The Tax Institute

Tax Update

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

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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 Traynor – Division 7A	**What happened?** The ART upheld Division 7A assessments for amounts recorded in CFDA's financial statements as loans to its shareholder and related trusts. General evidence that the group used shared loan facilities and transferred funds between entities did not displace the contemporaneous accounts. The taxpayers could not trace or reconcile the transactions, establish the correct alternative assessments or obtain relief under section 109RB. **Why it matters?** Amounts described as loans in signed financial statements may have significant Division 7A consequences. A later assertion that an account was merely a clearing or holding account will not be enough without contemporaneous records tracing each transfer, explaining its purpose and establishing the correct tax treatment. Inadequate record keeping may also prevent section 109RB relief and support administrative penalties.	Page 9
Item 2.2 Hilton – Part IVA	**What happened?** The Federal Court held that Part IVA applied to the sale of the Hilton Sydney. The transaction was structured as a sale of a share in AHA for about $29 million together with repayment of approximately $420 million of intercompany debt. Although the hotel was worth about $442 million, the structure produced only a relatively small capital gain. The Court found that several other commercially reasonable sale structures would have produced a taxable capital gain of approximately $173.3 million. **Why it matters?** The decision confirms that the Part IVA counterfactual analysis may involve more than one reasonable alternative. An alternative need not be the most likely or preferred transaction, provided it is commercially reasonable and reflects the scheme's substance and non-tax outcomes. Genuine commercial objectives will not prevent Part IVA from applying where the structure's unusual features are best explained by the tax outcome and obtaining the tax benefit was objectively the dominant purpose.	Page 13
Item 2.6 Chief Group – payroll tax and employment agency contracts	**What happened?** The NCAT held that contracts under which Chief Group supplied aviation security services to United Airlines and Delta Airlines, and vehicle cleaning and detailing services to Avis and Europcar, were employment agency contracts under section 37 of the *Payroll Tax Act*	Page 29

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Tax Update Matter	Impact Summary	Further Detail
	2007 (NSW). The services were integral to the clients' ordinary businesses and were provided regularly under detailed operational requirements. It did not matter that Chief Group and Chief National Cleaning operated independent businesses, supervised their personnel or held licences that the airline clients did not hold. **Why it matters?** The decision confirms that the employment agency provisions are fact sensitive and focus on the connection between the services and the ordinary conduct of the client's business. A contract may fall within the provisions even where the supplier is a genuine independent business and the client could not lawfully employ the workers directly. Businesses supplying personnel or subcontractors to perform functions integral to a client's operations should review their payroll tax exposure.	
Items 4.2, 4.3 and 4.4 2026 Budget trust reforms	**What happened?** The Bills implementing the 2026 Budget trust reforms have been introduced into Parliament. The package includes a 30% minimum tax for most discretionary trusts, transitional roll-over relief for trusts that restructure into fixed or more transparent vehicles, and an elective excluded election trust regime for existing discretionary trusts that lock in fixed income and capital percentages. The Bills retain the broad structure of the exposure draft but make several material changes, including testing minimum tax trust status at any time during the income year, adding excluded trust categories, revising the fixed trust test and further developing the top-up tax, beneficiary allocation and franking credit rules. **Why they matter?** The reforms are no longer merely proposals in exposure draft form and may change further as the Bills pass through Parliament. Advisers should review discretionary trust structures well before the proposed commencement dates and assess the introduced Bills rather than relying on the exposure draft. Trustees will need to consider whether to accept the minimum tax, restructure using the transitional roll-over or make an excluded election trust election. Each option involves trade-offs, including loss of flexibility, duty and transaction costs, continuity requirements, clawback risks and trustee duty issues where beneficiaries are effectively fixed or excluded for tax purposes.	Pages 54-63
Items 4.6 and 4.9 2026 Budget reforms – IBCC and R&D tax incentive	**What happened?** Treasury released exposure draft legislation for two 2026 Budget reforms. The proposed Innovative Business CGT Concession would provide a 50% CGT discount for eligible gains from qualifying interests in innovative start-up companies for CGT events happening on or after 1 July 2027. Separate exposure draft legislation would refocus the R&D Tax Incentive on higher-impact activity by changing key expenditure and turnover thresholds and encouraging larger-scale R&D investment.	Pages 66 and 74

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Tax Update Matter	Impact Summary	Further Detail
	Why they matter? The IBCC may preserve a CGT concession for qualifying early-stage investment after the broader CGT reforms commence, but investors and companies will need to satisfy detailed eligibility requirements. The R&D changes may alter which entities and expenditure qualify for refundable or non-refundable offsets and may materially affect the value and timing of claims. Both measures remain in exposure draft form, so affected businesses should monitor the final legislation before changing investment or R&D arrangements.	

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2. Detailed case summaries

2.1 Traynor – Division 7A

Facts

Shane Traynor controlled a group of companies and trusts known as the Complete Fire Doors Group, which operated a fire door manufacturing, supply and installation business from a purpose-built facility at Revesby, New South Wales. The group's principal trading company was Complete Fire Doors Australia Pty Ltd (**CFDA**). Other entities included KTM Property Trust, which owned the Revesby factory premises, and Songain Property Trust, which owned various investment properties. Shane was the director and shareholder of CFDA and controlled the various trust and company entities within the group. According to Shane, the group operated through a series of shared Westpac loan facilities and routinely transferred funds between entities to manage cash flow and minimise interest costs.

On 20 June 2016, Songain Property Trust sold a property at Arncliffe, New South Wales for approximately $3.6 million. Shane later said that the sale proceeds were applied against various group borrowings and were subsequently redrawn through the group's financing facilities to fund the acquisition and development of the Revesby factory premises owned by KTM Property Trust. No capital gain from the Arncliffe sale was returned at that time.

Between the 2016 and 2020 income years, entities within the Complete Fire Doors Group regularly transferred funds between group bank accounts and Westpac loan facilities as part of the group's financing arrangements. During the same period, CFDA's financial statements recorded amounts receivable from Shane, KTM Property Trust and Songain Property Trust, describing those balances as loans and carrying them forward as amounts owing to CFDA.

On 17 November 2021, the group's tax agent provided the financial statements to the ATO. CFDA's 2021 financial statements also included a balance described as "Loan Related Companies".

In February 2022, the ATO commenced an audit of CFDA focusing on the Division 7A consequences of the amounts recorded as loans from CFDA to Shane and the related trusts.

On 27 April 2022, the group's tax agent advised that no written loan agreements existed. The group contended that the amounts described as loans were not loans at all but reflected transfers through a group cash management system. Despite the lack of loan documentation, the tax agent stated that Shane transferred loan amounts he received from CFDA to related companies and these amounts should be treated as intercompany loans rather than loans to Shane. To demonstrate these intercompany loans, bank statements were provided showing the movement of funds between group entities.

The ATO also raised concerns that Songain Property Trust had not lodged trust tax returns and queried the CGT treatment of the 2016 Arncliffe sale.

In response to ATO queries, the group provided further explanations and bank statements. The bank statements showed extensive transfers, deposits, withdrawals and payments involving entities associated with Shane, including transactions relating to electrical services, a rugby tour of New Zealand, utilities, insurance, legal fees, ATO liabilities, land tax, council charges, travel and transfers to other group entities. However, they did not identify the specific transactions comprising the alleged intercompany funding arrangements or permit the loan balances recorded in CFDA's accounts to be traced and reconciled.

On 22 August 2022, the ATO issued an audit position paper concluding that CFDA had made loans to Shane, KTM Property Trust and Songain Property Trust which remained unpaid and had not been placed on complying

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Division 7A loan agreements. The ATO proposed treating the unpaid balances as deemed unfranked dividends.

On 19 September 2022, Songain Property Trust lodged its 2016 trust return and disclosed the capital gain from the Arncliffe sale. The 2017 trust return was lodged on 20 September 2022.

On 29 September 2022, Shane, KTM and Songain again explained that the Complete Fire Doors Group operated through shared Westpac loan facilities secured by group assets. They said excess funds were regularly deposited into, and redrawn from, those facilities to manage cash flow and reduce borrowing costs across the group. They maintained that amounts recorded as loans from CFDA to KTM Property Trust were actually funds used to acquire and develop the Revesby premises and were ultimately sourced from the Arncliffe property sale proceeds and other group borrowings. In support of that position, they provided further bank statements showing deposits and withdrawals between group entities and loan accounts. However, the statements generally recorded transactions only as deposits or withdrawals to particular Westpac accounts and did not specifically identify the transactions said to comprise the disputed intercompany balances.

On 14 December 2022, the ATO completed the audit and concluded that the amounts recorded by CFDA as loans were deemed dividends under Division 7A. The ATO found that the loans had not been repaid and did not qualify for any statutory exclusion.

On 19 December 2022, the ATO issued amended assessments to KTM Property Trust and Songain Property Trust. On 21 December 2022, the ATO issued amended assessments to Shane for the 2017 to 2020 income years. Administrative penalties of 25% were imposed on the basis that the taxpayers had failed to take reasonable care.

On 11 June 2024, Shane, KTM Property Trust and Songain Property Trust lodged objections and sought extensions of time. They contended that the amounts recorded as loans were actually movements through shared loan and clearing accounts used by the group's financing structure. They also maintained that the funds used by KTM Property Trust to acquire and develop the Revesby property ultimately originated from the Arncliffe sale proceeds.

On 18 October 2024, the group provided further bank statements and asserted:

> *Yes the financial statements shows* (sic) *the item as loans, however this is technically incorrect. The more correct term should have been holding account. The financial statements should not have described these amounts as loans.*

The group maintained that the accounts operated as holding or clearing accounts through which members of the group transferred funds.

On 21 and 22 November 2024, the Commissioner allowed the extensions of time but disallowed the objections. The Commissioner was not satisfied that the financial statements were wrong or that the alleged intercompany funding arrangements displaced the recorded loan balances.

The amended assessments treated the Division 7A deemed dividends as assessable income. The amended assessments resulted in tax shortfalls of $1,958,192 for Shane, $2,505,343 for KTM Property Trust and $131,523 for Songain Property Trust, together with 25% administrative penalties of $489,941, $626,336 and $32,881 respectively.

Shane commenced proceedings in the ART challenging the objection decisions. KTM Property Trust and Songain Property Trust commenced separate ART proceedings and the matters were heard together.

In the ART, Shane explained that entities within the Group had different cash flow requirements and used shared loan facilities to manage funding needs and minimise interest costs. Excess funds were deposited into

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those facilities and redrawn as required. He argued these withdrawals were not dividends or loans and should be treated as transfers to and from the various bank facilities.

Shane said that funds were transferred between group accounts and loan facilities to reduce interest costs and manage cash flow. When asked why monies recorded as flowing from CFDA to his personal loan accounts were not transferred directly to the relevant group entity or supplier, he maintained that he had not extracted funds from CFDA and the movement of these funds were all "above board".

The Commissioner contended that Shane, KTM Property Trust and Songain Property Trust had failed to prove that the Division 7A assessments were excessive or what the correct assessments should have been. CFDA's financial statements recorded the disputed balances as loans and none of the Division 7A exclusions applied.

The Commissioner also relied on section 1305 of the *Corporations Act 2001* (Cth), which provides that a company's books and financial records are admissible as prima facie evidence of the matters recorded in them. The Commissioner submitted that CFDA's financial statements were therefore prima facie evidence that the balances were loans owed by Shane, KTM Property Trust and Songain Property Trust to CFDA.

Issues

1. Did Division 7A apply to CFDA's recorded loans to Shane, KTM Property Trust and the Songain Property Trust?
2. If Division 7A applied, should the deemed dividends be disregarded or otherwise relieved under section 109RB on the basis that any non-compliance resulted from an honest mistake or inadvertent omission?
3. Were the amended assessments and the 25% administrative penalties excessive or otherwise incorrect?

Decision

Did the amounts recorded in CFDA's accounts constitute loans to which Division 7A applied?

The ART accepted that the Complete Fire Doors Group operated through multiple entities and relied on a number of Westpac loan facilities. It also accepted that funds were regularly transferred between group entities to manage cash flow and minimise borrowing costs. However, the ART considered that this general evidence did not answer the critical question of whether the specific amounts recorded in CFDA's financial statements as loans to Shane, KTM and the Songain Property Trust were in fact something else.

The ART placed significant weight on CFDA's financial statements, which expressly recorded loans to Shane, KTM and the Songain Property Trust. Those accounts consistently recorded the relevant balances as loans and had never been amended, despite the taxpayers later asserting that the descriptions were wrong. The bank statements and accounting ledgers relied upon by Shane showed substantial movement of funds between accounts, but they did not clearly identify the source, destination or purpose of many transactions. The ART found that the evidence demonstrated an intermingling of funds but did not provide the detailed tracing, reconciliation or forensic accounting necessary to show that the recorded loan balances were merely transfers of working capital.

The ART was also concerned by the evolving explanations advanced by the taxpayers. The balances were initially treated as loans in the financial statements, later said to be intercompany loans, then described as movements through shared financing facilities or holding accounts, and, in KTM's case, were also said to represent funds ultimately sourced from the Arncliffe sale proceeds. The ART considered that these shifting explanations undermined the taxpayers' attempt to displace the contemporaneous accounting records.

The ART noted that Shane, KTM and the trustee of the Songain Property Trust were required not only to show that the assessments were excessive, but also what the correct assessments should have been. Although the evidence demonstrated substantial movements of funds between entities and loan facilities, it did not permit the ART to determine the true character of the disputed balances or reconstruct the relevant transactions with

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sufficient confidence. In the absence of adequate tracing, reconciliation or forensic accounting evidence, the taxpayers failed to establish an alternative basis on which the assessments could be recalculated.

The ART found that CFDA had made loans to Shane, KTM and the Songain Property Trust that remained unpaid by the relevant lodgement dates. Those amounts were therefore correctly treated as deemed dividends.

Should relief have been granted under section 109RB because of an honest mistake or inadvertent omission?

Shane, KTM and the trustee of the Songain Property Trust argued that any Division 7A non-compliance resulted from an honest mistake because they believed they were operating a legitimate group funding arrangement rather than making loans. They contended that funds were simply being moved through shared facilities used across the group.

The ART rejected that argument. It accepted that the group was entitled to structure its finances using shared facilities and intercompany transfers. However, it considered that the real problem was not the existence of the funding structure itself, but the absence of adequate records capable of identifying and tracing the transactions. The ART noted that the financial statements continued to record the transactions as loans, no corrective action had been taken to amend those records, and no forensic accounting exercise had been undertaken despite the audit having commenced in 2022.

In those circumstances, the ART was not satisfied that the Division 7A outcome arose because of an honest mistake or inadvertent omission. Instead, the ART considered that the Division 7A consequences arose from the group's deliberate accounting practices and inadequate record keeping, rather than from any honest mistake or inadvertent omission.

The ART refused to exercise the discretion in section 109RB and declined to disregard or otherwise relieve the deemed dividends.

Were the amended assessments and administrative penalties excessive?

Having concluded that Division 7A applied, the ART considered whether the amended assessments and 25% penalties should nevertheless be disturbed. It noted that the taxpayers bore the burden of proving not only that the assessments were wrong, but also what the correct assessments should have been. The ART found that they had not discharged that burden. The evidence provided did not allow the ART to determine with confidence the true nature or amount of the transactions in dispute.

In relation to penalties, the ART found that the taxpayers had made materially misleading statements by lodging returns that omitted amounts recorded in the financial statements as loans from CFDA. Although the ART was not satisfied that the conduct involved recklessness or intentional disregard of the tax law, it concluded that neither Shane nor his advisers had taken reasonable care. Given the scale of the transactions and the complexity of the group's financial arrangements, the ART considered that a higher standard of record keeping and accounting was required.

The ART upheld both the amended assessments and the 25% administrative penalties, finding that the taxpayers had not shown either to be excessive or incorrect. It therefore affirmed all objection decisions.

COMMENT – Intermingling funds between related entities is not necessarily improper, but taxpayers must maintain records that allow each transaction to be reliably traced and characterised. General explanations, highlighted bank statements and incomplete accounting ledgers will not displace financial statements recording amounts as loans, particularly where business profits, loan funds and personal expenditure have passed through the same accounts.

TRAP – Describing an amount in a company's signed financial statements as a loan may have significant Division 7A consequences. A taxpayer will not ordinarily avoid those consequences merely by later asserting

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that the account was intended to operate as a clearing or holding account. Contemporaneous reconciliations should identify the source, recipient, purpose and repayment of each material transfer.

Citation *Traynor and Commissioner of Taxation (Taxation and business)* [2026] ARTA 2024 (General Member M Stratos, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2026/2024.html

2.2 Hilton – Part IVA

Facts

Ownership and operation of the Hilton Sydney

Since around 1974, the Hilton Sydney hotel at 488 George Street was continuously operated by the Hilton group. In 2000, the Hilton group acquired the land and buildings comprising the hotel for approximately $180 million.

In 2001, the hotel's freehold interest was held by three Australian companies, Admiral I Pty Ltd, Admiral II Pty Ltd and Admiral III Pty Ltd. Those companies were wholly owned by Admiral Investments Pty Ltd, an Australian holding company that was ultimately owned by the Hilton group.

Blackstone acquisition and global restructuring

In 2007, Blackstone acquired the Hilton group. As part of the financing arrangements, the Sydney hotel was pledged as collateral and a chain of 13 US limited liability companies (LLCs) was inserted into the ownership structure between Admiral Investments and the hotel-owning entities.

In July 2012, Hilton began considering selling the hotel and obtained advice from Deloitte.

In 2013, Hilton Worldwide Holdings was relisted through an IPO. During 2013 and 2014, the group undertook a global restructuring program.

Australian restructure and formation of the MEC group

On 12 March 2014, Hilton International Australia Holding Pty Ltd was incorporated with Hilton International Australia Pty Ltd (**HIA**) as its sole shareholder.

On 24 June 2014, Admiral Holdings Australia Pty Ltd (**AHA**) was incorporated with HIA as its sole shareholder.

On 26 June 2014, HIA sold Hilton International Australia Holding Pty Ltd (**HIAH**) for $1 as part of the wider restructure.

On 27 June 2014, HIA sold AHA for $1 to Hilton International Holding Corporation, a US company.

On 29 June 2014, Hilton's Australian tax consolidated group was converted into a Multiple Entry Consolidated (**MEC**) group. HIA, AHA and HIAH became eligible tier-1 companies within that group, with HIA appointed as provisional head company.

A MEC group allows Australian companies that are ultimately owned by the same foreign parent to be treated as a single consolidated group, even though no Australian company owns all the others. One eligible tier-1 company is appointed as the head company, while the other eligible tier-1 companies are treated as part of the group. The single entity rule generally treats the group members as parts of the head company for income tax purposes, but special rules apply when an eligible tier-1 company or its foreign owner leaves the group.

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On 1 July 2014, HIA transferred shares in entities connected with the operation of the hotel business, including Hilton Hotels of Australia Pty Ltd and LivingWell Australia Pty Ltd, to a new holding structure headed by HIAH, which was indirectly owned by Hilton International Holding Corporation in the United States.

Also on 1 July 2014, AHA acquired all of the shares in Admiral Investments Pty Ltd, and therefore the entities beneath it, including the hotel-owning entities. Rather than paying cash, AHA issued a promissory note to the seller, Hilton International Holding Corporation, creating an intercompany debt. The estimated purchase price, and therefore the debt, was initially $303 million. It increased to $444 million in November 2014 and to $602 million in February 2015 after an intercompany note had been omitted from the original valuation.

Proposed sale of the hotel

In July 2014, Hilton formally commenced investigations into a sale under the project name "Project Opera".

In November 2014, Bright Ruby Resources Pte Ltd was identified as a potential purchaser. Between November and December 2014, Hilton marketed the hotel through an information memorandum and invited bidders to comment on draft sale documentation.

On 24 December 2014, Hilton applied to the Foreign Investment Review Board for approval of a proposed internal restructure designed to facilitate a sale. In January 2015, Hilton sought stamp duty relief from the New South Wales revenue authority for that restructure, which was intended to consolidate the hotel assets into a single corporate vehicle.

On 30 January 2015, Bright Ruby lodged a formal expression of interest and negotiations commenced regarding a sale of the hotel through the sale of shares in AHA.

On 6 February 2015, the existing hotel management agreement was terminated and replaced with a new long-term management agreement designed to provide favourable and operator-friendly rights for Hilton before any sale occurred.

On 16 February 2015, Bright Ruby, through its subsidiary Glory Property III Investment Pty Ltd (**GP III**), submitted a bid of approximately $441 million for the hotel. On 23 February 2015, GP III and Hilton Worldwide entered into an exclusivity arrangement to negotiate a sale and associated management agreement amendments.

Pre-sale restructure

On 25 February 2015, Hilton undertook a significant pre-sale restructure. A new Luxembourg entity was incorporated, hotel business assets were transferred from Hilton Hotels of Australia and LivingWell into the hotel ownership structure, and ownership of both HIA and AHA was transferred into the new Luxembourg holding arrangement.

On 1 March 2015, as part of a pre-sale restructure, the hotel assets were consolidated into AHA and a series of internal debt assignments, dividends and capital returns were undertaken. Those steps resulted in AHA owing approximately $420 million to HIA under an intercompany promissory note. Under the sale agreement, that debt was discharged at completion by a direct payment from the purchaser to HIA.

Approval, sale and completion

On 7 April 2015, senior Hilton executives sought approval from Hilton's Investment Committee for the proposed sale. The memorandum noted that the transaction was structured as a sale of shares in AHA together with repayment of an intercompany note. It estimated Australian tax consequences of only approximately $8 million and highlighted the minimal tax impact as a benefit of the transaction. On 14 April 2015, the Investment Committee approved the sale.

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On 29 April 2015, Hilton Worldwide International Luxembourg Holdings (HWIH) entered into a Share Sale Agreement with GP III for the sale of its sole share in AHA. The parties valued the hotel at about $442 million. However, AHA held the hotel subject to approximately $420 million of intercompany debt under the promissory note. This reduced the equity value represented by the AHA share, so only about $29 million was payable to HWIH for that share.

GP III was also required to pay approximately $420 million directly to HIA to discharge AHA's intercompany debt. In economic terms, the purchaser paid for the hotel through the combination of the share price and the debt repayment. For tax purposes, however, the share sale produced only a relatively small capital gain for HWIH, while the much larger payment to HIA was treated as repayment of debt rather than taxable sale proceeds.

On 1 July 2015, completion occurred. Excluding the operation of Part IVA, HIA returned no taxable gain from the transaction, while HWIH recorded a net capital gain of approximately $21 million.

ATO dispute

In December 2020, the ATO determined under Part IVA that HIA had obtained a tax benefit and issued an amended assessment including $173.3 million in HIA's assessable income for the 2015 income year.

On 8 February 2021, HIA lodged an objection seeking cancellation of both the determination and amended assessment.

On 21 April 2023, the ATO disallowed the objection, concluding that Part IVA applied to the sale structure, that HIA had obtained a tax benefit of $173.3 million, and that the dominant purpose of the arrangement was to secure that tax benefit.

Commissioner's contentions

The Commissioner argued that the transaction was not simply a straightforward commercial sale of the Hilton Sydney hotel. Rather, the sale was deliberately structured so that most of the purchase price would be received by Hilton International Australia's Australian tax group through repayment of an intercompany debt, thereby avoiding the recognition of a substantial taxable capital gain in Australia.

Alleged scheme

Part IVA applies only if there is a "scheme" within the broad definition in section 177A(1) of the *ITAA 1936*. That definition includes any agreement, arrangement, understanding, promise, undertaking, plan, proposal, action, course of action or course of conduct. The identified scheme may comprise a series of related steps and need not be confined to the step that directly produces the tax benefit.

The Commissioner contended that the relevant "scheme" comprised the series of transactions undertaken in early 2015, including:

1. the transfer of hotel assets into AHA;
2. the creation and maintenance of a large intercompany debt owed by AHA to HIA;
3. the sale of AHA's sole share to the purchaser GP III; and
4. GP III's repayment of approximately $420 million of intercompany debt directly to HIA as part of completion.

HIA obtained a tax benefit

A taxpayer obtains a tax benefit under section 177C(1)(a) if an amount is not included in its assessable income and that amount would have been, or might reasonably be expected to have been, included if the scheme had not been carried out. Under sections 177CB(3) and (4), the reasonable-expectation limb must be tested against

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a reasonable alternative to the scheme, having particular regard to the scheme's substance and non-tax results or consequences, while disregarding the tax result of the alternative. The inquiry is objective and may identify more than one alternative postulate.

The Commissioner argued that if Hilton had not adopted this structure, a reasonable alternative transaction would have been one of three alternative postulates:

1. a direct asset sale of the hotel and business assets (**AP1**);
2. a sale of the shares in Admiral Investments Pty Ltd (AIPL) (**AP2**); or
3. a sale through a newly incorporated company (**AP4**).

Under each of those alternatives, HIA, as head company of the MEC group, would have derived a net capital gain of approximately $173.3 million which would have been included in its assessable income. Instead, under the actual structure, HIA received the $420 million debt repayment tax-free and did not recognise that gain. The Commissioner therefore said HIA obtained a tax benefit of approximately $173.3 million.

In response, Hilton argued that the relevant alternative was a sale of AHA after all hotel assets had been consolidated into it, but with the intra-group debt owed to HIA converted into equity immediately before completion so that AHA was sold debt-free (**AP3**). Hilton contended that AP3 achieved the same commercial objectives as the actual transaction, including a sale through a single entity, retention of the hotel management agreement and a commercially attractive sale structure, while avoiding the complexity and perceived disadvantages of the Commissioner's alternatives.

Commercial explanations

The Commissioner challenged Hilton's claim that AHA was a commercially necessary "clean skin" sale vehicle, arguing that:

1. AHA was not truly a "clean" company because it had inherited substantial liabilities and debt history from the restructuring;
2. the chosen structure created additional complexity and due diligence for the purchaser;
3. the purchaser queried the debt structure and required extensive explanations;
4. the use of a Luxembourg seller, HWIH, created further transactional friction and required additional warranties and guarantees; and
5. the hotel was a "trophy asset" being sold in a seller's market, meaning Hilton could likely have achieved the same commercial outcome using alternative structures.

The Commissioner therefore argued that the chosen structure was not commercially preferable and could not be explained by the commercial objectives relied upon by Hilton.

Dominant purpose

Even if there is a scheme and a tax benefit, Part IVA applies only if section 177D(1), read with section 177A(5), is satisfied. The question is whether, having regard to the eight objective matters in section 177D(2), it would be concluded that a person entered into or carried out the scheme, or part of it, for the dominant purpose of enabling the taxpayer to obtain the tax benefit. A tax purpose may coexist with commercial purposes, but it must be the ruling, prevailing or most influential purpose for Part IVA to apply. The inquiry is objective and focuses on the scheme's manner, form and substance, timing, tax result, financial and other consequences, and the connections between the relevant persons.

The Commissioner's central submission was that the dominant purpose of the structure was to obtain a tax benefit.

In support of that conclusion, the ATO relied on:

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1. the deliberate selection of AHA, an eligible tier-1 company within the MEC group, as the sale vehicle;
2. the decision to burden AHA with approximately $420 million of intercompany debt before the sale;
3. the fact that the purchaser effectively paid $442 million for the hotel, but only about $29 million was reflected as consideration for the AHA share;
4. contemporaneous documents showing the transaction was structured "for tax reasons"; and
5. the Investment Committee memorandum stating that the share sale structure would produce only about $8 million of Australian tax and would result in "minimal tax impacts" while maximising funds available to repay debt.

The Commissioner therefore submitted that the form of the transaction, involving a $29 million share sale and a $420 million debt repayment, did not reflect its economic substance, which was the sale of a hotel worth about $442 million. According to the Commissioner, that disparity strongly indicated a tax-avoidance purpose and justified application of Part IVA.

Issues

1. Did the series of transactions used to sell the Sydney Hilton hotel constitute a "scheme" for the purposes of Part IVA of the ITAA 1936?
2. Did Hilton International Australia obtain a tax benefit in connection with that scheme, that is, would a taxable capital gain of about $173.3 million have been included in its assessable income if a reasonable alternative transaction had been undertaken instead?
3. Having regard to the factors in s 177D, was the dominant purpose of entering into or carrying out the scheme to enable Hilton International Australia to obtain that tax benefit, such that Part IVA applied and the Commissioner was entitled to cancel the benefit?

Decision

Did the transaction constitute a "scheme" for the purposes of Part IVA?

The Court noted that there was ultimately little controversy about this issue. The Commissioner identified the scheme as the series of transactions undertaken as part of the sale process, including the transfer of hotel assets into AHA, the creation and maintenance of substantial intercompany debt, the sale of the sole share in AHA to the purchaser, and the repayment of approximately $420 million of debt to HIA on completion.

The Court observed that the statutory definition of "scheme" in Part IVA is extremely broad and extends to any agreement, arrangement, course of conduct or series of steps. The Court also accepted that events occurring before and after the sale could be considered when evaluating the scheme's purpose and commercial substance.

The Court held that the transactions constituting the actual sale formed a "scheme" within the meaning of Part IVA.

Did HIA obtain a tax benefit in connection with the scheme?

HIA argued that if the actual transaction had not occurred, the most realistic alternative would have been a modified version of the same share sale structure involving AHA (AP3). Under that alternative, HIA still would not have derived a taxable gain, meaning there was no tax benefit.

This argument treated the alternative-postulate inquiry as a search for the single transaction most likely to have occurred. HIA submitted that AP3 was the only sufficiently reliable prediction of what would have happened without the scheme. It was not enough, on HIA's case, that another transaction was commercially possible or reasonable. The Court had to identify the preferred alternative.

The Court rejected that interpretation. Section 177C(1)(a) asks whether an amount would have been, or might reasonably be expected to have been, included in assessable income if the scheme had not been carried out.

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Section 177CB(3) requires that expectation to be based on “a reasonable alternative” to the scheme. The Court placed particular weight on the reference to “a reasonable alternative”, rather than “the reasonable alternative”. It held that the legislation permits more than one alternative postulate to satisfy the statutory test.

The Court considered that several reasonable commercial alternatives were available, namely:

1. an asset sale of the hotel and business assets (AP1);
2. a share sale through Admiral Investments Pty Ltd (AIPL) (AP2); or
3. a share sale through a newly incorporated sale vehicle (AP4).

