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The Tax Institute

Taxation in Australia

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

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

Tax News – at a glance

by TaxCounsel Pty Ltd

October – what happened in tax?

The following points highlight important federal tax developments that occurred during October 2024. A selection of the developments is considered in more detail in the "Tax News – the details" column on page 180 (at the item number indicated).

Foreign resident capital gains withholding

An amending Bill (the Treasury Laws Amendment (2024 Tax and Other Measures No. 1) Bill 2024) that was introduced into parliament on 12 September 2024 contains amendments to the foreign resident capital gains withholding payments regime. **See item 1.**

Small and medium businesses: amendment of assessments

The amending Bill referred to in item 1 also contains amendments that will allow the Commissioner to amend an assessment of a small or medium business taxpayer who applies to the Commissioner within four years after the day the Commissioner has given notice of an assessment. **See item 2.**

Non-deductibility of ATO interest charges

The Treasury has released draft legislation (and explanatory materials) in relation to the proposal announced in the 2023–24 Mid-Year Economic and Fiscal Outlook to deny an income tax deduction for amounts of general interest charge and shortfall interest charge incurred by a taxpayer. **See item 3.**

Promoter penalty regime

The Treasury has released a consultation paper that reviews the tax promoter penalty laws and seeks views on whether the tax promoter penalty laws operate as intended, are fit for purpose, and are adequate to deter and to protect the community from contemporary forms of misconduct. **See item 4.**

Financial advice fees

The Commissioner has released a final determination that sets out when an individual who is not carrying on an investment business may be entitled to a general deduction (under s 8-1 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97)) or a specific deduction (under s 25-5 ITAA97 (tax-related expenses)) for fees paid for financial advice (TD 2024/7). **See item 5.**

Stay orders refused

A BAS and tax agent (the applicant) has been unsuccessful in his application to the AAT for stay and confidentiality orders pending the hearing of his application for the review of the decision of the Tax Practitioners Board to terminate his registration and prohibit him from applying for registration for a period of five years (*Hanieh and Tax Practitioners Board* [2024] AATA 3251). **See item 6.**

Onus of proof not discharged

The Federal Court (Perram J) has dismissed the appeals of two individual taxpayers from a decision of the AAT that held that the taxpayers had not discharged their onus of proving that amended assessments made by the Commissioner for the income years 2011 to 2016 were excessive (*Youssef v FCT* [2024] FCA 1154). **See item 7.**

Lump sum settlement amount income

The Full Federal Court (O'Sullivan, Hespe and Neskovcin JJ) has unanimously dismissed an appeal by a taxpayer from a decision of the AAT that a lump sum received by the taxpayer in respect of a claim made by her for future income protection benefit entitlements under a policy of insurance which also included provision for life insurance, was assessable as ordinary income (*Sladden v FCT* [2024] FCAFC 122). **See item 8.**

Public benevolent institution

In a unanimous decision, the Full Federal Court (Wheelahan, Hespe and Kennett JJ) has dismissed an appeal from a decision of the AAT which had held that Equality Australia Ltd was not a public benevolent institution within the meaning of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (*Equality Australia Ltd v Commissioner of the Australian Charities and Not-for-profits Commission* [2024] FCAFC 115). The court held that there was no question of law raised by the appeal. The court was unable to see how the AAT reached a factual conclusion that was not open to it as a matter of law.

President's Report

by Todd Want, CTA

The next generation of tax practitioners

President Todd Want discusses the future of our community.

The Tax Institute has cemented its place as the voice of tax in recent years, but for the past year, our focus has been on listening. We are an organisation run by members, for members, and our members' voices are the most important in the room when it comes to how we plan for our future.

This year, we have once again conducted our Annual Member Survey and made a concentrated effort to respond to feedback from members who asked for more local engagement, opportunities for complimentary CPD, and continued development of our technology platforms to further facilitate member engagement.

These activities, which included a series of complimentary webinars by and for members, and increased local networking events and communications geared towards local news and updates, have garnered a warm response from members overall.

The future of our membership

Our more seasoned members are a valued pillar of our community. However, when thinking of the future of our profession and the future stability of our organisation, we must begin to think about those just starting their career in tax. New, young members entering our ranks bring fresh perspectives, new ideas and engaged community members to our organisation.

Whether the next generation of tax practitioners are young adults just graduating university and entering the world of work, or professionals transitioning to a tax career after some time in the workforce, the needs and preferences of these individuals aren't the same as they were a decade or two ago. As an organisation, we must listen to how the needs of the profession are changing and adjust our own strategy accordingly.

In this context, it is especially pleasing to see the positive reception of our Tax Academy micro-credential units. Since launch, we have seen significant uptake, both from individuals and businesses training their staff. That is a phenomenal result for our initial step into the modern micro-credential learning space and goes to show that tax professionals are eager to learn and upskill, when given opportunities to do so that fit in their schedules, budget and interests.

Of course, structured education still lies at the heart of the Institute, and we are immensely proud that our education programs continue to develop the skills of more than 1,000 tax practitioners each year.

The Tax Institute's increased local engagement is part of the work to reach up-and-coming tax professionals as well. Those entering the profession benefit from the community that The Tax Institute provides, and by fostering a local network, we aim to help new tax practitioners get a foot in the door and start building their own professional connections. Our local CPD events have really come into their own this year, with a wonderful calendar of events happening all around the country. These opportunities to meet, discuss and collaborate with like-minded tax practitioners can be just the open door a young tax professional needs to get their career going.

It has been a productive and positive year at the Institute, and we look forward to continuing on this path.

CEO's Report

by Scott Treatt, CTA

Setting course for a bright future

CEO Scott Treatt reflects on the charted course for The Tax Institute.

From education comes knowledge and opportunity – that's the philosophy I live by every day, and it is the reason I am proud to be leading an Institute where our key objective is to further knowledge and education in tax. As a long-time member myself, I have been involved with the Institute in many ways over the years, from education courses and committees, to speaking at events, and leading the Tax Policy & Advocacy team. After all this time, I could not be more proud of who we are as an organisation and, crucially, where we are headed.

Turning the ship

In recent years, the Institute has undergone a course correction of sorts, working to invest more effectively and comprehensively in our members. We have undertaken significant development of our strategic direction, necessary restructuring of our organisation, and a focus on maximising return on investments, particularly in our education and technology fronts.

It can take time to turn a ship this large and to see the benefits of such work crystallise, but the investments we have made are beginning to come to fruition, and we are proud to offer improved services to our members.

For example, Tax Knowledge Exchange, our invaluable repository of tax knowledge, is growing once more, following its migration to a new, modern platform. We expect this trend of a growing subscriber base to continue as word spreads of its improved functionality.

Tax Academy, our micro-credential tax education product, also continues to grow. While efforts through the year have been focused on the corporate market, in recent months, we launched the product to consumers, allowing any individual to purchase units via our website. Interest in this flexible way of learning remains high and we are excited about the opportunities this provides for furthering tax education among a busy, digitally native cohort of tax practitioners.

While they represent different modes of education, both of these products are such important tools for tax practitioners to remain up to date and continue to educate themselves on emerging issues and ongoing topics in the tax profession.

All hands on deck

Last, but most certainly not least, this year, we made proactive efforts to listen to and connect with our members, reinvigorate our local engagement activities through state councils, and revitalise our member benefits which offer so much value each year.

Our members are the foundation of the Institute. It is important for us to recognise this and recognise their many efforts. Without their contributions, we would not be the Institute that we are. So, thank you to the hundreds of volunteers who have assisted us throughout FY24, and continue to do so today. Your generous support is highly valued by us, your peers and all members of the Institute.

Associate's Report

by Sumitha Krishnan, FTI

Proposed changes to interest charges

We examine the proposed removal of the deductibility of the general interest charge and shortfall interest charge and evaluate its impact on taxpayers and the tax system.

The general interest charge[1] (GIC) and shortfall interest charge[2] (SIC) arise when tax obligations are not paid on time or when a tax liability has been incorrectly self-assessed, resulting in an underpayment of tax. Currently, all taxpayers can claim deductions for GIC and SIC paid to the ATO.[3]

The introduction of interest charges within the taxation regime serves practical and equitable purposes. According to the Inspector-General of Taxation's 2004 Review of the remission of the general interest charge for groups of taxpayers in dispute with the Tax Office, the interest charge was designed to reimburse the ATO for the time value of money. Interest charges offset the ATO's financial losses and promote equity by recognising the obligation of compliant taxpayers.

On 24 September 2024, the Treasury released exposure draft legislation and an accompanying explanatory memorandum (the draft EM) on a measure that proposes to deny deductions for the GIC and SIC incurred in income years starting or after 1 July 2025 (the proposed measure). The proposed measure was announced in the Mid-Year Economic and Fiscal Outlook 2023–24 and was stated to enhance incentives for all entities to correctly self-assess their tax liabilities and pay on time and to level the playing field for individuals and businesses that already do so. A further potential reason for introducing the proposed measure could be the increase in outstanding debts to the ATO, especially given the rise in total debt from $26.5b to $50.2b between June 2019 and June 2023.

Impact on taxpayers and the tax system

A taxpayer incurs a GIC or SIC liability when served with a notice of assessment triggering the liability to pay income tax to which the GIC or SIC relates[4] and the taxpayer has failed to pay the tax by the due date. Consequently, the proposed measure applies to any notice of assessment issued for income years beginning on or after 1 July 2025. In this respect, the proposed measure will operate prospectively, which we welcome. However, uncertainty remains regarding its application to amended assessments that refer to income years starting before 1 July 2025 but are issued on or after 1 July 2025.

There are significant concerns regarding the potential impact of the proposed measure:

- taxpayers with existing tax debts may experience cash flow issues, potentially leading such individuals and small businesses toward insolvency or voluntary liquidation. Clarification of whether the proposed measure would apply to amended assessments for income years starting before 1 July 2025 would greatly assist taxpayers; and
- currently, GIC is set at the base rate plus 7%[5] (11.38% from October to December 2024) and the SIC at the base rate plus 3%[6] (7.3% for the same period). In contrast, interest rates for overpayments, early payments and delayed refunds stand at 4.36%, the base rate.[7] Many consider the fixed percentage point uplifts of 7% and 3% for GIC and SIC, respectively, to be excessive but they serve a purpose: to discourage taxpayers from using the ATO as a bank. That said, adding a non-deductible layer to the charge will make the consequences of failing to pay tax debts on time even more penal and will only increase the financial burden on taxpayers.

Furthermore, while the draft EM confirms that the right to request remission of GIC[8] and SIC[9] will continue under the proposed measure, feedback from our members suggests that the ATO has tightened its approach to granting such remissions. Moreover, ATO decisions to deny GIC remission are not reviewable,[10] which limits taxpayer recourse. Although SIC decisions can be reviewed,[10] the process is subject to conditions that may limit its accessibility. To enhance fairness and transparency, making GIC and SIC remission decisions unconditionally reviewable may be beneficial.

The proposed measure serves as an integrity measure aimed to incentivise timely compliance by taxpayers and discourage the accumulation of debts owed to the ATO. However, evaluating the proposed measure's broader impacts on taxpayers and the tax system is essential. Achieving a balance that promotes both fairness and transparency is vital for sustaining public trust in the tax system.

References

1 Pt IIA of the *Taxation Administration Act 1953* (Cth) (TAA).

2 Div 280, Sch 1 TAA.

3 S 25-5(1)(c) of the *Income Tax Assessment Act 1997* (Cth) (ITAA97).

4 *FCT v Nash* [2013] FCA 336; decision impact statement, *FCT v Nash*; TD 2012/2.

5 S 8AAD TAA.

6 S 280-105, Sch 1 TAA.

7 S 8X of the *Taxation (Interest on Overpayments and Early Payments) Act 1983* (Cth).

8 S 8AAG TAA.

9 S 280-160, Sch 1 TAA.

10 S 14ZS TAA.

Tax News – the details

by TaxCounsel Pty Ltd

October – what happened in tax?

The following points highlight important federal tax developments that occurred during October 2024.

Government initiatives

1. Foreign resident capital gains withholding

An amending Bill (the Treasury Laws Amendment (2024 Tax and Other Measures No. 1) Bill 2024) that was introduced into parliament on 12 September 2024 contains amendments to the foreign resident capital gains withholding payments regime.

The amendments (which are giving effect to changes that were announced in the context of the 2023–24 Mid-Year Economic and Fiscal Outlook) will:

- increase the withholding rate to 15% (from 12.5%); and
- remove the threshold before which withholding applies so that disposals of relevant CGT assets by a foreign resident are subject to the withholding requirements regardless of the market value of the CGT asset.

The amendments are to apply to acquisitions made on or after the later of the start of: (1) 1 January 2025; and (2) the first 1 January, 1 April, 1 July or 1 October to occur after the day the amending Bill receives royal assent.

A purchaser is generally taken to have acquired an asset on the date they entered into the contract to acquire it. Therefore, the amendments will not apply to transfers that occur under a contract entered into prior to the relevant application day.

2. Small and medium businesses: amendment of assessments

The amending Bill referred to in item 1 also contains amendments that will allow the Commissioner to amend an assessment of a small or medium business taxpayer who applies to the Commissioner within four years after the day the Commissioner has given notice of an assessment.

The amendments (which are partially implementing a 2023–24 Budget announcement) will allow the Commissioner to amend an assessment of a small or medium business entity if:

- the Commissioner is no longer able to amend the assessment under the general two-year amendment period;
- the small or medium business taxpayer applies for an amendment in the approved form; and
- the request is given to the Commissioner within four years after the day on which the Commissioner gave notice of the assessment to the taxpayer.

While the amendments will allow the Commissioner to amend such assessments in response to an application by the taxpayer, the provisions do not require the Commissioner to do so.

The Commissioner will only be able to amend such assessments to give effect to the Commissioner's decision on the taxpayer's application. The provisions will not permit the Commissioner to amend the assessment about other particulars that are not included in the taxpayer's application. This ensures that sufficient certainty is still afforded to these taxpayers, as the extended four-year limitation period only applies to amendments to give effect to the Commissioner's decision on the taxpayer's amendment application.

The amendment of an assessment will only be able to be made within four years of the Commissioner issuing notice of the assessment to the taxpayer. The four-year amendment period is only available after the applicable amendment period in table item 1, 2 or 3 of s 170(1) of the *Income Tax Assessment Act 1936* (Cth) (ITAA36) has expired. This restriction will ensure that the taxpayer is not subject to more than one amendment period, which provides certainty about how the amendments interact with other parts of the ITAA36.

The Commissioner will be unable to further amend an amended assessment solely because it is within four years of the time the amended assessment was made where four years have lapsed since the Commissioner has given notice of the original assessment to the taxpayer. This will prevent the taxpayer's amendment period recommencing each time an amendment is made, which would otherwise allow the amendment period to be refreshed in perpetuity, contrary to the intended policy outcome.

However, the Commissioner may amend an amended assessment in relation to a particular in the way set out in the table in s 170(3) ITAA36 within two years after the amended assessment was made. This will ensure that the Commissioner and the taxpayer have time to properly consider the effect of the amendment and is consistent with the existing rules for amended assessments.

Despite the four-year amendment period, the Commissioner is not prevented from amending an assessment where the Commissioner is of the opinion that there has been fraud or evasion, or to give effect to a decision on an appeal or review process.

The amendments are to commence on the first 1 January, 1 April, 1 July or 1 October to occur after the day the Bill receives royal assent, and are to apply to assessments issued after the commencement of the amendments for income years starting on or after 1 July 2024.

3. Non-deductibility of ATO interest charges

The Treasury has released draft legislation (and explanatory materials) in relation to the proposal announced in the 2023–24 Mid-Year Economic and Fiscal Outlook to deny an income tax deduction for amounts of general interest charge (GIC) and shortfall interest charge (SIC) incurred by a taxpayer.

SIC applies to shortfalls of tax liabilities that are revealed when the Commissioner amends an assessment of an amount of tax payable, whereas GIC is generally imposed on unpaid tax liabilities. Both GIC and SIC apply on a daily compounding basis and are charged at uniform rates for all taxpayers that are adjusted to reflect movements in the Commonwealth's cost of borrowing. The GIC and SIC annual rates are 11.36% and 7.36%, respectively, as at August 2024.

SIC is intended to ensure that taxpayers who understate their liability in returns that incorrectly self-assess a liability do not receive an advantage, in the form of a "free loan", over those taxpayers who report and meet their tax liabilities in full by the due date, whereas GIC is also intended to encourage taxpayers to pay their taxes on time. The ability of taxpayers to claim deductions for expenditure incurred for these interest charges can operate to undermine these objectives.

Taxpayers will continue to have the ability to apply to the ATO and request the remission of any GIC or SIC payable.

When enacted, the amendments are to apply to GIC and SIC incurred in income years commencing on or after 1 July 2025.

4. Promoter penalty regime

The Treasury has released a consultation paper that reviews the tax promoter penalty laws and seeks views on whether the tax promoter penalty laws operate as intended, are fit for purpose, and are adequate to deter and to protect the community from contemporary forms of misconduct.

The consultation paper seeks feedback on:

- how effective the current regime is in deterring scheme promotion;
- the current operation of the framework, focusing on:
  - the scope of key defined terms; and
  - whether exemptions adequately protect compliant tax practitioners; and
- other frameworks, and how comparable regimes deter misconduct.

Treasury is aware that the views raised in relation to the tax promoter penalty laws may also be relevant to the promoter penalties in relation to the promotion of illegal early release schemes under s 68B of the *Superannuation Industry (Supervision) Act 1993* (Cth).

The Commissioner's perspective

5. Financial advice fees

The Commissioner has released a final determination that sets out when an individual who is not carrying on an investment business may be entitled to a general deduction (under s 8-1 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97)) or a specific deduction (under s 25-5 ITAA97 (tax-related expenses)) for fees paid for financial advice (TD 2024/7).

Fees for financial advice on a proposed investment prior to the acquisition of an asset will not be deductible as a general deduction because they are an expense associated with putting the income-earning investment in place and do not have a sufficient connection with earning income from the investment. This is also the case where an individual's existing adviser provides advice on how they can invest additional funds to grow their investment portfolio. Fees for initial advice on pre-existing investments at the commencement of an advisory engagement are also not deductible where that advice involves the consideration of the individual's circumstances by that financial adviser for the first time and making recommendations and advising on the income-earning structure.

However, fees for financial advice incurred on a regular or recurrent basis for an existing or ongoing income-producing investment are deductible under s 8-1 ITAA97. This includes fees for advice from an existing adviser on whether the mix of assets held is still appropriate for the individual's needs and advice on whether to retain or dispose of those assets. For the fees to be wholly deductible, all of the fees must relate to gaining or producing assessable income otherwise only a proportion of the fees would be deductible.

An individual may seek advice from a financial adviser in relation to various insurance products. The deductibility of financial advice fees for advice on insurance products will be consistent with whether the respective premiums for the insurance product are deductible to the individual under s 8-1.

Fees for financial advice on income protection insurance are deductible under s 8-1 where the premiums for the income protection insurance are deductible to an individual under that section. However, fees for financial advice on other types of insurance products where the premiums are not deductible under s 8-1 (such as life, total and permanent disability, or trauma insurance) are not deductible under s 8-1.

While fees for financial advice on a new investment are not deductible under s 8-1 (because the amount is considered to be capital or of a capital nature), the expenditure may qualify as an incidental cost of the acquisition of the asset and, for CGT purposes, it may be included in the cost base of the asset under s 110-25(3) and s 110-35 ITAA97.

In relation to s 25-5 ITAA97, an individual must be able to identify that the payment was for advice to assist them in managing their tax affairs. For example, fees for advice in relation to salary sacrifice arrangements will be advice that assists an individual in managing their tax affairs. If all of the other requirements set out in s 25-5 are satisfied, the fees for the advice provided by the financial adviser will be deductible. An individual cannot deduct a fee or commission for advice about the operation of a Commonwealth law relating to taxation unless that advice is provided by a "recognised tax adviser".

Not all advice provided by a financial adviser will be considered to be tax (financial) advice. Where an adviser merely provides factual information about a financial product that does not involve the application or interpretation of the taxation laws to the client's personal circumstances, the advice will not be for managing the individual's tax affairs.

The use of the phrase "to the extent" in s 8-1 and s 25-5 means that it will be necessary, in some circumstances, to establish which parts of the expenditure are deductible.

TD 2024/7 has replaced TD 95/60 as a result of regulatory reforms to the financial services industry. However, it does not represent a change in the ATO's view on the deductibility of financial advice fees as outlined in TD 95/60.

Recent case decisions

6. Stay orders refused

A BAS and tax agent (the applicant) has been unsuccessful in his application to the AAT for stay and confidentiality orders pending the hearing of his application for the review of the decision of the Tax Practitioners Board to terminate his registration and prohibit him from applying for registration for a period of five years (*Hanieh and Tax Practitioners Board*[1]).

The Board's termination decision was made following an investigation in which the Board concluded that the applicant had engaged in a number of breaches of the *Tax Agent Services Act 2009* (Cth) (TASA) and the Code of Professional Conduct (the Code) in that Act. It was determined that breaches occurred on three main grounds:

1. the applicant had failed to act honestly and with integrity by (inter alia) lodging false BAS statements (resulting in him receiving significant refunds that he was not entitled to) which he knew or ought to have known were false;
2. the applicant failed to satisfy personal taxation obligations by engaging in this conduct; and
3. the applicant failed the element of fitness and propriety by (inter alia) receiving $231,766 from false BAS lodgments under his ABN, which resulted in significant losses to the ATO, and by engaging in conduct which undermined the integrity of the taxation system.

The AAT referred to the decision of Downes J (sitting as the president of the AAT) in *Scott and Australian Securities and Investments Commission*[2] in which her Honour considered the matters (principles) that were relevant to the grant of a stay of the kind being sought by the applicant. These matters included but by no means were limited to:

- the prospects of success;
- the consequences of the refusal of a stay for the applicant and for others;
- the consequences of granting a stay for the respondent;
- the public interest;
- whether the refusal of a stay would render the final relief nugatory;
- the time between the granting or refusal of the stay and the final hearing and decision; and
- any other matters that might be relevant.

Although the applicant conceded that he had made mistakes and was prepared to make good those errors, that did not detract from the foundation on which the decision of the Board had been made, that is, significant breaches of the TASA and the Code which had not been denied with any vigour by the applicant apart from the general statement that he was the "victim of a scam", which he currently could not prove.

The AAT said that the applicant had failed to establish how and why many of the refunds were directed into accounts either owned or controlled by him or by his associates. He testified that he was unable to obtain evidence as he was scammed by a Facebook bookkeeper, whose details he did not know, yet whom he entrusted with his finances. Further, the device with which he communicated with the bookkeeper no longer existed and the bookkeeper was no longer on Facebook. The AAT said that this tale beggared belief. However, truth has been known to be stranger than fiction, and should the matter proceed to a final review hearing, the applicant may be able to contact his telecommunications provider to obtain past messages, and likewise approach Facebook to ascertain the identity of "Michael" and issue a summons to compel evidence.

