Volume 61(1)
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The Tax Institute

Taxation *in* Australia

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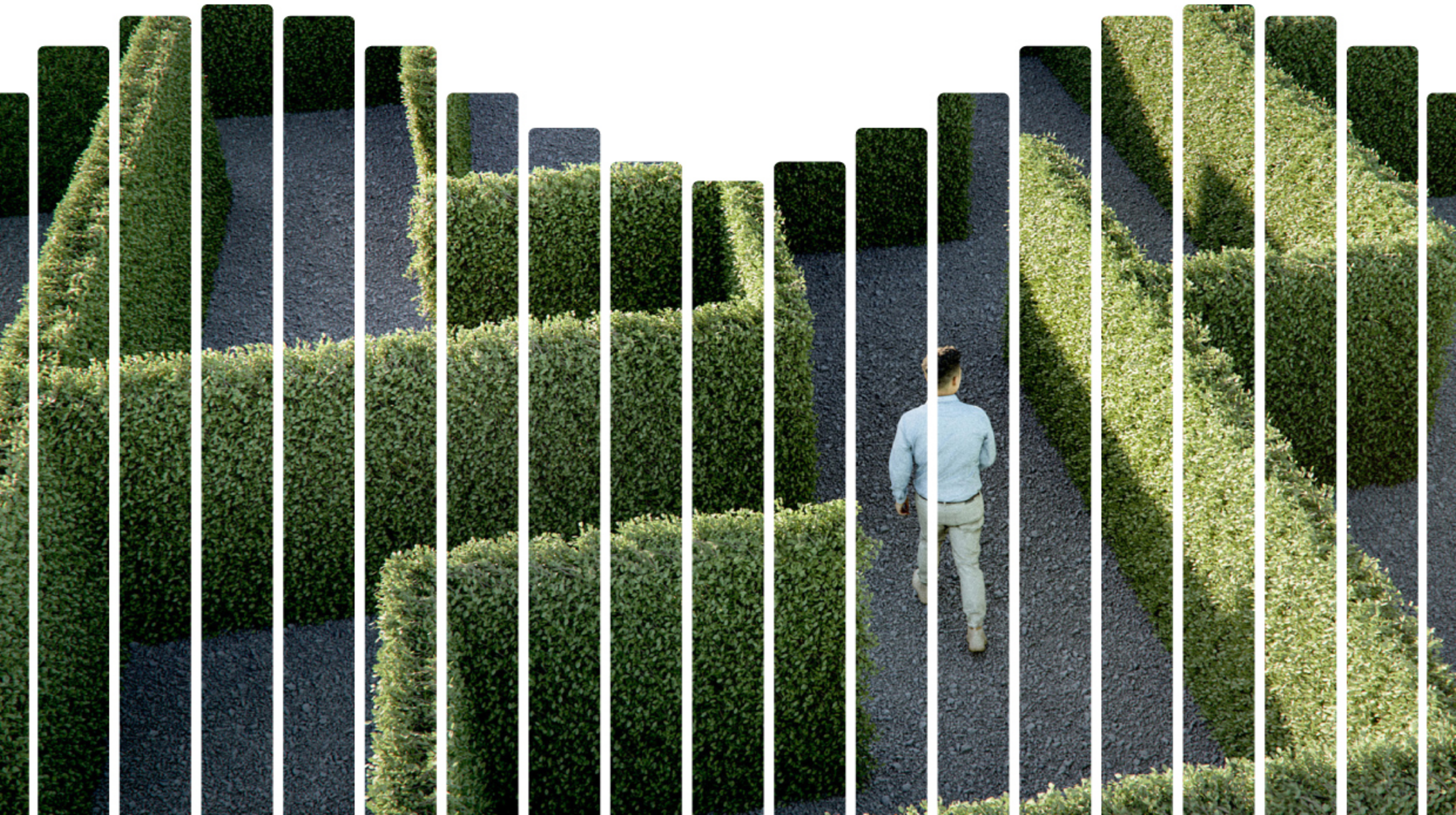

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We welcome original contributions that are of interest to tax professionals, lawyers, academics and students.

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Tax News – at a glance

by TaxCounsel Pty Ltd

June – what happened in tax?

The following points highlight important federal tax developments that occurred during June 2026. A selection of the developments is considered in more detail in the "Tax News – the details" column on page 7 (at the item number indicated).

Budget Bills introduced

On 28 May 2026, the government introduced amending legislation into parliament that will give effect to a number of the tax measures announced in the 2026–27 Budget. See item 1.

Tax and corporate whistleblowing: consultation

On 2 June 2026, the Assistant Treasurer announced that the government had opened consultation on a review of tax and corporate whistleblowing laws in Australia to ensure that they are working to effectively protect whistleblowers. See item 2.

GST: cross-border supplies to an Australian consumer

The Commissioner has released a draft GST ruling which explains when supplies of things other than goods or real property (such as services, digital products or rights) are made to Australian consumers and, therefore, connected with the indirect tax zone (Australia) under s 9-25(5)(d) of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GSTR 2026/D1). See item 3.

Car thresholds from 1 July

The Commissioner has released the car thresholds that are to apply for the 2026–27 income year. See item 4.

When does an ancillary fund "provide" a "benefit"?

The Commissioner has released a taxation determination in relation to ancillary funds (TD 2026/3). See item 5.

Car expenses: cents per kilometre rate

The Commissioner has released a draft legislative instrument that, when made, will set the rate at which work-related car expense deductions may be claimed in the 2026–27 income year when using the cents per kilometre method (LI 2026/D12). See item 6.

Family trust election made?

In a recent decision, the Federal Court (Hill J) held, contrary to the submissions of the taxpayers, that the taxpayers had not established that family trust elections and interposed entity elections that were referred to in various trust tax returns had not been made, and that the taxpayers were liable to family trust distribution tax as a result of trust distributions that were made outside the family group (*Cameron v FCT* [2026] FCA 609).**See item 7.**

Default assessments reinstated

In a joint judgment, the Full Federal Court (Charlesworth, Goodman and Horan JJ) has allowed an appeal by the Commissioner from a decision of Logan J that had set aside default assessments totalling approximately $30 million that were issued by the Commissioner to an Australian resident individual taxpayer (a Mr Cheung) for the 11 income years 2005 to 2015 (inclusive) (*FCT v Cheung* [2026] FCAFC 75).**See item 8.**

FBT: car parking issues

A taxpayer is seeking special leave to appeal to the High Court from the recent decision of the Full Federal Court that a shopping centre (the Grand Central Shopping Centre) car parking facility was a "commercial parking station" for the purposes of the *Fringe Benefits Tax Assessment Act 1986* (Cth) (*FCT v Toowoomba Regional Council* [2026] FCAFC 50).

Genuine redundancy

The Commissioner has released a decision impact statement in relation to the decision of the Full Federal Court in *FCT v Baya Casal* [2026] FCAFC 11 which considered whether the position of a dismissed employee had become genuinely redundant for the purposes of s 83-175(1) of the *Income Tax Assessment Act 1997* (Cth).

Morton case

The Commissioner has released a decision impact statement in relation to the decision of the Full Federal Court in *FCT v Morton* [2026] FCAFC 31 that a taxpayer did not embark on a business of developing land and did not venture the land into a profit-making scheme.

High Court: Div 7A

In a decision handed down on 10 June 2026, the High Court, by a 5:2 majority, dismissed the Commissioner's appeal from a decision of the Full Federal Court relating to the operation of Div 7A of the *Income Tax Assessment Act 1936* (Cth) (*FCT v Bendel* [2026] HCA 18). The decision of the High Court is discussed in the Tax Tips column of this issue of the journal (at page 12).

President's Report

by Tim Sandow, CTA

New measures this 1 July

President Tim Sandow discusses our advocacy concerning some key new tax measures.

With the end of another financial year, tax professionals everywhere are very busy — for us, the real work has only just begun. This year, there are also a number of new measures that have come into effect as of 1 July that we need to be aware of and guide clients through. These include (but are not limited to):

Payday Super

Employers will be required to pay employees' superannuation guarantee contributions at the same time they pay their salary and wages, rather than on a quarterly basis. In a survey of Institute members conducted in March 2026, 44% of respondents said that their clients had not yet begun planning for the transition to Payday Super. Further, 40% said that their clients likely needed three to six months more to prepare for the changes, while 23% estimated more than six months would be needed.

Given this, the Institute has advocated on this issue, including by calling for an extension of the transitional compliance period and providing clearer guidance on key concepts such as “reasonably practicable” and voluntary disclosure statements. The measure, however, will go forward as planned. I hope you are all prepared – and remember to stay connected to the Institute, as we will continue to advocate on your behalf.

Division 296 superannuation tax

Another measure that the Institute has advocated on extensively, Div 296 introduces an additional 15% tax on earnings on superannuation balances above $3 million and a further 10% tax on earnings on balances above $10 million and takes effect from 1 July 2026. The rework of the initially proposed legislation to remove the tax on unrealised gains and introduce threshold indexation was welcome, although the rushed consultation process is a concern, not just from the perspective of good policy design, but also from an ethical and due diligence standpoint.

In the absence of appropriate consultation, we have noted our members’ ongoing concerns, and recommended a post-implementation review after 12 and 24 months of its operation to verify whether the law is operating as intended.

High Court decision in FCT v Bendel

On 10 June 2026, the High Court ruled in favour of the taxpayer, finding that a trust's unpaid present entitlement to a company is not treated as a "loan" and potentially subject to tax as a deemed dividend under Div 7A. While not a new measure, this decision goes against the ATO's long-held stance on the matter and has significant implications for tax professionals working in this area. Our recent member webinar covered the outcome in-depth.

And while this brings some certainty to the matter, we expect that statutory revision of Div 7A may now be forthcoming. So, stay tuned, as our team will be engaging members for their feedback on any further movement in this space.

Proposed $1,000 standard deduction

Applicable for the financial year starting 1 July 2026, this draft measure means that tax practitioners will need to work with clients to determine if the standard deduction is appropriate, or if they are better served tracking and claiming their actual deductible expenses. Now is a good time to remind clients that if the latter is the case, they need to maintain expense records as usual.

While these measures may be yet more work to tackle for tax professionals in the thick of client advice, they are also changes to our tax system that our members have strong views on. Each week, we publish our Advocacy Tracker in the *TaxVine* newsletter — a record of the issues that we are currently drafting submissions or otherwise consulting on. We welcome member views on these issues, and I encourage you to write to the team with your ideas and concerns.

We are an Institute powered by and for members and we are dedicated to making our members' voices heard.

CEO's Report

by Scott Treatt, CTA

Powered by people

CEO Scott Treatt discusses The Tax Summit 2026, coming up this September.

In just two short months, the tax profession's best and brightest will be coming together in Sydney for our biggest event of the year: The Tax Summit.

I know our members need no introduction to The Tax Summit — it is not just our biggest event, but the one offering the most comprehensive technical program, the best networking, and the most exciting conference experience of the year. This year, the theme for The Tax Summit is "Powered by People".

At The Tax Institute, we are passionate advocates for bettering our tax system. We consult and advise on policy matters in a wide array of forums, with government, regulators and thinktanks. We speak publicly about the impact of legislative change and the dire need for reform of our tax system. We are ever aware of the tax system's role in the big picture: it underpins our economy and is one of the key levers we have at our disposal to influence the direction our nation takes economically and socially.

A strong, sustainable and modern tax system is a foundational pillar of a strong, sustainable and modern economy. So how does a system like that get built, be maintained and function day-to-day?

People. Our tax system is only as good as the people who power it — the accountants, lawyers, academics, regulators, and all other professionals who work in tax. Our members. So, this year at the Summit, we focus on what we feel is and will always be true: that the tax system is powered by the tax profession, by human intelligence, by people.

Some are predicting that evolving technology and, in particular, the rise of AI spells the end of dependence on people to fuel various industries, from manufacturing to tech, entertainment to tax. Others are waiting for the AI bubble to burst, while some are working to position themselves as frontrunners in a new, tech-driven future.

This brave new frontier is one we will actively discuss and examine at The Tax Summit this year. With a dedicated AI stream looking at how AI intersects with ethics, decision-making and regulations in tax, we're exploring how people will work with AI and shape its role in tax — not the other way around.

Also this year, the Tax Summit will once again play host to our Community Achievement Awards. These awards recognise those among us who best exemplify the spirit of community, collaboration and loyalty — the spirit of membership with the Institute. This is a wonderful opportunity to recognise your fellow members for their efforts and I hope to see you there.

I encourage you to join us at The Tax Summit, not only for the thought-provoking sessions, the energising atmosphere and the worthwhile networking, but also to take a moment out of your schedule to reflect and celebrate on what it means to be a tax professional.

Personally, I am looking forward to seeing our members in person and having the opportunity to speak with you all. It's invaluable to understand the member experience straight from the horse's mouth, so please don't hesitate to say hello at the Summit.

We look forward to celebrating all of you.

Associate's Report

by Sumitha Krishnan, FTI

Bracket creep: the case for structural reform

We consider Australia's reliance on personal income tax and whether the Federal Budget 2026–27 measures address the underlying structural issue of bracket creep.

Introduction

Personal income tax is the single largest source of Commonwealth revenue. In 2021–22, it made up 50.3% of total tax revenue, rising to 51.6% in 2022–23. When combined with corporate tax, income taxes account for around 75.8% of total revenue. The Tax Institute's Case for Change reform paper identifies an overreliance on personal income tax, noting that it has consistently accounted for approximately half of total revenue since the 1970s.

The 2026–27 Federal Budget announced three personal income tax measures: a reduction in the second income tax bracket rate; a new working Australians tax offset (WATO); and a $1,000 instant deduction for work-related expenses. These measures provide targeted cost-of-living relief. This article considers whether they address bracket creep and what further reform may be needed.

The 2026–27 Federal Budget measures

The rate cut for the second income tax bracket ($18,201 to $45,000) will reduce from 16% to 15% from 1 July 2026, and to 14% from 1 July 2027. These legislated changes, enacted under the *Treasury Laws Amendment (More Cost of Living Relief) Act 2025*, reduce the tax burden on lower and middle-income earners.

The WATO provides a permanent annual tax offset of up to $250 starting from 1 July 2027. It is projected to increase the effective tax-free threshold for wage and business income, lifting it to around $19,985 (or up to $24,985 when combined with existing offsets).

The $1,000 instant tax deduction allows workers to claim a flat deduction from 1 July 2026 without needing to itemise and claim work-related expenses if claiming less than $1,000. This measure aims to reduce workers' compliance costs for those with work-related expenses of less than $1,000, while also delivering additional cost-of-living relief.

Taken together, these measures represent a targeted response to the pressure on household incomes. They also reflect an attempt to simplify compliance for some taxpayers, particularly through the $1,000 instant deduction.

Bracket creep and its effects

Bracket creep occurs when inflation and cost-of-living pay rises push workers into higher tax brackets, even though their real purchasing power has not increased. The income thresholds that determine which tax rate applies remain fixed. As a result, workers' nominal income increases, but their real purchasing power does not improve to the same extent. The tax system does not distinguish between a real increase in income and a nominal one. Both are taxed in the same way.

The conservative example in Table 1 shows how this affects a worker earning $100,000 (close to the Australian Bureau of Statistics (ABS) average full-time wage) in 2024–25. Wage growth is assumed at 3.8% based on recent ABS data, rather than the 3.5% projected in the Federal Budget 2026–27 forward estimates.

Assumptions: starting salary $100,000; wage growth 3.8% per annum; Medicare levy 2% (private health insurance held); super at 12%; WATO $250 from 2027–28; $1,000 instant deduction excluded; no HECS/HELP debt; no further threshold changes after 2027–28.

The results in Table 1 reflect nominal wage growth. In real terms, however, after accounting for inflation, the value of each wage increase will be much lower (if anything at all).

