

Tax Update

September 2026



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Our tax training notes are prepared by Jane Harris and Matthew McKee.

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 2.3 Frugtniet v Mansfield	What happened? The Full Federal Court dismissed an appeal by Brian and Suzanne Frugtniet and held that four properties registered in their son Jerome's name formed part of his bankrupt estate. The Court upheld the exclusion of a purported trust deed because it had not been properly stamped, refused to reopen the proceeding after a later Revenue NSW assessment was obtained, and found that the evidence did not establish resulting trusts in favour of Brian and Suzanne. Why it matters? The decision is a practical warning that stamping is not just an administrative duty compliance issue. If a deed or other dutiable instrument is not properly stamped, it may be excluded from evidence, even where it is central to proving the trust or other arrangement relied upon. A later attempt to stamp the document may not cure the problem unless it clearly establishes that the same instrument has been duly assessed and stamped under the correct process.	Page 17
Item 2.4 Caserta	What happened? The Supreme Court of Victoria held that a trustee had not made valid income distribution determinations for the income years ended 30 June 2012 to 30 June 2016. Several minutes were unclear, unsigned or unreliable, and some resolutions used "or nominee" wording that impermissibly delegated the trustee's discretion. The Court also held that, from the income year ended 30 June 2018, the trustee failed to give real and genuine consideration to relevant beneficiaries when making distribution decisions. Why it matters? The decision is important for discretionary trust administration. Trustees must personally exercise distribution discretions, identify beneficiaries clearly and keep reliable records of decisions made before year end. Invalid or poorly recorded distribution resolutions can have trust law and tax consequences, including default income outcomes or trustee assessment. The case is also a reminder that tax planning cannot replace the trustee's duty to give active, real and genuine consideration to the relevant beneficiary class.	Page 23
Items 4.2, 4.3 and 4.4	What happened? Treasury released exposure draft material for the proposed 2026 Budget trust reforms. The package includes a 30% minimum tax for	Pages 41–55

Tax Update Matter	Impact Summary	Further Detail
2026 Budget trust reforms	most discretionary trusts, transitional roll-over relief for trusts that restructure into fixed or more transparent vehicles, and an elective excluded election trust regime for existing discretionary trusts that lock in fixed income and capital percentages. Why it matters? The reforms may require advisers to review discretionary trust structures well before the proposed commencement dates. Trustees will need to consider whether to accept the minimum tax, restructure using the transitional roll-over, or make an EET election. Each option involves trade-offs, including loss of flexibility, duty and transaction costs, continuity requirements, clawback risks, and trustee duty issues where beneficiaries are effectively fixed or excluded for tax purposes.	
Items 5.1 and 5.2 Crypto asset rulings	What happened? The ATO released two crypto asset updates. The first explains the tax treatment of airdrops, including when tokens received through an airdrop may be ordinary income and how their cost base is determined. The second addresses wrapping and unwrapping crypto assets, including when exchanging a native token for a wrapped version may be treated as a disposal for CGT purposes. Why it matters? The updates are important because airdrops and wrapping transactions may have immediate tax consequences even where no cash is received. Taxpayers may need to return the market value of airdropped tokens as income, track cost bases from the time of receipt, and consider whether wrapping or unwrapping a crypto asset triggers a CGT event. Advisers should not assume these transactions are tax neutral.	Pages 60 and 62
Items 5.4 and 7.1 Royalties and software distribution arrangement	What happened? The ATO has finalised its ruling on whether a payment made in connection with software distribution arrangement will be a royalty, <i>Taxation Ruling</i> TR 2026/2 (Item 5.4) and released the accompanying <i>Draft Practical Compliance Guideline</i> PCG 2026/D4 (Item 7.1). Why it matters? The items matter because the ATO's view may cause payments made under software distribution arrangements to be treated as royalties, even where the parties describe them as distribution, reseller or service fees. That characterisation can affect royalty withholding tax, treaty relief and gross-up provisions in cross-border software arrangements. Advisers should review the rights granted under the software supply chain, including whether the distributor, reseller or customer receives rights to reproduce, adapt, modify or otherwise commercially exploit the software.	Pages 66 and 78

2. Detailed case summaries

2.1 Hartley – work-related expenses

Facts

In September 2019, John Hartley began working for Ericsson Australia as a Domain Sales Manager. His formal duties focused on strategic sales, business development and customer opportunities. John said his role was broader. He described himself as an innovator and technology specialist who helped Ericsson develop and commercialise new ideas.

During his employment with Ericsson, John maintained a home computer laboratory. The lab included high-end computers, servers, software and more than 100 terabytes of stored data. Some of the data and equipment predated his employment with Ericsson. John used the lab for software development, testing, research, self-education, industry projects and blogging.

John worked on intelligent network design, cloud infrastructure and video interface technology. His network virtualisation work began before he joined Ericsson but later developed into technology that Ericsson sought to market. John also worked on cloud infrastructure projects through a telecommunications industry association as an Ericsson representative and helped develop a smart video platform that Ericsson later used in its business.

In the income year ended 30 June 2022, John claimed \$40,664 in work-related deductions and capital allowances. The claims included \$20,437 for depreciating assets, mainly digital storage devices. He also claimed \$7,068 for computer repairs and consumables, \$1,746 for software, \$1,818 for computing services and \$799 for subscriptions to The Age and Apple One.

On 26 September 2022, following an audit, the ATO reduced John's work-related deductions and capital allowances to nil. The ATO also imposed a \$4,778 administrative penalty for recklessness.

On 3 November 2023, John objected to the amended assessment. He reduced his claim to \$38,435 and asked the Commissioner to remit the penalty.

On 28 May 2024, the ATO partly allowed John's objection. It allowed a further \$6,004 in deductions and capital allowances and adjusted the penalty. It disallowed the remaining claims.

On 26 July 2024, John applied to the AAT (later ART) for review of the Commissioner's decision. He later conceded some claims, leaving just under \$31,870 in dispute.

In 2025, Ericsson instructed John not to use his home computer lab for Ericsson-related work.

The Commissioner argued that the disputed expenses lacked a sufficient connection with John's employment at Ericsson. While Ericsson may have benefited from some of his activities, the expenses were incurred to support John's personal research, professional development, industry profile and future earning capacity, rather than the performance of his employment duties. The Commissioner also argued that some expenses were private in nature and that the claims were inadequately substantiated.

John said the expenses allowed him to remain at the forefront of technology and perform his work for Ericsson. He said the lab supported projects that benefited Ericsson and allowed him to engage credibly with technical experts and customers. He also used his own equipment because Ericsson's equipment could not support some of the development work. John wanted to retain control and ownership of his work if he left Ericsson.

Issues

Did John's claimed deductions and capital allowances have a sufficient connection with his employment duties at Ericsson to be deductible under s 8-1 and Division 40 of the ITAA 1997?

Decision

Did John's expenses have the necessary connection with his employment at Ericsson?

The ART accepted that John's role extended beyond conventional sales activities. It also accepted that he had deep technical expertise and that Ericsson benefited from some of his research, development work, industry collaborations and blogging.

However, the key question was whether the expenditure was incurred in the course of earning John's employment income. The ART found that John's activities were directed towards maintaining and developing his broader professional expertise, reputation and future earning capacity, rather than performing his duties as a Domain Sales Manager. Many of the projects pre-dated his employment with Ericsson, and John gave evidence that he wanted to retain ownership and control of his work if he left Ericsson.

The ART also considered it significant that Ericsson did not require John to undertake the activities or establish the home lab. While Ericsson encouraged some of the work and may have benefited from it, encouragement alone was insufficient. The ART likened Ericsson to the "enlightened employer" in *Commissioner of Taxation v Hatchett* [1971] HCA 47, where activities that improve an employee's skills do not become deductible merely because an employer supports them.

The ART found that the expenditure was directed to John's professional competence and standing as a general matter. It was not sufficiently connected to the activities by which he earned his salary from Ericsson. The connection was indirect and related more closely to his personal brand, expertise and future opportunities.

The ART reached the same conclusion for John's blogging activities. Although the blog may have enhanced his industry profile and been valued by Ericsson, he operated it in a personal capacity and sought to retain ownership of the content. The activity was more closely connected to John's professional profile than his employment.

The ART also found that subscriptions to The Age and Apple One were private or domestic expenses. Staying informed through general news and media services was part of ordinary personal life rather than an income-producing activity.

Therefore, the ART found that the disputed deductions and capital allowances were not deductible under section 8-1 or Division 40 because they lacked the required nexus with John's income-earning activities as an Ericsson employee.

COMMENT – The nexus tests for section 8-1 and depreciating assets are not the same. Section 8-1 asks whether the outgoing is incurred in gaining or producing assessable income, while Division 40 looks to the asset's use for a taxable purpose. However, the ART did not treat those differences as producing a materially different outcome on these facts. Its focus remained on whether John's home lab and related activities were sufficiently connected with the income-earning activities of his employment, rather than with his broader professional development, personal profile or future opportunities.

Citation *Hartley and Commissioner of Taxation (Taxation and business)* [2026] ARTA 1590 (General Member M Burch, New South Wales)

w <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2026/1590.html>

2.2 Silverfern Investments – lease payment capital vs income

Facts

In about 2006, Belswan (Pinjarra) Partnership began owning and operating a retirement village in Pinjarra, Western Australia, approximately 80 kilometres south of Perth. The partnership comprised three discretionary trusts, the Pringle Family Trust, the Allingame Family Trust and the Cugley Family Trust. Beneficiaries of those trusts included Silverfern Investments (WA) Pty Ltd, Emma Pringle, Mary Allingame, George Cugley and Betty Cugley.

On 14 July 2008, Belswan was using a standard form retirement village contract known in the proceedings as the "2008 Contract". Under this arrangement, residents entered into agreements to occupy independent living units within the village. The retirement village was progressively developed, with the intention of eventually containing 229 independent living units.

In and before mid-2015, prospective residents entering the village did so under the 2008 Contract. During this period, legislative changes to the Western Australian retirement village regulatory framework were impending, including amendments to the Retirement Villages Regulations 1992 (WA) and replacement of the Fair Trading (Retirement Villages Interim Code) Regulations 2014 (WA). Belswan engaged specialist retirement village lawyers to update its standard form documentation.

In about mid-2015, ahead of proposed changes to the Western Australian retirement village legislative regime, Belswan replaced its earlier contractual arrangements with a new standard form "Resident Contract". Under the Agreement to Lease, the resident agreed to pay a substantial upfront amount called the "Lease Loan" "in consideration of the grant of the Lease". The Lease itself defined the Lease Loan as a loan made by the resident to Belswan. Clause 12 required the resident to "lend" the Lease Loan amount to Belswan at settlement and provided that no interest was payable. Clause 13 required Belswan to repay the Lease Loan upon termination of the residency by paying the "Lease Resale Price" (being the amount paid by a new incoming resident, or an independently determined market value) less specified deductions, including deferred management fees, refurbishment costs and other charges. Residents were also required to pay an administration fee and ongoing operating cost contributions. The Resident Contract remained in use from 2015 until it was replaced in 2021.

On various dates between 2015 and 2021, incoming residents signed the revised Resident Contract. During this period, Belswan continued developing the village. By 30 June 2021, 89 independent living units had been constructed, with development ongoing. The Lease Loan arrangement formed the central feature of the financial relationship between residents and the village operator.

In 2020, the ATO commenced a review of the retirement village arrangements. Following that review, the ATO undertook a formal audit in 2022. The ATO concluded that, under the revised Resident Contract used between 2015 and 2021, the Lease Loan payment was not a loan but was properly characterised as a lease premium. This view differed from the treatment adopted by Belswan and its stakeholders.

On 16 May 2022, the ATO formally notified Belswan (Pinjarra) Partnership that it was commencing an audit.

On 23 June 2023, the ATO issued correspondence summarising the amended income tax outcomes arising from the audit. Amended assessments were issued to the beneficiaries of the relevant family trusts. Mary Allingame received amended assessments dated 28 June 2023 for the 2018, 2019, 2020 and 2021 income years. Silverfern Investments (WA) Pty Ltd and Emma Pringle received amended assessments dated 25 July 2023, covering the 2021 and 2022 income years for Silverfern and the 2021 income year for Emma. George Cugley and Betty Cugley each received amended assessments dated 15 September 2023 for the 2022 income year. The ATO assessed the Lease Loan receipts as ordinary income on the basis that they were lease premiums.

On 25 August 2023, the affected taxpayers lodged objections to the amended assessments. On 31 October 2024, the objections were disallowed.

Applications were lodged in the ART on behalf of Silverfern Investments (WA) Pty Ltd, Mary Allingame, Emma Pringle, George Cugley and Betty Cugley.

The ATO argued that, despite being labelled a "Lease Loan", the payment was in substance consideration paid by residents to obtain the grant of a lease over an independent living unit. Particular emphasis was placed on the contractual terms stating that the resident agreed to pay the Lease Loan "in consideration of the grant of the Lease". The ATO contended that the payment was therefore a lease premium rather than a loan.

The ATO also argued that the repayment mechanism was inconsistent with a true loan because the amount ultimately returned to a departing resident could not be determined when the contract was entered into. Instead, the repayment depended on a future formula linked to the amount paid by a new incoming resident and various deductions.

The taxpayers contended that the Lease Loan was not a lease premium but a loan, or alternatively a capital contribution, similar in substance to the entry payments made under Belswan's earlier contractual arrangements. They argued that the Resident Contract imposed a clear obligation on Belswan to repay the Lease Loan when the resident's occupancy ended, with repayment calculated by reference to the Lease Resale Price less specified deductions.

According to the taxpayers, the fact that the repayment amount was determined by a contractual formula, and could be higher or lower than the original amount advanced, did not change the capital nature of the payment. They maintained that the Lease Loan represented capital provided by incoming residents and was therefore not assessable as ordinary income.

Issue

Did the Lease Loan constitute a lease premium that formed part of the assessable income of the taxpayers?

Decision

The ART first observed that the fact a payment fell within the statutory definition of a "premium" under the Western Australian retirement village legislation did not determine its character for income tax purposes. The statutory definition was broad enough to capture many forms of upfront payments made by residents and therefore did not answer the general law question of whether the payment was a lease premium or a loan. The ART noted that the relevant enquiry was whether the receipt was on revenue or capital account in the hands of Belswan.

Referring to *Federal Commissioner of Taxation v Cooling* (1990) 22 FCR 42, the ART observed that the character of a receipt depends on its quality in the hands of the recipient and whether it forms part of the taxpayer's ordinary business operations. The ART also referred to *Kosciusko Thredbo Pty Ltd v Federal Commissioner of Taxation* (1983) 80 FLR 290, where upfront payments received on the repetitive granting of subleases formed part of the taxpayer's profit-making activities and were therefore income. However, the ART emphasised that the true enquiry was directed to the substance of the rights and obligations created by the contract rather than the label attached to the payment. Further, drawing on *Commissioner of Taxation v Krakos Investments Pty Ltd* (1995) 61 FCR 489, the ART considered that a repayment obligation was a significant indicator that a payment was not a lease premium, noting that a true lease premium would ordinarily be non-refundable once paid.

The ART considered the terms of the Resident Contract. It considered clauses 12 and 13, which described the Lease Loan as money lent by the resident to Belswan and required Belswan to repay the Lease Loan upon termination of the resident's occupancy. The ART regarded the existence of a legally enforceable repayment

obligation as a fundamental characteristic of a loan. Although the amount ultimately repayable could not be known when the contract was entered into, the obligation to repay remained clear and enforceable.

The ART rejected the ATO's argument that the repayment mechanism was inconsistent with a loan due to the amount repaid being dependent on a future formula. The ART noted that the retirement village regulations expressly contemplated that repayment of an entry contribution could be calculated by reference to a formula. That the amount repayable was uncertain at the commencement of the arrangement did not, in the ART's view, prevent the amount from being characterised as a loan.

The ART also considered the significance of the repayment calculation being linked to the future Lease Resale Price. It observed that outgoing residents bore both the risk and benefit of market movements in the value of the relevant unit. If the value of a unit increased, the resident benefited from that increase. If the value decreased, the resident bore that loss. The ART considered that these features were more consistent with the resident having contributed capital and retained an economic interest in that capital than having paid a non-refundable premium for the grant of a lease.

Further, the ART considered how the retirement village business actually generated its profits. Evidence showed that Belswan's revenue was derived principally from administration fees, management fees, operating charges and other resident fees. Deferred management fees and refurbishment fees were recognised as revenue when deducted from the outgoing resident's entitlement. By contrast, Lease Loan amounts were treated as liabilities and ultimately repaid to residents, subject to agreed deductions. This supported the conclusion that the business derived its income from service fees and charges, rather than from the receipt of Lease Loans themselves.

Having considered the contractual terms, the statutory context and the commercial substance of the arrangement, the ART concluded that the Lease Loan was not properly characterised as a lease premium. Rather, it was more likely than not a loan, with the consequence that the receipt was on capital account rather than revenue account. The Lease Loan therefore did not form part of the taxpayers' assessable income. The amended assessments were accordingly set aside.

TIP – The tax treatment of an upfront payment on the grant of a lease turns on its legal character, not the label used by the parties. Although lease premiums are commonly associated with a grant of a lease, TR 2002/14 recognises that an upfront payment in a retirement village arrangement will generally not be treated as a lease premium where the operator has a genuine obligation to repay the amount to the resident.

COMMENT – The ATO has appealed to the Full Federal Court.

Citation *Silverfern Investments (WA) Pty Ltd and Commissioner of Taxation* (Taxation and business) [2026] ARTA 1619 (Deputy President Thompson SC, Western Australia)
w <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2026/1619.html>

2.3 Frugtniet v Mansfield – relying on unstamped documents

Facts

On 10 June 2008, Jerome Frugtniet became the registered proprietor of a property at Rosehill. The purchase price was funded through bank borrowings secured by a mortgage over the property. Jerome's parents, Brian Frugtniet and Suzanne Frugtniet, assisted in identifying property opportunities, paying deposits and transaction costs, and managing the properties, while Jerome obtained the loan funding in his own name.

On 2 September 2014, a document described as a trust deed was purportedly executed between Brian and Jerome. The document recited that Jerome had purchased or acquired certain properties in his own name but held them on trust for Brian. It listed four properties, namely the Rosehill property, a Lidcombe property, a

second Rosehill property and a Mount Druitt property. The deed also stated that Brian had paid the whole of the purchase money for those properties. The authenticity of this document later became a central issue because, at the date of the deed, Jerome was not yet the registered proprietor of all the properties referred to in it.

On 18 December 2014, Jerome became the registered proprietor of the Lidcombe property, which was transferred to him from the executors of his maternal grandmother's estate for stated consideration of \$500,000. The purchase was funded by a loan obtained by Jerome from the National Australia Bank and secured by a registered mortgage over the property.

On 13 January 2016, Jerome became the registered proprietor of the second Rosehill property and the Mount Druitt property. The second Rosehill property was transferred from his paternal grandfather for stated consideration of \$440,000 and the Mount Druitt property was transferred from Brian for stated consideration of \$400,000. Both transactions were funded through loans obtained by Jerome and secured by registered mortgages.

Brian and Suzanne managed the properties by arranging tenants, collecting rent, paying expenses and directing surplus rental income to the relevant loan accounts. The family arrangement was that Brian and Suzanne identified investment opportunities, paid deposits and transaction costs, and managed the properties, while Jerome borrowed the balance of the purchase funds and held legal title to the properties. The expectation was that rental income would service the loans.

In November 2015, Jerome had bank loans of approximately \$400,000 over the Lidcombe property and \$900,000 over the remaining properties, all secured by registered mortgages. He subsequently encountered financial difficulties and later entered voluntary bankruptcy.

On 11 February 2021, David Mansfield was appointed trustee of Jerome's bankrupt estate. Following that appointment, Brian and Suzanne asserted that Jerome held the four properties on trust for them and that they were therefore not assets available to creditors in the bankruptcy. Initially the claims were framed as constructive trust arrangements. Later, the parents relied upon the purported 2014 trust deed and alternatively contended that resulting trusts arose from their financial contributions towards the properties.

On 14 December 2021, Brian and Suzanne provided David with a copy of the purported trust deed after he had requested evidence supporting their claim to beneficial ownership of the properties. David disputed the authenticity of the document and maintained that the properties formed part of Jerome's bankrupt estate.

David commenced proceedings in the Federal Court seeking declarations that the four properties vested in him as trustee of Jerome's bankrupt estate. Brian and Suzanne opposed that relief and argued that Jerome held the properties on express, constructive or resulting trusts in their favour. They relied on the purported trust deed dated 2 September 2014 as evidence of an express trust and alternatively contended that constructive or resulting trusts arose from the family arrangements surrounding the acquisition, financing and management of the properties. David challenged the authenticity of the trust deed and also contended that it was inadmissible because it had not been duly stamped under the Duties Act.

On 25 June 2025, while the proceeding was underway, Brian and Suzanne sought to have the purported trust deed stamped by Revenue NSW. This became important because section 304(1) of the *Duties Act 1997* (NSW) provides that an instrument that effects a dutiable transaction "may not be presented in evidence in a court" unless it is duly stamped or stamped in a manner approved by the Chief Commissioner. David contended that the trust deed was a declaration of trust that attracted duty and therefore could not be relied upon in the litigation unless it complied with the legislation.

On 30 June 2025, Revenue NSW issued a Duties Notice of Assessment showing duty and interest of \$1,030 payable in relation to a document said to be the trust deed, and payment of that amount was made. David

contended that the assessment had been obtained through the wrong process and that substantially greater duty and interest would have been payable if the document had been correctly assessed.

The primary judge rejected the trust claims, refused to admit the trust deed into evidence, dismissed a subsequent application to reopen the proceedings after the deed was said to have been stamped, and declared that the properties vested in David as trustee of Jerome's bankrupt estate. Brian and Suzanne appealed to the Full Federal Court, challenging both the exclusion of the trust deed and the rejection of their resulting trust claims.

Issues

1. Did the primary judge err in excluding the purported trust deed from evidence?
2. Did the primary judge err in refusing to reopen the proceeding after Brian and Suzanne claimed that the deed had been stamped?
3. Did the primary judge err in finding that the properties were not held on resulting trusts for Brian and Suzanne and therefore formed part of Jerome's bankrupt estate?

Decision

Did the primary judge err in excluding the purported trust deed from evidence?

The dispute centred on section 304 of the Duties Act, which generally prevents an unstamped instrument from being used in legal proceedings. Brian argued that the trust deed should nevertheless have been admitted because he undertook to pay any duty assessed on the document and arrange for it to be provided to Revenue NSW. The principal issue was whether the primary judge was required to accept that undertaking and admit the document into evidence.

The Full Court rejected that argument. It held that the purpose of section 304 of the Duties Act is not merely to ensure that Revenue NSW receives a copy of the instrument. Rather, the provision is directed at protecting State revenue by ensuring that duty, interest and penalties are paid before documents affecting dutiable transactions can be relied upon in court. The Court held that a judge considering whether to admit an unstamped instrument may take into account the likelihood that duty will in fact be paid.

The primary judge had found that Brian was impecunious and that there was little prospect that he would be able to pay the potentially substantial ad valorem duty that might be assessed on the trust deed. The Full Court held that those findings were open on the evidence. In those circumstances, it was legitimate for the primary judge to conclude that the proposed undertaking was unlikely to result in the payment of duty and therefore did not justify admission of the deed.

The Full Court also rejected Brian and Suzanne's argument that the proceedings should have been reopened after they obtained a Revenue NSW assessment and paid approximately \$1,030. The Court held that the evidence did not establish that the trust deed relied upon in the litigation had in fact been duly stamped. The document produced to the Court had not been endorsed with the relevant duties assessment number, there were inconsistencies between the details in the deed and the assessment documents, and there was evidence suggesting that the deed may have been processed through an incorrect Revenue NSW procedure. The Court concluded that the primary judge was entitled to find that the evidence fell short of proving that the deed had been properly stamped.

Should the Federal Court have re-opened the proceeding after Brian and Suzanne claimed that the deed had been stamped?

The Full Court also held that, even if the deed had become admissible, it would not have been in the interests of justice to reopen the proceeding. The authenticity of the deed remained strongly disputed. Reopening would likely have required witnesses to be recalled and further evidence to be adduced, causing additional delay in already protracted bankruptcy proceedings. The Court considered that the primary judge was entitled to

conclude that finality and efficient case management outweighed any benefit that might have been obtained from reopening the case.

Therefore, the Full Court held that the trust deed was properly excluded and that the application to reopen was properly dismissed.

Did the primary judge err in finding that the properties were not held on resulting trusts for Brian and Suzanne and therefore formed part of Jerome's bankrupt estate?

A resulting trust can arise where one person contributes the purchase money for property that is placed in another person's name. In those circumstances, equity may presume that the registered owner holds the property on trust for the contributor to the extent of the contribution. That presumption can be displaced by evidence of a different intention. One important exception is the presumption of advancement. Where a parent provides property or financial assistance to a child, equity may infer that the benefit was intended as a gift rather than giving rise to a trust.

Brian and Suzanne argued that they were the true beneficial owners of the properties because they paid deposits and acquisition costs, managed the properties, collected rents and effectively bore the economic burden of the arrangements. They contended that Jerome's name was used only because he could obtain finance. They further argued that the primary judge placed too much weight on the presumption of advancement and failed to give sufficient weight to the objective evidence pointing to their beneficial ownership.

The Full Court held that these arguments misunderstood the primary judge's reasoning.

A critical factual finding was that Jerome provided the bulk of the purchase monies through bank loans for which he was personally liable. Under well-established resulting trust principles, money borrowed by a person and secured by mortgages granted by that person is generally treated as that person's contribution to the purchase price. Although Brian and Suzanne contributed deposits and transaction costs, the primary judge found that the extent of those contributions was not proved. He also found that many payments made into the loan accounts represented rental income collected from the properties rather than personal contributions by Brian and Suzanne.

The Full Court emphasised that the primary judge found much more than the mere existence of a parent-child relationship. He found that Brian and Suzanne intentionally assisted Jerome to acquire a property portfolio and did so for the benefit of "their son whom they love and whom they wanted to be financially secure". The Court regarded this as a positive finding of objective intention, not merely the application of a legal presumption.