The preliminary view of the AAT, which of course may change at any formal review hearing (should evidence by the applicant be submitted), was that the prospects of success were negligible. This was because the evidence, allegations and findings pointed in one direction.

7. Onus of proof not discharged

The Federal Court (Perram J) has dismissed the appeals of two individual taxpayers from a decision of the AAT that held that the taxpayers had not discharged their onus of proving that amended assessments made by the Commissioner for the income years 2011 to 2016 were excessive (*Youssef v FCT*[3]).

The taxpayers were brothers (George and Danny) and, as the facts of the brothers' cases did not differ in any material way, Perram J said that it was convenient to focus on George's case.

The aggregate of the taxable incomes as returned by George for the six income years was $270,527. The aggregate of the increasing adjustments made to George's taxable incomes for the six income years was $13,658,448 and the aggregate tax shortfall amount for the years was $7,612,187.

In the relevant income years, George generally returned income from a concrete pumping business, together with some amounts for interest and rent. His returned taxable income across the six years ranged from a minimum of $352 (in 2014) to a maximum of $177,955 (in 2011).

Following an audit of George's tax affairs, the Commissioner identified, predominantly from bank statements and casino records, substantial deposits into his accounts. The Commissioner concluded that these deposits were assessable income which George had failed to include in his returns. Amended notices of assessment were issued (which included penalties of $6,694,831 and interest) and George objected. Following his objections to the assessments being disallowed by the Commissioner, George applied for a review by the AAT.

By virtue of s 14ZZK(b)(i) of the *Taxation Administration Act 1953* (Cth), George had the burden of proving that the assessments were excessive or otherwise incorrect and what the assessments should have been. This provision meant that the Commissioner was not bound at the review hearing to prove anything, although he could if he so chose. Instead, the provision put in George's path two hurdles, both of which he needed to surmount. First, he had to show that the assessments were excessive or incorrect, for example, by demonstrating that some payments to him treated by the Commissioner as income were, in fact, capital in nature. Second, he had to show what his taxable income actually was.

Before the AAT, George successfully showed that the assessments were, to some extent, excessive but failed to show what his taxable income actually was.

George sought to persuade the tribunal that his assessable income consisted only of the income derived from the concrete pumping business, interest and rent. The evidence that these were his only sources of income was given in his affidavit. It was not put to him directly in cross-examination that this evidence ought not to be accepted.

The records for the concrete pumping business were unsatisfactory, but George sought to outflank this problem by proving that the maximum amount that the concrete pumping business could possibly have made in the relevant years was, even together with his rental and interest income, significantly lower than his assessed income.

While this solved one problem, it left unexplained the very many, and significant, deposits made into George's accounts. In this regard, George gave evidence that he was a prolific gambler and that the various deposits into his accounts were either gambling winnings or the repayment of loans he had advanced to other gamblers. Perram J said that the theory of this may be accepted. The Commissioner did not suggest, and the AAT did not find, that George was a professional gambler. Hence, it was correct that any winnings he made from his gambling activities were in the nature of capital rather income. Likewise, the repayment of any loan moneys would have been on capital account. However, George's evidence was incomplete.

Perram J said that the situation was that: (1) George's credibility was directly challenged in cross-examination; and (2) the AAT found that George was an unreliable witness. This, his Honour said, posed the question of whether the AAT was bound to accept George's evidence in his affidavit that he had no other sources of income apart from the concrete pumping business, interest and rent. Perram J went on:

> "23. … It was not. Where there is no doubt that the credit of a witness has been challenged – which was certainly the case here – a tribunal of fact is entitled to reject evidence of that witness that has not been directly challenged on cross-examination … Put another way, the rule in *Browne v Dunn* (1893) 6 R (HL) 67 does not require every aspect of a witness's evidence to be put to them if the cross-examiner has successfully demonstrated that the witness's evidence is otherwise unreliable."

Perram J concluded that, once George's evidence that he had no other sources of income was put aside by the tribunal, his case could not succeed. The tribunal could not be satisfied that the various deposits which made their way into his account were all gambling profits. And if they were not all gambling profits, George had failed to show what portion comprised the non-gambling profits. Further, "an artefact of this failure was that it was not possible to make even an approximation of what his gambling profits were".

8. Lump sum settlement amount income

The Full Federal Court (O'Sullivan, Hespe and Neskovcin JJ) has unanimously dismissed an appeal by a taxpayer from a decision of the AAT that a lump sum received by the taxpayer in respect of a claim made by her for future income protection benefit entitlements under a policy of insurance (which also included provision for life insurance) was assessable as ordinary income (*Sladden v FCT*[4]).

On 13 April 1999, the taxpayer (a Dr Sladden who was a medical practitioner) entered into two linked policies of insurance with National Mutual Life Association of Australasia Ltd (the life insurance business of National Mutual was transferred to AMP on 1 January 2017). The policies, which commenced on 13 April 1999 and were to expire on 3 April 2068, provided the following cover:

- a life protection plan which provided for a sum insured payable on death or trauma which sum diminished over time; and
- a professional income protection plan for a benefit period to age 65 for injury or sickness, with the sum insured varying over time and being $2,979 per month when the deed of release referred to below was entered into.

In February 2013, Dr Sladden was diagnosed with breast cancer. On about 4 March 2013, Dr Sladden made a claim for an income protection benefit under the income protection plan, following which she received monthly benefits under that plan.

On 9 May 2019, Dr Sladden appointed a Mr Colin Fullagar to negotiate with AMP on her behalf "re a possible commutation of [her] income protection insurance benefit". On 10 May 2019, Mr Fullagar asked Dr Sladden's case manager at AMP, to whom he had been directed, to "undertake the necessary calculations and come back with the amount [AMP] would be willing to offer Ms Sladden in exchange for future income protection benefit entitlements".

On 26 June 2019, Mr Fullagar informed Dr Sladden that AMP was willing to offer $1,000,000 in full and final settlement of her claim, with the policy to be surrendered. On 11 July 2019, Mr Fullagar informed AMP that Dr Sladden would accept the offer of $1,000,000 and asked for the necessary documentation to be drawn up and sent to him.

On 31 July 2019, Mr Fullagar emailed AMP as follows:

> "24. The policy contains a separate term insurance benefit for circa $25,000 for which premium waiver is in place. Can you please confirm that this benefit will continue on the same basis as a stand-alone policy …"

On 1 August 2019, Mr Fullagar called AMP to enquire about Dr Sladden's life insurance and was informed by the case manager that the case manager's understanding was that "the entire policy was being surrendered".

In her evidence before the AAT, Dr Sladden agreed that, knowing that the life protection plan was to be cancelled, she did not go back to AMP and ask for anything extra from AMP beyond the $1,000,000 which had been offered.

Before the AAT, it was not in dispute that the monthly benefits that Dr Sladden was receiving under the income protection plan was assessable income. However, Dr Sladden contended that the settlement sum was not assessable as ordinary income because it was an undissected lump sum comprising capital and income and, as such, it was all on capital account.

The AAT found that, on the totality of the evidence, it was not satisfied that the settlement sum related to claims, entitlements or benefits of a mixed income and capital nature and that Dr Sladden assented to acceptance of the settlement sum of $1,000,000 to commute or settle her claim under the income protection plan. Accordingly, the AAT affirmed the objection decision.

On the appeal by Dr Sladden, the Full Federal Court rejected the submission made on her behalf that the AAT erred in law by not confining itself to the deed of release or in having regard to the parties' subjective state of mind. The Full Court held that the former submission was unsustainable as a matter of law and the latter submission was unsustainable having regard to the AAT's findings of fact.

The Full Court made the following points by reference to decided cases:

- the character of a receipt is to be determined by the quality of the receipt in the hands of the recipient;
- an undissected, undifferentiated lump sum received by a taxpayer in settlement of claims, some of which are on revenue account and some of which are on capital account, is a capital receipt; and
- whether a receipt is to be characterised as an undissected lump sum in the hands of the recipient is not determined exclusively by reference to the terms of settlement pursuant to which it has been received, but requires an examination of the entirety of the facts and circumstances surrounding the agreement.

The Full Court then went on to say:

> "50. The surrounding circumstances include the objective facts and the circumstances known to both parties. The surrounding circumstances do not extend to uncommunicated reasoning which led the payer to agree to pay it … or to the payee agreeing to accept it. Where the surrounding circumstances support the existence of a number of causes of action for unliquidated damages (regardless of whether proceedings are threatened or not), a lump sum of damages accepted in full satisfaction of the entirety of the taxpayer's claims may be characterised as an undissected lump sum and in such circumstances the course of negotiation is not particularly probative …
>
> 51. By the same token, the nature of a sum received pursuant to an agreement is not determined by reference to the surrounding circumstances to the exclusion of the terms of the agreement. As the Full Court observed in [*FCT v CSR Ltd* [2000] FCA 1513], where a payment is made pursuant to an agreement that is not a sham, the 'why and how' of the payment is determined according to the terms of the agreement."

In the Full Court's view, the AAT made no error in considering the deed of release in light of the surrounding circumstances known to both parties. The court accepted that the character of the receipt was not to be determined by reference to the uncommunicated subjective state of mind of either party. However, the court rejected that the AAT's conclusion relied on findings of fact that were based on any parties' subjective state of mind.

The Full Court rejected the submission made on behalf of Dr Sladden that she had surrendered and released AMP from her "rights under the policy", by which was meant rights that Dr Sladden might have in the future, including "contingent claims" under the life protection plan.

In conclusion, the Full Court said that Dr Sladden had not demonstrated that the AAT erred in law in the process of fact finding. Where the facts, as found, are capable of falling within the statute, the decision of which side of the line they fall is a question of fact. It was open to the AAT to find on the facts, and the terms of the deed of release, that the "settlement sum" of $1,000,000 was in respect of commutation of Dr Sladden's monthly benefits payable under the income protection plan and that no part of the settlement sum was paid or payable in respect of the termination of the life cover plan.

TaxCounsel Pty Ltd
ACN 117 651 420

References

1 [2024] AATA 3251.
2 [2009] AATA 798.
3 [2024] FCA 1154.
4 [2024] FCAFC 122.

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Tax Tips

by TaxCounsel Pty Ltd

TPB code of conduct changes

The revised commencement date of the new Code of Professional Conduct obligations and the changes to the false or misleading statement and the client information obligations have been implemented.

Background

The last few months have seen substantial and significant developments in relation to the statutory Code of Professional Conduct (the Code) that is administered by the Tax Practitioners Board (the Board) and with which registered tax agents and BAS agents[1] must comply.

As a result of amendments to the *Tax Agent Services Act 2009* (Cth) (TASA) that were made by the *Treasury Laws Amendment (2023 Measures No. 1) Act 2023*, the Code was extended to include any obligations determined under s 30-12 TASA. That section provides that the Minister may, by legislative instrument, determine obligations that relate to the professional and ethical conduct of registered tax agents. The section stipulates that the obligations determined may elaborate or supplement any aspect of the Code, but must not be inconsistent with the Code.

In the exercise of the power conferred by s 30-12, a legislative instrument (the Tax Agent Services (Code of Professional Conduct) Determination 2024 (TAS(CPC)D)) was made on 1 July 2024 which set out a range of new Code obligations that were to apply from 1 August 2024. The Code obligations created by this instrument related to the following ("the new Code obligations"):

- upholding and promoting the ethical standards of the tax profession (s 10);
- false or misleading statements (s 15):
- conflicts of interest in dealings with government (s 20);
- maintaining confidentiality in dealings with government (s 25);
- keeping proper client records (s 30);
- ensuring that tax agent services provided on an agent's behalf are provided competently (s 35);
- quality management systems (s 40); and
- keeping clients informed of all relevant matters (s 45).

The explanatory statement to a later amending legislative instrument[2] stated that, following registration of the TAS(CPC)D which promulgated the new Code obligations, the Board began consulting with industry on guidance materials to provide further detail on the new Code obligations to help tax practitioners to understand and comply with their obligations. The Board communicated to stakeholders that it would continue to take a pragmatic and practical approach in enforcing compliance with the additional Code obligations for all tax practitioners trying to do the right thing. This included providing a reasonable time for tax practitioners to understand their obligations, assess their own practices, and implement changes, if required, to comply with the new obligations.

It is suggested that the taking of such a pragmatic and practical approach in relation to enforcing compliance with the new Code obligations was not an entirely satisfactory approach for the Board to take. The new Code provisions were to operate according to their terms and those terms conferred no power or discretion on the Board to act otherwise.

To provide certainty to tax practitioners as to the Board's approach to transition and implementation of the new Code obligations, the commencement date for compliance with the new Code obligations was, by an amending legislative instrument, deferred from 1 August 2024 to 1 January 2025 for larger firms and to 1 July 2025 for smaller firms.[3] This deferral is considered below under the heading "Commencement rules".

As a result of representations that were made in relation to the new Code obligations as originally made on 1 July 2024, the government also agreed that amendments would be made to the terms of the new code obligations relating to false or misleading statements and keeping clients informed of all relevant matters. An exposure draft legislative instrument (and exposure draft explanatory statement) of amendments for this purpose was released on 25 September 2024. An implementing legislative instrument was made on 8 October 2024.[4]

This article considers the revised commencement rules for the new Code changes and the way that the false or misleading statement obligation and the keeping of clients informed of all relevant matters obligation operate as amended.

Commencement rules

As the TAS(CPC)D was originally made, the new Code obligations were to apply on and from 1 August 2024.

As noted above, this commencement date was altered by the Tax Agent Services (Code of Professional Conduct) Amendment (Measures No. 1) Determination 2024. As a result, the new Code obligations apply to tax practitioners from one or other of two later dates (1 January 2025 or 1 July 2025).[5] The date that is relevant depends on the size of the tax practitioner and their firm or practice as at 31 July 2024. The size of the tax practitioner is based on the number of employees that the tax practitioner or related tax practitioner firm or practice had on 31 July 2024.

A tax practitioner is eligible for the 1 July 2025 extended timeframe if:

1. the tax practitioner is an individual (other than one covered by (3) below) who had 100 or fewer employees (including if they had no employees) as at 31 July 2024;
2. the tax practitioner is a company or partnership that had 100 or fewer employees as at 31 July 2024; or
3. the tax practitioner is an individual who is an employee or member of a tax practitioner company, or an employee or member of a tax practitioner partnership, that had 100 or fewer employees as at 31 July 2024.

The explanatory statement to the amending determination states that "employee" for these purposes has its ordinary common law meaning, and member has the meaning given by the *Income Tax Assessment Act 1997* (Cth).[6] For simplicity, the number of employees is calculated using a total headcount methodology, rather than on the basis of full-time equivalency or similar methodology.

For all other tax practitioners, the new Code obligations apply from 1 January 2025 (s 100(1)(b)).

Newly registered tax practitioners will also benefit from the transitional arrangements, but the new obligations for such a tax practitioner apply on the later of the relevant transitional period applying to them and their registration date. For example, a tax practitioner who becomes registered on 30 November 2024 will need to comply with the new obligations from 1 January 2025 (if they join an existing large firm), or 1 July 2025 (if they join an existing small firm or start a new practice).

If a registered tax agent moves firms or practices during the transitional period, the relevant transitional timeframe that applies to that agent may change to reflect the timeframe generally applying to that firm or practice. For example, if a tax agent moves from a large practice to a small practice, the transitional timeframe would move from 1 January 2025 to 1 July 2025 from the time the tax agent moves practices.

Keeping clients informed obligation

The most contentious aspect of the Code obligation (as originally made) relating to the requirement to keep clients informed as to all relevant matters was the requirement[7] that a registered tax agent advise all current and prospective clients of:

> "(a) any matter that could significantly influence a decision of a client to engage you, or to continue to engage you, to provide a tax agent service;"

That the keeping clients informed Code obligation, and, in particular, the obligation specified in para (a), could potentially give rise to significant difficulties was clear.

The Tax Agent Services (Code of Professional Conduct) Amendment (Measures No. 2) Determination 2024 amended the keeping clients informed Code obligation. As amended, s 45 TAS(CPC)D reads as follows:

> **"45 Keeping your clients informed**
>
> *Obligation*
>
> (1) You must advise all current and prospective clients, in the manner, form and timeframes set out in subsection (2), of all of the following:
>
> (a) that the Board maintains a register of tax agents and BAS agents and how they can access and search the register;
>
> (b) how they can make a complaint about a tax agent service you have provided, including the complaints process of the Board;
>
> (c) the following general information:
>
> (i) your rights, responsibilities and obligations as a tax agent or BAS agent, including to your client, under the taxation laws (including the Act and Code of Professional Conduct);
>
> (ii) what obligations your clients have to you as their tax agent or BAS agent;
>
> (d) if any of the following events have occurred within the last 5 years:
>
> (i) your registration was suspended or terminated by the Board;
>
> (ii) you were an undischarged bankrupt or went into external administration;
>
> (iii) you were convicted of a serious taxation offence;
>
> (iv) you were convicted of an offence involving fraud or dishonesty;
>
> (v) you were serving, or were sentenced to, a term of imprisonment in Australia for 6 months or more;
>
> (vi) you were penalised, subject to an injunction, or been subject to an order for breaching a voluntary undertaking, for being a promoter of a tax exploitation scheme;
>
> (vii) you were penalised, subject to an injunction, or been subject to an order for breaching a voluntary undertaking, for implementing a scheme that has been promoted on the basis of conformity with a public ruling, private ruling or oral ruling in a way that is materially different from that described in the ruling;
>
> (viii) you were penalised, subject to an injunction, or been subject to an order for breaching a voluntary undertaking, for promoting on the basis of conformity with a public ruling, private ruling or oral ruling a scheme that is materially different from that described in the ruling;
>
> (ix) the Federal Court has ordered you to pay a pecuniary penalty for contravening a civil penalty provision under the Act.
>
> (e) if any of the following matters currently apply to you:
>
> (i) your registration as a tax agent or BAS agent is subject to conditions.

Note: There may be other matters for which you will need to advise your clients under other laws, for example where you have failed to comply with the Code of Professional Conduct and you are ordered by the Board to advise your clients of one or more matters under section 30-20 of the Act.

Manner and form requirements

(2) Where you are required to advise clients of information covered by subsection (1), you must do so:

(a) by giving the information mentioned in a paragraph in subsection (1), in writing, to current and prospective clients in a prominent, clear and unambiguous way; and

(b) for information mentioned in a paragraph in subsection (1) (other than paragraph (1)(a), (b) or (c)):

(i) if a client makes inquiries to engage or re-engage you to provide tax agent services – at the time of the inquiry; and

(ii) for an existing client not previously advised of the information – within 30 days of the event; and

(c) for information covered by either paragraph (1)(a), (1)(b) or (1)(c) – upon engagement or re-engagement of a client (as the case requires), or upon receiving a relevant request.

Example Whilst not limiting the ways in which a registered tax agent or BAS agent could satisfy subsection (2), an agent who does all of the following, in the form and within the times mentioned in subsection (2), will have given information to all their current and prospective clients as required under this section:

(a) the agent publishes the information on a publicly accessible website that they use to promote the tax agent services they offer, and

(b) the agent includes the information in letters of engagement or re-engagement (as case the requires) given to each of their clients; and

(c) the agent provides their clients, upon engagement or re-engagement (as case the requires), with a copy of the Board's factsheet on general information for clients."

At a practical level, it is suggested that what is required by paras (a), (b) and (c) of s 45(1) could have been achieved by providing for a specimen form of notification or by authorising the Board to formulate a specimen notice which a tax agent could use.

It should be noted that the statutory example to s 45(2) (see above) lists two mechanisms (in paras (a) and (b)) for publishing the information required by s 45. The paragraphs are joined by "and" which would mean that it is envisaged that each paragraph (and para (c) as well) would need to be satisfied. Also, para (c) of the example refers to the agent providing their clients, on engagement or re-engagement (as the case requires), with a copy of the Board's fact sheet on general information for clients. In practical terms, this may mean that a copy of the fact sheet should be given in all cases. And, in the event that the fact sheet were to be amended, clients would, presumably, need to be informed. In such circumstances, disclosures would need to be made by the associated entities.

The relevant explanatory statement points out that disclosure to prospective and current clients should go beyond events relating directly to the individual tax practitioner, extending to matters relating to any company or partnership that they are associated with and that are involved in the provision of tax agent services.

It should also be noted that s 45 TAS(CPC)D does not operate to limit disclosures that must be made to clients under other laws. For example, following an investigation by the Board and a finding of a breach of the Act, including the Code of Professional Conduct, by a tax practitioner, the Board can order the disclosure of information by a tax practitioner to clients. Further, in certain situations, a failure to disclose information that is relevant to a decision to procure services, even if known only to the supplier of those services, can be unlawful under Australian consumer law.

There are transitional rules that make it clear that the five-year look-back period that is required by s 45(1)(d) TAS(CPC)D (see above) does not apply to matters or events occurring before 1 July 2022. Further, the transitional rules ensure that no action is required to be taken by tax practitioners before the new obligations begin to apply to them from either 1 January 2025 or 1 July 2025 by delaying any notification of new events occurring in the transitional period to existing clients until no later than 30 days after the new obligations begin to apply to the tax practitioner.

False or misleading statement obligations

The new Code obligations relating to false or misleading statements were substantially amended by the Tax Agent Services (Code of Professional Conduct) Amendment (Measures No. 2) Determination 2024.

As amended, the TAS(CPC)D provides for three Code obligations relating to the making of false or misleading statements. Two of these are concerned with the position that exists at the time the statement is made, and the third is concerned with the position after the statement is made. Some aspects of these obligations are considered below.

The time the statement is made

One of the Code false or misleading statement obligations that potentially arises at the time a statement is made will be breached where a registered tax agent:

- makes a statement to the Board or the Commissioner of Taxation;

- prepares a statement that the agent knows, or ought reasonably to know, is likely to be made to the Board or the Commissioner by an entity; or
- permits or directs someone else to make or prepare such a statement (s 15(1) TAS(CPC)D).

The obligation will be breached if the tax agent knew, or ought reasonably to have known, at the time the statement is made that the statement is false or misleading in a material particular, or omits any matter or thing without which the statement is misleading in a material respect. The statement can be made in the agent's capacity as a registered tax agent or in any other capacity.

The other Code false or misleading statement obligation that potentially arises at the time a statement is made applies where a statement is made to an Australian government agency (other than the Board or the Commissioner) (s 15(3) TAS(CPC)D).