The Court explained that an alternative did not need to be the most likely, most commercially attractive or preferred transaction. The question was whether it was a reasonable alternative to the scheme. This required more than showing that the transaction was merely possible, but it did not require proof that it would probably have occurred. The Court described reasonableness, rather than probability, as the measure of whether the prediction was sufficiently reliable.

This meant that one alternative could be less attractive than another but still be reasonable. For example, the Court accepted that AP2 would not have been the preferred option because it involved greater complexity and transactional risk. However, those disadvantages did not prevent AP2 from being a reasonable alternative. Similarly, although the Court regarded AP4 as the preferable entity-sale option, AP1 and AP2 also satisfied the statutory test.

The Court first considered the commercial substance of the transaction. Section 177CB(4) required the Court to have particular regard to the scheme’s substance and its non-tax results and consequences. The alternative transactions did not need to reproduce every legal step or feature of the actual structure. They needed to accord with its commercial and economic substance. Tax outcomes produced by an alternative were to be disregarded when deciding whether that alternative was reasonable.

The Court rejected HIA's submission that the substance of the scheme was simply the sale of a share in AHA. Instead, the Court characterised the substance of the transaction as the sale of the Sydney Hilton hotel and associated business assets for substantial value, while retaining long-term management rights and generating funds that could be used to repay debt within the Hilton group.

The Court then examined the competing alternatives. It accepted the Commissioner's evidence, particularly the evidence of the Commissioner's expert, that AP1, AP2 and AP4 were all commercially realistic methods of achieving substantially the same commercial objectives. The hotel was a trophy asset being sold in a strong seller's market, and the Court was not persuaded that those alternatives would have produced materially worse commercial outcomes.

The Court gave significant weight to evidence showing that the purchaser had concerns about AHA's debt structure and that AHA was not the "clean skin" vehicle Hilton claimed it was. The Court found that some of the alleged commercial advantages of the chosen structure were overstated.

As to AP3, the Court found that it effectively replicated the same tax-driven features as the actual transaction. The Court concluded that AP3 itself had the characteristics of a Part IVA avoidance scheme and therefore could not properly be used as the comparator for determining whether a tax benefit existed.

The Court’s reasoning was that an alternative postulate must operate as a genuine foil to the scheme. AP3 instead achieved a similar tax result through a different mechanism. Under the actual transaction, the intercompany debt reduced the amount paid for the AHA shares. Under AP3, the debt would have been replaced with equity before the sale, increasing the cost base of the AHA shares and reducing the resulting capital gain. The Court described the two structures as “two sides of the same coin”.

The Court also considered that using another Part IVA scheme as the comparator would create a circular inquiry. The tax effect of that comparator would itself need to be tested against another counterfactual. The

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Court therefore held that a postulate that itself satisfied the description of a Part IVA scheme should not be used in the section 177C comparison. If that conclusion was wrong, however, the Court accepted that AP3 would otherwise have been a reasonable commercial alternative.

Under each of AP1, AP2 and AP4, HIA would have derived a net capital gain of approximately $173.3 million that would have been included in its assessable income. Because that amount was not included under the actual structure, the Court concluded that HIA obtained a tax benefit.

It was therefore unnecessary for the Commissioner to establish that AP1, AP2 or AP4 was the transaction that would definitely, or even probably, have occurred. Nor did the Court need to select only one of them as the correct counterfactual. It was enough that one or more were reasonable alternatives and produced the identified tax effect. In this case, all three produced the same net capital gain, so the existence of multiple reasonable postulates did not create any difficulty in quantifying the tax benefit.

Was the dominant purpose of entering into or carrying out the scheme to obtain that tax benefit?

The Court emphasised that section 177D requires an objective assessment of the eight statutory factors. The inquiry concerns the purpose objectively revealed by the scheme, not the subjective motives of Hilton's executives. Contemporaneous statements remained relevant where they informed that assessment.

HIA argued that the structure served genuine commercial objectives. These included completing a quick sale at an attractive price, preserving favourable long-term management rights and enabling group debt repayment.

The Court accepted that the transaction achieved commercial benefits. However, a commercial objective does not prevent Part IVA from applying. Nor does choosing a transaction with a lower tax cost establish avoidance by itself. The question was whether obtaining the tax benefit was the dominant purpose of the particular structure adopted.

The Court concluded that it was, principally because:

1. the transaction's form did not reflect its commercial substance. Economically, Hilton sold the hotel for about $442 million. Legally, only about $29 million was paid for the AHA share, while about $420 million was directed to repayment of intercompany debt;
2. the structure created complexity and transactional friction. It involved substantial internal restructuring, intercompany debt, a Luxembourg seller, additional warranties and extensive due diligence. The Court was not satisfied that these features were needed to achieve Hilton's commercial objectives;
3. contemporaneous documents described the structure as having been adopted "for tax reasons" and identified minimal tax leakage as a significant benefit. Those statements were not decisive, but they undermined HIA's later claim that commercial considerations explained the structure; and
4. the evidence indicated that Hilton's strong bargaining position in a seller's market, rather than the particular structure, enabled it to obtain a high price and favourable management rights. The same commercial outcomes could have been achieved through reasonable alternatives.

The Court therefore found that the scheme's unusual features were not adequately explained by Hilton's commercial objectives but were readily explained by the tax outcome. Objectively assessed, obtaining the tax benefit was the dominant purpose of the structure, even though the sale also achieved genuine commercial objectives.

Conclusion

Having weighed all the statutory factors, the Court concluded that the dominant purpose of entering into and carrying out the scheme was to enable HIA to obtain a tax benefit. As a result, Part IVA applied and the Commissioner was entitled to include the $173.3 million gain in HIA's assessable income.

COMMENT – the taxpayer has appealed to the Full Federal Court.

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Citation *Hilton International Australia Pty Ltd v Commissioner of Taxation (No 2)* [2026] FCA 1325 (Younan J)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2026/1325.html

2.3 XP Investments – input tax credits and carrying on enterprise

Facts

XP Investments Pty Ltd was incorporated in 2004 and was controlled by its sole director, Kurt Opray. XP acquired, renovated and operated residential properties, including as Airbnb accommodation.

On 1 July 2016 XP was registered for GST. XP accounted for GST on a cash basis.

Kurt had an existing working relationship with a building business known as HIJ Developments, which had assisted with renovations to some of XP's Airbnb properties. HIJ Developments brought XP an opportunity to acquire and develop a property at Sandringham, Victoria. On 9 October 2021, a contract was entered into to purchase the property for $4.4 million. The contract named Kurt, '*as director for Valencia Trading Company and or Nominee*', as purchaser.

In March 2022, XP was nominated as the intended purchaser under an unsigned deed of variation. The proposed acquisition became known as the Sandringham Project, which XP said was intended to evolve from its existing Airbnb activities into a larger property development venture.

In late 2021 and early 2022, XP and Kurt sought substantial finance for the Sandringham Project. Loans were obtained to fund the deposit and proposed purchase, with security taken over several properties owned by XP in Queensland, Victoria and South Australia.

During this period, HIJ Developments was involved in preparing the plans and progressing the proposed development, while Kurt's involvement was principally directed to financing. Kurt said that external investors would participate in the project, but only one investor was identified and the proposed arrangements were not documented. Kurt also said that a builder had been engaged, but the documents he relied on related to other properties and did not establish any engagement for the Sandringham Project.

There was no formal business plan, no documented development agreement, limited evidence of any identified investors, and little contemporaneous evidence of development activity beyond the financing arrangements.

On 29 April 2022, XP entered into a mandate agreement with NMH Asset Management in connection with funding for the purchase of the Sandringham property. Around the same time, additional financing and brokerage arrangements were pursued through various lenders and intermediaries.

In May 2022, settlement of the Sandringham property was scheduled but ultimately did not occur. Around that time, Kurt was arrested on unrelated criminal charges and the Victorian Director of Public Prosecutions commenced confiscation proceedings. Properties owned by XP became subject to restraining orders that prevented their disposal. The Sandringham acquisition was never completed and the proposed development did not proceed.

On 10 October 2022, the County Court of Victoria varied the restraining orders by consent, permitting the sale of the restrained properties and allowing lenders to be repaid from the sale proceeds. XP subsequently sold the properties but did not remit GST on those sales.

During the 2022-23 financial year, XP's Airbnb properties were sold. On 30 January 2023, Fusion Capital issued an invoice to XP for internal collection costs associated with funding arrangements. XP also incurred various legal, brokerage and lending-related expenses which it later claimed were connected with the failed Sandringham Project.

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On 25 March 2024, XP lodged BASs for the periods from 1 October 2022 to 30 June 2023. Across those returns, XP claimed GST refunds totalling $50,919 and reported no GST on sales.

To be entitled to input tax credits, XP had to establish that the relevant acquisitions were made for a creditable purpose, namely in carrying on an enterprise. Although an enterprise includes activities undertaken in commencing a business, the law requires more than a mere intention or preparatory activity. XP therefore had to prove that it had commenced carrying on the asserted property development enterprise and that the claimed expenses were sufficiently connected with that enterprise.

In early 2024, the ATO commenced an audit.

On 19 April 2024, during an audit interview, Kurt told the ATO that XP had operated an Airbnb business with six properties, that those properties had been frozen by the Victorian Director of Public Prosecutions, and that the claimed expenses related to the sale of those properties.

On 29 April 2024, the ATO requested further information, including invoices, bank statements, records of business activities and supporting documentation. On 22 May 2024, XP responded and reduced its claim to approximately $28,936, contending that the relevant expenses related to the failed Sandringham Project and financing arrangements connected to that proposed development.

On 12 June 2024, following the audit, the ATO determined that the claimed GST credits should be reduced to nil because the evidence did not establish the required connection between the expenses and any enterprise carried on by XP. The Commissioner therefore issued amended GST assessments disallowing the input tax credits.

On 26 June 2024, XP lodged an objection to the amended assessments.

On 10 September 2024, the ATO disallowed the objection in full, maintaining the view that XP had not established that it was carrying on the claimed property development enterprise or that the relevant expenses gave rise to creditable acquisitions for GST purposes.

XP applied to the ART for review.

XP argued that the Sandringham Project was a natural progression of its existing property activities, rather than a new or separate venture. It contended that the project had moved beyond mere intention, relying on the property acquisition, financing arrangements, proposed investor involvement and development planning as evidence that it was carrying on a property development enterprise. XP submitted that the expenses incurred in connection with the failed project were acquired in carrying on that enterprise and therefore gave rise to input tax credits.

Issues

1. Had XP commenced carrying on a property development enterprise in relation to the Sandringham Project during the relevant period, or were its activities merely preparatory steps towards a proposed development?
2. If XP was carrying on such an enterprise, were the claimed finance, legal and related expenses acquired for a creditable purpose so as to entitle XP to input tax credits?

Decision

Had XP commenced carrying on a property development enterprise in relation to the Sandringham Project?

The ART accepted that XP had previously carried on genuine property activities, including acquiring, renovating and operating Airbnb properties. It also accepted that Kurt genuinely intended to undertake the Sandringham Project for profit and that significant financing arrangements had been pursued in connection with the proposed

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acquisition. The project involved a proposed purchase price of $4.4 million and substantial funding commitments, which supported the existence of a commercial objective.

However, the ART considered that the critical question was not whether Kurt intended to develop the property, but whether XP had actually commenced carrying on the asserted property development enterprise. The ART emphasised the distinction between an intention to undertake a development and the commencement of an enterprise.

The ART found that the evidentiary record was sparse. Although plans were said to have been prepared, no plans were produced. There was no formal business plan, no documented development agreement, limited evidence concerning investors, and no clear evidence that builders or consultants had been formally engaged for the Sandringham Project. The arrangements with HIJ Developments and proposed investors were largely informal and uncorroborated.

The ART also considered it significant that the property was never acquired and that the development itself never commenced. Most of the activity undertaken by XP was directed towards securing finance and assembling the resources necessary for the project. In the ART's view, this amounted to preparatory activity rather than the carrying on of a property development enterprise.

A further difficulty was that the evidence did not clearly establish that the relevant activities were being undertaken by XP rather than by Kurt personally or through other entities. The original purchase contract was not entered into by XP, some financing documents named both XP and Kurt, and some invoices were addressed to Kurt personally. This created uncertainty as to who was carrying on the alleged enterprise.

The ART ultimately concluded that the evidence established no more than preparatory steps towards a proposed development. XP had not demonstrated that the Sandringham Project had progressed beyond intention and preliminary preparation, nor that XP itself had commenced carrying on a property development enterprise. Accordingly, XP failed to establish that it was carrying on an enterprise during the relevant period.

If so, were the claimed expenses acquired for a creditable purpose giving rise to input tax credits?

Having found that XP was not carrying on the asserted property development enterprise, the ART held that XP could not establish that the claimed finance, legal and brokerage expenses were acquired in carrying on an enterprise. As a result, XP was not entitled to the claimed input tax credits.

Although it was unnecessary to determine the issue, the ART observed that XP would have faced significant evidentiary difficulties even if it had succeeded on the enterprise question. In relation to several claims, the documentary evidence did not clearly establish who acquired the relevant services, whether the supplies were made to XP, whether the amounts included GST, or whether the expenditure related to the Sandringham Project as opposed to other activities undertaken by Kurt.

The ART considered that these deficiencies reflected a broader evidentiary problem. Much of XP's case depended upon assertions by Kurt rather than contemporaneous documentation demonstrating the acquisition of taxable supplies by XP for a creditable purpose.

The ART affirmed the Commissioner's objection decision and disallowed the claimed input tax credits.

COMMENT – This is a further case in which a taxpayer was unable to establish that its activities amounted to an enterprise. There have been a number of such cases over the past 24 months.

Citation *XP Investments Pty Ltd and Commissioner of Taxation (Taxation and business)* [2026] ARTA 1890 (General Member Rebecca Smith, Adelaide)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2026/1890.html

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2.4 IQ Renew – taxable supplies

Facts

In October 2010, Par Recycling Services purchased and began operating a material recovery facility at Somersby, New South Wales. The facility received mixed recyclables from local councils and commercial customers, sorted those materials into recyclable commodities, sold recyclable products to third parties, and disposed of residual waste to landfill. The facility operated under an EPA licence and all incoming and outgoing materials were weighed and recorded to ensure regulatory compliance and support billing and stock management. Approximately 95% of material originated from council kerbside collections and the balance from commercial sources such as shopping centres.

On 1 December 2017, the New South Wales Container Deposit Scheme (**CDS**) commenced. The scheme was introduced to encourage the recovery, reuse and recycling of beverage containers. Under the scheme, consumers could receive a 10 cent refund for eligible containers, while material recovery facility (**MRF**) operators could claim refunds for eligible containers collected through kerbside recycling systems. The scheme was administered by the NSW Environment Protection Authority (**EPA**), with Exchange for Change (NSW) Pty Ltd appointed as the scheme coordinator. Par Recycling participated in the CDS from its commencement and claimed processing refunds under the scheme.

On 27 February 2018, IQ Renew Pty Ltd acquired Par Recycling and took over ownership and operation of the Somersby facility, together with its existing council contracts. IQ Renew continued the same recycling business and continued to participate in the CDS. The evidence showed that the introduction of the CDS did not materially alter the facility's collection, sorting, processing or recycling activities. Recyclable materials continued to be sorted and processed in the same manner as before the scheme commenced. The only physical change was the installation of a small access panel on a conveyor belt to assist sampling and auditing activities undertaken for the CDS.

On 26 February 2019, Par Recycling entered into refund sharing agreements with Mosman Council and Northern Beaches Council. Under those agreements, the councils received a share of the CDS refunds after deduction of the MRF operator’s costs. Similar arrangements were entered into or considered with other councils as required under the legislative framework governing CDS payments.

On 18 November 2022, the EPA varied the facility’s licence to increase its authorised processing capacity from 90,000 tonnes to 99,000 tonnes per annum. IQ Renew continued to maintain environmental management systems and compliance processes, including targets aimed at maximising recycling and minimising waste sent to landfill.

On 1 November 2023, IQ Renew incorporated a certified Environmental Management System into its workplace management plan. The system established recycling and waste-reduction targets and required the recording of incoming and outgoing materials through the facility’s weighbridge systems.

On each quarter after participating in the CDS, IQ Renew submitted claims for processing refunds. The process involved providing audit information already collected in the ordinary course of business, including weighbridge reports, stock records and material reconciliation data. IQ Renew elected to use the approved methodology that estimated eligible containers by reference to the weight of recyclable materials and container conversion factors published by the scheme coordinator.

On 25 November 2024, Exchange for Change issued a recipient-created tax invoice to IQ Renew for the September 2024 quarter. The invoice assessed a processing refund of $1,771,878, including GST of $161,080.

On 9 December 2024, IQ Renew received payment of the processing refund of $1,771,878 from Exchange for Change. IQ Renew considered that the refund should not have been subject to GST.

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On 28 February 2025, IQ Renew lodged its Business Activity Statement for the quarter ended 31 December 2024. Although it disputed the GST treatment, it included $161,080 in GST on sales in relation to the processing refund so that it could formally challenge the treatment. On the same day, IQ Renew lodged an objection to the BAS. A deemed assessment for the tax period was therefore made on 28 February 2025.

On 3 October 2025, the ATO disallowed the objection, concluding that IQ Renew had made a taxable supply and that the processing refund was consideration for that supply. On the same day, the ATO also declined to make a decision relieving IQ Renew from the operation of Division 142 of the GST Act.

On 17 October 2025, IQ Renew commenced proceedings in the Federal Court challenging the objection decision and seeking clarification of the GST treatment of processing refunds paid under the Container Deposit Scheme.

IQ Renew contended that the processing refund was not consideration for any taxable supply. It argued that it had been collecting, sorting and recycling containers before the commencement of the CDS and continued to do so afterwards, such that the processing refund was merely a statutory incentive payment designed to encourage recycling. IQ Renew also contended that any information provided to support refund claims was incidental to its ordinary business operations and did not constitute a supply to either the NSW EPA or Exchange for Change (NSW) Pty Ltd.

In the alternative, if GST had been overpaid, IQ Renew argued that it was entitled to a refund because the GST had not been passed on to any other entity.

Issues

1. Did IQ Renew Pty Ltd make a taxable supply to Exchange for Change (NSW) Pty Ltd or the NSW EPA by recycling eligible containers in a CDS-compliant way in return for the processing refund?
2. If IQ Renew did not make a taxable supply, was it entitled to a refund of the $161,080 GST it had remitted, or had the GST been passed on so that Division 142 of the GST Act prevented the refund?

Decision

Did IQ Renew make a taxable supply to Exchange for Change or the EPA?

Under section 9-5 of the GST Act, an entity makes a taxable supply if it makes a supply for consideration in the course or furtherance of an enterprise, the supply is connected with Australia and the entity is registered or required to be registered for GST. It was not disputed that IQ Renew carried on an enterprise, that its activities were connected with Australia and that it was registered for GST. The dispute concerned whether IQ Renew made a supply and, if so, whether the processing refund was consideration for that supply.

The GST Act defines a “supply” broadly as any form of supply whatsoever, including the supply of services, the provision of information, an entry into an obligation and the conferral of any right or benefit. “Consideration” is also defined broadly and includes a payment made in connection with, in response to or for the inducement of a supply. However, the existence of a supply and a payment is not sufficient. There must be a sufficient connection between the payment and the alleged supply for the payment to constitute consideration.

The Court accepted that IQ Renew's physical recycling operations did not materially change after the introduction of the CDS. IQ Renew was already collecting, sorting and recycling co-mingled recyclables before the scheme commenced and continued to do so in substantially the same way afterwards. Apart from the installation of a small access panel to assist with sampling activities, there was no material change to the recycling process itself.

However, the Court considered that the relevant enquiry was broader than whether IQ Renew's recycling activities had changed. Justice Jackman found that participation in the CDS required IQ Renew to undertake additional conduct, including facilitating sampling procedures, cooperating with audits and entering into refund

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sharing agreements with local councils where required. These activities were undertaken because IQ Renew wished to obtain the CDS refunds and provided something of value to both Exchange for Change (NSW) Pty Ltd and the EPA by assisting them to achieve the objectives of the CDS.

The Court rejected IQ Renew's argument that the processing refund was merely an incentive payment similar to the payments considered in *AP Group Ltd v Federal Commissioner of Taxation* [2013] FCAFC 105. Although IQ Renew would likely have continued recycling even without the refund, the Court considered that its participation in the CDS involved more than simply continuing its pre-existing business activities. The additional conduct undertaken to comply with the CDS framework was sufficiently connected to the receipt of the refund.

The Court also rejected the submission that the benefit received by Exchange for Change or the EPA was too vague to constitute a supply. In the context of a government-administered scheme, assisting the achievement of statutory and policy objectives was capable of amounting to a benefit for GST purposes.

Importantly, the Court accepted that the provision of information to support refund claims was not, by itself, a taxable supply. However, IQ Renew's participation in the CDS involved more than the mere provision of information. It included conducting its recycling business in a way that complied with the CDS and assisted the operation of the scheme.

The Court therefore concluded that IQ Renew made a supply for consideration. The appropriate characterisation of that supply was the recycling of eligible containers in a CDS-compliant manner. The processing refunds were consideration for that supply and were therefore subject to GST.

If no taxable supply existed, was IQ Renew entitled to a GST refund under Division 142?

Having concluded that IQ Renew made a taxable supply for consideration, the Court held that there was no overpayment of GST. As a result, there was no "excess GST" and it was unnecessary to determine whether Division 142 would have prevented a refund because GST had been passed on to another entity.

The Court therefore did not engage in a substantive analysis of Division 142 and treated the issue as falling away because the prerequisite finding of excess GST was not established.

COMMENT – The approach in this case will be relevant where a taxpayer receives a grant, rebate or incentive payment for doing more than merely carrying on its existing business. Examples include:

- a manufacturer receiving a payment for maintaining specified local production levels, providing compliance data and submitting to audits;
- a retailer receiving a council rebate for operating a collection point, recording returned products and meeting recycling standards;
- or a transport operator receiving a subsidy for running services at specified times, on specified routes and subject to reporting requirements.

In a property development context, a developer may make a supply where it receives a council or government contribution in return for delivering public infrastructure, affordable housing, environmental remediation or community facilities to an agreed standard, or for entering into and complying with ongoing reporting, access or maintenance obligations.

The practical question is whether the recipient merely qualifies for a payment by continuing its ordinary activities, or undertakes additional conduct or obligations sufficiently connected with the payment.

Citation *IQ Renew Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia* [2026] FCA 1393 (Jackman J, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2026/1393.html

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2.5 Carbery v Fire Rescue Victoria – FBT otherwise deductible and apportionment

Facts

In May 2018, the United Firefighters' Union of Australia applied to the Fair Work Commission seeking orders requiring firefighter employers to reimburse members for income protection insurance premiums.

In October 2018, the Fair Work Commission ordered that employed firefighters be reimbursed for the cost of income protection insurance premiums, up to $48 per week. The order also satisfied requirements contained in enterprise bargaining negotiations that required such a reimbursement arrangement to be implemented.

In late 2018, the Union and the relevant Victorian fire authorities agreed to an income protection arrangement known as the Victorian Firefighters Protect Injury & Sickness Policy. That arrangement remained in place until 1 January 2023.

On 1 July 2020, Fire Rescue Victoria commenced operations as the statutory successor to Victoria's earlier fire authorities.

In October 2022, the Fair Work Commission updated its earlier orders, increasing the reimbursement entitlement to $50.43 per week, or another agreed amount.

In December 2022, Fire Rescue Victoria and the Union agreed to replace the existing arrangement with a new scheme to commence on 1 January 2023. The scheme combined discretionary trust benefits with insurance cover.

On 28 December 2022, a trust deed established the United Firefighters' Union of Australia – Victorian Branch Discretionary Trust. Alternative Risk Management Services (**ARMS**) became trustee and the Union became the advocate for members. The trust was created to provide funding for claims and insurance designed to mitigate various member risks.

On 1 January 2023, the new scheme commenced. A product disclosure statement described a two-part structure comprising discretionary trust cover and insurance cover. The scheme provided benefits relating to loss of income, death, disability, accidental dental injuries, broken bones and ambulance cover. Members joined by making weekly contributions. Fire Rescue Victoria paid those contributions on behalf of participating firefighters and reimbursed them through the payroll system.

In November 2023, the Fair Work Commission again varied its orders, increasing the weekly reimbursement allowance to $55.22, with effect from 16 June 2023.

On 8 March 2024, the insurance arrangements evolved into excess-loss insurance. Under this structure, the trust met claims up to specified limits, with the insurer becoming liable only once trust limits were exceeded.

In the 2024 fringe benefits tax year, Fire Rescue Victoria paid approximately $10.28 million in member contributions to the trustee on behalf of its employees. In its FBT return, Fire Rescue Victoria reported a taxable value of approximately $11.16 million, reduced by about $541,000 representing premiums paid for income protection insurance.

In the year ended 30 June 2024, Robin Carbery received an income statement showing reportable fringe benefits of $5,569.51 arising from Fire Rescue Victoria's treatment of the reimbursed contributions. According to Carbery, this reduced his Family Tax Benefit entitlement and increased his child support obligations.

On 5 March 2025, Robin commenced proceedings in the Federal Court against Fire Rescue Victoria, alleging that Fire Rescue Victoria had incorrectly calculated his reportable fringe benefits amount and seeking declarations and corrective action. He contended that the correct reportable fringe benefits amount was nil.

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On 14 October 2025, Fire Rescue Victoria commenced separate proceedings against the Union and ARMS. Fire Rescue Victoria alleged that representations had been made that adopting the new scheme would not increase its tax liability, when in fact the scheme allegedly substantially increased its fringe benefits tax exposure. Fire Rescue Victoria also sought restitutionary relief against ARMS.

On 16 December 2025, Fire Rescue Victoria lodged an objection with the Commissioner of Taxation to its self-assessed 2024 fringe benefits tax liability.

On 24 February 2026, Fire Rescue Victoria issued a notice requiring the Commissioner to determine the objection within 60 days. When no determination was made within that period, the objection was deemed to have been disallowed.

On 7 May 2026, Fire Rescue Victoria commenced a Part IVC tax appeal against the Commissioner, contending that the taxable value of the fringe benefits was nil because the otherwise deductible rule applied to the contributions made under the scheme.

On 3 June 2026, the Court ordered that a separate question be determined in the Carbery and Fire Rescue Victoria proceedings concerning the taxable value of member contributions paid to the discretionary trust between 1 January 2023 and 1 October 2025. The Part IVC proceeding was heard concurrently so that all parties would be bound by the outcome.

On the eve of trial in 2026, Fire Rescue Victoria and the Commissioner reached agreement that 71.6% of the contributions were otherwise deductible. This meant that only 28.4% of the contributions remained taxable for fringe benefits tax purposes, narrowing the dispute before the Court.

Under the *Fringe Benefits Tax Assessment Act 1986* (Cth) (**FBTAA**), the payment by an employer of an employee's expense can constitute an expense payment fringe benefit. The taxable value of that benefit may be reduced under the "otherwise deductible" rule in section 24 to the extent that the employee would have been entitled to an income tax deduction had they incurred the expense personally. The dispute centred on the extent to which contributions to the discretionary trust qualified for that reduction.

Fire Rescue Victoria and the Commissioner contended that the contributions were only partly otherwise deductible. They argued that the contributions secured a package of benefits, including income protection, death, disability, ambulance, dental and other discretionary benefits. While the income protection component would have been deductible if paid personally by firefighters, the other benefits would not. Therefore, the contributions were said to be a mixed outgoing requiring apportionment, with 71.6% of the contributions attributable to deductible income protection benefits and the remaining 28.4% attributable to non-deductible benefits.

Fire Rescue Victoria and the Commissioner relied on evidence from Craig Harms, the head of ARMS and a specialist in discretionary trust products. He gave evidence about the operation of the scheme, the allocation of member contributions and the proportion of expenditure attributable to income protection benefits.

Robin and the Union argued that the scheme was, in substance, an income protection arrangement established to comply with the Fair Work Commission reimbursement orders. They contended that the additional trust benefits were incidental to the core income protection purpose and that the contributions should therefore be wholly, or substantially wholly, otherwise deductible, resulting in no, or a significantly reduced, fringe benefits tax liability and corresponding reportable fringe benefits amounts for participating firefighters.

Robin and the Union challenged the Commissioner's apportionment methodology on several grounds. They argued that the calculation should have been based on member contributions rather than trust expenditure, questioned the evidentiary basis for attributing 37% of the insurance premium to income protection benefits, contended that retained trust surpluses and other costs had not been properly taken into account, and submitted that the analysis relied improperly on hindsight by using expenditure data from a later period. They also argued that the calculation lacked support from independent actuarial or accounting evidence.

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Issues

1. Were the contributions to the discretionary trust "otherwise deductible" under section 24 of the FBTAA?
2. If so, what was the proper apportionment between deductible and non-deductible benefits?

Decision

Were the contributions to the discretionary trust "otherwise deductible" under section 24 of the FBTAA?

The Court accepted that, had firefighters personally paid premiums for ordinary income protection insurance, those premiums would generally have been deductible. However, the contributions paid under the discretionary trust scheme were not solely directed to income protection. Membership of the trust entitled firefighters to access a range of additional benefits, including death, disability, ambulance, dental, broken bones and other discretionary benefits. The trust also provided discretionary trust cover in addition to insurance cover.

Robin and the Union argued that the scheme should nevertheless be characterised as an income protection scheme because its essential purpose was to protect firefighters from loss of income, and that the other benefits were merely incidental additions. The Court rejected that submission. It held that the inquiry was not directed to the subjective purpose of the employee in joining the scheme, but to the objective character of the outgoing. The weekly contributions purchased access to both deductible and non-deductible benefits.

Applying the principles in *Ronpibon Tin NL v Commissioner of Taxation* (1949) 78 CLR 47, the Court held that the contributions were a single outgoing serving two objects indifferently: income protection benefits which would have been deductible, and other benefits which would not. In those circumstances, a fair and reasonable apportionment was required.

Accordingly, the Court held that the contributions were only partly otherwise deductible for the purposes of section 24 of the FBTAA.

What was the proper apportionment between deductible and non-deductible benefits?

