The Tax Institute

# Tax Update

## November 2024


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## About Brown Wright Stein

Brown Wright Stein is a medium-sized commercial law firm based in Sydney. We provide legal advice in the following areas:

- Tax
- Dispute Resolution
- Corporate & Commercial
- Franchising
- Property
- Employment
- Estate Planning
- Elder Law
- Intellectual Property
- Corporate Governance
- Insolvency & Bankruptcy

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

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

# Contents

Our tax training notes are prepared by Marianne Dakhoul, Jane Harris, Matthew McKee, Gillian Tam, Hayden Rudd, Aritree Barua and Amy Burriss.

# 1. Tax Update Pitstop

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

| Tax Update Matter | Impact Summary | Further Detail |
|---|---|---|
| Item 2.1<br><br>Pascua | The Fair Work Commission has held that an offshore worker engaged by law firm as a legal assistant was a common law employee of the law firm and hence was entitled to access the unfair dismissal regime in the *Fair Work Act 2009* (Cth). This was despite the contract referring to the worker as an independent contractor. | Page 7 |
| Item 2.2<br><br>Automotive Invest | The High Court has allowed a taxpayer's appeal concerning luxury car and GST. The issue before the Court was whether cars acquired by the taxpayer were acquired with the intention of using the cars for a purpose, and for no other purpose of holding the car as trading stock when the cars were displayed in a museum conducted by the taxpayer. | Page 12 |
| Item 7.1<br><br>ART commences | The Administrative Review Tribunal, which replaces the Administrative Appeals Tribunal, commenced on 14 October 2024. The Small Business Taxation Division was abolished but the ART now includes a Taxation and Business jurisdiction, and has preserved small business litigation funding. | Page 46 |
| Item 7.2<br><br>Small business litigation funding | The ATO has published guidelines on the availability of small business litigation funding in the ART. | Page 46 |
| Items 8.4<br><br>TASA Code changes draft guidance | The Tax Practitioners Board has issued draft guidance on the changes to the Code of Conduct under the *Tax Agents Services Act 2009* (Cth) | Page 57 |

# 2. Cases

## 2.1 Pascua – Offshore worker employee vs contractor

**Facts**

On 21 July 2022, Joanna commenced work as a legal assistant for Legal Practice Holdings Group Pty Ltd, which trades as 'MyCRA Lawyers'. The firm is based in Queensland and represents itself as the only specialist credit repair lawyers in Australia.

Joanna lives in the Philippines and performed her duties remotely from her home.

The work Joanna performed for MyCRA Lawyers was done under a contract dated 21 July 2022. Joanna entered into the contract with Doessel Group Pty Ltd, a related entity of Legal Practice Holdings.

Joanna worked at times that aligned with business hours in Australia. Each day, she received files by email and was responsible for communicating with MyCRA Lawyers' clients, as well as banks and other credit agencies on behalf of those clients. Joanna carried out these tasks through phone and email.

Joanna used a device, provided by Doessel Group, that made her phone appear to be based in Australia. She also had an email address with a “mycralawyers” domain and a signature block which identified her as a paralegal for the firm. While she was initially supervised by a solicitor, within a year Joanna was unsupervised and later began training others in conducting investigations.

Joanna was paid $18.00 per hour. She submitted weekly invoices, using a pro forma electronic invoicing system provided by Doessel Group. Invoices were capped at $720.00, being 8 hours per day for 5 days. Out of the 83 invoices submitted, 55 were paid at the maximum amount of $720.00, while the remaining 28 invoices varied from $432.00 to $709.20.

The contract between Joanna and Doessel Group is titled an "Independent Contractor’s Agreement". It identified Doessel Group as "the Company" and Joanna as the "Independent Contractor". However, the contract contains references to an employment relationship, including references to Joanna as an employee.

The contract consists of ten sections and two annexures, as follows:

1. section 1 outlines the engagement to provide specific services. These tasks, detailed in Annexure A, include legal research, drafting documents, case preparation, and client follow-ups, as well as meeting key performance indicators (KPIs). The KPIs included completing a minimum of 20 productive tasks daily or achieving four billable hours. The KPIs also specify that tasks should be completed within the same day unless otherwise communicated to a supervisor;
2. section 2 concerns remuneration and provides that it will be based on an hourly rate on a "time and material basis". Joanna was not required to supply any materials under the contract, nor did the contract make provision for payment for materials; The hourly rate is described as "AUD$18 per hour Salary all inclusive as a Full Time Employee";
3. section 3 requires Joanna to be available to perform, and to perform, the work;
4. section 4, titled "Independent Contractor Relationship" confirms Joanna is engaged solely as an independent contractor and states the contract does not create any agency, partnership, or employment relationship. It also specifies that Joanna is not entitled to any benefits beyond those in the contract, and that all related costs such as taxes and insurance are her responsibility;
5. section 5 states that Joanna has no copyright or publishing rights, or any proprietary rights to the work produced under the contract;

6. section 6 addresses the obligations related to the company's confidential and proprietary information, stipulating that such information is governed by a Non-Disclosure Agreement annexed to the contract as Annexure B, titled "Employee Non-Disclosure Agreement";
7. section 7 addresses warranties and indemnities. It states that Joanna warrants her services will comply with the law and meet certain standards. It also includes her assurance of authority to enter into the contract, alongside Doessel Group's similar commitment. Section 7 absolves Doessel Group of liability for any injury or death during contract performance and requires Joanna to indemnify Doessel Group against potential damages or claims;
8. section 8 outlines the contract's term and termination. The contract begins on 21 July 2022 and continues until Joanna satisfactorily completes her work or it is terminated. The termination clause allows either party to give 15 days' notice for breaches. Doessel Group could also terminate the contract for any reason with 10 days' notice;
9. section 9 addresses damages and remedies. It grants Doessel Group the right to recovery any property or materials upon contract termination and relieving it of liability for losses related to the termination; and
10. section 10 outlines general terms for the contract. It provides Doessel Group may assign the contract freely while requiring Joanna to obtain written consent for any assignment.

Following recent cases in the High Court of *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Pty Ltd and Jamsek* [2022] HCA 2, determining the legal nature of the relationship between the parties involves evaluating their contractual obligations. It requires an evaluative judgment of the contract, taking into account various indicia that may point to either an employment relationship or an independent contractor arrangement.

On 20 March 2024, Doessel Group terminated the contract, asserting that Joanna had breached the contract. Doessel Group relied upon the contract in support of the relationship being one of independent contractor and not one of employment.

Joanna argued she was an employee and was unfairly dismissed.

**Issue**

Is Joanna an employee?

**Decision**

After considering the terms of the contract, Deputy President Slevin, assessed the relationship as being one of employment, rather than that of a principal and independent contractor. In reaching this assessment, the Fair Work Commission considered Joanna was required to perform paralegal work exclusively for the business, which could not be delegated to others.

Additionally, Deputy President Slevin noted Joanna was paid below the minimum wage and was not operating her own business; instead, receiving a salary described as an hourly rate for full-time employment. The label of independent contractor did not accurately reflect the true nature of the contract, as Joanna followed daily instructions, was supervised in her tasks and the arrangement was meant to be ongoing unless terminated according to the terms of the contract.

**COMMENT –** this case is highly relevant to professionals engaging offshore contractors.

**COMMENT –** this case pre-dates the recent changes to the *Fair Work Act 2009* (Cth). Effective from 26 August 2024, the Act introduces a new definition of "employment" that emphasises the "real substance, practical reality and true nature" of the working relationship. This approach requires a comprehensive assessment of all aspects of the relationship, including both the terms of the contract and how it is executed in practice. This contrasts with the position under tax law, which continues to focus on the written contract

consistent with the decisions in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Pty Ltd and Jamsek* [2022] HCA 2.

Citation *Ms Joanna Pascua v Doessel Group Pty Ltd* [2024] FWC 2669 (26 September 2024) (Deputy President Slevin, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FWC/2024/2669.html

## 2.2 Automotive Invest – LCT and GST

**Facts**

Since 28 May 2016, Automotive Invest Pty Limited has operated the Gosford Classic Car Museum. Automotive Invest was controlled by Anthony Denny, who had a background in second-hand motor vehicle dealings in Australia and Europe.

The museum had over 300 vehicles on display, including a De Havilland Rapide, an old New York fire truck, a DMC DeLorean, a La Ferrari, and a Formula 1 racing car. The museum charged an admission fee which had increased over time, and also had a merchandise shop and a diner.

Automotive Invest employed staff who worked at the museum's admission/ticket desk, gift shop and the floor of the exhibits. It also promoted the museum to the public generally through its website, media and social media. The website stated that the museum was the largest car museum in Australia and one of the five largest car museums in the world. It also provided links to facilitate travel bookings, local hotels, and also noted that the museum was available for hire for functions or weddings.

From time to time, the museum put on special events, such as Royal Favourites Exhibition, Australian Day exhibition and a vintage fair.

From October 2016, Automotive Invest's website noted that many museum cars were for sale. The website noted that it was part of the museum's mandate to facilitate the purchase of vehicles, and excess stock would be available for sale via the website.

From February 2017, Automotive Invest started a monthly newsletter to report on events.

In July 2017, Automotive Invest's marketing manager prepared a submission for the Central Coast Business Excellence Awards to put the museum in the category of the 'Start Up Superstar'. The submission described the museum 'as a world class, diverse and evolving collection of rare and classic cars offering visitors a unique and inspiring experience of automotive engineering experience'.

During the first full financial year of the museum's operation, Automotive Invest received $1.32 million in admission fees and $4.39 million of profits from car sales.

When acquiring and importing its cars, Automotive Invest quoted its ABN and was not subject to Luxury Car Tax (LCT). Where an entity is not subjected to LCT because the entity has quoted for the supply, it will have an 'increasing luxury car tax adjustment' if it later uses the car for a purpose 'other' than a 'quotable purpose' under sections 15-30 and 15-35 of the LCT Act. Relevantly, a quotable purpose includes holding a car as trading stock, other than holding it for hire or lease. The Commissioner considered an 'other' purpose to be an additional purpose to holding the car as trading stock.

Automotive Invest also claimed input tax credits for the cars that it acquired or imported.

The Commissioner considered that Automotive Invest had increasing luxury car tax adjustments, as Automotive Invest had acquired each relevant car with the intention of using the car for exhibition purposes.

The Commissioner also contended that section 69-10 of the GST Act applied in relation to each car that Automotive Invest acquired or imported after 28 May 2016 to limit the input tax credits it could claim. Section 69-10 of the GST Act relevantly provides that if an entity acquires or imports a car the value of which exceeded the 'car limit', and the entity is not entitled to quote under the LCT Act, the entity is only entitled to claim an input tax credit up to 1/11th of the 'car limit'.

Automotive Invest appealed the Commissioner's decision in the Federal Court.

At the hearing, the parties agreed that the LCT and GST question would be answered in the same way, even though the LCT question concerned actual use and the GST question concerned the intended purposes.

In the Federal Court, Anthony made submission that Automotive Invest's business venture was to deal in exclusive high-end classic and luxury cars. He submitted that he had observed a similar marketing technique in Las Vegas where car stock was presented in a 'museum' format, which gave the impression of each of the vehicle displayed having a greater value than they might otherwise have.

Automotive Invest contended that the Commissioner's position that the display of the cars in the showroom was for an 'other purpose', because it was styled as a 'museum' and charged an entry fee to enter the premises, was excessively narrow and uncommercial. Automotive Invest submitted that its main intention behind the museum concept and the charging of admission fees was to create a level of exclusivity, attract genuine potential customers, and to discourage 'tyre kickers'. Automotive Invest submitted that its sole purpose was to maximise the value it could obtain, and that the museum was nothing more than a competitive and inventive means of selling stock.

Automotive Invest also submitted that the Commissioner should approach the question of whether there is an increasing adjustment by reference to each vehicle individually, rather than the vehicles as an indivisible group.

Automotive Invest further submitted at the hearing that 'for no other purposes' in section 9-5(1) should be read as 'alternative' rather than 'additional'. That is, Automotive Invest held the cars as trading stock and any use of the cars for any additional purpose was not use which took it out of being trading stock.

At first instance, Thawley J rejected the claim that the museum was solely 'an enterprising strategy intended to increase the price of the car'. Objectively assessed, the museum sought to attract as many visitors as it possibly could and would naturally have attracted many people who were uninterested in purchasing a car. In displaying the cars in the manner that it did, Automotive Invest used the car for the purpose in addition to holding the cars as trading stock.

Although Thawley J agreed that the question of purpose must be considered for each car individually, he considered that it did not assist Automotive Invest as each car available for sale was also used as an exhibit in the museum. Thawley J further rejected Automotive Invest's construction of section 9-5(1) and held that the word 'other' and the phrase 'for no other purposes' was unambiguous. As such, Thawley J held that the Commissioner was correct to conclude that Automotive Invest had an increasing LCT adjustment and that its input tax credit was limited.

Automotive Invest appealed to the Full Federal Court, which dismissed the appeal, holding that the scale and nature of the Automotive Invest's activities resulted in each of the cars being held as more than trading stock.

Automotive Invest appealed to the High Court of Australia.

In the High Court, it was noted the Commissioner, Federal Court and Full Court interpreted the purpose of the car display from an 'objective' standpoint, reasoning that the museum attracted a large number of visitors and generated income, thereby constituting an additional commercial activity. They all considered that the 'purpose' should be evaluated based on the objective facts and circumstances surrounding the museum, considering it a distinct use of the cars.

Automotive Invest argued that purpose should be viewed subjectively, focusing on the intention of Anthony as the controlling mind of the business. According to Anthony, the museum was simply a means of marketing, with the ultimate purpose being to sell the cars at premium prices.

**Issue**

Did Automotive Invest import or acquire each relevant car for the purpose of holding the car as trading stock 'and for no other purpose'?

**Decision**

A majority of the High Court allowed the appeal.

The majority examined the statutory framework, specifically section 9-5(1) of the LCT Act and section 15-30(3), which addresses 'increasing luxury car tax adjustments' if a car is used for a non-quotable purpose. Having regard to this statutory framework, the majority favoured Automotive Invest's interpretation, focusing on the appellant's subjective purpose under the statutory language of sections 9-5(1) and 15-30(3). The majority considered that the LCT liability should hinge on whether the taxpayer's purpose aligns with "quotable purposes" like trading stock, rather than any incidental or auxiliary commercial effects of marketing strategies like the museum display.

In distinguishing between 'means' and 'end', the majority relied on precedents including *Salvation Army (Victoria) Property Trust v Fern Tree Gully Corporation* (1952) 85 CLR 159 and *Ryde Municipal Council v Macquarie University* (1978) 139 CLR 633, which recognise that auxiliary activities undertaken as a 'means to an end' do not necessarily constitute a separate purpose. The High Court held that, although the museum setup attracted visitors and generated ancillary income, it remained subordinate to Automotive Invest's primary business of selling cars. The majority accepted that marketing methods, even if elaborate, do not create an independent purpose for tax liability if they are clearly designed to achieve a primary business goal.

Accordingly, the LCT assessments and GST assessments were set aside as Automotive Invest was using the cars solely for a quotable purpose.

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| Citation *Automotive Invest Pty Limited v Commissioner of Taxation* [2024] HCA 36 (Gageler CJ, Edelman, Steward, Gleeson and Jagot JJ)<br>w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2024/36.html |

## 2.3 Shugai – Work-related deductions

**Facts**

Alexander Shugai claimed a number of deductions in his income tax returns for the income year ended 30 June 2022. The deductions relate to Alexander's employment as a technical architect with Ice Data Services International Pty Ltd.

Alexander worked from home in a split-level residential dwelling that he shared with his wife, children and father. The deductions Alexander claimed included:

1. home office occupancy expenses – including home insurance, council rates, waste disposal, water rates, home office repairs;
2. home office running expenses – including gas, power and internet;
3. plant and equipment expenses – being office IT equipment;
4. consumable expenses;
5. mobile phone expenses;

6. motor vehicle expenses; and
7. spouse expenses – which involves payment to his spouse for tax management, office cleaning and document management/storage.

The ATO conducted an audit of Alexander as his deductions exceeded comparable returns. During the audit, the ATO issued Alexander's employer a request to provide information and documents under section 353-10 of Schedule 1 of the TAA.

The employer disclosed to the Commissioner that:

1. Alexander was employed as a 'Technical Architect' from 9.00am to 5.00pm Monday to Friday;
2. Alexander was on occasion required to be on calls with the global teams. These may occur outside of the standard work hours;
3. the place of work is an address in Malvern, Victoria, not where the suburb where Alexander lived;
4. Alexander was provided with computer equipment, but not other tools, materials and equipment he may use to work from home, e.g. a desk or chairs. He was reimbursed for tools, materials and equipment expenses;
5. Alexander was reimbursed for his mobile phone expenses; and
6. Alexander was not required to use his private vehicle for work, and would be reimbursed for all reasonable travel expenses.

The ATO disallowed the deductions that were claimed in the initial income tax return. The ATO issued Alexander with a notice of amended assessment.

Alexander lodged an objection to the amended assessment. The objection was disallowed and Alexander applied to the AAT to have the objection reviewed.

At the AAT, Alexander contended that the two rooms, a storage room, a bathroom, and a kitchenette on that lower level were used exclusively as a home office and a place of business. This floorspace occupied 31% of the dwelling's total floor area.

With respect his working hours, he contended that, despite this contract of employment, he worked 365 days a year from 6.00am to 11.00pm as he reported to a team in New York.

