The Tax Institute

Tax Update

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

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

Contents

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

1. Tax Update Pitstop

The Tax Update Pitstop provides a quick reference to the top 5 tax matters from the month as determined by our experts.

Tax Update Matter	Impact Summary	Further Detail
Item 2.1 XLZH	The ART has held the majority underlying interest in shares in a company owned by a discretionary had not changed since 30 September 1985 for the purpose of Division 149 of the ITAA 1997, such that the shares remained pre-CGT assets for the trust. The ATO had contended that the appointment a company as beneficiary of the trust had caused the shares to be cease to a pre-CGT assets.	Page 7
Item 2.2 YTL	The Federal Court has concluded that shares in ElectraNet Pty Ltd, an Australian company holding electricity transmission and system control licences in South Australia, were not taxable Australian property as its interest in the electricity transmission assets under the statutory regime was not real property. As such, the sale of those shares by a non-resident company was disregarded for CGT under Division 855 of the ITAA 1997.	Page 10
Item 2.5 SKG and Ezko	The Supreme Court of New South Wales has held that contracts between two cleaning companies and their clients are employment agency contracts for the purpose of the *Payroll Tax Act 2007* (NSW) and, therefore, the payment made to sub-contractors are taxable wages. This is the most recent case where the courts or tribunals have found that the employment agency contract provisions apply to sub-contracting arrangements	Page 16
Item 2.6 G Global	The High Court has held that legislation to retrospectively amend the *International Tax Agreement Act 1953* (Cth) to remove State taxes from the operation of the Act was valid and did constitute an acquisition of property on unjust terms for the purpose of the Commonwealth Constitution.	Page 18
Item 6.7 Oracle	The Full Court of the Federal Court has agreed to stay Part IVA proceedings commenced by Oracle to permit Oracle to continue the mutual agreement procedure under the Double Taxation Agreement with Ireland. The ATO had opposed the stay on the basis it was in the public interest for the Court to resolve whether the software distribution fees made by Oracle Australia to Oracle Ireland were a royalty.	Page 24

2. Detailed case summaries

2.1 UXLZH – Change of majority underlying interests for pre-CGT assets

Facts

XLZH is an individual.

On 1 August 1977, the Settlement Trust was established, with X Pty Ltd as its original trustee. XLZH's husband was appointed as the nominator, giving him sole authority to appoint beneficiaries, though he was expressly excluded from being a beneficiary himself.

On 1 July 1979, XLZH and her husband founded a business, which was initially operated by X Pty Ltd. They were the sole shareholders and directors of the company.

On 15 June 1988, Alpha Pty Ltd was incorporated, and its shares were acquired by X Pty Ltd as trustee for the Settlement Trust. From late June 1988 until July 2019, XLZH and her husband served as directors of Alpha Pty Ltd.

On 15 June 1988, Alpha Pty Ltd was incorporated and on 1 July 1998 the business operated by X Pty Ltd as trustee for the Settlement Trust was transferred to Alpha Pty Ltd. Under the roll-over in former subsection 160ZZN of the ITAA 1936 (which is the equivalent of Subdivision 122-A), the shares in Alpha were deemed to have been acquired by X Pty Ltd as trustee for the Settlement Trust pre-CGT. The parties obtained a private binding ruling from the Commissioner that confirmed this treatment.

In 2009 and 2010, additional discretionary beneficiaries were appointed to the Settlement Trust. These appointments were not contested by the ATO, as they involved family members or entities controlled by them.

On 10 June 2011, Beta Pty Ltd was appointed as a beneficiary of the Settlement Trust. The ATO later argued that this appointment caused the shares in Alpha Pty Ltd to lose their pre-CGT status due to a change in “majority underlying interests”.

On 1 April 2011, Delta Pty Ltd was incorporated. It held the sole share in Beta and acted as trustee for the Delta Trust. XLZH and the Husband were the directors and unit holders of the Delta Trust. The Delta Trust was a hybrid trust with discretionary objects limited to family members and related entities.

On 1 September 2011 and again in 2014, grandchildren of XLZH and her husband were added as discretionary beneficiaries of the Settlement Trust. These additions were within the permitted class and not challenged by the ATO.

Between 2009 and 2019, Alpha Pty Ltd paid dividends totalling $24,094,000 to the Settlement Trust. Of this, 63% was distributed to Beta. 81% of the dividends from Alpha Pty Ltd were ultimately paid to XLZH and her family members other than her husband and 19% of the distributed dividends were ultimately paid to her husband.

On 19 July 2019, the trustee of the Settlement Trust disposed of its shares in Alpha Pty Ltd to an unrelated third party for over $100 million.

On 30 June 2020, the trustee of the Settlement Trust distributed $64,405,094 to XLZH, which was connected to the proceeds from the sale of the shares in Alpha Pty Ltd.

When an asset ceases to be a pre-CGT asset

Division 149 of the ITAA 1997 may deem an asset acquired before 20 September 1985 (i.e. a 'pre-CGT asset') to have been acquired after that date.

Under section 149-10 of the ITAA 1997, a CGT asset is considered a pre-CGT asset only if the entity last acquired the asset before 20 September 1985, was not deemed under former provisions of the ITAA 1936 to have acquired the asset on or after that date, and the asset has not ceased to be a pre-CGT asset under Division 149.

Section 149-30 of the ITAA 1997 provides that an asset will cease to be a pre-CGT asset when the "majority underlying interests" in the asset are no longer held by the same ultimate owners who held those interests immediately before 20 September 1985.

The term “majority underlying interests” refers to more than 50 percent of the beneficial interests that ultimate owners have, whether directly or indirectly, in the asset and in any ordinary income that may be derived from the asset.

An ultimate owner indirectly has a beneficial interest in a CGT asset of another entity if the owner would receive any of the capital for their own benefit in the event that the other entity distributed its capital and that capital was then successively distributed through any interposed entities until it reached the ultimate owner. Similarly, an ultimate owner indirectly has a beneficial interest in ordinary income from a CGT asset if the owner would receive any dividend or income for their own benefit if the other entity paid or distributed that income and it was then successively passed through each interposed entity.

Section 149-30 sets out the consequences when an asset is deemed to no longer have the same majority underlying ownership. The asset stops being a pre-CGT asset at the earliest time when majority underlying interests were not held by the same ultimate owners who held those interests immediately before 20 September 1985. From that time, Part 3-1 and the relevant provisions apply as if the entity had acquired the asset at that earliest time.

However, if the Commissioner is satisfied, or considers it reasonable to assume, that "majority underlying interests" were continuously held by the same ultimate owners from 20 September 1985 until a particular time, then the rules apply as if that continuity actually occurred.

Positions of XLZH and ATO

XLZH argued that to decide when an asset no longer has the same majority ownership under section 149-30, you need to measure the ownership interests held by individuals just before 20 September 1985 and at later times, to identify who the ultimate owners are.

Where majority underlying interests are held in an asset indirectly, a tracing exercise is required to identify what distributions of income or capital an individual 'would receive'. However, in the case of a discretionary trust, no beneficiary can be deemed to have an interest in an asset, as beneficiaries of discretionary trusts do not have an interest in trust property or income unless and until the trustee exercises discretion to appoint the property or income of the trust. As a result, XLZH argued that the mere appointment of a discretionary object (in this case, the appointment of Beta Pty Ltd as trustee for the Delta Trust), would not result in a change in 'majority underlying interests'. The addition of this new beneficiary only raised a possibility that they *may* benefit from the capital or income of the trust.

XLZH referred to the ATO's ruling IT 2340: *Income tax: Capital gains: deemed acquisition of assets by a taxpayer after 19 September 1985 where a change occurs in the underlying ownership of assets acquired by the taxpayer on or before that date* (**IT 2340**). IT 2340 relates to the ATO's administration of the former statutory provision, section 160ZZS of the ITAA 1936, which is sufficiently similar to the current Division 149 of the ITAA

1997. IT 2340 provides that, in relation to the application of the former section 160ZZS to discretionary trusts, the ATO will continue to treat an asset as a pre-CGT asset where the discretionary trust holding the asset has been administered for the benefit of members of a particular family.

The ATO considered that the original business assets of Alpha Pty Ltd remained pre-CGT assets until 10 June 2011, when Beta was appointed as a beneficiary of the Settlement Trust. Before that date, XLZH's husband was not a direct or indirect beneficiary of the Settlement Trust. From 10 June 2011, XLZH's husband potentially could have benefitted from the income or capital of Alpha Pty Ltd, indirectly through Beta Pty Ltd and the Delta Trust in which he held units.

The ATO contended that XLZH incorrectly wished to use a test based on the pattern of actual distributions, whereas the key concepts of "beneficial interests" and "majority underlying interests" was to be determined by reference to the *hypothetical* distributions of income and corpus. The ATO also argued that IT 2340 was not a binding ruling for the purposes of the ITAA 1997.

Issues

1. Did the appointment of Beta Pty Ltd as a discretionary beneficiary on 10 June 2011 result in a change in "majority underlying interests" in the shares in Alpha Pty Ltd, such that they ceased to be pre-CGT assets under subsection 149-30(1) of the ITAA 1997?
2. Can the ART be satisfied, or reasonably assume under subsection 149-30(2) of the ITAA 1997, that the same ultimate owners held majority underlying interests in the shares in Alpha Pty Ltd continuously from before 20 September 1985 to 10 June 2011, thereby preserving their pre-CGT status?

Decision

The ART confirmed that Division 149 applies to discretionary trusts, treating beneficiaries as "ultimate owners" with hypothetical interests. However, adding Beta Pty Ltd did not automatically alter majority interests; it only created a possibility of future distributions.

The ART noted IT 2340 remains administratively binding and its comments on the need to assess how trustee discretion is exercised are relevant. Section 149-30(2) of the ITAA 1997 is a concessional provision and should be interpreted beneficially given the complexity of subsection (1). Importantly, the ART emphasised that the test is whether it can be reasonably assumed that the same majority group of ultimate owners continued to hold the interests. This requires examining actual distributions and trustee conduct, not merely the theoretical ability of a new beneficiary to receive income or capital.

On the evidence, from time of the appointment of Beta Pty Ltd as a beneficiary in 2011 to the time of the CGT event in 2020, the same majority group benefited, and XLZH's husband did not receive 50% or more of income. The ART was satisfied that majority underlying interests in Alpha Pty Ltd remained unchanged from 20 September 1985 until disposal of the shares. Accordingly, the shares in Alpha Pty Ltd retained their pre-CGT status.

COMMENT – courts and tribunals have consistently shown reluctance to read down provisions that are intended to confer concessions. This principle was reaffirmed in *Eichmann v Commissioner of Taxation* [2020] FCAFC 155, where the Full Federal Court emphasised that beneficial provisions should be construed in a way that promotes their remedial purpose. At paragraph [40], the Court stated that such provisions "*should be construed so as to give the most complete remedy which is consistent with the actual language employed and to which its words are fairly open*."

COMMENT – the roll-over in former subsection 160ZZN(7) of the ITAA 1936 was replaced by the CGT roll-over in Subdivision 122-A of the ITAA 1997.

COMMENT – having established that the shares in Alpha Pty Ltd are still pre-CGT assets, there is a further question about whether CGT event K6 could apply on sale. CGT event K6 would apply if the market value of post-CGT property of Alpha Pty Ltd was at least 75% of net value of Alpha Pty Ltd at the time the shares were sold. The potential application CGT event K6 was not addressed in this case.

TRAP – the IT series of rulings are not public rulings for the purpose of the TAA 1953 as they pre-date the introduction of the binding public rulings system. However, it is ordinarily expected that the Commissioner will follow them. The concept of an ATO published document being "administratively binding" likely only provides protection against penalties in the event that, as happened here, the ATO resiles from the position in legal proceedings. In this case, the ART was satisfied that IT 2340 reflected the correct construction of the provisions in Division 149.

Citation *XLZH v Commissioner of Taxation* [2025] ARTA 2154 (Deputy President G Lazanas, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/2154.html

2.2 YTL – Taxable Australian property

Facts

On 22 December 2000, YTL Power Investments Limited (**YTL**), a foreign resident company, acquired 3,300 fully paid ordinary shares in ElectraNet Pty Ltd, an Australian company holding electricity transmission and system control licences in South Australia.

On 21 March 2001, YTL acquired an additional 50 shares, bringing its total holding to 3,350 shares, representing a 33.5% interest in ElectraNet.

Between 20 September and 31 October 2000, ElectraNet entered into four key agreements with the Transmission Lessor Corporation (**TLC**), the Treasurer of South Australia, and other parties. These included the Electricity Transmission Business Sale Agreement, the Transmission Network Lease, the Transmission Network Land Lease, and the Transmission Sale/Lease Agreement. These agreements facilitated the privatisation of South Australia's electricity transmission infrastructure under the *Electricity Corporations (Restructuring and Disposal) Act 1999* (SA) (**Disposal Act**).

From around 31 October 2000, ElectraNet operated, maintained, and augmented the electricity transmission system in South Australia. The "Leased Assets" under the Transmission Network Lease comprised major electricity infrastructure such as transmission lines, substations, and associated equipment. The Leased Assets were situated on land owned by TLC, ElectraNet, and third parties. These arrangements were supported by a complex mix of statutory and contractual rights, including statutory easements created under South Australian legislation and private easements or licences negotiated with landowners.

On 8 February 2022, YTL entered into a Share Purchase Agreement to sell its 3,350 shares in ElectraNet to Australian Utilities Pty Ltd as trustee for the Australian Utilities Trust. The transaction was completed on 23 March 2022, and the buyer was registered as the new owner of the shares.

As a result of this disposal, YTL made a capital gain of $947,738,854. The ATO issued an amended assessment including this gain in YTL's assessable income. YTL objected to the assessment, arguing that the gain should be disregarded under section 855-10(1) of the ITAA 1997, which applies to foreign residents disposing of assets that are not "taxable Australian property".

The objection was disallowed and YTL sought review in the Federal Court.

The ATO contended that YTL's 33.5% shareholding in ElectraNet was a taxable Australian property interest under section 855-25 of the ITAA 1997 and that the capital gain on its disposal was taxable in Australia. This position was based on the following key arguments:

1. the rights conferred on ElectraNet under the Transmission Network Lease, including in respect of relevant assets situated on land not owned by TLC or ElectraNet, amounted to interests in "real property situated in Australia (including a lease of land)" within the meaning of section 855-20(a);
2. these rights were said to confer exclusive physical control and possession of the land on which the assets were located, and thus had the character of leasehold interests in land;
3. the value of these real property interests exceeded 50% of the market value of ElectraNet's total assets, satisfying the principal asset test in section 855-25(1)(b); and
4. YTL's 33.5% shareholding exceeded the 10% threshold in section 855-25(1)(a), meaning it held a sufficient interest for the purposes of the indirect Australian real property interest test.

YTL argued ElectraNet's rights under the Transmission Network Lease, particularly over assets on land not owned by TLC or ElectraNet, were not real property interests. Instead, those rights were contractual or statutory and did not involve exclusive possession of land. YTL also maintained that the infrastructure itself was not real property for tax purposes. As a result, ElectraNet did not meet the 50% asset threshold for real property, meaning YTL's shares were not taxable Australian property and the capital gain is disregarded under Division 855 of the ITAA 1997.

Issue

Whether the rights conferred on ElectraNet under the Transmission Network Lease amount to an interest in real property for the purposes of section 855-20(a) of the ITAA 1997.

Decision

The Court considered whether ElectraNet's rights under the Transmission Network Lease were "taxable Australian real property" under section 855-20(a) of the ITAA 1997, which includes "real property situated in Australia (including a lease of land)". The ATO argued the lease conferred exclusive possession, creating a leasehold interest.

The Court disagreed, applying property law principles: a lease requires exclusive possession of identified land. ElectraNet had no such rights over land where infrastructure sat on third-party property. It also rejected treating the infrastructure as "real property", noting section 855-20(a) refers to interests in land, not fixtures.

Section 30 of the Disposal Act was decisive: it deems electricity infrastructure leased or sold under the scheme to be personal property, severed from land. This statutory severance overrides common law and means the lease only granted rights to use infrastructure classified as personal property, not any estate in land.

The Court held that ElectraNet's rights were personal property, not real property, regardless of whether the land was owned by ElectraNet, TLC, or third parties. Where infrastructure was on third-party land, ElectraNet held only limited easements or access rights. Even where ElectraNet owned land, the Transmission Network Lease did not confer additional land rights.

Accordingly, the leased assets were not "taxable Australian real property", and ElectraNet's shares did not satisfy the principal asset test.

COMMENT – in the 2024-25 Federal Budget released in May 2024, the Federal Government announced changes to Division 855, including expanding the definition of 'real property'. Those changes have been stated to apply to CGT events that occur from 1 July 2025. However, precise details of the changes have not yet been

published as Treasury has not released exposure draft legislation and legislation to make the amendments has not yet been introduced to Federal parliament.

COMMENT – this case should be contrasted with the NSW duties case of *Conexa Sydney Holdings Pty Ltd v Chief Commissioner of State Revenue* [2025] NSWCA 20, in which the Court of Appeal of the Supreme Court of New South Wales held that an interest in a pipeline granted under the *Water Industry Competition Act 2006* (NSW) was a 'land holding' for the purposes of the *Duties Act 1997* (NSW) and not personal property. The Court in *YTL* distinguished *Conexa* on two grounds. First, *Conexa* concerned a pipeline primarily located beneath Crown land rather than privately owned land. Second, the severance legislation considered in *Conexa* was not comparable to section 30 of the Disposal Act. Additionally, *Conexa* did not address whether an interest in "real property" existed but concerned whether the interest was land holding as defined in the Duties Act. The different outcomes demonstrate the need to have regard to the specific statutory regimes.

Citation *YTL Power Investments Limited v Commissioner of Taxation of the Commonwealth of Australia* [2025] FCA 1317 (Hespe J, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2025/1317.html

2.3 VZFS – Sales made in course of carrying on an enterprise

Facts

VZFS, together with his two brothers, owned 70 hectares of rural land on the outskirts of Adelaide which, by the 1980s, had become an outer suburb of Adelaide. The land had been in his family for generations and the three brothers inherited it from their parents.

Around 2001, the third brother announced his intention to divorce and needed to sell his share of the land. VZFS and his other brother wished to retain the land but could not afford to buy out their brother's interest. They entered discussions with a representative of a Developer Group.

VZFS entered into an agreement with the developer group, under which the Developer Group would loan funds to VZFS and his late brother to buy out the third brother's share. In return, the Developer would gradually subdivide, develop, and sell the residential-zoned land. A fixed amount per lot to would be paid to VZFS as the lots were sold.

Around 2010, the Developer Group proposed a new project to develop and sell approximately 70 hectares of the remaining land. This led to a formal development agreement between VZFS, his brother, and the Developer.

The development works included infrastructure works such as the construction of streets; the provision of utilities and stormwater management; public spaces; provision for a childcare centre; and a sound barrier on the estate's boundary. Under the agreement with the Developer, the Developer at its own cost sought re-zoning and development approvals; carried out or caused the development works to be carried out; and marketed the subdivided lots.

VZFS retained the homestead and surrounding acreage on the land for his daughter and her family. He was not required to fund any part of the development or engage or pay any contractor to carry out the development works.

VZFS and his brother remained registered owners of the land and progressively gave the Developer access to the land as required. They also signed documents where necessary as the owners, including contracts for the sale of 700 subdivided lots. VZFS received 20% of the proceeds of sale progressively as sales of the subdivided lots were completed, with the Developer receiving the remaining 80%.

On an ongoing basis from the commencement of the project, VZFS facilitated the development by signing documents for rezoning and development approvals, refraining from encumbering or selling the land, and executing over 700 sale contracts. He also engaged accountants to review settlement statements for each sale and lodged business activity statements accounting for GST.

After lodging business activity statements bringing GST to account on the property sales, VZFS objected to those business activity statements on the basis that the sales were not in the course or furtherance of an enterprise.

The ATO disallowed the objections. VZFS sought review in the ART.

The question as whether the supplies of the land by VZFS were made in the course or furtherance of an enterprise. An 'enterprise' is defined in section 9-20(1) of the GST Act as follows:

> *(1) An enterprise is an activity, or series of activities, done:*
> *(a) in the form of a * business; or*
> *(b) in the form of an adventure or concern in the nature of trade; or*
> *(c) on a regular or continuous basis, in the form of a lease, licence or other grant of an interest in property;*

The expression “business” is defined in s 195-1 of the GST Act as follows:

> *business includes any profession, trade, employment, vocation or calling, but does not include an occupation as an employee.*

VZFS argued that his role in the development was essentially 'passive', as his contributions were of an administrative nature and did not amount to activities in the form of a business or an enterprise.

Issue

Were the activities carried out by VZFS sufficient to characterise the sales of the subdivided lots as being made in the course or furtherance of an enterprise?

Decision

Although VZFS argued that his role was passive and administrative, the ART found that his activities went beyond the mere realisation of a capital asset.