Over five years, the annualised tax growth is 4.62%, compared with wage growth of 3.8%. The effective tax rate briefly falls in 2027–28 due to the combined impact of the rate cut and WATO. However, from 2028–29 onwards, wages continue to grow while thresholds remain unchanged. Bracket creep resumes, and by 2029–30, the effective rate rises to 23.70%, higher than at any earlier point.

Despite the temporary relief, the worker will pay $5,744 more in tax by 2029–30. While wages increase, most of the value of those increases is eroded by inflation and a growing share is taken as tax, highlighting the effect of bracket creep.

The case for threshold indexation

One solution to the bracket creep problem is to adjust income tax thresholds each year in line with inflation or wage growth. Under an indexed system, the real value of each bracket is automatically preserved each year, without the need for periodic legislative intervention.

Several OECD countries already apply this approach. The United States adjusts federal income tax brackets automatically each year, tied to the chained consumer price index for all urban consumers, without requiring congressional approval. Canada indexes its federal brackets annually using the consumer price index, with provincial thresholds also typically indexed, preventing the automatic collection of additional revenue that arises solely from inflation rather than real income growth.

Table 1. Effect of bracket creep on an average wage earner (2024–25 to 2029–30)

Year	Salary	Super @ 12%	Income tax	Medicare @ 2%	WATO	Total tax	Take-home pay	Effective rate
2024–25	$100,000	$12,000	$20,788	$2,000	0	$22,788	$77,212	22.79%
2025–26	$103,800	$12,456	$21,928	$2,076	0	$24,004	$79,796	23.13%
2026–27 (rate cut)	$107,744	$12,929	$22,843	$2,155	0	$24,998	$82,746	23.20%
2027–28 (rate cut + WATO)	$111,839	$13,421	$23,804	$2,237	$250	$25,791	$86,048	23.06%
2028–29	$116,089	$13,391	$25,079	$2,322	$250	$27,151	$88,938	23.39%
2029–30	$120,500	$14,460	$26,402	$2,410	$250	$28,562	$91,938	23.70%

The United Kingdom's approach offers a useful insight. It usually adjusts income tax thresholds in line with inflation to keep the system fair. At the same time, governments may choose to pause these adjustments when needed for budget reasons. When this happens, taxpayers can still face rising tax burdens without real income growth.

This highlights an important principle. If thresholds were always linked to inflation, any decision to change or freeze them would be clear and explicit, rather than happening quietly over time. However, the Federal Budget 2026–

27 did not commit to such indexation, meaning the conditions for bracket creep remain in place.

The key takeaway is that indexation should be the strong and transparent default, while flexibility allows governments to respond to changing fiscal needs when required.

The position of wage and salary earners

Bracket creep falls most directly on wage and salary earners. Their income is reported automatically through the pay-as-you-go withholding system and taxed at source. Legitimate tax planning options are limited; salary sacrifice into superannuation and novated leases are the principal arrangements available to most employees.

Other taxpayers have comparatively more legitimate tax planning options. Business owners can retain profits in a company at 25–30%, rather than pay the top marginal tax rate of 45%. Investors can time their realisation of capital gains. Families with business income have historically used discretionary trusts to split income among lower-taxed family members.

The government acknowledged the broader asymmetry between wage earners and other taxpayers in its rationale for the announced 30% minimum tax on discretionary trust distributions, describing the measure as intended to narrow the gap between tax paid on trust income and tax paid by wage earners on comparable income.

This highlights the continuing need to focus on the position of wage earners in any tax reform discussion. It also reinforces the broader issue of Australia's reliance on personal income tax and the need to level the playing field between different types of taxpayers in any future reform.

Considerations for structural reform

Some of the 2026–27 Budget measures are a genuine attempt to ease the pressure on workers and are welcome. However, they do not solve the underlying problem of bracket creep; they just delay it.

Without indexation of tax thresholds, workers will continue to be pushed into higher tax brackets as wages rise, necessitating legislative intervention.

Indexing thresholds is one possible first step to ensure that bracket creep does not recur year on year. But fixing the broader imbalance between wage earners and other taxpayers requires asking whether Australia's tax mix is balanced. The Tax Institute's Case for Change reform paper calls for a whole-system review to examine how different taxes should work together to produce fair and sustainable outcomes.

These reforms are not straightforward. Indexation involves fiscal cost, and a whole-system review requires continued political commitment. The 2026–27 Budget measures represent a practical response to immediate pressures, but whether they are accompanied by a longer-term structural commitment remains to be seen.

Australia's Future Tax System Review (the Henry Review) and the NSW Review of Federal Financial Relations (the Thodey Review) reflect OECD research on tax and growth, which finds that consumption taxes are among the most efficient and least economically damaging ways to raise revenue. Yet this finding has been shelved for too long.

As personal income tax's share of revenue keeps growing, the case for a broader conversation about tax mix reform only gets stronger.

Tax News – the details

by TaxCounsel Pty Ltd

June – what happened in tax?

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

Government Initiatives

1. Budget Bills introduced

On 28 May 2026, the government introduced amending legislation into parliament that will give effect to a number of the tax measures announced in the 2026–27 Budget.

The amending Bills are the Treasury Laws Amendment (Tax Reform No. 1) Bill 2026 and the Income Tax Rates Amendment (Tax Reform No. 1) Bill 2026. The measures contained in the Bills are noted below.

CGT adjustments

The amending Bills contain amendments that will:

- replace the 50% CGT discount for individuals, trusts and partnerships with cost base indexation to ensure that only real gains are subject to taxation;
- introduce a 30% minimum tax on capital gains, with an exemption for certain income support recipients, to ensure that

capital gains are subject to a tax rate closer to the tax rate that individuals faced during their working life and commensurate with the tax rate paid by most workers; and

- apply the new arrangements prospectively to all capital gains accruing on and after 1 July 2027, including gains accruing on pre-CGT assets, while retaining access to the CGT discount to maintain support for new and affordable housing, and maintaining existing CGT concessions for small business.

These amendments are largely to apply in relation to assessments for the income year that includes 1 July 2027 and later income years.

Limiting negative gearing: residential property

Amendments are proposed that will restrict negative gearing for residential dwellings to new builds. The amendments do this by amending the *Income Tax Assessment Act 1997* (Cth) (ITAA97) to require that a person's net rental losses on a residential dwelling used or held as residential accommodation are a quarantined amount. Quarantined amounts are only to be available to deduct from net assessable income derived in relation to residential dwellings used or held as residential accommodation or to reduce revenue or capital gains from a residential dwelling. These amendments are to apply to interests in residential dwellings acquired on or after 7.30 pm AEST on 12 May 2026, unless an exception to this requirement applies.

Newly built residential dwellings (new residential dwellings) are to be excluded from the requirement to quarantine amounts. This means that investors who acquire new residential dwellings can continue to deduct net rental losses from these properties against their other assessable income, such as salary and wages.

Also to be excluded from the requirement to quarantine amounts are investments made before 7.30 pm AEST on 12 May 2026. This will ensure that the arrangements for taxpayers who made investment decisions under the settings in place before Budget night do not change.

Working Australians tax offset

The amending Bills also contain amendments that will introduce the working Australians tax offset, a non-refundable tax offset that is to provide targeted tax relief to Australian resident individuals who earn labour income

This offset is to apply for the 2027–28 and later income years.

Standard deduction for work-related expenses

The amending Bills also contain amendments to the ITAA97 that will introduce a $1,000 standard deduction for work-related expenses for individuals who are Australian tax residents who derive assessable labour income, so that eligible taxpayers can rely on a simple deduction instead of claiming their work-related expenses. The deduction is to be available in relation to assessments for the 2026–27 and later income years. The amendments to the FBT laws are to apply in relation to FBT years starting on or after 1 April 2027.

Progress of the Bills and consultation

The amending Bills were passed by the House without amendment on 4 June 2026 and now await consideration by the Senate.

When introducing the amending Bills into parliament, the Treasurer said that the government was consulting with stakeholders on further details of the reforms contained in the Bills, including the treatment of capital gains of small and start-up businesses where indexation is applied to a low or zero cost base, as well as other complex and specific details such as interactions with attribution managed investment trusts, tax consolidation, residency changes, and other issues.

2. Tax and corporate whistleblowing: consultation

On 2 June 2026, the Assistant Treasurer announced that the government had opened consultation on a review of tax and corporate whistleblowing laws in Australia to ensure that they are working to effectively protect whistleblowers.

The Assistant Treasurer said that whistleblowers play an important role in uncovering misconduct and wrongdoing in the tax and corporate sectors and need protection to feel supported in coming forward on issues which may otherwise go undetected.

Whistleblowing protection in the corporate and financial services sectors was broadened and reformed into a single regime in the *Corporations Act 2001* (Cth) in 2019. A new tax whistleblowing regime was also introduced at the same time into the *Taxation Administration Act 1953* (Cth).

The review will investigate whether these laws are working as intended, identify any ongoing concerns and, where appropriate, recommend further improvement.

The terms of reference include the consideration of whistleblowers' access to justice, and the effectiveness of the regimes in incentivising whistleblowing and disincentivising misconduct.

The Commissioner's perspective

3. GST: cross-border supplies to an Australian consumer

The Commissioner has released a draft GST ruling which explains when supplies of things other than goods or real property (such as services, digital products or rights) are made to Australian consumers and, therefore, connected with the indirect tax zone (Australia) under s 9-25(5)(d) of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GSTA99) (GSTR 2026/D1).

GST is payable on taxable supplies. For a non-resident supplier to be liable for GST on a taxable supply under s 9-5 GSTA99, the supply must be connected with Australia. A supply of anything other than goods or real property made to an Australian consumer is connected with Australia under s 9-25(5)(d).

GSTR 2026/D1 explains how to decide whether a recipient of a supply is an Australian consumer and how the safeguard approach under s 84-100 GSTA99 affects this task. It explains what evidence the supplier should have and what steps the supplier may take to collect evidence to establish whether the supply is not made to an Australian consumer.

An appendix to GSTR 2026/D1 provides compliance approaches that non-resident suppliers may consider when establishing whether the recipient is not an Australian consumer.

Even if a supply is not made to an Australian consumer (and therefore not connected with Australia under s 9-25(5)(d)), the supplier still needs to consider whether the supply is connected with Australia under other provisions, for example, if the thing is done in Australia or the supply is made through an enterprise that the entity carries on in Australia. If the supply is not connected with Australia, there is no liability for GST on the supply. Such supplies do not count when determining whether the supplier meets the GST registration threshold.

In some situations, it may be easier to first consider whether the supply is GST-free. If the supply is both GST-free and not made through an enterprise that is carried on in Australia, there is no need to consider whether that same supply is connected with Australia. For example, if an Australian consumer receives a haircut from a hairdresser in Germany, that supply will be GST-free. Therefore, it will not be subject to GST despite being connected with Australia under s 9-25(5)(d).

4. Car thresholds from 1 July

The following are the car thresholds that are to apply for the 2026–27 income year.

Income tax

The car limit threshold for 2026–27 is $69,883. This is the maximum value that can be used to calculate depreciation on a vehicle where:

- the vehicle is used for business purposes; and
- the first use or lease of the vehicle is in the 2026–27 income year.

Goods and services tax

If a vehicle is bought for more than the car limit, the maximum GST credit that can generally be claimed is one-eleventh of the car limit (subject to certain exceptions). For 2026–27, the most GST credit that can be claimed is $6,353 (that is, 1/11 × $69,883).

A credit cannot be claimed for any luxury car tax (LCT) that is paid when a luxury vehicle is bought, even if it is used for business purposes.

Luxury car tax

The LCT threshold for both fuel-efficient vehicles and other vehicles will increase in line with the motor vehicles consumer price index.

The LCT threshold for 2026–27 is:

- $91,661 for fuel-efficient vehicles; and
- $80,809 for all other luxury vehicles.

5. When does an ancillary fund "provide" a "benefit"?

The Commissioner has released a taxation determination in relation to ancillary funds (TD 2026/3).

Ancillary funds are charitable trusts established solely to fund and support eligible deductible gift recipients (DGRs). Although ancillary funds are themselves DGRs, they do not undertake charitable work. Instead, they act as intermediaries between donors and eligible DGRs that do. They facilitate philanthropy by allowing donors to claim an immediate deduction for gifts, which are then distributed over time to eligible DGRs.

Ancillary funds benefit from favourable tax treatment, with income generally exempt from tax and donations to them deductible. Because these concessions could otherwise be misused for private benefit, ancillary funds are governed by the *Taxation Administration (Private Ancillary Fund) Guidelines 2019* and the *Taxation Administration (Public Ancillary Fund) Guidelines 2022* (the guidelines).

Ancillary funds must be endorsed as DGRs and meet strict conditions to retain that status, including compliance with the guidelines. Section 8 of the guidelines provides a set of general principles which frame how ancillary funds must be established, maintained and wound up. Ancillary funds must be both philanthropic in character and vehicles for philanthropy. The ATO has adopted interpretations of ss 15(4) and 22(3) of the guidelines which are consistent with these general principles.

TD 2026/3 sets out the ATO's view of when an ancillary fund is providing a benefit. It covers both private and public funds, which are governed by the respective guidelines. Section 15(4) of the guidelines states that an ancillary fund may make its mandatory distributions by "the provision of money, property or benefits". Section 22(3) of the guidelines prohibits ancillary funds from providing benefits to certain related entities.

Specifically, TD 2026/3 explains the ATO's views on the meaning of:

- the "provision of … benefits" in s 15(4) of the guidelines; and
- to "provide any benefit, directly or indirectly" in s 22(3) of the guidelines.

TD 2026/3 does not consider the meaning of “money” or “property” in s 15(4) of the guidelines, and it does not apply to the meaning of “sole benefit” in s 21(6)(b) of the guidelines, which should be read in its own context.

6. Car expenses: cents per kilometre rate

The Commissioner has released a draft legislative instrument that, when made, will set the rate at which work-related car expense deductions may be claimed in the 2026–27 income year when using the cents per kilometre method (LI 2026/D12).

The Commissioner has determined the rate to be 91 cents per kilometre for the 2026–27 income year and subsequent income years, until such time as LI 2026/D12 is repealed or varied. The previous rate was 88 cents per kilometre.

LI 2026/D12 was developed to ensure that the rate for claiming work-related car expense deductions using the cents per kilometre method is updated to reflect recent average operating costs for cars. The update of the rate reflects the annual movement of the Private Motoring Subgroup of the consumer price index, rounded to the nearest whole cent within the year.

Recent case decisions

7. Family trust election made?

In a recent decision, the Federal Court (Hill J) held, contrary to the submissions of the taxpayers, that the taxpayers had not established that family trust elections and interposed entity elections that were referred to in various trust tax returns had not been made, and that the taxpayers were liable to family trust distribution tax as a result of trust distributions that were made outside the family group (*Cameron v FCT*[1]).

Hill J said that, considering the evidence as a whole, he would not accept the recollections of Mr Cook (the taxpayers' accountant) and Mr Cameron (effectively, the client) as to whether or not the 1998 ATO family trust election form was ever signed. The events occurred more than 25 years ago and it was clear that Mr Cook's evidence as to how information was included in the 1999 returns was a reconstruction, and was an attempt to think of an explanation for what he admitted in cross-examination was a disturbing result for a loyal client.