He also claimed that his deductions had been the subject of 2014 Ministerial review by (then) Federal Minister Tudge, and therefore had legitimacy.

Home office occupancy expenses

The amounts claimed under this category did not apply the floorspace percentage claim of 31%, but instead ranged from 25% for water rates, 50% for council bins, and 100% for cleaning and repairs. Alexander did not provide reasons as to how these percentages were arrived at.

Home office running expenses

In relation to the home office running expense, Alexander claimed a 50% apportionment on gas, 40% apportionment on power and 100% apportionment on internet.

Alexander claimed that a deduction amounting to 50% of the gas bill was appropriate as the biggest gas appliance in the house was a gas heater which he needed to turn on in full during the colder months whilst he was working. He also claimed that he was using gas hot water as well whilst he was working because he washed his hands.

Concerning the 100% claim for the internet, Alexander contended that it was exclusively used for his business purposes and other members of his households had their own internet connections which were not land based.

The Commissioner conceded that Alexander undertook income earning activities from the ground floor area of the dwelling during the financial year ended June 2022 and that home office running expenses may be deductible where they are appropriately apportioned. However, the Commissioner contended that Alexander had not properly established an entitlement to such deductions or otherwise appropriately apportioned them between private or work-related activities. The Commissioner submitted that it was open to Alexander to undertake a proper exercise to calculate the proportion of running expenses incurred in relation to the incoming producing activities, e.g. maintaining a logbook of the hours that he worked.

Plant and equipment expenses

Under this category, Alexander claimed a 100% proportion of expenses of IT equipment. He was unable to provide documentary evidence in support of the majority these claims.

Consumables

Deductions claimed under this category included a music book, toilet paper, medications, private personal health insurance, milk, tea, coffee, bottled mineral water, sugar and insect spray.

Mobile phone expenses

Alexander claimed 100% of his yearly mobile phone expenses. The evidence before the AAT revealed that his employer paid him a mobile phone allowance of $420 per year.

Motor vehicle expenses

Alexander claimed 97.5% of his total motor vehicle expenses, and produced a logbook with entries recorded over a period of 12 weeks from 7 April 2022 to 30 June 2022. The entries in his logbook included traveling to a local shopping centre to purchase work related items, refills, and client service calls.

When asked to provide further information on entries under the description client service call, Alexander was unable to do so.

Spousal expenses

Alexander claimed a total of is $11,420 for payments made to his spouse for tax management, office cleaning and document management/storage. His spouse rendered invoice in support of this claim.

**Issue**

Was Alexander entitled to claim the deductions?

**Decision**

The AAT considered that Alexander's evidence was fanciful and defied belief.

Home office occupancy expenses

The AAT determined that no deduction could be claimed for home office occupancy expenses. The claim for deductions could not be substantiated.

The AAT did not accept that the storage room, kitchenette and bathroom were used exclusively for income producing purposes. The AAT further noted that even if it were, the expenditure was of a capital, private or domestic nature, as there was no requirement by Alexander's employer that he work from home.

Home office running expenses

The AAT determined that Alexander did not discharge the burden of proof that these items of expenses was exclusively used for business purposes.

The AAT gave particular attention to the percentage apportionment claimed by Alexander, given the dwelling was occupied by 5 family members, yet there has been a 100% claim for internet expenses, 50% for gas and 40% for power. The AAT noted that Alexander was unable to provide a probable and rational account of the basis of the apportionment.

Plant and equipment expenses

The AAT held that the plant and equipment expenses were not deductible, given the lack of evidence.

Consumable expenses

The AAT disallowed this category of expenditure as the expenses were not incurred in producing income and were essentially of a private or domestic nature.

Mobile phone expenses

The AAT held that the mobile phone was not a deductible expense as Alexander had not proved that it was incurred in producing income and not of a private or domestic nature. Further, it was not deductible as Alexander received reimbursement from his employer for his mobile phone expenses.

Motor vehicle expenses

The AAT held that the motor vehicle expenses were not deductible as there was no evidence to substantiate this claim.

Spouse expenses

The AAT considered that the invoice had a degree of artificially to it and found that it was not deductible because such service was private and domestic in nature.

Citation *Shugai and Commissioner of Taxation (Taxation)* [2024] AATA 3619 (Senior Member R Cameron, Melbourne)
w https://www.austlii.edu.au/cgĺi-bin/viewdoc/au/cases/cth/AATA/2024/3619.html

## 2.4 BZVH – non-concessional contributions special circumstances

**Facts**

BVZH held his superannuation benefits in three separate funds, being the Commonwealth Superannuation Scheme, Australian Super, and the ZH Superannuation Fund.

On October 2018, BVZH separated from his (now former) wife.

On 23 March 2020, an order by consent was made by the Family Court of Australia. Clause 13 of the consent order provided that the trustee of ZH Superannuation Fund was to pay BVZH's wife an entitlement calculated in accordance with Part 6 of the *Family Law (Superannuation) Regulations 2001*, using a base amount of $1,575,000, less the amount of the wife's member entitlements at 30 June 2019.

On 24 April 2020, a sum of $1,575,000 was withdrawn from the ZH Superannuation Fund and paid to the benefit of the former wife. As at 1 July 2019, the former wife had an entitlement of $1,147,503.00. An amount of $427,497 was paid to her from BVZH's member account. His member balance in ZH Superannuation Fund was reduced by the equivalent amount.

On 18 June 2020, BVZH made a non-concessional contribution of $100,000 to the ZH Superannuation Fund. It was his first ever non-concessional superannuation contribution.

BVZH did this based on his own understanding that, following the reduction of his superannuation balance, his member balance was under $1.4 million, and he was entitled to bring forward the non-concessional contributions cap by 3 years. He did not obtain any accounting or legal advice before making this contribution.

Under section 292-85(5) of the ITAA 1997, BVZH's non-concessional contributions cap for 30 June 2020 was nil, as, before that year, his total superannuation balance exceeded the general transfer balance for that year.

The ATO made a determination which imposed a liability on BVZH for excess non-concessional contributions tax.

BVZH conceded that he made an honest mistake and sought a determination under section 292-465 of the ITAA 1997 to have his non-concessional contributions disregarded on the basis of special circumstances.

The application of section 292-465(3) of the ITAA 1997 requires that:

1. there are special circumstances; and
2. the making of the determination is consistent with the objects of Division 292 of the ITAA 1997.

This application was disallowed.

BVZH then lodged an objection against the ATO's decision not to make a determination under section 292-465 of the ITAA 1997. This objection was disallowed.

BVZH sought a review of the objection decision in the AAT.

BVZH argued that the following elements amounted to special circumstances:

1. the special circumstances arose solely from the reduction of BVZH's superannuation balance;
2. the effect of the reduction was that he was permitted to make non-concessional contributions without the imposition of additional tax; and
3. the reduction was so significant that the balance regressed to a position it was 8 years ago.

The Commissioner submitted that none of the above facts constituted special circumstances.

**Issue**

Did BVZH have special circumstances under section 292-465(3) of the ITAA 1997?

**Decision**

The AAT found that BVZH did not have special circumstances within the meaning of section 292-465(3) of the ITAA 1997.

The AAT referred to the decision of the Full Federal Court case of *Ward v Commissioner of Taxation* [2016] FCAFC 132 to identify what could constitute 'special circumstances'. The relevant question in that case was what would be 'out of the ordinary or usual case'. The Court held that if something was 'unfair, unintended, or unjust', there must have been a feature out of the ordinary.

Here, BVZH did not have special circumstances because:

1. there was nothing in the consent orders that were "out of the ordinary, unfair, unintended or otherwise unjust" in terms of the powers of the Family Court of Australia. The orders were made by consent and BVZH and his wife had access to legal advice;

2. while there was a significant reduction in BVZH's superannuation balance, it was not a "decimation" or "destruction of … long-term superannuation strategy". When there is a marriage breakdown, it is quite common for there to be superannuation implications. There was still a significant balance remaining;
3. the AAT found that most cases dealing with special circumstances involved the member being actively misled or acting under a misapprehension due to acts or omissions of others. However, in the present case, BVZH found himself in this situation solely for his own failure to understand the application and effect of section 292-85(2) of the ITAA 1997. He was an experienced lawyer and he could have obtained professional advice on this section. Special circumstances could not arise from simple errors.

On the basis of the above reasons, the AAT affirmed the objection decision.

Citation *BVZH and Commissioner of Taxation (Taxation)* [2024] AATA 3618 (Senior Member R Cameron, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/3618.html

## 2.5 Loan Market Group – payroll tax penalties and interest

**Facts**

The Chief Commissioner of State Revenue imposed payroll tax on commissions paid to brokers by Loan Market Pty Ltd (**LML**) via Loan Market Group Pty Ltd (**LMG**) for the period from 1 July 2011 to 30 June 2018. This was the subject of review in *Loan Market Group Pty Ltd v Chief Commissioner of State Revenue; Loan Market Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 390 (see our May 2024 Tax Training Notes).

The Chief Commissioner of State Revenue also imposed penalties and interest on the payroll tax liability.

A penalty tax rate of 25% was imposed on the payroll tax defaults for the financial years 2012 to 2016, covering commissions paid by LML to brokers. The total aggregate penalty tax initially calculated, before reductions, was $192,119.

For the financial years 2012 to 2016, only the market rate component of interest was applied to unpaid primary tax.

For the financial years 2017 and 2018, both the market rate component and the premium component of interest were applied.

Due to COVID-19 relief measures, no interest was charged during specific periods from 4 May 2020 to 31 January 2021, and from 9 August 2021 to 1 April 2022

Total interest was calculated based on a detailed year-by-year breakdown of both premium and market rate components, totalling approximately $198,983, with $79,238 attributed to the premium component alone.

LML applied to the Supreme Court of NSW for review of the penalty and interest decision. LML sought reduction or remission of penalties and interest based on the claim that it took reasonable care in its tax compliance efforts, relying on professional legal advice over time

During the submissions phase of the hearing, the Chief Commissioner acknowledged that the penalty rate should be reduced to from 25% to 20% based on the application of Section 29(1) of the *Taxation Administration Act 1996* (NSW), which allows a reduction when a taxpayer discloses sufficient information during an investigation.

**Issues**

1. Should the penalties be reduced or remitted?
2. Should the interest be reduced or remitted?
3. Who should bear the Chief Commissioner's costs for the proceedings?

**Decision**

Penalties

The Court held LML had taken reasonable care between December 2014 and June 2016. During this time, LML had sought and acted on professional advice from reputable law firms and senior counsel, who had assessed that the commission payments made to brokers under a new franchise model agreement were unlikely to attract payroll tax liability. Given this reliance on expert advice, the court decided to remit the penalty tax for this period, as LML's approach demonstrated reasonable care in its tax compliance efforts.

However, penalty tax for periods before December 2014 was not remitted as LML was deemed aware of payroll tax risk but continued with its approach. The Court noted that LML had earlier received advice in 2009 indicating a potential payroll tax liability for commissions paid to brokers, but had not sought further clarification or a ruling from the Chief Commissioner at that time. As a result, LML could not demonstrate that it had taken reasonable care during this earlier period, and the Court maintained the penalty tax for these years.

Interest

The Court decided to remit the premium component of interest for the financial years 2017 and 2018. This decision was influenced by several factors, including the complexity of the payroll tax liability issue and consistent reliance by LML and LMG on professional legal advice, including from senior counsel, throughout the period in question. LML and LMG had also engaged reasonably with the Chief Commissioner during the audit process, which demonstrated their intent to comply rather than evade tax obligations. The Court found no evidence of wilful default by LML or LMG regarding the payment of payroll tax, which supported the remission of the punitive premium component of interest.

However, the market rate component of interest was not remitted, as it serves to compensate for the time value of money lost due to delayed tax payments. The Court's rationale for remitting the premium component was based on the LML and LMG taking reasonable care in tax compliance, their reliance on expert advice, and the absence of culpable conduct, thereby negating the need for the punitive element of the premium interest.

Costs

The Court made a mixed costs order due to the partial success of both parties in the case. Although LML and LMG successfully reduced the overall payroll tax assessment, the Chief Commissioner prevailed on significant issues, including the central question of whether payroll tax applied to the commission payments.

The Court ordered LML and LMG to pay 60% of the Chief Commissioner's costs for the proceedings after 21 July 2020. This order reflected that the Chief Commissioner's success on key issues required substantial evidence and argument, even though LML and LMG achieved some reductions in the tax amount and succeeded in having penalty tax and premium interest partly remitted.

Additionally, the court recognised that the issuance of assessments to both LMG and LML resulted in unnecessary duplication and costs. Consequently, the Court ordered the Chief Commissioner to pay LMG's costs for the period before the cases were consolidated in July 2020, as these costs were incurred due to the initial issuance of assessments to both entities.

Citation *Loan Market Group Pty Ltd v Chief Commissioner of State Revenue; Loan Market Pty Ltd v Chief Commissioner of State Revenue (No 2)* [2024] NSWSC 1393 (Richmond J, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2024/1393.html

## 2.6 Commissioner of State Revenue v ASIC – Reinstatement of company

**Facts**

Lakewood is the registered proprietor of Lot 13 of Diagram 41978 (certificate of title volume 556 folio 102A) (**Land**).

On 27 November 2011, Lakewood was deregistered by the Australian Securities and Investments Commission (ASIC) for a failure to pay fees. As a result of Lakewood's deregistration, all property owned by Lakewood at the time of its deregistration vested in ASIC and since that date, ASIC is the only party who is legally able to deal with Lakewood's property.

RevenueWA issued Lakewood with 13 land tax assessments in relation to the Land. The last assessment was dated 1 November 2023 and showed that Lakewood had outstanding land tax of $84,000. As at the date of deregistration of Lakewood, this debt was only $9,264.

Since the deregistration of Lakewood, the solicitors for the Commissioner have been unable to recover the outstanding land tax. In addition, land tax continues to be assessed yearly on the Land. ASIC informed RevenueWA that it does not agree to sell the Land to satisfy the land tax debt.

RevenueWA first became aware that Lakewood was deregistered on 9 March 2012. However, land tax assessment notices were not sent to ASIC until the 2017/2018 assessment year and then following years, due to an inadvertent administrative error as well as resourcing constraints.

Under section 601AH(2) of the Corporations Act, where a company has been deregistered, the court may make an order that ASIC reinstate the company if the conditions required by the Corporations Act are met. Relevantly, section 601AH(2) states that the application can be made by a 'person aggrieved by the deregistration' or 'a former liquidator of the company'. Where the court is satisfied that it is just to do so, the company's registration will be reinstated.

The Commissioner applied to the Supreme Court of Western Australia seeking an order to reinstate Lakewood to enable RevenueWA to recover the outstanding debts and enable other creditors to recover any debts that are owed by Lakewood. ASIC did not oppose the application. The former director and sole shareholder of Lakewood did not want to be heard on the application.

**Issue**

Should an order for reinstatement of Lakewood be made?

**Decision**

The term 'person aggrieved' is not expressly defined in the Corporations Act, The Court confirmed that the term should not be construed narrowly. The Court stated that there need only be a causal link between the grievance and the deregistration of the company. As a result, a person can become aggrieved as a result of events which occur after the time of deregistration. The Court was satisfied that the Commissioner was a 'person aggrieved' by the deregistration of Lakewood and has standing to bring this application.

Before the Court can make an order for reinstatement, the Court must be 'satisfied that it is just that the company's registration be reinstated'. This confers a discretion on the Court and in exercising this discretion the following factors are considered:

1. the circumstances in which the company came to be deregistered;
2. the future activities of the company if an order is made;
3. whether any particular person is likely to be prejudiced by the reinstatement; and
4. the public interest generally.

The Court accepted that Lakewood became deregistered by its failure to pay ASIC fees. The Court also accepted that no one, except potentially for ASIC as the inheritor of the Land, will be prejudiced by the reinstatement of Lakewood. However, the Court stated that the Commissioner would suffer prejudice if it is not able to recover the outstanding land tax.

The Court found there was no suggestion that there will be any future activities of Lakewood as the former director did not want to be heard.

One important matter the Court considered was the significant delay in bringing the application given that RevenueWA was aware of the deregistration since 9 March 2012. Nonetheless, the Court accepted that there was no prejudice to any witness in respect of the delay, and that the delay was largely due to resourcing constraints.

The Court held that there is a public interest in granting the application to ensure compliance with Lakewood's taxation obligations. Therefore, the Court held it was just to make the order to reinstate Lakewood's registration.

In addition, the Court made an order to wind up Lakewood and to appoint liquidators who consented to act.

Citation *Commissioner of State Revenue v Australian Securities and Investment Commission* [2024] WASC 392 (Hill J, Western Australia)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/wa/WASC/2024/392.html

## 2.7 Eighth Avenue Austral – Validity of declarations of trust

**Facts**

Eighth Avenue Austral Pty Ltd undertook a development of land at Austral in New South Wales, on which a shopping centre was ultimately constructed and then sold. The shares in Eighth Avenue Austral were held by Aspromonte Pty Ltd.

On or about 16 November 2023, Aspromonte entered into a Deed of Declaration of Trust with each of seven entities, as beneficiaries under the trusts (**Beneficiaries**). Under the trusts, shares in Eighth Avenue Austral were purportedly held, in specified numbers, for the Beneficiaries. Relevantly, the Declarations of Trust contain the following clauses:

1. clause 2: the trustee, when required by the beneficiary, will convey the interest held by in it trust to the beneficiary or act as trustee at the beneficiary's direction;
2. clause 3: the trustee is to vote and do all things arising in respect of the shares as the beneficiary may from time to time direct. That commitment is, in its terms, consistent with a trust over the share and not merely a trust over their benefit such as dividends or franking credits, where a shareholder's right to vote is an important incident of ownership of the share; and
3. clause 4: at the request of the beneficiary, the trustee will execute a transfer or other documents required to have the beneficiary, or their assignees, registered as owners of their respective interest in the shares.