Fire Rescue Victoria and the Commissioner advanced an apportionment methodology based on the actual expenditure of the trust. The calculation identified the amounts paid for income protection claims, together with the proportion of the insurance premiums attributable to loss of income benefits, and compared those amounts to the trust's overall expenditure after excluding ordinary operating expenses. That methodology produced an "otherwise deductible" percentage of 71.6%.

Robin challenged the methodology on a number of grounds, including that it used the wrong denominator, relied on an unexplained allocation of insurance premiums, failed to account for trust surpluses and improperly relied on hindsight. The Court rejected each of those criticisms. It accepted the unchallenged evidence of Craig Harms concerning the operation of the scheme and the allocation of expenditure.

The Court emphasised that apportionment under *Ronpibon* does not demand mathematical precision. The relevant task is to achieve a fair and reasonable assessment of the extent to which the expenditure relates to the production of assessable income. The Court found that the methodology adopted by Fire Rescue Victoria and the Commissioner appropriately distinguished between the cost of income protection benefits and the cost of non-deductible benefits provided under the trust.

The Court was satisfied that 71.6% of the contributions were otherwise deductible and that the remaining 28.4% represented the non-deductible component of the benefits provided by the scheme. Therefore, the taxable value of the contributions was 28.4% of the amount contributed, inclusive of GST.

COMMENT – Robin cared about the amount reported because reportable fringe benefits are taken into account for a number of income-tested obligations and entitlements, even though they are not included in taxable income. In his case, the amount reduced his Family Tax Benefit entitlement and increased his child

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support obligations. Depending on an employee's circumstances, reportable fringe benefits may also affect HELP repayments, the Medicare levy surcharge and the private health insurance rebate. The dispute therefore had a direct financial consequence for Robin, despite the fringe benefit itself not being assessable income.

Citation *Carbery v Fire Rescue Victoria* [2026] FCA 1488 (McElwaine J, Victoria)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2026/1488.html

2.6 Chief Group – payroll tax and employment agency contracts

Facts

On 1 January 2016, Mr Farah founded Chief Group Services. The business later expanded into security, cleaning and vehicle detailing services across Australia.

In September 2018, Chief Group commenced trading in New South Wales and obtained a master security licence permitting it to provide security personnel. Around the same time, Chief National Cleaning, another company within the group and also directed by Mr Farah, operated as the group's vehicle cleaning and detailing arm. The two entities were grouped for payroll tax purposes.

On 21 February 2022, Chief Group entered into an agreement with United Airlines to provide aviation security, screening and related ground handling services at Sydney International Airport. Under the arrangement, Chief Group supplied security personnel, supervised screening operations, conducted baggage and passenger security functions, monitored aircraft operations and complied with detailed transport security requirements.

On 16 May 2022, Chief Group entered into a similar agreement with Delta Airlines. The services included guarding aircraft, monitoring passengers and baggage, controlling access to operational areas and providing other aviation security functions required for Delta's operations at Sydney Airport.

On or about 14 October 2022, Chief National Cleaning entered into an agreement with Avis to provide car cleaning and detailing services at Sydney Airport. The services included washing and detailing vehicles, conducting vehicle checks, collecting vehicles and preparing them for rental.

In about October 2022, an agreement with Europcar, which had initially been held by Chief Group, was transferred to Chief National Cleaning. Under that arrangement, Chief National Cleaning provided vehicle washing, detailing, inspections and related services for Europcar's rental fleet at Sydney Airport.

During the 2022 and 2023 financial years, Chief National Cleaning had up to 20 detailers working each day at Sydney Airport servicing the Avis and Europcar fleets. During the same period, Chief Group continued providing security services to United Airlines and Delta Airlines using a combination of employees and subcontracted security personnel.

In May 2024, Revenue NSW commenced a payroll tax investigation into salaries, wages, superannuation and contractor payments made by Chief Group and Chief National Cleaning.

On 14 October 2024, the audit was completed. Revenue NSW concluded that payments made to subcontractors providing security services to United Airlines and Delta Airlines, and cleaning and detailing services to Avis and Europcar, were made under employment agency contracts and therefore constituted taxable wages under the employment agency provisions of the *Payroll Tax Act 2007* (NSW).

The Chief Commissioner of State Revenue issued payroll tax assessments for the financial years ending 30 June 2020 to 30 June 2023. Revenue NSW calculated that payments to contractors totalled approximately $14.85 million during the audit period and assessed additional payroll tax, penalties and interest totalling about $885,000.

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On 22 November 2024, Chief Group lodged an objection to the assessments, contending that it provided specialised security and cleaning services as an independent contractor and that the relevant arrangements were not employment agency contracts.

On 18 July 2025, the Chief Commissioner disallowed the objection and confirmed the assessments.

Chief Group commenced proceedings in the NCAT seeking review of the objection decision and the payroll tax assessments.

The Chief Commissioner argued that the security services provided to United Airlines and Delta Airlines were essential to the operation of their airline businesses and were supplied on a regular and ongoing basis at Sydney Airport. The contractual arrangements contained detailed service specifications, performance requirements, audit rights and termination provisions, demonstrating that the services were provided in and for the ordinary conduct of the airlines' businesses. Accordingly, the arrangements were said to be employment agency contracts within section 37 of the *Payroll Tax Act.*

The Chief Commissioner made the same argument in relation to the Avis and Europcar contracts. The cleaning and detailing services were closely connected to the ordinary business of hiring clean and roadworthy vehicles, were performed continuously at the clients' premises, and were governed by detailed contractual requirements. The Commissioner submitted that both the airline contracts and the cleaning contracts fell within the employment agency provisions, with the result that payments made to subcontractors were taxable wages for payroll tax purposes.

Issues

1. Were the contracts between Chief Group and United Airlines and Delta Airlines for the provision of aviation security services "employment agency contracts" under section 37 of the Payroll Tax Act?
2. Were the contracts between Chief National Cleaning and Avis and Europcar for the provision of car cleaning and detailing services "employment agency contracts" under section 37 of the Payroll Tax Act?

Decision

Were the airline security contracts employment agency contracts?

The NCAT rejected Chief Group's submission that the matter should be determined by reference to earlier security industry decisions such as *E Group Security Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 1190 and *Infinity Security Group Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWCATAD 20. Instead, the NCAT considered that the authorities demonstrate that the test for an employment agency contract is fact sensitive and does not lend itself to merely applying established precedent or indicia.

The NCAT accepted that Chief Group operated a genuine security business, held its own security licence and supervised its own personnel. It also accepted that the airlines could not themselves employ personnel to perform the relevant aviation security functions. However, the NCAT considered that those matters were not determinative of the statutory test.

The security services included passenger screening, baggage screening, aircraft guarding, access control and compliance with aviation security requirements. The NCAT found that these services formed an integral part of the airlines' operations at Sydney Airport and were provided under contracts containing detailed performance standards, audit rights and operational requirements. The services were therefore provided in and for the ordinary conduct of the airlines' businesses.

The NCAT concluded that the contracts with United Airlines and Delta Airlines were employment agency contracts within section 37 of the Payroll Tax Act.

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Were the car cleaning and detailing contracts employment agency contracts?

The NCAT accepted that Chief National Cleaning operated an independent cleaning and detailing business and supplied its own personnel, equipment and supervision. However, applying the reasoning in *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, the NCAT considered whether the services were closely connected with the ordinary conduct of the clients' businesses.

The NCAT found that the cleaning, detailing, inspection and preparation of rental vehicles were fundamental aspects of the businesses conducted by Avis and Europcar. The services were performed on a regular and ongoing basis under contracts that contained detailed specifications and service requirements. Those features demonstrated a close relationship between the services provided and the conduct of the car rental businesses.

The NCAT therefore concluded that the Avis and Europcar contracts were employment agency contracts within section 37 of the Payroll Tax Act.

COMMENT – The fact that United Airlines and Delta Airlines did not hold security licences, and therefore could not themselves employ the security workers to perform the relevant functions, did not prevent the contracts from being employment agency contracts. This is significant because the Court of Appeal in *SKG Cleaning* identified that whether the client could have employed the workers was an important consideration in applying the statutory test. *Chief Group* suggests that this consideration is not determinative: a contract may still be an employment agency contract where the workers perform functions integral to the client's business, even if the client could not lawfully employ them directly to perform those functions.

TRAP – The employment agency contract provisions continue to be a key focus of Revenue NSW during payroll tax investigations. Businesses that engage suppliers or subcontractors to perform services for a client's ordinary business should review their arrangements carefully, even where the supplier or subcontractor operates an independent business, holds its own licences and supervises its personnel.

Citation *Chief Group Services Pty Ltd v Chief Commissioner of State Revenue* [2026] NSWCATAD 299 (Senior Member J Redfern PSM, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2026/299.html

2.7 O'Connor – former temporary resident superannuation

Facts

On 25 December 1983, James O'Connor arrived in Australia from Ireland on a temporary visa for a holiday. He did not undertake any employment and did not accrue any superannuation during his stay. On 13 January 1984, he returned to Ireland, and his temporary visa expired on or about 20 March 1984.

On 19 September 1985, James returned to Australia on a permanent resident visa. He later became an Australian citizen in 1989. Between 1985 and 1991, he worked in Australia and accrued superannuation entitlements. All of those entitlements were earned after he became a permanent resident and later an Australian citizen.

On 15 June 1991, James departed Australia for Ireland and did not return until December 2007. Thereafter, he visited Australia on five occasions, each visit lasting between two weeks and one month.

On 14 September 2023, a superannuation account held by National Mutual Retirement Fund in James' name, with a balance of approximately $38,524, was voluntarily transferred to the ATO under section 22 of the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (Cth) as unclaimed superannuation.

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On 1 November 2024, James applied for the release of all superannuation monies held by the ATO in his name.

On 21 January 2025, the Commissioner determined that the conditions in section 20H(1)(a)(ii) of the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (Cth) were satisfied because James had previously held a temporary visa that had ceased to be in effect and had left Australia after becoming the holder of that visa. Section 20H(2) required the Commissioner to release the funds if those conditions were met. At the time of release, the balance had increased to approximately $41,500.

Under section 301-170(2) of the ITAA 1997, a payment made under section 20H is treated as a Departing Australia Superannuation Payment (**DASP**). Such payments are subject to a specific tax regime for certain former temporary visa holders under section 301-175 of the ITAA 1997 and section 5 of the *Superannuation (Departing Australia Superannuation Payments Tax) Act 2007* (Cth). The ATO accordingly assessed tax of approximately $13,308 and released a net payment of approximately $28,193 to James.

On 21 January 2025, James sought an internal review of that decision, contending that the DASP provisions had been incorrectly applied because the superannuation had been accrued while he was a permanent resident and Australian citizen, rather than during his brief period in Australia as a temporary visitor.

On 18 June 2025, the ATO affirmed the assessment. The ATO's position was that James' earlier temporary visa and subsequent departure from Australia satisfied the requirements of section 20H(1)(a)(ii).

On 29 August 2025, James lodged an objection. On 21 November 2025, the ATO disallowed the objection and maintained that the payment had correctly been taxed as a DASP.

On 14 December 2025, James applied to the ART for review of the objection decision.

James argued that the DASP regime was intended to apply to temporary residents who accrued superannuation while in Australia on temporary visas and then permanently departed Australia. He contended that his superannuation had been earned entirely after he became a permanent resident and later an Australian citizen, and that it was inconsistent with the purpose of the legislation to treat him as a former temporary resident merely because he had made a brief tourist visit to Australia on a temporary visa more than 40 years earlier.

The Commissioner argued that section 20H(1)(a)(ii) of the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (Cth) should be applied according to its ordinary meaning. On that approach, James satisfied the provision because he had previously held a temporary visa, that visa had ceased to be in effect, and he had left Australia after becoming its holder. The Commissioner contended that those criteria operated independently of the definition of "former temporary resident" in section 20AA and therefore continued to apply notwithstanding that James later became a permanent resident and Australian citizen.

Issue

Should section 20H(1)(a)(ii) be read according to its literal terms, or should it be interpreted as incorporating the requirements in section 20AA, with the result that it applies only to a "former temporary resident" and not to an Australian citizen such as James?

Decision

The ART accepted James' argument and held that section 20H(1)(a)(ii) should not be read in isolation. Although the provision, read literally, applied where a person had held a temporary visa that had ceased and had subsequently left Australia, the ART considered that statutory construction required consideration of the context, purpose and legislative history of the DASP regime.

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The ART observed that the purpose of the DASP regime was to facilitate the release of superannuation held for temporary residents who had permanently departed Australia and to "claw back" superannuation tax concessions where such benefits were accessed before retirement. The explanatory materials made clear that Australian citizens and permanent residents were intended to remain subject to the ordinary preservation rules because they retained the possibility of retiring in Australia.

The ART noted that the Commissioner's interpretation would result in a person being permanently captured by the DASP regime merely because they had at some point held a temporary visa, even where they later became an Australian citizen and all of their superannuation was earned as a permanent resident or citizen. In the ART's view, that outcome was inconsistent with the legislative purpose of the regime and produced a result that could be regarded as capricious or irrational.

The ART also examined the legislative history of the provisions. It found that, before amendments made in 2009, the criteria now contained in the definition of "former temporary resident" in section 20AA had appeared elsewhere in substantially the same form. The ART considered that those amendments were intended to simplify the drafting of the legislation rather than expand the class of persons subject to the DASP regime. That history supported reading section 20H(1)(a)(ii) as incorporating the qualifications contained in section 20AA.

Accordingly, the ART concluded that section 20H(1)(a)(ii) applies only where the person satisfies the requirements of a "former temporary resident" within the meaning of section 20AA. Because James was an Australian citizen, he did not satisfy that definition. The ART therefore set aside the Commissioner's decision and substituted a decision that the superannuation be released under section 22B(3)(b)(i) of the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (Cth). As a consequence, the payment was not a DASP and was not subject to DASP tax.

Citation *O'Connor and Commissioner of Taxation (Taxation)* [2026] ARTA 2141 (General Member Dr M Bruce, South Australia)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2026/2141.html

2.8 Allott – NSW duty marriage breakdown

Facts

On 2 August 2013, Graeme Allott and Julia Corton, who had been in a de facto relationship and had recently separated, entered into a Cohabitation Separation Agreement (also described as a Separation Deed) in England, where both were living at the time.

The agreement recorded the permanent breakdown of their relationship, confirmed that each had received independent legal advice, and provided that Julia would transfer her interest in a New South Wales property to Graeme. In return, Graeme agreed to pay Julia a sum to assist her in purchasing a home for herself and their children and to continue paying child maintenance. The agreement also contemplated that Julia would sign all documents necessary to facilitate the transfer and obtain any available stamp duty exemptions in both the United Kingdom and Australia. The agreement stated that any disputes requiring court intervention would be determined by courts in England.

On 8 March 2022, a transfer of land form was executed to transfer Julia's interest in the New South Wales property to Graeme. The transfer was undertaken in accordance with the terms of the 2013 Cohabitation Separation Agreement.

On the same day, Revenue NSW issued a duty assessment stating that no duty was payable, and the transaction was stamped as exempt under section 68 of the *Duties Act 1997* (NSW). Section 68 exempts certain transfers of relationship property following the breakdown of a de facto relationship where the transfer is

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effected by or in accordance with a binding financial agreement made under specified provisions of the *Family Law Act 1975* (Cth), or pursuant to a relevant court order.

On 25 March 2022, the transfer of Julia's share in the property was formally registered by MJM Conveyancing.

On 20 August 2024, Revenue NSW commenced an audit of the transfer and requested supporting documentation through MJM Conveyancing.

On 7 February 2025, following the audit, Revenue NSW concluded that the transaction had been incorrectly assessed as exempt. Revenue NSW determined that the transfer did not qualify for the exemption in section 68 of the Duties Act and issued a Notice of Assessment for $51,165, comprising transfer duty of $33,957, penalty tax of $6,789, and interest of $10,419.

On 4 March 2025, MJM Conveyancing lodged an objection to the assessment on Graeme's behalf.

On 21 March 2025, Graeme and Julia executed a Deed of Variation to the 2013 agreement. The variation purported to clarify that, for the purposes of section 68A of the *Duties Act*, the original agreement was made under section 90UD of the *Family Law Act*. The variation was expressed to operate retrospectively from 2 August 2013.

On 22 August 2025, Revenue NSW allowed the objection in part. Revenue NSW accepted that the original assessment had overstated the dutiable value and reassessed the transfer based on the value of the half share actually transferred. As a result, the transfer duty was reduced to $15,749. Penalty tax was remitted in full, but market interest of $5,042 remained payable. Revenue NSW nevertheless maintained that the transfer was not exempt from duty because the agreement did not satisfy the statutory requirements for the relevant exemption.

Graeme applied to the NCAT for review of the decision, contending that no duty should have been payable because the transfer was effected under a binding relationship property settlement agreement.

The Chief Commissioner argued that the Separation Deed could not be a financial agreement made under Part VIIIAB of the *Family Law Act* for two independent reasons. First, section 90UA permits parties to make an agreement under section 90UD only if they are ordinarily resident in a participating Australian jurisdiction when the agreement is made. Graeme and Julia were both living in the United Kingdom when they entered into the Separation Deed. Secondly, the deed did not state that it was a financial agreement made under section 90UD. The Chief Commissioner submitted that this express identification was required and that an agreement which did not identify the provision under which it was made could not qualify for the duty exemption.

Issues

1. Did the 2013 Cohabitation Separation Agreement constitute a financial agreement that qualified for the exemption?
2. If not, could the Deed of Variation executed in 2025 retrospectively cure any deficiencies in the agreement and bring the transfer within the exemption?
3. If duty was payable, should the interest imposed by the Chief Commissioner of State Revenue have been remitted?

Decision

<u>Did the 2013 Cohabitation Separation Agreement constitute a financial agreement?</u>

The NCAT focused on whether the 2013 agreement satisfied the requirements of the *Family Law Act*, which was a prerequisite to obtaining the exemption in section 68(1A) of the *Duties Act*. A key difficulty for Graeme was section 90UA of the *Family Law Act*, which provides that parties can only make a Part VIIIAB financial agreement under sections 90UB, 90UC or 90UD if they are ordinarily resident in a participating Australian

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jurisdiction when the agreement is made. The evidence established that both Graeme and Julia were living in England when they entered into the Cohabitation Separation Agreement in August 2013.

The NCAT also noted that the agreement did not state that it was made under section 90UD, or any other relevant provision of the Family Law Act. Although the agreement referred to obtaining stamp duty exemptions and demonstrated an intention to divide property following the breakdown of the relationship, the NCAT considered that the statutory requirements were matters of substance rather than mere technicalities.

Graeme argued that the parties had always intended the agreement to operate as a binding financial agreement and relied on authorities concerning technical defects in family law agreements. The NCAT accepted that the parties intended the transfer to be exempt from duty. However, it found that their intention could not overcome the legislative requirements, particularly the residence requirement in section 90UA. Because the parties were not ordinarily resident in Australia when the agreement was executed, the agreement could not qualify as a financial agreement under sections 90UB, 90UC or 90UD.

The NCAT found that the 2013 Cohabitation Separation Agreement was not a qualifying financial agreement for the purposes of section 68(1A), and the transfer was not exempt from duty.

If not, could the Deed of Variation retrospectively cure any deficiencies in the agreement?

Graeme argued that the Deed of Variation executed in March 2025 confirmed the parties' original intention and retrospectively amended the 2013 agreement so that it expressly stated it was made under section 90UD of the Family Law Act.

The NCAT accepted that the Deed of Variation demonstrated an intention to comply with the requirements for duty relief. However, the Deed of Variation could not retrospectively alter the factual circumstances that existed when the agreement was made. It could not overcome the requirement in section 90UA that the parties be ordinarily resident in Australia at the time the financial agreement was executed.

The NCAT also considered authorities relied upon by the parties concerning deficiencies in family law agreements. It concluded that the absence of compliance with the residence requirement, coupled with the failure of the original agreement to identify the relevant provisions of the *Family Law Act*, were not minor drafting errors. Rather, they were substantive requirements that had not been satisfied.

The NCAT therefore found that the 2025 Deed of Variation could not retrospectively transform the 2013 agreement into a qualifying financial agreement for the purposes of section 68(1A). The transfer was dutiable.

If duty was payable, should the interest imposed have been remitted?

Having concluded that duty was payable, the NCAT then considered whether the remaining interest should be remitted. The Chief Commissioner had already allowed the objection in part by reducing the duty assessment and remitting penalty tax in full. However, market interest of approximately $5,042 remained payable.

Graeme relied on the fact that he had obtained legal advice in the United Kingdom and had acted on the basis that the transfer qualified for the exemption. The NCAT accepted that he had not deliberately provided incorrect information and had cooperated with Revenue NSW during the audit process. However, it found that he had not obtained advice from an Australian practitioner familiar with the relevant Australian legislation and that the advice he received failed to identify the requirements of section 90UA or the need for compliance with the relevant provisions of the Family Law Act.

The NCAT considered that the exemption application was ultimately based on information that was incorrect, namely that the agreement qualified as a binding financial agreement for the purposes of the Family Law Act. While Graeme may not have appreciated that the position was incorrect, the NCAT found that he remained responsible for ensuring that the information supplied was correct. It also noted that the agreement itself referred to the jurisdiction of England and made no reference to the relevant provisions of the Family Law Act.

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In those circumstances, the NCAT concluded that it was open to the Chief Commissioner to determine that sufficient and reasonable care had not been taken to comply with the relevant taxation obligations. It therefore affirmed the decision not to remit the remaining market interest.

COMMENT – The decision is a reminder that the duty exemption for transfers of relationship property following the breakdown of a marriage or a de facto relationship is only available where the statutory requirements are satisfied. It is not enough that the parties intended to enter into a binding financial agreement or intended that the transfer be exempt from duty. The case also demonstrates the difficulty of attempting to retrospectively cure deficiencies in a family law agreement after a transfer has occurred.

TIP – At the time of the transfer in *Allott*, the Duties Act did not recognise a general agreement dividing property following the breakdown of a de facto relationship (as it did with marriage breakdowns) unless it was a binding financial agreement under the Family Law Act. Section 68 now extends the exemption to transfers made under broader agreements for the division of property following the breakdown of a de facto relationship, rather than limiting relief to binding financial agreements.

TRAP – Practitioners should be cautious about assuming that a deed of variation, rectification deed or other retrospective amendment will cure a defect in an arrangement after a taxing event has already occurred. As a matter of general law, a deed ordinarily takes effect from the date it is executed, even if it purports to operate retrospectively as between the parties. Revenue statutes commonly determine liability by reference to the facts and legal rights existing at the time of the transaction.

Citation *Allott v Chief Commissioner of State Revenue* [2026] NSWCATAD 297 (Senior Member M Tibbey, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2026/297.html

2.9 Pratley & Pratley – tax debts and family law settlement

Facts

Ms Pratley and Mr Pratley married in 2006 and, during the relationship, built a highly successful mortgage broking business operated through B Pty Ltd, trading as the Suburb D franchise. Both were involved in the business, with different operational roles, and profits were distributed through the family trust. By the time of separation, the business was generating substantial annual income and had accumulated approximately $1 million in cash reserves.

During the relationship, the couple acquired four properties, including properties in Suburb S and Suburb E. They lived together at the Suburb E property before separation.

Separation and immediate aftermath (2017-2018)

In late 2017 or early 2018, the parties separated. The wife remained living at the Suburb E property and had sole occupation from February 2018.

On 20 February 2018, the husband transferred $1 million from business accounts. Most of the funds were subsequently returned, and business records showed that B Pty Ltd still held approximately $994,000 in bank accounts as at 21 February 2018.

On 4 October 2018, the husband removed the wife as a director of B Pty Ltd and stopped her salary. He thereafter retained sole control of the business. On 4 and 5 October 2018, following her removal, the wife withdrew $179,800 from business accounts.

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Commencement of litigation and business restraints (2019)

On 22 February 2019, the wife commenced family law proceedings seeking urgent interim property orders. Four days later, the Court made injunctions restricting the operation of B Pty Ltd and requiring commission income to be paid into a controlled account. At that time, business working accounts had fallen from approximately $994,000 at separation to about $459,000.

In early 2019, the wife made complaints to police concerning alleged sexual assaults. Around the same time, the husband suffered a medical incident requiring hospitalisation.

On 5 April 2019, the husband obtained permission to establish a second business through HH Pty Ltd, operating another franchise under the same franchisor. He controlled both businesses thereafter.

In mid-2019, the wife obtained a family violence order against the husband and later commenced proceedings before the Australian Human Rights Commission. During this period, key staff also left the Suburb D business, contributing to declining revenue.

Decline of the original business and property transactions (2020-2021)

In early 2020, criminal charges were brought against the husband in relation to allegations involving the wife. The husband also entered into a new franchise agreement giving the franchisor a first right of refusal if the franchise was sold.

By April 2020, the husband had decided he wished to sell the Suburb D business. On 26 August 2020, the Court ordered the sale of the business and the sale of two investment properties located in Suburb S.

Throughout 2020 and 2021, disputes arose regarding the depletion of business funds and compliance with Court-imposed financial restraints. The wife repeatedly sought explanations as to how a previously profitable business with substantial reserves had developed cash flow difficulties.

In April and July 2021, two investment properties in Suburb S were sold, generating proceeds of approximately $846,000 and $1.3 million. The net proceeds were divided substantially equally between the parties. The wife used part of her share to purchase a property in Suburb JJ with her new partner. The husband applied his share to tax liabilities, legal expenses and living costs.

In mid-2021, the husband was acquitted of the criminal charges.

Tax liabilities and increasing financial disputes (2022-2023)

In 2022, the husband continued to receive significant income through salary and trust distributions. He also received a Director Penalty Notice from the ATO in August 2022 for approximately $813,000.

By September 2022, the husband advised the wife that B Pty Ltd faced an ATO debt exceeding $800,000 and sought approval to use restrained funds to meet the liability. Records later showed that company tax debts had increased significantly between 2020 and 2023.

In March 2023, the wife agreed that $500,000 be released from the commissions account to reduce the company's taxation debt. By April 2023, the commissions account held approximately $1.62 million, while the company's tax debt exceeded $1.1 million, including approximately $93,000 in interest charges.

On 5 May 2023, the Court ordered payments totalling $250,000 to the parties as interim property distributions and ordered payment of $500,000 towards the company's outstanding taxation liability.

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Employee claims and further litigation (2023-2025)

On 24 July 2023, four former employees served a demand seeking approximately $3 million in unpaid commissions and employment entitlements. In October 2023, those employees were joined to the proceedings, resulting in the second scheduled final hearing being vacated.

By February 2024, B Pty Ltd received a statutory demand from the ATO for approximately $679,000 in unpaid tax. In March 2024, the husband used funds from the commissions account to satisfy that demand.

In April 2024, the husband informed the wife that he wished to sell HH Pty Ltd. In May 2024, settlement of the sale of B Pty Ltd was completed, with the purchaser being an entity associated with the franchisor.

Between July 2024 and May 2025, the employee claims were resolved through settlements totalling more than $1.6 million.

Financial position

Throughout the post-separation period, the husband received substantial salaries and trust distributions. Between the 2022 and 2025 financial years alone, he received approximately $2.8 million in dividends in addition to salary payments. At the same time, significant taxation liabilities accumulated, both personally and within the business entities. In addition to the DPN and statutory demand, the husband also accumulated personal tax liabilities of approximately $273,000 for 2024 and approximately $206,000 for 2025.

On 22 February 2019, the wife commenced proceedings in the Federal Circuit Court (later the Federal Circuit and Family Court of Australia) seeking property settlement orders following the parties' separation.

Issues

1. Should the husband’s substantial post-separation tax liabilities be treated as a joint liability of the parties, thereby reducing the property pool available for division, or should those debts be borne solely by him?
2. Did the husband’s post-separation handling of the parties’ business affairs, particularly his failure to pay tax liabilities on time and the resulting ATO interest charges, amount to financial wastage justifying an adjustment in the wife’s favour?
3. Should the Court reduce the value of the husband’s business, HH Pty Ltd, by allowing for estimated future capital gains tax and sale costs, even though no sale had yet occurred and those liabilities remained contingent?

Decision

Should the husband’s post-separation tax liabilities reduce the property pool available for division?

The Court accepted that the husband's personal tax liabilities were genuine. The issue was whether they should be borne by the parties jointly through a reduction in the property pool or whether they should remain the husband's sole responsibility.

The Court approached the issue by examining how the liabilities arose. After separation, the husband retained control of the parties' business interests and continued to receive substantial income through salary and trust distributions. Between the income years ended 30 June 2022 and 30 June 2025, he received approximately $2.8 million in franked distributions in addition to his salary.

The Court considered that the husband had enjoyed the benefit of those funds largely at his own discretion. Although some funds had been used for joint expenses, there was no satisfactory explanation for why he had failed to meet his personal tax obligations while receiving income and distributions of that magnitude.

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In considering the treatment of liabilities, the Court referred to *In the Marriage of Biltoft* (1995) 19 Fam LR 82 and *In the Marriage of Prince* (1984) FLC 91-501, which recognise that not all debts must necessarily be treated as a joint responsibility and that justice and equity may require one party to bear a particular liability.

The Court therefore concluded that, while the husband's tax liabilities formed part of his current and future circumstances, they should not reduce the property pool before division. The wife should not share the economic burden of tax debts that arose from the husband's post-separation receipt and use of substantial income.

Did the husband's failure to pay tax liabilities amount to financial wastage?

A separate issue concerned approximately $83,000 in interest incurred on unpaid tax liabilities of B Pty Ltd. The wife argued that this interest represented financial waste. The husband contended that Court-imposed restraints and difficulties accessing business funds contributed to the accrual of the debt.

The Court considered the principles in *Kowaliw & Kowaliw* (1981) FLC 91-092, which recognise that parties ordinarily share the financial ups and downs of a relationship but permit a different outcome where one party has acted recklessly, negligently or wantonly with matrimonial assets.

Although the husband attributed the tax problems to business restrictions and declining profitability, the Court found those explanations unpersuasive. It noted that throughout the relevant period the husband continued to receive substantial salaries, trust distributions and drawings from the businesses. The Court considered that those ongoing withdrawals undermined the contention that the failure to meet tax liabilities resulted from an inability to pay.

The Court regarded the interest charges as avoidable. In its view, sufficient funds had passed through the husband's hands for tax obligations to have been met in a timely way. The incurring of interest therefore reflected a failure to prioritise those obligations rather than an unavoidable business expense.

