

Volume 60(1)
July 2025

TI The Tax
Institute

Taxation *in* Australia

Understanding and managing tax uncertainty: part 1

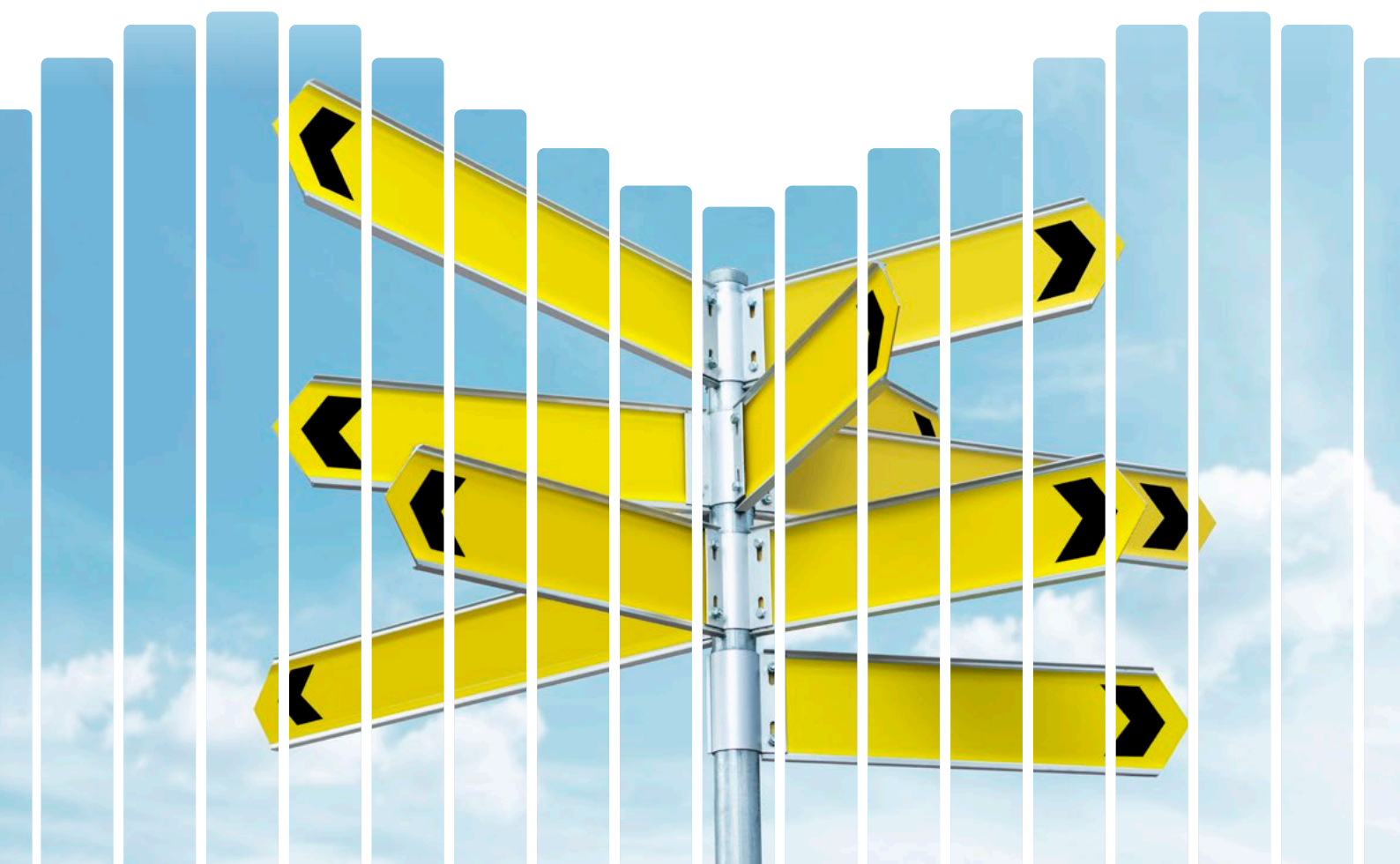
*Bruce Collins, CTA, and
Amanda Guruge, CTA*

Estate planning

*Shirley Schaefer and
Clinton Jackson*

Super and SMSFs: where are the goal posts?

Shirley Schaefer



Contents

Cover article

19

Understanding and managing tax uncertainty: part 1

Bruce Collins, CTA, Principal Solicitor, and
Amanda Guruge, CTA, Senior Associate,
Tax Controversy Partners

Feature articles

26

Estate planning

Shirley Schaefer, Partner, BDO, and
Clinton Jackson, Partner, Cooper Grace Ward

34

Super and SMSFs: where are the goal posts?

Shirley Schaefer, Partner, BDO

Insights from the Institute

2 President's Report

3 CEO's Report

4 Associate's Report

Regular columns

1 Tax News – at a glance

6 Tax News – the details

11 Tax Tips

15 Higher Education

17 Member Spotlight

40 A Matter of Trusts

43 Superannuation

46 Successful Succession

49 Events Calendar

50 Index

Invitation to write

We welcome original contributions that are of interest to tax professionals, lawyers, academics and students.

For details about submitting articles, see Guidelines for Publication on our website taxinstitute.com.au, or contact publications@taxinstitute.com.au.



Tax News – at a glance

by TaxCounsel Pty Ltd

June – what happened in tax?

The following points highlight important federal tax developments that occurred during June 2025. A selection of the developments is considered in more detail in the “Tax News – the details” column on page 6 (at the item number indicated).

New giving fund rules

In a media release on 10 June 2025, the Assistant Minister for Productivity, Competition, Charities and Treasury announced the release of a consultation paper in relation to the government’s proposals to strengthen philanthropy by new rules that would ensure that more money flows from charitable trusts to Australian charities. **See item 1.**

ATO scam warning

The ATO has recently released a scam warning for tax practitioners. **See item 2.**

Personal financial advice fees

The Commissioner has issued a practical compliance guideline that considers the amendments to the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Income Tax Assessment Act 1997* (Cth) that were enacted in 2024 to clarify the legal basis for the payment by a superannuation fund of financial advice fees which are paid from or charged to members’ superannuation interests, and the associated income tax consequences (PCG 2025/1). **See item 3.**

Stay of TPB cancellation decisions refused

The ART has refused applications for the stay of decisions of the Tax Practitioners Board to terminate the tax agent registrations of an individual (a Mr Lunn) and of a company (Albus Advisory Pty Ltd) that was owned and controlled by Mr Lunn, in each case with a two-year prohibition on re-applying for registration (*Lunn and Tax Practitioners Board* [2025] ARTA 697). **See item 4.**

Amendment of assessments: evasion

In a recent decision where amended assessments had been made by the Commissioner outside the two- or four-year

assessment amendment period that is permitted by s 170 of the *Income Tax Assessment Act 1936* (Cth) (ITAA36), the ART held that there was no basis for the Commissioner’s opinion that there was evasion of tax and, so, the amended assessments were not permitted by s 170 ITAA36 (*Kirtlan and FCT* [2025] ARTA 539). **See item 5.**

FBT issues

In a recent decision, the Federal Court (O’Sullivan J) allowed the Commissioner’s appeal from a decision of the AAT which raised a number of FBT issues. This case (*FCT v SEPL Pty Ltd as trustee of the SFT Trust* [2025] FCA 581) is considered in the Tax Tips column of this issue of the journal (at p 11).

ART: confidentiality orders refused

The Administrative Review Tribunal (ART) has refused an application for confidentiality orders in relation to a review of a decision by the Tax Practitioners Board to cancel the taxpayer’s registration as a tax agent. The ART said that it would thwart open justice if confidentiality orders were issued to prevent the likelihood of harm occurring to an applicant because a review of a reviewable decision may not go the way they want and they may not necessarily agree with the reasons why. To issue confidentiality orders in such circumstances would not advance the ART’s statutory objective of promoting public trust and confidence in the ART by conducting proceedings in an open and transparent way (*Carter and Tax Practitioners Board* [2025] ARTA 632).



President's Report

by Tim Sandow, CTA

Challenges in trusts

President Tim Sandow shines a spotlight on a particularly challenging area of tax practice at the moment: trusts.

We are seeing a particular focus on trusts in the tax technical landscape at the moment, from the family trust distribution tax (FTDT) to the ATO's views on corporate beneficiaries incorporated after the trust received a dividend.

The increasing complexity of the tax law in relation to trusts and family arrangements needs to be addressed sooner rather than later – before it becomes a ticking time bomb.

In our recent Incoming Government Brief, sent to a list of key lawmakers, regulators and policy stakeholders, The Tax Institute raised this complexity and the absolute necessity of these rules remaining fit for purpose and reflecting today's reality, particularly as family groups deal with succession and passing the torch to future generations.

Risky business for tax professionals

FTDT and many other policies related to family trusts are not well-understood by taxpayers, who, rightly so, turn to their tax advisers for help navigating these treacherous waters.

But the complexity of the tax law means error is almost inevitable – even when all parties are working in good faith towards the correct outcome.

What's more, the consequences of those errors can be horrific, for clients and tax professionals alike, as the rules do not discriminate between genuine mistakes being made and malicious efforts to be non-compliant.

A substantial error can mean a family is facing financial ruin. In that scenario, fingers of blame will inevitably be pointed – particularly at the poor tax agent who was trying their hardest to do the right thing and help their client.

With new breach reporting rules, this pressure on tax practitioners is even higher. Not only do they run the risk of being blamed for honest errors where every bit of due diligence was taken to ensure compliance, but they also face

the possibility of needing to report a colleague or fellow practitioner in that same boat. While I'm sure every tax practitioner reading this would, without hesitation, report a colleague wilfully doing the wrong thing, having to make that same report due to an honest error can be a far more stressful and morally challenging situation.

The urgent need for reform

The FTDT was never intended to collect tax, so the fact that it can potentially destroy the entire wealth of a family through an inadvertent error (not blatant tax avoidance motives) and cause such distress to the tax professionals working with it, clearly shows it is not working as originally intended.

Genuine and comprehensive tax reform is badly needed to simplify this part of the tax law, particularly as it applies to families and SMEs. The Tax Institute continues to advocate for these necessary changes on behalf of members. I encourage you to add your voice to our advocacy when the opportunity arises – keep an eye on the Advocacy Tracker in our weekly *TaxVine* newsletter for more information.

Here to support our members

To those members specialising or working in the area of trusts: you are not alone.

Your community at The Tax Institute is behind you and here to help. It is never more beneficial and important to be a member of a community like ours than when these challenges arise. Please use your member community as a sounding board, a shoulder to lean on, and an ear to listen when you need it.



CEO's Report

by Scott Treatt, CTA

Changes for a sustainable future

CEO Scott Treatt discusses the recent governance changes and how they centre members at the heart of our story.

Recently, we made a proposal to update the structure of our governance and Board as part of our efforts to safeguard the longevity of the Institute. This change was carefully considered and designed to sure up the foundations of the Institute, while keeping members and the benefits and opportunities offered to them at the core of our planning.

Thank you to all members who attended the meeting and to those who otherwise registered their vote by proxy. The Institute is built and maintained by the efforts of members, and we appreciate your engagement in matters such as this that are crucial to the sustainable running of our organisation.

As announced in *TaxVine*, I'm pleased to report that at the 8 May 2025 member's meeting, the resolution successfully passed with over 88% support. I feel this is a strong endorsement from our members. We are making changes in order to improve the Institute on your behalf and I am glad that our members have joined that journey with us.

New governance structure

Throughout the process of updating our governance structures, our aim has always been to be as transparent as possible with members and to keep you informed and engaged as we evolve.

The new governance structure commencing 1 July 2025 will diversify the expertise of our Board, increasing our ability to meet regulatory requirements and make forward-looking decisions for members. It will allow National Council to focus their efforts on representing members' best interests, bring increased transparency to the State Council election process, and further ensure accountability for TTI executives. I feel this is an overall wonderful development for all members.

As always, The Tax Institute will continue to work closely with all State and National Councillors in transitioning to the new governance structure. If you have any questions

or concerns, I encourage you to reach out to the Chair of your local State Council.

Your membership rights and responsibilities

Our members' willingness to volunteer and contribute continues to make us what we are – that has not changed and will not change in the future.

Crucially, the new Constitution does not change your rights or responsibilities as a member. We have done our due diligence in protecting the rights of members through the composition of the Board and the functions and roles that National Council will play.

The new Board composition specifies that members will represent at least 50% of the Board, and at least 50% of those present in a Board meeting must be members for there to be quorum. This is exactly as it should be – decisions being led by the members who have selflessly given their time, expertise and resources to benefit fellow members and the wider tax system.

Local engagement: by members, for members

These changes, and other improvements in the pipeline across the organisation, are designed to more closely align different parts of the Institute and to ensure that we are making the most of members' efforts. Our councils and committees work tirelessly to promote engagement in their local areas and that remains a focus for everyone at the Institute.

The Tax Institute is first and foremost your Institute – a “by members, for members” organisation, where the benefit and wellbeing of members is always paramount. It has never been a better time to be a member, as we work to serve members in increasingly meaningful ways.



Associate's Report

by Sumitha Krishnan,
FTI

Changes to GIC/SIC from 1 July 2025

We examine the non-deductibility of GIC and SIC from 1 July 2025 and evaluate its impact on taxpayers and the tax system.

Despite the steady decline of inflation and the lowering of interest rates by the Reserve Bank of Australia on two occasions during the current financial year, the cost-of-living pressure on taxpayers and the wider community persists. Against this backdrop, the start of the 2025–26 financial year on 1 July 2025 sees several significant measures take effect. These include the non-deductibility of the general interest charge (GIC) and shortfall interest charge (SIC), as well as the recent changes under the *Tax Agent Services Act 2009* (Cth) that will affect smaller practitioners with 100 or fewer employees.

Since the introduction of GIC and SIC in 1999 and 2005, respectively, they have been deductible under s 25-5(1) of the *Income Tax Assessment Act 1997* (Cth) (ITAA97).

Set out in Pt IIA of the *Taxation Administration Act 1953* (TAA), GIC and SIC arise when tax obligations are not paid on time, or when a tax liability has been incorrectly self-assessed, resulting in an underpayment of tax, respectively. Section 280-50 of Sch 1 TAA states that the objective of SIC is “to neutralise benefits that taxpayers could otherwise receive from shortfalls [of the applicable taxes], so that they do not receive an advantage in the form of a free loan over those who assess correctly”.

What is changing from 1 July 2025?

The measure to deny a deduction for GIC and SIC was first announced as part of the [Mid-Year Economic and Fiscal Outlook 2023–24](#). It was stated to enhance incentives for all entities to correctly self-assess their tax liabilities and pay on time to level the playing field for individuals and businesses that already do so. Preventing a deduction for GIC and SIC also aims to reduce the amount of [collectable debt](#) owing to the ATO, which sits at \$52.9 billion for 2023–24.

On 27 March 2025, the *Treasury Laws Amendment (Tax Incentives and Integrity) Act 2025* was enacted (the Act). Schedule 2 to the Act denies deductions for ATO interest charges, specifically for GIC and SIC incurred in income years on or after 1 July 2025. Schedule 2 gives effect to this measure by amending ss 25-5 and 26-5 ITAA97 to deny income tax deductions for amounts of GIC and SIC incurred by a taxpayer. These amendments:

- deny deductions for GIC and SIC by repealing para (c) of s 25-5(1) ITAA97; and
- insert new subs (1A) into s 26-5, which provides that, without limiting s 26-5(1)(a), GIC and SIC cannot be deducted under the ITAA97.

Importantly, the interest charges are non-deductible from 1 July 2025, based on when the GIC or SIC assessment is raised (ie incurred), irrespective of when the primary tax assessment is raised. This means that GIC or SIC incurred in the 2025–26 or a later income year that relates, for example, to an income tax assessment or a GST assessment from an earlier year is non-deductible from 1 July 2025.

The interest payable to a taxpayer on an overpayment, early payment, or delayed refund continues to be assessable.

Why is this change significant?

Given that the availability of a deduction for GIC and SIC has been integral to the tax system for an extended period, it is a significant change for taxpayers to navigate. Taxpayers with existing tax debts may experience cash flow issues, potentially leading such individuals and small businesses toward insolvency or voluntary liquidation.

To manage tax affairs, especially debts, small businesses should consider:

- settling outstanding debts to avoid higher costs;
- keeping all lodgments current;
- communicating with the ATO about debts as early as possible;
- making voluntary disclosures before GIC/SIC deductions are lost;
- seeking alternative financing at better rates;
- checking if financing costs are deductible;
- requesting GIC/SIC remission when in financial distress;
- renegotiating payment arrangements; and
- improving cash flow management to prevent tax debts.

Increased financial pressure may compel businesses to reallocate resources away from essential operations such as payroll or inventory procurement, jeopardising their long-term sustainability. This could, in turn, have profound implications for the broader economy as a potential increase in business failures may result in higher unemployment rates, diminished consumer expenditure, and slow economic growth, thereby establishing a cycle of adversity that impacts not only taxpayers, but also the community at large.

How can the government better support taxpayers and small businesses?

The government can support taxpayers by ensuring clarity and transparency regarding GIC remissions.

Although from the start of the 2025–26 financial year, taxpayers will no longer be able to deduct GIC and SIC, the right to request remission of such interest charges will continue. The Commissioner has the discretion to remit interest charges where it is fair and reasonable to do so, taking into consideration the circumstances that led to the delayed payment of tax liabilities or the tax shortfall. As such, the ATO is expected to continue to have regard to PS LA 2011/12 *Remission of general interest charge* and PS LA 2006/8 *Remission of shortfall interest charge and general interest charge for shortfall periods*.

The Tax Ombudsman, Ruth Owen CBE, recently released the [draft forward work plan for systemic reviews 2025–26](#), which included the ATO's management of GIC remission as a topic for review. This follows ongoing concerns from practitioners and their clients about the ATO's perceived tightened approach to GIC remissions, which is creating significant difficulties for taxpayers, particularly given that taxpayers will no longer be able to deduct these interest charges. To enhance clarity for taxpayers, it is suggested that the ATO should more transparently outline the parameters for granting GIC remissions, particularly if changes have been made to the previous approach.

Further, it is important to note that ATO decisions to deny GIC remission are not reviewable as per s 14ZS TAA. That is, where a taxpayer disagrees with the ATO's decision not to remit GIC, the only recourse available to the taxpayer is to appeal the ATO's decision in the Federal Court of Australia under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*.

In contrast, SIC remission decisions can be reviewed under specific conditions. Taxpayers with outstanding liabilities exceeding 20% of the shortfall can object to the ATO's decision, while those below this threshold may seek external review through the Administrative Review Tribunal starting from 14 October 2024, or the Federal Court. Given that the deductibility of interest charges will no longer be available, we recommend that legislative changes be made to allow unconditional reviewability of GIC and SIC decisions to better ensure fairness to taxpayers. If this recommendation is not adopted, applying a similar 20% threshold for GIC remission decisions is suggested to create a more equitable framework for taxpayers facing these charges.

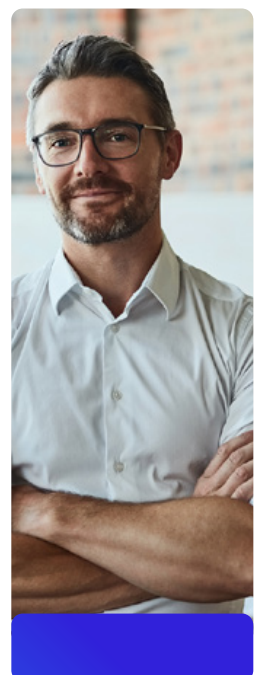


Affiliate members, time to upgrade

Would you like voting rights and a professional designation that highlights your commitment to excellence?

Your current experience may make you eligible to upgrade to a Fellow or Associate membership.

Call our team on 02 8223 0000 to get started.



Get started
taxinstitute.com.au

Tax News – the details

by TaxCounsel Pty Ltd

June – what happened in tax?

The following points highlight important federal tax developments that occurred during June 2025.

Government initiatives

1. New giving fund rules

In a media release on 10 June 2025, the Assistant Minister for Productivity, Competition, Charities and Treasury announced the release of a consultation paper in relation to the government's proposals to strengthen philanthropy by new rules that would ensure that more money flows from charitable trusts to Australian charities.

As part of these changes, public and private ancillary funds will be renamed "giving funds", a clearer term that better reflects their role in supporting charitable giving.

Giving funds are philanthropic trusts that distribute money to Australian charities. The government is seeking feedback on the following two proposed changes:

1. increasing the minimum annual distribution rate so more funds reach charities sooner; and
2. allowing distributions to be averaged over three years, helping funds to plan their giving more effectively.

The consultation paper invites views from across the sector (including charities and giving funds) on how these changes could help deliver greater benefit to communities in need.

The Assistant Minister said that giving funds play an important role in connecting generous Australians with the causes they care about. While careful investment can help grow these funds over time, the government wants to ensure that donations made with tax concessions are reaching charities at the right pace.

These reforms will implement recommendations from two key reports: the Productivity Commission's *Future Foundations for Giving* and the *Not-for-profit Sector Development Blueprint* from the Blueprint Expert Reference Group.

The Commissioner's perspective

2. ATO scam warning

The ATO has recently released a scam warning for tax practitioners.

The warning states that there is generally a rise in ATO impersonation scams targeting the community. ATO email scams have increased by over 300% since May 2024.

The warning sets out the following three key pieces of advice for tax practitioners:

1. never share your myGov sign-in details, and only share personal information (such as your tax file number or bank account details) if you trust the person and they genuinely require them. If in doubt, don't disclose anything;
2. take a second to check. Could the interaction be fake? Is it really the ATO? If a link or QR code is directing you to provide information or to log into an online portal, don't click on it, it's a scam; and
3. act swiftly if something doesn't feel right.

It is also important that clients know how the ATO communicates. In this regard:

- the ATO may send an SMS or email requesting contact but will *never* send an unsolicited message with a link requesting personal information or that the ATO's online services be accessed;
- the ATO has a Facebook, Instagram, X and LinkedIn account, but will *never* use these platforms to ask for personal information, documentation or for payments; and
- if clients suspect a scam, they should be directed to verify or report a scam on the ATO's website or call 1800 008 540 for confirmation.

To help protect a tax practitioner's practice and client information, the ATO recommends that the practitioner:

- follows the ATO agent verification methods guidelines and:
 - checks the proof of identity for all new clients;
 - questions any discrepancies in proof of identity; and
 - avoids retaining copies of any documents used to verify clients;
- only lodges for clients whose identity has been confirmed;
- trains their staff in why and how to secure client information;
- checks existing client records for unusual updates or lodgments;
- performs background checks on new employees; and
- educates their employees about what is appropriate to discuss on social media or by email.

It should be noted that tax practitioners have a client identification obligation under the tax agent registration rules. The Tax Practitioners Board (TPB) has issued guidance as to what this obligation requires. That guidance states that the TPB had worked closely with the ATO in developing the guidance and that tax and BAS agents using the ATO's online services and following the ATO's methods will meet the TPB's requirements.

While the ATO's methods for client verification are primarily for tax and BAS agents who use the ATO's online services, the TPB's guidance applies to all tax practitioners regardless of whether they use the ATO's online services or not.

