The Tax Institute

Tax Update

September 2022

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1. Cases

1.1 Adcon Resources Vic Pty Ltd – GST Grouping

Facts

Adcon Resources Vic Pty Ltd is one of the many companies that form part of the Adcon Group. Adcon Resources was incorporated on 12 March 2018, and was registered for GST on a cash accounting basis with quarterly reporting.

On 10 July 2019, Adcon Resources gave notice to the ATO that it was seeking to form a GST group with Adcon Contracting Pty Ltd. Adcon Contracting was registered for GST on a non-cash basis on 25 July 2018 with quarterly reporting. This was to have effect from 1 July 2018.

On 1 October 2019, the Commissioner gave Adcon Resources notice that it had registered the GST group effective from 1 July 2019.

On 20 November 2019, Adcon Resources objected to the Commissioner's grouping decision.

The Commissioner noted that according to ASIC searches, the ownership structure appeared to be as follows:

1. Adcon Resources had issued 100 ordinary shares that were all beneficially owned by Danny Isaac. Danny was also the sole director of the company;
2. Adcon Contracting had issued 24 ordinary shares that were all owned by Chale Pty Ltd, but Chale was not the beneficial owner. Danny was listed as the sole director of Adcon Contracting; and
3. Chale had issued 100 ordinary shares that were all beneficially owned by Danny. Danny was the sole director of the company.

The ASIC searches also showed that between 19 February 2018 and 13 March 2020, Danny's wife was the sole director of Chale and that Danny was the legal and beneficial shareholder.

On 26 June 2020, the Commissioner wrote to Adcon Resources seeking further details in relation to the ownership structures of both Adcon Resources and Adcon Contracting, as it appeared that they were not part of the same 90% owned group required by section 48-10(1)(b) of the GST Act to form a GST group.

Section 48-10(1) of the GST Act, provides:

> *(1) An entity satisfies the membership requirements of a GST Group, or a proposed GST Group, if the entity:*
> *(a) is:*
> *(i) a company; or*
> *(ii) a partnership, trust or individual that satisfies the requirement specified in the regulations; and*
> *(b) is, if the entity is a company, a company of the same 90% owned group as all the other members of the GST group or proposed GST group that are also companies; and*
> *(c) is registered; and*
> *(d) has the same tax periods applying to it as the tax periods applying to all the other members of the GST group, or proposed GST group; and*
> *(e) accounts on the same basis as all the other members of the GST group or proposed GST group; and*
> *(f) is not a member of any other GST group; and*
> *(g) does not have any branch that is registered under Division 54.*

Division 190 of the GST Act, provides:

> *(190-1)* ***90% owned groups***
> *Two companies are members of the same 90% group if:*

> (A) *one of the companies has at least a 90% stake in the other company; or*
> (B) *a third company has at least a 90% stake in each of the two companies.*

(190-5) ***when a company has at least a 90% stake in another company***
A company (the holding company) has at least a 90% stake in another company (the subsidiary company) if the holding company:

> (a) *controls, or is able to control, at least 90% of the voting power in the subsidiary company (whether directly, or indirectly through one or more interposed companies); and*
> (b) *has the right to receive (whether directly, or indirectly through one or more interposed companies) at least 90% of any dividends that the subsidiary company may pay; and*
> (c) *has the right to receive (whether directly, or indirectly through one or more interposed companies) at least 90% of any distribution of capital of the subsidiary company.*

Adcon Resources advised the Commissioner that the ownership structure was not what they had outlined, or intended the structure to be, in the initial consult with the accountant who was registering the company. It was explained that Adcon Resources and Adcon Contracting were to be owned by the same entity according to the internal group structure and that they had lodged with ASIC a request to correct the ownership of the shares from 1 July 2018 (which was the date the GST grouping was to take effect).

On 27 November 2020, the Commissioner refused Adcon Resources' objection in relation to the date of effect of its GST group. The Commissioner found that Adcon Resources and Adcon Contracting did not meet the requirements to account on the same basis as required by the section and as such, the earliest date at which the requirements to form a GST group were met was 1 July 2019. The Commissioner also put Adcon Resources on notice that they had identified issues around the GST group in regards to ownership rules and the matter had been referred for review.

On 22 January 2021, Adcon Resources made an application to the AAT to review the decision to appoint the group start date as 1 July 2019.

On 19 March 2021, the Commissioner gave Adcon Resources notice that it had revoked its GST group registration, effective from 1 July 2019.

On 16 May 2021, Adcon Resources made an objection to the decision to revoke the GST group registration. Adcon Resources submitted that:

1. the GST Group members did satisfy the requirements under section 48 of the GST Act;
2. that Adcon Resources and Adcon Contracting were part of the same 90% owned group as a request for correction to its shareholding had been submitted with ASIC; and
3. the conditions considered in the *ATO Interpretative Decision* ATOID 2004/201 applied to these circumstances.

ATOID 2004/201 involved Company A and Company B, who were both registered for GST, had the same tax periods and accounted for GST on the same basis. Neither were members of any other GST group. Company A owns 50% of the total shares in Company B and controls the rights attached to those shares. The remaining 50% of the shares are owned by an individual as a nominee shareholder for Company A. It was held that Company A controls 50% of the rights directly, and 50% of the right indirectly of Company B and, therefore, both companies are in the same 90% owned GST group. In this case, the rights to control or receive were not held either directly or indirectly by Adcon Resources in Adcon Contracting (or vice versa).

On 29 June 2021, the Commissioner refused Adcon Resources' objection in relation to the revocation of the group registration on the basis that the Adcon Resources GST group did not meet the ownership requirements in section 48-10 of the GST Act.

On 13 July 2021, Adcon Resources made an application to the AAT to review the decision to revoke the group registration decision made by the Commissioner. Danny outlined that:

1. he was the director of Chale, Pty Ltd, which was the trustee of the Chale Asset Trust, and Adcon Resources;
2. an error was made by his accountant when registering Adcon Resources;
3. he had instructed the accountant (when forming Adcon Resources) that the beneficiary should be Chale Pty Ltd as trustee for the Chale Asset Trust; and
4. he had requested that ASIC be notified to amend the error.

ASIC searches that were conducted on 11 October 2021 and 3 May 2022 showed that as of 3 January 2022:

1. Danny was no longer a director or shareholder of Adcon Resources. Another individual had been appointed as both director and legal and beneficial shareholder; and
2. Danny was no longer a director of Adcon Contracting and Chale Pty Ltd was no longer the legal shareholder of Adcon Contracting. Another individual had been appointed as both director and legal and beneficial shareholder.

Danny provided a statement of facts, issues and contentions as well as oral evidence at the AAT hearing. In the statement, Danny asserted for the first time in the proceedings, that Chale Pty Ltd held shares in both Adcon Resources and Adcon Contracting in its capacity as trustee of the Chale Asset Trust. This evidence was submitted to support the contention that there was a type of 'nominee' relationship, with Chale Pty Ltd holding the shares as trustee for the Chale Asset Trust. Danny then contended that section 48-10(1)(a)(ii) of the GST Act extends to trusts, which was relevant to Chale as trustee for the Chale Asset Trust.

Issue

Whether Adcon Resources and Adcon Contracting met the GST grouping requirements, and if so, from what date?

Decision

The AAT noted that it was unclear why Danny had asserted that the shares in Adcon Resources and Adcon Contracting were held by Chale as trustee for the Chale Asset Trust, and what the connection to section 48 of the GST Act was, given that Chale itself was not seeking to be a member of the GST group, and that section 48 of the GST Act deals specifically with entities joining a GST group.

Further, the AAT noted that evidence provided by Adcon Resources lacked both corroborating evidence and documentary evidence to prove that Danny was holding the shares as trustee for Chale, as opposed to in his personal capacity. Adcon Resources provided no documents, no company minutes and no shareholder records to support this claim. The only document provided was an ASIC form that was dated before the creation of the form.

The AAT held that Adcon Resources' reliance on the ATO Interpretative Decision 2004/201 was misguided, as the factual situation was materially different.

As Adcon Resources failed to discharge its onus to prove that the Commissioner's decision to revoke the GST grouping registration was incorrect, the AAT concluded that Adcon Resources and Adcon Contracting did not meet the GST group membership requirements, and that there was no need to consider when the proposed GST group should commence.

The AAT confirmed the Commissioner's objection decision.

Citation *Adcon Resources Vic Pty Ltd and Commissioner of Taxation (Taxation)* [2022] AATA 2629 (Member Mitchell, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/2629.html

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1.2 Goulopoulos – SIS Act compliance

Facts

Andrew Goulopulos and his wife, Valentina, were the directors and shareholders of A&V Goulopoulous Pty Ltd (the **SMSF Trustee**) which was the trustee of a self-managed superannuation fund called the Goulopoulos Superannuation Fund (**SMSF**). Andrew and Valentina were members of the SMSF.

Andrew was also a director and general manager of Andorra Pty Limited, which was the trustee of the Andorra Trust (**Andorra Trustee**). Since 1997, Andrew's father was a director of the Andorra Trustee.

The Andorra Superannuation Benefit Fund (**Benefit Fund**) is a self-managed superannuation fund. It is a related party of the SMSF. Andrew was a director of the corporate trustee of the Benefit Fund as well as a member of the Benefit Fund. Andrew's parents were also directors of the corporate trustee of the Benefit Fund and members of the Benefit Fund.

Andrew, as director of the SMSF Trustee, caused the SMSF Trustee to enter into various transactions which breached the *Superannuation Industry (Supervision) Act 1993* (**SIS Act**).

Relevantly:

1. in the years ended 30 June 2013 and 30 June 2014, payments were made from the SMSF which did not meet a condition of release. In the 2013 year, Andrew had caused a total of 18 withdrawals from the SMSF totalling $665,990. The monies withdrawn were applied towards the purchase of a new house as well as the purchase of a luxury vehicle (Mercedes Benz E63);
2. overall the SMSF Trustee caused a total of:
   (a) $878,365 to be withdrawn from the SMSF and a total of $52,436 to be repaid to the Fund so that the net withdrawal amount was $825,929;
   (b) $819,721 to be written off in the 2018 year;
3. it was the Andrew's practice to authorise the transactions through Andorra's internal accountant who had access to the bank account of the SMSF;
4. to the extent the monies were a loan, there was no documentation evidencing a loan, no security given or interest noted;
5. the SMSF Trustee failed to lodge its income tax returns for the SMSF during the four-year period from the years ended 30 June 2013 to 30 June 2016. The 2009 return was lodged 42 days late. The 2013, 2014, 2015 and 2016 returns were not lodged until May/June 2017;
6. in the 2013 year, the SMSF Trustee made loans to Andrew, the Benefit Fund, the Andorra Trustee and the Andorra Trust;
7. the SMSF Trustee provided access to Andrew to superannuation benefits without him meeting a condition of release in the 2013 and 2014 year;
8. the SMSF Trustee borrowed money from related parties (such as the Benefit Fund) and maintained those borrowings;
9. in 2009, the SMSF Trustee acquired 75 units by way of rollover in an unlisted trust related trust;
10. in the 2013 year, the SMSF Trustee failed to make sure that its in-house assets (comprising a loan to Andrew, and other related parties, the Andorra Trustee, the Benefit Fund and the Andorra Trust) did not exceed 5% of its total assets;
11. the SMSF Trustee lent money to Andrew and other related parties in the 2014 year other than on an arm's length basis.

On 23 August 2019, the Commissioner of Taxation notified Andrew and Valentina that they had been disqualified pursuant to section 126A(2) of the SIS Act. The disqualifications were on the basis that the SMSF Trustee had breached a number of provisions of the SIS Act while Andrew and Valentina were directors of the SMSF Trustee, including:

1. section 34: breach of the prescribed operating standards;
2. section 35D: failure by the Trustee to lodge annual returns;
3. section 62: breach of the sole purpose test;
4. section 65: lending to members of a regulated superannuation fund;
5. section 66: contravention of acquisitions of certain assets from members of regulated superannuation funds;

6. section 67: contravention for borrowing;
7. section 84: breach of the in-house asset rules; and
8. section 109: breach of the requirements that investments be made and maintained on an arm's length basis.

On 15 April 2021, the Commissioner confirmed the disqualification decision in respect of Andrew (**Disqualification Decision**).

Andrew applied to the AAT to review the Disqualification Decision.

Issues

1. Whether Andrew should be disqualified under section 126A(2) of the SIS Act because he was a person who is, or was, a responsible officer of a trustee, investment manager or custodian which had contravened the SIS Act on more than one occasion and the nature or seriousness of the contraventions, provides grounds for this disqualification.
2. Whether Andrew should be disqualified under section 126A(3) of the SIS Act on the ground that he is otherwise not a fit and proper person to be a trustee, investment manager or custodian or responsible officer of a body corporate that is a trustee, investment manager or custodian.

Decision

Section 126A(2) of the SIS Act

The AAT found that the nature, seriousness and the number of contraventions by the SMSF Trustee was grounds for disqualification of Andrew under section 126A(2) of the SIS Act.

The contraventions were serious, especially the unauthorised drawings or member loans from the SMSF. The SMSF was virtually depleted of all its funds.

Andrew sought to rely on the advice of his accountant. He had said that he was told by his accountant that ‘5% of super is considered junk’ and that he could use that for his own use but ‘replace it in the same year’. Andrew claimed he made the withdrawals from the SMSF with the accountant's advice ‘ringing in his ears’. The accountant gave evidence that he did not give Andrew any such advice. The AAT preferred the evidence of the accountant over the evidence of Andrew. The AAT found that whether or not someone told Andrew that ‘5%’ of superannuation was ‘junk’ was never explained, but Andrew ultimately was always aware that the payments were not permitted.

The AAT considered that any proposed undertaking offered by Andrew to attend education was not sufficient or appropriate in the circumstances and would not satisfactorily mitigate Andrew's future compliance risk if he were allowed to act as trustee or as a responsible officer in the future.

Furthermore, the SMSF Trustee had failed to lodge returns for the Fund for multiple years. In the context of the other contraventions, the failure to lodge those returns was particularly serious.

Having regard to section 126A(2) of the SIS Act, the AAT concluded that the correct and preferable decision was to disqualify Andrew.

Section 126A(3) of the SIS Act

The AAT held that section 126A(3) of the SIS Act was not concerned with particular acts or omissions in the way that section 126A(2) of the SIS Act is concerned with particular contraventions by the corporate trustee. Andrew's integrity and fitness, as conveyed by the contraventions under section 126A(2) of the SIS Act are relevant to the assessment but other evidence which sheds light on the presence or absence of the necessary characteristics was also relevant.

The AAT found that Andrew's role in the multiple contraventions of the SIS Act was not passive. Although Andrew himself accepted that he was responsible for various acts and omissions, Andrew shifted the blame to his accountant for ‘planting the seed’ for his conduct. The AAT found that this behaviour portrayed a refusal by

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Andrew to take full responsibility for his own choices and actions, which even on his own account he knew at the time to be wrong.