Accordingly, the Court treated the interest component of the tax debt as waste. Together with the husband's extensive post-separation drawings and control of the business interests, that wastage formed part of the justification for an adjustment in the wife's favour.

Should HH Pty Ltd be discounted for estimated future CGT and sale costs?

The husband argued that the value of HH Pty Ltd should be reduced by estimated capital gains tax of approximately $564,000 and anticipated sale costs because he intended to sell the business. The wife contended that those liabilities were contingent and speculative.

The Court reviewed the authorities dealing with contingent CGT liabilities, particularly *Rosati & Rosati* (1998) FLC 92-804 and the Full Court's recent decision in *Marlin & Henson* [2025] FedCFamC1A 71. Those authorities emphasise that the significance of a future CGT liability depends on the degree of certainty and immediacy of the proposed disposal. The more certain and imminent the sale, the stronger the case for recognising the tax liability.

The Court therefore focused on whether a sale of HH Pty Ltd was sufficiently likely. Although the husband proposed orders requiring a liquidator to sell the business, the Court found serious deficiencies in the proposal. The contemplated process would require an initial offer to be made to the franchisor, a close associate of the husband, at a price below the value agreed by the parties. The Court was not satisfied that this represented an arm's length market process.

The Court was also concerned that the proposed orders did not adequately prevent further drawings from the business before any sale occurred. In light of the husband's history of withdrawals from business entities, the Court was not persuaded that the value of the business would necessarily be preserved pending disposal.

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Because it was unclear how the sale would proceed, the Court concluded that both the CGT consequences and the anticipated sale costs remained contingent. The evidence supporting the estimated CGT liability was also unsatisfactory because it was based on assumptions about a future sale price that had not been established.

The Court therefore declined to reduce the value of HH Pty Ltd for either estimated CGT or anticipated realisation costs. The agreed value of $1.5 million was adopted without any deduction for those contingent liabilities.

Citation *Pratley & Pratley (No 9)* [2026] FedCFamC1F 398
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FedCFamC1F/2026/398.html

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3. Cases in brief

3.1 Sebastian – tax treatment of injury compensation

On 11 March 2024, Saji Sebastian was injured in a motor vehicle accident and became unable to return to work. During the income year ended 30 June 2024, he received weekly payments totalling $29,870 from QBE under a compulsory third party insurance policy. QBE withheld $7,509 from the payments under the PAYG withholding system. Saji included both the gross payments and the amount withheld in his income tax return, and the Commissioner of Taxation assessed him on that basis.

On 19 August 2025, Saji objected to the assessment, contending that the payments were non-taxable compensation received under his CTP insurance claim. He relied on information published by the State Insurance Regulatory Authority and a letter from QBE concerning its treatment of his weekly benefits.

On 10 October 2025, the ATO disallowed the objection. Saji applied to the ART for review on the same day. The matter was determined on the papers.

The ART explained that a compensation payment generally takes the character of the amount it replaces. Consequently, compensation for lost income will ordinarily be assessable as income, while compensation for the loss or impairment of earning capacity may be capital in nature. Where payments are made under a statutory insurance scheme, the terms and purpose of the legislation are a powerful guide to their character.

The payments were governed by the *Motor Accident Injuries Act 2017* (NSW). Under that Act, weekly statutory benefits paid during the first 78 weeks after an accident are calculated by reference to the injured person's lost earnings. Benefits paid after that period are calculated by reference to lost earning capacity.

The ART found that Saji's payments were made during the first 52 weeks after the accident and compensated him for lost earnings, rather than loss of earning capacity. The QBE invoices described the amounts as "weekly wage payments", and the payments were calculated using the earnings from Saji's cleaning and meter-reading work. Saji had also confirmed during the objection process that the payments were for loss of income.

The ART found that neither the SIRA website nor the QBE letter supported Saji's position. Instead, both materials recognised that weekly benefits replacing lost earnings may be taxable. Because the earnings replaced by the payments would have been ordinary income, the payments had the same character and were assessable under section 6-5 of the ITAA 1997. The ART affirmed the objection decision.

COMMENT – The tax treatment of an insurance or compensation payment depends on what the payment replaces. Under the NSW motor accident scheme, weekly benefits for the first 78 weeks are generally calculated by reference to lost earnings and will ordinarily be assessable as income. Payments for the loss or impairment of earning capacity may instead be capital, but that characterisation depends on the legislation, the insurance arrangement and the purpose of the particular payment.

Citation *Sebastian and Commissioner of Taxation (Taxation)* [2026] ARTA 1981 (General Member M Burch, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2026/1981.html

3.2 Barratt Nominees – Reversal of earlier vesting date decision

In our August 2026 Notes, we summarised *Application of Barratt Nominees Pty Ltd* [2026] NSWSC 860. That decision has since been withdrawn and replaced by *Application of Barratt Nominees Pty Ltd (No 2)* [2026] NSWSC 1104. On further submissions from the trustee, Parker J concluded that his earlier decision was wrong

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because the conclusion did not follow from the reasoning in the judgment. His Honour withdrew the earlier judgment, set aside the orders and issued replacement reasons.

The trust deed defined the distribution date as the earliest of:

1. 50 years from settlement;
2. 21 years after the death of the last surviving descendant of King George VI living at the date of settlement; or
3. an earlier date nominated by the trustee.

The trustee exercised a power of amendment in 2020 to replace the 50-year fixed period with an 80-year period. The amendment power prohibited any amendment that would extend the distribution date beyond "the latest date provided by" the deed.

Justice Parker held that the amendment was valid. His Honour reasoned that the amendment power was ambulatory and therefore the question of what date the deed "provided" as the latest date had to be determined when the amendment power was exercised, not when the deed was originally executed. At the time of the amendment in November 2020, it was certain that the royal lives period would continue well beyond the original fixed vesting date in 2027. Accordingly, the latest date provided by the deed was the expiry of the royal lives period.

His Honour further held that it did not matter that the amended fixed date of May 2057 might, as a theoretical possibility, occur after the royal lives period. The deed did not postpone vesting until the fixed date alone. Rather, even after amendment, the distribution date remained the earlier of the amended fixed period and the royal lives period. If the royal lives period expired first, the trust would vest on that earlier date. As a result, the amendment did not allow the trust to continue beyond the maximum period permitted by the deed or the common law rule against perpetuities.

The Court therefore advised that the trustee was justified in administering the trust on the footing that the 2020 amendment validly extended the fixed vesting date from 2027 to 2057.

COMMENT – The decision turned on the words "the earlier of" in the definition of the distribution date. Replacing the fixed period of 50 years with 80 years did not mean that the trust could vest later than the date provided by the Royal lives clause. The distribution date remained the earlier of the amended fixed period and the Royal lives period, so the trust would still vest when the Royal lives period expired if that occurred first.

Citation *Application of Barratt Nominees Pty Ltd (No 2)* [2026] NSWSC 1104 (Parker J, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2026/1104.html

3.3 Sydney Subdivision (in liq) – director's loans and right of indemnity

Sydney Subdivision Pty Ltd was the corporate trustee of a family trust and is now in liquidation. Another company has since replaced it as trustee. The liquidator, Michael Slaven, found that the company's only asset was a loan account: the directors owed the trust about $2.55 million. There was no written loan agreement. Over many years the directors drew on the loan and repaid amounts into it.

The directors made two main arguments:

1. only the new trustee could pursue the loan;
2. the claim was a debt or contract claim and was statute barred under s 14 of the *Limitation Act 1969* (NSW).

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Justice Wheatley rejected both arguments. Applying *Naaman v Jaken Properties Australia Pty Ltd* [2025] HCA 1, her Honour held:

1. a former trustee's right of indemnity is an equitable proprietary interest in the trust assets, and it survives the former trustee's replacement;
2. because the claim was equitable, not a claim in contract or debt, s 23 of the Limitation Act meant s 14 did not apply, whether directly or by analogy;
3. if the indemnity is worth more than the trust assets, those assets may no longer properly be called trust property. A liquidator appointed as receiver can then sell them by exercising the equitable lien that secures the indemnity.

Her Honour also found that the claim would not have been statute barred even if it were a debt claim. The loan worked like a running account or revolving facility, so the directors only had to repay it once a demand was made. The limitation period started when the liquidator made that demand.

COMMENT – Old director loan accounts in trading trusts may stay recoverable for many years after a trustee company fails, including by a liquidator. Replacing the trustee or making offsetting journal entries will not remove the debt. Creditors of an insolvent corporate trustee, including the ATO, will likely look at the trust's loan accounts as a possible source of recovery.

TRAP – A loan with no written terms may be repayable immediately, but this will not always be the case. If directors draw on a loan facility and make repayments over time, the loan may instead be repayable only on demand. In that case, the limitation period does not start until a demand is made.

Citation *Sydney Subdivision Pty Ltd (in liq) v Chow (No 4)* [2026] FCA 1435 (Wheatley J, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2026/1435.html

3.4 QQCS, CZMV, JRFK and Ors - false SMSF auditor disclosures

From 2015 to 2018, QQCS and CZMV were members and individual trustees of a self-managed superannuation fund, together with JRFK and PJXX. On 21 July 2018, WHVG became the fund's corporate trustee.

QQCS was principally responsible for the fund's accounting, taxation and audit arrangements, while CZMV left those matters to her. For the 2015 to 2018 income years, the fund lodged SMSF annual returns stating that a particular registered SMSF auditor had completed the fund's audits on specified dates and had issued unqualified audit reports.

In late 2019, the ATO commenced enquiries and requested copies of the relevant audit reports. The auditor subsequently confirmed that she had never audited the fund. The trustees ultimately accepted that the auditor details, audit completion dates and audit report information recorded in the returns were false.

QQCS prepared and lodged the returns, sometimes asking PJXX to perform the mechanical act of filing them. QQCS acknowledged that no audit reports had been received, that the stated completion dates were incorrect and that she had not been told any unqualified reports had been issued. She described the dates as "placeholder" dates and said she expected the audits to be completed. She nevertheless lodged the returns because she was concerned that failing to do so might result in the fund being treated as non-complying.

In October 2024, the ATO issued penalty assessments based on intentional disregard of a taxation law. The trustees' objections were later disallowed, and they applied to the ART for review on 1 May 2025.

The ART found that the incorrect auditor information was false or misleading in a material particular. The information was not trivial because it was directly relevant to whether the fund had complied with its annual

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audit obligations and retained access to concessional tax treatment. It was unnecessary for the false statements to produce a tax shortfall, a notice of non-compliance or another regulatory consequence before penalties could apply.

The ART also upheld the intentional disregard classification. QQCS repeatedly lodged returns stating that completed, unqualified audit reports existed when she knew they did not. The conduct was deliberate and was intended to avoid the possible consequences of the fund being treated as non-complying. The fact that QQCS was a former tax agent supported the conclusion that she understood the significance of the requirements.

The ART refused to remit the penalties. There was no reliable evidence that the misleading statements resulted from information supplied by the auditor's former firm, or that all relevant years had subsequently been properly audited. The other trustees' lack of personal involvement did not remove their joint and several liability because they had left the fund's compliance affairs to QQCS. The Commissioner's decision was affirmed.

TRAP – Sections 15 and 50-20 of the *Tax Agent Services Act 2009* (Cth) are directed at false or misleading statements made to the Commissioner. Registered tax agents must not make, prepare, permit or direct a statement that they know, or ought reasonably to know, is false or misleading in a material particular, and must take reasonable care in ascertaining a client's state of affairs and ensuring the taxation laws are applied correctly. Lodging an SMSF annual return using placeholder audit details, or other information known to be incorrect at the time of lodgment, may expose the agent to regulatory consequences, even if it is expected that the position will be corrected later.

Citation *QQCS, CZMV, JRFK, PJXX and WHVG and Commissioner of Taxation (Taxation)* [2026] ARTA 2159 (General Member J Dunne, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2026/2159.html

3.5 Handojo – FIRB condition breaches

This case concerned an Indonesian national who acquired vacant residential land in Point Cook, Victoria, subject to foreign investment approval requiring a dwelling to be completed within four years. The Federal Court imposed a substantial civil penalty after the land remained undeveloped for more than five years and Guno Handojo did not participate in the proceedings.

On 26 January 2017, Guno contracted to acquire the land for $290,000. On 28 February 2017, the Treasurer issued a no objection notification under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**), conditional on construction of one or more dwellings within four years. Settlement occurred on 9 March 2017 and Guno later became the registered owner. On 1 March 2021, the condition period expired without any dwelling having been constructed. There was no building permit, planning permit or recorded construction activity, and Guno had not applied to vary the condition.

From February 2022, the ATO repeatedly attempted to contact Guno by post, email and telephone. Its correspondence warned him that he was in breach of the FATA and that the matter could be escalated for a civil penalty. The ATO received no response. On 15 December 2025, the Commissioner of Taxation commenced Federal Court proceedings seeking declarations, a pecuniary penalty and costs. A freezing order was obtained to prevent disposal of the property. Despite being served with the proceeding and multiple Court orders, Guno filed no response, did not appear and took no step in the proceeding.

Justice Michael O'Bryan entered default judgment. His Honour found that the approval was valid, the property was residential land and Guno had failed to satisfy the construction condition. Under the continuing contravention provisions, Guno committed a separate contravention on each day from 1 March 2021. By judgment, the breach had continued for about five and a half years and involved more than 2,000 contraventions.

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The land was valued at $475,000 in April 2026, producing a notional capital gain of $185,000 above its purchase price. Justice O'Bryan considered the lengthy and continuing breach, its effect on the policy of increasing Australian housing supply, the apparent benefit of retaining vacant land in a rising market and Guno's complete failure to cooperate with the ATO. The Court imposed a single penalty of $370,000, being twice the notional capital gain and the current maximum for one contravention. Guno was also ordered to pay costs of $51,021, and the freezing order was extended for 28 days to protect the Commonwealth while a statutory charge was recorded against the property.

COMMENT – There appears to be an active ATO compliance program directed at landowners who obtained FIRB approval subject to development conditions but did not complete the required development within the specified period. Landowners should review the conditions and deadlines attaching to their approval and, if development will not be completed on time, seek a variation before the period expires rather than waiting for ATO compliance action.

Citation *Commissioner of Taxation v Handojo (No 2)* [2026] FCA 1363 (O'Bryan J, Victoria)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2026/1363.html

3.6 Iamiceli – vacant residential land tax (Vic)

The VCAT considered vacant residential land tax assessments issued to Antonio Iamiceli, Carlo Iamiceli and Sandro Iamiceli for seven properties in Spotswood and South Kingsville. The assessments related to the 2020, 2022, 2023 and 2024 land tax years and included penalty tax for notification defaults.

On 7 June 2024, the Victorian Commissioner of State Revenue issued ten assessments imposing vacant residential land tax and, for the earlier years, penalty tax at 20%. The tax assessed ranged from $8,200 to $36,500 for each assessment, with total penalty tax of $26,750. On 1 October 2024, the Commissioner disallowed the brothers' objections. On 21 January 2025, the matters were referred to the VCAT for review.

The brothers argued that none of the properties was habitable and that State Revenue Office officers had told them in telephone conversations during 2018 that vacant residential land tax did not apply to uninhabitable residences. They also raised numerous complaints concerning the investigation and objection processes, including alleged failures to provide procedural fairness.

The VCAT distinguished between properties that were capable of residential occupation and properties that were admittedly uninhabitable. It found that the houses at 54 Hick Street, 40 Birmingham Street and 30 Truman Street remained habitable at the relevant taxing dates, despite some being run-down or offering harsh living conditions. Rental advertisements, photographs and sales material supported the conclusion that the properties were capable of residential use. As the properties had also been unoccupied for more than six months, they were vacant residential land.

The remaining properties had been uninhabitable since at least January 2018. Following legislative amendments effective from the 2020 land tax year, land containing a residence that has remained uninhabitable for at least two years may itself be treated as vacant residential land. The brothers did not identify an acceptable reason why the residences had not been made habitable, so the discretion to treat them as not vacant was unavailable.

The 2018 telephone advice did not prevent the Commissioner from applying the legislation. The advice reflected the law as it then stood, before the amendments concerning long-term uninhabitable residences. The VCAT also declined to remit the penalties because the brothers had not lodged the required annual notices or sought updated guidance after the law changed. The assessments and penalties were confirmed.

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COMMENT – The decision highlights that a property need not be comfortable, compliant with contemporary rental standards or commercially attractive to remain habitable for vacant residential land tax purposes. Owners of unoccupied or deteriorating Victorian residential property should also review their notification obligations annually and should not assume that earlier advice remains reliable following legislative change.

Citation *Iamiceli v Commissioner of State Revenue* [2026] VCAT 763 (Deputy President R Tang AM, Victoria)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2026/763.html

3.7 Hughes – vacant residential land tax holiday home exemption (Vic)

Kevin Hughes and Maria Hughes owned an apartment in Carlton and a terrace house in Carlton North, which was their principal place of residence. They claimed the apartment was exempt from vacant residential land tax as a holiday home under section 88A of the *Land Tax Act 2005* (Vic). The properties were about 2.2 kilometres apart by road. The Commissioner rejected the exemption for the 2020, 2022, 2023 and 2024 tax years.

The VCAT found that the focus of section 88A is whether land was "used and occupied as a holiday home", rather than whether it could ordinarily be described as a holiday home. That question must be assessed by reference to the property's location, its distance from the owner's principal place of residence, and the nature and frequency of its use. Those considerations narrow the ordinary meaning of "holiday home".

The apartment's proximity to the Melbourne CBD, Lygon Street and surrounding amenities was consistent with holiday use. However, the short distance from the Hughes' principal residence did not support the exemption. The relevant distance should be consistent with travel ordinarily undertaken where a person has at least a day available for a holiday. The distance between the two Carlton properties did not meet that description.

Kevin and Maria also failed to establish that they used and occupied the apartment as a holiday home for at least four weeks in each relevant year. Utility bills did not show who used the apartment, when it was used or the nature of the use. The usage log was not supported by photographs, receipts or other contemporaneous documents. The oral evidence was general and did not establish what occurred on the dates recorded in the log. The VCAT therefore confirmed the assessments.

COMMENT – This is the first decision considering the Victorian vacant residential land tax holiday home exemption. It confirms that urban property may qualify as a holiday home, but merely using a second residence for leisure is not enough. Owners should retain contemporaneous evidence showing the dates, duration and holiday character of each stay. Utility bills and a later-prepared usage log may carry little weight without supporting records.

Citation *Hughes v Commissioner of State Revenue* [2026] VCAT 806 (Member P Klank, Victoria)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2026/806.html

3.8 Appeal updates

Sunna

The Full Federal Court dismissed both the taxpayer's appeal and the Commissioner's cross-appeal from *Sunna v Commissioner of Taxation* [2025] FCA 1499. The taxpayer's appeal argued that a capital gain mistakenly assessed in the income year ended 30 June 2020 prevented the Commissioner from assessing the correct gain in the income year ended 30 June 2019. The Court rejected that argument. The Commissioner's cross-appeal argued that section 170(10AA) of the ITAA 1936 permitted the ATO to amend the assessment for the income year ended 30 June 2020 outside the ordinary amendment period. The Court also rejected that argument

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because the amendment merely corrected an error and was not required to give effect to the CGT timing rule in section 104-10(3) of the ITAA 1997.

Citation *Sunna v Commissioner of Taxation* [2026] FCAFC 133 (Hespe, Stellios and Wheatley JJ)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2026/133.html

3.9 High Court special leave applications

Cheung

The High Court refused Mr Cheung special leave to appeal from *Commissioner of Taxation v Cheung* [2026] FCAFC 75, which we covered in our June 2026 training notes. The Full Court held that Mr Cheung had not discharged his onus of proving that more than $30 million deposited into his accounts was not assessable income: *Cheung v Commissioner of Taxation* [2026] HCADisp 257.

Toowoomba Regional Council

The High Court refused Toowoomba Regional Council special leave to appeal from *Commissioner of Taxation v Toowoomba Regional Council* [2026] FCAFC 50, which we covered in our May 2026 training notes. The Full Court held that a car park may be a "commercial parking station" for FBT purposes even if it is not operated for profit: *Toowoomba Regional Council v Commissioner of Taxation* [2026] HCADisp 242.

SKG Cleaning

The High Court refused SKG Cleaning and the related taxpayers special leave to appeal from *SKG Cleaning Services Pty Ltd v Chief Commissioner of State Revenue* [2026] NSWCA 122, which we covered in our July 2026 training notes. The Court of Appeal held that the critical question under the employment agency contract provisions is the connection between the services and the ordinary conduct of the client's business, rather than whether the client controls how the work is performed: *SKG Cleaning Services Pty Ltd v Chief Commissioner of State Revenue* [2026] HCADisp 265.

Vicinity Funds

The High Court refused the Commissioner special leave to appeal from the Victorian Court of Appeal decisions concerning the inclusion of tenant-funded improvements in the unencumbered value of land for duty purposes, which we covered in our June 2026 training notes. The substantive application was refused in *Commissioner of State Revenue v Vicinity Funds RE Ltd & Ors* [2026] HCADisp 249, with related costs applications refused in [2026] HCADisp 248 and [2026] HCADisp 250.

3.10 Other tax and super related cases from 10 Sept 2026 to 10 Oct 2026

Citation	Date	Headnote	Link
Hodgson (Liquidator) v Commissioner of Taxation, in the matter of ACN 009 068 473 Pty Ltd (In Liquidation) (No 2) [2026] FCA 1266	9 September 2026	INSOLVENCY - declaratory orders sought - order sought under s 588FF of the Corporations Act 2001 (Cth) - where admission through signed consent orders - orders granted	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2026/1266.html
Dundovich and Commissioner of Taxation (Practice and	14 September 2026	Practice and procedure – application for reinstatement – proceedings dismissed for failure	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2026/2073.html

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Citation	Date	Headnote	Link
Procedure) [2026] ARTA 2073		to comply with Tribunal directions or proceed with application – first reinstatement application dismissed - whether application dismissed in error – procedural fairness – whether second reinstatement application can be made – circumstances of the dismissal –merits of case- public interest – prejudice - application refused	
Watson v Commissioner of Taxation (No 2) [2026] FCA 1341	14 September 2026	PRACTICE AND PROCEDURE – application for leave to appeal from interlocutory decision – decision of primary judge striking out amended notice of appeal from decision of then Administrative Appeals Tribunal – where amended notice of appeal did not disclose any question of law – where new matters raised on appeal – where applicant self-represented – application dismissed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2026/1341.html
Alexander v Commissioner of State Revenue [2026] QCATA 143	23 September 2026	ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – HOMEBUILDER GRANT – where the appellant applied for home builder grant – where the respondent determined the applicant was not eligible for the grant – where part of the work carried out by a separate contractor at no cost to the builder – where certain materials were supplied by the appellant – where Tribunal at first instance upheld the decision of the respondent – whether there was a comprehensive home building contract – whether respondents entitled to the grant.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCATA/2026/143.html
Deputy Commissioner of Taxation v Rypinski [2026] NSWSC 1084	24 September 2026	TAXES AND DUTIES — collection and recovery of taxes — director penalties for unpaid PAYG tax, superannuation guarantee charges and GST — unpaid personal income tax — no defence pleaded under s 269-35 of Schedule 1 to the Taxation Administration Act 1953 (Cth) and no evidence filed by defendant — evidence facilitated by s 350-10 of	https://www.caselaw.nsw.gov.au/decision/1a0d0f8258f1b313f7a6343b

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Citation	Date	Headnote	Link
		Schedule 1 to the Taxation Administration Act 1953 (Cth) — no issue of principle — able to proceed pursuant to r 29.7 of the Uniform Civil Procedure Rules 2005 (NSW)	
Stevenson v Commissioner of State Revenue [2026] VCAT 792	29 September 2026	General Review – principal place of residence exemption – whether applicant taxpayers exempt from land tax on subdivided title – whether the applicants use and occupy subdivided block as principal place of residence – whether the subdivided block is exempt because it adjoins the applicants' principal place of residence.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2026/792.html
Kerrigan Law Pty Ltd v Commissioner of Taxation [2026] FCA 1438	29 September 2026	PRACTICE AND PROCEDURE – application to amend further amended originating application – where amendments introduce further grounds of judicial review – where additional grounds do not require further evidence – where respondent contends additional grounds are without merit – where merits of grounds can be efficiently addressed at final hearing – where no prejudice identified by respondent – leave granted EVIDENCE – application for leave under s 168(2) of the Evidence Act 1995 (Cth) to make requests under s 167(a) of the Evidence Act 1995 (Cth) – application for direction under s 169(1)(a) of the Evidence Act 1995 (Cth) directing a party to comply with a request – requests to make witnesses available for cross-examination relating to previous representations – whether requests reasonable – leave granted in part	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2026/1438.html
QGJS and Commissioner of Taxation (Practice and procedure) [2026] ARTA 2206	29 September 2026	PRACTICE AND PROCEDURE – review of taxation objection decision – expert report filed by applicant – expert report as filed included copies of letters of instructions from applicant's solicitor to expert – some annexures or attachments to	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2026/2206.html

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Citation	Date	Headnote	Link
		letters of instruction not filed with Tribunal – respondent seeking direction for production of those annexures or attachments – applicant claiming annexures and attachments are subject to privilege – letters of instruction describe annexures and attachments as confidential or subject to privilege - whether applicant waived privilege when expert report was filed with the Tribunal – privilege waived – Tribunal will direct documents be produced.	
Deputy Commissioner of Taxation v Clayton [2026] QSC 236	2 October 2026	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE JUDGMENTS AND ORDERS – GENERAL PRINCIPLES – where defendant applies to set aside a default judgment obtained by the plaintiff in February 2025 – where plaintiff claims for director penalties arising by operation of s 269-10 of the Taxation Administration Act 1953 – where defendant alleges a prima facie defence arises under s 269-35(1) or (2) that the defendant did not participate in the management of the relevant companies or that all reasonable steps were taken to ensure the companies complied with their obligations – where defendant's explanation for delay that she received advice from a solicitor that she did not have a defence – where application brought upon being advised that a potential defence available – whether default judgment should be set aside PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS -- AMENDING, VARYING AND SETTING ASIDE JUDGMENTS AND ORDERS – GENERAL PRINCIPLES – where default judgment obtained despite irregularity in statement of claim –	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QSC/2026/236.html

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Citation	Date	Headnote	Link
		where irregularity conceded – where parties agree appropriate order is to excise portion of judgment which is irregular – whether power to vary judgment should be exercised	
Miocevic v Chief Commissioner of State Revenue [2026] NSWCATAD 304	6 October 2026	REVENUE LAW - State taxes - land tax -objection - appeal - owner - freehold estate in possession - land subject to uncompleted agreement for sale - mortgagee - exemption - principal place of residence - land used for primary production - unfairness - estoppel of revenue - land tax "clearance" certificate - hardship - writing off tax	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2026/304.html
Noureddine and Commissioner of Taxation (Practice and procedure) [2026] ARTA 2261	6 October 2026	TAXATION – income tax – extension of time – objection to assessment and application to treat objection as having been duly lodged refused by Respondent – no jurisdiction to determine a substantive issue in dispute (entitlement to PAYG credits) – extension of time refused.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2026/2261.html
DEPUTY COMMISSIONER OF TAXATION -v- MOYO [2026] WASC 434	7 October 2026	Practice and procedure - Summary judgment - Application for leave to apply for summary judgment pursuant to O 14 r 1 Rules of the Supreme Court 1971 (WA) - Turns on own facts Practice and procedure - Summary judgment - O 14 Rules of the Supreme Court 1971 (WA) - Application for summary judgment for tax-related liabilities - Director penalties - Turns on own facts	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/wa/WASC/2026/434.html
Jin v Chief Commissioner of State Revenue [2026] NSWCATAD 306	8 October 2026	TAXES AND DUTIES — Dutiable transactions — Liability — Double duty — whether transfers satisfied conditions in s 18(3) TAXES AND DUTIES — Administration — Penalty tax — Remission TAXES AND DUTIES — Administration — Interest — Remission	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2026/306.html

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Citation	Date	Headnote	Link
Safarimaznabi v Commissioner of Taxation (No 3) [2026] FCA 1479	8 October 2026	PRACTICE AND PROCEDURE – application under rr 39.04 and 39.05 of the Federal Court Rules 2011 (Cth) to vary or set aside costs order – where costs order made against applicant in respect of respondents' strike out applications – where there was a failure to make submissions on unreasonableness of applicant's conduct in a "no costs" jurisdiction – costs order set aside COSTS – whistleblower protection claims under Taxation Administration Act 1953 (Cth) and Corporations Act 2001 (Cth), and claims under Fair Work Act 2009 (Cth) – whether applicant's conduct leading to the filing of strike out applications was unreasonable – costs order made	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2026/1479.html
Schulz v Commissioner for State Revenue [2026] QCAT 457	9 October 2026	ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – revenue and taxation – whether 'eligible transaction' for first home owner grant – whether property previously sold as place of residence and therefore not a 'new home' ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – revenue and taxation – civil penalties – whether elements of the offence can be satisfied on the balance of probabilities	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCAT/2026/457.html
Macquarie Land Pty Ltd v Commissioner of State Revenue [2026] VCAT 834	9 October 2026	General Review — Applicant assessed to duty on acquisition of land it had contracted to purchase, despite nomination of a subsequent purchaser to complete the purchase, on the basis that it involved a 'sub-sale' — Whether amount received from subsequent purchaser designated as a consultancy services fee was 'additional consideration' for the nomination — Whether the amount was excluded from	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2026/834.html

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Citation	Date	Headnote	Link
		definition of additional consideration as a reimbursement of 'excluded costs' — Applicant has not discharged burden of proof to establish that the amount was received for consultancy services — Assessment confirmed.	
INAS Australia (Italian Welfare) Inc v Commissioner of State Revenue [2026] VCAT 779	12 October 2026	General Review – exemption from stamp duty for transfer of property to a charity – whether the applicant was established for an educational purpose – failure of applicant to discharge onus to prove that it was charitable.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2026/779.html

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4. Federal Legislation

4.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Treasury Laws Amendment (Strengthening Accountability for Tax Adviser Misconduct and Other Measures) Bill 2026	2/7	20/08	7/9	10/9	15/9

4.2 2026 Budget reforms – 30% minimum tax on trusts (Updated)

On 14 October 2026, the Treasury Laws Amendment (Tax Reform No. 3) Bill 2026 (**Assessment Bill**) and the Income Tax Rates Amendment (Minimum Tax on Discretionary Trusts) Bill 2026 (**Income Tax Rates Bill**) were introduced into Parliament. We will provide a full summary of the proposed reforms, beginning with an explanation of what has changed from the exposure draft materials.