The Full Court also observed that the properties were acquired and financed in a manner consistent with Jerome being the owner. Jerome held legal title, obtained the bank finance, remained liable for repayment of the loans and was expected to derive tax benefits associated with ownership. The family management arrangements and the fact that Brian and Suzanne lived in some of the properties did not compel a different conclusion. Those facts were equally consistent with parents assisting their child in building a property portfolio.

Importantly, the appeal did not challenge the primary judge's factual findings. The Full Court repeatedly noted that many of Brian and Suzanne's submissions depended on an implicit challenge to findings of fact that were neither pleaded nor properly advanced on appeal. The appeal therefore had to be determined by reference to the facts as found by the primary judge.

On those facts, the Full Court held that the primary judge correctly concluded that any contributions made by Brian and Suzanne were by way of advancement to Jerome and that the evidence did not establish any resulting trust in their favour. The properties therefore formed part of Jerome's bankrupt estate.

Conclusion

The Full Court dismissed the appeal. It held that the primary judge correctly excluded the trust deed from evidence, correctly refused to reopen the proceedings, and correctly concluded that the properties were not held on resulting trusts for Brian and Suzanne. As a result, the four properties remained assets of Jerome's bankrupt estate and vested in David as trustee in bankruptcy.

COMMENT – Informal family property arrangements can have very different legal consequences from those intended by the family members involved. In the absence of clear contemporaneous documentation, courts will focus heavily on objective evidence such as who borrowed the purchase money, who assumed legal liability for repayment and whether the surrounding circumstances point to a gift rather than a trust.

TRAP – Stamp duty requirements can have consequences far beyond the assessment of duty itself. A document that has not been properly stamped may be unusable in litigation, even where it is central to a party's case.

Citation *Frugtniet v Mansfield (Trustee), in the matter of Frugtniet* [2026] FCAFC 105 (Feutrell, Owens and Wheatley JJ, New South Wales)
w <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2026/105.html>

2.4 Caserta – trustee decision making and validity of distributions

Facts

Grandine Family Trust

The M & G Grandine Family Trust, a family discretionary trust, was established in 1976. The trust was established for the benefit of the Grandine family. Michele Grandine and Graziella Grandine were the parents of Pina Costa, Angela Caserta and Paul Grandine.

Panfina Nominees Pty Ltd was the trustee of the trust. When the trust was established, Michele, Graziella, Pina, Angela and Paul were named as Specified Beneficiaries. The wider class of General Beneficiaries included members of their families and entities associated with them. Michele was originally the Appointor and Guardian of the trust.

The trust was valuable because of its interest in the Chestwell Partnership. Panfina held a 54% interest in that partnership. The Chestwell Partnership owned real estate at Fairbairn Road, Sunshine and also held 20% of the units in the Flinders Street Unit Trust. The Flinders Street Unit Trust produced substantial income, often more than \$1 million a year. The trust's interest in those arrangements was therefore an important source of family wealth.

Michele died in May 2012. After his death, Pina's husband, John Costa became the Appointor and Guardian of the trust. John and Angela were also the directors of Panfina.

Trust distributions

For the income year ended 30 June 2012, Panfina relied on minutes said to record that income was distributed 50/50 to Angela and Pina, or to their nominated beneficiaries. The wording did not identify the nominated beneficiaries at the time the resolution was made. It also appeared in minutes prepared at the same time for Panfina, M Grandine Holdings and Demiport, which later made it difficult to identify precisely whose profits were being dealt with.

For the income year ended 30 June 2013, Panfina again relied on minutes using similar “Angela or Pina and/or nominee” wording. Panfina’s case was that the trustee had distributed trust income between Angela and Pina, or their respective nominees, with John directing Pina’s nominees. As with the 2012 year, the minutes did not identify the nominated recipients when the resolution was made.

For the income year ended 30 June 2014, Panfina relied on unsigned minutes said to record distributions to Angela and Pina, again using “or nominee” language.

For the income year ended 30 June 2015, Panfina relied on another unsigned minute. John gave evidence about the meeting and the intended distribution decision, but there was little contemporaneous corroboration. The minute again used nominee language, meaning that the factual record did not simply show a fixed decision by Panfina to appoint income to identified beneficiaries.

For the income year ended 30 June 2016, there was no meeting of Panfina’s directors at which John and Angela together resolved to distribute trust income. Panfina’s position was that John had nevertheless made the distribution decision because Angela had previously left trust administration largely to him.

For the income year ended 30 June 2017, Panfina relied on a 9 June 2017 general meeting minute. That minute recorded a broader set of distributions than the earlier years. It referred to amounts paid or distributed to Paul, Angela, the Costa Family Trust and Demiport, and to further amounts connected with Angela’s 27% share of income from the Flinders Street Unit Trust received through the Chestwell Partnership.

Dispute and apparent settlements

After Michele’s death, conflict developed between different branches of the family. Angela and Paul challenged John’s role in Michele’s estate and sought to revoke the grant of probate to him. That dispute was resolved, at least in part, through mediation. On 2 February 2017, Angela, Paul, John, Pina and Panfina entered into a Deed of Settlement and Family Arrangement.

The 2017 settlement deed was intended to resolve a range of disputes about family assets, Michele’s estate and past claims concerning the trust. It transferred or allocated various assets between the family groups. It also dealt with past unpaid present entitlement claims. The deed recorded that the trust had nil unpaid present entitlements.

As part of the settlement, Angela retained an economic interest connected with the Flinders Street Unit Trust. Panfina was to hold half of its interest in that unit trust for Angela and pay her 27% of the income received by the Chestwell Partnership from the Flinders Street Unit Trust. The settlement therefore did not simply sever Angela’s connection with the wider family asset structure. It gave her an ongoing right to receive part of the income connected with that structure.

In May 2017, Angela resigned as a director of Panfina. Shortly afterwards, John said that a meeting occurred on 9 June 2017 at which documents concerning Panfina and the trust were signed. Those documents included a deed said to remove Michele, Graziella, Angela and Paul as Specified Beneficiaries of the trust, leaving Pina as the sole Specified Beneficiary. Elise was also later appointed as a director of Panfina.

The signed 2017 deed was not produced in the proceeding. John said that the signed deed, signed minutes and related trust records were lost or destroyed in a burglary at his Brewster Street office shortly after the June 2017 meeting. Angela and Paul disputed whether the deed had in fact been signed.

In April 2018, Angela commenced County Court proceedings against John and Panfina. Those proceedings concerned non-payment of the income Panfina was required to pay her under the 2017 settlement deed. Around this time, Panfina was also administering the trust on the basis that Angela, Paul and their families no longer had any meaningful ongoing interest in the trust.

From the income year ended 30 June 2018 onwards, Panfina made distribution decisions on that basis. In practical terms, Angela, Paul and their families were not treated as people whose circumstances needed to be considered when trust income was distributed.

In 2019, Panfina executed a supplementary deed. That deed again dealt with the removal of Michele, Graziella, Angela and Paul as Specified Beneficiaries and amended provisions concerning the Guardian. By that stage, Elise had resigned as a director of Panfina and John was the sole director. John therefore controlled Panfina alone.

Commencement of proceedings

In October 2019, Angela and Paul commenced proceedings in the Supreme Court of Victoria against Panfina and John. They sought, among other things, orders removing Panfina as trustee and requiring Panfina to file accounts for the trust. The proceeding brought together the family settlement, the purported removal of Specified Beneficiaries, past income distribution decisions, alleged unpaid entitlements and Panfina's ongoing administration of the trust.

There were also questions about whether amounts said to have been distributed to Angela, Paul or Vito had in fact been paid. The evidence included cheques, cheque stubs and accounting records. Some cash cheques were said by Panfina to have been payments for Angela's benefit, but the surrounding records suggested that some payments may instead have been for the benefit of Michele or Teresa.

A further factual question concerned John's own status as a beneficiary. Because John was the Guardian, the trust deed potentially excluded him from being a General Beneficiary unless an exception applied. During the trial, Panfina produced a second register of beneficiaries which recorded that John had been appointed as an additional General Beneficiary. Angela and Paul challenged the reliability of that register, particularly because it was produced late.

By the time the matter came before the Supreme Court of Victoria, the family dispute had therefore become a broader challenge to Panfina's administration of the trust. Angela and Paul said Panfina had treated them and their families as if they no longer mattered for distribution purposes, had failed to maintain proper accounts and had lodged tax returns late. Panfina and John maintained that the trustee had acted within the powers conferred by the trust deed and the settlement arrangements.

Issues

1. Were Angela and Paul validly removed as Specified Beneficiaries?
2. Did Angela and Paul release all future rights and interests in the trust under the 2017 settlement deed?
3. Did Panfina validly determine distributions of trust income and capital for the income years ended 30 June 2012 to 30 June 2017?
4. Was John excluded from being a General Beneficiary because he was the Guardian?
5. Were the alleged unpaid present entitlements in fact paid and, if not, did the settlement deed contain any warranties regarding unpaid present entitlements?
6. Did the later distribution resolutions fail to give real and genuine consideration to relevant beneficiaries?
7. Did Panfina breach its duties by failing to keep proper records and by lodging incorrect tax returns?
8. Should Panfina be removed as trustee?

Decision

Were Angela and Paul removed as Specified Beneficiaries?

Justice Moore in the Supreme Court of Victoria held that Angela and Paul had been removed as Specified Beneficiaries by the 2017 deed. Although the signed deed was not produced, his Honour accepted that a meeting occurred on 9 June 2017, attended by John, Pina, Elise and Joe, and that the business of the meeting

was broadly reflected in the unsigned minute prepared by John. The evidence supported a finding that Elise was appointed as a director at that meeting and that various Panfina and MGFT documents were signed.

Justice Moore accepted that the signed deed and signed minutes were likely lost or destroyed in the June 2017 burglary. Although John's evidence required caution, four witnesses recalled a meeting about Panfina and the trust, Angela had recently resigned, Elise was to become a director, and documents were signed. On balance, his Honour was satisfied that the 2017 deed was executed.

His Honour also held that the 2017 deed was within power. The trustee's variation power permitted amendments that related to the management or control of the trust fund or to the trustee's powers and discretions. Removing Specified Beneficiaries affected the default income and capital provisions and therefore related to the management of the trust fund. If the 2017 deed had not been effective, the same conclusion would have applied to the 2019 deed.

Did the settlement deed remove all future interests?

Justice Moore rejected the argument that the 2017 settlement deed required Angela and Paul to give up all present and future interests in the MGFT. The deed resolved substantial parts of the broader family dispute, but its text did not support a total prospective surrender of Angela and Paul's rights as objects of the discretionary trust.

The Court held that clauses dealing with releases and unpaid entitlements were directed to existing or past claims, not a general renunciation of future rights. As General Beneficiaries, Angela and Paul did not have fixed beneficial interests in the trust property, but they did have equitable rights to due administration of the trust. Those rights were not an "action", "claim" or "demand" in the ordinary sense and would not be surrendered without clear words.

Were the income distribution determinations valid?

Panfina succeeded only for the income year ended 30 June 2017. Justice Moore held that Panfina had not made valid determinations of trust income and capital for the income years ended 30 June 2012 to 30 June 2016.

For the income years ended 30 June 2012 and 30 June 2013 his Honour accepted that directors meetings occurred, but was not satisfied that the relevant entries recorded valid determinations of income of the M & G Grandine Family Trust. The meetings were held at the same time as meetings of other related companies and trusts, and the minutes referred generally to "profits" without identifying whether those profits were profits of Panfina as trustee of the M & G Grandine Family Trust, profits of another entity or trust, or profits of some other enterprise.

Justice Moore also held that, even if the 2012 and 2013 minutes were otherwise sufficient, the resolutions were void because they involved an impermissible delegation of Panfina's trustee discretion. The minutes referred to distributions to Angela and Pina, or to their nominated beneficiaries, with Pina's nominated beneficiaries to be directed by John. A trustee must personally decide who is to receive trust income unless delegation is authorised by the trust deed or legislation. His Honour rejected the argument that the wording merely allowed Angela and Pina to request that Panfina reconsider the recipients. On its natural meaning, the resolution left the substance of the distribution decision to someone other than the trustee.

For the income years ended 30 June 2014 and 30 June 2015, Panfina relied on unsigned minutes. Justice Moore accepted that a directors' meeting probably occurred in June 2014 at which trust distributions were discussed, particularly because of Jemma's evidence. However, it did not accept the unsigned 2014 minute as reliable evidence of what was actually determined. The document was produced only during trial, was in scanned rather than editable form, and was difficult to reconcile with John's usual practice of preparing Word versions of minutes before meetings and retaining signed hard copies.

The same problems applied to the unsigned 2015 minute. John was the only witness who gave evidence of the 2015 meeting, and Moore J was unwilling to accept his uncorroborated evidence. The unsigned minute did not provide sufficient corroboration because it had the same provenance problems as the 2014 minute. In any event, the 2014 and 2015 minutes also used “or nominee” wording. If the minutes had otherwise evidenced determinations, the residual income distributions would still have been void because they delegated Panfina’s discretion to Angela or Pina.

For the income year ended 30 June 2016, it was common ground that there was no directors’ meeting to determine income distributions. His Honour accepted that Angela had often allowed John to manage the trust in earlier years. However, by June 2016, Angela and John were in conflict about the trust and other family matters. That change in circumstances was inconsistent with any continuing implied authority, and there was no evidence that Angela intended to authorise John to exercise her authority as a director for that year. Panfina therefore made no valid determination for the 2016 income year.

The only year for which Panfina succeeded was the income year ended 30 June 2017. Although the tax return and final profit and loss statement did not match Panfina’s pleaded distributions, the Court accepted that the 9 June 2017 general meeting minute was sufficiently clear to constitute a distribution of income. The minute recorded amounts paid or distributed to Paul, Angela, the Costa Family Trust and Demiport, and further amounts connected with Angela’s 27% share of income from the Flinders Street Unit Trust received through Chestwell. The plaintiffs did not contest that the wording was sufficiently clear to constitute a distribution of income. His Honour therefore held that valid distributions were made for the 2017 income year, but not for the earlier years.

Was John excluded from being a General Beneficiary?

Justice Moore held that John was not excluded from being a General Beneficiary. The trust deed excluded the Guardian unless the Guardian was also named as a Specified Beneficiary or appointed as an additional beneficiary. John was not a Specified Beneficiary. His Honour rejected his primary construction argument, but accepted the alternative argument that he had in fact been appointed as an additional General Beneficiary.

That finding depended on the second register of beneficiaries, which was produced late during the trial. Justice Moore regarded the timing and circumstances of production as suspicious and treated John’s evidence with caution. However, applying the civil standard of proof and recognising the seriousness of an allegation of fabrication, his Honour was not satisfied that the second register was a fabricated document.

Were the payments of the UPEs made and, if not, did the settlement deed contain warranties about the UPEs?

Justice Moore made findings about payments said to have been made to beneficiaries. In relation to Angela, his Honour found that she was actually paid \$74,751 in the income year ended 30 June 2012. It did not accept that other cash cheques were properly treated as payments for her benefit, because contemporaneous cheque stubs and the surrounding evidence indicated that those payments were for Michele or Teresa.

Justice Moore also held that the settlement deed contained warranties about UPEs. Recital P stated that the MGFT had nil unpaid present entitlements. Read with the related release provisions, that statement operated as a warranty in circumstances where John controlled much of the relevant financial information and Angela and Paul were giving releases about past unpaid entitlements. Those warranties by John were false as the UPEs had not been paid.

Did Panfina breach its duties in failing to consider Angela and Paul?

Justice Moore held that, from the income year ended 30 June 2018 onwards, Panfina failed to give real and genuine consideration to relevant beneficiaries when making income distribution decisions. Panfina proceeded on the erroneous basis that Angela, Paul and their families had effectively given up their interests in the trust. It

also failed to properly inform itself about the circumstances of those beneficiaries, particularly Angela and Paul's children, who had received no benefits under the settlement deed.

Justice Moore referred to the decision of the Victorian Court of Appeal in *Owies v JJE Nominees Pty Ltd (in its capacity as the trustee for the Owies Family Trust)* [2022] VSCA 142 where the Court stated:

Certain points are clear beyond argument. Trustees must act in good faith, responsibly and reasonably. They must inform themselves, before making a decision, of matters which are relevant to the decision. ...

The Court noted that in *Karger v Paul* [1984] VR 161, McGarvie J confirmed that, unless a trustee chooses to give reasons for the exercise of a discretion, their exercise of the discretion cannot be examined or reviewed by a court, so long as they act in good faith, without an ulterior purpose and upon real and genuine consideration.; it requires the exercise of an 'active discretion'.

In terms of the proper process to be followed, the Court of Appeal stated in *Owies*:

... the process must be one in which the trustee is able to exercise the power in a manner that is just, in the sense of it not being arbitrary or capricious, and it must accord with the purpose of the trust. Often that will require ensuring that the trustee is adequately informed so as to put itself in a position to properly exercise the power.

Justice Moore noted that the obligation of a trustee to be properly informed is universal, but that the content of that obligation is informed by the size and scale of the trust, the nature of the relationships, and the purpose of the power to be exercised.

Justice Moore held that Panfina breached its trustee duties in each year from the income year ended 30 June 2018 because it did not give real and genuine consideration to Angela, Paul or their children when making income distribution decisions. His Honour began with the terms of the trust deed. Although Panfina had an "absolute discretion" to distribute income, that discretion still had to be exercised as a trustee discretion, in good faith, for the purposes of the trust and after properly informing itself about matters relevant to the exercise of the power.

Justice Moore found that, after the 2017 settlement deed, John proceeded on the mistaken understanding that Angela, Paul and their respective families no longer had any interest in the income or capital of the MGFT. That assumption was wrong because, although Angela and Paul had been removed as Specified Beneficiaries, they remained General Beneficiaries. Their children were also within the general beneficiary class and, unlike Angela and Paul, had received nothing under the settlement deed.

Justice Moore considered that this mistaken premise infected Panfina's distribution decisions. Panfina, acting through John, effectively excluded Angela, Paul and their children from consideration because John considered it unnecessary to make distributions to them after the settlement deed. That was inconsistent with the requirement that a trustee give active, real and genuine consideration to the objects of the trust when exercising a discretionary power.

Justice Moore also held that Panfina had not properly informed itself about the circumstances of Angela's and Paul's children. John's evidence was that he made no specific inquiries about Paul or his children after 2019. He relied only on general comments from another Chestwell Partnership member about whether the family was "doing OK" and adopted the same approach for Angela's family. Justice Moore described those efforts as plainly inadequate. Given the nature of the trust, the family relationships and the fact that the children had not benefited under the settlement deed, Panfina was required to give some real consideration to their individual circumstances before deciding whether to distribute income to them.

For those reasons, Moore J found that Panfina breached its duties as trustee for each year from the income year ended 30 June 2018. The plaintiffs did not seek to set aside the later distribution determinations, but the finding was relevant to the broader question whether Panfina should be removed as trustee.

Did Panfina breach its duties in failing to keep proper records and by failing to lodge tax returns?

Justice Moore held that Panfina breached its duties as trustee by failing to maintain proper accounts of the MGFT. His Honour emphasised that keeping proper accounts is an essential trustee duty and a necessary incident of controlling trust property. That general duty was reinforced by the trust deed, which required Panfina to keep complete and accurate records of all receipts and expenditure, and to prepare annual accounting reports after each accounting period.

Justice Moore accepted that burglaries at Brewster Street and Fairbairn Road may have disrupted Panfina's record keeping to some extent. However, his Honour rejected the suggestion that the MYOB deficiencies were simply external events outside Panfina's control. The accounting failures were fundamentally attributable to the decisions John made about how the trust records would be kept.

Justice Moore also held that Panfina breached its duties as trustee by failing to lodge the MGFT's tax returns on time. No returns for the 2012 income year onwards had been lodged before 4 October 2019. Panfina attempted to lodge the 2012 to 2017 returns on that date, but the evidence indicated that they were not in fact lodged until about 2 March 2020.

The later returns were also significantly delayed. Panfina lodged returns for the 2018 to 2022 income years on 3 November 2023, and the 2023 return on 12 February 2025. Although the trust was up to date by the time of trial, Moore J held that Panfina had been in breach for many years. The delays affected about eight income years and, in some cases, were as long as about six years.

Should Panfina be removed as trustee?

Justice Moore held that Panfina should be removed as trustee. His Honour began from the orthodox principle that the Court's power to remove a trustee is exercised by reference to the welfare of the beneficiaries, the security of the trust property, the efficient and satisfactory execution of the trust, and the faithful and sound exercise of trustee powers.

His Honour accepted that removal is a serious step and that not every breach of trust will justify replacing a trustee. Late lodgement of tax returns, considered alone, would not have warranted removal because the returns were ultimately brought up to date and no financial loss or penalties were shown to have resulted from the delays.

However, the record-keeping failures were more serious. Justice Moore treated Panfina's failure to maintain proper accounts as a central trustee failing. John's approach to the trust records was described as disorganised, haphazard and close to shambolic. His Honour considered that these sustained deficiencies showed more than isolated mistakes; they undermined Panfina's capacity to administer the MGFT efficiently and satisfactorily.

Justice Moore also placed significant weight on Panfina's repeated failure, from the income year ended 30 June 2018 onwards, to give real and genuine consideration to Angela, Paul and their children as potential beneficiaries. His Honour rejected the defendants' submission that only Pina's welfare mattered because she was the sole remaining Specified Beneficiary. In a discretionary trust, each General Beneficiary had a right to due administration of the trust and to be considered when the trustee exercised its distribution powers.

The First Settlement Deed did not alter that conclusion. Although it may inform how a trustee considers Angela and Paul in future years, it did not justify treating them, or their children, as irrelevant. Justice Moore considered it especially important that Angela's and Paul's children had received no benefits under the settlement deed, so their circumstances could not simply be ignored.

His Honour characterised Panfina's approach as a fundamental recasting of the beneficiary class, not a discrete misunderstanding of the trust deed. Since 2018, Panfina had effectively administered the trust for the benefit of John, Pina and their children, rather than for the class of General Beneficiaries as a whole.

The continuing family conflict reinforced that conclusion. Justice Moore had no confidence that John, as the person in effective control of Panfina, could remedy the administration of the trust so that it complied with the deed and Panfina's trustee obligations.

For those reasons, Moore J held that the interests of all beneficiaries, the efficient and satisfactory execution of the MGFT and the faithful and sound exercise of trustee powers were opposed to Panfina continuing as trustee. Panfina was therefore removed as trustee.

TRAP – It is important to not assume that a person is within the beneficiary class merely because they are family or have historically received distributions. In this case, the trust deed excluded the Guardian from the class of General Beneficiaries unless an exception applied. John was only found not to be excluded because the Court accepted the late-produced second register of beneficiaries as sufficient evidence that he had been appointed as an additional General Beneficiary. Without that register, distributions to John or entities in which he had an interest may have been vulnerable to challenge as made outside power.

COMMENT – Invalid distribution resolutions can have tax consequences. If no valid appointment of income is made by year end, beneficiaries who were intended to receive trust income may not be presently entitled for trust law purposes. Depending on the terms of the deed, the income may instead pass under any default income provision. If there is no effective default entitlement, the trustee will generally be assessed on the trust's net income for tax purposes, potentially under section 99A of the ITAA 1936.

COMMENT – Trustees of discretionary trusts must give real and genuine consideration to the objects of the trust when deciding how to distribute income or capital. That requires more than choosing the lowest-tax outcome or distributing income only to those who control the trustee. Tax planning may be a relevant consideration, but it cannot replace the trustee's obligation to consider the beneficiary class, the terms and purpose of the trust and the circumstances of relevant beneficiaries. This is especially important where family relationships have broken down, the trust involves blended families, or control of the trust has shifted from one branch of the family to another. In those cases, distribution decisions that consistently favour the controllers of the trust, while ignoring other beneficiaries, are more likely to suggest that the trustee has not exercised an active discretion at all.

Citation *Caserta v Panfina Nominees* [2026] VSC 488 (Moore J, Victoria)
w <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2026/488.html>

2.5 Stewart – principal place of residence for land tax (NSW)

Facts

On 3 April 2009, David Henderson became the owner of a residential property in Coffs Harbour.

On 22 January 2013, David and his wife Tanya Stewart, acquired a property at Merewether as joint tenants.

In February 2020, the Merewether property was leased to tenants. During the same period, Tanya and David began living at the Coffs Harbour property, where they remained until 1 October 2025.

On 27 July 2022, the Council approved a development application for the Merewether property, paving the way for the demolition of the existing dwelling and construction of a new home.

In May 2023, the tenancy at the Merewether property ended. The existing house remained vacant after the tenants left and was later demolished to facilitate the planned redevelopment.

In August 2023, the existing dwelling at Merewether was demolished and construction of a new residence commenced. From that point, the land remained unoccupied while building works were undertaken. Tanya and

David maintained that they intended to move into the completed dwelling and use it as their family home once construction was finished.

On 13 February 2025, Revenue NSW issued a Notice of Investigation in relation to the Merewether property and its claimed principal place of residence land tax exemption.

On 25 February 2025, Revenue NSW issued land tax assessments for the 2023, 2024 and 2025 land tax years, assessing land tax of approximately \$155,729 in respect of the Merewether property. The assessment was based on the view that the property did not qualify for the concession available to unoccupied land intended to become an owner's principal place of residence.

On 7 March 2025, Revenue NSW received a disclosure indicating that Tanya and David had been occupying the Coffs Harbour property as their principal place of residence during 2024 while construction continued at Merewether. This became central to the Commissioner's position that the Merewether concession was unavailable.

On 23 April 2025, Tanya and David lodged an objection challenging their liability to pay the assessed land tax.

On 12 June 2025, Revenue NSW disallowed the objection. Revenue NSW concluded that the concession for an intended principal place of residence was unavailable because the couple were living at, and entitled to claim the principal place of residence exemption for, the Coffs Harbour property.