The AAT determined that Andrew withdrew money from the Fund not on the basis that he understood it was lawful, but instead on the understanding that '*you might get away with it*', '*you might get a wrap and you know roll the dice*', '*it might be a quick fix*', '*I mean, you know, get a wrap on the knuckles and we'd – probably get reprimanded, but get away with it.*'

Andrew demonstrated by his behaviour that he preferred to take actions that suited his own convenience and comfort, rather than doing what he understood was right. As such, the AAT concluded that Andrew was not a fit and proper person to be a trustee, investment manager or custodian or responsible officer of a body corporate that is a trustee, or custodian within the meaning of section 126A(3) of the SIS Act and should be disqualified.

The AAT affirmed the Commissioner's decision.

Citation *Goulopulos v Commissioner of Taxation* [2022] AATA 2540 (Deputy President I R Molloy, Brisbane)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/2540.html

1.3 Niu – reliance on professional advice

Facts

On 11 February 2017, Dr Jianlei Niu came to Australia to take a position at the University of Sydney. On 19 January 2017, Jianlei was granted an Employment Visa (subclass 186).

On 3 May 2017, Jianlei entered into a contract for sale for a residential property in Leichardt. The property was to be used as Jianlei's main residence. Jianlei was the sole purchaser of the property. The purchase of the property was completed on 14 June 2017.

At the time that Jianlei purchased the property, he was a foreign person for the purposes of *Duties Act 1997* (NSW).

Section 104ZKA was inserted into the Duties Act by the *State Revenue and Other Legislation Amendment (Budget Measures) Act 2017 No 33* (the **Amending Act**) with effect from 20 June 2017. This section provides an exemption from surcharge purchaser duty for certain permanent residents in respect of their principal place of residence.

On 13 April 2022, Jianlei received a Duties Notice of Assessment for surcharge purchaser duty for a total of $74,000 with market interest of $3,451 in respect of the contract of sale (the **Assessment**).

On 5 August 2021, Jianlei lodged an objection to the Assessment. The Chief Commissioner permitted the late lodgement of the objection under section 90 of the *Taxation Administration Act 1996* (NSW).

On 11 November 2021, Jianlei received notice that the objection had been disallowed. Jianlei subsequently lodged an application for administrative review with NCAT.

Jianlei made the following statements in his submissions:

> *'..the solicitor should be held accountable for the mistake.'*
>
> *…*
>
> *'3....The 2nd question is whether the Surcharge purchaser duty should still be paid at the point of time of the investigation...I think the investigation came out with the valid conclusion that there has been a tax*

default at that point of time, which was caused by the negligence of other parties concerned, especially my conveyancer.'

…

1.b....this SPD is avoidable should I have been informed dutifully by any of the parties involved, including the agent, the mortgage broker, the NAB bank, and the conveyancer, I would have easily delayed my purchase.

Jianlei contended that the Assessment was issued to him despite the above circumstances and that, instead, the Assessment should have been issued to his advisers.

Alternatively, Jianlei contended that section 104ZKA of the Duties Act was intended to operate retrospectively and could be applied to his situation, even though it was not introduced until after he purchased the property.

Section 104ZF of the Duties Act provides for a refund if surcharge purchaser duty is paid on an agreement for sale or transfer of property, but at the time the actual transfer occurs, the Chief Commissioner is satisfied that none of the transferees are foreign persons. The section requires the Chief Commissioner to reassess and refund the duty if an application is made within 5 years of the initial assessment.

Jianlei argued that he should not be liable to pay surcharge purchaser duty, because even if he was initially liable, he retained the right to apply for reassessment under section 104ZF of the Duties Act, because after both the purchase agreement and transfer of property occurred, he ceased to be a foreign person.

Issue

1. Was Jianlei entitled to avoid liability for duty on the basis that he was not made aware of his potential liability for surcharge purchaser duty by his advisors?
2. Was Jianlei exempt from surcharge purchaser duty based on the retrospective application of section 104KZA of the Duties Act?
3. Was the assessment invalid on the proper application of section 104ZF of the Duties Act, given that Jianlei had ceased to be a 'foreign person' within 5 years of purchasing the property?

Decision

NCAT affirmed the Chief Commissioner's decision to disallow the objection.

<u>Asserted failure of advisors to warn of duty liability</u>

NCAT held that Jianlei's liability could not be reduced or negated by the actions of his advisers to the transaction, particularly in the context of administrative review.

In considering whether the Chief Commissioner's assessment should be upheld, revoked or varied, NCAT considered section 104R(1) of the Duties Act, which states that the person liable for the payment of duty is the transferee. NCAT emphasised that this legislation should be applied on its terms irrespective of taxpayer's private rights of redress.

Jianlei was the sole transferee of the relevant transfer and under the Duties Act, Jianlei was therefore liable for duty. There is nothing in the Duties Act which could allow Jianlei to avoid or reduce this personal liability on the ground that he had relied on the advice of another or that there may be potential grounds for redress against another.

<u>Application of section 104ZKA of the Duties Act: the issue of retrospective operation</u>

It was not disputed that the agreement for sale was entered into on 3 May 2017. Jianlei, therefore, became liable for surcharge purchaser duty on 3 May 2017. The Amending Act did not commence until 1 July 2017.

There was no evidence that the section 104ZKA of the Duties Act was intended to operate retrospectively.

Application of section 104ZF of the Duties Act

NCAT relied on the authority in *Gao v Chief Commissioner of State Revenue* [2020] NSWCATAD 218, which held that the question of whether the transferee is or is not a foreign person for the purpose of the refund in section 104ZF of the Duties Act, is to be asked and answered as at the date of the transfer. As Jianlei did not cease to be a foreign person until after the transfer occurred, he was not entitled to reassessment and refund under section 104ZF of the Duties Act.

COMMENT – a holder of Visa Sub Class 186 appears to be treated as a permanent resident for NSW surcharge duty purposes.

COMMENT – there is no discretion in the Duties Act for the liability for duty to be set aside based on the circumstances for the taxpayer here. Rather, the taxpayer could have brought an action against the advisors who he claims failed to advise him of his liability to surcharge purchaser duty.

Citation *Niu v Chief Commissioner of State Revenue* [2022] NSWCATAD 269 (J S Currie, Senior Member)
w http://classic.austlii.edu.au/au/cases/nsw/NSWCATAD/2022/269.html

1.4 Frietman – surcharge purchaser duty

Facts

Michael Robin Frietman has been a permanent resident of Australia since November 2012. Michael's partner was also a permanent resident of Australia.

In November 2016, Michael relocated his family permanently from overseas to Sydney.

In 2018, Michael's employer required him to work on projects that were located overseas. At the time, it was anticipated that the overseas project work would only take three months, but ultimately took much longer.

Michael's partner and family remained in Australia during this time. Michael continued to pay income tax, rent, utilities and other living expenses incurred in Australia.

On 28 February 2017, Michael and his partner entered into a contract to purchase off the plan residential-related property.

On 27 April 2018, Michael and his partner completed a Purchaser/Transferee Declaration form. In response to the question as to whether Michael was a 'foreign person', the answer was written as 'yes' but subsequently struck through, and the word 'no' is written in the response. The declaration was also completed to indicate that Michael was 'a person who is ordinarily resident in Australia'. The contract was stamped for duty under the Electronic Duties Return (EDR) system and recorded as 'off the plan' under s 49A of the *Duties Act 1997* (NSW)..

Settlement occurred on 5 March 2019 and the transfer was stamped as being liable for nominal duty of $10.

The property was purchased by Michael and his partner as their permanent residential address.

In the 12 months prior to the date of the contract (being 28 February 2017), Michael had been in Australia for 114 days.

In the 12 months prior to the date on which duty was paid (being 11 May 2018), Michael had been in Australia for about 245 days.

In the 12 months prior to the date on which settlement occurred (being 5 March 2019), Michael had been in Australia for 172 days.

On 30 April 2021, the Chief Commissioner assessed Michael for surcharge purchaser duty on his interest in the purchase of the property on the basis that Michael was a foreign person under section 104L of the Duties Act. No surcharge purchaser duty was calculated on the partner's interest as she was not a foreign person.

Section 12 of the Duties Act provides that a liability for duty arises when a transfer of dutiable property occurs.

Section 104N of the Duties Act provides that, in respect of a surcharge purchaser duty transaction that is an agreement for sale or transfer, the transfer occurs when the agreement is entered into.

Section 104ZF of the Duties Act provides that, if surcharge purchaser duty has been paid on an agreement for the sale or transfer of residential-related property and the Chief Commissioner is satisfied that none of the transferees in respect of a transfer made in conformity or partial conformity with the agreement are foreign persons, the Chief Commissioner must reassess and refund that duty if an application is made within 5 years of the initial assessment.

Michael contended that the due date for stamp duty on the purchase of the property was May 2018. As he was in Australia for 223 days in the 12 months immediately preceding the stamp duty date, he was not a 'foreign person'. Michael also contended that to the extent he was absent from Australia, it was due to work commitments made at the direction of his employer.

Michael sought a review of the assessment at NCAT.

Issues

1. When does a liability for surcharge duty arise?
2. Was Michael a 'foreign person' at the relevant time when the liability for surcharge purchaser duty arose?

Decision

NCAT found that Michael was liable for surcharge purchaser duty on the purchase of the property.

SM Higgins in NCAT considered that the date that the liability arose was on 28 February 2017, being the date the contract for the sale of property was entered into, and not on the date that the duty was paid.

The onus was on Michael to establish that as at the date of the contract, Michael was not a 'foreign person'. Michael would need to establish that he was a permanent resident and was present in Australia during 200 or more days in the period of 12 months prior to the date of the contract. As Michael was not present in Australia during 200 or more days in the period of 12 months prior to 28 February 2017, he was a 'foreign person' under the Duties Act and liable under section 104L of the Duties Act for surcharge purchaser duty on his share of the property.

SM Higgins also found that Michael was not entitled to a reassessment or refund of surcharge purchaser duty pursuant to section 104ZF of the Duties Act because Michael was not present in Australia for 200 or more days in the period immediately before the settlement date for the purchase of the property on 5 March 2019.

SM Higgins noted that there was no discretion to waive or grant an exemption from surcharge duty where the statutory criteria of being ordinarily resident were not met. Michael's employment requirements could not be taken into account. In addition, the principal place of residence exemption in section 104ZKA of the Duties Act came into force after the date on which the liability for surcharge purchaser duty arose, and did not have any application.

Citation *Frietman v Chief Commissioner of State Revenue* [2022] NSWCATAD 265 (Senior Member Higgins, New South Wales)

w http://classic.austlii.edu.au/au/cases/nsw/NSWCATAD/2022/265.html

1.5 Deliveroo Australia Pty Ltd – employee/contractor

Facts

Diego Franco commenced working for Deliveroo on 22 April 2017 as a delivery rider pursuant to a 'supplier agreement' signed on 18 April 2017. Deliveroo is a delivery service that provides food and drink to customers through an online platform. He signed a subsequent replacement supplier agreement on 2 October 2018 and again on 9 December 2019.

Diego worked regularly for Deliveroo until 30 April 2020. Diego carried out the deliveries using motorbikes he had purchased. Diego also performed work for Portier Pacific Pty Ltd (Uber Eats) from 6 April 2018 and Door Dash from 2 October 2018.

Diego was identified as a driver with delayed delivery times. Deliveroo determined that these delays were unacceptable, and subsequently emailed Diego on 23 April 2020 to inform him that if he continued failing to deliver orders within a reasonable time frame, he would be in breach of his agreement and the agreement would be terminated.

On 30 April 2020, Diego's access to the app was disabled.

Diego subsequently lodged an unfair dismissal application against Deliveroo before the Fair Work Commission.

Deliveroo raised a jurisdictional objection to Diego's unfair dismissal application, stating that Diego was not protected by unfair dismissal, and at the time of termination of Diego's engagement, Diego was not an employee, but rather an independent contractor of Deliveroo.

At first instance, Commissioner Cambridge of the Fair Work Commission found that:

1. applying the multifactorial approach, Diego was an employee of Deliveroo and was not an independent contractor;
2. Diego was protected from unfair dismissal;
3. Diego was unfairly dismissed; and
4. Diego should be reinstated and paid back pay.

Deliveroo appealed the decision to the Full Bench of the Fair Work Commission. The parties agreed to defer the matter until the High Court decisions in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 were handed down on 9 February 2022, as it was expected that both cases would be relevant in the case of *Deliveroo*.

Issues

Whether Diego was an employee of Deliveroo?

Decision

In determining whether Diego was an employee or independent contractor, the Full Bench applied the decisions in *Personnel Contracting* and *Jamsek,* which held that decision makers are to look no further than the terms of the written agreement made between the parties, where there is no suggestion of variation of a contract, the contract being a sham or where there is some other legal reason to depart from the terms of the contract. Further, the reality of a working relationship and how the parties interact is irrelevant and more importance is to be given to the practical and contractual terms agreed between the parties.

The Full Bench adopted the same approach as set out in *Personnel Contracting* and *Jamsek*, and focused on the contractual rights and obligations of the parties, rather than the reality of the working relationship. The Full

Bench determined their decisions based on four aspects of the supplier agreement between Diego and Deliveroo:

1. Diego was to determine which routes to take when making deliveries and Deliveroo did not determine which route was used. Diego was responsible and had full control in these aspects;
2. the supplier agreement allowed Diego, at his own discretion, to determine what sort of vehicle he used to complete deliveries;
3. Diego had the right to assign his duties to someone else to perform the delivery services, without approval of Deliveroo; and
4. Diego was required to pay an administrative fee of 4% to access Deliveroo's software and for Deliveroo to produce and provide administrative services and invoices. It was determined that this kind of fee is inconsistent with an employment relationship.

The Full Bench stated that there was a lack of control by Deliveroo and Diego was able to conduct his duties as someone would reasonably be allowed to if their relationship was that of an independent contractor.

The Full Bench noted that Deliveroo's requirement for Diego to make deliveries within a 'reasonable time period', to act professionally and courteously when dealing with others, and to provide services with due care, skill and ability did not provide Deliveroo with control in the sense considered under the employee-contractor test. These were merely performance standards consistent with an independent contract arrangement, rather than a degree of control.

The Full Bench overturned the decision of Commissioner Cambridge finding that the nature of the agreement between Diego and Deliveroo was that of an independent contractor, such that Diego was not an employee of Deliveroo and was not protected from unfair dismissal within the meaning of section 382 of the *Fair Work Act 2009* (Cth).

It was noted by the Full Bench that the conclusion reached by Commissioner Cambridge was correct at the time given the then law, however the new decisions in *Personnel Contracting* and *Jamsek* had shifted the common law when determining whether someone is an employee or independent contractor.

Citation *Deliveroo Australia Pty Ltd v Diego Franco* [2022] FWCFB 156 (Hatcher VP, Catanzariti VP and Cross D, Sydney)
w http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FWCFB//2022/156.html

1.6 FSYC – release from tax debt in the context of family violence

Facts

FSYC is an individual who migrated to Australia in November 2007 on a student visa. FSYC was not an Australian citizen but was considered an Australian resident for tax purposes. FSYC was granted an Australian Business Number (ABN) on 14 January 2008.

FSYC was the victim of family violence, perpetrated against FSYC by their former partner, who was sponsoring FSYC for a partner visa and trading under the ABN held by FSYC.

FSYC lodged a debt release application to the Commissioner of Taxation on 14 October 2020.