3. Personal financial advice fees

The Commissioner has issued a practical compliance guideline that considers the amendments to the *Superannuation Industry (Supervision) Act 1993* (Cth) (SISA) and the *Income Tax Assessment Act 1997* (Cth) (ITAA97) that were enacted in 2024 to clarify the legal basis for the payment by a superannuation fund of financial advice fees which are paid from or charged to members' superannuation interests (members' accounts), and the associated income tax consequences (PCG 2025/1).

A reference in PCG 2025/1 to "financial advice fees" is a reference to a payment by a superannuation fund to a financial adviser, member or another entity for advice that is personal advice provided by the adviser to the member of the fund within the definition in s 766B of the *Corporations Act 2001* (Cth). Funds may also indirectly (through member fees) charge a fee for general advice (as defined in that section) against members' accounts. PCG 2025/1 does not apply to the payment of advice fees that are for general advice provided to a member.

PCG 2025/1 outlines:

1. a methodology that a trustee of a superannuation fund other than a self-managed superannuation fund (SMSF) can use to determine the extent to which payments of financial advice fees satisfy para (d) of item 5 of the table in s 295-490(1) ITAA97; and
2. the ATO's compliance approach in relation to a fund's pay as you go (PAYG) withholding obligations for financial advice fees paid in income years prior to 1 July 2019. Section 307-10(e) (which excludes such amounts from being a superannuation benefit) applies from 1 July 2019.

A fund may choose whether to use the methodology referred to in (1) above. However, by following the methodology, the ATO will not have cause to apply compliance resources to review whether the requirement in para (d) has been satisfied, other than to verify compliance with PCG 2025/1.

PCG 2025/1 does not apply to the other requirements (in para (a), (b) or (c) of item 5 of the table in s 295-490(1)) which must also be satisfied for a payment of a financial advice fee to be deductible under that item. It is the ATO's expectation that a fund would have a documented governance framework and assurance practices in place that are adequate in meeting their income tax obligations for the deduction of financial advice fees for the purposes of satisfying para (a), (b) and (c). This may be considered, along with other relevant documentation, when the ATO engages with a fund as part of the ATO's compliance programs.

The methodology referred to in (1) above is not available to SMSFs. SMSFs have a limited number of members. Where a trustee of an SMSF pays a financial advice fee at the

request, or with the consent, of a member, it is expected that the trustee will review each piece of personal advice provided to the member to determine the extent to which the financial advice fee is deductible.

All superannuation funds, including SMSFs, may rely on PCG 2025/1 in relation to the compliance approach (under (2) above) to funds' PAYG withholding obligations for income years prior to the 2019-20 income year.

Recent case decisions

4. Stay of TPB cancellation decisions refused

The Administrative Review Tribunal (ART) has refused applications for the stay of decisions of the TPB to terminate the tax agent registrations of an individual (a Mr Lunn) and of a company (Albus Advisory Pty Ltd) that was owned and controlled by Mr Lunn, in each case with a two-year prohibition on re-applying for registration (*Lunn and Tax Practitioners Board*¹).

On 3 October 2024, the TPB made decisions (the reviewable decisions) to terminate the tax agent registrations of Mr Lunn and of the company and to impose a period of two years within which an application for reregistration could not be made. These decisions were to have taken effect on 25 November 2024.

On 25 November 2024, the applicants (Mr Lunn and the company) each made an application under s 41(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act), now s 32(2) of the *Administrative Review Tribunal Act 2024* (Cth) (ART Act), to stay the operation or implementation of the reviewable decisions (stay applications).

On 20 February 2025, the ART made orders by consent that the reviewable decisions be stayed on an interim basis until the ART heard and determined the stay applications or until further order subject to the condition that the applicants not accept any new clients in the meantime (interim stay order).

The TPB relied on extensive evidence when making the decision in respect of Mr Lunn. The findings as to Mr Lunn's alleged breaches of the Code of Professional Conduct (the Code) were as follows:

- failing to act honestly and with integrity. The breaches relied on by the TPB included Mr Lunn having made false and misleading statements to the Commissioner in his capacity as a tax agent and as trustee for the Lunn Family Trust, and his preparing and lodging 14 income tax returns which included excessive or incorrect deduction claims;
- failing to comply with the taxation laws in the conduct of personal affairs. The breaches relied on by the TPB included failing to properly complete aspects of the Lunn Family Trust's BAS and underreporting net income in the Lunn Family Trust's income tax returns;
- failing to ensure that tax agent services were provided competently. The breaches relied on included matters

arising from the lodging of income tax returns for his clients, Ms Kakarla and Mr Nemani, and lodging client income tax returns with excessive or incorrect work-related deductions claimed;

- failing to take care in ascertaining client affairs. The failures to take care related to the income tax returns lodged for Ms Kakarla and Mr Nemani, and the income tax returns lodged for the 14 clients referred to in the first bullet point above; and
- failing to take reasonable care in ensuring that the tax laws were applied correctly. The failures principally related to the income tax returns lodged for the 14 clients referred to in the first bullet point above.

The breaches of the Code by Mr Lunn led to the determination by the TPB that he had ceased to meet the tax practitioner requirement that he was a fit and proper person and that he was no longer of good fame, integrity and character.

The ART said that the power to order a stay was only to be exercised for the purposes of securing the effectiveness of the hearing and determination of the application for review. It was the applicant who, for practical purposes, bore the onus of satisfying the ART that a stay was desirable for the requisite purpose, and the ART must have sufficient evidence before it to draw that conclusion.

The ART said that the range of factors relevant to the ART's consideration of a stay were well established by the decision of Downes J in *Re Scott and Australian Securities and Investments Commission (Scott)*,² and the tribunal cases which have followed it. The six matters listed by Downes J in *Scott* are as follows:

1. the prospects of success;
2. the consequence for the applicant of the refusal of a stay;
3. the public interest;
4. the consequences for the respondent in carrying out its functions depending on whether a stay is granted or not;
5. whether the application for review would be rendered nugatory if a stay were not granted; and
6. other matters that are relevant.

The ART noted that these factors should not be treated as a complete checklist (indeed factor 6 effectively states this), as that risked losing sight of the discretion which the ART is being asked to exercise when considering whether it is "desirable" to award a stay "for the purpose of ensuring the effectiveness of the review".

As to factor 1 above, the ART was not prepared at this stage to make a finding that the applicants had no prospects of success in their applications for review, but their prospects were not strong enough to weigh in favour of the granting of a stay.

As to factor 2 above, this factor weighed slightly in favour of the grant of a stay but was outweighed in this case by the other relevant factors, including the public interest. The ART

was persuaded that the public interest factor (see 3 above) weighed strongly against the granting of stays in this case.

The ART accepted the TPB's submission that, where the factual findings underpinning the reviewable decisions were not readily able to be challenged by the applicants on the evidence and the arguments as they now stood, the need for protection of the TPB's reputation as the decision-maker and an effective regulator dictated that factor 4 should weigh against the grant of a stay.

Also, as to factor 4, the ART accepted that the applicants would suffer some financial loss if the stay was not granted, but this was not a case where their applications for review would be rendered nugatory or pointless if their stay applications were refused.

Accordingly, the ART determined that the weight of the relevant factors, particularly the public interest factor, was against the granting of stay orders and refused to make the requested orders.

The ART noted that any prejudice to the applicants which would flow from the ART refusing their applications for a stay would be managed best by the parties working with the ART to have the substantive proceedings heard and determined as soon as that could sensibly be achieved. The ART noted that programming orders to progress the matter to a substantive hearing had already been made.

5. Amendment of assessments: evasion

In a recent decision where amended assessments had been made by the Commissioner outside the two- or four-year assessment amendment period that is permitted by s 170 of the *Income Tax Assessment Act 1936* (Cth) (ITAA36), the ART held that there was no basis for the Commissioner's opinion that there was evasion of tax and, so, the amended assessments were not permitted by s 170 ITAA36 (*Kirtlan and FCT*).³

The taxpayer (a Mr Kirtlan), in the relevant tax periods (the 2006, 2007 and 2008 income years), was located partly in Australia and partly in the United Kingdom. He lodged his Australian income tax returns on the basis that he was not a resident of Australia and his UK returns on the basis that he was not a UK resident. Consequently, the significant UK-sourced income derived by the taxpayer was not brought to account in either jurisdiction.

The Commissioner decided that the taxpayer was an Australian resident for the relevant tax periods but would have been out of time to issue amended assessments unless he was of the opinion that there had been fraud or evasion. The Commissioner formed the opinion that there had been evasion. On that footing, the Commissioner issued amended income tax assessments, along with assessments of administrative penalties. The amended assessments increased (in aggregate) the taxpayer's taxable income for the three income years by \$8,129,644 and created an aggregated tax shortfall of \$3,791,090. Penalties totalling \$1,895,545 were imposed.

As the case finally came to be put on his behalf, the taxpayer confined his challenge to the income tax

assessments on the single ground that the Commissioner should not have formed the opinion that there had been evasion.

The ART said that it was common ground that evasion required more than mere avoidance of tax, or the withholding of information, or the provision of misleading information. Some blameworthy act or omission was required. However, “[an] intention to withhold information lest the Commissioner should consider the taxpayer is liable to a greater extent than the taxpayer is prepared to concede, is conduct which if the result is to avoid tax would justify finding evasion” (*Denver Chemical Manufacturing Co v FCT (NSW)*⁴). Intentionally omitting income without a credible explanation would also constitute evasion.

It was not in dispute that the taxpayer spent the following number of days in Australia in the relevant income years: 2006 – 173 days; 2007 – 187 days; and 2008 – 249 days.

The ART said that, while there is some overlap between “residence” according to ordinary concepts and “permanent place of abode”, they were separate concepts. Residence connoted an intention to treat a place as one’s home, so that a continuity of association with a place and an intention to return to it as one’s home would mark the place as remaining one’s residence, noting that a person may reside in more than one place. A permanent place of abode outside Australia connotes abandonment of a place of residence in Australia.

The taxpayer did not claim to have abandoned his Australian domicile. Thus, the debate regarding whether the taxpayer had a credible basis for claiming not to be a resident of Australia mainly focused on whether the taxpayer was a resident according to ordinary concepts and, if not, whether he had a permanent place of abode outside Australia. In particular, whether the evidence established that the taxpayer intended to reside in the UK indefinitely and to not return to Australia, having regard to various documentary and other evidence and the context referred to above.

The ART considered that a crucial consideration in that regard was the evidence of the taxpayer’s accountant, a Mr Spence. The ART said:

“76. If a properly informed accountant provides advice and/or prepares returns in a particular way and, as here, there is no suggestion of collusion between the accountant and the taxpayer to defraud the Commonwealth, it is difficult to see how a taxpayer following that advice and lodging returns in that way could be said to have engaged in evasion. Put another way, is it not the case that acting on the advice of a properly informed accountant would provide a credible explanation for a shortfall in a taxpayer’s returns such that there could not be said there was evasion?

...

90. It may be that a different picture would have emerged if Mr Spence had been cross-examined. But he was not. The Commissioner no doubt had good reasons for not troubling Mr Spence with cross-examination. But having

taken that decision, the Tribunal is left with Mr Spence’s unchallenged evidence. I accept Mr Spence’s affidavit as an honest account of his interactions with Mr Kirtlan. There is no reason not to. The Commissioner did not submit otherwise.”

On the foundation of that evidence, especially in relation to their long friendship and many and regular conversations, the ART was prepared to infer that Mr Spence was well-informed regarding the business and personal activities of the taxpayer relevant to his residency status. From that base of knowledge, which probably put Mr Spence in a superior position to many advisers in respect of their understanding of the factual context against which their advice to clients is formulated, Mr Spence provided advice to the taxpayer regarding his view as to the taxpayer’s tax residency status, and prepared or approved tax returns for the taxpayer’s signature. The taxpayer acted on that advice and authorised the filing of his returns on that basis.

In those circumstances, the ART accepted that the taxpayer had provided a credible explanation for filing his returns on the footing that he was not a resident of Australia at the relevant times. The returns may have been inaccurate, but they were prepared or approved by an accountant of long experience and in a very good position (because of their business and personal relationship) to understand the taxpayer’s activities and intentions. Accordingly, the ART accepted that the returns were not attended by evasion.

For another recent decision of the ART where the issue of evasion was considered in the context of the Commissioner’s power to issue an amended assessment, see *HWFX and FCT*.⁵

TaxCounsel Pty Ltd
ACN 117 651 420

References

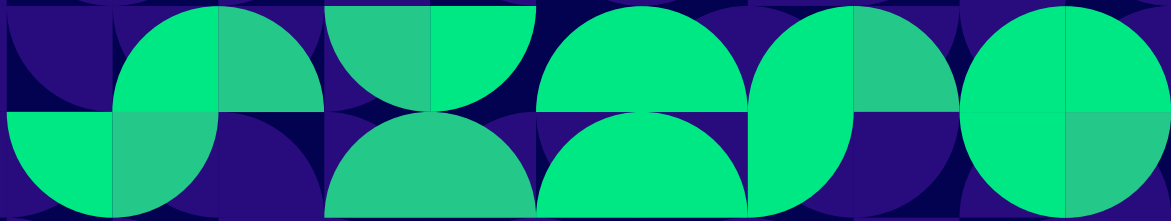
- 1 [2025] ARTA 697.
- 2 [2009] AATA 798.
- 3 [2025] ARTA 539.
- 4 [1949] HCA 25.
- 5 [2025] ARTA 680.

The Tax Summit

3–5 September 2025

MCEC Melbourne

20 CPD hours



SHAPE THE MOMENT



Countdown is on

Get ready for an unforgettable experience. The Tax Summit is the event you won't want to miss.



20 CPD hours

Earn 20 CPD hours while gaining valuable skills and knowledge.



40+ sessions

Choose from over 40+ sessions tailored to help you stay ahead in your field.

Register now – early bird tickets still available!

Register before or on Friday 1 August to save \$200

Tax Tips

by TaxCounsel Pty Ltd

FBT issues

A recent decision of the Federal Court on an appeal from the AAT has highlighted the potentially broad scope of fringe benefits tax.

Background

In its recent decision in *FCT v SEPL Pty Ltd as trustee of the SFT Trust*,¹ the Federal Court (O'Sullivan J) considered several FBT issues that arose out of the provision by the trustee of a discretionary trust of non-monetary benefits to the directors of the corporate trustee (the taxpayer). The case was an appeal by the Commissioner of Taxation from a decision of the Administrative Appeals Tribunal (AAT)² in which the AAT set aside a decision of the Commissioner disallowing the taxpayer's objection to amended FBT assessments for the fringe benefits tax years 2016 to 2020. The Federal Court allowed the Commissioner's appeal.

The issues that arose on the appeal included whether the appeal raised a question of law and, if so, whether the directors were employees for the purposes of FBT and, if so, whether the benefits were in respect their employment.

The FBT issue

The FBT issue raised in the *SEPL Pty Ltd* case was whether non-monetary benefits granted by the taxpayer to three brothers who had exclusive, personal use of over 40 luxury and high-performance motor vehicles gave rise to an FBT liability. The brothers were the sole directors and shareholders of the taxpayer. However, none of them received any payment from the taxpayer for the duties they performed. In its role as trustee, the taxpayer was engaged in significant commercial operations involving petrol stations, convenience stores, fast food and tobacco outlets, and gift shops.

The brothers were among many eligible beneficiaries of the trust, which included extended family. They alone, of the eligible beneficiaries, played an active "hands on role" in the taxpayer's business. They did not receive salaries but instead benefited in two ways:

1. sharing the taxpayer's business profits through an informal arrangement reached between the brothers, with the profits being distributed to each of the brother's family trusts (also eligible beneficiaries); and
2. each brother had the exclusive use of luxury and high-performance motor vehicles purchased in the taxpayer's name. Each brother used the motor vehicles allocated to him for both business and personal use over the relevant FBT years.

The expenses associated with the motor vehicles were debited to their mother's loan account with the trust. The loan was fully repaid from income of the trust distributed to the mother, grossed up to provide an amount sufficient to clear her loan account and to pay the income tax payable by her on the amount of that distribution.

There was no issue before the AAT that the provision of the motor vehicles for the private use of each of the directors was a benefit within the meaning of s 136(1) of the *Fringe Benefits Tax Assessment Act 1986* (Cth) (FBTAA). There was also no issue about the quantum of the assessments.

The two issues before the AAT were:

1. whether, on the facts found, the brothers in their roles as directors of the taxpayer came within the statutory meaning of the word "employee" for the purposes of the FBTAA; and
2. if so, whether the provision of the motor vehicles was "in respect of" the employment of the brothers for the purposes of the FBTAA.

The AAT determined that the brothers were not employees, but even if they had been, the non-cash benefits were not conferred in respect of employment.

The Commissioner appealed from the decision of the AAT to the Federal Court which has now allowed the appeal.

The legislation

The relevant provisions of the FBTAA are as follows:

"7 Car benefits

- (1) Where:
 - (a) at any time on a day, in respect of the employment of an employee, a car held by a person (in this subsection referred to as the **provider**):
 - (i) is applied to a private use by the employee or an associate of the employee; or
 - (ii) is taken to be available for the private use of the employee or an associate of the employee; and
 - (b) either of the following conditions is satisfied:
 - (i) the provider is the employer, or an associate of the employer, of the employee;
 - (ii) the car is so applied or available, as the case may be, under an arrangement between:
 - (A) the provider or another person; and
 - (B) the employer, or an associate of the employer, of the employee;

that application or availability of the car shall be taken to constitute a benefit provided on that day by the provider to the employee or associate in respect of the employment of the employee.

(2) ...

136 Interpretation

(1) In this Act, unless the contrary intention appears:

...

“current employee” means a person who receives, or is entitled to receive, salary or wages.

...

“employee” means:

- (a) a current employee;
- (b) a future employee; or
- (c) a former employee.

“employment”, in relation to a person, means the holding of any office or appointment, the performance of any functions or duties, the engaging in of any work, or the doing of any acts or things that results, will result or has resulted in the person being treated as an employee.

...

“in respect of”, in relation to the employment of an employee, includes by reason of, by virtue of, or for or in relation directly or indirectly to, that employment.

...

137 Salary or wages

(1) For the purpose only of ascertaining whether a person is an employee or an employer within the meaning of this Act, where:

- (a) a benefit is provided by a person (in this subsection referred to as the **first person**) to, or to an associate of, another person (in this subsection referred to as the **second person**);
- (b) but for this subsection, the benefit would not be regarded as having been provided in respect of the employment of the second person; and
- (c) either of the following conditions is satisfied:
 - (i) if the benefit were provided by the first person by way of a cash payment to the second person, the payment would constitute salary or wages paid by the first person to the second person;
 - (ii) all of the following conditions are satisfied:
 - (A) subparagraph (i) does not apply in relation to the benefit;
 - (B) the first person is an associate of a third person or the benefit is provided under an arrangement between the first person and a third person;
 - (C) if the benefit were provided by the third person by way of a cash payment to

the second person, the payment would constitute salary or wages paid by the third person to the second person;

a definition in subsection 136(1) applies as if the benefit were salary or wages paid to the second person by:

- (d) in a case to which subparagraph (c)(i) applies – the first person; or
- (e) in a case to which subparagraph (c)(ii) applies – the third person.”

The AAT decision

As indicated, the AAT concluded that the directors were not “employees” within the meaning of the FBTA provisions. That conclusion was underpinned by the following four central considerations:

1. the absence of any evidence of a board resolution to establish a contract of employment in circumstances where the AAT would expect there to be a record of a resolution to that effect if it were intended;
2. the evidence of control, which the AAT described as a typical feature of a contract of service, “was of limited value given the control that was potentially exercisable was referable to the underlying corporate contract (i.e. the Constitution of the Trustee) and did not of itself point to an underlying employment contract”;
3. the directors occupied positions at the apex of the taxpayer rather than being integrated into the hierarchy of the taxpayer; and
4. other indicia of an employment relationship did not clearly point in that direction.

Having found that the directors were not employees, the AAT nonetheless turned to the second issue should that conclusion be wrong and concluded that the non-cash benefits received by the directors were not provided “in respect of” employment.

The Federal Court’s decision

On the Commissioner’s appeal to the Federal Court, O’Sullivan J held that questions of law arose in relation to whether, on the facts as found, the directors were employees within the meaning of the FBTA and whether they received a benefit “in respect of” their employment within the meaning of the FBTA.

O’Sullivan J said that, when determining whether someone is an “employee” for the purposes of the FBTA, it was necessary to address the relevant provisions of the FBTA.³ Contrary to the AAT’s conclusion, given the definitions in question, recourse to common law concepts of whether an employment or employment relationship exists had no role to play in that process.

O’Sullivan J accepted that considerations of whether the individuals in question were employees for the purposes of the FBTA could not be determined in a factual vacuum and that the facts as found and/or the uncontroverted evidence

informed that inquiry.⁴ However, the fact-finding exercise did not evolve into an enquiry involving consideration of common law concepts in order to determine whether an employer and employee relationship existed for the purposes of the FBTA. The resolution of this issue involved an exercise in statutory construction, the approach to which has been repeatedly set out in numerous authorities as involving questions of text, context and purpose.

His Honour, in rejecting the taxpayer's submission that the definition of "employment" in s 136(1) FBTA did not expand the meaning of "employee" beyond its common law meaning said:

"86. I do not accept that submission. Section 137(1) of the FBTA operates as a statutory deeming provision that assists in determining whether a person should be treated as an employee. It does so by applying a hypothetical test: if the benefit had instead been paid in the form of a cash payment, would it constitute a salary or wages for the purposes of s 12-35 or s 12-40 of Schedule 1 to the *Taxation Administration Act 1953*? If the answer is yes, the recipient of the benefit is deemed to have received a salary or wages, which results in the recipient coming within the definition of "employee" for the purposes of the FBTA.

87. To that extent, the FBTA provides a comprehensive and self-contained definition of employee and expressly incorporates a statutory deeming provision in s 137(1) to broaden the concept of employment."

His Honour said⁵ that, applying s 137 FBTA:

- each of the three directors received a benefit in the form of motor vehicles provided by the trustee, thereby satisfying s 137(1)(a);
- but for s 137, the benefit would not be regarded as having been provided in respect of their employment, thereby satisfying s 137(1)(b); and
- if the benefit was provided by the trustee by way of a cash payment to the directors, the payment would constitute a salary or wages paid by the trustee to the directors. When taken with the definition of "salary or wages" in s 136(1), s 137(1)(c)(i) was satisfied.

Under those circumstances, the definition of "employee" in s 136(1) applied as if the benefit, ie the provision of the motor vehicles for exclusive, personal use, was salary or wages paid to each of the directors by the trustee, thereby satisfying s 137(1)(d).

Applying the provisions of the FBTA, each of the directors was an employee within the meaning of, and for the sole purpose of, the FBTA. Further, on the facts as found and/or on the uncontroverted evidence, only one conclusion was open to the AAT had it applied those facts to the legislative provisions.

O'Sullivan J accepted the Commissioner's submission that the term "employment", within the deeming provision of s 136(1), necessarily encompassed directors of a company who hold an office, regardless of the fact that the company acts as trustee.