Dividend statements dated June 2023 and August 2023 provided for payments described as 'shareholder dividend[s]' and franking credits to the Beneficiaries in respect of Eighth Avenue Austral.

One of the Beneficiaries was SVVID Pty Ltd. A director of SVVID provided evidence that he invested $849,000 "into" Eighth Avenue Austral but it was not clear how this investment was structured. Other Beneficiaries also made relevant investments, but it was similarly unclear how they were made.

The Beneficiaries requested that the shares in Eighth Avenue Austral be transferred to them. The director of Aspromonte, Mrs Carbone, refused to transfer the shares to the respective Beneficiaries.

A letter dated 1 March 2024 from the solicitors of Eighth Avenue Austral to the Beneficiaries referred to the shares held by Aspromonte on trust for the Eighth Avenue Austral, stating that:

> *It is only once those trust shares have been validly transferred to the relevant beneficiaries and those beneficiaries are recorded as the legal owner of those shares in the Company's share register that they will be entitled to properly call an extraordinary general meeting.*

On 9 April 2024, the Beneficiaries applied to the Supreme Court of New South Wales for a declaration that Aspromonte held shares in Eighth Avenue Austral in particular numbers of shares for each of the Beneficiaries, and an order that Aspromonte transfer those shares to each of the Beneficiaries.

Aspromonte referred to a Deed of Settlement for a unit trust dated 17 August 2017. However, the document plainly could not have been executed on that date, as it referred to allocation of units to several of the Beneficiaries which had not been incorporated at that time. The evidence left it unclear whether the unit trust plan was abandoned or if the trust was created and still exists. In any case, the Declarations of Trust were later executed.

Aspromonte denied that the Declarations of Trust were binding and contended that, at the time of the Declarations of Trust, there were no trust assets. This proposition was incorrect as the shares in Eighth Avenue Austral existed at the time the Declarations of Trust were entered into. Aspromonte made various contentions but its true contention appeared to be that Mrs Carbone had not, subjectively, intended the Declarations of Trust to extend, as they provide on their face, to the shares in Eighth Avenue Austral, and she intended them to have narrower operation.

Eighth Avenue Austral made no admissions in the proceedings.

**Issues**

1. Were the Declarations of Trust legally binding and is Aspromonte obligated to transfer the shares to the Beneficiaries?
2. Were the Declarations of Trust certain enough to amount to a trust over a pool of shares, without individual shares having been identified as the subject of the trust?

**Decision**

The Court held the Declarations of Trust were legally binding. Focusing on the objective intention of the words in the Declarations of Trust, the Court held that the language used unambiguously indicated an intention to hold the shares themselves in trust for the Beneficiaries not just the benefits derived from them.

The Court reiterated principles in *Ellison v Sandini Pty Ltd* [2018] FCAC 44 at [148] that there can be a valid trust over a fungible pool of assets provided the assets and relevant proportions for the different beneficiaries are identified with sufficient certainty.

The Court referred to the principle established in *Saunders v Vautier* [1841] 41 ER 482, which allows beneficiaries of a trust who are of legal age and absolutely entitled to the trust property to call upon the trustee

to transfer the trust property to them, effectively ending the trust. The Court held that, as the trusts exist, are sufficiently certain, and apply to shares in the numbers indicated for the relevant Beneficiaries, then the Court would make the orders sought by the Beneficiaries. The Court also noted that the Beneficiaries were entitled to the shares, as Aspromonte had an express obligation under clause 2 of the Declarations of Trust to transfer the shares upon request.

**COMMENT –** whether trust can be established over fungible pool of assets for different beneficiaries is also relevant to whether it can be said that the beneficiaries are 'absolutely entitled' to their relevant assets as against the trustee for the purpose of section 106-50 of the ITAA 1997 and CGT event E5. In Draft Taxation Ruling TR 2004/D25 the ATO accepts that the multiple beneficiaries can be absolutely entitled as against the trustee where the assets are fungible.

Citation *In the matter of Eight Avenue Austral Pty Ltd* [2024] NSWSC 1262 (Black J, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2024/1262.html

## 2.8 Anderson – residence requirement for First Home Buyers Assistance Scheme

**Facts**

On 21 March 2019, Lainie Anderson exchanged contracts for a Goulburn property. On 9 April 2019, the Chief Commissioner approved her application for a transfer duty exemption under the First Home Buyers Assistance Scheme.

The residence requirement under section 76(1) of the *Duties Act 1997* (NSW) mandates that, to qualify for the First Home Buyers Assistance Scheme, a purchaser must occupy the property as their principal place of residence. This requirement has two main conditions:

1. the property must be the purchaser's primary residence, not merely a secondary or occasional home; and
2. the purchaser must live there continuously for a minimum period of six months.

This period of continuous occupation must commence within 12 months from the date of the property's transfer.

On 18 April 2019, settlement took place, and Lainie's title to the Goulburn Property was registered. The property was purchased with an existing tenancy.

On 10 October 2019, Lainie and her partner signed a one-year lease for an apartment in Dulwich Hill, commencing on 11 October 2019. Lainie continued paying half the rent despite planning to reside in the Goulburn Property after the tenants vacated.

On 20 December 2019, the tenants vacated the Goulburn Property, allowing Lainie access. On 28 December 2019, Lainie moved into the Goulburn Property with assistance from her father, transporting various household items from Ulladulla. She stayed there intermittently due to fire emergencies near her family home and spent New Year's Eve with her partner in Sydney, before returning to Goulburn.

On 13 January 2020, Lainie updated her driver's licence to reflect her address at the Goulburn Property. The utilities were connected, and an internet service was established on 15 January 2020.

On 28 June 2020, Lainie vacated the Goulburn Property.

On 24 October 2023, the Chief Commissioner initiated an investigation to determine if Lainie met the residence requirement for the transfer duty exemption. Lainie, who was overseas with her partner at the time, requested

an extension to respond, which was denied. She provided a Residence Declaration dated 31 October 2023, stating she had resided at the Goulburn Property as her principal place of residence from 4 January 2020 to 28 June 2020. However, she mistakenly declared a move-in date of 4 January instead of 28 December 2019. In response to the question “did you occupy another property as a residence during the above period” she answered “Yes”; and provided the “Alternate residence address” for an apartment in New Canterbury Road, Dulwich Hill (Dulwich Hill). In response to the question “Days per week as residence” she responded “0-3”.

On 9 November 2023, the Chief Commissioner determined that Lainie did not satisfy the residence requirement, declined to exercise discretion under section 76(2) of the Duties Act to modify or waive the residence requirement, and issued a notice of assessment for $16,171, which included transfer duty, penalty tax, and interest. The penalty was increased by 20% due to an assessment of hindrance during the investigation.

On 4 December 2023, Lainie's request to pay the assessment debt in monthly instalments was approved, with the first payment due on 8 December 2023 and the last on 24 May 2024, with ongoing interest on the outstanding amount.

On 7 January 2024, Lainie formally objected to the assessment, challenging the Chief Commissioner’s conclusions and providing seven attachments to support her case. Among these, she clarified the electricity account's start date and her employment obligations impacting her residency pattern.

On 4 March 2024, following the Chief Commissioner's request for further clarification, Lainie corrected her earlier declaration, stating her actual move-in date was 28 December 2019, aligning with the required six-month continuous residence period. On 5 March 2024, the Chief Commissioner disallowed her objection in full, maintaining the assessment and declining to accept the corrected move-in date.

Lainie subsequently filed an application to the NCAT on 6 May 2024, seeking review of the Chief Commissioner’s assessment.

The Chief Commissioner contended that Lainie did not meet the residence requirement for the following reasons:

1. Lanie did not meet the required six-month continuous residence period, as her initial declaration stated a move-in date of 4 January 2020;
2. Lanie’s water and electricity usage at the Goulburn Property were significantly lower than expected for a principal residence;
3. Lanie maintained a lease and paid rent for an apartment in Dulwich Hill during the relevant period, indicating an alternative primary residence;
4. The majority of Lanie’s expenditures, including fuel, were concentrated in Sydney, suggesting she spent most of her time there;
5. Lanie only held building insurance, not contents insurance, which suggested a lack of permanence in her occupancy of the Goulburn Property; and
6. Lanie had minimal social and family ties in Goulburn, implying a weaker connection to the area as her main residence.

Lainie argued that she did meet the residence requirement, asserting that she moved into the Goulburn Property on 28 December 2019 and occupied it continuously for six months until 28 June 2020. She explained that her initial error in declaring a move-in date of 4 January 2020 was an honest mistake made under time pressure. Lainie also argued that her low utility usage was consistent with her unique circumstances, as she worked full-time in Sydney during the pandemic and spent limited time at home during weekdays.

She further clarified that her financial records did not reflect all her purchases because she often used cash and occasionally used her mother’s business account for fuel. Regarding her lease at the Dulwich Hill apartment, Lainie explained that she contributed to rent payments mainly to support her partner, who lived there full-time,

but her principal residence remained in Goulburn. She argued that the absence of contents insurance was irrelevant, as she had never purchased it previously, and her possessions in Goulburn were sufficient for a primary residence. Finally, Lainie highlighted her intention to live in Goulburn, demonstrated by her family's involvement in helping her set up her home, and the lack of stronger connections in Sydney did not detract from Goulburn being her primary residence.

**Issue**

Did Lainie meet the residence requirement to be eligible for the transfer duty exemption under the First Home Buyers Assistance Scheme?

**Decision**

The NCAT found in favour of Lainie, determining that she had satisfied the residence requirement under section 76(1) of the Duties Act. It concluded that Lainie had occupied the Goulburn Property as her principal place of residence for the required continuous six-month period, starting on 28 December 2019 and ending on 28 June 2020. The NCAT accepted Lainie's explanation for her initial date error, which she corrected once she realised the mistake, and found her evidence of occupation credible and consistent with her intention to reside in Goulburn.

The NCAT found that the low utility usage did not undermine her claim of residence, as her work and travel obligations to Sydney reasonably accounted for the lower-than-average consumption. Additionally, Lainie's financial records and evidence of spending in both Goulburn and Sydney were not sufficient to establish that she did not reside primarily in Goulburn, given her frequent commutes. The NCAT also accepted her explanation regarding her Dulwich Hill lease, concluding that her contribution to rent was to support her partner and did not negate Goulburn as her primary residence.

Based on these findings, the NCAT revoked the assessment in full, allowing Lainie to retain the transfer duty exemption.

Citation *Anderson v Chief Commissioner of State Revenue* [2024] NSWCATAD 329 (Senior Member J Sullivan)
w https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/329.html

## 2.9 Appeal update – Singapore Telecom

On 25 October 2024, the High Court refused special leave to appeal the Full Federal Court decision of *Singapore Telecom Australia Investments Pty Ltd v Commissioner of Taxation* [2024] FCAFC 29. In that case, the Full Federal Court upheld the ATO's decision to deny certain deductions claimed by SingTel Australia for interest paid on a related party cross-border loan from its parent company under the transfer pricing rule.

w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans/2024/74.html

## 2.10 Appeal update – PepsiCo

On 7 November 2024, the High Court granted special leave for the Commissioner to appeal the Full Federal Court decision in *PepsiCo, Inc v Commissioner of Taxation* [2024] FCAFC 86 (see our July 2024 Tax Training Notes). The case concerns the application of Diverted Profits Tax (DPT) and whether a payment under an exclusive bottling agreement included embedded royalties that were subject to royalty withholding tax.

w https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCASL/2024/298.html

## 2.11 Appeal update – Peter Hatfield Trust

The Commissioner has appealed the decision in *The Trustee for the Peter Hatfield Trust and Commissioner of Taxation (Taxation)* [2024] AATA 3428 (see our October 2024 Tax Training Notes). The case examines whether Christopher Hargreaves, a plumber who subcontracted to the Peter Hatfield Trust for a decade, should be classified as an "employee" under the *Superannuation Guarantee (Administration) Act 1992* (Cth) for superannuation purposes. The AAT ultimately found that Christopher operated independently as a contractor, maintaining control over his work, providing his own tools, and working under his own business, leading to the conclusion that he was not an employee and thus not entitled to superannuation contributions.

## 2.12 Other tax and superannuation related cases in period of 11 Oct 2024 to 7 Nov 2024

| Citation | Date | Headnote | Link |
|---|---|---|---|
| *BRKK v Commissioner of Taxation (Taxation)* [2024] AATA 3607 | 11 October 2024 | RELEVANCE – subjective – objective – privilege – external legal advice – summons | https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/3607.html |
| *Hudson v Commissioner of Taxation (Taxation)* [2024] AATA 367 | 11 October 2024 | TAXATION – Income tax – allowable deductions – travel expenses — transport of materials between home and work – whether materials bulky and essential to income generating activity-– whether personal choice involved – decision under review affirmed<br>Work related home office expenses – set aside<br>Balancing adjustment – termination value and car depreciation – arm's length transaction burden of proof not satisfied – affirmed | https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/3678.html |
| *Guo v Chief Commissioner of State Revenue* [2024] NSWCATAD 309 | 17 October 2024 | TAXES AND DUTIES – Land tax – Surcharge land tax – Foreign person – Liability – Exemptions – Principal place of residence – periods of absence from Australia | https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/309.html |
| *Carrigan v Commissioner of State Revenue (Review and Regulation)* [2024] VCAT 1006 | 18 October 2024 | Review and Regulation List – *Land Tax Act 2005* (Vic), ss 54 and 57 – Availability of principal place of residence exemption for land transferred to applicant following administration of | https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2024/1006.html |

| Citation | Date | Headnote | Link |
|---|---|---|---|
| | | his father's estate – Whether estoppel available against the Commissioner of State Revenue – Assessments confirmed. | |
| *Delma Investments Pty Ltd v Commissioner of State Revenue* [2024] VSC 649 | 25 October 2024 | TAXATION — Land Tax — Appeal against assessment — Primary production exemption — Whether Land was used solely or primarily for the business of primary production — Whether Appellant's principal business was the business of primary production carried on the Land — Whether recipient of dividends from non-trustee proprietary company was normally engaged in a substantially full time capacity in the business of primary production carried on the Land — Taxpayer not normally engaged in a full time capacity in the business of primary production — Commissioner's assessments confirmed | https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2024/649.html |

# 3. Federal Legislation

## 3.1 Progress of legislation

| Title | Introduced House | Passed House | Introduced Senate | Passed Senate | Assented |
|---|---|---|---|---|---|
| Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024 | 11/09 | 09/10 | 10/10 | | |
| Superannuation (Objective) Bill 2023 | 16/11 | 19/3 | 20/3 | | |
| Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023 | 30/11 | 9/10 | 10/10 | | |
| Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023 | 30/11 | 9/10 | 10/10 | | |
| Taxation (Multinational—Global and Domestic Minimum Tax) 2024 | 4/7 | 22/8 | 22/8 | | |
| Taxation (Multinational—Global and Domestic Minimum Tax) Imposition 2024 | 4/7 | 22/8 | 22/8 | | |
| Treasury Laws Amendment (Multinational—Global and Domestic Minimum Tax) (Consequential) 2024 | 4/7 | 22/8 | 22/8 | | |
| Treasury Laws Amendment (2024 Tax and Other Measures No. 1) Bill 2024 | 12/9 | 10/10 | | | |

## 3.2 Government payments program data matching

On 18 October 2024, a Gazette notice was released stating that the ATO will acquire government payments data from government entities who administer government programs for 2023–24 to 2025–26 financial years.

The data items that the ATO will collect will include:

1. service provider identification details (such as names, addresses, phone numbers, email and dates of birth); and
2. payment transaction details (such as service provider ID, name of service, type of service linked to program and value of payments received for the financial year).

The ATO will match this data against ATO records. The data collected will be used to identify and address tax and super risks, trends and non-compliance by service providers receiving government payments. It will also inform which taxpayers the ATO select for engagement activities.

w https://www.legislation.gov.au/C2024G00610/asmade/text

## 3.3 Proposed regulation for DGRs associated with community foundations

The Treasury has introduced exposure draft Taxation Administration (Community Charity) Guidelines 2024 as part of the *Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Act 2024*. These guidelines propose mandatory rules for managing community charities that seek Deductible Gift

Recipient (DGR) endorsement. This framework supports charitable entities associated with community foundations, allowing eligible trusts or corporations to gain tax advantages for donations they receive.

The proposed measures will initially only apply to entities associated with the 28 community foundations listed. The government may consider bringing other foundations into scope in the future.

Consultation is open until 3 December 2024.

w https://treasury.gov.au/consultation/c2024-597338
w https://treasury.gov.au/sites/default/files/2024-11/c2024-597338-fs.pdf

# 4. State Legislation

## 4.1 Corporate collective investment vehicles (NSW)

The Revenue Legislation Amendment Bill 2024 seeks to, amongst other matters, amend the *Duties Act 1997* (NSW) to make it clear that each sub-fund of a corporate collective investment vehicle (CCIV) established under the *Corporations Act 2001* (Cth) is taken to be a unit trust scheme of which:

1. the CCIV is the trustee;
2. the business, assets and liabilities of the sub-fund are the trust property; and
3. the members of the sub-fund are beneficiaries.