On 9 June 2021, the Commissioner of Taxation gave FSYC a partial release from payment of the tax debts leaving a total of $31,672 to be paid by FSYC being:

1. for the period ending 30 June 2014 to 30 June 2016 - $17,443 from quarterly BAS lodgements; and
2. for the periods ended 30 June 2019 and 30 June 2020 - $14,229 from income tax instalments (which was after FSYC ended their relationship with their former partner).

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FSYC lodged an objection to the debt release decision on the basis that FSYC had proven they were subjected to fraud and blackmail.

On 6 October 2021, the Commissioner of Taxation disallowed the objection stating that:
1. the GST portion of the $17,443 was not eligible to be considered for release; and
2. the income tax portion of the debt was incurred after FSYC had separated from their former partner.

FSYC applied to the AAT for review of the objection decision.

On 12 August 2022, FSYC was self-represented at the hearing conducted by Microsoft Teams. FSYC confirmed that they were not seeking release from the non-GST taxation liability as that portion arose after the end of the relationship with the former partner. FSYC sought release from $13,400, being GST of $12,443 and general interest charge on GST of $957.24.

Issues

Are the GST liabilities of FSYC eligible for release?

Decision

The AAT acknowledged the cooperation, openness and supporting evidence provided by FSYC. The AAT accepted that FSYC was subjected to blackmail and family violence and that tax debts were incurred by FSYC and the business while under the control of the former partner.

The AAT noted that the question for determination was a purely legal question, being, whether FSYC could be released from the GST liabilities.

The AAT noted Division 340 of Schedule 1 to the TAA gives the Commissioner the power to release an individual from certain income tax liabilities if the Commissioner is satisfied that fulfilling the liability would cause the individual or trustee serious hardship.

The Commissioner's discretion only applies to liabilities specified in section 340-10 of Schedule 1 to the TAA, which includes the following liabilities:

1. income tax;
2. general interest charge and shortfall interest charge on income tax;
3. shortfall penalties in relation to income tax;
4. fringe benefits tax;
5. an instalment of fringe benefits tax;
6. penalties relating to fringe benefits tax;
7. Medicare levy;
8. Medicare levy (fringe benefits) surcharge; and
9. PAYG instalments.

The AAT noted that the Act does not provide discretion to release liabilities that are not listed in section 340-10 of Schedule 1 of the TAA. The AAT confirmed that section 340-10 of Schedule 1 of the TAA does not include GST liabilities and associated general interest charges.

The AAT noted the reasoning in *Isaacman and Commissioner of Taxation* [2014] AATA 541 which confirmed that indirect taxes, like GST (and GIC on GST), which are not listed in section 340-10 of Schedule 1 of the TAA are 'ineligible liabilities' and cannot be released.

The AAT affirmed the objection decision.

COMMENT – the ATO have a practice statement, PSLA 2008/11, where in some instances of fraud the ATO will provide 'fraud credits' to reduce the amount owed by a taxpayer resulting from fraud.

Citation *FSYC and Commissioner of Taxation (Taxation)* [2022] AATA 2680 (Member D Mitchell, Brisbane)

w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/2680.html

1.7 Eagle View Holdings Unit Trust – corporate consolidation NSW duties relief

Facts

CPD#001 Pty Limited (**CPD**) is the trustee of the Eagle View Ryde Unit Trust (**Original Unit Trust**).

CPD (as trustee) was the registered proprietor of land in Ryde, NSW (the **Ryde Land**). The units in the Original Unit Trust were held in equal proportions by AJ Harb Holdings Pty Limited as trustee of the AJ Harb Family Trust and Harb (Aust) Pty Limited, as trustee of the Harb Family Trust (collectively, the **Family Trusts**).

In 2019, a restructure proposal was proposed as follows:

1. the first proposed transaction (**Step 1**) was:
   (a) the insertion between Original Unit Trust and the Family Trusts of a new trust, the Eagle View Holdings Unit Trust (the **Interposed Unit Trust**), with CPD as trustee; and
   (b) the transfer by the Family Trusts to CPD of their units in Original Unit Trust, in exchange for units in Interposed Unit Trust in the same proportions as their pre-transfer unit holdings in the Original Unit Trust; and
2. the second proposed transaction (**Step 2**) was:
   (a) the creation of a new trust, 748 Victoria Road Unit Trust (**748 Land Trust**), of which 748 Victoria Road Pty Limited (**748PL**), was to be the trustee and in which all of the units were to be owned by CPD as trustee for Interposed Unit Trust; and
   (b) the transfer of some but not all of the lots comprised in the Ryde Land to 748PL as trustee for the 748 Land Trust, being land located at 748 Victoria Road (the **748 Land**).

On 2 September 2019, a firm of accountants, instructed by the Harb Family interests, wrote to the Commissioner seeking pre-approval for implementation of the restructure on the basis that the transactions would be exempt from duty under section 273B of the Duties Act.

On 23 October 2019, the Commissioner confirmed that:

1. Step 1 would qualify for corporate consolidation relief under section 273B(2) of the Duties Act, subject to confirmation that the requirements under section 273D of the Duties Act were satisfied as at the date of the relevant transaction; and
2. Step 2 would qualify for corporate reconstruction relief under section 273B(1) of the Duties Act, subject to confirmation that the requirements under section 273E of the Duties Act are satisfied as at the date of the relevant transaction.

Relevantly, section 273D(2) of the Duties Act provides:

> *A transfer, or an acquisition of an interest in a landholder, is not a corporate consolidation transaction if, immediately before the transfer or acquisition occurred, the head corporation held dutiable property or a vehicle or an interest in a corporation.*

On 13 November 2019, 748PL was incorporated and an unexecuted trust deed for 748 Land Trust was sent by their solicitors to J and A Harb.

By no later than 18 November 2019, the draft trust deed for the 748 Land Trust had been varied to include CPD as trustee of the Interposed Unit Trust as the sole initial unitholder, had been executed and dated 13 November 2019. No subscription moneys had been paid for the issue of such units. The trust deed was subsequently executed and stamped by Revenue NSW.

On 21 November 2019, the Interposed Unit Trust was established with the Family Trusts each owning 50% of the units.

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On 23 April 2020, the Interposed Unit Trust acquired 100% of the issued units in the Original Unit Trust from the Family Trusts at $1 per unit (the **Unit Transfer**).

On 23 April 2020, 748PL as trustee of the 748 Land Trust contracted for the purchase of the 748 Land from the Original Unit Trust, with the 748 Land having a dutiable value of $3,000,000.

On or after 23 April 2020, the director of CPD signed an Exempt Acquisition Statement: Acquisition of an Interest in a Landholder which disclosed to the Chief Commissioner the Unit Transfer. This statement was undated but was witnessed by a prescribed witness on 15 May 2020.

On 8 September 2020, acting on advice of the accountants, J Harb electronically executed a unit certificate indicating that the Interposed Unit Trust was the holder of 100 units in 748 Land Trust. The accountants sent this certificate, along with a copy of the Register of Unit Holders to the Chief Commissioner.

On 9 October 2020, J Harb as director of 748PL signed a Purchaser/Transferee Declaration which disclosed to the Commissioner that 748PL as trustee for the 748 Land Trust acquired the 748 Land.

On 15 October 2020, the Chief Commissioner wrote to CPD stating that:

1. the Commissioner accepted that the transfer of the 748 Land by the Original Unit Trust to the 748 Land Trust was a corporate reconstruction transaction which qualified for relief from duty under section 273B(1) of the Duties Act; but
2. the Commissioner was not satisfied that the Unit Transfer qualified as a corporate consolidation transaction to which relief from duty under section 273B(2) of the Duties Act applied because before the transfer, the Interposed Unit Trust held an interest in a corporation, being the units in 748 Land Trust. Therefore, a requirement for a corporate consolidation transaction in section 273D(2) of the Duties Act was not met.

On 24 October 2020, CPD objected to the assessment. This assessment was followed by a succession of decisions by the Commissioner and further objection submissions by CPD.

On 14 February 2022, two deeds of ratification were entered into between each of the Family Trusts and the Interposed Unit Trust to:

1. record that each of the transfers dated 23 April 2020 by the Family Trusts of their units in Original Unit Trust in the Interposed Unit Trust were for nil consideration; and
2. amend the relevant transfers by deleting the words, symbols and figures ‘Fifty dollars ($50.00)’ and replacing them with the word ‘Nil’.

CPD applied to NCAT for review of the assessments.

Issues

1. Was the Unit Transfer a 'corporate consolidation transaction' within the meaning of section 273D of the Duties Act?
2. If the answers to the first and second questions are ‘no’, is the Unit Transfer nonetheless one in respect of which the Chief Commissioner should exercise his discretion under section 163H of the Duties Act to exempt the Unit Transfer from duty?

Decision

Corporate consolidation transaction?

NCAT determined that the Unit Transfer was not a 'corporate consolidation transaction' under section 273D of the Duties Act on the basis that section 273D of the Duties Act cannot be satisfied through the uncoordinated execution of documents and the implementation of a subordinate transaction. Section 273D of the Duties Act requires exact timing and order.

In respect of this fact scenario, the NCAT noted that the order of events in which the trusts obtained trust property was significant, since:

1. if the Interposed Unit Trust was only established upon obtaining from either or both of the Family Trusts their unit holdings in Original Unit Trust, then at that point it did not hold an interest in a corporation within the meaning of section 273A of the Duties Act; or
2. if, however, the Interposed Unit Trust was established as the consequence of the establishment of 748 Land Trust, then at the time at which it obtained its interests in the Original Unit Trust under the transaction, it did already hold an interest in a corporation, namely, the 748 Land Trust.

The NCAT concluded that the agreement by the 748 Land Trust to acquire the 748 Land:

1. gave rise to trust property, in the form of 748PL as trustee for 748VRUT's rights as against CPD as trustee for the Original Unit Trust to acquire the 748 Land, sufficient to establish the 748VRUT; and
2. in doing so automatically gave rise to trust property for EVHUT, in the form of its interest in the 748VRUT as initial unit holder described in the trust deed for 748VRUT.

Section 163H exemption?

NCAT determined that it was not just and reasonable to grant an exemption under section 163H(1) of the Duties Act.

Senior Member Boxall noted that the Duties Act provides a clear and readily accessible route for corporate consolidation transactions to be exempted from duty under Chapter 4, which CPD could not satisfy to the necessary standard. It was the direct consequence CPD's failure to ensure that the restructure transactions complied with the requirements of section 273D of the Duties Act that duty was payable.

The assessment was confirmed.

Citation *CPD#001 Pty Limited as trustee for the Eagle View Holdings Unit Trust v Chief Commissioner of State Revenue* [2022] NSWCATAD 273 (Senior Member AR Boxall, New South Wales)
w http://classic.austlii.edu.au/au/cases/nsw/NSWCATAD/2022/273.html

1.8 Melbourne Corporation of Australia – management fees and interest payments

Facts

Melbourne Corporation of Australia Pty Ltd claimed deductions under section 8-1 of the ITAA 1997 over the income years ended 30 June 2001 to 30 June 2014 in relation to amounts asserted to be management and consulting fees, and interest expenses relating to purported arrangements with Australian entities.

Various entities including the Anglo American Trust, Debbie Gould, Melbourne Insurance, Gould Family Trust, Philadelphia Investments and Leaver Trading, allegedly derived management and consulting fees across the years in question. Each of these entities was an entity within the group of companies controlled by Vanda Gould, or Vanda's wife, Debbie Gould.

The Commissioner issued amended assessments under section 167 of the ITAA 1936 disallowing the deductions claimed. The Commissioner also disallowed deductions for prior year losses. The Commissioner reduced the assessable income of Melbourne Corporation to exclude management and consulting fees and interest income derived in relation to arrangements with commonly controlled entities where the Commissioner considered the fees and interest were not deductible to the entities on the other side of the transaction.

The Commissioner formed the opinion that there had been an avoidance of tax due to fraud or evasion in relation to all income years in question. The Commissioner also imposed penalties in relation to all years

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except the years ended 30 June 2010 and 30 June 2011. The penalties varied from 75% to 90%. There was also a shortfall interest charge imposed for each of those years. There were no penalties or interest applied to the years ended 30 June 2010 and 30 June 2011, as these were the income years in which the Commissioner reduced the assessable income of Melbourne Corporation to nil.

Melbourne Corporation objected to the assessments but the Commissioner disallowed the objections. The Commissioner's decision was then appealed to the Federal Court. There were related proceedings heard at a similar time by the Court.

In cross-examination, Vanda stated that prior to the end of each income year, he would review the draft accounts prepared by staff, and at that point, determine the amount of a management fee and to whom it was payable. He also noted that a similar practice was adopted in relation to determinations of interest on intra-group loans. While there was one invoice produced as evidence, being an invoice in respect of the services rendered by Leaver Trading, there was no contemporaneous evidence to support the existence of any arrangement of management services.

However, the Court noted that a lack of documentary evidence in the circumstances was not fatal, citing Kearney J in *Electrical Enterprises Retail Pty Ltd v Rodgers* (1988) 15 NSWLR 473, '*within a group of companies, it is not surprising for internal arrangements to be made informally*'. Further in *VL Finance Pty Ltd v Legudi* [2003] VSC 57, Nettle J noted,

> *'in the absence of any suggestion of sham, there is no reason why loans agreed to be made by a family company to members of the family cannot be created orally or by conduct and sufficiently evidenced by book entry, and that it is enough to dispose of the consequences of the lack of cash in hand contention to observe that it has been the law since Spargo's case that obligations may effectually be set off one against another, leaving a net balance due, without any money changing hands.'*

In line with these judicial comments, Logan J noted in his judgment that it would be a 'great disservice' to the Australian business community to fail to recognise these ordinary features of Australian commercial life.

Following this, the Court accepted that Vanda had devoted time to serving the interests of Melbourne Corporation, since he ceased his direct involvement with his previous accounting firm Gould Ralph, and given the fact that Melbourne Corporation managed Vanda's private business interests, and the interests of some old clients.

However, the Court highlighted the inconsistency and large fluctuations in amounts of management fees supposedly rendered, and the entities who were providing the management fees.

Vanda conceded in his evidence, '*I would have to draw upon my sort of, you know, tax knowledge as to whether to actually – to actually, basically some form of management fee or just to let it be*'. Further, Vanda accepted that, '*I would have had an eye on the tax planning. ... I don't disagree that a management fee was in fact quantified to reflect an amount that suited [Vanda's] tax planning purposes for Melbourne Corporation*'.

The Court considered each management fee claim separately, only some claims are discussed in this case summary.

<u>Anglo American Trust</u>

The Court noted that there was inconsistent evidence produced regarding the fees paid to the Anglo American Trust. One particular point was that the Anglo American Trust had no employees in the year it supposedly received a payment. Vanda was the director of the trustee, but was also a paid employee of Melbourne Corporation, who also made superannuation contributions on his behalf. The Court therefore noted that in the context of a closely held group, it would be common practice for Vanda, as employee, to attend to duties that might otherwise be supplied by a corporate consultant. The Court considered the general ledger of Melbourne

Corporation however queried when the ledger was prepared. There was also no reliable evidence to suggest that a valid consultancy service was provided by the Anglo American Trust to Melbourne Corporation.