"In respect of" the employees' employment

On the issue of whether the provision of the motor vehicles was "in respect of" the employment of the brothers, the Commissioner submitted that the AAT erred in finding that the three brothers were in a position analogous to the directors considered by the Full Federal Court in *J & G Knowles and Associates Pty Ltd v FCT*.⁶ In that case, the corporate trustee of a unit trust was assessed as being liable to pay FBT under the FBTA on interest-free loans made to its directors. There were four directors of the corporate trustee, each of whom had established a discretionary family trust in which he and his family were beneficiaries. The trustee of each family trust held 25% of the units in the unit trust. Each director was paid a salary.

The corporate trustee maintained a cheque account from which funds were drawn by the directors to meet their or their family's private expenses. At the end of each accounting period, the amounts paid to each director at their request was debited to the loan account of the trustee of that director's family trust.

There was no relationship between the amount that each director requested to be paid from the corporate trustee's cheque account and the personal effort involved in working as a director. Nor was there any relationship between the amounts drawn by one director at their request and the amounts requested to be drawn by other directors.

The issue before the Full Federal Court was whether the loans (which were interest-free and assessed as a fringe benefit) were provided "in respect of" the employment of the directors.

The Full Court observed that the words "in respect of" are capable of having a very wide meaning, denoting a relationship or connection between two things or subject matters, but must be given a meaning depending on the context in which the words were found.

The Full Court considered that what was required was a sufficient link for the purposes of the particular legislation and that "... it could not be said that any causal relationship between the benefit and the employment was a sufficient link so as to result in a taxable transaction". The Full Court then said:

"23. ... For example, a discretionary trust with a corporate trustee might be established to purchase a family home for the benefit of its directors and their family. It does not follow that the rent-free occupation of that home on the authority of the directors is a benefit provided 'in respect of' their employment for the purposes of the Act. While there is a causal relationship between the provision of the benefit and the employment it is not a sufficient or material relationship. The rent-free occupancy arises because the trust was established for that purpose; a reason extraneous to the employment of the directors."

O'Sullivan J said that he accepted the Commissioner's submissions that the AAT had erred in finding that the three

brothers were in positions analogous to the directors in the *J & G Knowles* case for the following reasons:⁷

- it was difficult to understand why the subjective view of the brothers, or for that matter their motivation, was relevant. The question of whether an employee receives a benefit “in respect of” that employee’s employment is a question of fact to be determined objectively and for those facts then to be considered against the terms of the FBTA;
- there was no question of any subjective belief or motivation on the part of the directors in the *J & G Knowles* case being considered as a relevant consideration. Whereas the AAT in that matter determined that the directors were not owners, there was no suggestion in the Full Court’s reasons that the subjective views of the directors as to whether they were owners or not was relevant, nor was there any consideration of the directors “motivation”; and
- although the AAT referred to certain provisions of the trust deed, an analysis of the trust deed revealed a number of provisions in addition to those to which the AAT referred, specifically in relation to the powers of the trustee.

In conclusion, O’Sullivan J said:

“150. ... On the facts as found by the Tribunal and on the uncontroverted evidence only one conclusion was open to the Tribunal. Applying the ordinary meaning of the words in the definition of ‘in respect of’, the personal and exclusive use of the motor vehicles arose: ‘by reason of’, alternatively ‘by virtue of’, alternatively ‘in relation directly to’, alternatively ‘indirectly to’, the employment of the brothers as employees in the business of the Trust.”

Observations

The extensive interpretative provisions in Pt XII FBTA indicate that, when considering each stage in the application of the FBTA to particular circumstances which are not straightforward, a careful approach is required.

The statutory definition of the expression “in respect of” quoted above is illustrative. It is well recognised that the nexus conveyed by the expression is potentially very wide, as was recognised in the *J & G Knowles* case. It would seem that O’Sullivan J may possibly not have considered that the expression “in respect of” itself had an operation for the purposes of the FBTA definition of the expression, and that the other expressions used in the definition (“by reason of” etc) were governing. It is suggested that this is not so and that, when applying the definition, the defined term “in respect of” is to be given an independent operation. This, it is suggested, follows from the fact that the definition is an “inclusive” definition.

The importance of considering the definition provisions is also illustrated by s 138B FBTA which provides:

“A reference in this Act to a benefit provided in respect of the employment of an employee is a reference to a

benefit provided, or originally provided, as the case may be, in respect of that employment.”

A further important point is that O’Sullivan J, in reaching his conclusions, had regard to the terms of the trust deed. This means that care is needed in the drafting of a trust deed where FBT issues may arise.

TaxCounsel Pty Ltd

References

- 1 [2025] FCA 581. The case is referred to in this article as the *SEPL Pty Ltd* case.
- 2 *BQKD and FCT* [2024] AATA 1796.
- 3 [2025] FCA 581 at [70].
- 4 [2025] FCA 581 at [71].
- 5 [2025] FCA 581 at [88].
- 6 [2000] FCA 196.
- 7 [2025] FCA 581 at [133]–[135].

Higher Education

Challenging yet insightful tax learning

The Dux of ATL009 Corporate Tax for Study Period 2, 2024, shows us how lifelong learning is fuelled by drive, determination and time management.

Clara Tio

Tax Accountant
Mulpha Australia, Sydney



With a relatively short three years of experience in tax and finance under her belt, Clara is wasting no time when it comes to leveling up her tax skills. Currently a tax accountant with Mulpha Australia, Clara spends her days assisting with tax compliance and advisory for the group, including business activity statements, instalment activity statements, FBT and income tax returns.

Clara is also pursuing a Graduate Diploma in Applied Tax Law with The Tax Institute Higher Education, and recently achieved Dux of her Corporate Tax elective subject. We caught up with her to hear about her experience.

The start of something wonderful

When Clara graduated from university with a Bachelor of Business in Accounting, she wasn't quite sure what area of finance she would wind up in. But it wasn't long before she caught the tax bug.

"Tax is the ideal balance for the interaction of numeracy, technical and commercial competency, which are the aspects that would challenge me mentally while providing me with the necessary skills to advance my professional career," she tells us.

A career in tax comes with its challenges and complexities, and yet it promises an exciting journey of continuous, lifelong learning. There is always new knowledge to gain and fresh skills to develop, which is something Clara calls "the most rewarding aspect of my role". That same passion for growth and commitment to professional development ultimately led Clara to The Tax Institute and the Graduate Diploma of Applied Tax Law.

"The course materials and case studies are consistently updated to reflect the latest tax changes and are directly applicable to real-life tax practices. Compared to my

previous study experiences, The Tax Institute provides a more practical approach, equipping me with tax knowledge that relates to my day-to-day work," she says.

Sharpening corporate tax advisory skills

As a corporate tax accountant, choosing the Corporate Tax subject as an elective in her Graduate Diploma of Applied Tax Law was an obvious choice for Clara. She says the subject has "significantly deepened" her technical knowledge and ability to provide comprehensive advisory services.

"The modules in the Corporate Tax subject, particularly those on consolidations and international tax, are integral to my day-to-day work," she tells us.

And it's not just technical knowledge that Clara gained from the Corporate Tax subject. She has also developed her research skills, problem-solving abilities, critical thinking, and ability to apply tax legislation to specific tax issues – key skills as she grows in her career as a tax professional.

What's next for this top tax superstar?

After achieving Dux in her Corporate Tax subject this year, Clara's career and her focus on learning isn't slowing down one bit. After she completes her Graduate Diploma in Applied Tax Law, she has set her sights on the CTA3 Advisory subject – the last hurdle for her to earn the coveted Chartered Tax Adviser (CTA) designation.

"I would recommend other tax professionals to invest in continuous learning with The Tax Institute as it not only enhances tax technical knowledge, but also practical skills for dealing with complex tax matters in real-life situations," she says.



Advance your team's tax expertise anywhere, anytime.

Train your tax team your way, with Tax Academy.

Equip your staff with the skills and confidence to manage individual and employment-related tax matters with ease. This targeted learning pathway builds technical capability across PAYG, fringe benefits, and employment taxation – all through practical, online, self-paced units.

Start with the essentials

Taxation of individuals helps your team understand how and why tax applies to individuals, including rates, thresholds, offsets, and reporting obligations.

Build confidence in FBT

Taxation of fringe benefits gives staff a working knowledge of how FBT operates and what employers need to know, from identifying fringe benefits to calculating taxable values and determining liabilities.

Prepare for employment tax challenges

Employment taxation issues helps your team manage compliance with confidence, covering PAYG withholding, superannuation, termination payments, and contractor classification.

Whether you are onboarding new staff or building confidence across your broader team, Tax Academy delivers relevant, real-world learning that supports your business.

Buy units online or contact us to discuss upskilling your whole team.

taxinstitute.com.au/tax-academy



Member Spotlight

Finding meaning and mentorship in a tax career

Annemarie Wilmore

Johnson Winter Slattery

Annemarie Wilmore is a Partner at Johnson Winter Slattery, specialising in tax and revenue disputes, litigation, and alternative dispute resolution. She has been a member of the Institute since 2011.

Annemarie, what are you passionate about?

Currently, my passion project focuses on improving outcomes for vulnerable persons in their interactions with the tax system.

Recently, I've been assisting domestic violence victim survivors in navigating the tax system in conjunction with the University of NSW Tax Clinic, led by Associate Professor Dr Ann Kayis-Kumar.

My team and I have been assisting individuals in negotiating relief from tax liabilities that they didn't cause, but have fallen victim to, because they were under duress or under coercive control through their domestic relationships.

As part of the Tax Clinic Working Group, I've also been advocating for holistic reform to the tax system to recognise an important exception. Currently, the design of the tax system is predicated on a fundamental assumption that the information supplied to the Commissioner of Taxation which is used to form the basis of assessments and tax liabilities is inherently reliable.

In addition, the tax system prioritises the collection of tax debts, with very limited exceptions recognised. We think that, in circumstances where domestic violence victim survivors have been improperly made to bear the brunt of the liability, there are good reasons for that policy assumption to be displaced, and for further exceptions to be recognised. Unfortunately, the way the law works at the moment is that it doesn't recognise an exception based on coercive control or domestic violence.

Our recent work in advocating for holistic reform to the tax system has begun to gain momentum. A lot of our recommendations have been taken up by Parliamentary Committees and the Inspector General of Taxation, which is exciting. We are hopeful that we can obtain the much-needed changes to make the tax system fairer.



What kinds of people are you seeing come through these programs for tax help?

Through the Tax Clinic, it is domestic violence victim survivors who are typically from low socio-economic groups, who can't afford a tax adviser.

Some of these women have been made directors of companies and they had no idea. It is often their former spouse's business, and in some cases, their financial identity has been fraudulently used. In other cases, the victim survivor might have known that they signed a document relating to the business, but they didn't know the implications of signing it and may have been coerced into signing. These women are not involved in making financial decisions in relation to the business, but when you're a director of a company and you don't pay your tax bills, the ATO has a number of ways to recover tax debts, including making directors liable. Tax debts don't typically have an expiration date. The debt remains owing until it is paid or otherwise released, or the individual becomes bankrupt. For the victim survivor's we see through the Tax Clinic, they have on average a purported tax liability of over \$100,000.

Tell me about your experience with mentors in your career?

When I was earlier on in my career, a lot of my mentors were senior tax partners that I worked with daily. There was a degree of rigour around tax training and knowledge-sharing. They would take the time to explain the policy intent for a particular set of provisions, or the context of how a section was brought about. That insight was incredibly valuable.

Then there's on-the-job mentoring that's a bit more experiential. It's having conversations focused on, "this is what I think the client is looking for" or "this is the way I think we should play this".

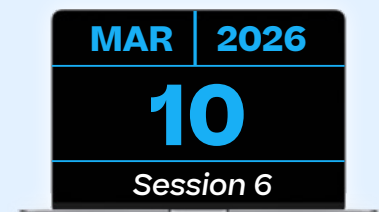
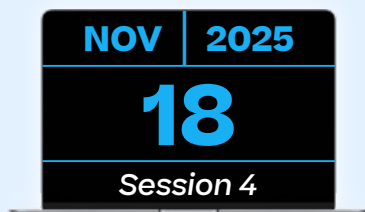
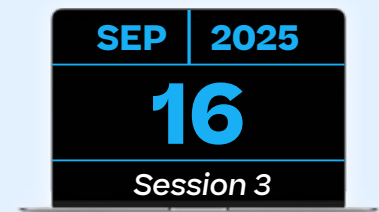
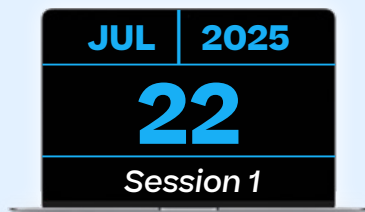
Now I try and do that for my team and explain where I'm coming from, what I recall about the policy intent at the time provisions were introduced, or an influential case that might have been a precursor to a change in the law. I certainly benefited a lot from mentoring, so I like to pay it forward where I can.

Read the full story on Annemarie [here](#).

Member webinar series



Mark these must-attend webinars in your calendar



★ BONUS SESSION: 9 June 2026 ★

1 UPCOMING: 22 July 2025

Watch every session

SESSION 1:

Identifying vulnerable taxpayers

Brought to you by your NSW State Council

Register for all sessions taxinstitute.com.au

Understanding and managing tax uncertainty: part 1

by Bruce Collins, CTA, Principal Solicitor, and Amanda Guruge, CTA, Senior Associate, Tax Controversy Partners

Providing clients with the best service while protecting your own livelihood can be difficult when there is tax uncertainty. It is important for all tax advisers to understand tax uncertainty and to then learn how to manage tax uncertainty. Tax uncertainty impacts all taxpayers – large and small, private, and not-for-profit. Part 1 of this article guides tax advisers on how to identify tax uncertainty and why it is important. The article covers the tax uncertainty model, risks of tax uncertainty, and assessing what is an uncertain tax position. It examines the key definition of what constitutes a “reasonably arguable position”, before reviewing the “reportable tax position” concept and the ATO schedule requirements, and then considers some of the ATO products that seek to enlighten practitioners and taxpayers on areas of uncertainty. Part 2 of the article works through some of the practical issues in managing cases involving identified tax uncertainty.

Introduction

While the increasing complexity in business arrangements may make it seem that uncertainty in tax is increasing, there has always been uncertainty in how the tax provisions will apply in different circumstances. All taxpayers can face the problem of what to do about an uncertain tax position. The problems of uncertainty are not limited to large corporations or multinationals, as they can arise in the tax affairs of an individual salary and wage earner, a small family operated business, or in a variety of private group contexts.

Uncertainty is inherent in our tax system. The tax laws administered by the Commissioner of Taxation are numerous and constantly changing, and how they may apply and interact with each other is often open to varying interpretations. When a specific provision takes precedence over a general provision is not always clear, and then

practitioners and their clients need to consider the range of specific and general anti-avoidance provisions that may apply to change an otherwise initially favourable tax outcome into an unfavourable one.

Over time, the evolution of case law and the revolution in the global economy from emergent technologies have created increasing uncertainty on how the tax laws deal with the longstanding accounting concepts of income and deductions, and how the general provisions (such as ss 6-5 and 8-1 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97)) have to be used in a changing business circumstance that operates in an environment of digital assets like crypto currency and the very real threats from cyber attacks.

Given the seemingly endless scope of human ingenuity, the economic and business environments in which taxpayers are operating continue to change, which creates inherent uncertainty. The facts of a business arrangement can be complex and detailed, making it difficult to establish between the parties, let alone for others outside the arrangement (like the ATO) to understand. Even if the facts are clear, there can be problems in obtaining evidence to support those facts, especially after the event. Further increasing uncertainty, questions of value may seem simple on their face but, in reality, agreeing on a true valuation can be a long and drawn-out process in which expert opinions need to be sought and often conflict.

Tax uncertainty model

Tax uncertainty can be thought of as a model of several component factors that can give rise to uncertainty on tax outcomes (see Diagram 1). Applying this model can help a taxpayer to identify whether they have an uncertain tax position and to assess the risks associated with that uncertain tax position. Assessing the risk is a key factor in working out the most effective action to take to mitigate that risk.

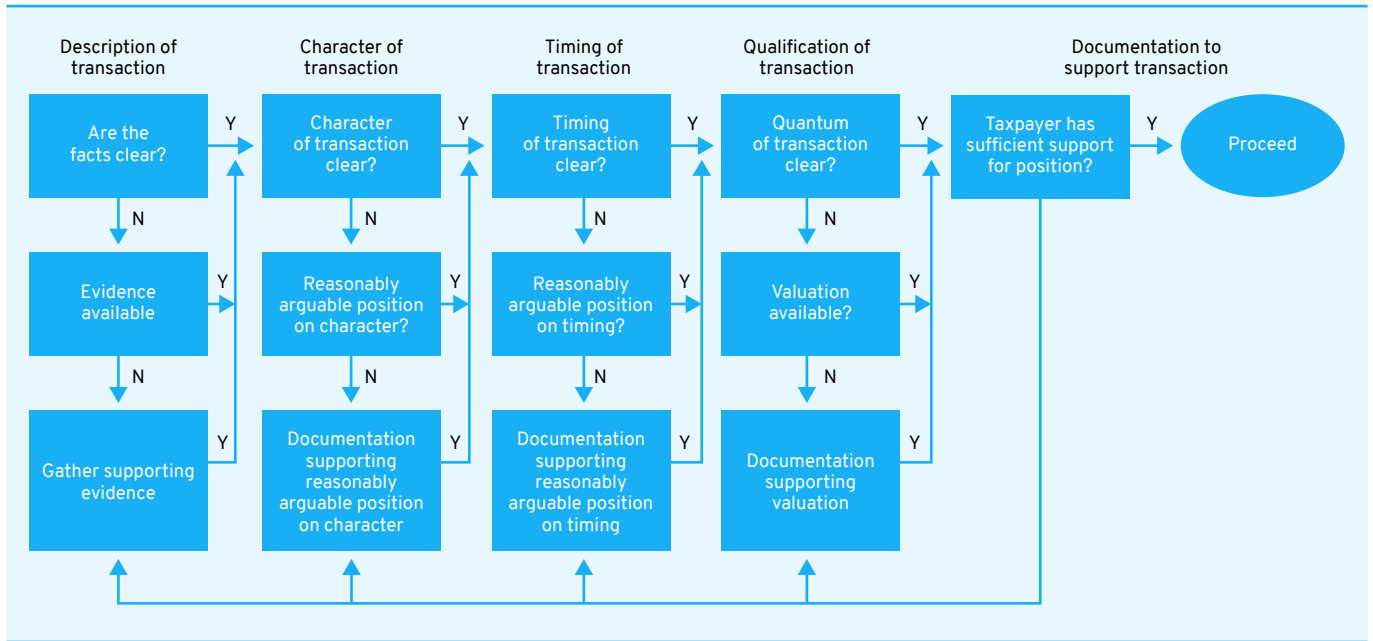
Description of transactions as matters of fact

The first factor is to accurately describe the elements of the arrangement, and experience shows that this is not always as simple as it seems. The greater the number of steps in the transaction and the more parties involved, the more difficult it can be to encompass the whole arrangement. This becomes more difficult when the taxpayer is trying to determine the tax position for a proposed transaction that is in contemplation, as facts will likely not be entirely certain and assumptions will need to be made as to what is proposed to happen. Subsequently, care needs to be taken as often a transaction may not end up being implemented in the way that the taxpayer had originally contemplated, which can materially change the tax outcome.

Characterisation of transactions under the law

The characterisation of a transaction under both general law and for the purposes of tax laws is important but may

Diagram 1. Tax uncertainty model



end up being hard to determine with certainty. For instance, the issues with the capital versus revenue dichotomy are well known. However, a profit from a property development project could be assessable income under s 6-5 ITAA97 as a profit from either carrying on a business or from an isolated transaction entered into for the purpose of making a profit, or it could be a CGT event under Pt 3-1 ITAA97. Characterisation problems can also occur when the facts suggest a specific form of the transaction but the way in which it has been implemented indicate that, in substance, it may instead have a different characterisation. Further complexity can be added when considering whether any specific or general anti-avoidance provisions, like Pt IVA of the *Income Tax Assessment Act 1936* (Cth) (ITAA36), may apply to a transaction.

Timing of transactions

When assessing the risk of an uncertain tax position, timing can also be an important consideration. The risk may be different for a transaction that will occur in one year only, rather than for an arrangement that spans several years. For transactions spanning several years, taxpayers should turn their mind to the likelihood of law changes or a precedential court decision (such as in the decision in *Ruhamah Property Co Ltd v FCT*¹). Transactions that occur at the end of the financial year (or other tax period), or the beginning of the next to maximise the tax benefits that the taxpayer would be entitled to in a particular year, will unsurprisingly often come under closer scrutiny.

Quantification of the transaction

As the size of a transaction relative to a taxpayer's income or turnover increases, so do the consequences flowing from the risks of having an uncertain tax position. Taxpayers can often pay the tax and penalties on a small transaction where they had an uncertain tax position without experiencing financial hardship, but this is not always the case for

larger/more material transactions. The quantification of a transaction can of itself create an uncertain tax position, for example, in matters of valuation but also in situations where the timing of events may result in a change to the economic value of elements in the transaction chain (like Forex conversion or moving from digital currencies to cash).

Evidentiary issues supporting the first four steps in the model

All transactions should be supported by documentary evidence. Problems often arise in transactions between entities within a group, especially where they are part of a family group as agreements are often verbal and not supported by written documentation. Further, the big challenge for many transactions can be the lack of contemporaneous evidence, especially where the tax uncertainty is only identified well after the time of the transaction/s. Trying to reconstruct evidence after-the-fact can then lead to questions from the ATO about the provenance of that evidence and its reliability, thus increasing the uncertainty of the eventual tax position. The best answer to these problems is to identify the uncertainties early, so that taxpayers and their advisers can take steps to ensure that there is required evidence supporting the description of the transactions, the elements going to the characterisation of those transactions, the timing of the transactions, and the quantum/value of the transactions.

Risks of tax uncertainty

Amendments

The first consequence of having an uncertain tax position that the ATO disagrees with is that it will be identified by the ATO, subjected to a review or an audit, and the Commissioner will then issue an amended (or original) assessment creating a tax liability that will become payable.

Tax shortfall penalty

Taxpayers who are amended in this manner can become liable for administrative penalty under Pt 4-25 of Sch 1 to the *Taxation Administration Act 1953* (Cth) (TAA53) for any tax shortfall that arises from their uncertain tax position. A tax shortfall amount is the amount by which a tax-related liability is less than it would have been, or by which a credit was increased. Specifically, Div 284, Pt 4-25, Sch 1 TAA53 imposes penalties relating to statements and schemes and has three main components:

1. making false and misleading statements (s 284-75(1), Sch 1 TAA53);
2. taking a position under an income tax law that is not reasonably arguable (s 284-75(2), Sch 1 TAA53); and
3. entering into schemes to get scheme benefits (s 285-145, Sch 1 TAA53).