On 1 October 2025, Tanya swore an affidavit stating that construction of the new Merewether dwelling was expected to be completed on 15 December 2025 and that she and David intended to move into the property upon completion, regarding Coffs Harbour as temporary accommodation during the construction period.

On 9 March 2026, Tanya and David brought proceedings in the NCAT seeking review of the Chief Commissioner's decision and contending that the Merewether property should have been exempt from land tax as their intended principal place of residence.

Under the *Land Tax Management Act 1956* (NSW) (**LTMA**), land tax is generally payable on land owned in New South Wales unless an exemption applies. One such exemption is the principal place of residence exemption, which applies where land is used and occupied by its owner as their principal place of residence. Where a property is jointly owned, the exemption may apply to all owners if one of the joint owners uses and occupies the property as their principal place of residence.

Schedule 1A of the LTMA also contains a concession for unoccupied land intended to become an owner's principal place of residence. Clause 6 provides that unoccupied land may be treated as the owner's principal place of residence where the owner intends to build or renovate a dwelling and subsequently occupy it as their principal place of residence. However, the concession does not apply if the owner, or a member of the owner's family, is entitled to have their actual use and occupation of another property taken into account as a principal place of residence under the Act. Clause 12 further provides that, subject to limited exceptions, a family can only receive the benefit of one principal place of residence exemption at a time.

Tanya and David argued that the Merewether property qualified for the concession in clause 6 because they always intended to occupy the new dwelling as their principal place of residence once construction was completed. They contended that their occupation of the Coffs Harbour property during the building works was only temporary, and that Merewether should be treated as their intended principal place of residence from at least the time development approval was granted in July 2022. They submitted that the deeming provision in clause 6 gave effect to that intention and extended the principal place of residence exemption to the unoccupied land.

Tanya and David further argued that clause 6(7)(a) should not disqualify them merely because they were living in another property while their future home was being built. In the alternative, they contended that clause 12

permitted them to nominate the Merewether property as their principal place of residence, or required it to be treated as such because it had the higher land value.

Issues

1. Was the Merewether property entitled to the principal place of residence concession in clause 6 of Schedule 1A to the Land Tax Management Act 1956 as unoccupied land that Tanya and David intended to use and occupy as their principal place of residence?
2. If the requirements of clause 6 were otherwise satisfied, was the concession nevertheless unavailable because Tanya and David were using and occupying the Coffs Harbour property as their principal place of residence, thereby engaging the exclusion in clause 6(7)(a)?
3. Alternatively, could Tanya and David rely on clause 12 of Schedule 1A to nominate the Merewether property as their principal place of residence and obtain the exemption?

Decision

Did the Merewether property satisfy the requirements of the clause 6 concession?

The NCAT accepted that Tanya and David satisfied the substantive requirements of clause 6. It found that the Merewether property was unoccupied because building works were being undertaken to facilitate its future use as their home, and accepted their evidence that they intended to occupy the completed dwelling as their principal place of residence once construction was finished. The NCAT also accepted that construction had commenced in August 2023 and that the property remained unoccupied while the new dwelling was being built.

The NCAT noted that clause 6 operates as a deeming provision. Where its requirements are met, the owner is treated as using and occupying the unoccupied land as their principal place of residence, even though they are not physically living there. On the agreed facts, the NCAT found that clauses 6(1) and 6(2) were satisfied and that the Merewether property would ordinarily qualify for the concession.

Tanya and David satisfied the threshold requirements of clause 6. However, entitlement to the concession remained subject to the exclusion in clause 6(7)(a).

Did clause 6(7)(a) prevent the concession from applying?

The NCAT found that, throughout the relevant period, Tanya and David were living together at the Coffs Harbour property and that property was being used and occupied as their actual principal place of residence. The NCAT relied on earlier authorities holding that the clause 6 concession is unavailable where a taxpayer is already entitled to have the use and occupation of another property taken into account as their principal place of residence.

The NCAT rejected the argument that Tanya and David's intention to move to Merewether should prevail over their actual occupation of Coffs Harbour. It held that clause 6 is designed to assist taxpayers in transition between homes, but clause 6(7)(a) expressly limits that concession. Once the exclusion was engaged, the concession was unavailable, regardless of the taxpayers' subjective intention or the temporary nature of their occupation of the Coffs Harbour property.

Could Tanya and David nominate the Merewether property as their principal place of residence?

The NCAT rejected this alternative argument. It held that clause 12 is an anti-avoidance provision designed to ensure that a family receives only one principal place of residence exemption where more than one residence might otherwise qualify. The provision does not allow taxpayers to elect whichever property would produce the most favourable tax outcome.

The NCAT found that clause 12 had no application to Tanya and David's circumstances because they did not use and occupy more than one residence as a principal place of residence. The Merewether property was

unoccupied throughout the relevant period and therefore was not a residence capable of being nominated under clause 12. Therefore, they could not rely on clause 12 to treat Merewether as their principal place of residence or to obtain an exemption based on its higher land value.

Conclusion

Although Tanya and David satisfied the basic requirements of the clause 6 concession, the NCAT held that the exclusion in clause 6(7)(a) applied because the Coffs Harbour property was their actual principal place of residence. Clause 12 did not assist them. The NCAT therefore confirmed the Chief Commissioner's decision and held that the Merewether property was not exempt from land tax for the 2023, 2024 and 2025 tax years.

COMMENT – The outcome may seem counterintuitive to practitioners familiar with the CGT main residence exemption. For CGT purposes, a taxpayer can, in some circumstances, obtain a main residence exemption for a dwelling that is not yet occupied, such as where they are building, renovating or repairing a home and subsequently move in (subject to the conditions in Subdivision 118-B of the ITAA 1997). The NSW land tax provisions operate differently. Clause 6 of Schedule 1A contains a concession for an intended principal place of residence, but that concession is expressly withdrawn where the taxpayer, or a family member, is entitled to have the actual use and occupation of another property taken into account as a principal place of residence. As a result, the NSW land tax regime is generally more restrictive than the CGT main residence rules and does not permit a taxpayer to effectively maintain an existing principal place of residence while simultaneously claiming a land tax exemption for a future principal place of residence under construction.

COMMENT – The decision is a reminder that "main residence" and "principal place of residence" concepts cannot be assumed to operate consistently across different tax regimes. Although similar language is used, the relevant provisions serve different purposes and contain different statutory conditions. A taxpayer may therefore be entitled to CGT main residence relief in circumstances where a land tax principal place of residence exemption is unavailable.

Citation *Stewart v Chief Commissioner of State Revenue* [2026] NSWCATAD 262 (Senior Member Dr L. Kirk, New South Wales)
w <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2026/262.html>

2.6 AS Residential Property – Windfall gains tax in Victoria

Facts

AS Residential Property No. 1 Pty Ltd, as trustee for AS Residential Property No. 1 Trust, was part of the Australian Super group. In September 2014, it entered into a contract to buy the former Kingswood Golf Course at 179–217 Centre Dandenong Road, Dingley Village. At that time, the land was mainly zoned Special Use Zone Schedule 1, which limited its use to a golf course and associated uses.

After the purchase, AS Residential Property engaged ISPT to assist with redevelopment of the land. ISPT engaged Tract Consultants to provide town planning advice. Between 2015 and 2018, AS Residential Property tried unsuccessfully to have Kingston City Council amend the planning scheme to rezone the land for residential use. In October 2018, the Council abandoned that amendment.

AS Residential Property completed the acquisition in March 2019. In August 2019, the Planning Minister established the Golf Course Redevelopment Standing Advisory Committee under the Planning and Environment Act 1987 (Vic). In June 2020, the Minister issued Ministerial Direction No 21, which required planning authorities preparing golf course redevelopment amendments to have regard to the Planning Guidelines for the Conversion of Golf Course Land to Other Purposes.

By mid-2020, Tract considered that the proposal could not progress unless the Minister acted as planning authority and referred the proposal to the Standing Advisory Committee. On 20 November 2020, AS Residential Property asked the Minister to appoint himself as planning authority and responsible authority, refer the proposal to the committee, instruct the Department to prepare a planning scheme amendment and permit application under section 96A of the *Planning and Environment Act 1987* (Vic), and refer the proposed development plan for concurrent review.

On 3 December 2020, the Department told ISPT that the application had been tentatively given the number Kingston Amendment C199king. Between December 2020 and April 2021, Tract and the Department continued to liaise while the Department prepared a brief to the Minister titled “Request to prepare planning scheme amendment C199king – Kingswood Golf Course Redevelopment”.

On 9 May 2021, the Minister approved the Department’s recommendations. He agreed to refer draft amendment C199king, with changes, to the Standing Advisory Committee, signed a letter to Australian Super confirming the referral, and signed letters to the committee chair and Kingston City Council. The letters made clear that the draft amendment and permit application would be publicly exhibited and referred to the committee for advice. The Minister also said that the referral did not indicate whether the proposal would ultimately be supported.

Broadly, under the *Windfall Gains Tax Act 2021* (Vic) (**WGT Act**), windfall gains tax (**WGT**) applies when Victorian land is rezoned and the rezoning increases the land’s capital improved value. The tax is imposed on the uplift in value caused by the rezoning, not on the total value of the land. If the taxable value uplift exceeds \$500,000, the tax is imposed at 50% of that uplift. The owner of the land at the time the rezoning takes effect is liable to pay the tax, although payment can generally be deferred until a later dutiable transaction, such as a sale or transfer of the land.

Section 40(2) of the WGT Act provides that WGT is not imposed on land rezoned by a WGT event if the Commissioner is satisfied that:

1. the planning scheme amendment constituting the rezoning was prepared by or at the request of the Planning Minister;
2. the Planning Minister agreed before 15 May 2021 to prepare the amendment;
3. before 15 May 2021, the owner of the land approached the Planning Minister to request the rezoning and had paid for, was liable to pay for, or had otherwise performed or procured relevant work or relevant costs to support consideration of the rezoning; and
4. the value of that relevant work and those relevant costs was at least the threshold amount.

The date 15 May 2021 is important because that was when the Victorian Government announced the windfall gains tax as part of the 2020–21 State Budget. Section 40 was intended to protect proponent-led rezonings that were already sufficiently underway when the tax was announced. For a Ministerial amendment, the key question is whether, before that date, the proponent had made the required investment in the rezoning and the Minister had agreed to embark on preparing the amendment. If those matters were not established before 15 May 2021, the transitional exemption would not apply.

In March 2022 the Standing Advisory Committee reported to the Minister. It noted that, on 9 May 2021, the Minister had referred the proposed redevelopment of the Kingswood Golf Course to it for consideration and advice. The proposal was exhibited from 28 June 2021, with the exhibition period twice extended to 3 September 2021. The committee received 1,650 submissions and ultimately recommended that the Minister prepare and approve a planning scheme amendment to rezone land not required for a public purpose to General Residential Zone.

On 19 September 2023, the then Minister advised Australian Super that she had decided to prepare, adopt and approve amendment C199king and exempt herself from the usual notice requirements. The amendment was

gazetted on 25 September 2023, rezoning the land to General Residential Zone Schedule 7. AS Residential Property later sold the land.

On 1 March 2024, the Victorian SRO assessed AS Residential Property to windfall gains tax of about \$36.2 million, based on an uplift in the capital improved value of the land of about \$72.5 million. The tax was paid with accrued interest when the land was sold. AS Residential Property objected and then sought review in VCAT, relying on the transitional exemption in section 40(2) of the Windfall Gains Tax Act 2021 (Vic).

Issues

1. Was VCAT satisfied that the Planning Minister had agreed before 15 May 2021 to prepare amendment C199king for the purposes of section 40(2)(b) of the Windfall Gains Tax Act 2021 (Vic)?
2. Did the Minister's 9 May 2021 decision to refer the draft amendment to the Golf Course Redevelopment Standing Advisory Committee amount to an agreement to prepare the amendment, or was it merely a decision to defer that question until after the committee reported?
3. Did the transitional exemption require the amendment to have been actually prepared, or prepared to a particular stage under the Planning and Environment Act 1987 (Vic), before 15 May 2021?

Decision

Meaning of "agreed to prepare"

VCAT held that the phrase "agreed to prepare" bears its ordinary meaning, read in the context of the Victorian planning scheme amendment process. The expression is not defined in the WGT Act and there is no separate statutory step under the Planning and Environment Act 1987 (Vic) by which a Minister formally "agrees to prepare" an amendment.

The VCAT rejected the Commissioner's narrower construction. The Minister did not need to have formally approved the amendment, physically prepared it, or prepared it to the point where a section 20(4) exemption from notice could be considered. Nor did the amendment need to have been fully settled or supported on planning merits before 15 May 2021.

Instead, the VCAT held that the Minister needed to have reached a state of mind evidencing an understanding, arrangement or consensus that the Department would embark on formulating the proposed change to the planning scheme on the Minister's behalf. That agreement could be express, implied or tacit, and could be inferred from actions and surrounding circumstances.

Was there agreement before 9 May 2021?

The VCAT was not satisfied that the Minister had agreed to prepare the amendment before 9 May 2021. The tentative registration of amendment C199king in the Amendment Tracking System on 3 December 2020 was not enough. Unlike the council-led exemption in section 40(1), section 40(2) requires Ministerial agreement, not mere registration in the tracking system. There was no evidence that the Minister knew about the proposal when the amendment number was tentatively allocated.

The VCAT also rejected reliance on work done by Departmental officers before the Ministerial brief. That work was properly characterised as preparatory work to bring the matter to the Minister's attention. Without evidence that the Minister knew of or endorsed that work, it could not establish that the Minister himself had agreed to prepare the amendment.

Minister's decision on 9 May 2021

VCAT held that the Minister's actions on 9 May 2021 were sufficient. The Minister approved a brief headed "Request to prepare planning scheme amendment C199king – Kingswood Golf Course Redevelopment". That

brief described the proposed rezoning, identified the draft amendment, and recommended that the Minister agree to refer the draft amendment to the Standing Advisory Committee with changes.

The VCAT considered the brief together with the Minister's letters to Australian Super, the Standing Advisory Committee and Kingston City Council. The Minister's letter to the committee referred to a draft combined planning scheme amendment and planning permit application, set out the key components of the draft amendment, and recorded his satisfaction that the proposed planning controls were properly prepared and presented for the purposes of the committee's terms of reference.

Those circumstances showed at least tacit agreement that the Department would formulate the amendment on the Minister's behalf. The referral could not occur without a draft amendment, explanatory report and associated material being prepared for exhibition and consideration. The Department's subsequent work in preparing and exhibiting the draft amendment was consistent with, and supported the inference of, the Minister's earlier agreement.

Referral to the Standing Advisory Committee did not defer the agreement

The VCAT rejected the Commissioner's argument that the Minister had merely deferred the decision whether to prepare the amendment until after the Standing Advisory Committee reported. The Minister was entitled to refer the draft amendment to the committee for advice on whether, and in what form, it should proceed. That was part of the preparation and assessment process. It did not mean that the Minister had not already agreed to begin preparing the amendment for that purpose.

The VCAT also held that the conditions attached to the Minister's referral did not prevent there being an agreement to prepare. A planning scheme amendment will often change as it moves through exhibition, committee review and final approval. Section 40(2) did not require complete identity between the amendment initially agreed to be prepared and the amendment ultimately approved.

Purpose of the transitional exemption

The VCAT considered the purpose of section 40 to be the protection of rezonings already underway when WGT was announced on 15 May 2021. For council-led amendments, that commitment is shown by registration in the Amendment Tracking System. For Ministerial amendments, it is shown by the Minister's agreement to embark on preparation of the amendment. The exemption required commitment from both the proponent, through expenditure on relevant work or costs, and the planning authority, through the relevant statutory or practical trigger.

That purpose supported a broader construction. If Parliament had intended to require public exhibition, committee advice, adoption, approval, or a section 20(4) notice exemption before 15 May 2021, it could have said so. Instead, it used the wider expression "agreed to prepare", which was directed to the commencement of the Ministerial amendment process rather than its later stages.

COMMENT – This is the first decision on the Victorian windfall gains tax regime. The VCAT took a practical approach to the transitional exemption for Ministerial amendments. It did not require a formal Ministerial decision using the precise words "agree to prepare", nor did it require the amendment to have reached a late statutory stage before Budget announcement day. The focus was whether the Minister had, in substance, agreed that the Department would start formulating the planning scheme change on his behalf.

TIP – There are several exemptions from WGT, so the starting point should not be to assume that every rezoning uplift is taxable. Important exemptions include rezonings that were already underway before 15 May 2021, residential land of up to 2 hectares, charitable land, land rezoned to or from the Urban Growth Zone within Growth Areas Infrastructure Contribution areas, certain rezonings involving public land or public purposes, and waivers for land used for charitable, community or other prescribed purposes.

Citation *AS Residential Property No. 1 Pty Ltd (ACN 601 592 661) as Trustee for AS Residential Property No. 1 Trust v Commissioner of State Revenue* [2026] VCAT 648 (Deputy President Tang, AM and Member Cook, Victoria)
w <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2026/648.html>

2.7 Ramaihi – Duty on nomination of a transferee in Victoria

Facts

Hassan Ramaihi entered into several Victorian property contracts with the intention that a corporate trustee of a unit trust would ultimately complete each purchase and develop the property. At the time he signed the contracts, however, the relevant corporate trustees and unit trusts had not yet been established.

Hassan signed the contracts as “Hassan Ramaihi and/or nominee”. The intended structure was that a newly incorporated company would act as trustee of a newly established unit trust. The property would then be nominated to that structure before settlement.

After each contract was signed, a planning permit application was lodged. Only after that did the relevant company and unit trust structure come into existence. Hassan then signed nomination forms naming the new corporate trustee as purchaser, and the nominated entity completed the purchase.

The timing differed slightly between the various properties:

1. for a property at 201 Pascoe Vale Road, Essendon property, the contract was signed in August 2014, the planning permit application was made in October 2014, the corporate trustee was incorporated in November 2015 and the nomination was signed in December 2015;
2. for a property at 8 Scotia Street, Moonee Ponds, the contract was signed in April 2015, the planning permit application was made in June 2015, the company and unit trust were established in June 2015 and the nomination followed later that month; and
3. for properties at 37 Epsom Road, Ascot Vale and 39 Epsom Road, Ascot Vale, the contracts were signed in July 2016, a planning permit application was lodged in September 2016, the company and unit trust structure was established in May 2017 and the nominations were signed shortly afterwards. Those properties were part of a single development project.

There were two other properties where the planning permit applications were made after the nominations.

Under Division 3 of Part 4A of the *Duties Act 2000* (Vic), a nomination may be treated as a “subsequent transaction” if it gives a person other than the original purchaser the right to have the land transferred to them on completion. That right is described in the legislation as a “transfer right”. If the nomination is made before any land development occurs, the ordinary nomination may not trigger the land development sub-sale rules. But if ‘land development’ occurs after the contract is signed and before the nomination, the original purchaser can be assessed as if they had completed the contract themselves, even though the land is transferred directly to the nominee, with the nominee also assessed for duty in the ordinary manner. That is, if the provisions apply, duty is charged separately on the original contract and on the subsequent transaction.

“Land development” is defined broadly. It is not limited to construction works. It includes applying for a planning permit.

The Victorian SRO investigated the six property acquisitions. The SRO adopted the following positions:

1. the sub-sale rules applied to four properties, being 8 Scotia Street, Moonee Ponds, 37 Epsom Road, Ascot Vale, 39 Epsom Road, Ascot Vale, and 201 Pascoe Vale Road, Essendon;

2. the sub-sale rules did not apply to two other transactions because the nominations in those cases occurred before the relevant planning permit applications were lodged.

The SRO assessed duty on the basis that each nomination gave the nominated entity a “transfer right” after land development had already occurred. The land development was the lodgement of the planning permit applications.

The assessments totalled \$271,425 in duty, \$54,285 in penalty tax and \$16,026 in interest. The SRO imposed penalty tax at 20%, reflecting a finding that Hassan had failed to take reasonable care, but had cooperated with the investigation.

Hassan objected. His main argument was that the nominated entities should be treated as having the transfer rights from the outset because he had always intended to purchase for those entities, or for structures that would later be established. He also argued that he was acting on the instructions of the people who would later control those entities, including business partners and family members.

The Pascoe Vale Road contract raised an additional issue because it was expressed to be subject to the purchaser obtaining a planning permit for six or more townhouses. Hassan argued that this meant the contract was not entered into until the permit was obtained. If correct, the planning application would not have occurred after the contract was entered into, and the sub-sale provisions would not have applied in the way assessed.

Hassan's objection was disallowed and an application for review was made to the VCAT.

Issues

1. Did each nomination of a newly established corporate trustee constitute the grant of a “transfer right” for the purposes of Division 3 of Part 4A of the Duties Act 2000 (Vic)?
2. Could the nominated entities be treated as having obtained the transfer rights before the planning permit applications were lodged, even though those entities did not exist when the sale contracts were signed?
3. For the Pascoe Vale Road property, was the contract entered into when it was signed, or only later when the planning permit condition was satisfied?
4. Did the lodgement of the planning permit applications constitute “land development” before the transfer rights were obtained?
5. Could Hassan rely on the apparent purchaser exemption, or any related exemption, to avoid the additional duty under the sub-sale provisions?
6. Did Hassan take reasonable care to comply with the duties legislation, and if not, should penalty tax or interest be remitted?

Decision

Did the nominations create transfer rights?

Yes. The VCAT held that each nomination gave the nominated entity a “transfer right” for the purposes of the Victorian sub-sale provisions. It did not matter that, under general law, a nominee may not have a direct right to sue the vendor in its own name. In the context of section 32I of the Duties Act, a nomination was capable of giving the nominee the right to have the land transferred to it on completion.

Could a transfer right exist before the company and trust were established?

No. This was the central reason Hassan failed. A transfer right must be obtained by a “person”. The corporate trustees and unit trusts did not exist when the contracts were signed. Because there was no legal person capable of holding or enforcing the right at that time, the nominated entities could not have obtained the transfer rights before they were incorporated and established.

Could agency, pre-incorporation contract or trust principles avoid the timing problem?

No. The VCAT rejected each of those arguments. Hassan could not have acted as agent for companies that did not yet exist. Section 131 of the *Corporations Act 2001* (Cth), which deals with pre-registration contracts, did not assist because the contracts did not identify the future companies with sufficient certainty, the vendors were not shown to have contracted on that basis, and the later nomination forms were not the same thing as corporate ratification. The VCAT also rejected the suggestion that Hassan held the transfer rights on trust for the later entities, because the companies, trusts and economic interests were not identified with sufficient certainty when the contracts were signed.

When was the Pascoe Vale Road contract entered into?

The VCAT held that the Pascoe Vale Road contract was entered into when it was signed, not when the planning permit was obtained. The planning permit clause was a condition precedent to performance, not a condition precedent to formation of the contract. In practical terms, there was a binding contract from the time of signing, but the purchaser could walk away and recover the deposit if the planning permit was refused.

Did applying for planning permits amount to land development?

Yes. The statutory definition of “land development” includes applying for a planning permit. The VCAT held that land development occurred when the planning permit applications were lodged. Because those applications were lodged after the sale contracts were signed but before the nominations took effect, the timing requirement in the sub-sale provisions was satisfied.

Did the apparent purchaser exemption apply?

No. Hassan was assessed as the first purchaser under section 32J(1)(a), whereas the exemption he relied on was directed to duty on a subsequent transaction under section 32J(1)(b) or (c). In any event, the apparent purchaser exemption requires the property to have vested in the apparent purchaser on trust for the real purchaser. That did not happen here because the properties were transferred directly from the vendors to the nominated entities. The properties never vested in Hassan.

Should penalty tax and interest be remitted?

No further remission was allowed. The VCAT accepted that Hassan may not have intended to obtain a tax advantage and may have made an honest mistake. But that was not enough. He was an experienced property developer, used relatively sophisticated corporate trustee and unit trust structures, had access to accounting and conveyancing advice, and signed statutory duties forms. The VCAT held that he should have obtained proper duty advice before lodging planning applications and nominations. His failure to do so meant he had not taken reasonable care.

The SRO had already reduced penalty tax from the standard 25% rate to 20% because Hassan cooperated with the investigation, and had remitted interest to the market rate only. The VCAT found no basis to reduce penalty tax or interest further. The duty assessments were confirmed in full.

COMMENT – This is another duties case showing how important timing can be. The facts were not the usual mischief at which the sub-sale provisions were directed: Hassan was not trying to on-sell the properties for a profit or extract value through a nomination. The intended purchasers were development entities associated with the relevant participants. That did not matter. Once planning applications were lodged before the nominations took effect, the statutory sequence was triggered and the additional duty consequences followed.

TRAP – Nomination and sub-sale duty rules differ between States and Territories. Do not assume that a standard nomination is duty-neutral merely because the contract allows it. If the purchaser named in the contract will not be the entity that completes the purchase, advice should be obtained before any nomination is

signed, any planning or development step is taken, or completion occurs with a transferee other than the purchaser named in the contract.

Citation *Ramaihi v Commissioner of State Revenue* [2026] VCAT 655 (Member P. Klank, Victoria)
w <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2026/655.html>

3. Cases in brief

3.1 Laureti – particulars of intentional disregarded

This case concerned penalty assessments imposed after the Commissioner issued default amended assessments under section 167 of the ITAA 1936. The Commissioner alleged that more than \$16 million credited to the taxpayer's loan account with Laureti Management Services Pty Ltd was assessable income and imposed 75% shortfall penalties on the basis that the taxpayer had intentionally disregarded a taxation law. The taxpayer sought summary judgment, arguing that the Commissioner had not properly identified how the penalty provisions could apply where the underlying income tax assessments were default assessments.

Justice Perry dismissed the application. Her Honour accepted that the Commissioner's appeal statement did not identify with sufficient precision the particular taxation law said to have been intentionally disregarded. However, Perry J treated the problem as a pleading deficiency, not as a reason to dispose of the penalty appeals summarily. The Commissioner's case was otherwise coherent and the deficiency could be cured by amendment. The Commissioner was therefore given an opportunity to file an amended appeal statement identifying the precise taxation law allegedly disregarded.