Debbie Gould

Evidence produced during the hearing was inconsistent. Further, it was not clear what Debbie did to warrant the payment of management fees – this could not be explained by Vanda.

The Gould Family Trust

There was again further inconsistency in the explanation for this management fee claim. In particular, whether the fee was payable to Darlington McCarthur for nominee services to clients, or for management fees relating to Vanda's personal accountancy business. Vanda was unable to reconcile these differing explanations under cross examination. There was also again an issue that in the years Darlington McCarthur supposedly received management fees, it paid no wages and had no employees.

Philadelphia Investments

This entity was discussed at length in the related proceedings. Again, Philadelphia Investments had no employees to furnish management services to Melbourne Corporation. The financial statements did not record any management fee income.

Issues

1. Whether Melbourne Corporation was able to prove the claimed management and consulting fees and interest expenses were allowable deductions under section 8-1 of the ITAA 1997? This included consideration as to whether the ‘fees’ were:
   (a) management or consulting fees or interest at all, including whether their being so designated was a sham, and as to the interest claims whether there was any loan;
   (b) incurred at all;
   (c) incurred in gaining or producing the assessable income of Melbourne Corporation; and
   (d) as to the interest claimed, denied deductibility pursuant to s 26-25 of the ITAA 1997 because of a failure to withhold tax from that purported interest payment.
2. Whether Melbourne Corporation is able to challenge the validity of the Commissioner's opinion as to fraud or evasion for the years ended 30 June 2001 to 30 June 2007?
3. Whether Melbourne Corporation is able to prove that the deductions are not tax benefits within the meaning of section 177C of Part IVA of the ITAA 1936, to refute the Commissioner's decision that the whole of the deductions should be disallowed on the basis that they constitute a scheme entered into for the dominant purpose of obtaining a tax benefit under section Part IVA of the ITAA 1936?

Decision

On the basis of the evidence given by Vanda, Logan J determined that the claims for management fees were simple ‘*closing adjustments*’ which were ‘*made to achieve the best overall tax outcome for the group*’, to quote Vanda. In most of the income years in question, Melbourne Corporation had no tax liability. Logan J found that this was not a coincidence, but was a result of the *ex post facto* constructs of Vanda. Logan J noted that a similar practice was adopted for the interest deductions claims.

Logan J held that the journal entries purporting to record management fee liabilities incurred by a particular entity prior to the end of an income year in the absence of fact, is a sham. Each entry is ‘*but a façade in respect of a liability which was never incurred*’.

Logan J also noted his strong impression that Vanda genuinely believed this practice of making ex post facto closing adjustments was lawfully permissible. As such, it was determined that Vanda was not dishonest, but rather was mistaken.

The Court ultimately determined that Melbourne Corporation had failed to prove that it was entitled to deduct any of the management fees under section 8-1 of the ITAA 1997.

In relation to the interest amounts allegedly paid and claimed, the Court held that Melbourne Corporation failed to discharge its onus, noting that the interest deductions were used to ensure the most tax-effective amounts were included in a particular entity's tax returns.

Having confirmed the Commissioner's decision in relation to the deductions for management fees and interest, the Court confirmed the Commissioner's decision to reduce the income of Melbourne Corporation for the relevant years, and make adjustments to the carry forward losses as a result of disallowing the deductions.

In relation to penalties, consistent with the Court's finding that Vanda was not dishonest but wilfully blind, Logan J determined that the penalty rate should be reduced to 50% on the basis that Vanda was reckless, but did not have intentional disregard for the taxation laws.

Citation *Melbourne Corporation of Australia Pty Ltd v Commissioner of Taxation* [2022] FCA 972 (Logan J, Queensland)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2022/972.html

1.9 Woodcock & Woodcock – asset protection and discretionary trusts

Facts

Mr and Ms Woodcock were parties to property division proceedings in the Family Court of Australia.

Mr Woodcock is a beneficiary under four discretionary trusts, the details of which are as follows:

1. the F Trust, which was established on 28 August 1995. The trustee of F Trust is F Pty Ltd, of which Mr Woodcock is one of many directors;
2. the E Trust, which was established on 1 March 1995. The trustee of E Trust is E Pty Ltd, of which Mr Woodcock is one of many directors;
3. the B Trust, which was established on 1 December 1992. The trustee of B Trust is B Pty Ltd, of which Mr Woodcock is one of many directors; and
4. Mr G (1977) Family Trust established on 30 June 1977. The trustee of this trust is C Pty Ltd, of which Mr Woodcock is the sole director.

Under the trust deeds for the F Trust, the E Trust and the B Trust a disqualifying event had occurred for Mr Woodcock which precluded him from being a director, although no steps had been taken to remove Mr Woodcock as a director.

Under each of the trust deeds, each trustee had the power to decide whether to distribute or accumulate income, to decide whether to distribute capital, to decide who amongst the potential beneficiaries would receive any distributions and determine the extent or value of any distribution.

In 2020 each of the trust deeds for the B Trust, the F Trust and the E Trust were amended so that a decision to distribute income require either an 'ordinary decision' or a 'majority decision', failing which income was accumulated. A distribution of capital required a 'majority decision'. These terms were defined in the trust deed.

The trusts were part of a group of entities referred to as the G Group. The G Group was governed by a Family Council since 1998. It appeared that Mr Woodcock is the Chair of the Family Council and is the CEO of the G Group.

Mr Woodcock received distributions of around $15 million from the trusts in the 2016 to 2020 years.

Mr Woodcock, as a potential beneficiary, had the following rights in relation to the trusts as a matter of general law:

1. the right to compel the trustee to give real and genuine consideration as to whether or not the trustee should exercise its power to distribute income or capital and if so, how much and to whom; and

2. the right to compel the due administration of the trust by the trustee, to perform and administer the trust in accordance with the trust deed as well as in accordance with the duties and powers of the trustee.

In the Family Court proceedings, Ms Woodcock contended that Mr Woodcock's rights in relation to the trusts were 'property' within the meaning of section 79 of the *Family Law Act 1975* (Cth) (**FLA**) and that such rights were capable of being valued.

The determination of these issues was set down for a hearing of preliminary issues in accordance with Rule 1.06 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth).

Mr Woodcock contended that the rights were not property and further were not capable of valuation for the following reasons:

1. that there are authorities that provide that property of a trust can only be treated as property for the purpose of section 79 of the FLA where a person has complete legal or de facto control over the assets of the trusts and can appoint them to their benefit or to the benefit of a party to the marriage;
2. that there is Western Australian authority which provides that the equitable rights of a beneficiary under a discretionary trust is not property for the purpose of *Family Court Act 1997* (WA), Western Australia's equivalent of the FLA [Note: Western Australia is the only State that never acceded to the FLA];
3. that there are authorities of single court judges in the Family Court that state that a beneficiary's right to due administration is not property for the purpose of section 79 of the FLA; and
4. that there are a number of authorities that indicate the rights of a beneficiary under a discretionary trust cannot be valued or that such a valuation would be very difficult, including the comments of French CJ in *Kennon v Spry; Spry v Kennon* [2008] HCA 56, where his Honour stated as follows:
   The beneficiary of a non-exhaustive discretionary trust who does not control the trustee directly or indirectly has a right to due consideration and to due administration of the trust but it is difficult to value those rights when the beneficiary has no present entitlement and may never have any entitlement to any part of the income or capital of the trust.

Mr Woodcock and Ms Woodcock provided evidence of competing experts in relation to the valuation issue. Mr Woodcock's expert indicated that the rights of the beneficiaries under the trust were not capable of being sold and, therefore, did not have market value. Further, there was no reasonable basis for estimating expected cash flows and, therefore, the value to the owner of the rights could not be determined.

Ms Woodcock's expert considered that Mr Woodcock's ongoing level of influence and the past distributions to him provided a reasonable basis to value his rights.

Issue

1. Whether the rights of Mr Woodcock in the trusts are 'property' for section 79 of the FLA; and
2. Whether the rights of Mr Woodcock are capable of being valued.

Decision

Were the rights property?

Wilson J considered that the rights of Mr Woodcock to compel real and genuine consideration and due administration were 'property' within the meaning of section 79 of the FLA for the following reasons:

1. he retained power permissibly exercised over a certain thing;
2. he held ‘bundle of rights’;
3. he enjoyed a position of considerable influence on the Family Council and historically had received distributions of approximately $15 million; and
4. he had ability to veto decisions.

Given the above, Mr Woodcock enjoys a legally endorsed concentration of power over things or resources, that has been recognised as property.

Were the rights capable of valuation?

Wilson J accepted that there are considerable authorities that indicate that merely because something is difficult to value does not mean it is not capable of valuation or does not have value. Given this, his Honour was not prepared to accept on a hearing on a preliminary issue that Mr Woodcock's rights could not be valued.

Accordingly, Wilson J decided both issues in favour of Ms Woodcock such that they would be further considered at the final hearing.

Citation *Woodcock & Woodcock (No 2)* [2022] FedCFamC1F 173 (Wilson J, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FedCFamC1F/2022/173.html

1.10 DSHE Holdings – dividend a breach of directors' duties

Facts

On 12 February 2015, the directors of Dick Smith Holdings Ltd (**Dick Smith**) voted in favour of a board decision to declare an interim dividend of $16.555 million after reviewing a report prepared by Deloitte regarding the half year accounts for the 2015 financial year and a short dividend discussion paper prepared by Michael Potts (Dick Smith's CFO, director and company secretary). The discussion paper recommended that the interim dividend be paid on 30 April 2015 and stated that this timing considered Dick Smith's operational cash flow requirements and had been factored into the weekly cash flow forecast.

Dick Smith also applied for a loan facility with the National Australia Bank (NAB). For the purposes of that application, Michael provided NAB with Dick Smith's monthly financial information for the 2015 financial year and the forecast numbers for the 2016 financial year.

On 30 April 2015, the interim dividend was paid.

On 6 May 2015, NAB and Michael had a meeting. During that meeting, NAB asked Michael why Dick Smith was overstocked in January 2015 and Michael stated this was due to the late arrival of a shipment of private label stock from Hong Kong.

On 22 June 2015, HSBC and NAB entered into a loan facility agreement under which NAB lent Dick Smith working capital advances of $35 million and $40 million and HSBC lent Dick Smith $60 million.

The daily cash flow forecast for the period showed that from the week starting 31 August 2015, Dick Smith would exceed its facilities limit of $135 million on multiple occasions up until mid-December 2016, and that cash at the end of 2016 income year would be negative $85.29 million.

On 17 August 2015, Michael and Nicholas voted in favour of a board decision to declare a final dividend of $11.826 million. The cash flow projection available at the time indicated that Dick Smith would have a cash shortfall of $31 million when the dividend was to be paid. The directors proposed to address the shortfall by deferring the payment of creditors.

On 30 September 2015, the final dividend was paid.

The banks alleged that Dick Smith had breached the loan agreements. Unable to remedy the alleged breach or reach agreement with the banks to waive the fees, on 4 January 2016, the board resolved to put Dick Smith and its subsidiaries into voluntary administration. Following that resolution, the banks appointed receivers.

In July 2016, Dick Smith went into liquidation.

Section 254T(1)(c) of the *Corporations Act 2001* (Cth) (**Corporations Act**) provides that a company must not pay a dividend unless, amongst other things, the payment ‘does not materially prejudice Dick Smith’s ability to pay its creditors’.

The receivers, DSHE Holdings Ltd (Receivers and Managers) (**DSHE**), brought a claim against Nicholas Abboud (Dick Smith's managing director and CEO) and Michael for breaching their directors' duties under section 180 of the Corporations Act by voting in favour of the interim and final dividends.

HSBC also brought a claim against Nicholas and Michael. NAB brought a claim against Michael. Both banks claimed that Michael and Nicholas breached their directors' duties by failing to consider with reasonable care and diligence (or at all) whether the payment of the interim dividend and the final dividend would comply with section 254T of the Corporations Act and whether the payment would materially prejudice Dick Smith's ability to pay its creditors.

The cases were heard at the same time by a single judge.

In relation to DSHE's claim, the Court held that the final dividend constituted a breach of directors' duties under section 180 of the Corporations Act, but that Dick Smith had not suffered loss as a result of Michael's contravention. Both Dick Smith and Michael appealed aspects of the decision.

In relation to HSBC's claim, the Court held that Michael had engaged in misleading or deceptive conduct prior to agreeing to extend the facility, but that a loss had not been proven to result from that conduct. HSBC appealed that decision.

In relation to NAB's claim, the Court held that Michael engaged in misleading and deceptive conduct. Michael appealed that decision.

Issues

1. Did Michael and/or Nicholas breach the directors' duties in section 180 of the Corporations Act by voting in favour of the resolution to pay the interim dividend?
2. Did Michael and/or Nicholas breach the directors' duties in section 180 of the Corporations Act by voting in favour of the resolution to pay the final dividend?
3. To the extent that any contraventions are made out, did they result in Dick Smith suffering any damage for the purposes of section 1317H of the Corporations Act?
4. Did Michael engage in misleading and deceptive conduct, and did that conduct cause a loss?

Decision

Interim dividend

The Court of Appeal held that neither Michael nor Nicholas breached their directors' duties in respect of the resolution to pay the interim dividend.

Final dividend

The Court of Appeal held that the primary judge did not err in finding that Michael contravened his duty as a director under section 180 of the Corporations Act by voting in favour of payment of the final dividend. The Court stated that reliance on industry practice with respect to late payment of trade creditors could not be an answer to an alleged failure properly to consider the distinct issue of whether payment of a dividend may contravene s 254T of the Corporations Act.

The Court of Appeal also held that Nicholas breached his duties under section 180 of the Corporations Act by voting in favour of payment of the final dividend. He did not exercise the degree of care and diligence that a reasonable person in his position as a director and CEO would have exercised. The Court considered that Nicholas understood at the relevant time that Dick Smith was not able to pay its creditors as and when they fell due and should have requested more detailed information about the cash flow position before supporting the dividend recommendation.

The question posed by section 254T of the Corporations Act is whether Dick Smith's ability to pay creditors was materially prejudiced by the payment of the dividend. The fact that the interests of creditors are being

prejudiced by the actions of Dick Smith at the time of payment of the dividend does not, of itself, establish a contravention of the provision. The evidence did not establish that Dick Smith's ability to pay its creditors was or would be compromised around the payment date. That a decision was imprudent, or that there were problems in the management of Dick Smith, does not establish that the decision showed a failure properly to consider section 254T of the Corporations Act issues, nor that payment of the dividend would materially prejudice Dick Smith's ability to pay its creditors.

Loss or damage

The Court of Appeal found that Dick Smith suffered damage by paying out money that would not otherwise have been paid but for breaches of directors' duties. Payment of a dividend can constitute damage suffered by the corporation, even though the payment benefits shareholders. The interests of the company and the shareholders are not identical.

Misleading and deceptive conduct

The Court of Appeal stated that there is a distinction between a person who enters into contractual relations as a result of misleading and deceptive conduct, and a person who is already in contractual relations with a person who engaged in misleading and deceptive conduct which causes an alteration to those contractual relations. It was for HSBC to establish what it would have done, thereby establishing recoverable loss or damage. There was no error in the primary judge finding that HSBC has failed to do so.

