and Eveash Co.

Revenue NSW issued land tax assessments, and reassessments, to the Land Companies for the 2019 to 2023 land tax years. The assessments and reassessments were issued on the basis that the Land Companies were "related" companies within the meaning of section 29(1) of the *Land Tax Management Act 1956* (NSW) (**LTMA**) and therefore liable for land tax as a group.

Section 29(1A) of the LTMA defines a "controlling interest" as follows:

> *(1A) A person holds, or persons together hold, a "controlling interest" in a company if--*
>
> *(a) the person, or the persons acting together, can control the composition of the board of directors of the company, or*
>
> *(b) the person is, or the persons acting together are, in a position to cast or control the casting of more than half of the maximum number of votes that might be cast at a general meeting of the company, or*
>
> *(c) the person holds, or the persons acting together hold, more than half of the issued share capital of the company.*

Section 29(2)(c), any shares held or power exercisable by a person or company as a trustee or a nominee for another person or company:

1. are to be treated as held or exercisable by that other person or company, if the trust is a fixed trust; and

2. are to be treated as not held or exercisable by the trustee or nominee (whether or not the trust is a fixed trust).

Under the constitution of each Land Companies, the directors could appoint and remove directors. Similarly, the shareholders could remove and appoint directors.

Revenue NSW argued that Jean held a “controlling interest” in all of the Land Companies, as he was a person who could control the composition of the board of directors of each of the Land Companies (as he could do so as a director) and was in a position to cast or control the casting of more than half of the maximum number of votes that might be cast at a general meeting (as director of the trustee shareholders). Revenue NSW accepted that Jean did not have a "controlling interest" under section 29(1A)(c) of the LTMA as he did not hold the shares in the Land Companies and the shareholdings of Addison and Eveash were disregarded under section 29(2)(c) of the LTMA.

The Land Companies lodged an objection to the relevant reassessment, which were disallowed by Revenue NSW.

The Land Companies then commenced proceedings in NCAT on 28 November 2024.

Issue

Were the Land Companies “related” companies within the meaning of s 29 of the LTMA?

Decision

The NCAT had to consider whether Jean had a controlling interest either because he could control the composition of the board of directors or because he had the majority voting power or could control the majority voting power at a general meeting.

The NCAT confirmed that as Addison Co and Eveash Co were trustees of the Addison Trust and the Eveash Trust respectively they did not hold the shares in the Land Companies for the purposes of s 29(1) and (1A) of the LTMA. Accordingly, neither Addison nor Eveash had a “controlling interest” in the Land Companies within the meaning of s 29(1) and (1A) of the LTMA.

Further, in relation to whether Jean had the majority voting power or could control the majority voting power at a general meeting, given section 29(2)(c) of the LTMA provides that Addison Co and Eveash Co were treated as not holding the relevant shares in the Land Companies, it could not be concluded that Jean had such a controlling interest.

Finally, in relation to Jean's powers under the constitutions of the Land Companies to appoint directors, the NCAT such powers were limited and constrained by the duties that Jean owed to the shareholders and the shareholders powers themselves to appoint and remove directors. Given this, the NCAT concluded that Jean did not have the power to control the composition of the board of directors of the Land Companies.

Accordingly, the NCAT concluded that the Land Companies are "related" companies.

KEY TAKEAWAY

Related companies are treated as a group for land tax purposes. Land tax is a self-assessment regime and, merely because the Revenue NSW assessment is not a group assessment, does not mean taxpayers should not lodge on a group basis.

Citation *51 Ochr Pty Ltd and Ors v Chief Commissioner of State Revenue* [2025] NSWCATAD 302 (EA MacIntyre)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/302.html

3. Cases in brief

3.1 EMH – GIC remission

On 7 June 2016, EMH IV Pty Ltd, acting as trustee for the EMH IV Family Trust, lodged its 2015 income tax return. The return reported no tax payable. Following a detailed audit of EMH and related parties, the Commissioner issued an assessment on 20 May 2020 determining that EMH had a tax shortfall of approximately $9 million for the 2015 income year. This meant that general interest charge (**GIC**) would accrue from the date the tax became due and payable.

On 24 March 2023, EMH sought remission of the GIC accrued from 7 June 2016. That decision was initially set aside in *Hyder v Commissioner of Taxation* [2024] FCA 464, and the matter was remitted for reconsideration by a new decision maker. On 11 October 2024, the Commissioner granted a substantial partial remission but declined to remit all GIC accruing between 7 June 2016 and 10 June 2020. EMH continued to dispute the starting date for GIC, arguing that its 2015 return had been lodged on time because, in its view, the Commissioner had extended the due date for lodgment to 7 June 2016. On 17 December 2024, the Commissioner again refused full remission. EMH commenced proceedings in the Federal Court to review this decision.

For entities that are not self-assessment taxpayers, the tax becomes "due and payable" 21 days after the day on which they were required to lodge their return, regardless of when the Commissioner later issues an assessment. If the return is lodged on or before the required lodgment date, and the Commissioner issues an assessment afterwards, the tax instead becomes due 21 days after the assessment is given.

The central question was when EMH was required to lodge its 2015 income tax return. This date determined when the underlying tax became due and payable and, accordingly, when GIC began to accrue under section 5-5 of the ITAA 1997. EMH argued that the Tax Agent Lodgment Program for 2015–2016 extended its lodgment deadline to 5 June 2016 (effectively 7 June 2016), meaning GIC could only run from 21 days after the assessment issued in May 2020.

The Commissioner maintained that EMH's lodgment deadline was 15 May 2016, with the so-called "5 June concession" constituting only a remission of failure-to-lodge penalties, not an extension of the lodgment date.

The Federal Court rejected EMH's arguments. The Court held that the Tax Agent Lodgment Program did not extend the lodgment date for individuals, partnerships or trusts. Instead, the 5 June concession merely waived penalties for late lodgment if taxpayers lodged and paid any tax by the extended date. Importantly, EMH did not fall into any category eligible for the concession because it ultimately had a substantial taxable liability and had not paid that liability by 5 June 2016.

The Court confirmed that EMH was required to lodge its 2015 return by 16 May 2016. Because the return was lodged late, the due-and-payable date for the assessed tax was 7 June 2016, and GIC began accruing from that date. The Commissioner's refusal to remit the remaining GIC involved no jurisdictional error.

KEY TAKEAWAY

ATO concessions do not always alter the operation of the law. In this case, the extension to the lodgment date did not extend the time from which interest commenced to run. While in many cases the ATO may administer the law to match the spirit of the concession, they will not always do so and, upon review, courts will generally apply the law.

TRAP – A taxpayer can only rely on the 5 June concession if they fall within one of the narrow groups identified in the Tax Agent Lodgment Program. To be eligible, an entity must already have a lodgment due date

of 15 May and must either be actually non-taxable or receiving a credit assessment for the relevant income year, or, for trusts, partnerships, and individuals, must have paid any tax owing by 5 June. The concession does not extend the statutory lodgment deadline. It is possible to request an extension of time to lodge a tax return, which may be granted by the ATO and actually extends the due date for lodgment.

COMMENT – A refusal to remit GIC cannot be appealed through an objection to the ATO, or an appeal to the ART. The only avenue for review is an application to the Federal Court. The Court does not decide whether the Commissioner's decision was the correct or preferable one, but instead considers whether the decision maker failed to take into account relevant considerations, took into account irrelevant considerations, acted unreasonably, or exercised the power in bad faith. This is a high threshold, and it means that, even if another decision might have been open, the Court will not intervene unless a genuine jurisdictional error is established.

Citation *EMH IV Pty Ltd as trustee for the EMH IV Family Trust v Commissioner of Taxation* [2025] FCA 1429 (Derington J, Queensland)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2025/1429.html

3.2 Charles Apartments – deductibility of interest

Charles Apartments, part of the Demian Group, was established in 2001 as a special purpose entity to acquire and develop three properties at Charles Street, Parramatta for sale. In February 2002, it purchased the properties for $3.125 million, funded by a $3 million loan from St George Bank secured by a mortgage. By mid-2003, the group faced financial pressure, and Charles Apartments' St George facility was due to expire.

In December 2003, the group obtained a $27 million facility from Suncorp through West Apartments Pty Ltd to consolidate debts and fund new projects. Suncorp required security, including a first mortgage over the Charles Street properties and guarantees from group entities, including Charles Apartments. To provide this security, Charles Apartments' St George loan was paid out using $3 million advanced internally from Demian Investments, sourced from the Suncorp facility.

According to the terms of the intra-group loan, Charles Apartments was not liable to pay interest as it accrued, but instead would pay the capitalised interest out of the sale proceeds when it sold the properties, capped to the amount of the sale proceeds after repaying the principal. The prevailing rate of interest on the intra-group loan matched that for which West Apartments was liable to Suncorp.

In 2009, West Apartments was in default under the terms of the Suncorp Facility. Suncorp was considering withdrawing that facility or taking enforcement action. To prevent this, Charles Apartments signed a Deed of Forbearance which set out an action plan that required additional security, further guarantees and the sale of assets by companies within the Demian Group. Its terms made clear that although the Charles Street properties had originally been mortgaged only to secure the debt under the 2003 Suncorp facility, Charles Apartments and the other obligors were acknowledging responsibility for all debts owed under all of the group's facilities.

On 12 May 2010, following discussions with Suncorp, Mr Demian received verbal consent to proceed with the sale of the three Charles Street properties.

On 13 August 2010, the full net sale proceeds of $4,870,223 from the three property contracts were remitted directly to Suncorp. Of this, $3 million was attributed to the repayment of principal and the balance of $1,870,223 was treated as interest under the terms of the intra-group loan.

The Commissioner disallowed the interest deduction and confirmed that position on objection. Charles Apartments sought review by the AAT, which allowed the deduction. The AAT found that "but for" the sale of

the properties, which gave rise to assessable income for Charles Apartments, the interest would not have fallen due and payable by Charles Apartments.

Both parties then appealed to the Federal Court, where the primary judge dismissed Charles Apartments' appeal and allowed the Commissioner's cross-appeal, confirming no deduction was allowable. Charles Apartments appealed to the Full Court.

The Full Court agreed with the primary judge that the AAT erred by adopting "but for" reasoning, when it had emphasised the fact that Charles Apartments would not have derived assessable income from the sale without agreeing to remit all proceeds to Suncorp. The correct approach was to examine the character of the payment itself. The $4.83 million was applied to reduce the group's indebtedness under the Suncorp facility, pursuant to guarantees and mortgages given by Charles Apartments. The advantage obtained was the release of securities and forestalling enforcement action, which is capital in nature.

Although the amount may have included capitalised interest, any liability discharged was that of West Apartments to Suncorp, not Charles Apartments under its intra-group loan. The consent to the sale was given by Suncorp expressly on the basis that the net proceeds of sale were required to be applied, and were on 13 August 2010 directly applied, to the Demian Group's Suncorp Facility. That is, they were not applied to repay the intra-group loan and associated interest owed by Charles Apartments to Demian Investments or its assignee.

The Full Court rejected the argument that the refinancing principle applied, finding no nexus between the payment and the original St George borrowing by Charles Apartments. The intra-group loan was effectively limited recourse, and after the payment to Suncorp, nothing remained payable to the assignee of that loan. Accordingly, the payment was an outgoing of capital or of a capital nature, and the claimed deduction under section 8-1 was not allowable.

KEY TAKEAWAY

This case reinforces that the test for deductibility is not a but for test but, rather, whether the occasion of the expenditure is an income producing use. The Court specifically commented on applying a but for stating as follows:

24. "But for" reasoning in relation to whether a deduction claimed under s 8-1 of the ITAA 1997 can have Siren-like attraction, and it is apt to lure those who sail on fiscal waters onto the rocks of failing to apply the language of the statute to the facts.

It remains to be seen whether the ATO, which often applies a 'but for' test to section 8-1, will heed this lesson.

Citation *Charles Apartments Pty Limited v Commissioner of Taxation* [2025] FCAFC 180 (Logan, Downes and Goodman JJ, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2025/180.html

3.3 Ziegler – dividend streaming and assessable recoupment

On 21 April 2009, Peter Ziegler and related entities entered into a settlement deed with the ATO to in settlement of the disputed taxation liabilities 22 related entities between 1998 and 2004. The agreed settlement sum was $3,900,000 plus GIC, and a single assessment would be to Orrong Strategies Pty Ltd (**Orrong**) for the 2008 income year.

Following the settlement, Peter reorganised ownership of Orrong and engaged in a series of intra-group transactions, including assuming obligations under a credit facility, the cancellation of options in another group entity, and the declaration of a fully franked dividend of nearly $7 million by Orrong. The dividend generated

imputation credits of $2.99 million which, once combined with deductions and losses, gave Peter personally a tax refund of approximately the same amount as the settlement sum.

The Commissioner viewed this outcome as undermining the commercial basis of the Settlement Deed, as most of the funds received by the ATO from Orrong were ultimately refunded to Peter through the tax offset. The Commissioner responded by cancelling the imputation benefits under the dividend anti-streaming rules in section 177EA of the ITAA 1936 and seeking recovery of the refund as an administrative overpayment pursuant to section 8AAZN of the ITAA 1936.

At the same time, for a separate issue, the Commissioner credited $13.7 million of recalculated GIC to Peter's Income Tax Account, which Peter had previously deducted. The Commissioner treated this credit as an assessable recoupment under section 20-20(3) of the ITAA 1997.

Both Peter and one of the group entities later objected to various penalty assessments, which the Commissioner then increased from 25% to 75% or 90% for intentional disregard of the law.

Peter appealed the objection decisions in the AAT and subsequently appealed the AAT decision in the Full Federal Court. The Full Court held as follows:

1. the crediting of general interest charge to Peter's account was a recoupment of an amount he had actually deducted, making it assessable. The amended assessment did not retrospectively extinguish the original liability, and section 20-20 of the ITAA 1997 applied to deductions in fact claimed, whether or not they were ultimately correct;
2. the Commissioner's duty to assess penalties was ongoing. While section 14ZY of the TAA 1953 empowers the Commissioner to allow an objection in whole or in part or to disallow the objection, section 298-10 of Schedule 1 to the TAA also empowers the Commissioner to increase penalties on objection;
3. the AAT had correctly concluded that Peter had a more-than-incidental purpose of obtaining an imputation benefit when orchestrating the share transfer and dividend. The section 177EA determination was valid; and
4. that a taxpayer cannot prove an assessment is excessive by reference to alleged breaches of a settlement deed. Excessiveness must be assessed only by reference to substantive tax law.

COMMENT – Peter has sought leave to appeal this decision in the High Court.

Citation *Ziegler v Commissioner of Taxation* [2025] FCAFC 168 (Bromwich, Thawley and Jackman JJ, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2025/168.html

3.4 Issa – services of director penalty notices

On 29 August 2023, the Australian Taxation Office generated and arranged for the posting of three Director Penalty Notices to Elie Issa in relation to unpaid GST liabilities of three companies for which he was a director: Seeky IP, Go Check ID and Sports Foyer IP. When combined, the unpaid amounts exceeded $2 million. Under Division 269 of Schedule 1 to the TAA, Elie became personally liable for penalties equal to the companies' unpaid amounts after they failed to meet their obligations.

On 18 April 2024, the Deputy Commissioner commenced proceedings seeking recovery of these penalties.

Elie denied liability on the basis that he had not received any Director Penalty Notices and arguing that, even if notices were posted, they were sent by an external contractor, Computershare Communication Services (**CCS**), rather than the Commissioner as required under the legislation.

The Court accepted detailed evidence from ATO officers and CCS personnel demonstrating an automated system in which the ATO sent daily print-ready correspondence files to CCS. On 28 August 2023, CCS received such a file containing the three notices issued to Elie. CCS printed the notices, processed them through its mailing machinery and lodged them with Australia Post the following day.

Although Elie argued that barcodes on the notices suggested the pages might have been misaligned in envelopes, the Court found this unpersuasive. Evidence established that CCS's mailing machine would stop if pages were incorrectly positioned such that the address and barcode could not be seen through the envelope window, and no irregularities were recorded. The Court was satisfied on the balance of probabilities that the notices were correctly addressed, pre-paid and posted on 29 August 2023.

Elie contended that only the Commissioner, a delegate, or an ATO officer could lawfully perform the act of posting. The Court rejected this argument, holding that printing and posting were purely administrative tasks that did not require statutory power. The Court found that the Commissioner could rely on external service providers to carry out administrative support functions without any formal delegation.

The Court concluded that the notices were posted by the Commissioner for the purposes of section 269-25 even though CCS performed the physical steps.

KEY TAKEAWAY

Service of a DPN is not dependent on the director having received the notice. The DPN will be deemed to have given by the ATO placing it in the post addressed to the last known address of the director (with the ATO or ASIC).

Citation *Deputy Commissioner of Taxation v Issa* [2025] NSWSC 1444 (Faulkner J, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2025/1444.html

3.5 Tao – Victorian landholder duty on change of control

On 11 February 2014, Zhiyong Tao purchased the four shares in 66 William Road (**66WR**) held by Nicolaos Constantinou. On 6 March 2014, Zhiyong was appointed as the sole director and secretary of 66WR, replacing Nicolaos who resigned on the same day. 66WR was the trustee of the WCT Unit Trust, which owned a development property at Hutchinson Road, Lynbrook. Because the trust was a private unit trust with Victorian land valued at more than $1 million, it was a private landholder for the purposes of the *Duties Act 2000* (Vic). The Commissioner later assessed Zhiyong for landholder duty, penalty tax and interest on the basis that he had made a relevant acquisition under the acquisition of control provisions in section 82 of the *Duties Act*.

Section 82 of the *Duties Act* applies where a person acquires the capacity to determine or influence the financial and operating policies of a private unit trust scheme. The provision does not require the person to hold units or other beneficial interests, and it operates separately from the direct interest and economic entitlement provisions. A relevant acquisition occurs if the person obtains practical control, whether directly or through another entity, and section 82(4) empowers the Commissioner to determine the extent of the acquisition, including by considering any economic or beneficial interests already held.

Zhiyong objected to the assessment. The objection was disallowed and Zhiyong appealed to the VCAT.

The VCAT reviewed extensive evidence about the 2011 joint venture, the acquisition and financing of the Lynbrook property, the severe financial difficulties that emerged after 2013 and the circumstances that led to Zhiyong taking over 66WR, the trustee company. The VCAT found that from March 2014 until Bendigo Bank appointed controllers in April 2015, Zhiyong had practical responsibility for strategic decisions concerning refinancing and sales. It accepted that although Nicolaos and Wilfred Wiemer were consulted, they exerted influence only, while Zhiyong alone held decision making control because he was the sole director and

shareholder at a time when the trust was in financial crisis. The VCAT concluded that Zhiyong acquired control for section 82 purposes on 6 March 2014.

The VCAT rejected Zhiyong's submission that section 82 required a corresponding acquisition of a beneficial or economic interest. It held that section 82 operates independently of other landholder duty provisions, applying wherever a person gains the practical capacity to determine or influence financial and operating policies. Turning to the extent of the deemed acquisition, the VCAT accepted that Zhiyong held an indirect 15% economic interest through another entity called Amber Investments. It exercised the discretion in section 82 to reduce the relevant acquisition from 100% to 85% and remitted the assessment accordingly.

Zhiyong sought leave to appeal to the Supreme Court of Victoria, raising three questions of law about the construction of section 82 and the VCAT's exercise of the discretion:

1. whether Zhiyong had reasonable prospects of demonstrating that the VCAT misapplied section 82 by failing to treat it as a composite provision;
2. whether the VCAT misunderstood the purpose of the discretion that the Commissioner may apply under section 82, such that the VCAT made a legal error in relation to the application of section 82; and
3. whether any of the Commissioner's conduct preceding the VCAT proceeding, particularly the shift from relying on section 78 to relying solely on section 82, could amount to legal error by the VCAT.