Hill J said that a safer guide was to have regard to the contemporary objective documentary evidence and the apparent logic of events. However, each of those matters pulled in opposing directions:

- as to contemporary documents: the detailed information in six returns filed in 2000 for the Cameron-associated and Wilson-associated entities suggested that family trust elections and interposed entity elections were made, including a family trust election in respect of the (Cameron) family trust. But the failure to mention the family trust election in any of the family trust's returns for the 2000 to 2022 income years suggested that a family trust election was not made; and
- as to the apparent logic of events: it was improbable that a registered tax agent would correctly understand the effect of the *Taxation Laws Amendment (Trust Loss and Other Deductions) Act 1998* (Cth) (and the need to sign an approved ATO form), but

> misunderstand the effect of the *Taxation Laws Amendment Act (No. 2) 2000* (Cth). That was particularly so when 14 of Mr Cook's clients wished to make a family trust election: there was every reason for Mr Cook to inform himself properly on the requirements for making this type of election. Further, it was improbable that a registered tax agent and two different clients would not notice that detailed information was wrongly included in three returns for each client. Hill J said that he had rejected Mr Cook's attempts to explain how this information came to be included in (or not omitted from) the returns. But it was also improbable that, if a family trust election had been made, a registered tax agent and his client would not record that fact in the income tax return for the next year, or at any time since then.

After noting that the taxpayers bore the onus of proof, at the civil standard, Hill J said that the "more probable" civil standard meant that it was not sufficient that the circumstances gave rise to conflicting inferences of an equal degree of probability or plausibility, or that the choice between them could only be made by conjecture. In civil proceedings, any inference must be "reasonable and definite".

Here, his Honour said, the evidence before the court did not allow him to be satisfied that it was more probable than not that a family trust election was not made. Putting the matter most favourably to the applicants, the evidence gave rise to competing inferences of equal probability.

8. Default assessments reinstated

In a joint judgment, the Full Federal Court (Charlesworth, Goodman and Horan JJ) has allowed an appeal by the Commissioner from a decision of Logan J that had set aside default assessments totalling approximately $30 million that were issued by the Commissioner to an Australian resident individual taxpayer (a Mr Cheung) for the 11 income years (the relevant period) 2005 to 2015 (inclusive) (*FCT v Cheung*[2]).

For the purposes of making the default assessments, the Commissioner concluded that, in the relevant period, Mr Cheung had two sources of ordinary income. The sources were: (1) deposits (the deposits) comprised of bank deposits made into bank accounts held by Mr Cheung or his wife, and third-party deposits, being two deposits found by the Commissioner to have been made to third parties at Mr Cheung's direction in the 2015 income year; and (2) interest (as to which there was no dispute).

The deposits had their source in a business trading in Vanuatu under the name Au Bon Marche (the ABM business). The Commissioner determined that the deposits were income derived from Mr Cheung's association with the ABM business, whether by virtue of him having an ownership interest in it, or by virtue of services that he had rendered to it.

At first instance, Logan J held that the Commissioner's case that the payments were returns in respect of an ownership interest by Mr Cheung in the ABM business failed on the facts. So, too, did an alternative submission that they were payments in the nature of a return for services rendered. They were not income in Mr Cheung's hands in any sense. They were, Logan J considered, just gifts of capital voluntarily made by a loving sister who had an acute sense of family loyalty and responsibility, and who had enjoyed good fortune in business, for Mr Cheung, a loved brother respected for his business judgement and like sense of family loyalty and responsibility, to invest as he saw fit and to draw on personally if he saw fit.

As indicated, the Full Federal Court has allowed the Commissioner's appeal from the decision of Logan J.

In a joint judgment, the Full Court pointed out that, at first instance, the onus was on Mr Cheung to prove (on the balance of probabilities) not only that the assessments were excessive (or otherwise incorrect), but also to prove what the assessments ought to have been.

The Full Court said that, on the appeal from Logan J, it was bound to conduct a real review of the evidence, and of the reasons given at first instance, in order to determine whether Logan J had committed the errors of fact or law asserted by the Commissioner. The Full Court's review function was to be performed with the onus and standard of proof borne firmly in mind. At first instance, there was no obligation on the Commissioner to erect and prove an alternative factual scenario in competition to that posited by Mr Cheung to any forensic standard at all. Nor did such a requirement arise on the appeal. The Commissioner's task was not to defend the correctness of the objection decision or to prove any fact underpinning it.

The Full Court said that, on the proper application of the relevant principles, Logan J ought to have concluded that Mr Cheung had failed to discharge his onus of proof and, accordingly, the appeal from the objection decision ought to have been dismissed.

The fact-finding function miscarried because Logan J did not make an assessment of the honesty of the witnesses based on the evidence as a whole. In multiple instances, Logan J did not examine or explain how (if at all) the witnesses explained evidence that contradicted or undermined their asserted facts or the narrative put forward in Mr Cheung's appeal statement. Logan J formed impressions of the witnesses based on his observations of tenor or demeanour, with little or no examination of the extent to which their testimony was undermined or contradicted by their own accounts or by documentary records. Further, in respect of Mr Cheung, the conclusion of "honesty" formed by the primary judge was not explained by reference to any particular observation of the outward manner in which he testified or the content of the testimony.

The Full Court's obligation was to identify for itself whether Mr Cheung discharged the onus of proof, taking into account any recorded observations of the manner in which the witnesses testified. The recorded observations were that Mrs Leong and Mr Andrew Leong (one of Mrs Leong's sons) gave evidence in a compelling outward manner. It may be assumed that there was nothing in the outward presentation of Mr Cheung and Mr Michael Leong (another son of Mrs Leong) that would reflect adversely on their credit and that the tenor of Mr Cheung's evidence was convincing.

The Full Court also said that the conclusions of Logan J on the subject-matter of Mr Cheung's involvement in the ABM business and the nature of the funds received by him were “glaringly improbable” having regard to the whole of the evidentiary record. Logan J ought to have found that Mr Cheung had not established that the deposits were not ordinary income because the evidence was not sufficient to prove the only narrative asserted in his appeal statement.

Also, Logan J ought to have found that the proposition that the payments were a gift entirely unconnected with the contribution that Mr Cheung had made to the generation of the profits over the whole of his working life was “inherently improbable”. Contrary to the reasoning of Logan J, the facts and circumstances were not at all analogous to a Western tradition of parents or grandparents making provision for their children and grandchildren from after-tax income and a lifetime of accumulated wealth.

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References

1 [2026] FCA 609.

2 [2026] FCAFC 75.

Division 7A: what is a loan?

The High Court has recently ruled on the scope of the Div 7A concept of a loan in the context of an unpaid present entitlement.

Background

Division 7A of Pt III of the *Income Tax Assessment Act 1936* (Cth) (ITAA36), which is titled "Distributions to entities connected with a private company", was enacted by the *Taxation Laws Amendment Act (No. 3) 1998*.[1] In very broad terms, the provisions of Div 7A can operate where there is a payment, a loan or a debt forgiveness by a private company in favour of a present or former shareholder (or a present or former associate of a shareholder).

Over the years, Div 7A has given rise to difficulties and these have included the scope of operation of the statutory definition of "loan" that applies for the purposes of the Division. The Commissioner issued TD 2022/11 which set out his views on the operation of the statutory definition in the context of a corporate beneficiary of a discretionary trust.

Most recently and importantly, the High Court, in a decision handed down on 10 June 2026, has authoritatively considered the meaning and effect of the definition. A majority of the court rejected the views of the Commissioner as expressed in TD 2022/11. The High Court's decision is *FCT v Bendel*.[2]

The decision of the High Court is clearly an important one and is considered in this article. The implications of the decision may need to be considered in relation to cases where an assessment for an income year has already been made and also in relation to cases where an assessment for an income year has not as yet been made.

The statutory definition of "loan"

When Div 7A was enacted, it contained an inclusive definition of "loan" in s 109D ITAA36. The definition (which has not been amended since its enactment) reads as follows:

> "What is a loan?
>
> (3) In this Division, loan includes:
>
> (a) an advance of money; and
>
> (b) a provision of credit or any other form of financial accommodation; and
>
> (c) a payment of an amount for, on account of, on behalf of or at the request of, an entity, if there is an express or implied obligation to repay the amount; and
>
> (d) a transaction (whatever its terms or form) which in substance effects a loan of money."

For the purposes of Div 7A, a loan is made to an entity at the time the amount of the loan is paid to the entity by way of loan or anything described in the definition in subs (3) is done in relation to the entity (s 109D(4)).

The facts of the case

The basic facts of the *Bendel* case were as follows.

In each of the income years ended 30 June 2014 to 30 June 2017, Gleewin Pty Ltd (Gleewin), as the trustee of the Steven Bendel 2005 Discretionary Trust (the 2005 trust), resolved to "set aside" for the benefit of one or each of two of its discretionary objects (Gleewin Investments Pty Ltd (Gleewin Investments) and Mr Bendel) defined percentages of the net income of the 2005 trust (the resolutions). Under the terms of the 2005 trust, the amounts set aside were required to be held on separate trusts. Gleewin did not pay to Gleewin Investments those amounts set aside by the resolutions and held on separate trust, and Gleewin Investments did not, at any relevant time, call for payment to be made.

Relying on s 109D ("Loans treated as dividends"), the Commissioner issued notices of amended assessment to Gleewin Investments for the income years. The Commissioner contended that the amounts set aside for Gleewin Investments by the resolutions (called "unpaid present entitlements") constituted the "provision of credit or any other form of financial accommodation" by Gleewin Investments to Gleewin as trustee, or were "in substance" loans of money from Gleewin Investments to Gleewin as trustee, and thus were each a "loan" as defined for the purposes of Div 7A in s 109D(3).

The appeal thus raised the construction of the expanded definition of "loan" in s 109D(3). However, preliminary questions arose about the proper construction and legal effect of the resolutions, in particular:

- whether the resolutions effected a setting aside and then a distribution of the unpaid present entitlements;
- if the resolutions effected a setting aside of the unpaid present entitlements, and no more, whether separate trusts were created in respect of those amounts; and
- whether the resolutions gave rise to a debtor/creditor relationship between Gleewin and Gleewin Investments.

As indicated, Gleewin Investments had never called for payment of any of the net income set aside for its benefit in any of the income years in question. It remained relevantly passive. The majority of the High Court said that the fact that Gleewin Investments did not call for payment was hardly surprising, given that much of the net income set aside in favour of Gleewin Investments was, in fact, lent to Mr Bendel, who controlled Gleewin and Gleewin Investments.

The *Bendel* case came before the High Court as an appeal by the Commissioner (with the special leave of the High Court) from a decision of the Full Federal Court in *FCT v Bendel*.[3]

The High Court decision

The High Court, by a majority (Gageller CJ, Gordon, Edelman, Steward and Gleeson JJ; Jagot and Beech-Jones JJ dissenting), dismissed the Commissioner's appeal in a joint judgment.

The majority held that the resolutions effected a setting aside of the unpaid present entitlements, but not a distribution of those amounts. The unpaid present entitlements were thereafter held on separate trusts created by the resolutions for Gleewin Investments, and no debtor/creditor relationship arose between Gleewin and Gleewin Investments. The Commissioner's argument that the expanded definition of "loan" in s 109D(3) encompassed the circumstances where a beneficiary does not insist on being paid an unpaid present entitlement by the trustee was rejected by the majority of the High Court.

The effect of the resolutions

After considering several earlier decisions in which the concept of a "debt" was considered but which did not involve the operation of Div 7A, the majority of the High Court said:

> "37. In light of the foregoing cases, did the Resolutions here create an unconditional duty to pay Gleewin Investments the unpaid present entitlements? Correctly construed, they did not. Prior to the Resolutions, Gleewin Investments was the object of a (discretionary) fiduciary power. The 2005 Trust had not 'vested'. As an object of a fiduciary power, like the object of a discretionary trust, Gleewin Investments' 'sole interest, if it be an "interest"' was to require Gleewin 'to exercise, in bona fide, [its] discretion as to how [the income] shall be distributed'.
>
> 38. The Resolutions provided that the amounts were 'hereby set aside'. The Resolutions were made pursuant to the power in cl 3(1)(a), read with cl 3(2)(c), not to 'pay' or 'apply' net income but to 'set aside' such income. The term 'set aside', as already mentioned, is defined in the 2005 Trust Deed to include the

> crediting of sums to a beneficiary in the books of account, rather than actually distributing such sums … Each of the Resolutions triggered an application of cl 3(5). That had three consequences. First, the amounts set aside 'cease[d] to form part of the Trust Fund'. Secondly, 'upon such setting aside' the amounts 'thenceforth' came to be held by the same trustee 'on a separate trust'. And thirdly, 'pending payment over thereof', the trustee had power 'to invest or apply or deal with' the amounts set aside. The legal effect was therefore that the amounts set aside were no longer impressed only with a fiduciary power in favour of objects including Gleewin Investments but became the subject of a fixed trust (the separate trusts) with Gleewin Investments as a beneficiary and with a power for Gleewin to invest, apply or deal with the funds subject to that trust for the benefit of Gleewin Investments.
>
> 39. It follows that the setting aside of net income under the deed did not create an unconditional duty to pay that income. That was not what was intended. In that respect, the phrase 'pending payment' in cl 3(5) is significant. It signifies that following the creation of the separate trust, there is a state of affairs which is anterior to payment, namely the holding of income by the trustee on that separate trust, and its investment in the meantime, and the holding of accretions to that trust, whether they be capital or income, subject to the same separate trust. Moreover, whilst invested, the trustee of this separate trust has a continuing right of indemnity."

The majority went on to say[4] that the phrase "pending payment" was significant for another reason. It made clear that something more must occur before payment must be effected, and before there arose an unconditional duty to pay. If the trustee did not choose to pay, and unless it otherwise admitted an indebtedness to the beneficiary, what must occur was a call for payment by the beneficiary of the new trust in circumstances where the beneficiary was entitled to call. Until then, the continued holding of the net income on a separate trust, and the investment of that income, was mandated by the deed.

The majority then said:[5]

> "41. The Commissioner also suggested that the effect of each of the Resolutions was to constitute a determination to pay, and not just set aside, the net income to Gleewin Investments (and to Mr Bendel), relying upon the phrase 'shall be distributed' and the fact that the Resolutions were labelled 'Distribution of Income'. The 2005 Trust Deed does not use the word 'distribute' in describing the powers of the trustee under cl 3. In such circumstances, the use of that word in the Resolutions should be seen as a generic way of describing one of the three ways of dealing with the money comprising the trust's net income in fact authorised by cl 3(1)(a) – namely, to 'pay apply or set aside' the net income. Here, the method chosen was to set aside the net income, and no more. Put in different terms, it is apparent by the use of future tense ('shall be distributed'), and the words 'for the avoidance of doubt', that the reference in the Resolutions to distribution is recording an obvious future consequence of setting aside the amounts. It does not change the fact that, until the call for payment, Gleewin retained the amounts and had no unconditional duty to pay that income. The fact that the Resolutions are labelled 'Distribution of

Income' cannot change the fact that the text provided for setting aside, not distribution. The label 'Distribution of Income' can be read as referring to distribution in a general sense – namely, the obvious future consequence of the setting aside – but it cannot alter the express operation of the Resolutions.

42. For these reasons, each of the Resolutions did not create an unconditional duty to pay Gleewin Investments."

The majority therefore concluded that the effect of the resolutions was not to make Gleewin as trustee a debtor of Gleewin Investments. Rather, as described, the resolutions set aside the net income of the 2005 trust in favour of Gleewin Investments and created, in each income year, a separate trust. The resolutions gave rise to no action in money had and received unless and until Gleewin Investments called for its payment, or Gleewin admitted that it was indebted to Gleewin Investments. However, no call by Gleewin Investments nor any admission by Gleewin as trustee ever took place.[6]

The construction of s 109D(3)(b): "provision of financial accommodation" etc

The majority also rejected the Commissioner's contention that s 109D(3) expanded the meaning of a "loan" such that a beneficiary provides "financial accommodation" to a trustee (s 109D(3)(b)), or effects "in substance" a loan of money (s 109D(3)(d)), whenever the beneficiary does not insist on being paid an amount of an unpaid present entitlement. Such an arrangement, it was argued, was capable of satisfying either or both of s 109D(3)(b) or s 109D(3)(d). The majority rejected these contentions.