After the statement is made

The Code false or misleading statement obligation that potentially arises after a statement is made are provided for by s 15(2) TAS(CPC)D which reads as follows:

"(2) Where:

(a) a statement has been given to the [Tax Practitioners] Board or the Commissioner [of Taxation]; and

(b) one of the following applies:

(i) you made the statement, or permitted or directed someone else to make the statement, other than for a client; or

(ii) for an entity that was your client at the time the statement was given to the Board or Commissioner, you made or prepared the statement, or permitted or directed someone else to make or prepare the statement; and

(c) at a time after the statement was made, you have reasonable grounds to believe that the statement:

(i) was false or misleading in a material particular at the time it was made; or

(ii) omitted any matter or thing, at the time it was made, without which the statement at that time is misleading in a material respect; and

(d) you also have reasonable grounds to believe that the false or misleading nature of the statement resulted from:

(i) a failure to take reasonable care in connection with the preparation or making of the statement; or

(ii) recklessness as to the operation of a taxation law; or

(iii) intentional disregard of a taxation law;

within a reasonable period of time[8] after you come to believe that the statement given satisfies paragraph (c), you must take each of the actions set out in an item of the following table when the situation described in that item of the table applies:

…."

Section 15(2) then sets out a table headed "Responding to a false or misleading statement" which contains five items, each of which sets out a particular situation and the required reasonable steps that the registered tax agent must take. For example, items 1, 2 and 3 are as follows:

"Item	Column 1 In this situation:	Column 2 You must take all reasonable steps to:
1	where you made the statement or permitted or directed someone else to make the statement (other than a statement made for a client)	have the statement corrected.
2	where you made or prepared the statement, or permitted or directed someone else to make or prepare the statement, for a client	advise your client about all of the following: (a) that the statement should be corrected; (b) the possible consequences of *not* taking action to correct the statement. However, this item does *not* apply to the extent that doing so would be unlawful under another Australian law.
3	where: (a) you made or prepared the statement, or permitted or directed someone else to make or prepare the statement, for a client; and (b) after a reasonable period of time after taking the steps mentioned in item 2 of this table, you are *not* reasonably satisfied that your client has corrected the statement or otherwise adequately explained the basis for the statement; and (c) either subparagraphs (2)(d)(ii) or (iii) are satisfied in relation to the false or misleading nature of the statement	withdraw from the engagement, and professional relationship, with your client (including no longer providing any further tax agent services to your client). However, this item does *not* apply to the extent that: (a) doing so would pose an unreasonable risk to your personal safety, or the safety of a member of your family or an at risk staff member of yours; or (b) doing so would be unlawful under another Australian law."

Some general points made in the explanatory statement in relation to s 15(2) TAS(CPC)D that should be noted are:

- a statement will be false or misleading in a material particular if it is relevant to the purpose for which it is made and relevant to that purpose if it may, not only if it must or if it will, be taken into account when making a decision under the taxation laws;
- in cases where the tax practitioner is obliged to notify the Board or Commissioner (as the case requires),[9] the tax practitioner is not required to correct the statement or explain to the Board or Commissioner why they believe the statement to be false or misleading or what the tax practitioner otherwise believes the statement should have said;
- there is no obligation under the Code to take action in relation to a statement that was *not* false or misleading at the time it was made, but later becomes false or misleading because of some later event, for example, there was a change to the law that operates on a retrospective basis, or a decision of a court or tribunal finds that the law operates differently to what had been the generally understood interpretation and administrative practice; and
- other obligations under the TASA or the Code may apply to past statements that become false or misleading after they are made, such as the obligation to lawfully act in the client's best interests, to notify the Board of a change in circumstances, or to notify the Board of a significant breach of the TASA or the Code.

Observations

The recent Code of Professional Conduct changes are quite extensive. As pointed out at the beginning of this article, the changes extend well beyond the two particular changes which this article considers. It is important that registered tax agents familiarise themselves with the new Code obligations.

Where there has been a breach of the Code, it must be kept in mind that, if the breach is significant (as defined), there will be an obligation to report (including to self-report) the breach to the Board (s 30-40 TASA).

TaxCounsel Pty Ltd

References

1 References in this article to registered tax agents include registered BAS agents.

2 Tax Agent Services (Code of Professional Conduct) Amendment (Measures No. 1) Determination 2024.

3 Tax Agent Services (Code of Professional Conduct) Amendment (Measures No.1) Determination 2024.

4 Tax Agent Services (Code of Professional Conduct) Amendment (Measures No. 2) Determination 2024.

5 S 100 TAS(CPC)D.

6 S 960-130 ITAA97.

7 S 45(1)(a) TAS(CPC)D as originally enacted.

8 The matters that are to be taken into account in determining what is a reasonable period of time are set out in s 15(2A) TAS(CPC)D.

9 See item 4 of the table in s 15(2) TAS(CPC)D.

Higher Education

The path to Chartered Tax Adviser

The National Dux for CTA3 Advisory 2023 shares her journey from digital marketing to taxing success.

Belinda Spence
Senior Manager
EY, Melbourne

Belinda didn't begin her career in tax. With a Bachelor of Communications, she initially worked in digital marketing for three years before realising her true passion lay elsewhere. "I knew I wanted something more," she recalls, which led her to pursue a Juris Doctor degree at Bond University. It was during her studies that she discovered tax law. "I took tax as an elective and instantly fell in love with its complexity and variety."

After completing her law degree, Belinda started her tax career as a graduate in Deloitte's corporate tax team in Brisbane, later moving to Melbourne. Over her career, she has worked in both professional services and industry, including roles at RACV and MYOB. Today, at EY, she advises multinational clients on tax structuring, compliance, and advisory matters, helping them to navigate both domestic and international tax landscapes.

The appeal of tax law

For Belinda, the ever-changing nature of tax law is what makes it so rewarding. "Tax never stands still," she explains. "There are always new laws and regulations, which means you're constantly learning. I wanted a career that would challenge me and allow me to keep growing."

One of the most fulfilling aspects of her role is helping clients solve complex tax problems. "It's incredibly satisfying to provide solutions that help businesses thrive and achieve their goals."

Becoming a Chartered Tax Adviser

Belinda's commitment to continued learning has been key to her career success. She completed the CTA3 Advisory subject as part of the Chartered Tax Adviser program with The Tax Institute. "The course was incredibly practical, and I gained valuable insights into areas of tax law that I hadn't encountered before, like the newly enacted equity-funded dividend rules. I apply this knowledge daily in my work, advising clients on these issues."

Balancing work, study and personal commitments, including raising a young family, wasn't easy. "It takes planning and flexibility. I set aside dedicated time each week for study, but I also had to be adaptable when urgent client work or family matters arose."

Advice for aspiring tax professionals

For those considering or already working in tax, Belinda's advice is clear: "Embrace continued education. Tax is a field that's always evolving, and the more you invest in developing your technical expertise, the more opportunities will open up for you."

Looking ahead, Belinda plans to continue her education by pursuing the Graduate Diploma of Applied Tax Law. "Given how fast the tax landscape changes, staying up to date is essential."

Inspired by Belinda's story? Explore our programs and take the next step in your career. Learn more here.

What are (not) tax agent services in an evolving digital ecosystem?

by Elizabeth Morton, FTI, Senior Lecturer, RMIT University, and Lisa Greig, CTA, Lecturer, The University of Melbourne

With the tax profession undergoing significant regulatory reform, this article considers what triggers the need to register with the Tax Practitioners Board. We explore the nature of providing tax agent services for a fee or other reward in conjunction with professional judgment and reliance on third-party information providers in an increasingly digitalised ecosystem. In doing so, we reflect on technology developments shifting direct reliance from a natural person to software and therefore code (ie programming) in intermediating that service provision. We elucidate key concerns over whether a provider ought to be obligated to register, and identify potential gaps in the safety net that such regulation aims to provide. This article highlights the importance of evaluating the increasingly digitalised toolkit that both tax practitioners and taxpayers routinely make use of, as well as the diversification and expertise relied on in bringing together key components of a taxpayer's tax liabilities, obligations or entitlements.

Introduction

The tax profession is undertaking the most substantial regulatory reform since the introduction of the *Tax Agent Services Act 2009* (Cth) (TASA). So far, we have seen a multitude of reforms enacted including, for example, the *Treasury Laws Amendment (2023 Measures No. 1) Act 2023* (Cth), the *Treasury Laws Amendment (Tax Accountability and Fairness) Act 2024* (Cth) and the Tax Agent Services (Code of Professional Conduct) Determination 2024. These, while initially triggered by the 2019 independent review led by Keith James into the Tax Practitioners Board (TPB),[1] were spurred on with speed following high-profile scandal and associated controversies.[2] In essence, the tax profession is facing a crisis of trust and the focus of this article hones into what triggers the need to register with the TPB – simply put, the provision of tax agent services for a fee. This article examines third-party information providers in the context of the provision of tax agent services. We reflect on what a tax agent service is and what can be relied on by the perspectives of both the taxpayer and the tax practitioner. This inherently brings in considerations of professional judgment in taking reasonable care, and technology developments shifting direct reliance from a natural person to software and therefore code (ie programming) in intermediating such provision.

For tax practitioners specifically, TPB registration is, at the time of writing, a focus of the Treasury.[3] Further to these tranches of reform are consultations covering numerous facets of the tax professions' regulatory context, including investigations, sanctions, secrecy laws, promoter penalties, and legal professional privilege, to name a few.[4] Overall, the government is seeking to "strengthen the integrity of the tax system; increase the powers of our regulators; and strengthen regulatory frameworks to ensure they are fit for purpose".[5] With this in mind, the TASA is designed to:[6]

> "[S]upport public trust and confidence in the integrity of the tax profession and of the tax system by ensuring that tax agent services are provided to the community in accordance with appropriate standards of professional and ethical conduct."

The TASA empowers the TPB to manage the registration and regulation of those providing tax agent services, including with respect to the TASA Code of Professional Conduct (the Code), and to sanction those who are found to be in breach of the Code.[7] Turning to those required to be registered with the TPB, s 2-10(1) TASA states that "You need to be registered to provide tax agent services for a fee or to engage in other conduct connected with providing such services".[8] TPB registration can be by way of tax agent or BAS agent.[9] Registration in turn requires set criteria to be satisfied, including appropriate qualifications, experience and, furthermore, the overall "trust" requirement to be a fit and proper person.[10]

Notably, it is not limited to an individual tax practitioner who can register as a tax agent. Registration extends to partnerships, trusts and companies – any entities that provide tax agent services for a fee fall under the TPB's scope.[11] This then creates a hierarchy of layers where an individual registered tax practitioner is operating within a further registered separate entity and where the trust equation resides through all levels. It is important to observe that tax agent services can be provided by any registered entity that meets the registration criteria. Many of these are accountants or those entities providing accounting services; however, this is not a requirement under the TASA. Those entities operating as accountants are accredited under one of the three Australian accounting bodies (or those relevant to BAS agents),[12] having separate and somewhat overlapping requirements. Given the self-assessment tax system, and the tools made available by the ATO, these tax practitioners can be contrasted with an individual submitting their own tax return, who may or may not have knowledge in taxation law.[13] Overall, this article takes stock of what can constitute tax agent services in a digital ecosystem.

This article is structured as follows. First, we present an overall definition of "tax agent services" as per the TASA and associated TPB guidance. We then move on to clarify the narrow nature of this service in terms of legal services more broadly captured by the legal profession. This leads to a consideration of characterising tax agent services within the connected trust-building requirements of reasonable care and other relevant Code items found within the TASA when tax practitioners and taxpayers bring together information and advice from not only the tax practitioner, but also from other third-party providers. A distinction is made here between the client-initiated provision and the tax practitioner outsourcing of such that nonetheless leads to a continued set of duties under the TASA. The article is brought together by a consideration of what ultimately may constitute tax agent services before concluding.

Defining "tax agent services"

When tax agent services are provided, this triggers the need for the entity to register as a tax practitioner. Whether an entity is providing tax agent services is a question of fact.[14] Looking specifically at the concept of tax agent services, this is defined in s 90-5(1) TASA as any service:[15]

"(a) that relates to:

(i) ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under a taxation law; or

(ii) advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a taxation law; or

(iii) representing an entity in their dealings with the Commissioner; and

(b) that is provided in circumstances where the entity can reasonably be expected to rely on the service for either or both of the following purposes:

(i) to satisfy liabilities or obligations that arise, or could arise, under a taxation law;

(ii) to claim entitlements that arise, or could arise, under a taxation law."

As described by the TPB, three key elements make up the definition of "tax agent services", for which either elements 1 or 2 are required to be satisfied, along with element 3 (see Table 1). Notably, element 1 relates to the need for *ascertaining* or *advising* the client of relevant liabilities, obligations or entitlements.[16] For element 3, the reliance relates to either *satisfying liabilities or obligations*, or *claiming entitlements* under taxation law.[17] The TPB indicates that it is necessary to consider the facts and circumstances surrounding the provision of services when establishing whether there will be a reasonably expected reliance on such.[18] This article focuses on element 1 in particular.

Table 1. TPB elements required to be satisfied to meet the definition of "tax agent services"

Satisfy either:			Satisfy:
Element 1	**Element 2**		**Element 3**
Service relates to ascertaining or advising a client about liabilities, obligations or entitlements under a taxation law	Representing a client in their dealings with the Commissioner	**AND**	Client relies on the service

Source: Adapted from TPB(I) 39/2023.[19]

In addition, s 90-5(2) TASA states that there are certain services that are explicitly *excluded* from the definition of a tax agent service.[20] These are outlined in Pt 6 of the *Tax Agent Services Regulations 2022*.[21]

As previously stated, providing tax agent services for a "fee or other reward" requires registration.[22] The phrase is not defined in the legislation and it takes on its ordinary meaning.[23] In the explanatory memorandum to the Tax Agent Services Bill 2008 (EM to the TASB), certain exclusions were made with respect to unregistered employees providing tax agent services to their employer – these included salary, wages, and other benefits such as fringe benefits.[24] A service may be taken to be provided for a fee where the fee is bundled with fees for other services.[25] Other rewards include, for example, bartering tax agent services for goods or other services, future benefits such as future business, sales or commissions, and even providing a service for no charge in order to attract or retain clients.[26] Table 2 presents examples of whether transactions or arrangements will amount to a fee or other reward.

Unregistered tax practitioners cannot charge a fee or receive a fee or other reward for providing these services, nor can they advertise tax agent services or represent that they are registered.[27] Civil penalties apply for unregistered tax practitioners undertaking such activities.[28] The TPB pursues unregistered tax practitioners to ensure the integrity of the TASA and publishes those impacted, with the sanctions applied, on the TPB website.[29] There are clear repercussions for those entities that fall outside of the regulation – whether this is because they are behaving egregiously, or whether they are subject to alternative regulatory frameworks. Thus, we hone into how tax agent services are characterised.

Tax services are more narrow than legal services

The term "taxation law" has been defined in the *Income Tax Assessment Act 1997* (Cth) (ITAA97) to mean:[30]

"(a) an Act of which the Commissioner has the general administration (including a part of an Act to the extent to which the Commissioner has the general administration of the Act); or

Table 2. Examples of fees or other rewards

	Transaction/arrangement	Fee	Other reward
1	An employee representative who receives a salary or wage for providing a tax agent service or BAS service, on behalf of, or to, their employer who is a registered tax agent or BAS agent	No	No
2	An entity provides a tax agent service or BAS service for a fixed amount.	Yes	No
3	An entity provides a tax agent service or BAS service for a time-based amount (for example, an hourly rate).	Yes	No
4	An entity provides a tax agent service or BAS service for an asset-based amount (for example, calculated as a percentage of the client's assets).	Yes	No
5	An entity provides a tax agent service or BAS service together with other services. The entity bundles the fees and charges a single amount to the client for all the services.	Yes	No
6	An entity provides a tax agent or BAS service for an amount, part or all of which is payable via a third party. For example, a BAS agent provides a BAS service and receives an amount that has been passed on by a tax agent (who may or may not retain a portion of that amount).	Yes	No
7	An entity provides a tax agent service or BAS service in exchange for other goods and/or services (non-dollar benefits). This may include, for example, a bottle of wine or use of a holiday home as recompense for the tax agent service provided.	No	Yes
8	An entity provides a tax agent service or BAS service in lieu of payment of an existing third-party debt, or for a future benefit.	No	Yes
9	An entity provides a tax agent service or BAS service for an amount that is calculated, or to be calculated in the future, based on certain conditions being satisfied or not satisfied.	Yes	No

Source: Reproduction of Appendix A to TPB(I) 40/2023.

(b) legislative instruments made under such an Act (including such a part of an Act); or

(c) the Tax Agent Services Act 2009 or regulations made under that Act."

It is noted that the TPB's scope is more narrow than broad legal services. Thus, solicitors can provide tax advice by applying taxation laws, but they would do so within the scope of the laws regulating legal practice (services) that are distinct from the TPB and tax agent services.[31] Accordingly, a lawyer would not provide services such as preparing and lodging a tax return or have access to the tax agent portal.[32] The TPB notes that a lawyer wishing to do so would be required to register with the TPB.[33] Tax lawyers are generally involved in providing legal briefs and reasonably arguable positions on contentious tax law interpretation or complex transactions, and are engaged during any dispute process with the ATO or when escalated through the administrative or judicial systems.

Reflecting further on the distinction between what the TPB allows a registered tax practitioner to do and that of "legal service" referred to in s 50-5(1)(e)) TASA (which has been subject to prior consideration[34]), we can look to the alternative regulatory framework for lawyers. In contrast to tax practitioners registered with the TPB, lawyers are subject to the Australian Solicitors Conduct Rules which were first endorsed by Law Council Directors in 2011.[35] These rules were developed collaboratively across state and territory law societies and relevant professional bodies and, over the years, have been adopted by various states and territories.[36]

Bevacqua et al note that:[37]

> "The paramount duty of lawyers is to the court and to the administration of justice, even if this is inconsistent with other duties such as acting in the best interests of a client. This can often see lawyers faced with difficult ethical dilemmas similar to those faced by accountants in complying with their overarching responsibility to act in the public interest …"

In the Legal Profession Uniform Law that is applicable in both NSW and Victoria, the term "legal services" is defined as "work done, or business transacted, in the ordinary course of legal practice", and to "engage in legal practice" is defined to include "practise law or provide legal services, but does not include engage in policy work".[38] An Australian lawyer, in general, requires an Australian practising certificate to engage in such activities and that certificate is subject to ongoing requirements.[39] Engaging in legal practice is prohibited unless the entity is a qualified entity.[40]

Consistent with tax services, Glover highlights that restrictions to legal practice are often about consumer protection.[41] In particular, this can be broken down into three rationales: (1) competence (protect from those who do not have the knowledge or understanding to provide advice); (2) remedial (binding obligations and ethical principles with avenues for breaches to result in sanctions); and (3) motivational (public service should be the proper motivator rather than profit).[42] Ultimately, we reflect on these rationales as enabling a "safety net" for those making use of legal services. This can extend to the use of tax practitioners by taxpayers. The Code and TPB registration requirements offer a comparable safety net to taxpaying clients who are relying on the services of tax practitioners to ascertain their liabilities, obligations or entitlements, or when they represent the client in dealing with the Commissioner.[43]

In the EM to the TASB, the impact of the TASA was noted to be improving:[44]

> "… the regulatory environment for the provision of tax agent services for a fee or other rewards by increasing the consistency in registration and providing appropriate, but flexible, regulation and greater certainty for agents."

Tax agents faced inherent barriers to entry, but it was seen as appropriate to step away from what was described as a "partially regulated but unenforced arrangement" that had been in place prior to the TASA's enactment.[45] Similarly, the introduction of the TASA was seen as necessary with the changing tax environment and an increasing proportion of taxpayers using tax agents to lodge their tax return.[46] This can be contrasted with the contemporary tax environment, that is, while there remains a significant proportion of taxpayers continuing to seek tax agent services, there is a growing trend of taxpayers self-lodging via myTax.[47]

The TASA enables non-lawyers who act as tax agents to provide tax agent services.[48] Glover concludes that the TASA does not result in the authorisation of tax agents to act as lawyers or to supply legal advice (documents).[49] Glover describes that what the TASA permits is more narrow than the broad sense of "legal advice".[50] In doing so, Glover reflected on Kenny JA in *Felman v Law Institute of Victoria:*[51]

> "[T]he Commonwealth Parliament would appear to have acted upon the assumption that a tax agent who gives advice as to income tax matters in his or her capacity as a tax agent does not give what is ordinarily understood as legal advice, i.e., advice of the kind properly given by a legal practitioner in his or her capacity as a legal practitioner. When tax agents give advice on income tax matters in their capacity as tax agents they give advice on the basis of their familiarity and experience with income tax matters, including familiarity with the approach adopted by the Commissioner of Taxation and other Commonwealth officers as to the administration of the income tax legislation, rulings and guidelines. Tax agents do not ordinarily hold out their advice as being legal advice of the kind sought from and given by legal practitioners."

We now consider how particular services, including various third-party providers and mechanisms such as outsourcing to provide third-party information, are characterised with regard to tax agent services. This requires consideration of duties imposed on tax practitioners through the Code, for example, taking reasonable care in ascertaining the client's state of affairs and ensuring that the taxation laws are applied correctly.[52]

Characterising tax agent services and taking reasonable care

As already reflected on in this article, a tax practitioner engaging in the preparation and lodgment of returns, notices and other relevant documents is within the scope of tax agent services.[53] Tax practitioners, when providing tax agent services, use a plethora of inputs in preparing tax advice and lodging tax returns on behalf of clients (the Appendix to this article lists the TPB's non-exhaustive list of services that may or may not amount to tax agent services).

Fundamental to this under the Code is the requirement for tax practitioners to take *reasonable care*. Determining reasonable care involves exercising professional judgment and taking into account relevant factors, such as the complexity of the transaction and level of sophistication.[54] The TPB reflects on the accounting profession, where professional competence and due care requires maintaining professional knowledge and skill at a level required to ensure that competent services are provided, acting diligently in accordance with applicable technical and professional standards, and exercising sound judgment when applying professional knowledge and skill in the performance of such a service.[55] The standard of "reasonable care" in the Code is that of a competent and reasonable person, possessing the knowledge, skills, qualifications and experience that a registered tax agent is expected to have, in the circumstances.[56]

Complications arise where tax practitioners utilise a variety of third-party resources to complete their obligations in terms of external professional services (such as outsourcing back-office functions, surveyors and valuers), as well as technology toolkits (such as software systems and data feeds). This extends to the preparation of various schedules, disclosures and amounts declared in a tax return. Tax practitioners may decide, for several reasons, to rely on third-party reports or advice for tax-related purposes.

Third-party provision of reports or other advice generally

While there is no separate legislative provision for dealing with the use of third-party reports or other advice, it is important to recognise that the TPB's position is two-fold.[57] First, the TPB recognises the fundamental proposition stemming from s 90-5 TASA that, to provide tax agent services, the party must be registered with the TPB. The entity will contravene s 50-5 if tax agent services are provided for a fee or other reward while unregistered,[58] with sanctions under the civil penalty regime.