Justice Sloss refused leave to appeal on the basis that Zhiyong did not have reasonable prospects of demonstrating that the VCAT misapplied section 82 by failing to treat it as a composite provision. The VCAT's two-stage reasoning was entirely consistent with the statutory framework. Justice Sloss found that the VCAT's reduction to an interest of 85% by Zhiyong was a proper exercise of the discretion. In addition, since Zhiyong never sought a reduction of his interest in the trustee to zero before the VCAT, he could not claim that the VCAT committed an error of law by failing to reduce the percentage further in the Supreme Court. Justice Sloss also held that beneficial ownership, winding-up hypotheticals, and similar matters were irrelevant to section 82. Section 82 concerns acquisition of control, not beneficial interests.

In relation to the second issue, Sloss J found that the VCAT expressly considered the purpose of the discretion, including the anti-avoidance context of the landholder regime, and applied it consistently with the text and purpose of section 82. The Supreme Court confirmed that section 82 is not limited to situations involving changes in beneficial ownership and that the VCAT was correct to reject Zhiyong's policy-based arguments. Ultimately, the purpose of section 82 is to apply to changes in control of a landholder.

Justice Sloss found that the VCAT did consider the only fact-specific matters pressed by Zhiyong at the hearing, and that he could not later complain about the VCAT's failure to consider matters never raised. Her Honour held that many of the additional factors on which Zhiyong relied were irrelevant to section 82 because the provision concerns the practical acquisition of control, not beneficial interests or hypothetical winding-up outcomes.

TRAP – in Victoria, landholder duty can arise from a mere change in control of a landholder, without a person making an actual acquisition in the landholder. These provisions need to be considered when changes are made in shareholders or unitholders in a landholder or in the directorsips of the landholder, which may give rise to a change in control of the landholder.

KEY TAKEAWAY

Duty can arise in all States from innocuous transactions. For example, a transfer of shares in a corporate trustee, where the trust owns land, may be an acquisition in a landholder. It is important that duties advice be obtained on any transactions, particularly where there is a connection to land.

Citation *Tao v Commissioner of State Revenue* [2025] VSC 831 (Sloss J, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2025/831.html

3.6 Oei – Victorian absentee tax

Sri Sumeiner Oei is an Indonesian citizen who moved to Australia in the early 2000s to study. She later obtained a Subclass 880 permanent visa that permitted her to remain indefinitely, but restricted her ability to re-enter Australia post-July 2008.

Sri purchased a flat in Glen Waverley in 2005 and lived there with her husband before the couple travelled to Hong Kong in 2008, ultimately remaining there long-term after starting a family. During this period, Sri lived in Hong Kong with her husband and three children, returning to Australia only once in 2019 for just over a week, and did not come back permanently until 2022. Her Glen Waverley property remained vacant for several years before being leased from 2016 onwards while she resided overseas.

The land tax framework in Victoria imposes tax on the owner of Victorian taxable land as at midnight on 31 December before each tax year, with higher surcharge rates applying to "absentee owners". A person is an absentee owner if they are an absentee person who owns Victorian land. A natural person is an absentee person if:

1. they are not an Australian citizen or the holder of a permanent visa;
2. they do not ordinarily reside in Australia; and
3. they were either absent from Australia on 31 December of the preceding year or absent for at least six months in that year.

Individuals who are absentee owners must notify the Commissioner by mid-January each year, and failure to do so gives rise to penalty tax unless reasonable care was taken or remission is granted.

The Commissioner assessed Sri at the absentee owner surcharge rates for the 2018–2022 land tax years, and penalty tax was imposed due to her failure to lodge the required absentee owner notifications. Sri objected to the assessments and her objection was disallowed. Sri applied to the VCAT for review of the decisions.

The VCAT found that Sri met all elements of the absentee owner definition. It found that although she once held a permanent visa, this visa ceased when she left Australia in 2008 because its travel facility had expired. Her later entry into Australia on a visitor visa in 2019 confirmed that she was no longer a permanent resident, and she had never become an Australian citizen. Sri, therefore, did not meet the requirement of being an Australian citizen or resident for any of the relevant land tax years.

The VCAT also found that Sri was absent from Australia on every 31 December from 2017 to 2021. Her evidence showed that she had lived continuously in Hong Kong for over fourteen years, apart from one short visit in 2019, so the statutory absence requirement was clearly satisfied.

The key issue was whether she nevertheless "ordinarily resided" in Australia. The VCAT found that she did not. While Sri maintained that she always intended to return, her objective circumstances showed that her ordinary residence was in Hong Kong. She had lived there long term, raised her children there, and established her domestic and family life there. Whilst Sri maintained a bank account, superannuation and library membership in Australia, Deputy President Tang found that these were insufficient to establish that Sri ordinarily resided in Australia. Her Glen Waverley property had been converted into a rental investment rather than maintained as a place for her to live, and her remaining ties to Australia were minimal.

The VCAT therefore concluded that she was a natural person absentee for each year and that the surcharge assessments were correctly imposed, although it reduced the penalty tax to 20% because she had not received the Commissioner's correspondence and lost the opportunity to make a voluntary disclosure.

Citation *Oei v Commissioner of State Revenue (Review and Regulation)* [2025] VCAT 1062 (Deputy President Tang AM, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2025/1062.html

3.7 Richwol – Victorian land tax principal place of residence

In 2017, Kim Richwol and her sister-in-law, Lena Brukarz, purchased a single parcel of land in Brighton East as tenants in common in equal shares. They agreed that each would build a townhouse for their respective families, with Lena and her family exclusively using the dwelling that later became known as Lot 11A, and Kim and her family using the adjoining dwelling, Lot 11B. After construction was completed, the land was subdivided in November 2022 into the two lots, although both women remained listed on title as co-owners of each lot in equal undivided shares.

For the 2023 land tax year, the Commissioner allowed Kim to claim the principal place of residence exemption on her half share of Lot 11B, where she lived. However, he assessed her to land tax on her half share of Lot 11A, which was occupied solely by Lena. Kim objected to this assessment. After it was confirmed, she brought the matter before the Victorian Civil and Administrative Tribunal for review.

Kim submitted that she was not a person entitled to land for a freehold estate in possession for Lot 11A because she did not physically use or occupy that land. She and Lena had agreed that Lena would have exclusive control and domestic enjoyment of Lot 11A. Kim argued that "in possession" should be interpreted according to ordinary, non-technical language, meaning actual physical possession, especially where the properties were used only for private domestic purposes.

The Commissioner argued that ownership for the purposes of the *Land Tax Act 2005* (Vic) depends on legal title, not physical occupation. The Commissioner relied on Croft J's reasoning in *Lotus Projects Pty Ltd v Commissioner of State Revenue* [2010] VSC 158, which confirmed that a person registered on title holds a freehold estate in possession and is therefore an owner for land tax purposes. The Commissioner submitted that Kim remained an owner of Lot 11A regardless of the families' private arrangement and that the joint ownership provisions in sections 38 and 39 required her to be assessed on her half share.

The VCAT adopted the High Court's interpretation of the expression "estate in possession" in *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490, where the High Court held that the phrase carries a technical legal meaning. An "estate in possession" refers to a present right to beneficial enjoyment, not to actual physical occupation. This distinguishes it from estates in remainder or reversion.

Applying that approach, the VCAT found that Kim, as a registered proprietor, retained a present legal right of enjoyment in Lot 11A even though she allowed Lena to occupy it exclusively. As she did not use Lot 11A as her principal place of residence, she was liable for land tax on her half share of the property.

COMMENT – The position is different in other States. For example in NSW, the principal place of residence exemption attaches to the land itself, rather than the proprietor's interest. In NSW, provided that the land is the principal place of residence of an owner who holds at least a 25% interest, and that owner otherwise meets the requirements for the principal place of residence exemption to apply, then the land is exempt. An exception to this is where the land is jointly owned by a company or special trust, which prevents the exemption from applying.

Citation *Richwol v Commissioner of State Revenue (Review and Regulation)* [2025] VCAT 1065 (Deputy President Tang AM, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2025/1065.html

3.8 Jones – NSW land tax principal place of residence

On 1 May 2018, Amy Jones purchased a home in Sydney and lived in it continuously as her principal place of residence. On 1 December 2023, following the sudden death of her mother, Amy decided to leave Sydney to live with and care for her father on his rural property in northern New South Wales, as he was struggling

emotionally and practically after his bereavement. On 23 December 2023, she entered into a residential tenancy agreement to lease out her Sydney home. The lease ran slightly longer than twelve months, ending on 5 January 2025, to avoid requiring the tenant to vacate during the Christmas period. On 5 January 2025, Amy returned to Sydney and resumed living in the property with her family.

On 1 January 2024 and again on 1 January 2025, the Chief Commissioner issued land tax assessments. Amy accepted liability for the 2024 assessment because she was not living in the property at the relevant taxing date. However, she applied to the NCAT for administrative review of the 2025 assessment, seeking to have it revoked on compassionate grounds or reduced proportionally to reflect that she had occupied the home for almost the entire 2025 calendar year.

The NCAT considered whether Amy satisfied the principal place of residence exemption under the *Land Tax Management Act 1956* (NSW) (**LTMA**). It also considered whether any temporary absence concession applied and whether compassionate or proportional relief was legally available.

Section 7 of the LTMA requires land tax to be paid annually on all taxable land unless an exemption applies. Section 8 states that land tax is levied based on ownership and land use as at midnight on 31 December before the tax year. Schedule 1A, clause 2 provides the principal place of residence exemption, which applies only where the owner uses and occupies the property as their principal residence at the taxing time. Clause 8 provides a concession that allows owners who temporarily vacate their home to continue to access the exemption, provided the absence is less than six years and any rent received is only enough to cover basic holding costs,

The NCAT found that Amy did not meet clause 2 because she was leasing out the property at midnight on 31 December 2024 and was not using or occupying it as her principal place of residence at that time. The NCAT noted that if the lease had ended before 31 December and Amy had moved back in immediately, she likely would have satisfied this requirement. However, it was required to apply the law to the actual facts.

The NCAT also found that clause 8 was unavailable because Amy received full market rent for over twelve months. Since the rent exceeded the level permitted under clause 8, the concession could not apply.

The NCAT confirmed that it has no power to waive or reduce tax on compassionate grounds. Liability arises strictly under the legislation, and the law provides no discretion to adjust tax based on hardship or fairness. The NCAT also held that a proportional reduction is not permitted because land tax is an annual tax based on the single taxing date of 31 December.

Citation *Jones v Chief Commissioner of State Revenue* [2025] NSWCATAD 324 (S E Frost, Senior Member) w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/324.html

3.9 Kim Investments– appeal rights and unpaid QLD land tax assessments

On 10 July 2024, Kim Investments GC Pty Ltd (**Kim Investments**) received a default assessment from the Commissioner of State Revenue assessing landholder duty of $440,525 and assessed interest of $95,124, totalling $535,649. On 24 January 2025, the Commissioner confirmed this amount after Kim Investments objected.

On 19 March 2025, Kim Investments paid the full amount shown on the assessment notice, and on 25 March 2025 it filed an appeal in the Supreme Court of Queensland. By that time, however, extra late payment interest had accrued on the unpaid primary tax. The Commissioner later stated that an additional $37,216.24 was outstanding as at the date the appeal was lodged. Kim Investments paid the further amount on 11 July 2025.

Under section 69(1)(b) of the *Taxation Administration Act 2001* (Qld), a taxpayer who is dissatisfied with an objection decision may only appeal to the Court or tribunal if they have paid "*the whole of the amount of the tax and late payment interest payable under the assessment to which the decision relates*".

Based on this framework, the Court held that Kim Investments had not paid everything required before filing its appeal. Even though late payment interest does not appear on the original assessment notice, it arises automatically while the assessed tax remains unpaid. The Court also confirmed that the internal way in which the Commissioner applies payments does not determine whether the appeal right is available, and that the later payment made in July 2025 could not retrospectively cure the failure to meet the statutory requirement before the appeal.

The Court ultimately concluded that Kim Investments had not satisfied the payment condition before filing its appeal and that the right of appeal had not been validly triggered.

Citation *Kim Investments GC Pty Ltd v Commissioner of State Revenue* [2026] QSC 4 (Cooper J, Brisbane)
w https://archive.sclqld.org.au/qjudgment/2026/QSC26-004.pdf

3.10 Re Cassar Family Trust – appointment of trustee

The Cassar Family Trust was established by an undated trust deed. Under the trust deed, Frank Cassar was the appointor of the trust during his lifetime. Frank's brother, Raymond Cassar, was named as the original trustee.

Clause 16.1 of the Trust Deed required that any removal or appointment of a trustee or appointor be exercised only by a person entitled to hold the power of appointment and that it be done by an instrument in writing. The Trust Deed provided that the person entitled to exercise this power was first Frank as appointor, then upon his death, the person he had appointed during his lifetime, and if none, his legal personal representative, or if no such person existed, the trustee could exercise the power.

In October 2011, Frank died. He was survived by his partner, Sandra Cassar, and their four children, Michael, Paul, Francis and Teresa Cassar.

On 3 February 2012, Michael obtained probate of a Will dated 24 September 2009, under which he was named sole executor and sole beneficiary of Frank's estate. This Will was later proved to be a forgery.

On 13 September 2012, Raymond allegedly retired as trustee and appointed Michael as trustee of the Cassar Family Trust, but no instrument in writing was able to be located or produced.

In his purported capacity as trustee of the Cassar Family Trust, Michael dealt extensively with estate assets, including transferring numerous properties to himself. He also transferred a property at 371 Fitzroy Street was transferred into his name as trustee of the Cassar Family Trust. Michael also exercised control over trust affairs more generally.

In March 2022, proceedings found that the Will was forged. Probate was revoked and Michael's actions as executor of the Will were declared invalid. Letters of administration on intestacy was be granted to Sandra.

On 19 August 2022, Michael executed a Deed of Variation inserting a new clause allowing a trustee to appoint a new appointor if the named appointor had died. He then used this newly inserted clause to appoint his wife, Samantha Barber, as appointor. On 12 July 2024, Sandra, as Frank's legal personal representative and therefore appointor by operation of the Trust Deed, executed a Deed of Appointment and Removal removing Michael as trustee and appointing a company as the new trustee of the trust.

On 10 April 2025, the new corporate trustee and Sanda sought declarations from the Supreme Court of Victoria to confirm that Michael's appointment as trustee of the Cassar Trust was void and therefore various actions made by him in his purported capacity as trustee were void and of no effect. They also sought declarations that Sandra was the appointor of the Cassar Family Trust and the appointment of the corporate trustee was valid. The Supreme Court held that Michael had never validly become trustee of the Cassar Family Trust. The Trust Deed required written instruments for any appointment or removal of a trustee, and no written appointment existed. Although Raymond may have believed he could appoint Michael, the absence of a written instrument rendered the appointment invalid.

Because Michael had not been validly appointed trustee, he had no authority to vary the Trust Deed or to appoint Samantha as appointor. Both acts were declared void. The Court further held that the transfer of 371 Fitzroy Street to Michael in his purported capacity as trustee was invalid.

Sandra validly became appointor when she became Frank's legal personal representative in 2022. Her appointment of the new corporate trustee in July 2024 was therefore valid.

COMMENT – This decision is an important reminder that trust administration requires strict adherence to the terms of the trust deed, particularly procedural requirements for appointing and removing trustees or appointors. Failing to follow these formalities can render appointments invalid and can unravel years of dealings with trust property.

Citation *Re Cassar Family Trust* [2025] VSC 693 (12 November 2025) (Barrett AsJ, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2025/693.html

3.11 Butler – enforceability of shareholder resolution and constitution

Michael Butler was a former non-executive director of Total Tools Holdings Pty Ltd (**Total Tools**).

On 24 October 2018, shareholders unanimously approved resolutions permitting the board to issue equity-based instruments to Michael and fellow director Stephen Heath. The proposed incentive was intended to align their interests with shareholders as the company advanced "Project Special Tiara", a dual-track process aimed at either an IPO or trade sale. The resolution expressly "authorised" the board to create and allot an equity instrument equivalent in value to 30 ordinary shares as at 30 September 2018, subject to completion of an IPO or trade sale.

Project Special Tiara was later paused in early 2019 after significant financial and governance issues emerged within the business. Shareholder dissatisfaction grew, and Michael ultimately resigned as a director on 1 April 2019.

The trade sale was later achieved through a different project and transaction structure, culminating in Metcash Limited (**Metcash**) acquiring 70% of the company on 1 September 2020 and the remaining shares by 2023.

On 2 March 2023, Michael received a letter from Julie Hutton, the chief legal, risk and compliance officer and company secretary of Metcash, which stated that the documentation she reviewed does not show that the Board ever passed a resolution to issue Michael any shares or other securities of any class in the capital of Total Tools.

Michael asserted that, despite having resigned, Total Tools was contractually obliged to issue him shares valued at 1.29% of the company at the time of the 2020 sale. He claimed this obligation arose from the 2018 resolution and the company's constitution. Total Tools disputed this, arguing the resolution merely provided authorisation, not a binding requirement.

Michael brought proceedings against Total Tools in the Federal Court.

Justice Anderson held that the 2018 shareholders' resolution authorised rather than required the board to issue equity. Several key factors supported this view:

1. the shareholders' resolution expressly used the word "authorised";
2. there was a discretion as to the timing of the issue of the shares (based on the words "at a time of the Board's choosing" in the shareholders' resolution); and
3. there was a discretion as to the form of the chose in action granted (being "an equity-based instrument in the Company or a successor entity of the Company").

Further, even if the shareholders' resolution created substantive rights, Michael could not enforce them. Once he resigned, he became an outsider to the statutory contract formed by the constitution under section 140 of the *Corporations Act*. The Court confirmed that only members, directors, and the company may enforce a constitution, and not former officeholders. The shareholders' resolution itself is not a contract that can be enforced.

The Court dismissed the proceeding, finding no entitlement to equity and no enforceable rights under the resolution or constitution.

Citation *Butler v Total Tools Holdings Pty Ltd* [2025] FCA 1225 (Anderson J, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2025/1225.html

3.12 Nunc Coepi – special trust or a fixed trust for land tax purposes

On 26 October 2023, the Chief Commissioner assessed land tax on the basis that the Vieira Family Unit Trust was a special trust rather than a fixed trust. Nunc Coepi objected, but the objection was disallowed. On 18 June 2025, the NCAT affirmed the assessment. Nunc Coepi then lodged an appeal, six days out of time. The Appeal Panel granted an extension, noting that Nunc Coepi had been unrepresented at filing.

The appeal ultimately turned on the proper construction of clause 2.9 of the trust deed, which stated:

> *If the Trustee is obliged to conduct the Trust:*
> *…*
> *(a) a Fixed Trust where the Trust owns real estate in New South Wales the most logical provisions conceivable not expressed in this deed necessary to enable the Trust to be a Fixed Trust shall be taken to apply by this deed as provisions of this deed overriding the express provisions of this deed excepting paragraph (a)*

Section 3A of the *Land Tax Management Act 1956* (**LTMA**) allows a trust to qualify as a fixed trust in two ways.

Under section 3A(2), the equitable estate in all of the land must be owned by persons who are recognised as owners for land tax purposes. In practice, this requires unitholders to possess genuine equitable ownership rather than the more limited interests typical of commercial unit trusts.

Alternatively, section 3A(3A) deems a trust to be fixed if it satisfies the "relevant criteria" in section 3A(3B). These criteria require the trust deed to specifically provide that beneficiaries are presently entitled to both income and capital, that these entitlements cannot be altered by discretion, that only one class of units exists, and that the same proportion governs both income and capital on winding up. These requirements must appear clearly and expressly in the deed.

The Appeal Panel of the NCAT agreed with the original NCAT decision. The Panel found the wording of clause 2.9 to be conditional, imprecise, and ultimately unworkable. The use of the word "if" signalled that the obligation only arose once some external trigger occurred. No evidence showed that any such step had ever been taken. Even if it had been, clause 2.9 did not identify with certainty which statutory pathway was intended, how the

inserted terms would interact with the existing deed, or which express provisions were being overridden. It therefore could not satisfy the requirement that the deed must specifically provide the fixed trust criteria.