The ART emphasised that the GST concept of an "enterprise" is broader than that of a "business" and can include commercial arrangements where the landowner plays a facilitative role.

The ART was not persuaded by the argument that VZFS had not advanced capital for the project, on the basis that VZFS had ventured the land for the development, which was a critical contribution to the project. While VZFS argued, and the ART accepted, that he did not take on any risk of loss of funds invested in the project, the ART noted that there was an opportunity cost in entering into the agreement that bound VZFS to the project over an extended period and his financial return was directly tied to the sale prices able to be achieved.

VZFS also argued that his contributions were administrative rather than 'substantive' in relation to the development because they did not require business judgement. The ART was also not convinced by this; viewing the administrative contributions of VZFS as essential to the project's success. The ART noted that it is not inconsistent with operating a business for significant responsibilities to be outsourced to another entity, an observation that carries greater force where the question is whether the activities are "i*n the form of*" a business.

The ART concluded that these activities amounted to a series of actions in the form of a business or an adventure in the nature of trade, within the meaning of section 9-20(1)(b) of the GST Act. VZFS was therefore liable for GST on the sales of the lots.

COMMENT – the ART made it plain that there is a distinction between "enterprise" and "business". However, it did seem to consider that an activity or series of activities in the form of an adventure or concern in the nature of trade, would likely extend to include a profit-making undertaking or plan, such that its conclusion is also relevant to whether the land is on revenue or capital account. However, it is not clear, just because there is an enterprise, this automatically mean the land is on revenue account. This is particularly the case given the change of intention authorities which have held that a mere realisation of a capital asset includes disposing of the asset in an enterprising way.

Citation *VZFS and Commissioner of Taxation (Taxation)* [2025] ARTA 2013 (Senior Member R Olding, Adelaide)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/2013.html

2.4 Fraser – Acquisition for creditable purpose

Facts

Adrian Fraser operated a video production and content creation business via various YouTube channels. Since 2021 or 2022 he had published videos to three separate YouTube channels. His channels specialised in content about people acting incorrectly in public, lashing out, or otherwise behaving poorly. His content creation process would include research on YouTube and watching television programs for production techniques, and then discussing content ideas and business development with his girlfriend, Ms Hoogduin, who worked with him on his videos. Adrian also engaged voice-over actors, scriptwriters, editors, thumbnail artists, and project managers to produce his videos. These contractors were based overseas, and all content for his YouTube videos was created overseas.

Adrian also owned a fourth YouTube Channel, which he had not yet posted any content to. Adrian claimed his intention for the Fourth YouTube Channel was to purchase a four-wheel drive vehicle to drive to difficult-to-reach locations, in order to make content of him modifying and travelling in the vehicle to post to the Fourth YouTube Channel.

Adrian registered for GST on 22 January 2020, with effect from 1 January 2020. He also obtained an ABN and operated as a sole trader until July 2023. Adrian lived on a property that his parents owned in Queensland (the **West Woombye Property**) and used a granny flat on the West Woombye Property as a temporary office for his business. A further building was constructed on the West Woombye Property which was intended as a permanent office space for Adrian. On 5 May 2023 Adrian purchased a 2022 Ford Ranger which he claimed was used as a prop for proposed video content for his Fourth YouTube Channel.

Throughout the Relevant Period, Adrian purchased various goods and services, including furniture and electrical equipment, construction materials, tools, fuel, travel and insurance in relation to which he claimed input tax credits in respect of his content creation business. This included expenditure relating to the purchase of a Ford Ranger vehicle, as well as purchases made by his father which he claimed were made on his behalf. He also claimed input tax credits in relation to expenses for the construction and fit-out of the office space constructed on his parents' West Woombye Property.

On 7 June 2023, Adrian lodged BAS for the monthly tax periods from 1 April 2022 to 31 May 2023 (**Relevant Period**), claiming input tax credits in each BAS, with refunds totalling $40,548.

Adrian claimed input tax credits in relation to:

1. appliances, furnishings, and other items in his home office in the granny flat on his parents' property;
2. expenses incurred in the construction of the new building on his parents' property to be used as his office for his business; and
3. expenses incurred in relation to the Ford Ranger.

On 20 June 2023 the ATO advised Adrian was commencing an audit of his BAS due to a perceived unusual pattern of refunds.

On 24 August 2023 the ATO advised Adrian of the finalised audit outcome. The ATO's position was that none of the purchases were made for a 'creditable purpose', not having been acquired for the purpose of carrying on an enterprise, and that some of the purchases were for private use.

Section 11-20 of the GST Act provides that an entity is entitled to an input tax credit for any creditable acquisition that it makes. A 'creditable acquisition' is defined in section 11-5 of the GST Act:

> *You make a creditable acquisition if:*
> *(a) you acquire anything solely or partly for a creditable purpose; and*
> *(b) the supply of the thing to you is a taxable supply; and*
> *(c) you provide, or are liable to provide, consideration for the supply; and*
> *(d) you are registered, or required to be registered.*

Section 11-15 of the GST Act provides that an entity will be deemed to acquire a thing for a 'creditable purpose' to the extent that the entity acquires it in carrying on its enterprise. However, an entity does not acquire a thing for a creditable purpose to the extent that the acquisition is of a private or personal nature (paragraph 11-15(2)(b)).

In relation to the appliances, furnishings and other items purchased for the granny flat used as his home office, the ATO queried whether all of the purchases claimed were relevant to or required for the carrying on of his business where all of the contractors that Adrian engaged were located overseas, most of the production work was undertaken overseas, and there was no evidence of him having conducted business meetings with any person other than his girlfriend (who he engaged to work with him in his content creation work).

Adrian lodged an objection against the amended assessment. He argued that he required an office space which was suitable for his business, and referred to log book records supporting his business use of vehicles, and evidence of trips taken to retailers to purchase items crucial to his business. He denied that any purchases were made for personal use. He also stated that the Ford Ranger was purchased explicitly for the production of a new YouTube channel.

The ATO disallowed Adrian's objection on the basis that Adrian had not substantiated that his purchases were creditable acquisitions in relation to carrying on a business or enterprise.

Adrian applied to the ART for review of the objection decision.

Issue

Did Adrian make creditable acquisitions?

Decision

<u>Home office items</u>

The ART accepted that the Commissioner cannot dictate business spending but may question whether purchases relate to carrying on a business. Only three transactions—AirPods, headphones, and branded merchandise—were shown to have a business purpose and were creditable acquisitions. Other items lacked

clear evidence; invoices were generic or inconsistent (e.g., “conference table” described as “dining setting”), so they were not accepted.

New building

The ART agreed a building could be constructed for business purposes even if not solely for video production. However, Adrian’s evidence was insufficient: intentions were uncorroborated, invoices were vague, and no proof of discussions with architects was provided. The ART was not satisfied the building expenses related to his business.

Ford Ranger

The ART found no adequate evidence that the vehicle was acquired for Adrian’s enterprise. While Adrian considered making 4WD videos, this was a departure from his established comedy content. Travel expenses to collect the vehicle—including fast food and a $715 hotel stay—were deemed private.

TRAP – input tax credits cannot be claimed merely because a person receives a tax invoice on which GST is charged. It's important to assess whether the acquisition is a creditable acquisition for the particular taxpayer claiming the credits.

Citation *Fraser v Commissioner of Taxation* [2025] ARTA 2153 (General Member C Willis, Melbourne)
w http://classic.austlii.edu.au/au/cases/cth/ARTA/2025/2153.html

2.5 SKG and Ezko – employment agency provisions

Facts

Two cases were heard together. The first case concerned SKG Cleaning Services Pty Ltd (**SKGC**), SKG Pty Ltd (**SKG**), and Sydney Express Cleaning Pty Ltd (**SEC**). SKG and SKGC had contracts with over 140 clients, covering offices, retail spaces, and government facilities. They provided cleaning services through subcontractors (and, for SKGC, employees). SEC also acted as a subcontractor. Their contracts were either standard short-form agreements or longer detailed contracts. The latter imposed stricter obligations, such as requiring SKG to ensure subcontractor compliance and allowing clients to direct or terminate subcontractor work. Cleaning duties included general maintenance tasks, and SKG allocated subcontractors and employees through internal rostering processes.

The second case concerned Ezko Property Services (Aust) Pty Ltd as trustee for The Ezko Unit Trust and Ezko Property Services (Aust) Retail Pty Ltd (collectively, **Ezko**), who also ran commercial cleaning businesses serving government, residential, and retail clients. They too used both employees and subcontractors under written contracts and supplied the necessary cleaning equipment. The contracts were non-standard and varied in complexity but consistently required Ezko to provide cleaning labour and meet client specifications. Clients sometimes requested specialised cleaning services, though the court found no evidence that these were outside the contractual scope.

Both Ezko and the SKG entities managed subcontractors and employees through internal systems, provided on-site equipment, and coordinated schedules with clients. Access to premises and attendance were controlled through sign-in systems, and client feedback was managed via regular inspections and meetings.

The Chief Commissioner assessed both groups for payroll tax on payments made to subcontractors, treating the cleaning contracts as employment agency contracts under section 37 of the *Payroll Tax Act 2007* (NSW).

Following these assessments, which included a 25% penalty tax, both SKG and Ezko lodged objections. These objections were unsuccessful, prompting each group to commence proceedings for review in the Supreme Court of New South Wales.

During the proceedings, the Court noted that Ezko and the SKG entities' evidence was incomplete or unreliable. Many contracts relevant to the assessments were missing, and several witnesses performed poorly under cross-examination. In addition, their statements about business operations were often unsubstantiated. In particular, Ezko's executive director provided unsupported figures and assumptions about the extent of subcontracted work and "specialty" cleaning services. The Court found the witness testimony largely unhelpful.

Issue

Were the cleaning contracts between the SKG entities, Ezko, and their respective clients employment agency contracts?

Decision

The Court referred to *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852 (**UNSW Global**), where it was held that an "employment agency contract" under section 37 of the Payroll Tax Act is a contract where one party (the agent) procures the services of another person in and for the conduct of the client's business. In *Chief Commissioner of State Revenue v Integrated Trolley Management Pty Ltd* [2023] NSWCA 302 (**ITM**), Basten AJA explained that test identified in *UNSW Global* is to be approached by identifying the work to be done and the nature of the client's business. His Honour commented as follows:

> *That language requires the identification of (i) the work to be done by persons who provide the services to a client and (ii) the nature and ordinary conduct of the client's business. It is the relationship between the two which determines the application of s 37(1) in a particular case.*

The Court referred to the fact that in *ITM* Basten AJA emphasised that whether a contract qualifies as an employment agency contract should primarily be determined by examining the terms of the contract itself. The Court emphasised that Basten AJA did not suggest that the Court must *only* consider the contract's wording in isolation but that context, including the nature of the client's business, can still inform the interpretation of the contract. The *ITM* decision also included a general warning from the Court against relying too heavily on checklists or "indicia" from previous cases, emphasising that each case must be judged on its own facts and contractual terms.

The Court held that each contract contained detailed specifications outlining what cleaning services were to be performed, where and when they were to occur, and how long they should take. This demonstrated a clear and ongoing connection between the services provided and the client's day-to-day business operations. Although the clients were not themselves cleaning businesses, the cleaning work was nonetheless performed "in and for" their business activities, satisfying the statutory test.

The Court held that the regularity, continuity, and on-site nature of the cleaning services strengthened the link between the cleaners' work and the clients' business needs. Citing *ITM*, the Court held that "it is usually very easy to discern the relevant relationship between the ordinary conduct of a client's business, on the one hand, and the everyday cleaning services which that business has contracted to acquire, on the other". While a contractor could, in theory, structure cleaning arrangements to fall outside section 37, the contracts in this case did not do so. Even if the contractors, rather than the clients, managed the cleaners directly, the clients still controlled what services were delivered and when, making the cleaning work integral to their business operations.

COMMENT – this is a further case that demonstrates the broad reach of the employment agency contract provisions. In recent times, Revenue NSW has extended the compliance activities for these provisions to other

industries, including construction. It is not yet entirely clear how the provisions apply in other industries, such as construction, given that the courts have emphasised that regard is to be had to the nature of the client's business, as well as the terms of the contract with the client.

TRAP – the taxpayers did not put on evidence as to the amount of the payments they made to subcontractors that was referable to each employment agency contract. This meant that, even if the taxpayers had been able to persuade the Court that one or more of the contracts were not employment agency contracts, they likely still would not have satisfied the onus that the payroll tax assessments were excessive.

Citation *SKG Cleaning Services Pty Ltd v Chief Commissioner of State Revenue; Ezko Property Services (Aust) Pty Ltd atf The Ezko Unit Trust v Chief Commissioner of State Revenue* [2025] NSWSC 1219 (Hmelnitsky J, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2025/1219.html

2.6 G Global – Retrospective changes to tax treaty obligations permitted

Facts

Francis Stott

On 24 October 2016, Francis Stott, a New Zealand citizen, notified the Victorian Commissioner of his status as an absentee owner under the *Land Tax Act 2005* (Vic). In February 2017, the Commissioner reassessed his land tax liability for the 2016 and 2017 tax years, applying the higher absentee owner rate.

On 31 December each year from 2015 to 2023, Francis was absent from Australia and not a resident or citizen, making him an absentee owner for each of the 2016 to 2024 tax years. He was assessed and paid land tax for those years.

G Global

G Global 120E T2 Pty Ltd and G Global 180Q Pty Ltd (collectively, the **GG Entities**) were Australian-incorporated companies acting as trustees of unit trusts that owned land in Queensland. The shares in the GG Entities and the units in the unit trusts were wholly owned by DWS Grundbesitz GmbH, a company incorporated in Germany. As a result, the GG Entities were classified as "foreign companies" and the unit trusts as "foreign trusts" under the *Land Tax Act 2010* (Qld) (**QLD Land Tax Act**).

In February 2021, the GG Entities were issued with land tax assessments for the 2020–2021 financial year, which included a surcharge imposed on foreign companies. The GG Entities paid the surcharge and subsequently objected to the assessments. The objections were disallowed, and the GG Entities appealed to the Supreme Court of Queensland.

The GG Entities argued that the imposition of the foreign surcharge was inconsistent with Article 24 of the agreement between Australia and Germany, which was given force of law in Australia by section 5(1) of the *International Tax Agreements Act* 1953 (Cth) (**Tax Agreements Act**). Article 24 of the agreement between Australia and Germany prohibits discriminatory taxation of nationals or enterprises of the other contracting state. The GG Entities submitted that the surcharge provisions in the QLD Land Tax Act imposed more burdensome taxation on them as foreign companies, contrary to the agreement, and were therefore inoperative by force of section 109 of the Constitution. Section 109 of the Constitution provides that a Commonwealth law prevails over a State law in the event of an inconsistency.

Legislative developments

On 8 April 2024, the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) (**Amending Act**) came into force. It amended section 5 of the Tax Agreements Act to exclude State taxes from the scope of international tax agreements, retrospectively applying from 1 January 2018. This change aimed to remove the inconsistency between Commonwealth law and State land tax laws that had previously rendered the State laws inoperative under section 109 of the Constitution. Section 5(3) provided that the operation of section 5(1) was subject to any inconsistent Commonwealth, State or Territory law imposing a tax other than an "Australian tax". Clause 2 of Schedule 1 to the Amending Act provided that the amendment applied to taxes payable on or after 1 January 2018.

On 26 August 2024, the GG Entities' appeals against the Queensland Commissioner's disallowance of their objections were removed into the High Court.

On 4 December 2024, Francis filed an amended statement of claim in the High Court, seeking declarations that the Victorian land tax provisions were invalid due to inconsistency with the New Zealand Convention, and that the amendments to revive the tax liability were also invalid.

On 28 February 2025, the QLD Land Tax Act was amended to insert section 104, which re-imposed the foreign surcharge retrospectively in the same terms as the previously inoperative provisions. Similarly, on 4 December 2024, the Vic Land Tax Act was amended to insert section 106A, which had the same effect.

The GG Entities and Francis challenged the validity and effect of the Amending Act. They argued that section 5(3) of the Tax Agreements Act was not supported by any head of Commonwealth legislative power, and that it could not operate retrospectively or retroactively to revive State laws that had previously been rendered inoperative by section 109 of the Constitution. They relied on the High Court's decision in *University of Wollongong v Metwally* (1984) 158 CLR 447 (**Metwally**), which they contended precluded the Commonwealth from retrospectively removing inconsistencies under section 109 of the Constitution.

The Commonwealth and the States of Queensland and Victoria submitted that section 5(3) of the Tax Agreements Act was validly enacted under the external affairs power in section 51(xxix) of the Constitution. They argued that the Amending Act had both retrospective and retroactive effect, and that *Metwally* should be overruled. They argued that the Commonwealth Parliament had the power to amend or repeal its own laws, including with retroactive effect, and that the amendments validly removed the inconsistency and revived the operation of the State surcharge provisions.

Issues

1. Prior to the commencement of the Amending Act on 8 April 2024, were the relevant provisions of the QLD Land Tax Act and Vic Land Tax Act inconsistent with section 5(1) of the Tax Agreements Act and therefore inoperative by force of section 109 of the Constitution?
2. Was section 5(3) of the Tax Agreements Act supported by a head of Commonwealth legislative power?
3. Was section 5(3) of the Tax Agreements Act, when read with clause 2 of Schedule 1 to the Amending Act, effective to remove the inconsistency between the QLD Land Tax Act and Vic Land Tax Act and section 5(1) of the Tax Agreements Act?
4. Did the Amending Act effect an acquisition of property otherwise than on just terms, contrary to s 51(xxxi) of the Constitution?

Decision

Inconsistency between Commonwealth and State laws prior to the Amending Act

The Court affirmed that section 109 of the Constitution renders a State law inoperative to the extent of its inconsistency with a valid Commonwealth law. The Court identified the following two approaches to inconsistency:

1. direct inconsistency, being where a State law alters, impairs or detracts from the operation of a Commonwealth law; and
2. indirect inconsistency, being where the Commonwealth law is intended to be a complete and exhaustive statement of the law on a subject.

Applying either approach, the Court held that the foreign surcharge provisions in the QLD Land Act and Vic Land Tax Act were inconsistent with Article 24 of the agreement between Australia and Germany and the agreement between Australia and New Zealand, respectively, as given force by section 5(1) of the Tax Agreements Act. The provisions imposed more burdensome taxation and obligations on foreign nationals and entities, contrary to the non-discrimination clauses.

The provisions were inoperative by force of section 109 of the Constitution.

Validity of section 5(3) of the ITAA 1953

The Court held that section 5(3) of the Tax Agreements Act was not supported by section 51(ii) of the Constitution (the taxation power), as it related to State taxes. However, the Court found that section 5(3) of the Tax Agreements Act was validly enacted under section 51(xxix) of the Constitution (the external affairs power), as it was reasonably capable of being considered appropriate and adapted to the implementation of international agreements.

The Court rejected the GG Entities' argument that section 5(3) of the Tax Agreements Act impermissibly undermined the implementation of the treaties.

The Court held that the power to implement a treaty includes the power to limit or repeal such implementation.

Effectiveness of the Amending Act in reviving inoperative State laws

The Court held that clause 2 of Schedule 1 to the Amending Act gave section 5(3) of the Tax Agreements Act retroactive effect, such that it applied to taxes payable on or after 1 January 2018. The Court found that this retroactive operation was intended by Parliament and supported by the text and extrinsic materials.

The Court considered whether the principle in *Metwally* precluded the Commonwealth from retrospectively removing the inconsistency as, in *Metwally*, the Court held that the Commonwealth could not retroactively declare that a law was never intended to be inconsistent with a State law. However, the Court distinguished *Metwally* on the basis that it concerned an indirect inconsistency and a declaratory provision. In contrast, the Amending Act in this case substantively amended section 5(1) of the ITAA 1953 and applied to taxes payable from a specified past date.

Applying the factors in *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, the Court held that *Metwally* should be reopened and overruled. The Court found that *Metwally* lacked a coherent doctrinal foundation, involved divergent reasoning among the majority, had not been acted upon in a way that would preclude reconsideration, and had not achieved a useful result.

The Court held that section 5(3) of the Tax Agreements Act, as amended by the Amending Act, was effective to remove the inconsistency and revive the operation of the QLD Land Tax Act and Vic Land Tax Act provisions.

Acquisition of property

The Court rejected the argument that the Amending Act effected an acquisition of property otherwise than on just terms, contrary to section 51(xxxi) of the Constitution.

The Court held that the revival of a valid tax obligation does not constitute an acquisition of property. The extinguishment of a restitutionary claim arising from the invalidity of a tax does not confer a proprietary benefit on the State.

COMMENT - this decision confirms that, while State land tax surcharges imposed on foreign persons and foreign-controlled entities may be invalid where they conflict with non-discrimination provisions in international tax treaties given force of law by the Commonwealth, the Commonwealth may validly legislate to remove such inconsistency, including with retroactive effect, thereby reviving the operation of the State surcharge provisions.