The Court of Appeal stated that the primary judge did not err in finding that Michael's conduct was misleading and deceptive in relation to the representations made to NAB. The evidence supported the finding that NAB officers would have considered the information which Michael withheld to be highly significant, and would have not agreed to participate in the syndicate with HSBC had it been disclosed.

Michael and Nicholas were each ordered to pay $11,826,000 to DSHE.

Citation *DSHE Holdings Ltd (Receivers and Managers) (in liq) v Potts; HSBC Bank Ltd v Abboud; Potts v National Australia Bank Ltd* [2022] NSWCA 165 (Leeming JA, Kirk JA, Basten AJA, Sydney)
w http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCA/2022/165.html

1.11 Other tax and superannuation related cases in period of 7 August 2022 – 7 September 2022

Citation	Date	Headnote	Link
Turitsyna v Chief Commissioner of State Revenue [2022] NSWCATAP 263	10 August 2022	APPEALS- whether Tribunal erred on question of law in rejecting Appellant's objection to Respondent's response to summons to produce documents	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAP/2022/263.html
Lawrence v Chief Commissioner of State Revenue [2022] NSWCATAD 266	12 August 2022	STATE TAXES – surcharge land tax – whether applicant a 'foreign person' – whether applicant 'ordinarily resident' in Australia – whether applicant was actually in Australia during 200 or more days in the relevant calendar years – applicant prevented from returning to Australia because of closure of international borders	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2022/266.html
Meridian Energy Australia Pty Ltd v Chief Commissioner of State Revenue [2022] NSWSC 1074	12 August 2022	TAXES AND DUTIES — Landholder duty — Landholdings — Threshold value — Whether Power Stations located on land were landholdings within the meaning of the Duties Act 1997 (NSW) — Whether Power Stations were fixtures or innominate sui generis property	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2022/1074.html

Rengasamy v Chief Commissioner of State Revenue [2022] NSWCATAD 272	17 August 2022	TAXES AND DUTIES — First Home Owner Grant (New Homes) — substantially renovated home	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2022/272.html
Monisse v Chief Commissioner of State Revenue [2022] NSWCATAD 276	18 August 2022	REVENUE LAW- STATE TAXES- surcharge purchaser duty- liability for duty not reduced by reason of failure of Revenue NSW to alert taxpayer to legislative changes.	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2022/276.html
De Tarle v Chief Commissioner of State Revenue [2022] NSWCATAD 278	19 August 2022	COSTS --- special circumstances	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD//2022/278.html
van der Zanden v Chief Commissioner of State Revenue [2022] NSWCATAD 283	23 August 2022	TAXES AND DUTIES — Surcharge purchaser duty — Liability — Foreign persons – whether ordinarily resident in Australia	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2022/283.html
Galle v Chief Commissioner of State Revenue [2022] NSWCATAD 285	24 August 2022	TAXES AND DUTIES — Surcharge purchaser duty — whether transferee a “foreign person” — whether temporary visa means person is subject to a limitation as to time imposed by law and not “ordinarily resident”	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2022/285.html
Vicinity Funds v Commissioner of State Revenue [2022] VSCA 176	24 August 2022	TAXATION – Statutory construction – Taxation Administration Act 1997 – Applicants lodged objections following notices of assessment – Objections remained undetermined for over two years – Objections set down as appeals in Supreme Court pursuant to s 106(1)(b) – Commissioner disallowed objections – Applicants thereafter requested referrals to Victorian Civil and Administrative Tribunal pursuant to s 106(1)(a) – Whether Commissioner under duty to make referrals after having already set down objections as appeals – Section 106(1) affords taxpayer with one request as to appeal or review – Appeal dismissed.	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2022/176.html
Tambakeras v UniSuper Limited [2022] NSWSC 1162	30 August 2022	SUPERANNUATION – Plaintiff applied for benefits including a Disablement benefit under trust deed – Whether decisions to refuse payment of Disablement benefit involved breaches of trustee’s duties – Whether trustee gave properly informed consideration to application – Whether there were conflicts in the medical evidence before the trustee that it was required to resolve – Whether trustee acted in good faith and was required to provide the plaintiff access to particular materials – Whether definition of Disablement was satisfied – Construction of superannuation trust deed – Whether trustee was required to consider the exercise of discretions – Whether the consent judgment sum could be offset against a Disablement benefit payment	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2022/1162.html
Trustee for The Lubiana Family Trust and Commissioner of Taxation [2022] AATA 2826	30 August 2022	TAXATION – WINE EQUALISATION TAX – where wine sold for single undissected amount – whether amounts said to be attributed to containers, delivery and ‘goodwill, reputation and romance’ of ultra-premium wine products excluded from taxable value – held no exclusion of these amounts – decision affirmed	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/2826.html

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JPD as Guardian v DMS as Trustee [2022] QSC 181	30 August 2022	EQUITY – TRUSTS AND TRUSTEES – APPOINTMENT, REMOVAL AND ESTATE OF TRUSTEES – RETIREMENT AND REMOVAL – REMOVAL BY THE COURT – GROUNDS FOR REMOVAL – where the father of the beneficiary children applies for the removal of the trustee under s 80 Trusts Act 1973 (Qld) – where the trustee has made decisions prioritising the children's wealth in adulthood – where the trustee has breached her undertaking to provide quarterly financial statements of the trust – where the father is not consulted on important trust decisions bearing upon the children's welfare – where the trustee has made decisions in an attempt to conform to the wishes of the dead mother – where the trustee has attempted to impose a move on the family to a smaller residence also owned by the trust – where the father of the children does not earn working income – where the father sought money from the trust to fund a move to Brisbane from Cairns – where this proposal was rejected – whether it is expedient for the court to interfere – whether the welfare of the beneficiaries is opposed to the trustee's continuation of office	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QSC/2022/181.html
Re Roth [2022] VSC 511	31 August 2022	EQUITY AND TRUSTS – Construction of trust deed – Interaction between trust deed and deeds of variation – Interaction between trust deed and deed of appointment – Principles of construction – Whether deeds of variation and appointment validly appointed plaintiffs as sole beneficiaries of a family trust upon vesting of the trust – Relevance of deceased's will to construction of the trust deed – *Byrnes v Kendle* [2011] HCA 26; (2011) 243 CLR 253.	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2022/511.html
Gillespie v Gillespies Cranes Nominees Pty Ltd [2022] NSWSC 1184	2 September 2022	EQUITY – trusts and trustees – discretionary family trust – corporate trustee – beneficiary makes derivative claims affecting the trust – beneficiary makes derivative claim in equity – administrative jurisdiction of the Court over trusts EQUITY – pleaded prayers for relief – orders to 'account and make good the Trust fund' – equitable debt – Barnes v Addy – equitable compensation – removal of trustee CORPORATIONS – statutory derivative actions – procedure under Part 2F.1A of the Corporations Act 2001 – exceptions to the rule in Foss v Harbottle – whether 236(3) of the Corporations Act abolishes derivative action by beneficiaries on behalf of the trust in equity – derivative action not abolished	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2022/1184.html

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2. Legislation

2.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Treasury Laws Amendment (2022 Measures No. 1) Bill 2022	27/7	2/8	3/8	4/8	9/8
Treasury Laws Amendment (2022 Measures No. 2) Bill 2022	3/8				
Treasury Laws Amendment (Electric Car Discount) 2022	27/7				

2.2 State government grants declared as NANE

The *Income Tax Assessment (Eligible State and Territory COVID-19 Economic Recovery Grant Programs) Amendment Declaration (No.4) 2022* (the **Declaration**) was made by the Treasurer on 22 August 2022.

The purpose of the Declaration is to declare that additional grant programs administered by States and Territories as eligible programs for the purpose of section 59-97 of the ITAA, under which a payment received in the 2020-21 or 2021-22 financial year by a small or medium business entity (as defined in that provision) from an eligible program, is non-assessable non-exempt income and will not be subject to income tax. This Declaration concerning multiple Victorian programs and one ACT program.

w https://www.legislation.gov.au/Details/F2022L01107

2.3 Change of beneficial ownership duty in New South Wales

On 26 August 2022, *Duties Regulation 2022* (NSW) was published and applies retrospectively to transactions which have occurred on or after 19 May 2022.

On 19 May 2022, the *Duties Act 1997* (NSW) was amended to introduce duty on transactions that result in a change in beneficial ownership, other than 'excluded transactions'.

The *Duties Regulation 2022* includes the following additional transactions as 'excluded transactions':

1. a change in default beneficial interests under a discretionary trust, including the following:
   (a) a change to the default beneficial interests of the default beneficiaries;
   (b) the addition or removal of a default beneficiary;
2. a change in beneficial ownership of dutiable property that occurs:
   (a) under a testamentary instrument or the laws of intestacy; or
   (b) otherwise by operation of law on the death of a person;
3. the grant or termination of a life estate in dutiable property for no consideration;
4. the variation or surrender of an easement for no consideration;
5. the grant, creation, variation or extinguishment of a mortgage, charge or other security over land;
6. the creation, variation or surrender, for no consideration, of a tenant's interest in fixtures that are fit-out for commercial premises;
7. a change in tenancy under a lease for no consideration;
8. a change, for no consideration, in the holding of property:
   (a) from joint tenants to tenants in common in equal shares; or
   (b) from tenants in common in equal shares to joint tenants;
9. the grant, variation, cessation, revocation or cancellation of a water right;
10. the expiry, extinguishment or merger of one or more leases for no consideration;

11. the variation or extinguishment of a profit a prendre for no consideration; and
12. the surrender of a security interest for no consideration.

Revenue NSW has updated its Guidance on the application of these recent amendments to the *Duties Act 1997*.

w https://legislation.nsw.gov.au/view/pdf/asmade/sl-2022-489

2.4 WA duties amendments for farm-in agreements

The *Duties Amendment (Farm-in Agreements) Bill 2022* (WA) (the **Bill**) seeks to amend the *Duties Act 2008* (WA) to address issues with transfer duties concessions for farm-in agreements involving mining tenements, which encourage the exploration of existing mining tenements for mineral resources.

A farm-in agreement is an agreement between a holder of a mining tenement and another person, which entitles the other person to acquire an interest in the tenement after spending an amount on exploration of the tenement.

Nominal duty of $20 applies to an eligible farm-in agreement if there is no consideration for the transaction other than the exploration amount. Duty does not apply to the transfer of an interest in a tenement or derivative mining right under a farm-in agreement if the specified exploration amount has been spent.

The Bill will ensure that the application concessions will continue to apply to eligible farm-in agreements, preserve the integrity of the concession, and ensure equitable outcomes for taxpayers. The Bill will also clarify that the concession does not apply to farm-in agreements where the exploration amount involves expenditure in connection with mining operations or capital costs associated with the construction of mining infrastructure to allow mining operations to be carried out.

The amendments will apply to farm-in agreements entered from 1 July 2008.

w
https://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=814377EDD545AAA0482588A0000857F4

2.5 Skills and training boost bonus deduction

Treasury is currently seeking consultation on the proposed *Treasury Laws Amendment (Measures for Consultation) Bill 2022: Skills and Training Boost*.

The Skills and Training Boost proposed in the Bill will provide small businesses (with an aggregated turnover of less than $50 million) with access to a bonus 20% in tax deductions for eligible expenditure incurred on external training delivered to their employees by providers registered in Australia (in addition to an existing available deduction for eligible expenditure incurred on external training for employees)

The bonus is calculated as 20% of the amount of expenditure that is both deductible under another tax law provision and eligible for the bonus deduction under the rules introduced by the Bill.

The bonus is available to small businesses that incur expenditure which meets the following criteria:

1. expenditure must be for training employees, either in-person in Australia, or online;
2. expenditure must be charged, directly or indirectly, by a registered training provider and be for training within the scope (if any) of the provider's registration;
3. the registered training provider must not be the small business or an associate of the small business;

4. expenditure must already be deductible under taxation law;
5. expenditure must be incurred within a specified period (between 7.30pm (by legal time in the ACT) on 29 March 2022 and 30 June 2024); and
6. expenditure must be for the provision of training, where the enrolment or arrangement for the provision of the training occurs at or after 7.30pm (by legal time in the ACT) on 29 March 2022.

The bonus deduction is not available for the training of non-employee business owners such as sole traders, partners in a partnership and independent contractors (who are not 'employees' of the business within the ordinary meaning).

Generally, small businesses can claim the bonus deduction in the income year in which the expenditure is incurred. However, there are special rules for small businesses depending on when their accounting period commences.

Normal or late balancers that incur expenditure between 7:30pm (by legal time in the ACT) and the end of their 2022-23 income year, will claim the bonus deduction in respect to this expenditure in the 2022-23 income year. This partly covers expenditure incurred in the 2021-22 income year, as well as expenditure incurred in the 2022-23 income year. For expenditure incurred in the 2021-22 income year, the special rule results in a delayed claim, where a bonus deduction is claimed in the year following the year in which expenditure was incurred.

Early balancers for the 2022-23 income year that incur expenditure between 7:30pm (by legal time in the ACT) on 29 March 2022 and the end of their 2022-23 income year, will claim the bonus deduction in respect to this expenditure in their 2023-24 income year. This results in a delayed claim, where a bonus deduction is claimed in the year following the year in which the expenditure was incurred. Early balancers are also able to claim the bonus deduction in their 2023-24 income year for expenditure incurred in that income year, consistent with the general rule.

The boost is intended to apply to eligible expenditure incurred from 7:30 pm on 29 March 2022 until 30 June 2024. Responses to the exposure draft legislation can be made up until 19 September 2022.

w https://treasury.gov.au/consultation/c2022-305552

2.6 Technical changes to First Home Super Saver Scheme

Treasury has released the *Treasury Laws Amendment (Miscellaneous and Technical Amendments) Bill 2022* as an exposure draft to make various technical amendments in relation to the First Home Super Saver Scheme (**FHSSS**) and other tax related amendments.

The draft legislation proposes to clarify some aspects of the FHSSS announced in the 2021-22 Budget presented by the previous government. The changes include:

1. increasing the Commissioner's discretion to vary or revoke applications and 'authorities to release' under the scheme;
2. allowing individuals to withdraw or amend their FHSSS applications before they receive a FHSSS amount, and allowing those who withdraw to re-apply for FHSSS releases in the future;
3. allowing the Commissioner of Taxation to return any FHSSS amounts to superannuation funds, provided the amount has not yet been released to the individual; and
4. clarifying that an FHSSS amount returned by the Commissioner of Taxation to superannuation funds are treated as funds' non-assessable non-exempt income and do not count towards the individual's contribution cap.

Other tax-related proposed changes include:

1. standardising terminology in the *Foreign Acquisitions and Takeovers Act 197*5 (Cth) in relation to register notices;

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2. introducing a requirement for the operators of electronic distribution platforms to be registered for GST if they wish to be treated as the supplier under section 84-55 of the GST Act;
3. correcting typographical errors in section 37 of the *Fringe Benefits Tax Assessment Act 1986* (Cth) and removing the requirement that an employer declaration in respect of a various transport and expense payment benefits must include the 'particulars of the car'; and
4. removing the requirement that a person's Tax File Number be provided *in writing* when applying for a director identification number.