Citation *Nunc Coepi Pty Ltd atf Vieira Family Unit Trust v Chief Commissioner of State Revenue* [2025] NSWCATAP 299 (K Robinson, Principal Member, EA MacIntyre, Senior Member)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAP/2025/299.html

3.13 FKG01 – subsale provisions

On 25 May 2022, Jeteld Pty Ltd entered into a contract to sell its commercial property in Toowoomba to FKG01 Pty Ltd for $10 million. At that time, the property was leased to Suncorp, whose lease included a make good requirement and was due to expire shortly after the scheduled settlement date. Before settlement, FKG01 negotiated with Suncorp, with Jeteld's approval, for Suncorp to pay $50,000 in lieu of performing make good works. Jeteld received this payment on 15 June 2022, and both Jeteld and FKG01 agreed that the amount would reduce the purchase price to $9.95 million so that FKG01 would be placed in the position it would have been had settlement occurred before Suncorp's lease expired.

On 14 June 2022, FKG01 paid transfer duty of $555,525 on the original contract. Shortly afterwards, Jeteld sought to rescind and replace the contract for its own tax timing purposes, proposing that the transaction be re-documented under a contract entered after 1 July 2022. FKG01 agreed to renegotiate and to extend settlement while revised terms were discussed. In late June 2022, FKG01 also decided that a related entity, 122 Margaret Street Pty Ltd, would instead act as the purchaser.

On 31 August 2022, Jeteld, FKG01 and 122 Margaret Street executed a deed of rescission, and Jeteld entered into a replacement contract with 122 Margaret Street. The new contract again stated a price of $10 million, with a settlement adjustment reducing it by $50,000. Transfer duty was assessed in the same amount as before and was paid. The deed of rescission included indemnities under which Jeteld assumed responsibility for any transfer duty that might ultimately remain payable on the cancelled contract.

On 11 October 2022, FKG01 applied to the Commissioner of State Revenue for a refund of the duty paid on the cancelled contract on the basis that it qualified for the exemption for cancelled agreements in section 115 of the *Duties Act 2001* (Qld). The Commissioner refused the refund, treating the replacement contract as a resale agreement, which would remove the exemption. FKG01 successfully appealed to the Supreme Court, and the Commissioner appealed to the Queensland Court of Appeal.

The Court of Appeal dismissed the Commissioner's appeal and held that the replacement contract was not a resale agreement. The $50,000 adjustment did not confer a financial benefit on FKG01 or 122 Margaret Street because it simply restored the position that FKG01 would have enjoyed had the original contract settled as expected. The Court accepted that 122 Margaret Street paid market value for the property, and the reduced effective price of $9.95 million merely reflected the value of Suncorp's make good payment, not a profit or gain.

The Court also held that the indemnities in the deed of rescission were not financial benefits. They merely ensured that FKG01 would not be financially disadvantaged by Jeteld's request to restructure the transaction and therefore did not fall within the type of financial benefit contemplated by section 115.

KEY TAKEAWAY

The case confirms that where a replacement contract only restores the parties to the positions they would otherwise have occupied, and no profit or advantage arises, the replacement contract will not be a resale agreement for the purposes of section 115. As a result, the exemption applied and transfer duty was not payable on the original, cancelled contract.

Citation *Commissioner of State Revenue v FKG01 Pty Ltd* [2026] QCA 12 (Bowskill CJ, Doyle JA, Wilson J, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCA/2026/12.html

3.14 Appeal Updates

YTL Power

The Commissioner has filed an appeal in the Full Federal Court against a decision of Hespe J, in the Federal Court of Australia, in relation to the imposition of capital gains tax on a disposal of membership interests in an Australian entity, ElectraNet Pty Ltd of in excess of $947 million. Previously, Hespe J had ruled that the taxpayer could disregard the gain as a result of the interpretation of the definition of "taxable Australian property" under Division 855 of the ITAA1997 as it applied to transmission network lease assets held under a state privatisation scheme.

Rusanov

The High Court has refused an application for special leave to appeal the decision in *Rusanov v Commissioner of Taxation (No 3)* [2025] FCAFC 117. The Full Federal Court had dismissed Rusanov's appeal against the Federal Court decision for want of prosecution and default of appearance. The Federal Court decision had upheld an AAT ruling which confirmed default assessments attributing unexplained deposits and expenses in Rusanov's bank accounts to taxable income. Rusanov argued the deposits were gifts or loans from individuals in Russia, but no contemporaneous evidence was provided. The Full Court noted repeated adjournments, lack of attendance, and unpersuasive arguments, describing the case as one with dubious merit that needed to be concluded. The taxpayer sought leave to appeal to the High Court on the grounds of The High Court determined that leave to appeal should not be granted because the taxpayer did not properly raise the procedural fairness issue in the lower court, and in any case, the proposed appeal lacked sufficient prospects of success to justify granting special leave.

Citation *Rusanov & Anor v Commissioner of Taxation* [2025] HCADisp 246 (Edelman and Gleeson JJ)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCADisp/2025/246.html

3.15 Other tax and super related cases published from 11 Nov 2025 to 11 Feb 2026

Citation	Date	Headnote	Link
The Mackay Community Foundation Ltd ATF the Mackay Community Trust v Commissioner of State Revenue [2025] QCAT 476	12 November 2025	TAXES AND DUTIES – STAMP DUTIES –EXEMPTIONS – CONVEYANCE OR TRANSFER ONSALE OF REAL PROPERTY – QUEENSLAND – where the Applicant applied to the Commissioner to be registered as a trustee of a charitable institution – The refused the application and refused an exemption to transfer duty – where the Applicant sought a review of the Commissioner's decision to refuse the exemption – whether the Applicant is an "institution" within the meaning of s149C of the Taxation	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCAT/2025/476.html

Citation	Date	Headnote	Link
		Administration Act 2001 (Qld)	
Maclachlan v Chief Commissioner of State Revenue [2025] NSWCATAD 284	18 November 2025	TAXES AND DUTIES – land tax – principal place of residence exemption – onus of proof	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/284.html
Phiwpang v Chief Commissioner of State Revenue [2025] NSWCATAD 282	18 November 2025	REVENUE LAW - State taxes - surcharge purchaser duty - exemption - assessment - objection - appeal REVENUE LAW - interest - penalties - reasonable care -whether tax default due to matters beyond control of taxpayer - personal circumstances - remission ADMINISTRATIVE LAW - reviewable decision - correct and preferable decision - Civil and Administrative Tribunal PRIVACY – information protection principles – disclosure of personal information – breach of information protection principles	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/282.html
Deputy Commissioner of Taxation v Issa [2025] NSWSC 1444	18 November 2025	MONEY CLAIM – Penalty under section 269-20 of the Taxation Administration Act 1953 – proceedings not to be commenced until Commissioner gives written notice – where posting of notice proved by evidence of system for bulk postage – where notice posted not by the Commissioner personally, nor by his delegate, nor by an officer of the ATO but by a private provider of bulk printing and posting services – notice found to have been posted by the Commissioner	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2025/1444.html
RM Thornton Family Trust Pty Ltd ATF RM Thornton Family Trust v Chief Commissioner of State Revenue [2025] NSWCATAD 283	18 November 2025	TAXES AND DUTIES — Land tax – Surcharge land tax – Applicant holds land on trust – discretionary trust – whether, during the relevant land tax years, foreign persons were excluded as a beneficiary under the terms of the trust deed for the purposes of section 5D of the Land Tax Act 1956 (NSW) – no discretion to relieve liability arising under statutory provisions	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/283.html
McEwen and Commissioner of Taxation (Practice and procedure) [2025] ARTA 2503	19 November 2025	PRACTICE AND PROCEDURE – application for review dismissed – application to reinstate under section 102 of Administrative Review Tribunal Act 2024 – application made within 28-day period – was the application dismissed in error – application for reinstatement refused	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/2503.html
HLQ v Chief Commissioner of State Revenue [2025]	24 November 2025	TAXES AND DUTIES – land tax – principal place of residence exemption – joint owners – concession for	https://www.caselaw.nsw.gov.au/decision/19aa4a7e6d068ea9b8fbfbb9

Citation	Date	Headnote	Link
NSWCATAD 296		unoccupied land intended by one of the joint owners to be that person's principal place of residence – whether the requirements of clause 6 of Schedule 1A of the Land Tax Management Act 1956 (NSW) were met ADMINISTRATIVE LAW – application for merits review of a land tax assessment of the respondent – whether the applicant, not an owner of the land in issue but the holder of a general power of attorney is an interested person entitled to make the application on behalf of the owners of the land	
Pambris v Chief Commissioner of State Revenue [2025] NSWCATAD 295	24 November 2025	REVENUE LAW - State taxes - land tax - exemption – principal place of residence - duty - exemption - unlawful use and occupation - unoccupied land - objection - appeal ADMINISTRATIVE LAW - reviewable decision - correct and preferable decision - Civil and Administrative Tribunal	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/295.html
PALD Medical Specialists Group Pty Ltd v Revenue SA [2025] SACAT 87	26 November 2025	Administrative Review – Emergency Services Funding Act 1998 – Decision by Minister in respect of an objection to land use attribution	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SACAT/2025/87.html
Richwol v Commissioner of State Revenue (Review and Regulation) [2025] VCAT 1065	3 December 2025	Review and Regulation List – Land Tax Act 2005 (Vic), section 10 – Relevant land owned by sisters-in-law as tenants in common in equal undivided shares – Land used by applicant's sister-in-law as her principal place of residence – Agreement between the applicant and her sister-in-law allowing sister-in-law to have exclusive use of land for herself and her family (and similarly for the adjacent property used by the applicant and her family) – Whether applicant is a 'person entitled to land for a freehold estate in possession' in these circumstances – Applicant a joint owner of the land and, as she did not use it as her principal residence, land tax applies despite absence of physical use or possession – Assessment confirmed.	https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2025/1065.html
Jeff Lunn and Gregoriades Sofocleous & Associates Pty Ltd and Tax Practitioners Board (Taxation) [2025] ARTA 2654	9 December 2025	TAX AGENTS – Tax Practitioners Board – registration as a tax agent – review of decision to cancel registration of a tax agent termination of tax agents' registration and imposition of two-year ban – requirements for registration – compliance with the Code of Conduct –	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/2654.html

Citation	Date	Headnote	Link
		fit and proper person requirement – whether termination warranted – protective purpose of sanctions – whether term of disqualification appropriate – period within which each of the applicants can apply for re-registration varied	
Jones v Chief Commissioner of State Revenue [2025] NSWCATAD 324	12 December 2025	TAXES AND DUTIES – Land tax – Principal place of residence exemption – Property had been owner's principal place of residence for several years – Property vacated so owner could live with and care for her recently widowed father – Property leased out during period of absence and not used and occupied as owner's principal place of residence at relevant taxing time – No exemption available – No authority to waive tax on compassionate or other grounds – No authority to reduce tax on a proportional basis	https://www.caselaw.nsw.gov.au/decision/19b0b5de820be379d3a10e07
Nandy v Commissioner of State Revenue [2025] QCAT 531	15 December 2025	ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL where the applicant claimed the First Home Owners concession – where the applicant did not take up occupancy within the required period – whether an 'intervening event' arose – whether a holding over by a tenant and need for repairs to be done by the tenant meets the definition of 'intervening event' – whether entitlement to concessional stamp duty was lost as a result of a 'disposal' of the property	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCAT/2025/531.html
Miller and Commissioner of Taxation (Taxation and business) [2025] ARTA 2725	19 December 2025	TAXATION – release of taxation liability – whether payment of tax liability would cause serious hardship – meaning of phrase 'serious hardship' – whether sufficient evidence of applicant's financial circumstances – factors relating to exercise of discretion to release – decision affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/2725.html
Cerreto and Commissioner of Taxation (Taxation) [2025] ARTA 2729	22 December 2025	TAXATION – Administrative Penalty Assessments – whether the taxpayer satisfied the onus of proof by establishing that the assessments were excessive and what they ought to have been – whether Applicant intentionally disregarded a Taxation Law – whether remission of administrative penalty appropriate – objection decisions affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/2729.html

Citation	Date	Headnote	Link
Zhou and Commissioner of Taxation (Taxation) [2026] ARTA 16	7 January 2026	TAXATION – application for review of an objection decision – section 167 default assessments – amended assessment – onus of proof not discharged – Applicant claims deposits were repayments of loan – deposits from family and friends – insufficient independent evidence that deposits were loans – Applicant's representation changed during cross-examination – Applicant's evidence not sufficiently reliable – Tribunal finds the assessments are not excessive – penalty assessments –– recklessness – engaging tax agent insufficient to demonstrate reasonable care – Tribunal finds the Applicant's statements were known to be false – shortfall interest charge – Tribunal has found evasion	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2026/16.html
APPLICANT AT81/2025 & ANOR v COMMISSIONER FOR ACT REVENUE (Administrative Review) ACAT 4 [2026] ACAT 81	19 January 2026	ADMINISTRATIVE REVIEW – merits review of Commissioner's decision to refuse an objection to reassessment of duty, penalty tax and interest – where the applicants applied for a duty exemption under the Home Buyers Concession Scheme – where the applicants formed the honest but mistaken belief that income eligibility under the scheme depended on their joint taxable income as evidenced by notices of assessment issued by the ATO – where the applicant's total gross income at the relevant time exceeded the relevant income threshold by a small amount – where the reassessment of duty found to be correct – whether penalty tax should be remitted under section 37 of the Taxation Administration Act 1999 – discussion of principles applying to the exercise of the discretion – penalty tax remitted in full	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/act/ACAT/2026/81.html
Tilli and Commissioner of Taxation (Taxation and business) [2026] ARTA 80	23 January 2026	TAXATION - administrative penalties – false or misleading statement - whether applicant liable for administrative penalties on basis of recklessness – whether penalty should be wholly or partly remitted – decision affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2026/80.html
Crawford and Commissioner of Taxation (Taxation and business) [2026] ARTA 90	28 January 2026	TAXATION- administrative penalties - whether applicant liable for administrative penalties on the basis of recklessness - where applicant allowed an old acquaintance to lodge amended income tax returns on applicant's myGov account where amendments	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2026/90.html

Citation	Date	Headnote	Link
		included a deduction equivalent to the gross income of the applicant in each of three income years reducing the taxable income for each year to nil resulting in fraudulent tax refunds - whether penalties imposed were excessive or incorrect - whether penalties should be remitted - where applicant was initially suspicious but considered old acquaintance to be knowledgeable about tax - where applicant believed he is the victim and was scammed - where applicant argued he took reasonable care and was not reckless - where applicant stated he was remorseful - where disclosure made after examination of applicant's tax affairs commenced and after penalty assessments issued - objection decision affirmed	
KES v Commissioner of State Revenue (General Review) [2026] VCAT 75 (9 February 2026)	9 February 2026	General Review practice area – Land Tax Act 2005 (Vic), ss 34B and 34C – Whether vacant residential land tax applies to property said to be uninhabitable – Onus of proof – Subject to remission of penalty tax, assessments confirmed.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2026/75.html

4. Legislation

4.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Treasury Laws Amendment (Supporting Choice in Superannuation and Other Measures) Bill 2025	26/11				
Treasury Laws Amendment (Strengthening Financial Systems and Other Measures) Bill 2025	4/9	8/10	27/10	27/11	04/12

4.2 Division 296 tax legislation introduced

On 19 December 2025 Treasury released Exposure Draft legislation for the Better Targeted Superannuation Concessions (**BTSC**) measure, with consultation closing on 16 January 2026.

On 11 February 2026 the Treasurer then introduced Treasury Laws Amendment (Building a Stronger and Fairer Super System) Bill 2026 (Cth) into the House of Representatives. The proposed legislation forms part of the Government's previously announced reforms to reduce concessional tax treatment for individuals with large total superannuation balances.

The Bill and the associated imposition Bill introduce a new framework for taxing superannuation earnings for individuals with total super balances above $3 million. The draft laws propose the creation of a new Division 296 of the ITAA 1997, which will give effect to the re-designed approach to calculating and taxing earnings for affected members.

Compared with the Government's earlier policy design and prior draft materials, the legislation now introduced includes several significant updates. The key aspects of the Division 296 tax are as follows.

Introduction of a second threshold at $10 million

A higher tier is introduced so that earnings attributable to balances above $10 million are subject to a 40% concessional rate. Earnings corresponding to balances between $3 million and $10 million will be taxed at 30%.

Indexation of both large-balance thresholds

The $3 million threshold will be indexed in $150,000 increments, and the $10 million threshold in $500,000 increments, consistent with indexation of the transfer balance cap. This represents a departure from the previously unindexed $3 million threshold.

Shift to a realised earnings methodology

Instead of calculating earnings based on changes in the member's Total Super Balance, the new draft adopts a realised-earnings basis aligned with existing income tax concepts. Superannuation funds will calculate and report realised earnings attributable to in-scope members. For small superannuation funds, Division 296 earnings are calculated in accordance with the following formula:

$$\text{relevant taxable income or loss} - \text{assessable contributions} + \text{net exempt current pension income} - \text{the entity's *non-arm's length component for the year (if any)} + \text{pooled superannuation trust component}$$

Once the superannuation entity has calculated its Division 296 fund earnings for the year, the entity must attribute those earnings to individual superannuation interests in that entity. The Exposure Draft materials state that the principles to be applied for this purpose will be prescribed in regulations.

The Division 296 earnings are then multiplied by the percentage of the member balance that is above the relevant threshold. The is illustrated by the following example from the Exposure Draft Explanatory Memorandum:

Example 1.1 TSB greater than $3 million

Jordan has a TSB of $4 million at the end of the 2026-27 income year. In the 2026-27 income year, their total superannuation earnings are $100,000.

As Jordan's TSB for the 2026-27 at the end of the 2026-27 income year is greater than the large superannuation balance threshold of $3 million, and their total superannuation earnings are greater than nil, Jordan will have taxable superannuation earnings for Division 296 purposes.

The proportion of Jordan's TSB above the threshold is 25 per cent (($4 million - $3 million)/$4 million). Jordan's taxable earnings for Division 296 purposes are calculated as $25,000 by multiplying their superannuation earnings by the percentage above the threshold (25 per cent of $100,000).

This taxable earnings amount will be taxable at 15 per cent. Jordan will have a Division 296 liability of $3,750 for the 2026-27 income year (15 per cent of $25,000).

Transitional arrangements for pre-commencement unrealised capital gains

There are different transitional provisions for unrealised capital gains depending on whether the superannuation fund is a small superannuation fund (i.e. an SMSF) or not.

For a small superannuation fund, the trustee may make an election to obtain modified cost base for all of it CGT assets (for Division 296 purposes only) equal to the market value as at 1 July 2026. This modified cost base applies to CGT assets owned directly by the fund and does not extend, for example, to assets owned by a unit trust in which the fund is a unitholder.

Any *deferred notional gains* arising under the 2017 transfer balance cap transitional CGT relief must be ignored when calculating Division 296 fund earnings.

For non-small superannuation funds (i.e. non SMSFs), a factor method is used. Under this method, the net capital gain of the fund for the relevant year is taken to be the amount of that gain multiplied by a factor (which must be less than 1) prescribed by the regulations for the relevant year.

Commensurate treatment for defined benefit members

The updated draft reflects changes to ensure equivalent treatment is maintained for defined benefit interests, with further consultation flagged to finalise detailed implementation.

Payment of Division 296 tax

Payment of assessed Division 296 tax will generally be due 84 days after the Commissioner gives the individual a notice of assessment for the tax. If it is not paid by this time, the Commissioner may issue a release authority to one or more superannuation providers that holds a superannuation interest for the individual.