**COMMENT –** this isrelevant for the purposes of the landholder duty provisions, where each sub-fund will be treated as a separate entity for the purposes of determining whether the entity is a landholder and whether the person has a made a relevant acquisition in the landholder.

w https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=18662

## 4.2 Temporary expansion to off-the-plan duty concession (Vic)

The Duties Amendment (More Homes) Bill 2024 introduces a temporary expansion to the off-the-plan duty concession for certain residential property purchases. This follows the announcement made by the Victorian premier, Hon Jacinta Allan MP on 21 October 2024.

The *Duties Act 2000* (Vic) grants a duty reduction for off-the-plan home purchases by excluding post-contract construction costs from the dutiable amount, which lowers the duty payable. The proposed amendment broadens eligibility to include investors, not just owner-occupiers.

It applies specifically to residential properties within strata subdivisions, such as apartments or townhouses with common property.

This new amendment, if passed, will apply to contracts entered into on or after 21 October 2024 and before 21 October 2025. This concession contains integrity measures to prevent pre-existing contracts from being altered to meet eligibility.

w https://www.legislation.vic.gov.au/bills/duties-amendment-more-homes-bill-2024

## 4.3 Payroll tax amendments (NT)

The Payroll Tax Amendment Bill 2024 proposes to amend the *Payroll Tax Act 2009* (NT) from 1 July 2025 to:

1. increase the payroll tax-free threshold from $1,500,000 to $2,500,000;
2. increase the maximum annual deduction to $2,500,00 per annum;
3. increase the rate at which the annual deduction reduces to $1 for every $2 in Australian wages over the tax-free threshold;
4. amend exempt wages to include employees who are an apprentice or trainee. However, wages will still be payable to a trainee by an employer if immediately before the commencement of the trainee's traineeship with the employer, the trainee has been employed by the employer for a continuous period of:

(a) for a full-time employee – 3 months or more; or
(b) for a part time or casual employee – 12 months or more.

w
https://legislation.nt.gov.au/en/LegislationPortal/Bills/~/link.aspx?_id=083E614B5CF64D639F35D085B8EABA76&_z=z

# 5. Rulings

## 5.1 Replacement draft GST determination on food marketed as a prepared meal

On 16 October 2024, the ATO issued a draft determination GSTD 2024/D3 to provide guidance on when, under section 38-3(1)(c) of the GST Act, a supply of food is not GST-free because it is a supply of food of a kind 'marketed as a prepared meal, but not including soup'. The draft determination follows the recent Federal Court decision in *Simplot Australia Pty Limited v Commissioner of Taxation* [2023] FCA 1115 (**Simplot**).

GSTD 2024/D1 was withdrawn on the same day.

In *Simplot*, the Court held that products which contained a mix of vegetables, spices or seasonings, and in some cases, grains, were food of a kind marketed as a prepared meal and therefore not GST-free. Some of the products in question were labelled as 'sides' or provided express or implied serving suggestions, including through pictures displaying the products served with added protein.

The Commissioner adopts the view of that, to determine if a produce is food of a kind marketed as a prepared meal, the question is a single composite question which is be answered by considering what is meant by food being food of a kind marketed as a prepared meal, followed by an assessment of whether the product in question falls within that class or genus.

What is the kind of food that is marketed as a prepared meal is to be determined by common sense and common experience, marketed as a prepared meal. This is determined objectively by considering the attributes of the food, including quantity, composition and presentation.

Whether a particular product falls within the class or genus of foods that are marketed as prepared meals is considered by viewing individual attributes objectively.

Quantity of the product

The Court held in *Simplot* that a meal connotes a 'quantity of substance'. The Commissioner considers the following to be relevant regarding quantity:

1. the food need not constitute a substantial meal i.e. a meal can be small;
2. what constitutes a 'quantity of substance' depends on the food in question;
3. food of a kind that is presented as being for consumption by a particular group, such as infants, or that is commonly consumed on a particular occasion, such as breakfast, needs to be considered in that context;
4. food may still be of a kind marketed as a prepared meal despite being supplied in large quantities; and
5. serving suggestions and similar guidance on product packaging have little or no relevance to determining whether a product contains 'quantity of substance'.

The quantity or weight of food will be of little relevance where the food is commonly sold in such a way that the consumer can choose or measure the amount they purchase.

'Of a kind'

The word 'of a kind' are words of expansion whether than limiting, and when read in context of legislation, the question is whether the product is a member of a class or genus of foods that are marketed as prepared meals.

Even when a product is marketed as a side dish or a snack, it does not mean that it could not also be food of a kind marketed as a prepared meal.

'Marketed as'

In determining whether a product is food of a kind marketed as a prepared meal, the marketed use of a product is to be determined objectively, having regard to what a reasonable observer would understand from the content of the marketing.

The test does not require that the food is a kind that is solely or principally marketed as a prepared meal, but is based on a common sense approach. If a product is of the same kind as food that is marketed as a prepared meal, it does not matter if its own marketing does not represent it as a prepared meal.

Prepared meal

A product will be food of a kind marketed as a prepared meal if it is the kind of food that, as a matter of common sense and common experience, is marketed as a prepared meal. This is to be determined objectively by considering the attributes of the product, including quantity, composition and presentation.

Quantity

A product is not food of a kind marketed as a prepared meal unless it is of a sufficient quantity for a meal.

Composition

Where food is made from multiple ingredients or elements, a food's composition will be consistent with it being a prepared meal. This is a question of fact and degree.

Consideration needs to be given to the nature of the ingredients or elements, not simply the amount of ingredients or elements. The composition of a product may also indicate its suitability to be eaten at a particular meal occasion.

Presentation

Food being presented as being complete is indicative of a prepared meal. This is a matter of fact and

The draft Determination provides several examples of when food is and is not of a kind marketed as a prepared meal.

When the draft Determination is finalised, it is proposed to apply both retrospectively and prospectively.

The Commissioner considers that this determination should be read in conjunction with an addendum to GST Industry Issue GSTII FL1 *Detailed Food List*. The Goods and Services Tax Industry Issue Food Industry Partnership Prepared food (Issue 5 Prepared Food) is to be withdrawn from the date of finalisation.

Comments on the draft Determination are due by 15 November 2024.

ATO reference *Goods and Services Tax Determination* GSTD 2024/D3
w https://www.ato.gov.au/law/view/document?docid=DGD/GSTD2024D3/NAT/ATO/00001

## 5.2 Abolition of duty on business insurance in Victoria

On 16 October 2024, the Victorian State Revenue Office issued ruling number DA-068 regarding the abolition of duty on business insurance. Effective from 1 July 2024, the duty on business insurance premiums will be gradually abolished over 10 years by reducing the rate of duty by 1% each year. Accordingly, duty will be fully abolished for contracts effected or renewed on or after 1 July 2033.

'Business insurance' is general insurance that falls under specified classes of business as determined by APRA. These specified classes include aviation, cyber (from 1 January 2025), directors and officers (from 1 January 2025), employers' liability, fire and industrial special risks, marine, public and product liability, and professional indemnity.

Business insurance does not include general insurance that:

1. falls under any other classes of business in the Prudential Standard issued by APRA (for example, householders, commercial motor, travel); or
2. is related to cyber or directors and officers' classes of business, if the relevant contract of insurance is effected or renewed before 1 January 2025.

Additionally, the Treasurer of Victoria has the power to make declarations regarding the definition of business insurance. Such power includes the ability to declare that a certain kind of insurance that falls under the specified classes of business insurance is not business insurance.

The rate of duty for a premium in relation to general insurance that is not business insurance remains at 10%. If a contract of insurance covers both business and non-business insurance, the premium will be apportioned, with duty charged only on the business insurance portion at the applicable reduced rate.

If a contract of business insurance is cancelled and the premium is refunded, the insurer is entitled to a refund of the duty paid on the premium.

SRO Reference *Ruling no. DA-068 Abolition of duty on business insurance*
w https://www.sro.vic.gov.au/legislation/abolition-duty-business-insurance

# 6. Private rulings

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

## 6.1 FBT on cash payments to spouse

**Facts**

For several years, the employer held an annual Christmas party for employees, inviting their spouses to attend. However, as the business expanded and the number of employees grew to nearly XXX, inviting spouses became challenging from an event-planning and logistical perspective. Consequently, the employer decided to limit the Christmas party to employees only, and spouses were no longer invited.

To address the disappointment many felt due to the exclusion of spouses and in recognition of the employees' demanding schedules—given that the business operates 24/7 throughout the year, often requiring long hours that disrupt family life—the employer made certain gestures each holiday season. These included:

1. a bonus for each employee, which was added to their assessable income; and
2. a cash gift of $XXX specifically designated for the employee's spouse.

**Question**

Were the cash payments of $XXX made to the employee's spouse a fringe benefit under subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986* (Cth) (**FBTAA**)?

**Ruling**

The ATO ruled yes.

Provision of a benefit

Under subsection 136(1) of the FBTAA, a 'benefit' is defined broadly, encompassing any right, privilege, service, or facility. In this case, the employer provided a cash gift of $XXX to the spouse of each employee to acknowledge their exclusion from the annual Christmas party and the family disruption caused by the employee's work schedule. The ATO concluded that this payment constituted a benefit as per the FBTAA's wide definition of the term.

Benefit provided to an associate of the employee

According to the FBTAA, an 'employee' includes current, former, and future employees, while an 'associate' includes relatives of the employee as per section 318 of the ITAA 1936. Section 995-1 of the ITAA 1997 further specifies that a 'relative' includes a spouse. Since the employer provided the benefit to the employee's spouse, the ATO determined that the benefit was indeed provided to an associate of the employee.

Benefit provided by the employer

The FBTAA requires that the benefit be provided by the employer, an associate of the employer, or a third party arranged by the employer. The ATO confirmed that the cash gift was given directly to the spouse by the employer, thereby fulfilling this requirement.

Benefit provided in respect of employment

For a benefit to be considered 'in respect of employment' under the FBTAA, there must be a discernible connection between the benefit and the employee's employment. The ATO relied on the case of *J & G Knowles & Associates Pty Ltd v Federal Commissioner of Taxation* (2000) 96 FCR 402, where the Full Federal Court held that a sufficient or material connection, rather than a causal link, is required to establish that a benefit is in respect of employment. The ATO determined that the cash gift had a material connection to the employee's employment as it was given to address the disruption to the family caused by the employee's work conditions. There was no other reason for the payment beyond its connection to the employee's employment.

Exclusion from fringe benefit definition

The ATO reviewed paragraphs (f) to (s) of subsection 136(1) to determine whether the benefit was excluded from the definition of a fringe benefit. Paragraph (g) exempts certain benefits, particularly if classified as property fringe benefits under section 40 of the FBTAA. Under section 40, 'property' includes both tangible and intangible property, and per ATOID 2007/204, cash is regarded as a form of property. Thus, the ATO concluded that the cash payment made to the associate of the employee in respect of the employee's employment constituted a property fringe benefit.

ATO reference *Private Binding Ruling Authorisation No. 1052269778625*
w https://www.ato.gov.au/law/view/document?docid=EV/1052269778625

## 6.2 Staking cryptocurrency

**Facts**

The taxpayer is an Australian resident for tax purposes and is not carrying on a business. They hold X cryptocurrency tokens as an investment on a cryptocurrency exchange, without any cryptocurrency held for personal use. The cryptocurrency exchange offers a service where staking is performed on the taxpayer's behalf.

While the X tokens are staked, the taxpayer cannot trade or transact with them. They have the flexibility to stake and unstake their X tokens at any time, subject to unstaking lockup periods. The exchange also provides an option to 'wrap' the X tokens, but the taxpayer does not intend to wrap any of their staked tokens. The taxpayer accepts that the rewards received from staking the X tokens are ordinary income.

**Question**

Does a CGT event happen at the time of staking or unstaking cryptocurrency under section 102-20 of the ITAA 1997?

**Ruling**

The ATO determined that staking and unstaking cryptocurrency tokens does not trigger a CGT event. Section 102-20 of the ITAA 1997 specifies that a CGT event only occurs if a specific CGT event is triggered, such as the disposal of an asset.

Under Section 108-5 of the ITAA 1997, cryptocurrency, including Bitcoin and other digital currencies with similar characteristics, is classified as a CGT asset. This classification aligns with *Taxation Determination TD 2014/26*, which confirms that Bitcoin qualifies as a CGT asset. Each cryptocurrency held by a taxpayer is treated as a separate CGT asset, even if stored within the same digital or hardware wallet.

The ATO confirmed that the mere act of staking X tokens, where the tokens are locked up in a staking account, does not constitute a CGT event. This is because the taxpayer retains ownership and control over the tokens, although they are precluded from trading with them during the staking period. However, a CGT event A1 will be triggered when the taxpayer ultimately disposes of the X tokens, including any additional tokens received as rewards for staking.

Therefore, for tax purposes, the ATO has established that CGT implications only arise upon the actual disposal of the tokens, not at the time of staking or unstaking.

ATO Reference *Private Binding Ruling Authorisation No. 1052296904875*
w https://www.ato.gov.au/law/view/document?docid=EV/1052296904875

## 6.3 Accidental loan repayment

**Facts**

The taxpayer entered into a contract to purchase a property. The taxpayer secured a loan related to the acquisition of the property. They accepted a loan offer from a bank for a specified amount, with an associated loan account and an offset account.

Settlement on the purchase of the property occurred, and the loan was fully drawn. Around this time, the taxpayer had funds deposited in their savings accounts. On the settlement date, they used their phone to transfer an amount (Amount X) from one of their savings accounts into the loan account, reducing the balance owing by the equivalent value of Amount X. However, the taxpayer's intention had been to deposit Amount X into the offset account.

The taxpayer contacted the bank on the same day to notify them that the transfer of Amount X into the loan Account was an error and sought to void the transaction. The bank advised that the transfer could not be cancelled.

On the same day, the taxpayer attempted to reverse the transaction by transferring an amount equivalent to Amount X from the loan account into their savings account, then transferring the same amount from the savings account into the offset account.

The taxpayer resided at the property after its purchase until they commenced using it for rental purposes.

**Question**

Can the taxpayer claim a full interest deduction under section 8-1 of the ITAA 1997 for the period after the property became available for rent?

**Ruling**

The ATO ruled yes.

The ATO accepted that all of the interest is deductible as the expense was incurred in the course of gaining or producing income and the mistaken transaction will not stop the full amount of interest being deductible.

ATO reference *Private Binding Ruling Authorisation No. 1052292644203*
w https://www.ato.gov.au/law/view/document?docid=EV/1052292644203

## 6.4 GST sale of going concern exemption

**Facts**

The Trust operates a business from leased premises.

The owner of the leased premises has decided to sell, and the Trust has first option to purchase the premises.

**Question**

If the Trustee purchases the premises that it currently lease and runs the business from, can the sale qualify as a GST-free sale of a going concern under section 38-325 of the GST Act?

**Ruling**

The ATO ruled no.

The ATO determined that the sale of premises from the current owner to the Trust will not qualify as a GST-free sale of a going concern. This ruling relies on the provisions set out in section 38-325 of the GST Act. Section 38-325 allows a sale to be GST-free if specific conditions are met, primarily that all necessary components to continue operating the existing business are transferred to the purchaser.

For a sale to qualify as GST-free under section 38-325, the following requirements must be satisfied:

1. the sale must be for consideration;
2. the buyer must be registered, or required to be registered, for GST;
3. both parties must agree in writing that the sale is a "going concern."; and
4. the seller must transfer all things necessary for the continued operation of the business being sold.

Application to the Trust's Purchase of Leased Premises

In this case, the Trust operates its business from premises it currently leases. The owner, whose business is solely in leasing, has decided to sell the property, and the Trust has the first option to purchase. However, a complication arises because, upon purchase, the leasing arrangement would end. The Trust cannot continue the leasing enterprise after the sale since it cannot lease the premises to itself.

Although other requirements of section 38-325 may be met, the critical element that all necessary components for the leasing business's continuity be provided is missing. As such, the ATO ruled that the sale does not qualify as a GST-free sale of a going concern, and therefore GST will be applied to the sale.

ATO reference *Private Binding Ruling Authorisation No. 1052302361895*
w https://www.ato.gov.au/law/view/document?docid=EV/1052302361895

## 6.5 PSI results test

**Facts**

In the relevant year, Company A, which operates in IT development, engaged with Company B to provide software development and consulting services through an individual (the test individual) acting on behalf of

Company A. This arrangement was not formalised in writing; instead, it was based on individual projects and tasks without a fixed duration. Each new project initiated by Company B was discussed with the test individual, who provided quotes for the work required. Company A retained the flexibility to engage subcontractors for specific tasks depending on their complexity and scope.

In that year, Company A subcontracted some work to a freelance full-stack developer, who was paid accordingly. This arrangement, too, lacked a formal written contract.

The test individual generally performed services from Company A's home office, though subcontractors worked from their own premises. Occasionally, the test individual travelled to Company B's premises to discuss larger projects.

The company billed Company B monthly, invoicing based on hours worked on completed tasks and projects, with uncompleted tasks being carried over to subsequent invoices. These monthly invoices summarised completed tasks, with the hours logged reflecting each project's scope. A 30-day warranty period was provided for defects; during this time, remediation was offered free of charge. After 30 days, any additional work was considered a new billable item, although no refunds were provided.

Company A employed one individual related to the test individual, who handled administrative duties, including managing a structured time-billing system for submission to Company B.

