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Taxation in Australia

Administering estates without probate: catch-22!

Kate Roff

Third-party data governance

Rob Leonard

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Invitation to write

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Tax News – at a glance

by TaxCounsel Pty Ltd

April – what happened in tax?

The following points highlight important federal tax developments that occurred during April 2026. A selection of the developments is considered in more detail in the "Tax News – the details" column on page 564 (at the item number indicated).

Closely held trusts: TFN reporting

An amending Bill (the Treasury Laws Amendment (Delivering an Efficient and Trusted Tax System) Bill 2026) which was introduced into parliament on 25 March 2026 contains amendments that will streamline how trustees of closely held trusts report beneficiary TFNs to the Commissioner. **See item 1.**

Draft foreign resident CGT amendments

On 10 April 2026, the Treasurer released draft legislation that will strengthen the foreign resident CGT regime and provide certainty for investors. **See item 2.**

FBT: cents per kilometre

The Commissioner has released a determination that sets out the rates to be applied on a cents per kilometre basis for calculating the taxable value of a fringe benefit arising from the private use of a motor vehicle other than a car for the FBT year commencing on 1 April 2026 (TD 2026/1). **See item 3.**

FBT: LAFHA reasonable amounts

The Commissioner has released a determination that sets out the amounts that he considers reasonable under s 31G of the *Fringe Benefits Tax Assessment Act 1986* (Cth) for food and drink expenses incurred by employees receiving a living-away-from-home allowance fringe benefit for the FBT year commencing on 1 April 2026 (TD 2026/2). **See item 4.**

Long-term construction contracts: ATO compliance approach

The Commissioner has released a draft practical compliance guideline which explains when the ATO will be more likely to have cause to apply compliance resources to consider the potential application of anti-avoidance provisions in the tax law (with specific emphasis on the general anti-avoidance provisions contained in Pt IVA of the *Income Tax Assessment Act 1936* (Cth)) to property development arrangements involving long-term construction contracts (PCG 2026/D2). **See item 5.**

TPB: AI and the Code of Professional Conduct

The Tax Practitioners Board has released a draft information sheet on the use of artificial intelligence and the Code of Professional Conduct for public consultation (TPB(I) D62/2026). **See item 6.**

Luxury motor vehicles: FBT

In a recent decision in a case that raised some fundamental FBT issues, a Full Federal Court (Perry, O'Callaghan and Thawley JJ) has unanimously allowed an appeal by the taxpayer from a decision of O'Sullivan J who had allowed an appeal by the Commissioner from a decision of the AAT (*SEPL Pty Ltd as trustee of the SFT Trust v FCT* [2026] FCAFC 36). **See item 7.**

Mere realisation decision affirmed

A Full Federal Court (O'Callaghan, Derrington and McEvoy JJ) has unanimously dismissed an appeal by the Commissioner from a decision of Wheelahan J at first instance in which Wheelahan J held that the activities of a land owner in relation to the development and sale of land that had been used for farming for many years did not go beyond the mere realisation of the land and, so, did not give rise to the derivation of assessable income (*FCT v Morton* [2026] FCAFC 31). **See item 8.**

Truck driver: meal expense deductions

The Federal Court (Colvin J) has dismissed an appeal by the Commissioner from a decision of the ART that allowed in full a long-haul truck driver's claim for a deduction for meal expenses calculated in accordance with TD 2020/5 (*FCT v Shaw* [2026] FCA 197). **See item 9.**

Chair appointments

The Treasurer, in a joint media release with the Assistant Treasurer, announced on 27 March 2026 that the government has appointed the Hon. David Bradbury as the part-time Chair and member of the Board of Taxation, and reappointed Mr Peter de Cure AM as the part-time Chair and member of the Tax Practitioners Board.

President's Report

by Tim Sandow, CTA

Maintaining trust amid legislative change

Ahead of the Federal Budget 2026, President Tim Sandow discusses the need for trust and confidence in the tax system.

The Federal Budget announcement is imminent, and I know we are all eagerly waiting to see what comes of it for the tax profession.

This year, there has been much talk about tax reform being a big-ticket item for this Budget. Scott has discussed in his report the Institute's views on reform in comparison to mere "change", so I won't delve too far into that. Instead, I'd like to consider the impact of legislative change on trust in our tax system.

The importance of trust in our system is well-illustrated by the recent speculation that the CGT discount, introduced in 1999 to account for the effect of inflation on investments, might be removed in the Budget and, further, that existing assets may not be exempt from its removal.

The intention here seems to be to begin to address the growing generational wealth divide in Australia, and create more equity, particularly for the housing market. This is an admirable goal that we can all agree is necessary and one that our tax system can play a pivotal role in. However, when implementing legislative change like this, both the practical knock-on effects and the long-term impact on trust in our tax system need to be considered.

In this case, there are two obvious opposing outcomes, neither of which are completely satisfactory. Either:

- the CGT discount is removed without having some mechanism to address inflation or without exempting existing investments. This may be unfair to those who made investment decisions based on following the law at the time. Had this legislative change been on the horizon at the time, they may not have made the same decisions; or
- the CGT discount is removed, exempting existing investments. This goes against the very objective of the change – it could deepen the generational wealth gap because it favours people who have already invested and disadvantages people who are still building themselves up to a point of making those long-term investments for their future.

There are, of course, plenty of different options in between those two, including partial grandfathering of existing investments. Like any other proposed legislative change, extensive consultation and consideration must go into how to implement change without creating unintended side effects.

One of those side effects is that introducing piecemeal legislative change without careful consideration of the knock-on effects and measures in place to address them may damage Australians' trust is our tax system.

Our tax system is based on self-reporting. That gives taxpayers a certain level of responsibility and calls for a high level of trust on both sides. Regulators need to trust that taxpayers, by and large, do their part and are honest and upfront in their affairs. But conversely, it's vital that taxpayers can trust that our tax system is fair, efficient and working as intended.

However well-meaning, legislative change to one area of the tax system, without corresponding changes elsewhere, often erodes that trust. That is why holistic reform is so important. If a taxpayer makes a decision for their finances based on complying with current legislation, future legislative change should not punish that decision. Equally, our tax system should work to create an equitable, fair society, and should have the flexibility to adapt to meet that goal.

In a tax system as complex as ours, comprehensive consideration must be given to the practical impacts of legislative change and to what such change signals to taxpayers about how our system works and who it is there to serve.

I hope that, regardless of what measures are introduced, this kind of consideration for the ongoing trust, confidence and transparency between the tax system and taxpayers is what we see in the Federal Budget announcement.

CEO's Report

by Scott Treatt, CTA

Gaining momentum for true tax reform

CEO Scott Treatt reflects on real tax reform ahead of the Federal Budget announcement.

Tax reform has been on our minds at The Tax Institute for many years. As a community of tax professionals working across the space, with every corner of the tax system, we are in a unique place to understand the impact of an outdated, patched-together system. Our members have long advocated for change in the tax system, whether around specific issues impacting their area of expertise or clients, or for the broader picture.

Well, when our members speak, we listen.

Our public tax reform conversation, beyond the regular schedule of consultation, submissions and advocacy, started in earnest in 2021, with the publication of our landmark report, the *Case for Change*. This report is, as media at the time love to point out, 287 pages of our detailed insights, ideas and potential paths around genuine, sweeping tax reform. Our members contributed heavily to the development of the report, and their insight has shaped our approach to tax reform ever since.

At the time of writing, we'd heard much about tax reform being a line item in this year's Federal Budget announcement. The general sentiment toward this also seemed to be along the lines of, "we'll believe it when we see it".

As we have always said, tinkering around the edges does not constitute reform. Changes to single parts of our tax law do not constitute reform. Various measures, including scrapping the CGT discount, winding back negative gearing, and the scheduled further income tax cuts have all been flagged. Regardless of the merits or flaws of any of these measures individually, unless they are accompanied by system-wide review and change, they are not only not reform, but may also lead to unintended outcomes.

Having said that, we can take heart in the fact that tax reform is squarely in the spotlight. Our tax system is increasingly recognised as one of the major levers we have to influence our economic development, productivity and society. I am glad that the profession, politicians and the public are having the tax reform conversation. It is now our job as an Institute to help shape that conversation in appropriate and impactful ways.

As our members, you are key to that work, just as you were in developing the *Case for Change* nearly six years ago. I encourage you to stay engaged and continue to add your voice as we pick up momentum for true reform.

A small update on the IPA Group opportunity

As you know, we are exploring the opportunity to join the IPA Group, as an avenue to better service delivery, bigger impact and a lasting legacy for our members. This is an exciting and important step towards a bright future for the Institute and for our profession.

Our members have been broadly supportive of the proposal, recognising the important opportunities for investment and sustainability that it creates. With that backing, we are in the final stages of reaching an agreement. I expect to have a substantial update for you very soon, so please keep an eye out for that.

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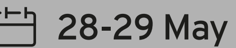 28-29 May 2026 CPD 12

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Tax Counsel's Report

by John Storey, FTI

Rethinking tax reform

Tax "reform" has come to mean higher taxes delivered through increasing complexity, uncertainty and compliance costs, rather than genuine simplification and improved system design.

Former Prime Minister John Howard, during a post-Budget breakfast speech in May 2014, is reported to have said: "When people hear the phrase tax reform, they immediately assume it means a tax cut for somebody else."

I am not sure that holds true today. When people hear the phrase "tax reform", they are more likely to assume that there will be a tax rise for somebody.

For example, take the signature tax "reform" of the current government: the introduction of Div 296 of the *Income Tax Assessment Act 1997* (Cth). This measure introduces, from 1 July 2026, a 15% tax on a portion of superannuation earnings for members with balances exceeding $3 million, and an additional 10% for balances exceeding $10 million. The government has referred to this measure as a "reform", a "modest change", "better targeting concessions" and "making the system fairer", but never as the introduction of a new tax or a tax increase.

So, when Treasurer Jim Chalmers says of the forthcoming 2026–27 Budget, "I'd be pretty happy if the headline out of the budget was that it was a 'tax reform budget'", many will understandably assume that taxes are going up for someone.

Investors in the spotlight

The likely taxpayers concerned will be investors, particularly investors in Australian real estate. The government has not formally endorsed the recent findings of a Senate inquiry into the 50% CGT discount, which was heavily critical of the discount. The majority report concluded that "there is evidence that the concessions provided by the capital gains tax discount, in combination with negative gearing, have skewed the ownership of housing away from owner-occupiers and towards investors".

Many media commentators are expecting changes to the 50% CGT discount, perhaps a reduction to 33%, and possible restrictions on negative gearing.

What tax reform should really mean

It is a shame that the term "tax reform" has become synonymous with tax cuts or tax increases. True tax reform is about far more than that.

A simpler and more efficient tax system creates a virtuous cycle: reducing economic drag and increasing potential tax receipts, so a smaller share of the economic pie needs to be collected to fund public services. By contrast, a complex and inefficient tax system creates a downward spiral, inhibiting growth and requiring an ever-larger share of the economy to be taxed to fund the same level of services.

There may be sensible policy reasons to limit the generosity of superannuation concessions, as intended by Div 296, or to revisit the tax treatment of property investors. However, whatever label one might give these changes, they cannot be described as a simplification of an already complex system.

Division 296 and the structure of superannuation

Despite the intention of targeting a relatively narrow cohort of wealthy superannuation investors, the final form of Div 296 is likely to dramatically increase compliance costs for almost all superannuation funds.

The fundamental difficulty is that increasing tax for certain individual members sits uncomfortably with the design of Australia's superannuation system. Contributions and earnings are taxed at the fund level at a flat concessional rate. Individual members are not directly assessed on a share of a fund's taxable income.

The first attempt to overcome this mismatch was to use movements in member balances as a proxy for earnings, an approach rightly criticised as taxing unrealised gains. Members could be taxed on increases in value that are never realised, creating fairness and liquidity concerns, particularly for self-managed superannuation funds invested in real property or other illiquid assets.

To address this criticism, the government changed approach and now requires funds to perform a modified taxable income calculation and attribute a portion of that income to high-balance members. Any fund with even one member with a balance above $3 million must undertake this calculation. Most large funds will be affected, as will a significant proportion of SMSFs.

This process is complex. In practical terms, many funds will need to prepare their tax return twice: once under existing rules, and again under modified rules. Compliance costs are likely to increase substantially, and these costs are unlikely to be borne only by the wealthy members ostensibly targeted.

Property tax changes and complexity

Any changes to the 50% CGT discount or negative gearing are, similarly, likely to be complex. We don't know exactly what the proposal will look like yet, but it is possible that it will contain some sort of transitional arrangement and other carve-outs. For example, it is possible that existing property investments will continue to benefit from the full 50% discount and/or negative gearing and the changes only affect new acquisitions. Grandfathering of this nature adds a lot of complexity to our tax system, as is evident from the fact that the rules regarding pre-CGT assets still represent a substantial portion of the CGT legislation some 40 years after its introduction.

There have also been proposals to limit the changes only to existing dwellings, not new properties (which raises an issue familiar to GST advisers as to whether renovations mean that a property has become "new" or not), or allowing the concessions for a limited number of properties per individual. Neither proposal is likely to be simple.

The hidden costs of complexity

Collecting any amount of tax is inevitably a drag on the economy to some extent, but such complexity greatly adds to it. If Australia's primary retirement investment vehicle (superannuation) is lumped with higher administrative charges, and decisions to invest in property requires complex advice, this is a hidden cost imposed on the community in addition to any tax raised.

If policymakers feel that certain segments of the community are not paying their fair share of tax, they would be well served complementing the introduction of complex integrity measures by introducing genuine tax reforms to simplify the system.

ABUMs and legislative uncertainty

The lowest of low hanging fruit in this regard is what The Tax Institute has called for in a recent media release – address the many longstanding ABUMs (announced but unenacted measures) that remain outstanding, and don't add to the list during the forthcoming 2026–27 Federal Budget.

It may be trite, but tax policymakers sometimes need a reminder that, under the Australian Constitution, any new tax measure only becomes enforceable at law once it has been passed by both houses of parliament and the Governor-General provides royal ascent. Australia is one of a handful of democracies that has a bicameral parliament where the upper house not only has the legal power to, but routinely does, vote down laws (the United States Senate is another). So the government of the day can announce whatever it likes, but until receiving a majority of the votes in the Australian Senate, it may or may not ever become law.

When governments make announcements with a certain application date, taxpayers and their advisers are in the predicament of not knowing if the measure will be enacted as announced, in some other form, or not at all. Australia's tax system is complex enough without having to consider various possible iterations of what it might be in the future.

Real-world consequences of uncertainty

This can have real, practical consequences for taxpayers and the broader economy. Take just one such measure listed in The Tax Institute's media release: the announcement during the 2020–21 Federal Budget to allow deductions for education and training expenses unrelated to an individual taxpayer's current employment.

Let's say Jane was a full-time hairdresser in 2020 and was planning on going to university to do a medical degree. On hearing the announcement, she speaks to her accountant who advises her that, if she waits to start her course until after the new law comes into effect, she might be able to claim a deduction for the costs of the course. Jane waits and two years pass by with no legislation in sight, until a new government is voted in. If she had kept waiting longer to see if the new government would accept or reject the proposal, one way or another, she'd still be waiting. If she had just started her medical degree in 2020, she'd nearly be finished.

What a real tax reform budget would look like

If the next Federal Budget is to deserve the label "tax reform budget", it must address complexity and uncertainty head-on. That means simplifying existing rules, clearing the backlog of unenacted measures, and restoring confidence that announced changes will be legislated clearly, promptly and prospectively.

Until then, "tax reform" risks remaining shorthand not for better tax design, but simply for higher taxes delivered through ever-greater complexity.

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Tax News – the details

by TaxCounsel Pty Ltd

April – what happened in tax?

The following points highlight important federal tax developments that occurred during April 2026.