If tax is late paid, interest at a special Division 296 general interest rate will be charged. This rate is lower than the standard GIC rate. It is 3% above the base rate. The Exposure Draft Explanatory Memorandum states as follows:

> *The lower interest charge on unpaid Division 296 liabilities ensures that relevant taxpayers are subject to a rate of interest that is broadly like market rates. While this provides significant additional payment flexibility for individuals, it maintains the real value of the tax liability over time to ensure it is not abused by taxpayers to reduce the tax they are required to pay.*

Death of a member

Section 296-50 provides that once an individual has died, their TSB is taken to be nil for purposes of the formulas. Because the formulas use TSB at the start of the year, an individual who dies later in the year may still incur Division 296 tax for that year (except in 2026-27). The Division 296 tax liability is included with the individual's final tax return. If the individual dies with negative Division 296 earnings, these cannot be transferred to beneficiaries or carried forward.

Temporary residents departing Australia

Departing temporary residents who receive a departing Australia superannuation payment are entitled to a refund of Division 296 tax that has been paid, but not to the extent to which the Division 296 tax was attributable to a period where the person was an Australian tax resident and not a temporary resident.

Deferred start date

The commencement of the measure has been deferred to 1 July 2026, compared with the original 1 July 2025 start. The delay is intended to allow further consultation and system readiness.

Further guidance from Treasury and the ATO is expected as final legislation is prepared for introduction in 2026.

COMMENT – The trustee must make the election, which is irrevocable, prior to the lodgment date for the income year ending 30 June 2027. Trustees of superannuation funds will need to consider whether to make this election even if, as at 1 July 2026 there is no member with a balance of above $3,000,000, in the event that a member's balance does exceed $3,000,000 in the future.

COMMENT – The effect of making an election is that trustees will need to have 2 different CGT calculations. One for the purpose of the ordinary tax of the fund (i.e. earnings attributable to the balance less than $3,000,000) and one for the purpose of Division 296 tax.

w https://consult.treasury.gov.au/c2025-726362
w https://treasury.gov.au/publication/p2025-709385-btsc

4.3 Stapled fund reforms

The *Treasury Laws Amendment (Supporting Choice in Superannuation and Other Measures) Bill* 2025 was introduced to the House of Parliament on 26 November 2025.

Schedule 1 of the Bill amends the *Superannuation Guarantee (Administration) Act 1992 (Cth)* (**SGAA**) to allow employers to request an employee's stapled fund details from the Commissioner, before, at or after the time the employee is given a standard choice form.

It is intended that the superannuation employee onboarding reforms will commence the day after the Bill has received royal assent.

Schedule 2 of the Bill prohibits employers from advertising superannuation products to an employee during the employee onboarding process, with the exception of certain MySuper Products, the employee's stapled fund, or the employer's default fund. Contravention of this prohibition may attract civil penalties.

Once the Bill has received royal assent, Schedule 2 of the Bill will commence from 1 July 2026.

Treasury Laws Amendment (Supporting Choice in Superannuation and Other Measures) Bill 2025
w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7412

4.4 Consultation reducing impact of coerced directorships

On 26 November 2025, Treasury released a consultation paper proposing reforms to reduce the impact of coerced directorships within the director penalty regime. Consultation closed on 24 December 2025.

Under the current framework, company directors can be made personally liable for unpaid company PAYG withholding, GST and superannuation liabilities under the Director Penalty Notice regime if these are not paid on time. This regime can be exploited in situations of financial abuse, where coerced directors — often unaware of their appointment or unable to exercise genuine control — may face penalties despite having little or no knowledge of, or involvement in, the company's affairs.

The consultation paper explores options to better support coerced directors by:

1. improving opportunities for affected directors to engage with the ATO and explain their circumstances, including recognising that coerced directors often only become aware of their liability after a DPN has issued; and
2. allowing longer timeframes to respond to DPNs, seek remission, or lodge a defence where coercive control is involved, to address practical barriers such as delayed notice, restricted access to information, or ongoing safety risks.

It also proposes to strengthen legal defences by:

1. introducing a new defence for directors who did not participate in management due to coercive control, recognising that even minimal or coerced involvement may currently preclude access to existing defences; and
2. defining "coercive control" in the legislation, with tailored evidentiary requirements and consistent application across tax and corporate law and enabling trauma-informed assessment of claims.

In addition to the reforms above, the consultation paper also considers broader measures to reduce coerced directorships, including strengthened director consent requirements, improved pathways for director resignation or removal, and enhanced defences for breaches of insolvency-related directors' duties.

The consultation paper also outlines measures to strengthen consequences for perpetrators and intermediaries who facilitate coerced directorships, including higher civil and criminal penalties and enhanced avenues for regulators to pursue shadow directors.

w https://consult.treasury.gov.au/c2025-719210

4.5 Foreign ownership reporting deadlines

Part 7A of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) establishes the Register of Foreign Ownership of Australian Assets, which records certain acquisitions, disposals and changes in interest relating

to Australian land, water, entities, businesses and other assets by foreign persons. Under this regime, a foreign person who undertakes a registrable action must lodge a register notice with the Registrar within 30 days of the registrable event.

Register notices may give rise to ongoing obligations — for example, if the nature of an interest changes, ceases, or if the person ceases to be a foreign person. The Commissioner of Taxation, acting as Registrar, is responsible for administering these obligations.

Recognising that foreign persons may face practical difficulties in meeting the 30-day lodgment deadline, such as complex transactions, system issues, or lack of timely access to required information, the legislative framework allows the Registrar to extend the lodgment period by legislative instrument.

A new legislative instrument, the *Foreign Acquisitions and Takeovers (Register Notices – Extensions of Time) Instrument 2026*, commenced on 9 January 2026, giving the Commissioner express power to extend the 30-day lodgment period for foreign persons to notify acquisitions or disposals of Australian assets under Part 7A of the *Foreign Acquisitions and Takeovers Act 1975*.

The instrument allows extensions of any length and any number of times, with applicants required to specify the period sought. In deciding whether to grant an extension, the Commissioner may consider factors such as the nature of the action, timing of the request, reasons for delay, complexity of obligations, availability of information, and the foreign person's efforts to comply.

The instrument was previously released in draft form on 18 June 2025, with no changes made in finalisation.

w https://www.legislation.gov.au/F2026L00006/asmade/text

4.6 Quarterly TFN reporting set to end for closely-held trusts

Treasury has released exposure draft legislation proposing to abolish quarterly TFN reporting for closely-held trusts and replace it with an annual TFN reporting requirement, to be lodged with the trust's income tax return. Trustees would report beneficiary TFNs only for income years in which a beneficiary is presently entitled to trust income, reducing compliance and improving ATO data-matching and pre-fill processes.

The draft also clarifies the Commissioner's powers to notify trustees when a quoted TFN has been cancelled, withdrawn or is otherwise incorrect. Where the Commissioner can identify the correct TFN, the notice is taken to apply from the time the incorrect TFN was originally quoted. Where the Commissioner cannot identify the correct TFN or deems it unreasonable to provide it, the Commissioner must notify the trustee and beneficiary, triggering TFN-withholding requirements.

The amendments apply to income years starting on or after 1 July 2026, with quarterly reporting continuing to apply for income years that begin before that date.

w https://consult.treasury.gov.au/c2025-726341

4.7 Treasury review of EV FBT exemption

Treasury is conducting the statutory review of the federal tax concessions for electric vehicles, including the FBT exemption for eligible EVs first held from 1 July 2022 and the related import tariff exemption introduced through the *Treasury Laws Amendment (Electric Car Discount) Act 2022*. The review will assess whether the concessions are functioning as intended and whether they should continue.

Treasury sought feedback on the effectiveness of the incentives in driving EV uptake, the appropriateness of current eligibility settings (including vehicle types), and any evidence relevant to the future design of the scheme.

w https://consult.treasury.gov.au/c2025-727436

4.8 Proposed amendments regarding FRCGW and SMSF trustees

On 5 December 2025, Treasury released exposure draft legislation and explanatory materials for the *Treasury Laws Amendment Bill 2025: Minor and Technical Amendments* (Autumn 2026) and the accompanying *Treasury Laws Amendment Instrument 2025*.

The draft Bill proposes a series of minor and technical amendments across tax, superannuation, and corporate regulatory legislation. These amendments are designed to correct drafting errors, update outdated cross-references, improve administrative clarity, and ensure that existing provisions operate as intended.

Some substantive changes proposed in the Exposure Drafts include:

Expanded flexibility for SMSFs where a member has died or is under legal disability

Amendments to the SIS Act will allow a Public Trustee, acting as a legal personal representative, to appoint an appropriately qualified agent to act as a director of a corporate SMSF trustee. The changes confirm that such agents may be remunerated for their services, ensuring funds can remain compliant during periods of incapacity or estate administration.

Legislating treatment of tax credits for foreign resident CGT withholding

Currently, an entity is entitled to claim a tax credit for the amount withheld under the foreign-resident capital gains withholding (**FRCGW**) legislation in the income year the withheld amount is paid to the Commissioner, usually on the settlement date. Where the date of contract and settlement date straddles two income years, it creates a timing mismatch.

Amendments to the TAA 1953 will ensure that vendors receive credit for FRCGW in the same income year in which the underlying CGT event is assessed. This outcome reflects and embeds the effect of the existing 2017 remedial determination, which will be repealed once the amendments commence.

The amendments commence either the day after Royal Assent or on the first day of the next quarter, depending on the provision. Treasury has sought stakeholder feedback on the clarity and effectiveness of the explanatory materials, as well as areas requiring ATO public advice or guidance, ahead of finalising the legislation for introduction in 2026. Consultation closed on 2 January 2026.

COMMENT – the issue regarding the restrictions in the SIS Act preventing a Public Trustee, acting as a legal personal representative, from appoint an appropriately qualified agent to act as a director of a corporate SMSF trustee were recently an issue in the NSW Supreme Court case *In the matter of Gainer Associates Pty Limited* [2024] NSWSC 1138.

w https://consult.treasury.gov.au/c2025-723460

4.9 ACT payroll tax increase for large employers

The *Payroll Tax Amendment Bill 2025* (ACT) passed on 4 December 2025, introducing a higher payroll tax rate of 8.75% from 1 January 2026.

The new Schedule 2A to the *Payroll Tax Act 2011* (ACT), Schedule 2A applies only if the employer's (or group's) total wages for 2025-26 exceed $150 million or monthly wages exceed $12.5 million between 1 January and 30 June 2026. Affected employers must calculate payroll tax using:

1. 7.85% for wages paid between 1 July and 31 December 2025, in accordance with the 2025 Payroll Tax Determination; and
2. 8.75% for wages paid between 1 January and 30 June 2026, as set by the amended Act.

Schedule 2A does not apply to several exempt universities, including Australian Catholic University, Charles Sturt University, ANU, UNSW and the University of Canberra.

w https://www.legislation.act.gov.au/b/db_73300/

4.10 Victorian tax reforms

The *State Taxation Further Amendment Bill 2025* (Vic) has passed both houses and introduces a package of reforms across multiple Victorian taxation and revenue laws. Key measures include: changes to the congestion levy (updated rate zones and exemptions), exclusion of Dinner Plain from the *Vacant Residential Land Tax*, a new land tax exemption for low-value land containing a non-permanent shelter used as a residence, exemption of New Zealand citizens from the foreign purchaser additional duty, and updates to domestic animal and greyhound registration fees, alongside technical amendments to ensure the legislation operates as intended.

The Bill amends a wide range of Acts, including the *Commercial and Industrial Property Tax Reform Act 2024*, *Congestion Levy Act 2005*, *Duties Act 2000*, *First Home Owner Grant and Home Buyer Schemes Act 2000*, *Land Tax Act 2005*, *Limitation of Actions Act 1958*, *Taxation Administration Act 1997*, *Building Act 1993* and the *Domestic Animals Act 1994*. It also repeals the *Taxation (Interest on Overpayments) Act 1986* and makes consequential amendments to related legislation.

Government amendments passed with the Bill require the State to enter memoranda of understanding with municipal councils in congestion levy areas to support funding for active transport initiatives.

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

4.11 Tasmanian payroll tax rebate scheme for apprentices

The *Taxation and Related Legislation (First Home Owner and Payroll Relief) Bill 2025* has received Royal Assent on 23 December 2025. The Bill amends the *Payroll Tax Rebate (Apprentices, Trainees and Youth Employees) Act 2017* (Tas) and the *First Home Owner Grant Act 2000* (Tas) to:

1. extend the Payroll Tax Rebate Scheme for eligible apprentices from 1 July 2025 up to and including 30 June 2026;
2. push back the repeal date of the *Payroll Tax Rebate (Apprentices, Trainees and Youth Employees) Act 2017* from 30 June 2028 to 30 June 2029; and
3. increase the First Home Owner Grant from $10,000 to $30,000 for eligible transactions commenced between 1 July 2025 and 30 June 2026, subject to completion within 24 months, and allow retrospective recognition of $30,000 payments made in anticipation of the Bill's assent, and top up earlier $10,000 grants with an additional $20,000.

The amendments will commence retrospectively on 30 June 2025 and will be repealed one year after receiving assent.

Taxation and Related Legislation (First Home Owner and Payroll Relief) Bill 2025
w https://www.parliament.tas.gov.au/bills/bills2025/taxation-and-related-legislation-first-home-owner-and-payroll-relief-bill-2025-43-of-2025

5. Rulings

5.1 CGT implications of right to occupy under a will

The ATO has released draft Taxation Determination TD 2026/D1, setting out its preliminary view on the meaning of a *"right to occupy the dwelling under the deceased's will"* for the purposes of the CGT main-residence exemption in section 118-195(1) of the ITAA 1997. The draft consolidates and replaces the following ATO IDs.

1. ATO ID 2003/109 *Capital gains tax: Deceased estate – main residence exemption*;
2. ATO ID 2004/882 *Capital Gains Tax: main residence exemption – deceased estate – right to occupy dwelling for limited period*; and
3. ATO ID 2004/734 *Income tax: Capital gains tax: main residence exemption: right to occupy dwelling under deceased's will*.

The phrase "right to occupy the dwelling under the deceased's will" is not defined in the ITAA 1997 and takes its ordinary meaning, having regard to the statutory context.

TD 2026/D1 confirms that an individual will only have a right to occupy a dwelling under the deceased's will if this right was granted in accordance with the terms of the will itself 'without the aid or intervention of any subsequent or intermediate transaction'. An individual will not be considered to have a right to occupy a dwelling under the deceased's will if that right was granted:

1. to an individual by a trustee under to a broad discretion given to the executor or trustee of the deceased estate under the deceased's will; or
2. under a separate agreement, such as a deed of arrangement which is entered into between the beneficiaries and executor or trustee of the deceased estate.

The Determination draws a strict distinction between a will and a testamentary trust, confirming that a right conferred under a testamentary trust is not granted "under the deceased's will". Likewise, a trustee's discretionary ability to grant occupancy under the trust does not meet the requirement. This reflects the ATO's view that a testamentary trust arises after estate administration and is legally distinct from the will.

Example 5 of TD 2026/D1 provides as follows:

35. Lalo dies and leaves a will with a testamentary trust deed annexed to it. Probate is granted for both the will and testamentary trust deed. Lalo's only asset is his house, which he bought in November 1982. The will bequeaths the house to Lalo's eldest daughter, Patricia, and does not expressly provide any rights in the property to any other individual. However, the testamentary trust deed annexed to Lalo's will provides a discretion to the trustee to grant a right to occupy the house to any individual. The trustee exercises the discretion in favour of Lalo's youngest daughter, Beatrice. Beatrice proceeds to occupy the house as her main residence.

36. Beatrice does not have a right to occupy the dwelling under the deceased's will for the purposes of item 2(b). The will does not specifically name or identify Beatrice as having such a right. The right to occupy arose by virtue of the trustee's exercise of their discretion pursuant to the testamentary trust deed.

The draft Determination also confirms:

1. a right to occupy created by a family provision order is taken to operate as if made by codicil to the will, and therefore does satisfy item 2(b); and

2. where the will grants a right to occupy for a specified period, the main-residence exemption applies only for that period. Occupation beyond that time (e.g. by agreement) will not satisfy item 2(b), although a partial exemption under section 118-200 of the ITAA 1997 may apply.

The draft Determination is open for public comment until 27 February 2026 and, once finalised, will apply to years of income commencing both before and after its date of issue.

COMMENT – Draft TD 2026/D1 takes a notably strict, literal approach to the meaning of the phrase *"right to occupy the dwelling under the deceased's will",* with no scope for trustee discretion, testamentary-trust provisions or post-death agreements. Advisers can no longer rely on flexible trust structures or administrative arrangements to preserve the main-residence exemption and must instead ensure that any intended right of occupation is hard-wired into the will.

ATO Reference *TD 2026/D1*
w https://www.ato.gov.au/law/view/document?docid=DXT/TD2026D1/NAT/ATO/00001

5.2 Denial of deductions for holiday homes

On 12 November 2025, the ATO published *Draft Taxation Ruling* TR 2025/D1, which sets out the Commissioner's preliminary views on when amounts received from rental properties are assessable and when related expenses are deductible for individuals who are not carrying on a business. The Draft Ruling replaces withdrawn Taxation Ruling IT 2167.

The Draft Ruling also contains comprehensive guidance on holiday homes, including when the deduction-denial rule in section 26-50 of the ITAA 1997 applies.

The Draft Ruling sets out a three step framework for income and deductions for rental properties.

Step 1 – Assessable income

Determine whether amounts received relate to a lease or licence of the property. Payments from household/family members may be non-assessable where they merely represent shared expenses, but become assessable where they are payments for rights to use the property.

Step 2 – Is the property a holiday home?

A property is a holiday home where it is used or held for use for the owner's (or their family/friends') holidays or recreation, including where it is blocked out for private use or used rent-free or at discounted rates.

This classification is objective and based on actual patterns of use, not the owner's intention.

If the property is a holiday home, section 26-50 may apply to deny deductions.

Step 3 – Deductible and apportionable expenses

If an expense is not denied under section 26-50, it may still be deductible only to the extent it is incurred in gaining assessable rental income, and must be apportioned where there is any private use. This is important in the context of holiday homes, where family members or friends may stay for free or at a reduced rate.

Holiday homes

Section 26-50 of the ITAA 1997 denies deductions relating to holding a "leisure facility", which is defined as land, a building, or part of a building or other structure, that is used (or held for use) for holidays or recreation.

The Draft Ruling defines "holiday home" as follows:

> *'Holiday home' refers to a property that is used (or held for use) for your holidays or recreation (or the holidays or recreation of your family members and friends for no rent or at a reduced rate).*

Paragraph 83 of the Draft Ruling explains:

> *Used (or held for use)' requires identification of the use to which a property is dedicated to at a point in time, including periods when the property is not actively being used or is unoccupied. 'Holiday' takes its ordinary meaning as 'a period of cessation from work, or of recreation; a vacation'. Recreation is defined as including 'amusement, sport or similar leisure-time pursuits'.*

This is an objective assessment based on the actual pattern of use, including whether the property is used or held for the owner's holidays or recreation, whether it is blocked out for private use during peak periods, or whether family and friends stay rent free or at reduced rates. The owner's subjective intention is irrelevant; the ATO focuses solely on how the property is in fact used or held for use.

What deductions are denied

If the property is a "leisure facility" you cannot deduct losses or outgoings that are incurred:

1. to acquire ownership;
2. to retain ownership;
3. to acquire rights to use it;
4. to retain rights to use it;
5. to use, operate, maintain, or repair it;
6. in relation to any obligation associated with your ownership; or
7. in relation to any obligation associated with your rights to use it.

Common examples of expenses that are denied include interest on borrowings to finance the property, council rates, land tax, and repairs and maintenance costs.

Expenses such as advertising costs to rent the property or cleaning costs after a guest stay, which do not relate to the ownership or use of a holiday home, are deductible to the extent they are incurred in gaining or producing assessable income, subject to the normal rules in section 8-1 of the ITAA 1997.

Exception where property held mainly for rental

Deductions will not be denied where, **at all times during the income year**, the holiday home is used or held **mainly** to produce assessable rental income. This is to be determined by considering a range of factors, including but not limited to:

1. the way the holiday home is actually used;
2. the time it is dedicated to income-producing use;
3. the time it is used privately, or held for potential private use; and
4. the extent to which it is genuinely available or used as a rental during periods when holiday properties are in demand (for example, school holidays, public holidays, or peak seasonal periods).