The exposure draft is open for comments until 29 September 2022.

w https://treasury.gov.au/consultation/c2022-314167

2.7 Technology investment boost

The Treasury has released a draft of the *Treasury Laws Amendment (Measures For Consultation) Bill 2022: Technology Investment Boost* for consultation.

The measure applies to small businesses (with an aggregated turnover under $50 million) to help support digital adoption for small businesses, by providing a bonus 20% tax deduction for eligible expenditure incurred on expense and depreciation assets that support digital operations of the small business.

To be eligible for the bonus deduction:

1. the expenditure must be eligible for a deduction under another provision of the taxation law;
2. the expenditure was incurred between 7.30pm (AEDT) on 29 March 2022 and 30 June 2023; and
3. if the asset is a depreciating asset - the asset must be first used or installed ready for use by 30 June 2023.

An annual cap will apply so that expenditure up to $100,000 will be eligible for the boost. The bonus deduction will be capped at $20,000 per year.

The expenditure must have a direct link to the entity's digital operations for its business, including but not limited to:

1. digital enabling items – computer and telecommunications hardware and equipment, software, systems and services that form and facilitate the use of computer networks;
2. digital media and marketing – audio and visual content that can be created, accessed, stored or viewed on digital devices; and
3. e-commerce – supporting digitally ordered or platform enabled online transactions.

Examples of expenditures that are ineligible for the bonus deduction are:

1. salary and wages costs;
2. capital works costs which can be deducted under Division 43 of the ITAA;
3. financing costs;
4. training and education costs; and
5. expenditure that forms part of, or is included in, the cost of trading stock.

As the expenditure must be eligible for a deduction under another provision of the taxation law, the expenditure must be incurred in carrying on a businesses. If the expenditure is a combination of both private and business use, the bonus deduction will only apply to the proportion of the expenditure that is for an assessable income producing purpose.

An entity cannot claim the bonus deduction for expenditure on a depreciating asset if any balancing adjustment event occurs to the asset while the entity holds it during the relevant time period, unless the balancing adjustment event is an involuntary disposal.

The EM notes that generally, entities must claim the bonus deduction for expenditure incurred in their 2021-22 income year in their 2022-23 return. This is to allow additional time for administrative and legislative arrangements to be put in place before the bonus deduction may be claimed. However, if an entity's 2022-23 income year begins before 1 July 2022 (i.e. it is an 'early balancer'), the entity must claim the bonus deduction for 2021-22 (if applicable), 2022-23 and 2023-24 in its 2023-24 return.

Treasury is seeking stakeholders' views on the draft legislation by 19 September 2022.

w https://treasury.gov.au/consultation/c2022-305555

2.8 Proposed amendments to definition of digital currency

Treasury has published Exposure Draft legislation to ensure that crypto currency will not be treated as 'foreign currency' under the ITAA 1997 and the GST Act. Crypto currency was previously understood to not be a 'foreign currency' but due to the decision of the Government of El Salvador to adopt Bitcoin as a legal tender, there was concern that this position may change.

The amendments proposed are as follows:

1. to amend the definition of foreign currency to exclude digital currency; and
2. to change the ordering rules in the GST Act between digital currency so that where a digital currency is adopted as legal tender so it could be both money and digital currency, it is treated as digital currency for GST. This rule does not apply to government issued digital currency, which is not treated as digital currency.

The exposure draft is open for comments until 30 September 2022.

https://treasury.gov.au/consultation/c2022-314572

3. Rulings

3.1 Source of trust capital gains

The ATO has finalised *Taxation Determination* TD 2022/12 (formerly TD 2019/D7) concerning whether the source of a capital gain is relevant to whether a non-resident beneficiary is assessed on the capital gain of a resident trust to which the non-resident is entitled.

Prior to the introduction of the streaming measures for trust income with effect from the 2011 income year, it was the case that a non-resident was not assessable in Australia on capital gains that did not have an Australian source. After the introduction of the streaming measures, under section 115-215 of the ITAA 1997 a beneficiary is treated as having an extra capital gain determined in accordance with the method statement in section 102-5(1) of the ITAA 1997. The source of the capital gain is not relevant to this calculation.

Further, in accordance with section 115-220 of the ITAA 1997, the trustee is assessed under section 98 of the ITAA36 on the trust's capital gain attributed to the non-resident beneficiary, calculated by reference to a non-resident beneficiary's share of the trust's capital gain. The increased amount assessable to the trustee occurs without the usual conditions in section 98 of the ITAA36, including the source limitation. For those reasons the ATO considers that foreign sourced capital gains to which a foreign resident beneficiary is entitled are assessable for the trustee under section 98 of the ITAA36, and a foreign resident beneficiary is also assessable on the gain with a credit for tax paid by the trustee.

The draft determination stated that it would only apply from the income year ended 30 June 2020 onwards. This statement has been amended in the finalised ruling to say that the Commissioner will not devote compliance resources to identifying arrangements for earlier income years, but that if the Commissioner is presented with the issue and asked to provide advice or otherwise becomes aware of an arrangement in the course of compliance activities, the Commissioner will apply the law consistently with the views expressed in the Determination.

ATO reference *Taxation Determination* TD 2022/12
w https://www.ato.gov.au/law/view/document?docid=TXD/TD202212/NAT/ATO/00001

3.2 Capital gains of a foreign-resident beneficiary

The ATO has finalised *Taxation Determination* TD 2022/13 (formerly TD 2019/D6) concerning whether a capital gain that a foreign-resident beneficiary has because of subsection 115-215(3) of the ITAA 1997 can be disregarded under section 855-10(1) of the ITAA 1997. The ATO considers it cannot be disregarded.

The reason for this determination flows from two provisions which allow foreign-resident beneficiaries and temporary residents to disregard capital gains on assets that are not taxable Australia property:

1. subsection 855-10(1) of the ITAA 1997 provides that a foreign resident can disregard a capital gain or capital loss **from a CGT event** if the event happens in relation to a CGT asset that is not taxable Australian property; and
2. section 855-40 of the ITAA 1997 disregards a capital gain that a foreign-resident beneficiary of a fixed trust is taken to have as a result of a CGT event happening to a CGT asset of that trust if, at the time of the event, the CGT asset was not taxable Australia property of the trust.

Section 115-215(3) of the ITAA 1997 treats a beneficiary as having extra capital gains (that is, in addition to those capital gains that the beneficiary has made directly) which are included in the calculation of their net capital gain.

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TD 2022/13 confirms that the capital gain which happens as a result of section 115-215(3) of the ITAA 1997 as not having occurred 'from a CGT event'. Therefore, the capital gain cannot be disregarded under section 855-10(1) of the ITAA 1997.

The ATO has also confirmed its view is that if section 855-10 of the ITAA 1997 allowed gains from trusts to be disregarded, there would be no work to be done by section 855-40 of the ITAA 1997 in relation to fixed trusts.

The ATO also noted that a temporary resident cannot disregard a capital gain through either a fixed or a non-fixed trust.

ATO reference *Taxation Determination* TD 2022/13
w https://www.ato.gov.au/law/view/document?DocID=TXD/TD202213/NAT/ATO/00001&PiT=99991231235958

3.3 QLD duties and self-assessors

The Commissioner of State Revenue has released Public Ruling DA000.2.10 which explains the rights and obligations of self-assessors under the *Duties Act 2001* (Qld) and the *Taxation Administration Act 2001* (Qld) who are required to lodge transaction statements with the Commissioner.

The Duties Act allows the Commissioner to register a person as a self-assessor.

The notice of registration given by the Commissioner to a self-assessor may require the self-assessor to lodge with the Commissioner periodic returns incorporating multiple transactions (a **Return**) and/or a separate statement for each transaction (a **Transaction Statement**).

The lodgement, payment and assessment obligations of a self-assessor in relation to a particular instrument or transaction differ depending on whether the self-assessor is required to lodge a Return or a Transaction Statement.

Failure to lodge a Transaction Statement, pay the required duty, and stamp an instrument or ELN transaction document will be an offence, or alternatively, a penalty may be applied.

When a Transaction Statement is lodged, an assessment is taken to have been made by the Commissioner. Therefore, rights of objection and appeal flow from the lodgement of the Transaction Statement.

The Public Ruling also sets out the stamping requirements for instruments and ELN transaction documents. These requirements are prescriptive, and offences apply where the endorsement of the instrument or ELN document is incorrectly completed.

This ruling replaces a previous ruling.

QLD Public Ruling DA000.2.10, *Self assessors, the Duties Act 2001 and the Taxation Administration Act 2001*
w https://www.treasury.qld.gov.au/resource/da000-2/

3.4 QLD taxes – remission of unpaid tax interest

The Commissioner of State Revenue has released Public Ruling TAA060.1.9 which provides guidance on the application of the Commissioner's discretion to remit unpaid tax interest (**UTI**).

UTI applies whenever there is a payment of tax. UTI is imposed to encourage the payment of tax on time and compensate the state for the period the tax has been unpaid.

In deciding whether to remit UTI, the Commissioner will consider:

1. the circumstances that caused the delay and the actions taken by the taxpayer to mitigate those circumstances;
2. the actions taken by the taxpayer to inform themselves and comply with their obligations;
3. the extent that the circumstances giving rise to the imposition of UTI were within the taxpayer's control;
4. whether the circumstances giving rise to the imposition of UTI were due to an error or unreasonable delay by the Commissioner;
5. whether the remission of UTI would provide an unfair advantage to the taxpayer over other taxpayers;
6. whether an extension of time has been granted b the Commissioner to lodge information;
7. whether the taxpayer has paid tax in error to another State or Territory and remedied this by paying the tax to the Commissioner; and
8. any other circumstances which satisfy the Commissioner that a remission of UTI is warranted.

Applications for the remission of UTI should be in writing, with full details of the facts and circumstances. The Commissioner may also choose to remit UTI following an investigation.

This ruling replaces a previous ruling.

QLD Public Ruling TAA060.1.9, *Remission of unpaid tax interest*
w https://www.treasury.qld.gov.au/resource/taa060-1/

3.5 QLD taxes – impact of refund of UTI on anther tax liability

The Commissioner of State Revenue has released Public Ruling TAA060.4.4 that clarifies how the Commissioner will exercise the discretion to remit unpaid tax interest (**UTI**) on an amount of primary tax payable and unpaid, if the taxpayer becomes entitled to a refund because of a reassessment decreasing a taxpayer's liability for tax under a separate assessment.

The Commissioner confirms that the imposition and remission of UTI are determined separately for each assessment, including the entitlement to a refund and the allocation of payments. Therefore, UTI will not generally be remitted if the taxpayer has made an overpayment for another tax liability, or if the taxpayer is entitled to a refund in relation to one or more other tax law liabilities.

When exercising discretion to apply part or all of a refund amount to any other tax law liability of the taxpayer, the Commissioner has confirmed State Revenue will apply the amount to the liability from the time the amount becomes available, that is when a reassessment is made. This ruling replaces a previous ruling.

QLD Public Ruling TAA060.4.4, *Impact of a refund on unpaid tax interest for another outstanding liability*
w https://www.treasury.qld.gov.au/resource/taa060-4/

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4. Private Binding Rulings

4.1 Farming write-offs

Facts

Farming land and improvements are owned by members of a consolidated group and are leased at market rates to a partnership (the **Partnership**) which runs an agricultural business. A member of the consolidated group is also a partner in the Partnership.

The aggregated turnover of the head entity of the group is more than $10 million and less than $50 million.

Another member of the consolidated group purchased an agricultural property (land, plant and structural improvements) in 2020 which was leased to the Partnership under a lease for 5 years for use in their agriculture business. The contract did not apportion the purchase price. However, valuations of the water facilities, fencing assets and manager's residence were obtained.

This residence is used as accommodation for employee of a related company who works in agriculture business that is conducted on the land. The related company charges a labour hire fee (at market rates) to the Partnership.

Deductions were claimed or could have been claimed by the previous owners for the water facilities and fencing assets under Subdivision 40-F of the ITAA 1997.

The entity that owns the land owns all the assets and has the right to remove or recover the assets.

Questions

1. Is a tax deduction able to be claimed by the head entity for water facility assets purchased for a cost (based on market value) of less than $150,000 under the Instant Asset Write Off provisions of section 40-82 of the ITAA 1997?
2. Is a tax deduction able to be claimed by the head entity for fencing assets purchased for a cost (based on market value) of less than $150,000 under the Instant Asset Write Off provisions of section 40-82 of the ITAA 1997?
3. Is a tax deduction able to be claimed by the head entity for the cost of the manager's residence under the Instant Asset Write Off provisions of section 40-82 of the ITAA 1997?

Decision

The ATO noted that under the single entity rule in the consolidation regime, the head entity is treated as having acquired the assets.

<u>Question 1 and Question 2</u>

The ATO ruled no.

Section 40-50(1) of the ITAA 1997 provides that you cannot deduct an amount, or work out a decline in value, for a depreciating asset a person has deducted or can deduct amounts for it under Subdivision 40-F (about primary production depreciating assets) of the ITAA 1997.

As the previous owner had claimed or could have claimed a deduction for the water facilities assets and fencing assets, the head entity was precluding from claiming a deduction for the cost of the water facility assets and fencing assets under the instant asset write off provisions.

Question 3

The ATO noted that section 40-45(2) of the ITAA 1997 states that Division 40 does not apply to capital works for which the person can deduct amounts under Division 43 of the ITAA 1997.

The ATO considered this depended on whether the residence was 'plant', as plant was precluded from being deductible under Division 43 of the ITAA 1997.

The ATO referred to Taxation Ruling TR 1999/2 which states as follows on the meaning of plant:

> *20. '[Plant] in its ordinary sense...includes whatever apparatus is used by a business man for carrying on his business, - not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business': Lindley LJ in Yarmouth v. France (1887) 19 QBD 647 at 658.*

The ATO considered that whether a 'building', 'structural improvements' or 'environmental protection earthworks' is plant depends on:

1. whether it is more than a mere setting for the taxpayer's operations; and
2. if it is, whether the function performed by the thing is so related to the taxpayer's operations or special that it warrants it being held to be plant.

The ATO noted that sections 45-40(1)(c) and (f) of the ITAA 1997 extend the ordinary meaning of 'plant' to include:

> *(c) fences, dams and other structural improvements, other than those used for domestic or residential purposes, on land that is used for agricultural or pastoral operations;*
> *(f) structural improvements that are excluded from paragraph (c), (d) or (e) because they are used for domestic or residential purposes if they are provided for the accommodation of employees, tenants or sharefarmers who are engaged in or in connection with the activities referred to in that paragraph.*

The ATO considered that the residence was not 'plant' within the ordinary meaning and considered it necessary to ascertain whether it was plant under the extended meaning.

The ATO concluded that the residence did not fall within the definition of 'plant' as:

1. the land was leased to the Partnership for the Partnership's own use in its agricultural operations; and
2. the employee who resides in the residence was engaged in the agricultural activities of the Partnership.

TRAP – the ATO used the fact that the previous owner 'could' have deducted amounts under Subdivision 40-F of the ITAA to deny a deduction. It is important to obtain information on what a previous owner has claimed when acquiring farmland.

COMMENT – the fact that the land in this PBR was being used by a partnership rather than by the corporate group should not, on its face, prevent the residence from being plant – there is an employee, the manager, who presumably is engaged in agricultural or pastoral operations.