COMMENT – The case is useful for penalty disputes because it indicates that the Commissioner should particularise the taxation law said to have been intentionally disregarded.

Citation *Laureti v Commissioner of Taxation* [2026] FCA 1086 (Perry J, New South Wales)
w <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2026/1086.html>

3.2 KYWNY – application by taxpayer to reverse fraudulent GST refunds

The ART considered an unusual jurisdictional issue arising from an alleged GST fraud. The case concerned four BASs lodged for the monthly tax periods from November 2021 to February 2022. Those BASs reported negative GST net amounts and resulted in GST refunds being paid by the ATO into a nominated bank account. Following an audit, the ATO issued amended assessments reducing the GST net amounts to nil. By operation of the GST legislation, this had the effect of treating the refunded amounts as debts payable by KYWNY to the Commonwealth. KYWNY objected to the amended assessments, and the objection was disallowed. He then sought review in the ART.

The central difficulty was that KYWNY maintained he was the victim of identity theft. He contended that he did not lodge the BASs, did not authorise anyone else to lodge them, did not nominate the bank account into which the refunds were paid and did not receive any of the GST refund amounts. The ATO disputed those allegations. Importantly, the substantive factual dispute about whether the BASs were authorised had not yet been determined. Instead, the Guidance and Appeals Panel of the ART was asked to decide a threshold question of whether the ART had jurisdiction to hear the review application at all.

The ATO argued that the matter raised an important issue concerning the ART's jurisdiction in cases involving suspected fraud by unrelated third parties. The jurisdictional challenge arose because KYWNY accepted that the amended assessments produced the correct GST net amount of nil. Ordinarily, a taxpayer invokes the review provisions because an assessment is excessive. Here, KYWNY was not saying the amounts assessed were excessive. Rather, he argued that the assessments were legally flawed because the BASs were not lodged by him and therefore should not have been treated as his returns in the first place.

The Guidance and Appeals Panel found that the ART did have jurisdiction. It concluded that a person can be "dissatisfied" with an assessment even where the amount assessed is not excessive, provided the assessment

is alleged to be otherwise incorrect in a way that has an immediate legal effect on that person. If KYWNY ultimately established that the BASs were lodged without his authority, the amended assessments would be incorrect because they would be based on deemed assessments that never validly arose. That contention was sufficient to engage the objection and review provisions.

The Panel also rejected the suggestion that jurisdiction had to await factual findings about the alleged identity theft. It found that the existence of the assessments and the ATO's objection decision was enough to enliven the review process. Whether KYWNY was in fact a victim of identity theft is a matter for the substantive hearing.

COMMENT – In recent times, the ATO has taken a strict and unsympathetic approach to GST fraud cases, including cases where a taxpayer says the relevant BASs were lodged without authority or that refund amounts were diverted to another person.

Citation *Commissioner of Taxation and KYWNY (Practice and procedure)* [2026] ARTA 1551 (Deputy President G Lazanas, Senior Member R Olding and General Member C Willis, New South Wales)
w <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2026/1551.html>

3.3 Lu, in the matter of Lu – bankrupt SMSF trustee director

George Lu was an undischarged bankrupt who sought leave from the Federal Court to continue managing Active Super No. 1, the corporate trustee of his self managed superannuation fund (**SMSF**), and sought an order that he not be treated as a disqualified person under the *Superannuation Industry (Supervision) Act 1993*. The SMSF had been established in 2012 by George and his wife and remained compliant, with the fund holding investments worth approximately \$434,000. George became bankrupt in February 2026 after personal guarantees he had given in connection with construction companies were called upon following their financial collapse. He faced claims exceeding \$10.8 million and ultimately entered bankruptcy on his own debtor's petition. As an undischarged bankrupt, he was automatically disqualified from managing corporations and from acting as a responsible officer of the trustee of an SMSF.

The principal issues were whether the Court had power to make an order under section 126J of the SIS Act in relation to an SMSF regulated by the Commissioner of Taxation rather than APRA, and if so, whether the discretion should be exercised in George's favour.

Justice Halley held that the Court did have power to grant relief. Consistent with earlier decisions, the Court concluded that section 126J could be used by a bankrupt seeking relief in relation to an SMSF, notwithstanding provisions suggesting that part of the statutory regime only applies where APRA is the relevant regulator. The Court considered that any contrary interpretation would produce a surprising result by depriving SMSF trustees of any mechanism to seek relief from disqualification.

The Court also exercised its discretion in George's favour. It accepted that his bankruptcy primarily arose from personal guarantees given in connection with businesses that failed due to a combination of external commercial pressures, including COVID-19 impacts, increased labour costs and losses on major projects. The Court noted there was no suggestion of fraud, dishonesty or intentional misconduct and no evidence that George posed any risk to the public. George had cooperated fully with his bankruptcy trustees and there was no indication that the circumstances leading to his bankruptcy were likely to be repeated.

A significant factor was that Active Super No. 1 existed solely to act as trustee of the family SMSF. The company had no external creditors, employees or business activities. The Court accepted that, absent relief, the fund would cease to satisfy the SMSF requirements in section 17A of the SIS Act and could suffer significant adverse tax consequences. Neither ASIC, the Commissioner nor George's bankruptcy trustees objected to the orders being made.

The Court therefore granted leave for George to continue managing the trustee company and ordered that he was not a disqualified person in relation to the SMSF. The orders were made subject to a condition that the company undertake no activities other than acting as trustee of the fund and activities incidental to that role.

COMMENT – The decision confirms that bankruptcy does not necessarily prevent a person from continuing as director of the corporate trustee of an SMSF. Where the bankruptcy arose from commercial circumstances rather than misconduct, the trustee company has a limited role, and there is no meaningful risk to the public, the Federal Court may grant relief to preserve the fund's compliance status and avoid adverse superannuation and tax consequences.

TIP – If a trustee or director of the corporate trustee of an SMSF becomes a disqualified person (for example, because they become bankrupt), the fund does not immediately cease to qualify as an SMSF. Section 17A of the SIS Act provides a six-month grace period during which the fund can continue to satisfy the SMSF definition while corrective action is taken, such as rolling over that member's benefits to an APRA regulated fund or withdrawing benefits if a condition of release is satisfied. If the issue is not resolved within six months, the fund may cease to qualify as an SMSF and lose access to the concessional regulatory and tax treatment available to complying SMSFs. Advisers and trustees should therefore act promptly whenever a trustee or director becomes bankrupt, is convicted of a relevant offence, or otherwise becomes a disqualified person.

TIP – An undischarged bankrupt is automatically a disqualified person for SMSF purposes, including where the bankruptcy arises under a foreign bankruptcy law. However, the disqualification is not permanent. Once the person is discharged from bankruptcy, they cease to be a disqualified person unless another ground of disqualification applies.

Citation *Lu, in the matter of Lu* [2026] FCA 841 (Halley J, New South Wales)
w <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2026/841.html>

3.4 Kupang Resources Pty Ltd - ATO and *Barnes v Addy*

The NSW Court of Appeal dismissed the Commonwealth's appeal from a decision holding it liable to Kupang Resources Pty Ltd, formerly Chameleon Mining NL (**Chameleon**), for knowing receipt under the first limb of *Barnes v Addy* (1874) LR 9 Ch App 244. In simple terms, *Barnes v Addy* is an equity case that can make a third party personally liable where it receives property that should have been held for someone else, and the third party knows enough about the breach of trust or fiduciary duty to make it unconscionable for the third party to keep the property.

Phillip Grimaldi had obtained valuable shares in breach of fiduciary duty owed to Chameleon. He sold those shares and used the proceeds to pay more than \$15 million to the ATO under a tax settlement. Phillip breached his fiduciary duty because, while acting as a de facto director of Chameleon, he used a transaction partly funded by Chameleon to obtain valuable shares for himself as a Spotter's Fee, without proper disclosure or approval, and then sold the shares for a large personal profit. The breach of fiduciary duty had been founded by the Federal Court in *Chameleon Mining NL v Murchison Metals Limited* [2010] FCA 1129.

Phillip had been investigated by the ATO under Project Wickenby. Through that investigation, the ATO knew that Phillip had made about \$36 million from the sale of the Spotter's Fee Securities. The Federal Court's earlier judgment found that Phillip obtained those securities in breach of fiduciary duty owed to Chameleon. The ATO knew of that judgment and the findings in it. The ATO also knew the proceeds were sitting in offshore accounts controlled by Phillip or his nominee entities. The payments to the ATO under the tax settlement came from those same proceeds.

The primary judge found, and the Court of Appeal accepted, that the ATO knew how Phillip obtained the profits, where those profits were held and that he used those profits to pay the ATO.

The Court rejected the Commonwealth's attempt to rely on the ATO's tax collection role. The ATO had no special protection merely because it received the money in payment of assessed tax debts. If the ATO received trust property with actual or constructive knowledge of the breach, it could be liable like any other recipient. The Commonwealth was also not permitted to run a new appeal ground based on the Commissioner's statutory duties because the point had not been pleaded or argued below.

Citation *Commonwealth of Australia v Kupang Resources Pty Ltd* [2026] NSWCA 161 (Bell CJ, Ward P and Griffiths AJA, New South Wales)

w <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA/2026/161.html>

3.5 Asdew – changing the vesting date and governing law of trust

Re Asdew Pty Ltd (as trustee) concerned a 1976 family discretionary trust that had no express power of amendment and no general governing law clause. The trust was settled in New South Wales, originally had New South Wales connections, and clause 6 referred to New South Wales law for trustee appointments. However, the trust had for many years been administered in Queensland, held assets only in Queensland, and its directors and income beneficiaries were in Queensland. The trustee sought orders under the *Trusts Act 2025* (Qld) to treat a photocopy of the lost trust deed as a true copy, extend the vesting date from 9 July 2026 to 8 July 2101, insert a Queensland governing law clause, amend beneficiary provisions so related companies could clearly take as beneficiaries, and rectify swapped middle names of two beneficiaries.

Justice Treston held that the Queensland Supreme Court had jurisdiction either because the trust was administered in Queensland or because the trustee was before the Court and subject to its in personam jurisdiction. The Court was also satisfied, under section 184, that the trustee was justified in administering the trust on the basis that the photocopy was a true copy of the lost deed. The copy bore the settlor's signature, Asdew's seal, signatures of the original directors, a Justice of the Peace witness, and stamp duty markings.

The Court then held that section 179 of the *Trusts Act 2025* (Qld) could be used to confer on the trustee a management power to amend the trust deed. The proposed amendments were expedient in the management or administration of the trust and did not alter its substratum. The Court authorised the trustee to extend the vesting date, insert a Queensland governing law clause, change the trustee appointment clause from New South Wales to Queensland, clarify that companies related to family beneficiaries could be beneficiaries, and correct the corporate beneficiary clause so it did not literally include every company except Asdew. The Court also rectified the deed to correct the switched middle names of Barry Wise and Craig Wise.

COMMENT – The case highlights a practical difference between Queensland and other States for older trust deeds approaching vesting. Queensland now permits a perpetuity period of up to 125 years, which allowed the Wise Trust's vesting date to be extended to 8 July 2101. By contrast, most States and Territories (other than South Australia) provide an 80 year perpetuity period.

Citation *Re Asdew Pty Ltd (as trustee)* [2026] QSC 202 (Treston J, Queensland)

w <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QSC/2026/202.html>

3.6 Filippini – asset protection of trust assets

This decision of the Full Federal Court concerned whether freezing orders could extend to assets held by trustees of discretionary trusts where the prospective judgment debtor, Mr Filippini, was not the legal or beneficial owner of those assets, but was a beneficiary, appointor and person with extensive practical control over the trusts. The Full Federal Court dismissed the appeal and held that the trust assets could remain frozen. The Full Court did not treat control as converting the trust assets into Mr Filippini's property. Instead, it treated

his position as giving him a valuable expectancy in the trusts, and held that freezing orders could be framed to preserve the value of that expectancy by restraining dealings with identifiable trust assets.

The Full Court considered the decision in *Australian Securities and Investments Commission v Carey (No 6)* (2006) 153 FCR 509, often referred to as *Richstar*. The Full Court noted that *Richstar* did not create a general rule that a discretionary trust beneficiary who controls the trust owns the trust assets. The Court accepted orthodox trust law: an ordinary discretionary beneficiary has no proprietary interest in any trust asset and only has a right to due administration and an expectancy. However, where the beneficiary also controls the trustee's power of selection, can replace the trustee, can appoint themselves as trustee and can cause income or capital to be appointed to themselves, that expectancy may have real value. In that sense, the beneficiary may have something approaching a general power over the trust property, but that is not the same as ownership. The Full Court noted that the mere expectancy is not a chose in action.

COMMENT – Discretionary trusts remain useful asset protection vehicles, but control matters. Where a beneficiary is merely one object among many, trust assets will ordinarily remain beyond the direct reach of that beneficiary's personal creditors. The position changes where the beneficiary is also the appointor, can replace the trustee, can appoint themselves as trustee, can accelerate vesting and can cause income or capital to be appointed to themselves. While the trust assets may not become the beneficiary's property, the expectancy may be valuable enough for a court to preserve it by making freezing orders against the underlying trust assets.

COMMENT – If the mere expectancy is not proprietary in nature, and is not a chose in action, that should mean that it is also not a CGT asset. By contrast, the interest of a taker-in-default under a discretionary trust is likely to be a chose in action that may be a CGT asset, albeit one that may have little or no value: *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] HCA 4. In *Buckle*, the High Court stated:

These were vested interests in a technical sense. They might, given the presence in New South Wales of the trustee and the assets comprising the Trust Fund, and the broad definition in s 3(1) of "property", be treated as property in New South Wales within the meaning of the Act. However, their present value had to reflect the vicissitudes which were an essential element of the structure created by the Deed of Settlement.

Citation *Filippini v Keystone Asset Management Limited (Receivers and Managers appointed) (in liquidation)* [2026] FCAFC 71 (Beach, Button and Younan JJ, Victoria)
w <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2026/71.html>

3.7 Appeal updates

Quy

The Federal Court has dismissed an appeal by Trong Quy from an ART decision that treated him as an Australian resident for tax purposes while he worked in Dubai between 2015 and 2021. Although the ART found that Trong did not reside in Australia under the ordinary concepts test, it was not satisfied that he had established a permanent place of abode outside Australia for the purposes of the domicile test in section 6(1) of the ITAA 1936.

Trong contended that in applying the permanent place of abode exception to the domicile test the ART had placed too much emphasis on whether he had definitely abandoned Australia but, instead, it was sufficient to show he has abandoned residence in Australia and made another country his residence.

The Court held that the ART applied the correct legal test and was entitled to conclude that Trong had not demonstrated that his Dubai living arrangements were more than temporary or transitory. In reaching that conclusion, the ART was entitled to take into account Trong's ongoing connections with Australia, including the retention of the family home, investment properties, bank accounts, motor vehicles, superannuation

arrangements and family ties. The Court rejected arguments that the ART had misunderstood the principles in *Federal Commissioner of Taxation v Applegate* (1979) 38 FLR 1 and *Harding v Commissioner of Taxation* (2019) 269 FCR 311 or that the only legally available conclusion was that Trong's permanent place of abode was outside Australia.

COMMENT – A taxpayer's ongoing connections with Australia remain relevant when considering whether the taxpayer has a permanent place of abode outside Australia. Retaining a family home, assets and family connections in Australia may support a conclusion that the overseas living arrangements are temporary or transitory. However, the Court also cautioned against conflating the permanent place of abode exception with the principles for establishing a domicile of choice. Establishing a domicile of choice requires an intention to abandon Australia indefinitely. The permanent place of abode exception does not require the same level of abandonment.

Citation *Quy v Commissioner of Taxation* [2026] FCA 1316 (Horan J, Victoria)
w <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2026/1316.html>

3.8 EMH IV Pty Ltd as trustee for the EMH IV Family Trust

The Full Federal Court has dismissed the appeal by EMH IV Pty Ltd as trustee for the EMH IV Family Trust, confirming that EMH was required to lodge its 2015 tax return by 16 May 2016 and was not entitled to rely on the Tax Agent Lodgment Program's 5 June concession to extend that deadline. The Court held that the concession merely waived failure-to-lodge penalties in certain circumstances and did not alter the lodgment due date or the commencement of GIC. As a result, the Court upheld the Commissioner's refusal to fully remit the GIC and dismissed the appeal with costs.

COMMENT – The case is a reminder that a refusal to remit GIC is not itself a reviewable objection decision. A taxpayer cannot challenge that refusal in the ART through the ordinary objection process merely because the refusal affects the amount ultimately payable. The available pathway is generally an appeal or judicial review in the Federal Court, and even then the review is narrow because the remission decision is discretionary. The Court must be satisfied that the Commissioner's state of satisfaction has miscarried on administrative law grounds of the kind identified in *Kolotex Hosiery (Australia) Pty Ltd v Federal Commissioner of Taxation* (1975) 132 CLR 535. Those grounds include that the Commissioner acted on a wrong principle, took into account irrelevant considerations, failed to take into account relevant considerations, made a mistake of law, acted in bad faith, or reached a decision that was so unreasonable that no reasonable decision-maker could have reached it. That is a difficult basis for review, because the Court is not simply re-exercising the Commissioner's discretion or deciding for itself whether GIC ought fairly to have been remitted.

Citation *EMH IV Pty Ltd as trustee for the EMH IV Family Trust v Commissioner of Taxation* [2026] FCAFC 112 (McElwaine, Hespe, Jackman JJ, Queensland)
w <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2026/112.html>

3.9 Other tax and super related cases from 10 Aug 2026 to 10 Sept 2026

Citation	Date	Headnote	Link
<i>Paglia and Commissioner of Taxation (Practice and procedure)</i> [2026] ARTA 1726	7 August 2026	PRACTICE AND PROCEDURE – Application to add a new ground of objection – Tribunal discretion in paragraph 14ZZK(a) of the Taxation Administration Act 1953 (Cth) – application refused	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2026/1726.html

Citation	Date	Headnote	Link
<i>Yelda and Commissioner of Taxation (Practice and procedure)</i> [2026] ARTA 1605	12 August 2026	PRACTICE AND PROCEDURE – jurisdiction question – Applicant seeks to review Commissioner of Taxation's refusal to consider an objection made to its decision to pursue a debt – no reviewable objection decision – application dismissed for lack of jurisdiction	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2026/1605.html
<i>Changovers Pty Ltd and Commissioner of Taxation (Practice and procedure)</i> [2026] ARTA 1692	14 August 2026	PRACTICE AND PROCEDURE — Taxation – Company in Liquidation – Former Director – Question of Standing	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2026/1692.html
<i>Zhang v Chief Commissioner of State Revenue</i> [2026] NSWCATAD 255	24 August 2026	TAXES AND DUTIES – Land tax – Applicants fail to notify Respondent of omitted information and errors in assessment – Errors ultimately corrected and revised assessment made – Interest imposed – Whether there are grounds for remission	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2026/255.html
<i>Deputy Commissioner of Taxation v Bekas</i> [2026] NSWSC 997	25 August 2026	TAXES AND DUTIES — Income tax — Collection and recovery — Proceedings for recovery — No appearance from plaintiff — No question of principle	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2026/997.html
<i>Skycorp Investments Pty Ltd v Commissioner of Taxation</i> [2026] FCA 1285	2 September 2026	APPEALS AND NEW TRIAL – practice and procedure – dispensing with time limit for application for leave to appeal – consideration of applicable principles – interests of the administration of justice – explanation for and length of delay – prejudice to respondent – prejudice to applicant – merits of application for leave to appeal APPEALS AND NEW TRIAL – leave to appeal – applicable principles – caution before granting leave to appeal on matter of practice and procedure – dismissal of application to strike-out – whether sufficient doubt to warrant reconsideration – whether reasonably arguable reasons contain asserted erroneous conclusions – whether reasonably arguable error in application of strike-out principles – whether reasonably arguable respondent's case in tax appeal untenable – whether reasonably arguable respondent's case in tax appeal inadequately particularised – whether reasonably arguable failure to accord procedural fairness – whether substantial injustice would result from refusal of leave – whether question of	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2026/1285.html

Citation	Date	Headnote	Link
		general principle at stake – whether substantive rights of applicant affected – whether applicant precluded from advancing its case in the tax appeal – whether applicant precluded from obtaining particulars of the respondent's case in the tax appeal – whether applicant precluded from summary determination of respondent's case in tax appeal – whether appeal appropriate vehicle for summary determination TAXATION – tax appeal – objection decision – taxation objections – grounds of objection – dissatisfaction with notice of assessment – specific deduction for capital works and construction expenditure under Div 43 of the Income Tax Assessment Act 1997 (Cth) – consideration of scope of appeal issues and burden of proof under s 14ZZ and 14ZZO of the Taxation Administration Act 1953 (Cth)	
<i>Peter Beck Consulting Pty Ltd as trustee for The Beck Family Trust v Chief Commissioner of State Revenue</i> [2026] NSWCATAD 270	8 September 2026	ADMINISTRATIVE LAW – Revenue – surcharge land tax – foreign person – deeming provisions under the Land Tax Act – trust deed amended after taxing date – whether retrospective effect – whether substance of trust and intention of the trustee impacted operation of deeming provisions	https://www.caselaw.nsw.gov.au/decision/1a07a2debf6b083657365419

4. Federal Legislation

4.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Treasury Laws Amendment (Strengthening Accountability for Tax Adviser Misconduct and Other Measures) Bill 2026	2/7	20/08	7/9		
Treasury Laws Amendment (Tax Reform No. 2) Bill 2026	25/6	18/8	19/8	19/8	26/8

4.2 2026 Budget reforms – 30% minimum tax on discretionary trusts

Treasury has released exposure draft legislation to implement the Government's proposed minimum tax on discretionary trusts. The reforms consist of the proposed Treasury Laws Amendment (Tax Reform No. 4) Bill 2026, the proposed Income Tax Rates Amendment (Minimum Tax on Discretionary Trusts) Bill 2026 and accompanying explanatory materials. The regime is intended to apply from the income year commencing 1 July 2028.

Overview

The exposure draft introduces a minimum 30% tax on the net income of most discretionary trusts. The tax is imposed on the trustee rather than beneficiaries. Broadly, the trustee will pay a top-up amount where the trust income would otherwise be taxed at a rate below 30%.

The measure is aimed at reducing tax rate arbitrage through discretionary trust distributions and aligning the tax burden on trust income more closely with the tax paid on employment income.

Which trusts are affected?

The regime applies only to a new category of "minimum tax trusts". Broadly, this means discretionary trusts that are not specifically excluded.

The following trusts are expressly excluded:

1. fixed trusts (the definition of which is discussed further below);
2. deceased estates;
3. special disability trusts;
4. complying superannuation entities; and
5. any other class of trust prescribed by legislative instrument.

Treasury indicates that widely held trusts, AMITs, CCIVs, charitable trusts, bare trusts, employee share trusts and worker entitlement funds would generally fall outside the regime due to the operation of existing provisions or the revised fixed trust definition.

Excluded income

The minimum tax applies by reference to a new concept of "minimum tax income". Certain categories of income are carved out.

Excluded income includes:

1. primary production income;
2. certain trust income distributed to vulnerable minors;
3. trust income distributed to registered charities, deductible gift recipients and exempt entities;
4. withholding payments to non-residents (i.e. dividends, interest and royalties subject to withholding tax separately to other trust income). Franking credits attached to a withholding payment are also excluded from minimum tax income; and
5. qualifying testamentary trust income.

For distributions to exempt entities that are not charities or deductible gift recipients (e.g. community organisations such as sporting clubs), the Explanatory Memorandum contemplates that the power given to the Minister to determine conditions may be applied to include a cap, or method for working out a cap, on the amount that may be excluded from the minimum tax income under these provisions. The legislation itself does not include any cap.

Qualifying testamentary trusts

The exposure draft preserves a concession for certain testamentary trusts by excluding qualifying testamentary trust income from the minimum tax base. As a result, income that satisfies the qualifying testamentary trust rules is not included in a trust's "minimum tax income" and is therefore not subject to the 30% minimum tax.

The exposure draft excludes certain testamentary trust income from minimum tax income. The exclusion applies to net income derived from particular assessable income if:

1. the trust was established under a will or codicil, following intestacy, or under a court order dealing with the deceased estate;
2. the relevant income is derived to benefit a beneficiary from:
 - (a) property transferred to the trust from the deceased estate;
 - (b) accumulations of income or capital from that property;
 - (c) property that represents estate property or qualifying accumulations, such as an asset acquired when the trustee sells and replaces an estate asset in a normal arm's length transaction; or
 - (d) other property transferred to the trustee before 7.30 pm, by legal time in the Australian Capital Territory, on 12 May 2026; and
3. if the trust was established on or after 1 July 2028, the beneficiary for whose benefit the income is derived is an individual or an income tax exempt entity.

Income derived from unrelated property transferred into the trust after 7.30 pm on 12 May 2026 will not qualify. That income will form part of the trust's minimum tax income unless another exclusion applies. This prevents unrelated assets from being injected into a testamentary trust to obtain the exclusion.

For a testamentary trust established on or after 1 July 2028, income is only excluded if it is derived to benefit an individual or an income tax exempt entity. Income derived to benefit a company or another trust will not qualify. The EM explains that this restriction confines the exclusion to trusts established and administered for individuals, charities and other income tax exempt entities.

The exclusion is also subject to anti-avoidance rules. Net income will not be excluded if:

1. it was derived directly or indirectly under a scheme entered into or carried out for a purpose that included obtaining the testamentary trust exclusion; or

2. the Commissioner is satisfied that property entered the trust, directly or through replacement property, under a scheme intended both to place the property in the trust and obtain the exclusion.

A merely incidental purpose is disregarded. The EM states that these rules prevent testamentary trusts from being used as tax planning vehicles, including through arrangements involving corporate beneficiaries or other trusts.

COMMENT – The exposure draft does not explain when a testamentary trust is "established" for the purposes of the 1 July 2028 beneficiary restriction. As a matter of trust law, the better view may be that a testamentary trust is not fully constituted until estate assets are appropriated or transferred by the executor to the trustee to hold on the testamentary trust terms. This may differ from the date of the deceased's death or the date the will takes effect.

