Volume 59(1)
July 2024

The Tax Institute

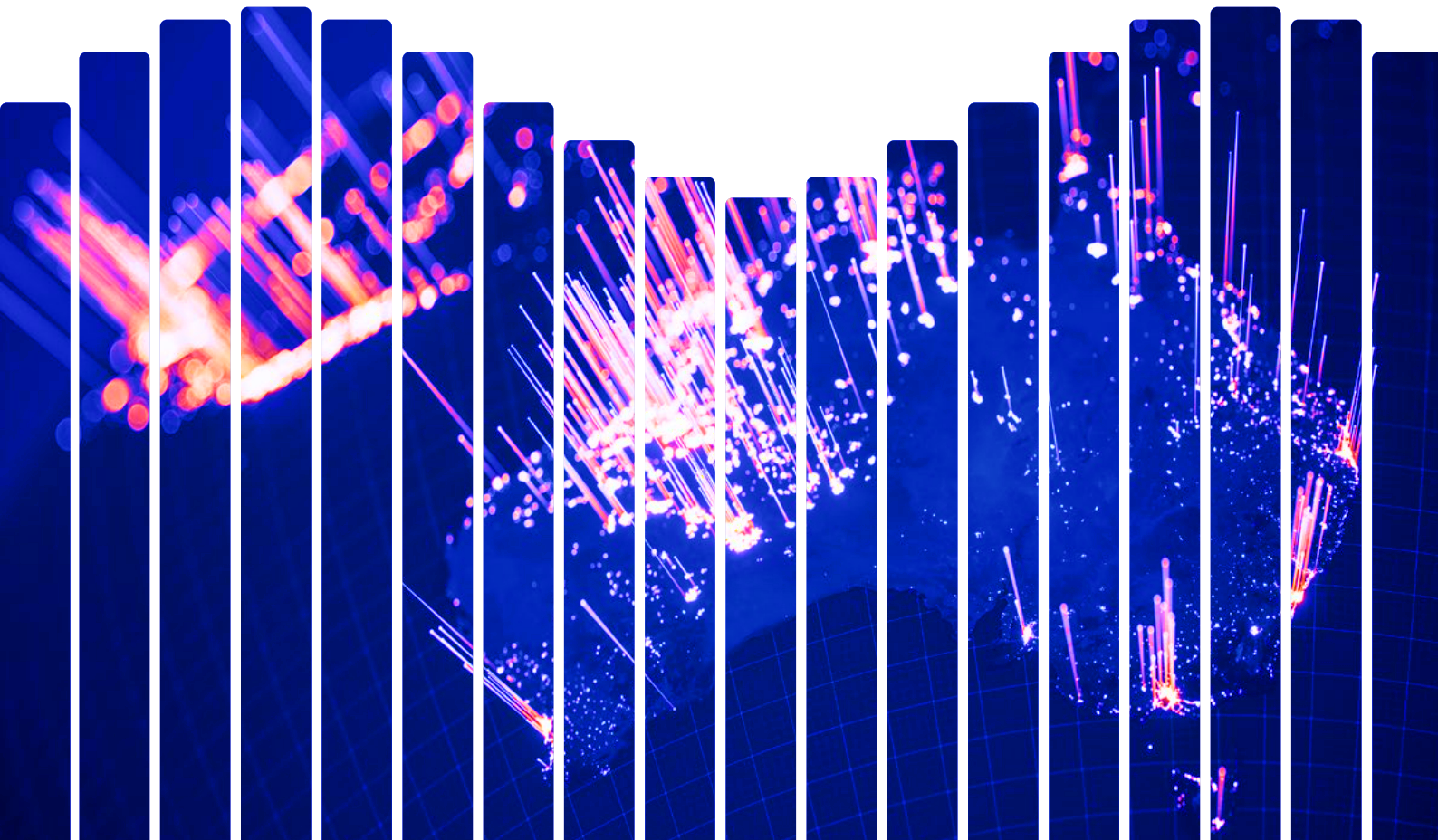
Taxation in Australia

The future of the tax profession

Steve Healey, CTA (Life)

The new Administrative Review Tribunal

Michael Bersten



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

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Tax News – at a glance

by TaxCounsel Pty Ltd

June – what happened in tax?