ATO reference *Private Binding Ruling* Authorisation Number 1051985901247
w https://www.ato.gov.au/law/view/document?docid=EV/1051985901247

4.2 Temporary residents

Facts

The taxpayer was born in and is a citizen of a foreign country.

The taxpayer holds a passport for their country of birth and entered Australia on that passport. He or she entered Australia with the intention of living here.

The taxpayer does not have a spouse.

The taxpayer presented she or he's country of birth's passport to a customs officer upon arrival in Australia and subsequently when he or she re-entered Australia after temporary absences.

The taxpayer holds as Special Category Visa (SCV).

The taxpayer is not a permanent resident of Australia or an Australian citizen.

The taxpayer a beneficiary of the foreign resident rust and will receive distributions from it.

The taxpayer had previously made a ruling application to the ATO stating that he or she was a temporary resident of Australia and his or her circumstances remained the same.

The foreign resident trust owns all of the shares in a company that was incorporated in the country of the taxpayer's birth (**Foreign Co**). The Foreign Co owns all of the shares in an Australian incorporated company (**Aus Co**). The shares in Aus Co were acquired as a long term investment.

After the death of the family patriarch, it is proposed that Foreign Co be wound up and the shares in Aus Co be distributed in-specie to the foreign trust.

Prior to the winding of Foreign Co, Foreign Co would pay a dividend of its accumulated profits and reserves.

Questions

Are the distributions received by the taxpayer from the trust, to the extent that they are sourced from Aus Co's dividends, NANE income for the taxpayer due to the application of section 768-910 of the ITAA 1997?

Decision

The ATO ruled yes.

The ATO noted that section 768-910 of the ITAA 1997 provides that statutory income derived by a temporary resident from a foreign source is NANE and the source of the income from the foreign trust is from a foreign source.

ATO reference *Private Binding Ruling* Authorisation Number: 1051980613759
w https://www.ato.gov.au/law/view/document?docid=EV/1051980613759

4.3 Crypto assets as personal use assets

Facts

The taxpayer acquired, for less than $10,000, eight Non-Fungible Tokens (NFT's) that represented an ownership interest in various digital artworks. The artworks are images of unique landscapes by an unknown artist.

The taxpayer collects art for your personal enjoyment.

The taxpayer liked the visual aesthetic and design of the images and acquired them for personal use and enjoyment.

No rights, other than the ownership of the digital artworks, were obtained from acquiring the NFTs.

The taxpayer looked at the NFT's occasionally but otherwise did nothing with them.

The taxpayer sold three NFT's and made a capital gain on each.

One NFT was sold to a collector at a charity auction and the proceeds were donated to a DGR. The taxpayer sold the other two NFTs were sold to the same collector but the proceeds were not donated.

The taxpayer had not previously sold digital art or collectables.

The taxpayer did not acquire any other NFTs during this period.

The ATO assumed that NFT's are not collectables as defined in subsection 108-10(2) of the ITAA 1997.

Question

Can the capital gains you made when selling the NFYs be disregarded on the basis that the NFT's were personal use assets acquired for less than $10,000?

Decision

The ATO ruled yes. The ATO accepted that the NFTs have been sold as personal use assets.

ATO Reference *Private Binding Ruling* Authorisation Number: 1051976096088
w https://www.ato.gov.au/law/view/document?docid=EV/1051976096088

4.4 Genuine redundancy payment

Facts

The taxpayer received a notice of termination of employment that stated:

> *'The purpose of this letter is to confirm the outcome of a recent review of the office of employer and its operational requirements, and what it means for you.*
>
> *As a result of change in operational requirements, the role of position 'A' is no longer required. Regrettably this means that your employment will terminate. This decision is not a reflection on your performance'.*

The taxpayer understood, from discussions with colleagues, that the employer was considering removing the taxpayer's role and replacing it with a position with markedly different duties and that the taxpayer did not have the necessary qualities for the new role.

The new position was not advertised and the taxpayer could not apply for it.

An Employment Termination Payment (ETP) was paid to the taxpayer in a single payment that included other termination entitlements.

The taxpayer received a final entitlements letter that did not classify the ETP as resulting from a genuine redundancy.

The taxpayer asked his or her employer to 'alter the taxation of the scheduled payment'.

The employer responded as follows:

> *'In respect to the taxation treatment of your final entitlements in relation to your employment in the office of your employer, XYZ considers that the termination of employment resulting from a restructure of the employer is not a genuine redundancy for the purposes of section 83-175 of the Income Tax Assessment Act 1997. The employer will require the services of someone for what is essentially the same position (i.e.,*

your personal employee position) and for that reason fails the test of genuine redundancy' (email from XYZ).

The taxpayer understood that he or she received severance payments that, under the relevant enterprise agreement, he or she would not have received on voluntary resignation.

A breakdown of the taxpayer's termination payment was as follows:

1. Payment in lieu of Annual Leave $XXX,
2. Payment in lieu of Long Service Leave (LSL) $XXX,
3. Tax on Annual Leave, LSL - $XXX,
4. Total Net Final Entitlement $XXX.

In addition:

1. The severance benefit / total ETP $XXX
2. Less tax @32% on $xxx: - $XXX
3. Net $XXX

Question

1. Were the payments made on termination of taxpayer's employment, the result of a genuine redundancy under section 83-175 of the ITAA 1997?
2. Is any part of the lump sum payment tax-free under section 83-170 of the ITAA 1997 as a genuine redundancy payment?

Decision

The ATO ruled no to both questions.

The ATO stated that a payment will not be taxable as an ETP if it is part of a genuine redundancy payment. For a payment to be a genuine redundancy payment, it must meet the following requirements:

1. the payment is received because the employee's position is genuinely redundant and exceeds the amount that could reasonably be expected to be received by the employee in consequence of the voluntary termination of his or her employment at the time of dismissal;
2. the payment must satisfy the following conditions:
   - (a) the employee is dismissed before the earlier of the following:
     - (i) the day he or she turned 65;
     - (ii) if the employee's employment would have terminated when he or she reached a particular age or completed a particular period of service the day he or she would reach the age or complete the period of service (as the case may be);
   - (b) if the dismissal was not at arm's length the payment does not exceed the amount that could reasonably be expected to be made if the dismissal were at arm's length; and
   - (c) at the time of the dismissal, there was no arrangement between the employee and the employer, or between the employer and another person, to employ the employee after dismissal;
3. the payment was not received by the employee in lieu of superannuation benefits to which the employee may have become entitled at the time the payment was received or at a later time; and
4. it is not a payment mentioned in section 82-135 of the ITAA 1997, apart from paragraph 82-135(e).

The ATO considered the first requirement.

The ATO noted that a position is redundant when the functions, duties and responsibilities attached the position are determined to no longer be necessary for organisation. The ATO noted that contrived acts of redundancy between an employee and employer will not meet the first requirement.

The ATO considered that there was insufficient evidence that the duties and responsibilities formerly attached to the taxpayer's position were no longer required as there is no evidence that the employer had provided advice that the position has been abolished.

The ATO also noted that the payment advice did not reflect that any of the payments were genuine redundancy payment.

The ATO noted that, had the unused annual leave payments and the unused long service leave payments been made in connection with a genuine redundancy payment, the taxpayer may have been entitled to a tax offset under section 83-15 of the ITAA 1997 in relation to such payments.

ATO reference *Private Binding Ruling* Authorisation Number: 7920141690797
w https://www.ato.gov.au/law/view/document?docid=EV/7920141690797

4.5 Excepted persons

Facts

A trust wishes to make trust distributions to a disabled minor who is a beneficiary of the trust.

The beneficiary has a number of serious and life shortening disabilities.

A legally qualified medical practitioner certifying has certified that the person has a disability and is likely to need care and attention either permanently or for an extended period and that they meet the meaning of 'disabled child' and 'disabled adult' under the *Social Security Act 1991* (Cth).

Question

Are the distributions made to a minor while they are under the age of 18, considered to be made to an excepted person for the purposes of paragraph 102AC(2)(d) of the ITAA 1936?

Ruling

The ATO ruled yes. The beneficiary is an excepted person as a qualified medical practitioner has certified that the minor is suffering a disability and has ongoing symptoms from their condition

ATO reference *Private Binding Ruling* Authorisation Number: 1051988371774
w https://www.ato.gov.au/law/view/document?docid=EV/1051988371774

4.6 Superannuation death benefits dependant

Facts

The deceased member was a sole parent who was admitted to hospital, where she passed away some months later.

The superannuation death benefits were paid to the deceased's estate.

The beneficiary, the adult child of the deceased, is the executor of the estate.

The beneficiary had always lived with the deceased and was in employment when the deceased died.

The beneficiary contributed to household expenses by paying for shopping and paying household bills.

The beneficiary provided domestic support and personal care to the deceased by

1. preparing of meals;
2. cleaning the house on a weekly basis;
3. gardening;

4. caring for the family pet;
5. caring for a minor sibling;
6. providing transport and accompaniment to medical appointments;
7. undertaking recreational day trips; and
8. regular laundering of the deceased's clothes.

The beneficiary provided emotional support to the deceased by:

1. daily hospital visits, including weekends and rostered days off;
2. ensuring that as much time as possible was spent doing activities together that she enjoyed;
3. providing relief from the stress of her illness; and
4. encouraging the deceased to open-up and discuss her worries with him.

Question

Was the beneficiary a death benefits dependant of the deceased according to section 302-195 of the ITAA 1997 due to being in an interdependency relationship with the deceased under section 302-200 of the ITAA 1997?

Ruling

The ATO ruled no.

The ATO noted two persons are in an interdependency relationship under section 302-200 of the ITAA 1997 where:

1. they have a close personal relationship (s 302-200(1)(a)); and
2. they live together (s 302-200(1)(b)); and
3. one or each of them provides the other with financial support (s 302-200(1)(c)); and
4. one or each of them provides the other with domestic support and personal care.

Subregulation 302-200.01(2) of the *Income Tax Assessment Regulations 2021* (**ITAR 2021**) states the matters taken into account in determining if two people are in an interdependency relationship are as follows:

1. all the circumstances of the relationship between the persons, including (where relevant):
    (a) the duration of the relationship;
    (b) the ownership, use and acquisition of property;
    (c) the degree of mutual commitment to a shared life;
    (d) the care and support of children;
    (e) the reputation and public aspects of the relationship;
    (f) the degree of emotional support;
    (g) the extent to which the relationship is one of mere convenience;
    (h) any evidence that the parties intend the relationship to be permanent; and
2. the existence of a statutory declaration signed by one of the persons to the effect that the person is, or (in the case of a statutory declaration made after the end of the relationship) was in an interdependency relationship with the other person.

Subregulation 302-200.02(2) of the ITAR 2021 provides that an interdependency relationship exists between two people where:

1. they satisfy the requirements of paragraphs 302-200(1)(a) to (c) of the ITAA 1997; and
2. one or each of them provides the other with support and care of a type and quality normally provided in a close personal relationship rather than by a mere friend or flatmate, for example one person provides significant care for the other person when they are unwell or suffering emotionally.

The ATO considered whether there was a close personal relationship between the deceased and the beneficiary, noting the Explanatory Statement to the Income Tax Amendment Regulations 2005 (No.7) stated that:

> *Generally speaking, it is not expected that children will be in an interdependency relationship with their parents.*

The ATO accepted that this does not preclude there being an interdependency relationship between a parent and a child but it would not be usual as there would not be a mutual commitment to a shared life between the two. For there to be an interdependency relationship between a parent and a child, there would need to be unusual and exceptional circumstances.

The ATO did not consider there was unusual and exceptional circumstances in this case. The care provided by the beneficiary was the level of care that one would expect an adult child to provide to a parent in such a situation. While they live at the home as a family unit, there was no indication of a strong mutual commitment to having a shared life.

The ATO was also not satisfied that there was evidence of financial support or domestic support and personal care. The ATO noted that, prior to the deceased's illness, the deceased had been employed and there was no evidence the beneficiary actually provide financial support.

Further, the domestic support and personal care, during the deceased's illness, was not of a frequent and ongoing nature.

ATO reference *Private Binding Ruling* Authorisation Number: 1051971162905
w https://www.ato.gov.au/law/view/document?docid=EV/1051971162905

4.7 UPEs and commercial debt forgiveness

Facts

A private company (**Company**) was made presently entitled to income of a family trust (**Trust**) in prior years but such amounts were unpaid.

The ABN for the Trust has been cancelled and it does not hold any property or assets.

The sole director of the Company died (the **Deceased**) and another person (the **Executor**), who was the executor of the deceased estate, was appointed as the sole director of the Company.

The liabilities of the Company are a loan owing to the Deceased and a provision for tax.

The Executor, in his or her capacity as executor, is prepared to forgive the debt to assist in the winding up of the Company.

Questions

1. Will the release by the Company of the UPE constitute a payment for section 109C of the ITAA 1936?
2. Will the trustee of the Trust obtain a financial benefit from the release of the UPE?
3. Will there be a deemed dividend for the purposes of Division 7A of the ITAA 1936 in respect of the release of the UPE amount owing to the Company?
4. Will the release of the UPE amount, as a debt, constitute commercial debt forgiveness for the purposes of Division 245 of the ITAA 1997?
5. Will the release of the UPE amount, as a debt, be considered a dividend under section 109F of the ITAA 1936?
6. Will the release of the UPE amount owing to the Company cause CGT event C2 to be triggered.

Ruling

Question 1

The ATO ruled yes that the release of the UPE constitutes a payment.

The ATO noted that a payment for section 109C of the ITAA 1936 means as follows:

1. a payment to the extent that it is to the entity, on behalf of the entity or for the benefit of the entity; and
2. a credit of an amount to the extent that it is:
   (a) to the entity; or
   (b) on behalf of the entity; or
   (c) for the benefit of the entity; and
3. a transfer of property to the entity.

The ATO also noted that TD 2015/20 states that a release of a UPE is a crediting of an amount within the meaning of section 109C of the ITAA 1936, *to the extent that the release represents a financial benefit to an entity.*

Question 2

The ATO ruled no, the trustee will not obtain a financial benefit from the release of the UPE.

The ATO noted that whether there is a financial benefit for the trustee will depend upon whether the beneficiaries have a cause of action against the trustee, but this will generally only be the case where there is causal connection between the breach of trust and the loss.

Where the incapacity to satisfy the UPR arises from circumstances outside of the control of the trustee, the beneficiary will not have a cause of action against the trustee.

In this case, the ATO was satisfied that the beneficiaries did not have a cause of action against the trustee and, therefore, the release did not result in a financial benefit to the trustee.

Question 3

The ATO ruled there would not be a deemed dividend on the release as there was no financial benefit to the trustee.

Question 4

The ATO ruled no, the release the debt will not constitute commercial debt forgiveness.

The ATO noted that a 'commercial debt' is defined in section 245-10 of the ITAA 1997 to be a debt where:

1. the whole or any part of interest, or of an amount in the nature of interest, paid or payable by you in respect of the debt has been deducted, or can be deducted, by you; or
2. interest, or an amount in the nature of interest, is not payable by you in respect of the debt but, had interest or such an amount been payable, the whole or any part of the interest or amount could have been deducted by you; or
3. interest or an amount mentioned in paragraph (a) or (b) could have been deducted apart from the operation of a provision of the ITAA 1997 (other than paragraphs 8-1(2)(a), (b) and (c) of the ITAA 1997) that has the effect of preventing a deduction.