The majority said[7] that, contrary to the Commissioner's contentions, there was no "provision … of financial accommodation" for the purposes of s 109D(3)(b) when a private company does nothing. The provision of financial accommodation requires some initial or anterior transfer of value or, put in different terms, the supply or grant of some sort of pecuniary assistance, involving some bilateral activity. The majority then went on:

> "72. … As already mentioned, Div 7A is directed at the transfer of value from a private company to a shareholder, or an associate of that shareholder. Implicit in its structure is that the private company does something to effect that transfer of value. The text of s 109D supports that conclusion. Section 109D(1) applies when a private company 'makes' a loan. That will take place, by the application of s 109D(3), when there is an 'advance' of money, or a 'provision' of financial accommodation, or a 'payment' of an amount in defined circumstances, or a 'transaction' which in substance effects a loan of money. Moreover, s 109D(4) states that a loan is made when the amount of the loan is 'paid' or anything described in s 109D(3) is 'done'. In each case, the legislation requires that the private company is actively doing something to move value from it to someone, which is analogous with the payment of a dividend. But here, Gleewin Investments did nothing. It did not 'provide' Gleewin with time to pay; there was nothing like the promise to transfer shares and to give time to pay by way of instalment as seen in Prime Wheat. Its mere inactivity cannot satisfy the language of 'advance', 'provision', 'payment' or 'transaction'."

The construction of s 109D(3): “in substance loan”

In their joint judgment, the majority also said[8] that the Commissioner’s arguments as to whether Gleewin Investments’ forbearance “in substance” effected a “loan of money” within the meaning of s 109D(3)(d) were no different from his arguments as to the breadth of “financial accommodation” within the meaning of s 109D(3)(b).

The majority went on:

> “74. … It thus follows that [the Commissioner’s] reliance on s 109D(3)(d) was also misplaced. Simply doing nothing, or acquiescing to the retention of funds, is not a transaction which in substance effects a loan. To find otherwise would be to ignore the word ‘transaction’, which by its ordinary meaning refers to some interchange or interaction between entities. That conclusion was buttressed by the fact that the relationship between Gleewin as trustee and Gleewin Investments remained one of trustee and beneficiary and not one of debtor and creditor. Moreover, if the Commissioner were correct, it would mean that a private company beneficiary in the position of being able to invoke the rule in *Saunders v Vautier*[9] would be taken to have made a loan to a trustee for the purposes of s 109D(3) for the period during which the beneficiary could have called for the trust to be terminated, but did not. That is a highly improbable outcome.”

Contextual factors

The majority further said that there were strong contextual factors that reinforced the conclusion that Gleewin Investments' forbearance did not constitute a loan for the purposes of s 109D.

Observations

The decision of the High Court in the *Bendel* case is clearly important and has settled questions that can arise as to the operation of Div 7A in the context of a loan. It is to be hoped, however, that there is some clarification from the government as to how the decision is viewed and whether any legislative change is envisaged.

In a statement released on 10 June 2026, the ATO stated that it was currently considering the implications of the High Court's decision and would, as soon as possible, update its views set out in its interim decision impact statement that was issued in relation to the Full Federal Court's decision to provide practical guidance to impacted taxpayers.

It should be noted that the ATO's interim decision impact statement states that, in addition to the application of s 109D, the basis on which private company beneficiaries deal with unpaid entitlements to trust income may have implications under other tax laws, such as s 100A ITAA36.

Unless there is a legislative change to Div 7A, where an issue arises as to the operation of the Division, the Commissioner will be bound to apply the decision of the High Court in the *Bendel* case. The reason for this was explained by Allsop J (Stone and Edmonds JJ each agreeing) in *FCT v Indooroopilly Children Services (Qld) Pty Ltd*.[10] His Honour said:

> "3. I wish, however, to add some comments about the attitude apparently taken by, and some of the submissions of, the appellant [Commissioner]. From the material that was put to the Full Court, it was open to conclude that the appellant was administering the relevant revenue statute in a way known to be contrary to how this Court had declared the meaning of that statute. Thus, taxpayers appeared to be in the position of seeing a superior court of record in the exercise of federal jurisdiction declaring the meaning and proper content of a law of the Parliament, but the executive branch of the government, in the form of the Australian Taxation Office, administering the statute in a manner contrary to the meaning and content as declared by the Court; that is, seeing the executive branch of government ignoring the views of the judicial branch of government in the administration of a law of the Parliament by the former. This should not have occurred. If the appellant has the view that the courts have misunderstood the meaning of a statute, steps can be taken to vindicate the perceived correct interpretation on appeal or by prompt institution of other proceedings; or the executive can seek to move the legislative branch of government to change the statute. What should not occur is a course of conduct whereby it appears that the courts and their central function under Chapter III of the Constitution are being ignored by the executive in the carrying out of its function under Chapter II of the Constitution, in particular its function under s 61 of the Constitution of the execution and maintenance of the laws of the Commonwealth."

Operation of public rulings regime

Although the decision of the High Court in the *Bendel* case is declaratory in that the decision states what the defined concept of a loan is and has been since the enactment of Div 7A, the Commissioner would be bound to apply TR 2022/11 if a taxpayer has relied on the ruling by acting (or omitting to act) in accordance with the terms of the ruling (s 357-60 of Sch 1 to the *Taxation Administration Act 1953* (Cth)). Whether a ruling has been relied on by a taxpayer would usually be evident.

On the other hand, a taxpayer would, of course, not be bound by the ruling. This would, it is suggested, mean, for example, that a taxpayer could (subject to any relevant time constraints) apply for an amendment of an assessment that had been made on the basis of the ruling.

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References

1 Act No. 47 of 1988.

2 [2026] HCA 18.

3 [2025] FCAFC 15. For completeness, it may be noted that the Full Federal Court's decision was given on an appeal from a decision of the AAT (*Bendel and FCT* [2023] AATA 3074).

4 [2026] HCA 18 at [40].

5 [2026] HCA 18 at [41].

6 [2026] HCA 18 at [57].

7 [2026] HCA 18 at [72].

8 [2026] HCA 18 at [74].

9 (1841) 41 ER 482.

10 [2007] FCAFC 16.

Higher Education

Balancing work, parenthood and study

With a career spanning 20 years, Sally Whenman didn't anticipate that she would need to return to study before registering to become a tax agent.

Sally Whenman, CTA

Partner, Corporate & International Tax, BDO

Sally Whenman, the dux of ATL004 CTA2B Advanced, proves that excellence doesn't require sacrifice when you have the right support system and a genuine passion for what you do.

"Managing study, work and other commitments was definitely a juggle! I was fortunate to have a very supportive family. My husband had just finished his MBA, so we swapped roles, with him taking the lead with the kids on weekends so I could study," Sally shares warmly.

“A real highlight was spending 18 months in London with EY’s International Funds Team in 2008,” she reflects on a career spanning almost 20 years. Eight years ago, she joined BDO, drawn by its genuine commitment to work–life balance.

From graduate role to partner

Sally’s journey into tax, like many professionals, wasn’t a childhood dream but a practical decision that evolved into genuine passion.

“Like many, I didn’t originally set out to work in tax. I accepted a graduate role in a competitive job market, thinking I would eventually move into a law firm. I quickly discovered that tax offers a unique blend of legal reasoning and problem-solving. What keeps me passionate is the constant variety. No two client problems are ever the same. I think tax can be misunderstood as being dry and repetitive, but in reality, it’s dynamic and intellectually challenging,” she says.

Building an inclusive future

Beyond client work, Sally finds personal fulfilment in championing diversity within the profession. Through her involvement in BDO’s national women@BDO network, which actively supports the firm’s gender equality goals, Sally contributes to initiatives aimed at building a more inclusive and supportive workplace.

A unique path to CTA2B

Sally’s decision to undertake CTA2B Advanced came from an unexpected challenge when applying to register as a tax agent before becoming a partner.

“I found that my experience didn’t meet the strict 80% full-time equivalent requirement over the past 10 years. Despite almost two decades in the profession, I had taken time out over the past 10 years to have children, and worked part-time for several years. I enrolled in CTA2A and CTA2B to bridge the gap in my qualifications as, ironically, I was missing an ‘advanced tax’ subject.”

What started as a regulatory requirement became a valuable learning experience. “Once enrolled, I found that the course was very valuable. It refreshed my knowledge in areas that I don’t typically deal with day-to-day, and helped me become a more well-rounded adviser.”

The joy of peer learning

While Sally felt confident with the international tax and corporate tax components of CTA2B Advanced, she particularly enjoyed diving deeper into FBT and GST. But what stood out most about her experience at The Tax Institute was the collaborative learning environment.

“The study groups were a highlight. It was interesting to collaborate with professionals from diverse backgrounds such as the ATO, industry, smaller firms and larger practices. Everyone brought different perspectives and expertise, and the peer learning broadened my thinking. I enjoyed sharing my knowledge in return.”

Looking ahead

Since finishing CTA2B in May 2025, Sally has gone on to complete CTA3 in September and has now obtained her Chartered Tax Advisor qualification. Sally is now focused on settling into her new role as partner at BDO.

Member Spotlight

A 20-year tax journey shaped by curiosity and GST expertise

Anna Chong, CTA

KPMG

From her beginnings as a migrant student to leading national teams across multiple tax areas, Anna Chong shares her journey, insights and advice for the next generation.

Can you tell us about yourself and your career journey?

Okay, where should I start? It's more than 20 years ago, it's a long story.

I'm an immigrant, so I came to Australia with my parents when I was about 13, and I started my schooling here from Year 8. When I went to Adelaide University, I studied commerce and law. At that point, I had no intention of becoming a tax practitioner.

What really made me start thinking about tax as a career was one of the tax subjects within my commerce degree. I thoroughly enjoyed that subject, and that's when I thought that tax could be my career.

After I graduated, I worked briefly in a law firm, but I realised it wasn't what I was interested in. I then moved to Darwin for a temporary job with a construction company as a contract administrator. That really opened my eyes, working in a different city and in industry.

My boss asked me what I would do next, and I said I wanted to do something in tax. He suggested firms like KPMG. I didn't even know what the Big Four were at the time. He connected me with a partner at KPMG Darwin. I had an interview and got offered a job the next day.

That's how I started in tax, working in business advisory. After about a year, I moved back to Adelaide and joined KPMG again, this time in indirect tax, GST. That's where my career really developed.

What was your introduction to The Tax Institute?

At that time, once you started working in tax in a professional firm, you were expected to join The Tax Institute. It was almost like a must-have membership to support your credentials. So I became a member very early in my career.

Can you tell me how you became a volunteer at The Tax Institute?

That came through my peers in the industry.

A colleague at KPMG who was on the GST Technical Committee was retiring and suggested I put my name forward. I thought, why not? If

I can help the profession through the Institute, I'd be very happy to do that. That's how I joined the committee about three years ago.

What impact has The Tax Institute had on your career?

There are two main impacts.

The first is the network. Even though I've been in the industry for 20 years, being involved in the committee made me realise there are a lot more people practising in GST than I thought. I've been able to connect with people not just in firms, but also those working in industry, which brings a different perspective.

The second is the ability to contribute to policy. We're at the forefront of helping shape policy intent. I believe that if you get the policy right, the legislation will follow, so it's a privilege to be part of that process.

How do you balance your career, your life outside of tax and volunteering?

I've been very fortunate to have strong family support, especially from my in-laws. They help a lot when I need to travel.

My husband is also very supportive, and his job is quite stable, so that helps.

For me, it's all about communication, letting my family know my schedule and when I might need help. You also need to be flexible and not feel guilty when priorities shift. Sometimes work comes first, and sometimes family does. My family is very understanding, very supportive.

To read Anna’s full story, click here.

When being “small” and “in business” isn’t enough

by Leanne Connor, CTA, WGC Business Advisors

The topic of this article is when being “small” and “in business” is not enough. Through one lens, the article sets out to highlight the complexities of the legislation that you need to navigate to access the small business CGT concessions, taking as a given that you are “small enough” or “in business enough” to qualify. But, if your transaction pushes up against either the turnover or the maximum net asset value test thresholds, the focus can also shift to some of the lesser known traps, opportunities and risk areas in the provisions, including: the identification of all connected and affiliated entities, applying the active asset test for shares (watch out for those shareholder loans), valuation methodology and ensuring that all allowed liabilities are taken into account for the $6 million MNAV, but no more than that.

Introduction

Capital gains tax was introduced into the Australian tax system with effect from the 20 September 1985. The small business CGT concessions contained in Div 152 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97) were introduced in legislation with effect from 1

July 1997. The concessions were originally introduced in the context of providing tax concessions for small business owners (and farmers) who treated their businesses as their “superannuation” and were denied the multitude of tax benefits that taxpayers could access through contributing to superannuation.

Whether looking to restructure or considering an exit, you will be called on to evaluate and mitigate the tax cost of the transaction. There is a smorgasbord of tax concessions available to small business owners, which can provide full or partial relief from tax on a capital gain arising from the disposal of assets related to their business.

Some provisions provide relief for all businesses, while other provisions are specifically targeted to small businesses. It is unfortunate that the rules relating to “the smaller end of town” appear disproportionately complex when determining eligibility for those concessions. This complexity has been exacerbated by a myriad of changes to the rules since the introduction in 1997, the latest of which has been the 2018 introduction of further integrity measures in relation to CGT events involving the disposal of shares in a company or interests in a trust. These changes seek to ensure that the concessions are only accessed in relation to assets used in a small business or ownership interests in a small business.

While the sale of many small businesses neatly fits into what you would expect to be covered by these concessions due to the size and scale of the operations, other businesses can qualify for the concessions even though their turnover *or* the net asset value of the entity or group of entities far exceeds the eligible thresholds. If you far exceed the threshold on one aspect of the eligibility condition, you may fully expect to be held to proof on the eligibility of the alternate test.

Advisers need to be on top of their game to ensure that eligibility for these tax concessions is correctly determined. Failure to identify eligibility for tax relief will erode the value that a client has built up in their business. Conversely, incorrectly applying tax concessions when the client is ineligible, or inadequate planning for the potential application of these concessions, can be equally catastrophic for the client and potentially expose the adviser to costly professional indemnity insurance claims.

The topic of this article is when being “small” and “in business” is not enough. Through one lens, the article sets out to highlight the complexities of the legislation that you need to navigate to access the small business CGT concessions, taking as a given that you are “small enough” or “in business enough” to qualify. However, even if you are not considered conventionally “small” or “in business” at the relevant time, you may still qualify. But be warned, if your fact pattern results in numbers that far exceed either of the small business or the maximum net asset value (MNAV) conditions but not both, expect to be put to the sword by the authorities on passing the condition you are relying on to access the concessions.

Utilising the small business CGT concessions

Division 152 provides four CGT concessions for capital gains that arise from the disposal of a CGT asset used in the carrying on of a business by eligible taxpayers, provided certain conditions are met. These provisions do not apply if a capital loss is made, nor do they apply to depreciable assets or trading stock.

Basic conditions

There are four basic conditions (set out in s 152-10 ITAA97) which are required to be satisfied for a taxpayer to reduce or disregard a capital gain under Div 152:

1. a CGT event happens in relation to a CGT asset of yours in an income year;
2. the CGT event would (apart from Div 152) have resulted in the gain;
3. at least one of the following applies:
    a. you are a CGT small business entity for the income year;
    b. you satisfy the MNAV test;
    c. you are a partner in a partnership that is a CGT small business entity for the income year and the CGT is an interest in an asset of the partnership; or
    d. the conditions in s 152-10(1A) or (1B) are satisfied in relation to the CGT asset; and
4. the CGT asset satisfies the active asset test.

Additional basic conditions apply if the relevant CGT asset is a share in a company or an interest in a trust, or the CGT asset is held by an interposed entity.

Having a clear and robust understanding of the above basic conditions is the cornerstone of the adviser's ability to confirm a taxpayer's eligibility to apply any of the small business CGT concessions to a capital gain that has been made.