The company utilised its own equipment and facilities, including a custom-built desktop computer, dual monitors, internet, and office furniture. Income for the relevant year was solely derived from Company B, with invoices detailing payments and descriptions of completed tasks. Company A did not carry a liability or indemnity insurance policy.

**Questions**

1. Was the income received by the Company for the services provided by the test individual in the relevant income year personal services income?
2. If the answer to question 1 is yes, did the Company meet the results test under section 87-18 of the ITAA 1997 in the relevant income year?

**Ruling**

Is the income PSI?

The ATO determined that the income received by Company A in the income year is classified as PSI, as it primarily rewards the test individual's personal efforts and skills. PSI applies where income is mainly derived from personal services rather than from the sale or supply of goods, use of income-producing assets, or a business structure. Although Company A operates as a corporate entity providing software development services, the ATO concluded that the income earned was chiefly a reward for the test individual's personal efforts and skills, meeting the PSI criteria.

Application of the results test

To determine if the PSI rules could be avoided, the ATO assessed whether Company A met the results test under section 87-18 of the ITAA 1997. This test exempts income from the PSI rules if certain conditions are met, namely that at least 75% of the PSI satisfies all three of the following conditions:

*1. Income for Producing a Result*

The ATO noted that for a contract to be considered results-based, income must be paid specifically for achieving a defined outcome, not merely for performing work on an ongoing basis. In Company A's arrangement with Company B, payments were made based on time worked rather than for completing a

specific, defined result. This billing structure, which involved hourly invoicing rather than a set amount for achieving a contractual result, suggested that the contract was for work rather than for achieving a specific outcome. Therefore, the ATO concluded that the income was not received for producing a result, and the first condition of the results test was not met.

*2. Supply of Tools and Equipment*

Company A provided its own equipment, including a computer, monitors, and office space; however, this alone did not fulfil the second condition. Since the connection to 'producing a result' was absent due to the ongoing nature of the tasks, the second condition of the results test also remained unsatisfied.

*3. Liability for Cost of Rectifying Defects*

Although Company A offered a 30-day warranty period during which defects would be remedied free of charge, the ATO noted that this was a customer service provision rather than an enforceable liability for covering defect costs. Company A's lack of a formal liability for defect rectification further indicated that this condition was not met.

As Company A did not satisfy all three conditions of the results test, the ATO concluded that the PSI rules apply to the income received by Company A in the 2023 income year. Consequently, the income is attributable to the test individual rather than to Company A, and certain deductions, such as rent, mortgage interest, rates, land tax for the test individual's home, and payments to associates for support work, are disallowed under PSI attribution rules. To comply, Company A must either pay the test individual as salary and wages, withholding and remitting tax accordingly, or withhold and remit tax on the PSI attributed to the test individual.

ATO Reference *Private Binding Ruling Authorisation No. 1052299759607*
w https://www.ato.gov.au/law/view/document?docid=EV/1052299759607

## 6.6 Third element costs

**Facts**

The taxpayer, Person A, jointly purchased a unit with their spouse, Person B. The unit was company titled, meaning they acquired a number of shares in the company that granted them rights to use and occupy the unit.

The share certificate indicates that Person A and Person B became registered holders of a specified number of shares in the company. According to the company's articles of association, holding a particular group of shares confers full rights to occupy a unit corresponding to that group.

The unit was used solely as a holiday home and was never utilised to generate assessable income. Subleasing was prohibited by the company's articles of association.

The charges and fees listed in the articles specify that the directors have the authority to levy shareholders. However, any levy must not exceed the amount necessary to cover the company's expenses, charges, and outgoings. Each shareholder's liability is proportional to their shareholding.

Following Person B's passing, Person A retained a solicitor to transfer Person B's interest in the shares to Person A. Person A subsequently passed away approximately XX years later, and the shares were sold by the executor of Person A's estate. The sale price was determined based on the market value of the property as estimated by a registered agent.

The trustee is seeking to include the following costs in the cost base:

1. Strata levy (50% from Person B's date of death)
2. Council rates (50% from Person B's date of death)
3. Repairs and maintenance (50% from Person B's date of death)

The company's articles of association also stipulate that a shareholder's failure to comply with the conditions and financial responsibilities outlined in the articles may result in forfeiture of their shares.

**Questions**

1. Are the interests in the shares in the company the relevant CGT asset for the purposes of section 104-10 of the ITAA 1997?
2. Is the acquisition date of the entirety of the interests in the shares held by Person A at their death the original date of purchase in YYYY?
3. Can the third element costs associated with holding the shares be added to the cost base of Person A's interest in the shares taken to have been held prior to the death of Person B in YYYY?
4. Can the third element costs associated with holding the shares be added to the cost base of Person A's 50% interest in the shares taken to have been acquired on Person B's death in YYYY?

**Ruling**

Are the interests in the shares in the Company the relevant CGT asset?

The ATO determined that the shares in the company are the relevant capital gains tax (CGT) asset for Person A. According to section 108-5(1) of the ITAA 1997, a CGT asset includes property and rights associated with shares. Therefore, it is the shares themselves, not any specific rights attached (like the right to occupy the property), that are considered the taxable asset under CGT provisions. This interpretation aligns with Taxation Ruling TR 94/30, which treats shares as the CGT asset rather than rights derived from them.

Is the acquisition date of the entirety of the interests in the shares held by Person A at their death the original date of purchase?

The ATO determined that Person A's acquisition date for their interests in the shares is split between two dates. Initially, Person A and Person B jointly acquired the shares, each with a 50% interest. When Person B passed away, Person A acquired the remaining 50% interest on that date. Under section 128-50 of the ITAA 1997, when a joint tenant passes, the surviving tenant is considered to have acquired the deceased's interest on the date of death. Additionally, item 3 of section 115-30 of the ITAA 1997 states that the executor, as the legal personal representative, can consider the asset held for over 12 months (from the original and subsequent acquisition dates), potentially allowing for a CGT discount.

Can the costs of holding the shares be added to the cost base of Person A's original 50% interest in the shares?

The ATO found that costs associated with holding the shares, like maintenance fees, council rates, and levies, cannot be added to the cost base of the original 50% interest. Subsection 110-25(4) of the ITAA 1997 specifies that third element costs, such as holding costs, can only be added for assets acquired after 20 August 1991. Since Person A's original interest was acquired before this date, the law restricts adding these types of costs to the cost base for that interest.

Can the costs of holding the shares be added to the cost base of Person A's 50% interest acquired upon Person B's death?

The ATO determined that the costs associated with holding the shares, including maintenance, levies, and council rates, can be added to the cost base of the 50% interest acquired upon Person B's death. Under subsection 110-25(4) of the ITAA 1997, such holding costs are allowable for assets acquired after 20 August

1991. Since Person A acquired this second 50% interest after Person B's death, these costs can be added to the cost base from that date. Additionally, the company's articles required payment of these fees to retain ownership and occupancy rights, supporting the view that these costs preserve the CGT asset. Thus, they qualify as maintenance-related costs and are included in the cost base for Person A's interest acquired from Person B.

ATO reference *Private Binding Ruling Authorisation No. 1052300681965*
w https://www.ato.gov.au/law/view/document?docid=EV/1052300681965

## 6.7 Deceased estate CGT with foreign beneficiaries

**Facts**

The deceased, an Australian citizen, passed away about two years ago, leaving behind a property purchased in joint ownership with their spouse around 30 years ago. This property served as the main residence of the deceased and their spouse, who passed away approximately 20 years ago.

Upon the spouse's death, the deceased acquired the spouse's 50% interest by right of survivorship. Since then, the deceased frequently travelled between Australia and another country, rarely spending more than 183 days annually in Australia, and lodged Australian income tax returns as a non-resident for the relevant income years.

The property had been rented out for some years before the deceased's passing.

Letters of Administration were granted to a child of the deceased, an Australian citizen and resident for tax purposes. The beneficiaries of the estate include both resident and non-resident beneficiaries.

The property was subsequently sold within two years of the deceased's death.

**Questions**

1. Can the trustee of the deceased estate disregard a capital gain or capital loss on the disposal of the dwelling under section 118-195 of the ITAA 1997?
2. Is the deceased estate a resident trust estate for Australian taxation purposes?
3. Is the trustee of the deceased estate eligible for the 50% discount on any capital gain on the disposal of the property that is attributable to a resident beneficiary?
4. Is the trustee of the deceased estate eligible for the full 50% discount on any capital gain on the disposal of the property that is attributable to a non-resident beneficiary?

**Ruling**

Main residence exemption

Under subsection 118-195(1) of the ITAA 1997, a capital gain or capital loss on a dwelling acquired from a deceased estate may be disregarded if certain criteria are met. Specifically, these include ownership as a beneficiary or trustee, the deceased's acquisition of the property on or after 20 September 1985, the dwelling being the deceased's main residence immediately before their death, and the property not being used to produce assessable income at that time. Additionally, the property must be disposed of within two years of death, or within a longer period as approved by the Commissioner, and the deceased must not have been an "excluded foreign resident." An 'excluded foreign resident' is an individual who was a foreign resident continuously for more than six years before their death.

In this case, the deceased had filed tax returns as a non-resident for several years and self-assessed as a non-resident beginning from 1 July 20XX. With no evidence to the contrary, the Commissioner has determined that

the deceased was a foreign resident for over six years before their death, thereby qualifying as an excluded foreign resident. As a result, the main residence exemption under subsection 118-195(1) does not apply, and CGT will apply to the property disposal.

Residency of the estate

According to section 95(2) of the ITAA 1936, a trust estate is regarded as a resident trust for Australian tax purposes if the trustee was a resident or if the central management and control of the trust was in Australia at any time during the income year. Since the trustee of the deceased estate is an Australian resident for tax purposes, the deceased estate is also considered a resident trust estate.

CGT discount

Section 128-15 of the ITAA 1997 treats a CGT asset owned by a deceased as acquired by the legal personal representative or beneficiary on the day the deceased passed away. For the CGT discount to apply, the asset must have been held for at least 12 months before the CGT event. In this instance, the 12-month holding period is met at the time of disposal.

Trustees are considered to have acquired a deceased's post-CGT asset at the time the deceased acquired it, allowing for potential CGT discount eligibility. For non-resident beneficiaries, section 115-110 of the ITAA 1997 adjusts the discount percentage, disallowing it for any capital gain accrued while the beneficiary was a foreign resident after 8 May 2012. The discount may be further reduced or denied based on foreign residency status after this date.

The ATO referred to *Taxation Determination TD 2022/12,* which explains that for non-resident beneficiaries, trustees are assessed under section 98 of the ITAA 1936 on trust capital gains attributed to these beneficiaries. Capital gains are also included in the non-resident beneficiaries' net capital gain calculations for the income year, though the beneficiaries may be entitled to a refundable tax offset.

ATO reference *Private Binding Ruling Authorisation No. 1052304453712*
w https://www.ato.gov.au/law/view/document?docid=EV/1052304453712

## 6.8 Promissory note as 'payment' for small business CGT

**Facts**

A company will make a capital gain on sale of a property. The company intends to apply the small business 15-year exemption to the capital gain.

Section 152-125 of the ITAA 1997 allows a company to make a tax exempt payment to its CGT concession stakeholders.

The company intends to make a payment to individuals B and C through a promissory note, equivalent to the capital gain derived from the sale of a Property.

Following this, B and C plan to gift the promissory note to Trust D and Trust E, respectively.

Trust D and Trust E will offset the promissory note against amounts that Trust D and Trust E owe to the Company.

**Questions**

1. Will the proposed payment by the Company to B and C by means of a promissory note of an amount equal to the gain on the sale of the Property be tax exempt under section 152-125 of the ITAA 1997?

2. Will the proposed gifting of the promissory note to Trust D and Trust E trigger CGT event A1 and result in a capital gain under section 104-10 of the ITAA 1997?

**Ruling**

Will the payment be tax exempt?

The ATO ruled yes.

Will the gifting of the promissory note to the trusts result in a capital gain?

The ATO ruled no.

**COMMENT –** This ruling is a request for an extension of earlier rulings that have since been archived by the ATO, so the detailed reasons for the decision are not available.

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| ATO reference *Private Binding Ruling Authorisation No. 1052281590649*<br>w https://www.ato.gov.au/law/view/document?docid=EV/1052281590649 |

## 6.9 Look-through earnouts

**Facts**

E1 and E2 each hold 50% of the shares in the Company, which owns 100% of Company B. Company B operates a business heavily reliant on skilled employees.

E3 has submitted an offer (the Offer) to acquire the shares in the Company. Negotiations for the purchase agreement are underway in an open-market, arm's-length context.

Both the Company and Company B hold more than 80% of their assets as active assets.

Under the Offer, the proceeds from the sale will be structured through an earnout arrangement, comprising an initial payment and deferred payments. The deferred payments are conditional upon the sellers fulfilling certain requirements. Sellers are eligible for these payments if the conditions are met, with entitlement to deferred payments ending four years post-sale.

**Questions**

Will the deferred payments be treated as look-through earnouts under section 118-565 of ITAA 1997?

**Ruling**

Where the valuation of a business or its assets is uncertain, earnout arrangements enable buyers and sellers to agree on future payments tied to the business's economic performance rather than a fixed upfront payment. Look-through earnout rights specifically refer to rights where the future financial benefits are not reasonably ascertainable at the time of the sale.

The ATO assessed whether the proposed arrangement satisfied each criterion under section 118-565:

1. Future Financial Benefits Not Reasonably Ascertainable

The deferred payments are contingent on future events and not reasonably ascertainable at the time of agreement. The Explanatory Memorandum to the bill introducing the look-through earnout rules clarifies that if

financial benefits are contingent on uncertain future events, they are generally unascertainable. The ATO determined that this requirement was met.

2. Created under an arrangement involving CGT asset disposal

Since the deferred payments arise from the sale of company shares (a CGT asset), this condition was satisfied.

3. CGT event A1 occurrence

The seller's disposal of shares initiates CGT event A1, meeting this requirement.

4. The CGT asset as an active asset

The company shares are active assets, as over 80% of the business's value is derived from active assets. The requirement of an active asset under section 118-565(1)(d) was thus fulfilled.

5. Financial benefits provided over a maximum of five years

The entitlement to deferred payments will conclude within four years from the CGT event, which meets the five-year provision requirement.

6. Benefits contingent on CGT asset's economic performance

The deferred payments are contingent on Company B's economic performance, making this condition satisfied.

7. Value of financial benefits relates to economic performance

The ATO noted that the deferred payment structure, based on Company B's business performance, reasonably related to the economic performance of the shares. This criterion was also met.

8. Arm's length dealing

The transaction occurred between unrelated parties under open market conditions, meeting the requirement of arm's length dealing.

Conclusion

The ATO concluded that the proposed earnout arrangement meets all conditions under section 118-565 of the ITAA 1997. Accordingly, any deferred payment arising from this agreement qualifies as a look-through earnout right, allowing the taxpayer to defer recognising capital gains on these contingent payments until they become payable.

ATO Reference *Private Binding Ruling Authorisation No. 1052287385088*
w https://www.ato.gov.au/law/view/document?docid=EV/1052287385088

## 6.10 LAFHA on short-term overseas assignments

**Facts**

Employer A assigns employees to Australia on short-term assignments to support local projects requiring specific expertise and industry experience not available at the project location. These short-term assignments are classified into seven categories, each with a defined duration and purpose.

Under Category 1, employees stay in Australia for 2–3 weeks every three months, performing peer reviews aligned with project milestones. Category 2 involves 2–6 week assignments, during which employees work with

local teams on tender bids or gain a better understanding of project requirements. Category 3 assignments last 2–3 weeks and involve attending meetings or forums. In Category 4, employees engage in short-term projects for 2–6 weeks, specifically contributing to project milestones. Category 5 employees stay in Australia for 3–8 weeks to oversee internal business or operational meetings requiring proprietary knowledge. Category 6 assignments are longer, ranging from 6 weeks to 3 months, during which employees contribute to short-term projects that support key milestones. Finally, Category 7 employees are divided into subcategories 7a to 7d, with durations from 3 to 6 months. These employees provide necessary skills for mid-term resourcing needs.

Throughout the short term assignment, employees maintain their primary residences outside Australia and remain under the supervision of their home-country managers. They adhere to their home country's travel policy, conduct code, and assignment guidelines. Personal items, vehicles, and substantial belongings are not relocated to Australia, and family members do not accompany them.

Employer B, a related entity, pays employees a per diem allowance of AUD$XX, intended to cover meal and incidental expenses on working days. This allowance is not paid on personal days, and no reimbursement or support is provided for non-working day expenses. Additional benefits covered by Employer B include accommodation, round-trip flights, and local travel expenses in Australia. Employer B books and directly pays for serviced accommodations close to the work location, typically within walking distance.

**Questions**

1. Is the per diem allowance paid to employees under each category arrangement considered to be a living-away-from-home allowance (**LAFHA**) for the purposes of subsection 30(1) of the *Fringe Benefits Tax Assessment Act 1986* (Cth) (**FBTAA**)?
2. If the answer to question 1 is no, is the per diem allowance subject to pay-as-you-go withholding (PAYGW) and reportable through Single Touch Payroll?
3. Is the provision of accommodation to employees under each category of arrangement a residual benefit to which the 'otherwise deductible rule' in section 52 of the FBTAA applies to reduce the taxable value of the benefit to nil?