COMMENT – Many testamentary trusts have a broad class of discretionary beneficiaries that includes companies and other trusts. If a person dies on or after 1 July 2028 and a testamentary trust comes into existence with such a beneficiary class, the trust may not satisfy the requirements for the testamentary trust exclusion from the outset.

Where the trust instrument contains an amendment power, it may be possible to restrict the beneficiary class to individuals and exempt entities after the trust comes into existence. However, trustees should first consider the scope of the amendment power and their duties to all beneficiaries whose interests may be affected.

TRAP – The exclusion is not a blanket exemption for testamentary trusts. Assets introduced after Budget night on 12 May 2026 may be outside the concession, and new testamentary trusts established from 1 July 2028 may lose access to the exclusion where companies or trusts are beneficiaries. Existing estate planning structures should be reviewed before additional assets are transferred into a testamentary trust.

New fixed trust definition

The draft repeals the existing fixed trust definition and replaces it with a new principles-based test intended to operate across the income tax law. Treasury introduced the change after concerns that the current fixed entitlement rules could inadvertently classify some commercial trusts as discretionary trusts for minimum tax purposes.

Under the new definition, a trust will be a fixed trust if:

1. beneficiaries have fixed entitlements to all income and capital of the trust; **or**
2. there are no material discretionary elements that affect a beneficiary's entitlement to income or capital.

The legislation moves away from the current technical focus on whether beneficiaries have vested and indefeasible interests. Instead, it requires a broader assessment of the substantive rights attaching to trust interests and the extent of any discretion retained by the trustee or other parties.

The exposure draft includes a non-exhaustive list of matters that may be considered when determining whether a trust has material discretionary features. These include:

1. beneficiaries have clearly defined, specific and enforceable entitlements or rights to all of the trust's income and capital;
2. beneficiaries have clearly defined, specific and enforceable rights concerning the governance of the trust;
3. any rules applying to those entitlements or rights are not discretionary;
4. any power to vary beneficiaries' entitlements or rights cannot be exercised to significantly vary existing entitlements or rights, or significantly affect the value of existing beneficiaries' interests;

5. any power to issue new entitlements or rights to one or more beneficiaries cannot be exercised to significantly vary existing entitlements or rights, or significantly affect the value of existing beneficiaries' interests;
6. any power to issue new interests in the trust cannot be exercised to significantly vary existing entitlements or rights, or significantly affect the value of existing beneficiaries' interests;
7. any power to classify amounts received by the trust as income or capital cannot be exercised to significantly vary existing entitlements or rights, or significantly affect the value of existing beneficiaries' interests;
8. any power dealing with administrative matters cannot be exercised to significantly vary existing entitlements or rights, or significantly affect the value of existing beneficiaries' interests;
9. any power to vary the trust instrument can only be exercised with the consent of all beneficiaries, or in a way that cannot adversely affect beneficiaries' entitlements or rights; and
10. any other matter prescribed by the Minister indicates that there are no material discretionary elements affecting beneficiaries' entitlements or rights.

Importantly, the test recognises that many commercial trusts contain administrative or commercial powers that do not materially affect beneficiaries' economic interests. The explanatory materials indicate that such powers should not, of themselves, prevent a trust from qualifying as a fixed trust. Treasury's stated objective is to better accommodate ordinary commercial trust arrangements while still distinguishing them from genuinely discretionary trusts.

The Commissioner will also be given a legislative instrument power to specify circumstances in which trusts will be treated as fixed trusts or taken not to be fixed trusts. This is intended to provide greater certainty as new trust structures emerge or unforeseen issues arise.

COMMENT – The proposed definition could have consequences well beyond the minimum tax regime.

Because the revised concept of a fixed trust is intended to apply throughout the income tax law, it may affect provisions dealing with trust losses, CGT rollovers, MIT eligibility, franking credit rules and other areas that currently depend on fixed trust status. Advisers should not assume that a trust previously treated as fixed, either under the legislation or ATO administrative concessions, will necessarily satisfy the new test.

TIP – The new definition of fixed trust appears to adopt a similar approach to the Commissioner's existing approach in PCG 2016/16. Rather than focusing only on whether beneficiaries have technically vested and indefeasible interests, the question is directed to whether the trust has material discretionary features that can change the economic rights of beneficiaries.

Beneficiary tax offset

To address double taxation concerns, non-corporate beneficiaries will generally receive a non-refundable tax offset equal to 30% of the amount of trust income reasonably attributable to minimum tax income. This is based on the beneficiary's assessable amount of the minimum tax income.

EXAMPLE – non-franked distribution income distributed to beneficiary with \$15,000 of other income:

A minimum tax trust derives \$100,000 of non-franked income, all of which is minimum tax income. The trustee resolves to distribute the whole amount to an adult individual beneficiary who has \$15,000 of other taxable income before the trust distribution. The trustee is liable for minimum tax of \$30,000. The beneficiary includes the \$100,000 trust distribution in assessable income, so taxable income increases from \$15,000 to \$115,000. Using the 2026–27 resident individual rates, the beneficiary's tax before offsets increases from nil on \$15,000 of other income to \$22,788 on taxable income of \$115,000 at marginal rates. The beneficiary receives a non-refundable minimum tax offset of \$30,000. The offset fully covers the \$22,788 tax otherwise payable by the beneficiary, but the unused \$7,212 is not refundable. The cash tax paid on the trust income is therefore \$30,000, being the trustee's minimum tax.

EXAMPLE – franked distribution income distributed to beneficiary with \$15,000 of other income: A minimum tax trust receives a fully franked dividend of \$70,000 with an attached franking credit of \$30,000. The trust's grossed-up net income is \$100,000, all of which is minimum tax income. The trustee is liable for minimum tax of \$30,000, but applies the \$30,000 franking credit against that liability. The trustee therefore has no net tax payable. The trustee resolves to distribute the \$100,000 grossed-up amount to an adult individual beneficiary who has \$15,000 of other taxable income before the trust distribution. The beneficiary includes the \$100,000 grossed-up trust distribution in assessable income, so taxable income increases from \$15,000 to \$115,000. Using the 2026–27 resident individual rates, the beneficiary's tax before offsets increases from nil on \$15,000 of other income to \$22,788 on taxable income of \$115,000 at marginal rates. The \$30,000 franking credit does not flow through to the beneficiary because the franked distribution forms part of the trust's minimum tax income. Instead, the beneficiary receives a non-refundable minimum tax offset of \$30,000. The offset fully covers the \$22,788 tax otherwise payable by the beneficiary, but the unused \$7,212 is not refundable. The cash tax paid within the trust and beneficiary structure is nil, because the trustee's minimum tax has been offset by the original franking credit and the beneficiary's tax has been offset by the non-refundable minimum tax offset. However, \$30,000 tax has already been paid by the company that paid the original franked dividend.

EXAMPLE – non-franked distribution income distributed to beneficiary with \$45,000 of other income: A minimum tax trust derives \$100,000 of non-franked income, all of which is minimum tax income. The trustee resolves to distribute the whole amount to an adult individual beneficiary who has \$45,000 of other taxable income before the trust distribution. The trustee is liable for minimum tax of \$30,000. The beneficiary includes the \$100,000 trust distribution in assessable income, so taxable income increases from \$45,000 to \$145,000. Using the 2026–27 resident individual rates, the beneficiary's tax before offsets increases from \$4,288 on \$45,000 of other income to \$42,288 on taxable income of \$145,000 at marginal rates. The additional tax referable to the \$100,000 trust distribution is therefore \$38,000. The beneficiary receives a non-refundable minimum tax offset of \$30,000, reducing the additional tax on the trust distribution to \$8,000. The total cash tax associated with the trust income is therefore \$38,000: \$30,000 paid by the trustee and a further \$8,000 payable by the beneficiary.

EXAMPLE – franked distribution income distributed to beneficiary with \$45,000 of other income: A minimum tax trust receives a fully franked dividend of \$70,000 with an attached franking credit of \$30,000. The trust's grossed-up net income is \$100,000, all of which is minimum tax income. The trustee is liable for minimum tax of \$30,000, but applies the \$30,000 franking credit against that liability. The trustee therefore has no net tax payable. The trustee resolves to distribute the \$100,000 grossed-up amount to an adult individual beneficiary who has \$45,000 of other taxable income before the trust distribution. The beneficiary includes the \$100,000 grossed-up trust distribution in assessable income, so taxable income increases from \$45,000 to \$145,000. Using the 2026–27 resident individual rates, the beneficiary's tax before offsets increases from \$4,288 on \$45,000 of other income to \$42,288 on taxable income of \$145,000 at marginal rates. The additional tax referable to the \$100,000 trust distribution is therefore \$38,000. The \$30,000 franking credit does not flow through to the beneficiary because the franked distribution forms part of the trust's minimum tax income. Instead, the beneficiary receives a non-refundable minimum tax offset of \$30,000, reducing the additional tax on the trust distribution to \$8,000. The beneficiary pays that \$8,000 top-up tax. The cash tax paid within the trust and beneficiary structure is \$8,000, because the trustee's minimum tax has been offset by the original franking credit. However, \$30,000 tax has already been paid by the company that paid the original franked dividend, so the total tax burden on the underlying company profit and the beneficiary top-up is \$38,000.

A similar mechanism applies where the beneficiary is the trustee of another trust.

Corporate beneficiaries are not entitled to the offset. Treasury's stated rationale is that companies already benefit from access to corporate tax rates and franking credit mechanisms.

EXAMPLE – A minimum tax trust has \$100,000 of net income, all of which is minimum tax income. The trustee resolves to distribute all of that income to a corporate beneficiary. The trustee is liable for minimum tax of \$30,000. The company is presently entitled to \$100,000, but the trustee pays \$30,000 of minimum tax and therefore the company actually receives only \$70,000 in cash. The company includes the \$100,000 distribution in its assessable income and, assuming it is taxed at 30%, pays company tax of \$30,000. Because corporate beneficiaries are excluded from the beneficiary tax offset, the company does not receive a 30% offset for the tax paid by the trustee. After paying company tax, the company has only \$40,000 remaining. The combined tax at that point is therefore \$60,000: \$30,000 paid by the trustee and \$30,000 paid by the company.

If the company then pays its remaining after-tax profit of \$40,000 to an individual shareholder as a fully franked dividend, the shareholder includes a grossed-up amount of \$57,143 in assessable income and receives a \$17,143 franking credit. If the shareholder's marginal tax rate is 30%, the shareholder's tax on the grossed-up dividend is \$17,143 and is fully offset by the franking credit, so no further tax is payable by the shareholder. Even so, the original \$30,000 trustee minimum tax remains an additional cost. The total tax paid across the structure is therefore still \$60,000: \$30,000 by the trustee and \$30,000 by the company. If the shareholder's marginal rate is higher than 30%, further top-up tax may be payable by the shareholder.

EXAMPLE – Assume instead that the minimum tax trust receives a fully franked dividend of \$70,000, with an attached franking credit of \$30,000. The trust's grossed-up net income is \$100,000, all of which is minimum tax income. The trustee is liable for minimum tax of \$30,000, but applies the \$30,000 franking credit against that liability. The trustee therefore has no net tax payable on the franked distribution.

The trustee resolves to distribute the \$100,000 grossed-up amount to a corporate beneficiary. The company is presently entitled to \$100,000, but the trust has only received \$70,000 in cash. The company therefore actually receives only \$70,000. The company includes \$100,000 in assessable income and, assuming it is taxed at 30%, its company tax is \$30,000. However, because the franking credit remains at the trustee level, the company does not receive the \$30,000 franking credit. The result is \$30,000 of company tax, even though only \$70,000 cash has flowed to the company.

After paying \$30,000 of company tax, the company has only \$40,000 remaining. It can therefore only pay a \$40,000 dividend to an individual shareholder. If the dividend is fully franked, the shareholder includes a grossed-up dividend of \$57,143 and receives a \$17,143 franking credit. If the shareholder's marginal tax rate is 30%, the shareholder's tax on the dividend is \$17,143 and is fully offset by the franking credit. Across the structure, the company pays \$30,000 of tax in cash. However, that is additional tax in substance, because \$30,000 tax had already been paid on the original franked distribution before it was received by the trust.

COMMENT – A corporate beneficiary is still taxed on its share of the trust's full section 95 net income, even though the trustee may need to pay minimum tax out of the trust funds before any cash is paid to the company. That can leave the company taxed on an amount greater than the cash it actually receives, without the benefit of the beneficiary tax offset. A fairer outcome for corporate beneficiaries may have been to provide that tax paid by the trustee is deducted in calculating the section 95 net income on which the company is assessed, given the company does not receive a rebate for that trustee-level tax.

The exposure draft also contains consequential provisions reducing certain existing rebates and credits to ensure taxpayers do not obtain multiple benefits in respect of the same income.

Franking credits

Under the existing rules, a franked distribution received through a trust may flow indirectly to a beneficiary under Division 207 of the ITAA 1997. The beneficiary may then include the franking credit in assessable income and claim a corresponding tax offset.

The proposed rules change this treatment where the franked distribution forms part of a minimum tax trust's minimum tax income. The franked distribution and related franking credit will remain at the trust level rather than flow through to beneficiaries. The trustee will:

1. include the cash distribution and attached franking credit in the trust's assessable income;
2. be entitled to a tax offset equal to the franking credit;
3. apply that offset against the trustee's minimum tax liability; and
4. retain any excess franking credit subject to the refundable tax offset rules.

EXAMPLE – A minimum tax trust receives a fully franked dividend of \$70 with a \$30 franking credit. The trustee includes the grossed-up amount of \$100 in assessable income. The trustee is liable for minimum tax of \$30 and applies the \$30 franking credit against that liability. The trustee's net tax payable on the dividend is therefore nil.

The \$30 franking credit does not flow through to the beneficiary. If the beneficiary is not a company, the beneficiary may instead receive a non-refundable minimum tax offset of \$30 under proposed section 101AF of the ITAA 1936, even though the trust did not actually pay any tax.

Excess franking credits

If the franking credits exceed the minimum tax payable, the trustee may receive a refund of the excess under the refundable tax offset rules.

If only part of a franked distribution is minimum tax income, the distribution and its franking credit must be split proportionately:

1. the trustee uses the franking credit relating to the minimum tax income against its minimum tax liability;
2. any excess credit relating to that income may be refundable to the trustee;
3. the balance of the distribution may continue to flow through to beneficiaries under Division 207; and
4. the corresponding balance of the franking credit may also flow through to beneficiaries under the existing rules.

The amendments to subsection 67-25(1B) preserve the trustee's ability to obtain a refund for excess franking credits associated with minimum tax income. The changes to Divisions 6E and 207 allow the remaining part of a franked distribution, and its related franking credit, to continue to flow through to beneficiaries.

EXAMPLE – one franked distribution, split between an individual and a charity: Assume a minimum tax trust receives one fully franked dividend of \$70,000 with an attached franking credit of \$30,000. The trust's grossed-up net income from the dividend is \$100,000. The trustee resolves to distribute 50% of the franked distribution to an adult individual beneficiary and 50% to a registered charity. The \$50,000 share attributed to the individual is minimum tax income. The trustee includes that amount in the minimum tax calculation, has a \$15,000 minimum tax liability on that share and applies \$15,000 of the franking credit against that liability. The franking credit referable to the individual's share does not flow through to the individual. Instead, the individual may receive a non-refundable minimum tax offset based on the amount of minimum tax income included in their assessable income.

The charity's 50% share is excluded from minimum tax income because trust income distributed to registered charities, deductible gift recipients and exempt entities is excluded from the minimum tax base. The ordinary Division 207 flow-through rules apply to that share. The charity is treated as receiving \$35,000 of franked distribution and \$15,000 of franking credit, being a grossed-up amount of \$50,000. The practical result is that the one franked dividend is split: the individual's half is dealt with under the minimum tax rules, with the trustee using the related franking credit and the individual receiving a minimum tax offset; the charity's half is not minimum tax income, so the franked distribution and related franking credit retain their ordinary character and may flow through under the existing rules.

Consequential changes to Divisions 6E and 207

The amendments to sections 207-45 and 207-50 of the ITAA 1997 prevent a franked distribution from flowing indirectly to beneficiaries to the extent it forms part of the trust's minimum tax income. To that extent, the trustee is treated as the recipient of the franked distribution and claims the franking credit tax offset.

Division 6E currently removes certain franked distributions and franking credits from the ordinary Division 6 calculation because Division 207 separately attributes those amounts to beneficiaries. That approach would not work where the amounts remain at the trust level.

The proposed amendments therefore limit Division 6E so that it does not remove:

1. the part of a franked distribution that forms part of minimum tax income; or
2. the corresponding proportion of the attached franking credit.

Those amounts remain within the trust's net income and minimum tax calculation. Division 6E continues to apply to the part of a franked distribution, and the related franking credit, that does not form part of minimum tax income.

COMMENT – This changes the character of the benefit received by a non-corporate beneficiary. The beneficiary receives a non-refundable minimum tax offset rather than the refundable franking credit that would otherwise flow through the trust. Although an excess franking credit may be refundable to the trustee, the draft does not explain how a trustee must deal with the resulting refund under the trust deed or how the economic benefit will reach beneficiaries

Rate of tax

The proposed Income Tax Rates Amendment (Minimum Tax on Discretionary Trusts) Bill 2026 establishes the mechanism for imposing the tax. The regime operates as a top-up system.

Broadly:

1. where trust income is already taxed at 30% or more, no additional tax applies;
2. where trust income is taxed below 30%, a top-up amount applies;
3. where no trustee-level tax would otherwise apply, tax is imposed at 30%.

Proposed commencement

The amendments are proposed to apply to assessments for income years commencing on or after 1 July 2028.

w <https://consult.treasury.gov.au/c2026-799771>

4.3 2026 Budget reforms – roll-over relief for discretionary trusts

Treasury has released exposure draft legislation providing transitional roll-over relief for discretionary trusts affected by the proposed 30% minimum tax. The measure is designed to facilitate restructures out of discretionary trust structures before the minimum tax commences on 1 July 2028. The relief is available for transfers occurring between 1 July 2027 and 30 June 2030.

Overview

The proposal introduces a new roll-over allowing eligible discretionary trusts to transfer assets to another entity without triggering immediate income tax consequences. The stated objective is to allow trusts to migrate to

structures with more fixed and transparent economic outcomes, such as companies or fixed trusts, without tax becoming a barrier to restructuring.

The measure differs from existing roll-overs because it is not limited to small business entities and is specifically designed to facilitate restructuring in response to the introduction of the minimum tax. There is no requirement to establish that the arrangement constitutes a genuine business restructure.

Who can access the roll-over?

Broadly, the roll-over is available where:

1. assets are transferred by the trustee of a minimum tax trust;
2. the assets are transferred to a single eligible transferee;
3. all required trust assets are transferred before 30 June 2030;
4. the transferor and transferee jointly elect to apply the roll-over;
5. continuity requirements are satisfied;
6. Australian residency requirements are met; and
7. the replacement structure does not retain material discretionary features.

The transferee may be a company, individual, partnership or another trust, provided it is not itself a minimum tax trust. The relief is not available for transfers to exempt entities, complying superannuation entities or another minimum tax trust.

All assets requirement

One of the key conditions is that the restructure must transfer all trust assets to the replacement entity by the end of the transitional period. If the restructure is not completed by 30 June 2030, previously claimed roll-over relief may be reversed.

Certain assets may be retained without causing the roll-over to fail, including:

1. assets that cannot legally be transferred;
2. primary production assets;
3. assets required to satisfy trust liabilities;
4. assets required for winding-up costs; and
5. low-value assets costing \$1,000 or less at the time they were acquired.

The exclusion for primary production assets reflects the fact that primary production income is generally excluded from the minimum tax regime.

Choice requirements

The roll-over is voluntary. Both the transferor and transferee must choose for it to apply, and each choice must be made in the approved form. The transferor's choice must identify the single transferee that will receive the trust assets. If the transferee is a general law partnership, each partner receiving an asset must make their own choice.

The choices must be given to the ATO in an approved form by the earlier of the lodgment day for the income tax return for the income year in which the first asset transfer occurs, and the due date for that return, unless the Commissioner allows more time. Once made, the choices cannot be revoked. The transferor cannot choose the roll-over if it has already made an excluded election trust election for the trust.

The transferor can only make one roll-over choice for that trust.

Continuity requirements

The roll-over is intended to preserve economic ownership rather than facilitate changes in ownership.

For family trusts (being trusts that have made a family trust election), every individual who acquires a direct or indirect interest in the replacement structure must have been both:

1. a beneficiary of the trust; and
2. a member of the relevant family group for the purposes of the family trust election,

immediately before the restructure.

For trusts that are not family trusts, continuity requirements will be prescribed by legislative instrument.

Treasury has indicated this approach is intended to accommodate the wider range of beneficiary arrangements that may exist outside family trust structures.

Residency requirements

To qualify for relief:

1. individuals and companies must be Australian residents;
2. trusts must be resident trusts for CGT purposes;
3. partners receiving transferred assets must be Australian residents; and
4. corporate limited partnerships must be Australian tax residents.

Tax consequences

Where the roll-over applies, the transfer generally has no direct income tax consequences. Instead, the transferee inherits the transferor's tax history and tax cost base for the relevant assets. The measure therefore defers tax rather than permanently eliminating it.

The inherited tax cost broadly equals:

1. cost base for CGT assets;
2. cost or opening value for trading stock;
3. break-even value for revenue assets; and
4. adjustable value for depreciating assets.

The draft also provides:

1. continuity of depreciation outcomes;
2. continuity of small business rollover history;
3. preservation of 15-year exemption ownership periods; and
4. relief from family trust distribution tax on qualifying transfers.

Material discretionary elements

A significant integrity rule aims to ensure taxpayers do not effectively recreate a discretionary trust after undertaking the restructure.

The roll-over will be clawed back if the replacement entity contains material discretionary elements affecting members' rights or interests during a four-year review period commencing when the final required asset transfer occurs.

The explanatory materials indicate that the following features are generally consistent with fixed and transparent economic ownership:

1. clearly defined and enforceable rights to income, capital and governance;
2. amendment powers that cannot materially affect existing rights;
3. powers to issue interests that cannot materially dilute existing interests; and
4. amendment mechanisms requiring unanimous consent or that cannot adversely affect members.

By contrast, arrangements allowing income or capital to be allocated between members at someone's discretion are likely to constitute material discretionary elements. Treasury specifically identifies alphabet share arrangements as an example that would ordinarily fail the test.

TRAP – Care will be needed where the replacement entity is a company that has adopted the replaceable rules, either in whole or in relation to section 254W(2) of the *Corporations Act 2001* (Cth). One view is that section 254W(2) allows directors to pay dividends to one shareholder to the exclusion of another, even where both shareholders hold shares of the same class. If that view is correct, a company that has adopted the replaceable rules may contain material discretionary elements because the directors can affect the economic rights of shareholders by deciding whether, and to whom, dividends are paid. This could be relevant both to whether a company qualifies as an eligible replacement entity and whether the restructured arrangement remains free of material discretionary elements during the review period.

A specific provision is to be introduced to enable the Commissioner to amend an assessment despite section 170 of the ITAA 1936 where the amendment is connected with whether the transitional roll-over was available for an asset transfer. The rule can apply to the transferor trust, a beneficiary of the minimum tax trust, the transferee or a member of the transferee, provided the relevant assessment relates to an income year in which a roll-over transfer occurred and the amendment is made within four years after notice of assessment is given. The practical effect is that the ordinary amendment period will not prevent the Commissioner from reversing or adjusting the tax consequences of the roll-over if a condition is later found not to have been satisfied, including where the replacement structure contains material discretionary elements during the review period.

Proposed commencement

The roll-over applies only to transfers occurring during the period starting on 1 July 2027 and ending on 30 June 2030. Further integrity measures may be introduced in later legislation.

COMMENT – The roll-over is considerably broader than existing restructuring concessions. It is available regardless of business size and can be used for structures holding passive investment assets as well as operating businesses. The policy objective is clearly aimed at removing tax barriers for taxpayers who decide that a discretionary trust is no longer an appropriate vehicle following the introduction of the minimum tax.

TRAP – The relief is subject to a number of conditions that continue after the restructure is completed. Trustees must ensure that:

1. all required assets are transferred by 30 June 2030;
2. annual notifications are lodged where transfers occur over multiple years; and
3. the replacement structure does not introduce discretionary features within the four-year clawback period.

Failure to satisfy any condition may permit the Commissioner to amend prior assessments and reverse the benefit of the roll-over.

w <https://consult.treasury.gov.au/c2026-799771>

4.4 2026 Budget reforms – EET regime for discretionary trusts

Treasury has released exposure draft legislation introducing an elective regime that allows certain existing discretionary trusts to opt out of the proposed 30% minimum tax without undertaking a restructuring. The regime operates through an "excluded election trust" (**EET**) election for trusts that exist on 1 July 2028.

Overview

The proposal allows trustees to nominate beneficiaries and fixed entitlement percentages. So long as the trustee distributes income and capital consistently with that nomination, the trust is excluded from the minimum tax regime.

Treasury states that the regime is intended to reduce the restructuring costs that might otherwise arise under the minimum tax, including transfer duty and other non-income tax costs.

Who can make the election?

The election is available only to discretionary trusts that:

1. are minimum tax trusts;
2. exist on 1 July 2028; and
3. make the election during their first income year commencing on or after 1 July 2028.

The election is a one-off opportunity. If a trustee does not make the election in that first income year, it cannot be made later. Similarly, if an election is revoked, a replacement election cannot be made.

Importantly, a trustee cannot access both the EET regime and the transitional roll-over relief. Trustees must choose one path or the other.

An EET election must be notified to the Commissioner in the approved form by the earlier of the return lodgment due date and the actual lodgment date for the income year in which the election is made. The election cannot be made after that time. Once made, it applies from the start of that income year and continues until it is revoked, the trust vests or the trust estate is wound up.

The EET election

The election must be accompanied by a nomination specifying:

1. every beneficiary who may receive trust income and capital;
2. the proportion of income allocated to each beneficiary; and
3. an identical proportion of capital allocated to that beneficiary.