Government initiatives

1. Closely held trusts: TFN reporting

An amending Bill (the Treasury Laws Amendment (Delivering an Efficient and Trusted Tax System) Bill 2026) which was introduced into parliament on 25 March 2026 contains amendments that will streamline how trustees of closely held trusts report beneficiary TFNs to the Commissioner.

The amendments will require trustees to provide a presently entitled beneficiary's TFN to the Commissioner at the same time that the trust return is provided for an income year, if the beneficiary has quoted it to the trustee. This is intended to enhance the ATO's data-matching and pre-filling capabilities for beneficiary returns.

The change to the TFN reporting requirements will not change existing TFN withholding rules for closely held trusts. It also helps to ensure that trustees are withholding from beneficiaries' entitlements in line with the existing withholding requirements where the beneficiary has chosen not to quote their TFN.

The existing withholding arrangements, combined with the enhanced pre-filling capabilities supported by the reporting of beneficiary TFNs in the trust's tax return, will assist in ensuring that the right amount of tax is being paid by trustees and beneficiaries on trust income.

The new requirement will replace the obligation for trustees to lodge a TFN report for the quarter in which a beneficiary quotes their TFN to the trustee. The new requirement will commence on the first 1 January, 1 April, 1 July or 1 October to occur after the day the Bill receives royal assent.

2. Draft foreign resident CGT amendments

On 10 April 2026, the Treasurer released draft legislation that will strengthen the foreign resident CGT regime and provide certainty for investors.

These reforms, which were first announced in the 2024–25 Budget, are intended to ensure that foreign residents pay a fair share of tax in Australia, while providing generous concessions for investments in renewable energy.

The Treasurer said that the government had engaged with the renewable energy sector to ensure that these arrangements strike the right balance between supporting investment in clean energy while ensuring that foreign investors pay their fair share of tax. As a result of this consultation, the government will provide a time-limited, targeted concession in the foreign resident CGT regime for investment in the renewables sector.

The draft legislation also includes targeted amendments which will clarify that state and territory laws, such as the severance provisions in property law, do not determine which assets are in scope of the foreign resident CGT regime. These amendments are to apply to investments since the foreign resident CGT regime was introduced in 2006.

Over time, the absence of a clear definition of "real property" in the law and interactions with state and territory property laws have created uncertainty about the meaning of real property and this legislation will address those concerns.

Clarifying the interaction with state and territory laws reinforces the original intent of the law and ensures that the CGT treatment for assets held by foreign investors applies consistently, regardless of which state or territory the asset is located in. State revenue laws already generally disregard severance provisions for their own tax purposes.

This will protect revenue by ensuring that foreign residents disposing of an interest in large-scale infrastructure assets which are fixed on Australian land are subject to CGT. This includes buildings and energy, transport and telecommunications assets.

The Commissioner's perspective

3. FBT: cents per kilometre

The Commissioner has released a determination that sets out the rates to be applied on a cents per kilometre basis for calculating the taxable value of a fringe benefit arising from the private use of a motor vehicle other than a car for the FBT year commencing on 1 April 2026 (TD 2026/1).

The rates are:

Engine capacity	Rate per kilometre
0 – 2500cc	70 cents
Over 2500cc	82 cents
Motorcycles	20 cents

4. FBT: LAFHA reasonable amounts

The Commissioner has released a determination that sets out the amounts that he considers reasonable under s 31G of the *Fringe Benefits Tax Assessment Act 1986* (Cth) (FBTAA86) for food and drink expenses incurred by employees receiving a living-away-from-home allowance (LAFHA) fringe benefit for the FBT year commencing on 1 April 2026 (TD 2026/2).

Where the total of food and drink expenses for an employee (including eligible family members) does not exceed the amount that the Commissioner considers reasonable, those expenses do not have to be substantiated under s 31G FBTAA86. Where an employee receives a LAFHA fringe benefit with a component for food and drink expenses, for the employer to reduce the taxable value of the fringe benefit by the exempt food component, the expenses must be either:

- equal to or less than the amount that the Commissioner considers reasonable; or
- substantiated.

If the total of an employee's food or drink expenses exceeds the amount that the Commissioner considers reasonable, the substantiation provisions will apply.

TD 2026/2 sets out the amounts that the Commissioner considers reasonable for food and drink within Australia and overseas.

5. Long-term construction contracts: ATO compliance approach

The Commissioner has released a draft practical compliance guideline which explains when the ATO will be more likely to have cause to apply compliance resources to consider the potential application of anti-avoidance provisions in the tax law (with specific emphasis on the general anti-avoidance provisions contained in Pt IVA of the *Income Tax Assessment Act 1936* (Cth) (ITAA36)) to property development arrangements involving long-term construction contracts (PCG 2026/D2).

PCG 2026/D2 considers property development arrangements where a land owner engages another party to develop its land under a property development agreement (PDA) using a long-term construction contract. Typically (but not always), the developer engages a builder to undertake the construction work. In some arrangements, the land owner may also grant security over its land, or otherwise provide guarantees, to support financing obtained by the developer for the purposes of undertaking the development.

A PDA (or a similar agreement, however it may be described) is a contract between a developer and a land owner, outlining the terms and conditions for developing land and construction works, as well as the respective responsibilities of the parties and the financing arrangements for the project. A long-term construction contract refers to a contract under which construction work extends beyond one income year. While long-term construction contracts can be separate from PDAs (and vice versa), they are often one and the same or together form part of the contractual framework underpinning the broader property development arrangement.

The use of PDAs is common in Australia's property and construction sector and, generally, the ATO does not have a concern with this operating model. The concern that the ATO has is where certain taxpayers are using PDAs between entities that are under common ownership or control, or are not dealing with each other at arm's length, to obtain a tax benefit. Specifically, the ATO compliance focus is on entities that are, in substance, undertaking a single economic activity of property development but separate the land ownership and development activities in an attempt to defer the recognition of income and circumvent the trading stock provisions.

PCG 2026/D2 provides a risk assessment framework (a green low-risk zone and a red high-risk zone) on the application of the Pt IVA general anti-avoidance rules in the context of property development arrangements involving PDAs. The risk assessment framework sets out factors that the ATO will take into account when deciding whether or not compliance resources will be devoted to further examine these property development arrangements. It does not mean that the general anti-avoidance rules will necessarily apply.

The arrangements that are the subject of PCG 2026/D2 were flagged by the ATO earlier this year in TA 2026/1.

6. TPB: AI and the Code of Professional Conduct

The Tax Practitioners Board (TPB) has released a draft information sheet on the use of artificial intelligence (AI) and the Code of Professional Conduct (the Code) for public consultation (TPB(I) D62/2026).

Some points considered in TPB(I) D62/2026 are:

- while AI tools are useful and can deliver significant benefits, tax practitioners are still ultimately responsible for the tax agent services that they provide to their clients. It is important for tax practitioners to understand the capabilities and limitations of AI tools, and ensure that AI outputs are assessed and supplemented by professional judgement;
- while not binding on all tax practitioners, Accounting Professional and Ethical Standards Board standard APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)* provides guidance to clarify the expected behaviours of members when using technology;
- to comply with the competency requirements in the Code and TPB(I) D62/2026, tax practitioners must exercise their own professional judgement when advising clients and should not rely on AI output as a substitute for their own analysis of a client's circumstances;
- AI models may not always be accurate or factually correct and, as such, should inform, not substitute, tax knowledge, experience or expertise. Tax practitioners should verify and review AI-generated content for accuracy and should establish processes to understand and contest AI decisions/outputs;
- in relation to using AI while providing tax agent services, there is no set formula for determining what it means to take reasonable care. Rather, whether a tax practitioner has taken reasonable care in a given situation will depend on an examination of all of the circumstances; and

- an important obligation is in relation to confidentiality of client information. In particular, tax practitioners should be mindful of their obligations under the Code to not disclose any information relating to a client's affairs to a third party (any entity other than the client and the tax practitioner) without the client's permission, unless there is a legal duty to do so.

Recent case decisions

7. Luxury motor vehicles: FBT

In a recent decision in a case that raised some fundamental FBT issues, a Full Federal Court (Perry, O'Callaghan and Thawley JJ) has unanimously allowed an appeal by the taxpayer from a decision of O'Sullivan J who had allowed an appeal by the Commissioner from a decision of the Administrative Appeals Tribunal (AAT) (*SEPL Pty Ltd as trustee of the SFT Trust v FCT*[1]).

The appellant taxpayer (SEPL Pty Ltd) was a corporate trustee engaged in business involving petrol stations, convenience stores, fast food and tobacco outlets, and gift shops. The shareholders and directors of SEPL Pty Ltd were three brothers who were also among the beneficiaries of the trust of which SEPL Pty Ltd was trustee (the SFT Trust). They had the power, under the trust deed, to appoint or remove the trustee, and to appoint discretionary objects of the trust.

As trustee of the SFT Trust, SEPL Pty Ltd owned a number of luxury motor vehicles which it made available for the brothers' business and personal use. The costs of personal use were debited to the matriarch's beneficiary account, which was then cleared by trust distributions.

The Commissioner assessed FBT on the personal use of the vehicles by the brothers. SEPL Pty Ltd objected to the assessment and the objection was disallowed by the Commissioner. SEPL Pty Ltd succeeded in having the Commissioner's objection decision set aside by the AAT (*BQKD and FCT*[2]).

There were two main issues before the AAT, both relating to the definition of "fringe benefit" in s 136(1) of the *Fringe Benefits Tax Assessment Act 1986* (Cth) (FBTAA86), which provides:

> "**fringe benefit**, in relation to an employee, in relation to the employer of the employee … means a benefit … provided to the employee … by the employer … in respect of the employment of the employee …"

The first issue was whether each brother was an "employee", as defined for the purposes of FBT in s 136(1) FBTAA86. After a careful analysis of the facts, the AAT concluded that the brothers were not employees, emphasising the following:

- there were no written employment contracts for the brothers; there was no board resolution suggesting any employment contract; the brothers were not paid wages; the brothers had no other entitlements associated with employment, such as leave; and managers were employed for all relevant functions in the business; and
- the brothers' conduct was consistent with control as proprietors; the brothers were not subject to controls like those with employment contracts; and to the extent that there was "control" over the brothers, it was referable to the company constitution and the collective decision-making processes of the board which, being associated with corporate governance, was therefore of limited value as an indicium of employment.

In reaching the conclusion that the brothers were not employees of SEPL Pty Ltd, the AAT noted that the definition of "employee", and other associated definitions, ultimately relied on common law concepts of employment and the characterisation of employment relationships. Read fairly, the AAT used common law employment concepts as an aid to construction of the word "employee" as it appeared in the FBTAA86. It did not use the common law meaning of the word as a free-standing test or as a substitute for the statutory text.

The second issue was whether, if the three brothers were employees, the benefits were paid to them "in respect of" their employment. The AAT held that the luxury cars were not provided "in respect of" the assumed employment because there was no sufficiently material connection between the benefit and any such employment. The trust deed permitted the trustee to provide beneficiaries with the use of trust property, including vehicles. Private use of the luxury cars was debited to the matriarch's beneficiary account and offset via trust distributions, a process consistent with the benefits being accessed as an incident of beneficial ownership of the business, rather than as remuneration. The benefit was provided by reason of the relationship of the brothers to the trust and not in any material way by reason of any employment relationship.

Having concluded that the brothers were not employees, the AAT set aside the Commissioner's objection decision and substituted a decision that the objection be allowed.

On an appeal by the Commissioner to the Federal Court, O'Sullivan J at first instance allowed the appeal and affirmed the Commissioner's objection decision (*FCT v SEPL Pty Ltd as trustee of the SFT Trust*[3]). The two issues underlying the contended questions of law for the purposes of the appeal were the same as the two issues before the AAT.

SEPL Pty Ltd has now successfully appealed to the Full Federal Court from the decision of O'Sullivan J. The Full Court held:

- as to the first issue, contrary to the conclusion of O'Sullivan J, it was open for the AAT to conclude that the brothers were not employees. The AAT did not err in its understanding of the meaning of the word "employee" or fail correctly to apply the statute; and
- as to the second issue, contrary to the conclusion of O'Sullivan J, on the hypothetical assumption that there was an employment relationship, it was open to the AAT to conclude that the benefit was provided by reason of the relationship of the brothers to the trust and not the employment relationship.

8. Mere realisation decision affirmed

A Full Federal Court (O'Callaghan, Derrington and McEvoy JJ) has unanimously dismissed an appeal by the Commissioner from a decision of Wheelahan J at first instance in which Wheelahan J held that the activities of a land owner in relation to the development and sale of land that had been used for farming for many years did not go beyond the mere realisation of the land and, so, did not give rise to the derivation of assessable income (*FCT v Morton*[4]).

The taxpayer was a retired farmer. For many years he owned a small parcel of land known to his family as "Dave's Block" in Tarneit, in Melbourne's west. He farmed that land, and adjoining land owned by his mother and father, as one property, the whole of which was referred to as "Morton Farm". In 2010, Morton Farm (including Dave's Block) was rezoned from rural to residential land. Over the following years, the taxpayer and his family entered into several development agreements for Morton Farm to be developed, subdivided, and then sold as individual allotments as part of a housing estate. As part of that enterprise, the taxpayer received proceeds from the sale of the allotments on what had been Dave's Block.

O'Callaghan J (with whose reasons Derrington and McEvoy JJ each agreed) said that it was common ground at the hearing of the appeal that the role of the Full Court in an appeal such as the present was to conduct a real review, or an independent assessment, of the evidence at trial in order to determine whether the primary judge erred in law (there being no allegation that Wheelahan J had erred as to any matter of fact).

O'Callaghan J did not, however, accept the Commissioner's contention that the developer was appointed to carry out the development "on behalf" of the taxpayer as his agent and that he therefore ventured the land to a business venture or to a profit-making undertaking or plan.

O'Callaghan J said that merely to point to those provisions of the development agreement that imposed obligations on the owner, or to provisions that the developer carry out acts on behalf of the owner, did not go far enough, first, because to ask the question "was the developer the agent of the owner?" was not the relevant ultimate question, and second, because the proposition put by the Commissioner did not come to terms with express terms of the agreement limiting the scope and nature of the relationship.

The relevant question was not whether the developer was the agent of the owner or acted on his behalf. Rather, the relevant questions were:

- when developing, subdividing and selling the land that comprised Dave's Block, whether the taxpayer carried on a business such that the amounts in issue were income according to ordinary concepts; or
- whether the amounts in issue were assessable as statutory income on the ground that the amounts were profit arising from the carrying on or carrying out of a profit-making undertaking or plan.

As for the second question, assuming that an agency relationship existed between the taxpayer and the developer to the extent contemplated by the development agreement, the true question must involve defining the content of that relationship. Here, the Commissioner's agency contention did not come to terms with the specific terms of the development agreement that limited and defined that content, namely:

- other than its interest in the land, the owner had no interest in the development;
- the manner in which the developer was to undertake and complete the development works was at the discretion of the developer;
- nothing in the agreement authorised or empowered the developer to act as agent for the owner, otherwise than in accordance with the terms of the agreement;
- the developer was to carry out its responsibilities as an independent party and assumed all of the risks of so doing;
- the developer was to conduct the development in its own right and nothing contained in the agreement granted, gave to, or created in the developer a beneficial or equitable interest in the land; and
- other than as permitted by the agreement, neither party was to represent or warrant to a person that it acted for or on behalf of the other party.

The Commissioner also placed reliance on the "massive" scale of the subdivision. As Wheelahan J said at first instance, there was no doubt that the development of Morton Farm occurred on a very extensive scale, culminating in the creation of about 1,632 lots. However, Wheelahan J also observed, "[t]he scale of the subdivision and sale of the [farm] was a product of the size and nature of [it] as an asset, in combination with forces prevailing in the market for residential property in Tarneit over the relevant period", and that he "[did] not accept that, without more, the acreage or the number of lots involved indicated that the taxpayer was engaged in a business of land subdivision and development".