**Ruling**

LAFHA classification of per diem allowance

The ATO analysed whether the per diem allowance provided to short-term assignment employees qualifies as a living-away-from-home allowance under subsection 30(1) of the FBTAA. To classify the allowance, the ATO considered the purpose, duration, and nature of each assignment. For employees in Categories 1 to 6, the shorter durations (ranging from 2 weeks to 3 months) were consistent with a travel allowance, which is intended to cover deductible work-related travel expenses rather than a LAFHA, which compensates for additional living costs due to extended time away from home. By contrast, employees in Category 7, who stay in Australia for 3 to 6 months, are viewed as living away from home rather than merely travelling, resulting in the per diem being classified as a LAFHA for those employees.

PAYGW and STP reporting obligations

Since the per diem allowance for Categories 1 to 6 was not classified as a LAFHA, the ATO examined whether it would be subject to PAYGW and reporting through Single Touch Payroll. The ATO determined that, as a travel allowance falling within reasonable amounts, it is exempt from PAYGW and does not require reporting through STP or on employee income statements.

Residual fringe benefit and 'otherwise deductible rule'

The ATO assessed the provision of accommodation for short-term assignment employees to determine if it qualified as a residual fringe benefit and, if so, whether the 'otherwise deductible rule' would reduce its taxable

value. For employees in Categories 1 to 6, who are considered to be travelling on work, the ATO applied the 'otherwise deductible rule,' which effectively reduces the taxable value of the accommodation benefit to nil, as the expense would be deductible if incurred personally. However, for employees in Category 7, who are regarded as living away from home during their assignment, the accommodation benefit is private and does not qualify for this deduction, making it subject to fringe benefits tax.

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|---|
| ATO reference Private Binding Ruling Authorisation No. 1052248446533<br>w https://www.ato.gov.au/law/view/document?docid=EV/1052248446533 |

# 7. ATO and other materials

## 7.1 ART commences

On 14 October 2024, the Administrative Review Tribunal (**ART**) officially replaced the Administrative Appeals Tribunal.

The ART maintains the same jurisdiction as the AAT. The ART aims to provide a more efficient, accessible, and fair process for individuals seeking independent reviews of government decisions.

The key features of the ART include:

1. a transparent, merit-based selection process for non-judicial members;
2. improved accessibility for users and a demand-driven funding model;
3. greater flexibility in procedures and harmonisation across different case types; and
4. mechanisms to escalate significant issues in administrative law and decision-making.

All current Australian Public Service employees from the AAT have transitioned to the ART, and all ongoing matters before the AAT have automatically transferred to the ART.

People who had previously applied to the AAT do not need to resubmit their applications to the ART. However, all AAT decisions that have already been finalised will not be considered again by the ART.

The Small Business Taxation Division has been dissolved. The ART now includes a "Taxation and Business" jurisdiction, ensuring that small business litigation funding remains available for eligible taxpayers.

For more information on how to apply to the ART, individuals can visit the ART's new website or access the fact sheet from the Attorney-General's Department website.

w https://ministers.ag.gov.au/media-centre/first-day-administrative-review-tribunal-14-10-2024
w https://www.ato.gov.au/businesses-and-organisations/small-business-newsroom/administrative-review-tribunal-starts
w https://www.ag.gov.au/legal-system/publications/fact-sheet-new-administrative-review-tribunal

## 7.2 Eligibility for small business litigation funding

The ATO offers small business litigation funding to assist small businesses engaged in disputes with the ATO at the Administrative Review Tribunal (**ART**). This funding aims to cover reasonable legal expenses for eligible small businesses.

**Eligibility criteria**

A business must meet all of the following criteria to be eligible for litigation funding:

1. the entity is a small business (sole trader, partnership, company, or trust);
2. for the income year in dispute:
   (a) the entity operated a business for all or part of the year; and
   (b) the entity's turnover was less than $10 million;
3. the dispute is within the Taxation and Business jurisdictional area of the ART;
4. the dispute concerns a 'small business taxation decision' as defined in the *Administrative Review Tribunal Rules 2024*;

5. the entity is not, and has not been, legally represented in the ART for the dispute; and
6. the ATO has engaged legal representation for the ART dispute.

Eligibility for funding begins from the date the ATO decides to engage external legal representation.

**Expectations and conditions**

The ATO expects that the chosen legal representative should not have conflicts of interest, such as being a shareholder, director, or family member connected to the small business. Additionally, cases involving tax avoidance schemes, superannuation violations, fraud or evasion, cash economy issues, or attempts to gain improper outcomes are excluded. Businesses with a poor compliance history may also be ineligible. Furthermore, the small business must demonstrate a willingness to progress the dispute promptly. If this is not observed, funding may cease unless a different legal representative is appointed.

**Funding agreement**

Eligible businesses will receive a funding deed, outlining the terms of the agreement, which must be signed by both parties. Funding covers legal costs but excludes tax agent or accountant fees, and is discretionary based on the ATO's evaluation.

**COMMENT –** the ATO website refers to turnover, not aggregated turnover, when determining eligibility.

**COMMENT –** the requirement that the entity is not legally represented may discourage taxpayers from seeking advice earlier in the dispute process.

w https://www.ato.gov.au/individuals-and-families/your-tax-return/if-you-disagree-with-an-ato-decision/seek-an-external-review-of-our-decisions/small-business-litigation-funding

## 7.3 Staff celebrations and FBT

The ATO recently updated its guidance on fringe benefits tax (FBT) in preparation for the holiday season, offering advice to businesses planning celebrations for their employees. Before booking a venue or organising an event, businesses should determine if the benefits provided to employees are considered entertainment-related and subject to FBT. Key considerations include:

1. the amount spent per employee;
2. the timing and location of the event;
3. the attendees, including whether only employees or also partners, clients, or suppliers are invited; and
4. the nature and value of any gifts provided.

If employers provide entertainment-related benefits, they must maintain detailed records to calculate the taxable value accurately. Understanding FBT obligations before offering perks can help businesses avoid unexpected FBT liabilities. Further guidance, including scenarios for not-for-profit organisations, is available on the ATO's website.

w https://www.ato.gov.au/businesses-and-organisations/not-for-profit-organisations/not-for-profit-newsroom/could-your-staff-celebration-attract-fbt

## 7.4 Tax treatment of exchange traded funds (ETFs)

On 11 October 2024, the ATO published guidance on its website as to how buying and selling ETFs should be treated for tax purposes and what should be included in tax returns.

An ETF is a managed fund that lets people buy or sell units in a trust that owns investments, such as shares, bonds and currency, on a registered exchange (such as the ASX) rather than owning the assets personally.

Income from an ETF, whether by distribution or reinvested into a distribution reinvestment plan, needs to be declared in tax returns. If an ETF unit is sold, any capital gain or loss should be disclosed.

Investors should keep records of their investments for 5 years after their tax return is processed by the ATO. Most of the records should come from the fund or the broker, and most issuers of ETFs provide guidance for tax statements to help investors prepare their tax returns.

w https://www.ato.gov.au/individuals-and-families/investments-and-assets/shares-funds-and-trusts/exchange-traded-funds

## 7.5 Varying PAYG instalments for SMSFs

On 17 October 2024, the ATO updated its website guidance on varying PAYG instalments for SMSFs. For the 2024–25 income year, PAYG instalment amounts for SMSFs have been increased by a GDP adjustment factor of 6%.

The ATO will calculate the new PAYG instalment amount or rate for an SMSF based on the latest information from the SMSF's annual return.

If the expected tax liability for the year differs from the SMSF's current instalments, the SMSF can vary its PAYG instalments via Online services for business.

w https://www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/self-managed-super-funds-smsf/smsf-newsroom/varying-your-payg-instalments

## 7.6 Commissioner's address at National GST Conference

At The Tax Institute's National GST Conference in Melbourne on 17 October 2024, the Commissioner of Taxation delivered a reflective address on the evolution of GST in Australia, its complexities, and the ATO's future direction. The Commissioner began by revisiting GST's introduction as a replacement for the Wholesale Sales Tax, a narrow and complex system that limited the taxation of goods and services. While acknowledging progress, he noted that classification issues, especially around food, continue to pose challenges for both taxpayers and administrators.

Addressing the tax gap, the Commissioner observed a decline during the COVID-19 pandemic due to fewer cash transactions, but warned of a recent increase linked to the resurgence of fraudulent claims. Highlighting efforts to combat fraud, he detailed Operation Protego, which has led to enforcement against fraudulent actors and bolstered the ATO’s defences against GST fraud.

For large businesses, the Commissioner reported that the Justified Trust program has enhanced compliance and governance among top taxpayers. Looking to the future, he emphasised the ATO’s focus on digitalisation as part of its 2030 vision, particularly to simplify GST compliance for small businesses. Pilot initiatives will explore more frequent payment options, user-friendly software, and data access improvements to support

seamless compliance. The Commissioner closed by affirming the importance of collaboration between the ATO and tax professionals in preserving the GST system's integrity as it adapts to ongoing digital and regulatory advancements.

w https://www.ato.gov.au/media-centre/commissioners-address-at-the-ti-national-gst-conference

## 7.7 Private groups – what attracts the ATO's attention

The ATO has outlined its primary focus areas for privately owned and wealthy groups in 2024–25. These groups play a significant role in the economy and tax system, and there is a heightened community expectation that they meet their tax obligations transparently and fairly. The ATO recognises that private groups may have complex tax affairs, often leading to potential risks or mistakes. To address this, it has developed tax performance programmes to aid compliance and also tackle deliberate tax avoidance.

**2024–25 Areas of Focus**

The ATO's new "Areas of Focus 2024–25" page provides insights into specific behaviours and practices that may attract scrutiny. This initiative aims to support private groups through proactive guidance and education while enhancing compliance by keeping entities informed about evolving obligations.

The key focus areas are briefly outlined in the table below.

| Focus Area | Details |
|---|---|
| Foundational Issues | • Issues with registration, lodgment, and timely tax payment obligations.<br>• Problems include incorrect registrations, missed lodgments, and overdue tax debts. |
| Incorrect Reporting | • Errors in reporting income, sales, and expenses, including ineligible claims for R&D and base rate entity status. |
| Tax Advisers and Professional Firms | • Non-compliance with lodgment and payment obligations by advisers.<br>• Aggressive tax schemes promoted by intermediaries, including inappropriate profit allocations. |
| Division 7A | • Unreported or non-compliant shareholder loans, inadequate loan agreements, and insufficient loan repayments.<br>• Requests for section 109RB discretion for relief on loans. |
| Capital Gains Tax (CGT) | • Misuse of small business CGT concessions and CGT discount calculations.<br>• Inappropriate use of the small business restructure rollover and related party capital losses. |
| Property and Construction | • Misclassification of property disposals and underreporting of GST<br>• Failure to meet GST reporting and registration requirements for real property. |
| International Transactions | • Issues with intangible migration, service transaction mischaracterisation, and withholding tax compliance.<br>• Concerns over related party financing with non-commercial terms. |
| Other Domestic Transactions | • Issues with non-arm's length income in self-managed super funds and trust distributions.<br>• Discrepancies in franking account balances and breaches of the 45-day holding rule. |

| | |
|---|---|
| Emerging or Evolving Risks | • Incorrect deductions by trusts, ineligible R&D claims, and improper GST credits.<br>• New CGT challenges and misuse of private ancillary funds to avoid tax. |
| Targeted Focus Areas | • Succession Planning:<br>o Risks linked to the ageing demographic.<br>• Private Equity<br>o Risks throughout the private equity investment lifecycle.<br>• Retirement Villages<br>o Issues with GST, income tax, and related party transactions.<br>• GST in Retail and Construction<br>o Misreporting on GST supplies, acquisitions, and intragroup transactions. |

**Enhanced Communication and Compliance**

To support private groups in staying up-to-date, the ATO has refreshed its "What Attracts Our Attention" content. This resource provides a detailed overview of tax issues that may invite ATO attention. The ATO also offers tailored communication channels, such as the fortnightly Business Bulletins newsletter, enabling entities to receive timely updates and insights into compliance expectations.

The ATO emphasises that its guidance is periodically updated based on emerging intelligence, encouraging private groups to remain vigilant and proactive in addressing any flagged risks. Through these measures, the ATO aims to strengthen transparency and community confidence in the tax compliance of Australia's wealthiest taxpayers.

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/privately-owned-and-wealthy-groups/what-attracts-our-attention/areas-of-focus-2024-25
w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/our-areas-of-focus-for-private-groups

## 7.8 Medium and emerging private groups tax performance program

The ATO has updated their website in respect of supporting medium and emerging private groups to meet their tax obligations.

The ATO states they have a risk-based approach to identifying groups with higher tax risks and supporting them in meeting their tax obligations. Through the medium and emerging private group tax performance programs, the ATO has improved their knowledge and understanding of business operating environments and tax risks and issues that are present or may be emerging.

The Program covers:

1. private groups linked to Australian resident individuals who, together with their associates, control wealth between $5 million and $50 million; and
2. businesses with an annual turnover of more than $10 million, that are not public or foreign owned and are not linked to a high wealth private group.

Types of engagement that entities that fit within the Program can expect are:

1. a review of areas of correct tax reporting risk specific to their business;
2. pre-lodgment compliance agreement for commercial deals and restructure events; and
3. leveraged engagements for areas of potential risk that are generally more easily resolved.

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/privately-owned-and-wealthy-groups/what-you-should-know/tax-performance-programs-for-private-groups/medium-and-emerging-private-groups-tax-performance-program

## 7.9 Commercial deals client engagement

The ATO, through its commercial deals service, aims to provide businesses with tax certainty on significant transactions. Such transactions may affect the structure of a taxpayer's business, such as restructures and sales of businesses or business assets.

The commercial deals service allows the ATO to assist in resolving tax technical issues related to the deal, reach an agreement on the intended tax position and support taxpayers to meet their tax obligations and reduce the likelihood of a review.

The ideal time for engagement with the ATO on a commercial deal is after completion of the transaction and prior to lodgment. If an agreement is reached and lodgment is received as agreed, no review or audit will be conducted for that deal.

In cases involving foreign residents, the ATO focuses on pre-deal completion and pre-lodgment compliance activities to address potential risks, such as the misapplication of capital gains tax exemptions and dissipation of assets. These compliance measures apply broadly and are not limited to wealthy or privately-owned groups.

On 14 October 2024, the ATO published the results of its annual survey to understand the experience of taxpayers from their involvement in the Commercial deals early engagement service. The survey revealed high satisfaction with the service, with 92% of respondents expressing satisfaction, marking a 6% increase from the previous year.

Taxpayers reported that the ATO regularly treats them professionally and understands their individual circumstances better than in previous years. The taxpayers also believe the service provides tax certainty and reduces the likelihood of future disputes, though some respondents to the survey expressed concerns about the time and cost involved to participate. Overall, 74% of taxpayers said they would recommend the service to others.

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/privately-owned-and-wealthy-groups/what-you-should-know/the-right-services/commercial-deals/engage-with-us-for-your-commercial-deal
w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/privately-owned-and-wealthy-groups/what-you-should-know/the-right-services/commercial-deals/commercial-deals-client-engagement

## 7.10 ATO collects $100 billion from large corporates

The ATO has released its tenth annual Corporate Tax Transparency report, revealing that it collected $97.9 billion in corporate income tax in 2022–23 from large corporates, an increase of 16.7% from the previous year. This includes $100 billion in total, factoring in contributions from the Tax Avoidance Taskforce. The mining sector, particularly the oil, gas, and coal industries, was a major contributor, paying over five times more tax than in 2014–15 due to high commodity prices and ATO interventions.

The 2022–23 report includes data from 3,985 entities, with an expanded scope now covering Australian-owned private entities with income between $100 million and $200 million. This aims to encourage voluntary compliance and increase transparency. Compliance improvements are notable, with large corporates paying

96% of the income tax they owe following ATO interventions. The percentage of companies paying no income tax has decreased to 31%, compared to 36% in 2013–14.

The Tax Avoidance Taskforce, funded by the government since 2016, has been instrumental in securing over $33.2 billion in additional revenue, enhancing compliance within large corporate groups. The report underscores the ATO's sustained efforts to ensure corporate tax compliance and transparency across large public and private businesses.

w https://www.ato.gov.au/media-centre/ato-collects-100-billion-dollars-from-large-corporates
w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/large-business/in-detail/tax-transparency/corporate-tax-transparency-report-2022-23

## 7.11 Tax Avoidance Task Force report 2023-24

On 1 November 2024, the ATO published its Tax Avoidance Taskforce summary, highlights and focus areas for the 2023–24 financial year. The May 2024 Budget extended the taskforce's mandate until 30 June 2028, along with an additional $1.2 billion in funding. The taskforce aims to drive long-term behavioural change among large businesses and multinationals, increasing the revenue taxable in Australia and enhancing the integrity of the tax system.

Over the past year, the taskforce expanded its reach to include medium-sized, emerging public companies, and private groups, introducing early engagement programs to tackle new risks. Since July 2016, its interventions have generated approximately $32.4 billion in revenue, with $20.8 billion directly attributable to taskforce funding as of June 2024. In the 2023–24 financial year alone, compliance efforts secured an additional $5.7 billion in tax revenue from large public groups, multinationals, and privately owned and wealthy groups.