Changes from the exposure draft materials

The Bills retain the broad structure of the exposure draft minimum tax regime, but make a number of material changes. The most important change is that a trust is a minimum tax trust if it is a minimum tax trust at any time during the income year, rather than only at year end.

The Assessment Bill:

1. also adds new excluded trust categories, including employee share trusts, approved worker entitlement funds and certain thin capitalisation special purpose entities;
2. expands the Minister's exemption power to cover widely held trusts and collective investment structures;
3. modifies the testamentary trust exclusion to permit trustees of special disability trusts;
4. revise the charity and exempt entity exclusions so that they are tested when the beneficiary is presently entitled and by reference to the beneficiary's share of adjusted net income;
5. amends the new fixed trust test by asking whether material discretionary elements are capable of significantly affecting rights to income or capital. Governance rights are also narrowed, redemption powers and majority or special resolution amendment processes are recognised. The Minister has expanded determination powers, including conclusive determinations instead of just matters that 'suggest' fixed status;
6. introduces a new share of adjusted net income concept for capital gains and franked distributions; and
7. adds specific rules for non-resident withholding amounts, related franking credits and conduit foreign income.

The Bills also include a more developed top-up tax mechanism and franking credit integrity rules so that tax paid or credits used at the trustee level are properly coordinated with beneficiary offsets.

Overview

The Bills introduce a 30% minimum tax on the net income of minimum tax trusts for income years starting on or after 1 July 2028. The tax is imposed on the trustee and operates as a top-up tax: where another provision

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already taxes the relevant income at 30% or more, no further tax is imposed; where the existing trustee-level tax is less than 30%, the minimum tax applies only to the shortfall.

The measure is stated to be directed at discretionary trust income that can otherwise be streamed, accumulated or distributed in a way that produces a tax rate below the rate paid by many workers. It does not apply to all trusts. The Bills use the new concept of a "minimum tax trust" and then exclude a range of trust structures and categories of income.

Which trusts are affected?

A trust is a minimum tax trust at a particular time during an income year if, at that time, it is not one of the excluded categories. This is broader than the exposure draft, which tested status at the end of the income year. A temporary change in status during the year may therefore be sufficient to bring the trust within the regime for that income year.

The following trusts are expressly excluded:

1. fixed trusts (the definition of which is discussed further below);
2. deceased estates;
3. special disability trusts;
4. complying superannuation entities;
5. certain thin capitalisation special purpose entities;
6. employee share trusts;
7. approved worker entitlement funds; and
8. any other class of trust prescribed by legislative instrument.

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

Minimum tax income

The minimum tax applies to the trust's "minimum tax income". Broadly, the calculation starts with the trust's net income and then removes excluded income and excluded beneficiary shares. For capital gains and franked distributions, the Assessment Bill determines the excluded amount by reference to the beneficiary's share of adjusted net income. This is intended to align the minimum tax calculation with the existing rules for allocating capital gains and franked distributions between beneficiaries.

Excluded income includes:

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

For registered charities and deductible gift recipients, the exclusion is tested at any time during the income year when the entity is presently entitled to income of the trust estate. For exempt entities that are not registered charities or deductible gift recipients, the Assessment Bill allows the Minister to determine conditions and caps for the exclusion. The introduced Bill also shifts the calculation from a share of net income to a share of adjusted net income.

Qualifying testamentary trusts

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

The Bills exclude certain testamentary trust income from minimum tax income. The exclusion applies to net income derived from particular assessable income if:

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

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

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

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

1. it was derived directly or indirectly under a scheme entered into or carried out for a purpose that included obtaining the testamentary trust exclusion; or
2. the Commissioner is satisfied that property entered the trust, directly or through replacement property, under a scheme intended both to place the property in the trust and obtain the exclusion.

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

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

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

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

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

New fixed trust definition

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

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

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

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

The Assessment Bill sets out a non-exhaustive list of matters relevant to whether a trust has discretionary elements capable of significantly affecting a beneficiary's entitlements or rights to income or capital. These include:

1. beneficiaries have clearly defined, specific and enforceable entitlements or rights to all of the trust's income and capital;
2. beneficiaries have clearly defined, specific and enforceable rights concerning the governance of the trust;
3. any rules applying to those entitlements or rights are not discretionary;
4. any power to vary beneficiaries' entitlements or rights cannot be exercised to significantly vary existing entitlements or rights, or significantly affect the value of existing beneficiaries' interests;
5. any power to issue new entitlements or rights to one or more beneficiaries cannot be exercised to significantly vary existing entitlements or rights, or significantly affect the value of existing beneficiaries' interests;
6. any power to issue new interests in the trust cannot be exercised to significantly vary existing entitlements or rights, or significantly affect the value of existing beneficiaries' interests;
7. any power dealing with administrative matters cannot be exercised to significantly vary existing entitlements or rights, or significantly affect the value of existing beneficiaries' interests;
8. any power to vary the trust instrument can only be exercised with the consent of all beneficiaries, or in a way that cannot adversely affect beneficiaries' entitlements or rights; and
9. any other matter prescribed by the Minister indicates that there are no material discretionary elements affecting beneficiaries' entitlements or rights.

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

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

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

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

Beneficiary tax offset

To address double taxation concerns, non-corporate beneficiaries may receive a non-refundable tax offset equal to 30% of the beneficiary's share of the minimum tax income. The offset is calculated by reference to the beneficiary's share of adjusted net income that is reasonably attributable to the trust's minimum tax income. The offset is not available to corporate beneficiaries or to exempt entities when they are presently entitled to income of the trust estate.

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

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

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

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

Franking credits

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

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

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

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

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

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4. the corresponding balance of the franking credit may also flow through to beneficiaries under the existing rules.

Consequential changes to Divisions 6E and 207

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

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

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

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

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

COMMENT – This changes the character of the benefit received by a non-corporate beneficiary. The beneficiary receives a non-refundable minimum tax offset rather than the refundable franking credit that would otherwise flow through the trust.

Rate of tax

The proposed Income Tax Rates Bill establishes the mechanism for imposing the tax. The regime operates as a top-up system.

Broadly:

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

Proposed commencement

The amendments made by Schedule 1 apply in relation to assessments for income years starting on or after 1 July 2028. Schedule 1 commences at the same time as the accompanying rates legislation and does not commence if that Act does not commence.

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4.3 2026 Budget reforms – roll-over relief for trusts (Updated)

The roll-over relief measure in the Assessment Bill is largely the same as was provided in the exposure draft materials.

Who can access the roll-over?

Broadly, the roll-over is available where:

1. assets are transferred by the trustee of a minimum tax trust;

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

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

All assets requirement

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

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

1. assets that cannot legally be transferred;
2. any CGT asset used to generate assessable income from carrying on a primary production business;
3. assets required to satisfy trust liabilities;
4. assets required for winding-up costs; and
5. low-value assets costing $1,000 or less at the time they were acquired. In the Assessment Bill, this also covers an asset forming part of a set that cost $1,000 or less, and identical or substantially identical assets whose combined cost was $1,000 or less; and

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

Choice requirements

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

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

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

Continuity requirements

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

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

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

immediately before the restructure.

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For trusts that are not family trusts, continuity requirements will be prescribed by legislative instrument. As introduced, a family trust that does not satisfy the family trust continuity requirements may also rely on requirements determined by the Minister. These alternative pathways do not apply unless a determination is in force. Treasury has indicated this approach is intended to accommodate the wider range of beneficiary arrangements that may exist outside family trust structures.

Residency requirements

To qualify for relief:

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

Tax consequences

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

The inherited tax cost broadly equals:

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

The draft also provides:

1. continuity of depreciation outcomes;
2. continuity of small business roll-over history;
3. preservation of 15-year exemption and significant individual ownership periods, and (new in the Assessment Bill) continuity of the active asset test history for the small business CGT concessions; and
4. relief from family trust distribution tax on qualifying transfers.

Material discretionary elements

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

The roll-over will be clawed back if the transferee is covered by new section 126-935 at any time during a review period starting on the day after the final required asset transfer and ending four income years after the income year of that transfer.

As introduced, an entity (other than an individual) is covered if there are material discretionary elements capable of significantly affecting members' rights or interests to income or capital of the transferee. Importantly, the test also looks through to members of interposed entities where ultimate economic ownership is held indirectly.

COMMENT – This addresses what was seen as a planning opportunity under the exposure draft materials.

The following features are generally consistent with fixed and transparent economic ownership:

1. clearly defined and enforceable rights to income, capital and governance;
2. amendment powers that cannot materially affect existing rights;

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3. powers to issue, redeem or extinguish interests that cannot materially dilute or vary existing interests; and
4. amendment mechanisms requiring unanimous consent or that cannot adversely affect members.

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

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

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

Proposed commencement

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

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

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

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

Failure to satisfy any condition may permit the Commissioner to amend prior assessments and reverse the benefit of the roll-over. The transferor and transferee must each notify the Commissioner if the restructure is not completed or a condition is not met, and the Bill notes that failure to do so may constitute an offence under subsection 8C(1) of the TAA 1953.

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4.4 2026 Budget reforms – EET regime for trusts (Updated)

The Assessment Bill also introduces the proposed "excluded election trust" (**EET**) election for trusts that exist on 1 July 2028.

Overview

The proposal allows trustees to nominate beneficiaries (and, as introduced, eligible classes of charities and deductible gift recipients) and fixed entitlement percentages. So long as the trustee confers entitlements to income and “non-income earnings” consistently with that nomination, the trust is excluded from the minimum tax regime. Non-income earnings are amounts included in the trust’s assessable income that are not income of the trust, such as net capital gains, and replace the exposure draft’s reference to capital.

Who can make the election?

The election is available only to discretionary trusts that:

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

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

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

An EET election must be notified to the Commissioner in the approved form by the earlier of the return lodgment due date and the actual lodgment date for the income year in which the election is made. Once made, it is in force from the first day of the trust’s first income year commencing on or after 1 July 2028 and continues until it is revoked. Revocation includes automatic revocation if the trust vests or is wound up.

The EET election

1. each beneficiary or eligible class of beneficiary (deductible gift recipients or registered charities) who may become presently entitled, or specifically entitled, to a share of both the income and non-income earnings of the trust;
2. the proportion of income allocated to each beneficiary; and
3. an identical proportion of non-income earnings allocated to that beneficiary.

Collectively, the nominated percentages must equal 100% of both trust income and non-income earnings. If a nominated beneficiary becomes entitled to corpus, that share must be equivalent to its nominated share of income and non-income earnings.

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

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

Eligible beneficiaries

Only beneficiaries capable of benefiting under the trust deed as it existed on 1 July 2028 can generally be nominated. Similarly, an eligible class of beneficiary can only be nominated if persons of that class were

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capable of benefiting on 1 July 2028. Beneficiaries introduced through later deed amendments cannot ordinarily be added to the nomination.

The following entities cannot be nominated:

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

Trusts and companies may be nominated.

Eligible companies

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

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

Factors indicating that a company is eligible include:

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

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

Effect of the election

While an EET election remains in force:

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

To maintain the election, each nominated beneficiary must become presently or specifically entitled to income and an equivalent share of non-income earnings in accordance with the nomination every year. Where an eligible class is nominated, one or more members of that class must become so entitled, and the amounts must be paid or applied for their benefit before the end of the following income year.

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

Varying the nomination

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

The nomination may only be varied in two circumstances:

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

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

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

Revoking the election

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

The election is also automatically revoked if:

1. the trust itself is wound up or vests;
2. entitlements, payments to eligible class members or corpus entitlements are not made consistently with the nomination (other than an entitlement failure in a year where income and non-income earnings are nil but net income is positive);
3. a nominated company beneficiary is wound up, deregistered, is no longer capable of benefiting or ceases to satisfy section 102UYD; or
4. a nominated company beneficiary has a shareholder who held a share when the company was nominated, and that shareholder later ceases to hold that share for a reason that is not an allowable reason.

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

As introduced, the trustee must notify the Commissioner of any revocation event, and failure to do so may be an offence.

The Commissioner may also, on application, determine that an entitlement, payment or corpus failure does not cause revocation where revocation would be unreasonable, having regard to matters such as inadvertence, quantum and mitigation. A refusal is objectionable under Part IVC.

Consequences of revocation

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

1. beneficiaries are deemed never to have been presently entitled to trust income or non-income earnings, or specifically entitled to capital gains or franked distributions, for that income year (this does not apply where revocation is due to the trust vesting or being wound up);
2. the trustee is assessed on the trust's entire net income; and
3. the trust becomes subject to the minimum tax regime in future years. Where revocation results from a payment failure for an eligible class, the election ceases to be in force from the end of the second income year before the year of revocation.

The Explanatory Memorandum states that trustee taxation will occur at the top marginal tax rate under section 99A in the year of revocation.

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

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

TRAP – Trustees will need to carefully consider whether making an EET election is consistent with their duties to all beneficiaries. Although the election may reduce or avoid the proposed minimum tax, it effectively

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requires the trustee to lock in nominated beneficiaries and fixed income and capital percentages, albeit only for tax purposes. That may advantage some beneficiaries while excluding or disadvantaging others who remain within the beneficiary class under the trust deed. A trustee should therefore consider the terms and purpose of the trust, the circumstances of all relevant beneficiaries and whether making the election involves a proper exercise of trustee power, rather than merely pursuing the lowest overall tax outcome for certain members of the group.

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

Proposed commencement

The EET regime applies to income years commencing on or after 1 July 2028. Trustees wishing to use the regime must make the election during their first income year commencing on or after that date and the election must be notified to the Commissioner in the approved form by the earlier of the return lodgment due date and the actual lodgment date for the income year in which the election is made..

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

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4.5 2026 Budget Reforms – CGT and negative gearing Tranche 2

The Tranche 2 CGT and negative gearing measures have now been introduced into Parliament. The exposure draft materials for these measures were covered in our August 2026 Tax Training Notes.

Any significant changes from the exposure draft materials will be covered in our November 2026 Tax Training Notes.

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

4.6 2026 Budget Reforms – IBCC exposure draft legislation

Treasury has released exposure draft legislation for the proposed Innovative Business CGT Concession (IBCC). The concession is intended to preserve incentives for early investment in innovative start-ups following the broader CGT reforms applying from 1 July 2027.

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Overview

The draft provides a 50% CGT discount for eligible capital gains arising from qualifying interests in innovative start-up companies. The discount applies to CGT events happening on or after 1 July 2027. It is also available for qualifying interests issued before that date under transitional rules.

The minimum tax on capital gains will not apply to a gain that qualifies for the IBCC discount. An eligible taxpayer may instead choose cost base indexation. If that choice is made, the IBCC discount does not apply and the gain may be subject to the minimum tax rules.

Who can claim the discount?

The discount is available to an entity that:

1. is not a company;
2. is not a complying superannuation entity;
3. is not a foreign resident when the CGT event happens;
4. makes the gain directly, through an eligible trust or partnership, or from qualifying carried interest;
5. has not chosen cost base indexation; and
6. derives the gain from an IBCC asset that is not disqualified when the CGT event happens.

Eligible trusts include managed investment trusts and trusts other than superannuation funds and public unit trusts. The Government is continuing to consider how the direct issue and continuity requirements should apply to managed investment trusts, attribution managed investment trusts and other widely held trusts.

IBCC assets

An IBCC asset is broadly:

1. a share;
2. an option or warrant originally issued to acquire a share; or
3. a convertible note that is not a debt interest.

The asset must generally:

1. be genuinely at risk, with no arrangement protecting its value or return;
2. be issued directly by the company rather than acquired from another investor;
3. be issued when the company qualifies as an IBCC company; and
4. be held for at least three years.

The three-year holding requirement does not apply where the interest, together with all or substantially all similar interests in the company, is acquired under a takeover or similar scheme.

Special rules preserve the holding period and original issue treatment where:

1. an option or convertible note is converted into shares;
2. an eligible replacement asset rollover applies;
3. an asset passes from a deceased spouse; or
4. an asset is transferred following a relationship breakdown.

Most replacement asset rollovers are covered. However, the rules exclude the Division 122 wholly-owned company rollovers and the Subdivision 124-M scrip-for-scrip rollover.

Assets acquired through an employee share trust may qualify under modified direct issue requirements. This allows the concession to apply where an employee acquires an interest under an employee share scheme through, or from, an employee share trust.

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TRAP – Acquiring shares from a founder or another investor will generally not qualify. Except for specified employee share trust and rollover arrangements, the interest must be issued directly by the company. Secondary market acquisitions are therefore outside the concession.

TRAP – The status of an asset must be checked both when it is issued and when the CGT event happens. The company must qualify as an IBCC company at issue, while the asset must not be disqualified at disposal. Satisfying the initial requirements does not secure the concession permanently.

IBCC companies

A company will broadly qualify as an IBCC company if it:

1. was incorporated under Australian law less than 15 years ago;
2. is not affiliated with an entity incorporated under Australian law 15 or more years ago;
3. is not listed on a stock exchange;
4. had aggregated turnover not exceeding $50 million for its most recent earlier income year;
5. is an Australian resident;
6. has at least 50% of its service providers working primarily in Australia;
7. has at least 50% of its assets by value situated in Australia;
8. satisfies the innovative company test;
9. satisfies the predominant activity test; and
10. is registered with the Industry Secretary.

The innovative company test requires the company to be genuinely focused on commercialising a new or significantly improved product, process, service, marketing method or organisational method. The company must also demonstrate high growth potential, scalability, access to broader than local markets and competitive advantages.

The Industry Secretary may determine safe harbour conditions by legislative instrument. A company satisfying a safe harbour will be taken to meet the relevant part of the innovative company test, but will not automatically qualify as an early stage innovation company.

COMMENT – Registration does not conclusively establish that a company is an IBCC company. The draft expressly allows the Commissioner to determine entitlement when assessing the investor. Registration may also be cancelled retrospectively, with affected assessments amended outside the ordinary amendment periods.

Predominant activity test

The company must be engaged in activities relating to developing or commercialising its innovation. It must also satisfy at least two of the following tests:

1. more than 75% of relevant assets are used primarily in eligible innovation activities;
2. more than 75% of relevant employees are engaged primarily in those activities; or
3. more than 75% of relevant income is derived from those activities.

The thresholds apply across the company and entities it controls.

The company must also intend to continue an eligible innovation activity for five years after first registering. A reasonable person in the company's position must not expect that activity to cease during that period, except because of insolvency.

Ineligible activities include:

1. property development and land ownership;

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2. banking, providing capital, leasing, factoring and securitisation;
3. insurance;
4. infrastructure construction or acquisition;
5. passive investments directed to interest, rent, dividends, royalties or lease payments;
6. certain gambling technology; and
7. certain tobacco and vaping technology.

Developing technology for use in finance, insurance or investment activities is not itself excluded. Ancillary or incidental activities relating to that technology development are also permitted.

Proposed safe harbours for existing start-ups

A separate draft legislative instrument provides objective conditions for companies incorporated before 1 July 2027. The conditions operate as safe harbours for the five elements of the innovative company test.

A company may establish a genuine commercialisation focus by satisfying either:

1. an R&D expenditure test, requiring qualifying R&D expenditure of at least 30% of expenses for the most recent income year or 15% across the three most recent income years; or
2. an intellectual property commercialisation test, requiring enforceable rights to commercialise relevant intellectual property and active steps towards commercialisation.

High growth potential may be demonstrated through one or more of the following:

1. at least $200,000 of cash equity investment from unassociated wholesale or sophisticated investors;
2. investment from an eligible venture capital vehicle;
3. an employee share scheme with at least a 10% equity allocation when established;
4. turnover growth of at least 30% across three income years; or
5. at least three qualifying contracts with independent customers.

Scalability may be demonstrated through completion of a qualifying accelerator program, an employee share scheme or eligible venture capital investment.

Access to broader than local markets may be demonstrated through:

1. a relevant regulatory approval;
2. a written commitment from an overseas customer or partner;
3. at least $100,000 of export revenue in the most recent income year;
4. a relevant overseas R&D finding; or
5. intellectual property applications in at least two jurisdictions.

Competitive advantage may be demonstrated through a qualifying research collaboration, satisfaction of the intellectual property commercialisation condition or qualifying customer contracts.

COMMENT – The proposed safe harbours may provide a more practical route than proving the principles-based innovation requirements directly. However, each of the five elements of the innovative company test must be satisfied. A company may need to rely on different conditions for different elements.

Registration and annual reporting

A company must apply to the Industry Secretary to register as an IBCC company. The application must be in the prescribed form, contain satisfactory information and be accompanied by any prescribed fee.

If the Industry Secretary does not decide an application within 60 days, excluding periods spent waiting for requested information, the application is taken to have been refused.

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Registration can have retrospective effect. Broadly, a later registration can support interests issued earlier if the company meets the substantive requirements and, when it registers, notifies the Industry Secretary and each holder of an intended IBCC asset.

A registered company must provide an annual report within the period set by the Industry Secretary. That period must be at least 30 days after the end of the income year.

Registration is automatically suspended if the company fails to lodge an annual report on time. While suspended, the company is treated as not having been registered for the relevant income year. Registration is restored retrospectively if the report is lodged before cancellation occurs.

Registration is automatically cancelled if the report remains outstanding at the start of the next income year. A late report can reverse the cancellation if the delay resulted from exceptional circumstances beyond the company's control and the other requirements are satisfied.

TRAP – A company's annual reporting default can affect assessments already made to investors. Suspension or cancellation may remove the discount retrospectively, and the ordinary amendment period does not prevent the Commissioner from amending an assessment to reflect that outcome.

The Industry Secretary may also cancel registration if:

1. the company did not qualify when registered;
2. registration was obtained by fraud or serious misrepresentation;
3. an annual report involved fraud or serious misrepresentation; or
4. registration or annual reporting was based on untrue, incorrect or incomplete information.

Where cancellation relates to initial eligibility or the registration application, the company may be treated as never having been registered. The Commissioner may amend affected income tax assessments despite the ordinary amendment periods.

Disqualified assets

An IBCC asset will be disqualified when the relevant CGT event happens if:

1. the company has ceased to satisfy the predominant activity test;
2. the company's registration has ceased to have effect; or
3. the Industry Secretary has made a disqualification determination.

A company that satisfied the predominant activity test for at least 20 years is protected from disqualification merely because it later ceases to meet that test.

The Industry Secretary may make a disqualification determination where it reasonably believes the company has ceased to satisfy the predominant activity test or its registration has ceased, and this is likely to continue for at least the next income year. The company must notify each holder of an IBCC asset after receiving notice of the determination.

Carried interests

The 50% discount can apply to CGT event K9 gains arising from carried interests held by general partners in VCLPs, ESVCLPs and AFOFs, and limited partners in VCMPs. The gain must be reasonably attributable to an IBCC asset held by the relevant venture capital vehicle for at least three years.

If only part of the carried interest gain is attributable to IBCC assets, the concession applies only to that part.

Rulings and review rights

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The Industry Secretary may issue public and private rulings about:

1. whether a company is an IBCC company; and
2. whether a CGT asset is a disqualified asset.

A private ruling concerning a company may also apply to holders of interests issued by that company and beneficiaries of trusts holding those interests. A ruling binds both the Industry Secretary and the Commissioner where it applies to an entity and the entity acts, or does not act, in accordance with it.

The Commissioner cannot issue a ruling on a matter to the extent that the Industry Secretary has power to rule on it. However, the Commissioner remains responsible for administering the tax law and assessing claims for the IBCC discount.

Reviewable decisions include registration refusals, disqualification determinations, decisions about late annual reports, cancellation decisions and private ruling decisions. A company generally has 28 days to seek internal review. An internal review decision may then be reviewed by the ART.

Transitional rules

The transitional rules extend the concession to qualifying assets issued before 1 July 2027. The relevant company must register before the CGT event, but it need not have been registered when it issued the asset.

Broadly, the company must:

1. have been incorporated under Australian law for less than 15 years on 30 June 2027;
2. not be affiliated with an entity incorporated under Australian law 15 or more years ago;
3. be unlisted when registered, unless it was listed before 11 September 2026;
4. be an Australian resident when registered;
5. have at least 50% of its service providers and assets in Australia when registered;
6. have aggregated turnover not exceeding $50 million for the later of the income year ended 30 June 2026 and its year of incorporation; and
7. have satisfied the innovative company and predominant activity tests for that income year.

COMMENT – The concession depends significantly on the conduct of the company, although the tax benefit belongs to investors. A company's failure to lodge an annual report, maintain its innovative activities or provide accurate registration information may cause investors to lose the discount. Investors may therefore require contractual reporting, notification and indemnity protections.

w https://consult.treasury.gov.au/c2026-801619
w https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/exposure-draft-legislation-tax-reforms-support

4.7 2026 Budget Reforms – Venture capital tax incentives

The Treasury Laws Amendment (Tax Reform No. 3) Bill 2026 (Bill) includes amendments to expand the venture capital tax concessions available through Venture Capital Limited Partnerships (VCLPs) and Early Stage Venture Capital Limited Partnerships (ESVCLPs). The reforms respond to higher business valuations and larger funding rounds in the modern start-up sector while maintaining the venture capital regime's focus on high-growth businesses.

Changes from the exposure draft materials

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The Bill retains the substantive settings in the exposure draft materials. The commencement date of 1 July 2027, the increased VCLP and ESVCLP investee asset thresholds, the increased ESVCLP committed capital cap, the increased threshold for the full ESVCLP tax exemption and the closure of the Eligible Venture Capital Investor program to new applications are unchanged. The principal change is that the measures are now contained in a Bill introduced into Parliament rather than exposure draft legislation.

Overview

From 1 July 2027, the Bill:

1. increases the asset value thresholds for eligible investee entities;
2. increases the maximum committed capital for ESVCLPs;
3. increases the asset threshold for full ESVCLP tax exemptions; and
4. closes the Eligible Venture Capital Investor (**EVCI**) program to new applications.

Increased investee asset thresholds

The Bill increases the maximum asset values that an investee entity (and its connected entities) may have immediately before receiving venture capital investment:

Investment vehicle	Current threshold	Proposed threshold
VCLP	$250 million	$480 million
ESVCLP	$50 million	$80 million

The thresholds apply when the investment is made and apply to both new investments and follow-on investments made on or after 1 July 2027.

Increased ESVCLP committed capital cap

The maximum committed capital for an ESVCLP increases from $200 million to $270 million. Committed capital is the amount investors have committed to contribute to the partnership.

The increase applies to both existing and new ESVCLPs from 1 July 2027. It also applies to registration applications that have been lodged but not determined by that date.

Expanded ESVCLP full exemption threshold

Limited partners in an ESVCLP are currently entitled to a full exemption for qualifying gains only while the investee's asset value remains below a specified threshold. Once that threshold is exceeded, only a partial exemption is available.

The Bill increases that threshold from $250 million to $420 million. This means start-ups can grow substantially larger before investors lose access to the full ESVCLP exemption.

Importantly, this threshold applies throughout the investment period, not merely when the initial investment is made.

Closure of the EVCI program

The Bill closes the EVCI program to new applications made after 7.30 pm (AEST) on 12 May 2026.

The amendments do not remove existing EVCI arrangements and are directed only at new applications.

Commencement

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The amendments commence on the first 1 January, 1 April, 1 July or 1 October after Royal Assent and apply from 1 July 2027.

The increase to the ESVCLP committed capital cap applies to:

1. existing ESVCLPs;
2. new ESVCLPs; and
3. registration applications that are on foot but undecided at 1 July 2027.

COMMENT – The reforms are directed primarily at inflation and growth in start-up valuations since the existing thresholds were introduced. The changes should make it easier for venture capital funds to continue funding successful businesses through later funding rounds without losing tax concessions.

TRAP – The eligibility thresholds for VCLP and ESVCLP investments continue to be tested immediately before the investment is made. An entity that exceeds the applicable threshold at that time remains outside the concession despite otherwise meeting the venture capital requirements. Independent valuations may be required to evidence the asset values at the relevant investment time.

4.8 2026 Budget Reforms – FBT for EVs exposure draft legislation

Treasury has released exposure draft legislation to phase out the current FBT exemption for eligible electric vehicles and replace it with a concessional FBT regime. The reforms implement the Government's response to the statutory review of the electric car discount and are intended to reduce the fiscal cost of the concession while continuing to support electric vehicle adoption.

Overview

The draft creates three periods:

1. 1 July 2022 to 31 March 2027: existing eligible electric cars remain fully exempt from FBT;
2. 1 April 2027 to 31 March 2029: eligible electric cars receive either a 100% or 25% FBT discount depending on value;
3. from 1 April 2029: only a 25% FBT discount remains available.

Existing arrangements entered into before the relevant transition dates are generally grandfathered until the commitment ends.

What vehicles qualify?

The concession applies only to battery electric vehicles and hydrogen fuel cell electric vehicles.

The vehicle must also:

1. be provided as a car benefit to a current employee; and
2. have a base value not exceeding the fuel-efficient car limit when first acquired or leased by the employer.

Level of concession

For commitments made on or after 1 April 2027, the level of concessions are as follows, depending upon when the commitment is made:

Base value	1 April 2027 to 31 March 2029	From 1 April 2029

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$75,000 or less	100% FBT discount	25% FBT discount
$75,001 to fuel-efficient car limit	25% FBT discount	25% FBT discount
Above fuel-efficient car limit	no concession	no concession

Under the statutory formula method, the normal statutory fraction of 20% is reduced accordingly. A 100% reduction produces a taxable value of nil. A 25% reduction reduces the statutory fraction from 0.20 to 0.15.

Grandfathering of existing arrangements

The current FBT exemption will continue for vehicles provided under commitments made before 1 April 2027 until the relevant commitment ceases.

Examples of events that may create a new commitment include:

1. refinancing a vehicle;
2. entering a new novated lease;
3. changing lease terms;
4. increasing lease payments to fund accessories; or
5. changing employers.

Where a new commitment arises, the vehicle moves into the new concessional regime.

Reportable fringe benefits

The concession reduces FBT payable but does not reduce an employee's reportable fringe benefits amount. The reportable amount continues to be calculated as if the normal 20% statutory fraction applied.