Taking an incorrect tax position on an uncertain tax position when lodging a tax return can be regarded as a false or misleading statement by the ATO. A false statement is one that is contrary to fact or is wrong and includes omissions of fact, while a misleading statement can be true but is one that creates a false impression because of something that it contains or omits. Making a claim for a deduction in a tax return that is not allowable is an example of such a false or misleading statement.

If the taxpayer does not have a reasonably arguable position supporting their treatment of the relevant transaction (and thus demonstrating that they took reasonable care in making that statement, even if the ATO may subsequently disagree), such a shortfall penalty may be imposed based on the wider behaviour of the taxpayer in making the statement:

- **lack of reasonable care:** a shortfall amount or part of it that resulted from a failure by the taxpayer (or their agent) to take reasonable care to comply with a tax law attracts a penalty at a base rate of 25% (s 284-90(1), Sch 1 TAA53). As discussed in MT 2008/1 *Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard*, the reasonable care test requires an entity to take the same care in fulfilling their tax obligations that could be expected of a reasonable ordinary person in their position. This means that, even though the standard of care is measured objectively, it takes into account the circumstances of the taxpayer. MT 2008/1 also observes that taking a reasonably arguable position will normally demonstrate that a taxpayer has exercised reasonable care;
- **recklessness:** a shortfall amount or part of it that resulted from the recklessness of the taxpayer in failing to comply with a tax law attracts a penalty at a base rate of 50% (s 284-90(1), Sch 1 TAA53). A person's conduct will be considered reckless if they disregard or show indifference to consequences that could be reasonably foreseen by a reasonable person. As with reasonable care test, it is an objective test and the taxpayer's intentions are not relevant and taxpayer can be reckless without being dishonest; and

- **intentional disregard:** a shortfall amount or part of it that resulted from the intentional disregard of the taxpayer in failing to comply with a tax law attracts a penalty at a base rate of 75% (s 284-90(1), Sch 1 TAA53). In contrast to a lack of reasonable care or recklessness, this is a subjective test and, when making the statement, the taxpayer must be shown to have known that it is false (ie dishonesty must be shown), to have understood the effect of the relevant legislation in how it operates in respect of the entity's affairs, and to have made a deliberate choice to ignore the law.

The Commissioner can also impose an uplift factor of up to 20% to the base rate, which means that, in the worst-case scenario, a taxpayer could be liable for a penalty of 90% for getting an uncertain tax position wrong. For significant transactions, even a 25% or 50% shortfall penalty will be a cause of substantial concern for taxpayers, so avoiding exposure to such penalties is a very important part of managing uncertain tax positions.

Shortfall interest charge

A taxpayer who takes an inarguable position may also have to pay the shortfall interest charge (under s 280-103, Sch 1 TAA53), which is imposed on the shortfall arising from an amended assessment for the period for when it would have been due until when the assessment was amended at the rate set by the law.

Assessing what is an uncertain tax position

Reasonably arguable positions

Establishing whether a taxpayer has a reasonably arguable position is the first step in mitigating the risk of their uncertain tax position because if they do, under s 284-75(2), Sch 1 TAA53, the taxpayer will generally not be liable for any shortfall penalty as they will be seen as having exercised reasonable care. The relevant statutory definition reads as follows:²

“284-15 When a matter is reasonably arguable

- (1) A matter is **reasonably arguable** if it would be concluded in the circumstances, having regard to relevant authorities, that what is argued for is about as likely to be correct as incorrect, or is more likely to be correct than incorrect.

Note: For the effect of transfer pricing documentation on when a matter is reasonably arguable, see Subdivision 284-E.

- (2) To the extent that a matter involves an assumption about the way in which the Commissioner will exercise a discretion, the matter is only **reasonably arguable** if, had the Commissioner exercised the discretion in the way assumed, a court would be about as likely as not to decide that the exercise of the discretion was in accordance with law.
- (3) Without limiting subsection (1), these authorities are relevant:

- (a) a taxation law;
- (b) material for the purposes of subsection 15AB(1) of the *Acts Interpretation Act 1901*;
- (c) a decision of a court (whether or not an Australian court), the AAT or a Board of Review;
- (d) a public ruling.”

Further guidance as to when a taxpayer would have a reasonably arguable position can be found in *Walstern v FCT*,³ which makes it clear that it is an objective standard test based on an analysis of the law (referring to tax laws, extrinsic legislative material (such as explanatory memoranda), decisions of the Administrative Review Tribunal or a court, and public rulings) to the identified facts to determine whether the taxpayer’s position was reasonably arguable. In considering whether a position was likely to be correct, Hill J stated:

“5. ... The word ‘about’ indicates the need for balancing the two arguments, with the consequence that there must be room for it to be argued which of the two positions is correct so that on balance the taxpayer’s argument can objectively be said to be one that while wrong, could be argued on rational grounds to be right.”

The taxpayer’s position does not have to be the “better view” (as under the previous rules), but it must be defensible and have a reasonable expectation that it would be successful if the matter was decided by a court. In *Cameron Brae Pty Ltd v FCT*,⁴ Stone and Allsop JJ adopted a slightly less strict view when they said that the relevant test was whether the question was “open to debate in the sense of being arguable”.

What seems particularly important is that taxpayers take steps to establish a reasonably arguable position before they adopt it, rather than “after-the-fact”. Based on the decision in *Cameron Brae*, taxpayers need to have a well-reasoned construction of the particular provision, which can be contrary to a public ruling that is about as likely as not to be the correct interpretation. The construction of the argument is critical because seeking advice from a tax professional does not of itself create a reasonably arguable position. Where a taxpayer relies on advice provided by a tax professional, they will generally be considered to have taken reasonable care for the purposes of determining if they are liable for a shortfall penalty at a rate of 25% (for not taking reasonable care), but this is different test to that of a reasonably arguable position. However, taking steps to establish a reasonably arguable position will generally be taking reasonable care. This is confirmed by the Commissioner in MT 2008/2 *Shortfall penalties: administrative penalty for taking a position that is not reasonably arguable*:

“31. Although demonstrating a reasonably arguable position involves the application of a purely objective test, an entity will usually reach their position (at the time of making the statement) as a result of researching and considering the relevant authorities. In these circumstances, the efforts made by the entity to arrive

at the correct taxation treatment will also demonstrate that reasonable care has been shown.”

One other issue that trips up many taxpayers is the confusion between the eminence of the author of a position paper and whether it is really “reasonably arguable” that the position is “at least as likely as not to be correct”. The position taken by the taxpayer must be supported by the relevant authorities, which is reflected in the wording of s 284-15, Sch 1 TAA53, and the list of relevant authorities on which such a “reasonably arguable position” needs to be based. Paragraph 51 of MT 2008/2 states:

“51. In comparison, an entity having an opinion expressed by an accountant, lawyer or other adviser is not of itself a relevant authority. Rather, the authorities used to support or reach the view expressed by the adviser, including a reasonable construction of the relevant statutory provisions, may support the position taken by a taxpayer.^[5] Accordingly, the Commissioner will consider the authorities referred to in any opinion submitted by a taxpayer.”

In other words, it is not whether the position paper is written by a King’s Counsel or an ex-jurist, but rather the strength of the legal analysis that is crucial. However, perhaps the most significant development in this area has been the ATO’s requirement for larger taxpayers taking a “material” reasonably arguable position to now complete a “reportable tax position” schedule.

What is a reportable tax position?

Certain large companies are required to lodge a reportable tax position schedule with their income tax returns which discloses their contestable and material tax positions. The schedules are intended to help the ATO to tailor its engagement with taxpayers to resolve any concerns that the ATO may have with complex high-risk arrangements and to provide assurance to taxpayers about them. Companies that meet one of the following criteria must currently lodge a reportable tax position schedule:

1. a public company or foreign-owned company (including foreign-owned private companies) with a total business income of \$250 million or more;
2. a company with business income of \$25 million or more that is part of a public or foreign-owned economic group whose total business income is \$250 million or more in the current year or the immediate prior year. An economic group includes all entities (companies, trusts and partnerships etc) that lodge an Australian tax return under a direct or indirect Australian or foreign ultimate holding company or other majority controlling interest; or
3. a large private company that meets the above parameters in (1) or (2) must lodge a reportable tax position schedule if notified to do so by the ATO.

There are currently three categories of reportable tax positions that must disclosed when completing the schedule:

1. **category A reportable tax position:** a material position that is about as likely, or less likely, to be correct as incorrect based on the guidance set out in MT 2008/2 and means that a reasonably arguable position will need to be disclosed;
2. **category B reportable tax position:** a material position in respect of which uncertainty about taxes payable or recoverable is recognised and/or disclosed in the taxpayer's or a related party's financial statements, including uncertainty in respect of a provision and/or contingent liability; and
3. **category C reportable tax position:** asks a series of questions and a taxpayer will have a reportable tax position where the answer to any question is yes. It includes questions on taxpayer alerts, and taxpayers may have a reportable tax position where their arrangement is a variation of the arrangement and examples set out in the specific taxpayer alert.

“A taxpayer alert can help a taxpayer to decide whether they have an uncertain tax position.”

A “category A reportable tax position” is “material” if the potential adjustment is equal to or exceeds the “materiality amount”, being 5% of the taxpayer's Australian current tax expenses. A “category B reportable tax position” will be “material” if the difference between the taxpayer's position and the measurement and/or recognition of the taxes payable/recoverable in respect of that position as adopted in the financial statements is equal to or exceeds the materiality amount. A “category C reportable tax position” does not have a “material” criterion.

What is a taxpayer alert?

A taxpayer alert can help a taxpayer to decide whether they have an uncertain tax position. It is an early warning to the community about a new or emerging activity or arrangement that is causing the ATO concern but on which the ATO may have not yet formed a view on how the law applies to it.

As outlined in PS LA 2008/5 *Private advice, guidance and objections*, the intended purpose of a taxpayer alert is to enable taxpayers who have entered into an arrangement, or may be contemplating doing so, to make informed decisions about their tax affairs. Taxpayer alerts will generally cover new, or emerging, significant, higher-risk tax planning and superannuation, or similar arrangements that go beyond the policy intent of the law or involve deliberate approaches to avoid tax.

The ATO may issue a taxpayer alert where:

- it is considering the application of specific, or the general, anti-avoidance provisions;
- the arrangement constitutes a sham;
- the arrangement involves exploitation or deliberate misapplication of the law;
- it is considering the application of the promoter penalty laws;
- the purported tax result of the arrangement is not reasonably arguable; and
- it considers that there may be fraud or evasion.

In many ways, the ATO issuing a taxpayer alert on an arrangement may be seen as the first shot in an ongoing battle with advisers who have a different perspective on the efficacy of that arrangement, along with their clients who may have entered, or been considering entering, into such an arrangement. However, sometimes a great deal of work will have been going on prior to that point, with the ATO having identified and reviewed multiple cases in order to be able to sufficiently articulate a clear description of the arrangement and the range of concerns that the ATO may have with it in practice.

Often, ATO views will follow such alerts and, not infrequently, there may be tax litigation to clarify the uncertainty about the tax effect of such arrangements – under ordinary provisions and specific or general anti-avoidance rules. Some alerts may even warn of the potential application of the promoter penalty laws (in Div 290, Sch 1 TAA53) or referral of tax practitioners involved to the Tax Practitioners Board for potential breaches of the Code of Professional Conduct in the *Tax Agent Services Act 2009* (Cth).⁶ It is worth noting that the Code requires certain standards of behaviour by registered persons which might be breached by promoting or implementing taxpayer alert arrangements, including “acting lawfully in the best interests of the client” (item 4), taking “reasonable care to ensure that taxation laws are applied correctly” (item 10) and the new determination under item 17, sub-item 1, “upholding and promoting ethical standards of the tax profession”.

What is a practical compliance guideline?

A practical compliance guideline (PCG) set outs a practical administration approach to assist taxpayers in complying with relevant tax law. It sets out the approach expected by ATO officers when dealing with taxpayers who have encountered the activity or arrangement discussed in the PCG. PCGs are intended to narrow the ATO's focus and compliance resources on higher-risk arrangements. The ATO outlines on its website that PCGs are used commonly where the tax law may be uncertain. PCGs may provide an administrative safe harbour which gives taxpayers some certainty – which is important when dealing with uncertain tax positions.

The role of a PCG is to enable taxpayers to position themselves within a range of behaviours/activities/structures that the ATO assesses as being from low to very high-risk. Where a taxpayer falls within the “low-risk” category, they can expect little-to-no scrutiny from the ATO. The issue lies with taxpayers who fall within the medium to

very high-risk categories as this is when the ATO will apply more of its compliance resources.

Importantly, PCGs are not public rulings and they therefore have a different role than taxation rulings. They are not designed for the Commissioner to express his view on the application of a tax law – they are only designed to let taxpayers know how the ATO will apply its compliance resources. Further, they are different to another type of compliance guideline previously provided, that is, law administration practice statements, which provide guidance to ATO staff rather than taxpayers.

As a PCG is not a public ruling, it does not legally bind the Commissioner. However, the Commissioner has made clear statements in PCGs that he will administer the law in accordance with the PCG where a taxpayer has followed it in good faith. Michael Bersten summarises the essence of the statement in *Macquarie Ltd v FCT*,⁷ stating: “once the Commissioner possesses a sufficient basis to conclude that revenue is payable ... there is an obligation to assess and collect revenue”.⁸ This is consistent with the general power of administration that the Commissioner has under the various tax Acts, as stated at the beginning of the relevant enactments.

Conclusion

Part 2 of this article will cover how to manage tax uncertainty and the importance of engaging with the ATO early as part of the process, but, before getting to that step, it is important that the tax uncertainty is identified and the risks are understood.

The problems of tax uncertainty apply at all levels of the tax system, including individuals with one complex transaction, smaller business and SME private groups, the largest private groups in the Top 500, and globe-spanning multinationals. Assessing the tax situation includes proper consideration of the Commissioner’s views in public rulings or areas of concern outlined in relevant taxpayer alerts and practical compliance guideline documents. Having considered these and the other information available (including legislation and case law), it is important to appropriately document the decision-making process where tax uncertainty arises to protect your client’s primary tax position and their exposure to potential penalties. Doing so can also be an important part of how practitioners manage their own risks under their respective regulatory frameworks.

Bruce Collins, CTA
Principal Solicitor
Tax Controversy Partners

Amanda Guruge, CTA
Senior Associate
Tax Controversy Partners

References

- 1 [1928] HCA 22.
- 2 Some may question the design of the law on the inclusion of ATO public rulings as a relevant authority that must be considered, as this essentially

allows the Commissioner to shore up his view on an uncertain tax position by publishing the ATO view in such a public ruling, especially with the rising importance of law companion rulings on new legislation. See [www.ato.gov.au/general/ato-advice-and-guidance/ato-advice-products-\(rulings\)/public-rulings/law-companion-rulings/](http://www.ato.gov.au/general/ato-advice-and-guidance/ato-advice-products-(rulings)/public-rulings/law-companion-rulings/).

- 3 [2003] FCA 1428.
- 4 [2007] FCAFC 135.
- 5 Para 1.27 of the revised explanatory memorandum to the A New Tax System (Tax Administration) Bill (No. 2) 2000.
- 6 The ATO’s referral process to the Tax Practitioners Board is outlined on its website, and can be accessed at www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/your-practice/tax-and-bas-agents/working-with-you-to-manage-risk/our-information-exchange-with-tax-practitioners-board.
- 7 *Macquarie Bank Ltd v FCT* [2013] FCAFC 119 at [11].
- 8 M Bersten, “Practical compliance guidelines: Australian tax administration law innovation or overreach?”, (2023) 21(1) *eJournal of Tax Research* 55.

Gain the tax knowledge to grow and the to thrive.

Accelerate your progress with Online Intensive study mode – designed for experienced tax professionals who want to fast-track their learning. Complete a subject in just six weeks and work toward your next career milestone sooner.

Enrolments for Online Intensive close 30 July.

Become great in tax.

For more information, visit:
taxinstitute.com.au/education

 **The Tax Institute** | Higher Education

HEPCO Pty Ltd trading as The Tax Institute Higher Education PRV14349.

24-004EDU_07/25



24-028RES_07/25

 **The Tax Institute**

“

It's been an invaluable resource at all stages of my career.

Adeline, Tax Accountant

With over 42,000+ in-depth analyses, journal articles, case studies and more, **Tax Knowledge Exchange** is the database trusted by thousands of tax professionals nationwide. **Subscribe today.**

taxinstitute.com.au/tke

Estate planning

by Shirley Schaefer, Partner, BDO, and Clinton Jackson, Partner, Cooper Grace Ward

Superannuation is now a significant asset for many Australians and a large number of members do not exhaust their superannuation balance during their life, leaving a balance to be distributed to their family members and loved ones on death. Increasing attacks on the payment of superannuation death benefit payments over the last decade, including the decision-making processes of trustees and the validity of binding death benefit nominations, have highlighted the importance of properly dealing with superannuation as part of a person's estate planning arrangements. This article provides an overview of estate planning and superannuation issues, and the practical matters that should be considered by practitioners when dealing with a person's superannuation as part of their estate planning. The following major issues are discussed in this article: lessons learned from recent cases; key elements in self-managed superannuation fund estate planning, including trusteeship, eligibility and payments; and checklist, roles and responsibilities.

Overview

This article provides an overview of estate planning and superannuation issues and the practical matters that should be considered by practitioners. The following major issues are discussed in this article:

- lessons learned from recent cases;
- key elements in self-managed superannuation fund (SMSF) estate planning, including trusteeship, eligibility and payments; and
- checklist, roles and responsibilities.

Recent cases: lessons learned

The payment of superannuation benefits following the death of a member have been a subject of much litigation over the last 15 years. Recently, there have been a number of cases that are worth taking note of (discussed below).

Re *Rentis Pty Ltd*

*Re Rentis Pty Ltd*¹ considered the issue of whether an attorney should make or renew a binding death benefit nomination (BDBN).

Whether an attorney has the power to make or renew a BDBN is a fairly complex question and it really depends on a number of factors, including which state the member of the superannuation fund lives in, the terms of the enduring power of attorney document itself, the terms of the trust deed for the superannuation fund, the relationship between the attorney and the principal, and who are the interested beneficiaries for the superannuation balance.

Re Rentis Pty Ltd again confirms that, in Queensland at least, if the power of attorney document does not exclude the power to make a BDBN, the attorney has the power under the legislation.

In particular, this case considered the express power in the power of attorney document that allowed the attorney to “renew” the BDBN. The main issue was whether the term “renew” should have been interpreted:

- narrowly – in which case, the attorney would only be able to make another BDBN on the same terms as the BDBN previously made by the member themselves; or
- broadly – in which case, the attorney is able to make a BDBN taking into account a change in circumstances.

The court favoured a broad/purposeful interpretation in this case, stating:

“A narrow construction would produce capricious, unreasonable and certainly inconvenient results for a principal who became incapacitated and whose circumstances had changed or where other circumstances had changed. One would think that it is precisely the existence of changed circumstances that gave rise to the authority given to the attorney to renew any binding death benefit in the sense of making a fresh BDBN, that is, to make a new BDBN to address those circumstances or to renew the BDBN.”

Gainer Associates Pty Ltd

*In the matter of Gainer Associates Pty Ltd*² considered whether the trustee of the SMSF was justified in paying a death benefit in circumstances where the continued appointment of the trustee raised compliance issues for the SMSF.

In this case, the NSW Trustee and Guardian (NSWTG) was appointed as administrator of the sole member's estate. The NSWTG appointed a qualified liquidator as the sole director of the corporate trustee of the SMSF (this is because the NSWTG is not a person and cannot be appointed to a director role).

This gave rise to two main compliance issues:

1. s 17A of the *Superannuation Industry (Supervision) Act 1993* (Cth) (SISA) requires every member (or the legal personal representative (LPR) of a deceased member) to be a trustee or director of the corporate trustee of the SMSF; and
2. the trustee or its directors cannot receive remuneration for duties or services performed in relation to the SMSF. Section 17B SISA provides a notable exception

to this rule, that is, if a director possesses professional qualifications and is performing work for the SMSF in their professional capacity.

Because the liquidator was not the executor or administrator of the member's estate, the SMSF had ceased to comply with the conditions in s 17A.

The trustee of the SMSF and the NSWTC jointly wrote to the Commissioner, requesting that the Commissioner exercise its discretion not to issue a notice of non-compliance to the SMSF. The Commissioner responded, advising that it would not pursue the SMSF for any breaches of s 17A and agreed not to issue a notice of non-compliance.

The deceased member's de facto spouse commenced court proceedings seeking the trustee's removal (removal proceedings). In addition, the spouse sought:

- orders prohibiting the trustee's remuneration or indemnification for costs from the assets of the SMSF;
- orders compelling the due and proper administration of the SMSF and distribution of the death benefit; and
- damages for breach of trust.

In addition, the de facto spouse objected to the trustee's proposal to pay the member's death benefits as follows:

- two-thirds to the LPR, where it would be dealt with as an asset of the estate; and
- one-third to the de facto spouse.

The trustee then sought the court's advice about whether it was justified in:

- paying the death benefit in accordance with its proposed decision;
- defending the removal proceedings brought by the de facto spouse;
- paying the director's fees and other costs from the assets of the SMSF; and
- relying on the usual indemnities available to trustees.

The court noted that the fact that the trustee was in breach of the rules was a reason to seek judicial advice. Further, it would not have been appropriate to proceed in the absence of such advice or not to proceed at all. The court concluded that it was in the best interests of the trust estate for the court to provide advice so that trust property could be managed and administered in a timely manner.

The court noted that the trustee could not simply leave its role without a replacement and, given the NSWTC was unwilling to accept the role of trustee of the SMSF, there was no replacement available that would comply with the legislation and the rules of the SMSF.

The court went on to say that the trustee had done its best to resolve the compliance issues (noting that the problem was not of its making) and, as a result, the breach was unlikely to expose the beneficiaries or the SMSF to loss.

In relation to the specific advice that the trustee sought, the court gave advice as follows:

- the trustee was justified in paying the death benefit as it had proposed. In giving that advice, the court rejected the allegations that the trustee lacked independence and had not given real and genuine consideration to the issues. Notably, Rees J emphasised that the trustee was not legally bound by statute or common law to pay the death benefit to a dependant in priority to the estate, as suggested by the spouse;
- the trustee was justified in defending the removal proceedings. Her Honour noted that, in those proceedings, the spouse was doing more than seeking the trustee's removal (in which case, the spouse argued, the SMSF should not pay the costs of the trustee seeking to remain in office). The spouse was also seeking to impugn the conduct of the trustee. Her Honour expressed concern that the spouse had not progressed the removal proceedings and held that the trustee should not be left in an uncertain position as to what it should do if the spouse chose to progress the proceedings;
- the trustee would be justified in paying fees charged by the liquidator for carrying out his role as director from the assets of the SMSF. Her Honour indicated that, on review of the liquidator's timesheets, the bulk of his work would fall within the exception in s 17B(2) but, given the indemnity provided by the Commissioner, concluded that there was no reason to actually undertake an assessment of what time did or did not fall within the exception; and
- in giving advice that the trustee would also be justified in paying the portion of the fees that fall outside the exception, her Honour noted that: it was in the interests of the SMSF that the director complete his duties; the director was entitled to seek payment for that work; and the trustee had taken reasonable steps to reduce the risks arising from the non-compliance.