Collectively, the nominated percentages must equal 100% of both trust income and trust capital.

For example, a trustee cannot nominate one beneficiary to receive all income and another beneficiary to receive all capital. The income and capital percentages must align.

Although the nomination specifies intended beneficiaries and percentages, the trustee retains legal discretion under the trust deed. However, if the trustee exercises that discretion inconsistently with the nomination, the election will be revoked and adverse consequences arise.

Eligible beneficiaries

Only beneficiaries capable of benefiting under the trust deed as it existed on 1 July 2028 can generally be nominated. Beneficiaries introduced through later deed amendments cannot ordinarily be added to the nomination.

The following entities cannot be nominated:

1. complying superannuation entities;
2. partnerships; and
3. companies that do not satisfy the "eligible company" requirements.

Trusts and companies may be nominated.

Eligible companies

Where a company is nominated as a beneficiary, it must be an "eligible company".

Broadly, this requires that there be no material discretionary elements affecting the rights or interests of shareholders. The drafting mirrors the concepts used in the proposed fixed trust and roll-over relief provisions.

Factors indicating that a company is eligible include:

1. shareholders having clearly defined rights to income, capital and governance;
2. powers that cannot materially dilute or vary existing rights;
3. amendment provisions requiring unanimous consent or that cannot adversely affect shareholders; and
4. any additional matters prescribed by legislative instrument.

COMMENT – There does not appear to be any requirement that the shareholders of an eligible company themselves have no material discretionary elements. The test appears to focus on whether material discretionary elements affect the rights or interests attaching to shares in the nominated company, rather than looking through to the ownership structure of each shareholder.

Effect of the election

While an EET election remains in force:

1. the trust is treated as not being a minimum tax trust; and
2. the 30% minimum tax does not apply.

To maintain the election, the trustee must confer present entitlements to both income and capital in accordance with the nominated percentages every year.

The legislation also extends the concept of present entitlement so that capital distributions are tested in a similar manner to income distributions.

Varying the nomination

The nominated beneficiaries and percentages are generally locked in once the election is made.

The nomination may only be varied in two circumstances:

1. the death of a nominated beneficiary; or
2. a relationship breakdown between nominated beneficiaries.

Where a beneficiary dies, their entitlement can generally only be reallocated to beneficiaries of that person's estate.

Where a relationship breakdown occurs, the nomination may be amended to reflect family law orders, agreements or awards.

Revoking the election

The trustee may voluntarily revoke the election. Once revoked, it cannot be reinstated.

The election is also automatically revoked if:

1. distributions are not made in accordance with the nomination;
2. a nominated trust beneficiary is wound up or vested;
3. a nominated company beneficiary is wound up, deregistered or ceases to satisfy the eligible company requirements; or
4. a nominated company beneficiary has a shareholder who held a share when the company was nominated, and that shareholder later ceases to hold that share for a reason that is not an allowable reason.

The allowable reasons for shareholdings to change are limited. They are where the shareholder dies, or where the shares change hands because of a relationship breakdown dealt with under a relevant family law order, agreement or award. Other changes in share ownership will generally fall outside those allowable reasons and may cause the election to be revoked.

Consequences of revocation

The consequences of revocation are severe. Where an election is revoked:

1. beneficiaries are deemed never to have been presently entitled to trust income or capital for that income year;
2. the trustee is assessed on the trust's entire net income; and
3. the trust becomes subject to the minimum tax regime in future years.

The explanatory materials indicate that trustee taxation will occur at the top marginal tax rate under section 99A in the year of revocation.

COMMENT – The EET regime appears intended to create a middle ground between accepting the minimum tax and undertaking a full restructure. In effect, trustees may preserve their existing trust structure provided they are prepared to lock in a fixed distribution pattern for the foreseeable future.

For many family groups, the practical effect may resemble converting a discretionary trust into a fixed entitlement vehicle without formally changing the trust deed or triggering a transfer of assets.

TRAP – Trustees will need to carefully consider whether making an EET election is consistent with their duties to all beneficiaries. Although the election may reduce or avoid the proposed minimum tax, it effectively requires the trustee to lock in nominated beneficiaries and fixed income and capital percentages, albeit only for tax purposes. That may advantage some beneficiaries while excluding or disadvantaging others who remain within the beneficiary class under the trust deed. A trustee should therefore consider the terms and purpose of the trust, the circumstances of all relevant beneficiaries and whether making the election involves a proper exercise of trustee power, rather than merely pursuing the lowest overall tax outcome for certain members of the group.

COMMENT – There have been commentary that the making of the EET election may have stamp duty implication. These concerns are likely overstated. An EET election and nomination operate for income tax purposes only. They should not, of themselves, amend the trust deed, convert discretionary objects into fixed interest holders, or transfer equitable interests in trust property. On that basis, the election should not automatically cause a change in beneficial ownership of the trust assets or result in a trust acquisition. The position may be different if the trustee also amends the deed, changes default capital interests, or otherwise alters trust law rights. The better view is therefore that the duties analysis depends on what is done to the trust

law rights, not merely on the making of the EET election. However, care should be exercised when making the nomination and regard should be had to the potential duties implications in each State or Territory where the trust owns dutiable property.

Proposed commencement

The EET regime applies to income years commencing on or after 1 July 2028. Trustees wishing to use the regime must make the election during their first income year commencing on or after that date.

TRAP – The integrity rules are very rigid. A trustee has only a single opportunity to make the election, cannot remake the election after revocation and is generally unable to change nominated beneficiaries or entitlement percentages. A distribution outside the nominated percentages can trigger automatic revocation, retrospective denial of present entitlement and trustee assessment on all trust income for that year.

w <https://consult.treasury.gov.au/c2026-799771>

4.5 Loss carry-back, IAWO and negative gearing amendments now law

The Treasury Laws Amendment (Tax Reform No. 2) Bill 2026 has now been enacted. The Bill's original measures were not amended before the law was passed. They include:

Measure	Application
New loss carry-back tax offset	Applies to assessments for income years starting on or after 1 July 2026. For most companies, that means it is first available for the income year ended 30 June 2027.
Permanent \$20,000 instant asset write-off	Applies to assets first used, or first installed ready for use, for a taxable purpose on or after 1 July 2026. Certain pool and balancing adjustment amendments also apply from income years ending on or after 1 July 2026.
Income tax exemption for employment income earned with PNG Chiefs Limited	Applies to assessments for the 2025-26 income year and the next nine income years. The exemption itself covers amounts included in assessable income for the 2025-26 income year or any of the following nine income years.

Negative gearing amendments

A significant late amendment deals with the proposed negative gearing rules. It preserves existing tax outcomes where an ownership interest in a residential property transfers between spouses, former spouses or co-owners because of death or relationship breakdown. In these cases, the recipient can generally continue to access the same negative gearing treatment that applied before the transfer.

The amendments also preserve access to the existing concessions for newly constructed residential dwellings where ownership changes as a result of death or relationship breakdown. A surviving spouse, a beneficiary who inherits an interest in a dwelling, a co-owner who acquires a deceased co-owner's interest, or a person who acquires an interest under a marriage or relationship property settlement can effectively inherit the transferor's status as owner of a "new residential dwelling". This allows the recipient to continue accessing the exclusion from the loss quarantining rules that would otherwise have been available to the transferor.

The amendments also ensure that these recipients may choose between the CGT discount method and the cost base indexation method when calculating any minimum tax on a later capital gain. Existing exclusions from

the loss quarantining rules continue to apply to interests acquired before Budget night and to new residential dwellings that are subsequently used to produce assessable income.

The amendments also address how the "first use to produce assessable income" rule interacts with the new residential dwelling exception. Subsection 118-192(2) can deem a taxpayer to acquire a dwelling at its market value when it is first used to produce assessable income. New subsections 26-155(3AA) and (3AB) ensure that this deemed acquisition does not cause a dwelling to lose access to the relevant exceptions from the loss quarantining rules. When determining whether an ownership interest was acquired before Budget night, or whether a dwelling qualifies as a new residential dwelling, the effect of subsection 118-192(2) is disregarded. This preserves access to the existing exceptions where a dwelling that was previously used as a main residence is later rented out and becomes income-producing.

w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r7502

4.6 Proposed SMSF and financial sector reforms

Treasury has released a fact sheet providing further detail on its 2026-27 Budget measure, Protecting Consumers in the Superannuation System. The package contains a significant number of reforms affecting APRA-regulated funds, SMSFs, financial advice, managed investment schemes, lead generation practices and the Compensation Scheme of Last Resort. The proposed SMSF measures are likely to be of the greatest interest to tax and superannuation practitioners.

SMSF reforms

The Government proposes a range of new measures directed at SMSF establishment, administration and member protection.

Key measures include:

1. giving the ATO power to prevent rollovers to newly established SMSFs where it is investigating concerns about fraud, financial abuse, misconduct or potential member harm;
2. requiring prospective SMSF trustees to complete mandatory trustee education before registration;
3. requiring each SMSF to maintain a uniquely identifiable bank account;
4. requiring SMSFs to have a written investment strategy before registration and consulting on measures to improve the quality of SMSF investment strategies;
5. allowing the ATO to collect additional information about financial advisers and other parties involved in SMSF establishment and advice fee deduction arrangements;
6. increasing the SMSF supervisory levy from \$259 to \$295, being the first increase since 2013; and
7. providing SMSF trustees, particularly those with lower balances, with greater visibility of how their returns compare with APRA-regulated superannuation funds.

The fact sheet also proposes that all SMSFs become Tier 3 levy payers under the Compensation Scheme of Last Resort (**CSLR**) waterfall model where a special levy is required. The SMSF sector levy would be scaled by reference to assets under management, although a flat levy amount would apply to individual funds.

Protections for APRA-regulated funds

The Government proposes stronger trustee obligations and enforcement powers, including caps on advice fee deductions from member accounts, substantially increased trustee penalties, new APRA powers to impose risk-based capital requirements on higher-risk investment options, and powers for ASIC to direct trustees to undertake remediation where investment option failures may involve breaches of trustee duties.

Lead generation and anti-hawking reforms

The package includes measures aimed at reducing harmful lead generation practices in the superannuation sector. Proposed reforms include banning unlicensed real-time communications about superannuation, strengthening consent requirements, narrowing existing anti-hawking exemptions for financial advisers, introducing civil penalties, and imposing due diligence and oversight obligations on licensees that use lead generators. Further consultation is proposed on data harvesting and data broking practices.

Managed investment schemes

The Government proposes to strengthen governance of managed investment schemes by allowing mandatory audit and assurance standards for compliance plan audits and requiring responsible entities to notify ASIC when redemption rights are frozen or restricted. Consultation will also occur on improved data collection for the managed investment scheme sector.

Financial advice reforms

The fact sheet confirms that the Government will proceed with previously announced reforms, including changes to intra-fund charging, targeted superannuation prompts and statements of advice. It also proposes introducing the new class of adviser regime initially for APRA-regulated superannuation and life insurance entities, simplifying aspects of the best interests duty safe harbour, reviewing the Code of Ethics, reforming adviser education requirements and supporting ASIC's work on advice fee deductions.

Compensation Scheme of Last Resort

The Government proposes several CSLR reforms, including limiting compensation to actual losses for future claims, changes to the special levy framework, expanded recovery rights for the CSLR operator, changes to levy administration processes and other technical amendments intended to improve efficiency and funding certainty.

COMMENT – It is unclear whether the requirement to have an investment strategy before registration means the investment strategy will need to be provided when applying to register the SMSF with the ATO.

w <https://treasury.gov.au/publication/p2026-797028>

w <https://ministers.treasury.gov.au/ministers/daniel-mulino-2025/media-releases/protecting-consumers-and-promise-superannuation>

4.7 Tasmania passes miscellaneous revenue amendments bill

The *Taxation and Related Legislation (Miscellaneous Amendments) Act 2026* (Tas) passed the Legislative Council on 3 September 2026 and now awaits Royal Assent. The Act makes a series of targeted amendments to Tasmania's duties, land tax and tax administration legislation. Most changes commence on Royal Assent, while the foreign investor housing measures apply from 1 July 2026.

Foreign investor residential development concessions expanded

The Act substantially broadens access to foreign investor surcharge relief for residential developments.

From 1 July 2026, developers need only complete 10 new dwellings in a financial year to qualify for relief from the Foreign Investor Duty Surcharge and foreign investor land tax surcharge. Previously, at least 50 dwellings were required. The amendments apply only prospectively and do not permit reassessments or refunds for earlier financial years.

Intergenerational rural transfer concession made more flexible

Several changes have been made to the intergenerational rural transfer duty exemption.

The amendments focus on transfers involving trusts. Eligibility is now tested by reference to the beneficiaries who are named in the trust deed at the time of transfer. The legislation also permits trust deeds to be amended within six months after the transfer (or a longer period approved by the Commissioner) to satisfy the exemption requirements. Where compliance is achieved within the permitted period, taxpayers may seek a reassessment and refund of duty previously paid.

These changes address practical issues that arose where minor trust deed defects prevented access to the concession despite the transfer being intended to remain within the family group.

Deceased estate and family law exemptions extended

The deceased estate exemption has been expanded to cover property passing under the rules of intestacy, ensuring equivalent treatment whether a person dies with or without a valid will.

The Act also extends existing duty exemptions for transfers following relationship breakdowns. Transfers made under family law arbitration awards will now qualify regardless of whether the award is formally registered under the *Family Law Act 1975* (Cth). Corresponding provisions apply to marriages and de facto relationships.

Corporate reconstruction exemptions modernised

The corporate reconstruction and consolidation exemption provisions have been updated and brought closer into line with arrangements available in other jurisdictions.

Key changes include:

1. extending the regime to companies limited by guarantee;
2. allowing a corporate group to be established as part of a reconstruction transaction;
3. disregarding certain interests acquired solely for the purposes of a consolidation transaction; and
4. removing a number of pre-association, post-association and group ownership requirements that previously restricted access to the exemptions.

The amendments are intended to simplify internal restructures that do not result in substantive changes in underlying ownership.

Clarification of council public road exemption

The partial duty exemption available where land is transferred to be used as a public road has been clarified.

The legislation confirms that a "public road" includes adjoining land used for ancillary purposes, including associated infrastructure and works. The Commissioner may also claw back the exemption if the land is not used for the intended public road purpose within 24 months of the transfer, unless an extension is granted.

Land tax instalment arrangements expanded

The Commissioner will have greater flexibility in administering land tax payment arrangements.

Instead of being limited to three instalments, the Commissioner may now permit payment in a number of instalments determined by the Commissioner. This provides scope for more flexible payment arrangements tailored to individual circumstances.

Commissioner given longer period to withdraw assessments

The period within which the Commissioner may withdraw an assessment has been increased from three years to five years. This aligns more closely with existing reassessment and refund time limits.

The Act also makes technical amendments to the Taxation Administration Act 1997 (Tas), including changes to reassessment and refund provisions intended to simplify administration and reduce procedural complexity.

Other amendments

Other changes include:

1. extending certain superannuation fund duty concessions to arrangements involving self-managed superannuation funds;
2. updating definitions of "foreign natural person" and "permanent resident";
3. amending principal residence land tax rebate provisions;
4. updating references to the Australian Securities Exchange; and
5. making minor technical and drafting corrections across the revenue legislation.

Taxation and Related Legislation (Miscellaneous Amendments) Act 2026 (Tas)

w <https://www.parliament.tas.gov.au/bills/bills2026/taxation-and-related-legislation-miscellaneous-amendments-bill-2026-21-of-2026>

5. Rulings

5.1 Receipt and disposal of crypto assets by an airdrop

The ATO has issued *Draft Taxation Ruling* TR 2026/D1, setting out its preliminary views on the income tax consequences of receiving or issuing crypto assets through an "airdrop". An airdrop is a distribution of crypto assets to a digital wallet for little or no consideration. In many cases, recipients receive the assets automatically, often because they hold another crypto asset or have participated in a particular platform or project.

Receipt may be income where linked to a business or services

The ATO's view is that the tax treatment depends largely on why the crypto asset was received and the activities of the recipient.

Where a taxpayer is carrying on a business of trading crypto assets, the market value of airdropped assets is assessable as ordinary income when received, even where the airdrop is unsolicited or resembles a windfall gain. Similarly, where crypto assets are received in return for promoting a project, providing services or undertaking other income-producing activities, the market value of the assets is ordinary income.

The ruling illustrates this with an example of a social media influencer who receives crypto tokens for promoting a new crypto project. According to the ATO, the market value of the tokens is assessable in the same way as any other non-cash payment for services.

Investors generally taxed under the CGT rules

For investors who hold crypto assets on capital account and are not carrying on a trading business, the ATO takes the view that most airdrops are not assessable when received. This includes cases where a person receives new tokens merely because they already hold another crypto asset, or where tokens are deposited into a wallet without any action by the recipient.

Instead, the airdropped asset is treated as a separate CGT asset. Tax consequences generally arise later, when the asset is sold, exchanged or otherwise disposed of. Any resulting gain or loss is dealt with under the CGT provisions.

The ruling confirms that the airdropped asset is distinct from the crypto asset that may have entitled the holder to receive it. For example, if a person receives a new token because they hold a particular cryptocurrency, the new token is treated as a separate CGT asset with its own cost base and acquisition date.

Cost base based on market value

A significant aspect of the draft ruling concerns valuation.

Where an established crypto asset has a market value when it is received, that market value generally becomes the recipient's cost base under the CGT rules. This means that although the recipient may not be taxed immediately, the value of the asset when received will be relevant in calculating any future capital gain or capital loss. The ATO provides the following example in the draft ruling:

Example 5 – airdrop of crypto assets received without recipient's knowledge

47. Eloise holds crypto assets on multiple crypto platforms. Eloise is not carrying on a business of crypto asset trading. She holds the crypto assets on capital account.

48. *Eloise checks her wallet on one of the platforms and discovers that she has received 10,000 'Freebie coins'.*

49. *The Freebie coins were distributed to Eloise's wallet as the issuer decided to issue them to randomly selected wallet holders on the platform as a promotional exercise. Eloise did not do anything in order to acquire the coins.*

50. *At the time Eloise receives the Freebie coins in her wallet, the Freebie coins are already being traded on the platform, giving them an observable market value of \$0.05 each.*

51. *When Eloise disposes of the Freebie coins, she will need to include any net capital gain in calculating her assessable income for the income year. The cost of her Freebie coins will be their market value on the date she received them ($\$0.05 \times 10,000 = \500). If Eloise does not want the Freebie coins, any expenses she incurs in rectifying her wallet will be included in the second element of the cost base of the Freebie coins. If she later disposes of the Freebie coins, the costs she incurred in rectifying her wallet will be included in calculating whether she made a capital gain or capital loss from CGT event A1 happening.*

The ATO also acknowledges that some new crypto assets have little or no market value when first distributed. In those circumstances, the cost base may be nil or negligible.

Hobby activities distinguished from business activities

The draft ruling adopts a different approach where airdropped crypto assets are received through a hobby or recreational activity.

The ATO's example involves a university student who receives in-game crypto rewards while playing an online game as a hobby. In that case, the rewards are not assessable income and expenses associated with the activity are not deductible because they are private in nature.

This distinction reflects the ATO's broader view that airdrops are generally only assessable as ordinary income where they arise from a business, services or another income-producing activity.

Examples address scams and unsolicited tokens

The ruling also considers situations where a person receives an email claiming they are entitled to free crypto assets but does not claim them because the offer appears to be a scam. The ATO confirms that no tax consequences arise if no crypto assets are actually received.

Another example deals with unsolicited tokens deposited directly into a wallet. The ATO's view is that such receipts are generally capital in nature where the recipient is an investor rather than a trader. A future disposal may nevertheless trigger a capital gain or loss.

Limited scope

The ruling does not apply to all forms of crypto rewards. It excludes, among other things, airdrops received in exchange for fiat currency or other crypto assets, rewards for providing liquidity to decentralised exchanges and certain arrangements involving "rebasing" tokens. A rebasing token is one where software automatically increases or decreases the number of tokens held in a wallet to maintain a target price.

Comments on the draft ruling are due by 16 October 2026. The ATO proposes that the final ruling will generally apply both before and after issue, although special transitional treatment is proposed for some initial distributions of newly created crypto assets.

COMMENT – The draft ruling does not explain why CGT event H2 would not happen for an investor when the airdrop occurs. CGT event H2 is a residual CGT event that can happen where an act, transaction or event occurs in relation to a CGT asset. In the airdrop context, the question is whether the issue or allocation of the

new crypto asset is an act, transaction or event in relation to the investor's existing crypto asset, wallet rights or other CGT asset.

COMMENT – The ATO also does not explain why the recipient would necessarily receive a market value cost base for an unsolicited airdropped crypto asset. Presumably, the intended basis is section 112-20(1)(a) of the ITAA 1997, which can substitute market value where a CGT asset is acquired without incurring expenditure. A question may arise whether the issue of the crypto asset by the issuing entity is itself a CGT event for that entity. If there is no relevant CGT event for the issuer or the CGT event is CGT event D1, section 112-20(1)(a) would likely not apply to cause the recipient's first element of cost base to be market value.

ATO reference *TR 2026/D1*

w <https://www.ato.gov.au/law/view/document?docid=DTR/TR2026D1/NAT/ATO/00001>

5.2 CGT consequences of using a smart contract to wrap and unwrap crypto assets

The ATO has released *Draft Taxation Determination* TD 2026/D2, which considers the CGT consequences of using a smart contract to "wrap" and later "unwrap" crypto assets. The Draft Determination focuses on common arrangements used in decentralised finance (DeFi), where a crypto asset is exchanged for a tokenised equivalent to enable use on particular platforms or protocols.

Wrapping a crypto asset triggers a CGT event

The ATO's preliminary view is that wrapping a crypto asset constitutes a CGT event.

The Draft Determination uses Ether (**ETH**) and wrapped Ether (**WETH**) as examples. ETH is the native cryptocurrency of the Ethereum blockchain. WETH is a token that represents ETH on a one-for-one basis and can be used with various DeFi applications that do not support ETH directly. To create WETH, a holder deposits ETH into a smart contract which then issues an equivalent amount of WETH.

According to the ATO, when ETH is transferred to the wrapping contract, ownership of that particular CGT asset ends and CGT event C2 happens. The capital proceeds are equal to the market value of the WETH received. The ATO considers that the WETH received is a new and separate CGT asset rather than the same asset in a different form.

Unwrapping also gives rise to a CGT event

The ATO takes the same approach when the process is reversed.

When WETH is exchanged back into ETH, the WETH is permanently destroyed (or "burnt") by the smart contract and an equivalent amount of ETH is released. The ATO considers that another CGT event C2 happens when the WETH is burnt. The capital proceeds are the market value of the ETH received and the newly received ETH becomes a separate CGT asset with a new cost base.

This means taxpayers may realise capital gains or losses both when wrapping and when unwrapping crypto assets, even though they may regard the process as merely converting an asset into a compatible format for use on a different platform.

Example highlights potential CGT consequences

The Draft Determination includes an example where a taxpayer acquired 5 ETH for \$10,000 and later wrapped the ETH when it was worth \$30,000 in order to use a DeFi protocol.

The ATO concludes that the wrapping transaction triggers CGT event C2 and results in a \$20,000 capital gain. If the taxpayer later unwraps the WETH when the replacement ETH is worth \$28,000, a further CGT event occurs, resulting in a \$2,000 capital loss.

The example illustrates that significant CGT consequences may arise even where there is no economic disposal to an external counterparty and no cash has been realised.

ATO rejects view that ownership continues

A significant part of the Draft Determination is devoted to rejecting alternative interpretations.

The ATO does not accept that a taxpayer retains a continuing ownership interest in the original crypto asset while it is held by the wrapping contract. Nor does it accept that ETH and WETH should be treated as the same asset in a different form. Instead, the ATO considers that each blockchain balance represents a separate CGT asset and that a new CGT asset comes into existence when the wrapped token is created.

The ATO also rejects arguments that the transaction should qualify for replacement asset rollover relief or that no CGT event occurs because ownership has merely changed form.

No ordinary income consequences

The Draft Determination states that the act of wrapping or unwrapping crypto assets does not, of itself, give rise to ordinary income.

Instead, the tax consequences arise under the CGT provisions because the ATO regards the relevant crypto asset as ending when it is transferred to, or burnt by, the smart contract.

Scope of the determination

The Draft Determination only applies to particular "lock-and-mint" smart contract arrangements, where a crypto asset is locked in a smart contract and an equivalent wrapped token is issued. It does not deal with arrangements involving custodians, businesses carrying on crypto trading activities or transactions undertaken as part of a profit-making scheme.

Comments on the Draft Determination are due by 2 October 2026. The ATO proposes that the final determination will apply both before and after its date of issue.

ATO reference *TD 2026/D2*

w <https://www.ato.gov.au/law/view/document?docid=DXT/TD2026D2/NAT/ATO/00001>

5.3 Standard deduction for work-related expenses

The ATO has released *Draft Law Companion Ruling LCR 2026/D5*, which explains the new standard deduction for work-related expenses under section 25-130 of the ITAA 1997. When finalised, the Ruling is proposed to apply from 1 July 2026.

Eligibility and amount of deduction

An individual is eligible for the standard deduction if they:

1. are an individual;
2. are an Australian tax resident at any time during the income year; and
3. derive assessable labour income during the income year.

Assessable labour income broadly includes payments to employees, directors and certain office holders, return-to-work payments, employment termination and retirement payments, superannuation benefits and parental leave pay that are subject to the PAYG withholding provisions.

The deduction is the lesser of:

1. \$1,000; and
2. the individual's total assessable labour income for the income year.

An eligible individual does not need to incur or substantiate expenses to receive the standard deduction. The ATO will calculate the deduction from the information reported in the individual's tax return.