Citation *G Global 120E T2 Pty Ltd v Commissioner of State Revenue; G Global 180Q Pty Ltd v Commissioner of State Revenue; G Global 180Q Pty Ltd v Commissioner of State Revenue; Stott v The Commonwealth of Australia* [2025] HCA 39 (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2025/39.html

2.7 E-Synergies.com – Land tax primary production exemption

Facts

E-Synergies.com Pty Ltd as the trustee of the Num-Num Trust owned rural land in the Northern Rivers region in New South Wales during the 2020 to 2025 land tax years.

The land had multiple uses as follows:

1. beef and dairy cattle farming: the land was partially leased to Exotic Organics Pty Ltd, a trustee entity that had grazing rights for cattle. Both beef and dairy cattle grazed on the land;
2. residential use: there were two residential dwellings on the land, a villa and a cottage, which were rented out under residential tenancy agreements at various times during the land tax years.
3. cultivation of bamboo and trees: there was no documentation of land management, expenses incurred, or business planning to support cultivation for sale. The only evidence of sale was a single transaction in 2025 amounting to $2,405, with no prior sales or business plans presented;
4. café/restaurant: between 2019 and 2021, part of the land was used for a café or restaurant operated by a lessee. The café/restaurant operated on Friday and some Saturday and Sunday nights. There were "pop-up" dinner events on some weekends and live music events;
5. bottling water business: from 2022 onwards, the lessee began a new enterprise involving the bottling and sale of mineral water sourced from the property; and
6. cultivation of plants: E-Synergies cultivated fruits, vegetables, herbs, and roots, as well as kept chickens for egg production.

The respective areas within the land deployed for each use was as follows:

1. growth of bamboo and trees – 11%;
2. growing of fruit – 2%;
3. growing of greens – 18%;
4. breeding of cattle – 60%;
5. sheds (industrial and commercial) – 2%;
6. environmental protection – 12%; and
7. residential – 4%.

Evidence of expenditure in respect of the various uses of the land was as follows:

Expense	2020	2021	2022	2023	2024	2025
Cattle	Nil	Nil	Nil	Nil	$704.87	$227.28
Fruit and Greens	Nil	Nil	Nil	Nil	Nil	Nil
Timber	Nil	Nil	Nil	Nil	Nil	Nil
Café/Restaurant	$113,554 (including $36,750 rent paid to the Applicant)	$138,180 (including $24,600 rent paid to the Applicant)	Nil	Nil	Nil	Nil
Bottled Water	Nil	$2,257	$65,484	$79,179	$63.64	$1,219.83
Rent (Residential)	$69,288	$57,789	$72,967	$66,152	Not produced	Not produced

No wages were paid for labour used in primary production because the labour of the director of the trustee was deployed for primary production activities and that he was unpaid. E-Synergies also said that it carried out organic farming and that farming of this kind required few inputs. No evidence of wages paid in respect of the primary production activities was produced.

The income recorded from the various uses of the land was as follows:

Source of Income	2020	2021	2022	2023	2024	2025
Cattle	$1,795	Nil	Nil	Nil	Nil	Nil
Fruit and Greens	$1,367	$251	$835	Nil	$222	$1,770
Timber	Nil	Nil	Nil	Nil	Nil	$2,405.45
Café/Restaurant	$55,613	$44,892	Nil	Nil	Nil	Nil
Bottled Water	Nil	Nil	$25,000 (flood recovery grant)	$151	Nil	$2,384
Rent (Residential)	$26,000	$91,160	$108,915	$53,896	$85,450	$113,140.30
Rent (from lessee)	$36,750	$24,600	$20,800	$20,800	$20,800	$20,800
Other	$840 (water) $2,292 (wine)	$940 (wine)	Nil	Nil	Nil	Nil

On 18 October 2024, the Chief Commissioner issued land tax assessments for the 2020 to 2024 tax years. On 23 October 2024, E-Synergies objected to the assessments. The objection was disallowed on 13 February 2025. Subsequently, on 14 January 2025, a land tax assessment for the 2025 tax year was issued. E-Synergies lodged another objection on 29 May 2025, which was also disallowed on 23 June 2025.

On 2 May 2025, E-Synergies commenced proceedings in NCAT seeking administrative review of the 2020 to 2024 land tax assessments and later amended the application so that all assessments from the 2020 to 2025 land tax years were included in the proceedings.

Where land is zoned rural land, the eligibility of the primary production land tax exemption depends on whether the 'dominant use' of the land is for one of the prescribed primary production uses in section 10AA(3) of the LTMA.

Issue

Was the dominant use of the land in the 2020 to 2025 land tax years for primary production?

Decision

The NCAT reviewed case law on "dominant use," noting that "use" refers to the physical deployment of land for a present benefit, assessed objectively, not by the owner's intentions. The NCAT noted that "dominant" qualifies both the use and its purpose—the primary physical deployment aligned with a commercial objective. Financial return can indicate dominance but is not decisive. Finally, the NCAT noted that the courts consider the taxing date (31 December) and a reasonable period before and after to assess overall patterns.

Although 80% of the land was used for primary production (cattle grazing and crops), area alone was not determinative. Examining nature, intensity, and income, the NCAT found residential occupancy was the most continuous and intensive use from 2022–2025, with highest expenditure except for a brief spike in bottled water operations. In 2020–2021, the café/restaurant was dominant, generating the most income and employing paid labour—unlike primary production, which had low intensity and minimal income. Financial return strongly supported that primary production was not dominant.

The NCAT held the dominant use was the café/restaurant for 2020–2021 and residential rental for 2022–2025. It rejected E-Synergies' argument for apportionment, noting the LTMA provides no such mechanism. E-Synergies failed to prove dominant use was for primary production under s 10AA(3), and the assessments were confirmed.

COMMENT – the land tax primary production exemption in New South Wales is very difficult to satisfy and there is an increasing level of compliance activity by Revenue NSW.

TIP – the primary production exemption can be lost where a new use commences on land for which the exemption already applies. This means careful consideration should be given to using primary production land for multiple purposes and an assessment should be made as to whether the benefits of the proposed new uses may be outweighed by the loss of the primary production exemption.

Citation *E-Synergies.com Pty Ltd Pty Ltd ATF the Num-Num Trust v Chief Commissioner of State Revenue* [2025] NSWCATAD 262 (Senior Member EA MacIntyre, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/262.html

3. Cases in brief

3.1 Oracle – Mutual Assistance Procedure under DTAs

The dispute involved three entities within the Oracle group, Oracle Corporation Australia Pty Ltd (**Oracle Australia**), an Australian tax resident, Vantive Australian Pty Ltd (**Vantive**) – also an Australian tax resident and the head company of a consolidated group that includes Oracle Australia, and Oracle Capac Services Unlimited Company (**Oracle Ireland**) – an Irish tax resident.

Oracle Australia operated as a software distributor in Australia under agreements with Oracle Ireland. In return for a fee to Oracle Ireland, these agreements granted Oracle Australia rights to market, distribute, and sell software licences, as well as to use the software for demonstrations, training, support, and internal purposes.

The ATO considered the fees to be 'royalties' under Article 13(3) of the Australia–Ireland Double Tax Agreement (**DTA**), making them subject to royalty withholding tax (**RWT**). Consequently, the ATO issued non-resident royalty withholding tax notices to Oracle Ireland. If the payments were royalties, Oracle Australia was required to withhold 10% tax before remitting funds to Oracle Ireland. Because Oracle Australia did not withhold RWT, the ATO imposed penalty notices totalling approximately $253 million.

The Oracle group advanced several counterarguments, including:

1. the rights granted were merely for simple use, not royalty-generating rights;
2. the payments were not for the use of copyright, or if they were, the use was minimal; and
3. if any portion of the payments constituted royalties, they should be apportioned, not taxed in full.

Oracle Australia objected to the penalty assessments, while Oracle Ireland initiated the Mutual Agreement Procedure (**MAP**) under the DTA, as modified by Article 16 of the Multilateral Instrument (**MLI**). The MAP process involves negotiations between the Irish and Australian tax authorities, with unresolved matters proceeding to arbitration.

Oracle Australia requested the ATO to defer finalising its objection until the MAP concluded. The ATO refused and finalised the objection decision. Oracle Australia then appealed the disallowance to the Federal Court within the 60-day limit to preserve its appeal rights.

However, under the MLI rules, once Oracle Australia appealed to the Federal Court, the ATO could suspend the MAP. To address this, Oracle Australia applied for a temporary stay of the Federal Court proceedings so that the MAP could resume and run its course.

On 21 October 2025, the Full Court of the Federal Court of Australia allowing Oracle's appeal against the earlier first instance refusal to grant a temporary stay of proceedings.

The central question was whether Oracle could pause its own Part IVC proceedings while the MAP ran its course. At first instance, Perram J refused the stay, weighing competing considerations and concluding that the public interest favoured continuation. His Honour reasoned that a final appellate determination would provide valuable guidance to competent authorities, taxpayers, arbitrators, and trading partners on the meaning of "royalty" under Australia's tax treaties.

The Full Court considered a stay was warranted having regard to the following:

1. Concurrent remedies under international tax rules: The Court emphasised that both the Double Tax Agreement (DTA) and the Multilateral Instrument (MLI) envisage taxpayers having access to domestic

litigation and the Mutual Agreement Procedure (MAP) at the same time. The choice of which path to pursue generally rests with the taxpayer;

2. Commissioner's approach criticised: The Court rejected the Commissioner's claim that there is an obligation to finalise objection decisions despite the MAP process. It described this stance as a distraction from the fact that the Commissioner's actions effectively forced Oracle into a dilemma—either commence domestic proceedings and risk suspension of MAP or abandon domestic appeal rights entirely and rely solely on MAP;
3. Diplomatic considerations outside judicial scope: The Court found no merit in a consideration that a domestic judgment would resolve any diplomatic disagreement with the United States over the interpretation of "royalties." Such matters fall within the remit of executive government and international negotiation, not the courts; and
4. Public interest argument: The Full Court concluded that the supposed public interest in providing judicial guidance was unsupported by evidence. Oracle's dispute was highly fact-specific, tied to unique contractual arrangements, and unlikely to serve as a precedent for other taxpayers. Justice Perram had indicated he would have granted the stay but for this factor. Since the other considerations favouring a stay were uncontested, the Full Court allowed the appeal.

COMMENT – the ATO is yet to finalise its guidance on how when software distribution arrangements will give rise to royalty withholding tax. It appears that the ATO was hoping that the Oracle litigation would provide judicial guidance sooner rather than later.

Citation *Oracle Corporation Australia Pty Ltd v Commissioner of Taxation* [2025] FCAFC 145 (Hespe, Button and Younan JJ, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2025/145.html

3.2 ACN 154 520 199 Pty Ltd and CPG Group – GST anti-avoidance

Two cases have been handed down by the Full Federal Court concerning the application Division 165 of the GST Act (the anti-avoidance provisions) to arrangements concerning the supplies of gold.

The arrangements can be summarised as follows:

1. Apple Co sells gold bullion in investment-grade form to Banana Co at the market price of $5,000. This is an input-taxed supply;
2. Banana Co melts the bullion and manufactures gold jewellery. A sale of jewellery is a taxable supply;
3. Banana Co sells the jewellery to Orange Co for, say, $5,280, which includes $4,800 plus $480 GST. Banana Co now has a GST liability of $480 but does not remit the GST;
4. Orange Co sells the jewellery to Pear Co for $5,390 (made up of $4,900 plus $490 GST). Orange Co incurs a GST liability of $490, while Pear Co can claim an input tax credit for the same amount;
5. Pear Co sells the jewellery to Refiner Co (a refiner) for $5,500 ($5,000 plus $500 GST). Pear Co has a GST liability of $500, and Refiner Co is entitled to an input tax credit of $500;
6. Refiner Co refines the gold back into investment-grade bullion and sells it to Apple Co GST-free as the first supply after refining. Refiner Co has no GST liability on this sale but holds input tax credits of $500. It therefore can claim a refund of that amount when lodging its BAS.

The issue in these cases is how Division 165 operates to the Refiner Co, when all it has done is claim input tax credits to which it is entitled. Can Division 165 operate to deny the tax benefit? In the case concerning ACN 154 520 199 Pty Ltd the Full Court commented as follows:

> *it is useful to emphasise that Div 165 operates according to its terms and it matters not that an avoider is unaware of the scheme or part of the scheme in which the avoider is the participant*".

The ATO's appeals were allowed as the Full Court considered that the AAT decisions had wrongly concluded that Division 165 of the GST Act could not apply to the taxpayers who were not the fraudulent schemers and had erred in limiting the scheme to the taxpayers who had charged GST and retained the GST benefit. The cases have been remitted to the ART.

Citations *Commissioner of Taxation v ACN 154 520 199 Pty Ltd (in liquidation)* [2025] FCAFC 146 and *Commissioner of Taxation v CPG Group Pty Ltd* [2025] FCAFC 147 (Derrington, Goodman and Feutrill JJ, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2025/147.html and https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2025/146.html

3.3 Zhang – Garnishee notices and re-raised taxation debts

In March 2013, a non-pursuit recommendation was made in relation to Li's taxation debts, recorded on his Statement of Account, and, on 14 July 2016, the ATO marked a debt of $1,828,271.97 as "uneconomical to pursue". The non-pursuit of Li's tax debts was approved because he was incarcerated at the time.

On 17 August 2022, the ATO recorded a "Re-raise of non-pursuit amount – Income Tax" of $1,819,671.46, and, on 23 September 2022, Li received an email from the ATO stating he owed $1,152,002.06. The ATO changed its position on the debt as it had identified that Li had a term deposit of $391,735.78 with HSBC.

On 6 March 2024, the ATO issued a garnishee notice to HSBC in respect of accounts held by Li. The garnishee notice was issued based on Li's poor compliance history, recent incarceration for tax evasion, and unwillingness to pay the debt.

Amongst other arguments, Li contended that the ATO was out of time to recover the taxation debt, relying primarily on section 14(1)(d) of the *Limitation Act 1969* (NSW), which provides that an action to recover money recoverable by virtue of an enactment, other than a penalty or forfeiture, must be brought within six years from the date the cause of action accrues. Li submitted that this limitation period applied to the ATO's attempt to re-raise the previously marked "uneconomical to pursue" debt, and that the right to recover the debt had been extinguished by operation of section 63 of the Limitation Act.

The Court accepted the ATO's argument that *Deputy Commissioner of Taxation v Moorebank Pty Ltd* [1988] HCA 29 provides that the federal taxation regime was a complete and exclusive code for the collection and recovery of the income tax debts, and that the intrusion of state limitation laws would undermine the operation of that regime. Accordingly, no limitation period applied to the recovery of income tax debts under federal law.

COMMENT – the Commonwealth's recovery powers for income taxation debts are not subject to state-imposed time limits. As confirmed in *Moorebank*, the federal taxation regime is a complete code for the recovery of income tax debts.

COMMENT – the Court also held that the re-raise of a non-pursuit amount is not reviewable under the *Administrative Decisions (Judicial Review) Act 1997* (Cth). The Court treated it as an internal accounting entry, reinforcing that not all administrative actions by the Commissioner are amenable to judicial review.

Citation *Zhang v Commissioner of Taxation* [2025] FCA 1230 (Younan J, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2025/1230.html

3.4 McNair – ATO offset of tax refund against Centrelink debt

On 22 August 2024, Charmaine McNair lodged her income tax return for the 2024 financial year and expected a refund. However, on 8 August 2024, the ATO issued a notice of assessment advising that the amounts of $4,553.63 and $107.10 had been garnished from her refund to repay a family tax benefit debt from the 2023 financial year. The offsetting was made under section 82 of the *A New Tax System (Family Assistance) (Administration) Act 1999* (**Family Assistance Act**), which permits recovery of debts by applying income tax refunds.

Charmaine initially sought review of the offsetting decision in the Social Services Jurisdictional Area of the ART, but her application was dismissed on 28 April 2025 on the basis that the decision was not reviewable in that jurisdiction. She then lodged a second application in the Taxation Jurisdictional Area on 24 February 2025.

In the course of proceedings, the ATO reversed the offset and refunded the withheld amount to Charmaine, exercising its discretion under section 87 of the Family Assistance Act. Despite receiving the refund, Charmaine continued with the application to ensure that others would not face similar difficulties.

The ART invited submissions on whether the matter raised a systemic issue.

On 16 September 2025, the President of the ART formally notified the Commissioner and the Administrative Review Council of a systemic issue arising from the automated offsetting of income tax refunds against Centrelink debts. The President identified that the process caused financial hardship to vulnerable individuals, was conducted without consideration of individual circumstances, and lacked transparency regarding review rights. The President noted that the failure to consider individual circumstances may amount to jurisdictional error, and that neither the ATO nor Services Australia considered the offsetting decision to be reviewable by the ART.

Ultimately, the ART held that it did not have jurisdiction to review the offsetting decision. The ART found that section 111 of the Family Assistance Act only permits review of decisions that are either subject to internal review under Subdivision B of Division 1 or made by specific officers. Since the offsetting decision was not subject to internal review and was not made by a person listed in section 111(1A) of the Family Assistance Act, it was not a "reviewable decision" under section 12 of the *Administrative Review Tribunal Act 2024* (Cth).

COMMENT – this decision confirms that the ART does not have jurisdiction to review the ATO's decision to offset income tax refunds against Centrelink debts under the Family Assistance Act. However, due to the persistence of the taxpayer in this case, the matter has prompted broader systemic scrutiny. The identification of financial hardship caused by automated offsetting, particularly for vulnerable individuals, has led to inter-agency engagement, clearer public guidance, and a referral to the Administrative Review Council.

Citation *McNair and Commissioner of Taxation (Taxation)* [2025] ARTA 2188 (Deputy President K Dordevic)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/2188.html

3.5 El Chami – Transfer of land between married or de facto couples

Joseph El Chami and Marvett El Chami, a married couple, lived in a property solely owned by Joseph. On 23 October 2023, Joseph instructed his solicitor to transfer the property into joint names as joint tenants, which would ordinarily be exempt from duty under section 104B of the Duties Act.

On 27 October 2023, the solicitor prepared a transfer instrument that mistakenly recorded a transfer of 100% of the property from Joseph to Marvett for $1. Gryphon Lawyers assessed the transfer as exempt under section 104B, and it was registered on 30 October 2023. The error was later discovered, but instead of cancelling the

first transfer, the solicitor prepared a second transfer on 29 July 2024 to return a 50% interest to Joseph, creating joint tenancy.

This was explained by the solicitor to Marvett as follows:

> *…due to a genuine mistake the initial transfer was incorrectly done which on the face of it would invoke normal duty. Notwithstanding this technical error, EDR permitted the incorrect attempt at a transfer under s 104b to be completed confirming exempt duty as evidenced by DAN 10763400-001. As a result of this and the honest oversight on our part, we took it as a valid transfer and proceeded to completing the transfer on Pexa. Indeed, had the transfer been rejected on EDR for not complying with the requirement for a 50/50 transfer or shown duty payable then we would have been alerted to the error and arguably avoided the mistake but that is not the case.*

The Chief Commissioner investigated and assessed duty on the first transfer, finding section 104B did not apply because the property was not held jointly after the transfer. Other exemptions—sections 293, 50A, and 65(14)—were also rejected because the first transfer was valid, registered, and effective. The second transfer was exempt under section 104B.

The NCAT upheld the duty assessment and declined full penalty remission under section 27(3) of the *Taxation Administration Act 1996* (NSW), noting the solicitor failed to exercise reasonable care and the error was not beyond their control. However, under section 33, NCAT reduced penalty tax by 50% (from 25% to 12.5%) due to Marvett's genuine reliance on the solicitor. Interest at the market rate was not remitted, but the premium interest component was reduced by 50%, considering Marvett's lack of culpability and cooperation issues.

COMMENT – the duties consequences can differ significantly depending on the form of the transaction. In this case, if the original transfer had been cancelled and a new transfer taken place for the 50%, the concession would have applied.

El Chami v Chief Commissioner of State Revenue [2025] NSWCATAD 266 (Senior Member J Sullivan, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/266.html

3.6 Chalik – Duty and strata title conversion

On 19 November 2007, 233 Beauchamp Rd Pty Ltd was incorporated with Isaac Chalik as sole director and shareholder. That day, the company purchased land in NSW, later converted into two strata lots. Its constitution gave each of two shares exclusive rights to occupy one lot. Holding both shares, Isaac had exclusive use of the property. Ad valorem duty was paid on the land acquisition.

In 2010, Isaac sold one share to a third party. In 2017, he transferred half of the remaining share to his wife, Hanh Thi Tuyet Chalik, which was exempt under section 104B of the Duties Act. In 2022, the land was converted to strata title. In August 2023, Isaac and Hanh applied to transfer one strata lot from 233 Beauchamp to themselves, relying on section 64 of the Duties Act, which allows $50 duty where a land use entitlement converts to strata title. Section 64 requires:

1. transferee held a land use entitlement before strata registration;
2. transfer gives an interest similar to that entitlement; and
3. one subparagraph of (c) applies, including that ad valorem duty was paid on acquisition (64(c)(i)).