Executors and trustees must ensure that they are acting in the interests of the beneficiaries or of the trust estate itself. As always, trustees making discretionary decisions must ensure that they are acting honestly and in good faith, and with a real and genuine consideration of the issues. While a trustee does not need to provide reasons for its decision, it should be in a position to demonstrate that it followed a proper decision-making process.

van Camp v Bellahealth Pty Ltd

*van Camp v Bellahealth Pty Ltd*³ considered the important issue regarding the capacity of a member to make a BDBN.

In this case, the member of the SMSF made a BDBN on the day of his death from cancer in favour of his de facto spouse. This BDBN was a change from the member's prior instructions to some of his advisers and conflicted with the intentions outlined in his last will.

The trustee of the SMSF and others were of the view that the member lacked capacity to make the BDBN and alleged unconscionable conduct on behalf of the de facto spouse, and sought an order that the BDBN be set aside or declared void or unenforceable.

When considering the issue of capacity, the court made the following comments:

“191. The essential general nature and broad operation of the BDBN is apparent from its terms, namely that Dr Nespolon, the sole member of the Fund, was specifying how his member benefits were to be paid on his death in a manner binding on the Fund Trustee, rather than leaving the decision as to how they were to be paid to the discretion of the Trustee ...

192. In assessing capacity, consideration should be given to whether Dr Nespolon was capable of understanding that the act of making the BDBN would have the particular effects described above, in particular, whether he had the capability of understanding that all of his member benefits would be paid directly to Ms van Camp and would not be used by the executors in accordance with the terms of his Will, if such an explanation had been provided to him. In my view, a general understanding of these matters would not require a particularly complicated explanation in the circumstances of this case ...”

Significant evidence was provided by a number of the member’s advisers and doctors. The member made comments to the effect that:

- the BDBN related to his will; and
- the BDBN would prevent his de facto spouse from being “taxed out of her brains”.

The court found that:

- these statements indicated that Dr Nespolon appreciated that Ms van Camp would receive the member benefits, understood that his member benefits could be reduced by the incidence of taxation, and knew that there was an advantage from a tax perspective in using the BDBN to pay the benefits directly to Ms van Camp; and
- the circumstances around making the BDBN did not amount to the de facto spouse taking advantage of any known special disadvantage of the member in circumstances that were unconscionable.

The court declared that the BDBN was valid and binding, and directed the trustee to pay out the death benefits to Ms van Camp.

Williams v Williams

*Williams v Williams*⁴ considered whether a BDBN needed to be given to all of the trustees of the SMSF in order to be valid.

In this case, the member of the SMSF appointed his son to be a second trustee with him following the death of his first wife.

Many years after the appointment of the son as a trustee, the member made a BDBN which required his death benefit to be paid:

- 50% to his new spouse; and
- 50% to his LPR.

The BDBN was not given by the member to his son, the second trustee of the SMSF.

Following the member’s death, the new spouse commenced an application to have the BDBN declared valid and binding.

The BDBN was found to be invalid as the trust deed required the BDBN to be given to the trustees and this requirement had not been satisfied.

Benz v Armstrong

*Benz v Armstrong*⁵ considered the application of the NSW notional estate rules in the *Succession Act 2006* (NSW) to superannuation death benefits.

The effect of the member’s estate planning was as follows:

- his second spouse received \$3 million of non-estate assets that passed either directly to her or to her control outside of the estate;
- his second spouse received approximately \$2 million from the estate;
- the member’s six children received \$200,000 between them from the estate; and
- his second spouse received \$12 million directly from the SMSF.

Three of the member’s six children challenged the estate for a greater share and were successful in their application.

In order to satisfy the successful claim made by the children, the court sought to apply the notional estate rules to the superannuation death benefit to ensure that there were sufficient assets in the estate to provide further provision to the successful children.

In applying the notional estate rules, the court examined the making of the BDBN in May 2016 in favour of the second spouse as this was within the three-year clawback period. Ultimately, the court determined that the BDBN was not made for the purposes of defeating a claim on the estate. Therefore, the May 2016 BDBN was not overturned under the three-year clawback rule.

However, the court then considered whether its powers under the 12-month clawback period should be applied. The court determined that the failure of the member to take action in the 12 months before his death to have the superannuation death benefit paid to his estate (ie by revoking the May 2016 BDBN and making a new nomination in favour of his estate) was a transaction to which the notional estate rules applied. As a result, the superannuation death benefit was clawed back from the second spouse to the estate for the purposes of satisfying the successful claim by Dr Benz’s three children.

Key elements

On the death of a superannuation member, that member’s benefits must be paid out of their member account. It is the only compulsory cashing condition.⁶

Following the death of a member, there are several key elements that need to be addressed by the remaining

trustees of the SMSF. These can be broken down into three key categories:

1. trusteeship: who takes control of the SMSF;
2. eligibility: who is entitled to death benefits; and
3. payments: how benefits are paid to beneficiaries.

Many of these elements can be planned for and documents or processes implemented prior to the death of the member to make them effective. It is critical for effective planning that appropriate professionals be engaged to ensure that the member's wishes are implemented on death.

Trusteeship

Following the death of a member, the structure of the SMSF may need to be reviewed or updated.

On the death of a member, the SMSF may fail the definition of an SMSF outlined in s 17A SISA. Section 17A allows that if an SMSF fails the trustee and membership rules outlined in that section due to the death of a member, the fund can continue to meet the requirements of the section for a period of six months.⁷

Section 17A also allows an SMSF to meet the definition if an LPR has been appointed to act in the capacity of LPR of the deceased member. However, it should be noted that the LPR's appointment will only comply with s 17A until the death benefits commence to be paid.⁸ At this time, the structure of the SMSF may need to be reconsidered. The same period of six months applies for the fund to meet the requirements of s 17A.⁹

Where an LPR is appointed to act for the deceased member as a trustee of the SMSF, their appointment will need to comply with the requirements of the fund's trust deed and the superannuation legislation.

Any new trustee or director appointed (even if that person is the LPR) will need to ensure that the processes regarding the trustee appointment are followed, specifically, they must:

- consent to be a trustee of the SMSF;
- be appointed in accordance with the fund's trust deed (via a deed of appointment or minutes as outlined in the trust deed) if they are individual trustees, or be appointed as a director following the process in the constitution for the company where there is a corporate trustee; and
- sign the ATO's trustee declaration within 21 days of being appointed.

It should also be noted that the individual who is the deceased member's LPR may be appointed in their personal capacity, simply as a second or an individual trustee or director.

Before making decisions regarding the appointment of an additional or a replacement trustee or director, the remaining trustee(s) or director(s) should carefully read the SMSF's trust deed to ensure that there are no specific provisions for the appointment of a trustee in the event of death. This could be written into the SMSF's trust deed

or could be in the form of an appointment deed that is not effective until the death of the member.

Where the SMSF has a corporate trustee, the remaining trustee(s) will need to consider not only the SMSF's trust deed and the superannuation legislation, but also the constitution of the corporate trustee. Depending on the age of the company's constitution, there may be specific provisions that need to be considered. For example, the constitution may provide that decisions of the company can only be made with two directors.

It should also be noted that, if the deceased member held shares in the corporate trustee, those shares are not part of the SMSF but in fact form part of the deceased's estate and will be disposed of in accordance with their testamentary instructions. The power of appointment of directors of a company usually rests with the shareholders, and therefore the individuals who inherit the shares in the corporate trustee have the power to appoint directors of the corporate trustee.

“It is critical for effective planning that appropriate professionals be engaged to ensure that the member's wishes are implemented on death.”

In any event, where a new trustee or director is appointed to act (even in the capacity of LPR), their appointment will need to be in accordance with the SMSF's trust deed, company constitution (where there is a corporate trustee), and the superannuation legislation. The ATO must also be notified of any changes in the trustees or directors of the corporate trustee.

Eligibility

On the death of a member, benefits can only be paid out in accordance with the SMSF's trust deed, any death benefit nominations, and the superannuation legislation. The remaining trustees of the SMSF will have the sole discretion regarding the payment of death benefits unless there is some form of binding direction in place. Under the SISA, death benefits can only be paid to “dependants” as defined by the SISA. They include:¹⁰

- a spouse of the deceased;
- a child of the deceased;
- an LPR;¹¹ and
- any person who is in an interdependency relationship with the deceased.¹²

Table 1 sets out the detailed definitions of persons to whom death benefits can be cashed in accordance with the SISA.

Before making death benefit payments, the remaining trustees will need to establish whether there are any prescriptions in the SMSF trust deed which limit to whom death benefits can be paid. Alternatively, whether there

Table 1. Superannuation death benefit dependants

Dependant	Definition (SISA)
Spouse	Includes: <ul style="list-style-type: none"> another person (whether of the same sex or a different sex) with whom the person is in a relationship that is registered under a law of a state or territory; and another person who, although not legally married to the person, lives with the person on a genuine domestic basis in a relationship as a couple.
Child	Includes: <ul style="list-style-type: none"> a natural child of a person; an adopted child, a stepchild or an ex-nuptial child of the person; a child of the person's spouse; and someone who is a child of the person within the meaning of the <i>Family Law Act 1975</i> (Cth).
Legal personal representative	A person appointed as the executor of the will or administrator of the estate of a deceased person, the trustee of the estate of a person under a legal disability, or a person who holds an enduring power of attorney granted by a person.
Interdependency relationship	Two persons have an interdependency relationship if: <ul style="list-style-type: none"> they have a close personal relationship; they live together; one or each of them provides the other with financial support; and one or each of them provides the other with domestic support and personal care. See also reg 1.04AAAA SISR.

are any instructions or death benefit nominations or reversionary pensions that need to be considered.

If allowed by the SMSF trust deed, members can complete a reversionary beneficiary nomination for their pension or death benefit nomination. If the nomination is non-binding, it is only an indication of the member's wishes but it is not binding on the remaining trustees. If the death benefit nomination is a binding nomination, benefits must be paid in accordance with the nomination.

There has been significant case law over a number of years regarding the payment of death benefits in SMSFs. Of note are the following cases:

1. *Katz v Grossman*;¹³
2. *Donovan v Donovan*;¹⁴
3. *Ippolo & Hesford v Conti*;¹⁵
4. *Wooster v Morris*;¹⁶
5. *Munro v Munro*;¹⁷ and
6. *McIntosh v McIntosh*.¹⁸

The first five cases cover the situation where funds had BDBNs but did not have valid or effective BDBNs. The judgments consider the requirements when appointing additional or replacement trustees, what constitutes a binding nomination, when an SMSF can have a non-lapsing BDBN (providing the trust deed allows for this), and when trustees have sole discretion in relation to the payment of death benefits.

The final case involves a member of a large APRA-regulated fund who died intestate. The judgment considers the obligations of a beneficiary and the potential conflicts of interest arising where they are also the administrator of an estate.

It may be possible for the SMSF trust deed to be drafted so that BDBNs are "non-lapsing", that is, they do not expire after three years. Regulation 6.17A SISR does not apply to SMSFs and therefore a BDBN that purports to be non-lapsing is not constrained by the requirements of the SISA or the SISR. This means that all non-lapsing BDBNs do not expire after three years.

This was contested in *Hill v Zuda Pty Ltd*,¹⁹ where the plaintiff challenged the validity of a BDBN that had been made more than three years prior to the death of the member. The Western Australian Supreme Court determined that an SMSF could make a non-lapsing BDBN. The plaintiff then appealed the decision to the High Court of Australia. The High Court handed down its decision confirming that BDBNs in SMSFs can be non-lapsing (*Hill v Zuda Pty Ltd*²⁰). This decision is a timely reminder for trustees to review existing BDBNs and the deeds of SMSFs to ensure that they provide for non-lapsing BDBNs, and that they are valid and reflect the member's wishes and circumstances.

Payments

Death benefits must be paid out as soon as is practicable after the death of the member.²¹

The time frame is not prescribed and will depend on the circumstances of the SMSF, the members, and the liquidity of the SMSF assets. Where the SMSF trustees take a longer period of time to pay death benefits to beneficiaries, it will be important that there are valid reasons for the delay, and that SMSF trustees are able to document or justify why a delay was encountered. This could include:

- assets taking longer to realise to pay benefits;
- disputes with the beneficiaries or identification of the beneficiaries; and

- personal circumstances of the trustees and/or beneficiaries.

Death benefits can be paid as lump sum benefits or as pensions.

Where death benefits are to be paid as lump sums, they can be paid as either:

- a single final lump sum payment; or
- an interim benefit and final benefit.

If death benefits are paid as pensions, they can either be the continuation of a reversionary pension (established during the member's lifetime) or a death benefit pension.

With the introduction of the transfer balance cap regime in 2017, additional considerations may need to be taken into account in relation to reversionary pensions or the commencement to a death benefit pension if the recipient is already in receipt of their own retirement phase income stream.

Death benefits as income streams can only be paid to:

- a dependant of the member (this would include the member's spouse);
- a child of the deceased under the age of 18 years;
- a child under age 25 who is financially dependent on the member; or
- a child of the deceased who has a disability (as defined by the *Disability Services Act 1986* (Cth)).²²

The minimum pension that is payable in the year of death will depend on whether the original pension is reversionary or non-reversionary. Where a pension is reversionary and the deceased dies during the year, the minimum pension obligations are required to be met for the year of death (as the pension continues to be paid for the whole year). The minimum pension amount will have been determined based on the age of the deceased at the beginning of the financial year. In subsequent years, the minimum pension obligation will be dependent on the age of the reversionary beneficiary at the beginning of the financial year.

Where the pension of the deceased member is non-reversionary, there is no obligation to make the minimum pension payment in the year of death. Where a death benefit pension is commenced for a tax dependant, the minimum pension obligation will be determined based on the age of the death benefit pension recipient and the recipient's age at the commencement of the pension and at 1 July in subsequent financial years.

It should be noted that once a benefit is a death benefit, it is always a death benefit. This means that where a death benefit (or reversionary death benefit) income stream is commuted, it must be paid out as a lump sum death benefit to the beneficiary. Commuted death benefit pensions cannot remain in the superannuation fund. This is important where a child is in receipt of a pension. The pension will need to be commuted at age 18 or 25 years if the child was financially dependent on the member and paid to the child as a lump sum benefit. The same

commutation rules do not apply for children in receipt of pensions where they have been paid due to the child having a disability.

Death bed withdrawals

There has been significant commentary about whether withdrawals of superannuation that are signed on a member's death bed, ie requests made immediately prior to death, should be considered to be superannuation benefits (and taxed in the hands of the member, if appropriate) or death benefits (and taxed, depending on the recipient of the death benefits).

There have been a number of private binding rulings considering this issue. Two examples are:

1. PBR 1052097327812: in this ruling, the deceased, with the assistance of their financial adviser, electronically signed a request to withdraw all of their superannuation benefits on the same day as their death. The next day the financial adviser informed the superannuation fund that the member was now deceased. The withdrawal form was rejected by the fund as it did not contain a "wet signature" as was required by them to be able to process the withdrawal. The fund went on to process the withdrawal as a death benefit payable to the deceased's estate; and
2. PBR 1052090528673: in this ruling, the deceased, again with the assistance of their adviser, made a request for the payment of a lump sum benefit from their superannuation pension interest (as a partial commutation of the pension). The benefit was processed as a lump sum benefit payment, but payment was actually made over multiple payment amounts. The multiple payments were required as there was a daily payment limitation that was applicable. The superannuation fund payments were received after the member's death, but before the superannuation fund had been advised of the member's death. These benefit payments were considered to be superannuation benefit payments as the fund had accepted the request and processed the payments prior to becoming aware of the member's death.

The ATO position appears to be dependent on whether the trustees of the fund are aware of the death of the member and if all processes are completed prior to that knowledge. It is difficult to argue in the SMSF environment that the trustees of the fund would not be aware of a member's death.

Taxation of superannuation death benefits

How death benefits are taxed in the hands of the recipients depends on whether the benefits are paid to a superannuation death benefits dependant as defined by the *Income Tax Assessment Act 1997* (Cth) (ITAA97).²³ See Table 2 for the ITAA97 definition of a superannuation "death benefits dependant".

The taxation of death benefits paid are outlined in the ITAA97²⁴ and are summarised in Tables 3 and 4.

Table 2. Superannuation death benefit dependants (taxation definitions)

Dependant	Definition (ITAA97)
Spouse or former spouse	Includes: <ul style="list-style-type: none"> • another person (whether of the same sex or a different sex) with whom the person is in a relationship that is registered under a law of a state or territory; and • another person who, although not legally married to the person, lives with the person on a genuine domestic basis in a relationship as a couple.
Child < 18 years	Includes: <ul style="list-style-type: none"> • a natural child of a person; • an adopted child, a stepchild or an ex-nuptial child of the person; • a child of the person's spouse; and • someone who is a child of the person within the meaning of the <i>Family Law Act 1975</i> (Cth).
Interdependency relationship	An interdependency relationship considers the following factors: <ul style="list-style-type: none"> • they have a close personal relationship; • they live together; • one or each of them provides the other with financial support; and • one or each of them provides the other with domestic support and personal care. See also regs 302-200.01 and 302-200.02 of the <i>Income Tax Assessment (1997 Act) Regulations 2021</i> (Cth).

Table 3. Taxation of lump sum benefits (tax rates)

	Tax-free component	Taxable component	Untaxed element
Paid to a tax dependant	0%	0%	0%
Paid to a non-tax dependant	0%	15% plus levies	30% plus levies
Paid to an LPR (deceased's estate)	0%	0%	0%

Table 4. Taxation of pension benefits (tax rates)

	Tax-free component	Taxable component	Untaxed element
Paid to a tax dependant: <ul style="list-style-type: none"> • where either the beneficiary or the deceased are > 60 years of age • where the beneficiary is a child who is < 25 years of age or a child who has a disability 	0%	0%	Personal marginal tax rates (with a 10% tax offset)
Paid to a tax dependant where both the beneficiary and the deceased are < 60 years of age	0%	Personal marginal tax rates (with a 15% tax rebate)	Personal marginal tax rates (no tax offset)

An untaxed element will typically only arise where the death benefit includes proceeds from a life insurance policy held by the fund, or where the death benefit is being paid from an untaxed superannuation fund, for example, certain government sector superannuation funds.

Income tax withholding obligations

Where death benefits are paid to non-tax dependants, it is the obligation of the SMSF trustee(s) to withhold the appropriate amount of income tax and remit this to the ATO.

Where death benefits are paid to the deceased's estate (paid to the LPR), the lump sum benefits are not taxed in the superannuation fund but may be required to have tax withheld by the LPR prior to payment, depending on whether they are paid to a non-tax dependant. Superannuation moneys paid to a deceased's estate

must be separately identified so that they can be taxed appropriately. However, it is not the obligation of the superannuation fund to withhold income tax on any lump sum benefits.

Where death benefit pensions are subject to income tax and both the deceased and the death benefits recipient are below the age of 60 years, the SMSF trustee(s) are obligated to withhold the appropriate amount of income tax and remit this to the ATO.

Conclusion

Whether it is in planning for death or the execution of instructions after the death of a member, there are a variety of roles and responsibilities in ensuring that superannuation death benefits are dealt with in accordance with the member's instructions.

While the trustees of the SMSF have ultimate responsibility for decisions taken, this is often done in conjunction with other professionals. It is always better to plan for events after death and for the process to be collaborative between the trustees and the various professionals engaged.

Shirley Schaefer
Partner
BDO

Clinton Jackson
Partner
Cooper Grace Ward

This article is an edited version of "Estate Planning" presented at The Tax Institute's Superannuation Intensive held on 2 to 3 April 2025.

References

- 1 [2023] QSC 252.
- 2 [2024] NSWSC 1138.
- 3 [2024] NSWSC 7.
- 4 [2023] QSC 90.
- 5 [2022] NSWSC 534.
- 6 Reg 6.17A of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SISR).
- 7 S 17A(4) SISA.
- 8 S 17A(3) SISA.
- 9 S 17A(4) SISA.
- 10 S 10(1) SISA.
- 11 Reg 6.22 SISR.
- 12 S 10A SISA.
- 13 [2005] NSWSC 934.
- 14 [2009] QSC 26.
- 15 [2013] WASC 389.
- 16 [2013] VSC 594.
- 17 [2015] QSC 61.
- 18 [2014] QSC 99.
- 19 [2021] WASCA 59.
- 20 [2022] HCA 21.
- 21 Reg 6.21 SISR.
- 22 S 8(1) of the *Disability Services Act 1986* (Cth).
- 23 S 302-195 and 302-200 ITAA97.
- 24 Subdiv 302-B and Subdiv 302-C ITAA97.



Transfer Pricing Masterclass

Sharpen your edge with a powerful day of Transfer Pricing insights.

14 August 2025

Sheraton Grand Sydney Hyde Park & Online

7 CPD hours



Register now
taxinstitute.com.au

Super and SMSFs: where are the goal posts?

by Shirley Schaefer, Partner, BDO

Superannuation and the rules that apply to self-managed superannuation funds (SMSFs) in particular seem to be a constantly moving target. The government continues to make changes to rules, and the ATO interpretation of those rules can also change. It can be difficult to know what the current rules and current focuses of the ATO in this area of tax law are. This article provides an overview of current superannuation and SMSF issues and the practical matters that should be considered by practitioners in 2025. The proposed introduction of Division 296 tax is foremost in practitioners minds at this time – the “elephant in the room”. The ATO regularly provides public information on what it is reviewing for SMSFs, at conferences or other speeches. This article focuses on the most commonly discussed issues: illegal early access; non-arm’s length income and non-arm’s length expenditure; asset valuations; and SMSF auditors.

The elephant in the room

In February 2023, the government announced the planned introduction of a large fund balance tax. By late 2024, the Bill to introduce the new tax was before the Senate awaiting a second reading. The Bill is the Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023.

The Bill lapsed with the recent federal government election, but the Labor Party has indicated that it intends to propose the legislation without change at the next sitting of parliament. This includes the government’s intention that the start date for the imposition of the new tax will be 30 June 2026 (with a first measurement date of 30 June 2025).

At this time, there is no draft legislation in place and it is not known when the legislation will be passed.

The concept of the new tax is that those individuals with significant savings in superannuation (deemed as more than \$3 million) will be subject to an additional 15% income tax on the growth in their superannuation fund each year. The growth of the superannuation fund balance is adjusted for capital amounts (contributions in and benefit withdrawals out) but includes all fund earnings, including unrealised capital gains (as assets are required to be measured at market value each year).

The key features of the Division 296 tax are:

- the tax will be levied at a rate of 15% on a proportion of an individual’s “superannuation earnings” (including unrealised capital gains);
- the proportion is determined as that part of their total superannuation balance above \$3 million (at the end of each financial year);
- the tax will be levied directly on individuals and imposed separately to personal income tax and superannuation fund tax (similar to the current Division 293 contribution tax, the individual may elect to pay this tax personally, or elect to pay the tax from their superannuation account balances);
- the \$3 million cap will not be indexed; and
- the tax will first apply for the 2025–26 financial year.