However, the TPB affirms its position that an unregistered provider of such reports or other advice will not contravene s 50-5 TASA:[59]

> "13. … in respect of the provision of the tax-related information if the arrangements between the issuer, the tax practitioner and the client are such that:
>
> - the obligations of the issuer are to procure the tax-related advice from a tax practitioner
> - the tax practitioner will be responsible to the client in relation to that advice."

However, in our interpretation of this guidance, this does not capture explicitly where the client initiates, or is in control of, the procurement of information for inclusion within the tax return, which requires consideration of the terms of engagement between the tax practitioner and the client and ultimately the duties of the tax practitioner to take reasonable care – particularly in terms of ascertaining a client's state of affairs.[60]

The TPB further states that this approach will be taken where:[61]

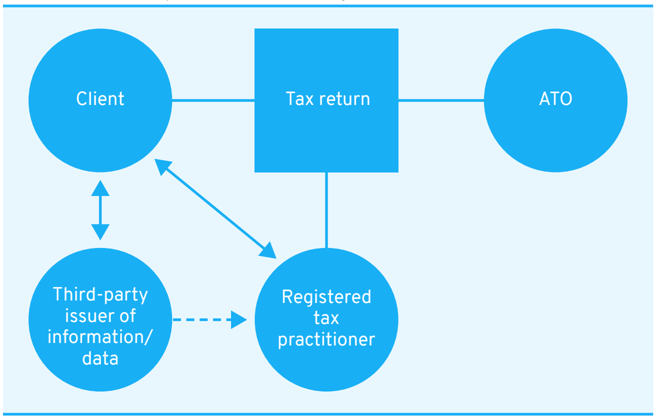
> "14. …
>
> - the information constituting a tax agent service is to be, and is in fact, provided by a separate entity
> - the separate entity is a registered tax practitioner who is clearly identified in the report or other advice as the provider of the tax agent service
> - the tax practitioner is responsible to the client for the accuracy of the information that constitutes the tax agent service
> - the information that constitutes the tax agent service is clearly identified within the report or other advice."

Where these factors are met, the TPB considers that the provider of the report or other advice does not provide the tax agent service but merely arranges for the provision of a tax agent service to be made by a properly authorised and qualified entity who is responsible for the tax agent service.[62] However, our interpretation of the initial framing of the arrangement focuses on unregistered providers, while the TPB extends the context of third-party provision when introducing a second registered tax agent into the arrangement. Ultimately, if a tax practitioner is engaged to prepare a tax return and an element of that return relies on the provision of information from a third-party provider, the tax practitioner, lodging the return, is required take *reasonable care* regardless of any registration status of the third-party entity information.

It is relevant to note, and the TPB affirms, that a tax practitioner is not required to audit, examine or review client records in full – it comes down to exercising professional judgment and understanding whether the information provided is credible/feasible/sensible, whether there is doubt, and so forth, as already flagged.[63]

One traditional example includes depreciation schedules.[64] Line 5 of the Appendix to this article indicates that the TPB interprets this service to be a tax agent service. A tax practitioner may make use of such a schedule, relying on a quantity surveyor as the professional who prepares such schedules, to establish deductions permitted under the tax laws. We suggest that this is an engagement initiated and contracted directly by the client, rather than the tax practitioner, under the direction and guidance of the tax practitioner (see Diagram 1). We interpret that this depreciation schedule is the provision of tax agent services, that the quantity surveyor is clearly identified as the provider, and that they are responsible for the accuracy of the information reported and must take reasonable care under the Code.

Diagram 1. Third-party information provision initiated by the client (tax practitioner lodged)



Source: Author depiction.

We can describe this from the perspective of the tax practitioner informally as "plug and play" – the tax practitioner relies on this schedule as the primary source. However, the tax practitioner utilises their professional judgment to high-level review, as a sense check, prior to relying on the information from the quantity surveyor report.

This duty reflects numerous obligations that are not only clarified in TPB(I) 08/2011, but also more general obligations of proper practice under the Code, including Code item 9 that requires the tax practitioner to take reasonable care to ascertain a client's state of affairs.[65] The tax practitioner must exercise professional judgment, which involves knowledge, skills and experience.[66] Looking to the provider, the tax practitioner must establish that they are credible (and therefore capable) and that there is no basis for doubt in the provision of the relevant information and how it applies to their client's specific circumstances.[67] The tax practitioner may consider that the quantity surveyor is expected to be registered with the TPB and sufficient information is provided on the document to support this conclusion. However, it would be wise, for example, to undertake an actual check to confirm that the provider is a registered tax practitioner via the TPB register.[68]

If the tax practitioner has any doubt, they have not yet discharged their obligations under Code item 9 and should make the necessary inquiries and obtain the relevant records. For the tax practitioner to proceed, they are utilising their knowledge of the tax law to interpret that a depreciation or capital works figure is indeed compliant with relevant taxation laws, meets necessary substantiation requirements, and considers consequences for the CGT cost base on disposal. This is reflected in Code item 10 which requires a tax agent to take reasonable care in ensuring that the taxation laws are applied correctly.[69]

This is somewhat indirectly affirmed by the TPB's additional guidance that, where the provider of the report includes elements that may constitute the provision of a tax agent service, registration under the TASA would be required.[70] This is consistent with the circumstances for which the taxpayer does not use a tax practitioner to prepare and lodge their tax return and instead self-lodges via myTax (see Diagram 2).

Where a tax practitioner is engaged, the scope of the engagement and the associated terms are critical to understanding the elements of the tax agent's services relied on by both parties.[71] The terms of engagement can impact whether (or to the extent that) the tax practitioner "plugs and plays" the information provided, undertakes some level of review, or even revises that information. Characterisation of the latter options inherently complicates the provision of what is and who is actually providing the tax agent services. However, the latter options are arguably – at least to some extent – necessary for the tax practitioner to satisfy their own role and risks. Thus, the terms of engagement and how the tax practitioner is expected to incorporate third-party information are fundamental to clarifying what tax agent services they are providing and how they can ensure that they are doing so in compliance with not only the taxation laws, but also the Code.

It is relevant to note that the Code itself does not mandate the use of engagement letters; rather, the Code encourages such use to avoid uncertainty and misunderstanding, thereby avoiding the potential for disputes between the parties on fees and scope of the works to be completed.[72] Moreover, where the tax practitioner is being investigated for a breach of the Code, the TPB flags the existence of an engagement letter as being potentially relevant.[73] Essentially, an engagement letter can support numerous Code items being achieved,[74] for example, the determination of rights and obligations for both parties are similarly of concern when contemplating the purpose of the engagement.[75] However, this does not inherently remove a tax practitioner's obligations under the Code, such as to take reasonable care.

Simply put, the classic saying "garbage in, garbage out" applies. These considerations go beyond ensuring that a tax practitioner has done their duty, but also what is ultimately trying to be achieved – assisting a taxpayer to comply with their tax obligations and ensuring that the inputs of the tax return are appropriate. Ultimately, the "toolkit" that is being utilised ought to be holistically competent. The challenge that is becoming increasingly evident is how technology is driving an increasing digitalisation of the tax practitioner's toolkit and, relevantly, who or what the taxpayer is relying on. With it, there is, to varying degrees, a transcending from the natural person(s) underpinning the direct information provision to that of digital software (code/programming), and re-orientations between the provision of a *service* and the provision of the application of taxation laws within a *product*. This evolves further to encompass questions of automation and artificial intelligence in the provision of tax agent services – or, more inherently, the tax lodgment system.

Tax practitioner outsourcing services

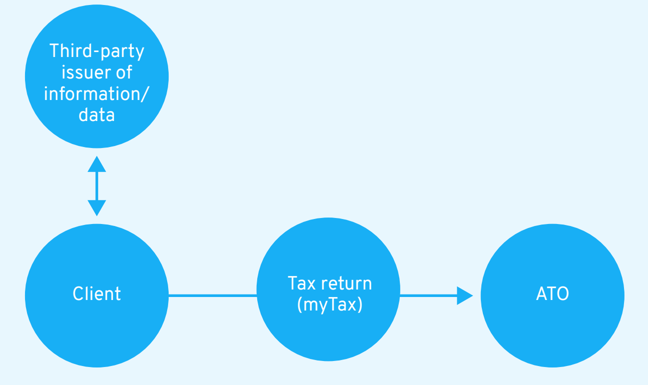
Putting aside these challenging questions around technology evolution, what this analysis leads to are considerations of the tax practitioner *outsourcing*, ie obtaining (by contrast) from an outside supplier,[76] rather than the client initiating third-party information provision (see Diagram 3). The TPB describes outsourcing as:[77]

> "4. Essentially, outsourcing involves an entity entering into an arrangement with a third party to provide a specific process(es), function(s), service(s) or activity(ies). It can involve transferring portion(s) of services an entity provides or even an entire operation to outside providers, contractors or suppliers."

The TPB specifically includes outsourcing activities as seeking an opinion or advice from a third party,[78] and contracting a third-party provider that maintains offsite data storage systems, including cloud storage.[79]

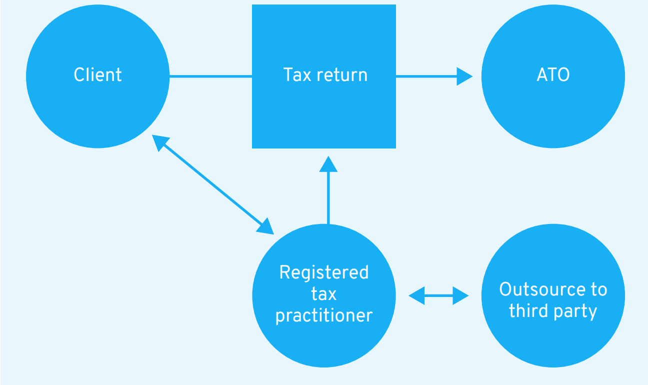
When outsourcing, a number of issues should be considered, including the tax practitioner's duties, obligations and responsibilities, the consequences of liability and indemnity insurance arrangements, data management, security risks, competency considerations, and regulatory requirements.[80] Comparable to contemplating third-party information provision generally, there is no specific Code item under s 30-10 TASA that deals with outsourcing. However, the TPB reflects on several Code items that are of particular relevance. These include:

Diagram 2. Third-party information provision initiated by the client (self-lodgment)



Source: Author depiction.

Diagram 3. Outsourcing to a third party



Source: Author depiction.

- Code item 6, in relation to the confidentiality of client information requiring a client's permission unless there is a legal duty to disclose;[81]
- Code item 7, in relation to providing (and supervising) tax agent services competently;
- Code items 9 and 10, in relation to providing reasonable care to ascertain a client's affairs and applying the taxation laws correctly; and
- Code item 13, in relation to maintaining professional indemnity insurance.[82]

Fundamentally, outsourcing without adequate policies and procedures in place may result in the tax practitioner being investigated by the TPB for not only breaching the Code, but also other relevant legislation.[83]

> "Ultimately, the 'toolkit' that is being utilised ought to be holistically competent."

Critically, following Code item 7, where tax practitioners have tax agent services provided on their behalf, they must ensure that they are provided competently — this is irrespective of whether the outsourcing is to an entity that is unregistered, or whether they are located in Australia or abroad.[84] The TPB highlights a distinction where the outsourcing is to a registered or an unregistered third party:[85]

> "27. Where a registered tax practitioner outsources part or all of the provision of tax agent services to an unregistered third party, they must ensure that the work performed by the third party is under their supervision and control or the supervision and control of another registered tax practitioner. In this case, the registered tax practitioner is ultimately responsible for the quality of work of the unregistered third party, including ensuring that there are appropriate supervisory arrangements. In these circumstances, tax practitioners should, in addition to their Code of Professional Conduct obligations, also consider their civil penalty obligations under the TASA.
>
> 28. Where a registered tax practitioner outsources the provision of tax agent services to a registered third party, then the tax practitioner is not responsible for reviewing the third party's work, nor are they required to provide supervision and control." (citations omitted, emphasis added)

The TPB is clear that supervision is not in itself sufficient — contemplation needs to go to issues of sufficient supervision, quality controls, competency of those involved, knowledge and skills of relevant parties, and so forth.[86]

These issues are front of mind with respect to the recent review being carried out by Treasury on TPB registration requirements.[87] We must also contemplate the implications of recent reforms in relation to the use of disqualified entities and the dob-in provisions which further complicate the outsourcing and reliance on third-party providers.

When it comes to Code items 9 and 10, there is no set formula in contemplating reasonable care when outsourcing.[88] The TPB offers the following circumstances to examine:

> "40. …
>
> - the nature and scope of the tax agent services being provided
> - the terms of engagement between the tax practitioner and the outsourced provider or offshore entity
> - the agreed terms of engagement between a tax practitioner and their client, including whether the client, or another entity, checks or reviews the work before purporting to rely on it
> - the skills, experience, qualifications and abilities of the outsourced/offshore provider
> - the degree of supervision and oversight the tax practitioner exercises over the provider's provision of tax agent services
> - the client's circumstances, including their level of sophistication (such as education standard and level of tax knowledge or experience in the area which is the subject of advice) and
> - the nature of any pre-existing relationship between the tax practitioner and their client." (citations omitted)

As previously indicated, the standard of "reasonable care" in the Code is that of a competent and reasonable person, possessing the knowledge, skills, qualifications and experience that a registered tax agent is expected to have, in the circumstances.[89] However, the TPB notes an expectation that, when outsourcing, tax practitioners are required to take *additional* steps and measures to "ensure that the applicable technical and professional standards are met and that a client receives competent professional services".[90]

Data matching and pre-filling

The question can therefore turn as to whether any input into a tax return inherently forms part of the tax agent services that a registered tax practitioner provides. Whether using a tax practitioner or self-preparing, the ATO provides pre-fill information through data matching linked by the tax file number (TFN) for a suite of assessable income items under taxation laws to assist in the accurate preparation of a self-assessed tax return. In some respects, we can look to the reliance on banks to provide accurate statements pertaining to interest earned and assessable under s 6-5 ITAA97. The level of assurance and trust in such documentation is high. However, ultimately, this stems from significant normalisation of such information and data provision over time. Over the past number of years, the ATO has assigned a certainty indicator of the confidence level of the accuracy of such information, thus mandatorily determining the assessability of such amounts under the tax laws for that taxpayer.[91]

In comparison, where a tax practitioner examines receipts provided by the client for deduction claims, the tax practitioner must take reasonable care over their compliance with not only the deduction provisions, but also the necessary substantiation requirements. Other facets of the tax return can be more challenging due to their sensitive nature, such as when a tax practitioner is required to disclose a spouse and their associated taxable income. Moreover, pre-filling data may not accurately provide relevant interpretations, such as the 45-day rule for franking credits, beneficial ownership etc.

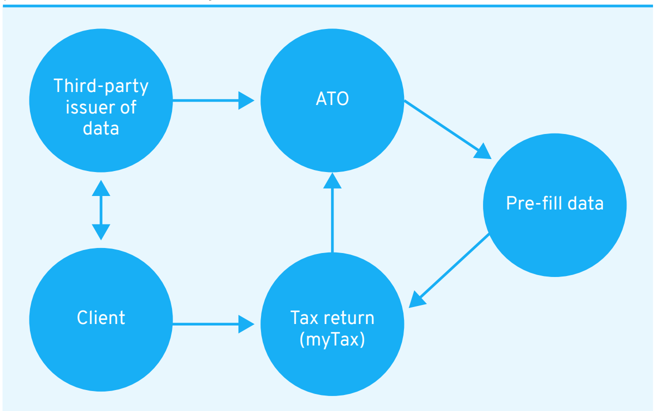
Overall, however, there is an increasing reliance on third-party providers across the tax return due to technological advancements.[92] Critically, these are instigated by the ATO itself through its extensive data-matching program[93] and, therefore, third-party information is being increasingly captured and relied on regardless of the party who is lodging (see Diagram 4).[94]

The ATO also deploys "nudging" technology based on extensive data benchmarking and analytics to affect both tax practitioner and taxpayer behaviour when the inputs do not seem credible or align with norms for specific occupations and industries.[95]

The ATO, via data-matching programs, collates data from health funds, financial institutions, employers and government agencies.[96] Pre-filling data captures not only taxpayer details, but also income sources, health insurance policy information, Higher Education Loan Program and other income-contingent loans, as well as data with respect to various data-matching programs designed to increase confidence in the system and compliance.[97]

So, we ask, is it too far-fetched to contemplate whether an increasingly digitally reliant "toolkit" of pre-filled information is a service, and, more intriguing, could it be possible for the ATO itself to provide tax agent services through third parties and be covered under the Code?

Diagram 4. ATO as instigator of third-party information provision (self-lodgment)



Source: Author depiction.

Data, information or advice?

Turning to specific examples of what is considered as tax agent services in the digital ecosystem, the TPB often takes us to BAS services (a subset of tax agent services) that focus on information more than "advice". For example, it is relevant to note that the TPB considers the installation of computer accounting software *and* the determination of default GST and other codes tailored to clients as tax agent services.[98] Similarly, coding transactions and transferring data onto a computer program for clients through processes that require the interpretation or application of a BAS provision are tax agent services.[99] However, this can be contrasted with where the entity installs computer accounting software *without* determining default GST and other codes tailored to the client (this service is not considered to be a tax agent service by the TPB).[100] On a comparable note, the TPB considers the transmission of data to the ATO through single touch payroll (STP)-enabled software to also not fall within the scope of tax agent services where the data transmission does not require the interpretation or application of a taxation law.[101] This is also the case where there is coding of tax invoices and transferring data onto a computer program for clients under the instruction and supervision of a registered tax or BAS agent,[102] or entering data without involvement in or calculation of figures to be included on a client's activity statement.[103]

In general, we can reflect on the performance of data entry for clients through processes that do not require the interpretation or application of a taxation law as not amounting to tax agent services.[104] In the EM to the TASB, it was noted that tax agent services only include those services involving the application or interpretation of taxation law (see Table 3).[105] This requires, as the EM to the TASB clarifies, a level of knowledge and experience in taxation law.[106] In contrast, tax agent services exclude services that do not involve such interpretation or application of taxation laws.[107] Nor where there is no reasonable expectation that the client will rely on the services to satisfy liabilities or obligations, nor to claim entitlements under taxation law.[108]

The TPB indicates that relying on third parties for specialist knowledge can take a tax practitioner outside of the scope of tax agent services. The TPB describes the scenario of "contracting the services of a specialist to provide advice about an area of taxation law that you have no expertise and cannot review for accuracy" as one that does not amount to a tax agent service.[109] This is in contrast with the EM to the TASB, which suggests that, if tax agents engage a tax expert for specialist tax advice that they are not familiar with or cannot review for accuracy, the tax advice *would* normally be a tax agent service.[110]

The EM to the TASB goes on to specify that most tax-related services that a tax agent may outsource to an unregistered tax agent would not be tax agent services.[111] The EM to the TASB explains that this is owing either to the lack of interpretation or application of the taxation laws, or because of the relationship between the tax agent and the

Table 3. EM to the TASB examples of what may constitute tax agent services

Example 2.1. Tax agent services	Example 2.2. Tax agent services	Example 2.3. Not tax agent services	Example 2.4. Not tax agent services	Example 2.5. Not tax agent services	Example 2.6. Tax agent services
Lorenzo describes himself as an *"R&D consultant"*. Lorenzo assists his clients to identify which of the activities undertaken by them will meet the definition of "R&D activities", for the purpose of assisting them in making claims under the *R&D tax concession* provisions in the [*Income Tax Assessment Act 1936* (Cth) (ITAA36)]. Lorenzo advises his clients on which activities are eligible, and helps them to prepare their registration forms to be lodged with Innovation Australia, in respect of these activities. This registration form includes a description of the eligible R&D activities and the technical objectives of those activities, as well as a break up of the expenditure claimable in respect of those activities. Registration with Innovation Australia is a pre-requisite to making a claim for the expenditure on those activities under the R&D tax concession. The work performed by Lorenzo falls within the definition of "tax agent service" as the service provided and advice given relate to the ascertaining of clients' entitlements under the R&D tax concession provisions in the [ITAA36] and the services are provided in circumstances in which Lorenzo's clients could reasonably be expected to rely on them to claim the entitlement. (emphasis added)	Jessica is a *quantity surveyor* who provides reports that detail depreciable items in a building to enable her clients to calculate deductions for *decline in the values of depreciating assets*. Jessica is providing a tax agent service as she would need to have certain knowledge of the relevant taxation laws to determine the depreciable nature of the assets to provide the service and it is reasonable to expect her clients to rely on the service to claim an entitlement under the taxation laws. (emphasis added)	Tom is an *asset valuer* and provides opinions on the value of assets. Tom often assists clients in determining the *market value of assets* for tax purposes. There are many provisions in the taxation laws where the tax position depends upon the value of an asset or transaction, for example, ascertaining the tax consequences of non-arm's length transactions. Tom would not ordinarily be providing a tax agent service as the provision of this service does not normally involve the interpretation and/or application of the taxation laws to ascertain clients' tax positions. (emphasis added)	Tanto Ltd is a *car dealer*. While selling cars, Tanto Ltd often gives its clients *suggestions on the tax implications* of car purchase transactions, but includes with its advice that because it is not a tax expert, clients should consult their tax agent. Because Tanto Ltd does not hold itself out as a tax advisor or as having expertise in tax, and, further, caveats its advice, it is not reasonable to expect the tax advice provided by Tanto Ltd to be relied upon by its clients for the purpose of satisfying their liabilities or obligations under a taxation law, or claiming entitlements under a taxation law. As such, the tax advice provided by Tanto Ltd is not a tax agent service. (emphasis added)	Ace Accounting is a partnership which is registered as a tax agent. Acme Services Trust provides *professional and administrative support* personnel to Ace Accounting. The personnel supplied remain employees of Acme Services Trust, and as such, they are Ace Accounting's contractors. *Ace Accounting instructs and directs the contractors, and provides the relevant steps and review processes that the contractors must adhere to*. Ace Accounting specifies in its engagement letters with clients that it may use contractors or other entities to deliver contracted services with their authorisation, but that it is responsible for the conduct and activities of all persons that it uses in delivering the contracted services. In these circumstances, the services provided by the contractors are not tax agent services because it is not reasonable to expect that Ace Accounting would rely on the services to satisfy its clients' liabilities or obligations, or claim entitlements, under a taxation law. (emphasis added)	Joe is a registered tax agent who sometimes *contracts the services* of Wilma, a specialised tax agent who has particular *expertise in the area of capital gains tax (CGT)*. In this case, Wilma, in providing the specialised CGT services, is providing a tax agent service to Joe, as it is reasonable to expect that Joe would rely on the services provided by Wilma to satisfy his clients' obligations under the taxation laws. (emphasis added)

Source: EM to the TASB, pp 27–29.

contractor is such that it is not reasonable to expect the tax agent to rely on the contractor to satisfy the agent's clients' obligations or to claim entitlement under the taxation laws.[112]

To assist with the logic in this situation, we can turn to TPB(I) 13/2022.[113] Looking to third-party provision of information that is considered as tax agent services instigated by the tax practitioner, the guidance distinguishes contractors who are providing services *for* a registered agent and those who are providing services *through* a registered agent.[114] The former may reflect an employee relationship in the eyes of the law.[115] As highlighted earlier in this article, employees do not fall within the scope of the TASA as not providing tax agent services for a fee or other reward.[116] Their reward is via salary and wages (see Table 2). Here, the client relies on the registered tax practitioner not the contractor. It is the tax practitioner who receives the fee or other reward.[117] This can be compared with a contractor providing services *through* a registered tax agent.[118] In this instance, both parties may be in receipt of a fee or other reward – even where the tax agent is in receipt of such in relation to the services provided, then, if the contractor also provides tax agent services, it will be required to register.[119] Inherently, this is akin to the registered tax practitioner procuring further tax agent services for the client.