Isaac and Hanh met (a) and (b). The dispute was whether 64(c)(i) applied. They argued it did because no duty was payable on the 2007 allotment or 2017 transfer, or alternatively that duty paid by 233 Beauchamp in 2007

satisfied the requirement. They also claimed the transactions formed a single dutiable transaction under section 18.

The NCAT rejected these arguments. It found that 64(c)(i) requires actual payment of duty on the entitlement acquisition; the fact no duty was payable does not suffice. The wording and structure of section 64 confirm this, as other subparagraphs address situations where no duty was chargeable. The NCAT also found duty paid by 233 Beauchamp could not be attributed to Isaac and Hanh's entitlement acquisition; the company's land purchase and the share allotment were separate transactions under different chapters. Section 18 did not apply because the allotment was not a transfer. The constitution and share documents were not instruments effecting a land transfer.

COMMENT – land use entitlements typically arise under company title schemes. This case shows section 64 of the Duties Act operates strictly: its conditions must be met exactly to access concessional duty. The exemption requires actual payment of ad valorem duty on acquiring the land use entitlement, not merely that no duty was payable. Duty paid by a company on land acquisition cannot satisfy this requirement—the individual owner must have paid duty when acquiring the shares.

Citation *Chalik and Chalik v Chief Commissioner of State Revenue* [2025] NSWCATAD 254 (Senior Member EA MacIntyre)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/254.html

3.7 Cavallaro – Termination due to breaches of TASA Code

Maria Cavallaro was a registered tax agent and the sole director of two registered tax agent companies, being Alliance Accounting & Business Consultants Pty Ltd and Tradie Troopers Pty Ltd.

Over several years, Maria failed to meet key professional obligations in her personal and business affairs. She lodged annual declarations with the Tax Practitioners Board (**TPB**) that contained false or misleading information, including statements that she and her entities had no overdue tax obligations, despite substantial debts being outstanding. These declarations were often completed by her assistant without proper oversight, and Maria did not verify their accuracy before submission. In addition to the false declarations, Maria failed to lodge income tax returns and activity statements for herself, her companies, and various clients. She also failed to pay tax debts on time, resulting in significant penalties. The conduct extended to companies in which she was a director, including family businesses, many of which had long-standing lodgment failures and unpaid liabilities.

Maria accepted that these failures occurred but attributed them to a series of personal and professional challenges, including PTSD, bereavement, a ransomware attack, and the COVID-19 pandemic.

The ART, in reviewing the determination by the TPB that Maria was not a fit and proper person under the *Tax Agent Services Act 2009* (Cth) (**TASA**), found that Maria had breached multiple obligations under the Code of Professional Conduct, including the requirement to act honestly and with integrity. While the ART accepted that her conduct was not intentionally dishonest, it concluded that it was reckless and demonstrated a serious failure to meet professional standards. The ART also found that Maria was no longer a fit and proper person to be registered under the TASA, and that the companies had ceased to meet the registration requirements due to her directorship.

The ART affirmed the decision of the TPB to terminate the registrations of Maria and the two companies, with a one-year disqualification period.

COMMENT – the decision confirms that recklessness and sustained non-compliance with tax obligations may be sufficient to establish a failure to act honestly and with integrity, even where there is no intention to

mislead. Personal circumstances may be relevant, but will not excuse systemic breaches of the Code or failure to meet registration requirements.

Citation *Cavallaro v Tax Practitioners Board (Taxation)* [2025] ARTA 2028 (Senior Member Mark Harrowell, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/2028.html

3.8 Enlace – Surcharge land tax and discretionary trust

Enlace Pty Ltd is the trustee for the Enlace Trust. The Enlace Trust is a discretionary trust.

On 9 April 2020, the trust deed was amended to include the following provision:

> *80. Foreign Persons or Entities*
>
> *80.1 Notwithstanding any other provision contained within this Deed to the contrary, the Trustee is prohibited from effecting any distribution under this Deed to any person and/or entity who would be considered to be a foreign person and/or foreign entity by Revenue NSW (or the requirements of any other state revenue authority).*
>
> *80.2 Despite any other provision of this Deed, this Clause 80 is irrevocable and may not be removed or amended.*

On 10 December 2024, the Chief Commissioner wrote to Enlace advising that the amending deed did not irrevocably exclude foreign beneficiaries in accordance with section 5D of the *Land Tax Act 1956* (NSW) (**LTA**). The Chief Commissioner assessed Enlace for surcharge land tax for the 2022 to 2024 land tax years.

Enlace objected to the assessments. The Chief Commissioner disallowed the objection stating:

> *While it is acknowledged that there may have been a genuine intention to exclude foreign persons as beneficiaries of the Trust, this does not negate the necessity for the Trust Deed, together with subsequent Deeds of Amendment, to meet the specific requirements outlined in subsection 5D(3) of the Land Tax Act. The incorporation of the definition of "foreign person" in the manner prescribed within the Land Tax Act would have ensured that the Trust Deed had complied with the meaning of "foreign person" within section 5D. An intention to comply through the implementation of an unprescribed or generic definition does not achieve these requirements.*

The key issue was whether Enlace Trust was a "foreign person" within the meaning of section 5A of the LTA during the relevant years. This depended on whether the wording of clause 80 of the trust deed satisfied the "no foreign beneficiary requirement" under section 5D(3)(a) of the LTA.

The NCAT accepted that courts can sometimes construe a clause purposively to avoid absurd or mistaken outcomes. However, it emphasised that this can only occur when the language and the intended meaning are clear. Here, Enlace's argument that the wording was "obvious" and, that the reference to "Revenue NSW" and "foreign person" was sufficient, was rejected. The NCAT held that the clause, objectively construed, did not clearly incorporate the statutory definitions or explicitly link to the LTA or the Duties Act. The references to "foreign entity" and other states further obscured the intended meaning, and no evidence was provided to show how the trustee would practically apply or record what Revenue NSW considered the position to be.

Although the NCAT accepted that it is irrelevant that no foreign person had ever received, or was likely to receive, a distribution from the trust. The legislation requires the terms of the trust deed itself to preclude such distributions. Given that clause 80 failed to properly incorporate the prescribed statutory definition of "foreign

person," the trust did not meet the "no foreign beneficiary requirement" in section 5D(3)(a). The NCAT agreed with the Commissioner's objection decision that a general or unprescribed reference to foreign persons could not satisfy the statutory standard. The NCAT also declined to undertake a "speculative redrafting exercise" to fix the defective wording.

The NCAT concluded that at each relevant taxing date the "no foreign beneficiary requirement" was not satisfied. As a result, Enlace was deemed a foreign person, and surcharge land tax was correctly assessed and payable for the 2022 to 2024 land tax years.

COMMENT – drafting choices in foreign person exclusion clauses continue to be a problem for the foreign person surcharges. Neither the revenue offices nor the tribunals consider that fairness or honest mistakes as a basis on which to not impose the surcharge.

Citation *Enlace Pty Ltd ATF Enlace Trust v Chief Commissioner of State Revenue* [2025] NSWCATAD 253 (Senior Member J Sullivan, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/253.html

3.9 Appeal Updates

Auz Taxation

The TPB has appealed to the Federal Court against the ART's decision in *Auz Taxation Pty Ltd & Anor v Tax Practitioners Board* [2025] ARTA 1711. The ART had overturned the TPB's decision to terminate the registrations of both the company and its principal tax agent, following a finding that a newly hired employee had accessed the online services for agents using the credentials of other people and subsequently committed fraud. The ART instead issued a written caution and ordered remedial measures, including disclosure of the decision's reasons to all clients and staff, and completion of additional training by the individual agent.

Merchant

The Commissioner and the taxpayers have both been granted special leave to appeal to the High Court from the Full Federal Court's decision in *Merchant v Commissioner of Taxation* [2025] FCAFC 56. The Full Court had largely dismissed the taxpayers' appeal, upholding the Federal Court's finding that Part IVA and the dividend stripping provisions of the ITAA 1936 applied to a scheme involving the sale of high-cost shares by a family trust to a related entity to generate a capital loss.

3.10 Other tax and super related cases published from 9 Oct 2025 to 11 Nov 2025

Citation	Date	Headnote	Link
Queensland X-Ray Group Pty Ltd and Commissioner of Taxation (Practice and procedure) [2025] ARTA 2259	9 October 2025	PRACTICE AND PROCEDURE – Reinstatement application – application for review previously dismissed by Tribunal on basis of failure by Applicant to comply with directions of Tribunal and/or failure to proceed with application within a reasonable time - whether application dismissed in error – factors to be considered – whether appropriate to reinstate - reinstatement application	https://classic.austlii.edu.au/au/cases/cth/ARTA/2025/2259.html

Citation	Date	Headnote	Link
		refused	
HWWK and Commissioner of Taxation (Practice and procedure) [2025] ARTA 2156	9 October 2025	PRACTICE AND PROCEDURE Applicant failure to file outline of written submissions and allowed the time to lapse without notifying the Tribunal – Directions made months earlier – Applicant not able to proceed on hearing date and did not advise the Tribunal – Significant illness of director - Considerably aged matter – Engagement of legal advisers after non-compliance hearing scheduled - Application dismissed under section 100 of the Administrative Review Tribunal Act 2024 (Cth)	https://classic.austlii.edu.au/au/cases/cth/ARTA/2025/2156.html
Birdseye and Commissioner of Taxation (Practice and procedure) [2025] ARTA 2147	10 October 2025	PRACTICE AND PROCEDURE – Reinstatement application for proceedings dismissed under section 97 of the Administrative Review Tribunal Act 2024 (Cth) for lack of jurisdiction as there was no reviewable decision – Applicant required to demonstrate error for the proceedings to be reinstated and failed to do so – Reinstatement application dismissed	https://classic.austlii.edu.au/au/cases/cth/ARTA/2025/2147.html
Yelda and Commissioner of Taxation (Practice and procedure) [2025] ARTA 2170	14 October 2025	PRACTICE AND PROCEDURE – Application dismissed pursuant to section 97 of the Administrative Review Tribunal Act 2024 (Cth) as comprised of judicial review grounds	https://classic.austlii.edu.au/au/cases/cth/ARTA/2025/2170.html
Bani Samuel Pty Ltd and Commissioner of Taxation (Taxation) [2025] ARTA 2186	17 October 2025	Catchwords- income tax – Small Business Tax Division- assessments made under s.166 of the Tax Assessment Act 1936 (Cth)- whether taxpayers had discharged their onus under s 14ZZK(b)(i)of the Taxation Administration Act 1953 (Cth)- whether evidence of the taxpayers was sufficiently reliable to discharge the onus, extraordinary lack of business records- unexplained deposits, admissibility of witness statement if witness not available for cross examination- no evidence of taxpayer ever being registered for Fringe Benefits Tax under the Frings Benefits Tax Assessment Act 1986 (Cth)- administrative penalties – penalty assessment – intentional disregard – false or misleading statements – shortfall interest charge.	https://classic.austlii.edu.au/au/cases/cth/ARTA/2025/2186.html
Safarimaznabi v Commissioner of Taxation [2025] FCA 1266	17 October 2025	TAXATION – whistleblower protections under the Taxation Administration Act 1953 (Cth) – application for summary dismissal of proceedings – where applicant alleges existence of novel duty	https://classic.austlii.edu.au/au/cases/cth/FCA/2025/1266.html

Citation	Date	Headnote	Link
		of care – where applicant/whistleblower alleges Commissioner of Taxation owes duty of care to take reasonable steps to prevent foreseeable harm to eligible disclosers from retaliation by third party – whether no reasonable cause of action disclosed – whether no reasonable prospects of successfully prosecuting proceeding	
ZBDD v Commissioner of Taxation [2025] ARTA 2197	20 October 2025	PRACTICE AND PROCEDURE – Application to issue a summons to an ATO officer dismissed - no reasonable grounds to believe that the ATO officer had any information relevant to the Tribunal proceedings given the jurisdiction of the Tribunal and the nature of proceedings in the Tribunal under Part IVC of the Taxation Administration Act 1953 (Cth)	https://classic.austlii.edu.au/au/cases/cth/ARTA/2025/2197.html
Zhu v Commissioner of State Revenue [2025] VCAT 926	22 October 2025	Review and Regulation List – Land Tax Act 2005 (Vic), ss 34A, 34C, 54 and 56 – Whether property used and occupied as applicant's principal place of residence during relevant land tax years – Whether applicant met temporary absence conditions – Whether property was vacant during relevant land tax years – Inconsistencies in evidence – Assessments confirmed.	https://classic.austlii.edu.au/au/cases/cth/ARTA/2025/2197.html
Urquhart v Commissioner of Taxation [2025] ARTA 2267	24 October 2025	TAXATION - income tax assessment; entitlement to Dependant (invalid and carer) tax offset, statutory construction, whether justification for departing from literal interpretation, no error in application of the statutory requirements, decision under review affirmed.	https://classic.austlii.edu.au/au/cases/cth/ARTA/2025/2365.html
Grant and Commissioner of Taxation (Practice and procedure) [2025] ARTA 2362	28 October 2025	PRACTICE AND PROCEDURE – where applicant seeks to adduce two expert reports to support a postulate for the purposes of Part IVA of the Income Tax Assessment Act 1936 (Cth) – where experts asked similar questions and have similar qualifications and experience – where reports relied upon in respect of different income years	https://classic.austlii.edu.au/au/cases/cth/ARTA/2025/2365.html
Skycorp Investments Pty Ltd v Commissioner of Taxation (No 2) [2025] FCA 1316	28 October 2025	TAXATION - sale by foreign resident entities of shares in Australian entity conducting mining operations in Australia - whether share sale gave rise to capital gains tax liability - whether shares were taxable Australian real property - issues determined and matters to be referred to a referee for report identified	https://classic.austlii.edu.au/au/cases/cth/FCA/2025/1316.html
Commissioner of Taxation v Huang [2025] FCA 1314	29 October 2025	TAXATION – administrative penalties – notice of liability to pay administrative	https://classic.austlii.edu.au/au/cases/cth/FCA/2025/13

Citation	Date	Headnote	Link
		penalties given under s 298-10 of Schedule 1 of Taxation Administration Act 1953 (Cth) – Commissioner assessed amount of administrative penalty as 50% of shortfall amounts under Item 2 of s 284-90(1) and s 298-30 of Schedule 1 of the Administration Act – Administrative Appeals Tribunal found that taxpayer discharged onus of proving that assessments of penalty should not have been made under s 14ZZK(b)(ii) or were excessive and should have been nil under s 14ZZL(b)(i) of the Administration Act – whether Tribunal erred in applying s 14ZZK(b)(ii) – whether Tribunal erred in misunderstanding or misapplying taxpayer's onus of proof under s 14ZZK(b) – whether Tribunal bound on facts as found to conclude taxpayer had failed to discharge onus of proof under s 14ZZK(b)(i)	14.html
DefendTex Pty Ltd v Commissioner of Taxation [2025] ARTA 2287	30 October 2025	Request to issue a summons under s 74 of the Administrative Review Tribunal Act – request for directions under s 79 of the Administrative Review Tribunal Act – respondent requests a summons so as to seek access to the applicant's premises on the basis that the definition of produce includes permit access to – s 74 and s 79 do not give power to the Tribunal to permit the respondent to access the private premises of the applicant – applications refused	https://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/ARTA/2025/2287.html
Gray and Commissioner of Taxation (Practice and procedure) [2025] ARTA 2359	30 October 2025	PRACTICE AND PROCEDURE - Stay application – substantive proceedings seek review of a decision made by the Commissioner of Taxation to retain refunds pursuant to section 8AAAZLGA – whether stay in relation to a small business taxation assessment decision – no objection nor objection decision in respect of an assessment - stay application dismissed – further interlocutory hearing scheduled to determine Tribunal jurisdiction	https://classic.austlii.edu.au/au/cases/cth/ARTA/2025/2359.html
Walker v Chief Commissioner of State Revenue [2025] NSWCATAD 270	5 November 2025	TAXES AND DUTIES — Dutiable transactions —Exemption from duty under First home buyers assistance scheme — Reassessment — Onus of proof satisfied	https://classic.austlii.edu.au/au/cases/cth/ARTA/2025/2197.html
Uddin and Commissioner of Taxation (Taxation) [2025] ARTA 2365	5 November 2025	TAXATION – income tax – superannuation contributions – Division 293 assessment – lump sum payment for income arrears over a number of years – when income earned – whether discretion	https://classic.austlii.edu.au/au/cases/cth/ARTA/2025/2365.html

Citation	Date	Headnote	Link
		to reallocate income – no discretion – decision affirmed	
Newmont Canada FN Holdings ULC v Commissioner of Taxation (No 2) [2025] FCA 1356	5 November 2025	TAXATION - sale by foreign resident entities of shares in Australian entity conducting mining operations in Australia - whether share sale gave rise to capital gains tax liability - whether shares were taxable Australian real property - issues determined and matters to be referred to a referee for report identified	https://classic.austlii.edu.au/au/cases/cth/FCA/2025/1356.html

4. Legislation

4.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Superannuation Guarantee Charge Amendment Bill 2025	9/10	30/10	3/11	4/11	6/11
Treasury Laws Amendment (Payday Superannuation) Bill 2025	9/10	9/10	9/10	9/10	9/10
Treasury Laws Amendment (Payments System Modernisation) Bill 2025	30/7	2/9	4/9	4/9[A]	19/9
Treasury Laws Amendment (Strengthening Financial Systems and Other Measures) Bill 2025	4/9	8/10	27/10		

4.2 Senate establishes Select Committee to consider operation of CGT discount

On 4 November 2025, the Senate resolved to establish the Select Committee on the Operation of the Capital Gains Tax Discount.

The Select Committee is to consider the following:

1. the extent to which the CGT discount contributes to inequality in Australia, particularly in relation to housing;
2. the impact of the CGT discount on Australia's productivity, including whether it channels investment into existing housing assets rather than more productive uses;
3. how the CGT discount influences asset selection and whether these investments are primarily productive or speculative;
4. the distributional effects of the CGT discount across different groups;
5. the application of the CGT discount by trusts;
6. whether the CGT discount continues to serve its original intended purpose;
7. the potential role of the CGT discount within Australia's future tax framework; and
8. any other related matters.

The Select Committee is scheduled to deliver its final report by 17 March 2026.

w
https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Operation_of_the_Capital_Gains_Tax_Discount/CapitalGainsTaxDiscount

4.3 Payday Super reform passed

On 30 October 2025, the Superannuation Guarantee Charge Amendment Bill 2025 and the Treasury Laws Amendment (Payday Superannuation) Bill 2025 passed the House of Representatives, progressing the Government's Payday Super reforms.

From 1 July 2026, employers will be required to ensure superannuation guarantee (**SG**) contributions reach employees' super funds within seven business days of paying "qualifying earnings". Timely contributions will reduce SG charge liability to nil, while late or missed payments will attract the SG charge and notional earnings to compensate employees for lost returns.

The legislation also provides additional time for first-time contributions to a new fund and includes consequential amendments across tax and superannuation laws.

The Bills will commence on 1 July 2026.

w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7374
w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7373

4.4 PAYG withholding variation for directors

The ATO has issued a draft legislative instrument (LI 2025/D24) providing for the PAYG withholding variation to nil for remuneration paid by companies to directors and other office holders where the director or officer holder is obligated to pay the remuneration to another entity and they are an employee, director or partner of the other entity.

The legislative instrument is a continuation of an existing PAYG withholding variation.

Consultation on the legislative instrument is open until 5 December 2025.

w https://www.ato.gov.au/law/view/document?docid=OPS/LI2025D24/00001

4.5 Instant asset write-off for small business entities

Treasury Laws Amendment (Strengthening Financial Systems and Other Measures) Bill 2025 containing changes to extend the instant asst write-off for small business entities, as well as changes to enhance ownership disclosure for listed entities and other tax-related measures has received Royal Assent.

The Bill extends the $20,000 instant asset write-off for small business (with annual turnover under $10 million) by 12 months until 30 June 2026. Eligible assets must be first used or installed ready for use on or before 30 June 2026. This measure was announced on 4 April 2025. It will commence on the day after assent of the Bill.

The Bill also includes various other amendments as follows:

1. amendment to the Corporations Act to enhance the substantial holding and tracing notice regimes for listed entities;
2. amendment to the GST Act to clarify the interaction between the Commissioner's power to determine the tax period for attributing input tax credits and the time limit rules in Division 93 of the GST Act. The proposed amendments state that, if the Commissioner determines the tax period for attribution, the taxpayer must claim the input tax credit within 4 years of the due date for lodging the GST return for that period; and

3. amendment to the *Australian Charities and Not-for-profits Commissioners Act 2021* to allow public disclosure of protected ACNC information about new and ongoing investigations.

w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7367

4.6 Trading names to remain visible on the ABR

On 3 October 2025, the *A New Tax System (Australian Business Number) Amendment (Display of Trading Names) Regulations 2025* was made to ensure that business trading names continue to be displayed on the ABR from 1 November 2025. The intention is for trading names to remain permanently visible on the ABR, although following the completion of ASIC's register stabilisation and uplift program, expected around 2030, trading names will be retained only as historical details.

w https://www.legislation.gov.au/F2025L01227/asmade/text

4.7 Mandating of cash acceptance at supermarkets and fuel retailers

On 17 October 2025, the Government released the exposure draft of the *Competition and Consumer (Industry Codes—Cash Acceptance) Regulations 2025*. The draft regulations propose mandatory industry codes requiring supermarket and motor fuel retailers to accept cash for in-person payments of $500 or less. The requirement does not apply to small business entities, defined as those with aggregate turnover under $10 million (including franchise arrangements).