The ATO emphasises that simply offering the property for rent for a large portion of the year is insufficient

No single factor is decisive. All relevant circumstances must be weighed to assess the degree and priority of each type of use. The assessment is objective and based on actual use and how the property is held, rather than the owner's subjective intentions.

Part year changes in use

The Ruling also recognises that the main use of a holiday home may change during an income year. Where there is a clear and sustained shift — such as an owner moving overseas and removing all private restrictions so the property becomes genuinely available for rent — the denial of deductions may cease to apply from the point of that change. Seasonal fluctuations alone, or an isolated departure from the prior pattern of use, will not satisfy the part-year test.

Transitional compliance approach

Because public guidance on the application of section 26-50 of the ITAA 1997 to individuals has historically been limited, the ATO has adopted a transitional compliance approach. The Commissioner will not deploy compliance resources to review whether section 26-50 applies to expenses incurred before 1 July 2026, provided the arrangement was entered into before 12 November 2025. This concession does not prevent the ATO from applying the Ruling when issuing or amending assessments or private rulings.

The ATO has also published *Draft Practical Compliance Guideline* PCG 2025/D7 (see item 5.1 of these notes).

COMMENT – This is one of the most substantive changes in ATO guidance on rental properties in many years. The emphasis on objectively demonstrated patterns of use, rather than intention or availability alone, means that many taxpayers who rent properties intermittently — particularly during off-peak periods — will find that their properties fall within the holiday-home category and that key deductions are therefore denied. Private use or even potential private use during peak income-earning periods appears especially problematic.

ATO Reference *TR 2025/D1*
w https://www.ato.gov.au/law/view/document?docid=DTR/TR2025D1/NAT/ATO/00001

5.3 Promoter penalty rules clarified for schemes citing public rulings

TR 2006/10 concerns public rulings for the purposes of the TAA, which are binding on the Commissioner. If the taxpayer relies on such a ruling, the ATO must apply the law to the taxpayer in the manner set out in the ruling (or in a way that is more favourable to the taxpayer if the ATO is satisfied that the ruling is incorrect and disadvantages the taxpayer, and no legislative time limit prevents doing so). The taxpayer will be protected from having to pay any underpaid tax, penalty, or interest relating to matters covered by the ruling if it turns out that the ruling does not correctly state how the relevant provision applies to the taxpayer.

The ATO has issued an addendum to TR 2006/10 to clarify that the promoter penalty laws can still apply even where a scheme is marketed as being supported by a public ruling. The revised paragraph 42A confirms that the laws may apply where a scheme is materially different from the ruling it purports to rely on, or where the scheme is implemented in a materially different way to that described in the ruling. In such cases, the Commissioner may also seek Federal Court sanctions or remedies to address the conduct.

The addenda apply retrospectively prior to the issue date of 26 November 2025.

ATO Reference *TR 2006/10A8 - Addendum*
w https://www.ato.gov.au/law/view/document?docid=TXR/TR200610A8/NAT/ATO/00001
ATO Reference *CR 2001/1A5 - Addendum*
w https://www.ato.gov.au/law/view/document?docid=CLR/CR20011A5/NAT/ATO/00001
ATO Reference *PR 2007/71A6 – Addendum*
w https://www.ato.gov.au/law/view/document?docid=PRR/PR200771A6/NAT/ATO/00001

5.4 Provision of benefits by a private or public ancillary fund

The ATO has published *Draft Taxation Determination* TD 2025/D3, which sets out the Commissioner's preliminary view on when a private or public ancillary fund is taken to "provide" a "benefit" for the purposes of the Private Ancillary Fund Guidelines 2019 and Public Ancillary Fund Guidelines 2022 (collectively referred to as the 'Guidelines')

Ancillary funds receive concessional tax treatment, including income tax exemption and deductible gift recipient status. Because these concessions could otherwise be used to confer private or related-party advantages, the Guidelines impose strict integrity rules. In particular, ancillary funds must meet minimum annual distribution requirements and must not provide benefits, directly or indirectly, to founders, donors, trustees or their associates.

The draft determination addresses uncertainty arising from the fact that the term "benefit" is not defined in the Guidelines. The Commissioner adopts a broad interpretation, stating that a benefit includes any advantage, profit or gain, and is not limited to the payment of money or the transfer of property. A benefit may be immediate, future or contingent and may arise either by conferring an advantage or by relieving another entity of a liability, obligation or expense. The ATO also considers that an opportunity to pursue a position of advantage may itself constitute a benefit, even if the outcome is uncertain.

The determination considers the concept of a benefit in two distinct contexts.

First, in relation to minimum annual distributions, the ATO explains that a benefit may satisfy a fund's distribution obligation where it is provided to an eligible deductible gift recipient and represents a net benefit capable of being objectively valued at market value. Benefits may include non-cash advantages, such as paying expenses on behalf of a DGR or providing services or concessions. However, no distribution arises where the ancillary fund receives money, property or benefits of equal or greater value in return, or where dealings are conducted on ordinary commercial arm's-length terms. The ATO also confirms that non-binding promises or statements of intention to make future payments do not constitute a distribution until the payment is actually made, unless the promise gives rise to an enforceable legal right.

Secondly, and more significantly, the determination explains the operation of the related-party prohibition. Under this rule, an ancillary fund must not provide any benefit, directly or indirectly, to a related entity. The ATO describes this as a broad integrity provision that focuses on substance rather than form. A benefit may be provided through informal arrangements, omissions, or third-party transactions, and does not require a direct payment to the related entity. Even transactions conducted at market rates may give rise to a prohibited benefit if they place a related entity in a better or more favourable position, such as by improving cash flow, relieving a burden, or creating an opportunity to earn profits.

The draft determination includes examples illustrating that benefits may arise where an ancillary fund bears a disproportionate share of joint expenses, fails to enforce contractual rights against a related entity, or structures grants in a way that indirectly advantages a related business. In these cases, the trustee may be liable to a penalty equal to the value of the benefit provided.

The ATO emphasises that trustees have a positive obligation to ensure that prohibited benefits are not provided. The draft determination confirms that the value of any benefit is to be assessed having regard to all relevant circumstances and represents the net value of the advantage conferred.

The draft determination is proposed to apply both before and after its date of issue once finalised.

ATO Reference *TD 2025/D3*
w https://www.ato.gov.au/law/view/document?docid=DXT/TD2025D3/NAT/ATO/00001

5.5 Deferred farm out arrangements

On 10 December 2025, the ATO published an Addendum to *MT 2012/2 Miscellaneous taxes: application of the income tax and GST laws to deferred transfer farm-out arrangements* to amend MT 2012/2 in line with the decision of *Shell Energy Holdings Australia Limited v Commissioner of Taxation* [2021] FCA 496.

The addendum clarifies where, under a farm-out arrangement, a farmee does not have a right to become the legal owner of the interest in the mining tenement or the right to exercise immediately the rights in relation to the interest in the mining tenement until requisite statutory approvals have been obtained, then the farmee will not begin to hold the interest in the mining tenement under item 5 of the table in section 40-40 of the ITAA 1997 at the time when the right to acquire the interest is exercised.

ATO Reference *MT 2012/2A4 - Addendum*
https://www.ato.gov.au/law/view/document?docid=MXR/MT20122A4/NAT/ATO/00001

5.6 GST treatment of sunscreen

On 19 November 2025, the ATO issued a Goods and Services Tax Determination GSTD 2025/2 to provide guidance on when a supply of sunscreen product is GST-free under section 38-47(1) of *A New Tax System (Goods and Services Tax) Act 1999*. This was previously published as *Goods and Services Tax Determination* GSTD 2024/D2 (please see our September 2024 notes).

Under section 38-47(1) of the GST Act, goods can be GST-free if they are declared by the Health Minister as such. The Health Minster sets out in *A New Tax System (Goods and Services Tax) (GST-free Health Goods) Determination 2022* that goods will be GST-free if they are goods of a kind:

1. that are specified in Schedule 1 of the Health Goods Determination; and
2. required, or in a class of goods required, to be included in the Australian Register of Therapeutic Goods.

Item 5 of Schedule 1 of the Health Goods Determination provides that sunscreen preparations for dermal application are GST-free if they:

1. have a Sun Protection Factor (**SPF**) of 15 or more; and
2. are marketed principally as sunscreen.

In the final Determination, the Commissioner considers that the d**efinition of 'Of a Kind' r**efers to products that share key attributes with a specific category or class. For sunscreens, the **Commissioner considers that that attributes include**:

1. **Sunscreen Preparation**: products applied to the skin to protect against UV radiation, which could be available in various forms like creams or sprays.
2. **SPF Requirement**: Must be SPF 15 or higher.
3. **ARTG Inclusion**: Must be listed or registered in the Australian Register of Therapeutic Goods with 'AUST L' or 'AUST R' identification numbers.
4. **Marketing**: Must be marketed primarily for sun protection. Multi-use products or those marketed for other purposes may not qualify.

The final Determination clarifies that where there are inconsistencies in the classification or marketing of a product through the supply chain, a single retailer's marketing that is inconsistent with the overall marketing of the sunscreen product will not alter the GST treatment of the sunscreen product. Instead, an overall impression approach will be taken by evaluating marketing of the product across the supply chain and by competitors.

The final Determination have also made specific references to the Therapeutic Goods Advertising Code in line of requirements under the Therapeutic Goods Act.

ATO Reference *GSTD 2025/2*
ATO Reference *GSTD 2025/2EC*
w https://www.ato.gov.au/law/view/document?docid=GSD/GSTD20252/NAT/ATO/00001
w https://www.ato.gov.au/law/view/document?docid=CGS/GSTD2025EC2/NAT/ATO/00001

5.7 NSW permanent build-to-rent (BTR) tax concessions

The NSW BTR concession has been made permanent under the *Land Tax (Build-to-Rent Concessions) Amendment Act 2025*, providing an ongoing 50% reduction in land value for land tax purposes, along with permanent surcharge purchaser duty and surcharge land tax relief for eligible foreign developers.

Treasurer's guidelines issued on 4 December 2025 set out detailed eligibility conditions, including:

1. a minimum of 50 self-contained dwellings used for BTR purposes;
2. a single management entity for tenants;
3. compliance with planning and ownership structure requirements;
4. lease-related conditions, including offering tenants a genuine option for a fixed-term lease of at least 3 years and compliance with the *Residential Tenancies Act 2010* (NSW); and
5. proportional concessions where only part of a parcel is used for BTR (with exceptions for on-site management facilities).

The guidelines also address construction-phase labour force requirements, subdivision restrictions, treatment of future consolidation and subdivision, and ongoing compliance obligations. Revenue Ruling G014 has been updated to reflect the new framework.

Separately, amendments to section 9F(12) of the *Land Tax Management Act 1956* (NSW) establish a public register of land accessing the concession. The Chief Commissioner must record details, including land tax year, address, owner, and lot/plan numbers, by 1 April each year, with these provisions now incorporated in the *Land Tax Management Regulation 2024* (NSW).

w https://arp.nsw.gov.au/assets/ars/attachments/2953/TPG25-12-Guidelines-for-the-reduction-in-land-value-for-certain-build-to-rent-properties-for-land-tax-purposes.pdf

5.8 NSW duties and partitions of land

Revenue NSW has published web guidance on the application of section 30 of the *Duties Act 1997* (NSW), which provides for concessional rate of duty applies to eligible partitions.

The guidance notes that partitions eligible for the concessional treatment under section 30 include single parcel or multiple separately titled parcels allocated between co-owners, and partitions effected with or without consideration. However, it will not apply to land not jointly owned, distributions in a deceased estate, and anti-avoidance schemes.

Where the partition is one where all transferees receive property of the same value, there will be nominal duty payable. Where any of the transferees receive property which value exceeded their entitlement, duty will be calculated on the greater of excess received above entitlement or consideration paid.

The guidance makes note of common errors in partitions which will attract duty, including dual entitlements land, declarations of trust in a deed of partition and partition of land held by a trustee of a deceased estate.

The guidance sets out the documentary evidence commonly required to obtain the concessional treatment under section 30, including evidence of:

1. existing ownership structure;
2. market value of land pre- and post-partition;
3. apportionment calculations;
4. consideration paid; and
5. deeds of partition or agreements.

COMMENT - A key point made in the guidance is that when a partition occurs pursuant to an agreement or deed of partition, the liability date will be the date that the instrument is executed. This is contrary to Revenue NSW's previous practice, which was to refuse to stamp deeds of partition in most cases.

w https://www.revenue.nsw.gov.au/property-professionals-resource-centre/duties-guides/partitions

5.9 QLD rulings on AFAD and land tax foreign surcharge

On 15 December 2025, the Commissioner of State Revenue in Queensland issued 4 public rulings on relief from additional foreign acquirer duty (**AFAD**) and land tax foreign surcharges (**LTFS**).

Public Ruling GEN012.1 Administrative arrangement—exemption from AFAD and LTFS for residential land developers sets out the basis for administration of exemptions of additional foreign acquirer duty and land tax foreign surcharge for foreign persons residential land developers undertaking residential land development. To be exempt, the developer will generally have to be undertaking development or redevelopment of 20 or more residential lots, satisfy Australian-based management operational requirements, and be in compliance with FIRB and other regulatory requirements. There may be exceptions for developments in regional or priority development areas.

Public Ruling LTA000.6.1 Administrative arrangement—exemption from land tax foreign surcharge for landholders undertaking commercial activities that make a significant contribution sets out the basis for administration of exemptions of LTFS for landholders undertaking commercial activities that make a significant contribution. To be exempt, the developer will generally have to employ 75 or more full-time equivalent employees (not labour hire or contractors) in Queensland, and incur expenditure in Queensland of more than $20 million annually. They also have to satisfy Australian-based management operational requirements, and be in compliance with FIRB and other regulatory requirements. The Chief Commission may make exemptions for commercial activities in regional or priority development areas using other measuring matrix.

Public Ruling DA000.15.5 Additional foreign acquirer duty—ex gratia for significant development for liabilities arising before 15 December 2025 have been amended to confirm that ex gratia relief in the public ruling will cease to apply from 15 December 2025.

Public Ruling LTA000.4.4 Guidelines for ex gratia relief from the land tax foreign surcharge for liabilities arising before 30 June 2026 have been amended to confirm that ex gratia relief in the public ruling will cease to apply to liabilities arising on or after 30 June 2026.

w https://qro.qld.gov.au/2025/12/rulings-on-relief-from-foreign-surcharge/

5.10 Queensland objection time-limit extensions

On 5 December 2025, the Queensland Revenue Office issued two new public rulings, being FHOGA056.1.1 and TAA065.1.1, clarifying how the Chief Commissioner exercises the discretion to grant extensions of time to lodge objections. The rulings apply respectively to decisions under the *First Home Owner Grant and Other Home Owner Grants Act 2000* (Qld) and to assessments or decisions under the *Duties Act 2001* (Qld*), Payroll Tax Act 1971* (Qld), *Land Tax Act 2010* (Qld), *Betting Tax Act 2018* (Qld) and Queensland royalty laws.

Both rulings set out common factors the Commissioner will consider when deciding whether to extend the objection period beyond the statutory 60-day timeframe, including:

1. the legislative intent behind having a time limit;
2. the objector's explanation for the delay;
3. the circumstances and extent of the delay;
4. whether the objection discloses an arguable case based on the material provided;
5. prejudice to the objector if an extension is refused; and
6. any other relevant reasons advanced by the objector.

These rulings provide clearer guidance for taxpayers seeking additional time to object across Queensland's state taxes and grant legislation.

w https://qro.qld.gov.au/resource/fhoga056-1/
w https://qro.qld.gov.au/resource/taa065-1/

5.11 Queensland rulings on reassessments

The Queensland Commissioner of State Revenue has issued a new ruling and updated other rulings on reassessments under section 17 of the *Taxation Administration Act 2001* (QLD) (**TAA**). The new and updated rulings apply in relation to Queensland.

The new Public Ruling TAA017.1.1 *Reassessments decreasing liability for tax* sets out the Commissioner's practice regarding reassessments that decrease a liability for tax under section 17 of the TAA. The ruling sets out the mandatory requirements for the discretion to be exercised and the discretionary factors that may be considered.

They include:

1. the taxpayer must demonstrate that the assessment was incorrect or is no longer correct;
2. the basis for reassessment must be based on the legal interpretations and assessing practices applicable at the time of the original assessment;
3. the request for reassessment must be made less than five years of the original assessment being given.

The following existing rulings have been updated:

1. Public Ruling DA085.1.13 *Concession for homes and first homes—occupancy requirements*: paragraphs 26 and 27 were amended to clarify that, for home concession claims made subsequent to an assessment, the reassessment will be made following the Commissioner allowing a concession claim;
2. Public Ruling PTA026.2 *Employment agency contracts—declaration by exempt clients*: paragraph 16 was amended to insert a footnote referencing the new Public Ruling TAA017.1; and
3. Public Ruling TAA149C.4.2 *Registration of community housing providers as charitable institutions—administrative arrangement*: paragraph 19 was amended to insert a footnote referencing the new Public Ruling TAA017.1.

The new ruling and updated rulings are effective from 1 December 2025.

w https://qro.qld.gov.au/2025/12/rulings-on-reassessments/

5.12 Queensland duties and pharmacy restructures

The Queensland Revenue Office has updated Public Ruling DA 000.19.2 to align with the commencement of the *Pharmacy Business Ownership Act 2024* (Qld) on 1 November 2025. The ruling confirms that certain transactions involving changes in pharmacy ownership are exempt from transfer duty, landholder duty and corporate trustee duty when they occur under the administrative arrangement linked to the new Act.

The updated examples clarify how the exemption applies, including Example 2, which confirms that where an eligible pharmacy business is transferred and the Commissioner can "look through" the structure to verify that the same shareholders remain in substance, the exemption is available.

The administrative arrangement applies to transactions with a duty liability arising on or after 1 January 2025, and the updated ruling commenced on 12 January 2026.

w https://qro.qld.gov.au/resource/da000-19/

5.13 Queensland updates to the ruling on paid parental leave

The Queensland Commissioner of State Revenue has updated Public Ruling PTA037.3 – Paid parental leave. The updates reflect the introduction of Commonwealth-funded superannuation contributions to payments made under the Federal Government's Paid Parental Leave scheme and clarify how these contributions are treated for Queensland payroll tax purposes.

As with parental leave payments under the scheme, superannuation contributions paid by the Commonwealth on parental leave payments are not considered wages under the *Payroll Tax Act 1971* (Qld). Voluntary superannuation contributions paid by the employer on parental leave pay are considered wages for the purposes of payroll tax.

w https://qro.qld.gov.au/2025/12/paid-parental-leave/

5.14 Victorian duties and economic entitlements

The Victorian SRO has finalised Revenue Ruling DA-067, providing guidance on the economic entitlement provisions in Part 4B of Chapter 2 of the *Duties Act 2000* (Vic). These rules apply where a person acquires rights to the economic benefits of land valued above $1 million without acquiring a legal or beneficial interest.

Under s 32XC of the Duties Act, an economic entitlement arises where an arrangement (on or after 19 June 2019) gives a right to participate in income, capital growth, sale proceeds or amounts calculated by reference to those benefits.

DA-067 clarifies:

1. the meaning of an arrangement and transitional relief for pre-19 June 2019 arrangements;
2. that arrangements "in relation to" land may involve multiple parcels;
3. the timing, acquisition through another person, and what constitutes "participation in" economic benefits;
4. application of the rules to share and unit acquisitions; and

5. treatment of foreign purchaser additional duty.

For shares and units, the ruling confirms the provisions do not apply where rights are limited to general dividends or income reflecting the landholder's assets as a whole, but can apply where governing documents confer enforceable rights tied to specific land.

The ruling finalises the earlier draft and applies from 26 November 2025.