It is therefore logical that, if a contractor provides such services and is unregistered, they will contravene the civil penalty provision.[120] It is also notable that disclaimers may be used in such circumstances, whether in relation to accepting liability or in relation to relying on the services.[121] If such disclaimers are used, the TPB will contemplate the disclaimer when assessing whether a person could reasonably be expected to rely on a service but, critically, a mere existence is not alone determinative.[122]

What ultimately constitutes tax agent services?

Reframing the conversation around third-party information providers in a contemporary digital context raises significant questions as to what is truly capable of being captured as tax agent services. While there has been clear discussion and analysis contrasting and comparing legal services, we now need to recalibrate our focus to the contents of the technology and knowledge toolkit that tax practitioners make use of.

As outlined, we summarise that, where third-party information provision is instigated by the client, such as a depreciation schedule, there is a separate provision of tax agent services by that provider. The tax agent then takes reasonable care in accepting that information before including it in the client's tax return. In this setting, the tax agent relies on the "expertise" – perhaps "plugs and plays", accepting the provision of information subject to underpinning professional judgment that assesses the context of provision. In contrast, where third-party information is sourced via the tax agent outsourcing, the tax agent has heightened obligations with respect to their duties and ensuring that the services are provided ethically and competently.

With this, we raise the inherent uncertainties that ensue, mainly when the client initiates the provision of information by a third party not registered with the TPB. We are concerned about the potential gap in this grey area. This concern increases: (1) where the terms of engagement explicitly limit the tax agent's obligations – which can be appropriate, particularly where they do not have the competencies to carry out aspects of the services; (2) where the taxpayer does not obtain the services of a registered tax agent and instead self-lodges via myTax; and (3) where there is a non-natural intermediary and instead a reliance on software (programming/code) to move beyond what is "an entity" in accordance with the definition of providing tax agent services.[123]

This can include the situation where data is aggregated/interpreted through the use of software systems. For example, in the blockchain space, where the use of crypto aggregators manage the voluminous data generated due to the quantum of transactions possible. Broadly, the sharing economy can be included here, along with the crypto digital service providers. Or, in contrast, consider the bank feeds and bank rules extending to accounting software packages or the ATO's pre-filling functions and myTax system.

We ask to what extent are system and program default settings considered or updated to suit the particular client's affairs, who is involved in reviewing and finalising those settings, and who is then making sense of the data inputs into those programs and the integrity and completeness of such information as the "code" processes and aggregates data into meaningful information aligned with taxation law? To what extent do we interpret the information produced by such programmed code that has been designed to align with taxation law as merely the entering of data without involving the application of a method statement from legislation, or similarly the transmission of data to the ATO without the need for interpretation or application of the taxation laws? We can take comfort from the fact that simple data entry, without interpretation or application of the taxation laws, does not amount to tax agent services.[124]

With this in mind, we posit that if the tax agent relies on "expertise", amending nothing, confidently accepting all, "plug and play", they are not providing services; rather, they are using professional judgment to ensure that their inclusion of the figure provided is appropriate. But what services are the aggregator providers considered to be offering? In contrast, what if the tax agent reviews, edits and amends the outputs provided? As soon as they edit it, it is more likely that they are providing tax agent services, more akin to outsourcing, increasing their responsibilities pursuant to the information provided. Does this in turn reduce the aggregators' provision of "tax agent services"? Is this nuance truly serving the object of the regulation?

With technology increasingly enabling code to automate and simplify, and as we see technologies such as artificial intelligence and blockchain technology increasing in prevalence, we need to be mindful of the consequences for consumer protection, for the extent of regulatory capture, and for the risk of unenforceability. This is particularly pertinent when we look to the increasing proportion of taxpayers who are self-lodging via myTax. This is a further intermediary making use of technology and the power of code. Blockchain technology itself is founded on the notion of removing the need for that intermediary, to facilitate trust in the code.

However, as with the discussions on blockchain's "code of law" versus "law of code", the question circles back to one of consumer protection. To what extent are tax agent services being carved out from a registered tax practitioner's scope of responsibility *by code*, and then not requiring application of *the Code*? Particularly looking towards those who can meet their tax obligations through self-lodging and accessing verifiable pre-filled data, to what extent does this make tax agent services obsolete as the technology intermediates providers and clients? To oversimplify, in the words of the former Commissioner of Taxation, Chris Jordan: "Tax just happens".[125]

To some extent, this is appropriate – if technology enables the automation of verifiable data flows, tax practitioners ought not to be unnecessarily burdened. Such is the use of the crypto aggregators. However, at the same time, does this create equivalent regulatory gaps when we look to the code? To what extent do we need to turn our minds to software design and structural framework design – the design of the code? TPB guidance contemplates the installation of software and the use of software but, taking a step back, what about the inherent design of the software and the actual coding? We can contemplate that, if software, if code, is aligned with taxation law, then, in its design, there is inherently interpretation of taxation law to facilitate that design. However, in doing so, it is not doing so for "an entity", it is doing so in a universal sense with broad application. However, with data feeds, whether bank or API feeds, capturing an entity's transactions is then automatically coded based on the system design, whereby neither the tax practitioner nor the client undertakes any set up, unaware of accepting default settings, only linking the particular data feed. In this case, has no one provided tax agent services? If so, to what extent is this in alignment with the object of the TASA and the TPB? The concern resembles that being reflected in Glover's rationales[126] for restricting legal practice:

1. reduced competency is a concern as data flows through a mechanism that can automatically code activities with a certain level of consistency, yet the question arises as to those who ought not to be expected to have knowledge or understanding of taxation law (namely, clients).[127] There is a fundamental question regarding the onus on taxpayers in a self-lodgment system where the system is inherently subject to significant complexity and the cost of compliance is a key barrier;
2. the removal of natural persons as intermediaries comes with a reduced ability to apply the ethical principles and obligations underpinning the TASA and TPB, yet, at the same time, technology enabled information provision can remove the risks of unethical behaviour stemming from a tax practitioner's human hand. However, it leaves open risks to the taxpayer's morality and overall morale towards the tax system. Similarly, there are inherently ethical conundrums in removing the natural person in its entirety in that there ought to always be some level of human oversight. This is particularly pertinent where the ATO itself becomes the key intermediary in the provision of third-party information through pre-filling. This has implications for taxpayer rights;[128] and
3. ultimately, how does motivation play a part where third-party information provision is automated through code? This depends on the particular attributes of information being provided. For example, general and straightforward data, such as bank interest, is more readily verifiable and normalised in the pre-filling process. This can be compared with the use of commercial software aggregation providers that can be utilised to process and code data into meaningful information in line with taxation laws. There is inherently a continuum where commercial reality may or may not play a part.

Expanding on the latter point, consideration of what constitutes "fees" can readily turn to subscription approaches offered by such commercial providers. We then must ask where subscriptions have no-fee levels of entry, does this then lead us to a conclusion that, irrespective of the earlier characterisation, the services are not being provided for a fee or other reward? Naturally, the attention turns to notions of other rewards. We can ask, for example, whether the provision is bundled with other services (see item 5, Table 2), or perhaps in anticipation of a future benefit (see item 8, Table 2). We note that the EM to the TASB in this regard interprets future benefits to include future business, sales or commissions, or even in attracting or retaining clients.[129] So, if a provider is providing free services with the anticipation of ongoing business, perhaps with an expectation that the client proceeds to a higher-level, paying, subscription, it may not matter that the current services are for no fee. Similarly, we must turn our minds in a contemporary, digital society to the value of client data. Data is becoming increasingly valuable – so to what extent do we need to appreciate the inherent data-capturing abilities of such providers as being within the scope of "other rewards"? What can we extend in this regard to the provision of myTax services by the ATO itself? We can reflect on the common quote of "if you're not paying for the product, you are the product".

Final comments

We conclude with the reflection that the TPB ought to contemplate providing guidance on the digitalised toolkit that practitioners and taxpayers are increasingly making use of, as well as the diversification and expertise relied on in bringing together key components of an entity's tax liabilities, obligations or entitlements that the entity can reasonably be expected to rely on in order to satisfy or claim such.[130] This extends to the scope for which reg 26 of the *Tax Agent Services Regulations 2022* provides exclusions for services which are not considered as tax agent services,[131] and, moreover, the distinction between the provision of *services* and where a *product* is deployed in the interpretation of taxation laws to produce equivalent outcomes without the natural person.

Further research is needed to explore what drives tax practitioners to rely on third-party information providers, including outsourcing directly or client-initiated. The access and utilisation of such third-party providers intermediated by technology is becoming increasingly pivotal. The need for further research is particularly relevant where we see increasing numbers of taxpayers lodging via myTax, rather than relying on tax practitioners.[132]

This analysis can then turn more directly to contemplate the implications of the recent tranches of reforms that are reshaping the tax profession. For example, we can focus on the interpretation of the dob-in provisions and how they interact with third-party information provision — contrasting the implications where they are client-initiated compared to outsourced compared to when the direct intermediary is code, including the extent to which code enables auto-execution or incorporates elements of artificial intelligence. Inherently, where the tax practitioner has outsourced the services, there is more clarity in the consequences.

Ultimately, the question turns to what safety net ought to operate in a digital ecosystem where the technology itself — the code — is an intermediary between taxpayers and the collation and interpretation of their tax affairs, whether by tax practitioners or via self-lodgment. In doing so, we ask the question: to what extent should this grey area be brought into the scope of the TPB?

Elizabeth Morton, FTI
Senior Lecturer
RMIT University

Lisa Greig, CTA
Lecturer
The University of Melbourne

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2 For example, the Greens amendments, and the overlap and confusion around the Tax Agent Services (Code of Professional Conduct) Determination 2024. See, for example, E Morton and K Devos, *Code of Professional Conduct and Minister's power: tax practitioner perspectives*, Austaxpolicy: tax and transfer policy blog, 22 July 2024. Available at www.austaxpolicy.com/code-of-professional-conduct-and-ministers-power-tax-practitioner-perspectives.

3 Treasury, *Response to PwC – Tax Practitioners Board registration review*, 17 July 2024. Available at https://treasury.gov.au/consultation/c2024-536402.

4 See, for example, Treasury, *Government response to PwC tax leaks scandal*, September 2023. Available at https://treasury.gov.au/sites/default/files/2024-06/c2024-536402-fs.pdf.

5 Ibid p 1.

6 S 2-5(1) TASA.

7 S 2-5(2) TASA. Note that "the Code" (capitalised) refers to the TASA Code, whereas "code" (lower case) refers to programming code.

8 S 2-10(1) TASA. See also s 50-5(1)(c) TASA.

9 Note that BAS agents' services also come under the regulation of the TPB and the TASA. However, our focus is primarily on tax agents. We therefore use the collective term "tax agent services" throughout this article.

10 S 20-1 TASA. Notably, education providers are subject to regulation by, for example, TEQSA and must meet complete regular reviews of their programs and courses.

11 See s 20-5 TASA for core eligibility for registration as a registered tax or BAS agent. The Treasury discussion paper reviewing TPB registration requirements provides a detailed overview of the registration requirements. See *Response to PwC – Tax Practitioners Board registration review*, 17 July 2024. Available at https://treasury.gov.au/consultation/c2024-536402.

12 CPA Australia, Chartered Accountants of Australia and New Zealand, Institute of Public Accountants of Australia.

13 See J Harb, E Morton and V Narayanan, "Acceptance of myTax in Australia", (2023) 38(1) *Australian Tax Forum* 111, and J Harb, E Morton and S Pittayachawan, "Variation between Australian taxpayers lodging their income tax returns via myTax and tax agents", (2024) *New Zealand Journal of Taxation Law and Policy* 30(7).

14 TPB(I) 39/2023: What is a tax agent service?, information sheet, 31 January 2023, p 3. Available at www.tpb.gov.au/tpbi-392023-what-tax-agent-service.

15 See also ss 90-10 and 90-15 TASA for the meaning of "BAS service" and "tax (financial) advice service". These are, in general, beyond the scope of this article.

16 TPB(I) 39/2023, p 4.

17 Ibid.

18 TPB(I) 39/2023, p 5. Factors that the TPB identifies as relevant will be explored in a later section of this article.

19 TPB(I) 39/2023, p 4.

20 S 90-5 TASA.

21 The latest version at the time of writing is 1 July 2024 and is subject to unincorporated amendments.

22 S 50-5(1)(c) TASA.

23 TPB(I) 40/2023: What is a fee or other reward?, information sheet, 9 February 2023, p 4. Available at www.tpb.gov.au/tpbi-402023-what-fee-or-other-reward.

24 P 75 of the EM to the TASB.

25 Ibid p 76.

26 Ibid p 77.

27 Subdiv 50-A TASA.

28 See, for example, s 50-5 TASA.

29 Tax Practitioners Board, *Unregistered preparers strategy*, 12 December 2023. Available at www.tpb.gov.au/unregistered-preparers-strategy.

30 S 995-1(1) ITAA97.

31 S 50-5 TASA. Note that tax practitioners are also subject to broader regulation, such as Accounting Professional & Ethical Standards Board pronouncements and disciplinary body regulations.

32 S 50-5 TASA. Exceptions apply, however, where the services are tax or BAS services provided as a legal service in the course of acting for a trust or deceased estate as trustee or legal personal representative: s 50-5(3) and (4) TASA.

33 Tax Practitioners Board, *Tax agent services*, 14 October 2024. Available at www.tpb.gov.au/tax-agent-services.

34 See, for example, C Wallis, "Accountants cannot give legal advice: what that means for them, their clients and the lawyers", (2005) 45(10) *Taxation in Australia* 601.

35 Law Council of Australia, *Australian Solicitors Conduct Rules*, Policy Agenda, 11 April 2024. Available at https://lawcouncil.au/policy-agenda/regulation-of-the-profession-and-ethics/australian-solicitors-conduct-rules.

36 Ibid.

37 J Bevacqua, S Marsden, A Morgan, E Morton, K Devos and S Verma, *Australian taxation*, 3rd ed, Wiley, 2024, p 15.

38 S 6(1) of the Legal Profession Uniform Law as applied in NSW by the *Legal Profession Uniform Law (NSW) No 16a of 2014* and the *Legal Profession Uniform Law Application Act 2014* (NSW), and in Victoria by Sch 1 to the *Legal Profession Uniform Law Application Act 2014* (Vic).

39 S 43 of the Legal Profession Uniform Law.

40 S 10 of the Legal Profession Uniform Law. A qualified entity includes, for example, an Australian legal practitioner or law practice.

41 J Glover, "Tax agents providing trust deeds and/or advising about trusts: unauthorised legal practice?", (2018) 33(3) *Australian Tax Forum* 411 at 417. See Glover also for in-depth interpretations of the legal practice.

42 Ibid p 418.

43 That is, in providing tax agent services: s 90-5 TASA. See also the object of the TASA in s 2-5 TASA.

44 P 4 of the EM to the TASB.

45 EM to the TASB, p 5.

46 Ibid p 7.

47 See J Harb, E Morton and V Narayanan, "Acceptance of myTax in Australia", (2023) 38(1) *Australian Tax Forum* 111.

48 J Glover, "Tax agents providing trust deeds and/or advising about trusts: unauthorised legal practice?", (2018) 33(3) *Australian Tax Forum* 411 at 425.

49 Ibid p 435.

50 Ibid p 425.

51 [1998] 4 VR 324 at 345 (cited in Glover, op cit, p 426).

52 S 30-10(9) and (10) TASA.

53 TPB(I) 39/2023, p 6.

54 TPB(I) 17/2013: Code of Professional Conduct – Reasonable care to ascertain a client's state of affairs, information sheet, 4 December 2023, p 4. Available at www.tpb.gov.au/reasonable-care-ascertain-clients-state-affairs-tpb-information-sheet-tpbi-172013.

55 Ibid p 4. The TPB refers to: Accounting Professional & Ethical Standards Board APES 110 Code of Ethics for Professional Accountants, ss 100.5 and 130; and APES 220 Taxation Services, paras 3.11 to 3.17.

56 TPB(I) 17/2013, p 5.

57 TPB(I) 08/2011: Reports or other advice incorporating tax agent services provided by a third party, information sheet, 27 September 2016, p 3. Available at www.tpb.gov.au/reports-or-other-advice-incorporating-tax-agent-services-provided-third-party-tpb-information-sheet.

58 Ibid.

59 Ibid.

60 S 30-10(9) TASA.

61 TPB(I) 08/2011, p 4.

62 Ibid.

63 Ibid.

64 TPB(I) 39/2023, p 8.

65 S 30-10(9) TASA.

66 TPB(I) 17/2013.

67 Ibid.

68 Tax Practitioners Board, *Is your tax practitioner registered?* (the TPB Register). Available at https://myprofile.tpb.gov.au/public-register.

69 S 30-10(10) TASA.

70 TPB(I) 08/2011, p 4.

71 See, for example, TPB(PN) 3/2019: Letters of engagement, practice note, 1 April 2022. Available at www.tpb.gov.au/tpb-practice-note-tpbpn-32019-letters-engagement.

72 Ibid p 4.

73 Ibid p 4.

74 Ibid p 5.

75 Ibid p 4.

76 TPB(PN) 2/2018: Outsourcing and offshoring of tax services – Code of Professional Conduct considerations, practice note, 1 April 2022, p 3. Available at www.tpb.gov.au/tpbpn-22018-outsourcing-and-offshoring-tax-services-code-professional-conduct-considerations. Note that the issues pertaining to offshoring, while relevant, are beyond the scope of this article. Although we recognise that, where the software provider has data centres or activities undertaken outside of Australia, this would be offshoring (TPB(PN) 2/2018, p 4). We have kept the focus of this article purposefully narrowed in its reflection.

77 TPB(PN) 2/2018, p 3.

78 Ibid p 4.

79 Ibid p 7.

80 Ibid pp 5 and 6.

81 While relevant, this article is narrow in scope and so does not expand fully on the issues of confidentiality. We note, however, that there are inherent and interrelated issues relating to who the data belongs to, who has provided the data, risks of cyber security, permissions, and so forth. See, for example: TPB(PN) 2/2018; TPB(PN) 1/2017: Cloud computing and the Code of Professional Conduct, practice note, 1 April 2022, available at www.tpb.gov.au/tpbpn-012017-cloud-computing-and-code-professional-conduct; TPB(I) 21/2014: Code of Professional Conduct – Confidentiality of client information, information sheet, 1 July 2024, available at www.tpb.gov.au/confidentiality-client-information-information-sheet-tpbi-212014.

82 TPB(PN) 2/2018, p 6. On this issue, the TPB highlights that the tax practitioner that outsources needs to ensure that their coverage is appropriate for the services they provide, including outsourcing of services (TPB(PN) 2/2018, p 14).

83 TPB(PN) 2/2018, p 15.

84 Ibid p 9.

85 Ibid p 9.

86 Ibid p 10.

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94 Harb, Morton and Narayanan, op cit; Harb, Morton and Pittayachawan, op cit.

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99 Ibid, line 25.

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102 Ibid, line 47.

103 Ibid, line 54.

104 Ibid, line 48.

105 EM to the TASB, p 26.

106 Ibid.

107 Ibid p 27.

108 Ibid, p 28.

109 See the Appendix to this article, line 49.

110 EM to the TASB, p 29.

111 Ibid, p 28.

112 Ibid, p 28.

113 TPB(I) 13/2022: Contractors, information sheet, 27 September 2016. Available at www.tpb.gov.au/contractors-tpb-information-sheet-tpbi-132012.

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115 Ibid, p 5.

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117 Ibid. Note that a contractor merely procuring tax agent services is similarly not captured.

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120 Ibid.

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122 Ibid.

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125 Commissioner Chris Jordan AO, *Why tax can't just happen*, address to Xerocon Sydney, International Convention Centre Sydney, 8 September 2022. Available at www.ato.gov.au/media-centre/why-tax-can-t-just-happen-without-you.

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128 See, for example, D Bentley, "Timeless principles of taxpayer protection: how they adapt to digital disruption", (2019) 16(3) *eJournal of Tax Research* 679.