Actual work-related expenses

If an individual separately claims work-related expenses covered by the standard deduction, the standard deduction is reduced dollar-for-dollar, potentially to nil. The relevant expenses include:

1. general employment deductions, including self-education expenses, compulsory uniforms and occupational clothing, working-from-home expenses and work-related travel;
2. car expenses and travel between workplaces;
3. repairs and decline-in-value deductions relating to assets used to earn assessable labour income;
4. balancing adjustment deductions relating to those assets; and
5. deductible COVID-19 testing expenses.

If an individual claims actual expenses, the full amount claimed must be incurred and substantiated, not merely the amount exceeding \$1,000.

Where a claimed work-related expense is later disallowed, the ATO may increase the standard deduction as part of making or amending the assessment, up to the amount that would otherwise have been available.

Certain deductions do not reduce the standard deduction and may be claimed in addition to it. These include:

1. income protection, personal sickness and accident insurance premiums;
2. membership fees for trade, business or professional associations;
3. deductions relating to investment income, including rental property income;
4. expenses incurred in managing tax affairs; and
5. deductible gifts and donations.

These deductions remain subject to the ordinary substantiation requirements.

Changes to substantiation

From the 2026–27 income year, the former substantiation concessions for the following expenses no longer apply:

1. work expenses of \$300 or less;
2. laundry expenses of \$150 or less; and
3. certain transport expenses associated with an allowance or reimbursement under an industrial instrument.

An individual who claims actual work-related expenses covered by the standard deduction must therefore substantiate the full amount claimed. The draft Ruling recommends that individuals maintain records throughout the income year because they may not know until year end whether claiming actual expenses will produce a better result.

Depreciating assets

The draft Ruling explains the interaction between the standard deduction and Division 40. Broadly:

1. decline-in-value and balancing adjustment deductions relating to assets used to earn assessable labour income reduce the standard deduction;
2. deductions attributable to another taxable purpose, such as earning rental or business income, may be claimed separately;
3. an individual may use a simplified 50% reduction when calculating a balancing adjustment for certain assets used to earn assessable labour income where the individual has relied on the standard deduction during the asset's effective life; and
4. deductions for assets allocated to a low-value pool before 1 July 2026 may continue to be claimed in addition to the standard deduction.

However, a depreciating asset first used from the 2026–27 income year cannot be allocated to a low-value pool if the individual reasonably expects to use it mainly to earn assessable labour income.

FBT and salary packaging

Amendments applying from 1 April 2027 restrict the FBT otherwise deductible rule where an expense payment fringe benefit is provided under a salary packaging arrangement for an expense covered by the standard deduction.

From that date, the section 58X exemption will also generally be unavailable where the following work-related items are provided under salary packaging:

1. portable electronic devices;
2. computer software;
3. protective clothing;
4. briefcases; and
5. tools of trade.

Ordinary reimbursements and work-related items provided outside salary packaging arrangements are generally unaffected. An employee's standard deduction is not reduced by reimbursed expenses because the employee cannot separately claim those expenses as income tax deductions.

Laundry expenses

The draft Ruling contains a proposed compliance approach for taxpayers who claim actual deductible laundry expenses. The ATO will accept a calculation based on:

1. \$1 for each load containing only work-related clothing; and
2. 50 cents for each mixed load containing work-related and other clothing.

The individual must retain records showing:

1. why the clothing and associated laundry expenses are deductible;
2. the number of full and mixed loads undertaken;
3. how the deduction was calculated; and
4. evidence of relevant outgoings, including electricity, water and detergent expenses.

This methodology does not remove the substantiation requirement. It provides an accepted method for calculating the deductible amount where the taxpayer claims actual expenses rather than relying on the standard deduction.

Consultation closes on 9 October 2026.

COMMENT – The standard deduction is not merely a substantiation threshold. An eligible individual may receive a deduction of up to \$1,000 without incurring equivalent expenses. However, actual work-related expenses covered by the regime reduce the standard deduction dollar-for-dollar and must be fully substantiated. Advisers should therefore compare the available standard deduction with the client's total actual work-related expenses before completing the return.

TIP – Clients should still be encouraged to retain records throughout the income year. A client may not know until year end whether actual expenses exceed the standard deduction, and failing to maintain records may prevent the client from claiming the larger amount.

COMMENT – Employers should review salary packaging arrangements before 1 April 2027. The amendments may produce FBT liabilities for reimbursements and work-related items that would previously have obtained relief under the otherwise deductible rule or the section 58X exemption.

ATO Reference *Draft Law Companion Ruling LCR 2026/D5*

w <https://www.ato.gov.au/law/view/document?docid=COD/LCR2026D5/NAT/ATO/00001>

5.4 Royalties - payments for software and intellectual property rights

On 4 September 2026, the ATO issued *Taxation Ruling* TR 2026/2, which finalises TR 2024/D1. TR 2026/2 deals with when cross-border payments made under software intermediation arrangements are royalties subject to withholding tax. It covers software supplied through downloads, cloud services and tangible goods containing embedded software.

ATO view

A payment may be a royalty where a software intermediary uses, or receives the right to use, copyright or another intellectual property right. Relevant rights may include the rights to reproduce software, communicate it online or authorise an end-user to perform an act covered by copyright.

The character of the payment depends on the arrangement as a whole. The description used in the agreement is relevant but not decisive. If intellectual property rights are inseparable from the other rights and benefits provided, the ATO may treat the whole payment as a royalty. Otherwise, the payment must be apportioned on a fair and reasonable basis.

Scope of the final ruling

The final ruling replaces the broad term “software arrangement” with “software intermediation arrangement”. The revised definition focuses on intermediaries that make payments to software intellectual property owners or licensees to obtain a position from which they can earn income relating to the software. It does not cover payments made directly by end-users or by intermediaries acting as agents for the intellectual property owner or licensee.

The ruling also identifies tax treaties with royalty definitions that materially differ from the standard definition. Its principles may not apply in the same way under Australia's treaties with the Netherlands, Italy, Singapore, the United States and Mexico.

Characterising payments

The final ruling has been updated to reflect the High Court's decision in *Commissioner of Taxation v PepsiCo Inc* [2025] HCA 30. In deciding what a payment is “for”, the ATO considers the payment's objective purpose,

basis or condition. The agreement is the starting point, but the parties' conduct, commercial purpose, valuation evidence and monetary and non-monetary undertakings may also be relevant.

The ATO also maintains that *International Business Machines Corporation v Commissioner of Taxation* [2011] FCA 335 remains good law. That decision supports considering the whole agreement when characterising a payment, including any express or implied intellectual property rights needed to perform it.

The binding part of the ruling has also been shortened and restructured. It now contains two main examples of software intermediation arrangements. A new example in the non-binding explanation addresses when an intermediary may authorise customers to perform acts covered by copyright.

Copyright and access rights

The final ruling contains more detailed guidance on authorisation. The ATO considers that an intermediary may use copyright by authorising an end-user to reproduce or otherwise use software. This may be the case even if the authorised act would not infringe copyright or is expressly excluded from infringement.

The ATO has also expanded its guidance on access control technological protection measures, including online accounts, licence keys and activation codes. It considers that the use of, or right to use, these measures may fall within the treaty expression "other like property or right".

Examples and embedded software

The ATO removed the draft example involving the distribution of physical copies of computer games. It considers that PCG 2026/D4 provides more appropriate guidance on compliance risk and possible apportionment. The discussion of commercial rental arrangements was also removed because the ATO now considers such arrangements less likely to arise in the software intermediation arrangements covered by the ruling.

The treatment of embedded software has been clarified. A payment wholly for tangible goods will generally not be a royalty if the distributor receives no right to use the intellectual property in the software. However, a royalty may arise if the distributor can modify, adapt or otherwise use intellectual property rights in that software.

Date of effect

TR 2026/2 applies to payments made before and after 4 September 2026. However, TR 93/12 may continue to apply to periods before its withdrawal on 1 July 2021 where it was appropriately relied upon. The ATO says the final ruling does not represent a change of view.

COMMENT – The changes do not materially narrow the ATO's position. In particular, an intermediary's role in enabling downloads or cloud access may involve the use of copyright even where the software licence or technical service is provided by an offshore entity.

TRAP – The ruling applies retrospectively to payments. Existing arrangements are not protected merely because they predate TR 2026/2 or describe payments as distribution fees, service fees or royalty-free amounts.

COMMENT – The ATO has also issued a Draft Practical Compliance Guideline PCG 2026/D4 (see item 6.1 of these notes).

ATO reference TR 2026/2

w <https://www.ato.gov.au/law/view/document?docid=TXR/TR20262/NAT/ATO/00001>

5.5 Calculating qualifying earnings for SG under section 12(3)

The ATO has released *Draft Superannuation Guarantee Determination* SGD 2026/D1, which sets out its preliminary view on how to determine an individual's "qualifying earnings" under paragraph 10A(1)(d) of the SGAA where the individual is treated as an employee under subsection 12(3) because they work under a contract that is wholly or principally for their labour. The draft forms part of the Payday Super package and is proposed to apply from 1 July 2026.

The draft Determination explains that only amounts paid "in respect of" the person's labour are included in qualifying earnings. The phrase is intended to limit the scope of paragraph 10A(1)(d), so employers must identify and, where necessary, apportion payments between labour and non-labour components. Qualifying earnings include payments for physical, mental or artistic exertion, including overtime, on-call allowances and other amounts relating to labour performed under the contract.

The draft confirms that certain amounts are not qualifying earnings, including payments for plant or equipment hire, materials, exact reimbursements, third-party costs passed through to the employer and the GST component of payments. Where the labour component is not separately identified, employers may use a reasonable market value of either the labour element or the non-labour component to determine the amount attributable to labour. Employers are expected to retain records supporting the methodology adopted.

The ATO includes examples illustrating the treatment of overtime and on-call allowances, exclusion of equipment hire charges, software licensing arrangements and the use of award rates to estimate the labour component of a contract.

The draft Determination is open for comment until 2 October 2026.

The ATO has withdrawn SGD 96/2, which explained how employers should calculate the labour component of a contract for superannuation guarantee purposes where a person was deemed to be an employee under subsection 12(3) of the SGAA, with effect from 2 September 2026

ATO reference *SGD 2026/D1*

w <https://www.ato.gov.au/law/view/document?docid=DSD/SGD2026D1/NAT/ATO/00001>

ATO reference *SGD 96/2W*

w <https://www.ato.gov.au/law/view/document?docid=SGD/SGD962/NAT/ATO/00001>

6. Private Rulings

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

6.1 328-G roll-over not available

Facts

The taxpayer operated a clinical and disability support services business through a partnership of two individuals. The partnership had existed since its establishment and its ownership had not changed. The business services were provided by the partners as well as a growing number of qualified contractors, with contractors performing most of the principal work. The business experienced significant growth since commencement and expanded substantially through the increased use of contractors.

Following legal advice, the taxpayer sought to restructure the business to improve asset protection, reduce the personal risk exposure of the business owners, and present a more commercial operating structure to support future growth.

The taxpayer proposed to cease operating through the existing partnership of individuals and instead conduct the business through a partnership of two discretionary trusts.

Under the proposed structure:

1. one discretionary trust would be controlled by one of the current partners, who would be the sole director of its corporate trustee and the appointor of the trust;
2. the second discretionary trust would be controlled by the other current partner, who would be the sole director of its corporate trustee and the appointor of that trust; and
3. the primary beneficiaries of each trust would be the relevant partner together with that partner's spouse and children.

The taxpayer also proposed that each discretionary trust would make a Family Trust Election in its first financial year, with the respective controlling partner nominated as the specified individual.

The taxpayer's aggregated turnover was below the small business entity turnover threshold (\$10 million) and was expected to remain below that threshold in the following income year based on projected business performance.

Question

Is the taxpayer eligible for the small business restructure rollover under Subdivision 328-G of the ITAA 1997?

Ruling

The ATO concluded that the taxpayer was not eligible for the small business restructure rollover because the proposed restructure failed the ultimate economic ownership requirement in paragraph 328-430(1)(c) of the ITAA 1997.

Requirements for the small business restructure rollover

Section 328-430 sets out several conditions that must be satisfied before the rollover is available. Relevantly:

1. the transaction must form part of a genuine restructure of an ongoing business;
2. each transferor and transferee must satisfy one of the small business entity requirements;
3. the transaction must not materially change the ultimate economic ownership of the assets transferred;
4. the assets transferred must be active assets;
5. the parties must satisfy the residency requirements; and
6. the parties must choose to apply the rollover.

The ruling focused on the third requirement: whether the restructure would maintain ultimate economic ownership of the transferred assets.

Ultimate economic ownership

The ITAA 1997 does not define "ultimate economic ownership". The ATO relied on the Explanatory Memorandum to the *Tax Laws Amendment (Small Business Restructure Roll-over) Act 2016*, which explains that ultimate economic ownership rests with the natural persons who ultimately benefit from an asset. Where assets are owned through an interposed entity such as a company, trust or partnership, a look-through approach is required to identify those individuals.

The Explanatory Memorandum also recognises that partnerships can own assets for the purposes of the rollover provisions. In that context, the partnership is treated as the asset-owning entity and the partners are the ultimate economic owners.

Before the proposed restructure, the business assets were owned by a partnership of two individuals. Because the partners' interests were known, their proportional economic ownership could be identified.

After the restructure, the assets would be owned by a partnership whose partners were discretionary trusts. The ATO considered that this created a problem because beneficiaries of a discretionary trust do not have fixed entitlements to income or capital. Their interests depend on future trustee decisions. As a result, it is generally not possible to determine each beneficiary's share of ultimate economic ownership.

The proposed trusts would also have a broader range of potential beneficiaries than the existing partnership structure, including the partners, their spouses and their children. Because different beneficiaries could potentially receive economic benefits from the trust property, the ATO considered that it could not be established that the same individuals would retain the same proportional economic interests after the restructure. The ordinary ultimate economic ownership test was therefore not satisfied.

Alternative test for non-fixed trusts

The ATO then considered the alternative ultimate economic ownership test in section 328-440 of the ITAA 1997. This provision is intended to deal with restructures involving family discretionary trusts where it is difficult to identify fixed economic interests.

Under section 328-440, a transaction will be taken not to change ultimate economic ownership if:

1. immediately before or immediately after the transaction, the asset is included in the property of a non-fixed trust that is a family trust;
2. every individual who had ultimate economic ownership before the transaction is a member of the relevant family group; and
3. every individual who has ultimate economic ownership after the transaction is also a member of that family group.

The ATO referred to *Law Companion Ruling* LCR 2016/3, particularly Example 12, which demonstrates that the alternative test only applies where the transferred assets are themselves property of a non-fixed trust before or after the transaction.

Why the alternative test failed

The critical issue was that the transferred business assets would not be owned by either discretionary trust. Instead, they would be owned by a partnership of discretionary trusts. The partnership is a separate entity for the purposes of the rollover provisions because subsection 960-100(1) of the ITAA 1997 includes partnerships within the definition of an 'entity'.

The ATO therefore distinguished between the business assets held by the partnership and the partnership interests held by the trusts.

Although the trusts would indirectly participate in the business through their partnership interests, the transferred assets would not form part of the property of the trusts themselves. As a result, the requirement in section 328-440 that the assets be included in the property of a non-fixed trust before or after the transaction was not met.

Because the taxpayer could not establish ultimate economic ownership under the ordinary test, and the alternative test in section 328-440 was unavailable, paragraph 328-430(1)(c) was not satisfied. The ATO therefore concluded that the transfer of assets from the partnership of individuals to the partnership of discretionary trusts did not qualify for the small business restructure rollover under Subdivision 328-G of the ITAA 1997.

COMMENT – It is not safe to assume that section 328-G rollover will always be available where a discretionary trust is involved, even if the trust has made a family trust election. The active assets still need to be an asset of the family trust before or after the restructure.

COMMENT – The ATO's approach in the ruling is open to doubt. A partnership is not a separate legal entity at general law. Although the income tax law often deems a partnership to be an entity for particular purposes, that deeming should not be taken further than the statutory context requires. It should not, of itself, change the underlying ownership position that the relevant assets remained assets of the discretionary trusts following the restructure for the purpose of the rollover in section 328-G.

ATO reference *Edited Private Advice Authorisation No. 1052549624977*
w <https://www.ato.gov.au/law/view/document?docid=EV/1052549624977>

6.2 328-G roll-over allowed

Facts

Trust A is a discretionary trust established in MM 19XX. Company A is the trustee and Individual A and Individual B are its directors and shareholders. The beneficiaries comprise members of the C family and associated entities. Trust A has made a family trust election effective from an earlier income year, with Individual A as the specified individual.

Trust A carries on a primary production business involving the breeding and sale of lambs, wool production, and the cultivation and sale of crops including barley, wheat, beans and canola.

Trust A also owns all shares in Company B, which holds valuable primary production land.

The taxpayers proposed a restructure under which the business and its operating assets would be transferred to a newly established discretionary trust (**New Trust**). New Trust would have substantially the same family group as beneficiaries and would make a family trust election with Individual A as the specified individual.

The assets to be transferred include livestock, trading stock, plant and equipment, vehicles, land use rights and any goodwill associated with the business. Following the transfer, the business would continue to be operated by Individual A and Individual B through New Trust, with no intention to cease operations or transfer control of the business.

The stated purpose of the restructure was to separate the operational risks associated with carrying on the primary production business from the ownership of the shares in Company B and the underlying land assets. The taxpayers submitted that the business was exposed to a range of commercial risks, including employment-related claims, adverse weather events, commodity price fluctuations and business debt obligations. The restructure was also said to reduce exposure to potential historical risks associated with the long-standing operation of the business and the trust.

The applicants proposed to apply the small business restructure roll-over in Subdivision 328-G of the ITAA 1997 to the transfer of the business assets. The following assumptions were made:

1. Trust A would continue to exist after the restructure;
2. no amendments would be made to the trust deed;
3. the proposed arrangement constitutes a genuine restructure and, consistent with the safe harbour provisions in section 328-435 of the ITAA 1997, for the three-year period following the transfer:
4. there is no change in ultimate economic ownership, as the beneficiaries of New Trust will comprise the same family group as the existing beneficiaries of the Trust A, and New Trust will make a Family Trust Election nominating Individual A as the specified individual;
5. the business assets will continue to be used in carrying on the business and will therefore remain active assets, and
6. there will be no significant or material private use of the business assets.

Question

Will the proposed restructure satisfy the conditions for roll-over relief under Subdivision 328-G?

Ruling

The ATO concluded that the proposed transfer of the primary production business and its assets from Trust A to New Trust qualified for the small business restructure roll-over under Subdivision 328-G of the ITAA 1997.

The roll-over requirements in section 328-430 were satisfied because:

1. genuine restructure: The transfer formed part of a genuine restructure of an ongoing business. The restructure was driven by commercial objectives, namely separating the operating business from valuable landholding assets, improving asset protection, and reducing exposure to business risks. The business would continue to operate indefinitely under New Trust with the same controllers, and there was no evidence that the arrangement formed part of a business wind-down, succession plan, or asset realisation strategy;
2. small business entities: Both Trust A and New Trust were small business entities. Trust A carried on the primary production business and had aggregated turnover of less than \$10 million. Following the restructure, New Trust would carry on the same business and was also expected to have aggregated turnover below the threshold;
3. ultimate economic ownership: Although the transfer was between discretionary trusts, the alternative ownership test in s 328-440 was satisfied. Trust A had made a family trust election and New Trust would make a corresponding family trust election with the same specified individual. The business assets would

therefore remain within the same family group before and after the transfer, with no material change in ultimate economic ownership;

4. active assets: The transferred assets, including livestock, trading stock, land use rights and goodwill, were used in carrying on the business and constituted active assets for the purposes of the roll-over provisions;
5. residency requirement: Both Trust A and New Trust satisfied the residency requirements; and
6. roll-over choice: Trust A and New Trust would jointly choose to apply the Subdivision 328-G roll-over to the transfer.

The ATO also accepted that the arrangement would satisfy the safe harbour requirements in s 328-435, including continuity of economic ownership, continued business use of the assets, and no significant private use of those assets for three years following the restructure.

Therefore, Trust A was entitled to choose the small business restructure roll-over in respect of the transfer of the business and its assets to New Trust.

ATO reference *Edited Private Advice Authorisation Number*: 1052551547527
w <https://www.ato.gov.au/law/view/document?docid=EV/1052551547527>

6.3 Family trust election family control test

Facts

The taxpayer and their former spouse were married before the establishment of the trust and later divorced.

The trust was established during the marriage. Since its establishment, the taxpayer has been:

1. the appointor of the trust;
2. the trustee of the trust; and
3. one of the named beneficiaries of the trust, together with their former spouse.

No family trust election (**FTE**) has previously been made for the trust.

Following the divorce the taxpayer remains the appointor and both individuals remain beneficiaries.

No additional appointors, trustees, directors, shareholders or other persons have been granted powers to control the application of the trust's income or capital.

If an FTE is made, the trust intends to distribute income and/or capital to the taxpayer and/or their former spouse. No distributions are intended to be made outside the relevant test individual's family group.

No interposed entity elections are proposed.

Under the trust deed, the trustee has absolute discretion to distribute trust income to beneficiaries until the vesting day.

Under the trust deed, the appointor has the power to appoint and remove the trustee.

The taxpayer sought a ruling on a number of alternative arrangements involving different nominated test individuals for a proposed family trust election and different appointorship arrangements, including arrangements under which either former spouse would be the test individual and/or appointor of the trust.

Only one of the alternative arrangements outlined in the ruling application will be implemented.

Questions

1. Does the trust satisfy the family control test where Person B is the test individual and Person A is the appointor of the trust?
2. Does the trust satisfy the family control test where Person A is the test individual and Person B is the appointor of the trust?
3. Does the trust satisfy the family control test in Schedule 2F where Person B is the test individual and sole appointor of the trust?
4. Does the trust satisfy the family control test in Schedule 2F where Person A is the test individual and sole appointor of the trust?
5. Where a valid family trust election is made, will distributions of income or capital by the trust to Person A be subject to family trust distribution tax under Schedule 2F of the ITAA 1936 where Person B is the test individual?
6. Where a valid family trust election is made, will distributions of income or capital by the trust to Person B be subject to family trust distribution tax under Schedule 2F of the ITAA 1936 where Person A is the test individual?

Ruling

Question 1 – Person B as the test individual and Person A as appointor

The ATO concluded that the trust did not satisfy the family control test in Schedule 2F of the ITAA 1936 where Person B was the test individual and Person A remained appointor. The family control test in section 272-87 requires one of the specified groups connected to the test individual to satisfy at least one of the control conditions in subsection 272-87(2). The relevant group generally consists of the test individual and members of the test individual's family.

The critical issue was that, following the divorce, Person A was no longer a member of Person B's family for the purposes of section 272-95. Although former spouses may remain members of a test individual's family group for distribution purposes under section 272-90, that rule applies to family trust distribution tax and does not apply when determining whether the family control test is satisfied. As Person A held the key control power as appointor, and Person A was not part of Person B's family for section 272-87 purposes, neither Person B nor Person B's family group held any of the relevant control powers. Accordingly, none of the control tests in subsection 272-87(2) were satisfied.

Question 2 – Person A as the test individual and Person B as appointor

The ATO concluded that the trust satisfied the family control test where Person A was the test individual and Person B was appointor. Although Person B was not part of Person A's family following the divorce, the family control test could still be satisfied because Person A personally possessed sufficient control over the trust.

The ATO focused on paragraph 272-87(2)(b), which applies where the relevant group is able, directly or indirectly, to control the application of the trust's income or capital. As trustee, Person A had an absolute discretion under the trust deed to distribute trust income among beneficiaries. The ATO considered this discretionary power to be sufficient control over the trust's income and capital to satisfy paragraph 272-87(2)(b). Consequently, even though Person B held the appointor role, the trust passed the family control test because Person A, as test individual, controlled the application of trust income and capital through the trustee powers.

Question 3 – Person B as the test individual and sole appointor

The ATO concluded that the trust would satisfy the family control test where Person B became the sole appointor and was also the test individual. The decision turned on the significance of the appointor's powers under the trust deed.

Under clauses 45 and 46 of the trust deed, the appointor had the power to remove and appoint the trustee. Paragraph 272-87(2)(e) specifically provides that the family control test is satisfied where the relevant group can appoint or remove the trustee. Because Person B would personally hold that power and would also be the test individual, the ATO considered that paragraph 272-87(2)(e) was satisfied. Control through trustee appointment and removal was therefore sufficient to establish family control, even though Person B was not trustee.

Question 4 – Person A as the test individual and sole appointor

The ATO concluded that the trust would satisfy the family control test where Person A was both the test individual and sole appointor. This arrangement involved two independent forms of control recognised by section 272-87.

First, Person A, as trustee, had an absolute discretion to distribute income and therefore satisfied paragraph 272-87(2)(b) by controlling the application of trust income and capital. Secondly, Person A, as sole appointor, would hold the power to remove and appoint the trustee, satisfying paragraph 272-87(2)(e). The existence of both trustee and appointor powers meant that the family control test was clearly met.

Question 5 – Distribution to Person A where Person B is the test individual

The ATO concluded that distributions of income or capital by a family trust to Person A would not be subject to family trust distribution tax where Person B was the test individual specified in the FTE.

Family trust distribution tax under section 271-15 generally applies where a family trust distributes income or capital outside the test individual's family group. The ATO noted that the concept of a "family group" for distribution tax purposes is broader than the concept of "family" used in the family control test. Section 272-90 expressly includes former spouses within the family group in relation to distributions of income or capital. Therefore, even though Person A was no longer a member of Person B's family under section 272-95, Person A remained a member of Person B's family group under section 272-90 because Person A was a former spouse. As the proposed distributions would remain within the family group, section 271-15 did not apply.

Question 6 – Distribution to Person B where Person A is the test individual

The ATO reached the same conclusion in reverse. Distributions of income or capital to Person B would not be subject to family trust distribution tax where Person A was the nominated test individual.

Again, the key distinction was between the family control provisions and the family group provisions. Section 272-90 includes former spouses within the test individual's family group for distribution purposes. As a result, Person B remained a member of Person A's family group notwithstanding the divorce. Because the distributions would be made to a member of the relevant family group, the trust would not incur family trust distribution tax under section 271-15.