Retailers must provide a reasonable opportunity for consumers to pay in cash, with at least one cash payment point per site. Civil penalties may apply for non-compliance, though enforcement will not commence until six months after the regulations take effect.

The ACCC may grant exemptions to individual retailers or classes of retailers under specified conditions. The regulations are scheduled to commence on 1 January 2026, with a review after three years to assess effectiveness and consider expansion.

w https://consult.treasury.gov.au/c2025-707578

4.8 Victoria: changes to land tax, duties, and levy

On 14 October 2025, the Victorian Government introduced the State Taxation Further Amendment Bill 2025 (Vic) into the Legislative Assembly. The Bill proposes a broad range of amendments to refine and modernise Victoria's state taxation laws. Key measures include:

1. adjustments to congestion levy zones and exemptions, including new concessions for retail premises and exclusions for residential parking and government school premises;
2. a new land tax exemption for low-value land with non-permanent shelters used as residences;
3. changing how the foreign purchaser additional duty and absentee owner surcharge apply to New Zealand citizen by replacing the special category visa test with a residency-based test. It was considered that the special category visa test could create anomalous outcomes because, unlike a permanent visa, a special category visa is granted and ceases every time the person enters and leaves Australia. For example, a New Zealand citizen who does not reside in Australia can avoid the absentee owner surcharge by being present in Australia on 31 December. The amendments provide that only New

Zealand citizens who ordinarily reside in Australia are outside the scope of the absentee owner surcharge; and

4. repealing the *Taxation (Interest on Overpayments) Act 1986* (Vic).

The Bill also makes consequential amendments to numerous Acts, including the Duties Act 2000, Land Tax Act 2005, Congestion Levy Act 2005, and others, to ensure consistency and continued operation of Victoria's taxation regime.

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

5. Rulings

5.1 ATO moves effective life guidance online

On 31 October 2025, the ATO formally withdrew Taxation Ruling *TR 2022/1*, which outlined the methodology for determining the effective life of depreciating assets under section 40-100 of the ITAA 1997.

The ruling has been replaced with updated web guidance, excluding Tables A and B, which remain in force via *the Income Tax Assessment (Effective Life of Depreciating Assets) Determination 2025* (LI 2025/20). The Determination contains the Commissioner's current effective life determinations and will be periodically updated as asset reviews are completed.

ATO reference *TR 2022/1W*
w https://www.ato.gov.au/law/view/document?docid=TXR/TR20221W/NAT/ATO/00001

5.2 ATO releases draft compliance guide for Payday Super

On 9 October 2025, the ATO released draft Practical Compliance Guideline PCG 2025/D5, outlining its proposed compliance approach for the first year of the Payday Super reforms, which commence on 1 July 2026. The reforms require employers to make superannuation guarantee contributions in line with the payment of qualifying earnings, replacing the current quarterly system.

The guideline introduces a risk-based framework for assessing employer compliance:

1. Low-Risk Zone: employers will be in this zone if they attempt to make on-time SG contributions and promptly correct any delays (e.g. fund rejections), resulting in no SG shortfalls;
2. Medium-Risk Zone: employers will be in this zone if they do not meet low-risk criteria but ensure all SG shortfalls are resolved within 28 days after the relevant quarter; and
3. High-Risk Zone: employers will be in this zone if they have unresolved SG shortfalls beyond the 28-day window, or who fail to adopt the Payday Super framework.

The following example would be considered low-risk:

Example 1 – low risk – evidence the employer attempts to reduce their individual base SG shortfall to nil by making sufficient on-time eligible contributions – rejected contributions

26. *From 1 July 2026, an employer pays superannuation contributions at the same time they pay their employees. Usually, the super funds receive these contributions on time. However, on occasion, the super fund rejects a contribution. When this happens, the employer works with the fund and the employee to fix the error and re-makes the contribution as soon as possible.*

27. *Even though the re-made contributions are received late, the employer is considered to fall into the low-risk zone because they corrected the error as soon as reasonably practicable, resulting in all their individual final SG shortfalls being nil. The Commissioner will not have cause to apply compliance resources to this employer for any QE days occurring from 1 July 2026 to 30 June 2027.*

The following example would be considered high-risk:

Example 6 – high risk – employer incorrectly calculates qualifying earnings and makes insufficient contributions by the end of the quarter

38. *Before 1 July 2026, an employer pays their employees monthly and pays all superannuation contributions for their employees at the end of each quarter. From 1 July 2026, the employer makes no adjustments and continues to pay superannuation contributions quarterly, even though they pay their employees monthly. The employer also misclassifies some payments and incorrectly treats them as not being qualifying earnings. As a result of this misclassification, the employer does not make sufficient contributions for some employees.*

39. *The employer is considered to fall into the high-risk zone because they have individual final SG shortfalls greater than nil 28 days after the end of the relevant quarter in which the qualifying earnings were paid. The Commissioner will prioritise compliance resources to investigate this employer ahead of employers in the medium-risk zone for the QE days occurring from 1 July 2026 to 30 June 2027.*

The ATO will prioritise investigations based on the three risk zones, focusing on employers who fail to meet minimum SG obligations or do not correct errors promptly. Employers continuing to use the quarterly SG system without transitioning to Payday Super will not be considered low-risk.

The draft is open for public comment until 7 November 2025.

ATO reference *PCG 2025/D5*
w https://www.ato.gov.au/law/view/document?docid=DPC/PCG2025D5/NAT/ATO/00001

5.3 Updates to private rulings framework

The ATO has finalised its addendum to *Taxation Ruling* TR 2006/11, which outlines the framework for private rulings. While many of the amendments are editorial in nature, such as grammatical corrections and updated references, there are several substantive changes that tax professionals should be aware of. These changes are particularly relevant in light of the enactment of the *Taxation (Multinational – Global and Domestic Minimum Tax) Act 2024*. The key changes are set out below.

Expanded grounds for declining to issue a private ruling

The addendum clarifies that the Commissioner may refuse to issue a ruling in cases where:

1. the application relates to the Australian Income Inclusion Rule (IIR) tax, Undertaxed Profits Rule (UTPR) tax, or Domestic Minimum Top-up (DMT) tax;
2. The matter involves guidance published by the OECD/G20 Inclusive Framework that has not yet been incorporated into Australian law; and
3. issuing a ruling would require the Commissioner to interpret or apply foreign tax laws.

Clarification of ruling applicability to trustees and beneficiaries

The addendum revises further clarifies that a private ruling issued to a trustee may also apply to:

the beneficiaries of the trust provided the ruling does not relate to indirect tax or excise; and
a replacement trustee, as long as the scheme to which the ruling relates remains materially unchanged.

ATO reference *TR 2006/11A6 – Addendum*
w https://www.ato.gov.au/law/view/document?docid=TXR/TR200611A6/NAT/ATO/00001

5.4 GST and supplies of formula products

The ATO has released its draft determination GSTD 2025/D1 *Goods and services tax: supplies of formula products*. GSTD 2025/D1 provides guidance on when, under section 38-2 of the GST Act, a supply of a formula product is GST-free. Paragraph 38-3(1)(d) of the GST Act provides that the supply of a beverage (or an ingredient for a beverage) will not be GST-free, unless it is of a beverage (or ingredient) or a kind specified in the third column of the table in clause 1 of Schedule 2 to the GST Act, which specifies:

> *beverages, and ingredients for beverages, of a kind marketed principally as food for infants or invalids.*

GSTD 2025/D1 explains the ATO's view on which formula products will be considered GST-free under table item 13 as beverages or ingredients for beverages of a kind marketed principally as food for infants. It does not cover supplies of beverages, and ingredients for beverages, of a kind marketed principally as food for invalids.

Comments on the draft determination are due by 28 November 2025. A compendium of comments will be prepared and published when finalising the determination.

ATO reference *GSTD 2025/D1*
w https://www.ato.gov.au/law/view/document?docid=DGD/GSTD2025D1/NAT/ATO/00001

5.5 Ruling on connected entities duty exemption WA

RevenueWA has issued a ruling on the connected entities exemption in section 264 of the *Duties Act 2008* (WA).

Chapter 6 of the Duties Act provides an exemption from duty for certain transactions between corporations and unit trust schemes within the same family group. This ruling outlines how RevenueWA interprets key terms for the connected entities exemption under the Duties Act.

Applicants may seek a pre-transaction decision to confirm if a proposed transaction qualifies or if an existing exemption would be revoked. RevenueWA is bound by this decision unless circumstances or information materially differ or disclosure was incomplete.

Under section 264, RevenueWA must be notified of “notifiable events” within three years of an exempt transaction. The transaction group includes all entities involved. Notifiable events include:

1. winding up of a controlling entity with no major holder;
2. loss of control (below 50%) by the controlling entity or its major holder; and
3. unstapling of securities that created family member status.

Under section 264A, an exemption for a reconstruction transaction is automatically revoked if the controlling entity ceases to hold or control more than 50% of a member that owns property linked to the exempt transaction.

Exemption applications must be lodged in the approved form within 12 months of the transaction date. RevenueWA must grant the exemption unless:

1. the transaction is part of a tax avoidance scheme;
2. a notifiable event would revoke the exemption under section 264A; and
3. any family member has outstanding tax liabilities.

The 12-month deadline cannot be extended. The transaction date is when duty liability arises—either on transfer or agreement to transfer. If an agreement specifies an earlier effective date, RevenueWA may accept that date if:

1. documents clearly support it;
2. reliable evidence confirms it; and
3. there is a genuine commercial reason.

If an agreement states both effective date and completion occurred before signing, the completion date is the transaction date.

RevenueWA reference *Revenue Ruling DA 19.3*
w https://www.wa.gov.au/government/publications/duties-ruling-connected-entities-exemption

6. Private rulings

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

6.1 CGT event K6

Facts

The taxpayer is an individual and an Australian resident for tax purposes. They acquired shares in Company X prior to 20 September 1985. Company X wholly owned Company Y, which operated a business.

The taxpayer entered into a sale agreement (**Parent SPA**) to sell all shares in Company X to an unrelated third party at arm's length. This transaction (**Share Sale**) effectively transferred ownership of the business operated by Company Y to the purchaser.

Under the terms of the Parent SPA, the initial consideration payable to the taxpayer was reduced by a "Notified Leakage Amount", which represented transaction costs incurred for the taxpayer's benefit in relation to the Share Sale. Additionally, upon completion of the Share Sale, the taxpayer paid a commission to a service provider for assistance with the transaction.

Company X's only directly held asset was its shares in Company Y, which were acquired after 20 September 1985. The indirectly held assets consisted of the business assets of Company Y, all of which were also acquired after that date.

Given the multi-tier structure, the taxpayer proposed to calculate the capital gain from CGT event K6 under subsection 104-230(6) of the ITAA 1997 by attributing the capital proceeds to the underlying business assets held by Company Y, rather than to the shares in Company Y held by Company X. Since all relevant assets were post-CGT, the taxpayer's approach focused on the nature and market value excess of each category of property owned by Company Y.

Issues

1. Did section 104-230 of the ITAA 1997 apply to the sale of shares in Company X by the taxpayer as part of the Share Sale?
2. In calculating the capital gain under subsection 104-230(6) of the ITAA 1997, should the capital proceeds be reduced by a portion of the Notified Leakage Amount?
3. Should the portion of the commission paid by the taxpayer upon completion of the Share Sale be included in the calculation of the capital gain under subsection 104-230(6) of the ITAA 1997?
4. Does the taxpayer's proposed method of calculating the capital gain under subsection 104-230(6) of the ITAA 1997 constitute a reasonable attribution of the capital proceeds?
5. Is the capital gain made by the taxpayer from CGT event K6 a discount capital gain with a 50% discount under Division 115 of the ITAA 1997?

Ruling

CGT event K6

CGT event K6 applies where a taxpayer disposes of pre-CGT shares (i.e. acquired before 20 September 1985) and the underlying company holds post-CGT property (i.e. acquired on or after 20 September 1985) that meets the 75% threshold of net asset value. In this case, the taxpayer acquired shares in Company X before the CGT start date. Company X held 100% of Company Y, whose business assets were all post-CGT. The sale of Company X shares triggered CGT event A1, and no rollover relief was available. The market value of post-CGT property exceeded 75% of Company X's net value immediately before the sale. Therefore, all conditions under subsection 104-230(1) ITAA 1997 were satisfied, and CGT event K6 applied. No exemptions under subsections 104-230(9) or (10) were available, as the shares were unlisted and no scrip-for-scrip rollover applied.

Capital proceeds

Under Division 116 ITAA 1997, capital proceeds include amounts received or entitled to be received in respect of a CGT event. Subsection 103-10(1) deems amounts applied for the taxpayer's benefit or at their direction as received. Although the taxpayer's initial entitlement was reduced by the Notified Leakage Amount (transaction costs incurred for their benefit), this amount was still considered received under subsection 103-10(1). Therefore, it was included in the capital proceeds under subsection 116-20(1). None of the six modification rules in section 116-10 (e.g. market value substitution, apportionment, non-receipt, repayment, assumption of liability, or misappropriation) applied to reduce the capital proceeds. Consequently, the Notified Leakage Amount formed part of the taxpayer's capital proceeds.

Treatment of Commission payment

The commission paid by the taxpayer post-completion for services related to the Share Sale did not reduce the capital proceeds under subsection 116-20(1) ITAA 1997, as it was not paid out of the sale proceeds nor directed to be paid by the purchaser. It also did not meet any of the modification criteria under section 116-10. While the Commission may be an incidental cost under subsection 110-35(2) (e.g. consultant fees), CGT event K6 requires reference to the cost base of the underlying property (i.e. assets held by Company Y), not the cost base of the pre-CGT shares in Company X. Since the Commission was not incurred in relation to the underlying property, it could not be included in the cost base under subsection 110-25(3). Therefore, it was excluded from the capital gain calculation under subsection 104-230(6).

Attribution of capital proceeds in multi-tier structure

Subsection 104-230(6) ITAA 1997 requires a reasonable attribution of capital proceeds to the market value excess of post-CGT property over its cost base. In multi-tier structures, Taxation Ruling TR 2004/18 confirms that attribution should be made to the underlying property rather than to the interests in lower-tier entities to avoid double counting. The taxpayer's approach of attributing proceeds to the business assets of Company Y (all post-CGT) rather than to the shares in Company Y held by Company X was consistent with the legislative intent and guidance in TR 2004/18, particularly paragraphs 24, 35 and 35A. The ATO accepted this as a reasonable attribution method under subsection 104-230(6).

Discount capital gain

A capital gain from CGT event K6 may qualify as a discount capital gain under Division 115 if certain conditions are met. These include: the taxpayer being an individual (section 115-10), the CGT event occurring after 21 September 1999 (section 115-15), no indexation of the cost base (section 115-20), and the asset being held for at least 12 months (section 115-25). All conditions were satisfied in this case. Section 115-45, which can deny discount treatment in certain cases involving substantial ownership and recent asset acquisitions, did not apply because not all conditions were met — specifically, the cost base of recently acquired assets did not exceed

50% of total assets. As the taxpayer was an Australian resident, the discount percentage was 50% under section 115-100(a). Therefore, the capital gain qualified as a discount capital gain.

ATO reference *Edited Private Advice Authorisation No. 1052386137768*
w https://www.ato.gov.au/law/view/document?docid=EV/1052386137768

6.2 Business of short term stay accommodation

Facts

The taxpayer and their late spouse jointly acquired a property over 20 years ago with the intention of using it both as their main residence and as a licensed bed and breakfast. Council approval for the business was obtained approximately six months after purchase. The spouse operated the bed and breakfast as a sole trader for over 6.5 years, reporting income and expenses as business income. During this period, the taxpayer had minimal operational involvement due to full-time external employment but provided assistance as needed.

The taxpayer resigned from employment to provide care to their spouse who was diagnosed with a serious illness. The business ceased and the spouse passed away.

After the spouse passed away, the taxpayer did not want to leave the house but needed an income stream. They decided to re-establish the bed and breakfast activity.

Renovations were undertaken to update and reconfigure the property for guest accommodation. The taxpayer operated the business as a sole trader for approximately 7.5 years, reporting all income and expenses as business income, while continuing to reside at the property.

The business was paused to allow for travel, during which the property was rented fully furnished to a third party via a real estate agent for 12 months. Upon returning, the taxpayer chose to retire and sold the property, continuing to reside there until the sale. No other main residence was owned thereafter, and the taxpayer moved into a retirement village. At the time of sale, the taxpayer was over 55 years old and not employed in any capacity. The net value of assets owned by the taxpayer, affiliates, and connected entities did not exceed $6 million.

The bed and breakfast operation involved offering multiple large suites to guests, with access to communal areas such as lounges, dining rooms, day rooms, and outdoor spaces. The taxpayer resided in a private section of the property not accessible to guests. The property was extensively renovated for guest use and marketed through signage, a dedicated website, booking platforms, and social media. It was available year-round and operated with regular bookings, typically for 2–3 nights per guest.

The taxpayer managed all aspects of the business, including meal preparation, cleaning, guest services, bookings, and property maintenance. Guests did not have exclusive possession of rooms, and no formal lease agreements were in place. The taxpayer retained entry rights to rooms for maintenance and kept detailed records of bookings and expenses. Although no formal business plan existed, the taxpayer had prior experience in tourism and sales, had assisted their spouse previously, and undertook marketing seminars and professional advice to support the business.

Questions

1. Was the taxpayer carrying on a business of providing short-term holiday accommodation?
2. Was the property considered an active asset under Subdivision 152-A of the ITAA 1997?
3. Did the taxpayer satisfy the requirements in section 152-105 of the ITAA 1997 to apply the 15-year exemption for the 50% interest in the property originally acquired?

Ruling

Carrying on a business

The ATO applied the business indicators outlined in *Taxation Ruling* TR 97/11 to determine whether the taxpayer was carrying on a business. These indicators include:

1. Profit motive and prospect of profit: The activity generated profits in most years and was the taxpayer's primary income source.
2. Repetition and regularity: The bed and breakfast was advertised year-round and operated consistently with frequent guest bookings.
3. Business-like manner: The taxpayer maintained records (receipts, invoices, booking diary), attended marketing seminars, and sought professional advice, demonstrating a structured and profit-oriented approach.
4. Similarity to other businesses: The operation included serviced guest suites, breakfast, signage, online marketing, and standard check-in/check-out procedures, aligning with industry norms.
5. Size, scale, and permanency: The property accommodated multiple guests, was renovated for commercial use, and operated over several years.
6. Not a hobby or recreation: The taxpayer intended to generate income and did not treat the activity as a hobby.
7. Commercial character and intention: The overall impression was that the activity had a significant commercial flavour and was intended to be a business.

Based on these factors, the ATO concluded that the taxpayer was carrying on a business of providing short-term holiday accommodation.

Active asset

To qualify for small business CGT concessions, the property must meet the active asset test under section 152-35 of the ITAA 1997. The test requires that:

1. if held for more than 15 years, the asset must be active for at least 7.5 years; or
2. if held for less than 15 years, the asset must be active for at least half the ownership period.

The taxpayer held an original 50% interest for over 15 years and operated the business for more than 7.5 years, satisfying the test. The inherited 50% interest was held for less than 15 years but was active for more than half that time, also satisfying the test.

The ATO also considered the affiliate rules under section 328-130(1) and section 152-47. The taxpayer's late spouse was deemed an affiliate, meaning their business use of the property contributed to the active asset status of the taxpayer's original interest.

Importantly, the ATO assessed whether the property's main use was to derive rent, which would exclude it from being an active asset under section 152-40(4)(e). Applying TD 2006/78, the ATO found:

1. guests did not have exclusive possession;
2. no formal lease agreements existed;
3. the taxpayer retained control and provided substantial services (meals, cleaning, amenities); and
4. the arrangement resembled a licence to occupy rather than a lease.

Therefore, the income was not considered rent, and the property qualified as an active asset.

15 year exemption

Under section 152-105, an individual may disregard a capital gain if:

1. the basic conditions under Subdivision 152-A are met;
2. the CGT asset was owned continuously for at least 15 years; and
3. the individual was aged 55 or over at the time of the CGT event and the event was in connection with retirement.

The taxpayer met all these conditions for the original 50% interest:

However, the exemption does not apply to the inherited 50% interest, as it was not held for the required 15-year period. Each interest is treated as a separate CGT asset.