129 EM to the TASB, p 77.

130 As per s 90-5(1) TASA.

131 S 90-5(2) TASA and reg 26 of the *Tax Agent Services Regulations 2022* (Cth).

132 See, for example, Harb, Morton and Narayanan, op cit; Harb, Morton and Pittayachawan, op cit.

Appendix. TPB interpretation of services amounting to tax agent services

	Service	Tax Agent Service?
1	Preparing returns, notices, statements, applications or other documents about your client's liabilities, obligations or entitlements under a taxation law.	Y
2	Applying to the Commissioner or the Administrative Appeals Tribunal for a review of, or instituting an appeal against, a decision on an objection under Pt IVC of the *Taxation Administration Act 1953* (Cth) (TAA).	Y
3	Lodging returns, notices, statements, applications or other documents about your client's liabilities, obligations or entitlements under a taxation law.	Y
4	Assisting clients with tax concessions for expenditure incurred on research and development activities where the service involves the application of taxation laws.	Y
5	Preparing depreciation schedules on the deductibility of capital expenditure.	Y
6	Ascertaining the withholding obligations for employees of your clients, including preparing income statements.	Y
7	Preparing or lodging objections on behalf of a taxpayer under Pt IVC TAA against an assessment, determination, notice or decision under a taxation law.	Y
8	Giving clients advice about a taxation law that they can reasonably be expected to rely on to satisfy their taxation obligations.	Y
9	Providing tax-related advice specific to client's circumstances regarding: PAYG withholding liability, superannuation guarantee obligations, FBT laws (if relating to collection and recovery only), and termination and redundancy payments.	Y
10	Advising about claiming an allowable tax deduction for superannuation contributions under the ITAA97.	Y
11	Advising about superannuation contribution caps (such as the transfer balance cap) and the effect of exceeding those caps.	Y
12	Advising about FBT laws.	Y
13	Undertaking a payroll compliance review, providing an assessment and/or opinion as to whether the client is compliant with their obligations under one or more taxation laws.	Y
14	Dealing with the ATO on behalf of clients under a taxation law.	Y
15	Providing a payroll service which involves interpreting and applying a taxation law, including reporting employee payroll information through the use of or set-up of STP-enabled software.	Y
16	Advising a client on the multinational anti-avoidance laws under the ITAA36.	Y

Appendix. TPB interpretation of services amounting to tax agent services (cont)

	Service	Tax Agent Service?
17	Advising on the tax implications of salary sacrificing arrangements and salary packaging.	Y
18	Applying to the Registrar for an ABN on behalf of a client.	Y
19	Advising a client on fuel tax credits.	Y
20	Advising, or acting on behalf of, clients on tax debts (ie payment plans, remission of debt or interest, winding-up matters initiated by the ATO).	Y
21	Installing computer accounting software and determining default GST and other codes tailored to clients.	Y
22	Reconciling BAS data entry to ascertain the figures to be included on a client's activity statement.	Y
23	Completing activity statements on behalf of a client or instructing them on which figures to include.	Y
24	Confirming figures to be included on a client's activity statement.	Y
25	Coding transactions, tax invoices and transferring data onto a computer program for clients through processes that require the interpretation or application of a BAS provision.	Y
26	Providing advice about or confirming a client's withholding tax obligations in relation to the client's employees.	Y
27	BAS services, including services declared to be a BAS service by way of a legislative instrument issued by the TPB.	Y
28	Preparing and providing an income statement that may include reportable fringe benefits amounts and the reportable employer superannuation contributions.	Y
29	Registering or providing advice on registration for GST, PAYG withholding, or FBT.	Y
30	Services under the *Superannuation Guarantee (Administration) Act 1992* (Cth) to the extent that they relate to a payroll function or payments to contractors.	Y
31	Advising about a superannuation guarantee charge (SGC) liability, including calculating the liability and preparing the SGC statement.	Y
32	Advising about the offsetting of late payments of superannuation contributions against the SGC.	Y
33	Completing the late payment offset election section of an SGC statement.	Y
34	Representing a client in their dealings with the ATO relating to the SGC — lodging SGC statements, being an authorised contact relating to the superannuation guarantee (SG) and SGC, and accessing these accounts in the ATO's online services for agents.	Y
35	Being an authorised contact with the ATO for payment arrangements relating to SGC.	Y
36	Being an authorised contact with the ATO for requesting penalty remissions relating to SGC.	Y
37	Being an authorised contact for any audit or review activity undertaken by the ATO relating to SGC.	Y
38	Determining and reporting the superannuation guarantee shortfall and associated administrative fees.	Y
39	Dealing with superannuation payments made through a clearing house.	Y
40	Completing and lodging the taxable payments annual report to the ATO on behalf of a client.	Y
41	Sending a TFN declaration to the ATO on behalf of a client.	Y
42	Undertaking a payroll compliance review, providing an assessment and/or opinion whether the client is compliant with one or more BAS provisions.	Y
43	Providing a payroll service which involves interpreting and applying a BAS provision, including reporting employee payroll information through the use of or set-up of STP-enabled software.	Y
44	Installing computer accounting software without determining default GST and other codes tailored to the client.	N
45	Providing non-tax advice relating to salary sacrificing arrangements and salary packaging.	N
46	Transmission of data to the ATO through STP-enabled software, where the data transmission does not require the interpretation or application of a taxation law.	N
47	Coding tax invoices and transferring data onto a computer program for clients under the instruction and supervision of a registered tax or BAS agent.	N

cont ...

Appendix. TPB interpretation of services amounting to tax agent services (cont)

	Service	Tax Agent Service?
48	Performing data entry for clients through processes that do not require the interpretation or application of a taxation law.	N
49	Contracting the services of a specialist to provide advice about an area of taxation law that you have no expertise and cannot review for accuracy.	N
50	Services provided by an auditor of a self-managed superannuation fund under the *Superannuation Industry (Supervision) Act 1993* (Cth).	N
51	Providing general taxation advice to clients that does not involve the application or interpretation of a taxation law to the client's personal circumstances (for example, general advice sent to clients in a newsletter or published on a website).	N
52	General training (such as a classroom) in relation to the use of computerised accounting software not related to particular situations.	N
53	Performing bank reconciliations.	N
54	Entering data without involvement in or calculation of figures to be included on a client's activity statement.	N
56	Providing advice on taxes and duties under state or territory-based legislation.	N

Source: This Appendix is based on Appendix A to TPB(I) 39/2023.

Issues with child support minimisation: part 1

by Chris Wallis, CTA, Barrister, Victorian Bar and South Australian Bar

The *Child Support (Assessment) Act 1989* (Cth) obliges parents to provide financial support for their children until the age of 18, and calculates the obligation by reference to each parent's adjusted taxable income. The use of the adjusted taxable income metric enables tax practitioners (and others) to provide advice that would allow a parent to reduce or avoid an obligation to pay child support. In this part 1 of a three-part article, the author identifies the destructive effect of policies designed to win votes without regard to the integrity of the child support regime. The author observes that a tax practitioner's involvement in child support minimisation has attracted the attention of the Tax Practitioners Board.

Introduction

The principal object of the *Child Support (Assessment) Act 1989* (Cth) (CSAA) is to "ensure that children receive a proper level of financial support from their parents".[1]

Some practitioners promote their ability to minimise (even eliminate) or defer, including indefinitely, obligations to pay child support ("child support minimisation/deferral planning") through newsletters, websites and in year-end tax planning sessions for the proportion of parents who seek advice to minimise or defer any CSAA obligations.

Child support minimisation/deferral planning includes providing advice on:

- structures and practices to minimise or eliminate any liability for child support;
- techniques for deferring the date on which child support obligations can be determined or updated;
- structures and arrangements to frustrate the collection of an unpaid CSAA liability.

Some tax agents and other "flying monkeys"[2] are willing to meet the demand for child support minimisation/deferral planning without consideration of whether involvement in that activity might result in contraventions of the Tax Practitioner Board's (TPB's) Code of Professional Conduct.

Given the length and complexity of the CSAA and the difficulty in attempting, within a few pages, to identify and describe the issues and suggest cures, the author focuses on the tools used by those engaging in child support minimisation/deferral planning and identifies the small, easily made cures that could be made to defeat child support minimisation/deferral planning.

Some issues created by child support minimisation/deferral that result in financial abuse[3] and coercive control of former partners, identified but not discussed in part 1, will be discussed as follows:

- in part 2: the evil arrangements used by a parent who is self-employed and/or operating in the shadow economy; and
- in part 3: the systemic and administrative inter-departmental weaknesses that result in ineffective enforcement and arrears collection mechanisms.

Requests from parents wanting to avoid child support obligations

A parent may seek child support minimisation/deferral planning advice to entrench the parent's subjective and self-serving view of the "proper level of support" and/or as means of coercing a former partner.

Almost every tax practitioner can recount a similar story to this:

> **Parent**: Friends have told me (or a solicitor has told me) that you will be able to get rid of my child support obligation.
>
> **Agent**: Why would you want to do that, isn't it your child?
>
> **Parent**: Yes, but I don't want to give [that moron/imbecile/idiot] anything.

In mid-2023, the TPB banned one registered tax agent[4] who was found, inter alia, to have acted without honesty and integrity by relying on false or misleading income tax returns that the tax agent had lodged, and the notices of assessment issued by the ATO, to reduce the tax agent's child support obligation.[5]

Some months ago, the author was retained to appear for a client in an AAT review application in relation to work-related expenses. The client had only a slim chance of being successful at the AAT and at the outset received (and acknowledged) receipt of advice to that effect.

When pressed on why spend more on fees to pursue the review application than the amount in dispute, the client replied, "I would rather spend it on your fees than give it to my ex".

A few days before the scheduled AAT hearing, the Federal Court handed down a decision in another matter which all but obliterated the client's already slim chances of success. It was only on the morning of the AAT hearing that the client provided instructions to withdraw their review application and, even then, only because the client, who would have been appearing online from their workplace, couldn't find a private location for the online appearance and was concerned about giving evidence in those circumstances.

Child support minimisation/deferral planning can reflect antisocial behaviour and is attractive to a parent:

- whose view about what constitutes a proper level of support differs from the views of their fellow parent;
- who sees child support as "tax" by another name;
- who is a higher earning employee or who is (or who is able to become) a self-employed person;
- who may resent that the other parent receives child support for a child but is not required to show that the child support was expended on or for that child; and/or
- who wants to financially abuse or otherwise coercively control the other parent (and former partner).

Antisocial behaviours have a tendency to highlight systemic weaknesses.

An employee cannot easily reduce their taxable income so that child support minimisation/deferral planning is effectively restricted to:

- those who are (or who can become) self-employed without personal services income; and
- those operating in the shadow economy.

A simple scenario

In this article, the author considers only the simplest scenario:

- P1 and P2 have a single child;
- the child, C1, is aged 13 at 30 June 2024;
- neither P1 nor P2 has re-partnered; and
- neither P1 nor P2 has other children.

In ordinary circumstances, child support obligations for C1 end during the year of income ended 30 June 2029, when C1 will turn 18.

The total amount of child support payable for C1 by P1 and P2 is calculated by reference to the combined taxable income of P1 and P2. P1's liability for child support will reflect the number of nights P1 provides care for C1.

The mechanism used to calculate a parent's child support obligation ensures a zero-sum game result — no matter the calculated amount of child support for C1, if P1 can succeed in reducing their liability for child support for C1, they transfer liability to P2, and vice versa.

Either or both of P1 and P2 could try to reduce their adjusted taxable income for the purposes of calculating C1's child support, but usually only one of P1 or P2 would do so. Sadly, if both P1 and P2 were to use child support minimisation/deferral planning, they could reduce the child support for C1 to nil.

Relevant provisions

A parent's "child support income" is worked out using one of the several formulae in s 41 CSAA and by calculating the difference between:

- a parent's "adjusted taxable income for the child for a day", worked out in accordance with s 43 CSAA; and
- the parent's "self-support amount for the day", worked out in accordance with s 45 CSAA;

Section 43, following multiple amendments, relevantly provides:

> ***"Working out parent's adjusted taxable income***
>
> (1) Subject to this Part, *a parent's* ***adjusted taxable income*** *for a child for a day* in a child support period is the total of the following components:
>
> (a) the parent's *taxable income for the last relevant year of income* in relation to the child support period;
>
> (b) the parent's reportable fringe benefits total for that year of income;
>
> (c) the parent's target foreign income for that year of income;
>
> (d) the parent's total net investment loss (within the meaning of the *Income Tax Assessment Act 1997*) for that year of income;
>
> (e) the total of the tax free pensions or benefits received by that parent in that year of income;
>
> (f) the parent's reportable superannuation contributions (within the meaning of the *Income Tax Assessment Act 1997*) for that year of income.
>
> Note 1: Other provisions that relate to a person's adjusted taxable income are section 34A and Subdivisions B and C of Division 7.
>
> Note 2: The components of the definition of ***adjusted taxable income*** are defined in section 5." (emphasis added)

Section 5 relevantly provides:

> "***'adjusted taxable income'*** has the meaning given by section 43 and subsections 61(1) and 63(1) …
>
> ***'child support period'*** has the meaning given by subsection 7A(1) …
>
> ***'last relevant year of income'*** in relation to a child support period means the last year of income that ended before the start of the period.
>
> Note: For example, in working out Philippe's last relevant year of income for the child support period that began on 1 January 2008, the last relevant year of income is 2006-07 …
>
> ***'taxable income'*** has the meaning given by sections 56 and 57."

Section 56(1) provides:

> **"Taxable income is as assessed under Income Tax Assessment Act**
>
> Meaning of ***taxable income***
>
> (1) For the purposes of assessing a parent in respect of the costs of a child in relation to a child support period, if the parent's taxable income has been assessed under an Income Tax Assessment Act for the last relevant year of income in relation to the child support period, the parent's ***taxable income*** for that year is the amount as so assessed."

For each of P1 and P2:

- the relevant formula is the basic formula set out in s 41(1) CSAA; and
- in 2024, the annual self-support amount is $28,463.[6]

Child support minimisation/deferral planning enables a parent such as a business owner, other than a parent in receipt of personal services income, to fund their living expenses from receipts not included in the calculation of adjusted taxable income.

Exploitablility #1

Ordinarily, P1 or P2 would be able to depreciate an item of equipment over the life of the equipment and claim deductions for that depreciation, thereby reducing their taxable income by the depreciation expense.

> "… the politicians have unwittingly castrated the CSAA definition of 'adjusted taxable income'."

If P1 or P2 is conducting a business, their adjusted taxable income will be reduced by outlays for equipment, eg a taxi, a truck, machinery generally, a twin cab ute,[7] an excavator, a tractor, a header, and equipment used in medical or dental practices.[8]

In recent years, the government of the day has used instant asset write-offs and temporary full expensing measures to enable taxpayers to claim the full amount of the expenditure in the year in which a depreciating asset is installed ready for use, rather than progressively over the life of the depreciating asset.

Additional specific exclusions from the CSAA defined "adjusted taxable income" of a parent carrying on a primary production business to include:

- capital expenditure on a water facility in the financial year of expenditure; and
- the amount of a farm management deposit in the financial year the deposit is made.

If P1 had acquired an excavator and used the instant asset write off measure to reduce P1's taxable income in the year of acquisition to about the self-support amount (or even less), P1's child support obligation would be nil in that year and the child support obligation would fall to P2.

Any tax loss carried forward tax serves as a deferral tool.

Exploitability #2

The calculation of a parent's adjusted taxable income takes no account of concessions relating to CGT events.

If P1 or P2 disposes of a CGT asset, they receive 100% of the capital proceeds but the non-assessable portion of the capital proceeds are not included in the calculation of the parent's adjusted taxable income.

If P1 or P2 (or a trust that either of them controls) disposes of a CGT asset that is an active asset within Div 152 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97), either P1 (or P2) or the trust receives 100% of the capital proceeds, but up to 100% of the capital proceeds:

- will not be included within P1's (or P2's) adjusted taxable income;
- can be contributed to P1's (or P2's) superannuation without being a reportable superannuation contribution;
- will be removed from P1's (or P2's) overall asset pool.

Exploitablility #3

The CSAA definition of "adjusted taxable income" adds back "total net investment losses", defined by reference to s 995-1 ITAA97 as:

> "**"total net investment loss**" of an individual for an income year means the sum of:
>
> (a) the amount (if any) by which the individual's deductions for the income year that are attributable to financial investments exceed the individual's gross income for that year from those investments; and
>
> (b) the amount (if any) by which the individual's deductions for the income year that are attributable to rental property exceed the individual's gross income for that year from rental property."

If P1 (or P2) has a negatively geared rental property, an amount equal to the amount of the negative gearing would be added back to the CSAA definition of "adjusted taxable income". Tax practitioners, and other flying monkeys step around that "add back" by advising that negatively geared assets should be held in a controlled entity, usually a trust.

Conclusion

A child's entitlement to receive child support (under the CSAA) reflects a basic human right under several articles of the *Convention on the Rights of the Child*[9] (the Convention), including art 23 and art 27.

The CSAA mechanism for calculating a parent's child support liability relies on the broader tax system, and history shows that governments routinely use the tax system to buy votes, a practice unlikely to ever change.

Many of the vote-buying measures identified as adversely impacting the operation of the CSAA "adjusted taxable income" metric reflect amendments made to the tax system such as accelerated depreciation and capital gains concessions (or pork barrelling through the tax system for the primary production sector) by parliamentarians who have consistently failed to identify, or consider:

- the impact of the proposed measures on the level of child support payable for a child; and
- the human rights of the affected child, in particular, rights under art 27 of the Convention;[10]
- the psychological impact on the child caught in the parental war over child support;
- the long-term loss to the child (or society more generally) through loss of opportunity when inadequate provision is made for the child; and
- the impact on those who depend on child support to care for children.

The operation of the CSAA "adjusted taxable income" metric could have been protected by parliament requiring that the value of the benefits identified above be "added back" in the manner employed earlier to ensure that the CSAA definition of "adjusted taxable income" included the value of:

"(b) the parent's reportable fringe benefits total for that year of income;"

New provisions can and should be added to the CSAA definition of "adjusted taxable income":

"(ba) the amount by which a deduction made pursuant to a temporary full expensing measure[11] exceeds the amount that would have otherwise been allowable as a deduction under any of Division 40, Division 41, Division 42 or Division 43 of the *Income Tax Assessment Act 1997*;

(bb) so much of a capital gain as is a discount capital gain under Division 115 of the *Income Tax Assessment Act 1997*;

(bc) so much of the capital proceeds received or deemed to be received in relation to a CGT event happening to a CGT asset that are disregarded under Division 152 of the *Income Tax Assessment Act 1997*;

(bd) the total of any farm management deposit made during the year of income;

An experienced tax practitioner has sufficient skill and familiarity in dealing with structuring and related matters to provide child support minimisation/deferral planning services that would enable a parent with control of their income-earning activities:

- to use the available flexibilities to opt out of paying child support; and/or
- to exploit the mechanism used to assess the level of child support.

Vote-buying announcements that impact adversely on the operation of the CSAA definition of "adjusted taxable income" are rarely, if ever, called out by oppositions or the cross bench.

The author does not suggest that, by engaging in shameless vote-buying exercises, the politicians have intentionally destroyed the child support system for many children, only that the politicians have unwittingly castrated the CSAA definition of "adjusted taxable income".

Each of our politicians has an obligation to consider and raise amendments to the CSAA definition of "adjusted taxable income" so as to add back amounts of unintended deletions, including:

- a capital expenditure amount incurred by a primary producer (or an entity controlled by the producer) where that amount is expended on infrastructure, such as for a water facility,[12] fencing, shelterbelts, silos or fodder storage sheds and for some landcare operations, and is fully deductible in the year of expenditure; and
- where a trust (or other entity) is controlled[13] by P1 (or P2), the net investment loss in a trust controlled by P1 (or P2) by either a new provision or by extending and broadening the existing para (d) in the definition.

The author contends that an "adding back" approach would reflect drafting techniques currently employed within the structure of the CSAA definition of "adjusted taxable income" and the following ITAA97 provisions:

- s 35-10(2), where deductions are deferred; and
- Div 293, limiting the concessional treatment of contributions of superannuation for certain individuals.

Child support evasion has been a problem "forever" and is as unlikely to be legislated out of existence as tax evasion, but that doesn't excuse inaction.

To meet Australia's obligations under the Convention, our parliamentarians (and their public service advisers) must do more than just drafting and passing legislation without regard to its foreseeable but unforeseen impacts.[14]

Chris Wallis, CTA
Barrister and Accredited Mediator
Victorian Bar and South Australian Bar

References

1 S 4(1) CSAA.

2 The expression "flying monkeys" refers to people who carry out the work of a narcissist or an abusive person, and it comes from *The Wizard of Oz*, in which the Wicked Witch of the West puts flying monkeys under her spell. The flying monkeys include the infamous "Bob from the pub" or "Cathy at Centrelink".

3 Financial or economic abuse is a legally recognised form of domestic abuse. It often takes place in the context of intimate partner violence. It involves the control of a partner or an ex-partner's money, finances and things that money can buy, such as clothing, transport, food and a place to live.

4 See https://myprofile.tpb.gov.au/public-register/practitioner/?ran=65446005.

5 See www.tpb.gov.au/egregious-behaviour-results-5-year-ban.

6 See s 45 CSAA, and Australian Government, *Guides to social policy law, Child support guide*, version 4.83, released 12 August 2024, available at https://guides.dss.gov.au/child-support-guide/2/4/2.

7 A practitioner providing child support minimisation/deferral planning strategies is unlikely to be too fussed about compliance with the FBT rules relating to the twin cab ute.

8 A further issue is that, often, the equipment is acquired on hire purchase or with borrowed money and the ongoing deduction on interest reduces adjusted taxable income for the duration of the loan. On 9 May 2023, as part of the 2023–24 Budget, the government announced that it will temporarily increase the instant asset write-off threshold to $20,000 for an asset, from 1 July 2023 until 30 June 2024, for businesses with an aggregated turnover of less than $10m.

9 Australia became a signatory to the United Nations *Convention on the Rights of the Child* on 22 August 1990 and ratified the Convention on 17 December 1990, meaning that Australia has a duty to ensure that all children in Australia enjoy the rights set out in the Convention.

10 Article 27 of the Convention (available at www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child) states: "1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. 2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development. 3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing. 4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements."

11 See Subdiv 40-BB of the *Income Tax (Transitional Provisions) Act 1997* (Cth).

12 Section 995-1 ITAA97 defines "water facility" to have the meaning given in s 40-520 ITAA97.

13 Applying the test of control established in *Kennon v Spry* [2008] HCA 56.

14 The Parliamentary Education Office states: "The Constitution gives the Governor-General the power to: give Royal Assent to a bill – proposed law – passed by the Senate and House of Representatives. The Governor-General may recommend changes to a bill; however, no Governor-General has ever refused to give Royal Assent." See http://peo.gov.au.

Tax and estate planning in 2025: strategies and risks

by Matthew Burgess, CTA,
Director, View Legal

In light of ongoing changes to the taxation regime and the expanding wealth of Australia's ageing population, there has for many years been a growing need for appropriate tax structuring in all estate planning related areas. At its heart, therefore, "holistic" estate planning is predicated on a deep understanding of tax-related second order consequences. In recent years, holistic estate planning has seen a constant evolution in a number of areas, including trust vesting, trust splitting, testamentary trusts, excepted trust income and family trusts. Near the start of a new calendar year, it is timely to again explore a number of the most common strategies utilised in the holistic tax and estate planning arena over the last 12 months and to consider the risks associated with those strategies.

Introduction

Considering ongoing changes to the taxation regime and the expanding wealth of Australia's ageing population, there has for many years been a growing need for holistic estate planning to utilise appropriate tax structuring.

Around this time last year, an article in this journal[1] explored several key tax and estate planning related changes, including:

- lost trust deeds;
- loans, gifts and books of account;
- trusts and asset protection in family law situations; and
- a further key development in relation to superannuation and estate planning – in particular, in relation to binding nominations.

Twelve months on, this article examines the following tax structuring and holistic estate planning related developments sourced from 2024 (and particularly highlights some important hazards that advisers should actively seek to avoid) as the foundation for the year ahead in 2025, namely:

- (unnecessarily) complex testamentary trusts;
- gift and loan back strategies;
- estate equalisation and "hotchpot" arrangements; and
- superannuation and binding death benefit nominations (BDBNs).