An example of a calculation follows:

- Samantha has a total superannuation balance (TSB) at 1 July 2025 of \$5,500,000;
- during the 2026 FY, she contributed \$27,500 in concessional contributions;
- during the 2026 FY, she withdrew \$120,000 in pension payments; and
- Samantha’s TSB at 30 June 2026 is \$5,800,000.

TSB at 30 June 2025		\$5,500,000
TSB at 30 June 2026		\$5,800,000
• Contributions (85% of concessional contributions)		(\$23,375)
• Pensions		\$120,000
Adjusted TSB at 30 June 2026		\$5,896,625
Earnings		\$396,625
Proportion above \$3 million	(\$5.8m – \$3m)/\$5.8m	48%
Taxable earnings		\$190,380
Tax payable		\$28,557

Current ATO focus

Illegal early access

In 2023, the ATO conducted research into illegal early access of superannuation moneys from SMSFs for the 2020 and 2021 financial years. The research findings included the following information:

Element	2019–20 financial year	2020–21 financial year
Non-lodger population size	14,964	24,955
Non-lodger population illegal early access estimate (\$m)	283.0	174.4
Lodger population illegal early access estimate (\$m)	97.5	81.7
Combined illegal early access estimate (\$m)	380.5	256.1
Combined total assets (\$b)	720.5	843.7
Combined estimate as percentage of combined total assets	0.05%	0.03%

Non-lodger funds represent SMSFs that have been established but have never lodged an SMSF annual return (income tax return) (SAR). The lodger funds represent those SMSFs that have lodged SARs and have been subject to an annual audit.

The ATO considers that illegal early access is the most significant regulatory risk impacting the SMSF sector. It has also determined that, in both lodging and non-lodging SMSFs, this is likely driven by the following factors (not exclusively):

- financial stress;
- promoters and schemes;
- lack of knowledge; and
- community attitudes to superannuation.

The ATO's calculation estimates that 22.1% of the assets of SMSFs that never lodge has been accessed illegally. This compares to SMSFs that have been established and are either lapsed lodgers or have lodged their SAR, where the analysis showed only 0.44% and 0.01%, respectively, of assets leaving the system through illegal early access.

To help combat this and to reduce the ability for SMSF funds to be accessed early, the ATO has introduced a number of additional requirements when an SMSF is established, including:

- new SMSF registration reviews, including member verification processes;
- ensuring that all roll-overs to SMSFs are now done via Superstream;
- contacting new trustees to discuss their understanding of the obligations required as a trustee; and
- providing educational resources to trustees.

SMSF details do not appear on either the Australian business number register or Superfund Lookup until the ATO is satisfied that the fund is appropriately established.

For SMSFs that are already established, the ATO has focused on amounts that are recorded as "loans" in the SAR and whether these represent valid loans by the SMSF or illegal loans (loans to members or relatives). The ATO is increasingly finding that illegal early access has been hidden by recording the amount withdrawn as "loans" but with little or no intention to repay the moneys to the SMSF.

Increasingly, we are seeing that the ATO is more likely to deem that a "loan" is illegal early access if it has not been appropriately documented and can be verified as being a loan to a member or relative.

NALI and NALE

The concept of non-arm's length income (NALI) has been around for many years (previously known as "special income"). It provides that, where transactions are not undertaken on an arm's length basis, tax may be imposed at the top marginal tax rate (currently 45%) rather than at any concessional or lower rate of income tax.

Specifically in relation to the taxation of superannuation funds, NALI is defined as:¹

- “(1) An amount of ordinary income or statutory income is *non-arm's length income* of a complying superannuation entity if, as a result of a scheme the parties to which were not dealing with each other at arm's length in relation to the scheme, one or more of the following applies:
- (a) the amount of the income is more than the amount that the entity might have been expected to derive if those parties had been dealing with each other at arm's length in relation to the scheme;”

There has been some delay, but in 2024, the definition of NALI was expanded to include income derived where expenses of the superannuation entity were not on arm's length terms, that is, non-arm's length expenditure (NALE). The definition now includes:²

- (b) if the entity is of a kind referred to in paragraph (8)(a) (about certain small entities):
- (i) in gaining or producing the income, the entity incurs a loss, outgoing or expenditure of an amount that is less than the amount of a loss, outgoing or expenditure that the entity might have been expected to incur if those parties had been dealing with each other at arm's length in relation to the scheme; and
- (ii) subsection (8) does not apply to the loss, outgoing or expenditure;
- (c) if the entity is of a kind referred to in paragraph (8)(a) (about certain small entities):
- (i) in gaining or producing the income, the entity does not incur a loss, outgoing or expenditure that the entity might have been expected to incur if those parties had been dealing with each other at arm's length in relation to the scheme; and
- (ii) subsection (9) does not apply to the loss, outgoing or expenditure that the entity might have been expected to incur.”

While NALE is not applied to large Australian Prudential Regulation Authority (APRA) regulated superannuation funds, it is applied to SMSFs and small APRA funds (SAFs).

The above provisions of the ITAA97 provide that, where a specific investment or asset expense is either not on arm's length terms, or has not been incurred when it should have been incurred, the net income arising from that investment or asset is taxable as NALI, at 45%. This can be either ordinary or statutory income (capital gains).

There is further clarification in relation to general expenses incurred (or not incurred) by an SMSF or SAF. As general expenses can be implied to relate to the whole of the income of the fund, the measurement of NALI is limited to twice the difference between the expenditure that

was incurred and the expenditure that should have been incurred if on arm's length terms.³

The ATO has issued guidance regarding the application of NALE in LCR 2021/2 *Non-arm's length income – expenditure incurred under a non-arm's length arrangement*. This law companion ruling provides multiple examples of how NALE would be applied in certain circumstances.

While NALE is most likely to occur between an SMSF (or an SAF) and a related party, it is not limited to only related party transactions.

Importantly, this change to the legislation means that, where trustees are undertaking activities for the SMSF in a capacity other than as trustee, and they are licensed to provide the same activities or services to others, the SMSF should incur the same level of costs as a third party.

It should also be noted that NALE not only applies to direct SMSF and SAF expenditure, but also to any investments in other entities undertaken by the SMSF or SAF and the expenditure incurred in those entities.

The ATO has indicated that it is about to release specific guidance to SMSF auditors in relation their obligations to review SMSF expenditure for NALE. This is likely to include specific requirements for enquiries of SMSF trustees regarding related party relationships and enquiries about a trustee's profession (to determine whether trustees are undertaking activities or providing services as a trustee or in a professional or work capacity). The SMSF auditor's file will need to include appropriate documentary evidence of these enquiries.

ATO focus

The ATO focus is not just limited to NALE. The new legislation has also refocused the ATO's attention to non-arm's length arrangements generally. Again, while not limited to related party transactions, they are specifically focused on related party transactions. This is demonstrated via the ATO activities in SMSF compliance and in relation to its compliance activities against SMSF auditors.

Specifically in the firing line are related party lease arrangements of business real property or other assets. The ATO has indicated that not only should the SMSF auditors have a copy of the related party lease agreement included in their audit workpapers, but they are also required to examine the terms and conditions of the lease to ensure that they represent "arm's length" or "commercial" arrangements. The ATO is focusing on the following elements of the lease agreements:

- the term of the lease and any renewal arrangements;
- the quantum of the lease/rental amount – importantly, how trustees have determined that the amount of the lease is at market value;
- whether increments in rental during the terms of the lease been applied (CPI or market value);
- how often lease payments are made. Most commercial leases with unrelated parties require rental to be paid monthly in advance;

- whether the terms of the renewal of the lease have been followed, and whether it is required to be in writing and within specified time frames; and
- if the lease has not been renewed within the terms of the lease, whether there is a "holding over clause" whereby the lease arrangement continues on a monthly basis.

SMSF trustees also need to be aware of the *Superannuation Industry (Supervision) Act 1993* (Cth) (SISA) requirements in relation to the investments by the SMSF in a lease of business real property to a related party. For the lease arrangement to be excluded from the in-house asset restrictions,⁴ the property must be the subject of a legally enforceable lease arrangement.⁵

Asset valuations

Since 30 June 2013, all SMSF assets are required to be valued at market value.⁶

The ATO defines "market value" as:⁷

"The amount that a willing buyer of the asset could reasonably be expected pay to acquire the asset from a willing seller if all the following assumptions were made – that the:

- buyer and the seller dealt with each other at arm's length in relation to the sale
- sale occurred after proper marketing of the asset by the buyer and
- the seller acted knowledgeably and prudentially in relation to the sale."

The ATO has provided detailed guidance around the obligations of trustees to determine the market value of their assets each year.⁸ Importantly, the requirement to value assets at market value is an annual requirement under the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SISR). However, annual independent valuations may not be required. A trustee valuation can be undertaken, but the trustees need to evidence that the market valuation has been based on objective and supportable data. The trustees will need to be able to provide the supportable data to justify the market valuation, at least to the SMSF auditor and in some cases to the ATO.

In late 2024, the ATO undertook a mail-out to 16,000 SMSF trustees and 1,000 SMSF auditors which identified SMSFs where asset valuations remained unchanged for at least three years. It also identified that, if the values of assets remained unchanged, those SMSFs and SMSF auditors were likely to be the subject of an ATO review.

While it is possible that SMSF asset valuations may remain unchanged from year to year, it will be important for SMSF trustees to ensure that they have appropriate data to support the valuation of the SMSF assets.

The valuation of assets at market value is important as it provides for the calculation of a member's benefit within an SMSF and impacts the following additional measures:

- total superannuation balance: this can impact the ability of a member to make contributions to superannuation or for the imposition of excess contribution taxes;
- transfer balance cap/account: this impacts a member's ability to commence new or additional pensions; and
- minimum pension requirements: the value of a member's pension account directly impacts the minimum pension obligations and the requirement to draw a minimum pension from the SMSF.⁹
- when acquiring assets between SMSFs and related parties;¹¹
- to ensure that investments are made and maintained on an arm's-length basis;¹²
- when disposing of certain collectables and personal use assets to a related party of the fund;¹³ and
- when determining the market value of an SMSF's in-house assets as a percentage of all assets in the fund.¹⁴

Valuing SMSF assets at their market value is also important in the following circumstances:

- when preparing the financial accounts and statements of the fund;¹⁰

The ATO has provided detailed guidance around what information is required in relation to undertaking a market valuation for specific classes of assets (see Table 1).¹⁵

Table 1. ATO valuation guidelines

Class of assets or transactions	QC 26343 detail
Listed securities	For the end of financial year reporting of listed securities, for example, listed shares and managed units, use the closing price on each listed security's approved stock exchange or licensed market at 30 June as the market value of the security.
Real property	<p>When valuing real property, you may wish to consider using a qualified independent valuer, especially where the value of the property represents a significant proportion of the fund's value.</p> <p>When valuing real property, relevant factors and considerations may include:</p> <ul style="list-style-type: none"> • the value of similar properties and recent comparable sales results; • the amount that was paid for the property in an arm's length market – if the purchase was recent and no events have materially affected its value since the purchase; • an independent appraisal from a real estate agent (kerbside); • whether the property has undergone improvements since it was last valued; • a rates notice (if consistent with other valuation evidence); and • for commercial properties, net income yields (not sufficient evidence on their own and only appropriate where tenants are unrelated). <p>Unless the property has been recently purchased by the fund, you should consider a variety of sources to substantiate the market value of real property. Generally, it is not sufficient for valuations to be based on only one item of evidence in the above list.</p> <p>A valuation undertaken by a property valuation service provider, including online services or a real estate agent, would be acceptable. However, the valuation should stipulate the supportable data if it is the sole source of evidence being relied on to substantiate the valuation. For example, in the case of a real estate agent appraisal or online report, the valuation should list the comparable sales it relied on.</p>
Unlisted securities and unit trusts	<p>When valuing an unlisted security, for example, a share in a private company or a unit in an unlisted unit trust, the ATO expects you to take into account a number of factors that may affect its value, including both the:</p> <ul style="list-style-type: none"> • value of the assets in the entity; and • consideration paid on acquisition of the unlisted securities or units. <p>Evidence to support your valuation of an unlisted security may include:</p> <ul style="list-style-type: none"> • an independent expert valuation of assets held in the company or unit trust; • a property valuation where property is the only asset of the company or unit trust; and • the date and price of the most recent sale and purchase of a share or unit between unrelated parties. <p>If an independent expert valuation is not available, provide:</p> <ul style="list-style-type: none"> • evidence of how the market valuation was substantiated by the directors or trustees, including objective and supportable data on which they relied; and • the valuation method they used, and any assumptions made. <p>You should consider using a qualified independent valuer if:</p> <ul style="list-style-type: none"> • the nature of the asset indicates that the valuation is likely to be complex; or • the value of the asset (or assets) represents a significant proportion of the fund's value. <p>Company or unit trust financial statements that are signed and audited are unlikely to be sufficient evidence on their own, where the purpose is to establish whether the fund's investment is reported at market value if the assets have been valued at cost.</p>

SMSF auditors

Since 2013, only Australian Securities and Investments Commission (ASIC) registered SMSF auditors have been eligible to conduct the audit of SMSFs as required under the SISA.¹⁶

Since the introduction of the registration process, the ATO has undertaken the initial regulatory review process for SMSF auditors. The initial years had a focus on the education of SMSF auditors, but in the last five years, there have been increasing levels of sanctions imposed on auditors or on the disqualification of auditors or the cancellation of auditor registrations. This has led to a significant reduction in the number of registered SMSF auditors.

“Specifically in the firing line are related party lease arrangements of business real property or other assets”

Where the ATO review finds matters of non-compliance with Australian auditing standards and ATO auditor requirements, the auditor is referred to ASIC for further review and the imposition of any sanctions. Only ASIC can impose sanctions on auditors. These can include:

- imposing a condition on an auditor’s registration;
- varying a condition on an auditor’s registration;
- accepting an enforceable undertaking;
- cancelling an auditor’s registration (usually at the request of the SMSF auditor);
- suspending an auditor’s registration; and
- disqualifying a person from being an approved SMSF auditor.

Sanctions or conditions imposed on SMSF auditors can include the requirement to undertake specific education and training and/or the imposition of regular review of SMSF auditor files by an independent quality review auditor.

The ATO has provided specific guidance on its website regarding what SMSF auditors can expect when they are reviewed by the ATO.¹⁷

The ATO has a regular program of SMSF auditor reviews. The general focus has been on auditors who are undertaking a significant number of SMSF audits or SMSF auditors who are considered to be high-risk. The current ATO focus for SMSF auditor reviews is on those auditors who are still conducting “in-house audits”, where the accounting work and audit work is being undertaken by the same firm, and auditors whose source of work is from a single or limited referral source. This is a focus on the auditor independence standards of APES 110.¹⁸

In addition to the regular compliance and review program undertaken by the ATO, this is augmented by reviews of specific SMSF auditors who come to the attention of the ATO. This may be because the ATO’s work in relation to a specific SMSF may indicate that the SMSF auditor has not identified SISA and SISR contraventions and breaches, or due to whistleblowing by accountants, administrators, auditors or trustees.

ASIC and ATO findings

ASIC publishes the results of SMSF auditors referred to them for further review or investigation. While specific findings are not published, the general comments provided indicate that SMSF auditors are failing their compliance with Australian auditing standards and the ATO requirements in the following areas:

- independence requirements;
- insufficient documentation included within audit files to support the auditor’s opinion;
- insufficient testing of SMSF assets;
- failure to identify SISA and SISR contraventions;
- failure to identify non-arm’s length transactions; and
- insufficient testing of limited recourse borrowing arrangements and their compliance with the SISA.

Further specific failings can be identified from the changes to, and increased, explanatory material provided by the ATO for SMSF auditors. In recent years, the following specific failures have been identified:

- insufficient testing of asset existence (title searches not being conducted every year);
- insufficient documentation to support the valuation of assets;
- insufficient documentation to support a qualified audit opinion or issue of an auditor contravention report (ACR);
- the auditor not obtaining signed documentation (including the audit engagement letter, the trustee representation letter, and financial statements); and
- failure to bring immaterial SISA and SISR contraventions to the trustee’s attention.

This increased focus on SMSF auditors by the ATO and ASIC has seen an increase in the qualifications of audit reports and the issue of ACRs by SMSF auditors. It has also led to a real or, in some cases, perceived increase in the level of documentation being requested by SMSF auditors. This is particularly evident in past years around investment strategies and the valuation of SMSF assets.

Conclusion

It is important for practitioners to keep themselves up to date and informed of government measures and the regulator’s focus areas to ensure that their clients operate their SMSFs within the current rules and regulations (including the ATO’s interpretation of those rules and regulations). SMSF knowledge is a specialist area; if you are

unsure of how specific SMSF rules and regulations apply, you should seek appropriate expert knowledge.

Shirley Schaefer
Partner
BDO

This article is an edited version of “Super & SMSFs – where are the goal posts?” presented at The Tax Institute’s SA Tax Forum held in Adelaide on 3 to 4 April 2025.

References

- 1 S 295-550(1)(a) of the *Income Tax Assessment Act 1997* (Cth) (ITAA97).
- 2 S 295-550(1)(b) and (c) ITAA97.
- 3 S 295-550(8) and (9) ITAA97.
- 4 Ss 82 to 85 SISA.
- 5 S 71(1)(g) SISA.
- 6 Reg. 8.02B SISR.
- 7 Australian Taxation Office, *Guide to valuing SMSF assets*, QC 26343. Available at www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/self-managed-super-funds-smsf/smsf-administration-and-reporting/guide-to-valuing-smsf-assets.
- 8 *Ibid.*
- 9 Reg 1.06 SISR.
- 10 Reg 8.02B SISR.
- 11 S 66 SISA.
- 12 S 109 SISA.
- 13 Reg 13.18AA(7) SISR.
- 14 Ss 82 and 83 SISA.
- 15 Australian Taxation Office, *Guide to valuing SMSF assets*, QC 26343. Available at www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/self-managed-super-funds-smsf/smsf-administration-and-reporting/guide-to-valuing-smsf-assets.
- 16 S 35C SISA.
- 17 Australian Taxation Office, *Our compliance approach for SMSF auditors*, QC 45573. Available at www.ato.gov.au/tax-and-super-professionals/superannuation-professionals/smsf-auditors/our-compliance-approach-for-smsf-auditors.
- 18 Accounting Professional & Ethical Standards board, APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)*.

The Tax Institute

Publish your insights

Write for our journals and grow your professional profile.

Find out more
taxinstitute.com.au

24-025.RES_07/25

A Matter of Trusts

by Will Monotti, Sladen Legal

The powers of the court in varying trusts

The court has powers under legislation and under its inherent supervisory jurisdiction to vary trusts to ensure that they may be duly executed in certain circumstances.

Introduction

The trustee of a trust is obliged to manage and administer the trust's assets in accordance with the provisions of its deed and the law. There may be circumstances in which it is prevented from doing so; this could be because the deed does not contain requisite provisions or powers, and the scope of the trustee's power of variation under the deed does not permit it to make those variations. Alternatively, it may be that the variation power is sufficiently broad, but requires the consent of another party, such as an appointor or guardian, for it to be exercised, and the appointor or guardian refuses to or cannot provide that consent. In the event of such impasses arising, a trustee may be minded to seek orders from a court to vary the trust to resolve the matter.

This article looks at the court's jurisdiction in these matters and the manner in which its powers under the *Trustee Act 1958* (Vic) (or similar) have been applied.

Power of the court to vary trusts

Section 63A of the *Trustee Act 1958* (Vic) provides the court with the power, in relation to real and personal property under trusts arising under any will, settlement or other disposition, to make orders approving any arrangement "... varying or revoking all or any of the trusts, or enlarging the powers of the trustees or managing or administering any of the property ..." on behalf of the following groups of persons:

- “(a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of minority or other incapacity is incapable of assenting; or
- (b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified

description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class (as the case may be) if the said date had fallen or the said event had happened at the date of the application to the Court; or

- (c) any person unborn; or
- (d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined”

The approval of any arrangement under the section (with the exception of any arrangement pursuant to s 63A(1)(d)), is predicated on the arrangement being for the benefit of the person to which it applies. The provision, which is in alignment with similar provisions in other Australian jurisdictions and the *Variation of Trusts Act 1958* (UK), is designed to allow the court to approve arrangements on behalf of persons otherwise incapable of providing such approval, with the court's power substituting in effect for this lack of capacity.¹

The Victorian decision in *McNee v Lachlan McNee Family Maintenance Pty Ltd*² considered the scope of this power. The case concerned a minor, whose parents had been separated for some years. As part of a property settlement between his parents, a trust had been established of which the minor child was the primary beneficiary. The property of the trust was a residential property, in which both the minor child and his mother were permitted to reside. The mother was the director of a company acting as trustee of the trust and was also its sole appointor. The provisions of the trust were such that the child would automatically become the trust's appointor on attaining the age of 18 years. Prior to that time, the child's relationship with his mother deteriorated, and he moved in to live with his father who became his primary carer under court orders. The child, by litigation guardian, sought to have the company removed as trustee of the trust, and the mother removed as its appointor.

The court held that the child was a person to which the provisions of s 63A of the *Trustee Act 1958* (Vic) applied, and that the replacement of the child's mother with another person as appointor pursuant to that section could be categorised as an “arrangement”, which the court noted was a word “deliberately used in the widest possible sense so as to cover any proposal which any person may put forward for varying or revoking the trusts”.³ The court was moved to make orders to vary the deed of the trust to remove the mother as an appointor. This, in part, was linked to the finding of Moore J that there were grounds to remove the company acting as trustee of the trust. Moore J held that the trustee had failed to understand the documents relating to the trust, had consciously acted in breach of trust by mortgaging the trust property, which was specifically prohibited under the trust deed, and was in a position of inevitable conflict as its controlling mind, the mother, had a right to reside in the property under the terms of the trust which was conditional on personal obligations to keep the property insured and in good repair.

The appointor of a trust has the power to change its trustee and, in many trust deeds, is also required to consent to the trustee's exercise of its power of variation (a power sometimes given to a guardian). In *McNee*, Moore J held that, because of the failings of the trustee company in respect of the trust's administration, it followed that its controlling mind, the mother, would not be suited to continue as appointor of the trust, particularly given that the appointor has the power to change the trustee, defeating the purpose of any order to replace the trustee with an independent. The court thus ordered that an independent person replace the mother as appointor of the trust pursuant to s 63A of the Act, with the child to replace the said independent on attaining adulthood.

The court's inherent jurisdiction

The Western Australian case of *Dryandra Investments Pty Ltd v Hardie*⁴ considered the scope of the inherent jurisdiction of the court to ensure the proper administration and execution of trusts. This is a power that is distinct to that conferred by s 63A of the Victorian Trustee Act and its comparable provision (s 90 of the *Trustees Act 1962* (WA)).

The case concerned a trust of which the defendant was the appointor and guardian. The defendant suffered from dementia caused by Alzheimer's disease. The plaintiff in the case was the trustee of the trust, and sought orders for the replacement of the defendant as guardian and appointor of the trust.

The court noted that its powers under the *Trustees Act 1962* (WA) to make variations could only be exercised on the basis that the person on whose behalf the approval of the variation was being sought had a direct or indirect interest under the relevant trust(s) and was incapable of assenting to the variations on that basis. Master Russell held that the legislative power was not sufficient to permit the variations sought, as the application had been made in respect of the defendant in her capacity as guardian of the trust, rather than as a beneficiary.