ATO reference *Edited Private Advice Authorisation No. 1052450529838*
w https://www.ato.gov.au/law/view/document?docid=EV/1052450529838

6.3 Capital v revenue for shares

Facts

The taxpayer is a discretionary trust, established in 20XX and controlled by an individual for the benefit of that individual and their family. It was created as a special purpose investment vehicle to acquire and hold shares in B Pty Ltd. The trust did not issue a prospectus or similar document.

The investment opportunity was introduced to the individual by a neighbour, who was also a former executive at A Bank. No formal Statement of Advice was provided. The individual recalls the advice as suggesting a strong investment with an expected annual return of X%. This was appealing due to the taxpayer's historical concentration in a particular industry and a desire to diversify. The shares were expected to deliver a dividend return of X% per annum.

No formal due diligence was undertaken. The individual justified this by noting the investment was modest relative to their overall wealth and relied on the fact that A Bank had conducted its own due diligence. Trust in the neighbour's professional background also influenced the decision.

Following the decision to invest, the trust was established to hold the shares. It did not carry on a business and had no other substantive investments. The sale proceeds from the shares were later loaned to related parties.

In 20XX, the taxpayer acquired the shares from A Pty Ltd under a Selldown Share Sale Agreement for approximately $X million. This was a partial divestment by A Pty Ltd. The taxpayer also acceded to a Shareholder Deed executed in 2020 by original shareholders of B Pty Ltd. No written communications exist between A Pty Ltd and the taxpayer regarding the sale offer.

The taxpayer held no board representation in B Pty Ltd and had no involvement in either B Pty Ltd or A Pty Ltd. The Shareholder Deed included tag-along rights requiring the taxpayer to sell its Shares if private equity holders of X Class and Ordinary shares sold theirs.

No dividends were declared during the holding period. The taxpayer was a minority shareholder and had no influence over board decisions.

In 20XX, all shareholders of A Pty Ltd executed a Share Sale Deed to sell 100% of the issued shares to C Pty Ltd, an unrelated third party. The taxpayer did not participate in the sale process or negotiations. Its share of the sale proceeds was approximately $X million, and completion occurred in 20XX.

The taxpayer did not undertake any activities to enhance the value of the Shares, nor did it engage in further investment activity. The acquisition was a single transaction, and the taxpayer lacked sufficient influence to affect the sale process. There was no known association between the taxpayer and other shareholders.

Question

Did the sale of shares give rise only to a capital gain?

Ruling

The ATO referred to *Taxation Determination TD 2011/21*, which clarifies that the mere fact an investment is held by a trust does not automatically mean any gain on disposal is on capital account. The determination outlines three scenarios where a gain may be on revenue account:

1. if the gain arises from normal operations in the course of carrying on a business of investment;
2. if it arises from an extraordinary operation within such a business, entered into with a profit-making intention; or
3. if it results from a one-off or isolated transaction entered into as part of a business operation or commercial transaction for the purpose of profit-making.

The ATO concluded that the taxpayer was not carrying on a business of trading in securities. The trust held only one substantive investment—the shares in B Pty Ltd—which were held for over three years. The sale proceeds were loaned to related parties, and no other investment activity occurred. These facts supported the view that the trust was not engaged in a business operation.

The ATO then applied *Taxation Ruling* TR 92/3, which interprets the High Court decision in *FC of T v The Myer Emporium Ltd* (1987) 163 CLR 199. This ruling sets out that a profit from an isolated transaction may be assessable as ordinary income if:

1. the taxpayer entered the transaction with a purpose of making a profit or gain; and
2. the transaction was part of a business operation or commercial transaction.

Importantly, the ATO noted that the relevant intention is assessed objectively, based on the facts and circumstances at the time of acquisition, not merely the taxpayer's subjective statements.

In this case, the trust was established specifically to hold the shares, and the individual controlling the trust relied on informal advice from a neighbour (a former bank executive). No formal due diligence was undertaken, and the investment was described as modest relative to the individual's overall wealth. The trust was a passive investor with no board representation or influence over dividend decisions.

The taxpayer expected a dividend yield of X% per annum, but no dividends were declared during the holding period. The trust was a minority shareholder and had no control over the board of B Pty Ltd. This lack of influence supported the view that the investment was not made with a short-term profit-making intention.

Although the shares were subject to tag-along rights under a Shareholder Deed, the trust did not initiate or participate in the sale process. The sale was arranged by unrelated parties, and the trust had no control over the timing or terms. The ATO found no evidence that the trust anticipated a short-term gain from a forced sale triggered by private equity holders.

Based on the facts presented, the ATO accepted that the trust did not acquire the shares with a purpose of profit-making through resale. The transaction did not constitute a business operation or commercial transaction. Accordingly, the gain on disposal was held to be on capital account, assessable under the capital gains tax regime in Part 3-1 of the ITAA 1997.

ATO reference *Edited Private Advice Authorisation No. 1052444496479*
w https://www.ato.gov.au/law/view/document?docid=EV/1052444496479

6.4 Not carrying on business as a digital currency trader

Facts

The taxpayer was employed full-time in the financial services industry and separately engaged in digital currency trading as a sole trader. The activity commenced on 1 July of the relevant year, with the intention of transitioning to full-time trading if it became profitable.

A business plan was in place, outlining structured short-, mid-, and long-term objectives, supported by various trading strategies. The taxpayer regularly injected personal funds to maintain liquidity and adjust position sizing. Trading activity varied significantly, both annually and monthly, and was conducted across multiple platforms. All trades were short-term, with holding periods of less than 12 months.

The taxpayer maintained detailed records of trades, asset balances, CGT summaries, and income events using a digital tool. Despite lacking formal trading qualifications, the taxpayer dedicated a substantial number of hours weekly to market research, trade planning, and analysis using both paid and free resources.

Risk management strategies were actively implemented, including:

1. defined stop-loss orders (maximum 10% capital per trade);
2. minimum 1:4 risk-to-reward ratios;
3. technical analysis using indicators such as RSI, MACD, ADX, and SMA crossovers; and
4. ongoing performance reviews and strategic adjustments.

The taxpayer subscribed to multiple research institutions and groups to inform trading decisions. Despite these efforts, losses were incurred in the first two financial years, with only a small profit realised in the final year before ceasing the activity.

The taxpayer had a business plan and strategy in place of short-term, mid-term and long-term swing trading while also using momentum trading and later expanding into futures trading.

In the relevant 3-year period, the taxpayer made a total of approximately 200 to 1500 trades and buying and selling of digital currency varied from 0 to 1200 transactions per month.

Question

Are the proceeds from the taxpayer's digital currency transactions assessable as business income under section 6-5 of the ITAA 1997?

Ruling

The Commissioner concluded that the taxpayer was not carrying on a business of digital currency trading during the relevant income years. As a result, proceeds from the activity were not assessable as ordinary income under section 6-5 of the ITAA 1997 but instead fell within the CGT regime.

To determine whether a business was being carried on, the ATO applied the indicators outlined in *Taxation Ruling TR 97/11*, which draws on judicial authority including *Evans v. FCT* (1989) 20 ATR 922 and *Stone v. FCT* (2005) 222 CLR 289. These indicators include:

1. whether the activity has a significant commercial purpose or character;

2. the intention to engage in business;
3. the presence of a profit-making purpose and a prospect of profit;
4. repetition and regularity of activity;
5. whether the activity is conducted in a businesslike manner;
6. the size, scale and permanency of the activity;
7. whether the activity resembles that of ordinary trade; and
8. whether the activity is more appropriately characterised as a hobby or recreation.

Although the taxpayer had a business plan, invested capital, and spent a substantial number of hours weekly on trading and research, the ATO found that the activity lacked sufficient repetition, regularity, and commercial scale. The number of trades varied significantly across months and years, and there was no consistent pattern in the timing or nature of trades. The taxpayer also maintained full-time employment in the financial services industry, which suggested the digital currency activity was not the taxpayer's main source of income.

The ATO considered that the taxpayer's trading was not conducted in a sufficiently systematic or organised manner to meet the threshold of a business. Despite the use of risk management strategies and record-keeping, the activity was ultimately found to be ad hoc and lacking the commercial character expected of a business. Furthermore, the taxpayer incurred losses in the first two years and only made a small profit in the final year, which was also the year the activity ceased.

Accordingly, the ATO determined that the taxpayer was acting as an investor rather than a trader. As such, the digital currency holdings were treated as CGT assets. Gains or losses from their disposal were to be assessed under the CGT provisions, specifically, section 102-5 (capital gains) and section 102-10 (capital losses) of the ITAA 1997, rather than as ordinary income under section 6-5.

COMMENT – this ruling states explicitly "if your digital currency activities are insufficient to be carrying on a business you will be regarded as an investor." This fails to consider whether the gains on disposal could be ordinary income from a profit-making undertaking, as was considered in the private ruling at 5.3.

ATO reference *Edited Private Advice Authorisation No. 1052412427851*
w https://www.ato.gov.au/law/view/document?docid=EV/1052412427851

6.5 Non-commercial loss rules

Facts

The taxpayer is an individual and an Australian resident who did not engage in paid employment during the relevant income year. Prior to the period in question, the taxpayer had an established habit of testing products and writing reviews.

During the relevant income year, the taxpayer was invited to participate in a product review program. Participation in the program is unpaid, and the taxpayer provided a copy of the participation agreement outlining the terms and responsibilities.

The taxpayer reviewed a substantial number of products, averaging multiple items per week, with an itemised report showing the recommended retail prices (**RRP**) of each item. Over the course of the year, the taxpayer reviewed more than a hundred items, with a total estimated RRP value in the thousands of dollars.

The time commitment varied depending on delivery frequency, with some days involving no activity and others requiring reviews of numerous products. Each review took at least one hour and involved unboxing, photography, testing, and writing. Some products also required video content or follow-up updates.

The taxpayer did not have a business plan, financial strategy, or intention to commercialise the activity. There were no associated social media accounts, resale channels, business registration, or commercial premises. All items were stored at the taxpayer's personal residence.

The only ongoing expenses incurred were internet and mobile data costs. The taxpayer strictly adhered to the review requirements set out in the program agreement.

Questions

1. Are the products received by the taxpayer through participation in a review program considered assessable income under section 6-5 of the ITAA 1997?
2. If the taxpayer is carrying on a business, do the non-commercial loss rules under Division 35 of the ITAA 1997 apply?

Ruling

Assessable income

Under section 6-5 of the ITAA 1997, assessable income includes ordinary income derived directly or indirectly from all sources. Ordinary income is interpreted according to "ordinary concepts," which has been shaped by case law rather than statutory definition.

In *Scott v Commissioner of Taxation* (1935) 35 SR (NSW) 215, Jordan CJ emphasised that income must be understood in its ordinary usage. Subsequent cases such as *Federal Commissioner of Taxation v Dixon* (1952) 86 CLR 540 and *Just v Federal Commissioner of Taxation* (1949) 8 ATD 419 have reinforced that ordinary income typically exhibits characteristics of regularity, recurrence, and periodicity.

Importantly, income may also arise from the provision of services, even if the payment is non-cash. In *Reuter v Federal Commissioner of Taxation* (1993) 111 ALR 716, it was held that payments for labour or services constitute ordinary income. Similarly, *Hayes v Federal Commissioner of Taxation* (1956) 96 CLR 47 confirmed that the receipt of goods or benefits in exchange for services is assessable if it is a product of the taxpayer's efforts.

In this case, the taxpayer received products in exchange for performing review services. Although no monetary payment was made, the Commissioner determined that the goods received had a direct nexus to the taxpayer's input and were therefore assessable as ordinary income under section 6-5. The market value of the goods received is included in assessable income, except for items returned.

Do the non-commercial loss rules apply?

Division 35 of the ITAA 1997 restricts the ability of individual taxpayers to offset losses from non-commercial business activities against other income unless certain tests or exceptions apply. These include the assessable income test, profits test, real property test, and other assets test (per paragraph 35-10(1)(a)). Additionally, the Commissioner may exercise discretion under subsection 35-55(1).

However, subsection 35-5(2) clarifies that Division 35 only applies to activities that amount to carrying on a business. The definition of "business" under section 995-1 includes any profession, trade, or vocation, but excludes employment.

The ATO referred to *Taxation Ruling TR 97/11,* which outlines eight indicators for determining whether a business is being carried on. These include commercial purpose, profit intention, repetition, businesslike organisation, and scale.

In this case, the taxpayer's activity lacked a business plan, commercial infrastructure, and profit motive. The ATO concluded that the activity did not meet the threshold of a business. As a result, Division 35 does not apply, and the taxpayer is not prevented from claiming losses from the review activity against other income.

COMMENT – this ruling illustrates where a taxpayer makes assessable income that does not amount to a business, the non-commercial loss rules have no application. It also demonstrates that a person can derive income from an activity, even though the activity does not amount to a business. That is, whether an activity gives rise to income does not turn on a distinction between a business and hobby. This was confirmed by the High Court in *Commissioner of Taxation v Stone* [2005] HCA 21.

ATO reference *Edited Private Advice Authorisation No. 1052436307343*
w https://www.ato.gov.au/law/view/document?docid=EV/1052436307343

6.6 Deduction for costs paid after concluding business

Facts

The taxpayer operated a sole trader business which ceased trading in April of the relevant income year.

The business reported income on a cash basis. Despite the cessation of trading, the taxpayer continued to incur expenses related to the business, including payments on an ongoing lease and amounts owed to a supplier.

The lease, which was active as of 30 April, was a long-term arrangement directly connected to the former business and continued to be paid monthly, with final payments scheduled through December of the following year.

The taxpayer had an outstanding balance with a supplier as of 30 April, part of which was paid in late June, with the remainder due by 31 December. Both the lease and supplier costs were directly attributable to the previously operated business.

Question

Are costs paid by the taxpayer after the cessation of their business deductible under section 8-1 of the ITAA 1997?

Ruling

The ATO accepted that the taxpayer could claim deductions for certain costs incurred after the cessation of their sole trader business. The reasoning is grounded in the principles outlined in *Taxation Ruling TR 2004/4*, which deals with the deductibility of interest expenses incurred before or after income-producing activities cease.

Although TR 2004/4 specifically addresses interest, the ATO applied its broader reasoning to other types of expenses. The key principle is that if a liability arises from a prior income-producing activity and the expense is incurred in discharging that liability, the expense may still be deductible under section 8-1 of the ITAA 1997, even after the business has ceased.

In this case, the taxpayer continued to pay a long-term lease and settle outstanding supplier debts after the business had stopped trading. Both obligations were directly connected to the previously conducted business. The ATO considered these costs to be sufficiently linked to the income-earning activity that had ceased, and therefore deductible under section 8-1.

The ruling aligns with judicial principles established in cases such as *FC of T v Brown* 99 ATC 4600 and *FC of T v Jones* 2002 ATC 4135, which support the view that post-cessation expenses may be deductible if they are incurred in satisfying obligations that arose during the course of a business.

TRAP – where the taxpayer is a non-natural person, the deductions for the post-cessation activities can effectively be lost if they are incurred in an income year after the business has ceased.

ATO reference *Edited Private Advice Authorisation No. 1052440371322*
w https://www.ato.gov.au/law/view/document?docid=EV/1052440371322

6.7 Foreign exchange gains and source

Facts

The taxpayer implemented a foreign exchange (**FX**) hedging strategy to manage currency risk associated with its foreign asset portfolios. This strategy was executed on an overlay basis, meaning it was applied across the entire portfolio rather than being tied to individual assets.

To carry out the hedging transactions, the taxpayer engaged a primary hedge manager who acted as the taxpayer's agent. This hedge manager utilised several liquidity providers, including another entity to execute the FX trades.

The hedge manager and the taxpayer entered into an International Swaps and Derivatives Association (ISDA) agreement to govern the terms of the FX transactions. The liquidity provider operated through its Australian head office, where all FX transactions were executed. Each trade was conducted by a representative located at the Australian office.

Communication between the hedge manager and the liquidity provider occurred primarily through a trading platform equipped with an instant messaging function, although other electronic communication methods were occasionally used. This platform facilitated the exchange of financial information and enabled the negotiation and execution of trades, including the identification of contracting parties, timing, and terms of the trade.

The hedge manager, acting on behalf of the taxpayer, initiated trade requests via the platform. The liquidity provider, through its Australian office, offered FX rates, which the hedge manager accepted either through the platform interface or verbally via the platform's messaging system.

Importantly, the liquidity provider did not include a 'last look clause' in its trading arrangements, meaning it was obligated to act on the hedge manager's instructions without the discretion to reject trades after receiving them.

All FX trades were executed by the liquidity provider through its Australian office, based on instructions from the hedge manager acting for the taxpayer.

Question

Does the taxpayer's foreign currency hedging gain have an Australian source for the purposes of calculating the foreign income tax offset (**FITO**) limit under subparagraph 770-75(4)(a)(ii) of the ITAA 1997?

Ruling

Section 770-75 of the ITAA 1997 sets out the method for calculating the FITO limit. The offset is capped at the amount of Australian tax payable on the foreign-sourced income that has been subject to foreign tax. This requires identifying the source of income. Only foreign-sourced income contributes to the FITO limit.

Accordingly, where FX hedging gains are determined to have an Australian source, they are excluded from the FITO limit calculation.

The determination of whether FX hedging gains have an Australian source depends on the place of formation of the relevant contracts. According to *Taxation Ruling TR 2014/7*, the source of income from FX hedging transactions is generally where the contract is formed, unless there are express or implied terms to the contrary. In this case, the taxpayer's hedge manager, acting as agent, accepted FX trade offers made by the liquidity provider through a trading platform and instant messaging system. The liquidity provider operated through its Australian office, and all trades were executed by representatives located there.

Under section 14B of the *Electronic Transactions Act 1999* (Cth), an electronic communication is deemed to be received at the place of business of the addressee. Therefore, when the hedge manager accepted trade offers electronically, the acceptance was received at the liquidity provider's Australian office. This location is determinative of where the contract was formed.

As a result, the FX hedging contracts were formed in Australia. Consequently, any gains arising from these contracts are considered to have an Australian source for the purposes of subparagraph 770-75(4)(a)(ii) of the ITAA 1997.

COMMENT – Under the FITO rules, the offset limit is calculated as the difference between the total Australian tax payable on all assessable income and the hypothetical Australian tax payable if foreign-sourced income (and related deductions) were excluded. Since the FX hedging gains are Australian-sourced, they reduce the FITO limit and could lead to unutilised foreign tax credits and a higher effective tax burden.

ATO reference *Edited Private Advice Authorisation No. 1052449784454*
w https://www.ato.gov.au/law/view/document?docid=EV/1052449784454

6.8 Marriage breakdown issues and disposal of assets

Facts

The taxpayer is the director, secretary, and sole shareholder of Company A, operating under Business Name A.

Following a Final Order under the *Family Law Act 1975* between the taxpayer and their ex-spouse (Person B), Person B was required to:

1. return control of the taxpayer's personal cryptocurrency holdings (Crypto Asset A) by transferring it into a digital wallet nominated by the taxpayer;
2. return control of the Company A's cryptocurrency holdings (Crypto Assets B, C, and D) by transferring it into a digital wallet nominated by the company;
3. transfer full legal title (free of encumbrances) of additional units of Crypto Assets B, C, and D from Person B's wallet to the taxpayer's nominated wallet; and
4. within seven days of these transfers, Person B was also required to reimburse the taxpayer for 50% of all transaction and transfer fees incurred during the transfers. In return, the taxpayer was required to transfer a specified amount of Crypto Asset A to Person B.

Both parties were subject to injunctions prohibiting the disposal of their respective cryptocurrency holdings until the required transfers were completed.

Separately, the taxpayer had entered into a Division 7A complying loan agreement with Company A, which governed all loans made to the taxpayer up to a capped principal amount. Although the original agreement

contemplated the purchase of the family home, this did not occur post-divorce. However, the loan terms remained in effect.

In a later transaction, the taxpayer repaid a company loan using cryptocurrency received from Person B under the divorce property settlement. This repayment occurred in the same year as the divorce settlement. The taxpayer provided details of the dates and values of the cryptocurrency transferred and disposed of, although they were unable to determine the fees and charges associated with the disposal.

Questions

1. Did CGT event A1 under section 104-10 of the ITAA 1997 occur when the taxpayer disposed of cryptocurrency assets to repay a company loan?
2. Is the first element of the cost base of the cryptocurrency assets transferred to the taxpayer under the divorce agreement equal to the cost base of those assets in the hands of the ex-spouse at the time of acquisition, pursuant to subsection 126-5(5) of the ITAA 1997?

Ruling

CGT event A1

Under section 104-10 of the ITAA 1997, CGT event A1 occurs when a taxpayer disposes of a CGT asset. Cryptocurrency is treated as a CGT asset under subsection 108-5(1) and (2) of the ITAA 1997, as it constitutes property or a legal/equitable right.