As common in most ITAA97 legislative drafting, the "you" referred to above is the taxpayer that has realised the capital gain in the relevant period. This understanding becomes critical as you work through the small business CGT concession provisions, especially as it relates to connected entities and affiliates.

CGT small business entity versus satisfying the MNAV test

To satisfy the third basic condition above, you (the taxpayer making the gain) must be either a CGT small business entity or, if you are not a CGT small business entity, you must satisfy the MNAV test.

Rules relating to small business entities are contained in Div 328 ITAA97, including the definition of terms such as what is a small business entity, turnover thresholds and related concepts.

You need only qualify for one but not necessarily both of these options to satisfy the third basic condition. That is, if the gain-making entity is classified as a CGT small business entity by satisfying the threshold test, the value of the net assets of the entity, its affiliates and connected entities becomes irrelevant to satisfy this condition. Likewise, if the turnover exceeds the CGT small business entity threshold but the assets are under the maximum net asset value threshold, the level of turnover becomes irrelevant to satisfy this condition.

It is only natural that there will be increased scrutiny of turnover calculations, business operations and/or asset values if either the turnover or asset values far exceed allowable levels. The same could be said if the calculations for either turnover or asset values are close to the requisite threshold limits – again, additional scrutiny of the calculations would be expected.

So, why are the considerations for turnover, business operations or asset values important?

Definition of "small business entity"

Section 328-110 ITAA97 defines the meaning of a "small business entity":

"(1) You are a ***small business entity*** for an income year (the ***current year***) if:

(a) you carry on a business in the current year; and

(b) one or both of the following applies:

(i) you carried on a business in the income year (the ***previous year***) before the current year and your aggregated turnover for the previous year was less than $10 million;

(ii) your aggregated turnover for the current year is likely to be less than $10 million."

As it relates to the small business CGT concessions, s 152-10(1AAA) introduced a new term for a CGT small business entity which is defined as both a small business entity and an entity that would be a small business entity if each reference in s 328-110 ITAA97 to $10 million were a reference to $2 million.

An entity's annual turnover for an income year is the total ordinary income that the entity derives (excluding GST) in the income year in the ordinary course of carrying on a business. The entity is then required to aggregate the relevant annual turnovers of itself, its connected entities and any affiliates (excluding inter-entity dealings).

Tips and traps: small business entity considerations

When determining whether you satisfy the definition of a "small business entity", careful consideration should be given to the following:

Have you considered whether you satisfy the threshold question of "Am I in business?" in the year of the CGT event? There is no definition of "business" contained in the income tax legislation. Rather, it has a common law definition developed in case law and supported by ATO views in publications such as TR 97/11.

The principles to assess this question include identifying the activities being undertaken and then answering such questions as intention to commence business, intention to make a profit, and the size, scale and repetition of activities which are considered planned, organised and carried out in business-like manner.

Often the tension with assessing small business CGT concession eligibility in a situation with high net asset values, low levels of turnover, or losses due to the business winding down is a threshold question: is the entity in fact conducting a business in the year of sale?

When does a business cease? The ATO has stated on its website that a business has officially ceased for tax purposes when operations stop, assets are disposed of and obligations are met. Therefore, in factual situations where a business is winding down in the year of disposal of a CGT asset and, irrespective of losses being generated, the business should not have ceased. However, from a practical perspective, it would also be preferable to align the disposal of an active asset in a year considered to be most favourable in assessing business activity and the level of profit being generated.

Do you have turnover? To be classified as a small business, you, your affiliates and those entities connected to you must have an aggregated turnover (current or prior year) of less than $2 million. This begs the question: do you meet the definition of "less than $2 million turnover" if you have no turnover in the year of the CGT event? As an accountant, I would much prefer to have some turnover in the relevant year, rather than having to run the argument that a business can be classified as a small business with less than $2 million turnover, if the business has, in fact, $nil turnover in the relevant year.

Include the turnover of all connected entities and affiliates. The aggregation of turnover is not selective for affiliates, that is, you must include the turnover of all affiliates, whether that business is in any way connected to your business or not.

Correctly identify the reporting period to which the turnover relates – whether that be cash or accruals for income tax purposes. Attempts to manipulate the turnover figure by deliberately delaying receipt etc may lead to failure of this basic condition.

Maximum net asset value test

If the taxpayer fails the small business entity definition as outlined above, it may still meet the third basic condition to access the small business CGT concessions if it passes the MNAV test, that is, if the sum of its net assets and those of certain connected entities and affiliates is less than $6 million.

Broadly, the assets included in the MNAV test only take into account the market value of the business (or income-producing) assets less the related business liabilities.

Section 152-15 ITAA97 outlines the assets that need to be included in the MNAV test:

> "You satisfy the maximum net asset value test if, just before the CGT event, the sum of the following amounts does not exceed $6,000,000:
>
> (a) the net value of the CGT assets of yours;
>
> (b) the net value of the CGT assets of any entities connected with you;
>
> (c) the net value of the CGT assets of any affiliates of yours or entities connected with your affiliates (not counting any assets already counted under paragraph (b))."

Meaning of net value of the CGT assets

Section 152-20(1) ITAA97 outlines the meaning of "net value of the CGT assets":

> "(1) The ***net value of the CGT assets*** of an entity is the amount (whether positive, negative or nil) obtained by subtracting

from the sum of the market values of those assets the sum of:

(a) the liabilities of the entity that are related to the assets; and

(b) the following provisions made by the entity:

(i) provisions for annual leave;

(ii) provisions for long service leave;

(iii) provisions for unearned income;

(iv) provisions for tax liabilities."

It is important that you are able to identity liabilities that are related to the asset, as that will reduce the market value of the asset being included in the MNAV test.

The ATO takes the view in TD 2007/14 that the term "liabilities" in the context of s 152-20(1) has its ordinary meaning. "Liabilities" extend to legally enforceable debts due for payment and to presently existing legal or equitable obligations to pay either a sum certain or ascertainable sums. It does not extend to future obligations, expectancies or liabilities that are uncertain as both a theoretical and a practical matter.[1]

CGT assets that are disregarded when working out the net value of CGT assets

Section 152-20(2) ITAA97 outlines the assets that are disregarded when calculating the net asset value of the entity:

- **for all entities**: shares, units and other interests (except debt) in another entity that is either connected with, or an affiliate of, the entity;

- **for individuals**:
  - assets solely for personal use and enjoyment (other than a main residence);
  - a main residence, but where interest deductions could have been claimed in respect of the dwelling at any time during ownership, then only a partial exclusion applies;
  - a right to any allowance, annuity or capital amount payable out of a superannuation fund or an approved deposit fund; and
  - a life insurance policy; and
- **for your affiliate or an entity connected to your affiliate**: assets not used in carrying on a business by you or an entity connected with you.

Section 152-20(3) and (4) clarify what assets of others must be included in your MNAV calculation, including, but limited to, the assets of your affiliate and entities connected with your affiliate (excluding connections only because of the affiliate relationship) which are used or held ready to use in the carrying on of your business, or entities connected with you.

Valuation considerations for the MNAV test

There is no helpful statutory definition in the ITAA97 for the "market value" of an asset, save for the fact that s 960-405 ITAA97 requires the value to be reduced by any relevant GST input tax credits. We therefore need to turn to either case law or the ATO for additional guidance.

The ATO has released a comprehensive summary document which outlines its view of acceptable processes to undertake a market valuation for tax purposes.[2] This guide contains details and links to other ATO products depending on the nature of the transaction or asset being valued. Importantly, the ATO guide indicates that you should assess market value on the basis of the "highest and best use" of the asset as recognised in the market.

In relation to guidance from case law, most would be familiar with Griffith CJ's statement on the ordinary meaning of market value in *Spencer v Commonwealth*:[3]

> "… the test of value of land is to be determined, not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, i.e., whether there was in fact on that day a willing buyer, but by inquiring: 'What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?'"

This test was also adopted in *Abrahams v FCT*[4] where Williams J stated the market value was:

> "… the price which a willing but not anxious vendor could reasonably expect to obtain and a hypothetical willing but not anxious purchaser could reasonably expect to have to pay … if the vendor and purchaser had got together and agreed on a price in friendly negotiation …"

Where both parties are knowledgeable, dealing at arms-length and not anxious to transact, the actual market should align with this hypothetical market, which should also align with the price agreed to be paid. However, there may be instances where the price agreed to be paid may not align with the actual or hypothetical market as the price may include differences due to special circumstances unique to the purchaser (or vendor) or the pricing could be aggregated with other disposals.

If the measurement for the MNAV test is the sum of the market value of the CGT asset just before the CGT event, is the figure for MNAV always equal to the price transacted or not? What if it is an internal restructure – is not the risk heightened when you can only consider a hypothetical market to apply a value to the transfer?

Syttadel Holdings

Syttadel Holdings Pty Ltd and FCT[5] involved the sale of a marina in 2006 for a contracted price of $8.9 million. In late 2008, the vendors applied for an ATO ruling seeking a determination that, despite the sale at $8.9 million, the market value of the marina was in the range of $4 million to $4.5 million and therefore the MNAV test was satisfied. The ATO disagreed and the matter was heard at the AAT in 2011. Although Deputy President Hack was unpersuaded with Syattadel's valuer's opinion that the market value of $4.5 million was acceptable, he did conclude that the market value of the marina was at least the $5.3 million which was the opinion of the valuer commissioned by the ATO.

While the $5.3 million was still in excess of the then MNAV limit of $5 million, it nevertheless established that there could be circumstances where the market value and sale price are not necessarily the same, albeit one that the ATO considers not a general outcome and one that is decided on the facts.[6]

Hookey

In *Hookey and FCT*,[7] Deputy President Rayment recently confirmed these principles whereby:

> "24. … the taxpayer has failed to establish that the contract price was not the market price of the learning centres. In order to do such a thing, it would have needed to lead evidence that the price paid by ABC was wholly erroneous, and affected by error. The prima facie effect of the negotiated price was to show that the market price was the amount agreed to be paid by ABC, and the taxpayer has not in my opinion displaced that prima facie position. I am not satisfied that ABC paid other than the market value for the properties."

Miley

Miley and FCT[8] concerned the sale of all 300 shares in AJM Environmental Services Pty Ltd under a sale agreement for $17.7 million, or $5.9 million to each of the three equal shareholders, including Andrew Miley's 100 shares. It was a condition of the agreement that the buyer would buy all of the shares held by the shareholders and was not obliged to buy the shares held by one of the shareholders to the exclusion of the other shares held by the shareholders.

The ATO assessed the market value of Miley's 100 shares just before the CGT event as $5.9 million which, when added to Miley's other CGT assets of $120,000, exceeded his MNAV limit of $5 million. Miley objected and successfully appealed to the AAT in the first instance. The Commissioner's principal argument was that the most reliable evidence of the market value of the shares was the price that the unrelated buyer in fact paid.

Miley referred to the High Court decision in *Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd*,[9] submitting that the market value is to be determined by reference to a hypothetical sale between willing but not anxious parties and this was not necessarily equal to the amount paid by the actual buyer. Although different to the expert valuations, the AAT accepted that the market value was $4,914,700, after applying a 16.7% discount for lack of control.

Deputy President Frost concluded that:

> "… the consideration that Mr Miley received for his shares, which formed part of the consideration paid by the Buyer for all the shares in the Company, is more than a hypothetical willing but not anxious purchaser would have paid if it had purchased Mr Miley's shares alone – and that is the basis on which the market value of Mr Miley's shares should be determined. Therefore, while the actual consideration received by Mr Miley should not be ignored as an indicator of the market value of his shares just before the time of the CGT event … it is not determinative of that market value."

The AAT concluded that the correct enquiry when determining the market value of the 100-share parcel was not to look at the "special circumstances" of this sale, which contemplated that the parcel was sold along with the balance of the shares on issue, but rather to determine the value of the shares alone and not part of the whole share package.

The AAT decision was subsequently overturned in the Federal Court in favour of the Commissioner,[10] with the substantive issue argued before the court being whether a minority interest discount for lack of control should apply for the purposes of determining market value for the MNAV test.

The Federal Court found that the AAT misdirected itself in relation to *Pioneer Concrete* which caused it to ignore a relevant consideration, being the fact that, just before the sale, there was a not anxious buyer in the market willing to paying $17.7 million for all of the shares in the company, and that Miley and his fellow shareholders were willing to sell at that price. Therefore, there were no special circumstances, as contemplated in *Pioneer Concrete*, but rather that was the reality of the market and no discount should be applied.

Miley established the following principles for determining market value:

- the decision confirmed the accepted definition of “market value” from *Abrahams v FCT*,[11] being “a willing but not anxious vendor could reasonably expect to obtain and a hypothetical willing but not anxious purchaser could reasonably expect to pay …”;
- if there is no ready market or no present, willing but not anxious buyer for the shares, you will need to hypothesise that there is such a buyer and they got together with the seller and agreed on a price;
- if the current transaction was effectively akin to a recent sale at arm’s length, there is nothing to suggest that both parties were not knowledgeable, willing but not anxious buyers and sellers,

and therefore the price agreed by arms-length negotiation should relevantly be the market value;

- if there is, or is likely to be, a particular buyer who is willing to pay more for the shares than other buyers for a particular reason, that buyer should not be excluded when considering the relevant market value; rather, it may just be the realities of the market; and
- it is not appropriate to apply a minority interest discount to a parcel of shares where the terms of the sale require all of the issued shares of the company to be sold contemporaneously and the buyer is not required to buy the shares of one shareholder to the exclusion of others.

Kilgour

Many of the above observations were mirrored in the original decision of *Kilgour v FCT*,[12] confirming that, while a price which is above or below "market value" may suggest that the parties may not be dealing with each other at arm's length, the agreed price (proceeds) must be respected unless it can be definitively established that the parties are not acting at arm's length. That is, proof that a disposal was not "fair", or not at market value, is not sufficient to show that the dealing in connection with the disposal was not at arm's length. This view was upheld on appeal in the Full Federal Court in *Kilgour v FCT*,[13] noting that not only was the special or strategic price element just part of the market value of the shares, but also that the application of a minor interest discount applied to a particular parcel of shares for MNAV purposes is not appropriate to displace the actual proceeds received.

Moloney

Finally, the AAT case of *Moloney v FCT*[14] confirmed that view that the Commissioner is able to substitute the capital proceeds where the capital proceeds are more or less than the market value of the asset and the seller and purchaser did not deal at arm's length — as was the case with this transaction resulting from an internal restructure.

The Deputy President did not accept that the taxpayers had dealt with each other at arm's length. Although they obtained independent valuations, there was no real bargaining between the parties — the valuations were not challenged, but rather it was driven by the accountants and the agreement was substantially controlled and directed by the same persons.

> "The law in relation to the small business CGT concessions can be extremely advantageous but complex . . ."

You are therefore left with both the taxpayer and the ATO engaging multiple independent valuers, with decisions being made by tribunals/courts after consideration of valuation reports, underlying assumptions and valuation principles.

The lesson learnt from these cases is that, if a taxpayer wishes to argue that the market value of an asset is less than its sale price, the taxpayer should obtain an independent valuation from a qualified expert valuer, and the methodologies used by the valuer must be accepted methodologies that can be supported and withstand rigorous examination by both the ATO and/or a tribunal or court.

Similarly, any independent valuation provided by the ATO should be carefully examined to ensure that the valuation methodologies used are acceptable, where those methodologies include approaches based on market, income, assets, cost or probabilities.