(Unnecessarily) complex testamentary trusts

Implicit in many estate planning arrangements that derail is the fact that material costs are borne by the ultimate beneficiaries under the estate to achieve clarity about the legal position.

Arguably, most of these costs can be avoided where a willmaker proactively invests to implement a robust holistic estate plan, while taking equal care to avoid the pitfall of unnecessarily complex arrangements.

The decision in *Re OSD; SMA v FJX; OSD v ABJ*[2] starkly highlights this point.

In a relatively complex factual matrix, the key party had lost capacity and had not adequately implemented arrangements in relation to personally owned wealth that exceeded $14.5m.

In proceedings that evolved over a number of years, the decision involved:

- six barristers, including three King's Counsel; and
- four specialist law firms.

While some estate planning steps had been taken historically, the court commented that a number of the documents in place were less than ideal. For example:

- an enduring power of attorney which was, on any view, nonsensical and incomplete or, as the beneficiaries' counsel described it in their written submissions, "absurd".[3] For example, it referred to:
  - a will that did not exist at the time it was executed;
  - a trust, the terms of which also did not exist when the enduring power of attorney was signed; and
  - a discretion to arrange the transfer of assets to an inter vivos trust that was non-existent "in contemplation of my succession plan as a whole"[4] but did not identify nor refer to any document which might advise as to what the terms of such a plan were; and
- conversely, wills which were "well described by the various parties as both impenetrable and stiflingly complex".[5] For example:
  - the court confirmed that the wills were "bound up" in trusts and discretions, directions and wishes;
  - the circumstances in which one of the wills was made were held to be "somewhat concerning and slightly bizarre";[6]
  - the wills were unduly complex and, given the age and state of health of the willmaker at the time, there were serious questions about whether the willmaker knew

and approved of the contents of the wills and whether they understood the effect of the wills; and

- the likely inability to understand the wills was particularly stark given the extraordinarily broad discretions granted to the trustee under the terms of the wills which enabled them to effectively dispose of the willmaker's assets in a manner which could exclude her only surviving blood relatives, and generally on any terms which the trustee had a complete discretion to ascertain.

In effectively sidestepping the provisions of the final will, the court endorsed an approach that saw the attorneys permitted to:

- cause certain inter vivos trusts to be established; and
- transfer the willmaker's assets valued at about $13.4m to one of those trusts and to retain about $1m in her bank account.

While not mentioned in the decision, it may be that the wills here were similar to that in the case of *James v Douglas*.[7] In this case, the will was of great length and greater complexity — apparently incorporating many of the potential testamentary trusts mentioned in the above decision.

It appears that the approach of the lawyers drafting the wills in the abovementioned cases may have been similar to one that has been popular from time to time, and that is to allow for the potential establishment of a vast array of testamentary trusts, and then to permit the trustee of the will to decide which (if any) of the trusts will in fact be utilised. Versions of this precedent often have over 12 different potential forms of elective testamentary trusts set out under the will.

The number and description of testamentary trusts in this style of precedent is largely dependent on the approach of the lawyer who drafts the base precedent.

Examples of the types of testamentary trusts included in the one will document are as follows:[8]

- cascading testamentary trusts;
- beneficiary controlled testamentary trusts;
- capital reserved (or protected) testamentary trusts;
- asset specific testamentary trusts;
- accommodation fund testamentary trusts;
- special disability testamentary trusts;
- other protective testamentary trusts;
- all needs protective testamentary trusts;
- superannuation proceeds testamentary trusts;
- special needs testamentary trusts;
- contribution fund trusts;
- restricted life estate testamentary trusts;
- GST (or generation skipping) testamentary trusts;
- insurance proceeds testamentary trusts;
- parallel testamentary trusts;
- more restricted testamentary trusts;
- capital reserved non-fixed testamentary trusts;
- split fixed testamentary trusts;
- income reserved non-fixed testamentary trusts;
- optional testamentary trusts;
- perpetual charitable trusts; and
- life interest funds.

From an estate planning perspective, there is a threshold risk with this type of will-drafting approach that allowing the trustee to determine what, if any, trusts are utilised may be a delegation of the willmaker's power.

Ignoring this potential issue, there is also the risk that errors will be made in the drafting process that may remain undiscovered until it is too late.

As noted, the case of *James v Douglas*[9] is an example in this regard. The court confirmed its view that the will had:

> "47. … all the hallmarks of a document constructed from a precedent containing general and specific provisions which were to be adopted, completed and amended, depending on the circumstances of the particular [willmaker's] wishes. In such a case, when construing the will it is not obvious that if there was a simpler or clearer means of recording the [willmaker's] wishes, the draughtsperson necessarily would have adopted it."

Here, the court accepted that the lawyer who prepared the will did discuss with the willmaker, at least in outline, what he thought were the significant provisions of the draft will. However, the court also stated that, given the lengthy and complex nature of the document, the lawyer would not have given any explanation, or made any comment, about one of the main aspects of the will that was in contention, namely, who was to be the appointor of one of the trusts established.[10]

Furthermore, the court concluded that the willmaker would also not have been informed of the powers that were vested in the appointor. This meant that the purported exercise of powers by those who thought they were validly named as appointors required two court cases to resolve that they, in fact, were not the appointors of the relevant trust.

Gift and loan back strategies

The asset protection strategy often referred to as a "gift and loan back" arrangement (and various iterations of it) has arguably had a chequered history[11] and often seen branding developed to conveniently label the steps involved, for example:

- beta strategy (which was the subject of a failed patent application in the case of *Grant v Commissioner of Patents*[12]);
- legacy protection strategy;
- secured loan arrangement;
- synthetic transfer;

- capital protection strategy using a lineal descendent or bloodline trust; and
- 100% security strategy to protect assets from thieves, such as the tax man.[13]

One purported version of the "synthetic" wealth transfer approach has attracted particular attention in recent years (but for all the wrong reasons) and provides a "cautionary tale" for advisers in relation to a range of issues, including marketing strategies, effective legal drafting, and reliance on artificial intelligence.

Branded as the "Vestey Trust" or the "Master Wealth Control Package", the arrangement in question was promoted as part of a wider property and investment offering that promised advice on "how to locate and invest in undervalued property, undertaking property developments, locating undervalued businesses, renovating for profit, and how to secure and grow your wealth".[14]

In 2021, concerns about the approach were publicised on the television program *A current affair*.[15]

In April 2022, ASIC banned the individual promoter of the strategy (Dominique Grubisa[16]) for four years following findings that she claimed to hold Australian financial services and credit licences when she did not, and that she was not a fit and proper person to engage in financial services or credit activities.[17]

The AAT subsequently set aside the ban on the basis that, while it was satisfied that grounds existed to make the banning orders, it was not satisfied that the discretion should be exercised. In reaching this conclusion, the tribunal was clear in not excusing "the applicant's problematic behaviour that has been uncovered through ASIC's diligent investigations", rather that "the issues she presents are issues for a different decision-maker".[18]

In December 2022, a productised version of the arrangement gained the attention of the ATO, and it confirmed its view that, as a threshold issue, the arrangement promoted was unnecessary because the superannuation system already protects SMSF assets from creditors.[19] The ATO then went on to detail a range of tax and superannuation concerns with the solution.

In April 2024, the ACCC has successfully attacked all key aspects of the approaches of the DG Institute in the Federal Court decision of *Australian Competition and Consumer Commission v Master Wealth Control Pty Ltd*.[20]

A significant portion of the case was focused on the strategy that the ACCC summarised as follows (accepted as accurate by the court) and promoted as the "Real Estate Rescue" program (which generated circa $8.9m[21] in revenue over four years):

- identifying homeowners who may be in financial distress, including by monitoring court lists to identify possession, divorce or probate proceedings;
- contacting such homeowners with a view to reaching agreement for the program participant to purchase the homeowner's property below market value, or being authorised to sell the property and retain the proceeds above a certain amount; and
- the strategy was promoted as being one which would allow participants to acquire a property below market value and sell it for a higher amount, while allowing the homeowner to receive the benefit of part of the value of the equity held by the homeowner in the property, which the promotional materials indicated the homeowner would not otherwise receive in the event of a forced mortgagee sale.

The court concluded that the scheme was knowingly in contravention of Australian consumer laws and made representations which amounted to false and misleading conduct.

In relation to the tax-effective asset protection product prompted via the "Master Wealth Control" program (which generated circa $9.2m[22] in revenue over four years) of setting up a structure described by the DG Institute as an "impenetrable Vestey Trust" or "asset protection trust", the court similarly accepted the concession during the trial by the defendant that the obvious flaws in the solution meant that the representations promoting it were also false and misleading.

In particular, the court observed:

- while not raised by the ACCC, the strategy was noted as being wrongly attributed to the well-known Vestey family from the UK, who never entered into arrangements analogous to those promoted;
- a purported assignment made without consideration validly assigns any existing debts or other choses in action but is ineffective to assign any rights in relation to mere expectancies or possibilities of future entitlement;[23]
- the Vestey Trust scheme was summarised, at its most basic level, as follows:[24]
  - a discretionary trust would be created and controlled by the client;
  - all future income of the client was intended to be assigned to the trustee and paid into the trustee's bank account, although, as a matter of law, that was only valid to the extent of existing debts at the time the notice of assignment was given;
  - the client would then withdraw money from time to time from the trustee's bank account to meet personal expenses of the client, thereby borrowing money from the trustee free of interest and with no obligation of repayment for at least 50 years; and
  - that loan would be secured by the equitable mortgage and would also be the subject of a caveat on the title of any real property and could be the subject of registration in respect of personal property on the Personal Property Securities Register;
- there was an obvious flaw with the structure, stated to be designed to protect the client's property from creditors, in that in fact it only afforded protection to the extent of the amount of the secured loan by the trustee

to the client. In the early stages of the structure, the amount of the loan would be relatively small. That is, the amount of the loan would be limited by the amount of the existing debts assigned to the trustee and would be limited further by the amount of the withdrawals from the trustee's bank account to meet personal expenses of the client. Despite this fact, the program claimed to provide clients with complete and immediate protection from creditors to the extent of all their net worth;

- Grubisa demonstrated a lack of legal competence with the arrangements, including:[25]
  - the claim in promotional material that the trust deed contained a prohibition on the trustee borrowing (which did not in fact appear in the deed);
  - the failure to appreciate that the assignment would be effective only in relation to existing debts and not in relation to all future income; and
  - the infelicity of referring in a "declaration and acknowledgment" and elsewhere to a mortgage only over the client's "equity in the property";
- despite the above errors perhaps being able to be overlooked, the overriding obvious flaw (of most of the client's equity in their property not in fact being protected by the scheme) was held to be a "matter of commonsense which would be readily appreciated by anyone with elementary legal knowledge";
- in particular, the fact that the loan secured by the equitable mortgage would be most unlikely to reach the value of the client's assets for a very substantial period of time (if ever) was so obvious that it was held that Grubisa must have been aware of it when conceptualising, drafting and implementing the structure;
- while it was accepted that clients were encouraged to consult their accountants (an important part of the defence against liability), this aspect was held to be irrelevant to Grubisa's culpability. This was because accountants for clients were only provided a "briefing paper"[26] which made no reference to the loan by the trustee to the client or how it would arise over time, other than to state that "Available equity will effectively be mortgaged to the hilt to the Trust". A statement that was false, and reflected the obvious flaw in the structure, although that flaw would have only been apparent to an accountant if they had also been given the whole package of transaction documents and associated commentary (rather than merely the briefing paper);
- the promotional claim that the Vestey Trust approach had been approved by the decision in *Sharrment Pty Ltd v Official Trustee In Bankruptcy*[27] was also held to be false and misleading; and
- in particular, in the *Sharrment* decision, it was held that the disputed transactions were not shams but real transactions, and in order for the acts or documents to be shams, the parties must intend that the acts or documents are not to create the legal rights or obligations which they give the appearance of creating. There was no suggestion of any express arrangement or understanding that the transactions were not to take effect according to their terms, and there was a real debt created – attributes essentially missing from the Vestey Trust arrangements as documented. Further, the *Sharrment* case did not consider any of the types of key documents featured in the Vestey Trust arrangement (such as promissory notes, declaration and acknowledgments, notices of assignment or caveats).[28]

In the subsequent penalty decision,[29] the court imposed a range of sanctions including the following, although, strikingly, due to (an apparent) failure by the ACCC to consider who to seek penalty orders against, it would appear that less than $1.5m (and possibly less than $500,000) of the financial penalties will in fact be recovered, pending any successful actions by liquidators:

- $6m in fines payable to the Commonwealth;
- a five-year ban on making any representations in the supply or promotion of programs offered by the DG Institute;
- disqualifying Ms Grubisa from managing corporations for a period of five years;
- the organisation making an offer to redress each student who enrolled in the programs in the period April 2017 to November 2022 (estimated to be in the region of $14.7m);
- the organisation providing a refund (in an amount equal to the course registration fee paid by each student plus interest from the date the student paid the course registration fee to the date the refund is provided) to each student who had historically provided their bank account details; and
- the organisation widely publishing a notice substantially in the form directed by the court.[30]

> "… the only certainty for specialist advisers is that there will be no slowdown in changes …"

The notice that the court required is radically different to that proposed by Grubisa, which was held to be misleading and deceptive. Interestingly, part of the suggested approach by Grubisa contained (apparently due to an oversight) the wording "use British spelling please, ChatGPT".

In relation to the use of artificial intelligence by advisers, the court confirmed:

- the use of artificial intelligence was not something that should be regarded as a significant matter since the relevant resolution did not require the exercise of significant legal skills or judgment, and instead "appeared to be the kind of thing which artificial intelligence is capable of producing effectively";

- artificial intelligence does have a role to play in certain aspects of legal drafting; and
- the important aspect, in circumstances where artificial intelligence is used, is that any such draft is scrutinised and settled by a legal practitioner.

Estate equalisation and "hotchpot" arrangements

In a sentence, the objective of a "hotchpot"[31] clause is to equalise the ultimate entitlements of beneficiaries under a will, taking into account pre-death advances.

The term is said to be derived from the French word "hochepot", meaning "a dish shaken up". The analogy is that the approach operates by putting all of the property of the willmaker and all of the gifts and settlements made before death into one pot and then doling out the mixture in accordance with the formula set out in the will.

Traditionally, hotchpot provisions focused on loans made to beneficiaries prior to the death of a willmaker. However, in modern, holistic tax and estate planning, hotchpot provisions can mandate adjustments for a range of issues, including:

- gifts;
- the time value of money, that is, inflation (and deflation);
- the investment performance of different categories of assets (particularly where certain assets have been transferred to certain beneficiaries prior to death);
- assets that may have been received by beneficiaries from another estate, for example, from the spouse (including a former spouse) or parents of the willmaker;
- assets that do not strictly exist at the time of crafting the will (for example, life insurance); and
- tax attributes, particularly where certain assets have an embedded tax impost compared to those which may be tax-free (for example, superannuation benefits passing to a tax dependant, a property which meets the main residence definition, and assets that were acquired by the willmaker prior to the introduction of CGT).

Arguably, the threshold issue in relation to hotchpot clauses is the legal interpretation of the provisions under a will, and there are several hazards in this regard.

As explained in one of the leading decisions (*Re Tennant; Mortlock v Hawker*[32]), the main interpretation principles can be summarised as follows:

- when a disposition requires that a fund should be distributed equally among a class and then goes on to provide that those members of the class who have received advancements should bring them into hotchpot, the effect is to qualify the statement that the shares in the fund are to be equal;
- further, the will should direct a method of calculation, which may be expected to result in some other proportions;
- generally, the purpose of directing the hotchpot is to ensure that children obtain from their parent, by advancement and under the will, equal portions or equality of benefit;
- ultimately, however, any hotchpot clause operates according to its own terms; thus, if the language of the relevant hotchpot clause discloses that the willmaker intended that some advancements, but not others, are to be brought into account, the language and intention are to be given effect to; and
- this can mean, as one example, that a particular hotchpot clause may be crafted to require some, but not all, advances made during the willmaker's lifetime to be brought into account.

In another leading decision (*Prichard v Prichard*[33]), the following further principles were confirmed:

- the common law principle on a total intestacy that the deceased's children are obliged to bring substantial advancements made at any time into account when calculating their entitlement on the intestacy, does not apply directly to the construction of a hotchpot clause in a will;
- this means that, when applying the legal principles governing the construction of wills, a hotchpot clause must be construed according to its terms and considering the circumstances in which it was made;
- "advancement" has a particular meaning at law and usually denotes payments made by a parent, early in a child's life, to establish the child in life or to make provision for the child. This means that casual or small payments to a child are not considered to be "advances" in the legal sense of the word;[34] and
- thus, a willmaker may use the words "advance" and "advanced" in a manner that is not the same as the strict legal definition.

When applying the principles from *Prichard v Prichard*,[35] the court concluded that the willmaker sought to identify with particularity *some*, but not *all*, payments which were to be brought into hotchpot, despite the fact that there was no evidence that the payments were an "advancement" in the legal sense.

Indeed, the decision is an example of a further key risk in hotchpot situations, that is, practically, whether there is the evidential material available to allow the requested adjustments to be accurately calculated.

The relevant hotchpot clause in *Pritchard v Pritchard* was as follows:

> "22 … I DECLARE that every advance of money or property made by me as set out in the paper writing kept with this my Will and signed by me to any child of mine and every sum of money or property advanced by me to any child of mine shall be brought into hotchpot by such child upon the division of my residuary estate at the value at the time of such advance and be accounted for accordingly and shall be brought into account as

against all persons interested in such share (the hotchpot clause)."

Bound with the will was a typed list, on a separate page (the schedule), with the date, the name of each child, the amount advanced, and the signature of the willmaker.

A copy of the schedule bound with a copy of the will was found among the willmaker's papers. This copy had two further advances noted, added in handwriting by the willmaker.

None of the advances made after the execution of the will were noted on the schedule with the final signed will. Some, but not all, of the advances which were made after the execution of the will were noted on the amended copy of the schedule found with the willmaker's personal papers.

The court confirmed that, based on the factual matrix, there were six possible interpretations of the hotchpot clause, namely, that the amounts to be brought into hotchpot were those:

1. set out in the schedule of the signed will (and only those amounts);
2. set out in the schedule, together with the additional amounts added to the amended copy of the schedule by the deceased;
3. specified in the schedule and any additional amounts advanced by the deceased to a child after the date of the will, not limited to and not necessarily including the amounts specified in the amended copy of the schedule;
4. specified in the schedule, the additional amounts added to the amended copy of the schedule, and any other additional amounts advanced to a child after the date of the will, irrespective of whether they were specified in the amended copy of the schedule or not;
5. specified in the schedule to the will, the additional amounts added to the amended copy of the schedule, and any other additional amounts advanced to a child after the willmaker stopped keeping records of advances; or
6. specified in the schedule and any amount advanced to a child before or after the date of the will, irrespective of whether it was included in the schedule or the amended copy of the schedule.

In concluding that, based on the drafting of the clause and all available evidence, the correct approach was interpretation (2) (that is, the schedule in the final will, together with the additional amounts added to the amended copy of the schedule), the court confirmed:

- it is not for a court to rewrite a will to align with its view of a family's financial history;
- the clause here was ambiguous on its face because, on a plain reading, it described two groups of advances which were to be brought into hotchpot, but the manner in which the latter group was described appeared to include in that group all of the first group of advances;
- this uncertainty justified the court having regard to extrinsic evidence in construing the clause; and
- ultimately, the description of the second group of advances to be brought into hotchpot needed to be discarded for uncertainty.

Following on from above, the steps an executor must take to ensure that a hotchpot clause can be adhered to (managing these risks) may mean that a court application is required, specialist advice obtained, or written agreement documented between all beneficiaries.

At a minimum, however, an executor — and their advisers — should be satisfied of the accuracy of the factual matrix and the correct interpretation and calculation of the hotchpot clause based on consideration of the will and:

- financial records (including accounting statements) of the deceased;
- loan agreements (whether or not secured);
- deeds of gift;
- bank account records;
- any running ledgers maintained by the willmaker or trusted adviser (eg in handwriting, Excel or Word);
- written statements (including statutory declarations) by the willmaker, any beneficiary or trusted adviser; and
- the intended treatment of second order consequences, particularly taxation.[36]

In relation to calculating the consequences of a hotchpot clause, the accepted principles are explained in *Re Tennant; Mortlock v Hawker*[37] as follows:

If there is a distribution of corpus being adjusted, this is done by adding the aggregate amount of the advancements made by the willmaker to the amount of the corpus of the willmaker's estate and then dividing the total equally; this approach gives a prima facie share from which the amount advanced to each respective beneficiary must be deducted to obtain their distributable share in the estate; and alternatively, the same result can be achieved in another way. Namely, out of the willmaker's estate, each unadvanced beneficiary and each beneficiary who has been advanced in less degree than the beneficiary who has received the greatest advancement may be credited with amounts which will bring them all up to an equality — and then the remainder of the estate is divided equally.

When applying one of the above approaches, the following points are important:

- to ascertain the proportionate shares of corpus which, in any given case, an advanced and an unadvanced beneficiary are to take, it is necessary to express in money both the value of the respective advances and of the willmaker's residuary or other fund to which the hotchpot provision applies;
- usually the advancements are expressed in monetary terms, and if the hotchpot clause covers gifts of property in specie, often the will supplies the value or a means of fixing it; and

- in the absence of any other indication, there must be a valuation as at the date of the gift.

The necessity of reducing the residuary estate to monetary expression is a cause of potential difficulties and complexity.

The choice is between waiting for the actual realisation in money of all of the assets comprising the estate, or fixing the values by estimation as at some earlier point of time.

If the former course is adopted, the proportional or fractional shares in the residuary estate, a result of the operation of the provision for hotchpot (and the direction to divide equally between the beneficiaries), will not be ascertained until actual conversion into money is completed; a step often not required except for the purpose of final distribution.

In contrast, if the latter course is adopted, the fact that the value of property does not remain constant means that the proportional or fractional shares taken by the beneficiaries will vary according to the period chosen for fixing them by means of valuation.

Superannuation and BDBNs

As is the case in many areas of holistic estate planning, perhaps the only certainty for specialist advisers is that there will be no slowdown in changes in the superannuation rules, and therefore no slowdown in workflow.

Perhaps too will the litigation lawyers running matters disputing aspects of BDBNs become increasingly busy, further supporting a conclusion that, unlike the Benjamin Franklin reflection of death and taxes being the only two certainties, there is in fact a third certainty for holistic advisers (namely, superannuation-related advisory work) which may be equally perilous.

Historically, the decision in *Walter William Nespolon v Lindy van Camp*[38] provided a stark example of the above observations. In this case, a surviving spouse was alleged to have coerced her de facto less than 24 hours before he died to sign a BDBN in her favour.