Victorian State Revenue Office Reference *DA-067*
w https://www.sro.vic.gov.au/about-us/laws-legal-cases-and-rulings/rulings/land-transfer-duty-economic-entitlements-relation-land-key-concepts-and-interpretation

5.15 Victorian duties – assumed liabilities and consideration

The Victorian State Revenue Office has released draft Revenue Ruling DA-070, which clarifies when an Assumed Tax Liability Amount forms part of the consideration for a transfer of dutiable property under section 20(1) of the *Duties Act 2000* (Vic).

Under section 20(1), duty is charged on the greater of the consideration (monetary or non-monetary) or the unencumbered value of the property. The draft ruling recognises that, in many contracts, purchasers agree to pay, on top of the contract price, amounts towards the vendor's land tax, windfall gains tax, congestion levy or rates liabilities.

The ruling states that an Assumed Tax Liability Amount forms part of the consideration where it is part of what 'moves' the transfer, determined by assessing the transaction as a whole at the time of transfer. Its character depends on substance rather than form: labels such as "adjustments", and whether payment is made to the vendor or a third party, are not determinative.

The ruling will apply from 1 February 2026 when finalised.

Victorian State Revenue Office Reference *Draft-DA-070*
w https://www.sro.vic.gov.au/about-us/laws-legal-cases-and-rulings/draft-rulings/land-transfer-duty-consideration-assumption-tax-liabilities

5.16 Tas & SA – payroll tax clarification on paid parental leave

The Tasmanian and South Australian revenue authorities have each updated revenue rulings to clarify the payroll tax treatment of Commonwealth paid parental leave.

For children born or adopted on or after 1 July 2025, the ATO will make superannuation guarantee (**SG**) contributions directly to an employee's superannuation fund on Commonwealth-funded paid parental leave. Employers are not required to make SG contributions on PPL amounts but may choose to do so voluntarily.

Both the Tasmanian ruling PTA037 and South Australian ruling PTA037 confirm that employer-facilitated paid parental leave payments:

1. do not constitute wages for payroll tax purposes; and
2. are not subject to payroll tax, as the employer acts only as a conduit for payments made on behalf of the Commonwealth, and the payments are not remuneration for services performed by the employee.

w https://www.sro.tas.gov.au/Documents/PTA037v3-paid-parental-leave.pdf

w https://www.revenuesa.sa.gov.au/latest-news/updated-revenue-ruling-released

6. ATO and other materials

6.1 Compliance approach to holiday homes and section 26-50

The ATO has released *Draft Practical Compliance Guideline* PCG 2025/D7, which sets out the Commissioner's compliance approach to section 26-50 of the ITAA 1997 in the context of holiday homes that are also rented out. The Guideline complements the interpretative position in TR 2025/D1 (see item 4.2 of these notes) and provides taxpayers with practical insight into how the ATO will allocate compliance resources where deductions relating to holiday homes are claimed. The objective is to address the increasing prevalence of holiday homes being made available on short-term rental platforms in ways that blur the line between genuine commercial letting and private recreational use.

Section 26-50 of the ITAA 1997 denies deductions for losses or outgoings relating to the ownership or use of a holiday home unless the property is used or held mainly to produce assessable income from rents or similar charges.

Risk zones

The ATO adopts a three-zone framework—green, amber and red—which categorises behaviours according to whether they indicate the property is mainly used (or held) for rental or mainly for private purposes.

Green zone – low risk

Green-zone arrangements are characterised by high commercial exploitation and limited personal use. Indicators include high occupancy during peak periods, clear prioritisation of rental over private use, commercial-rate letting, and active management to maximise rental returns. Taxpayers in this zone can generally expect no ATO compliance action apart from confirming eligibility. Examples include high-occupancy coastal or regional properties where private stays are brief and incidental.

Amber zone – medium risk

Amber-zone arrangements involve a mix of commercial and personal motivations, such as increased private use (particularly at below-market or no cost), blocking out periods for potential private occupation, using the property during peak seasons, or making only limited attempts to maximise rental income. These cases may attract ATO attention, and further enquiries are likely. Examples include owners who use the property during peak demand or who selectively manage availability to accommodate their own recreational plans.

Red zone – high risk

Red-zone arrangements display limited commercial exploitation and dominant private use. Common features include blocking out high-demand periods for personal use, imposing unreasonable restrictions on renters, making minimal efforts to secure bookings, or keeping parts of the property inaccessible to guests (e.g., private storage of high-value items). Such cases will draw priority attention, and an audit is likely if facts are confirmed. Examples include properties consistently used for the owners' holidays, rarely rented out, or managed in a way that effectively discourages prospective tenants.

Balancing commercial and private use factors

The ATO explains that zone classification involves weighing factors across two broad categories:

1. Commercial exploitation, meaning the extent to which the property is genuinely held or used to produce income; and

2. Non-income-producing use, meaning private use or holding the property available for private enjoyment, especially during high-demand periods.

The ATO reviews the full pattern of use across the year, including any clear change of use (for example, shifting from private recreation to full-time rental). The Guideline emphasises that time-based comparisons alone (days rented vs days privately held) are not determinative. Availability in peak periods and the taxpayer's behavioural pattern are also critical factors.

Date of effect and interaction with TR 2025/D1

When finalised, PCG 2025/D7 will apply both before and after its issue date. However, consistent with TR 2025/D1, the Commissioner will not apply the compliance approach for expenses incurred before 1 July 2026, where the rental arrangement was entered into before 12 November 2025.

ATO Reference *PCG 2025/D7*
w https://www.ato.gov.au/law/view/document?docid=DPC/PCG2025D7/NAT/ATO/00001

6.2 Apportionment of rental property deductions

On 12 November 2025, the ATO published *Draft Practice Compliance Guideline* PCG 2025/D6, setting out its compliance approach to apportioning rental property deductions where a property has mixed private and income-producing use. The Guideline aims to provide clarity on what the Commissioner considers "fair and reasonable" for the purposes of section 8-1, and outlines time-based, area-based and combined apportionment methodologies the ATO will accept. It operates alongside TR 2025/D1 (see item 4.2 of these notes).

Direct rental expenses

Certain costs relate solely to rental activities and do not require apportionment, such as agent fees, platform commissions, advertising, and guest-related cleaning.

Time-based apportionment

Where a property is rented for only part of the year, deductions must generally be apportioned according to the number of days the property is used or held for income-producing purposes.

Example 2 – Limited rental demand and owner occupation

Daniel and Kate live in their cottage during the summer for work (not recreation), and list it for rent at other times, securing only 14 days of bookings. Because the property is not genuinely available on commercial terms during unoccupied periods, only 14/365 of their expenses are deductible.

Example 3 – Significant rental activity with some private use

Gail and Craig jointly own a rental property that they advertise through a real estate agent, with rental terms and rental rates consistent with comparable properties in the area, and the agent actively monitoring enquiries to maximise bookings. Over the year, they use the property themselves for 30 days, and their total expenses amount to $36,629, including $1,828 of direct rental expenses, such as agent's commission and advertising, which are fully deductible.

Because the remaining $34,801 of expenses relate to a property used partly to earn income and partly for private purposes, they must apply the time-based apportionment method, under which the property is either rented or genuinely held available to produce income for 335 out of 365 days. Using the time-based formula, they may claim $31,940, with the balance corresponding to their personal use of the property.

Example 4 – Mid-year change in use

Sachin rents out a property until he moves in on 1 March. From that date, the property is used solely for private purposes, requiring apportionment of interest. Only 243/365 of his interest bill is deductible.

Area-based apportionment

Area-based apportionment applies when only part of the property is rented.

Example 5 – Exclusive floors with shared garden

Kim rents the bottom floor of her townhouse while occupying the top floor. Including shared garden areas, her deductible percentage is 46.3%, reflecting the tenant's exclusive and shared access.

Combined time-and-area method

Where only part of a property is rented, and only for part of the year, both time and area factors are relevant.

Example 6 – Letting a spare room for part of the year

Jane rents out her spare bedroom for 100 days of the year and allows guests to use shared areas of the home; applying the area-based method, 43.75% of the property is considered available to guests, and when combined with the time-based factor of 100/365 days, this results in 11.99% of her ownership costs being deductible, while expenses that relate solely to the guest stays remain fully deductible.

Renting to family or friends

Example 7 – Below-market rent to mother

Jana rents a property to her mother at a deliberately discounted rate. Because the arrangement mixes private benefit with rental activity, total deductions must be capped at rent received.

Example 8 – Market-value rent to son

Bartolo rents to his son at market rates supported by valuation evidence. As the property is used solely to derive income, no apportionment is required.

Mixed-purpose loans

Interest must be apportioned where borrowings are used partly for rental purposes and partly for private purposes, including where redraws fund non-income-producing activities.

Independent objectives (TR 95/33)

Where rental income is minimal or disproportionate to expenses, the ATO may examine subjective purpose. Deductions may be limited to income if the expenditure is found to support non-income objectives (e.g., personal motives, tax benefits).

Application

When finalised, the Guideline will apply both before and after its issue date, meaning taxpayers can rely on its accepted methodologies for past and future years.

ATO Reference *PCG 2025/D6*
w https://www.ato.gov.au/law/view/document?docid=DPC/PCG2025D6/NAT/ATO/00001

6.3 Taxpayer alert – related party development arrangements

On 14 January 2026, the ATO issued *Taxpayer Alert* TA 2026/1 regarding contrived property development arrangements between related parties that defer recognition of income and exploit tax losses. The ATO is currently reviewing certain property development arrangements between related parties involving long-term construction contracts that appear designed to create an artificial mismatch between the timing of income recognition and deductions for development costs, enabling profits to be indefinitely deferred and losses to be used within the group to obtain a tax advantage.

These arrangements typically involve interposing a special purpose 'developer' entity between a related-party landowner and a builder under a long-term Property Development Agreement. Although the developer is contractually responsible for delivering the project, it often has no employees, minimal assets and little or no practical capacity to undertake development activities. Construction work is practically outsourced to a builder and another entity in the group provides financing or provides a guarantee to a financial institution in order to allow the developer to obtain financing. The developer commonly incurs construction costs and claims deductions progressively, but deliberately defers deriving income until completion of the development.

This creates a mismatch between deductions and income that leads to tax losses, which are then used to shelter other income within the broader economic group. The structure is often replicated across successive projects, enabling groups to continually offset income and significantly reduce, or indefinitely defer, tax liabilities despite substantial growth in economic wealth.

An example provided by the ATO illustrates a landowner establishing a developer entity with no substantive operations, which enters into a multi-year development agreement, outsources all work to a builder, incurs deductible construction costs but chooses not to invoice the landowner during the build. Losses generated by the developer are used to absorb income from a family trust, while new projects are commenced to ensure available losses continue to offset income when earlier project revenue is eventually recognised.

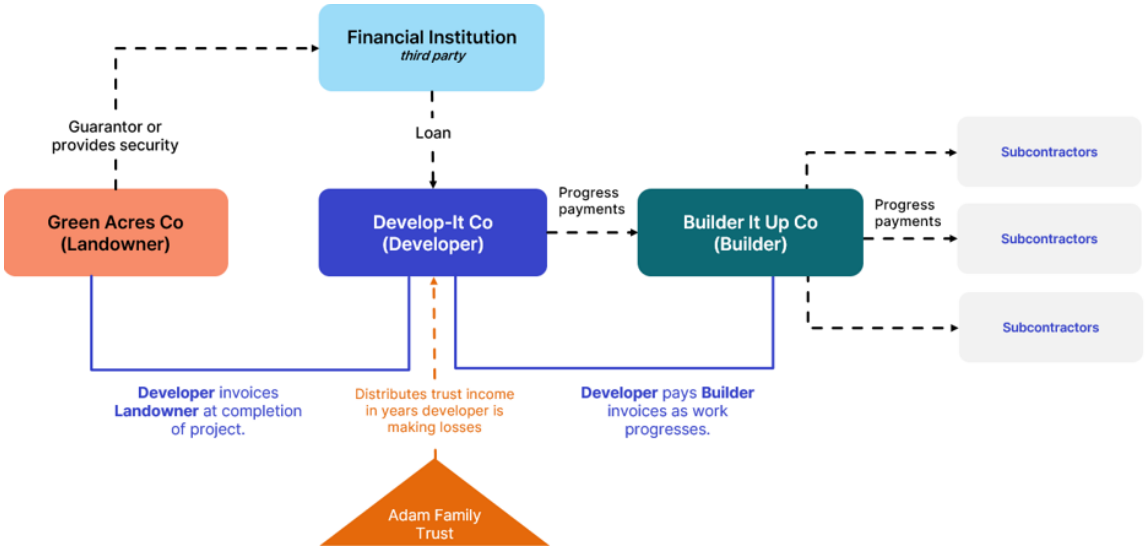

Diagram 1 extracted from TA 2026/1

The ATO is concerned that these arrangements artificially separate landownership and development activities, which in substance constitute a single economic undertaking. The ATO considers that such structures may improperly manipulate the trading stock rules, inappropriately defer income, and generate artificial losses used to offset unrelated income within the group. Where repeated in a planned manner, they may amount to a scheme to which Part IVA of the ITAA 1936 applies.

The ATO is actively reviewing these arrangements and will shortly publish a draft Practical Compliance Guideline outlining indicators of higher-risk arrangements and circumstances likely to attract compliance activity. Taxpayers involved in similar arrangements are encouraged to seek independent advice, request a

private ruling, or make a voluntary disclosure. Penalties may apply to participants and promoters, and tax practitioners involved may be referred to the Tax Practitioners Board.

COMMENT – a media release accompanying the release of TA 2026/1 acknowledges that property development agreements (**PDAs**) are very common in the property and construction industry and are not inherently concerning. The ATO's concerns appear to focus on related-party dealings involving developer entities with minimal assets or activities that result in continued deferral of tax on development profits across multiple projects.

ATO Reference *TA 2026/1*
w https://www.ato.gov.au/law/view/document?docid=TPA/TA20261/NAT/ATO/00001
w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/taxpayer-alert-contrived-property-development-arrangements

6.4 Improper deductions for donations of 'barter credits'

On 17 November 2025, the ATO has published Taxpayer Alert TA 2025/3, outlining concerns about arrangements that purport to allow taxpayers to claim income tax deductions for donations of so called ‘barter credits’ or ‘trade dollars’.

Barter credits represent the value of goods or services that a member of a barter exchange can spend within that exchange network. Instead of paying with cash, a business earns credits by providing goods or services to another exchange member and then spends those credits to purchase goods or services from someone else.

The ATO is concerned about arrangements that involve taxpayers paying a fee to access a barter exchange, obtaining large amounts of barter credits under a non-recourse or limited-recourse loan, and subsequently donating those credits to a deductible gift recipient (**DGR**). Taxpayers are led to believe they can claim a deduction equal to the nominal face value of the credits, even though the economic outlay is significantly lower and the underlying loan features are atypical.

In this type of scheme, taxpayers typically pay an establishment or enabling fee to join a barter exchange and are then granted access to a “barter credit loan facility”. The nominal face value of the credits provided can be many times the fee actually paid, sometimes up to ten times its value. The “loan” generally features extended loan terms (sometimes up to 25 years), the absence of interest, no genuine obligation to make repayments, and no meaningful consequences if the loan is never repaid. In some cases, any repayment obligation may be satisfied by returning barter credits rather than Australian currency.

The taxpayer then donates the barter credits obtained under the loan facility to a deductible gift recipient that is willing to accept them. The DGR issues a receipt for the nominal face value of the barter credits, and the taxpayer claims a deduction for that amount under section 30-15 of the ITAA 1997.

The ATO notes that, in many cases, the donated barter credits may not provide the DGR with genuine access to goods or services through the barter exchange, or the practical value of what can be obtained is significantly less than the face value recorded on the receipt.

The ATO’s central concern is that these arrangements are ineffective for tax purposes and may, in some cases, be unlawful. The ATO highlights risks that:

1. the loan facility and donation steps may constitute a sham, particularly where the exchange appears not to conduct genuine commercial activity;
2. parties involved may share an intent to participate in a fraudulent tax scheme;

3. the features of the “loan” do not align with ordinary commercial lending terms, raising questions about whether a genuine loan exists;
4. the credits may not be capable of being donated in a way that satisfies the legal requirements of a “gift”, including the requirement of benefaction;
5. any deduction claimed under section 30-15 of the ITAA 1997 may not be available, or may be available only for an amount less than the nominal face value; and
6. taxpayers may be incorrectly relying on paragraph 15 of IT 2668 to treat one barter credit as equivalent to one Australian dollar, even though this valuation approach is not applicable to these arrangements.

The ATO is concerned that these arrangements are being actively promoted by barter exchanges as tax effective strategies to reduce tax payable or generate refunds and that taxpayers are led to believe that they are legitimate arrangements.

The ATO is considering the application of section 78A of the ITAA 1936, which is directed at schemes to obtain deductions for gifts to DGRs, as well as Part IVA, where the arrangements constitute schemes entered into for the dominant purpose of obtaining a tax benefit

The ATO is actively reviewing these arrangements and liaising with the Australian Charities and Not for profits Commission (**ACNC**) in respect of participating DGRs, and with ASIC in respect of barter exchanges.

Further guidance is expected, including possible clarification that the valuation principles in IT 2668 do not apply in this context. Taxpayers and advisers who promote or facilitate these arrangements will be subject to increased scrutiny, and significant penalties may apply, including promoter penalties under Division 290 of Schedule 1 to the TAA 1953 and potential referrals to the Tax Practitioners Board.

The ATO encourages taxpayers who have entered into, or are considering entering into, these arrangements to seek independent advice, request a private ruling, or make a voluntary disclosure to mitigate penalties.

ATO Reference *TA 2025/3*
w https://www.ato.gov.au/law/view/document?docid=TPA/TA20253/NAT/ATO/00001

6.5 Finalised ATO guidance on PSI alienation and Part IVA

The ATO has finalised PCG 2025/5, which sets out its compliance approach to the possible application of Part IVA to arrangements where an individual’s personal services income (**PSI**) is derived through a personal services entity (**PSE**) that qualifies as a personal services business (**PSB**).

Some changes have been made from the draft guideline that was previously released as PCG 2024/D2.

Definitions

Definitions have been added at paragraph 4 to clarify:

- *'Alienation' refers to redirecting or retaining income away from the individual who performed the services, usually through another entity or associate.*
- *'Self-assess' refers to a PSE that has not sought a personal services business determination (PSBD) from us and has formed their own view that they meet a PSB test.*
- *'Tax benefit' refers to an amount of assessable income that is not included in the individual's tax return in the year the services were performed.*

Risk profile

A new paragraph 11 has been added to focus on materiality of the PSI diverted and provide a timeframe to 30 June 2027 for taxpayers to make a genuine attempt to comply:

> *11. While Part IVA can apply to any higher-risk arrangement, the materiality of the PSI diverted will always be a relevant factor we consider when deciding whether to review an arrangement or pursue Part IVA. We are more likely to target arrangements where there are substantial distributions or payments made to associated lower-tax persons or entities. Further, taxpayers should not be concerned that we will apply compliance resources to pursue Part IVA where they have made a genuine attempt to move into a low-risk arrangement by 30 June 2027.*

The ATO also clarifies at paragraph 17 that an arrangement between two spouses to divide profits from a shared business in a tax advantageous way is not sufficient to conclude that there is a scheme to obtain a tax benefit. However, if the partnership has artificial or contrived term that can only be explained by a tax benefit, Part IVA may apply. For example, the ATO indicates that a partnership in which one partner performs no services, provides no capital and takes no part in the management of the business, would raise a question about the potential application of Part IVA.

Additional examples

The finalised PCG includes four additional examples.

Example 7 — Interposed company, cash-flow issues, temporary retention of profits (Low risk)

This example involves a web designer operating through a company that experiences an industry downturn. The company retains a small amount of post-tax profit to fund short-term cash-flow needs, such as interest, wages and administrative expenses, until new work is secured. Because the retention of profits is for a clear commercial purpose and the company follows through by applying the retained funds to business expenses in the next income year, the arrangement is assessed as low risk.