Tips and traps: MNAV considerations

When determining whether you satisfy the $6 million MNAV test, careful consideration should be given to the following:

- Have you added all of your CGT assets as defined in s 108-5(1) ITAA97, including any kind of property such as depreciating assets, trading stock, bank accounts and cash, debtors and loans?
- Have you disregarded interests in an entity that is connected to you or with an affiliate but included the related liabilities?
- If you are an individual, have you excluded personal-use assets, superannuation, life insurance policies and the main residence unless it was used at some time to produce assessable income, in which case, include a reasonable proportion of the market value having regard to the extent that the interest was or would have been deductible?
- Have you correctly identified all entities connected with you, including 100% of the value of their assets less the related liabilities — irrespective of your ownership percentage?
- Have you excluded assets of an affiliate other than those used or held ready for use in your business or an entity connected with you (excluding business entities connected only because of your affiliate)?

- Have you correctly calculated the market value of the CGT assets just before the CGT event?
- Have you only reduced the value of the CGT asset by a liability that is related to the asset or a named provision in s 152-20(1)(b)? There remains some uncertainty regarding the interpretation of a liability "related to the asset". While the relationship nexus is quite clear if the liability arose to fund the acquisition of the asset, there are other instances where the link is not so strong. For example, if a loan facility has been redrawn for payments to an owner's equity or shareholder loan, is that still related to the current assets of the business?
- What if the asset was transferred out of the entity under a family law directive but the liability remained? Always check the nexus between the asset and the liability if you wish to reduce the value of the asset.
- The timing of the liability can also be important. In the case of *FCT v Byrne Hotels Hotel Qld Pty Ltd*,[15] the courts found that expenditure on legal, accounting and real estate commission in relation to the sale of the asset could be included in the MNAV test assessment which is undertaken just before the CGT event, as it was found that the obligations were either existing legal or equitable obligations, or an obligation that was not "truly contingent" in the sense of being "uncertain as both a theoretical and a practical matter".

Concept of controlled entities and affiliates

Assessing whether you are a small business entity or whether you satisfy the MNAV test or active asset test requires an in-depth understanding not only of the taxpayer making the gain, but also who controls that taxpayer, either from an ownership or a decision-making perspective. Failure to identify the relevant connections can lead to a failure to aggregate turnover, asset values or ownership percentages that can lead to an erroneous conclusion that the taxpayer has met the basic conditions and concessions are applied that the taxpayer was not entitled to.

A whiteboard map with all possible entities in the group is an essential start in the forensic process to identify possible connected entities and affiliates. Further, it is also important to go beyond the ownership interests in the entities on the whiteboard by seeking to understand what each of the entities do and who are the possible controllers behind the entities identified on the board. Once controllers have been identified, your forensics need to extend to other entities that aren't just connected by ownership interests but also persons or entities with common business control to the entity with the CGT event.

Identifying connected entities

The concept of a "small business entity" was the term introduced into Div 328 ITAA97 (in 2007) which outlines the meaning of a small business entity, what entities are taken to be connected with that entity, and the meaning of an "affiliate". Eligibility for being considered a small business entity is focused on aggregating the turnover of the business entity and its connected entities, which is currently under $10 million per annum.

As noted earlier, s 152-10(1AAA) introduced a new term for a CGT small business entity which effectively substitutes a turnover threshold of $2 million for the small business CGT concessions to apply.

Section 328-125(1) ITAA97 provides that:

> “(1) An entity is ***connected with*** another entity if:
>
> (a) either entity controls the other entity in a way described in this section; or
>
> (b) both entities are controlled in a way described in this section by the same third entity.”

The concept of control, in situations other than a discretionary trust, can be summarised as an entity will control another entity if the first entity, its affiliates, or the first entity together with its affiliates have the right to at least 40% of income and/or capital distributions from the other entity, or, if the other entity is a company, control at least 40% of the voting power.

Which entity controls a discretionary trust requires an examination of whether the trustee acts, or could reasonably be expected to act, in accordance with an entity’s directions or wishes. This a factual-based analysis of who is making the decisions regarding the trust. In the case of *Gutteridge and FCT*,[16] it was found on the facts that, while the trustee company of a trust sourcing childcare centres was 100% owned by the daughter, it was in fact the father who made all of the business decisions and therefore it was the father who controlled the trust.

This meant that the trust could access the small business CGT concessions as the trust was taken not to be connected to another company which operated the childcare centres – that company was 100% owned by the daughter – so both entities were not controlled by the same third entity.

An alternative control test for discretionary trusts is to look at the past four years of trust income and capital distributions, deeming that a beneficiary in receipt of at least 40% of the distribution will control the trust.

What is an "affiliate"?

To correctly identify connected entities and potentially what assets can be considered active, you need a clear understanding of the concept of an "affiliate", given the meaning in s 328-130(1) ITAA97:

> "(1) An individual or a company is an ***affiliate*** of yours if the individual or company acts, or could reasonably be expected to act, in accordance with your directions or wishes, or in concert with you, in relation to the affairs of the business of the individual or company."

While this provision appears logical and easy to apply to the concept of control, it can be really challenging to apply in a factual situation. First, an affiliate can only be an individual or a company that is conducting a business.

You are therefore identifying an entity which causes that individual or company conducting the business to act in accordance with your directions or wishes or in concert with them.

The way to make sense of the principle is that both the “controlling” entity and the affiliate are both conducting business and thus this provision ensures that you cannot avoid connections merely because you have divested your business activities into entities with little or no common ownership.

By way of illustration, let’s look at the following simple example:

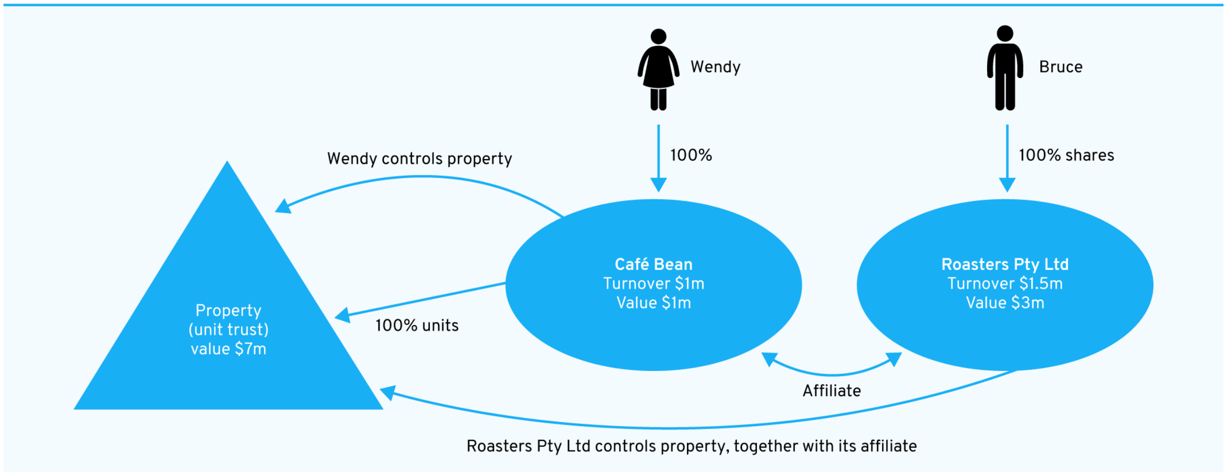
- Wendy, the daughter, is acting as a sole trader and conducts a café business named “Café Bean”;
- Bruce, the dad, is acting as the sole director and shareholder of a company called “Roasters Pty Ltd”, which roasts coffee beans for sale to a number of local cafés, with Café Bean being its major customer;
- as a university student, Wendy does not have any day-to-day running of the café business. Rather, it is Bruce who hires the staff for the café and oversees the daily operations;
- both businesses operate from the same business premises owned by Wendy;
- assume that Wendy and Bruce have no other common business interests; and
- the company, Roasters Pty Ltd, which conducts the coffee bean roasting, sells the business, making a capital gain, and wishes to access the small business CGT concessions.

See also Diagram 1.

The following broad conclusions may be drawn:

- Bruce controls Roasters Pty Ltd as he owns > 40% of the shares in the company;
- neither Wendy, Wendy's business nor the property unit trust are connected to Bruce (or his company) by any concept of common ownership;
- Wendy is an affiliate of her dad's company, Roasters Pty Ltd, as Wendy acts or could reasonably be expected to act in accordance with the directions or wishes of Roasters Pty Ltd, or in concert with Roasters Pty Ltd in relation to the affairs of Wendy's café business;
- to calculate the connected entities of Roasters Pty Ltd, you need to include the company's affiliates (Wendy), any entity that is connected to that affiliate, and any entity controlled by the company together with the affiliate. Therefore, Roasters Pty Ltd and the property unit trust are also connected; and
- if the café business was conducted by a family discretionary trust, while the affiliate provisions may not apply, it is likely that Bruce could still control both the trust (through s 328-125(3) ITAA(7) and his company (direct control through s 328-125(2)). This means that the trust (conducting the café business) and Roasters Pty Ltd would be connected, as both entities are controlled by the same third person.

Diagram 1. Structure of Roasters Pty Ltd



For completeness, this would mean that:

- the company with the gain must aggregate the business turnovers of both Roasters Pty Ltd and the café operated by Wendy (as an affiliate) to determine whether Roasters Pty Ltd is a CGT small business entity with a turnover of less than $2 million;
- Roasters Pty Ltd must include some, but not all, of the net assets owned by Wendy (as an affiliate). Section 152-20(3) limits assets of an affiliate or entities connected to an affiliate to only those assets that are used, or held ready for use, in the carrying on of a business by you (Roasters Pty Ltd) or another entity connected with you; and
- therefore, as a minimum, Roasters Pty Ltd would include the premises owned by Wendy in its MNAV test as they both operate from the same premises, plus any other assets owned by Wendy and used in the Roaster Pty Ltd business.

In summary, the affiliate provisions ensure that a business entity making a gain cannot gain access to the small business CGT concessions by fragmenting their business operations into a number of entities that do not have the requisite common ownership to be connected, even though each of the business activities are being directed by a common person or entity. The connection, via an affiliate status, will always mean that the two operating businesses are aggregated for turnover testing. However, for MNAV testing, you only need to count those CGT assets that are used, or held ready to be used, in the business of the entity making the gain. In contrast, if the connection was by the requisite 40% or more ownership control, all of the CGT assets of the connected entity are counted.

Further, you can disregard the assets of a business being conducted by a connected entity that is only connected with you because of your affiliate.

It is vital when interpreting the small business CGT concessions that you clearly understand which entity is making the gain, and then how they may be connected to other entities, either by themselves or by being linked with other entities if both the taxpayer and the other entity is controlled by the same third entity. Nothing can be assumed when applying the connected with and the affiliate provisions, as the assessments undertaken are predominately factually based.

Additional hurdles if the CGT asset is a share or unit

On Budget night, 9 May 2017, the government announced an integrity measure to ensure that the small business CGT concessions were appropriately targeted. In particular:

> "… the Government will amend the small business CGT concessions to ensure that the concessions can only be accessed in relation to assets used in a small business or ownership interests in a small business."

The new law applies to CGT events happening after 8 February 2018, when the CGT asset being sold is a share in a company or an interest in a trust. The change repealed and replaced the wording of s 152-(10)(2) to retain the existing two additional basic conditions and add an extra three additional basic conditions.

The target taxpayers were those accessing the concessions for assets which were unrelated to their small business, with access being gained through arranging their affairs so that their ownership interests in larger businesses did not count towards the tests for determining eligibility for the concessions.

Additional conditions if the CGT asset is a share or unit

Three additional conditions have been added to s 152-10(2), namely:

1. the taxpayer is required to either satisfy the $6 million MNAV test in s 152-15 ITAA97 or they must be carrying on a business *just before* the CGT event;
2. the object entity would be either a CGT small business entity for the income year or satisfy the $6 million MNAV test, if it is assumed that the only CGT assets or annual turnovers considered were those of:
    a. the object entity;

   b. each affiliate of the object entity; and
   c. each entity controlled by the object entity in a way described by s 328-125, but with a reference to a 20% interest not 40% and disregarding a determination in force under s 328-125(6) (over 40% but less than 50% ownership); and
3. additional testing of the CGT asset to ensure that it satisfies the active asset test, if the assumptions in the new s 152-10(2A) were made.

What is the additional modified active asset test?

The additional testing to ensure that the share in the company or the unit in the trust being disposed of is still considered to be an active asset is by far the most difficult to interpret of the February 2018 changes.

There is no change to the wording of s 152-40(3) ITAA97 regarding when shares or units can be active:

> "(3) A CGT asset is also an ***active asset*** at a given time if, at that time, you own it and:
>
> (a) it is either a share in a company that is an Australian resident at that time or an interest in a trust that is a resident trust for CGT purposes for the income year in which that time occurs; and
>
> (b) the total of:
>
> (i) the market values of the active assets of the company or trust; and

(ii) the market value of any financial instruments of the company or trust that are inherently connected with a business that the company or trust carries on; and

(iii) any cash of the company or trust that is inherently connected with such a business;

is 80% or more of the market value of all of the assets of the company or trust."

The replacement s 152-10(2) seeks to modify what assets of the company or trust are eligible to count towards the 80% or more threshold test in s 152-40(3).

To now satisfy the modified active asset test, at least 80% of the sum of:

- the total market value of the assets of the object entity (disregarding any shares in companies or interests in trusts); and
- the total market value of the assets of any entity (*a later entity*) in which the object entity had a small business participation percentage of greater than zero, multiplied by that percentage,

must relate to assets that are:

- active assets; or
- cash or financial instruments that are inherently connected with a business carried on by the object entity or a later entity.

However, cash or financial instruments that were acquired for a purpose that included satisfying this modified active asset test will not be included as an asset counting towards the 80% threshold in either s 152-40(3)(b)(ii) or (iii).

The modified active asset test must be met for at least half of the asset ownership period (or at least 7.5 years, if the asset was held for 15 years), but not necessarily on a day-to-day basis.

A share in a company or an interest in a trust will continue to be an active asset at a later time if:

- it was an active asset at an earlier time; and
- it is reasonable to conclude that the share or interest is still an active asset at the later time.

A temporary breach of this requirement will not result in the test being failed.

Shares held by the object entity in a later entity

If the asset held by the object entity is a share or a unit in another entity ("later entity"), what is included for the purposes of active asset testing in s 152-40(3)(b) is the market value of the assets held by a later entity multiplied by the object entity's small business participation percentage in the later entity at the test time, rather than the share or unit itself. Thus, a look-through approach will be adopted by the object entity in relation to interests held in later entities when seeking to satisfy the active asset test.

Further, assets of the later entity will only be counted as an asset covered by s 152-40(3)(b) if the provisions of the new s 152-10(2B) are satisfied. This subsection provides that, for assets held by the later entity to be included in the aforementioned modified active asset test, those assets must be held by a later entity that:

- is a CGT small business entity; or

- satisfies the $6 million MNAV test in relation to the capital gain,

in which the taxpayer has a small business participation percentage of at least 20% or is a CGT concession stakeholder at the relevant time.

When determining whether a later entity is either a CGT small business entity or satisfies the MNAV test, at the relevant time, it is assumed that the only CGT assets or annual turnovers considered were those of:

- the later entity;
- each affiliate of the later entity; and
- each entity controlled by the later entity, in a way described by s 328-125, but with a reference to a 20% interest not 40% and disregarding a determination in force under s 328-125(6) (over 40% but less than 50% ownership).

So, what is caught now?