The decision of Wheelahan J at first instance in the *Morton* case was considered in the June 2025 Tax Tips column of the journal (at p 524).

9. Truck driver: meal expense deductions

The Federal Court (Colvin J) has dismissed an appeal by the Commissioner from a decision of the Administrative Review Tribunal (ART) that allowed in full a long-haul truck driver's claim for a deduction for meal expenses calculated in accordance with TD 2020/5 (*FCT v Shaw*[5]).

The taxpayer was employed by VPL Transport (WA) Pty Ltd (VPL Transport) as a long-haul truck driver in Western Australia and was paid a travel allowance by VPL Transport. He drove long distances, including in the Pilbara and across the Nullarbor, and was away from home for considerable periods each year.

For the 2020–21 income year, the taxpayer claimed a deduction of $32,782 for meal expenses. The taxpayer's

claim seemed to have been calculated by multiplying the number of days he was away from home (310) by the maximum reasonable daily allowance (being $105.75) set out in TD 2020/5.

The taxpayer provided the Commissioner with details of his journeys away from home and set out the breaks he took. This material included fatigue management reports for the relevant income year that he was required to maintain which showed when breaks were taken. It also included bank statements for periods from 18 April 2020 to 16 April 2021.

Following an audit carried out in 2022, the Commissioner issued an amended assessment for the 2020–21 income year which reduced the taxpayer's claimed deduction for that income year to zero. The taxpayer objected to the amended assessment and the Commissioner allowed the objection in part by increasing the taxpayer's deductions for meal expenses to $5,890, based on a review of the taxpayer's logbook, fatigue diary and bank statements. This was an average of $19 per day ($5 for breakfast, $5 for lunch and $9 for dinner) multiplied by 310 (the number of days the taxpayer was said to be away from home).

The taxpayer said that he spent more than $105.75 (the maximum reasonable daily amount) on food during his trips away, but only claimed that capped amount. His tax agent told him that he did not need to substantiate his expenses if he claimed the lower figure in TD 2020/5, which was lower than his actual expenditure.

On review, the ART allowed the taxpayer's objection (*Shaw and FCT*[6]). The ART held that, on the balance of probabilities, the taxpayer had incurred the claimed expenditure in gaining or producing his assessable income and that he had met his burden of proof in that regard.

The ART also held that the exception to the substantiation provisions provided for by s 900-50 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97) applied to the taxpayer. That section provides that a taxpayer can deduct a travel allowance expense for travel within Australia without getting written evidence or keeping travel records if the Commissioner considers reasonable the total of the losses or outgoings that the taxpayer claims for travel covered by the allowance.

Colvin J, in dismissing the Commissioner's appeal from the decision of the ART, said that when it comes to the deduction of work expenses, there is a difference between qualification and substantiation. Both requirements must be met. To qualify for deduction, the work expense must come within a provision of the ITAA97 "outside" Div 900 (the substantiation rules). In addition, it must be substantiated by written evidence as provided for in Subdiv 900-E ITAA97. A number of provisions in Div 900 are expressed in terms of what may be deducted by a taxpayer. However, those provisions are dealing with the substantiation that is required in order to be able to deduct an amount. Division 900 does not state the qualification for a deduction. That must be found outside Div 900.

For those reasons, in order to demonstrate that an amount spent by an employee on food or drink while travelling for work purposes is deductible, it is necessary for the employee to establish that the expense was incurred in producing the employee's salary or wages and so qualifies as a deduction under s 8-1(1) ITAA97. If that is demonstrated, then, by operation of s 900-15(1)(b), it is also necessary to substantiate the expense by getting written evidence that meets the terms of Div 900.

Colvin J said that there appeared to be two possibilities as to what is meant by providing (in s 900-30(2) ITAA97) that travel allowance expenses "count as" work expenses. The first possibility was that the terminology "count as" was to ensure that the substantiation requirements of Div 900 in respect of work expenses also applied where a deduction is claimed for expending a travel allowance.

The second possibility was that the terminology "count as" provided, in effect, that a travel allowance expense was to be adjudged as being a work expense with the consequence that it would be taken to be "a loss or outgoing you incur in producing your salary or wages". Given the context, Colvin J concluded that it was clearly the first possibility that was intended. In consequence, the substantiation provisions apply where the employee has been paid a travel allowance in respect of a travel expense which has been shown to have been incurred in producing the employee's salary or wages.

In relation to the contention for the taxpayer that, while the taxpayer did incur the expenditure, TD 2020/5 provided authorisation for the standard deduction approach that had been adopted, Colvin J said that TD 2020/5 was about substantiation, and it did not provide a one-off set deduction for truck drivers and there was no statutory provision providing for that.

TaxCounsel Pty Ltd
ACN 117 651 420

References

1 [2026] FCAFC 36.
2 [2024] AATA 1796.
3 [2025] FCA 581.
4 [2026] FCAFC 31.
5 [2026] FCA 197.
6 [2025] ARTA 224.

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Tax Tips

by TaxCounsel Pty Ltd

Tax agent issues

There are a number of developments that potentially affect the registration of tax agents and unregistered entities that should be noted.

Background

The present statutory regime that governs the registration of tax agents is contained in the *Tax Agent Services Act 2009* (Cth) (TASA09). The substantive provisions of this Act established the Tax Practitioners Board (TPB), govern, for example, when registration is required, prescribe the terms of the Code of Professional Conduct (the Code), and provide for the circumstances in which civil penalties may be imposed. These provisions generally commenced on 1 March 2010.[1]

Since then, there has been a constantly growing body of case law, legislative change and TPB information products[2] that are relevant to the registration of tax agents and the carrying on of a business as a tax agent.

Changes on the way

On 13 April 2026, the government released exposure draft legislation (and explanatory materials) which will fundamentally expand the operation of the TASA09 in relation to unregistered entities.

The draft legislation proposes to:

- introduce criminal offences for unregistered tax return preparers;
- substantially increase the maximum amounts for civil penalties;
- allow infringement notices to be issued for alleged breaches of some civil penalty provisions;
- enable enforceable voluntary undertakings to be entered into;
- allow the contingent and interim suspensions of registration in certain circumstances;
- introduce new civil penalties for:
  - breaches of the Code by registered tax practitioners; and
  - false or misleading statements by unregistered preparers; and
- extend the maximum period before a terminated practitioner can reapply for registration from five years to 10 years.

Unregistered entity: no fee recovery

In *Mercor Group Pty Ltd v State One Holdings Pty Ltd*,[3] Braddock DCJ of the Western Australia District Court considered whether certain activities of the plaintiff (Mercor), which was not a registered tax agent, constituted the provision of tax agent services (as defined in the TASA09) and, in the event that they were, whether Mercor could sue to recover its fee in relation to the services.

Braddock DCJ found that Mercor was engaged by the defendant specifically for the purpose of assisting with work, and did work, for the purpose of obtaining AusIndustry registration and thereafter submitting a claim for an R&D tax rebate. The fee was based on a percentage of the benefit to the defendant. In her Honour's view, it was reasonable to expect, in these circumstances, that this advice would be relied on. Mr Walkemeyer (the director of Mercor), on his own evidence, had been told that previous applications had been made through a firm of accountants, and that the defendant did not wish to instruct them again because of the expense. He was told that the objective was to obtain a cash rebate. Mr Walkemeyer prepared documents that were clearly ATO documents and charged a substantial fee.

In her Honour's view, it was reasonable that the party commissioning and paying for this work would rely on the work done, even if it was contained in the disclaimer that the work was not being done by a tax agent. She went on:

> "110. … To say that somebody should review the documents does not obviate that reliance. Asserting that Mercor was not a tax agent does not change the nature of the services. The [TASA09] does not require direct evidence that the recipient did so rely, as the statutory requirement involves an objective test. Accordingly, I find that the contract was for the provision of a tax agent service and that the work [Mr Walkemeyer] did was such a service …
>
> 111. I have no difficulty in finding that Mercor, by its director Mr Walkemeyer knew or ought reasonably to have known that the services were 'tax agent services'. Mr Walkemeyer had experience in R & D claims for tax rebates and he had been previously involved in such work when employed by another entity. His protestations that he was not giving advice, which defy credulity, coupled with his repeated instance [sic] that he informed [the defendant] he was not a tax agent, convince me that he well knew the nature of the services that he was contracting to provide. It is ironic that had Mercor or Mr Walkemeyer been directly employed to do the same work, he would have been paid wages for his services, whatever the outcome. His emphasis on being an independent contractor was misconceived.
>
> 112. Accordingly, Mercor contravened s 50-5(1) of TASA."

Enforceability

Having determined that a contract was formed on 9 December 2016 between Mercor and the defendant for the provision of work that satisfied the definition of "tax agent services" in the TASA09, and that the work was

done in contravention of s 50-5(1) TASA09, Braddock DCJ said that it was necessary to turn to the issue of the enforceability of the contract by Mercor. Her Honour said that this required consideration of many factors, the first of which was the TASA09 itself. Her Honour went on:

> "117. Section 2-5 TASA09 sets out the objects of the statute, which is one protective of the public. Its express aim is to ensure that tax agent services are provided in accordance with appropriate standards and to provide a framework in which that object can be achieved and where sanctions can be applied. The facts of this case well illustrate the reason for such provisions."

Her Honour said[4] that the TASA09 does not specifically proscribe the making of a contract to provide tax agent services unregistered; rather, it provides sanctions for persons providing such services, if unregistered, by way of civil penalty. Thus, a person contravenes the law if they provide such services unregistered, and proceedings may be taken against them (s 50-5). Her Honour said:

> "119. In this case, Mercor entered into a contract specifically to provide services it could not lawfully provide. It now sues upon that contract. Whilst there is no express prohibition on such contracts, nevertheless, the courts have held that a statute prohibiting conduct may, by implication, prohibit a contract involving such conduct. Particularly, this applies to contracts that involve illegal activity that could not be performed lawfully in the known circumstances. This raised the question of whether TASA impliedly prohibits all such contracts."

Later, Braddock DCJ said:

> "131. TASA is expressly an Act for the purposes of protecting the public from certain types of conduct, for which it imposes a civil penalty. Protection of the public is an important policy consideration. If it were possible to ignore the law requiring professional registration and to profit from it, and to engage the court in the pursuit of contractual payments, the protective purpose of the legislation would in my view be circumvented.
>
> 132. In this case, the contract provided for the provision of services by a person who was unregistered, and who knew he was required to be registered. Thus, the contract could not have been lawfully performed by Mercor.
>
> 133. TASA provides civil penalties … There is also a scheme for the maintenance of professional standards under TASA.
>
> 134. TASA does not expressly prohibit contracts of the kind in issue here. In a modern regulatory statute, if it had been intended so to prohibit contractual arrangements, in my opinion, it would be so expressed. I cannot interpret the Act to impliedly prohibit and render void all such contracts. Nothing in the statute requires that interpretation and circumstances may vary greatly. The scheme TASA created is clearly intended to regulate such contracts.
>
> 135. Mercor seeks to recover almost $150,000, which is likely to exceed any civil penalty. There is no certainty that proceedings for a penalty will be brought. By the very circumstances, conduct such as that disclosed in this case would be unlikely to come to light without this action by Mercor to pursue payment.
>
> 136. In my opinion, this case concerns the other aspect of public policy referred to by Gaegler J; that a person should not be assisted by law to benefit from an illegal act. This still requires consideration of the objects of the statute and the intent of the claimant.
>
> 137. Mercor, by its director Mr Walkemeyer knew, as I have found, that it was providing services it was not licenced to provide. I am satisfied that Mercor entered the contract knowingly with the intent to be paid for work which it was not lawfully authorised to perform.
>
> 138. There is no conflict with the statutory scheme set out in TASA in withholding a remedy to Mercor in these circumstances. It is not disproportionate where the fee is substantial and where, in addition, the advice given was erroneous and did not result in benefit to [the defendant].
>
> 139. The contract relied upon was for the performance of the very activity regulated by TASA. To permit Mercor to recover would undermine the intention of the statute, and prejudice [the defendant], who may be innocent of any deliberate wrongdoing."

Observation

If the facts of the *Mercor* case had been that the defendant had in fact paid the fee charged, the question would have arisen whether the defendant would have had an action against the plaintiff to recover the amount paid. It is suggested that the defendant would have had such a right.

Professional negligence/breach of contract

In a recent decision, Cole J of the New South Wales District Court held that an accountant (a Mr Trovas) was liable for breach of contract and for negligence in advising the plaintiffs to acquire a dwelling, that was to be used as a principal place of residence, in the name of a company in its capacity as the trustee of a discretionary trust (*Forrester Management Pty Ltd v AMI Tax Advisory Pty Ltd (trading as ANCO Accounting Services)*.[5]

It was alleged, in the statement of claim, that Mr Trovas owed the plaintiffs a duty to take reasonable care and to exercise a reasonable degree of skill and diligence in the provision of advice to the plaintiffs. It was contended that Mr Trovas knew, or ought to have known, that the plaintiffs were relying on his skill, knowledge, experience, resources and competence regarding the purchase of the property, and would suffer loss or damage if the advice regarding the purchase of the property was not accurate. The loss and damage were foreseeable and the risk was not insignificant.

Duty of care

In regard to the duty of care, Cole DCJ referred to the following statement by Gzell J in *Leda Pty Ltd v Weerden (No. 2)*:[6]

> "45 Professionals are expected to exercise a standard of care that may reasonably be expected of practitioners practising in the relevant area of expertise. Thus in *Rogers v Whitaker*[7] the High Court said:
>
> > 'The law imposes on a medical practitioner a duty to exercise reasonable care and skill in the provision of professional advice and treatment … The standard of reasonable care and skill required is that of the ordinary skilled person exercising and professing to have that special skill.'
>
> 46 In *Pech v Tilgals*[8] Dunford J said:
>
> > 'As a person holding himself out as possessing professional skill as an accountant and tax agent the defendant was bound to exercise the skill and diligence of a reasonably competent and careful practitioner in that profession.'"

Cole DCJ said that she found that Mr Trovas gave the advice to Mr Forrester (one of the plaintiffs), concerning the holding of the property in a trust of which a plaintiff company would be the trustee, on 20 January 2020. Mr Trovas owed the plaintiffs a duty of care when giving his advice throughout his contact with Mr Forrester. Mr Trovas owed a duty of care to each of the plaintiffs because it was, or should have been, obvious to him that it was reasonably foreseeable that his advice, if it fell short of the applicable standard of care, posed a not insignificant risk of causing loss to each plaintiff.

Cole DCJ went on:

> "65. I find that the scope of the work Mr Trovas undertook for Mr Forrester was to give accounting advice in relation to the best way to protect the property from creditors, including creditors of Mr Forrester's businesses. Advice about the best way necessarily included advice about the tax consequences of the alternative practically available courses of action. I reject the argument that the scope of the work was confined to the incorporation of the company and the establishment of the trust, for the reasons set out above."

Later her Honour said:

> "68. I accept the evidence of Mr Yao [an expert witness] that a competent accountant acting in conformity with standards and ethics applicable to professional accountants would have given the correct advice. A competent accountant would have known that a principal place of residence held in a trust would not be exempt from either land tax or capital gains tax. A competent accountant would have advised Mr Forrester that the use of a discretionary trust to purchase and hold the property would have the consequence that land tax would be levied and payable annually and that capital gains tax would be payable after sale if a capital gain were realised. Further, a competent accountant would know and advise that in the circumstances in existence by 18 January 2022, a transfer of the property to Mrs Forrester would trigger a liability to pay substantial stamp duty. In the event that the competent accountant, at any stage of the process, came to believe that they had insufficient information to advise competently, ethically and to the applicable standard, their obligation was to seek the information needed to advise in accordance with the applicable standard. A competent accountant would proactively advise on all of the tax implications of the structure they were suggesting be implemented and all other practical structures available for consideration."