Example 8 — Interposed company, start-up costs, temporary retention of profits (Low risk and higher-risk scenarios)

An IT specialist establishes a new cybersecurity consultancy and retains modest profits to fund start-up overheads (including her own wages) in the following income year. Where the retained profits are used as intended for legitimate business costs, the arrangement is low risk.

However, the example also outlines a higher-risk variation. If the company later has sufficient income to meet expenses but continues to retain profits without any commercial justification, the arrangement becomes higher risk and may attract ATO scrutiny, including whether Part IVA could apply.

Example 9 — Interposed company with a silent investor (Low risk)

A landscaper starts a company jointly owned with his father, who contributes capital as a genuine silent investor. The company pays the individual a wage commensurate with his work and uses the investor's funds to cover start-up losses. In a later year, when profitable, the company pays dividends to both shareholders. As the PSI is properly returned by the individual and dividends to the investor represent a commercial return on capital, not an income-splitting attempt, the arrangement is low risk.

The guideline notes that Part IVA could still be considered if returns to the investor were disproportionate to the commercial risk undertaken, but such cases are unlikely to be prioritised.

Example 11 — Interposed company, wages capped below top marginal rate and retention of profits (Higher risk)

This example involves an electrician who provides his personal services through a company. Although the company qualifies as a PSB, it pays the individual a wage deliberately set just below the top marginal tax threshold, rather than an amount commensurate with the value of his work. A substantial portion of the PSI is then retained in the company and taxed at the lower corporate tax rate. Because the arrangement results in a significant amount of PSI not being included in the individual's assessable income, and the remuneration is not reflective of the services performed, the ATO considers it a higher-risk arrangement likely to attract scrutiny under Part IVA. A contrasting low-risk variation is also provided, where the company pays a commercially appropriate salary and pays the remaining profit as an end-of-year bonus to the individual, leading to all PSI being correctly taxed to the person who performed the services.

COMMENT – as a practical compliance guideline, the role of this document is to indicate where the ATO will devote compliance resources. It does not provide guidance as to the application of the law to particular arrangements. The PCG is also limited to the risks associated with arrangements involving the potential alienation of PSI through a PSE that is conducting a PSB. If the ATO is concerned about other tax provisions, including the potential application of Part IVA, the ATO may devote compliance resources to addressing those risks.

ATO Reference *PCG 2025/5*
w https://www.ato.gov.au/law/view/document?DocID=COG/PCG20255/NAT/ATO

6.6 Minor updates to PSLA on Commissioner's discretion under s109RB

The ATO has updated *Law Administration Practice Statement PS LA 2011/29* regarding the exercise of the Commissioner's discretion to disregard a deemed dividend or to permit a deemed dividend to be franked under section 109RB of Division 7A of the ITAA 1936.

The practice statement has been updated for a minor wording amendment under the heading "*If there is a delay in taking corrective action or the relevant entities are only willing to take corrective action if the Commissioner's discretion is exercised*".

The words "[d]elays in taking corrective action may weigh against the exercise of the discretion" have been added.

The relevant paragraph now reads:

> *Those seeking the exercise of the discretion to disregard the deemed dividends should have voluntarily and unilaterally implemented corrective action unless it was unreasonable to do so (for example, the corrective action would have been costly or unduly inconvenient). Delays in taking corrective action may weigh against the exercise of the discretion.*
>
> *It may genuinely and reasonably be believed that taking corrective action should be conditional on the exercise of the discretion. For example, there may be circumstances where an entity has not yet implemented corrective action but is willing to do so as part of fulfilling the Commissioner's discretion conditions. This will not weigh against the exercise of the discretion where a timely application is made to the Commissioner for the discretion.*

The practice statement has also been checked for technical accuracy and currency, and updated in line with current ATO style and accessibility requirements.

ATO Reference *PS LA 2011/29*
w https://www.ato.gov.au/law/view/view.htm?docid=PSR/PS201129/NAT/ATO/00001

6.7 Commissioner's discretion to retain a refund

The Commissioner is required to refund to the taxpayer, within a reasonable time, any running balance account (**RBA**) surplus or a credit that has not been applied against a tax debt unless one of the grounds for discretion to retain the refund applies. The ATO's approach to exercising this discretion is set out in PS LA 2011/22.

Generally, the grounds for retaining a refund are as follows:

1. Voluntary payments - A refund can be retained where the surplus arises because the taxpayer made a voluntary payment in anticipation of a tax debt, and the taxpayer has not requested the money back.
2. Missing or non-compliant bank account details - If the taxpayer has not provided financial institution account (FIA) details, or the details are non-compliant, the Commissioner may retain the refund until compliant details are supplied.
3. Outstanding BAS or PRRT notifications - Where a required BAS or PRRT return is outstanding, and that missing lodgment affects or may affect the refund calculation, the Commissioner may hold the refund until the notification is lodged or an assessment is made.
4. Outstanding Single Touch Payroll (STP) information - If the Commissioner reasonably believes the taxpayer has not lodged required STP payroll information that affects the refund amount, the refund can be retained until the information is provided or the position is otherwise resolved.
5. Verification of information - Refunds may be held where the Commissioner needs to verify information included in a notification (e.g., BAS or return) because it appears inconsistent, high-risk, incomplete, or potentially incorrect, and verification is reasonably required to protect the revenue.

PS LA 2011/22 has been updated to reflect two key legislative changes.

Extended BAS-related notification period

The notification period for BAS-related RBA surpluses was extended from 14 to 30 days for lodgments received on or after 1 July 2025, as introduced by the *Treasury Laws Amendment (Tax Incentives and Integrity) Act 2025*. The Commissioner now has more time to conduct preliminary risk checks before being required to notify the taxpayer. This is intended to provide administrative flexibility, particularly where large or unusual BAS refunds require early triage.

Wine producer rebate cap

The wine producer rebate cap was previously $500,000 per financial year. The *Treasury Laws Amendment (2017 Measures No. 4) Act 2017* reduced the cap to $350,000, applying from 1 July 2018. Example 9 in the Practice Statement was updated to replace the prior rebate cap with the reduced $350,000 cap.

w https://www.ato.gov.au/law/view/document?docid=PSR/PS201122/NAT/ATO/00001

6.8 Remission of penalties for failure to withhold

On 11 December 2025, the ATO published an updated version of PS LA 2007/22 regarding remission of penalties for failure to withhold. The update forms part of the ATO's ongoing program to modernise Law Administration Practice Statements for accuracy, consistency and accessibility. Certain paragraphs have been rewritten to align with updates to the ATO's writing style, but no changes were made to the substantive remission framework. For example, some rewritten paragraphs are intended to provide a clearer articulation of factors relevant to remission decisions (e.g. compliance history, revenue impact, voluntary disclosure and record-keeping).

The reworded examples continue to highlight the ATO's strong emphasis on compliance behaviour, record-keeping, and voluntary disclosure when determining whether exceptional circumstances exist.

w https://www.ato.gov.au/law/view/document?docid=PSR/PS200722/NAT/ATO/00001

6.9 ATO compliance approach for first year of Payday Super

The ATO has finalised PCG 2026/1, which sets out its compliance approach for the first year of Payday Super (1 July 2026 – 30 June 2027). The Guideline replaces the earlier draft PCG 2025/D5 and reflects changes arising from the enactment of the *Treasury Laws Amendment (Payday Superannuation) Act 2025*.

A number of refinements have been made to improve clarity in the final Guideline:

1. additional detail has been included to explain "as soon as reasonably practicable" in the context of correcting late or rejected contributions, with paragraph 17 expanded to specify the types of corrective actions expected from employers;
2. footnote 10 has been updated to outline the allowable longer periods for making an on-time contribution (e.g., first-time contributions to a new fund, out-of-cycle payments, exceptional circumstances); and
3. restructured references and definitions now align with the enacted Payday Super legislation rather than the prior draft Bill.

Clarification of risk zones

The final Guideline clarifies the behaviours that place an employer in the low-risk zone, emphasising genuine attempts to make contributions on time and prompt correction of fund-returned contributions. The medium-risk zone is unchanged in principle but is now more clearly linked to cases where contributions are not made within the allowable periods, yet all individual final SG shortfalls are nil by 28 days after the end of the quarter. The high-risk zone has been clarified to focus on circumstances where employers fail to make sufficient contributions even by quarter-end, or do not rectify errors, resulting in final SG shortfalls greater than nil.

Additionally, the ATO emphasises that each QE day is assessed independently, and earlier low-risk outcomes do not shield later non-compliance.

Additional examples

The final PCG includes new examples and expanded scenarios to help employers understand how their behaviour affects risk classification:

Example 8 — Movement from low-risk to high-risk

An employer with a strong compliance history slips into late and uncorrected payments from January 2027 onwards, moving them into the high-risk zone.

Example 9 — Movement from medium-risk to low-risk

An employer with earlier errors introduces reconciliation controls, corrects underpayments, and rectifies occasional delays promptly, resulting in a shift to the low-risk zone.

ATO Reference *PCG 2026/1*
w https://www.ato.gov.au/law/view/document?docid=COG/PCG20261/NAT/ATO/00001
w https://www.ato.gov.au/law/view/document?docid=COG/PCG20261EC/NAT/ATO/00001

6.10 Payday Super

The ATO published web guidance on Payday Super. As the Payday Superannuation legislation has not become law, the guidance is intended to help employers prepare for anticipated changes from 1 July 2026.

From 1 July 2026, under Payday Super:

1. employers must pay employees their super guarantee on payday, at the same time as their salary and wages;
2. super guarantee is to be calculated on the employee's "qualifying earnings", which includes OTE, salary sacrifice contributions and other amounts that are currently included in an employee's salary or wages for super guarantee;
3. SGC will apply of amounts are not received by the superfund within 7 business days of payday; and
4. penalties will be 25% or 50% of the SGC.

Employer should review payroll and super processes to ensure they can calculate super every pay cycle, pay super on payday, correctly report superannuation through ATO systems.

w https://www.ato.gov.au/businesses-and-organisations/super-for-employers/payday-super/paying-super-on-payday

6.11 ATO spotlight on Payday Super

On 3 November 2025, Deputy Commissioner Emma Rosenzweig published an article regarding Payday Super in the ATO's Small Business newsletter to inform and prepare small business employers for the upcoming Payday Super changes.

Starting from 1 July 2026, Payday Super will require employers to pay superannuation at the same time as salary and wages, rather than quarterly.

The article outlines practical steps employers can take now to prepare for the change. These include:

1. paying super more frequently;
2. ensuring employee super fund details are accurate;
3. strengthening payroll governance;
4. planning for the closure of the ATO’s Small Business Super Clearing House; and
5. reviewing cash flow impacts.

w https://www.ato.gov.au/businesses-and-organisations/small-business-newsroom/deputy-commissioner-emma-rosenzweig-talks-payday-super

6.12 ATO simplifies home-charging cost calculations for EVs and PHEVs

The ATO has finalised updates to PCG 2024/2, confirming simplified calculation methods for electricity costs when charging electric vehicles (**EVs**) and plug-in hybrid electric vehicles (**PHEVs**) at an employee’s or individual’s home for FBT and income tax purposes. A significant number of amendments have been made from the earlier version, with substantial additions and clarifications throughout the guideline.

A major structural change is the expansion of the guideline to cover PHEVs, not just zero-emission electric vehicles. To reflect this, references throughout the document have been updated, and new sections have been inserted to explain the different methodologies applicable to vehicles that use both electricity and petrol.

The ATO has clarified wording in several parts of the guideline, particularly in paragraphs 4 and 15, to remove ambiguity about who can rely on the guideline and the conditions for doing so. The expanded definitions also ensure clear differentiation between EVs and PHEVs.

PHEV-specific methodology

A significant addition is the inclusion of a detailed, seven-step methodology for calculating electricity costs for PHEVs. This includes guidance on:

1. identifying actual petrol costs;
2. calculating petrol vs electricity kilometres;
3. determining electricity-fuelled kilometres; and
4. applying the EV home-charging rate only to the electricity-fuelled portion.

For EVs, the Commissioner will not allocate compliance resources to review a taxpayer's calculation if they apply the EV home-charging rate of 4.20 cents per kilometre multiplied by total annual kilometres travelled.

A transitional approach applied for the 2024–25 FBT and income tax years. If odometer records or petrol-cost substantiation were not kept at the start or end of the year, taxpayers may rely on reasonable estimates such as service records, logbooks or other available information.

The finalised guideline contains new examples illustrating the application of the methodology to PHEVs.

These include worked examples under both:

1. FBT scenarios (e.g., exempt benefits, operating cost method), and
2. income-tax scenarios (e.g., logbook method).

Record-keeping guidance has been expanded to address:

1. substantiating actual petrol costs for PHEVs
2. when reasonable estimates may be used
3. additional odometer requirements for PHEVs under both FBT and income-tax rules.

ATO Reference *PCG 2024/2DC*
w https://www.ato.gov.au/law/view/document?docid=COG/PCG20242/

6.13 ATO updates employees guide on deducting work expenses

The ATO has updated its guide for employees on how to determine if a work expense is deductible, how to apportion expenses if they are only partly deductible, and what records need to be kept to substantiate work expenses.

The ATO's updates include:

1. new information on deducting dental expenses, medical expenses, passport expenses and travel insurance expenses;
2. the increased fixed rate fixed rate for each hour worked from home to 70c from 1 July 2024;
3. information about calculating home charging of electricity from 1 July 2024 for individuals who own a plug-in hybrid electric vehicle; and
4. footnotes to case references to support the ATO views outlined in the guide.

w https://www.ato.gov.au/law/view/document?DocID=SAV/EGWE/00001

6.14 ATO focus on FBT on work vehicles

The ATO is focusing on ongoing non-compliance risks where employers provide work vehicles that are made available for employees' private use. Private use of a work vehicle will generally give rise to an FBT liability, requiring the employer to lodge an FBT return and pay FBT.

The ATO notes that common errors include failing to lodge an FBT return, assuming that dual-cab utes automatically qualify for exemption, incorrectly claiming vehicle exemptions, not apportioning private use, and failing to maintain adequate records (such as valid logbooks).

The ATO is using enhanced data and analytics to identify employers who incorrectly report or fail to report vehicle-related fringe benefits, and compliance teams are actively contacting such employers. The ATO encourages employers to ensure appropriate record-keeping and correct classification of private versus business use of vehicles.

w https://www.ato.gov.au/businesses-and-organisations/small-business-newsroom/misreporting-fbt-on-personal-use-of-work-vehicles

6.15 Top 500 key findings and priorities

The ATO has published its 2024–25 Top 500 key findings and priorities, highlighting stronger tax governance across wealthy private groups but also signalling a sharper compliance focus for 2026. The program continues to build confidence that most Top 500 groups are paying the right amount of tax, with a 20% increase in groups achieving justified trust or provisional justified trust in 2024–25.

Despite this improvement, the ATO found that over three-quarters of additional liabilities raised arose from basic, preventable errors, such as omitted income or over-claimed deductions, often by groups that had repeated earlier mistakes. The ATO emphasises that effective tax governance frameworks remain the strongest safeguard against these avoidable costs.

Looking ahead to 2025–26, the ATO will:

1. prioritise groups with poor or absent governance;
2. intensify reviews of significant or atypical transactions;
3. focus on lodgment discipline, with firmer action, including penalties, default assessments and prosecution, where entities fail to lodge on time; and
4. engage with new entrants whose wealth or turnover now places them within the Top 500.

The ATO reports that several groups that are eligible to exit the program have chosen to stay in the program to secure the benefits of justified trust. Groups that are eligible to exit have been given the option to remain in the Top 500 program provided they achieve justified trust within 12 months

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/privately-owned-and-wealthy-groups/findings-report-top-500-tax-performance-program-june-2025/top-500-key-findings-and-priorities

6.16 ATO widens focus on high-risk behaviours

On 30 January 2026, the ATO expanded its website guidance on the behaviours, characteristics and tax issues within privately owned and wealthy groups that draw its attention. The updated guidance highlights a broad set of risk indicators, including:

1. low transparency and material adviser influence;
2. large or unusual transactions involving shifting of wealth;
3. aggressive tax planning, outcomes inconsistent with legislative intent, and repeated non-compliance;
4. lifestyles not supported by reported income; and
5. private use of business assets, weak governance, selective participation in the tax system, incorrect reporting, misuse of concessions, and cross-border structuring to minimise tax.

The ATO also reiterated its strong focus on non-lodgment, targeting taxpayers who attempt to delay or avoid tax by failing to lodge income tax returns, FBT returns or activity statements. Using expanded data-matching, the ATO identifies entities that receive income but fail to lodge, under-report income, carry outstanding activity statements, or report instalments significantly lower than prior years. Directors with repeated or unnecessary lodgments also attract scrutiny.

In relation to private-company benefits (including Division 7A), the ATO continues to monitor arrangements used to extract company wealth without appropriate tax.

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

6.17 ATO sharpens focus on Division 7A

The ATO has refreshed its website guidance on private-company benefits, outlining behaviours that attract scrutiny where wealth is extracted from private companies without appropriate tax consequences.

The ATO is monitoring arrangements involving interposed entities or structures designed to obscure the flow of funds, and excessive or non-arm's-length payments, or benefits that are received but not reported.

Key high-risk areas include:

1. director loans to shareholders reporting low taxable income but maintaining high personal spending;
2. dividend access share schemes used to channel profits to associates tax-advantageously; and
3. UPEs where a private company is presently entitled to trust income but does not receive or properly document payment.

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/privately-owned-and-wealthy-groups/what-attracts-our-attention/private-company-benefits-including-division-7a

6.18 Upcoming inclusion of super funds and CIVs in RTP schedule

On 18 November 2025, the ATO confirmed that large superannuation funds and collective investment vehicles (**CIVs**) will be required to complete a Reportable Tax Position schedule for the 2026 tax years.

The ATO will release further guidance on how to complete the RTP schedule before the new requirements take effect.

w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/upcoming-inclusion-of-super-funds-and-civs-in-rtp-schedule

6.19 Consultation for ATO updated guidance on transfer pricing issues

On 10 December 2025, the ATO released Draft PCG 2019/1DC, outlining proposed changes to its compliance approach for inbound distribution arrangements. PCG 2019/1 sets out the ATO's compliance approach to assessing transfer-pricing risk for inbound distribution arrangements, where Australian entities distribute goods or digital products/services acquired from related foreign entities. The draft changes consolidate and update PCG 2019/1 to ensure that transfer pricing profit markers remain contemporary, and introduces several substantive clarifications and structural updates.

The draft update introduces a 'white zone', indicating circumstances where the ATO will not allocate compliance resources beyond confirming continued consistency with a previously agreed approach (e.g., APA, settlement, recent review with high assurance). It also re-articulates low, medium, and high-risk zones, with clear articulation of ATO actions expected for each zone, including increased emphasis on early engagement and APA pathways.

To ensure relevance in the current economic environment, the draft includes updated industry-specific profit markers including Revised EBIT-based profit markers reflecting updated benchmarking across general distributors, life sciences, ICT and motor vehicles sectors and clearer differentiation of value-adding activities that warrant higher expected profit outcomes, particularly in the life sciences and ICT sectors through revised activity categories.

When finalised, this Guideline is proposed to apply to income years finishing after the date it is published and will apply to existing and new inbound distribution arrangements.

The ATO invites stakeholders to submit comments on the draft. Submissions are due by 13 February 2026.

ATO Reference *PCG 2019/1DC*
w https://www.ato.gov.au/law/view/document?docid=DPA/PCG20191DC1/NAT/ATO/00001

6.20 Pillar Two updates

OECD SbS Package

On 5 January 2026, the OECD/G20 Inclusive Framework on BEPS (the **OECD**) released its 'Side-by-Side' administrative guidance package (**SbS Package**). The SbS Package reflects consensus among 147 Inclusive Framework jurisdictions on a coordinated architecture for operating Global Anti-Base Erosion (**GloBE**) rules, including simplification measures, new substance-based safe harbours, and alignment of tax-incentive treatments to support consistent effective tax rate (**ETR**) computations and top-up tax determinations. It also establishes an evidence-based stocktake mechanism and reinforces qualified domestic minimum top-up taxes (**QDMTTs**) as the primary tool for safeguarding local tax bases, particularly in developing jurisdictions.