Key highlights in the summary include:

1. success in the Full Federal Court decision in *Singapore Telecom Australia Investments Pty Ltd v Commissioner of Taxation* [2021] FCA 1597, confirming a transfer pricing benefit claim relating to a 2002 acquisition;
2. resolution of a dispute with SGSP (Australia) Assets Pty Ltd (Jemena), resulting in an announcement to the Singapore Exchange regarding $800 million in convertible instruments;
3. Significant contributions from oil and gas companies, with tax payments of $4.4 billion for 2022–23, marking some as Australia's largest taxpayers;
4. support for the *Treasury Laws Amendment (Making Multinationals Pay Their Fair Share – Integrity and Transparency) Act 2024*, which enacts thin capitalisation amendments; and
5. success in *Merchant v Commissioner of Taxation* [2024] FCA 498, where the Federal Court ruled an additional $40 million was owed in a 2015 dividend stripping case.

w https://www.ato.gov.au/about-ato/tax-avoidance/tax-avoidance-taskforce/tax-avoidance-taskforce-highlights-2023-24

## 7.12 First Home Super Saver statistics

The First Home Super Saver (FHSS) scheme, active since 1 July 2018, allows individuals to save for their first home via superannuation. Data from 2018 to 2024 reflects the scheme's growing usage, with the latest update on 15 October 2024. For the 2023–24 financial year, there were 49,300 FHSS determinations, 16,800 release requests, and $312.7 million requested. Applicants, mostly aged 26–35, reflect younger demographics, with 10% under 25 and 18% aged 36–40. Location data shows requests across all Australian states, with Greater

Sydney, Melbourne, and Brisbane having the highest demand. Gender data indicates a consistent majority of male applicants (57%), with female applicants making up 43%.

Income demographics reveal that most users have taxable incomes between $45,001 and $120,000, accounting for about 58-65% of requests across recent years. Processing times improved over time, with 90% of release requests completed within a 20-day service standard by 2023–24, following a reduction from the previous 25-day target. The ATO commits to clear, accurate information and considers any user errors resulting from incorrect guidance.

w https://www.ato.gov.au/about-ato/research-and-statistics/in-detail/super-statistics/early-release/first-home-super-saver-scheme-data

## 7.13 Change in ATO's approach to collecting unpaid tax and super

On 23 October 2024, the ATO announced that it is changing its approach to collecting unpaid tax and super. The ATO is focusing on businesses who refuse to engage with the ATO and continue to ignore the ATO's SMS and letter reminders.

The ATO announced the following changes:

1. for business that don't engage with the ATO or set up a payment plan, the ATO will move more quickly to firmer actions such as Director Penalty Notices (**DPNs**) and garnishees; and
2. for directors of multiple companies who allow tax and super to go unpaid and do not engage with the ATO, the ATO will issue DPNs capturing the total value of these amounts across all related entities and recover these amounts directly from the director, putting the director's assets at risk.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/we-re-changing-our-approach-to-collecting-unpaid-tax-and-super

## 7.14 ATO Administration and Management of Objections Report

The Inspector-General of Taxation's report on the ATO's administration of objections reveals critical findings on process inefficiencies and accessibility issues impacting taxpayers. The report identifies over 25,000 annual objections received by the ATO, mostly from individuals and small businesses, with 55% of these objections being self-initiated due to the need for post-assessment amendments. The Inspector-General has made five key recommendations to address inefficiencies in the ATO's handling of tax objections, aiming to improve accessibility, streamline processes, and enhance taxpayer engagement.

**Digital objection lodgment**

The Inspector-General advises the ATO to prioritise the "Optimising Disputes" project to enable all taxpayers, including unrepresented individuals, to lodge objections electronically. This move would reduce processing time, minimise transcription errors, and provide greater convenience for taxpayers, aligning with broader government digital transformation goals.

**Enhanced data tracking and differentiation**

To improve support and data accuracy, the Inspector-General recommends that the ATO track key objection handling milestones and differentiate objections lodged by non-agent tax professionals, such as accountants and legal practitioners. This would allow for more targeted support and efficient reporting, enabling the ATO to identify trends and pain points in the objection process.

**Streamlined self-initiated objections**

Recognising that self-initiated objections account for a significant portion of ATO's caseload, the Inspector-General suggests a streamlined process for these cases. This recommendation targets low-value or low-risk amendments filed as objections due to time limits on standard amendments. If administrative solutions are unviable, the ATO should brief the Treasury on potential legislative changes to reduce the resource burden and enhance taxpayer experience.

**Administrative reconsideration for non-engagement cases**

The Inspector-General proposes that the ATO explore administrative reconsideration options for cases where taxpayers had no opportunity to engage, such as covert audits or default assessments. Such a measure would alleviate the need for full objections and improve processing times, benefiting both taxpayers and the ATO.

**Strengthened feedback framework**

To prevent unnecessary disputes from escalating, the Inspector-General recommends establishing a robust feedback loop between the objections function and other ATO business lines. This would allow the ATO to capture and implement lessons from past objections, enhancing its compliance activities and reducing dispute escalation.

w https://www.igt.gov.au/investigation-reports/ato-administration-and-management-of-objections-report/

## 7.15 ATO Decision Impact Statement – Hannover Life

The ATO has issued a decision impact statement regarding the decision in *Commissioner of Taxation v Hannover Life Re of Australasia Ltd* [2024] FCAFC 23 (see our April 2024 Tax Training Notes). The decision considered the method of apportionment when claiming input tax credits in relation to overhead costs, where the supplier makes a mixture of input taxed supplies in respect of which credits are not available and GST-free supplies in respect of which credits can be claimed.

**ATO view on decision**

The ATO agrees with the Court's approach to interpreting section 11-15 of the GST Act, which requires a precise examination of the connection between an acquisition and the supplies made by an entity. The ATO emphasises that determining a "creditable purpose" involves assessing whether an acquisition has a "real and substantial connection" to input-taxed, GST-free, or taxable supplies. An acquisition that supports an input-taxed supply does not automatically support other supplies, even if those supplies are interdependent.

The ATO accepts the Court's finding that certain overhead expenses can relate to multiple types of supplies. However, the ATO emphasises that businesses must factually establish the link between overhead expenses and specific supplies. Simply categorising an expense as an "overhead" does not mean it necessarily benefits all supplies equally. Taxpayers should carefully analyse their circumstances and not assume the Court's outcome in Hannover will apply identically to similar cases.

**Apportionment methods under section 11-30 of the GST Act**

Although Hannover's revenue-based apportionment method was accepted in this case, the ATO does not endorse this approach universally. The ATO insists that apportionment methods under section 11-30 of the GST Act must be fair, reasonable, and fact-specific. Multiple apportionment methods might be appropriate depending on an enterprise's circumstances, and the choice of method should reflect the actual benefits received by different supply categories.

The Commissioner considers that an apportionment method's fairness depends on the factual scenario and does not endorse the revenue-based method used in this case for all circumstances. The ATO refers to GST Rulings GSTR 2006/3 and GSTR 2006/4, which provide guidance on determining creditable purpose and selecting apportionment methods. These rulings clarify that apportionment methods, including revenue-based methods, are permissible when they fairly reflect the relationship between acquisitions and supplies. However, each method must be evaluated in its factual context to ensure it yields a fair and accurate measure of creditable purpose.

w https://www.ato.gov.au/law/view/document?docid=LIT/ICD/NSD816of2023/00001

## 7.16 NT Payroll tax threshold to increase

The Chief Minister and Treasurer of the Northern Territory government has announced in a joint media release they are fulfilling an election promise by introducing payroll tax reforms that is expected to save Northern Territory businesses up to $68,750 annually.

From January 1, 2025, businesses with payroll below $2.5 million will be exempt from payroll tax, while those with payroll between $2.5 million and $7.5 million will see tax reductions beginning from 1 July 2025. This initiative intends to benefit an additional 380 businesses with reduced tax burdens. It will make the Northern Territory the highest payroll tax-free threshold in Australia, raising it from $1.5 million to $2.5 million.

On average, businesses can expect savings of $22,000 each year, and around 200 companies will have their payroll tax completely eliminated, encouraging them to hire more staff.

Apprentice and trainee wages will also be exempt from payroll tax starting 1 July 2025.

The Government aims to create a competitive business environment to support economic growth in the Northern Territory.

w https://createsend.com/t/t-F8148377F12776722540EF23F30FEDED

# 8. Tax Professionals

## 8.1 New approach to ATO debt collection

The ATO is intensifying its focus on businesses that refuse to engage with their tax obligations despite repeated SMS and letter reminders. This refined approach aims to ensure a fairer system, placing a greater emphasis on businesses that are proactively meeting their responsibilities, while targeting those who continuously neglect their tax and superannuation duties.

Businesses that fail to engage or establish payment plans for unpaid GST, Pay As You Go (PAYG) withholding, or employee superannuation can expect the ATO to take firmer actions. This includes issuing Director Penalty Notices (DPNs) and garnishee orders. Directors overseeing multiple companies who allow such obligations to remain unpaid will face a consolidated approach by the ATO, which may result in DPNs covering the total outstanding amounts across all affiliated entities. The ATO has also indicated that it may recover these amounts directly from directors, placing their personal assets at risk.

This enhanced enforcement may impact business clients who have not responded to the ATO's previous engagement efforts. To avoid these stringent measures, businesses are urged either to settle their obligations or to arrange payment plans promptly.

**Steps to support clients in managing tax obligations**

Advisors are encouraged to remind clients of the importance of prioritising tax and superannuation payments to avoid interest charges and collection actions by the ATO. For clients who are unable to pay in full and on time, the ATO offers options such as payment plans, which can be set up online for debts under $200,000. Additionally, clients facing genuine financial hardship can explore alternative options, including deferred payment arrangements and interest remissions.

The ATO's key message to business clients is clear: those who can pay should do so promptly, while those needing additional time should not ignore their obligations. Early action, such as establishing a payment plan, can help prevent further complications and collection actions.

For further information, business owners are encouraged to learn more about the consequences of non-payment.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/we-re-changing-our-approach-to-collecting-unpaid-tax-and-super

## 8.2 Qualified audit reports for SMSFs using wrapped investments

The ATO has updated its website guidance explaining the conditions under which auditors may issue a qualified audit report for SMSFs that utilise investment management service organisations. In such arrangements, the SMSF's assets are typically held by a custodian on behalf of the SMSF, not directly by the SMSF itself. Examples of these types of investments include WRAP accounts, individually managed portfolio services, or platform investments.

During the annual SMSF audit, auditors must verify the assets in the SMSF's financial statements. However, when assets are managed by a service organisation, auditors often encounter challenges in confirming ownership. This can occur even if an annual investment statement and other audit documents are available.

If the auditor finds there is insufficient evidence to confirm asset ownership, they may qualify Part A of the Independent Auditor's Report (IAR), which addresses the financial aspects of the audit. This qualification may be necessary despite the SMSF trustees having fulfilled all their obligations.

The ATO advises that advisers should discuss any Part A qualifications on the IAR with the SMSF auditor to understand the implications for the SMSF.

For auditors, the *Guidance Statement GS009 Auditing Self-Managed Super Funds* provides specific considerations for SMSFs using service organisations. It indicates that a Part A qualification may not be necessary if adequate evidence is obtained in compliance with ASA 402. The Joint Accounting Bodies

have also released an FAQ document that clarifies audit considerations, suggesting that while obtaining sufficient evidence is sometimes possible, each case requires a tailored approach.

w https://www.ato.gov.au/tax-and-super-professionals/for-superannuation-professionals/super-funds-newsroom/understanding-qualified-audit-reports

## 8.3 TPB consultation on guidance

The TPB is engaging with stakeholders to provide practical guidance on the expanded Code of Professional Conduct for tax practitioners, which focuses on integrity and transparency.

The TPB aims to finalise the guidance by December 2024, supported by webinars to aid understanding. In a media release dated 16 October 2024, the TPB emphasised that the revised Code offers clarity on what practitioners must communicate to clients, excluding personal matters, and that the TPB's approach will prioritise voluntary compliance through education, with targeted investigations for higher-risk behaviours and misconduct.

w https://www.tpb.gov.au/improving-integrity-tax-profession

## 8.4 Draft guidance on new professional obligations

The TPB has released draft policy guidance for public consultation to uphold professional and ethical standards within the tax profession. The guidance aims to help tax practitioners understand new obligations under the Tax Agent Services (Code of Professional Conduct) Determination 2024. The TPB is inviting feedback on six draft information sheets covering ethical standards, false or misleading statements, conflicts of interest, record-keeping, supervision and competency, and client communication (see items 8.5 to 8.7 of these notes). These new requirements will apply from 1 July 2025 for most practitioners, with earlier implementation from 1 January 2025 for larger firms with over 100 staff.

TPB Chair, Peter de Cure AM, emphasised that the guidance aims to foster trust in the profession by promoting competent services and transparency. The draft guidance incorporates feedback from initial roundtable discussions with professional bodies and consumer groups and encourages further input from stakeholders through written submissions or participation in webinars.

The consultation period ends on 21 November 2024, with the final guidance expected in December 2024, alongside complementary resources to aid practitioners in compliance.

w https://www.tpb.gov.au/tpb-expands-consultation-draft-code-determination-guidance

## 8.5 Draft TPB information sheet – Ethical standards

The TPB has published a draft information sheet (TPB(I)D56/2024) regarding the obligations under section 10 of the Tax Agent Services (Code of Professional Conduct) Determination 2024. This section supplements the 17 obligations outlined in the *Tax Agent Services Act 2009* (**TASA**) and introduces additional expectations for registered tax practitioners to act ethically and professionally, promoting public trust in the tax profession.

**Obligations under Section 10**

Section 10 obliges tax practitioners to uphold and promote the Code and refrain from conduct that may discredit the tax profession or tax system. It requires collaboration among practitioners to maintain public trust. Practitioners must also ensure that employees, contractors, and other assistants meet these obligations.

**Case Studies**

Three case studies illustrate these obligations.

Failure to Manage Conflicts

A registered tax agent, Sam, ignored conflicts of interest in handling tax returns for a divorced couple. Despite staff raising concerns, Sam failed to act, deleted evidence, and did not maintain adequate records.

Sam breached section 10 by failing to promote the Code, manage conflicts, and maintain transparency. His conduct undermined public trust and failed to meet other professional obligations.

Undermining the Collective Work

Anne, director of KDG Pty Ltd, ignored employee James's concerns about unethical practices by a supervising tax agent, Lachlan. Anne dismissed the concerns, threatened James, and deleted related communications.

KDG Pty Ltd breached section 10 for failing to hold Lachlan accountable, silencing concerns, and destroying evidence. The firm's conduct eroded public trust and the integrity of the tax profession.

Maintaining Accountability

Tom, director of Mulholland Services Pty Ltd, identified non-compliance in continuing professional education (CPE) among supervising BAS agents. He addressed the issue by reallocating work, providing resources, and documenting actions.

Mulholland Services complied with section 10 by actively managing underperformance and promoting transparency, upholding public trust and confidence.

**Consultation and finalisation**

The TPB invites comments on this draft until 21 November 2024, seeking input on the adequacy of internal controls and the applicability of case examples provided. The TPB will consider feedback before finalising its guidance.

w https://www.tpb.gov.au/tpbi-d562024-upholding-and-promoting-ethical-standards-tax-profession

## 8.6 Draft TPB information sheet – False and misleading statements

The TPB has published a draft information sheet to guide registered tax agents and BAS agents on their obligations under section 15 of the Tax Agent Services (Code of Professional Conduct) Determination 2024.

This sheet outlines the duties to prevent, correct, and report false or misleading statements made to government agencies, including the TPB and the Australian Taxation Office (ATO). The Code contains 17 items regulating conduct, with section 15 detailing specific obligations to address material misstatements.

**Obligations under section 15**

Registered tax practitioners must not knowingly or recklessly make or prepare false or misleading statements to the TPB, ATO, or other government bodies. They must avoid omissions that would result in misleading information. If a false or misleading statement is discovered, tax practitioners must take reasonable steps to correct it or advise clients to do so. If the client fails to correct it, the practitioner may need to withdraw from the professional engagement or notify relevant authorities.

The key elements of compliance include making reasonable efforts to address misstatements, maintaining transparency with clients, and fulfilling obligations even if it conflicts with clients' preferences.

**Required actions**

The draft information sheet outlines specific actions practitioners must take, depending on the situation. These include:

1. Correction: Practitioners should correct the statement if made independently of a client.
2. Client Notification: If made on behalf of a client, the practitioner must advise the client to correct the statement and warn of potential consequences.
3. Withdrawal: If a client refuses to correct the statement, the practitioner must withdraw from the engagement if the false statement resulted from recklessness or intentional disregard of taxation laws.
4. Notification: If the client continues to refuse to correct the statement and substantial harm to public interest or third parties is likely, the practitioner must notify the TPB or ATO as relevant.

In relation to the requirement to withdraw from the relationship, the draft information sheet clarifies:

> *62. Not only are registered tax practitioners required to withdraw from their engagement in providing tax agent services (including BAS services) to the client, they must also withdraw from their professional relationship with the client. This means that the registered tax practitioner must withdraw from any other professional relationship they have with the client outside of the provision of tax agent services. For example, if the registered tax practitioner also provides business advisory, accounting, audit and/or financial services to the client, the registered tax practitioner must also withdraw the engagement in connection with the provision of these services.*
>
> *63. If the registered tax practitioner is required to withdraw from their engagement and/or professional relationship with a client under subsection 15(2) of the Determination, this obligation to withdraw will not extend to related entities of the client, that the tax practitioner is engaged by or has a professional relationship with. The obligation to withdraw attaches to the client that has not corrected the false or misleading statement or has not adequately otherwise explained the basis for the statement.*

The draft information sheet also notes that in some circumstances, the making, preparing or directing, or permitting someone to make or prepare a false or misleading statement may give rise to the registered tax practitioner having a reasonable belief that they have committed a ‘significant breach’ of the Code, particularly where the false or misleading statement resulted from a failure to take reasonable care, recklessness or an intentional disregard of a taxation law by the registered tax practitioner. This could trigger the separate obligation of a registered tax agent to report the breach to the TPB under sections 30-35 and 30-40 of the *Tax Agent Services Act 2009* (TASA), which apply from 1 July 2024.