TRAP – Grandfathering depends on the continuation of the original commitment. Refinancing, replacing a novated lease, changing employers or materially altering the arrangement may terminate the existing exemption and move the vehicle into the new concessional regime.

TRAP – The relevant threshold is the vehicle's base value when first held by the employer, not its later market value. A vehicle that exceeds the fuel-efficient car limit receives no concession, regardless of its later value.

w https://consult.treasury.gov.au/c2026-800622
w https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/exposure-draft-legislation-tax-reforms-support

4.9 2026 Budget Reforms – R&D tax incentive exposure draft legislation

Treasury has released exposure draft legislation to refocus the Research and Development Tax Incentive (RDTI) on higher-impact R&D activity. The reforms form part of the Government's response to the Ambitious Australia review and are intended to simplify the regime, encourage larger-scale R&D investment and moderate growth in the fiscal cost of the incentive.

Overview

The exposure draft:

1. increases the minimum and maximum expenditure thresholds;
2. increases the turnover threshold for the refundable offset;

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3. restricts refundable offsets to younger entities;
4. increases R&D offset rates;
5. reduces the R&D intensity threshold;
6. creates special rules for therapeutic goods research; and
7. removes eligibility for supporting R&D activities.

Expenditure thresholds

The minimum expenditure threshold increases from $20,000 to $50,000. Businesses with less than $50,000 of eligible R&D expenditure will generally no longer qualify for the incentive. Existing concessions for expenditure through research service providers and CRCs are retained.

The maximum expenditure eligible for premium offset rates increases from $150 million to $200 million. Expenditure above that threshold remains eligible only for an offset equal to the entity's corporate tax rate.

Refundable offsets

The aggregated turnover threshold for access to the refundable offset increases from $20 million to $50 million.

However, refundable offsets become limited to younger entities. Broadly, an entity can access the refundable offset only if at least one day in the relevant income year occurs before the tenth anniversary of the earlier of:

1. first carrying on an enterprise; or
2. first registration for R&D activities.

Entities that exceed the ten-year period but remain below the $50 million turnover threshold continue to receive the highest offset rate, but on a non-refundable basis.

Therapeutic goods concession

A longer refundable period applies to certain life sciences entities.

Where the dominant purpose of the relevant R&D activities is generating new knowledge about therapeutic goods or therapeutic uses of therapeutic goods, the refundable period extends from 10 years to 15 years.

To access the extension:

1. the entity must have registered qualifying R&D activities within its first ten income years; and
2. the dominant purpose requirement must be satisfied.

The legislation introduces a new process under which the Industry Innovation and Science Australia Board can make binding findings about whether activities satisfy the dominant purpose test. Those findings will bind the Commissioner and may affect refundability.

Offset rates

All offset premiums increase by 4.5 percentage points.

The key rates become:

1. refundable offset: corporate tax rate plus 23 percentage points;
2. lower intensity non-refundable offset: corporate tax rate plus 13 percentage points;
3. higher intensity non-refundable offset: corporate tax rate plus 21 percentage points; and
4. R&D intensity threshold.

The intensity premium threshold falls from 2% to 1.5% of total expenses. This reduces the level of R&D expenditure required before an entity can access the higher intensity premium rate.

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Removal of supporting R&D activities

The most significant structural change is the abolition of supporting R&D activities.

The existing distinction between:

1. core R&D activities; and
2. supporting R&D activities,

is removed. The concept of "core R&D activities" is renamed simply "R&D activities".

An activity will no longer qualify merely because it supports, or is directly related to, another qualifying R&D activity. The activity must itself satisfy the substantive R&D activity requirements.

Transitional arrangements

The amendments generally apply for income years commencing on or after 1 July 2028.

Transitional rules preserve access to existing supporting R&D activity claims that relate to periods before 1 July 2028. Existing registrations and findings relating to earlier years also continue to have effect in certain circumstances.

COMMENT – The therapeutic goods rules appear intended to address the long development cycles commonly associated with pharmaceuticals, medical devices and biotechnology. Entities in those sectors may retain refundable benefits for substantially longer than other R&D claimants.

TRAP – The removal of supporting R&D activities is likely to materially reduce eligible expenditure for many claimants. Activities that previously qualified because they directly supported experimental activities will need to independently satisfy the R&D activity definition.

TRAP – Businesses approaching the tenth anniversary of commencing an enterprise, or first registering for R&D activities, may lose access to refundable treatment despite remaining below the $50 million turnover threshold. The offset may continue to be available, but only as a non-refundable offset.

w https://consult.treasury.gov.au/c2026-792804
w https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/exposure-draft-legislation-tax-reforms-support

4.10 Exposure draft legislation on PAYGI monthly instalments

Treasury has released exposure draft legislation allowing entities to voluntarily pay PAYG instalments monthly and giving the Commissioner power to require certain non-compliant entities to move to monthly instalments. The reforms are intended to improve cash flow management and strengthen tax compliance.

Overview

Under the current rules, entities generally pay PAYG instalments quarterly unless they qualify as annual payers or satisfy the compulsory monthly payer test (currently based on instalment income exceeding $20 million).

The exposure draft introduces two new categories of monthly payer:

1. entities that voluntarily opt in to monthly instalments; and
2. entities required to pay monthly because of a Commissioner determination.

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Voluntary monthly payments

Entities that pay PAYG instalments will be able to choose monthly payments by notifying the Commissioner in the approved form. Commissioner approval is not required.

The choice takes effect from the start of the entity's next income year. An entity cannot switch to monthly payments part-way through an income year.

An entity that has opted in may later choose to return to quarterly instalments or, if eligible, annual instalments. The change also takes effect from the start of the next income year.

Commissioner determination power

The Commissioner may determine that an entity must pay PAYG instalments monthly if satisfied that the entity has a history of failing to comply with its obligations under a taxation law.

The Commissioner must:

1. provide written notice of the determination;
2. give reasons for the decision; and
3. state when the determination takes effect.

Commencement of monthly payer status

Entities that opt in, or become subject to a determination, become monthly payers at the start of their next income year.

The legislation is designed so entities are not required to reconcile quarterly and monthly instalment obligations in the same income year. Once an entity becomes a monthly payer, the existing monthly PAYG instalment rules apply.

Revocation of Commissioner determinations

An entity may apply for a determination to be revoked. The Commissioner must revoke the determination unless satisfied that the entity still has a history of non-compliance.

A revocation generally takes effect from the start of the next income year. If the determination is revoked before it first takes effect, it never commences.

Review rights

An entity may object under Part IVC of the TAA 1953 to:

1. a determination requiring monthly instalments; or
2. a decision refusing to revoke a determination.

Usual review rights through the objection process, ART and Federal Court remain available.

Commencement

The amendments commence on the first 1 January, 1 April, 1 July or 1 October after Royal Assent and apply to instalment months for income years commencing on or after 1 July 2027. No entity can become an opt-in monthly payer or determination monthly payer before that time.

COMMENT – The Commissioner determination power is modelled on the existing GST provisions that allow entities with a history of non-compliance to be moved to monthly GST reporting. The proposal extends a similar compliance approach to PAYG instalments.

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TRAP – An opt-in choice must be made before the start of the relevant income year. A taxpayer cannot elect into monthly instalments after the income year has commenced and obtain immediate effect.

w https://consult.treasury.gov.au/c2026-798896
w https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/exposure-draft-legislation-tax-reforms-support

4.11 ATO visa data-matching

The ATO has announced a new visa data-matching program under which it will obtain visa and travel data from the Department of Home Affairs for the 2026-27 to 2028-29 income years. The program is expected to collect records relating to approximately 9 million individuals each year.

The data to be provided includes:

1. visa status and visa subclass information;
2. address and contact history for visa applicants, sponsors and migration agents;
3. migration agent details;
4. international travel movements (arrivals and departures);
5. sponsor details for certain visa holders; and
6. education provider details for student visa holders.

The ATO states that the program will be used to:

1. verify tax and superannuation compliance;
2. identify registration, lodgment, reporting and payment risks;
3. detect fraud and other emerging compliance risks;
4. improve risk detection models;
5. cancel ABNs held by ineligible entities; and
6. support compliance activities under Australia's foreign investment rules

w https://www.legislation.gov.au/C2026G00617/asmade/text

4.12 Miscellaneous GST, TSB and tax offset proposed amendments

Treasury has released exposure drafts of the Treasury Laws Amendment Bill 2026: Minor and Technical Amendments (Spring 2026) and the Treasury Laws Amendment (Minor and Technical Amendments) Regulations 2026. Both are part of the Government's routine care and maintenance of Treasury laws.

We set out some of the more significant proposed changes below.

Tax offsets for unused annual leave and long service leave

Sections 83-15 and 83-85 of the ITAA 1997 cap tax on these payments at 30% plus the Medicare levy. At present, the offset is only available if the leave payment is made in connection with one of the following:

1. a genuine redundancy payment;
2. an early retirement scheme payment;
3. the invalidity segment of an employment termination payment or superannuation benefit.

Unused leave payments are excluded from being employment termination payments, so they cannot themselves be genuine redundancy payments. As a result, someone made genuinely redundant who receives

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only their leave entitlements gets no offset. The former ITAA 1936 provisions did not produce this result. The 2007 rewrite into the ITAA 1997 was meant to keep their effect.

The draft inserts paragraph 83-15(aa) and replaces subsection 83-85(2). The offset will be available if the payment was made because the employee was dismissed after their position was genuinely made redundant. No separate payment is required. The amendments will apply to income years starting on or after commencement. Commencement will be the first 1 January, 1 April, 1 July or 1 October after Royal Assent.

GST – residential aged care

The exposure draft amends subsection 38-25.01(1) of the GST Regulations. It removes the carve-out that stopped services in Division 8 of the aged care service list being GST-free where the supplier charges a higher everyday living fee. The change will apply to supplies made on or after 1 November 2025. It restores the GST-free treatment these services had under the former aged care framework.

Total superannuation balance – family law payment splits

The exposure draft corrects paragraph 307-230A.10(7)(b) of the Income Tax Assessment (1997 Act) Regulations 2021. At present, the paragraph applies where "neither" of the relevant Divisions of the Family Law (Superannuation) Regulations 2025 applies. It should apply where "either" of them applies. Because of this error, a non-member spouse's notional interest could be valued at nil at the start of the year but at its correct value at the end. That would overstate the growth and the Division 296 tax. The correction will apply to TSB calculations made just before 1 July 2026 and later.

w https://consult.treasury.gov.au/c2026-810713

4.13 Simplified Accounting Method for Restaurants, Cafes and Caterers

The Commissioner has made a new determination (A New Tax System (Goods and Services Tax) (Simplified Accounting Method for Restaurants, Cafes and Caterers) Determination 2026) under paragraph 123-5(1)(a) of the GST Act. The Determination enables eligible restaurants, cafes and caterers to estimate their input tax credits on trading stock from two 4 week sample periods each year.

The Determination repeals and replaces Goods and Services Tax: Simplified Accounting Method Determination (No. 38) 2016 for Restaurants, Cafes and Caterers – purchases snapshot method, which would otherwise sunset on 1 October 2026. The Determination has the same substantive effect as the 2016 instrument.

Almost all of a cafe's sales are taxable, so calculating GST on sales is simple: one-eleventh of GST-inclusive sales. Purchases are more difficult as stock may mix taxable items (such as soft drinks, confectionery and packaging) with GST-free basic food, and the purchases are often many and small.

Under the Determination, the business can choose the simplified method for a tax period if:

1. it is registered for GST throughout the tax period;
2. it operates a restaurant, cafe or catering business during the tax period;
3. its GST turnover is $2 million or less.

The method only changes how credits on trading stock are worked out. GST on sales is calculated under the ordinary rules. So are credits on everything else, such as equipment, rent, utilities and imports.

For monthly and quarterly lodgers, the steps are:

1. work out the GST-free proportion from a 4 week sample: GST-free stock purchases divided by total stock purchases;

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2. multiply total stock purchases for the tax period by that proportion to estimate the GST-free purchases;
3. subtract the estimate from total stock purchases to get the estimated creditable purchases;
4. claim one-eleventh of that amount as input tax credits.

The sample period depends on which half of the year the tax period falls in:

Tax periods falling in	Sample period: any continuous 4 weeks between
1 July – 31 December	1 June and 31 July of that year
1 January – 30 June	1 December of the previous year and 31 January

The proportion is worked out once in each 6 month period and then used for every tax period in it. A quarterly lodger therefore applies the method four times a year using only two samples. A business that starts trading during a tax period can use any 4 weeks within its first two months of trading. A business that first adopts the method outside the usual sample windows can use any 4 weeks within the tax period in which it starts.

Cash basis businesses use the amounts they paid. Non-cash basis businesses use the "relevant consideration", which is the amount paid or, if an invoice was issued first, the invoice amount.

Annual lodgers split the financial year into two halves, July–December and January–June. They apply the method to each half using a separate sample and add the two results.

Example 1 – quarterly lodger, cash basis

Cafe Co uses the method for the quarter ended 31 December 2027. Its sample period is 1 to 28 June 2027:

	Amount
Sample: total stock purchases	$8,800
Sample: GST-free stock purchases	$2,200
GST-free proportion ($2,200 ÷ $8,800)	25%
Quarter: total stock purchases	$39,600
Estimated GST-free ($39,600 × 25%)	$9,900
Estimated creditable ($39,600 − $9,900)	$29,700
ITCs ($29,700 ÷ 11)	**$2,700**
GST on sales	$18,700
Net amount payable	**$16,000**

Example 2 – annual lodger, non-cash basis

Caterer Co lodges annually for the 2027–28 financial year:

	July–December 2027	**January–June 2028**
Sample period	1–28 June 2027	1–28 December 2027
Sample: total / GST-free	$13,200 / $3,300	$12,100 / $2,200
GST-free proportion	25%	2/11 (about 18.18%)
Total stock purchases for the half	$66,000	$72,600
Estimated GST-free	$16,500	$13,200
Estimated creditable	$49,500	$59,400
ITCs (÷ 11)	$4,500	$5,400

Total credits are $9,900. With GST on sales of $41,800, the net amount payable is **$31,900**.

Example 3 – new business, with non-stock purchases (illustrative)

Bean Pty Ltd lodges quarterly on a cash basis and opens a cafe on 15 March 2027. For the quarter ended 30 June 2027 it may use a sample from its first two months of trading. It chooses 15 March to 11 April 2027.

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	Amount
Sample: total / GST-free stock purchases	$6,600 / $1,650
GST-free proportion	25%
Quarter: total stock purchases	$33,000
Estimated creditable ($33,000 × 75%)	$24,750
ITCs on stock ($24,750 ÷ 11)	$2,250
Plus: coffee machine, $5,500 including GST, under ordinary rules	$500
Total ITCs	**$2,750**

For the quarters ending 30 September and 31 December 2027, Bean Pty Ltd must take a new sample between 1 June and 31 July 2027.

COMMENT – This is a straight remake with no change in substance. Clients already using the 2016 method can continue as before. The method works well where the mix of GST-free and taxable stock is fairly stable through the year.

TRAP – The method is only as accurate as the sample. A business that picks an unrepresentative 4 weeks, or whose menu or suppliers change after the sample period, will under- or overclaim credits. It should also keep the sample period records, because those records support the credits for the next six months. Calculate the proportion as an exact fraction rather than a rounded percentage. In Example 2, using 0.18 instead of 2/11 would understate the GST-free estimate by $132.

w https://www.legislation.gov.au/F2026L01275/asmade/downloads

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5. State Legislation

5.1 SA stamp duties with amendments for short stay accommodation

The *Stamp Duties (Residential Purposes and Residential Land) Amendment Act 2026* (SA) received Royal Assent on 22 September 2026. It is taken to have commenced on 15 September 2026, when the Bill was introduced into the House of Assembly.

The Act amends the *Stamp Duties Act 1923* (SA) and the Stamp Duties Regulations 2013 (SA) to clarify when land is treated as residential for duty purposes. For improved land, the test is whether the land is, or will be after commenced building work, capable of occupation as a residence or accommodation. The length of occupation and any concurrent use are not determinative. Vacant land is generally residential if its zoning permits residential or other accommodation use. Short-stay accommodation can therefore be residential even if it is not subject to residential tenancy legislation.

The Regulations prescribe features indicating residential use, including sleeping areas, bathrooms, food preparation areas and laundry facilities. They exclude specified properties, including purpose-built student accommodation, hotels, motels, serviced apartments, certain multi-unit short-term accommodation and nursing or convalescent facilities. Merely renting land as short-stay accommodation does made it excluded.

The Act also confirms the exemption from duty for qualifying commercial and industrial land. Vacant land may qualify for an exemption at acquisition, or a refund after acquisition, if it is developed for a qualifying non-residential and non-primary-production purpose. Development must generally be completed within three years, although the Commissioner may extend the period to five years. A change of use or subdivision alone is not development for this purpose.

An exemption may be revoked if the development conditions are not met or the application contained false, misleading or incomplete information. If revoked, duty is payable from the original transfer date and interest and penalty tax may apply.

The amendments concerning vacant or minimally improved land operate both prospectively and retrospectively. However, the transitional provisions are intended to preserve the existing duty treatment of historical transactions.

w https://www.legislation.sa.gov.au/lz?path=/b/current/stamp%20duties%20(residential%20purposes%20and%20residential%20land)%20amendment%20bill%202026

5.2 NSW Government announces proposed duty relief for EET elections

On 15 October 2026, the NSW Labor Government announced that, if re-elected, it would introduce duty relief for discretionary trusts that opt into the Federal Government's proposed excluded election trust (**EET**) regime. It proposes to amend the Duties Regulations 2022 (NSW) to clarify that making an EET election will not be treated as a dutiable transaction.

The proposed change is intended to remove uncertainty about the NSW duty consequences of making an EET election.

The announcement is an election commitment. No amending regulation has yet been made.

w https://www.nsw.gov.au/ministerial-releases/delivering-certainty-for-nsw-businesses

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6. Rulings

6.1 Identification of employer under the short-term visit exception

On 23 September 2026, the ATO updated *Taxation Ruling* TR 2013/1, which explains how to identify the employer of a non-resident individual for the short-term visit exception in Australia's tax treaties. The exception generally applies where the individual satisfies the relevant presence threshold, the remuneration is paid by or for a non-resident employer, and the remuneration is not borne by an Australian permanent establishment.

The update materially shortens the Ruling and aligns it with Taxation Ruling TR 2023/4, which contains the ATO's current view on identifying an employee at general law. The ATO has removed most of the former detailed analysis and examples addressing arrangements involving labour hire, secondments, professional services firms and other intermediaries. Many paragraphs in both the binding ruling and the explanation are now marked as omitted.

The updated Ruling retains the central proposition that the relevant employer is the enterprise to which the non-resident individual provides services in what would be considered an employment relationship. However, it now directs taxpayers to apply the ordinary meaning of employee as explained in TR 2023/4. The contractual rights and obligations between the parties will therefore be central to identifying the employer. The ATO must also consider the context, object and purpose of the treaty exception, particularly the conditions dealing with the residence of the employer and whether an Australian permanent establishment bears the remuneration.

The revised Ruling retains two examples. In the first, an employee of a non-resident accounting services company works at the premises of an Australian client under the client's day-to-day direction. The non-resident company remains the employer because it retains ultimate authority over the employee, bears responsibility and risk for the work, and provides the accounting services as part of its own business. The fee charged to the Australian client includes employment costs and a profit margin.

The second example concerns an employee of a foreign group company who spends three months in Australia providing centralised human resources services to an Australian group company. The foreign company remains the employer because the employee continues to report to it, the services form part of its centralised group function, and it retains ultimate authority, responsibility and risk. The allocation of the employee's costs between group companies does not change that conclusion.

The Ruling continues to recognise that the formal employer may not always be the employer for treaty purposes. Where the nature of the services points to a different employment relationship, relevant factors include:

1. which enterprise bears responsibility or risk for the work;
2. who has authority to instruct the individual about how the work is performed;
3. who controls and is responsible for the workplace;
4. whether the remuneration and employment costs are directly charged to the user enterprise;
5. who provides the tools and materials;
6. who determines the number and qualifications of workers;
7. who selects the worker and can terminate the arrangement;
8. who may impose disciplinary sanctions; and
9. who determines leave and work schedules.

The financial arrangements between the formal employer and the user enterprise remain relevant but are not conclusive. A direct recharge of employment costs may support a conclusion that the remuneration is borne by the user enterprise. By contrast, a commercial service fee that reflects several inputs and includes a profit element may support a genuine contract for services between the enterprises.

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The Ruling also retains the position that disagreements between treaty countries about whether an employment relationship exists should be resolved having regard to the OECD Commentary, including through the mutual agreement procedure where appropriate. The short-term visit exception may also be denied in abusive cases.

COMMENT – The update does not materially change the ATO's ultimate test. Its main effect is to replace the former detailed guidance with a cross-reference to TR 2023/4 and a shorter set of principles and examples. This places greater emphasis on the contractual rights and obligations between the worker, the formal employer and the Australian entity.

COMMENT – Australian day-to-day supervision, the use of Australian premises or a recharge of employee costs will not alone establish that the Australian entity is the employer. The arrangement should be considered as a whole, including which enterprise retains ultimate authority, bears responsibility and risk for the work, and carries on the business of supplying the relevant services.

ATO reference *Taxation Ruling TR 2013/1*
w https://www.ato.gov.au/law/view/document?docid=TXR/TR20131/NAT/ATO/00001

6.2 Temporary absence from continuous foreign service

Section 23AG of the ITAA 1936 provides an exemption for certain foreign employment income derived during a continuous period of qualifying foreign service of at least 91 days. A key issue is whether temporary absences interrupt that continuous period of foreign service.

The ATO has finalised updates to TD 2012/8, which deals with the types of temporary absences that form part of a continuous period of foreign service, and reverses the position proposed in the July 2026 draft determination.

Service performed in Australia is not foreign service

The most important change is the insertion of a new statement that service must be performed in a foreign country. Service performed in Australia, international waters or international airspace is not foreign service.

The ATO relies on *Overseas Aircrew Basing Ltd v Commissioner of Taxation* [2009] FCA 7 and *Chaudhri v Commissioner of Taxation* [2001] FCA 554 for the proposition that "foreign service" means service in a foreign country, not merely service outside Australia.

Reversal of the July 2026 draft position

The July 2026 draft determination provided that short work-related absences from a foreign country, including travel to Australia for meetings, conferences, training and similar duties connected with the overseas posting, could continue to form part of a continuous period of foreign service.

That position has been abandoned. The final determination adopts a strict geographical approach. The ATO's position is that service performed in Australia cannot be foreign service, regardless of how closely connected it is to the overseas assignment.

Medical and caring absences remain protected

The ATO retained its existing view that absences because of illness or injury can continue to be treated as foreign service if they occur during the scheduled foreign posting and are permitted under the terms of employment.

The compendium confirms that this can include:

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1. returning to Australia for medical treatment;
2. escorting an injured employee back to Australia; and
3. carer's leave to care for an ill family member.

Weekends and days off unchanged

The ATO has not altered its existing approach to weekends, public holidays, rostered days off and similar non-working days.

These days continue to form part of foreign service where they arise under the normal conditions of the overseas posting, regardless of whether they are spent in the foreign country, Australia or a third country.

Consultation submissions

The consultation process revealed significant concern from employers and industry groups about the change. Submissions argued that foreign service should continue during short trips to Australia for:

1. leadership meetings;
2. conferences and workshops;
3. compulsory professional training;
4. business meetings with overseas counterparties; and
5. other work directly connected with the overseas posting.

The ATO rejected those submissions. Its response was that there is no discretion to treat work performed in Australia as foreign service because Australia is not a foreign country.

The compendium also confirms that the ATO was not persuaded by submissions concerning increased payroll complexity, FBT implications or practical compliance difficulties.

COMMENT – The final determination is significantly less favourable than the July 2026 draft. Under the draft, work-related trips to Australia could potentially remain part of a continuous foreign service period. Under the final determination, the ATO has adopted a strict location-based approach. Work performed in Australia is not foreign service, even where the work is undertaken solely because of the foreign assignment.

TRAP – Attendance in Australia for meetings, training, conferences, workshops or similar work-related activities may now break a period of foreign service. Taxpayers who previously relied on the July 2026 draft position should review their section 23AG positions for the 2026-27 income year onwards.

ATO reference *TD 2012/8A1*
w https://www.ato.gov.au/law/view/document?docid=TXD/TD20128A1/NAT/ATO/00001
w https://www.ato.gov.au/law/view/document?docid=CTD/TD2012EC8/NAT/ATO/00001
w https://www.ato.gov.au/law/view/document?docid=CTD/TD2012EC8-2/NAT/ATO/00001
w https://www.ato.gov.au/law/view/document?docid=TXD/TD20128/NAT/ATO/00001

6.3 US global intangible low-taxed income regime

The ATO has issued an Addendum to *Taxation Determination* TD 2022/9 following amendments to section 951A of the US Internal Revenue Code made by the One Big Beautiful Bill Act 2025. TD 2022/9 considers whether section 951A corresponds to sections 456 or 457 of the ITAA 1936 for the hybrid mismatch rules in subsection 832-130(5) of the ITAA 1997.

The US amendments:

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1. remove the net deemed tangible income return from the section 951A calculation, increasing the scope of controlled foreign company income covered by the regime;
2. rename global intangible low-taxed income as net CFC tested income;
3. reduce the deduction available to a US domestic corporation under section 250 from 50% to 40%; and
4. increase the deemed paid foreign tax credit from 80% to 90%.

The changes apply for US taxable years beginning after 31 December 2025.

The ATO states that the amendments do not change its view in TD 2022/9. Section 951A remains an inclusion provision forming part of a minimum tax regime. It therefore does not correspond to the Australian controlled foreign company attribution rules in sections 456 or 457 of the ITAA 1936.

The Addendum applies from 1 January 2026. TD 2022/9 otherwise applies both before and after its date of issue.

COMMENT – The amendments expand the US income inclusion and alter the associated deduction and foreign tax credit settings. However, the ATO considers that these changes do not alter the essential character of section 951A as a minimum tax rule rather than a controlled foreign company attribution rule corresponding to sections 456 or 457.

ATO reference *TD 2022/9A1 – Addendum*
w https://www.ato.gov.au/law/view/document?docid=TXD/TD20229A1/NAT/ATO/00001

6.4 Victorian landholder duty and leasehold interests or fixtures

The Victorian Commissioner of State Revenue has issued *Revenue Ruling* DA-055v4, which replaces DA-055v3. The revised ruling clarifies how the landholder provisions apply where a landholder's land holdings include leasehold estates or interests, or fixtures on land owned by someone else.

DA-055v4 sets out the Commissioner's view on the operation of the landholder duty provisions in the *Duties Act 2000* (Vic). Part 2 of Chapter 3 of the Duties Act charges duty on relevant acquisitions in landholders. A landholder is any company or unit trust, private or public, whose Victorian land holdings have an unencumbered value of $1 million or more.

DA-055v4 sets out:

1. lodgement concessions;
2. worked examples of duty calculations;
3. duty concessions, including where the land holdings include leasehold estates, separately owned fixtures or primary production land.

It does not cover duty on economic entitlements under section 81 or control under section 82.

Duty is charged at land transfer duty rates. A phasing-in formula in section 89 applies where the land holdings are worth between $1 million and $2 million. For a single acquisition in a private landholder, duty is the value of the Victorian land holdings multiplied by the percentage interest acquired. For example, acquiring 70% of a landholder with $10 million of Victorian land gives a dutiable value of $7 million and duty of $435,000.

Leasehold estates

DA-055v4 notes that most leases are not dutiable property for the purposes of transfer duty in Chapter 2 of the Duties Act. However, the definition of land holding in section 72(1) of the Duties Act does not exclude leases and accordingly it will be a land holding of a company or unit trust scheme. The value of a lease, including any fixtures attached under it, therefore counts when deciding:

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1. whether the company or unit trust is a landholder;
2. whether the phasing-in concession in section 89 applies.

Duty is only charged on the value of a lease if that lease would be dutiable on a hypothetical transfer under Chapter 2. As a result:

1. if the landholder holds only non-dutiable leases, no duty is payable, because the acquisition is exempt under section 89D(a);
2. if the landholder holds non-dutiable leases and other dutiable land, duty is charged only on the other dutiable land. Section 89E excludes the leases;
3. if any of the leases would be dutiable under Chapter 2, duty is charged on all land holdings that would be dutiable on a Chapter 2 transfer.

Fixtures on third party land

A land holding includes fixtures held separately from the land they sit on. Typically these are fixtures on land the landholder does not own, or holds under a lease. Where fixtures are installed under a standard commercial lease, the Commissioner will generally charge duty only on the value of the fixtures.

Chapter 3, which contains the landholder provisions, has different thresholds and phasing-in rules from Chapter 2. To keep the outcomes consistent, the Commissioner has decided:

1. fixtures count when deciding whether the entity is a landholder and whether section 89 phasing-in applies;
2. duty is only charged on the fixtures if their total value is more than $2 million.

The ruling then sets out these outcomes:

COMMENT – The update is relevant to entities whose main Victorian holdings are leases and fixtures on someone else's land rather than freehold. Examples include renewable energy projects, network infrastructure and data centres. It also comes soon after the SRO named landholder duty a compliance focus for 2026–27. The two targets are acquisitions in companies and unit trusts holding commercial and industrial land, and offshore transactions involving indirectly held Victorian energy, infrastructure or data centre assets.

TRAP – The 20% threshold for private unit trusts is much lower than the 50% threshold for private companies. Further acquisitions after a relevant acquisition are also caught, however small. A minor unit issue or transfer in a trust that already has a significant interest holder can therefore trigger duty and a new 30 day lodgement deadline.

SRO Reference *Revenue Ruling* DA-055v4
w https://www.sro.vic.gov.au/about-us/laws-legal-cases-and-rulings/public-rulings/landholder-provisions-obligations-making-relevant-acquisition-and-duty-calculation

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7. 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.

7.1 Trust - fixed entitlements

Facts

The taxpayer is the trustee of a unit trust established under a trust deed and operated as a syndicated investment vehicle for unrelated investors. The trust was established to enable unitholders to derive income and profits from the trust's investments. The trust has issued both Ordinary Units and Performance Units, and all dealings between the trustee and members occur on an arm's-length basis. Unit holdings have remained unchanged since the trust was established.