Breach of contract

It was pleaded in the statement of claim that it was an implied term of the contract between Mr Forrester and Mr Trovas that Mr Trovas would give his advice with all due professional skill and diligence ("the implied term").

Cole DCJ said that she accepted that Mr Forrester and Mr Trovas entered into an oral contract for the provision of advice by Mr Trovas to Mr Forrester about the appropriate way to acquire the property. The consideration was payment of money from Mr Forrester to Mr Trovas via Mr Sevdalis (a business associate of Mr Trovas).

Her Honour said that Mr Trovas' duties under the implied term of the contract were the same as his obligations under the law of negligence. The two duties exist in parallel and concurrently.[9] Mr Trovas was therefore liable to Mr Forrester for breach of the implied term of their contract.

Cole DCJ said[10] that the ruling principle for damages for breach of contract is that when a party sustains loss by reason of a breach of contract, that party is to be placed, in so far as money can do it, in the same situation, with respect to damages, as if the contract has been performed.

Further, costs incurred by a plaintiff in a reasonable attempt to mitigate their loss are recoverable in an action for breach of contract. Thus, the stamp duty incurred in the transfer of the property to Mrs Forrester (another plaintiff) from the trustee, and paid by Mr Forrester, were recoverable.[11]

There is, it is submitted, a puzzling aspect of the decision in this case. Cole DCJ found that the scope of the work that Mr Trovas undertook for Mr Forrester was to give accounting advice in relation to the best way to protect the property from creditors, including creditors of Mr Forrester's businesses. However, her Honour appears to focus entirely on the incidence of CGT, land tax and stamp duty.

State taxes

Where a registered tax agent who is not a legal practitioner is confronted with a situation which requires advice in relation to the operation of a state or territory taxation law (for example, stamp duty or land tax), an issue may

arise as to whether the tax agent could give advice without infringing the legal practitioner legislation of the particular state or territory.[12]

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References

1. It should be noted that the registration regime extends to BAS agents.
2. The most recently released TPB product is draft guidance for the use of artificial intelligence (AI) and the Code (TPB(I) D62/2026). This draft guidance is noted at item 6 in the Tax News column of this issue of the journal (page 565). The legislative scheme includes other components, including the *Tax Agent Services Regulations 2022* (Cth).
3. [2019] WADC 169.
4. [2019] WADC 169 at [118].
5. [2026] NSWDC 13.
6. [2006] NSWSC 125.
7. [1992] HCA 58.
8. 94 ATC 4206 at 4211.
9. *Astley v Austrust Ltd* [1999] HCA 6 at [48].
10. [2026] NSWDC 13 at [75].
11. [2026] NSWDC 13 at [76].
12. This question was considered in the Tax Tips article in the April 2023 issue of the journal.

Higher Education

How CTA2A boosted a career

The Dux of CTA2A Advanced for study period 1, 2025 found her calling in tax, building a rewarding career advising Australia's wealthiest families through life's most complex moments.

Patsiri Boonprasop
Tax Manager, Mutual Trust Pty Ltd

Patsiri's career path was mapped out early. Law, medicine, engineering or accounting: the classic quartet of ambitious families. She chose accounting and finance at the University of Melbourne, and it was more by chance than design that she landed in tax after graduating.

Five years on, she has not looked back. Patsiri works in the Tax Advisory team at Mutual Trust, Australia's leading modern family office, managing the complex tax affairs of ultra-high-net-worth families. Her work spans across business structuring, intergenerational wealth transfer, corporate tax matters, and direct liaison with the ATO on private binding rulings, early engagement and audit processes.

What surprised Patsiri most about tax was how personal it is. Buying a first home, the passing of a loved one, a marriage breakdown, the sale of a family business: tax touches every major chapter of life. That realisation transformed how she saw her work.

"Working in a family office means I'm not just solving technical tax issues. I'm part of a team helping families navigate complex, often emotional decisions. I find it incredibly fulfilling to be there for families as they open, continue, or close chapters in their lives, offering advice during moments that matter most. It's the combination of meaningful relationships and technical problem-solving that makes my work so rewarding."

Patsiri undertook CTA2A Advanced with a specific goal: to move from a compliance-focused role into advisory work.

"The subject offered a solid foundation in interpreting and applying tax law, covering key topics that frequently arise when working with families, including trusts, partnerships and capital gains — all highly relevant to the complex advisory work we do. Pursuing the CTA designation is also an important step in my professional development and long-term career goals in tax advisory."

The content aligned closely with her day-to-day work, making the learning immediately applicable rather than merely theoretical. Up-to-date case law, practical guidance on interpreting ATO legal documents, and a variety of formats, including live and recorded lectures, mini webinars and CCH resources, all gave Patsiri the flexibility to study around full-time work.

"My favourite part of CTA2A was definitely passing the subject, though that's only half a joke! I genuinely enjoyed attending the live lectures. Hearing from experienced professionals brought the content to life and offered valuable insights into how tax legislation is applied in practice. The peer discussions enriched the experience and deepened my understanding."

Achieving top marks while working full-time required structure. Patsiri blocked out study time each week and treated those blocks as non-negotiable. She also made a habit of celebrating small wins, whether it was finishing a module, cracking a difficult concept, or simply sticking to the plan.

Her advice to others considering further study is simple: "Do it. Working in tax means committing to lifelong learning, and The Tax Institute makes that journey easier. Personally, it has significantly enriched my professional development and supported my career progression."

What's next? Not surprisingly, she already has a promotion from Assistant to Tax Manager secured since completing her subject.

"The studies [with TTI] definitely strengthened my technical foundation and supported my overall readiness. My promotion was very much a team effort, enabled by the guidance of my people leader, support from the team and alignment with the business needs at the time."

And as for continuing her tax education, she knows it is a vital part of her journey, in particular CTA3 Advisory, as "achieving the CTA is a key milestone in my professional development, and I'm excited to continue building on the technical and practical knowledge I've gained so far," she concludes.

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Andrew Gordon
Anita Nguyen
Augustine Phung

Caleb Rice
Christopher Shaw
Danielle Eliatamby
Darren Adams
David Graf
Drew Bannister
Assoc Prof Duyen Le
Fan Sun

Kate Yebin Sohn
Katherine Howard
Luis Pitruzzello
Madeleine Scott
Manvir Nagra
Dux CTA3 Advisory, SP3 25
Michael Dusting

Samantha Bailey
Teresa Bich-Ha Thi Ta
Tuan San Lee
Yenny Sukiman
Yi Fan
Dux ATL004 CTA2B Advanced, SP2 25

Graduate Diploma of Applied Tax Law:

Amy Harrison
Bernadine Perera
Chahak Garg
David Lyburn
Harrison Patrick Keenan Jones
Dux ATL008 Tax for Trusts SP2 25

Heather Dowell
Hong Lam Truong
Jennifer Vink
Leanna Marinucci
Luke Geoffrey Boyle
Marianne Dakhoul
Marlon Andres Camacho

Natasha Green
Thiruchelvakumar Sivapatham
Tio Clara
Udeshi Senasinghe
Wanyue Fang
Dux ATL002 CommLaw1, SP2 25

Graduate Certificate in Applied Tax Law:

Admire Kachaka
Chung Hok Har

Individual Australian Tax Law Subject Deuces:

Study Period 1 2025

Jacob Pantlin
ATL001 CTA1 Foundations

Paul Iaconis
ATL002 CommLaw1

Patsiri Boonprasop
ATL003 CTA2A Advanced

Weiyan Chen
ATL003 CTA2A Advanced

Sally Whenman
ATL004 CTA2B Advanced

Jiaqi Zhang
ATL005 CommLaw2

Tio Clara
ATL006 CommLaw3

James Michael Joseph Dawson
ATL008 Tax for Trusts

Study Period 2 2025

Hanna Yelack
ATL001 CTA1 Foundations

Ross Dixon
ATL002 CommLaw1

Wanyue (Virginia) Fang
ATL002 CommLaw1

Rebecca Gibbons
ATL003 CTA2A Advanced

Tegan Watkin-Brown
ATL003 CTA2A Advanced

Fabian Biondo
ATL003 CTA2A Advanced

Charlie (Yi) Fan
ATL004 CTA2B Advanced

Sony (Song Phuong) Dingh
ATL005 CommLaw2

Carrie Jing Yi Tan
ATL006 CommLaw3

Harrison Patrick Keenan Jones
ATL008 Tax for Trusts

Christopher Shaw
ATL009 Corporate Tax

Study Period 3 2025

Joshua (Yuesen) Gao
ATL001 CTA1 Foundations

Darren Tappouras
ATL0002 CommLaw1

Hanna YelackATL003
CTA2A Advanced

Tegan Watkin-Brown
ATL004 CTA2B Advanced

Julian Allotta
ATL005 CommLaw2

Adralin Phil Garambas
ATL006 CommLaw3

Alexandra Skolarikis
ATL007 Advanced Superannuation

Damithri Charm Jayatileka
ATL009 Corporate Tax

Manvir Nagra
CTA3 Advisory

Teresa Ta
CTA3 Advisory

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Administering estates without probate: catch-22!

by Kate Roff, Complex Tax Consultant, BNR Partners

It is common for executors lawfully appointed under wills to administer estates without obtaining probate. Administering estates without probate substantially reduces costs and avoids unnecessary delays. Yet the ATO puts executors without probate in an impossible position. It tells them that they must finalise the deceased's taxation affairs but denies them the tax information and online access that they and their tax agents need to comply. Catch-22! This article examines whether these practices are justified at law. It concludes that they are not justified and, further, that the provisions for collecting tax and paying refunds on income derived by deceased taxpayers are defective in relation to estates administered by executors without probate. These defects could be easily remedied with simple amendments.

Introduction

The ATO has an administrative practice of distinguishing between executors of deceased estates who have or have not been granted probate. The ATO refers to those with probate as "authorised legal personal representatives" (authorised LPRs) and those without as merely "legal personal representatives" (LPRs). The ATO makes this distinction notwithstanding that the conception of an authorised LPR does not appear in the taxation law itself and notwithstanding that many executors do not need probate to administer estates under state and territory succession laws.[1]

Executors whom the ATO deems to be merely LPRs rather than authorised LPRs – and the tax agents who act on their behalf – are routinely (but not consistently) denied access by the ATO to information about the taxation affairs of deceased taxpayers. They are also refused tax refunds and franking credits owing to deceased taxpayers. Perversely, however, the ATO tells these LPRs that they must finalise the deceased's taxation affairs, including by notifying the ATO of the death, lodging outstanding tax returns up to the date of death, and paying the deceased's outstanding taxes.[2]

The ATO's practices put executors without probate in an impossible position – on the one hand, the ATO is telling them that they are responsible for finalising the deceased's taxation affairs, while on the other hand, it is denying them the tax information and online access that they and their tax agents need to evaluate their obligations and comply with the law. Catch-22!

The upshot is that executors feel pressured by the ATO to obtain probate, irrespective of whether it is ultimately in the interests of their estates for them to seek a grant,[3] and notwithstanding that there is in fact no explicit requirement in the taxation law that they should obtain probate. This is exposing many estates[4] to what are otherwise avoidable costs[5] and to unnecessary delays. Indeed, it is not uncommon for executors to obtain probate only to discover that the costs of obtaining the probate are excessive relative to the refunds owing to the deceased.[6]

Concerns about these, and other ATO practices affecting deceased estates, have been the subject of numerous complaints, from individuals and professional bodies, both to the ATO and the Office of the Inspector-General of Taxation and Taxation Ombudsman (IGTO). Indeed, from May 2015 onwards, the volume of complaints to the IGTO were so large that the IGTO instigated an investigation into the compliance burdens imposed by the taxation system on the LPRs of deceased taxpayers.

In 2020, the then IGTO published a report of her investigation.[7] She endorsed many of the concerns that had been raised about the ATO's practices and found that the compliance burdens being imposed on estates in relation to deceased taxpayers were disproportionate to the revenue that was being raised.[8] She therefore made a series of recommendations including, inter alia, that the ATO change its administrative practices and/or consider the necessity for legislative change.[9] Yet, in 2026, there has been no law reform and the ATO's haphazard practices continue unabated. This is disappointing. Australia's population is rapidly ageing[10] and these are issues which will affect many in the community.

Given the inaction, the purpose of this article is to examine whether the ATO's practices with respect to executors without probate are in fact justified under the taxation laws. Specifically, it considers the general law status and obligations of executors, the statutory mechanisms for assessing and collecting tax on income derived by persons who have died (Subdiv 260-E of Sch 1 to the *Taxation Administration Act 1953* (Cth) (TAA53)), and the statutory provisions governing the disclosure of taxpayer information (Div 355, Sch 1 TAA53).

The article reaches five key conclusions:

1. the taxation laws, and ATO practices, adopt a narrower conception of administered estates than at general law and this was likely inadvertent;
2. Subdiv 260-E does not empower the Commissioner to assess executors on income derived by deceased taxpayers if the executors do not obtain probate;
3. the ATO is right to be concerned that it may not have the authority to pay refunds to executors (including, in some cases, to executors with probate);

4. Div 355 does not prevent ATO officers from disclosing taxation information to executors without probate provided the officers take reasonable steps to satisfy themselves that they are dealing with lawful executors. In choosing not to make the disclosures, the ATO is putting revenue at risk; and
5. simple remedial amendments could make the taxation law fit for purpose, without requiring *all* executors to obtain probate.

Grants of representation and the administration of estates

Subdivision 260-E contains provisions dedicated to collecting the outstanding tax-related liabilities of persons who have died.[11] The provisions distinguish between estates in which there has or has not been a formal grant of representation (that is, probate or letters of administration). Those with grants are labelled "administered estates",[12] and those without are labelled "unadministered estates".[13] The distinction, introduced in 1999, likely explains the ATO's practice of distinguishing between authorised LPRs and mere LPRs. But it is a distinction that has no basis at general law.

At general law, deceased estates can be administered by executors appointed under wills or, absent wills, by administrators appointed by courts. For both taxation law and general law purposes, executors and administrators are collectively referred to as LPRs.[14] The legal source of their authority is, however, very different.

An executor lawfully appointed under a will derives their status and authority,[15] and in at least four states, their title to the assets of the estate,[16] from the will, not from probate. As such, executors may "lawfully and properly" administer an estate, and be subjected to the responsibilities of the office, without obtaining probate.[17] Probate is merely conclusive proof of a person's status as executor and authentication of their right to deal with the title to the deceased's assets.[18]

An administrator, in contrast, is wholly a creature of the court. An administrator derives their status and authority, and their title, from the grant of representation. Until a putative administrator has received a formal grant of representation, they have no status or authority as an administrator, and no standing, to deal with the deceased's assets.[19]

Understood from that perspective, the Subdiv 260-E categories of "administered" and "unadministered" estates are confusing.[20] Substantively, they do not distinguish between estates that are being administered and those which are not; rather, they distinguish between estates in which probate or letters of administration have or have not been granted. And they are mutually exclusive. An estate that is being administered by a person who has accepted the office of executor, and assumed all the responsibilities of the office (referred to in this article as a "lawful executor"), is nonetheless treated by Subdiv 260-E as an unadministered estate if the executor has not obtained probate.

The discrepancy between the general law position and the Subdiv 260-E nomenclature begs an important question – why has the statute employed a narrower conception of administered estates than the general law? Could it have been a policy choice? Research undertaken for this article has not located any evidence that it was. To the contrary, the statutory history, set out below, strongly suggests that the narrow conception of an administered estate in Subdiv 260-E was introduced inadvertently, in 1999, when the Commissioner's former collection and recovery powers for deceased estates were standardised and co-located with other collection and recovery powers in the TAA53.