ATO guidance materials

In December 2025, the ATO updated its website guidance in relation to Pillar Two measures, including:

1. when and how the Pillar Two rules apply;
2. lodging, paying and other obligations for Pillar Two;
3. Pillar Two interactions with other provisions;
4. transitional CbC reporting safe harbour;
5. Pillar Two interactions with consolidation; and
6. specific issues for Pillar Two.

Detailed website guidance on these items can be accessed from the ATO's website page on global and domestic minimum tax, linked below.

w https://www.oecd.org/en/about/news/press-releases/2025/12/international-community-agrees-way-forward-on-global-minimum-tax-package.html
w https://www.ato.gov.au/businesses-and-organisations/international-tax-for-business/in-detail/multinationals/global-and-domestic-minimum-tax

6.21 Board of Taxation to review thin capitalisation reforms

On 30 January 2026, the Treasurer announced that the Government has tasked the Board of Taxation with an independent statutory review of Australia's thin capitalisation reforms. These reforms, enacted in April 2024, aim to curb excessive debt-related tax deductions by multinationals and align Australia's rules with OECD best-practice guidance. The review, which is required under the *Treasury Laws Amendment (Making Multinationals Pay Their Fair Share—Integrity and Transparency) Act 2024*, will examine whether the amendments are operating as intended, assess technical issues, and consider the effectiveness of measures such as the third-party debt test and the $2 million exemption threshold. The review will commence 1 February 2026 and a final report is due within 12 months.

w https://taxboard.gov.au/review/thin-capitalisation-reforms
w https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/review-thin-capitalisation-reforms

6.22 Public country-by-country (CBC) reporting exemptions

On 5 December 2025, the ATO finalised PS LA 2025/2, which outlines its administrative approach to exemption requests under the new public country-by-country (**CBC**) reporting regime. The final guidance replaces the earlier draft issued as PS LA 2025/D1, with several refinements made following consultation.

The final version largely confirms the draft approach but adds useful clarification, including reaffirming that the Commissioner's exemption discretion for Public CBC reporting remains broad and case-by-case. The finalised version includes expanded guidance on when exemptions may be granted, including exceptional circumstances, national security issues, commercial sensitivity, conflicts with foreign law, currency fluctuations and ownership changes, supported by more examples, clearer decision-making steps, strengthened procedural-fairness requirements, improved guidance on aggregation and evidence, and clearer internal review and timing processes. The ATO declined proposals for class exemptions, broader carve-outs, simpler thresholds or any shift away from the regime's transparency objective, leaving the underlying policy settings unchanged.

w https://www.ato.gov.au/law/view/document?docid=PSR/PS20252/NAT/ATO/00001
w https://www.ato.gov.au/law/view/document?docid=CLA/PS2025EC2/NAT/ATO

6.23 Proposed protections for super and financial services consumers

The Commonwealth Government has announced plans to strengthen consumer protections and enhance stability and confidence in the superannuation and financial services sectors, prompted by concerns arising from the Shield and First Guardian Master Fund cases. These cases highlighted harmful practices such as aggressive lead generation and steering consumers into higher-risk, low-quality products.

The Government will consult in early 2026 on targeted reforms to ensure consumers are better informed before switching superannuation funds and more effectively protected when they do so. It will also address broader systemic risks affecting advice, investment schemes and switching practices.

To support the Compensation Scheme of Last Resort (**CSLR**), a $47.3 million special levy will apply in 2025–26, reflecting increased claims from recent financial collapses. Further options, including professional indemnity insurance settings and misuse of insolvency processes to avoid AFCA determinations, will be considered as part of an options paper due in early 2026.

w https://ministers.treasury.gov.au/ministers/daniel-mulino-2025/media-releases/consumer-protection-and-stability-finance-sector

6.24 ATO finalises SMSF education-direction guidance

The ATO has finalised its SMSF education-direction practice statement. In finalising the statement, the ATO:

1. confirmed no materiality threshold will apply - education directions may be issued for any contravention linked to a trustee's lack of knowledge;
2. removed references to an "accredited SMSF adviser" in favour of neutral terminology;
3. will verify Auditor Contravention Reports before relying on them;
4. confirmed former trustees cannot be issued a direction, but the ATO will enhance risk-profiling for individuals re-entering the system;
5. advised a second education direction remains possible where appropriate; and
6. confirmed compliance timeframes will be no less than 28 days, with flexibility for extensions.

w https://www.ato.gov.au/law/view/document?docid=PSR/PS20261/NAT/ATO/00001

6.25 Tax measures in the 2025–26 MYEFO

On 17 December 2025, the Treasurer released the 2025–26 MYEFO. The following measures were announced:

1. **Crypto asset reporting from 2028**: Australia will implement the OECD Crypto-Asset Reporting Framework, with domestic and international reporting commencing in 2027 and first exchanges occurring in 2028, to improve tax transparency;
2. **New specifically listed DGRs**: four organisations will receive five-year DGR listing from 1 July 2026 to 30 June 2031, being Australian Academy of Law, Cambridge Australia Scholarships Limited, Ross House Trust and Tanarra Social Purpose Ltd. Additional eligible community-foundation-linked charities may seek endorsement;
3. **International sporting event concessions**: the AFC Women's Asian Cup will receive income tax, withholding tax and customs duty exemptions through to 31 December 2028; and
4. **Diplomatic tax concessions**: Angola's diplomatic and consular representatives will gain access to GST, fuel and alcohol tax refunds under the Indirect Tax Concession Scheme.

w https://budget.gov.au/content/myefo/index.htm

6.26 OECD recommends tax reform in Australia

The OECD's 2026 Economic Survey of Australia, released on 21 January 2026, urges a major structural overhaul of Australia's tax system, warning that the current mix, heavily reliant on personal income tax, corporate tax and state transaction duties, is unsustainable and economically inefficient. The OECD calls for reducing this reliance and shifting toward more stable, broad-based taxes.

Key recommendations include:

1. broadening the GST base and increasing the GST rate, paired with income-tax cuts to protect low-income households;
2. greater adoption of broad-based land taxes to improve stability and reduce distortions created by stamp duty;
3. reducing superannuation tax concessions, which the OECD considers skewed toward higher-wealth households, including lowering the $30,000 concessional contributions cap;
4. addressing housing affordability by phasing out negative gearing concessions and replacing stamp duty with recurrent land taxes to better align real property taxation with other asset classes;
5. compensating for declining fuel-excise revenue as EV uptake grows by gradually increasing fuel taxes toward European levels, reducing fuel-tax credits, and expanding road-user charging systems; and
6. commissioning a new comprehensive tax reform review to address long-term fiscal pressures driven by ageing demographics and climate-transition costs.

w https://www.oecd.org/content/dam/oecd/en/publications/reports/2026/01/oecd-economic-surveys-australia-2026_1b6f84bc/d22a1efd-en.pdf

6.27 2025 updates to the OECD Model Tax Convention

The OECD Model Tax Convention is an international standard that countries use when negotiating bilateral tax treaties. The 2025 Update introduces several important changes.

Commentary on Article 5 – Permanent Establishment (PE) guidance

Major updates clarify when home-working or cross-border remote work creates a PE. A home office generally does *not* create a PE unless the employee works there less than or equal to 50% of the time *and* there is a "commercial reason" for their presence in that country. Detailed examples are included. An optional alternative rule for extractive industries introduces lower PE thresholds for offshore/onshore resource activities.

Commentary on Articles 7, 9 and 24 – Transfer pricing

Clarifications cover the treatment of financial transactions, interaction with domestic interest limitation rules, and the process for correlative adjustments. Updates also reference the OECD's new Amount B guidance for simplified transfer pricing. Amount B is an OECD simplification that gives standardised profit margins for routine distribution activities, so it is not necessary to perform complex transfer pricing analyses for those cases. It is designed to reduce disputes and compliance costs by providing a clear, fixed return for low-risk distributors.

Article 25 – Mutual Agreement Procedure (MAP)

A new paragraph 6 clarifies how tax authorities decide whether a measure falls within the scope of a tax treaty when a dispute also involves the World Trade Organisation's General Agreement on Trade in Services (**GATS**) rules. This ensures tax treaty dispute mechanisms take priority.

Article 26 – Exchange of Information

States may now use exchanged information for tax matters involving persons other than the original taxpayer, and rules on taxpayer access and confidentiality have been refined.

The update also incorporates numerous country-specific reservations and editorial corrections across many articles.

w https://www.oecd.org/content/dam/oecd/en/publications/reports/2025/11/the-2025-update-to-the-oecd-model-tax-convention_c7031e1b/5798080f-en.pdf

6.28 OECD updates to MAP manual

The OECD has released the 2026 edition of its Manual on Effective Mutual Agreement Procedures, offering updated, practical guidance to improve the efficiency and consistency of cross-border tax treaty dispute resolution. The revised manual places greater emphasis on dispute prevention, including how competent authorities should be organised and how pre-MAP consultations can help avoid unnecessary cases. It also clarifies best practices for accessing MAP and when unilateral relief should be granted to resolve issues early. The guidance on bilateral negotiations has been significantly expanded, with new practical advice on position papers, meeting conduct, and detailed direction on MAP arbitration for the first time. To support consistency across jurisdictions, the manual includes templates for MAP requests and position papers, along with capacity-building guidance for lower-resourced tax administrations.

w https://www.oecd.org/en/about/news/announcements/2026/02/oecd-releases-revised-version-of-the-manual-on-effective-mutual-agreement-procedures-memap-to-strengthen-tax-treaty-dispute-resolution.html

6.29 Director addresses no longer published on ASIC extracts

ASIC will remove residential addresses of company officeholders from company extracts purchased through its website, aiming to reduce privacy, safety and identity-theft risks. The announcement on the ASIC website states, "Law enforcement agencies, government departments, and those who require address details for regulatory compliance and business purposes will still have access to this information." ASIC is working with registry intermediaries and monitoring the rollout to understand impacts for users. The change forms part of ASIC's RegistryConnect program, which is intended to improve data quality, link director IDs, and strengthen identity-verification processes to reduce exposure of personal information.

COMMENT – changes to addresses of directors must be notified to ASIC within 28 days of the change. The removal of the addresses from the ASIC company extract does not remove this requirement.

KEY TAKEAWAY

It is important that the addresses of officeholders be kept to up to date with ASIC for many reasons, including that its legal requirement and that the address can be used for service of director penalty notices by the ATO. That the address of an office holder will no longer be on company extracts removes a way in which the need for notification of address changes may be prompted. Presumably officeholder addresses will still be listed on the annual statement for the company. The annual statement should be reviewed for this purpose as a fallback.

w https://www.asic.gov.au/about-asic/news-centre/news-items/asic-updates-information-available-through-purchased-extracts/

7. Tax Professionals

7.1 ATO overhauls interest and penalty requests

The ATO has implemented interim changes to the process for requesting remission of general interest charge, shortfall interest charge and failure-to-lodge penalties, effective from 22 January 2026. These changes are intended to improve consistency by directing all requests to a dedicated team and to provide clearer guidance on circumstances in which remission is likely to be granted. Any requests lodged before this date will continue to be processed under existing arrangements.

From 22 January 2026, remission requests must be made using a prescribed application form, with separate forms required for GIC, SIC and failure-to-lodge penalties. Agents must submit the forms via Online Services for Agents, while legal practitioners may lodge forms by mail or over the phone. Supporting evidence, such as medical certificates or financial statements, must accompany applications.

The ATO has cautioned that processing delays may occur while the new system is implemented.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/changes-to-interest-and-ftl-penalty-remission-requests
w https://www.ato.gov.au/individuals-and-families/your-tax-return/if-you-disagree-with-an-ato-decision/dispute-interest-or-penalties/remission-of-interest-charges/how-to-request-a-remission-of-interest-and-failure-to-lodge-penalties

7.2 Updates to TPB guidance

On 13 January 2026 the TPB released updated policy guidance to help tax practitioners more easily understand their obligations under the Tax Agent Services (Code of Professional Conduct) Determination 2024 and breach-reporting requirements. The revisions were informed by feedback from the TPB Consultation and Standards Forum.

Associated web content has been updated, and revised factsheets are expected to be published soon.

False or Misleading Statements (TPB(I) 45/2024)

Minor stylistic updates have been made to this information statement. A new paragraph 84 has also been added as follows:

> *However, when making a notification to the TPB or ATO, or taking any further action, under subsection 15(2) of the Determination, registered tax practitioners should exercise caution to ensure that the requirements of section 15 have been satisfied (see paragraphs 71 and 78 respectively) and that the notification itself only includes such information that is lawfully permitted (see paragraph 73). Registered tax practitioners that make a notification to the TPB or ATO, or take any further action, that is not supported by section 15 of the Determination risk breaching the Code, including Code items 4 and 6.*

Managing Conflicts of Interest for Government Work (TPB(I) 46/2024)

The updated guidance expands on obligations under section 20 of the Code Determination, confirming that material conflicts of interest must be disclosed to the relevant government agency. This responsibility extends beyond the practitioner's own conflicts to those of employees, associates, or other relevant parties.

Breach Reporting (TPB(I) 43/2024)

The TPB clarified when practitioners must report a significant breach of the Code. Even where uncertainty exists, practitioners must report if they have reasonable grounds and a reasonable basis for believing a significant breach may have occurred. Paragraphs 40 and 41 have been updated to state:

> *40. This is because the law requires the tax practitioner to be satisfied to the extent of having 'reasonable grounds' (which is a lower standard than being certain). Determining whether there are reasonable grounds for reporting a breach requires the tax practitioner to make a professional judgment.*
>
> *41. If a registered practitioner is not certain that they have reasonable grounds, the TPB recommends that they err on the side of caution and report the breach, provided they still have a reasonable basis or foundation for the claim.*

Paragraph 63 also states that if the tax practitioner is unsure whether a breach constitutes an 'indictable offence' or 'offence involving dishonesty', but they have reasonable grounds for believing it is, they must report it. If they are unsure whether they have reasonable grounds, the TPB recommends they err on the side of caution and report the matter to the TPB, provided they still have a reasonable foundation or basis for the claim.

The guidance also elaborates on what may constitute an "otherwise significant" breach. A new paragraph 94 has been inserted to state:

> *Although determining if a breach is 'otherwise significant' will ultimately depend on the facts and circumstances, if a breach involves intentional, negligent or reckless conduct or otherwise egregious behaviour, it may be more readily identifiable as a breach that needs to be reported under paragraph (c).*

Additional conditions have been added for consideration of whether a breach is "otherwise significant" at paragraph 98. The new items are indicated in bold below:

> *However, when deciding whether a breach is 'otherwise significant', registered tax practitioners are not limited to these factors. They can take into account any factor they consider relevant. Other considerations may include the:*
>
> - *nature and scale of the registered tax practitioner's business*
> - *number of clients involved*
> - ***nature and impact of the breach***
> - *complexity of the arrangements*
> - ***presence of intentional, negligent or reckless conduct, or otherwise egregious behaviour***
> - ***actual** or potential financial or non-financial loss, damage or **harm to others, including clients (not covered under paragraph (b) of the 'significant breach definition')***
> - ***materiality of loss or damage***
> - ***flow-on impacts for clients as a result of the breach, and** vulnerability of affected clients*
> - ***unreasonable risk to an entity's safety***
> - *impacts and harm on the tax system more broadly.*

Paragraphs 200 to 207 outline where anonymity and whistleblower protections may be available when an individual registered tax practitioner reports on another tax practitioner.

w https://www.tpb.gov.au/improving-our-guidance-make-it-easier-tax-practitioners
w https://www.tpb.gov.au/tpbi-452024-false-or-misleading-statements
w https://www.tpb.gov.au/tpbi-462024-managing-conflicts-interest-when-undertaking-activities-government-and-maintaining-confidentiality-dealings-government
w https://www.tpb.gov.au/tpbi-432024-breach-reporting-under-tax-agent-services-act-2009

7.3 TPB's 2026 Guidance Priorities

The TPB has released its 2026 policy guidance priorities, focusing on emerging risks, regulatory developments, and practitioner support. The priorities are as follows:

1. **artificial intelligence**: new guidance will clarify practitioners' obligations under the *Tax Agent Services Act 2009* (TASA) when using AI in tax agent services;
2. **financial abuse within the tax system**: guidance will assist practitioners in recognising and responding to financial abuse within the tax system, particularly affecting vulnerable taxpayers;
3. **continuing professional education for registered tax practitioners**: concise guidance will be developed to support compliance with CPE requirements, accompanied by monitoring to ensure the CPE framework remains fit for purpose;
4. **factsheets**: additional factsheets will be produced to improve accessibility of frequently used guidance materials; and
5. **information library redesign**: the TPB will simplify and modernise its online guidance library to enhance usability.

w https://www.tpb.gov.au/2026-policy-guidance-priorities

7.4 TPB Annual Report 2024–25

The TPB published its annual report on 2024–25 year, setting out its achievements and performance against its strategic objectives for the year.

Compliance activity intensified, with over 13,000 complaints and referrals assessed and 275 serious misconduct cases resulting in outcomes. Landmark enforcement included the record $1.8m civil penalty against unregistered preparer Jayden Van Dyke and the maximum five-year ban imposed on Raheel Chaudry following multi-agency investigations. The TPB also continued supporting affected taxpayers through its Client Support Program.

The TPB reports that registration reforms were successfully implemented, with the transition to annual renewals handled smoothly (95% of applications were processed within 30 days). The practitioner population grew to 63,865 registered practitioners, including 4,373 new registrations.

Guidance and education were significantly expanded. The TPB delivered 26 webinars to more than 102,000 attendees (a 50% increase) and released new and updated guidance including multilingual consumer factsheets.

Financially, the TPB managed a $32m budget, ending the year with a modest surplus and directing major spend toward IT uplift, litigation, Board remuneration and outreach.

Overall, the TPB reported strong performance against its measures, with 11 of 16 targets achieved and the remaining 5 substantially achieved.

w https://www.tpb.gov.au/annual-report

7.5 ATO targets correct reporting of government program payments

The ATO has issued updated website guidance reminding practitioners that clients who receive government payments for delivering services, including under programs such as the NDIS, Aged Care Subsidy and other Commonwealth-funded service arrangements, must keep accurate records and report these payments as

assessable income. The ATO will begin contacting agents and affected clients in early February to ensure correct reporting.

The update accompanies enhancements to the Government Payments Program (**GPP**) data-matching protocol, allowing the ATO to more effectively detect non-compliance by matching payment information from government agencies against taxpayer lodgments.

A new Fraud Fusion Taskforce (**FFT**) supported pilot program will focus on raising awareness of tax-reporting obligations among service providers and improving voluntary compliance across sectors heavily reliant on government funding.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/help-your-clients-navigate-government-payments

7.6 Tax Ombudsman 2025–26 systemic-review work plan

The Taxation Ombudsman has published its refreshed systemic-review work plan for 2025–26, outlining priority areas where it will investigate system-wide issues affecting taxpayers, tax practitioners and other stakeholders.

Since the Taxation Ombudsman announced its work plan in June 2025:

1. its reviews into the ATO's approach to GIC remission and an own-motion review examining systemic issues raised by a specific, long running taxpayer complaint are in progress. Both of these reviews are expected to be finalised in early 2026;
2. its review of the ATO's Online Services for Agents platform and its review of how the ATO engages with First Nations taxpayers are scheduled to commence later this year;
3. it has determined that it is appropriate to remove the review into compromised accounts; and
4. it has determined to add a review of the ATO's use of director penalty notices to its work plan, to be undertaken as and when resources are available.

w https://taxombudsman.gov.au/wp-content/uploads/2025/12/Systemic-reviews-refreshed-work-plan-2025-26.pdf