In this case, the taxpayer disposed of cryptocurrency assets received from their ex-spouse under a *Family Law Act 1975* property settlement. These assets were used to repay a company loan. The repayment constituted a disposal because the taxpayer ceased to own the cryptocurrency and applied it to extinguish a liability.

Section 116-20 of the ITAA 1997 defines capital proceeds to include the market value of property received or receivable. Section 103-10 expands this definition to include the use of property to discharge a debt. Therefore, the application of cryptocurrency to repay the loan triggered CGT event A1, and the taxpayer is required to calculate any capital gain or loss based on the market value of the cryptocurrency at the time of disposal.

Cost base of cryptocurrency received in divorce settlement

Subdivision 126-A of the ITAA 1997 provides for a CGT roll-over in the context of a marriage or relationship breakdown. Where a CGT asset is transferred between spouses under a court order made under the Family Law Act 1975, the transferor disregards any capital gain or loss (subsection 126-5(4)). The transferee inherits the cost base of the asset as it stood in the hands of the transferor (subsection 126-5(5)).

The taxpayer received various cryptocurrency assets from their ex-spouse pursuant to a court order. The roll-over provisions applied, meaning the taxpayer could not use the market value of the assets at the time of transfer as the first element of the cost base. Instead, the cost base is inherited from the ex-spouse, based on the value at the time the ex-spouse originally acquired the assets.

If the assets were legally owned by the taxpayer throughout and merely held in the ex-spouse's wallet, the cost base would be determined by the taxpayer's original acquisition cost.

COMMENT – the last paragraph of the summary of the ruling is seemingly inconsistent with prior rulings that the ATO to the effect that ownership of cryptocurrency is not usually retained for CGT purposes when transferred to another person's wallet as the owner of the wallet has control of the cryptocurrency.

ATO reference *Edited Private Advice Authorisation No. 1052439188608*
w https://www.ato.gov.au/law/view/document?docid=EV/1052439188608

6.9 Supplies through internet platforms

Facts

The taxpayer is an Australian resident carrying on an enterprise of creating and distributing digital content. The taxpayer is registered for GST and supplies content through three non-resident online platforms:

Internet subscription service platform

The platform enables direct interaction between the taxpayer and subscribers/fans. Subscribers pay the platform for access to the taxpayer's content; the platform collects payments on the taxpayer's behalf.

After deducting its service and storage fees, the platform transfers the net amount to the taxpayer's bank account.

The platform does not collect GST on behalf of Australian content creators and does not charge GST on its fees. Purchaser details are collected based on geolocation.

The contractual arrangement is between the taxpayer and the fan/subscriber; the platform merely facilitates the transaction.

Video streaming platform

To monetise content, the taxpayer must enter into an agreement allowing the platform to display advertisements and other content on the taxpayer's videos. Payments to the taxpayer are based on valid ad interactions (e.g., clicks or views).

The platform determines viewer location to serve country-specific ads. The taxpayer supplies content directly to the non-resident video streaming platform and receives consideration accordingly.

Social media platform

The taxpayer must comply with the platform's monetisation policies. Under these policies, the taxpayer grants the platform a non-exclusive, transferable, sub-licensable, royalty-free, worldwide licence to use the content.

Payments are received either as a share of revenue generated from viewer interactions or as bonus payouts based on reach, reactions, shares, and comments.

The taxpayer supplies content directly to the non-resident social media platform and receives consideration for monetised content.

Questions

1. Is the taxpayer's supply of digital content to Australian-based subscribers and fans via a non-resident internet subscription service platform a taxable supply under section 9-5 of the GST Act?
2. Is the taxpayer's supply of digital content to non-resident subscribers and fans outside Australia via a non-resident internet subscription service platform a GST-free supply under table item 2 of subsection 38-190(1) of the GST Act?
3. Is the taxpayer's supply of digital content to a non-resident video streaming platform a GST-free supply under table item 2 of subsection 38-190(1) of the GST Act?
4. Is the taxpayer's supply of digital content to a non-resident social media platform a GST-free supply under table item 2 of subsection 38-190(1) of the GST Act?

Ruling

Supplies to Australian subscribers via internet subscription platform

A supply is taxable if it meets four criteria: it is made for consideration, in the course or furtherance of an enterprise, is connected with the indirect tax zone (Australia), and the supplier is registered or required to be registered for GST.

In this case, the taxpayer is carrying on an enterprise in Australia and is registered for GST. The supply is made directly to the subscribers/fans, not to the platform itself. This is supported by the platform's terms of service, which establish a direct contractual relationship between the taxpayer and the subscriber. The platform merely facilitates the transaction by collecting payments and deducting its fees.

The supply is considered connected with Australia under subsection 9-25(5)(b) of the GST Act, as it is made through an enterprise carried on in Australia. The ATO concluded that the taxpayer's supply of digital content to Australian-based subscribers and fans via a non-resident internet subscription service platform constitutes a taxable supply under section 9-5 of the GST Act and is not GST-free or input taxed.

Supplies to non-residents via internet subscription platform

The taxpayer's supply of digital content to non-resident subscribers and fans outside Australia is treated as GST-free under table item 2 of subsection 38-190(1) of the GST Act. This provision applies to supplies of things other than goods or real property that are made to non-residents who are not in Australia at the time the supply is made.

The ATO determined that the supply is neither a supply of work physically performed on goods located in Australia nor a supply directly connected with Australian real property. The content is consumed outside Australia, and the recipients are non-residents not present in Australia when the supply occurs. Accordingly, the supply meets the criteria under paragraph (a) of table item 2 and is GST-free.

Supplies to non-residents via video streaming platform

The taxpayer's supply of digital content to a non-resident video streaming platform is also GST-free under table item 2 of subsection 38-190(1) of the GST Act. The taxpayer enters into a monetisation agreement with the platform, granting it rights to place advertisements and cache content. Payments are made based on ad interactions, and the supply is made directly to the platform.

As with the previous scenario, the supply is not connected with goods or real property in Australia. The recipient, being the video streaming platform, is a non-resident and not in Australia when the supply is made. Therefore, the supply satisfies the conditions for GST-free treatment under paragraph (a) of table item 2.

Supplies to non-residents via social media platform

The taxpayer's supply of digital content to a non-resident social media platform is similarly GST-free under table item 2 of subsection 38-190(1) of the GST Act. The taxpayer agrees to the platform's monetisation policies, granting a non-exclusive, royalty-free licence to use the content. Payments are received either as a share of advertising revenue or as bonuses based on user engagement metrics.

The ATO found that the supply is made directly to the platform, which is a non-resident not located in Australia at the time of supply. The supply is not physically performed on goods in Australia and is not connected with Australian real property. Therefore, it qualifies as GST-free under the same provision as the previous two scenarios.

ATO reference *Edited Private Advice Authorisation No. 1052407162732*
w https://www.ato.gov.au/law/view/document?docid=EV/1052407162732

6.10 Provision of flights FBT

Facts

The taxpayer resides at Location A but performs work duties at the employer's office located at Location B on most workdays. Travel between these locations is undertaken either by commercial airline or by the taxpayer's own car.

Under the taxpayer's remuneration package, the employer provides entitlements for up to a specified number of business class return airfares per year for reunion travel between the taxpayer's place of work and primary residence. These entitlements are granted during each defined service period.

When travelling by air, the employer directly books and pays for the taxpayer's business class flights. If the taxpayer opts to travel by car, they seek reimbursement from the employer based on a cents-per-kilometre method. The taxpayer maintains a logbook to record distances travelled, which is used to calculate the total reimbursement amount.

The total value of travel benefits, whether by air or car, is capped annually at the equivalent cost of the specified number of business class return airfares, as determined at the beginning of the year.

Questions

1. Does the provision of flights by the employer to the employee constitute a 'residual fringe benefit' as defined in subsection 136(1) of the FBTAA?
2. If the answer to Question 1 is yes, can the taxable value be reduced in accordance with the 'otherwise deductible rule' under section 52 of the FBTAA?
3. Does the reimbursement by the employer of car travel expenses to the employee constitute an 'expense payment fringe benefit' as defined in subsection 136(1) of the FBTAA?

Ruling

Residual fringe benefit

A residual fringe benefit arises when a benefit does not fall within any of the specific categories listed in Subdivision A of Divisions 2 to 11 of the FBTAA.

In this case, the employer books and pays for business class flights directly, meaning the benefit is not an *expense payment benefit* under section 20 of the FBTAA. Since the benefit does not fit into any other defined category (e.g. car, loan, housing), it is classified as residual under section 45.

To qualify as a fringe benefit, five conditions under subsection 136(1) must be met:

1. a benefit is provided during the year of tax;
2. the benefit is provided to an employee or associate;
3. the benefit is provided by the employer or a related party;
4. the benefit is provided in respect of the employee's employment; and
5. the benefit is not specifically excluded under paragraphs (f) to (s) of the definition.

All conditions were satisfied. The employee receives salary and wages, the employer provides the flights, and the travel is sufficiently connected to employment. The benefit is not excluded under the fringe benefit definition. Therefore, the flights are a residual fringe benefit.

Otherwise deductible rule

The 'otherwise deductible' rule in section 52 of the FBTAA applies where the employee would have been entitled to a once-only deduction under the ITAA 1997 or ITAA 1936 had they incurred the expense personally.

To assess deductibility, the ATO applied section 8-1 of the ITAA 1997 and *Taxation Ruling TR 2021/1*. Under section 8-1, a deduction is only allowed if the expense is incurred in gaining or producing assessable income and is not private, capital, or related to exempt income.

The ATO referred to Example 5 in TR 2021/1, where an employee living in Brisbane and working in Sydney could not deduct flight costs because the expenses were incurred due to personal living choices, not employment duties. Similarly, in this case, the employee chose to live in Location A while working in Location B. The flights were necessary to attend work but were not incurred in the course of performing work duties. They were private in nature and not deductible under section 8-1.

As the expense would not be deductible to the employee, the otherwise deductible rule does not apply, and the taxable value of the fringe benefit cannot be reduced.

Reimbursement of car travel

The reimbursement of car travel expenses by the employer does not constitute an expense payment fringe bene*fit* under subsection 136(1) of the FBTAA because the benefit is exempt under section 22.

An expense payment benefit arises under section 20 when an employer reimburses an employee for expenses incurred. In this case, the employer reimburses the employee on a cents-per-kilometre basis for travel in their own car, which qualifies as a Division 28 car expense under section 28-13 of the ITAA 1997.

Section 22 of the FBTAA provides an exemption for car expense payment benefits if certain conditions are met:

1. the car is owned or leased by the employee;
2. the reimbursement is calculated by distance travelled; and
3. the benefit is not related to relocation, holidays, or other excluded purposes.

All conditions were satisfied. The car was owned by the employee, the reimbursement was distance-based, and none of the exclusions applied. Therefore, the benefit is exempt and excluded from the definition of a fringe benefit under paragraph (g) of subsection 136(1).

As a result, the reimbursement does not meet the definition of an expense payment fringe benefit and is not subject to fringe benefits tax.

ATO reference *Edited Private Advice Authorisation No. 1052429864259*
w https://www.ato.gov.au/law/view/document?docid=EV/1052429864259

6.11 Primary producer registered emissions units

Facts

The taxpayer and another individual jointly own land as tenants in common. The taxpayer conducts farming activities on part of this land as a sole trader. Although there is no formal business plan, the taxpayer's decision

to engage in farming is driven by personal passion, family heritage, and a desire to continue a generational tradition.

The farming operations are comparable in size and scale to those of similar landholders in the region, as evidenced by seasonal carrying capacity, stock turnover, and sales data. The taxpayer is actively and regularly involved in the farming activities, which are conducted with repetition and consistency. While there are no employees, contract labour is engaged as needed to perform various farming tasks.

The taxpayer has made investments in livestock and plant equipment, without relying on external finance. Record keeping is conducted systematically. The land also hosts a carbon farming initiative project registered under the *Carbon Credits (Carbon Farming Initiative) Act 2011*, which generates Australian Carbon Credit Units (**ACCUs**). This project is located on the same land titles as the taxpayer's farming activities.

ACCUs were issued to the taxpayer during the relevant financial year and are sold upon issuance

Questions

1. Was the taxpayer considered to be carrying on a primary production business for the purposes of satisfying subparagraph 420-13(e)(i) of the ITAA 1997 in relation to 'Primary Producer Registered Emission Units'?
2. Does the taxpayer's holding of ACCUs satisfy the definition of 'Primary Producer Registered Emissions Units' under section 420-13 of the ITAA 1997, such that the concessional treatment under section 420-62 of the ITAA 1997 applies?
3. Is the taxpayer eligible for concessional tax treatment under primary production income averaging and the Farm Management Deposit scheme in accordance with subsections 420-65(7) and 420-70(3) of the ITAA 1997?

Ruling

Carrying on a business

The ATO determined that the taxpayer was carrying on a business of primary production as a sole trader. This conclusion was reached by applying the business indicators outlined in *Taxation Ruling TR 97/11*, which are used to assess whether activities constitute a business for tax purposes. These indicators include:

1. commercial purpose or character: The taxpayer's activities were found to be commercially oriented, supported by prior experience, regular engagement, profitability, and operational scale;
2. more than mere intention: The taxpayer demonstrated actual activity beyond intention, consistent with the principle in *Inglis v FC of T* 80 ATC 4001; (1979) 10 ATR 493;
3. prospect of profit: Although profitability is not required in every year, the taxpayer showed a genuine intention and prospect of profit, aligning with *FC of T v JR Walker* (1985) 16 ATR 331 and *Tweddle v FC of T* (1942) 2 AITR 360;
4. repetition and regularity: The taxpayer's farming activities were conducted consistently over several years;
5. similarity to ordinary trade: The operations mirrored those of other regional farmers in terms of scale, practices, and industry engagement;
6. businesslike conduct: The taxpayer maintained financial records and used professional services, indicating structured and organised operations;
7. size and scale: While scale alone is not determinative, the taxpayer's use of contractors and investment in infrastructure supported a business classification, consistent with *Thomas v FC of T* ATC 4099 and *JR Walker*; and
8. not a hobby: The activities were not better described as a hobby or recreation, as clarified in *Ferguson v FC of T* ATC 4265.

Under subsection 995-1(1) of the ITAA 1997, the taxpayer was found to be maintaining animals for sale, satisfying the definition of a primary production business. Because these activities occurred on the same land as the carbon farming project, the taxpayer met the condition in subparagraph 420-13(e)(i) of the ITAA 1997, qualifying the ACCUs as "primary producer registered emissions units."

Concessional treatment for ACCUs

The taxpayer satisfied all criteria under section 420-13 of the ITAA 1997 for their ACCUs to be classified as "primary producer registered emissions units." These criteria include:

1. the units are ACCUs;
2. the taxpayer is an individual;
3. the units were first held on or after 1 July 2022, having been issued under the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth);
4. the taxpayer carried on a primary production business in the same area as the carbon farming project; and
5. the taxpayer was actively engaged in that business while the project was carried on.

As a result, the concessional tax treatment under section 420-62 applies. This provision exempts the taxpayer from the annual valuation and reporting obligations under Subdivision 420-D, which would otherwise require recognition of unrealised gains or losses based on market value fluctuations. However, section 420-60(3) still applies, deeming the cost of an ACCU to be its market value immediately after acquisition.

Eligibility for primary production averaging and farm management deposit scheme

Division 392 provides for income averaging, a mechanism that allows primary producers to smooth their tax liabilities over multiple income years. This is particularly beneficial in managing the volatility of agricultural income, which can fluctuate significantly due to seasonal and market factors.

Division 393 governs the Farm Management Deposit (**FMD**) scheme, which enables eligible taxpayers to defer income by making deposits in profitable years and withdrawing them in leaner years. This scheme supports financial risk management and cash flow stability for primary producers. Together, these provisions offer significant tax planning advantages for individuals engaged in primary production.

Subsection 420-65(7) provides that the general restrictions on deductions for expenditure related to registered emissions units do not apply to primary producers for the purposes of Divisions 392 and 393. Similarly, subsection 420-70(3) ensures that income from ceasing to hold a primary producer registered emissions unit retains eligibility for concessional treatment.

Given that the taxpayer acquired and disposed of ACCUs after 1 July 2022, and those units qualify as primary producer registered emissions units, the income derived from their disposal is treated as primary production income. Therefore, the taxpayer is entitled to apply both income averaging and the FMD scheme to this income.

ATO reference *Edited Private Advice Authorisation No. 1052446559653*
w https://www.ato.gov.au/law/view/document?docid=EV/1052446559653

6.12 Donation of goods

Facts

The taxpayer is an Australian resident for tax purposes. During the relevant income year, the taxpayer donated various items to Entity Y, a registered charity. The items were collected by Entity Y on a specified date in July of that year.

Following the collection, Entity Y issued a letter to the taxpayer listing and valuing the donated items. However, the valuations included in the letter were provided by the taxpayer, not independently determined. The letter also included Entity Y's Australian Business Number.

Although Entity Y is a registered charity, it does not hold deductible gift recipient (**DGR**) status.

Question

Is the taxpayer entitled to a deduction under Division 30 of the *Income Tax Assessment Act 1997* (ITAA 1997) for goods gifted or contributed to Entity Y?

Ruling

Under Division 30 of the ITAA 1997, a taxpayer may claim a deduction for certain gifts or contributions made to eligible entities. The eligibility criteria are outlined in section 30-15, which includes a table specifying the types of recipients that qualify for deductible gifts. These typically include funds, authorities, or institutions that are either listed by name in Subdivision 30-B or endorsed as DGRs under Subdivision 30-BA.

In this case, Entity Y is a registered charity and fits the general description of a recipient under item 1 of the table in section 30-15. However, it is not named in Subdivision 30-B and has not been endorsed as a DGR. As per subsection 30-17(2), where an entity is not specifically listed, it must be endorsed as a DGR to satisfy the deductibility requirements.

Further, section 30-226 outlines the requirements for receipts issued for deductible gifts, including the need for the entity's ABN and confirmation of DGR status on the Australian Business Register. Subsection 30-227(2) defines a DGR as an entity that is either endorsed under Subdivision 30-BA or named in the legislation.

Because Entity Y lacks DGR endorsement, the taxpayer's donation does not meet the statutory requirements for deductibility under Division 30. Therefore, the taxpayer is not entitled to a deduction for the goods donated to Entity Y.

ATO reference *Edited Private Advice Authorisation No. 1052434700164*
w https://www.ato.gov.au/law/view/document?docid=EV/1052434700164

7. ATO and other materials

7.1 AML/CTF Updates

Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) regime is undergoing a significant transformation. TThe changes will affect both existing reporting entities and newly regulated businesses, with phased implementation beginning in 2026. AUSTRAC has released reforms guidance to help current and future reporting entities comply with changes to the AML/CTF legislation.

Expansion of regulated sectors

One of the most notable changes is the expansion of the AML/CTF regime to cover additional sectors. From 1 July 2026, AML/CTF obligations will apply to a broader range of professions and services. These include real estate professionals, dealers in precious metals and stones, lawyers, conveyancers, accountants, trust and company service providers, and virtual asset service providers. For current reporting entities and virtual assets service providers, these obligations will commence earlier, from 31 March 2026.

Introduction of new AML/CTF rules

The AML/CTF Rules 2025, tabled in Parliament on 29 August 2025, introduce a more flexible and risk-based approach to compliance. One of the key changes is the removal of the requirement to divide AML/CTF programs into Part A and Part B. Instead, reporting entities are expected to develop tailored programs that reflect their specific risks, including those related to money laundering, terrorism financing, and proliferation financing.

Enhanced information-gathering powers

AUSTRAC's powers to collect information have been expanded under new legislative provisions. These include sections 49B and 49C of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act), which allow AUSTRAC to issue notices and authorisations to obtain information in specific circumstances. Additionally, section 172A of the AML/CTF Act grants the AUSTRAC CEO the authority to obtain documents and data directly.

w https://www.austrac.gov.au/about-us/amlctf-reform/reforms-guidance

7.2 ATO updates 2025–26 compliance priorities for private groups

On 17 October 2025, the ATO updated its compliance focus areas for privately owned and wealthy groups for the 2025–26 financial year. The refreshed guidance reflects increasing tax complexity as private groups grow, diversify, and engage in succession planning. The ATO is particularly focused on:

1. the use of business funds for personal or group purposes, including Division 7A and lifestyle assets;
2. tax consequences of succession planning, restructures, asset disposals, and wealth transfers;
3. industry-specific risks, especially in property, construction, private equity, and international dealings; and
4. core compliance obligations, including accurate income and CGT reporting, eligibility for concessions, and timely lodgment and payment.

The ATO expects private groups to meet their obligations and set a standard for fairness in the system. Tailored support will continue to be offered through tax performance programs, but deliberate non-compliance will attract enforcement action.

w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/private-groups-whats-on-our-radar-for-2025-26

7.3 FBT and festivities

On 31 October 2025, the ATO updated its website guidance on the FBT implications of end-of-year celebrations, such as staff parties, events and gifts. The guidance clarifies that FBT will not apply in certain circumstances, including where:

1. food and drink is consumed by employees on business premises during a working day;
2. food and drink is provided off business premises and the cost is less than $300 per person (qualifying as a minor benefit); and
3. benefits are provided to clients.