However, the court confirmed its inherent supervisory jurisdiction to make orders ensuring that trusts are properly executed. Master Russell held that, while the inherent power does not permit the court to vary or alter the terms of the relevant trust,⁵ it would have the power to change the identity of the person appointed as guardian in certain circumstances. In this particular case, the appointment could be effected by the court because the guardian was incapacitated, and thus could not exercise its powers of consent to any of the trustee's reserved or restricted powers; nor could it exercise its powers under the deed requiring it to request the trustee to provide the names and addresses of the persons who have custody of trust assets, to substantiate the trust's records. These were matters preventing the trust from being properly executed. The court elected to remove and replace the appointor for similar reasons. However, it cautioned against applying its reasons in this instance to all instances where a trust has a guardian or appointor (or constituent) who is incapacitated, providing:

"102. ... the court has power under its inherent supervisory jurisdiction to remove and, relevantly, replace a guardian of a trust, if the circumstances are such as to warrant the exercise of the power. There is no fixed rule. Each case must be considered on its own facts and circumstances, including the terms of the relevant trust instrument."

Conclusion

These cases indicate that routes are available to a trustee in the event of a trust's administration being stymied by a limited deed or by a negligent controlling party. It is not the business of the court to alter trusts with unlimited latitude; instead, the court is merely obliged to ensure that they are duly executed and administered appropriately. The law is such that orders may be made to protect the interests of beneficiaries who are minors, incapacitated or even unborn.

When establishing new structures, advisers should consider:

- who is to be appointed as trustee, appointor and/or guardian of the trust and what is to occur if any person appointed to such position ceased to have decision-making capacity;
- whether successive guardians or appointors of a trust should be nominated by deed, will or otherwise;
- what the obligations of a trustee are and whether they could conflict with the obligations of a beneficiary (in respect of rights to occupy property, in particular); and
- the breadth of the variation power, and whether drafting a variation power in a broad manner would mitigate the need for an application to the court to be made altogether.

Will Monotti
Senior Associate
Sladen Legal

References

- 1 See *Re Holmden's Settlement Trusts* [1968] AC 685 at 710H-711A per Lord Guest, as cited in *McNee v Lachlan McNee Family Maintenance Pty Ltd* [2020] VSC 273 at [104].
- 2 [2020] VSC 273.
- 3 [2020] VSC 273 at [105].
- 4 [2024] WASC 248.
- 5 [2024] WASC 248 at [94].



Barossa Convention

Join us in the scenic and historic Barossa Valley for a deep dive into the wild west of tax: Navigating the new frontier.

- Gain expert-led insights on *Bendel*, Division 7A, and the statutory presumption in the Federal Court and ART.
- Sharpen your strategy in a shifting tax landscape.
- Unwind and connect at the Convention Dinner at Gomersal Winery.

Register for South Australia's most-loved event by Friday, 11 July to save \$200!

6–8 August 2025

Novotel Barossa Valley Resort

12 CPD hours

Register now
taxinstitute.com.au

 The Tax Institute

Superannuation

by Daniel Butler, CTA, and
Fraser Stead, DBA Lawyers

NALI and NALE – NALI still needs fixing: part 1

The NALI provisions have a controversial history. NALI can be applied to a wide range of situations with the potential for significantly disproportionate tax outcomes for SMSFs.

Non-arm's length income (NALI) remains a contentious topic for self-managed superannuation funds (SMSFs). Part 1 of this three-part article provides a history and overview of NALI, as well as examining NALI under s 295-550(1) (ordinary NALI) of the *Income Tax Assessment Act 1997* (Cth) (ITAA97).

Types of NALI

Broadly, there are different types of NALI covered in s 295-550 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97). We will refer to these as:

- ordinary NALI (includes non-arm's length expenditure (NALE) that is not covered by s 295-550(8) and (9)), found in s 295-550(1);
- dividend NALI, found in s 295-550(2) and (3);
- non-fixed trust entitlement NALI, found in s 295-550(4);
- fixed trust entitlement NALI, found in s 295-550(5);
- NALE (but not in relation to a particular asset, where the loss, outgoing or expenditure is less than an arm's length amount, ie general NALE), found in s 295-550(8); and
- NALE (similar to s 295-550(8) but where there is no or a nil loss, outgoing or expenditure), found in s 295-550(9).

Section 295-545 ITAA97 provides that the taxable income of an SMSF is split into a non-arm's length component and a low tax component. While the low tax component of a superannuation fund is subject to a 15% rate of tax (or zero on assets in pension or retirement phase), the non-arm's length component is subject to a 45% tax rate (s 26 of the *Income Tax Rates Act 1986* (Cth)).

There is a two times multiple to the lower loss, outgoing or expenditure that is deemed to be the NALE amount that is taxed as NALI under s 295-550(8). The NALE amount that is taxed under s 295-550(9) is two times the amount

that the entity might have been expected to incur had the parties been dealing at arm's length.

Further, where the entity is an SMSF or a small APRA fund, the non-arm's length component is subject to s 295-545(2A) that has the effect of reducing the deemed amount that might otherwise be taxed under s 295-550(8) and (9) by capping the amount to the fund's actual taxable income as adjusted under s 295-545(2A)(b).

Background to NALI

Earlier NALI provisions

Section 273 of the *Income Tax Assessment Act 1936* (Cth) (ITAA36) was initially introduced to counter higher than arm's length dividends in private companies being paid to superannuation funds and to counter certain other non-arm's length transactions.

On 25 November 1997, s 273 was expressly amended so that NALI caught certain trust distributions to superannuation funds.

Section 273 largely remained unchanged from 25 November 1997 to mid-2007 when it was replaced by s 295-550, which took effect on 1 July 2007. The 1 July 2007 superannuation reforms broadly resulted in Pt IX ITAA36 being replaced by Pt 3-30 ITAA97, and s 295-550 was largely a restatement of s 273 ITAA36 in more modern language.

2018 Treasury consultation and subsequent amendments

In 2018, Treasury carried out a consultation process regarding changes to the NALI rules as part of the *Superannuation taxation integrity measures* consultation paper (2018 Treasury consultation paper). Treasury considered that the rules in place did not take into account fund expenditure incurred that would normally apply in a commercial transaction. The 2018 Treasury consultation paper and exposure draft legislation was aimed at assessing non-arm's length related party limited recourse borrowing arrangements (LRBAs).

The impetus for the NALE changes in mid-2018 was an increase in low or no interest LRBAs in use by certain SMSFs. The ATO had issued several favourable private rulings (confirming certain low and no interest LRBAs) prior to the ATO issuing the safe harbour LRBA guidelines in PCG 2016/5.

The Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2019 (2019 Bill) received royal assent on 2 October 2019. The 2019 Bill re-cast s 295-550(1) and (5) to expressly provide for arrangements where an SMSF trustee incurred lower or no expenses than it might have been expected to incur had it been dealing at arm's length.

This 2019 Bill proved controversial as a lower or nil expense of a general nature could result in all of the ordinary and statutory income of an SMSF (including assessable contributions) being NALI for a particular income year. The ATO provided some administrative relief in PCG 2020/5

which stated that the ATO would not allocate compliance resources to determine whether the NALI provisions applied to a complying superannuation fund for FY2019 to FY2023 where a fund incurred NALE of a general nature. However, the ATO administrative relief in PCG 2020/5 ceased on 30 June 2023, leaving SMSFs open to general NALE risks from 1 July 2023.

Following years of industry consultation, the Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023 (2023 Bill) was introduced and finally passed as law on 24 June 2024, with royal assent being received on 28 June 2024. Broadly, the 2023 Bill included the following changes and applied with retroactive effect from 1 July 2018:

- large APRA funds were excluded from the operation of the NALE rules for both specific and general NALE;
- the amount of NALI taxed due to a lower or nil general expense was subject to the application of the “twice the difference” in s 295-550(8) and (9), respectively; and
- concessional contributions would not be subject to NALI.

Ordinary NALI

Legislative overview

Section 295-550(1) provides:

- “(1) An amount of ordinary income or statutory income is **non-arm’s length income** of a complying superannuation entity if, as a result of a scheme the parties to which were not dealing with each other at arm’s length in relation to the scheme, one or more of the following applies:
- (a) the amount of the income is more than the amount that the entity might have been expected to derive if those parties had been dealing with each other at arm’s length in relation to the scheme;
 - (b) if the entity is of a kind referred to in paragraph (8)(a) (about certain small entities):
 - (i) in gaining or producing the income, the entity incurs a loss, outgoing or expenditure of an amount that is less than the amount of a loss, outgoing or expenditure that the entity might have been expected to incur if those parties had been dealing with each other at arm’s length in relation to the scheme; and
 - (ii) subsection (8) does not apply to the loss, outgoing or expenditure;
 - (c) if the entity is of a kind referred to in paragraph (8)(a) (about certain small entities):
 - (i) in gaining or producing the income, the entity does not incur a loss, outgoing or expenditure that the entity might have been expected to incur if those parties had been dealing with each other at arm’s length in relation to the scheme; and

- (ii) subsection (9) does not apply to the loss, outgoing or expenditure that the entity might have expected to incur.

This subsection does not apply to an amount to which subsection (2) applies or an amount derived by the entity in the capacity of beneficiary of a trust.”

Scheme

The first step for the ordinary NALI provisions to be applied requires that the parties to the scheme were not dealing at arm’s length.

The definition of “scheme” in s 995-1 ITAA97 is so broad as to render little assistance. It provides:

“‘scheme’ means:

- (a) any arrangement; or
- (b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.”

Based on this definition, in practice, it can usually be assumed that the SMSF trustee is a party to a scheme. At times, identifying what steps or actions form the relevant scheme and the parties to the scheme can be contentious.

Meaning of arm’s length

Section 995-1 ITAA97 provides the following as a definition of arm’s length:

“‘arm’s length’: in determining whether parties deal at **arm’s length** consider any connection between them and any other relevant circumstance.”

It has been said that this definition contains a direction about how to determine whether parties are dealing at arm’s length rather than a definition or explanation of the expression.¹

A useful explanation of “arm’s length” is stated in *APRA v Derstepanian*:²

“18. ... a dealing that is carried out on commercial terms ... a useful test to apply is whether a prudent person, acting with due regard to his or her own commercial interests, would have made such an investment.”

Another explanation was provided in *Granby Pty Ltd v FCT*³ as follows:

“20. ... the term ‘at arm’s length’ means, at least, that the parties to a transaction have acted severally and independently in forming their bargain.”

Application of ordinary NALI

Although the 2023 Bill has provided some relief in respect of general NALE, the ATO view is that a lower expense in relation to a particular asset will generally give rise to NALI in respect of all future income and capital gains derived from that asset. This is extremely broad and can result in innocent oversights tainting an asset for life, as demonstrated in example 9 of LCR 2021/2. In this example, Trang, a plumber, renovated the bathroom and kitchen of

a rental property owned by her SMSF without charging an arm's length fee. This resulted in all of the future net rental income and any net capital gain in respect of a disposal of that property in the future being taxed as NALI.

In contrast, in example 1 of LCR 2021/2, Armin sells a commercial property to his SMSF for \$200,000 which has a market value of \$800,000. While NALI applies to all future net rental income and any net capital gain, the SMSF trustee obtains a market value (substituted) cost base under s 112-20 ITAA97 of \$800,000 when determining his fund's future net capital gain.

It should be noted that the CGT market value substitution rules for the amount of capital proceeds apply differently in a superannuation context. In particular, s 116-30(2C) ITAA97 does not limit the capital proceeds from a CGT event to the market value of a CGT asset in a superannuation fund context. This rule was examined in *Kilgour v FCT*⁴ in a non-superannuation context but the parties were deemed to be dealing at arm's length. Section 116-30(2C) results in a superannuation fund being taxed on capital proceeds that exceed the market value of the CGT asset.

Conclusion

The NALI provisions can be applied to a wide range of situations. The result of such a broad application is the potential for significantly disproportionate outcomes for SMSFs, particularly where the ordinary NALI provisions under s 295-550(1) are enlivened in respect of a particular SMSF asset. When enlivened, SMSFs that incur nil or lower expenses in relation to a particular SMSF asset can result in a 45% tax rate on all of that asset's ordinary net income, as well as on any net capital gain when the asset is finally realised.

Advisers naturally need to be careful when advising clients of the risks and downsides of getting NALI or NALE wrong. A number of professional bodies are seeking revised provisions to make NALI fairer and more practical. It is hoped that the provisions will be revised soon to provide more practical and appropriate law.

NALI and NALE: parts 2 and 3

We have examined a number of aspects of NALI in part 1 of this article. Part 2 will cover dividend NALI and fixed entitlement NALI. Part 3 will examine general NALE and other NALI interactions (ie CGT and contributions). Please keep a look out for the next part!

Daniel Butler, CTA
Director
DBA Lawyers

Fraser Stead
Lawyer
DBA Lawyers

References

- 1 *The Trustee for MH Ghali Superannuation Fund and FCT* [2012] AATA 527 at [48].
- 2 [2005] FCA 1121.
- 3 [1995] FCA 1217.
- 4 [2024] FCA 687.

Successful Succession

by Tim Donlan, ATI, Donlan Lawyers

Powers of attorney and foreign jurisdictions

Having a power of attorney recognised in another state or territory might seem simple enough. In reality, that may not always be the case.

In an ageing population, many advisers assist their clients with estate planning arrangements that include appointing an attorney under an enduring power of attorney document so as to handle a person's legal and financial affairs in the event of that person's loss of mental capacity.

It is well recognised that an attorney sits in a fiduciary role. As an agent of the principal or "donor", the attorney must at general law act in good faith in the best interests of the donor.

The power of attorney legislation in each state or territory of Australia allows for the statutory establishment of an "enduring" power of attorney.¹ The purpose of the legislation in all jurisdictions was to alter the common law position that an attorney's power ceases in the event of the loss of capacity of the donor.

In Western Australia, for example, the Minister for Health, Mr Wilson, in the second reading speech in the Assembly on 6 June 1990 (*Hansard*, p 1916) stated:

"This Government recognises the predicament that many elderly, mentally ill and intellectually disabled people are in, and we are providing a mechanism for assisting them in a manner which will least restrict their civil liberties. It includes legislative reform which will improve their lives and give them hope and direction, which is long overdue. Although this Bill has emanated from agencies concerned with the intellectually handicapped it can, and should, be extended to all persons who can benefit from it. Accordingly, I commend this very worthwhile Bill to the House."

With the common legislative intention in all jurisdictions being to enable an attorney to "take over" the affairs of the affected person by way of substituted decision-making power or otherwise to enable an attorney's general power to "endure" beyond a principle's loss of capacity, it might be assumed that the legislative provisions might, for the sake of efficiency, be mirrored across all jurisdictions.

That is not necessarily the case. While all states and territories do provide for mutual recognition of interstate powers of attorney,² difficulties might arise due to the differences in the respective recognition provisions themselves, but also in their interaction with the different statutory requirements of each jurisdiction regarding the creation and validity of enduring powers of attorney.

While there are consistencies, there are many important differences in the creation requirements across jurisdictions.

The mutual recognition provisions in New South Wales, Victoria, Tasmania, Queensland, the Northern Territory and the Australian Capital Territory are relatively simple and provide, for example, in Queensland,³ that:

"Recognition of enduring power of attorney made in other jurisdictions

If an enduring power of attorney is made in another jurisdiction and complies with the requirements in the other jurisdiction, then, to the extent the powers it gives could validly have been given by an enduring power of attorney made under this Act, the enduring power of attorney must be treated as if it were an enduring power of attorney made under, and in compliance with, this Act."

Those recognition provisions largely mean that, if an enduring power made by a donor or principle in another state is valid in that jurisdiction, it will be valid in those other states. While that may seem both practical and simple, many readers will be familiar with the frustration that might be visited on an attorney who may, for example, attend at the bank in one of those jurisdictions with a "foreign" or interstate power of attorney only to be told that it cannot be recognised or that the outcome of recognition will need to await advice from the organisation's legal department before it can be recognised and operated.⁴ That will never be ideal in circumstances where time is of the essence for reasons such as the donor's loss of capacity prior to settlement of the sale or purchase of real property.

It should also be noted that, other than the Queensland power of attorney provisions allowing for recognition of a New Zealand power of attorney,⁵ none of the mutual recognition provisions in the Australian states and territories allow any mechanism for recognition of overseas power of attorney documents. That would involve an entirely different process, including the use of notary publics and is outside the scope of this article.⁶

In South Australia, the recognition of interstate power of attorney provisions state that evidence that a power of attorney has been validly created in an interstate jurisdiction will be satisfied if a certificate to that effect is provided by an appropriately qualified interstate legal practitioner.⁷

While that adds a layer of compliance, in order to have an enduring power that has been created interstate recognised as valid (and to avoid potential consequential associated costs and delays), it does provide some safeguard to any

person or organisation when relying on that certification, and reduces confusion and delay.

In Western Australia, however, the interstate recognition provisions found in s 104A of the *Guardianship and Administration Act 1990* (GA Act) are far more onerous. For the recognition of an interstate power of attorney, the provisions require the approval of the State Administrative Tribunal of Western Australia. The costs and delay of that process might be considered undesirable from the perspective of both the donor and the attorney.

A recent case that was heard in the Western Australian State Administrative Tribunal, known as *MS*,⁸ addressed the issue of the recognition of an enduring power of attorney created in NSW under the *Powers of Attorney Act 2003* (NSW).

In that case, MS appointed his son PA as his attorney by a power of attorney document that had been made in NSW in 2008. The NSW power of attorney was created in the prescribed form and complied with the NSW formal requirements.⁹ Those formal requirements included that:

- “(a) an instrument creates an enduring power of attorney if:
- (i) it is expressed to be given with the intention that it will continue to be effective even if the person making the appointment (the donor) loses capacity after the instrument is executed;
 - (ii) it is witnessed by a prescribed person which includes an Australian legal practitioner; and
 - (iii) it is endorsed with a certificate made by the witness stating that:
 1. the witness has explained the effect of the instrument to the donor before it was signed;
 2. the donor appeared to understand the effect of the power of attorney;
 3. the witness is a prescribed witness, who is not an attorney under the power of attorney and they witnessed the donor sign the power of attorney; and
 4. it is signed by the appointed attorney.”

The prescribed form on which the subject power of attorney was made by MS included, in cl 3, five options for the circumstances in which the power of attorney would operate. The first four options had been crossed out in the power of attorney. The fifth option was stated, in the form, to be “other”. In the power of attorney, the handwritten words “If and when I don’t have capacity to make rational decisions as certified by a medical practitioner” appear next to the word “other”.

Common form power of attorney documents are often an “all or nothing” type document, that is, they are often expressed as being operative only in the event of one’s “loss of mental capacity” or similar. The condition that MS did not have capacity to “make *rational* decisions” added another layer of complexity in determining the validity of the operation of the power of attorney.

MS was aged in his 90s at the time of the proceedings. He had made the power of attorney while aged in his 70s. It was accepted, the power of attorney being created on the prescribed form and certified with the required statements and witnessed by a solicitor, that MS had the requisite capacity to make the power of attorney when he did.

The reason for the application by PA was that PA wanted to invest MS’s money with the Perth Mint. He could not do so without the tribunal declaring for the recognition of the power of attorney in Western Australia. PA must have really believed in that investment because he made the application to the State Administrative Tribunal, which was dismissed at first instance by a single tribunal member before he successfully appealed that decision to have the power of attorney recognised in Western Australia.

PA applied to the tribunal for an order under s 104A GA Act that the power of attorney be recognised as an enduring power of attorney for the purposes of Pt 9 GA Act. Section 104A(2) GA Act provides that:

- “Where the State Administrative Tribunal is satisfied, on an application made under subsection (1), that –
- (a) a power of attorney created under the laws of another State, Territory or country corresponds sufficiently, in form and effect, to a power of attorney created under section 104; and
 - (b) it is appropriate to do so;

the Tribunal may make an order recognising that power of attorney under an enduring power of attorney for the purposes of [Pt 9 GA Act].”

The issue for the tribunal to determine (which it did by way of a fresh hearing *de novo* on the appeal) were:

- Was the power of attorney validly created under the laws of NSW?
- Did the power of attorney correspond sufficiently in form and effect to a power of attorney created under s 104 GA Act?

And if “yes” to the above:

- Was it appropriate to make an order recognising the power of attorney for the purposes of Pt 9 GA Act?

Fortunately, the tribunal accepted the evidence of various medical practitioners that MS was not capable of making “rational” decisions. It could easily have been, but was not, drawn into the potentially subjective considerations of rationality. Once that condition was established by medical evidence, in addition to the formal requirements of the NSW power of attorney being satisfied, it was accepted that the power of attorney was validly created under the laws of NSW.

The next question for the tribunal to determine was: did the power of attorney correspond sufficiently, in form and effect, to a power of attorney created under s 104 GA Act?

The tribunal was accepting that the difference in the number of witnesses required for the creation of a power of attorney made in NSW and Western Australia did not

prevent the NSW power of attorney “corresponding” sufficiently to a power of attorney created in Western Australia under the GA Act, nor did the issue of the number of attorneys it appointed.¹⁰

The tribunal did carefully consider whether there was an inconsistency between the provisions of MS’s NSW power of attorney which respectively provided:

- cl 2: that the power of attorney is given with the intention that it will continue to be effective if MS lacks capacity through loss of mental capacity after its execution; and
- cl 3: that the power of attorney operates if and when MS does not have capacity to make rational decisions as certified by a medical practitioner.

Unlike the Senior Member at first instance who dismissed the application on the basis of an inconsistency between the two provisions, the tribunal stated on appeal that:

“44. We are satisfied that there is no inconsistency between cl 2 and cl 3.

45. In our view, the effect of cl 2 is to express MS’s intention that the power of attorney continues to be effective to appoint PA as MS’s attorney despite MS’s later incapacity. Section 21(1) of the NSW Act, being the effective equivalent of s 105 of the GA Act, then ensures that the power of attorney, having been created in compliance with s 19(1) of the NSW Act, survives MS’s incapacity.

46. In our view, the effect of cl 3 is to identify the date on which the power of attorney will take force, that is when the authority conferred on PA may be exercised. Clause 3 makes the exercise by PA of that authority conditional upon PA obtaining confirmation of MS’s lack of capacity, in the form of a medical certificate.”

The tribunal found that the power of attorney corresponded sufficiently, in form and effect, to a power created under s 104 GA Act.

The last issue that the tribunal was called on to consider was whether it was appropriate to recognise the power of attorney under Western Australian law pursuant to the GA Act. It found that the application was for a legitimate purpose, being to preserve the assets of MS in an investment that was only available in Western Australia. There was no evidence to the contrary submitted to the tribunal. It made the orders recognising the NSW power of attorney.

Summary

While the outcome for MS was favourable, no doubt PA would have preferred to avoid the costs and delay associated with the tribunal process.

Some takeaways for donors of an enduring power of attorney might be:

1. consider where it is likely that future investments could be made and, if relevant, create a power of attorney made specifically under the applicable legislation in that jurisdiction; and

2. avoid the use of conditions of operation in powers of attorney that might lead to inconsistencies or subjective assessment such as the ability to make “rational” decisions.