COMMENT - This ruling highlights an important distinction in Schedule 2F between the family control test in section 272-87 and the family group rules in section 272-90. A former spouse may cease to be part of a test individual's "family" for the purposes of establishing control of the trust, but may nevertheless remain part of the test individual's "family group" for the purposes of receiving trust distributions without triggering family trust distribution tax. In practice, advisers must separately consider (1) whether the nominated test individual's family controls the trust and (2) whether proposed beneficiaries fall within the family group, as the two tests operate under different statutory concepts.

ATO reference *Edited Private Advice Authorisation No.* 1052542219061
w <https://www.ato.gov.au/law/view/document?docid=EV/1052542219061>

6.4 GST not passed on

Facts

The taxpayer was registered for GST, is an ACNC entity, an endorsed charity and a deductible gift recipient. It was entitled to certain GST concessions.

The taxpayer was entitled to treat certain supplies as GST free under section 38-250 as non-commercial supplies. However, it reported the supplies as taxable and not GST-free.

Questions

1. Was there excess GST?
2. Was the GST passed on?

Ruling

Was there excess GST?

Yes.

The ATO noted that subsection 142-5(1) of the GST Act applies where an assessed net amount includes GST that exceeds the amount payable, after disregarding any amounts covered by subsection 142-5(2). No amounts relating to the supplies here were disregarded under subsection 142-5(2).

The ATO noted that the taxpayer applied the non-commercial supply concessions in section 38-250. However, in the relevant BAS, it treated the supplies as taxable and remitted GST, although the supplies were GST-free under those concessions.

Accordingly, the assessed net amount for the relevant tax period included GST exceeding the amount payable. The excess is 'excess GST' under subsection 142-5(1).

Was the excess GST passed on?

No.

The ATO noted that, under s 142-10, excess GST is treated as payable on a taxable supply if it has been passed on to another entity. If the excess GST has not been passed on, s 142-10 does not apply and the taxpayer may amend its GST return to reduce the GST attributed to the relevant tax period.

Whether GST has been passed on is determined objectively having regard to all relevant facts and circumstances. Consistent with GSTR 2015/1, the ATO considered:

1. the manner in which the excess GST arose;
2. the taxpayer's pricing policy and practice;
3. the documentary evidence surrounding the overpayment; and
4. any other relevant circumstances.

The ATO found that the excess GST arose solely because the taxpayer incorrectly reported GST in its GST return. The supplies were treated and priced as GST-free, and the taxpayer did not increase prices to recover any GST amount from recipients.

The ATO also noted that the taxpayer's pricing practices were consistent with an intention to supply GST-free services. Although documentary evidence is relevant, the question remains whether the recipient ultimately bore the economic burden of the GST.

Having regard to all relevant circumstances, the ATO concluded that the economic burden of the excess GST was borne by the taxpayer rather than the recipients. Accordingly, the excess GST had not been passed on for the purposes of Division 142.

As a result, the taxpayer was entitled to amend its GST return to reduce the GST attributed to the relevant tax period. Any resulting refund would be paid or applied under s 155-75 of Schedule 1 to the TAA 1953.

ATO reference *Edited private advice authorisation number*: 1052542023861
w <https://www.ato.gov.au/law/view/document?docid=EV/1052542023861>

7. ATO and other materials

7.1 Royalty characterisation - ATO compliance approach

The ATO has released *Draft Practical Compliance Guideline* PCG 2026/D4, which sets out a proposed compliance approach for determining whether cross-border payments made under software distribution and software intermediation arrangements contain a royalty component for royalty withholding tax purposes. The draft Guideline accompanies TR 2026/2, which contains the ATO's substantive views on the characterisation of software-related payments. The Guideline introduces a risk assessment framework ranging from green zone (low risk) to red zone (high risk), with the level of ATO compliance activity increasing as the perceived risk increases.

Royalty apportionment

The draft Guideline addresses situations in which a payment may contain both royalty and non-royalty elements.

Example 1 concerns a software distribution arrangement where the parties identify a royalty component and the Australian entity remits royalty withholding tax. The taxpayer maintains documentation supporting the methodology used to determine the amount attributable to royalties. The arrangement falls within the green zone.

The draft Guideline does not prescribe a mandatory apportionment methodology. Instead, it provides a risk assessment framework under which taxpayers may assess the proportion of a payment that is attributable to royalties. The framework includes a residual profit-style methodology for evaluating the level of royalty-related income within an arrangement.

Green zone arrangements

The draft Guideline identifies several categories of arrangements that will generally be regarded as low risk. These include software acquired solely for a taxpayer's own business use, software acquired for private or domestic purposes, software embedded in physical products and certain software distribution arrangements involving the sale of software copies.

Example 3 considers an Australian business subscribing to standard cloud-based software products, including productivity software, customer relationship management systems and enterprise resource planning software. The software is used internally in the business and is not resold or otherwise commercialised. The arrangement falls within the green zone.

Examples 5 and 6 deal with software embedded within physical products. The examples involve a smart washing machine and a smartphone. In each case, the software enables the product to perform its intended functions and is not separately exploited. The ATO regards both arrangements as low risk.

The ATO also treats certain software distribution models as low risk. Software distribution arrangements will fall within the green zone where:

1. the distributor does not have the right to, and do not, make additional copies of the software, and
2. there is no adaptation of the software, pre-sale or implementation services or post-sale services connected with the use of the software by your customers or end users; and
3. either:
 - (a) the software copies that you acquire are embodied on physical media, or

- (b) the software copies are electronic and your customers pay a fixed price (once) for a perpetual or ongoing licence to use the copy of the software.

In Example 7, a green zone arrangement, an Australian subsidiary distributes video games developed by a foreign group member. Customers make a one-off payment to obtain a copy of the software and the Australian distributor has no right to copy, reproduce or modify the software.

Amber zone arrangements

The draft identifies a number of characteristics that may indicate a greater likelihood that payments contain a royalty component. These include arrangements involving software subscriptions, software access rights and Australian entities acting as intermediaries between customers and offshore software owners.

Example 8 concerns an Australian subsidiary distributing enterprise software owned by a foreign parent company. Australian customers subscribe to the software and pay subscription fees to the Australian entity, which remits most of the revenue to the foreign owner. Although no royalty is recognised under the arrangement, the ATO places the arrangement in the amber zone.

The ATO notes that Australian customers obtain access to software owned by the foreign entity, the contractual arrangements are directed to that software, and the Australian entity operates as an intermediary through which customers obtain access to the software. The example illustrates the ATO's focus on software subscription and software-as-a-service arrangements where Australian entities collect customer revenue and remit amounts offshore.

Red zone arrangements

The highest risk category is illustrated by Example 9.

In that example, an Australian distributor is granted rights to market, distribute, copy and sell licences for software owned by an offshore related party. Customers enter into end-user licence agreements and the Australian distributor remits 97% of its revenue to the foreign software owner. The agreement provides that the relevant rights are granted on a "royalty-free" basis.

The arrangement is nevertheless classified as red zone. Relevant features include the Australian entity's right to copy software, the granting of software licences to customers, the use of activation keys and passwords to control access to the software, and the residence of the offshore recipient in a specified jurisdiction. The example reflects the ATO's view that the legal description adopted in the contract will not necessarily determine whether a payment contains a royalty component.

Consultation

Consultation on draft PCG 2026/D4 closes on 2 October 2026. The ATO has invited submissions on the proposed risk framework and the operation of the examples contained in the Guideline.

ATO Reference *PCG 2026/D4*

w <https://www.ato.gov.au/law/view/document?docid=DPC/PCG2026D4/NAT/ATO/00001>

7.2 Oracle Decision Impact Statement

The ATO has issued a Decision Impact Statement following the Full Federal Court's decision in *Oracle Corporation Australia Pty Ltd v Commissioner of Taxation* [2025] FCAFC 145. The proceedings relate to the ATO's view, now expressed in TR 2026/2 (see item 4.4 of these notes) that certain payments made by Australian software distributors for software distribution rights may constitute royalties subject to withholding tax. The substantive dispute concerns payments made by Oracle's Australian entities to an Irish group entity for

rights to distribute Oracle software in Australia. The Commissioner had assessed those payments as royalties and imposed withholding tax consequences.

The issue before the Full Federal Court was not whether the payments were royalties. Rather, it concerned whether Oracle's Federal Court proceedings should be stayed pending completion of the mutual agreement procedure (**MAP**) between Australia and Ireland under the Australia-Ireland tax treaty. At first instance, the stay was refused because the Court considered the case would provide useful guidance on the broader royalties issue. The Full Court disagreed and held that, on the evidence before it, the proceedings should be stayed pending completion of the MAP process.

The Full Court found that the Commissioner had not adduced sufficient evidence to establish that Oracle's arrangements were sufficiently similar to those of other taxpayers such that a court decision would provide broader industry guidance. It also found that correspondence from the United States Treasury did not establish broader uncertainty regarding the interpretation of the term "copyright" in Australia's tax treaties.

ATO view

The ATO accepts that MAP remains an important mechanism for resolving potential double taxation disputes. However, the ATO continues to regard judicial determination as an important means of obtaining certainty on treaty interpretation issues where administrative or bilateral processes do not provide sufficient guidance. The ATO has emphasised that the decision turned on the evidence concerning the appropriateness of a stay application and did not determine the substantive royalties issue.

The ATO has also indicated that it will continue seeking appropriate opportunities to obtain judicial clarification regarding the characterisation of software payments under Australia's tax treaties.

COMMENT – The decision does not provide any guidance on whether software distribution payments are royalties. Instead, its significance lies in the Court's approach to stay applications where a taxpayer seeks to resolve a dispute through a treaty MAP process. The ATO has acknowledged that future attempts to oppose a stay on public interest grounds will likely require more detailed evidence demonstrating how other taxpayers would benefit from a judicial determination of the issue.

w <https://www.ato.gov.au/law/view/document?docid=LIT/ICD/NSD1716of2024/00001>

7.3 Tax Ombudsman reviews ATO administration of DPNs

The Tax Ombudsman has commenced a review of the ATO's administration of Director Penalty Notices (**DPNs**). The review will assess whether the ATO administers DPNs fairly and effectively, with appropriate safeguards for affected directors.

DPNs allow the ATO to recover a company's unpaid GST, PAYG withholding and superannuation guarantee charge directly from current and former directors for liabilities arising during their directorship.

During the financial year ended 30 June 2025, the ATO issued more than 84,000 DPNs to directors of about 64,000 companies. This represented a 136% increase from the previous financial year.

The Tax Ombudsman notes that some directors may not understand:

1. the company's tax obligations;
2. the personal consequences of the company failing to meet those obligations;
3. that former directors may remain liable for periods during which they were directors; and
4. that late lodgment may substantially limit the options available to resolve their personal liability.

Concerns raised through complaint investigations also suggest that former directors may have difficulty obtaining information from the ATO after receiving a DPN because the ATO no longer recognises them as the company's authorised contact.

Scope of the review

The review will examine whether, before, during and after issuing a DPN, the ATO:

1. gives current and former directors adequate and timely information about their obligations, the director penalty, the underlying company debt and the available actions;
2. appropriately and consistently considers each affected director's circumstances, including when recovering the debt; and
3. appropriately and consistently identifies and responds to vulnerability, coerced directorship and financial abuse.

The review will also consider:

1. how the ATO selects cases for DPN action;
2. what follow-up occurs after a DPN is issued;
3. how the ATO considers statutory defences;
4. whether directors of the same company are treated consistently;
5. how DPN action affects small businesses and former directors;
6. the use of DPNs while a company is operating, during external administration or after liquidation; and
7. the operation of the regime in insolvency and small business restructuring contexts.

The review will not examine:

1. financial abuse issues unrelated to DPN administration;
2. the ATO's wider debt recovery practices, except as needed to understand DPN administration; or
3. broader corporations law, insolvency and small business restructuring settings, except as needed to understand the DPN regime.

Vulnerability and coerced directorships

The review will examine cases where directors may have had little control over, or awareness of, the company's affairs because of illness, vulnerability, coerced directorship or financial abuse.

The Tax Ombudsman is seeking information about experiences of:

1. notifying the ATO of vulnerability, coercion or financial abuse;
2. raising a defence to a director penalty;
3. the ATO's consideration of individual circumstances before issuing a DPN or when managing a defence; and
4. the clarity and usefulness of ATO correspondence about DPN liabilities.

Consultation

The Tax Ombudsman is seeking submissions from current and former directors, advisers, tax professionals, financial counsellors and community organisations with experience of DPNs.

Submissions may address:

1. the ATO's consideration of a director's circumstances;
2. the clarity and timing of ATO communications;
3. the handling of statutory defences;

4. the treatment of vulnerability, coercion and financial abuse;
5. consistency where a company has several directors;
6. the effect of DPN action at different stages of a company's lifecycle; and
7. possible improvements to ATO systems, safeguards and administration.

Submissions close at 5.00 pm AEST on 29 September 2026. Feedback may be provided by survey, webinar, email, telephone or post. The final report is expected in April 2027.

Information provided to the review may include legally privileged material. The Tax Ombudsman states that including privileged information in a submission will not waive privilege. Aggregated or de-identified findings may be published, but individuals will not be identified unless they expressly waive confidentiality.

w <https://taxombudsman.gov.au/terms-of-reference-review-atos-administration-of-director-penalty-notices/>
w https://taxombudsman.gov.au/reviews_reports/review-atos-administration-of-director-penalty-notices/

7.4 Board of Taxation annual report 2025–26

In August 2026, the Board of Taxation published its Annual Report 2025–26, outlining its work during the year and priorities for 2026–27.

The Board completed its Red Tape Reduction Review and submitted its report to Government on 30 June 2026. The recommendations have not been published.

The redesigned Voluntary Tax Transparency Code commenced on 1 July 2026. It updates the reporting framework, reduces duplication with public country-by-country reporting and includes further guidance.

The Board also commenced its statutory review of the thin capitalisation reforms. The review covers the third-party debt test, the \$2 million exemption threshold, tax EBITDA and the debt deduction creation rules. The Board is due to report to Government by 31 January 2027.

w <https://taxboard.gov.au/sites/taxboard.gov.au/files/2026-08/2025-26-bot-annual-report.pdf>

7.5 Be payroll tax ready

Revenue NSW has reminded employers to be payroll tax ready for the 2026–27 year. The update directs employers to the key payroll tax lodgement and payment dates, including the new downloadable calendar, and to the payroll tax customer education library, which includes how-to videos on calculating and lodging monthly payroll tax, setting up automatic payments, updating payroll tax details and finding a correspondence ID.

The practical message is that employers should diarise payroll tax deadlines and use the available resources to reduce the risk of late lodgement or late payment.

TRAP – Payroll tax lodgement and payment dates are set by legislation. Late payment of payroll tax is a tax default and will result in penalty tax of 25% being imposed.

w <https://www.revenue.nsw.gov.au/news-media-releases/be-payroll-tax-ready-pay-on-time-to-avoid-additional-costs>

8. Tax professionals

8.1 Tax Time 2026 update

On 28 August 2026, the ATO published key messages from the Tax Practitioner Stewardship Group Tax Time meeting held on 25 August 2026.

Tax return lodgments and agent phone line

By 23 August 2026, the ATO had received more than 5.9 million individual income tax returns for the income year ended 30 June 2026. This was 1% fewer than at the same time in the previous year. More than 3.4 million returns were self-prepared and more than 2.4 million were lodged by registered tax agents.

During the previous week, the ATO answered more than 23,900 calls on the registered agent phone line. The average wait time was 7 minutes and 30 seconds.

The main topics generating calls were:

1. follow-up enquiries about income tax return lodgments;
2. ABN applications;
3. GST eligibility and reinstatement;
4. GST registration; and
5. business activity statement activity enquiries.

Digital services

By 23 August 2026:

1. the ATO app had about 1.1 million users during the financial year to date;
2. Online services for individuals had more than 10.5 million users during that period; and
3. use of Online services for individuals was lower than in the previous financial year, while ATO app use had increased by 17.8%.

The ATO reported that its digital services were performing well, with no material updates.

Tax time guidance

The ATO highlighted recent guidance for tax agents concerning:

1. consultation on the draft law companion ruling for the \$1,000 standard deduction;
2. the five most common income tax return due dates and which clients they apply to;
3. data-matching letters for taxpayers who disposed of property but had not lodged a return;
4. determining a client's private health insurance tax claim code; and
5. the recording of the Tax Time open forum.

The ATO also continued its tax time communications on work-related deductions, common misconceptions and amending income tax returns.

First home super saver scheme pre-fill issue

The ATO is managing an issue affecting pre-filled information for about 16,000 taxpayers who accessed the first home super saver scheme during the income year ended 30 June 2026.

ATO interest pre-fill information

Tax practitioner representatives raised the continuing unavailability of ATO interest pre-fill information. The ATO confirmed that it was working on a fix and would provide more information when available.

w <https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/prepare-and-lodge/tax-time/tpsg-tax-time-updates/tax-time-2026-update-25-august>

8.2 AUSTRAC issues notices to non-enrolled businesses

On 28 August 2026, AUSTRAC announced that it had begun issuing notices under section 167 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) to businesses that appear to provide designated services but have not enrolled with AUSTRAC.

The notices require businesses to provide information so AUSTRAC can determine whether they:

1. provide services regulated under the AML/CTF regime; and
2. comply with their obligations under the regime.

The affected sectors include:

1. lawyers and conveyancers;
2. accountants;
3. trust and company service providers;
4. real estate agents;
5. jewellers; and
6. dealers in precious stones and metals.

The AML/CTF regime was expanded to these sectors on 1 July 2026. AUSTRAC considers enrolment a basic legal requirement and a key regulatory priority. Businesses providing designated services must also actively manage the risk that criminals could use their services to move or conceal illicit funds.

AUSTRAC states that its present focus remains on helping businesses understand and comply with the expanded regime. However, businesses that ignore their obligations should expect regulatory scrutiny. AUSTRAC has also emphasised that regulated businesses remain responsible for compliance despite the guidance, tools and support available to them.

TRAP – A business should not assume it falls outside the AML/CTF regime merely because it does not regard itself as a traditional financial services business. The question is whether it provides a designated service covered by the legislation. Lawyers, accountants and other professional advisers may fall within the regime because of the services they provide.

TIP – A business that receives a section 167 notice should promptly identify the services it provides, determine whether any are designated services and respond to the information request. A business that may be covered but has not enrolled should review its position without delay. AUSTRAC encourages businesses making a genuine effort to comply to contact its Contact Centre for help.

w <https://www.austrac.gov.au/news-and-media/article/austrac-issues-notices-non-enrolled-businesses>

8.3 Understanding clients' income tax return due dates

On 20 August 2026, the ATO published guidance explaining the five most common income tax return due dates under the registered agent lodgment program.

A client's due date may depend on:

1. when the client was added to the tax agent's client list;
2. the entity type;
3. whether the client is a new registrant;
4. whether the client has overdue returns; and
5. whether the latest return lodged was taxable or non-taxable.

The common due dates are:

31 October 2026

This date generally applies to entities:

1. with overdue returns for earlier income years;
2. added to the tax agent's client list after 31 October; or
3. specifically notified of this due date by the ATO, including some entities prosecuted for non-lodgment and some new registrant SMSFs reviewed at registration.

Tax agents must lodge overdue returns and add new clients to their client list by 31 October 2026. The deadline is not extended to the next business day. Meeting this deadline allows the client to receive the applicable lodgment program due date for the 2026 return.

31 January 2027

This date generally applies to:

1. taxable large and medium entities, other than individuals, based on the latest return lodged; and
2. a taxable head company of a consolidated group, including a new registrant, where a member was treated as a large or medium entity in the latest income year lodged.

28 February 2027

This date generally applies to:

1. non-taxable large and medium entities, other than individuals, based on the latest return lodged;
2. new registrant large and medium entities, other than individuals;
3. a non-taxable head company of a consolidated group where a member was treated as a large or medium entity in the latest income year lodged;
4. a member that exited a consolidated group during the income year;
5. a new registrant non-taxable head company of a consolidated group; and
6. new registrant SMSFs.

31 March 2027

Excluding large and medium entities, this date generally applies to:

1. individuals and trusts whose latest return resulted in a tax liability of \$20,000 or more;
2. companies and superannuation funds whose total income exceeded \$2 million in the latest income year lodged; and

3. the head company of a consolidated group where a member's total income exceeded \$2 million in the latest income year lodged.

15 May 2027

This date generally applies to entities that are not required to lodge earlier and are not eligible for the 5 June concession.

COMMENT – A client's due date may change if the client's circumstances change. Tax practitioners should check due dates regularly through Online services for agents or the practitioner lodgment service rather than relying on the general dates above.

TRAP – Adding a new client to the client list after 31 October may result in a 31 October lodgment date rather than the later date that would otherwise apply under the lodgment program. Overdue returns for earlier income years can have the same effect.

w <https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/unsure-why-your-client-received-a-particular-due-date>

8.4 Tax Ombudsman report on OSfA

On 20 August 2026, the Tax Ombudsman released a review of the ATO's Online Services for Agents (OSfA) and Practice Mail. The review found that the services were not keeping pace with agents' needs and were creating avoidable administrative work.

Registered agents represent about 62% of individual taxpayers and 96% of non-individual taxpayers. However, the proportion of agents who said OSfA met all or most of their needs fell from 76% in 2022 to 63% in 2026.

The review found that agents can generally complete required tasks, but often need to:

1. switch between OSfA, Practice Mail and the registered agent phone line;
2. repeat tasks or use manual workarounds;
3. request information that the ATO already holds digitally;
4. review clients individually because practice-level reporting is limited; and
5. wait for the ATO to manually prepare reports that could potentially be provided through self-service.

The resulting administrative burden affects agents' productivity, creates more work for the ATO and may increase clients' compliance costs.

Practical improvements to OSfA

The review identified several specific limitations in OSfA:

1. some campaign and bespoke correspondence sent to clients does not appear in the communication history;
2. BAS agents cannot access SGC account information, even when they have prepared and lodged the relevant SGC statements;
3. detailed FBT client lists must be requested through Practice Mail and manually prepared by the ATO;
4. refund applications for franking credits by non-profit organisations still require a PDF form and manual processing;
5. payment plans for balances exceeding \$200,000 cannot be initiated and progressed online;
6. credit transfers must be requested through Practice Mail;
7. practice-level reports do not cover all tax and super obligations requiring attention; and

8. downloaded documents often require agents to redact TFNs manually.

The Tax Ombudsman recommended that agents be allowed to initiate and track requests through OSfA even where the ATO must later conduct a manual review. This would avoid requiring agents to restart a request through another channel.

ATO prioritisation of system changes

The review found almost 100 OSfA-related improvements awaiting action in the ATO's system backlog. Some had remained unresolved since before 2022. Stand-alone OSfA improvements often struggle to progress unless they form part of a larger ATO project.

The existence of a workaround can also cause an issue to receive lower priority, even where the workaround requires significant additional work by agents or ATO staff.

The Tax Ombudsman recommended that the ATO:

1. address the risk that agents' operational needs are underweighted when system investments are prioritised; and
2. introduce a transparent process for communicating prioritisation decisions and giving feedback to agents and professional bodies.

Practice Mail

Practice Mail allows agents to send requests to the ATO. However, the review found that it operates more like digital post than a modern two-way communication service.

Agents must select from more than 200 topics. Choosing the wrong topic may cause a request to be redirected and, in some cases, restart the 28-day response period. Once a request is submitted, agents cannot see whether it has been allocated, transferred, is awaiting action or requires further information.

Where further exchanges are required, agents may need to lodge a new request with a new receipt number. Responses may also be sent through different channels or mailboxes. This makes ongoing matters difficult to track, particularly within larger practices.

The review recommended that the ATO:

1. develop a secure digital channel supporting ongoing exchanges within a single interaction history; and
2. make short-term improvements to Practice Mail, including simpler request categories and better identification and tracking of requests.

ATO response

The ATO accepted all three recommendations. It agreed to consider practical improvements to OSfA, develop a clearer framework for prioritising system changes and examine both short-term Practice Mail improvements and longer-term secure two-way digital communication.

However, the ATO's response does not commit to implementing every specific improvement identified in the review. For the first recommendation, it will consult tax practitioners, assess feasibility and prioritise proposed changes under its improved prioritisation process.

w https://taxombudsman.gov.au/reviews_reports/review-ato-online-services-for-agents/
w <https://taxombudsman.gov.au/wp-content/uploads/2026/08/Online-Services-for-Agents-Review-report.pdf>
w <https://www.ato.gov.au/media-centre/ato-response-to-the-tax-ombudsmans-review-report-into-online-services-for-agents>

8.5 Tax Ombudsman priorities consultation

On 1 September 2026, the Tax Ombudsman released a draft work plan seeking feedback on possible systemic reviews of tax and superannuation administration over the next 12 months. The proposed topics draw on complaint trends, stakeholder feedback, current issues and areas of government and parliamentary interest.

The Tax Ombudsman conducts four systemic reviews each year. The four topics will be selected based on their relevance, impact and potential to improve tax administration.

The ten proposed topics are:

1. the ATO's administration of applications for release from tax debts because of serious hardship;
2. the TPB's management of complaints and alleged breaches of the Tax Agent Services Act 2009 (Cth), including the consistency and transparency of its processes and sanctions;
3. whether the ATO's consultation framework and consultation groups are effective and fit for purpose;
4. the ATO's administration of early release of superannuation on compassionate grounds;
5. whether the ATO's services, guidance and processes for deceased estates are clear and consistent;
6. whether the ATO manages compromised taxpayer accounts consistently with good administration;
7. the ATO's administration and governance of the first home super saver scheme;
8. the operation and governance of the ATO's test case litigation program;
9. the ATO's handling of employee notifications about unpaid super, including the transition to Payday Super; and
10. whether the ATO administers the research and development tax incentive in a timely, consistent and proportionate way.

Topics not selected for a formal systemic review may still be considered through a shorter project, consultation or public discussion paper. These activities would not result in formal recommendations to the ATO.

Feedback closes on 29 September 2026

w <https://taxombudsman.gov.au/publications/input-needed-on-tax-pain-points/>