There are a number of situations whereby taxpayers may lose access to the small business CGT concessions on the sale of shares or units in an object entity for CGT events post-8 February 2018. The reasons for the loss of the concessions may include:

- the taxpayer wanting to satisfy the "small business entity" definition, but commenced business operations after the CGT event (a pre-8 February 2018 business commencement is only required by 30 June of the relevant year);
- the taxpayer holds shares or units in an object entity that does not satisfy the modified definition of "small business entity" or

the $6 million MNAV test, including entities that have a 20% or more interest in (not required pre-8 February 2018); and

- some assets held by the object entity are no longer assets to be included in the numerator of the 80% active asset definition (assets in the numerator changed from 8 February 2018). For example:
    - cash or financial instruments acquired for a purpose that included passing the modified active asset 80% test;
    - investments held in a later entity disregarded and replaced with each asset of the later entity at the object entity's ownership percentage;
    - previously, the object entity treated an investment in a later entity as active if 80% or more of the later entity's assets were active. Thus, up to 20% of the later entity's assets could be passive but still active for the object entity's 80% test. By including a portion of all of the later entity's assets in the object entity's numerator, the test has effectively lost this buffer, making the active asset test harder to pass; and
    - for the later entity's assets to be considered active at all in the object entity's 80% test, the taxpayer (shareholder of the object entity) must have a 20% or more interest (indirectly) in the later entity.

These additional three eligibility requirements, to be satisfied if the taxpayer is selling shares in a company or units in a trust, are all integrity measures introduced to better target the small business CGT concessions:

- wealthier clients can no longer commence a small business after the CGT event and think they can still access the small business CGT concessions on the sale of shares or units in another entity;
- you can no longer sell shares or units in entities that cannot, of themselves, pass modified small business or MNAV tests; and
- it is now a lot harder for those shares or units in an object entity subject to disposal to be treated as active assets, especially if the object entity owns interests in other later entities.

Conclusion

Whether you are advising clients on setting up structures for a business, restructuring the current arrangements in response to changing business needs, or contemplating an exit, whatever your strategy entails, it will be fraught with tax perils.

It will always be a risky tax business to adopt a strategic plan for owning or disposing of business assets. The risks become more apparent if the strategy is to enact a succession plan when there is no cash from the transaction to pay any unintended tax consequences.

When applying CGT concessions to a transaction, it is critical that you, the adviser, has an in-depth understanding of the taxpayer making the gain and those entities which are connected to that taxpayer, whether it be through the aggregation of turnovers, ownership interests or control through the decision-making process.

This analysis inevitably takes time and costs the client money when undertaken properly. The law in relation to the small business CGT concessions can be extremely advantageous but complex, with short-cuts leading to errors and errors leading to increased tax exposure for all concerned.

The above "Introduction" contained a warning that is worthy of repeat:

> The topic of this article is when being "small" and "in business" is not enough.

In many cases, a taxpayer operating a small business will easily pass either the threshold turnover, business operations or MNAV test contained in the third basic condition for relief outlined in s 152-10. In other circumstances, a taxpayer will have a turnover far in excess of $2 million or have an MNAV far in excess of $6 million, yet they nonetheless qualify. In the latter case, expect to be put to the sword by the authorities on passing the condition that you are relying on to access the concessions. Whether it be scrutiny of asset valuations, turnover, business activities, connections or affiliations, the analysis needs to be thorough. Advisers need to deftly navigate an ATO review or audit through the complexities of the rules — keeping the process focused and on track to a successful conclusion.

Plan well and plan ahead.

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Bendel and the outer limits of "loan" in Div 7A

by Tony Anamourlis, CTA, Principal, Parkland Rhodes Lawyers

For more than 15 years, the Commissioner of Taxation maintained that a corporate beneficiary which left its present entitlement unpaid thereby provided "financial accommodation" to the trustee, attracting the deemed dividend rules in Div 7A of the *Income Tax Assessment Act 1936* (Cth). In *FCT v Bendel*, the High Court rejected that position by a majority of five to two. This article argues that the majority reached the correct construction of "loan" in s 109D(3), but that the decision is more significant for its method than its result. The majority anchored the deeming provision in the idea that a private company must actively do something to move value before Div 7A can engage, and it read s 109D(3) harmoniously with s 109F(6) and Subdiv EA. The reasoning restores coherence to a Division that had drifted from its statutory text. Yet the majority also widened the concept of a loan beyond money, and it resolved contested questions of trust law that the parties had treated as settled. The practical consequence is clarity on forbearance, and fresh uncertainty about the line between passivity and the granting of time to pay.

Introduction

Division 7A of the *Income Tax Assessment Act 1936* (Cth) (ITAA36) is an integrity measure. It treats certain payments, loans and forgiven debts made by a private company to a shareholder or an associate as assessable dividends, so that profits are not extracted from the corporate form free of tax.[1] The mechanism is deeming, and the reach of the deeming turns on the defined word "loan" in s 109D(3) ITAA36. The question in *Bendel* was deceptively narrow. Where a discretionary trust resolves to make a corporate beneficiary presently entitled to trust income, but the entitlement is left unpaid, has the company "made a loan" to the trustee because it has not insisted on payment?

The Commissioner had answered yes since 2010, principally through TR 2010/3, treating an unpaid present entitlement as a provision of financial accommodation.[2] That position generated a vast compliance apparatus and reshaped how closely held groups dealt with corporate beneficiaries. The Full Court of the Federal Court rejected it, holding that an unpaid present entitlement is not a loan for Div 7A purposes.[3] The High Court dismissed the Commissioner's appeal.[4] The majority concluded that the resolutions set aside the entitlements onto separate trusts, that no debtor and creditor relationship arose, and that mere forbearance could not answer the statutory description of a loan.[5]

This article advances three claims. First, the majority's construction is textually and contextually sound: the language of s 109D requires active conduct, and the surrounding provisions confirm that an obligation of repayment lies at the heart of the definition. Second, the decision quietly enlarges the concept of a loan in one respect while narrowing it in another, and that asymmetry will matter in later disputes. Third, the case is best understood as a statement about who parliament chose to tax.

The statutory framework

Section 109D(1) deems a private company to have paid a dividend where it makes a loan to an entity during the year, the loan is not fully repaid before the lodgment day, Subdiv D does not prevent the deeming, and the entity is a shareholder or an associate. The word "loan" is given an inclusive definition. In this Division, loan includes: an advance of money; a provision of credit or any other form of financial accommodation; a payment of an amount for, on account of, on behalf of, or at the request of an entity, if there is an express or implied obligation to repay the amount; and a transaction, whatever its terms or form, which in substance effects a loan of money.[6]

Two features of the drafting framed the contest. The definition is inclusive, so the ordinary meaning of loan is retained and extended, not replaced. And s 109D(4) provides that a loan is made when the amount is paid by way of loan or anything described in s 109D(3) is done in relation to the entity.[7] The Commissioner fastened on limb (b), the provision of credit or any other form of financial accommodation, and limb (d), a transaction which in substance effects a loan. The taxpayers answered that each limb presupposes an obligation of repayment, and that doing nothing is not the doing of anything.

The commercial setting is familiar to anyone who advises closely held groups. A trustee resolves to distribute income to a corporate beneficiary at year end, the cash is not paid across, and the funds keep working in the group. The beneficiary returns the entitlement as assessable income and pays tax at the corporate rate.[8] The Commissioner's construction would add a second, deemed dividend on top of that tax unless the entitlement was placed on complying loan terms. That is the practical stake.

The dispute and its passage to the High Court

Gleewin Pty Ltd (Gleewin) was trustee of the Steven Bendel 2005 Discretionary Trust. Gleewin Investments Pty Ltd (Gleewin Investments) was a corporate beneficiary. Mr Bendel owned and controlled both companies and was a discretionary object of the trust. For the income years ended 30 June 2014 to 30 June 2017. the trustee resolved each year to set aside trust income to Gleewin Investments and to Mr Bendel. The entitlements of Gleewin Investments were not paid across. Much of the income set aside for the company was in fact lent to Mr Bendel. The Commissioner assessed Gleewin Investments on the footing that the unpaid entitlements were loans by the company to the trustee.

The Administrative Appeals Tribunal set aside the Commissioner's objection decisions and remitted the matter. It found that the unpaid entitlements were not loans within s 109D(3), and that the substance of the arrangement was a loan to Mr Bendel which should have been taxed in his hands under Subdiv EA ITAA36. In the tribunal's view, the Commissioner had taxed the wrong taxpayer.[9]

The Full Court dismissed the Commissioner's appeal, though on a different basis from the tribunal. It reasoned that limbs (a), (c) and (d) of s 109D(3) each embody a concept of repayment, so limb (b) should be read the same way, and that limb (b) requires an obligation to repay an identifiable principal sum rather than a mere obligation to pay.[10] The Commissioner obtained special leave. The appeal was argued, adjourned for supplementary submissions on the effect of the resolutions, and resumed before being dismissed by a majority of five.[11]

The majority: active conduct and the essence of repayment

The majority of Gageler CJ, Gordon, Edelman, Steward and Gleeson JJ began with the ordinary meaning of "loan". Adopting Dr Pannam's definition[12] and the reasoning in *Radilo*,[13] their Honours held that repayment lies at the centre of the concept:

> "67. … A loan of money may be defined, in general terms, as a simple contract whereby one person ('the lender') pays or agrees to pay a sum of money in consideration of a promise by another person ('the borrower') to repay the money upon demand or at a fixed date … The essence of the transaction is the promise of repayment."

That starting point was reinforced by Gleeson CJ's observation in *Prime Wheat*[14] that giving a purchaser time to pay is not a disguised loan, because "[t]he essence of a loan is an obligation of repayment".[15] The inclusive definition extends the ordinary concept; it does not abandon the feature that gives the word its meaning.

The decisive move was to read s 109D as requiring the company to do something. Limb (b) speaks of a "provision" of financial accommodation, and a provision, the majority held, requires a transfer of value:

> "72. Contrary to the Commissioner's contentions, there is no 'provision … of financial accommodation' for the purposes of s 109D(3)(b) when a private company does nothing. The provision of financial accommodation requires some initial or anterior transfer of value or, put in different terms, the supply or grant of some sort of pecuniary assistance, involving some bilateral activity … Its mere inactivity cannot satisfy the language of 'advance', 'provision', 'payment' or 'transaction'."

This is the ratio. Division 7A is directed at the movement of value out of a private company, in a manner analogous to the payment of a dividend. Where the company is simply passive, no value moves and nothing is done. The same reasoning disposed of limb (d): acquiescing in the retention of funds is not a transaction, a word which by its ordinary meaning denotes an interchange between entities. Mere inactivity could not satisfy any limb of the definition.

> "*Bendel* is a reminder that Div 7A taxes the movement of value — not the mere existence of an unpaid obligation."

The majority then refined the Full Court's analysis in a way that deserves attention. Their Honours agreed that even the expanded definition requires an obligation to repay value supplied. But they rejected the Full Court's further premise that the obligation must attach to money or an identifiable principal sum:

> "76. … In that respect, we differ from the Full Court to the extent that it is an element of their Honours' reasoning that s 109D(3) is limited to transfers of 'an identifiable principal sum' or money more generally. Section 109D is not limited to transfers of money; it extends to any transfer of value from a private company, including transfers of property or supplies of services, burdened with an obligation of repayment of the value supplied."

So the company won on conduct, not on subject-matter. A loan for Div 7A purposes can be a transfer of property or a supply of services, provided value moves under an obligation of return. What it cannot be is nothing at all.

Context sealed the conclusion. Section 109F(6) ITAA36 deems a debt to be forgiven where a reasonable person would conclude that the company will not insist on payment. If the Commissioner were right, a company that did not insist on payment would already have made a loan from the inception of the debt, which would leave little work for s 109F(6) to do:

> "77. … If s 109D(3) can apply to a private company not insisting upon the performance of an obligation to repay it, it makes, with respect, little sense for the legislation to include the foregoing provision, which is triggered when a reasonable person would conclude that a private company 'will not insist' on payment … That is not a conclusion that promotes a harmonious and coherent application of Div 7A."

The majority added that the Commissioner's reading would treat a beneficiary able to invoke the rule in *Saunders v* Vautier,[16] but choosing not to call for payment, as having made a loan to the trustee, which their Honours described as a highly improbable outcome.[17] The construction was made to turn on objective conduct, not on a beneficiary's subjective restraint.

The most telling part of the reasoning is historical. When Div 7A was enacted, it contained no rule for unpaid entitlements of corporate beneficiaries. Parliament responded first with former s 109UB ITAA36 and, after the Board of Taxation's 2002 review, with Subdiv EA.[18] The significance, for the majority, lay in the identity of the taxpayer that parliament selected:[19]

> "81. … It is immediately noteworthy that the legislative solution for what was to occur when unpaid present entitlements of a private company were effectively lent to that company's shareholder was to make the shareholder the recipient of the deemed dividend, rather than the trustee, as the Commissioner would have it in this case … it is the shareholder, not the private company, that has received the economic value."

That choice answered the case. The economic value had passed to Mr Bendel, and Subdiv EA was designed to tax him. The Commissioner's construction would have taxed the trustee on the strength of the company's silence, a result the statutory history did not support.

The dissents: "makes", accommodation, and time to pay

Jagot and Beech-Jones JJ would have allowed the appeal. Their reasoning rewards attention because it accepts the same statutory text and reaches the opposite result. Jagot J held that the company made a loan in the form of a provision of financial accommodation:[20]

> “92. On the proper construction of s 109D of the 1936 Act Gleewin Investments Pty Ltd … the beneficiary, made a ‘loan’ to Gleewin Pty Ltd … the trustee, in the form of ‘a provision of … any … form of financial accommodation’ in each of the relevant years …”

Her Honour’s path turned on two points. First, the word “makes” does not require a positive act; a person may cause a result by refraining from acting. Second, the difficulty of fitting forbearance into the requirement that a loan be “repaid” should be solved by reading the undefined word “repaid” expansively, not by narrowing the defined word “loan”. On the facts, Jagot J accepted the respondents’ Full Court admission that a debtor and creditor relationship existed, and the tribunal’s finding that no separate trust arose, so that the company’s decision not to require payment was the provision of accommodation.

Beech-Jones J framed the issue more tightly. The real question, he held, was whether a company that grants time to pay an existing debt makes a loan, and the answer was yes:

> “195. … Contrary to the reasoning of the Full Court, the answer to that question is ‘yes’ because the deferral of a shareholder’s obligation to pay a debt amounts to the provision of ‘credit or any other form of financial accommodation’ within the meaning of s 109D(3)(b).”

Crucially, his Honour did not say that pure inaction suffices. He drew a line that the majority did not need to draw:

> "236. … Mere inaction in seeking payment or even an uncommunicated acquiescence may not be sufficient to provide credit or financial accommodation but conduct or advertence amounting to giving or granting time is sufficient to provide credit or financial accommodation. Such conduct or advertence may be inferred; it need not be contractual or express."

The dissents therefore agreed with the majority on a critical premise. Doing nothing is not enough. Their disagreement was about characterisation: whether a controlled corporate beneficiary that knowingly leaves an admitted debt outstanding, so that the trustee can on-lend the funds, has crossed from passivity into the granting of time. That is a question of fact dressed as a question of construction, and it is the seam along which future disputes will run.

Critical evaluation

The construction is right, and rightly reasoned

The majority's central holding is convincing. The verbs in s 109D, advance, provision, payment and transaction, all denote conduct, and s 109D(4) confirms that a loan is made when something is done in relation to the entity.[21] To deem a dividend from a company's silence is to read the active language out of the section. The point is not merely linguistic. Division 7A targets the extraction of value, and value is not extracted by a beneficiary who declines to collect what it is owed. The majority's insistence on a transfer of value gives the

Division a principle rather than a list, and the principle matches the integrity purpose.

The use of s 109F(6) is the strongest part of the judgment. A statute that separately deems forgiveness when a company will not insist on payment cannot sensibly also treat the same restraint as the making of a loan. Reading the two provisions together avoids both redundancy and the absurdity of a deemed dividend arising at the very moment a debt is created.[22]

The dissent does not leave the point unanswered. Beech-Jones J meets it by distinguishing forgiveness from deferral, reasoning that s 109F(6) is directed to cases where payment is no longer sought at all, not to the granting of time to pay, so that the two provisions can operate without overlap. The answer has force, but it does not dissolve the difficulty. The boundary between not insisting for the time being and not insisting at all is the kind of fine factual judgment that produces the double counting the majority feared, and the objective test in s 109F(6) tells against making liability turn on the company's posture. On balance, the majority's reading is the more coherent. This is orthodox construction applied with discipline, and it is the kind of reasoning a later court can use.