The ATO notes that determining whether a debt is a 'commercial debt' requires an examination of the borrower's purpose. Put simply, if the use of the loan could result in an allowable deduction of interest, were interest to be charged, a commercial debt exists.

The ATO noted that there is a distinction between a claim in equity and a debt owing and that a UPE does not, in itself, give rise to a debt owing from the trustee to the beneficiary: *R v Brown* [1912] HCA 6; 14 CLR 17, *Fischer v Nemeske Pty Ltd* [2015] NSWCA 6.

Accordingly, so the ATO says, this means that UPE is not a debt.

The ATO concluded that, as the UPE is not a commercial debt to which interest is deductible, the commercial debt forgiveness provisions do not apply.

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The ATO also noted that, even if the UPE was a debt owing, the gross forgiven amount was incapable of being applied in the manner set out in Division 245 and, as a result, the gross forgiven amount is disregarded.

Question 5

The ATO ruled no. The ATO stated that, as there was no financial benefit to the trustee from the release, the release cannot give rise to a deemed dividend.

Question 6

The ATO ruled that the release will not result in a capital gain from CGT event C2.

The ATO noted that CGT event C2 can happen when a UPE comes to an end, either because it is satisfied by payment, or it is released. In relation to a UPE coming to an end on payment, the ATO noted that, consistent with *Commissioner of Taxation v Dulux Holdings Pty Ltd & Orica Ltd* [2001] FCA 1344, the Commissioner's position has been that it is appropriate to look through the legal rights incidentally created and discharged/satisfied when they are merely facilitating the real transaction, being the distribution of income from a trust to a beneficiary. Hence, a payment of a UPE will not lead to CGT event C2 happening.

The ATO noted that the Company's cost base in the UPE is nil, as the Company did not give consideration to receive the UPE and section 112-20(3) of the ITAA 1997 provides that the market value substitution rule does not apply to right to receive income from a trust (other than unit trust or deceased estate) for no consideration and which was not acquired by way of assignment.

The ATO noted that the Company's capital proceeds would also be nil due to the application of the market value substitution rule and that Family Trust did not have the capacity to satisfy the UPE.

Accordingly, as both cost base and capital proceeds were nil, there was no capital gain.

ATO reference *Private Binding Ruling* Authorisation Number: 1051956222079
w https://www.ato.gov.au/law/view/document?docid=EV/1051956222079

4.8 Deduction for transaction bonuses to employees

Facts

A company ran a business and the shares in the company were to be the subject of an acquisition by a buyer.

On the day of the acquisition, the company made transaction bonus payment to a number of continuing senior staff (more than 10 but less than 30) to reward them for long service, past performance, and additional efforts in implementing the transaction.

The business's employment expenses make up about 40% of total expenses excluding raw materials and consumables.

The employment contracts for the employees indicate that the company may pay performance bonuses to them at the board's discretion, dependent on business productivity, and individual performance. of the A family. Other recipients were senior employees who received transaction bonuses on the takeover.

All entities are Australian tax residents.

The shareholders of the target company received a combination of scrip and cash from the buyer.

The company actively sought the acquisition as part of the strategic plan was to attract new shareholders to help grow the business. The buyer's business plan included injecting capital into the company and achieving rapid growth.

It was determined to pay the bonuses about 2 months before the takeover, while reviewing the draft share sale agreement.

The target company's original shareholders agreed not to terminate any employees or alter the terms and conditions of their employment.

There was no suggestion that any employees intended to retire or resign after payment of the bonuses. There were no conditions attached to the bonuses.

The bonuses were paid from existing cash reserves of the company, with the cash being set aside the day before the takeover.

The senior employees were heavily involved in the transaction process.

The company told the buyer about the prospect of paying transaction bonuses.

There were four reasons given for the payment of the transaction bonuses:

1. to reward the senior employees for successfully implementing the takeover project;
2. to reward and incentivise the employees for their past performance and continued loyalty as employees of the target company;
3. to retain the employees by paying bonuses through a remuneration policy that was consistent with past events and practice; and
4. to reward their additional efforts during the COVID-19 pandemic.

The buyer was a member of a tax consolidated group. The payments were made shortly after completion, at the time that the company had become part of the buyer's tax consolidated group.

Questions

1. Are the transaction bonuses deductible under section 8-1?
2. In the alternative, should the Commissioner find that the transaction bonuses are not deductible under section 8-1, are the transaction bonuses deductible under section 40-880?

Ruling

The ATO ruled that the payments were deductible under section 8-1 of the ITAA 1997.

The ATO considered on balance that the payments were made to retain staff and maintain staff productivity. In coming to this conclusion, the ATO considered a variety of factors as follows:

1. Recipients: the payments were made to current, ongoing staff and there was no suggestion any of them were retiring;
2. Conditions: the payments were unconditional;
3. Change in ownership: it was connected with the sale of the shares in the company but those shareholders acquired shares in the buyer's group;
4. Trigger: the payments were made on completing a takeover. This may have suggested that they were not ordinary business expenses;
5. Decision makers: the board was controlled by the selling shareholders when it resolved to pay the bonuses. This may have suggested that the payments were not ordinary business expenses, although the ATO did not think any personal connection could explain the payments given the bonuses were paid to key management staff. The payments did not have the appearance of a parting gesture to a few close friends;
6. Staff knowledge: most recipients were told about the potential payments about 2 weeks before the takeover was completed;
7. Staff Involvement: the staff were heavily involved in the takeover;
8. Takeover negotiations: the buyer was aware the bonuses might be paid;
9. Decision timing: the board decided to make the payments just two months before the takeover, when the draft agreement was being reviewed;
10. Records: the board meeting minutes record that the payments were made to reward staff for past performance and long or loyal service;

11. Remuneration policy: the target company pays key staff performance bonuses

As the payments were made at the time that the company formed part of the buyer's tax consolidated group, the payments were deductible to the head entity in the consolidated group.

ATO reference *Private Binding Ruling* Authorisation Number: 1052003467154
w https://www.ato.gov.au/law/view/document?docid=EV/1052003467154

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5. ATO and other materials

5.1 Older edited versions of private rulings to be removed from register

The ATO is going through a process of removing older edited versions of private rulings from its website legal database. The following disclaimer appears at the top of rulings that it proposes to remove:

This edited version will be removed from the Database after 1 October 2022. If you believe the issues detailed in this edited version warrant retention in an alternative form, email publicguidance@ato.gov.au

This edited version has been archived due to the length of time since original publication. It should not be regarded as indicative of the ATO's current views. The law may have changed since original publication, and views in the edited version may also be affected by subsequent precedents and new approaches to the application of the law.

An example of an edited version of a private ruling bearing this disclaimer can be viewed at the link below.

w https://www.ato.gov.au/law/view/document?docid=EV/74828

5.2 Synthesised text of tax treaty with Republic of Hungary

The ATO has issued a synthesised text for the application of Australia's tax treaty with Hungary. The tax treaty was signed on 29 November 1990 and was modified by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) signed on 7 June 2017. The synthesised text is not a source of law but is instead intended to help with understanding how the MLI applies to the tax treaty.

TRAP – always check whether a DTA you are reading has been modified by a MLI before relying on the text.

w https://www.ato.gov.au/law/view/document?docid=MLI/MLI-Hungary-agreement

5.3 408 pandemic event visa and impact on tax residency

The Australian Government announced the COVID-19 Pandemic Event (Subclass 408) Visa during the pandemic. This visa allows temporary visa holders to stay in Australia for an additional period of 6 or 12 months.

Presently, the 408 Visa is offered to any person working in, or with an offer to work in agriculture, food processing, health care, aged care, disability care, child care, and tourism and hospitality.

Whether moving to a 408 Visa has tax consequence will largely depend upon whether it changed a person's tax residency status, noting that the visa will not, on its own, change someone's tax residence.

The ATO publication outlines the various outcomes that could arise if tax residency has changed depending upon the original visa status and whether or not someone came from a country with a tax treaty containing a non-discrimination provision.

w https://www.ato.gov.au/General/COVID-19/Support-for-individuals-and-employees/408-Pandemic-event-visa/

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5.4 ATO: Areas of focus

Andrew Watson, Assistant Commissioner of Taxation, has indicated, in an interview given on an Accountants Daily Podcast, the following three areas of focus for the ATO:

1. the apportionment of expenses that are used for both business and personal purposes;
2. the omission of business income, particularly in the gig economy; and
3. business record keeping.

w https://www.accountantsdaily.com.au/tax-compliance/17473-a-trio-of-tripwires-businesses-should-avoid-says-ato

5.5 Present entitlement - update to TD 2012/22

The ATO has indicated that it is intending to update *Taxation Determination* TD 2012/22, a determination concerning the meaning of presently entitlement to a share of the income of the trust estate, following the decision of the Full Federal Court of Australia in *Lewski v Commissioner of Taxation* [2017] FCAFC 145.

Lewski involved a consideration of whether a beneficiary was presently entitled to a share of the income of the trust estate for the purposes of section 97 of the ITAA 1936 where the entitlement arose only upon a contingency set out in the trustee's resolution being satisfied and such contingency was only satisfied after the end of the income year. The Full Court held that the beneficiary was not presently entitled by the end of the income year in such circumstances.

The update to TD 2012/22 is expected to be completed by early 2023.

w https://www.ato.gov.au/General/ATO-advice-and-guidance/Advice-under-development-program/Advice-under-development---trust-specific-issues/

5.6 Finalisation of section 100A Guidance

The ATO's website no longer has an expectation completion date for the finalisation of its guidance on the application of section 100A of the ITAA 1936. The previous indication was that the guidance was expected to be completed in July 2022.

w https://www.ato.gov.au/General/ATO-advice-and-guidance/Advice-under-development-program/Advice-under-development---trust-specific-issues/

5.7 Corporate tax transparency income threshold for resident private companies

The ATO is required by law to publish information reported to it by large corporations. The publication of this data is intended to increase community confidence that corporations are paying the right amount of tax and to encourage voluntary compliance. On 9 August 2022 the *Treasury Laws Amendment (2022 Measures No. 1) Act 2022* reduced the corporate tax transparency income threshold for Australian-owned resident private companies from $200 million to $100 million.

From the 2023 income year onwards, the corporate tax transparency reports will include:

1. Australian public and foreign-owned corporate tax entities with income of $100 million or more;
2. Australian-owned resident private companies with income of $100 million or more; and

3. entities that have petroleum resource rent tax payable.

w https://www.ato.gov.au/General/New-legislation/In-detail/Other-topics/International/Corporate-tax-transparency-income-threshold-for-resident-private-companies/

5.8 Board of Taxation review of the tax treatment of digital assets and transactions

On 21 March 2022, the former Government released the Terms of Reference for a review to be carried out by the Board of Taxation in relation to the taxation of digital assets and transactions, such as crypto assets.

The Board of Taxation has been asked to:

1. consider the current tax treatment of digital assets and any tax policy issues which might arise;
2. consider the awareness of retail and wholesale investors and those who transact in digital asset as part of their business of the tax treatment of digital assets;
3. consider the characteristics and features of digital assets and transactions in the market, including the rapid evolution of technology;
4. analyse the taxation of digital assets in comparative jurisdictions; and
5. consider whether changes to Australian taxation laws are required.

A working group has been established by the Board of Taxation. The group will conduct targeted consultation with stakeholders in the business community, academia and government.

A Consultation Guide was published in August 2022 by the Board of Taxation, which outlines the relevant government reports and announcements. The Board of Taxation also proposes to hold a series of consultations on various dates listed on the website which is linked below. In addition to participating in consultations, the Board of Taxation welcomes any written submissions.

The Board of Taxation intends to report back to the Government by the end of 2022.

w https://taxboard.gov.au/review/digital-assets-transactions-aus

5.9 Crypto asset regulatory reforms

The Treasurer, Dr Jim Chalmers, has issued a joint media release with Stephen Jones and Dr Andrew Leigh regarding the Albanese Government's intention to improve the way Australia's regulatory system manages crypto assets.

The Albanese Government intends to start consultation with stakeholders on a regulatory framework which allows consumers to safely participate in the crypto market.

The first step will focus on 'token mapping' which will help identify how crypto assets and related services should be regulated. Ultimately it is the Government's intention to ensure that customers engaging with crypto are adequately informed and protected.

A public consultation paper on 'token mapping' will be released soon.

w https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/work-underway-crypto-asset-reforms

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5.10 Revenue NSW: General statement for transfer duty and leases

Revenue NSW has issued a general statement on when a lease is dutiable as a change in beneficial ownership pending release of a Commissioner's Practice Note on this issue.

Generally, leases where rent is paid or payable will not be liable for duty, provided there is no premium or other consideration for the grant of the lease.

Leases liable to duty under the above provisions will need to be lodged with Revenue NSW for assessment of duty via eDuties.

w https://www.revenue.nsw.gov.au/electronic-duties-for-professionals/professionals-resources/duties-technical-guides/legislation-amendment-act-2022-guide?result_396764_result_page=3
w https://www.revenue.nsw.gov.au/news-media-releases/holding-statement-for-leases

5.11 Correct process for requesting copies of tax documents

On 11 August 2022, the ATO published guidance to tax advisers on the correct process to request copies of tax documents on behalf of clients. To do so you need to use the Online services for agents (**OSfA**) and be authorised on the client's record to do so.

From 20 August 2022, the ATO updated the request form to address errors that they encountered frequently, such as:

1. the request form not being attached to the Practice mail message;
2. incorrect email subjects or headings;
3. requests being made by an unauthorised agent; and
4. requests for documents for multiple clients within the one Practice mail message.

On OSfA, you can obtain copies of:

1. income tax returns and notices of assessment for 2010 onwards – select Lodgments then Income tax; and
2. payment summaries or income statements (pre-fill) for 2009 onwards – select Reports and forms then Reports.

You need to use the ATO's new form and submit it via Practice mail in OSfA for copies of:

1. income tax returns and notices of assessment for 1997 to 2009;
2. payment summaries or income statements (pre-fill) for 2001 to 2008; and
3. FBT returns from 2001.

w https://www.ato.gov.au/Tax-professionals/Newsroom/Income-tax/Correct-process-for-requesting-copies-of-tax-documents/

5.12 WA: Bill to allow separating de facto couples to split super awaits assent

On 18 August 2022, the Honourable John Quigley (the Attorney General and Minister for Electoral Affairs) released a statement that the Parliament of Western Australia has passed legislative reform which will enable de facto couples who reside in Western Australia to split their superannuation in the event that their relationship breaks down.

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Prior to the reform, the Family Court of Western Australia was unable to make an order splitting superannuation asset when it came to de facto couples. This was in contrast to married couples in WA, as well as married and de facto couples elsewhere in Australia.

The substantive provisions of the new law, although passed, will commence on a date to be proclaimed by the Governor.

w https://www.mediastatements.wa.gov.au/Pages/McGowan/2022/08/De-facto-couples-now-captured-under-superannuation-splitting-laws.aspx

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