Ultimately, in an ageing population, legislative reform is desirable in order to provide consistency in power of attorney documentation across all Australian jurisdictions as this would reduce costs and lead to greater certainty, simplicity and efficiency for attorneys to act on behalf of their donors.

Potential and actual financial abuse by attorneys might be better addressed in other ways.

Tim Donlan, ATI
Principal
Donlan Lawyers

References

- 1 *Powers of Attorney Act 2003* (NSW); *Powers of Attorney Act 2014* (Vic); *Powers of Attorney Act 1998* (Qld); *Powers of Attorney and Agency Act 1984* (SA); *Guardianship and Administration Act 1990* (WA); *Powers of Attorney Act 2000* (Tas); *Powers of Attorney Act 1980* (NT); *Powers of Attorney Act 2006* (ACT).
- 2 S 25 of the *Powers of Attorney Act 2003* (NSW); s 138 of the *Powers of Attorney Act 2014* (Vic); s 34 of the *Powers of Attorney Act 1998* (Qld); s 14 of the *Powers of Attorney and Agency Act 1984* (SA); s 104A of the *Guardianship and Administration Act 1990* (WA); s 42 of the *Powers of Attorney Act 2000* (Tas); s 6A of the *Powers of Attorney Act 1980* (NT); s 89 of the *Powers of Attorney Act 2006* (ACT).
- 3 S 34 of the *Powers of Attorney Act 1998* (Qld).
- 4 For example, many readers will be familiar with the sentiment of the actual law and the law of the banks, by virtue of their own policies, not always being one and the same.
- 5 Sch 3 of the *Powers of Attorney Act 1998* (Qld) includes New Zealand in the definition of “jurisdiction” with respect to s 34.
- 6 A foreign power of attorney may need a notary public and apostille process and involve a consular certification. Not all countries will recognise an Australian power of attorney document and vice versa.
- 7 S 14(4) of the *Powers of Attorney and Agency Act 1984* (SA).
- 8 Known as MS [2025] WASAT 49.
- 9 S 8 of the *Powers of Attorney Act 2003* (NSW); s 5 and Sch 2 of the *Powers of Attorney Regulations 2024* (NSW).
- 10 Section 102 GA Act provides that there be two attorneys, whether they be jointly or jointly and severally appointed. That provision has been held in prior cases (for example, *Ricetti v Registrar of Titles* [2000] WASC 98 at [11] per Miller J) to mean that no more than two attorneys can be appointed under the GA Act. The tribunal found that, in MS’s case, the appointment of PA as the attorney (with his daughter as substitute attorney) satisfied the statutory requirement.

Events Calendar

Upcoming months

<p>JULY</p> <p>24–25</p> <p>Thu–Fri</p>	<p>VIC</p> <p>Yarra Valley Tax Retreat</p>		<p>12 CPD hours</p>
<p>JULY</p> <p>24–25</p> <p>Thu–Fri</p>	<p>WA</p> <p>WA Tax Retreat</p>		<p>10 CPD hours</p>
<p>JULY/AUGUST</p> <p>30–1</p> <p>Wed–Fri</p>	<p>TAS</p> <p>State Taxes Convention</p>		<p>12 CPD hours</p>
<p>AUGUST</p> <p>6–8</p> <p>Wed–Fri</p>	<p>SA</p> <p>Barossa Convention</p>		<p>12 CPD hours</p>
<p>AUGUST</p> <p>14</p> <p>Thu</p>	<p>NSW Online</p> <p>Transfer Pricing Masterclass</p>		<p>7 CPD hours</p>

For more information on upcoming events, visit taxinstitute.com.au/events.

Index

A	Evidence	Tax agent registration
Administrative Review Tribunal	characterisation of transactions 20	termination, stay of decisions 7, 8
confidentiality orders refused 1	employment contract 12–14	Tax compliance
Amended assessments	F	Tax education
tax evasion 8, 9	False and misleading statements	ATL009 Corporate Tax Dux Award,
tax uncertainty 20	tax shortfall penalties 21	study period 2, 2024
Arm's length	Family trust distribution tax	- Clara Tio 15
definition 44	tax professionals, risks 2	Tax evasion
Assets	Financial advice fees	amended assessments 8, 9
SMSFs, valuation 36, 37	superannuation funds 7	Tax liabilities
Auditors	Fringe benefits tax	self-assessment 4, 5
SMSFs, compliance 36, 38	discretionary trust, non-monetary	vulnerable persons 17
Australian Capital Territory	benefits 11–14	Tax practitioners
powers of attorney, foreign	G	ATO scam warning 6, 7
jurisdictions 46	General interest charge	Tax Practitioners Board
Australian Securities and	changes from 1 July 2025 4, 5	client identification obligation 6, 7
Investments Commission	remissions 5	confidentiality orders 1
SMSF auditor registration 38	Genuine mistakes	tax agent registration
Australian Taxation Office	family trust distribution tax 2	termination 7, 8
practical compliance	Giving funds	Tax professionals
guidelines 23, 24	new rules, Australian charities 6	family trust distribution tax, risks 2
scam warning 6, 7	H	Tax reform
SMSF auditors, compliance	High-risk arrangements	family trust distribution tax 2
approach 36, 38	SMSF auditors 38	Tax schemes
superannuation	tax uncertainty 22–24	tax shortfall penalties 21
- asset valuation guidelines 37	I	Tax shortfall penalties 20, 21
- financial advice fees 7	In respect of	Tax uncertainty
- illegal early access 34, 35	definition 11–14	assessing 21–24
B	Income tax withholding obligations	factors giving rise to 19, 20
Binding death benefit nominations	superannuation death benefits 32	risks 20, 21
capacity of member to make 27, 28	Intentional disregard	tax advisers 19–24
power to renew 26	tax shortfall penalties 21	Taxpayer alerts
providing to all trustees 28	Interdependency relationships	tax uncertainty 23
superannuation 26–28, 30	death benefit dependants 32	The Tax Institute
C	Interest charges	Incoming Government Brief 2
Capacity	non-deductibility 4, 5	new governance structure 3
ending power of attorney 46–48	L	Timing issues
powers of court to vary trusts 40	Leases	tax uncertainty 20
to make BDBN 27, 28	related party arrangements,	Total superannuation balance
Car benefits	SMSFs 36	above \$3m, new tax on
non-monetary benefits, FBT 11–14	Listed securities	earnings 34–39
Charities	ATO valuation guidelines 37	Trustees
new giving fund rules 6	Loans	obligations 40
Children	"in respect of" employment of	powers of court to vary trusts 40, 41
death benefit dependants 32	directors 13	SMSFs, structural review 29
trust beneficiaries, powers of	Lump sum benefits	Trusts
court 40, 41	taxation 32	family trust distribution tax 2
Client identification obligations	M	powers of court to vary 40, 41
tax practitioners 6, 7	Market value	U
Code of Professional Conduct	ATO definition 36	Unit trusts
potential breaches 23	Member Spotlight	ATO valuation guidelines 37
Compliance resources	Annemarie Wilmore 17	Unlisted securities
practical compliance	Minors – see Children	ATO valuation guidelines 37
guidelines 23, 24	Motor vehicles	V
Cost-of-living pressures 4	non-monetary benefits, FBT 11–14	Valuation
D	N	SMSF assets 36, 37
Death benefits – see Superannuation	New South Wales	Victoria
death benefits	powers of attorney, foreign	powers of attorney, foreign
Deductibility of expenditure	jurisdictions 46	jurisdictions 46
financial advice fees 7	New Zealand	W
shortfall interest charge/general	powers of attorney, foreign	Western Australia
interest charge 4, 5	jurisdictions 46	powers of attorney, foreign
Directors	Non-arm's length expenditure	jurisdictions 47, 48
non-monetary benefits, FBT 11–14	SMSFs 35, 36	Withholding tax
whether employees 12–14	Non-arm's length income provisions	income tax, death benefits 32
Discretionary trusts	definition 35	PAYG, financial advice fees 7
non-monetary benefits of	SMSFs	Legislation
directors, FBT 11–14	- background 43, 44	A New Tax System (Tax
E	- disproportionate tax 43–45	Administration) Bill (No. 2) 2000 24
Employees	- legislative overview 44	Administrative Appeals Tribunal
car benefits, FBT 11–14	Northern Territory	Act 1975
Employment	powers of attorney, foreign	s 41(2) 7
evidence of 12–14	jurisdictions 46	Administrative Decisions (Judicial
Enduring power of attorney	P	Review) Act 1977 5
foreign jurisdictions 46–48	Pay as you go withholding obligations	Administrative Review Tribunal
Errors	financial advice fees 7	Act 2024
tax professionals 2	Penalties	s 32(2) 7
Evasion	tax shortfalls 20, 21	Corporations Act 2001
amended assessments 8, 9	Pension benefits	s 766B 7
	taxation 32	Disability Services Act 1986
	Philanthropy	s 8(1) 33
	new giving fund rules 6	Family Law Act 1975 30
	Power of attorney	Fringe Benefits Tax Assessment
	foreign jurisdictions 46–48	Act 1986
	Practical compliance guidelines	Pt XII 14
	ATO resources 23, 24	
	Property settlement	
	powers of court to vary trusts 40, 41	
	Public interest	
	tax agent registration	
	termination 7, 8	
	Q	
	Queensland	
	powers of attorney, foreign	
	jurisdictions 46	
	R	
	Real property	
	ATO valuation guidelines 37	
	Reasonable care	
	lack of 21	
	Reasonably arguable positions	
	tax shortfall penalties 21	
	tax uncertainty 21, 22	
	Recklessness	
	tax shortfall penalties 21	
	Related party lease arrangements	
	SMSFs, business real property 36	
	Reportable tax positions	
	tax uncertainty 21, 22	
	Residency	
	amended assessments, evasion 8, 9	
	S	
	Scams	
	ATO warning 6, 7	
	Scheme	
	definition 44	
	Self-managed superannuation funds	
	assets, valuation 36, 37	
	auditor compliance 36, 38	
	BDBNs 26–28, 30	
	illegal early access 34, 35	
	structural review after member's	
	death 29	
	superannuation rule changes 34–39	
	Shortfall interest charge	
	changes from 1 July 2025 4, 5	
	South Australia	
	powers of attorney, foreign	
	jurisdictions 46	
	Spouses	
	death benefit dependants 32	
	Stay applications	
	tax agent registration	
	termination 7, 8	
	Succession and estate planning	
	notional estate rules 28	
	powers of attorney, foreign	
	jurisdictions 46–48	
	superannuation and	
	BDBNs 26–28, 30	
	superannuation issues 26–33	
	Superannuation	
	balances above \$3m, 15% tax 34–39	
	BDBNs 26–28, 30	
	illegal early access 34, 35	
	non-arm's length income,	
	definition 35	
	SMSF rule changes 34–39	
	succession and estate	
	planning 26–33	
	Superannuation death benefits	
	death bed withdrawals 31	
	dependants 32	
	income tax withholding 32	
	notional estate rules 28	
	superannuation 26–33	
	Superannuation funds	
	financial advice fees 7	
	T	
	Tasmania	
	powers of attorney, foreign	
	jurisdictions 46	
	Tax advisers	
	tax uncertainty 19–24	

§ 136(1)	11, 13
§ 137(1)	13
§ 137(1)(a)	13
§ 137(1)(b)	13
§ 137(1)(c)(i)	13
§ 137(1)(d)	13
§ 138B	14
Guardianship and Administration	
Act 1990 (WA)	48
Pt 9	47
§ 102	48
§ 104	47, 48
§ 104A	47, 48
§ 104A(2)	47
§ 105	48
Income Tax Assessment (1997 Act)	
Regulations 2021	
reg 302-200.01	32
reg 302-200.02	32
Income Tax Rates Act 1986	43
ITAA36	
Pt IVA	20
§ 170	8
§ 273	43
ITAA97	
Pt 3-1	20
Pt 3-30	43
Subdiv 302-B	33
Subdiv 302-C	33
§ 6-5	19, 20
§ 8-1	19
§ 25-5	4
§ 25-5(1)	4
§ 26-5	4
§ 26-5(1)(a)	4
§ 112-20	45
§ 116-30(2C)	45
§ 295-490(1)	7
§ 295-545	43
§ 295-545(2A)	43
§ 295-545(2A)(b)	43
§ 295-550	43
§ 295-550(1)	43-45
§ 295-550(1)(a)	39
§ 295-550(1)(b)	39
§ 295-550(1)(c)	39
§ 295-550(2)	43
§ 295-550(3)	43
§ 295-550(4)	43
§ 295-550(5)	43
§ 295-550(8)	39, 43, 44
§ 295-550(9)	39, 43, 44
§ 302-195	33
§ 302-200	33
§ 307-10(e)	7
§ 995-1	44
Powers of Attorney Act 1980 (NT)	48
§ 6A	48
Powers of Attorney Act 1998 (Qld)	48
§ 34	48
Sch 3	48
Powers of Attorney Act 2000 (Tas)	48
§ 42	48
Powers of Attorney Act 2003 (NSW)	47
§ 8	48
§ 21(1)	47
§ 25	48
Powers of Attorney Act 2006 (ACT)	48
§ 89	48
Powers of Attorney Act 2014 (Vic)	48
§ 138	48
Powers of Attorney and Agency Act 1984 (SA)	48
§ 14	48
§ 14(4)	48
Powers of Attorney Regulations 2024 (NSW)	
§ 5	48
Sch 2	48
Superannuation Industry (Supervision) Act 1993	7, 36
§ 10(1)	33
§ 10A	33
§ 17A	26, 27, 29
§ 17A(3)	33
§ 17A(4)	33
§ 17B	26
§ 17B(2)	27
§ 35C	39
§ 66	39
§ 71(1)(g)	39
§ 82	39
§ 82 to 85	39
§ 83	39
§ 109	39
Superannuation Industry (Supervision) Regulations 1994	36
reg 1.04AAAA	30
reg 6.17A	33
reg 6.21	33
reg 6.22	33
reg 8.02B	39
reg 13.18AA(7)	39
Tax Agent Services Act 2009	4, 23
Taxation Administration Act 1953	
Pt IIA	4
§ 14ZS	5
Sch 1	
- Pt 4-25	21
- Div 284	21
- Div 290	23
- § 12-35	13
- § 12-40	13
- § 280-50	4
- § 280-103	21
- § 284-15	22
- § 284-75(1)	21
- § 284-75(2)	21
- § 284-90(1)	21
- § 285-145	21
Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2019	43
Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023	34
Div 296	34
Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023	44
Treasury Laws Amendment (Tax Incentives and Integrity) Act 2025	4
Sch 2	4
Trustee Act 1958 (Vic)	40
§ 63A	40, 41
§ 63A(1)(d)	40
Trustees Act 1962 (WA)	
§ 90	41
Variation of Trusts Act 1958 (UK)	40
Rulings and other materials	
Accounting Professional and Ethical Standards Board	
APES 110	39
Australian Taxation Office	
LCR 2021/2	36, 44, 45
MT 2008/1	21
MT 2008/2	22, 23
PBR 1052090528673	31
PBR 1052097327812	31
PCG 2016/5	43
PCG 2020/5	43, 44
PCG 2025/1	7
PS LA 2006/8	5
PS LA 2008/5	23
PS LA 2011/12	5
Cases	
A	
APRA v Derstepanian [2005] FCA 1121	44
B	
Benz v Armstrong [2022] NSWSC 534	28
BQKD and FCT [2024] AATA 1796	14
C	
Cameron Brae Pty Ltd v FCT [2007] FCAFC 135	22
Carter and Tax Practitioners Board [2025] ARTA 632	1
D	
Denver Chemical Manufacturing Co v FCT (NSW) [1949] HCA 25	9
Donovan v Donovan [2009] QSC 26	30
Dryandra Investments Pty Ltd v Hardie [2024] WASC 248	41
G	
Gainer Associates Pty Ltd, In the matter of [2024] NSWSC 1138	26
Granby Pty Ltd v FCT [1995] FCA 1217	44
H	
Hill v Zuda Pty Ltd [2021] WASC 59	30
Hill v Zuda Pty Ltd [2022] HCA 21	30
Holmden's Settlement Trusts, Re [1968] AC 685	41
HWFx and FCT [2025] ARTA 680	9
I	
Ioppolo & Hesford v Conti [2013] WASC 389	30
J	
J & G Knowles and Associates Pty Ltd v FCT [2000] FCA 196	13, 14
K	
Katz v Grossman [2005] NSWSC 934	30
Kilgour v FCT [2024] FCA 687	45
Kirtlan and FCT [2025] ARTA 539	8
L	
Lunn and Tax Practitioners Board [2025] ARTA 697	7
M	
Macquarie Bank Ltd v FCT [2013] FCAFC 119	24
McIntosh v McIntosh [2014] QSC 99	30
McNee v Lachlan McNee Family Maintenance Pty Ltd [2020] VSC 273	40, 41
MS [2025] WASAT 49	45
Munro v Munro [2015] QSC 61	30
R	
Rentis Pty Ltd, Re [2023] QSC 252	26
Ruhamah Property Co Ltd v FCT [1928] HCA 22	20
S	
Scott and Australian Securities and Investments Commission, Re [2009] AATA 798	8
SEPL Pty Ltd as trustee of the SFT Trust; FCT v [2025] FCA 581	11
T	
Trustee for MH Ghali Superannuation Fund and FCT [2012] AATA 527	45
V	
van Camp v Bellahealth Pty Ltd [2024] NSWSC 7	27
W	
Walstern v FCT [2003] FCA 1428	22
Williams v Williams [2023] QSC 90	28
Wooster v Morris [2013] VSC 594	30
Authors	
B	
Butler, D	
Superannuation	
- NALI and NALE – NALI still needs fixing: part 1	43
C	
Collins, B	
Understanding and managing tax uncertainty: part 1	19
D	
Donlan, T	
Successful Succession	
- Powers of attorney and foreign jurisdictions	46
G	
Grurge, A	
Understanding and managing tax uncertainty: part 1	19
J	
Jackson, C	
Estate planning	26
K	
Krishnan, S	
Associate's Report	
- Changes to GIC/SIC from 1 July 2025	4
M	
Monotti, W	
A Matter of Trusts	
- The powers of the court in varying trusts	40
S	
Sandow, T	
President's Report	
- Challenges in trusts	2
Schaefer, S	
Estate planning	26
Super and SMSFs: where are the goal posts?	34
Stead, F	
Superannuation	
- NALI and NALE – NALI still needs fixing: part 1	43
T	
TaxCounsel Pty Ltd	
Tax News – what happened in tax?	
- June 2025	6
Tax Tips	
- FBT issues	11
Treath, S	
CEO's Report	
- Changes for a sustainable future	3
W	
Wilmore, A	
Member Spotlight	17

Giving back to the profession

The Tax Institute would like to thank the following presenters from our June CPD sessions. All of our presenters are volunteers, and we recognise the time that they have taken to prepare for the paper and/or presentation, and greatly appreciate their contribution to educating tax professionals around Australia.

Danish Aleemullah
Melanie Baker KC
Aaron Bennett
David Bradbury
Neil Brydges, CTA
Richard Buchanan, CTA
Chloe Burnett SC, ATI
Eugene Chan
Kaihui Chong
Matthew Cridland, CTA
Lisa Cusano
Stephen Dodshon
Danielle Donovan
Michael Doolan, FTI
Tracey Dunn
Sian Fenner
Ross Follone
Matt Gould
Susan Grennan
Trinh Hua
Laura Hussay, ATI
Michael Ingersoll
Aparna Koneru
Stuart Landsberg
Denis Larkin, FTI
Ryan Leslie

Kaitilin Lowdon
Alia Lum, CTA
Ben Major
Landon McGrew
Matthew McKee, FTI
Chris Miller
William Moore
Tamara Philips
Vanessa Poon
Greg Protektor
Luke Raams
Peter Radlovacki, ATI
Priscilla Ratilal
Nadine Redford
Greg Russo
Kane Sim
Sarah Stevens
Jennifer Ta
Denise Tan, FTI
Linda Tapiolas, CTA
Jayde Thompson
John Walker, CTA
Rob Warnock, CTA
Mark West, CTA
Bradley White
Alex Whitney, CTA

Contacts

National Council

Chair

Clare Mazzetti

President

Tim Sandow, CTA

Vice President

Paul Banister, CTA

National Councillors

Todd Want, CTA

Leanne Connor, CTA

Ian Heywood, CTA

Modiesha Stephens, CTA

Rae Ni Corraidh, CTA

National Office

CEO: Scott Treatt, CTA

Level 21, 60 Margaret Street

Sydney, NSW 2000

T 1300 829 338

E tti@taxinstitute.com.au

State Offices

New South Wales and ACT

Chair: Alison Stevenson, CTA

Vice Chair: Kristie Schubert, CTA

Level 21, 60 Margaret Street

Sydney, NSW 2000

T 02 8223 0000

E nsw@taxinstitute.com.au

Victoria

Chair: Dioni Perera, FTI

Vice Chair: Frank Hinoporos, CTA

Level 3, 530 Collins Street

Melbourne, VIC 3000

T 03 9603 2000

E vic@taxinstitute.com.au

Queensland

Chair: Kim Reynolds, CTA

Vice Chair: John Middleton, CTA

310 Edward Street

Brisbane, QLD 4000

T 07 3225 5200

E qld@taxinstitute.com.au

Western Australia

Chair: Ross Forrester, CTA

Vice Chair: Billy-Jo Famlonga, FTI

152 St Georges Terrace

Perth, WA 6000

T 08 6165 6600

E wa@taxinstitute.com.au

South Australia and Northern Territory

Chair: George Hodson, CTA

75-77 Dale Street

Port Adelaide, SA 5015

T 1300 829 338

E sa@taxinstitute.com.au

Tasmania

Chair: Simon Clark, CTA

Vice Chair: Ron Jorgensen, CTA

E tas@taxinstitute.com.au

Taxation *in* Australia

ISSN 0494-8343

Publishing House

The Tax Institute
ABN 45 008 392 372

Level 21, 60 Margaret Street
Sydney, NSW 2000

Editorial Board (appointed September 2021)

Michael Walpole, CTA, Professor,
UNSW (Chair)

David W Marks KC, CTA, Queensland Bar

Helen Hodgson, CTA, Professor,
Curtin University

Paul O'Donnell, CTA, Principal, Deloitte

Content Marketing Executive

Kelley Wallace

Editorial Adviser

Professor Bob Deutsch, CTA

Managing Editor

Deborah Powell

Graphic Designers

Claudio Palma, Mei Lam and Jack Miller

Typesetter

Midland Typesetters, Australia

Advertising

Business Relationship Manager

02 8223 0003

© 2025 The Tax Institute

This journal is copyright. Apart from any fair dealing for the purpose of private study, research, criticism or review, as permitted under the Copyright Act, no part may be reproduced by any process without written permission.

Disclaimer

Unless otherwise stated, the opinions published in this journal do not express the official opinion of The Tax Institute. The Tax Institute accepts no responsibility for accuracy of information contained herein. Readers should rely on their own inquiries before making decisions that touch on their own interests.