Under the trust deed, the taxpayer has the power to issue, acquire, dispose of, redeem and cancel units. However, the trust may only issue Ordinary Units and Performance Units and cannot create additional classes of units. The taxpayer also has the power to issue options to subscribe for units, although no further units or options have been issued since establishment.

The trust deed permits the issue of partly paid units and provides for forfeiture in the event of default. However, no partly paid units have been issued, forfeited, sold or otherwise disposed of.

The taxpayer has various powers to redeem units. A member may only redeem or withdraw units with the taxpayer's consent or under the terms of a withdrawal offer. Redemption proceeds are generally determined by reference to the trust's net asset value. Performance Units cannot be withdrawn or redeemed, and no units have been redeemed or withdrawn since the trust's establishment.

The trust deed may be amended, repealed or replaced either by special resolution of members or by the taxpayer where the taxpayer reasonably considers the amendment would not adversely affect members' rights. Members also have the right to propose resolutions for consideration and voting. No amendments to the trust deed have been made since establishment.

The trust was established for the benefit of its members. Ordinary unitholders are entitled to receive income and capital in proportion to their unit holdings. Performance unitholders are entitled to participate in distributions only upon the occurrence of a significant event. On winding up, realised proceeds and other trust assets are distributed to Ordinary Unitholders, subject to the rights and restrictions attaching to Performance Units.

In certain circumstances, the taxpayer may suspend or terminate a member's rights to receive distributions and vote, offset amounts otherwise distributable to a member to account for defaults or losses suffered by the trustee, or sell a member's units at a price determined by the taxpayer.

Tax losses are expected to be recouped during the relevant ruling period. No arrangements have been entered into, or are expected to be entered into, that would result in the application of section 272-35 of Schedule 2F to the ITAA 1936, involve trafficking in tax losses, bad debt deductions or debt/equity swap deductions, or involve fraud or evasion.

The ruling is based on assumptions that:

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1. no further units with special rights will be issued,
2. no partly paid units will be issued,
3. the taxpayer will not exercise any power capable of defeating a unitholder's interest in trust income or capital,
4. the trust deed will not be amended to alter existing unitholders' rights, and
5. membership of the trust will remain unchanged so that those benefiting from the recoupment of tax losses are the same members who held interests when the losses were incurred.

Questions

1. Do the members of the trust have fixed entitlements to all of the income and capital of the trust for the purposes of subsections 272-5(1) and 272-5(2) of Schedule 2F to the ITAA 1936?
2. If the members of the trust do not have fixed entitlements, will the Commissioner exercise the discretion to treat the members as having fixed entitlements to the income and capital of the trust?

Ruling

Fixed entitlements

The ATO ruled that the members of the trust did not have fixed entitlements to the trust's income and capital for the purposes of subsections 272-5(1) and 272-5(2) of Schedule 2F to the ITAA 1936.

This was because the terms of the trust deed did not confer on the members a vested and indefeasible interest in a share of the trust's income as it arose from time to time, nor in the trust's capital.

Discretion

The ATO ruled that, although the unitholders did not have fixed entitlements under subsections 272-5(1) and 272-5(2) of Schedule 2F to the ITAA 1936, the Commissioner would exercise the discretion in subsection 272-5(3) of Schedule 2F to treat the unitholders as having fixed entitlements to all of the income and capital of the trust. This conclusion was reached after considering the relevant factors prescribed by paragraph 272-5(3)(b) and determining that it was appropriate to grant fixed trust treatment despite the technical deficiencies in the trust deed.

ATO reference *Edited Private Advice Authorisation No.* 1052551161378
w https://www.ato.gov.au/law/view/document?docid=EV/1052551161378

7.2 Relationship breakdown CGT roll-over

Facts

The taxpayer is a non-resident of Australia for tax purposes. They are permanently separated from their spouse, although they are not yet legally divorced, and they have two children.

The taxpayer is a beneficiary of an Australian resident discretionary trust. The trust owns all of the shares in an Australian resident company.

The taxpayer and their spouse are involved in Family Court proceedings arising from the breakdown of their marriage. It is proposed that Family Court orders made under the *Family Law Act* will require that the taxpayer become entitled to:

1. all shares in the Company currently held by the Trust;
2. all assets held by the Trust; and
3. all assets held by the Company.

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The proposed orders would compel:

1. the transfer of the Company's shares from the Trust to the taxpayer;
2. the transfer of the Trust's assets to the taxpayer; and
3. the transfer of the Company's CGT assets to the taxpayer.

Questions

Does the CGT roll-over in subdivision 126-A of the ITAA 1997 apply to the proposed transfer of CGT assets from a trust and company to the taxpayer under Family Court orders?

Ruling

The ATO considered that the proposed transfers would result in a change of ownership of CGT assets. CGT event A1 would happen in respect of each transferred CGT asset

In considering the ownership requirement, the ATO referred to *Ellison & Anor v Sandini Pty Ltd & Ors; FC of T v Sandini Pty Ltd & Ors* [2018] FCAFC 44. That decision discusses the concept of ownership for CGT purposes and distinguishes a mere beneficial interest from the level of legal and proprietary control required for ownership. The ATO considered the case authority for the proposition that the proposed court-ordered transfers would result in a genuine change in ownership of the relevant assets.

Having established that CGT event A1 would occur, the ATO then considered whether the marriage breakdown rollover provisions applied. Section 126-15 of the ITAA 1997 extends the marriage breakdown rollover rules to transfers involving a trustee or company where the transfer occurs because of a court order relating to the breakdown of a marriage. Section 126-15 applies the rollover consequences in section 126-5 to those transfers. The proposed orders were to be made under section 79 of the *Family Law Act*. The ATO therefore considered them to be qualifying court orders for the purposes of section 126-15.

Because the transfers would occur under Family Court orders and would involve a change in ownership of CGT assets from the trust and company to the taxpayer, the conditions in section 126-15 were satisfied. The marriage breakdown rollover was therefore available to both the trust and the company. As a result, any capital gain or capital loss arising from the transfers would be disregarded under Subdivision 126-A of the ITAA 1997.

TRAP – The availability of the marriage breakdown rollover under Subdivision 126-A of the ITAA 1997 does not displace Division 7A. Where a private company transfers assets to a spouse or former spouse under Family Court orders, advisers should separately consider whether the transfer gives rise to a deemed dividend. If Division 7A applies because of a family law obligation, section 109RC of the ITAA 1936 may permit the deemed dividend to be franked.

COMMENT – Having regard to the potential Division 7A implications, the order that both the shares in the company be transferred to the taxpayer *and* the assets of the company be transferred to the taxpayer would not make sense for an Australian resident taxpayer (in this PBR the taxpayer was a non-resident). The roll-over in Subdivision 126-A of the ITAA 1997 is not a choice (TD 1999/49), so the taxpayer would inherit the company's tax cost bases in the transferred assets. If the transfer also gives rise to a deemed dividend under Division 7A, the taxpayer could be taxed on the value extracted from the company without obtaining a corresponding uplift in the cost bases of the assets received.

ATO reference *Edited Private Advice Authorisation No. 1052562365857*
w https://www.ato.gov.au/law/view/document?docid=EV/1052562365857

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7.3 Whether payments under BFA go to cost base

Facts

The taxpayer purchased a residential property that was intended to be the main residence of the taxpayer and their spouse. The acquisition was funded partly through a joint home loan in the names of the taxpayer and the spouse, with the balance funded from joint savings. Despite the joint funding arrangements, legal title to the property was registered solely in the taxpayer's name.

Following the breakdown of the marriage, the taxpayer and their spouse separated and subsequently divorced. Prior to the divorce, they entered into a financial agreement which provided that, in the event of a marriage breakdown, the property would be sold by public auction and the net sale proceeds would be divided equally between the taxpayer, the former spouse, and their child.

After the divorce, the property was used as an investment property. The taxpayer and the former spouse later considered alternatives to selling the property under the financial agreement. The options discussed included:

1. selling the property and distributing the proceeds in accordance with the financial agreement;
2. the taxpayer retaining the property, obtaining an independent valuation, paying the former spouse an amount representing their one-third entitlement, and removing the former spouse from the loan arrangements; or
3. the former spouse acquiring the property based on an independent valuation.

The parties ultimately agreed, through a series of email exchanges, that the taxpayer would retain ownership of the property and pay the former spouse an amount equivalent to their one-third share. The taxpayer also agreed to assume sole responsibility for the loan and remove the former spouse from all loan documentation. In return, the former spouse surrendered any claim to the property.

The taxpayer subsequently made two payments to the former spouse in accordance with that agreement and later disposed of the property.

Questions

1. Can the payment made by the taxpayer to their former spouse form part of the fourth element of the property's cost base as capital expenditure incurred to preserve or increase the property's value under section 110-25(5) of the ITAA 1997?
2. Can the payment made by the taxpayer to their former spouse form part of the fifth element of the property's cost base as capital expenditure incurred to establish, preserve or defend the taxpayer's title to the property under section 110-25(6) of the ITAA 1997?

Ruling

<u>Fourth element cost base expenditure</u>

The fourth element of a CGT asset's cost base under section 110-25(5) of the ITAA 1997 includes capital expenditure incurred to preserve or increase the value of an asset. The provision typically applies to expenditure directed at maintaining or enhancing the asset itself, such as capital improvements or expenditure incurred to protect the asset's value from external threats.

The ATO considered that the payment to the taxpayer's former spouse was not incurred to preserve or increase the value of the property. Rather, the payment represented consideration for the former spouse relinquishing their entitlement under a financial agreement, which provided for a share of the sale proceeds if the property were sold following the marriage breakdown. The payment did not improve the property, protect it from diminution in value, or otherwise affect its market value. Instead, it reflected a negotiated outcome between the parties regarding future ownership of the property.

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The ATO also rejected the taxpayer's reliance on ATO ID 2004/425. In that interpretative decision, expenditure was incurred to remove a competing interest that impeded the disposal of the asset. The ATO distinguished the taxpayer's circumstances because there was no impediment to the sale of the property. One of the options actively considered by the parties was to sell the property in accordance with the financial agreement. Further, after making the payment, the taxpayer retained the property as an investment for a number of years before ultimately disposing of it. These facts indicated that the payment was not directed towards preserving or enhancing the property's value.

Therefore, the ATO concluded that the payment was not capital expenditure of the kind contemplated by section 110-25(5) of the ITAA 1997 and could not be included in the fourth element of the property's cost base.

Fifth element cost base expenditure

The fifth element of a CGT asset's cost base under section 110-25(6) of the ITAA 1997 includes capital expenditure incurred to establish, preserve or defend a taxpayer's title to an asset or a right over an asset. The provision commonly applies where ownership rights are challenged and expenditure is incurred to secure or protect legal title.

The ATO's view was that the taxpayer's payment to the former spouse was not incurred to establish, preserve or defend title to the property. Legal title had always been held solely by the taxpayer, and there was no dispute regarding that title. The arrangement under which the taxpayer paid the former spouse arose from a mutually agreed variation of the parties' existing financial arrangements rather than from litigation or any challenge to ownership of the property.

In reaching this conclusion, the ATO referred to ATO ID 2001/730 *Income Tax: CGT - deceased estate - cost base of CGT asset - legal costs to determine control of the estate*, which explains that expenditure incurred in defending title generally requires some action placing title in dispute. A typical example is where another party asserts ownership rights and legal proceedings are commenced to determine entitlement to the asset. The taxpayer's circumstances were materially different because no competing claim was made against the taxpayer's legal ownership of the property.

Although the former spouse had rights under the financial agreement that could potentially have resulted in the property being sold, those rights did not amount to a challenge to the taxpayer's legal title. The payment was made to facilitate an agreed restructuring of the parties' interests and obligations following the relationship breakdown. As the payment was not incurred to establish, preserve or defend title, it did not satisfy the requirements of section 110-25(6) of the ITAA 1997 and could not be included in the fifth element of the property's cost base.

COMMENT – The fourth and fifth elements of a CGT cost base are narrower than many taxpayers assume. Expenditure will not qualify merely because it has some connection with retaining an asset or resolving competing economic interests in an asset. For the fourth element, the expenditure must be directed to preserving or increasing the value of the asset itself. For the fifth element, there must generally be a genuine issue concerning legal title or rights over the asset.

ATO reference *Edited Private Advice Authorisation No. 1052564054757*
w https://www.ato.gov.au/law/view/document?docid=EV/1052564054757

7.4 Qualifying earnings

Facts

The taxpayer is an employer whose industrial agreement allows employees to bank overtime payments as time off in lieu (**TOIL**). Under the agreement, TOIL accrued from overtime retains the value of the applicable

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overtime penalty rate. As a result, an employee who works overtime at double time may elect to convert each overtime hour worked into two hours of paid TOIL.

At the time of the ruling, the taxpayer did not pay superannuation guarantee contributions on TOIL taken in respect of overtime worked.

Employees may also elect to cash out accrued TOIL. Where this occurs, the payment reflects the overtime rate that originally applied when the entitlement was accrued. Accordingly, TOIL derived from overtime worked at double time is paid out at an amount equivalent to the original overtime entitlement.

The taxpayer provided an example in which an employee accumulated a TOIL balance instead of receiving overtime payments. The employee then used the accumulated TOIL to take paid leave during ordinary working hours, with the TOIL entitlement covering the employee's ordinary rostered hours for the relevant period. The accumulated TOIL represented overtime previously worked and credited at double time, resulting in a greater number of paid hours off than the actual overtime hours worked.

Question

Are payments made by the taxpayer to employees for TOIL included in the employees' qualifying earnings for the purposes of section 10A of the SGAA?

Ruling

The ATO concluded that TOIL payments taken as paid leave during an employee's ordinary working hours form part of the employee's qualifying earnings under section 10A of the SGAA. This result follows from the interaction between the concepts of qualifying earnings and ordinary time earnings (**OTE**). Section 10A includes an employee's OTE within qualifying earnings, and the reforms introducing qualifying earnings did not alter the established meaning of OTE for superannuation guarantee purposes.

The starting point is to identify an employee's ordinary hours of work. The ATO referred to LCR 2026/D1, which explains that these are the hours specified under the applicable industrial instrument or employment arrangement. Hours worked outside those ordinary hours are overtime hours and remuneration that is solely referable to those overtime hours is generally excluded from OTE. A conventional overtime payment does not attract superannuation guarantee obligations because it is remuneration for work performed outside ordinary hours.

The ATO emphasised that amounts paid to employees must be characterised according to what they are paid for. In the superannuation guarantee context, earnings are either referable to ordinary hours of work or referable solely to non-ordinary hours such as overtime. There is no separate category of earnings that are simply "employment-related" without being connected to particular hours of work. Consequently, determining whether a payment is OTE requires consideration of the character of the payment at the time the payment is received by the employee.

The ruling then considers the treatment of paid leave. As set out at paragraphs 59 to 61 of LCR 2026/D1, payments made while an employee is absent from work on paid leave are generally treated as a continuation of ordinary remuneration where they relate to ordinary working hours. The ATO specifically notes that payments received at ordinary rates in respect of TOIL are ordinarily included in OTE because they represent remuneration for periods that substitute for attendance during ordinary hours of work.

Applying those principles, the ATO accepted that the employee initially earns the entitlement through overtime worked. However, once the employee elects to convert the overtime payment entitlement into TOIL and subsequently takes paid time off, the entitlement changes character. The relevant payment is no longer compensation for performing overtime work. Instead, it becomes remuneration for a period of paid absence occurring during the employee's ordinary rostered hours. The fact that the TOIL entitlement was originally generated by overtime does not determine its character when ultimately taken as leave.

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The ATO concluded that TOIL taken as paid leave forms part of OTE and, consequently, forms part of qualifying earnings under section 10A of the SGAA.

The ruling also distinguished cash payments of accrued TOIL from TOIL taken as leave. The ATO observed that where banked TOIL is paid out as a lump sum, whether during employment or on termination, the payment is not considered to be made in respect of ordinary hours of work and does not replace ordinary working time. Such payments therefore do not form part of OTE.

ATO reference *Edited Private Advice Authorisation No. 1052562413198*
w https://www.ato.gov.au/law/view/document?docid=EV/1052562413198

7.5 Deductions for super contributions

Facts

The taxpayer made a personal contribution to their superannuation fund and subsequently sent a notice of intent (NOI) to claim a personal superannuation contributions deduction for that contribution. The NOI was lodged with the fund by post.

The taxpayer did not receive an acknowledgement from the fund confirming receipt of the NOI. When preparing to lodge their income tax return for the relevant income year, the expected deduction did not appear in the pre-filled tax information.

The taxpayer's tax agent later contacted the fund to enquire about the missing deduction. The fund advised that it had not received the original NOI and that a replacement NOI could not be accepted because the statutory deadline for lodging the notice had already passed.

Question

Is the taxpayer eligible to claim a personal superannuation contributions deduction under section 290-170 of the ITAA 1997 for contributions, in circumstances where the 'Notice of Intent' to claim a deduction for the contributions was not received by the superannuation fund within the prescribed time limits?

Ruling

The tax law requires a taxpayer who wishes to claim a deduction to notify the fund that they intend to treat the contribution as deductible. This notification is made by lodging a valid Notice of Intent (NOI) with the trustee of the fund. The purpose of this requirement is to ensure that the contribution is correctly classified and taxed within the superannuation system before the member claims a deduction in their income tax return.

Under section 290-170 of the ITAA 1997, three key requirements must be satisfied.

1. the taxpayer must provide a valid NOI in the approved form to the trustee of the fund;
2. the notice must be received by the fund before the statutory deadline, being generally before the end of the following income year or, if earlier, before the taxpayer lodges their income tax return for the year of contribution; and
3. the trustee must acknowledge receipt of the notice.

Without that acknowledgement, the statutory process for claiming the deduction is incomplete.

In this case, the taxpayer posted an NOI to the fund and believed that the notice had been lodged. However, the fund subsequently advised that it had never received the notice. As a result, the fund did not issue the acknowledgement required by section 290-170. Although the taxpayer had taken steps to submit the notice, the

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legislative requirement is that the notice must actually be received by the fund within the required timeframe. Evidence of sending the notice is not sufficient where receipt by the trustee cannot be established.

By the time the issue was identified, the statutory deadline for lodging a valid NOI had expired. The fund therefore could not accept a replacement notice. Because the fund had not received a valid NOI within the prescribed period and had not acknowledged receipt of such a notice, the conditions in section 290-170 were not satisfied. Consequently, the taxpayer was not entitled to claim a deduction for the personal superannuation contribution.

The ATO also noted that the Commissioner has no discretion to extend the legislated time limits or to waive the statutory requirements. Even though the taxpayer intended to claim the deduction and attempted to lodge the NOI, the deduction was unavailable because the mandatory requirements of section 290-170 were not met.

ATO reference *Edited Private Advice Authorisation No. 1052554441193*
w https://www.ato.gov.au/law/view/document?docid=EV/1052554441193

7.6 Loss on JV units deductible

Facts

Company A and Company B set up a joint venture through their wholly owned subsidiaries. They used a special purpose unit trust (the Trust) for a property development, and each company holds 50% of the units. Company A is the head company of a tax consolidated group.

When the developed properties are sold, a developer's fee will be paid to the Trust. The fee is effectively the net cash proceeds from the sales. The Trust will pay out those proceeds, after expenses, to Company A and Company B in proportion to their units.

A unitholder agreement sets up a management committee to oversee the Project and make decisions for the unitholders. Both companies sit on the committee, and it has met regularly.

Company A pays tax on the cash distributions. The Trust will be wound up once all the properties are sold. The profit distributions and the wind-up are expected to happen as part of a single course of events. Company A expects to make a loss when its units are realised. The tax cost of the units is the acquisition price plus related costs, such as legal fees.

Question

Is Company A's loss on realising its units in the Trust deductible under section 8-1 of the ITAA 1997?

Ruling

Yes. Because of the single entity rule in section 701-1, Company A, as head company, is treated as having acquired and realised the units itself.

On the positive limb, the ATO found the loss was incurred in gaining Company A's assessable income as a property developer. Company A earns assessable income from the units in two ways: through its part in managing the Trust, and directly as a unitholder.

On the capital exclusion in paragraph 8-1(2)(a), the ATO found:

1. the Trust let the joint venture partners share resources and risk for the Project;
2. the units gave each partner an interest in the Trust's assets as a whole, but not in any particular asset;

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3. in a build-and-sell project, the Trust earns its income from selling the developed properties, and the Project runs for a limited time;
4. the advantage from holding the units was therefore not lasting or enduring.

Accordingly, the loss was not capital in nature, and Company A could deduct it under subsection 8-1(1).

COMMENT – The ATO has now published a series of edited private advice treating units in a joint venture unit trust used for a build-and-sell development as held on revenue account (see, for example, Authorisation No. 1052390728993, discussed in our July 2025 notes). The facts in this ruling are almost identical to that one. The ATO's reasoning has been consistent in that units in a unit trust set up for a single development take on the revenue character of the underlying enterprise, because the advantage they give lasts only as long as the project.

If the units are on revenue account, while a loss on the units is deductible under section 8-1, a gain on the units is likely to be ordinary income.

The reasoning is unlikely to carry over where the Trust holds the developed property long-term, for example for rent. In those cases, the units are more likely to be on capital account.

ATO reference *Edited Private Advice Authorisation No. 1052554484463*
w https://www.ato.gov.au/law/view/document?docid=EV/1052554484463

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8. ATO and other materials

8.1 ATO reports on Top 1,000 assurance program

The ATO has published its findings from the Top 1,000 income tax and GST assurance programs for the year ended 30 June 2026. The program covers the largest public and multinational entities outside the Top 100. Entities in the program generally have turnover above $350 million.

At 30 June 2026, the ATO had completed income tax assurance reviews for 83% of the current Top 1,000 population. Of those reviewed, 30% received high assurance, 59% received medium assurance and 11% received low assurance. Taxpayers with high or medium assurance paid $32.5 billion of the population's $38.4 billion in income tax for the income year ended 30 June 2024.

The report also identified improved income tax governance. In reviews completed during the financial year ended 30 June 2026, 73% of taxpayers received a stage 2 or stage 3 governance rating. The ATO expects greater focus on periodic testing of internal controls as more taxpayers progress beyond having effectively designed controls.

For GST, 54% of taxpayers reviewed during the financial year ended 30 June 2026 received high assurance. Across the Top 1,000 population, 46% had received high assurance in their latest review and 95% had received high or medium assurance. During the year, 59% of taxpayers reviewed received a stage 2 or stage 3 GST governance rating.

The ATO reported that 27% of taxpayers made a GST voluntary disclosure after receiving notice of an assurance review but before receiving the ATO's recommendations. It also observed that supplementary annual GST returns were associated with shorter information requests and fewer areas requiring further investigation.

The ATO continues to focus on governance, significant and new transactions, differences between accounting and tax results, international related-party dealings, financing arrangements, tax losses, capital and revenue characterisation, CGT rollovers, GST data and transaction testing. Of the reviews completed during the financial year ended 30 June 2026, 3% were escalated for further ATO action and 24% resulted in specific follow-up actions for the taxpayer.

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/large-business/engaging-with-large-corporates-insights/findings-report-top-1000-income-tax-and-gst-assurance-programs
w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/large-business/engaging-with-large-corporates-insights

8.2 ATO 2024–25 corporate tax transparency report

On 1 October 2026, the ATO published its twelfth annual corporate tax transparency report. The report covers 4,299 corporate entities with total income of at least $100 million, including 1,882 Australian private entities.

The entities reported total income of $3.34 trillion, taxable income of $329.2 billion and tax payable of $87.5 billion. Total income increased by 1.9%, while taxable income fell by 9.9% and tax payable fell by 8.6%. Private entities accounted for 43.8% of the population and 12.9% of tax payable. Entities with total income between $100 million and $250 million represented 54.8% of the population but accounted for 8.4% of tax.

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About 27% of entities paid no income tax, the lowest proportion recorded over the 12 years of reporting. Of the total population, 12% incurred an accounting loss, 4% incurred a tax loss, 9% used carried-forward tax losses and 2% used tax offsets. When assessed at the economic group level, the proportion paying no tax fell to 19% because some nil-tax entities belonged to groups in which another entity paid tax.

The ATO states that it examines loss-making companies closely and uses data and analytics to monitor medium corporations and private groups. It may undertake tailored engagement where it identifies higher-risk or emerging issues. The published data is taken from income tax returns at a particular point in time and does not reflect later amendments, settlement outcomes or ATO compliance activity.

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/large-business/in-detail/tax-transparency/corporate-tax-transparency-report-2024-25

8.3 Payday Super – exceptional circumstances determinations

The ATO has finalised PS LA 2026/2, which provides guidance on when the Commissioner may make a legislative instrument granting affected employers an additional period to make on-time Payday Super contributions following a natural disaster or a widespread technology outage. The Practice Statement deals with the Commissioner's power under subsection 18C(4) of the SGAA and the factors relevant to extending the usual 7 business day contribution period.

The final version did not undergo substantial policy change. Most consultation outcomes involved clarifications and additional examples. The ATO rejected most requests for bright-line rules, safe harbours and broader relief.

Key changes on finalisation

Expanded treatment of technology outages

The final Practice Statement includes considerably more detail about modern contribution-processing infrastructure.

The ATO added express references to:

1. clearing houses;
2. payment, clearing and settlement systems;
3. superannuation gateways;
4. the Superannuation Transaction Network (STN);
5. cloud-based infrastructure and software services; and
6. shared technology dependencies relied on in contribution processing.

This is one of the most significant practical changes because many submissions focused on cloud services, gateways and third-party payroll infrastructure rather than traditional payroll software outages.

Outages can be "widespread" even if not everyone is affected

The draft referred to outages affecting most users. Submitters argued this was too narrow because cloud environments and technology platforms may affect only a subset of users while still disrupting thousands of employers.

The final Practice Statement now expressly states that an outage may be widespread even where some users remain unaffected. The focus is on whether a shared system, platform or dependency relied upon by a class of employers has been disrupted.

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Greater recognition of continuing disruption after restoration

The final version recognises that the practical effects of an outage may continue after services are restored.

The ATO added clarification that:

1. restoration of services is not determinative;
2. continuing impacts can be taken into account;
3. employers may still need to undertake validation, processing and settlement activities after systems return; and
4. residual disruption may remain relevant when deciding whether a determination should be made.

This appears to be a direct response to concerns from software providers and administrators that "service restored" does not necessarily mean employers can immediately process contributions.

Broader recognition of government disaster declarations

The draft referred primarily to government declarations.

The final version now expressly recognises that Commonwealth, State, Territory and local government disaster declarations may all be relevant evidence when assessing whether a natural disaster exists.

Clarification that determinations are legislative instruments

The final Practice Statement expressly states that subsection 18C(4) determinations are legislative instruments and must comply with the Legislation Act 2003.

More guidance on evidentiary records

The final version now includes specific examples of records employers may keep to support reliance on a determination, including:

1. incident notifications;
2. system-generated reports;
3. communications with providers;
4. emergency declarations; and
5. evidence of business disruption.

Consultation responses

No safe harbours or numerical thresholds

Several submissions sought objective tests based on the number of affected employers, users or employees.

The ATO rejected those proposals and retained a principles-based approach. It considers predetermined thresholds inconsistent with the purpose of the legislation because disruption severity cannot be measured solely by affected user numbers.

Financial difficulty is irrelevant

Multiple submissions argued that natural disasters and outages often create financial as well as operational impacts.

The ATO firmly rejected that approach. It maintained that the provision is concerned with disruption to the contribution process, not an employer's cash flow, liquidity or ability to fund contributions.

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No relief while a determination is being considered

A notable point from the compendium is that employers receive no interim protection while the Commissioner is considering whether to make a determination.

The ATO confirmed that:

1. a disaster or outage does not automatically extend contribution deadlines;
2. protection only arises if a determination is ultimately made; and
3. the determination may operate retrospectively.

Third-party provider failures do not qualify

The ATO rejected submissions seeking relief where an individual payroll provider, intermediary or payment provider fails to remit contributions after receiving funds.

The ATO's view is that:

1. subsection 18C(4) is directed at classes of employers;
2. isolated provider failures are not exceptional circumstances;
3. employers remain responsible for ensuring contributions reach the fund; and
4. the former PS LA 2007/1 administrative approach no longer applies from 1 July 2026.

No special treatment for insolvency practitioners

The ATO also rejected submissions seeking automatic relief for administrators, liquidators and receivers who inherit dysfunctional payroll and superannuation systems.

Its view is that these difficulties arise from the appointment itself and do not fall within the prescribed categories of natural disasters or widespread technology outages.

TRAP – An employer cannot assume that a declared disaster, payroll outage or provider failure automatically extends the 7 business day contribution period. The extension only applies if the Commissioner makes a determination covering the employer's class. Until then, the ordinary Payday Super rules continue to apply.

ATO reference *PS LA 2026/2*
w https://www.ato.gov.au/law/view/document?docid=PSR/PS20262/NAT/ATO/00001

8.4 Electronic device usage expenses – verification approaches

The ATO has updated PS LA 2001/6, which outlines the evidence and verification approaches ATO officers may accept when reviewing claims for phone, internet and other electronic device usage expenses. The Practice Statement deals with proving that an expense was incurred and determining the deductible work-related proportion.

The update is largely consequential on the introduction of the standard deduction. The substantive approaches for calculating and apportioning phone and internet expenses remain largely unchanged.

Removal of the $50 shortcut method

The most significant change is the removal of the concession that allowed taxpayers to claim up to $50 of phone calls, text messages and internet expenses using limited documentation. Under the previous version, taxpayers with incidental use could rely on prescribed rates and basic records rather than detailed evidence.

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The ATO has removed this method because it considers it unnecessary following the introduction of the standard deduction in section 25-130 of the ITAA 1997.

Increased focus on substantiation

The updated Practice Statement now expressly states that phone and internet expenses are work expenses that must be substantiated with written evidence. This point was not stated as prominently in the previous version.

The revised document also separates the concepts of:

1. evidencing that expenditure was incurred; and
2. substantiating the deductible amount claimed.

No substantive change to actual-cost methodologies

The approaches for calculating actual deductions have been retained, including:

1. call-based apportionment for home telephones;
2. work-use apportionment for mobile phones;
3. time-based and data-based internet calculations;
4. representative four-week records; and
5. apportionment of bundled services.