This is unfortunate. As discussed below, the narrow conception of an "administered estate" in Subdiv 260-E fails to recognise that persons appointed as executors under valid wills may be lawfully administering estates without probate. That failure represents a lacuna in the taxation law which puts revenue at risk and denies refunds that would otherwise have been due to deceased taxpayers. As explored below, that lacuna could be removed by simple remedial amendments.

Statutory history

The history of the Commissioner's statutory collection and recovery powers with respect to the outstanding tax liabilities of deceased taxpayers are long and complex. The story begins with s 46 of the *Income Tax Assessment Act 1915* (Cth). Section 46, as later supplemented by s 46A, provided that the Commissioner could assess "executors and administrators" in the place of deceased taxpayers whose taxable income had not been assessed during their lifetime. To that end, the Commissioner was given "the same powers and remedies against the executors and administrators of the taxpayer as he would have had against the taxpayer" and was empowered to require executors and administrators to make returns of the taxable income derived by the deceased taxpayer. Where executors or administrators were assessed to tax, the liability operated as a charge on "all the taxpayer's estate in the hands of the executors and administrators".

Sections 46 and 46A were re-enacted in ss 61 and 62 of the *Income Tax Assessment Act 1922* (Cth), in broadly similar terms. Very soon, however, the Commissioner began to encounter cases where he was unable to locate any executors or administrators "in whose name assessments could be made" or "against whom recovery action might be instituted".[21] This led, in 1927, to the parliament supplementing the Commissioner's powers in ss 61 and 62 by inserting new s 62(3A) to (3G). The new provisions gave the Commissioner a special power, only exercisable if probate or letters of administration had not been granted within six months of a taxpayer's death, to assess tax due by a deceased taxpayer. Once made, and published in a daily newspaper, such an assessment provided conclusive evidence that the deceased was indebted to the Commissioner in an amount which the Commissioner could then recover, by distress, against any assets that the deceased had left behind. But the Commissioner wasn't bound to assess the deceased person. His separate power

to assess executors or administrators under ss 61 and 62(1) to (3) remained in effect and unaltered providing he could locate persons to whom the provisions applied.

When the *Income Tax Assessment Act 1936* (Cth) (ITAA36) arrived, former s 61 became s 216, former s 62(1) to (3) became s 217, and former s 62(3A) to (3G) became s 220. Although the basic structure of the provisions remained relatively intact, some of the terminology changed. Significantly, instead of the Commissioner's powers being exercisable with respect to "executors or administrators", now they were exercisable with respect to "trustees of the estate of the taxpayer". The change in wording was unexplained at the time, but likely the draftsman was relying on the broad definition of "trustee" in s 6(1) ITAA36 which then, as now, included "an executor or administrator" and any other person "acting in any fiduciary capacity".

Subsequently, in 1984, ss 216 and 217 were consolidated by amendments to s 216 and the repeal of s 217. Among other things, the amendments to s 216 specified, for the first time, that the Commissioner's power to assess and recover tax from a trustee of a deceased estate related to the deceased's liability to tax for income derived by the taxpayer in their lifetime, being tax which had not been "assessed or paid" before death.[22] Despite the new words, there is no sense in the extrinsic materials that the amended s 216 was intended to operate differently from the combined operation of former ss 216 and 217.[23] Relevantly, s 220 ITAA36 was not amended at that time.

Then came the process, in 1999, when the parliament standardised and co-located all of the Commissioner's powers of collection and recovery into the TAA53. This process resulted in a new Pt 4-15 being inserted into Sch 1 TAA53.[24] Part 4-15 included Subdiv 260-E. Section 260-140 is a rewrite of former s 216, and ss 260-145 and 260-150 combined are a rewrite of former s 220. Although the new provisions use different terminology, the changes made are largely explicable as aids to the standardisation process. The only substantive changes apparent in the statutory text, and flagged by the explanatory memorandum, were the removal of the charge that the Commissioner previously had on a "taxpayer's estate" for tax assessed to trustees under s 216, and the introduction of a new regulation making power in s 260-150 for setting out "procedures" governing the seizure and disposal of property belonging to deceased persons when their estates are unadministered. According to the explanatory memorandum, the first change removed the Commissioner's "priority", and the second change provided for regulations that must be made before "the Commissioner could exercise" his powers to distrain the deceased's property (that is, by seizing and selling the property).[25] To date, however, no such regulations have in fact been made.

One final change — not acknowledged in the explanatory memorandum — was the addition of a threshold requirement limiting the Commissioner's power to assess trustees under s 260-140 to estates where probate or letters of administration have been granted. For reasons explained below, the threshold represents a major curtailment of the Commissioner's powers. He can no longer assess executors of deceased estates who do not have probate, but who are otherwise properly and fully administering estates in accordance with the law.

Existing law

Taxpayers may die with assessed (that is, cohate) and/or unassessed (that is, inchoate) taxation liabilities or entitlements. This part of the article examines how the general law of succession, and Subdiv 260-E, deals with these liabilities and entitlements if the estates of the deceased taxpayer are administered by executors without probate.

Assessed tax liabilities and entitlements

If the Commissioner has, in a person's lifetime, assessed the person to tax on income derived or gains made by the person but the person dies before they have paid the resulting tax liability (s 5-5 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97)), or before they have received a refund (s 8AAZLF TAA53), the debt or the right to the refund will fall into the deceased estate and be dealt with in accordance with the common law and jurisdiction-specific statutory principles that apply to any other debts or assets of that estate.

Generally speaking, this will be uncontentious if the estate is being administered by an executor who has obtained probate. In that case, the Commissioner's powers of recovery are enhanced by s 260-140(2) which permits him to treat the executor as if the executor were the deceased taxpayer. As explained in PCG 2018/4 at paras 12 to 13, the result is that the executor is taken to have notice of the deceased taxpayer's outstanding tax-related liabilities. However, the position is more complicated if the estate is being administered by an executor without probate.

If the taxpayer dies with a tax debt due and payable to the Commissioner, an executor without probate, who has assumed the responsibilities of the office, will be liable to discharge the debt to the full extent to which the assets of the estate admit or they risk being held personally liable, just as they would had they obtained probate.[26] This presupposes, however, that the executor without probate, who is not subject to s 260-140(2), has notice of the tax debt. If they do not have notice, in some states and territories (but not necessarily all), the executor without probate will be protected from liability so long as they have observed the statutory procedures for giving prescribed notices to claimants.[27] To the extent that the ATO refuses to disclose the existence of tax debts to executors without probate, it is therefore putting the collection of those debts at risk.

If the taxpayer dies with an outstanding entitlement to a refund, an executor without probate may or may not have title to enforce the chose in action depending on the particular jurisdiction in which they reside.[28] Further, even in those jurisdictions where title does not depend on probate, the Commissioner may be within his rights to insist on executors obtaining grants of representation to prove that

they can give him a valid discharge.[29] However, tax returns and applications for refunds are typically made online, and the associated payments are automated, so the legal questions concerning outstanding refunds are likely more theoretical than practical.

Unassessed tax liabilities and entitlements

It is an entirely different matter, however, if the Commissioner has not assessed the deceased on income derived or gains made by the deceased prior to death, either because the deceased was not up to date with their tax returns or because the deceased's returns were incomplete or inaccurate.

In that case, the deceased likely died with an inchoate liability,[30] the perfection of which is conditional on assessment and objection.[31] Assessment is the event which ascertains the amount of the liability and converts it into a debt due and payable.[32] If the Commissioner wishes to perfect the liability, and recover, the debt, he must do so in accordance with Subdiv 260–E. Given the statutory history and context, the better view is that Subdiv 260-E is an exclusive code for these purposes (at least with respect to liabilities).[33]

Administered estates

If a deceased estate is administered in the Subdiv 260-E sense that probate or letters of administration have been granted, and if the deceased died with an "outstanding tax-related liability" that was unassessed as at the date of death,[34] the Commissioner can assess the executor or administrator on the deceased's income as if they were the deceased based on the returns that the deceased was, or would have been, required to lodge.[35] In effect, the deceased's inchoate liability is perfected and imposed on the executor or administrator, quoad the estate, as a representative taxpayer for the deceased.[36] This aspect of the taxation law, explained in PCG 2018/4, is uncontentious.

It is not obvious, however, what should happen if a taxpayer dies with an inchoate entitlement to a refund rather than with an "outstanding tax-related liability". For example, if their income at the date of death was below the tax-free threshold, yet they had unclaimed franking credits. On its face, s 260-140 would not apply (irrespective of whether the LPR has probate) because the taxpayer would not have died with a tax liability of any kind.[37] But if s 260-140 does not apply, how then does a deceased taxpayer's inchoate entitlement to a refund crystallise into an entitlement due and payable by the Commissioner to the deceased estate? There are no clear answers to this question.[38]

Unadministered estates

If a taxpayer dies with inchoate tax liabilities, but the estate is unadministered in the Subdiv 260-E sense,[39] there is nobody for the Commissioner to assess as a representative taxpayer for the deceased.

Although s 260-140 empowers the Commissioner to assess a "trustee" of a "deceased person's estate" in their "representative capacity" as if they "were the deceased person", that power does not apply to a lawful executor administering an estate without probate. This stands in contrast to former ss 216 and 217, and their predecessor provisions in 1915, none of which were expressly restricted to executors who had been granted probate. As discussed above, this change was likely inadvertent.

Nor does s 254 ITAA36 assist the Commissioner. Although it permits him to assess trustees as representative taxpayers, including trustees of deceased estates, he may only assess them with respect to income, profits or gains that they derive as trustees.[40] In other words, s 254 cannot operate with respect to income, profits or gains derived by a deceased person before they died.

If probate has not been granted, the Commissioner's only powers to collect tax on the unassessed income of a deceased person are in ss 260-145 and 260-150. To recover tax, his only course is to "determine" the "total amount" of the deceased's "outstanding tax-related liabilities", as at the date of death, and to recover the same by "seizing and disposing" of any "property of the deceased". Relevantly:

- "outstanding tax-related liabilities" include inchoate, contingent liabilities that have not been ascertained by a process of assessment;[41]
- although a determination is conclusive evidence of the amount of the deceased's "outstanding tax-related liabilities", it does not retrospectively convert those liabilities into debts due and payable by the deceased and recoverable in the usual manner, nor does it have any legal effect on the estate itself.[42] Instead, the Commissioner is given a statutory right to recover the amount so determined by distraining against property that belonged to the deceased;
- as the Commissioner's right of recovery rests solely on a determination of the deceased's inchoate liabilities rather than a full assessment of the deceased's taxable income,[43] it is doubtful whether a determination can crystallise any entitlements that might have been due to the deceased had they been assessed. If that is correct, s 260-145 does not give the Commissioner the power to refund unadministered estates amounts that would otherwise have been due to a deceased had the deceased been assessed in their lifetime;[44]
- persons with an interest in unadministered estates, or who are subsequently granted administration, may object to the determination as if they were the deceased person. But if they do object, there is nothing which personally attaches the underlying liability to those persons;
- the "property of the deceased person" which may be seized and disposed of is not defined; arguably, it only includes assets of the deceased which were owned by the deceased, and which pass to the executor and/or a beneficiary.[45] On that view, it would not extend to subsequently acquired property of an estate or a beneficiary. Note that the antecedent provisions, ss 216 and 220, explicitly distinguished between charges on a "deceased estate" (that secured a trustee's debt as a representative taxpayer) and "property of the deceased" (which could be distrained to recover the deceased's

unassessed liability). Arguably, an "estate in the hands of" executors and the "property of the deceased" are discrete, albeit potentially overlapping, categories of assets; and

- the authorised person "*may* seize and dispose" of property as prescribed by regulations. The statutory language is thus ambiguous as to whether the power can be exercised if regulations have not been made. That depends on whether "may" in s 260-150(2) is mandatory or permissive.[46]

In summary, it is possible that s 260-145 does not apply to property acquired by executors (or beneficiaries) by converting property of the deceased. If that is correct, and an executor converts or liquidates assets coming to them from a deceased before the Commissioner makes a determination, there may be no property against which the Commissioner can recover. Further, there is a respectable argument that the Commissioner's seizure and disposal powers have no operation without regulations that prescribe how those powers should be exercised.

Given the above, it is concerning that the Commissioner's practices place pressure on executors to obtain grants of probate not otherwise required for estate purposes. The Commissioner should be transparent about the fact that executors are not obliged to obtain probate for tax purposes and that, if they do obtain probate, they may expose themselves, and their estates, to liabilities that they would not otherwise be subject to. For the same reasons, practitioners should be wary of advising executors without probate that they must lodge tax returns for the deceased up to the date of death.

Returns

Arguably, the Commissioner does not have any power under s 161 ITAA36 to require a lawful executor, without probate, to provide returns of a deceased's taxable income. That is because s 260-145 does not deem the executor to be the deceased taxpayer who derived the income (cf s 260-140(2)). The Commissioner could, however, rely on his power in s 163 ITAA36 to require returns from such executors in their capacity as non-taxpayers.

Confidentiality of deceased's tax information

As documented by the IGTO,[47] the ATO has an administrative practice of refusing to share taxation information with executors who have not obtained probate. The Commissioner justifies this practice citing s 355-25, Sch 1 TAA53. Section 355-25 provides that it is an offence for a tax officer to disclose "protected information" about a taxpayer other than to a "covered entity".

At first blush, the ATO's reliance on s 355-25 is surprising because s 355-25(2)(d) provides that a "covered entity" includes a taxpayer's "legal personal representative". And "legal personal representative" is defined in s 995-1 ITAA97 to mean, inter alia, "an executor or administrator of an estate of a person who has died". The definition does not restrict "executors" to those who are administering estates under grants of representation.

Further, s 355-25 has no application at all if an ATO officer discloses information "in the performance of their duties as a taxation officer" (s 355-30). The performance of duties exception permits, inter alia, disclosures for the purpose of "administering taxation laws" and/or for the purpose of enabling another entity to "understand or comply with its obligations under a taxation law".

> "… if they do obtain probate, they may expose themselves, and their estates, to liabilities …"

How then does s 355-25 justify ATO officers denying protected information to executors who are administering deceased estates without probate? This is not entirely clear. Executors manifestly require the information for a permissible purpose. It must be either that the ATO is reading "executor" in the definition of "legal personal representative" down to exclude executors who have not obtained probate, or that it is simply taking the evidential position that it is unsafe for ATO officers to accept that persons are lawfully fulfilling the office of executor if they have not obtained grants of probate.

Meaning of executor

The most likely explanation for why the ATO denies protected information to executors administering deceased estates without probate is that the ATO construes the term "executor" in the definition of "legal personal representative" to only include executors who have obtained probate. For instance, the Commissioner has said that he cannot use his remedial powers to expand "the definition of legal personal representative to include persons *entitled* to be a taxpayer's legal personal representative" (emphasis added) because he said it would be against legislative policy.[48]

The Commissioner's explanation infers that persons do not have the status of "executors" unless and until they have been granted probate. However, as discussed above, such a view is at odds with the position at general law. At general law, an executor is any person appointed under a valid will who, by their conduct, has accepted their appointment and assumed the burdens and responsibilities of the office.[49] It is not appropriate to describe such a person as one who is "entitled" to be an executor; rather, they are an executor who is "entitled" to apply to the court for a grant of probate.[50]

If the term "executor" in the definition of "legal personal representative" is to be attributed a narrower meaning than it has at general law, there must be something in the statutory context to support that narrower meaning.[51] In that vein, it might be argued that the collocation of

executors with administrators in the definition of "legal personal representatives" infers an intention to only designate representatives who have received formal grants of representation. But the definition of "trustee" in s 6(1) ITAA36 points against such an intention. Under the latter definition, "executors" and "administrators" are collocated with "trustees" and other persons who act in fiduciary capacities. This suggests that, for the purposes of the taxation law, the key attribute "executors" and "administrators" have in common are the fiduciary obligations attaching to their offices rather than the manner in which they assumed their offices. And it makes intuitive sense that the taxation law would be concerned with those more substantive qualities, given the terms "legal personal representative", "executor" and "administrator" serve multiple taxation provisions, not just the confidentiality provisions.