**Case Studies**

The TPB presents case studies illustrating practical applications of these obligations, which are summarised below.

Omission of bankrupt status

A sole practitioner registered tax agent intentionally omits her status as an undischarged bankrupt on her registration form, which results in a false declaration. The practitioner's omission violates both the Determination and Code of Professional Conduct.

False BAS returns

A BAS agent submitted false BAS returns on a client's instructions even though the instructions were consistent with a widely publicised warning issued by the ATO to about a fraudulent scheme to claim false GST refunds. When the BAS agent raised his concerns about the fraudulent scheme with the client, the client instructed the BAS agent to lodge anyway.

Following further media coverage of the schemes, the BAS agent took steps to notify the client and eventually withdrew from the engagement and informed the ATO when the client refused to correct the statements.

Mistake on insurance disclosure

A practitioner mistakenly declares insurance coverage based on outdated information. Upon discovering the error, the practitioner corrects the statements promptly, leading to leniency from the TPB.

Consistent false claims

A registered tax agent made consistent false claims for work related expenses for clients, despite the ATO's audit activity identifying those clients had provided all relevant and accurate information and records when engaging the tax agent to complete their income tax returns. This indicated intentional disregard for tax laws by the tax agent. The TPB determined that this behaviour violated section 15 of the Determination, Code item 1 (acting honestly and with integrity), Code item 11 (obstructing the proper administration of the tax laws) and he may also be found to no longer be a fit and proper person for registration as a tax practitioner.

Immaterial false statement in previous return

A practitioner identifies an immaterial false statement in a previous tax return in the form of an incorrect business industry code. The practitioner advises the client of the error and suggests they contact the ATO to determine if the error required amendment. No breach occurs as the mistake is not material.

Materially false declarations

A practitioner identifies materially false GST and superannuation declarations by a client. When the client refuses corrective action, the practitioner withdraws from the engagement and notifies the ATO, considering the public interest implications.

**Consultation and finalisation**

The TPB invites comments on this draft until 21 November 2024. The TPB will consider feedback before finalising its guidance.

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| w https://www.tpb.gov.au/tpbi-d572024-false-or-misleading-statements |

## 8.7 Draft TPB information sheet – Conflicts

The TPB has published a draft information sheet (TPB(I)D55/2024) regarding the obligations under sections 20 and 25 of the Tax Agent Services (Code of Professional Conduct) Determination 2024, adding to other ethical requirements under the *Tax Agent Services Act 2009* (TASA) and the Accounting Professional and Ethical Standards Board codes.

**Obligation under Section 20: conflict of interest management**

Section 20 mandates that tax practitioners identify, disclose, and manage any significant conflicts of interest in activities for government agencies. Practitioners must document any real or perceived conflicts promptly upon discovery, informing the relevant agency and, where possible, taking steps to avoid the conflict. If avoidance is impractical, practitioners must mitigate the conflict through measures such as adjusting internal access to sensitive information. For example, reallocating tasks or limiting disclosure among a select group are potential steps to maintain impartiality. The obligation does not ban conflicts but requires responsible management to uphold agency interests.

**Obligation under Section 25: confidentiality and information use**

Section 25 prohibits the unauthorised disclosure of information obtained from government agencies and forbids using such information for personal advantage. Practitioners can only share confidential information when authorised by the agency or legally required. Even implied disclosures must align strictly with agency consent. This includes maintaining confidentiality in any outsourced tasks or cloud storage solutions. Practitioners are advised to exercise professional judgement and err on the side of caution when uncertain about the extent of permissible disclosures.

**Comparison with the Corporations Act and professional ethics**

While the TPB's Determination shares ethical similarities with the Corporations Act's requirements for financial services, section 20 is broader. Unlike the Corporations Act's client-focused best interests duty, the TPB's obligation applies universally to government engagements and prioritises transparency in all potential conflicts. The TPB also requires more extensive record-keeping to track conflicts and confidentiality protocols.

**Case studies and practical scenarios**

The TPB offers scenarios illustrating how practitioners should approach conflicts and confidentiality. For instance, when a practitioner identifies a potential conflict due to their advisory role affecting their clients' tax obligations, they must promptly disclose this to the agency and follow measures to minimise any bias. Another example includes a practitioner who refrains from disclosing confidential information gained in a government consultation to third parties unless clearly permitted by the agency.

These standards underscore the importance of managing conflicts with transparency and safeguarding confidential information to maintain trustworthiness in government-related work.

**Consultation and finalisation**

The TPB invites comments on this draft until 21 November 2024, seeking input on the adequacy of internal controls and the applicability of case examples provided. The TPB will consider feedback before finalising its guidance.

w https://www.tpb.gov.au/tpbi-d582024-managing-conflicts-interest-when-undertaking-activities-government-and-maintaining-confidentiality-dealings-government

## 8.8 Draft TPB information sheet – Client records

The Tax Practitioners Board (TPB) issued this draft Information Sheet (TPB(I) D59/2024) to clarify obligations under section 30 of the Tax Agent Services (Code of Professional Conduct) Determination 2024. The TPB seeks feedback on this draft, which aims to guide registered tax practitioners on maintaining proper client records for tax agent services provided, ensuring compliance with both the Determination and broader tax legislation.

**Obligations and requirements**

Under section 30, tax practitioners must keep records that accurately reflect services provided, retain them for a minimum of five years, and ensure these are easily accessible and convertible to English. Records should detail the nature, scope, and outcomes of services, include relevant advice given and received, and capture key aspects, such as calculations and assumptions in complex cases. Practitioners are expected to create and retain records promptly after service completion to ensure completeness and accuracy.

**Minimum record types**

The TPB identifies essential records that practitioners must keep, including:

1. client details and terms of engagement;
2. communications, advice, and authorisations related to tax services; and
3. records detailing advice and calculations, and correspondence with the ATO and other third parties.

These records provide documentation of the services rendered and aid in resolving potential disputes.

**Retention and confidentiality**

Practitioners must retain records for five years post-service, covering both active and former clients. Compliance with privacy laws is mandatory, especially concerning Tax File Numbers (TFNs), where practitioners must follow specific rules under the Privacy (TFN) Rule 2015. Records must be securely stored and protected from unauthorised access, and practitioners should consider destruction, de-identification, or return of records after the mandatory retention period, in line with privacy laws.

**Client interaction and recordkeeping**

Practitioners are advised to clarify recordkeeping roles with clients, including stipulating client responsibilities under tax laws. Letters of engagement should specify the practitioner's recordkeeping obligations and outline arrangements upon engagement termination. Practitioners must inform clients that these recordkeeping duties do not relieve them of their own tax compliance requirements.

**Additional considerations and case studies**

The TPB outlines scenarios illustrating practical applications of section 30 obligations, such as cases involving employee-provided services, former client records, and reviews of past tax returns.

<u>Responsibility for employee-provided services</u>

In this scenario, ABC Pty Ltd, a registered tax agent company, employs Lisa, who is not a registered tax practitioner, to assist in preparing client tax returns. Michael, the director and nominated supervising agent of ABC Pty Ltd, is responsible for ensuring compliance with recordkeeping obligations for services provided by Lisa. This includes maintaining records in English, retaining them for five years, and ensuring they accurately reflect the scope and outcome of the services provided.

Retaining records for former clients

This example focuses on Sandra, a registered tax agent, who previously completed a tax return for a client, Rick. When Rick appoints a new tax agent, Sandra provides copies of Rick's records to the new agent after securing Rick's consent. Sandra still retains her copies of Rick's records, ensuring they are securely stored for the required five-year period. This case highlights the continuing recordkeeping obligations that apply to former clients, as well as the need to handle client transitions responsibly and in compliance with confidentiality requirements.

New recordkeeping requirements for reviews of past services

In the third case study, Carla, a tax agent at Helpful Tax Pty Ltd, completed a tax return for her client Dean four years ago. Recently, the ATO initiated a review of Dean's tax return, and Dean engaged Carla to represent him in the review process. Although the five-year retention period for the original tax return has expired, Carla must now maintain records related to her representation of Dean in the review, extending the retention period based on the new engagement. This example illustrates how new engagements, such as representing clients in reviews or audits, can create fresh recordkeeping obligations that supersede previous retention periods.

**Consultation and finalisation**

The TPB invites comments on this draft until 21 November 2024. The TPB will consider feedback before finalising its guidance.

w https://www.tpb.gov.au/tpbi-d592024-obligation-keep-proper-client-records-tax-agent-services-provided

## 8.9 Draft TPB information sheet – Supervision, competency and quality control

The TPB has issued a draft Information Sheet (TPB(I) D60/2024), providing guidance on obligations related to supervision, competency, and quality management for registered tax and BAS agents under the *Tax Agent Services Act 2009* (TASA) and the Code of Professional Conduct. The draft aims to clarify the TPB's expectations, particularly on supervisory arrangements, maintaining a competent standard, and establishing quality management systems, without creating new legal obligations.

**Key obligations and standards**

Competency and supervisory arrangements

Registered tax practitioners must ensure that tax and BAS services are delivered competently, as outlined in subsections 30-10(7) to (10) of TASA. Supervisory arrangements must ensure that staff members providing these services maintain necessary skills and are appropriately overseen. Practitioners are responsible for setting up a system of quality management to maintain service standards and documenting supervisory processes.

Sufficient number requirement

For partnerships and companies, meeting the "sufficient number" requirement is essential for registration. This requirement mandates that an organisation has enough registered individuals to competently provide services and oversee operations. The TPB assesses each case individually, considering factors such as organisational structure and the complexity of services provided.

**Remote and multiple supervisory roles**

The draft recognises that supervisory arrangements may be remote or cover multiple entities. Remote supervision must include regular check-ins, access to resources, and clear communication protocols to ensure adequate oversight. Tax practitioners supervising multiple entities must evaluate their ability to maintain adequate control across all roles, particularly if the client base is diverse or complex.

**Quality management systems**

Practitioners must establish quality management systems to ensure ongoing compliance with the Code. These systems should cover governance, performance monitoring, client engagement, conflict management, and confidentiality. While larger firms may require extensive controls, smaller practices can adopt more simplified systems based on their size and resources.

**Examples**

The draft includes the following examples:

1. AAA Pty Ltd failed to meet the TPB's requirement for sufficient supervision because it did not obtain prior informed consent from Tom, the nominated supervising agent. The TPB highlights that companies must formally document supervisory arrangements to meet competency standards;
2. XYZ Pty Ltd (a financial services licensee) was required to have a registered tax agent to satisfy the TPB's sufficient number requirement. Until it met this requirement, XYZ needed to ensure all representatives providing tax (financial) advice services were either registered tax agents or qualified providers. This case underscores the TPB's focus on ensuring appropriate qualifications and supervision in the financial services context;
3. XYZ Pty Ltd was deemed to have inadequate remote supervisory arrangements. Steven, the supervising agent, did not maintain sufficient contact or oversight with Amanda, an unregistered tax services provider working remotely. This example stresses the importance of structured remote supervision, including regular check-ins and training schedules;
4. Gaby, a registered BAS agent, held multiple supervisory roles across several entities with varied client bases and complexity. The TPB found that Gaby's supervision was insufficient given her extensive responsibilities, highlighting the importance of adequate resource allocation and management when supervising multiple entities;
5. Bizy B Pty Ltd lacked sufficient supervision for Vanessa, an unregistered tax services provider, who was inexperienced with BAS services. Bizy B's verbal supervision, infrequent check-ins, and outdated training materials did not satisfy TPB's supervision standards. This example illustrates the need for regular, documented supervision and relevant training; and
6. Koality Pty Ltd had outdated quality management policies and did not enforce professional training for employees regarding compliance with the Code. The TPB found that without current policies and active enforcement, Koality failed to meet the requirements for a system of quality management. This example emphasises maintaining up-to-date and enforced quality management practices.

These examples underscore the TPB's expectations for structured, documented, and frequent supervision, especially in cases involving remote supervision, inexperienced staff, or multiple supervisory roles. They also highlight the importance of maintaining current, actively enforced quality management systems.

**Consultation and finalisation**

The TPB invites comments on this draft until 21 November 2024. The TPB will consider feedback before finalising its guidance.

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| w https://www.tpb.gov.au/tpbi-d602024-supervision-competency-and-quality-management-under-tax-agent-services-act-2009 |

## 8.10 Draft TPB information sheet – Keeping clients informed

The TPB has released draft Information Sheet TPB(I) D61/2024, inviting comments on its guidance for registered tax practitioners under section 45 of the Tax Agent Services (Code of Professional Conduct) Determination 2024.

**Key obligations under section 45**

Client information requirements

Registered tax practitioners must provide clients with critical information, including access to the TPB's Public Register, which details registered tax and BAS agents. Practitioners are also required to inform clients on how to file complaints about tax services.

The draft information sheet states that at a minimum, the TPB recommends that registered tax practitioners provide the following information to all their current and prospective clients:

1. if the client wishes to make a complaint about a tax agent service that has been provided by the registered tax practitioner, a complaint can be made in writing to the TPB via its website and include a website link to the complaint form; and
2. further information on how to make a complaint to the TPB can be found on its website, including the TPB's complaints process.

The tax practitioner is also required to outline both practitioner and client rights, responsibilities, and obligations. This includes maintaining professional conduct, managing conflicts of interest, and the requirement for clients to provide accurate and timely information. The TPB refers to its fact sheet titled 'Information for clients' which may be used to assist with meeting this obligation. However, the TPB notes that the factsheet will need to be supplemented with additional relevant information regarding to the terms of engagement via a letter of engagement or some other communication depending on the specific terms relevant to the nature of the individual engagement.

Disclosure of events and conditions

Practitioners must disclose any "prescribed events" from the last five years, such as suspensions, serious convictions, or conditions imposed on their registration. These disclosures ensure clients are aware of any past issues that could impact their decision to engage the practitioner. Additionally, practitioners must notify clients if there are any current conditions imposed on their registration.

**Manner, form, and timing of client notifications**

Section 45 outlines specific methods for informing clients, requiring written, clear, and accessible communication. Practitioners may use websites, engagement letters, or the TPB's client factsheet for these notifications. Information should be updated promptly, especially when new clients are engaged or when significant changes arise, with disclosures made within 30 days for ongoing or new matters.

**Practical guidance and case studies**

The draft includes case studies that illustrate compliance and non-compliance scenarios, helping practitioners understand the practical application of these obligations. For example, it discusses the consequences of failing to inform clients about a suspension and the correct handling of re-engagement notifications.

**Consultation and finalisation**

The TPB invites comments on this draft until 21 November 2024. The TPB will consider feedback before finalising its guidance.

w https://www.tpb.gov.au/tpbi-d612024-keeping-your-clients-informed
w https://www.tpb.gov.au/sites/default/files/2024-10/Information%20for%20clients%20factsheet.pdf

## 8.11 TPB Annual Report 2023-4

The Tax Practitioners Board 2023-24 Annual Report outlines the TPB's recent activities, particularly in the areas of registration reform, compliance initiatives, and technological updates. The report promotes the TPB's achievements in enhancing regulatory oversight and highlights legislative changes such as the shift from a three-year registration period to an annual renewal. This change is presented as a measure for improving regulatory visibility and consumer confidence, aligning with practices across other government agencies.

In an accompanying media release dated 4 November 2024, the TPB notes the following key highlights from the report:

1. improving professional standards, accountability and confidence in the system, with implementation of an expanded compliance program, supported by $30.4 million in government funding;
2. completing 483 compliance cases as part of the expanded compliance program, addressing high-risk tax practitioners and their behaviours;
3. supporting legislative reform, including supporting tax practitioners move to an annual registration cycle and publishing additional information on the TPB Register to assist consumers in making informed choices;
4. delivering 21 educational webinars to over 52,000 attendees; and
5. improving investigations capability to ensure timely and effective case completion and reduce unnecessary disruptions to tax practitioners.

The report emphasises the TPB’s Expanded Compliance Program, aimed at targeting high-risk tax practitioners to protect consumers and support ethical standards within the profession. Through data-driven tools and risk assessments, the program seeks to address instances of non-compliance. Specific case studies, like that of ‘Person A,’ showcase disciplinary measures taken by the TPB for breaches of the Code of Professional Conduct, portraying a proactive stance on ethical enforcement.

The TPB also notes its collaboration with agencies such as the Australian Taxation Office and the Australian Securities and Investments Commission. This whole-of-government approach is framed as an effort to enhance data sharing and tackle widespread risks, although the report provides limited detail on the specific outcomes of these partnerships. Additionally, the TPB recounts successful legal actions in high-profile cases, which it asserts affirm its commitment to compliance.

The report claims strong engagement with practitioners through educational efforts, with 21 webinars and a series of guidance publications. It attributes positive feedback and high attendance rates as indicators of these programs’ success in helping practitioners understand new obligations and adhere to standards.

Technology upgrades, particularly the adoption of cloud-based systems and data analytics, are presented as central to improving the TPB’s operational capabilities, including system reliability and availability, which are deemed critical for regulatory efficiency.

w https://www.tpb.gov.au/annual-report
w https://www.tpb.gov.au/tpb-reflects-strengthening-collaboration-stakeholders-and-supporting-tax-profession