One of the reasons the deceased was said to have been interested in a BDBN was that, after speaking with his accountant, he believed that there would be tax advantages achieved by signing a BDBN — despite the fact that, of itself, a BDBN has no impact on the tax outcome.

While the judgment did not resolve the dispute, the court was blunt in confirming that it would be wholly inappropriate for the trustee of the SMSF to pay the death benefit into court. That is, if the purported BDBN was ultimately held to be unenforceable or set aside, the trustee would be required to exercise its discretion and determine how to pay the death benefit. The trustee was not entitled to abrogate that responsibility by simply paying the death benefit into court.

In the subsequent decision of *van Camp v Bellahealth Pty Ltd*,[39] the court concluded that the BDBN was in fact valid and instructed the trustee to arrange payment of the death benefit of over $4.5m (including $3m of life insurance proceeds) to the surviving de facto spouse.

While, during the early stages of the proceedings, there were suggestions that the BDBN was invalid for a failure to comply with reg 6.17A of the *Superannuation Industry (Supervision) Regulations 1994* (Cth), the court was blunt in dismissing this suggestion, citing *Hill v Zuda Pty Ltd*[40] as authority for the fact that this regulation does not apply to SMSFs.[41]

Instead, the court had to determine whether the:

- member lacked capacity to make the BDBN; and
- the BDBN was liable to be set aside by reason of unconscionable conduct by the de facto.

In summary, the key elements of the factual matrix were as follows:

- the SMSF was a sole member fund;
- the member and his de facto shared two infant children together and had been in a relationship for around seven years;
- as part of the wider estate plan, the member had created a testamentary trust will, with flexibility for a special purpose "superannuation proceeds trust" to be established (ie a form of testamentary trust whereby the range of beneficiaries is limited to tax dependants to ensure that the concessional tax treatment otherwise afforded to death benefits paid directly to tax dependants could be accessed);
- the trustees of the testamentary trust appear to have been the de facto, the member's brother and the member's lawyer, acting by majority;
- a key driver for the structure of the will was the member's concerns that his de facto was not a good saver and that the assets should be protected for the long-term benefit of the children, particularly given the assumption that his de facto would re-partner;
- the accountant for the SMSF had advised that, unless the death benefit was paid to the de facto, there would be adverse tax outcomes; and
- the lawyer for the estate plan had flagged that, given the commercial objectives, it should still be possible to achieve most of the desired tax outcomes even if the benefits were paid to the legal personal representative and formed part of the estate.

In deciding that the member had sufficient capacity to validly make the BDBN, the court confirmed:

- unlike the member's will, the BDBN itself was not complex in this case; rather, it was a short document and straightforward in its terms;
- thus, the main consideration was simply whether the member had the capability of understanding that all of his member benefits would be paid directly to his de facto and would not be used by the executors in accordance with the terms of his will, which required only a general understanding and not an overly

complicated explanation in the circumstances of this case;

- this was particularly so, given the member was educated in business as well as medicine, a director of various companies and experienced in dealing with his financial affairs and businesses, and had received advice about the nature and effect of making a BDBN from his lawyer historically, and his accountant immediately before it was signed;
- the question of capacity was determined not by reference to what the member, in fact, understood but instead whether he would have had the capacity to understand if the matter had been explained to him;
- in all of the circumstances, the member was held to have either understood, or been capable of understanding, that his member benefits would not be available to his estate or to his executors to pay debts (in which case, tax would have likely been payable);
- the fact that the two doctors who witnessed the BDBN considered it was reasonable to do so, without doing a formal cognitive assessment, supported a conclusion that the member's mental functioning was not so obviously impacted by the medications being administered so as to raise real reservations or concerns about his capacity; and
- as the member's lawyer had experience in estate planning, her observations that, during a very short phone call with the member shortly before the BDBN was prepared, the member seemed "drugged up" were not critical, particularly given that:
  - the discussion was not an in-person meeting, where the court held that she could have more properly observed and tested the issues with him (although compare with *Drivas v Jakopovic*[42]);
  - the lawyer did not contemporaneously relay any concerns to the other partner working on the matter; and
  - nothing was raised by the lawyer about capacity issues in the cover email sending the BDBN for signing.

In deciding that the de facto had not acted unconscionably in relation to the BDBN, the court confirmed:

- the conclusion that the member did not lack mental capacity to make the BDBN did not mean automatically that he could not be in a special disadvantage, that is, disadvantage may be situational or relational, have been created or exacerbated by an absence of advice or explanation, and may coexist with a "full understanding" of the disputed transaction;[43]
- the fact that the de facto printed the BDBN without giving a copy of the lawyer's email of advice to the member or explaining the advice to him, was not due to some contrivance on her part or focus on her own material gain, and while this was not of itself determinative of the question of unconscionable conduct, it did point to an absence of a predatory state of mind and conscious victimisation or taking advantage;
- there was insufficient evidence to support a conclusion that the de facto actually knew, or ought to have known, of the existence and effect of a special disadvantage being endured by the member, that is, she did not know or suspect that the member was confused, could not recall things, or was in a very vulnerable state in relation to decision-making concerning his financial affairs; and
- thus, the BDBN was not signed as a result of the de facto taking unconscionable advantage of any known special disadvantage of the member.

Conclusion

In modern estate planning, significant complexities from the interaction between the legislation relating to tax, trusts, bankruptcy, family law and superannuation have been omnipresent. To coin an increasingly prevalent estate planning heuristic, "estate planning always needs to be more than a will".[44]

As has been the case in each of the last few years, there are fundamental reasons why specialist tax and structuring advice will remain critical components of any holistic estate planning exercise – with any will merely one part of a much wider tapestry.

Matthew Burgess, CTA
Director
View Legal

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1 M Burgess, "Tax and estate planning in 2024: what's 'hot' right now?", (2024) 58(6) *Taxation in Australia* 325.

2 [2023] QSC 264.

3 [2023] QSC 264 at [21].

4 [2023] QSC 264 at [21].

5 [2023] QSC 264 at [22].

6 [2023] QSC 264 at [26].

7 [2016] NSWCA 178.

8 While the author is unaware of a will containing all 22 forms of testamentary trust, many templates contain at least 12, although a material question might be whether some purported trusts have any substantive difference, other than the "branding".

9 [2016] NSWCA 178.

10 [2016] NSWCA 178 at [48].

11 See, for example, the decision in *Re Permewan No. 2* [2022] QSC 114, as explored in M Burgess, "Tax and estate planning in 2022: the year ahead", (2022) 56(7) *Taxation in Australia* 423.

12 [2006] FCAFC 120.

13 See Ed Burton and his "Diamond Inner Circle Coaching and Mastermind Alliance" as part of the "Vital Link Financial Education" Group circa 2004 (please contact the author if further information is required in relation to this material).

14 Strictly, the scheme was offered by the "DG Institute"; however, this entity was founded by solicitor and barrister Dominique Grubisa.

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21 [2024] FCA 344 at [3(b)].

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25 [2024] FCA 344 at [88].

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27 [1988] FCA 266.

28 [2024] FCA 344 at [100].

29 *Australian Competition and Consumer Commission v Master Wealth Control Pty Ltd (Penalty)* [2024] FCA 795.

30 [2024] FCA 795 (see Sch 1).

31 Sometimes, erroneously, referred to as “hotchpotch.”

32 [1942] HCA 3.

33 [2015] WASC 170.

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37 [1942] HCA 3.

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41 The implications of this decision were also explored in detail in M Burgess, “Tax and estate planning in 2022: the year ahead”, (2022) 56(7) *Taxation in Australia* 423.

42 [2019] NSWCA 182.

43 See *Mentink v Olsen* [2020] NSWCA 182, citing *Bridgewater v Leahy* [1998] HCA 66.

44 Arguably attributed to most specialist, holistically aware, advisers.

A Matter of Trusts

by Phil Broderick, CTA, and
Terence Wong, Sladen Legal

Trusts and NALI/NALE: part 2

In part 2 of this article, we consider the NALI/NALE rules in the context of multi-entity structures.

Disproportionality in the tax liability incurred for non-arm's length income (NALI) is sufficient disincentive for avoiding any NALI risk altogether, NALI being one of the most potent tax penalties available to the ATO.

Part two of this article considers the potential for triggering NALI, or breaching the superannuation laws, via multiple entity structures such as an SMSF investment in a unit trust.

First, we examine whether a holistic or a dissection approach should be taken. Then we examine the ATO's views on this and case law that has examined SMSF investments in structures.

Examining arm's length dealings

A critical element that can arise when considering the tax laws is whether you need to consider the arm's length dealing test from the perspective of the totality of the arrangement or if you can instead examine whether just one element of the arrangement was a non-arm's length dealing.

In the 2010 decision of *FCT v AXA Asia Pacific Holdings Ltd*[1] (*AXA*), the court looked at the meaning of the expression "did not deal with each other at arm's length" in the context of the CGT roll-over relief provisions in Subdiv 124-M of the *Income Tax Assessment Act 1997* (Cth) (ITAA97). Relevantly, the court noted:

> "119. …we consider there may be real risks in approaching the question of whether two parties are dealing with each other at arm's length by '*dissecting' the dealing into segments or aspects* and submitting that the parties 'colluded' or 'yielded judgment' one to the other on some aspect of the dealing in the manner contended for by the Commissioner. As the facts of this case demonstrate, one party can frame an offer in terms that it knows will attract the other party. There may be little debate between them about the terms (or some of the terms) yet the parties will still have dealt with each other at arm's length. If, however, the dealings are dissected, it may be thought to lead to the result that if A offers B a term that it knows will attract B, A has somehow yielded its freedom of bargaining power to B when, in fact, the contrary is the position – A has exercised its freedom of bargaining power with a view to attracting acceptance by B. In the end, what must be borne steadily in mind is that *any assessment of whether parties were dealing at arm's length is a question of fact and that question of fact is resolved by 'an assessment [of] whether in respect of that dealing they dealt with each other as arm's length parties would normally do, so that the outcome of their dealing is a matter of real bargaining'*: [*Trustee for the Estate of the late AW Furse No. 5 Will Trust v FCT* (1990)] 21 ATR 1123 at 1132 per Hill J. *'Dissecting' the dealing into segments may not assist that enquiry*. But that is not to deny, however, the possibility that there may be one or more aspects of parties' dealings which, on assessment, can be seen not to have been a dealing where the parties dealt with each other as arm's length parties would normally do: see, by way of example, [*Collis v FCT* (1996)] 33 ATR 438." (emphasis added)

Therefore, the decision in *AXA* suggests that an approach of "dissecting" the dealings between the related parties into segments to each be separately scrutinised for NALI is incorrect.

Instead, the arrangement should be looked at holistically in its entirety to determine whether it is on arm's length terms. The dissection approach is not supported by the case law or the wording of s 295-550(1) ITAA97.

The ATO's views on SMSF trust investment and NALI/NALE

Example from TA 2023/2

The ATO's TA 2023/2 is based on a hypothetical example involving two SMSFs that enter into a property development agreement to establish two new interposed companies or special purpose vehicles (SPVs). The first is owned 50% by each SMSF (XYZ Interposed Co) and the second (New Interposed Co) is owned 100% by XYZ Interposed Co.

In this example, New Interposed Co would engage in non-arm's length transactions with the civil works and project management companies of the owners of the two SMSFs to generate a higher than normal profit on the property development project, driven in part through lower than normal fees charged by the civil works and project management companies.

As stated in TA 2023/2, the ATO's concerns about the use of multi-entity structures are with regard to the separation of non-arm's length dealings away from the direct investment of the SMSF:

> "2. The non-arm's length arrangements have the effect of shifting what would otherwise be the profits of the related entities (taxed at the corporate rate, for example) to the SMSFs, being concessionally taxed entities. If the SPV is a company, the SMSFs may also receive tax offset refunds in relation to the dividends received.
>
> …
>
> 18. A view has been expressed that as long as the SMSF is not directly involved in any non-arm's length dealing,

the NALI provisions cannot apply. These views are not correct and have been addressed judicially."

Example from SMSFRB 2020/1

In SMSFRB 2020/1, the ATO gives an example of where NALI may arise in a property development context:

"66. John and Vanessa are unrelated individuals who come together to enter into a property development venture. John is the sole member of the J SMSF and Vanessa is the sole member of the v. SMSF. John and Vanessa incorporate a company, JV Co, to conduct the property development activities. J SMSF and v. SMSF each acquire 200,000 shares in JV Co at $1 per share.

67. JV Co uses the $400,000 invested to acquire vacant land. It then borrows $4 million from an unrelated bank. The bank will not lend this amount without additional security, and John and Vanessa need to provide personal guarantees and assurances, taking on the full financial and commercial risk of the development. JV Co also borrows a further $3 million from related parties for additional working capital.

68. After two years of development JV Co realises a profit and pays tax. JV Co distributes its profits as fully franked dividends to J SMSF and v. SMSF, funding these distributions by taking further loans from related parties. As the SMSFs are fully in retirement phase, they do not pay tax on these dividends and receive a substantial refund of franking credits.

69. Although the documented arrangements on face value appear to be at arm's length, when viewed holistically it is clear that these dividends are not consistent with an arm's length dealing. An unrelated SMSF would not have been able to access these dividends by investing in JV Co for the same value as the J SMSF and v. SMSF, (as) the risk was born by John and Vanessa personally. It is also unlikely that unrelated lenders would be willing to lend to JV Co for additional working capital and to fund dividends, which would prevent JV Co from realising its profit and distributing to the SMSFs.

70. As such, the dividends from JV Co may be NALI for the two SMSFs. Consideration may also be given to whether the arrangement is a scheme to which Part IVA of the ITAA 1936 applies."

The ATO finds that NALI is triggered here because members of each SMSF provide personal guarantees to the borrowing undertaken by the related company. This seems to be particularly based on the proposition that a new incoming SMSF would not have received the same valued investment due to the personal guarantees.

With respect, we question this view for a number of reasons:

- personal guarantees are an arm's length dealing that are required in almost all borrowing arrangements;
- the personal guarantees are likely to have been given by directors of the company in that role (not as representatives of the shareholders);
- it is likely that an incoming SMSF would likewise have its members provide a personal guarantee if the member became a director of the company; and
- it is common, and generally considered arm's length, for some directors/members to provide guarantees and for others to not provide guarantees.

This example also highlights that:

- in the ATO's view, even where completely unrelated lenders are involved in funding the project, NALI may still arise;
- the ATO will examine both the specific transactions as well as the arrangement overall when assessing for NALI (although note the counter view above); and
- related party loans would preferably be benchmarked to arm's length terms and documentary evidence of that benchmarking be sought and retained.

Case law on superannuation and multiple entity structures

Allen's Asphalt: NALI in a multiple entity structure

The Full Federal Court decision in *Allen (Trustee), in the matter of Allen's Asphalt Staff Superannuation Fund v FCT*[2] was an early example of NALI in a multiple entity structure. There, special income (ie NALI) was found to be triggered as the SMSF, indirectly, received a discretionary distribution of capital gains from a hybrid trust.

While this result is not controversial today, it clarified some uncertainty at the time, including whether special income/NALI captured statutory income such as capital gains.

Montgomery Wools: indirect superannuation compliance breaches

While not a NALI case, in *Montgomery Wools Pty Ltd as trustee for Montgomery Wools Pty Ltd Super Fund and FCT*[3] (*Montgomery Wools*), the Administrative Appeals Tribunal found that the trustee of the SMSF that held 100% of the units in a unit trust breached the sole purpose test under s 62 of the *Superannuation Industry (Supervision) Act 1993* (Cth) by effectively acquiescing to a charge being granted over the unit trust's asset to the ultimate detriment of the SMSF.

The decision in *Montgomery Wools* therefore supports the position that an SMSF trustee that invests in an entity, that itself proceeds to deal in a way that is not arm's length, can cause the SMSF to effectively breach the superannuation laws.

BPFN: NALI not triggered on a multiple entity structure

The recent decision of *BPFN and FCT*[4] is an example where NALI was not triggered on a multiple entity structure.

Here, the SMSF was the sole unit holder in a related unit trust (JJUT). JJUT then lent funds to a related company (ABC). ABC in turn lent funds to a related discretionary trust (DEF). The controller of the SMSF was the controller of the corporate trustee of DEF. DEF then lent the funds to unrelated third parties for a market rate return. At all times, the SMSF's interest in JJUT was a fixed entitlement.[5] The lending from JJUT to ABC to DEF is referred to as the "lending structure".[6]

The ATO sought to apply the fixed trust entitlement NALI provisions under s 295-550(5) ITAA97[7] (as the SMSF had a fixed entitlement in JJUT). The SMSF therefore had to establish that either the dealings were on an arm's length basis and/or that the income derived by the SMSF was not more than it should have been had the dealings been on an arm's length basis.

In relation to the first question, the AAT found, due to the highly related structure between the SMSF, JJUT, ABC and DEF, and the lack of real bargaining between the parties, that they were "plainly" not dealing at arm's length.[8]

In relation to the second question, the Commissioner did not focus on JJUT or the income derived by DEF from the unrelated borrowers. Rather, it argued that ABC's fees were "unsustainably low".

The taxpayers argued, with the support of two expert witnesses who were lawyers with experience in private lending, that it was typical to have on-lending arrangements on such terms and that the interposed entities (DEF and ABC) could be used to share the risk and that the rewards here for those intermediaries were "within the reasonable bounds acceptable within the commercial market".

The ATO argued, with support from a finance valuer expert witness, that the lack of margin on the interest rate paid to ABC and JJUT was not at arm's length. Likewise, it argued that ABC's fees were "unsustainably low" such that BPFN earned more than it would have if the parties were dealing at arm's length. Ultimately, the AAT did not accept this as evidence as to what occurs in relation to a private lending arrangement.

The AAT accepted the taxpayer's arguments, and evidence, that "the scheme established under the private lending facility did not differ from that which might be expected to have operated between independent parties dealing independently with one another in the private lending market at the time".[9] As such, the AAT found that NALI was not triggered.

This is an important, and sensible, decision in relation to the application of the NALI rules and supports the position that arrangements can be commercial (ie an arm's length dealing), even in the absence of benchmarking and the strict evidence requirement position pushed by the ATO.

BPFN decision impact statement

Since the *BPFN* decision, the ATO has issued a decision impact statement.[10] The ATO confirms that it will not appeal the *BPFN* decision.

In the decision impact statement, the ATO tries to read down the adverse finding (that the superannuation fund did not derive more income than an arm's length arrangement). In particular, the ATO notes:

> "While noting the Tribunal's conclusion at [95], that JJUT (and presumably BPFN as sole unit holder) did not derive more income under this particular scheme based on the evidential findings made by the Tribunal, we would question whether this decision can be extrapolated to arrangements involving private lending arrangements more broadly.
>
> When considering the application of subsections 295-550(1) or (5) to a scheme involving private lending arrangements, it is necessary in each case to consider whether the terms, rates of return and other remuneration of the parties dealing with each other in relation to each step of the scheme are consistent with that which arm's length parties bargaining in their own self-interest would expect."

So where does this leave us? Well, we know the ATO's view – benchmarking evidence is required for the arrangement. While *BPFN* has shown that benchmarking is not strictly required, expert evidence as to the commerciality of the arrangement will most likely be required if the matter ends up in a tribunal or court.

Conclusion

As this article shows, NALI and the superannuation laws need to be considered when SMSFs invest in a unit trust. This includes not only the actions of the SMSF, but also those of the unit trust and other related entities that deal with the unit trust (including evidence that arrangements are on an arm's length basis at all levels).

The *BPFN* decision supports a more "old school" view that arrangements between related parties should be considered holistically in relation to NALI, which is contrary to the more aggressive ATO views as outlined in various publications, including TA 2023/2 and SMSFRB 2020/1.

Phil Broderick, CTA
Principal
Sladen Legal

Terence Wong
Senior Associate
Sladen Legal

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2 [2011] FCAFC 118.
3 [2012] AATA 61.
4 [2023] AATA 2330.
5 [2023] AATA 2330 at [16].
6 [2023] AATA 2330 at [26].
7 [2023] AATA 2330 at [46].
8 [2023] AATA 2330 at [55].
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10 Decision impact statement, *BPFN and FCT*, 10 April 2024.

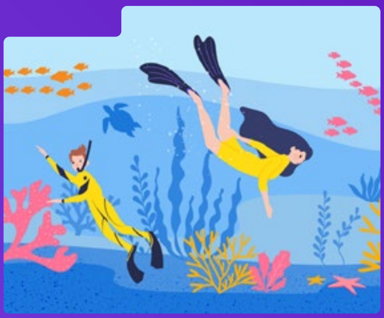
Events Calendar

Upcoming month

NOVEMBER
13–15
Wed–Fri

QLD

Noosa Tax Convention



13 CPD hours

NOVEMBER
19–20
Tue–Wed

Online

Property Intensive

8 CPD hours

NOVEMBER
21–22
Thu–Fri

WA

National Resources Tax Conference

10 CPD hours

NOVEMBER
26–27
Tue–Wed

QLD

Next Generation Tax Convention

8 CPD hours

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National Office

CEO: Scott Treatt, CTA

Level 21, 60 Margaret Street
Sydney, NSW 2000

T 1300 829 338
E tti@taxinstitute.com.au

State Offices

New South Wales and ACT
Chair: Alison Stevenson, CTA
Vice Chair: Hannah Soh, CTA

Level 21, 60 Margaret Street
Sydney, NSW 2000

T 02 8223 0000
E nsw@taxinstitute.com.au

Victoria
Chair: Dioni Perera, FTI
Vice Chair: Frank Hinoporos, CTA

Level 3, 530 Collins Street
Melbourne, VIC 3000

T 03 9603 2000
E vic@taxinstitute.com.au

Queensland
Chair: Kim Reynolds, CTA
Vice Chair: John Middleton, CTA

310 Edward Street
Brisbane, QLD 4000

T 07 3225 5200
E qld@taxinstitute.com.au

Western Australia
Chair: Ross Forrester, CTA
Vice Chair: Billy-Jo Famlonga, FTI

152 St Georges Terrace
Perth, WA 6000

T 08 6165 6600
E wa@taxinstitute.com.au

South Australia and Northern Territory
Chair: Nicole Peterson, CTA
Vice Chair: George Hodson, CTA

75–77 Dale Street
Port Adelaide, SA 5015

T 1300 829 338
E sa@taxinstitute.com.au

Tasmania
Chair: Simon Clark, CTA
Vice Chair: Ron Jorgensen, CTA

E tas@taxinstitute.com.au

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Level 21, 60 Margaret Street
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Content Marketing Executive
Chantel Fekete

Editorial Adviser
Professor Bob Deutsch, CTA

Managing Editor
Deborah Powell

Graphic Designers
Mei Lam, Claudio Palma and Jack Miller

Typesetter
Midland Typesetters, Australia

Advertising
Business Relationship Manager
Paul Camus 02 8223 0003

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