Requisite level of proof that a person is an executor

That leaves the argument that the reason why ATO officers cannot share protected information with executors administering estates without probate is because, without probate, the officers cannot be satisfied that the persons have been validly appointed as executors. But that seems a stretch. Should an ATO officer disclose information to a person whom they reasonably believe to be an executor within the meaning of s 355-25(2)(d), their disclosure would be protected under s 355-50, even if the person turns out not to satisfy s 355-25(2)(d) because they were not validly appointed. That is because the disclosure would have been made by the officer, bona fide, in the performance of their duties.

On this view, the critical question is not the meaning of "executor". Rather, it is the nature and extent of the information that ATO officers acting reasonably should be required to collect before they can lawfully disclose protected information to persons claiming to be executors of deceased estates.

The evidentiary standard which officers must meet could be the subject of a formal direction from the Commissioner. For example, the Commissioner could direct his officers, in a practice statement, to require persons claiming to be lawfully appointed executors to substantiate that claim by providing proof of their identify, a certified copy of the death certificate and will, and a statutory declaration attesting to the fact that they have accepted appointment as executor under the will and are administering the estate without probate.[52] Officers who comply with that direction would be acting in the performance of their duties.

Possible amendments

As discussed above, the enactment of Subdiv 260-E has removed the Commissioner's power to assess executors who are administering estates without probate. This is a lacuna in the law which puts the collection of deceased taxpayers' inchoate tax liabilities at risk.

Assuming that the lacuna was not intended, and is against policy, an easy remedy would be to remove the threshold requirement in s 260-140 that there must have been a formal grant of representation. That would return the law to the way it was before the rewrite in 1999. Consideration should also be given to clarifying that s 260-140 applies to cases where taxpayers die with inchoate entitlements to refunds. At present, the provision only applies if a person dies with an "outstanding tax-related liability".

It would also be useful to include a provision that authorises the Commissioner to pay refunds to persons that the Commissioner is *satisfied* are *entitled* to obtain probate of the will. Such a provision should specify that such persons do not have to obtain probate. Where the Commissioner pays a refund to an executor without probate, he would be discharged from any further liability in respect of the amount. A model provision to this effect can be found in s 211 of the *Life Insurance Act 1995* (Cth).

Conclusion

The taxation law does not oblige executors to obtain grants of probate if probate is not required for estate purposes. Nor should they. It would be poor tax policy to insist that executors expose their estates to unnecessary costs and liabilities simply to comply with the taxation law.

That said, there are gaps in the taxation law that prevent the Commissioner from assessing executors who are administering estates without grants of probate. There also appear to be gaps in the law as to when the Commissioner can pay refunds. This too is poor tax policy. It puts revenue at risk that should be collected and refunds that should be paid. Simple amendments would remedy these deficits in the taxation law.

Finally, the ATO is wrong to say that its officers cannot share protected information with executors who are administering deceased estates without probate. Officers can disclose information to those persons if they are satisfied, on a reasonable basis, that they are lawful executors seeking information for permissible purposes. The Commissioner could put this issue beyond doubt, and protect his officers, by issuing a practice statement specifying the evidence that they must obtain to reasonably satisfy themselves that a person is acting as a lawful executor.

Dr Kate Roff
Complex Tax Consultant
BNR Partners

References

1 Probate is not always required. Whether it is required depends on the composition of the deceased estate and the succession laws of the states and/or territories in which the deceased held their assets.

2 See, for example, Australian Taxation Office, *Who can represent a deceased estate*, 1 May 2025, available at www.ato.gov.au/individuals-and-families/deceased-estates/who-can-represent-a-deceased-estate, and paras 2 to 3 of PCG 2018/4.

3 Generally, executors should not obtain grants of probate if grants are not required and administering without grants would substantially reduce the costs of administering the estates. See, for example, Thomson Reuters, *Lawyers practice manual NSW*, para 12.4.201, and Thomson Reuters, *Lawyers practice manual Victoria*, para 13.3.201.

4 Analysis of published statistics on death and grants of representation in NSW in 2024, and in Victoria in 2024–25, suggests that estates with grants of representation typically represent less than 55% of all reported deaths. See Australian Bureau of Statistics, *Deaths, Australia* 2024, Supreme Court of NSW, *2024 annual review*, Supreme Court of Victoria, *Annual report 2024–25*, and *2025 Australian probate report*, pp 17–19.

5 Filing fees for grants of representation depend on the jurisdiction in question and the gross value of the estate (see *2025 Australian probate report*, pp 32–35). For example, in 2025 in Tasmania, the fee for estates valued at under $50,000 was $534, rising to $2,278.63 for estates valued at $5,000,000 or more. Contrast Victoria, where there are no fees for estates valued at under $250,000, but they rise to $17,297.50 for estates valued at $7,000,000 or more. Legal and other fees apply on top of filing fees (*Australian probate report*, pp 36–39).

6 Chartered Accountants Australia and New Zealand, *Investigating the ATO's probate requirements for deceased estates*, 9 March 2026. Available at www.charteredaccountantsanz.com/member-services/technical/tax/tax-in-focus/investigating-the-atos-probate-requirements-for-deceased-estates.

7 Inspector-General of Taxation and Taxation Ombudsman, *Death and taxes: an investigation into Australian Taxation Office systems and processes for dealing with deceased estates*, report, July 2020.

8 Ibid p 65.

9 Ibid, recommendations 1 and 7.

10 In 2024, Australia recorded 185,766 deaths; the Australian Bureau of Statistics projects that annual deaths will exceed 200,000 by 2030 (*2025 Australian Probate Report*, para 1.1.

11 Separate collection mechanisms apply if LPRs accrue post-death tax liabilities as trustees of the estates.

12 S 260-140, Sch 1 TAA53.

13 S 260-145, Sch 1 TAA53.

14 S 995-1 ITAA97, definition of a "legal personal representative".

15 See, for example, *Meyappa Chetty v Supramanian Chetty* [1916] 1 AC 603, *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57 at 78 (Gibbs J), *The Estate of the Late Sir Donald Bradman v Allens Arthur Robinson* (2010) 107 SASR 1 at [183].

16 In Victoria, Queensland, South Australia and Tasmania, a deceased's property vests in the "lawful executor" from the moment of the testator's death. For personal property, the vesting is by operation of the common law, for real property, it is by operation of statute. See *Public Trustee v CBA* [2018] SASC 25 at [81]–[87]. The position in the other states and territories is less clear because statutes in those jurisdictions provide for the assets of the deceased to vest in the Public Trustee until probate is granted, whereupon the interest is divested from the Public Trustee and vested in the person named in the grant (in some cases, relating back to the date of the deceased's death, and in other cases, from the date of the grant). Some have suggested that in these states, executors have been assimilated to administrators to the extent that both offices derive their interest in the deceased's property from the grant: see, for example, *Ex parte Public Trustee; Re Birch* (1951) 51 SR (NSW) 345, and FC Hutley, "The executor de son tort in the law of New South Wales", (1952) 25 *Australian Law Journal* 716. But that view is open to challenge: see, for example, *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57 at 77 per Gibbs J, and N Crago, "Executors of unproved wills: status and devolution of title in Australia", (1993) 23(2) *University of Western Australia Law Review* 235.

17 N Crago, "Executors of unproved wills: status and devolution of title in Australia", (1993) 23(2) *University of Western Australia Law Review* 235. Historically, it has been debated whether a lawful executor appointed by a valid will who has accepted the office by their conduct (ie intermeddling), but who has not proved the will, is properly described as an executor de son tort: see GE Dal Pont, Law of succession, Lexis Nexis Australia, 2021, para 10.15. However, recent Australian decisions appear to support the traditional English view that such a person is simply to be regarded as a lawful executor who has subjected themselves to the burdens and responsibilities of the office and who may not renounce the office without curial permission and/or who may be ordered to take out probate: see, for example, *Re Stevens; Cooke v Stevens* [1897] 1 Ch 422, *Holder v Holder* [1968] Ch 353, *In the Will of Lyndon (dec'd)* [1960] VR 112, *Mulray v Ogilvie* (1987) 9 NSWLR 1, *Re Estate Kleinlehrer (dec'd)* [2024] NSWSC 648 at [30], [35], [44], [52] and [89], and *Public Trustee v CBA* [2018] SASC 25 at [99]–[102].

18 See, for example, *Meyappa Chetty v Supramanian Chetty* [1916] 1 AC 603 at 608, *Public Trustee v CBA* [2018] SASC 25 at [85]–[87], and *Ryan v Davies Bros Ltd* (1921) 29 CLR 527 at 536.

19 See, for example, *Ingall v Moran* [1944] KB 160, *Re Full Board of the Guardianship and Administration Board* [2003] WASCA 268 at [47]

20 Also, the ATO's distinction between authorised LPRs and LPRs.

21 See s 24 of the *Income Tax Assessment Act 1927* (Cth), and Sir George Pearce, *Hansard*, 7 December 1927, p 2716.

22 S 117 of the *Taxation Laws Amendment Act 1984* (Cth).

23 Cls 117 and 118 of Pt B of the explanatory memorandum to the Taxation Laws Amendment Bill 1984.

24 *A New Tax System (Tax Administration) Act 1999* (Cth).

25 Paras 2.48 and 2.50 of the explanatory memorandum to the A New Tax System (Tax Administration) Bill 1999.

26 See, for example, *Levy v Kum Chah* [1936] HCA 60.

27 *DCT v Brown* (1958) 100 CLR 32 at 53; *Taylor v DCT* (1969) 123 CLR 206. Relevantly, see s 64 of the *Administration and Probate Act 1929* (ACT), s 92 of the *Probate and Administration Act 1898* (NSW), s 96 of the *Administration and Probate Act 1969* (NT), s 67 of the *Trusts Act 1973* (Qld), s 63 of the *Trustees Act 1962* (WA), s 33 of the *Trustee Act 1958* (Vic), and s 29(1) of the *Trustee Act 1936* (SA). Historically, the protection offered by the notice procedures was sometimes limited to executors with probate but that was not considered to be good policy: see Queensland Law Reform Commission, *Administration of estates of deceased persons: report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, report no. 65, vol 2, April 2009, pp 298–303.

28 See, for example, *Byers v Overton Investments Pty Ltd* [2001] FCAFC 760. Cf RW White, "The position of executors before grant", paper given for the NSW Bar Association, 27 June 2024.

29 See, for example, *Public Trustee v CBA* [2018] SASC 25 at [88] and [120]. But cf s 54 of the *Succession Act 1981* (Qld).

30 See *Binetter v FCT* (2016) 249 FCR 534. Compare the definition of "income tax" in s 6(1) ITAA36 and the definition of "income tax liability" in s 995-1 ITAA97.

31 *Barkworth Olives Management Ltd v DCT* [2010] QCA 80 at [27].

32 S 5-5 ITAA97.

33 On the logic that the deceased taxpayer can no longer send in returns, be subjected to assessments and appeal assessments: *DCT v Brown* (1958) 100 CLR 32 at 51–52.

34 Div 255, Sch 1 TAA53; *Binetter v FCT* (2016) 249 FCR 534.

35 S 260-140, Sch 1 TAA53.

36 See *Aitken v FCT* [1936] HCA 53, *Patterson v FCT* (1936) 56 CLR 507 at 516 and 518–19, *Stapleton v FCT* (1955) 93 CLR 603 at 618, *Taylor v DCT* (1969) 123 CLR 206 at 210; *DCT v Brown* (1958) 100 CLR 32 at 42, 48, 57 and 63.

37 S 260-140(1)(a), Sch 1 TAA53.

38 First, it is not clear whether a nil assessment must be made under s 166 ITAA36 before a refundable offset becomes due and payable by the Commissioner pursuant to s 63-10 ITAA97 and s 8AAZLF TAA53. Second, if an assessment is required, it is also unclear what mechanisms are available to the Commissioner to make that assessment (ie assuming that s 260-140, Sch 1 TAA53 does not apply).

39 S 260-145, Sch 1 TAA53.

40 See, for example, *Commissioner of Taxation (NSW) v Lawford* (1937) 56 CLR 774 at 780, *FCT v Australian Building Systems Pty Ltd (in liq)* [2015] HCA 48, and *Robson v FCT* [2024] FCA 720.

41 See *Binetter v FCT* (2016) 249 FCR 534, and *Bennett v FCT* [2015] 101 ATR 466 at 472.

42 *Binetter v FCT* (2016) 249 FCR 534 at 556.

43 Cf *Bennett v FCT* [2015] 101 ATR 466 at 473.

44 But this assumes that an assessment is required for the entitlement to crystallise (s 260-140(1)(a), Sch 1 TAA53).

45 Cf, generally, *Stapleton v FCT* (1955) 93 CLR 603.

46 Paragraph 2.50 of the explanatory memorandum to the A New Tax System (Tax Administration) Bill 1999, which introduced s 260-145, inferred that the regulations must be made and complied with before an authorised person can exercise the power.

47 Inspector-General of Taxation and Taxation Ombudsman, *Death and taxes: an investigation into Australian Taxation Office systems and processes for dealing with deceased estates*, report, July 2020, pp 22–23.

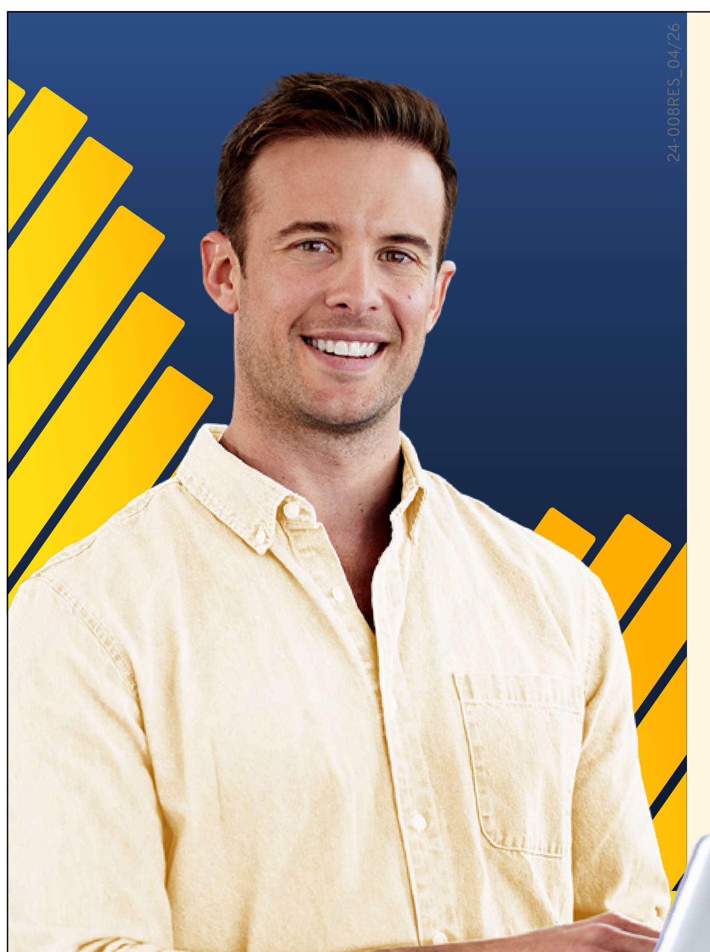
48 Australian Taxation Office, *When the Commissioner's remedial power was unable to be used to assist individuals*, 22 September 2025. Available at www.ato.gov.au/about-ato/ato-advice-and-guidance/commissioner-s-remedial-power/when-the-commissioners-remedial-power-has-not-been-used/when-commissioners-remedial-power-was-unable-to-be-used-to-assist-individuals#ato-Legalpersonalrepresentativedefinition.