When determining whether FBT applies, employers are reminded to consider the location, cost, and nature of the benefit, as well as who receives it.

w https://www.ato.gov.au/businesses-and-organisations/small-business-newsroom/fbt-and-festivities-what-employers-need-to-know

7.4 ATO to send out rental data-matching letters

On 10 October 2025, the ATO announced that it will be issuing rental data-matching letters to agents and taxpayers. These letters are triggered where third-party data suggests that rental income may have been omitted from a lodged return, or that a return including rental income is overdue.

Where a return appears to be outstanding, the ATO will email agents with client lists for follow-up. Agents are expected to confirm rental property ownership and ensure all overdue returns are lodged. Where rental income has been omitted, agents should review ownership records, rental periods, and any private or non-commercial use, and lodge amendments as required.

The ATO also reminded agents to remove clients from their list if they no longer act for them.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/we-re-sending-rental-data-matching-letters

7.5 Vulnerability framework released

On 21 October 2025, the ATO released its Vulnerability Framework in final form. The Framework was previously released in draft form (see our July 2025 Tax Training Notes).

The Framework is a principle-based guide intended to improve how the ATO supports individuals experiencing vulnerability when engaging with the tax system. Vulnerability may arise from a range of circumstances, including social, economic, physical or mental health conditions, disability, age, or lack of access to essential services.

The Framework was developed following consultation with tax professionals, individuals and advocacy groups, and includes an 'Easy Read' summary, examples of vulnerable circumstances, and information about available

support. The ATO has committed to implementing the Framework with empathy and transparency, and to ensuring that individuals facing hardship, particularly in relation to tax debts, are appropriately supported.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/weve-released-our-vulnerability-framework

7.6 Release of super benefits for compassionate reasons

On 16 October 2025, the ATO and the Australian Health Practitioner Regulation Agency (**AHPRA**) issued a joint warning regarding inappropriate use of the compassionate release of superannuation provisions. The ATO's latest data shows a significant increase in applications for compassionate release of super, particularly for dental services, with many failing to meet the legal criteria. In 2024–25, approximately $1.4 billion was released under these provisions, with 30 per cent of medical treatment applications rejected by the ATO.

The ATO cautioned that some health practitioners and registered tax agents are improperly supporting early access to super for elective or cosmetic procedures. AHPRA and the Dental and Medical Boards of Australia have released updated guidance emphasising that certification must be based on a thorough clinical assessment and limited to treatments necessary to alleviate serious pain, illness or mental health conditions.

Practitioners and agents are reminded that inaccurate statements or unsupported applications may result in regulatory action or penalties

w https://www.ato.gov.au/media-centre/ato-and-ahpra-send-warning-about-extracting-super-early

7.7 ATO sets compliance tone as Payday Super reform introduced

On 21 October 2025, the ATO reminded employers to prepare for the introduction of Payday Super from 1 July 2026, following the Government's introduction of the enabling legislation to Parliament on 9 October 2025.

Under the reforms, employers will be required to pay superannuation guarantee contributions at the same time as salary and wages. Contributions must generally reach employees' super funds within seven business days of payment, or employers will be liable for the Superannuation Guarantee Charge.

Employers will benefit from new digital services, such as Member Verification Requests, to help prevent rejected contributions and improve reconciliation.

The ATO has released draft guidance (PCG 2025/D5) outlining its compliance approach for the first year of implementation. Employers making genuine efforts to comply and promptly correcting errors are unlikely to face compliance action.

w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/payday-super-legislation-introduced

7.8 Commissioner's remedial power and superannuation

The ATO has published scenarios where it could not use the Commissioner's remedial power for superannuation issues.

The ATO notes that the remedial power allows limited modifications to tax law only when entities are better off or no worse off and the change aligns with legislative intent. Examples of where the remedial power could not be exercised for superannuation issues include:

1. deferred annuities: double taxation concerns were resolved through legislative amendment, not the remedial power;
2. CGT relief for unsegregated funds: simplifying cost base resets was rejected as inconsistent with the law's design;
3. excess non-concessional contributions (**ENCC**): Earnings formula concerns were intentional under the law, so remedial power could not apply;
4. lost and unclaimed super reporting: reporting obligations remained until later legislative changes;
5. defined benefit income streams: technical debit value issues were fixed by amendment, not by the remedial power;
6. early release discretion: allowing flexibility would undermine strict evidentiary rules;
7. associated earnings formula: requests to reduce earnings to nil were rejected as the law operated as intended; and
8. transfer of losses in fund mergers: expanding rollover relief was inconsistent with Division 310 and policy intent.

w https://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-modify-the-superannuation-law

7.9 LISTO Boost and New Tax Rules for Large Super Balances

On 13 October 2025, the Government announced key reforms to improve equity in the superannuation system.

From 1 July 2027, the income threshold for the Low Income Superannuation Tax Offset will increase from $37,000 to $45,000, and the maximum offset will rise from $500 to $810. These changes are expected to benefit 3.1 million Australians, including 1.3 million low-income earners (60% of whom are women).

The Better Targeted Superannuation Concessions will commence on 1 July 2026. Key changes include:

1. a 30% concessional tax rate on earnings for balances between $3 million and $10 million;
2. a 40% rate for balances above $10 million;
3. indexation of both thresholds to maintain alignment with the transfer balance cap;
4. a shift to taxing future realised earnings rather than accrued earnings;
5. applying equivalent treatment for defined benefit interests; and
6. an exemption extension for certain judges to ensure jurisdictional neutrality.

Legislation to implement these reforms will be introduced in 2026, with further consultation planned.

w https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/reforms-support-low-income-workers-and-build-stronger
w https://treasury.gov.au/policy-topics/superannuation/reforms-support-low-income-workers-build-stronger-super-system

7.10 Partnerships and statements of distribution

From 1 July 2025 partnerships of all sizes can lodge statements of distributions digitally.

This can be completed either via standard business reporting enabled software, or for registered agents, the ATO's practitioner lodgement service.

w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/remember-all-partnerships-can-now-lodge-sods-digitally

7.11 International dealings schedule changes

Tax agents can sign up to the ATO's International Dealings Schedule (**IDS**) mailing list to receive ATO updates regarding updates to the IDS and instructions about how to lodge the IDS. The ATO also provides other subscription and notification services in relation to other tax updates.

w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/sign-up-to-our-international-dealings-schedule-mailing-list

7.12 Advance pricing arrangements (APAs)

On 29 October 2025, the ATO updated *Law Administration Practice Statement PS LA 2015/4*, which outlines its approach to APAs. The update reflects recommendations from the 2023 APA Program Review and incorporates process improvements made since then. Key changes include:

1. clearer mutual expectations between the ATO and taxpayers;
2. refined entry criteria for the APA program;
3. greater transparency in decision-making;
4. updated governance arrangements; and
5. revised treatment of collateral issues depending on the stage of the APA process.

The statement has also been updated to align with current ATO style and accessibility standards.

ATO reference *PS LA 2015/4*
w https://www.ato.gov.au/law/view/document?docid=PSR/PS20154/NAT/ATO/00001

7.13 ATO access to information held by Swiss banks

The decision impact statement outlines the Commissioner's response to a ruling by the Federal Supreme Court of Switzerland, which dismissed a Swiss company's appeal against an order requiring it to provide information requested by the ATO. The request was made to the Swiss Federal Tax Administration (**SFTA**) under Article 25 of the Convention between Australia and Switzerland for the Avoidance of Double Taxation (**Swiss Convention**). The information sought was relevant to an ATO transfer pricing audit concerning an Australian group's transactions with its Swiss supplier.

The case arose when the ATO audited an Australian income tax consolidated group that operated franchises in Australia, examining whether its head company obtained a transfer pricing benefit under Subdivision 815-B of the ITAA 1997. The audit focused on the pricing of transactions between the Australian head company and a Swiss supplier. To assist with the audit, the ATO asked the SFTA to provide information about the dealings between the Swiss supplier and the Australian companies. The Swiss supplier objected to the disclosure, arguing that the ATO's request sought information for an audit involving pricing between non-associated enterprises, which it claimed fell outside the scope of Article 9 of the Swiss Convention.

The Swiss Federal Administrative Court rejected the supplier's challenge, finding the information was relevant to the ATO's application of Australia's transfer pricing laws. On appeal, the Federal Supreme Court of Switzerland upheld that decision. The Court confirmed that under Article 25 of the Swiss Convention, information exchange may occur when the data requested is foreseeably relevant to the administration or enforcement of tax laws, regardless of whether the entities involved are formally associated for treaty purposes. The Court also ruled that questions regarding the application of Australia's transfer pricing rules were for the ATO to determine, not for the Swiss authorities.

In its reasoning, the Court reaffirmed two key principles: foreseeable relevance and international trust. It held that information requests under Article 25 are justified if they are likely to assist in applying domestic transfer pricing laws, and that the requested state (Switzerland) should rely on the requesting state's (Australia's) representations unless there is clear evidence of treaty abuse. Any concern about possible taxation contrary to the Swiss Convention, the Court said, should be resolved between the contracting states themselves, not through the exchange of information process.

The ATO welcomed the decision, viewing it as confirmation that Australia's transfer pricing laws under Subdivision 815-B can apply to both associated and non-associated cross-border entities, and that this does not restrict the ATO's ability to seek information through treaty mechanisms. The ruling supports the ATO's continued use of exchange-of-information powers under international tax treaties to ensure compliance with Australia's transfer pricing regime. The ATO is also reviewing whether the decision affects any existing advice or guidance.

w https://www.ato.gov.au/law/view/document?docid=LIT/ICD/2C-219/2024/00001

7.14 Tax treaty with Ukraine

On 16 October 2025, Australia and Ukraine signed their first bilateral tax treaty, the *Convention for the Elimination of Double Taxation with respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance*.

The agreement aims to reduce tax barriers and improve certainty for taxpayers operating between the two countries.

Under the treaty, the following will apply:

1. withholding tax rates will be reduced on certain types of income;
2. dividends will be subject to a general withholding rate of 15%, with a reduced rate of 5% applying to intercorporate dividends where the shareholder holds at least 10% of the company;
3. Interest will be taxed at a general rate of 10%, with a 5% rate available for interest earned by financial institutions in specific circumstances; and
4. Royalties will be subject to a flat withholding rate of 10%.

Certain exemptions from withholding tax will also apply. These include portfolio dividends and interest earned by government bodies, central banks, Ukrainian-recognised tax-exempt pension funds, Australian superannuation funds, and Australian residents engaged in complying superannuation activities.

The treaty also includes provisions to reduce compliance costs and enhance certainty for taxpayers. Importantly, it allows both countries to retain their domestic anti-avoidance laws and incorporates integrity measures consistent with the OECD's Base Erosion and Profit Shifting (BEPS) framework to prevent tax evasion and avoidance. This treaty marks the beginning of formal tax cooperation between Australia and Ukraine.

w https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/treasurer-inks-australias-first-tax-treaty-ukraine

7.15 Tax Ombudsman review of ATO phone line and digital services

On 14 October 2025, the Tax Ombudsman released a systemic review of the ATO's registered agent phone line and broader service offering to tax agents.

The review found widespread dissatisfaction among agents and highlighted a mismatch between agent expectations and the ATO's current service model. Although agents represent 62% of individual taxpayers and 96% of other taxpayers, most calls are answered by contracted call-centre staff with limited tax training, contributing to frustration and unresolved complex queries.

The review made four key recommendations to the ATO:

1. publicly acknowledge the role played by agents, improve consultation processes, and ensure agent feedback is acted on;
2. review and improve online tools (OSfA and practice mail), add progress tracking, and share internal decision-making tools to reduce reliance on phone support;
3. enhance call handling by routing complex queries to experienced staff, improve fast key codes, and publish detailed service performance data; and
4. make client-agent linking requirements clearer, improve phone support visibility, and offer tailored help for vulnerable taxpayers.

The ATO accepted all but one recommendation, rejecting the proposal to route agent calls to more skilled staff, citing a preference to invest in digital channels and escalation pathways instead.

w https://www.taxombudsman.gov.au/wp-content/uploads/2025/10/Review-report-ATOs-registered-agent-phone-line-and-service-offer-to-agents-October-2025-FINAL.pdf
w https://www.taxombudsman.gov.au/reviews_reports/systemic-review-of-the-effectiveness-of-the-atos-registered-agent-phone-line/

7.16 Residency requirement for First Home Buyers Assistance Scheme

Revenue NSW is reminding industry professionals and purchasers to ensure they fully understand the residency requirements when applying for an exemption or concession under the First Home Buyers Assistance Scheme.

There has been a noticeable increase in cases where purchasers fail to meet these requirements, which are as follows:

the purchaser must move into the property within 12 months of settlement; and
must reside in the property as their principal place of residence for a continuous period of at least 12 months.

Failure to meet these conditions will result in the exemption or concession being revoked. In such cases, transfer duty will become payable, and interest and penalties may also apply.

Purchasers are legally required to notify Revenue NSW in advance if they are unable to meet the residency requirements. Revenue NSW may contact purchasers to verify compliance and will take appropriate action if non-compliance is identified.

w https://www.revenue.nsw.gov.au/property-professionals-resource-centre/duties-guides/first-home-buyers-assistance-scheme-guide

7.17 Payroll Tax Implications on labour hire services – South Australia

Revenue SA has released an Information Circular which explains the Commissioner of State Taxation's approach to administering payroll tax for entities operating within the framework of the *Labour Hire Licensing Act 2017* (SA). It focuses on how payments made by employment agents, referred to as Labour Hire Services entities, are treated for payroll tax purposes and outlines the resulting implications for tax liability.

Under the *Labour Hire Licensing Act 2017* (SA), a person provides labour hire services if they supply an individual to another business (the host) to perform work, with the individual classed as a labour hire worker. Certain types of work such as cleaning, horticultural processing, meat or seafood processing, and trolley work are prescribed under this legislation.

The *Payroll Tax Act 2009* (SA) also defines an "employment agency contract" as one under which an agent procures the services of a service provider for a client. Section 39 of the Act contains deeming provisions under which the employment agent is considered the employer and the service provider is deemed the employee. Accordingly, wages, fringe benefits, and superannuation contributions related to these services are treated as taxable wages for payroll tax purposes.

Businesses or grouped entities must register for payroll tax if their Australia-wide taxable wages exceed $28,846 per week or $1.5 million annually. Registration is completed through RevenueSA Online, with monthly returns and an annual reconciliation required. Many entities use labour hire arrangements to meet seasonal or fluctuating labour demands. However, failure to register or remit payroll tax can lead to enforcement action, including interest, penalty tax, and garnishee orders.

Entities covered by the *Labour Hire Licensing Act 2017,* particularly those in prescribed industries, must assess their own payroll tax liability and register with RevenueSA where applicable. The Commissioner may obtain data from other government agencies to ensure compliance. Under section 42 of the *Payroll Tax Act 2009* (SA), if an employment agent fails to meet their payroll tax obligations, the Commissioner may disregard the employment agency contract and hold the client entity liable. For instance, if a horticultural business engages a non-compliant labour hire entity, the horticultural business may become responsible for the tax.

The Circular applies retrospectively from 1 July 2021 and encourages employment agents and client entities to make voluntary disclosures where payroll tax obligations have not been met. Those who voluntarily disclose underpayments may receive full remission of penalty tax. Failure to disclose, however, may result in full or increased penalties depending on the circumstances.

w https://www.revenuesa.sa.gov.au/tools-and-resources/resources/publications/information-circulars/information-circulars/information-circular-109

8. Not for profit spotlight

8.1 NFP AGMs

The ATO has issued a reminder for not-for-profit (**NFP**) organisations preparing for their annual general meetings (**AGMs**). The ATO encourages NFPs to use this opportunity to review their activities, ensure tax and superannuation obligations are up to date, and confirm that contact details and permissions are current.

To assist, the ATO provides an NFP tax, super and registry responsibilities checklist, which includes guidance for different types of NFPs, such as self-assessing income tax exempt entities, charities, deductible gift recipients (**DGRs**), and taxable NFPs. The checklist also covers universal tasks like updating Australian Business Number details, notifying changes within 28 days, and reviewing governing documents for compliance clauses.

The ATO highlights the importance of updating authorised contacts when committee membership changes and recommends reviewing governing documents to ensure they prohibit distribution of income or assets for private benefit.

w https://www.ato.gov.au/businesses-and-organisations/not-for-profit-organisations/not-for-profit-newsroom/is-your-nfps-agm-coming-up
w https://www.ato.gov.au/businesses-and-organisations/not-for-profit-organisations/your-organisation/in-detail/checklists/nfp-tax-super-and-registry-responsibilities-checklist

8.2 Self-assessing NFPs

The ATO has provided guidance for NFPs self-assessing as income tax exempt.

The ATO notes that it is critical that NFPs correctly classify themselves otherwise there will be adverse tax consequences.

The first step is to determine whether the organisation is a charity. If all of its purposes are charitable and for the public benefit, it cannot self-assess. In such cases, registration with the Australian Charities and Not-for-profits Commission (**ACNC**) and endorsement by the Australian Taxation Office are mandatory.

The ATO notes that misidentifying charitable status is a common compliance risk, so this check should always be performed before proceeding. While community service, cultural, and sporting categories are widely recognised, there are five additional categories that often require closer attention: educational, health, employment, resource development, and scientific.

Educational organisations

Educational organisations must operate as public institutions with the sole purpose of providing education. They should be open to the public or a defined section of the public, and any other purpose must be incidental to education. In practice, most educational organisations have charitable purposes and therefore do not qualify for self-assessment.

Health organisations

Health organisations include public hospitals or hospitals operated by not-for-profit societies or associations. To qualify, they must provide continuous medical care and treatment for sickness, disease, or injury, with

accommodation forming an integral part of that care. Examples include nursing homes, hospices, and day surgeries offering recovery facilities. Private health insurers may also qualify if they operate on a not-for-profit basis and comply with relevant legislation. However, most health organisations are eligible for ACNC registration under the charitable purpose of advancing health, making self-assessment uncommon.

Employment organisations

Employment organisations are typically trade unions, employee associations, or employer associations that are registered or recognised under Australian law. They must exist to protect and advance employment conditions, and all operations and expenditure must occur entirely within Australia.

Resource development organisations

Resource development organisations are established to promote the development of Australian resources such as agriculture, tourism, aviation, information technology, and manufacturing. Activities may include research, training, marketing improvements, or facilitating cooperation. The organisation's primary purpose must be resource development, with any secondary purposes remaining incidental.

Scientific organisations

Scientific organisations are formed to advance or encourage science, including physical, human, and applied sciences. They must operate on a not-for-profit basis and focus on research, teaching, or dissemination of scientific knowledge. Many scientific organisations overlap with charitable purposes such as advancing education or health, which often makes them ineligible for self-assessment.

Compliance requirements before lodging

To qualify for self-assessment, an organisation must:

1. not be a charity;
2. follow its governing rules and apply income and assets solely for its stated purpose; and
3. meet one of the following tests: physical presence in Australia, deductible gift recipient status, or prescribed by law.

w https://www.ato.gov.au/businesses-and-organisations/not-for-profit-organisations/not-for-profit-newsroom/self-assessing-nfps-education-health-and-more

8.3 Necessitous circumstances fund schedule for DGR applicants

The ATO has updated its guidance for organisations seeking deductible gift recipient (**DGR**) endorsement under the *Necessitous Circumstances Fund* category (item 4.1.3). This type of fund is a public fund that provides relief to individuals in Australia experiencing financial hardship, typically due to poverty, illness, disability, or natural disasters.

Applicants must complete the dedicated schedule, available from the ATO, and submit it either with their ACNC charity registration or with the Application for DGR endorsement (NAT 2948), along with supporting documents. Detailed eligibility criteria and assistance are provided on the ATO website and assistance can be obtained from its helpline.

w https://www.ato.gov.au/forms-and-instructions/necessitous-circumstances-fund-schedule-for-dgr-applicants

8.4 Tax and super obligations for NFP employers

The ATO has reiterated that not for profits (**NFPs**) are subject to the same compliance requirements as other businesses when it comes to employee entitlements and employer responsibilities.

The ATO notes the following

1. NFPs are required to register for PAYG withholding and deduct tax from employee and contractor payments, with penalties for non-compliance;
2. NFPs providing non-cash benefits can trigger fringe benefits tax (FBT), which must be reported annually;
3. superannuation guarantee contributions must be paid for eligible employees by quarterly deadlines, and late payments attract charges;
4. single Touch Payroll reporting is mandatory for all pay cycles using compliant software;
5. correct worker classification is essential to avoid issues with PAYG and super obligations; and
6. NFPs must keep complete tax and super records for at least five years to ensure compliance and audit readiness.

w https://www.ato.gov.au/businesses-and-organisations/not-for-profit-organisations/not-for-profit-newsroom/does-your-nfp-have-employees