Other changes

The Practice Statement has been restructured and reformatted to align with current ATO drafting conventions. Additional cross-references have also been included to the standard deduction and other current ATO guidance.

COMMENT – The amendments do not materially alter the ATO's longstanding views on how work-related phone and internet expenses should be apportioned. Most of the update involves modernisation, clarification and the removal of a concession rendered largely redundant by the standard deduction.

ATO reference *PS LA 2001/6*
w https://www.ato.gov.au/law/view/document?docid=PSR/PS20016/NAT/ATO/00001

8.5 ATO use of AI

On 20 August 2026, ATO Second Commissioner Kirsten Fish delivered a speech on the ATO's use of artificial intelligence, automation and advanced analytics in tax administration. The speech emphasised that AI is intended to improve compliance, system integrity, resource allocation and decision quality, rather than replace human decision-making.

The ATO identified four key objectives for its use of AI:

1. making compliance easier through pre-fill technologies, digital lodgment processes and real-time prompts that help taxpayers identify and correct errors before lodgment;
2. supporting earlier intervention by improving fraud detection, identity protection, risk modelling and network analysis;
3. enabling better use of expertise by assisting officers with document review, information gathering and case preparation; and
4. improving decision quality by identifying patterns, inconsistencies and outliers that may warrant further review.

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The ATO reported that in 2024-25 its real-time prompting technology generated more than 720,000 prompts to taxpayers, helping protect an estimated $62.5 million in revenue from incorrect returns. It also stated that its fraud detection capabilities helped protect 12,830 taxpayers from fraud-related harm between February 2025 and February 2026.

The speech emphasised that AI does not alter administrative law principles. Decisions must still be made under lawful authority, relevant considerations must still be taken into account, procedural fairness obligations continue to apply, and taxpayers retain review rights. Responsibility for decisions remains with ATO officers, not technology systems.

The Commissioner also outlined the ATO's AI governance framework, which focuses on:

1. privacy and confidentiality of taxpayer information;
2. preventing errors, particularly errors at scale;
3. transparency, explainability and auditability of AI-enabled processes; and
4. avoiding over-reliance on AI outputs where professional judgment is required.

In relation to tax professionals, the Second Commissioner stated that AI is likely to significantly reduce the time required for tasks such as research, document review, drafting and information gathering. However, the ATO considers that professional judgment, validation of outputs, ethical conduct and communication skills will become increasingly important. Tax professionals will continue to play a central role in assessing whether AI-generated outputs are correct, relevant and appropriate.

The ATO is currently exploring a range of AI initiatives, including call transcription and summarisation, taxpayer request triage, case profiling tools, drafting assistance, coding support and internal knowledge management systems. The ATO indicated that future development is likely to involve increasingly agentic systems and structured AI support for end-to-end workflows.

The overall message was that AI and automation are expected to become increasingly embedded in both tax administration and tax practice, but that trust, accountability, transparency and human judgment will remain fundamental.

w https://www.ato.gov.au/media-centre/second-commissioner-kirsten-fishs-speech-at-the-cpa-tax-forum-2026

8.6 R&D tax incentive transparency report 2023–24

The ATO has published its annual R&D tax incentive transparency report, which analyses data reported by companies claiming the R&D tax incentive for the 2023–24 income year. The report is based on company tax return data extracted as at 30 June 2026 and sits alongside the detailed dataset published on Data.gov.au. It is intended to increase transparency and public awareness of R&D tax incentive claims.

Claimed R&D expenditure increased to $16.7 billion in the 2023–24 income year, up 3% from $16.2 billion in 2022–23. The number of companies claiming the incentive also increased by 4% to 13,490 companies. Public and multinational businesses remained the largest claimants by dollar value, reporting $9 billion of expenditure, followed by privately owned and wealthy groups ($4.6 billion) and small businesses ($3.1 billion).

Small businesses accounted for the largest number of claimants, with 6,920 companies (51% of all claimants), reflecting a 15% increase in claimants and a 28% increase in expenditure compared with the prior year. By contrast, privately owned and wealthy groups experienced decreases in both claimant numbers and expenditure.

The report notes that the professional, scientific and technical services sector continued to dominate R&D activity. This industry accounted for more R&D expenditure than any other sector, with approximately $6.5

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billion of reported expenditure and almost 6,000 claimants. Manufacturing and mining were the next largest sectors by expenditure.

The largest individual claimant was Atlassian Australia 1 Pty Ltd, which reported R&D expenditure of approximately $236.3 million, followed by Fortescue, Cochlear and CSL.

The report also highlights the ATO's continued compliance focus on the integrity of the R&D tax incentive program. The ATO and the Department of Industry, Science and Resources continue to undertake risk-based reviews and audits, with particular focus on large claims, arrangements involving associated entities and overseas R&D activities. The report notes that Part IVA has applied to R&D tax offsets as a tax benefit since 1 July 2021.

Notably, the published data includes taxpayer-initiated amendments processed by 30 June 2026, but does not disclose amendments resulting from ATO compliance activity. The report also does not disclose the value of the tax offset received by a claimant or whether the offset was refundable or non-refundable.

COMMENT – The report suggests continued growth in R&D incentive utilisation, particularly among small businesses, which now make up more than half of all claimants. However, the data remains subject to a two-year publication lag and does not reveal the outcome of ATO compliance activity. As a result, reported expenditure levels should not be taken as indicating that all claims have been accepted by the ATO.

w https://www.ato.gov.au/businesses-and-organisations/income-deductions-and-concessions/incentives-and-concessions/research-and-development-tax-incentive/r-d-tax-transparency-reports/r-d-tax-incentive-transparency-report-2023-24

8.7 SG checklist for sportspeople, performers, film makers etc

On 24 September 2026, the ATO published a checklist to help businesses determine whether they must pay superannuation guarantee for sportspeople, performers, film makers and people undertaking related activities. The checklist also covers payment arrangements, required information, contribution deadlines and record keeping.

Individuals covered

An individual is generally treated as an employee for superannuation guarantee purposes if they are paid to:

1. play sport;
2. perform or present music, dance or entertainment;
3. undertake promotional activities or activities involving similar skills;
4. provide services required for those activities to occur; or
5. perform services in, or required for, making a film, tape, disc, television program or radio program.

Superannuation guarantee may apply even if the individual:

1. is not a professional;
2. has an ABN;
3. issues an invoice;
4. describes themselves as a contractor;
5. performs only occasionally or at a one-off event;
6. undertakes the activity as a hobby or provides a Statement by a Supplier form; or
7. is retired or receiving a superannuation pension or annuity while working.

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The ATO states that superannuation guarantee is generally not required where the worker is engaged through a company, partnership or trust. It also identifies exceptions for genuine volunteers, certain private or domestic arrangements and individuals under 18 who work fewer than 30 hours a week.

Who must pay superannuation guarantee

A person paying an individual directly will generally be responsible for that individual's superannuation guarantee if the payer is liable to make the payment for the work.

Where one person receives a payment and distributes it to others, the outcome depends on whether that person acts as agent:

1. if the recipient is not acting as agent, the payer generally pays superannuation guarantee only for the recipient. The recipient is responsible for the other individuals, unless the payer separately engaged them;
2. if the recipient is acting as agent, the payer must generally pay superannuation guarantee for each individual, even though payment is distributed through the agent.

Businesses should therefore identify who engaged each individual, who is legally liable to pay them and whether an intermediary acts as principal or agent.

Calculating the contribution

The parties should agree whether superannuation is included in, or payable in addition to, the agreed fee. Regardless of that agreement, the contribution must be paid to the individual's nominated superannuation fund. It cannot be paid directly to the individual.

Superannuation guarantee is calculated on the part of the payment attributable to the individual's work or labour. Amounts attributable to equipment hire, intellectual property, expense reimbursements or other non-labour components are excluded. The contribution must be at least 12% of qualifying earnings.

Information and payment requirements

For a new engagement, the payer should obtain the individual's:

1. full name;
2. tax file number;
3. superannuation fund ABN;
4. unique superannuation identifier; and
5. member account number.

The payer should also confirm that the fund is complying and can receive the contribution. A standard choice form may be used to collect the required information.

For an ongoing or renewed arrangement, the payer should check that:

1. the individual continues to be engaged on the same basis;
2. no relevant exception has begun or ceased to apply; and
3. the individual's fund details remain current.

Contributions must generally be paid through a SuperStream-compliant method within seven business days after payday. A 20-business-day period applies to the first contribution where the payer is contributing for a person for the first time, paying to a newly nominated fund or engaging the person under a new arrangement.

Record keeping

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The payer should keep records of:

1. the engagement;
2. the agreed payment for the performance or service;
3. the identity of each person paid;
4. the amount paid to each individual;
5. the amount paid to each individual's superannuation fund; and
6. each individual's choice of fund.

Records relating to superannuation guarantee contributions must be retained for five years after the contribution date.

TRAP – Payments made through a booking agent, band leader, production company or other intermediary need to be examined carefully. If the intermediary acts as agent, the person making the payment may remain responsible for superannuation guarantee for each individual performer or worker.

w https://www.ato.gov.au/businesses-and-organisations/super-for-employers/work-out-if-you-have-to-pay-super/super-for-sportspeople-performers-film-makers-and-related-activities/super-checklist-for-sportspeople-performers-film-makers-and-related-activities

8.8 ATO to stop accepting credit card payments after 30 June 2027

The ATO initially announced that it will stop accepting credit card payments after 30 November 2026. The change follows the Reserve Bank of Australia's review of merchant card payment costs and surcharging. The ATO considers that credit card merchant fees should not be transferred to the community.

Credit card payments were initially going to cease from 1 December 2026. However, following discussions with the government and the provision of transitional funding, the ATO announced on 9 October 2026 will continue accepting credit card payments for tax obligations until 30 June 2027.

Taxpayers will need to use an alternative payment method from 1 July 2027. The ATO's existing payment options include debit card, BPAY, direct credit and direct debit.

The ATO recognises that some taxpayers rely on credit cards to manage their tax payments. It will contact taxpayers whose payment plans are linked to credit cards and explain the steps required to change their payment method. A taxpayer with a direct debit arrangement linked to a credit card will need to update the payment method before the first instalment due after 30 June 2027.

The ATO will continue to provide support to taxpayers experiencing financial hardship or other circumstances that make it difficult to pay their tax liabilities.

Credit cards represented approximately 2.3% of tax payments during the income year ended 30 June 2025. More than 60% of credit card payments were made by privately owned and wealthy groups and public and multinational businesses.

TRAP – A payment plan linked to a credit card will not update automatically. If the taxpayer does not change the payment method, an instalment may fail and the taxpayer may breach the payment plan. If the taxpayer defaults on the payment plan, the full overdue balance becomes immediately payable. The ATO may also take firmer recovery action. Repeated defaults may limit the taxpayer's ability to establish a new payment plan online and require the taxpayer to contact the ATO.

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w https://www.ato.gov.au/media-centre/ato-to-stop-accepting-credit-cards-after-30-november-2026
w https://www.ato.gov.au/media-centre/ato-extends-transition-period-for-taxpayers-using-credit-cards-until-30-june-2027

8.9 Updated OECD Model Tax Convention and commentary

The OECD has released the 2025 edition of the Model Tax Convention on Income and on Capital, updating the principal model used by countries to negotiate, apply and interpret bilateral tax treaties. The OECD Model remains a key reference point for addressing double taxation, preventing tax avoidance and evasion, and facilitating cross-border trade and investment.

Cross-border WFH and permanent establishments

While the core provisions of the OECD Model remain largely unchanged, the 2025 update includes several commentary developments. Of particular practical interest is new guidance on when cross-border home working arrangements may give rise to a permanent establishment. The OECD acknowledges the increasing prevalence of remote work and provides guidance on when an employee's home office may constitute a fixed place of business of the enterprise. The Commentary confirms that an employee's home office will not automatically constitute a fixed place of business of the enterprise. Broadly, a home office will generally not be treated as a place of business where the employee works there for less than 50% of their working time. Where an employee works from home more extensively, the key question is whether there is a commercial reason for the employee to be located in that country, such as servicing local customers or accessing business opportunities. The Commentary indicates that working from home for personal reasons, or merely to reduce office costs, will not generally be sufficient to create a permanent establishment.

Other updates

The update also expands guidance on fiscally transparent entities (such as partnerships and trusts), introduces new provisions dealing with the interaction between tax treaties and international trade agreements, and adds further commentary on natural resource activities, transfer pricing and dispute resolution. These changes are intended to assist with treaty interpretation rather than introduce significant new treaty rules.

w https://www.oecd.org/en/publications/model-tax-convention-on-income-and-on-capital-2025-full-version_db32e18b-en.html

8.10 NSW payroll tax and exemption for employment agency contracts

On 18 September 2026, Revenue NSW published a new webpage on when payments under an employment agency contract can be exempt from payroll tax. It covers which wages are exempt, when the client must give a Relevant Declaration, how to complete one, and what records to keep.

Under the employment agency provisions in Division 8 of Part 3 of the *Payroll Tax Act 2007* (NSW), the employment agent is treated as the employer and the on-hired worker as its employee. Amounts the agent pays under the contract are treated as wages. The contractor exemptions do not apply, because an employment agency contract cannot be a relevant contract.

Under section 40(2), payments to a worker are exempt if both of these are true:

1. the wages would have been exempt under Part 4 had the client employed and paid the worker directly;
2. the client has given the employment agent a Relevant Declaration to that effect.

Clients that may qualify include:

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1. non-profit bodies whose sole or dominant purpose is charitable, benevolent, philanthropic or patriotic;
2. public benevolent institutions;
3. religious institutions;
4. certain non-profit schools at or below secondary level;
5. health care service providers;
6. councils, except for some activities.

Exempt wages under these arrangements do not need to be declared in monthly or annual returns.

Examples from the guidance

The page gives two examples:

1. full exemption: a registered charity hires six support workers through ABC Helpers Pty Ltd to deliver its welfare programs. The whole amount is exempt if ABC Helpers Pty Ltd obtains a Relevant Declaration from the charity when the contract is entered into;
2. partial exemption: a church hires ministers and pastoral workers through an agency, along with staff for a café it runs commercially for the public. Payments for the ministers and pastoral workers are exempt because their work is central to the church's religious purpose. The café is a commercial activity, not a religious or pastoral one, so the café staff do not qualify.

Client Declaration

The requirements for the client declaration are as follows:

1. the agent must get a written, signed declaration from the client. The client can use Revenue NSW's form (OPT 006) or its own document if it contains the required information;
2. a declaration is generally needed for each employment agency contract with an exempt client. It is the agent's job to give the declaration to the client to complete;
3. one declaration obtained at the start of a contract covers the whole contract, including across several financial years, as long as the terms or the nature of the work do not change and the client keeps paying exempt wages;
4. the agent must keep the declaration for 5 years;
5. an agent that supplies workers to both exempt and non-exempt clients must keep records that substantiate the exempt portion of its wages;
6. giving false or misleading information is an offence and may also attract interest and penalty tax.

TIP – Businesses that do work for charities, schools, health providers or churches should check that each contract is supported by a signed declaration obtained when the contract was entered into.

TRAP – The exemption depends on the type of work, not just the client. The church example shows that one contract can include both exempt and taxable workers. The exemption also does not apply where the client pays no payroll tax only because it is below the threshold. Given the breadth of the employment agency provisions, businesses that do not see themselves as labour hire firms, such as cleaning or security contractors working for exempt clients, should also consider whether they need declarations.

w https://www.revenue.nsw.gov.au/taxes-duties-levies-royalties/payroll-tax/exemptions/employment-agency-contracts

8.11 Victorian State Revenue Office 2026–27 compliance priorities

On 23 September 2026, the Victorian State Revenue Office (**SRO**) published its compliance priorities for the 2026–27 financial year. The SRO stated that its compliance programs focus on identifying non-compliance,

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protecting revenue and supporting a fair tax system. In 2025–26, the SRO completed more than 13,500 investigations, detected non-compliance in more than 90% of cases and issued more than $1.094 billion in assessments, including over $56 million in penalties.

The SRO has identified the following areas as priorities for 2026–27.

Payroll tax

The SRO will focus on employers that:

1. incorrectly disclose wages, including contractor payments, employee share schemes and fringe benefits;
2. fail to lodge annual reconciliations on time;
3. should be grouped for payroll tax purposes; and
4. engage in labour hire arrangements.

Land tax

The SRO will focus on landowners who:

1. should be grouped for land tax purposes;
2. incorrectly claim the principal place of residence exemption or primary production exemption; and
3. fail to disclose trustee ownership or absentee owner status.

Vacant residential land tax

Following the extension of vacant residential land tax across Victoria, the SRO will target:

1. owners who fail to notify vacant properties; and
2. incorrect claims, including holiday home exemption claims.

Land transfer duty

The SRO will continue reviewing transactions involving:

1. related parties;
2. foreign purchasers that do not disclose their status; and
3. claims for residence-based concessions and exemptions.

Landholder duty

The SRO identified increased scrutiny of:

1. acquisitions of interests in companies and unit trusts holding Victorian commercial and industrial land; and
2. offshore transactions involving foreign entities that indirectly own Victorian energy, infrastructure or data centre assets.

First Home Owner Grant

The SRO will focus on applicants who:

1. do not satisfy residency requirements;
2. fail to disclose that a spouse or partner has previously received a grant; or
3. fail to disclose an earlier relevant property interest.

w https://www.sro.vic.gov.au/about-us/news-and-events/news/compliance-areas-focus-2026-27

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9. Tax professionals

9.1 PAYG instalment obligations

On 1 September 2026, the ATO announced that it is contacting taxpayers, or their tax agents, where PAYG instalments have been varied to nil for multiple years.

The ATO warns that general interest charge may apply where PAYG instalments have been significantly understated. When varying instalments, tax practitioners should ensure that estimates are based on reasonable, current and substantiated information. Variations should be reviewed if the client's circumstances change.

The ATO recommends that practitioners:

1. encourage clients to review their PAYG instalment amounts regularly;
2. retain appropriate records supporting each variation; and
3. update variations when the client's financial circumstances change.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/reinforcing-payg-instalment-obligations

9.2 New foreign resident CGT measure starts 1 October 2026

The ATO has reminded tax professionals that the Government's foreign resident CGT reforms received Royal Assent and commence on 1 October 2026.

The reforms apply to disposals of Australian real property and certain indirect interests in Australian real property, including interests held through shares, trust units and other membership interests. Advisers should review foreign resident clients who hold Australian real estate, water entitlements, or investments in Australian entities.

Key changes from 1 October 2026 include:

1. a new requirement for foreign vendors providing a non-IARP declaration for disposals of $50 million or more to notify the ATO using a prescribed form;
2. purchasers being required to reconsider a declaration where they reasonably believe it is false before settlement;
3. a broader Commonwealth definition of real property, including land, rights and interests relating to land, assets fixed to land, and leases or licences over those assets;
4. replacement of the point-in-time principal asset test with a 365-day testing period; and
5. a temporary 50% CGT discount for eligible non-individual foreign residents disposing of certain renewable energy assets.

The ATO has confirmed that the expanded real property definition will not apply retrospectively to settled disposals. Further guidance is expected on the new real property definition, the 365-day principal asset test and the renewable energy asset concession.

TRAP – A foreign resident selling shares, units or other membership interests with a value of $50 million or more should not assume that a non-IARP declaration alone will be sufficient. New notification requirements apply from 1 October 2026 and purchasers may need to revisit declarations if later information suggests they are incorrect.

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w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/new-foreign-resident-cgt-measure-starts-1-october

9.3 TPB enhanced sanctions regime commences

From 1 October 2026, the Tax Practitioners Board (**TPB**) has access to a significantly expanded range of sanctions under the *Tax Agent Services Act 2009* (Cth) (**TASA**). The reforms apply to registered tax practitioners and unregistered entities. They are intended to allow the TPB to respond to misconduct in a more graduated and proportionate way.

The reforms follow the independent review of the TPB and TASA completed in 2019 and the Government's response to the PwC tax leaks matter. The primary legislation was enacted in September 2026. The supporting regulations commenced on 1 October 2026.

New criminal penalties for unregistered entities

New criminal offences apply where an unregistered entity:

1. provides tax agent or BAS services for a fee or other reward;
2. advertises tax agent or BAS services; or
3. represents that it is a registered tax agent or BAS agent.

The maximum penalty for each offence is 40 months' imprisonment, 200 penalty units or both. As at 1 October 2026, a penalty unit is $330. Exceptions continue to apply for certain services provided by legal practitioners, customs brokers and volunteers.

The criminal offences sit alongside the existing civil penalty regime. The TPB may choose whether civil or criminal proceedings are the appropriate response, having regard to the seriousness of the conduct and the risk posed to the tax system.

New and increased civil penalties

A new civil penalty applies to each breach by a registered tax practitioner of the Code of Professional Conduct or the Code Determination. A separate civil penalty applies where an unregistered entity makes a false or misleading statement to the TPB or ATO.

The maximum civil penalties for contraventions of the TASA have also increased substantially:

1. for an individual, from 250 penalty units to 2,500 penalty units;
2. for a body corporate, from 1,250 penalty units to 50,000 penalty units; and
3. for a significant global entity, to 50,000 penalty units.

For a partnership or trust that is a significant global entity, the body corporate maximum applies to each partner or trustee, including an individual partner or trustee.

Infringement notices

The TPB can now issue infringement notices for prescribed civil penalty provisions.

For registered tax practitioners, the provisions include certain requirements concerning:

1. compliance with taxation laws in the practitioner's own affairs;
2. accounting for client money or property;
3. disclosure of client information;

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4. maintaining knowledge and skills;
5. advising clients of their rights and obligations;
6. maintaining professional indemnity insurance;
7. responding to TPB requests and directions;
8. keeping proper client records;
9. maintaining confidentiality in dealings with government; and
10. keeping clients informed.

Infringement notices may also be issued to unregistered entities for conduct such as providing or advertising tax agent services, representing that they are registered, or providing or advertising tax financial advice services without the required registration or qualifications.

A notice must generally be issued within 12 months of a registered practitioner's contravention or within two years of an alleged contravention by an unregistered entity. The maximum amount payable is the lesser of:

1. 12 penalty units for an individual or 60 penalty units for a body corporate; and
2. one-fifth of the maximum civil penalty that a court could impose.

Payment is generally required within 28 days. Payment provides an alternative to court proceedings and is not an admission of guilt or liability.

Enforceable undertakings

The TPB may accept enforceable undertakings from registered practitioners and unregistered entities concerning compliance with any provision of the TASA.

An undertaking may require an entity to:

1. take specified action to comply with the TASA;
2. refrain from specified action; or
3. take action to prevent a contravention or reduce the likelihood of one occurring.

For a Code breach, the TPB can only accept an undertaking after it has investigated and found that a breach occurred. If the undertaking is not complied with, the TPB can seek court orders requiring compliance and imposing financial penalties.

Interim suspension

The TPB may immediately suspend a registered practitioner for up to 90 days without first completing, or even commencing, an investigation.

The TPB must be satisfied on reasonable grounds that:

1. the practitioner engaged in conduct that may constitute a taxation offence or contravention of a civil penalty provision; and
2. there is or may be a significant risk of material loss or damage to clients, or suspension is in the public interest due to a significant risk to Commonwealth revenue or the integrity of the tax system or profession.

The TPB may extend the suspension for further periods of up to 90 days if the criteria continue to be met and an investigation has commenced.

Information about an interim suspension, including the reasons for it, must be published on the public TPB Register while the suspension remains in force. The information is removed when the suspension ends. The explanatory materials state that an interim suspension should not, without more, be treated as reflecting on the practitioner's ongoing suitability after the suspension has ceased.

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Contingent suspension

The TPB may suspend a practitioner's registration if:

1. an event affecting continued registration occurs;
2. the practitioner ceases to satisfy a registration eligibility requirement; or
3. the practitioner breaches a registration condition.

The suspension continues until the practitioner remedies the non-compliance. The practitioner may apply to have the suspension lifted by providing evidence that the required action has been completed. This provides the TPB with an alternative to terminating registration.

Longer banning period

The maximum period during which a practitioner whose registration has been terminated can be prohibited from applying for registration has increased from five years to ten years.

The practitioner will also remain a disqualified entity throughout the full non-application period. The practitioner cannot provide tax agent or BAS services on behalf of a registered practitioner without TPB approval during that period.

Publication on the TPB Register

The Tax Agent Services Amendment (Enhancing Tax Practitioners Board Sanctions) Regulations 2026 expand the information that must be published on the public TPB Register.

The Register may now include information concerning:

1. suspensions and terminations of registration;
2. interim suspensions;
3. criminal proceedings for unregistered activity;
4. convictions for those offences;
5. paid infringement notices issued to unregistered entities; and
6. enforceable undertakings.

For an ordinary suspension, information remains on the Register until five years after the suspension ends. For a termination, information generally remains for five years after termination. If the TPB imposes a non-application period, information remains until five years after that period ends.

Information about criminal proceedings for unregistered activity remains on the Register while the proceedings are on foot. If there is no conviction, the entry is removed. If there is a conviction, details remain for five years after conviction or, where imprisonment is imposed, until five years after the imprisonment ends.

If an unregistered entity pays an infringement notice, the Register will state that payment is not an admission of guilt or liability. The information generally remains for five years from payment but must be removed if the notice is withdrawn, unless another basis for publication exists.

Details of an enforceable undertaking remain on the Register from acceptance until five years after the undertaking is withdrawn, cancelled or expires.

The amendments generally apply to conduct occurring on or after commencement. The previous register provisions continue to govern conduct occurring before commencement.

w https://www.legislation.gov.au/F2026L01227/asmade/text
w https://www.tpb.gov.au/enhancing-tpb-sanctions-regime
w https://www.tpb.gov.au/tpb-provides-guidance-reforms-sanctions-powers

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9.4 Top 5 myths busted – cents per kilometre method

On 18 September 2026, the ATO published guidance addressing common misconceptions about the cents per kilometre method for claiming work-related car expenses. The ATO notes that these misunderstandings frequently lead to incorrect claims.

The ATO highlighted the following common misconceptions:

1. Misconception: Home-to-work travel is generally deductible - the ATO reiterates that travel between home and work is generally not deductible, regardless of the method used. Limited exceptions may apply, such as where the employee is required to transport bulky tools or equipment and no secure storage is available at the workplace;
2. Misconception: taxpayers can automatically claim 5,000 kilometres without records - he ATO states that records are still required, including evidence of ownership (or a right to use the vehicle), work-related use and how the kilometres were calculated;
3. Misconception: any lease arrangement allows a car expense claim - the ATO notes that a taxpayer with a novated lease under a salary sacrifice arrangement generally cannot claim car expenses because they do not own the vehicle for these purposes. However, unreimbursed work-related parking and tolls may still be deductible.
4. Misconception: decline in value can be claimed separately when using the cents per kilometre method - the ATO states that depreciation is already built into the cents per kilometre rate and cannot be claimed separately. Separate depreciation claims are only available under the logbook method.
5. Misconception: taxpayers can switch between the cents per kilometre and logbook methods during the same income year - the ATO states that one method must be used for the entire income year and taxpayers cannot split the year between methods to maximise deductions.

TIP – Where there is uncertainty about whether the cents per kilometre or logbook method will produce the better outcome, taxpayers should keep full records throughout the income year. This preserves the ability to choose the most favourable method when preparing the return.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/top-5-myths-busted-cents-per-kilometre-method

9.5 Client-to-agent linking expanding to individuals and sole traders

On 23 September 2026, the ATO announced that client-to-agent linking will be extended to individuals and sole traders. The change is intended to reduce identity-related fraud and ensure that only authorised agents can access a client's tax information.

The new process will apply when an individual or sole trader appoints a new registered agent or changes the authorisations given to an existing agent. Existing agent authorisations will remain unchanged unless one of these events occurs.

How the process will work

Unlike the existing process for other ABN entities, the process for individuals and sole traders will be initiated by the agent. Broadly:

1. the agent will send a client nomination request through Online services for agents or compatible practice software;
2. the client will review and confirm the request through the ATO app or Online services for individuals accessed through myGov; and

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3. after confirmation, the agent may add the client to the practice's client list and access the client's tax record.

The ATO is developing assisted and non-digital pathways for clients who cannot use the digital process or need additional support.

Implementation

The ATO proposes a staged rollout:

1. March 2027, the pilot will begin with selected registered agents and the individual and sole trader clients they onboard;
2. March to October 2027, pilot participants will test the process and provide feedback; and
3. November 2027, the process will be fully implemented and will become the only way for registered agents to add new individual and sole trader clients to their client lists.

The ATO is seeking expressions of interest from registered tax and BAS agents that represent individuals and sole traders. Selected participants will receive dedicated ATO support and an opportunity to test the process.

No action is required from agents or clients at this stage. The ATO will publish further guidance and support materials before implementation.

COMMENT – The agent-initiated process should be simpler for individuals and sole traders than the existing client-initiated process for other ABN entities. However, it introduces an additional onboarding step that will depend on the client promptly accessing the ATO app or myGov and approving the nomination.

TRAP – From full implementation, an agent will not be able to add a new individual or sole trader client to the practice list until the client confirms the nomination. Delayed authorisation may therefore affect access to client records and the timely preparation or lodgment of returns.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/client-to-agent-linking/client-to-agent-linking-for-individuals-and-sole-traders
w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/client-to-agent-linking-is-expanding

9.6 TaxTools4Tradies - new ATO resource

On 25 September 2026, the ATO launched TaxTools4Tradies, a new online resource for clients working in the building and construction industry. It was developed with the Property and Construction Stakeholder Relationship Forum.

TaxTools4Tradies provides guidance on key tax, superannuation and registration obligations. It covers tradies who are employees, subcontractors, employers or business owners.

The resource includes:

1. practical tips to help tradies avoid common mistakes;
2. links to training and other useful resources;
3. access to detailed guidance on specific topics; and
4. information about support options for tradies who fall behind or cannot meet their obligations.

The ATO encourages tax professionals to share the resource with clients. It considers that the guidance may help clients maintain better records and provide more complete information at lodgment time.

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Clients can access the resource by searching for “TaxTools4Tradies” on the ATO website or bookmarking the Building and construction tradies tax essentials page.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/taxtools4tradies-a-new-resource-for-your-clients

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