49 *Public Trustee v CBA* [2018] SASC 25 at [86]–[88].

50 Cf ss 211 and 212 of the *Life Insurance Act 1995* (Cth).

51 Ordinarily, statutory words take their general law meaning unless the context demands otherwise: see *Attorney-General (NSW) v Brewery Employees Union of New South Wales* (1908) 6 CLR 468 at 531, and D Pearce, *Statutory interpretation in Australia*, Lexis Nexis, 2019, para 4.21.

52 In the alternative, if a solicitor has been appointed to act for a deceased estate, a letter from the solicitor stating that they have no cause to doubt the validity of the will might also be provided. Chartered Accountants Australia and New Zealand has suggested evidentiary requirements along these lines: see Chartered Accountants Australia and New Zealand, *Investigating the ATO's probate requirements for deceased estates*, 9 March 2026. Available at www.charteredaccountantsanz.com/member-services/technical/tax/tax-in-focus/investigating-the-atos-probate-requirements-for-deceased-estates.



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Third-party data governance

by Rob Leonard, Director, PwC

This article examines the practical implementation of the ATO's third-party data (TPD) Guide, addressing how entities can strengthen tax governance over outsourced data arrangements and prepare for regulatory review. The purpose is to provide a structured pathway for entities seeking to achieve a stage 2 assurance rating, and progress towards stage 3 through controls testing. The approach synthesises the TPD Guide's four principles and five controls into a sequenced methodology, encompassing mapping outsourcing ecosystems, documenting data flows for income tax returns and distribution statements, conducting gap analyses, executing remediation plans, and performing periodic controls testing. Findings emphasise the importance of board reporting, reliance on ASAE 3402/GS 007 reports, oversight of outsourced service providers' IT systems, and robust controls for complex international investments. While analytics, automation and artificial intelligence support repeatable processes, human judgement remains essential. A well-designed governance framework delivers benefits extending beyond improved assurance ratings.

Introduction

Lodging entities carry the legal responsibility for ensuring that false or misleading statements (including, for example, statements made in tax returns and annual investment income reports) are not made to the ATO.[1] As the use of outsourced service providers (OSPs) does not diminish this legal responsibility, it is incumbent on entities with outsourcing arrangements to obtain a high level of confidence over both the accuracy of information that OSPs provide, and the controls relevant to the OSP environment from which it is sourced.

The ATO's supplementary guide on *Governance over third-party data*[2] (TPD Guide), released in 2022, outlines the key principles to which superannuation funds, investment managers, insurers and their OSPs should have regard when establishing and maintaining controls to manage the risk of inaccuracies in third-party data (TPD) that feed into their income tax reporting obligations and distribution statements.[3] The TPD Guide follows the publication of the *Tax risk management and governance review guide* (2017) and the *GST governance, data testing and transaction testing guide* (2020). In accordance with the approach adopted by the ATO in respect of the 2017 and 2020 guidance, the ATO uses a three-stage rating system to assess where taxpayers have TPD controls in existence (stage 1), that are designed effectively (stage 2) and that are operating effectively (stage 3).

This article will focus on the key practical steps that entities should take to implement the TPD Guide and to be prepared for ATO review.[4] While it is expected that entities will apply the TPD Guide in a way that is "fit for purpose", there are key requirements common for most entities that are subject to the TPD Guide. In this regard, a summary of the key steps that taxpayers should take to align with the TPD Guide, mirroring the structure of this article, is outlined in Table 1 to assist readers in navigating areas of focus. Note that, for the purpose of this article, it is assumed that the reader has the objective of achieving a stage 2 or 3 rating in respect of TPD controls.

Suggested approach to align with the TPD Guide

Map outsourcing ecosystem

The first step when considering alignment with the TPD Guide is to identify and map key OSPs that receive, process and provide data relevant to the entity's income tax distribution and/or return processes (depending on entity type). Where these providers rely on data, systems, calculation engines and/or software of additional service providers, the entity should understand these dependencies and consider whether these providers may also be key OSPs, where relevant.

Each entity's map of potential OSPs and data sources will differ, but generally each should include:

- OSPs: such as custodians, administrators (including registry service providers) and tax advisers that provide tax reports directly to the entity and/or investors. Entities should also consider including third parties whose systems, calculation engines or software are relied on to capture, collate and process the data that feeds into the entity's tax reporting, as well as underlying sources of data such as investment managers, quantity surveyors or actuaries whose data is received and processed by the OSP;
- data sources: define the data that will be relevant to and impact tax calculations and reporting; and
- complex investments: consider whether complex or international investments are in place/are entered into regularly as these are subject to additional expectations in the TPD Guide. In this regard, the TPD Guide is focused on CLPs, foreign hybrid limited partnerships, controlled foreign companies, FITOs and foreign trusts, and particular attention should be paid to identify these investments.

Where the OSP is a related party to, or an "in-house" function of, the entity, the governance expectations in the

Table 1. Suggested approach to align with the TPD Guide

Step	What it involves	Key documentation
	Suggested approach to align with the TPD Guide	
1.1 Map the entity's outsourcing arrangements	Identify material OSPs involved in the tax data and reporting chain, including "in house" and external providers.	List of material OSPs and services provided.
1.2. Document data sources and flows relevant to income tax return and distribution statement	Identify data sources and flows from source to tax returns, income tax provisions, distribution calculations and investor distribution statements (as relevant) for each material OSP.	Data flow diagram showing source to tax return/distribution statement and associated schedules, including manual processing points and known system limitations (eg foreign hybrid limited partnership, controlled foreign company calculations, components of domestic tax distributions, off-market share buy-backs, TOFA elections, 45-day rule). Define criteria in the tax governance framework for what constitutes significant or complex investments; consider where analytics can be used to validate correctness of tax treatment.
1.3 Collate existing controls documentation and perform gap analysis against the TPD Guide's four principles and five controls	Inventory what already exists: service level agreements (SLAs), ASAE 3402/GS 007 reports, tax governance frameworks, controls over TPD, OSP transition/migration plans, board reporting templates, significant transaction definitions, custodian and administrator tax policies, reconciliation processes and data analytics. Assess current state documents for alignment with TPD Guide, having regard to compensating controls and areas requiring special consideration (eg corporate limited partnerships (CLPs), successor fund transfers, custodian changes; see below).	Inventory of existing documentation relevant to TPD Guide. Gap analysis report with current state, identified gaps rated by risk and effort, and compensating controls documented on an "if not, why not" basis.
1.4 Prepare and execute remediation plan	Assign accountable owners and target dates to uplift gaps. Use plan as basis for board reporting.	Prioritised remediation plan with owners and dates. Board paper summarising findings and plan (BLC 3). Uplifted processes and documentation (where required), preparation and execution of TPD controls testing plan (BLC 4).
1.5 Perform periodic controls testing over TPD controls	Design ongoing TPD controls testing plan on three-year basis, performed by independent reviewer. Report test results to board or audit committee.	Finalised and approved three-year TPD controls test plan. Independent testing and board/audit committee report covering TPD controls; documented testing.
	Additional considerations	
2.1 Complex/foreign investments	Where entities have complex and/or offshore investments, implement process for establishing tax treatment for entry, holding and exit. As the source information is from offshore entities, entities are expected not to rely solely on custodian reporting but also to have an understanding of the Australian tax treatment of the underlying investment.	Controls should be tailored to the nature of investments, but broadly may include documentation covering (where relevant): tax treatment of investment and returns; foreign hybrid determination; system configuration; documented process for processing team; and review of distributions.
2.2. Current ATO focus areas	Consider current ATO focus areas to maximise return on effort.	
2.3. Analytics, automation and AI	Consider how automation and AI can support repeatable processes such as data analytics, reconciliations, anomaly detection and monitoring.	Perform analytics tests over key TPD sources and document analytics controls in the tax governance framework.

TPD Guide continue to apply. The entity is still expected to have documented SLAs, clearly defined roles and responsibilities, and independent assurance over the OSP's control environment. This is because the greater access and influence available in a related party arrangement do not reduce the obligation to formally document and test the controls in the same manner as for an unrelated provider.

To assist readers of this article, Table 2 contains a simple example map of relevant OSPs and TPD sources.

Document data flows

For each material data source, entities should document how TPD flows from source to tax return or distribution statement. This should include the mechanism by which data is received, who reviews or validates it before it is relied on for tax reporting and what procedures they perform, where manual processing or adjustments occur along the chain, and whether there are known limitations in OSP systems for particular transaction types (such as off-market share buy-backs, taxation of financial arrangements (TOFA) elections, or the 45-day rule where shares are not held at risk).

The TPD Guide acknowledges the distinction between "straight-through processing" (being instruments whose tax treatment is clear, usually due to vanilla equity and debt status) and more complex transactions that may require additional tax review. In this regard, the TPD Guide suggests that a high-quality ASAE 3402/GS007 report (scoped for tax) is generally expected to provide sufficient assurance over the OSP's control environment for straight-through data processing, while additional TPD tax controls are expected in respect of more complex or significant investments, such as CLPs, corporate actions, non-portfolio investments and investments across multiple jurisdictions. In practice, taxpayers may perform data analytics over all transactions and identify where complex, material or significant transactions require more extensive tax review.

Table 2. Example map of relevant OSPs and TPD ecosystem

Example OSPs	Potential underlying data sources (TPD)
Custodian (non-complex, Australian investments)	Investment reports outlining dividends, franking credits, capital gains, cost base records.
Investment manager (CLPs, attribution managed investment trusts and managed investment trusts)	Foreign income reports, foreign income tax offsets, distributions and capital call notices from CLPs, and distribution component breakdowns from Australian managed funds. Corporate action processing.
Administrator (fund member tax reporting, contributions processing)	Notices of intention to deduct personal contributions, member tax file numbers, contribution classifications.
Unit registry services provider (unitholder reporting)	Unitholder registry covering identity, TFN, residency status, unit transaction records regarding redemptions, transfers, distributions.
External tax adviser (tax return and distribution review data)	Tax return and distribution calculation packs.

Collate existing controls documentation

Many entities already have practices and documentation that satisfy elements of the TPD Guide. Before creating anything new, entities should take stock of what already exists. The objective should be to inventory existing documentation and controls and map these against the TPD Guide's four principles and five controls to identify gaps. An example summary of key existing documentation that may be helpful to facilitate this process is provided in Table 3. For completeness, it is noted that these documents may not exist or be able to be provided by the relevant OSP. Entities might therefore consider updating requirements in SLAs to ensure that TPD-aligned documentation exists.

Practical guidance for the gap analysis

Do not overlook informal processes. A quarterly call with the custodian's tax team that is not minuted, a spreadsheet reconciliation performed annually but not referenced in the tax risk management framework, or an ad hoc review of the ASAE 3402 report that is not reported to the board all represent existing practices that may only need to be formalised and documented to satisfy the ATO's expectations.

> "A well-designed TPD tax governance framework provides the board with confidence that tax risks are managed …"

Similarly, processes and controls often exist with the investment operations team, the risk and compliance function, or the outsourcing or procurement teams, not just the tax function. SLAs for example may be managed outside the tax/finance team.

Note the version and currency. For each document collected, record whether it is current, when it was last reviewed, and who is responsible for maintaining it. A custodian tax policy obtained three years ago but never reviewed since will not satisfy the annual review expectation under MLC 6.

Prepare and execute remediation plan

While the gap analysis summarises an entity's "current state", the remediation plan sets out how to close the gap against ATO expectations. A prioritised remediation plan with assigned accountable stakeholders can also form the basis for board reporting under BLC 3, and further demonstrate to the ATO in any future combined assurance

Table 3. Example of collated controls documentation relevant to TPD Guide

Document type	What to collect	What it evidences
Service level agreements	Executed SLAs with custodians, administrators and external tax advisers; any schedules or annexures addressing tax reporting deliverables, service levels and breach notification processes.	Managerial-level control (MLC) 1 (roles and responsibilities), board-level control (BLC) 3 (board informed of breaches)
Custodian and administrator tax policies	Tax policy documents from each custodian and administrator; any external tax adviser reviews of those policies (and frequency); documentation of default assumptions (eg 45-day rule, cost base methodologies).	MLC 6 (tax policies in accordance with the law)
Independent assurance reports	ASAE 3402/GS 007 reports from custodians and administrators; any documented analysis of scope, findings and exceptions; evidence of board or audit committee reporting on findings.	BLC 4 (periodic tax controls testing), BLC 3 (board informed of findings)
Tax risk management framework and process documents	Current tax risk management framework policy documents; any outsourcing sections, RACI, escalation procedures or board reporting protocols already embedded in the framework, process documents.	MLC 1, MLC 6, BLC 3
Board and committee papers	Board or audit committee papers addressing tax risk, outsourced provider performance, ASAE 3402/GS 007 findings, or tax governance matters	BLC 3
Risk and controls matrix and testing plan scoped for OSP/TPD controls	Any internal or external audit reports, control testing results or review findings covering tax controls or TPD processes.	BLC 4

reviews work undertaken to date and future work plans. This is particularly important as, since 1 July 2024, the ATO has provided a rating for governance over TPD to relevant investment industry entities. The ATO expects a stage 2 rating to be the industry standard and that all investment industry entities should have effectively designed controls in place.

The plan should be structured around the four principles and five controls, with each identified gap assigned a priority, an owner and a target date. A simple example plan covering common areas for remediation is set out in Table 4.

Periodic controls testing

Many entities already have an internal audit testing program for their broader tax control framework, but the key question is whether that program extends to TPD tax controls. The ATO expects a formal test plan that is approved by the audit committee or board and covers testing on an ongoing three-year cycle. The test plan should cover BLC 3 (board reporting), MLC 1 (roles and responsibilities of OSPs), MLC 3 (significant transactions) and MLC 6 (documented control framework). Entities may work with their internal audit teams to add these controls to existing tax controls testing cycles, or create dedicated testing plans with the assistance of external advisers.

Importantly, testing must be performed by an independent reviewer and must be on an ongoing basis rather than a one-off exercise. When determining the independence of the tester, it is relevant to consider whether the third party has undertaken any of the responsibilities of the control owners, including where the tester has undertaken the design of the tax controls or assisted with the income tax work. If they are not considered independent, the entity will not have met the requirements for a stage 3 rating. Most commonly, testing would be performed by an internal audit or by an external adviser.

Once testing is completed, results must be reported to the board or audit committee. The ATO requires testing reports to include sufficiently detailed evidence of the testing methodology (including sampling). Where testing reports are on an "exceptions only" basis without describing what was tested, how and what sample was examined, this will not be sufficient.

Additional considerations

Complex/international investments

The TPD Guide requires entities with complex international investments to make sure that processes and controls are in place to ensure the correct tax outcomes, having regard to any potential difficulties accessing information from foreign sources or service providers and differences between Australian and international tax laws. The TPD Guide specifically includes procedures for CLPs, foreign hybrid limited partnerships, controlled foreign companies, foreign income tax offsets and foreign trusts. While the detail of each of these investments is beyond the scope of this article, broadly, the ATO expects taxpayers to have in place processes relating to the full lifecycle of these investments, covering the onboarding, ongoing monitoring and dissolution of these investments.

Entities are expected not to rely solely on custodian reporting for these investments but to have, and apply, an understanding of the Australian tax treatment of the underlying investment. This is particularly relevant to overseas custodians or administrators which may be less likely to have regard to Australian income tax issues and may provide raw data for the Australian fund to determine appropriate tax treatment. The ATO expects controls at each stage of the investment lifecycle. A high-level summary of these expectations is outlined in Table 5.