The trust law findings and the cost of revisiting concessions

The majority did not rest on construction alone. It also held that the resolutions set aside the entitlements onto separate trusts with sufficient certainty of subject-matter, and that no debtor and creditor relationship arose between trustee and company.[23] These findings were necessary to the result because a genuine debt deferred by agreement would have looked far more like the granting of time that Beech-Jones J described. The dissenters were willing to hold the respondents to their Full Court admission that a debt existed, and to the tribunal's finding that no separate trust arose. The majority reopened both. That is defensible where the questions are ones of legal characterisation rather than primary fact, but it leaves the trust law holdings resting on the wording of one deed. A differently worded resolution, one that distributes rather than sets aside, or that credits the beneficiary in the books, may yield a debt, and with it the prospect that deferral amounts to accommodation. The majority's reliance on the language of "set aside" and the phrase "pending payment" in cl 3(5) shows that drafting will decide many of the cases that follow.

The wrong taxpayer, and the limits of the win

The most durable contribution of the case is its account of who parliament chose to tax. The majority endorsed the tribunal's conclusion that, where unpaid entitlements are in substance channelled to a shareholder, the deemed dividend belongs in the shareholder's hands under Subdiv EA, not the trustee's.[24] Read this way, *Bendel* is less about whether forbearance is a loan and more about the Commissioner having chosen the wrong provision and the wrong party. The framing matters because the revenue was not left without remedy. Subdivision EA remained available against Mr Bendel. The taxpayers won the argument about s 109D, but the economic arrangement was never beyond the reach of the Division as a whole.

What remains unresolved

Three questions survive.

The first is the boundary between passivity and the granting of time. The majority held that pure inaction is not a loan, and Beech-Jones J accepted as much, but neither opinion fixes the point at which conduct or advertence converts forbearance into accommodation. A board minute, a deferral agreement, or a course of dealing may be enough.

The second is the treatment of genuine debts. Where a resolution does create a debtor and creditor relationship, the deferral of that debt may still attract limb (b), and *Bendel* does not foreclose that result.

The third is legislative. The Commissioner has lost a position held for 15 years, and the simplest response is amendment. If the Commissioner wishes to tax unpaid entitlements at the level of the trustee or the company, it can say so directly, as the Board of Taxation once contemplated.

Conclusion

Bendel settles that a corporate beneficiary which simply leaves its entitlement unpaid has not made a loan to the trustee. The majority reached that conclusion by holding that Div 7A requires the company to do something, that the essence of a loan is an obligation of repayment, and that the surrounding provisions, in particular s 109F(6) and Subdiv EA, cannot be reconciled with the Commissioner's reading. The decision is correct, and its method is more valuable than its result. It supplies a principle for the Division and a clear account of the taxpayer that parliament chose to pursue.

What the analysis establishes is the inadequacy of mere forbearance as a trigger for the deeming. What it leaves unresolved is much of what lies just past that point. The majority widened the concept of a loan to any transfer of value, narrowed it to exclude inactivity, and rested its trust law conclusions on the wording of a single deed. The dissents show how small a change in the facts, an admitted debt, a deferral that is communicated and intended, might have produced the opposite outcome. The law is now clear at its centre and contested at its edges, and the next round of disputes will be fought over drafting and over the meaning of giving time to pay.

Key takeaways

1. An unpaid present entitlement of a corporate beneficiary, left uncollected, is not a loan under s 109D(3). Mere passivity does not engage Div 7A because the company must actively transfer value before a loan is made.

2. The definition of “loan” still requires an obligation of repayment, but it is not limited to money. It extends to any transfer of value, including property or services, burdened with an obligation of return.

3. Section 109F(6) and Subdiv EA do the work that the Commissioner sought to extract from s 109D. Where value reaches a shareholder, the deemed dividend belongs to the shareholder under Subdiv EA, not the trustee.

4. Drafting matters. A resolution that sets aside income onto a separate trust is safer than one that distributes or credits a beneficiary so as to create a debt because deferral of a genuine debt may still be accommodation.

5. The result is vulnerable to legislative reversal. Advisers should treat the position as settled at common law but open to amendment, and should monitor the Commissioner's response to the loss of a 15-year administrative practice.

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1 S 109D(1) ITAA36. The deemed dividend is limited by the company's distributable surplus: s 109Y ITAA36.

2 The ruling was withdrawn with effect from 1 July 2022 and replaced, for trust entitlements arising on or after that date, by TD 2022/11 (final, 13 July 2022); TR 2010/3 continues to apply to entitlements arising on or before 30 June 2022.

3 *FCT v Bendel* [2025] FCAFC 15 per Logan, Hespe and Neskovcin JJ.

4 *FCT v Bendel* [2026] HCA 18 (*Bendel* (HCA)).

5 *Bendel* (HCA) at [6].

6 S 109D(3) ITAA36.

7 S 109D(4) ITAA36; see also s 109D(1AA) ITAA36 (amount of the deemed dividend).

8 S 97(1) ITAA36, and Div 6 of Pt III ITAA36; the present entitlement is included in the beneficiary's assessable income.

9 *Bendel* (HCA) at [23]–[24]; the tribunal set aside the objection decisions and remitted the matter to the Commissioner.

10 *Bendel* [2025] FCAFC 15; the appeal was confined to questions of law under s 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth).

11 *Bendel* (HCA) at [6].

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19 *Bendel* (HCA) at [81].

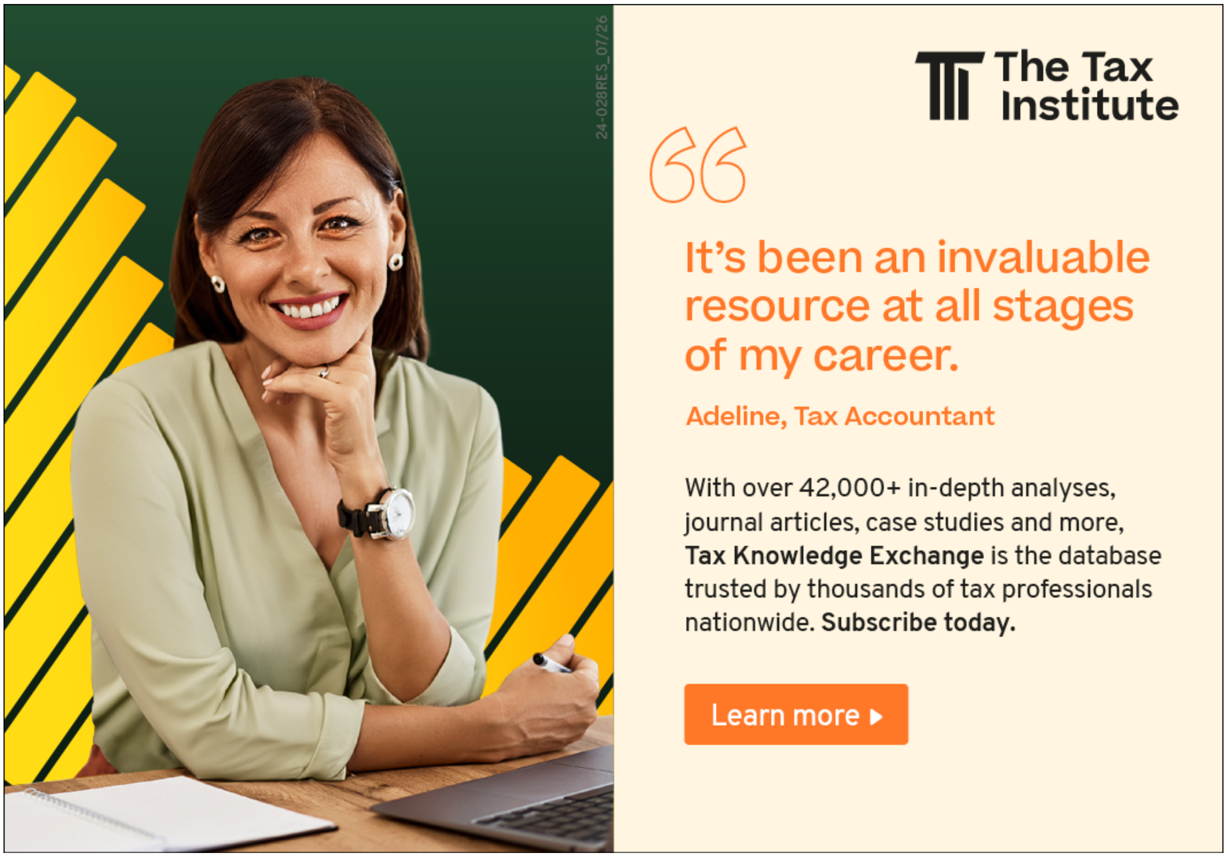
20 *Bendel* (HCA) at [92] per Jagot J.

21 *Bendel* (HCA) at [72], [76].

22 *Bendel* (HCA) at [77].

23 On certainty of subject-matter, the majority applied *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* [2000] HCA 25: *Bendel* (HCA) at [49]. On the debtor and creditor question, the majority distinguished *Fischer v Nemeske Pty Ltd* [2016] HCA 11 (resolution for a "final distribution" secured by a deed of charge): *Bendel* (HCA) at [30]–[33]; cf the contrary reliance on *Fischer* by Jagot J in dissent at [167]–[169], [176]–[185].

24 *Bendel* (HCA) at [23], endorsing the tribunal's view that Mr Bendel was assessable under Subdiv EA.



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Superannuation

by Daniel Butler, CTA, and William Fettes, DBA Lawyers

UK inheritance tax impacts SMSF members

Not having a BDBN in respect of UK pension benefits should be reconsidered as discretionary and non-discretionary pension benefits will generally be subject to inheritance tax from 6 April 2027.

Background

This article covers recent changes to the United Kingdom inheritance tax (IHT) regime, including changes to the calculations of the value of a person's estate such that it includes unused pension funds and pension death benefits (pension benefits). We also discuss the impact that binding death benefit nominations (BDBNs) have for IHT purposes prior to 6 April 2027 and how the new long-term resident rules alter the landscape.

How IHT currently operates

The UK IHT is a tax imposed on the transfer of wealth on death and, in some cases, certain lifetime transfers. While Australia does not currently impose an equivalent estate tax, UK IHT remains highly relevant to Australians who retain connections with the UK, including dual citizens, former UK residents, and individuals holding UK-origin pension benefits or other UK assets.

Where an individual falls within the UK IHT regime, His Majesty's Revenue and Customs (HMRC) generally imposes a 40% tax on the value of assets exceeding the available nil-rate bands.

Broadly, in prior years, it was expected that less than 10% of estates annually were forecast to have IHT liabilities as a result of a "generous combination of nil-rate bands, exemptions and reliefs".[1] Notably, the IHT nil-rate band allows estates to pass on £325,000 to beneficiaries without incurring an IHT charge. There is an additional £175,000 residence nil-rate band available where a principal home passes to direct descendants. These nil-rate bands have been extended to operate until 5 April 2030. The thresholds have been frozen since 2009, providing for fiscal drag to increase the amount of estates exposed to IHT liability. Additionally, gifts made within the last seven years of life are brought back into the estate calculation for IHT purposes.

Historically, exposure to UK IHT depended heavily on concepts of domicile and deemed domicile. However, from 6 April 2025, these concepts were substantially reformed through the introduction of the long-term UK residence rules (discussed further below).

Treatment of pension benefits

Historically, pension benefits have generally received favourable treatment for IHT purposes, subject to the structure of the fund's death benefit arrangements. In broad terms, where trustees or pension scheme administrators retained ultimate discretion regarding the payment of death benefits, these amounts were generally regarded as falling outside the member's estate and therefore outside the scope of IHT.

This issue has been relevant for Australian superannuation funds holding UK-sourced funds, based on HMRC's published guidance in IHTM17052.[2] Broadly, HMRC states that, where a member can direct who will receive a death benefit and the trustee is bound to follow that direction, the member may be regarded as having a "power to dispose" of the relevant property. Consequently, for individuals caught in the UK IHT net, executing a BDBN in respect of UK-sourced pension or superannuation assets may result in those benefits forming part of the member's estate for IHT purposes.

For this reason, some advisers recommended removing BDBN and like clauses from SMSF deeds altogether for affected members to protect the fund's discretionary status. This reflected a concern that the mere existence of a power enabling a member to bind the trustee gave rise to risk based on existing HMRC guidance.

Changes

Discretionary and non-discretionary pension benefits

From 6 April 2027, the distinction between discretionary and non-discretionary arrangements will be removed. Broadly, most pension benefits will be brought within the value of a deceased person's estate for IHT purposes, regardless of whether trustee discretion previously existed.

HMRC has confirmed that, while these amounts will generally be included in the deceased member's estate, transfers to a surviving spouse may continue to access the spouse exemption. However, pension benefits passing to children or other non-spouse beneficiaries may increase the estate's exposure to IHT.

Thus, since pension benefits will be within the IHT net from 6 April 2027, it is worthwhile considering whether a BDBN should be implemented after 5 April 2027. From 6 April 2027, having a BDBN so that pension benefits are paid to a surviving spouse will assist in obtaining the spouse exemption from IHT.

Long-term UK tax resident determination

The long-term UK residence rules introduced on 6 April 2025 replaced the previous regime which was based primarily on domicile and deemed domicile concepts. Broadly, if an individual is classified as a long-term UK resident, their non-UK assets may also be subject to IHT when they die or make certain transfers of wealth.

An individual will be a long-term UK resident in a tax year if they are a tax resident in the UK for either:

- the previous 10 consecutive years; or
- a total of 10 years or more within the previous 20 years.

As a result, individuals who fall within the long-term UK resident regime may be exposed to IHT on their worldwide assets, including interests in non-UK structures such as Australian superannuation funds and family trusts.

QROPS transfers to SMSFs

Under the current UK tax framework, transfers from a UK pension fund to an Australian SMSF that satisfies the relevant criteria can be recognised as a qualifying recognised overseas pension scheme (QROPS). QROPS can broadly be made without UK transfer taxes, subject to the same jurisdiction requirements and the member's available overseas transfer allowance (OTA). Broadly, transfers in excess of the member's available OTA may be subject to a 25% tax charge on the excess amount.

Historically, transferring UK pension benefits to an Australian SMSF has often formed part of broader succession and estate planning strategies. While a transfer to an Australian SMSF may continue to provide a range of superannuation, tax and estate planning benefits, the introduction of the new IHT rules means that individuals who remain within the UK IHT net (including under the long-term UK residence rules) will also need to consider the potential IHT implications of assets held through an Australian SMSF from 6 April 2027.

The average IHT liability is expected to increase by around £34,000 when pension benefits are included in the value of the estate.[3] The deceased person's legal personal representatives are liable for reporting and paying any IHT.

Conclusion

The UK IHT can apply to pension benefits of long-term UK residents, including interests in non-UK structures such as Australian superannuation funds and SMSFs. While there has been an incentive to not have a BDBN in the past in respect of UK pension benefits from an IHT perspective, this position should be reconsidered after

5 April 2027. From 6 April 2027, both discretionary and non-discretionary pension benefits will be subject to IHT, apart from where the spouse exemption applies.

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Upcoming events

JULY
23–24
Thu–Fri

VIC

Yarra Valley Tax Retreat

10 CPD hours

JULY
23–24
Thu–Fri

WA

WA Tax Retreat

10 CPD hours

JULY
30–31
Thu–Fri

VIC

State Taxes Convention

12 CPD hours

AUGUST
5–7
Wed–Fri

SA

Barossa Tax Convention

12 CPD hours

SEPTEMBER
2–4
Wed–Fri

NSW

The Tax Summit

20 CPD hours

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