Table 4. Example summary TPD Guide remediation plan

Principle/control	Gap identified	Remediation action	Owner	Priority/target date	Status
P1/MLC 1	Responsible, accountable, consulted, informed (RACI) model does not exist	Build RACI model cross-referenced to existing SLA tax deliverables	Head of tax	High 6 months	Not started
P2/MLC 6	Custodian tax policy not reviewed since 2022	Obtain current policy; engage external adviser for annual review	Tax manager	High 6 months	In progress
P3/MLC 3	No defined criteria or escalation for significant investments	Draft criteria and escalation process in tax governance framework	Head of tax	High 3 months	Not started
P4/BLC 4	No three-year test plan covering TPD tax controls	Draft risk and controls matrix and test plan on rotation basis; present to audit committee for approval	Head of tax/ internal audit	Medium 6 months	Not started
P4/MLC 3/ MLC 6	ASAE 3402 and GS 007 reports obtained but no documented review of scope alignment to TPD Guide. No mapping of investment profile against report scope to identify gaps (eg CLPs, corporate actions, manual tax adjustments not covered, and findings/exceptions not reported to the board).	(1) Review ASAE 3402 and GS 007 reports to confirm inclusion of taxation control objectives; (2) map entity's investment profile against report scope to identify areas not covered; (3) where gaps identified, raise with custodian for inclusion or document compensating controls; (4) establish annual process to report findings and exceptions to the audit committee	Head of tax	Medium 12 months	Not started

Table 5. TPD Guide expectations in respect of complex/ international investments (high level)

Stage	ATO expectations
Onboarding	Tax due diligence to classify the investment vehicle for Australian tax purposes (eg CLP, foreign hybrid limited partnership etc), determine foreign hybrid status, document the nature of expected returns, and verify that relevant system set-ups reflect the classification.
Ongoing monitoring	Annual confirmation questionnaires to investment managers, a documented annual review process for CLP distributions using risk-based assessment criteria, ongoing monitoring of CFC/foreign hybrid limited partnership status, and data analytics and sample testing of custodian tax data. Tax policies that cover (where relevant) classification and tax treatment of foreign investments and distributions.
Exit	Confirmation that the tax treatment on exit is consistent with the original tax advice and custodian processing has occurred as instructed.

Current ATO focus areas

The ATO's 2025 findings report identified a number of areas that require improvement.[5] When undertaking a gap analysis, taxpayers should pay particular attention to these areas and prioritise opportunities for uplift. In this regard, the ATO found that some entity's board reporting templates contain limited or no information about material breaches of SLAs by OSPs, including how breaches were rectified and what controls were implemented to prevent recurrence. Where no breaches arise, entities should include positive comments to this effect (BLC 3).

The findings report also highlighted that some ASAE 3402/ GS 007 reports do not contain sufficient tax control objectives in scope. Further, entities must evidence that findings are reviewed, understood and reported to the board, with a remediation strategy where exceptions are identified (BLC 4/principle 4).

Further, some entities exhibit a lack of oversight of changes to OSP IT systems or process improvements that impact tax reporting or tax calculations (MLC 1). Entities should consider how to evidence their understanding of underlying OSP systems that are relevant to tax calculations (for example, through process documents that reference this information).

With regard to significant or complex investments, the ATO noted that, while many taxpayers define significant or complex investments, the criteria for assessing complexity and the escalation and sign-off processes need to be more clearly defined. Exit controls may be overlooked, and documented controls for data migration events (eg custodian changes, successor fund transfers, platform migrations) require strengthening (MLC 3).

Finally, the ATO noted that entities need greater processes and controls to ensure that administrator tax policies are prepared in accordance with the law, particularly for more complex entities. With an increase

in international investments, entities need to understand the gaps in their custodian's tax controls for reviewing information provided by offshore investment managers (MLC 6).

These findings should be considered when performing the gap analysis. Where any of these areas are identified as gaps, they should be treated as high-priority items in the remediation plan, given they represent known areas of ATO focus.

Analytics, automation and AI

Much of what the ATO expects under the TPD Guide involves repeatable, data-intensive processes: reconciling custodian tax reports against source data, performing pre-configured data analytics across large datasets, identifying outliers, and monitoring for systemic errors across high volumes of transactions. These are areas where analytics and AI can add significant value.

In practice, entities can support governance over TPD through a combination of data analytics, anomaly detection and reconciliation automation. Data analytics can apply automated validation rules across the full dataset, such as matching franking credits to franked dividends, foreign income tax offsets to foreign-sourced income, and confirming CGT discount eligibility based on discount rates and days held. Anomaly detection can then be used to identify items for further review, including CLP distributions with extreme component splits, material year-on-year variances, or unexpected foreign withholding tax rates, consistent with the risk-based assessment criteria the ATO expects. Finally, reconciliation automation can support reconciliations of custodian tax reports against investment manager data (including dividends, franking credits and capital gains), supported by exception reporting for manual review. These capabilities can support controls relevant to MLC 1, MLC 3 and MLC 6.

To avoid any doubt, technology and AI do not change the ATO's expectations or remove the entity's responsibility. Automating a control does not transfer accountability. Accordingly, the entity must still understand what the technology is doing and why, and be able to explain it to the ATO. The use of OSPs, including technology providers, does not extinguish the entity's legal responsibility.

Further, outputs still require human judgement. While data analytics can flag an anomaly, determining whether a CLP distribution has been correctly characterised for Australian tax purposes still requires tax expertise. Analytics are tools for identification and efficiency and cannot substitute for technical analysis, remediation or changes to upstream processes where errors are identified.

Where technology or AI is deployed as part of the tax control framework, it should be documented in the tax governance framework like any other control, including the logic applied, the data sources used, the frequency of execution, who reviews the outputs, and how exceptions are escalated.

Conclusion

The suggested steps outlined in this article (ie mapping the outsourcing ecosystem, documenting data flows, collating existing documentation, performing the gap analysis, and preparing a remediation plan) are designed to provide a practical, structured pathway to progress towards a stage 2 rating and, for those entities testing TPD controls, towards stage 3.

Entities do not need to start from scratch. In many cases, the controls already exist in practice but may need to be documented, connected to the tax governance framework, or reported to the board. For the more complex areas such as data migrations and foreign investments, targeted controls will be required.

A well-designed TPD tax governance framework delivers benefits beyond an improved assurance rating. It provides the board with confidence that tax risks associated with outsourced providers are being managed, it reduces the incidence and cost of misreporting, and it assists entities in adhering to their key legal obligation to refrain from making misleading statements.

Rob Leonard
Director
PwC

This article is an edited version of "Third-party data governance – meeting expectations and managing risk" presented at The Tax Institute's Financial Services Taxation Conference held in Sydney on 26 to 27 March 2026.

References

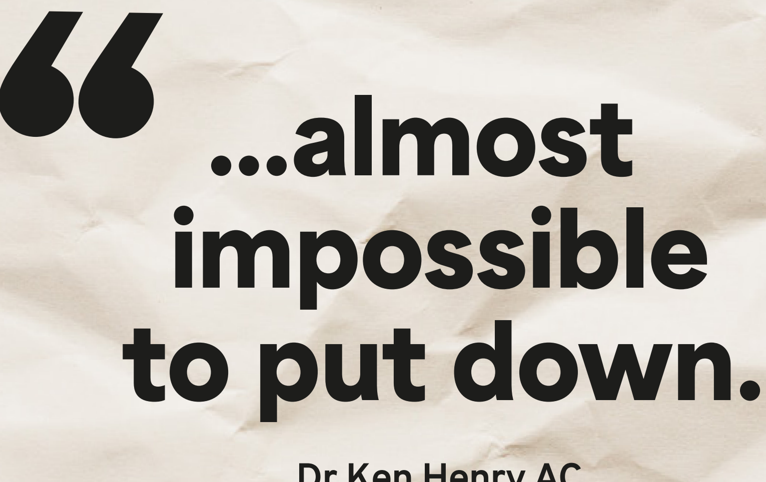
1 Refer to Div 284 of Sch 1 to the *Taxation Administration Act 1953* (Cth).

2 Available at www.ato.gov.au/law/view/pdf/adhoc-sgml/governance-third-party-data.pdf.

3 The TPD Guide is structured around four principles (that the entity understands OSP roles and responsibilities, has documented tax controls for TPD, identifies significant transactions, and seeks independent assurance over OSP data accuracy) and five controls (MLC 1, MLC 3, MLC 6, BLC 3 and BLC 4). The TPD Guide is focused on income tax and does not extend to GST or other taxes.

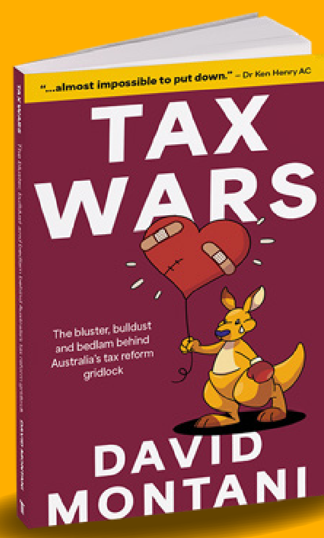
4 Generally, the ATO will consider compliance with the TPD as part of combined assurance reviews. Note, however, that funds with less than $350 million in revenue may still be selected for review due to their inclusion in the funds' management industry. Accordingly, there is a need for entities in this industry to demonstrate that TPD controls are in place.

5 Australian Taxation Office, *Findings report – Top 1,000 income tax and GST assurance programs*, 18 September 2025. Available at www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/large-business/engaging-with-large-corporates-insights/findings-report-top-1000-income-tax-and-gst-assurance-programs.



Tax Wars

by David Montani



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Superannuation

by Daniel Butler, CTA, and
Nick Walker, DBA Lawyers

Payday Super and SMSFs

This article focuses on the key risks and considerations for employers who make SG contributions to SMSFs, as well as what SMSF trustees must do to be ready for Payday Super.

Introduction

From 1 July 2026, the Payday Super (PDS) regime requires employers to pay superannuation guarantee (SG) contributions at the same time as they pay salary and wages. Further, these SG contributions must be received by the relevant superannuation fund within seven business days.

Employer risk when dealing with SMSFs

The ATO recently published its quarterly statistical report for December 2025[1] which confirmed that there were:

- 663,867 SMSFs; and
- 1,224,936 SMSF members.

These numbers have significantly increased in recent years.

Under the choice of fund regime, employees may choose to have their SG contributed to a superannuation fund of their choice, including an SMSF. Indeed, it is becoming increasingly popular for employers to contribute to an employee's SMSF. ATO figures show that there were some 244,000 SMSFs receiving SG contributions for 366,000 employees via single touch payroll.

An employer wears additional risk when contributing to an SMSF compared to a large industry fund due to factors such as:

- an SMSF's details might be withheld if it lodges its annual statutory return late;
- an SMSF may change its bank account details; or
- an SMSF may be rendered non-complying.

Where one or more of these issues occurs, the SMSF may be unable to receive SG contributions. This creates flow-on issues for employers which are still required to satisfy their PDS obligations.

The ATO statistical report also confirmed that the demographic profile of new SMSF members is changing to a younger cohort. Among new entrants, 39.1% are aged between 35 and 44 and 18.5% are aged between 45 and 49 – overall, nearly seven in 10 new members are under 50, compared to an estimated ~25% of the existing SMSF population.

A key ATO concern regarding SMSFs in recent years has been the potential for SMSFs to be used for illegal early access. The ATO recently issued a warning that "some people may say they can help you set up an SMSF so you can access your super for reasons such as paying off your credit card, buying a house or to go on a holiday. This is not true, it is illegal". An employer contributing to such a fund could, for instance, encounter risk if the fund's details are withheld or the fund is rendered non-complying if the employer does not contribute the minimum SG amount within the seven-day time frame.

Accordingly, employers may be exposed to penalties and interest where SG is not received on time, even when the reason for the delay is outside the employer's control.

Large APRA funds are subject to strict processing requirements, including allocating SG within three business days and, if that fails, returning the SG within the same three-business day period. However, SMSFs have up to 28 days to allocate contributions and do not have to reject a contribution. Thus, an employer which pays a contribution to an SMSF should not expect a contribution to be returned. Therefore, the risk that the employee's SMSF may have contravened the *Superannuation Industry (Supervision) Act 1993* (Cth) (SISA) falls on the employer which may have to make contributions to a complying fund to minimise the SG shortfall, penalties and interest that may otherwise arise.

Under PDS, employers generate contribution data via their payroll systems, transmit that data through SuperStream, transfer contributions via the New Payments Platform (NPP), and ensure that the contribution is received and validated within seven business days. There are a number of potential risk points and employers remain responsible for satisfying their SG obligations even if the reason for a delay is completely outside of their control.

The NPP is a 24/7 fast payment system that should enable near real-time transactions between bank accounts.

Note, however, that an employer contributing to an SMSF where there is a related party relationship (eg between the employer and the SMSF or an SMSF member) is not required to use SuperStream and may instead contribute via an electronic funds transfer or another method. Despite this "carve out" from SuperStream for SMSFs, many related party employers may still rely on SuperStream and the NPP to keep their payroll affairs more streamlined moving into PDS.

Given the additional risks thrust on employers which are required to contribute to an employee's SMSF, employers can consider including an indemnity clause in the employment contract to protect the employer where they pay SG on time but the contribution is not received by the SMSF on time due to the SMSF trustee's fault. Naturally, this

would not displace the employer's statutory obligations but provides a contractual claim against the employee.

SMSF trustee compliance

SMSF trustees must also ensure that they comply with all PDS and SuperStream changes, including:

- ensuring that the SMSF's bank account is NPP compliant; and
- ensuring that they are registered for, and continue to maintain, an active electronic service address (ESA).

The ESA is how SuperStream contribution messages are delivered to an SMSF, usually through an administrator or a messaging provider.

If the above criteria are not satisfied, it may only become apparent when a contribution is rejected or delayed, exposing the employer to an SG shortfall and potentially a range of other penalties, despite having acted on time.

Employer due diligence obligations

Employers should adopt a proactive approach to PDS, especially with regard to managing the additional risks associated with employee SMSFs, including:

- verifying SMSF details via Super Fund Lookup at least annually or more frequently if there are any concerns about their employees' SMSFs;
- obtaining a written compliance certificate from each SMSF trustee at least annually; and
- undertaking a member verification service check to confirm each employee's details, including the name of their chosen fund and it's unique superannuation identifier.

However, an employer cannot generally rely on this information if there is a related party relationship and there is reasonable belief that a contravention of the SISA has occurred.

Conversely, if:

- there is no related party relationship;
- there is no knowledge of any contravention; and
- a written compliance certificate from the SMSF trustee has been received by the employer,

the contribution should be accepted as an eligible contribution under the *Superannuation Guarantee (Administration) Act 1992* (Cth) (SGAA).

As you can see, employers are made responsible for many things that are outside their control under PDS and the SGAA. Accordingly, employers are now required to monitor their employees' SMSFs closely to minimise their risk.

Further, given the strict time frames and significant penalties that can be imposed, employers should have the employee's stapled and default fund details on hand. This provides the employer with a backup option to satisfy their SG obligation where issues arise with the employee's SMSF.

Closing comments

There is increased risk for employers when paying SG to an SMSF. In particular, employers remain liable for late SG payments despite relying on SMSF trustees, systems and third-party providers for the SG payment to be received on time.

Employers should work with trustees to ensure that the SMSF complies with the PDS requirements and should begin reviewing systems, verifying data, and implementing processes well before 1 July 2026 to mitigate the risk of non-compliance and significant penalties.

Daniel Butler
Director
DBA Lawyers

Nick Walker
Lawyer
DBA Lawyers

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1 Australian Taxation Office, *Highlights: SMSF quarterly statistical report December 2025*, 13 March 2026. Available at www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/self-managed-super-funds-smsf/smsf-newsroom/highlights-smsf-quarterly-statistical-report-december-2025.

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Giving back to the profession

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Contacts

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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
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310 Edward Street
Brisbane, QLD 4000

T 07 3225 5200
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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

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Editorial Board (appointed September 2021)
Michael Walpole, CTA, Professor, UNSW (Chair)
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