The following points highlight important federal tax developments that occurred during June 2024. A selection of the developments is considered in more detail in the "Tax News – the details" column on page 9 (at the item number indicated).

2024–25 Federal Budget

The 2024–25 Federal Budget, which was handed down by the Treasurer on 14 May 2024, contains a number of tax measures, the more important of which are noted below. **See item 1.**

New administrative tribunal

Legislation that establishes a new and improved administrative review body (called the Administrative Review Tribunal) to replace the Administrative Appeals Tribunal was passed by parliament on 28 May 2024 and received royal assent and became law on 3 June 2024. **See item 2.**

Exempt income: international organisations

The Commissioner has released a new draft ruling which considers the income of international organisations and persons connected with them that is exempt income (TR 2024/D2). **See item 3.**

Tax practitioner incapacity

The Tax Practitioners Board (TPB) has released guidance on the issues that may arise under the *Tax Agent Services Act 2009* (Cth) where a registered tax or BAS agent becomes incapacitated due to an unforeseen event (for example, a health condition) and may not be able to run their practice in the short or long term. **See item 4.**

Onus of proof discharged

In a recent decision, the Federal Court (Logan J), in allowing the taxpayers' appeals from a decision of the AAT, held that the tribunal had incorrectly concluded that the taxpayers had not discharged the onus of proving that the amended assessments issued by the Commissioner (which were not default assessments) were excessive (*Liang v FCT* [2024] FCA 535). **See item 5.**

NSW land tax exemption

The High Court (Gageler CJ, Gordon, Edelman, Steward and Jagot JJ), in a unanimous decision, has dismissed an appeal by the taxpayer from a decision of the New South Wales Court of Appeal and held that the taxpayer was not entitled to the land tax exemption provided for by s 10AA of the *Land Tax Management Act 1956* (NSW) for land used for primary production (as defined) (*Godolphin Australia Pty Ltd v Chief Commissioner of State Revenue* [2024] HCA 20). **See item 6.**

Tax agent registration

The Federal Court (Logan J) has dismissed a tax agent's appeal from a decision of the AAT which had affirmed a decision of the TPB to terminate her registration as a tax agent and to prohibit her from reapplying for registration for a period of two years (*Clifford v Tax Practitioners Board (No. 2)* [2024] FCA 557). The Federal Court's decision is considered in the Tax Tips column of this issue of the journal (see page 15).

Statistics

The Commissioner has released *Taxation statistics 2021–22* which shows statistics from tax returns and related schedules for the 2021–22 income year. This is the ATO's most comprehensive statistical publication. It also includes information relating to the 2022–23 financial or fringe benefits tax year, including in relation to GST and FBT.

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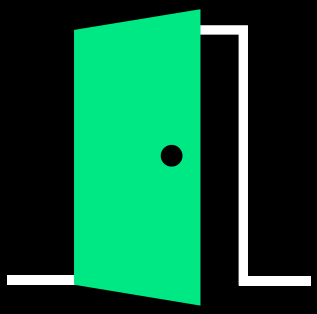

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President's Report

by Todd Want, CTA

The value of membership

President Todd Want discusses the value – both quantifiable and unquantifiable – of membership.

As we open on a new financial year, I am delighted at the strong rate of renewal among the Institute's members. It's a wonderful thing to see how robust our community remains and to have irrefutable proof of our value in the eyes of the most important people involved – our members.

Most things in tax are quantifiable. It's a numbers game. However, you know as well as I do that that's not all tax is. A career in tax is also about critical and flexible thinking. It's about effective communication of complex concepts and problems.

Membership is similar. Although parts of its value are quantifiable, others are more experiential in nature.

Over the last few months, you've heard from us about the value of membership. You've heard that, in the past 12 months, we have supplied you with 88 tax technical resources to help navigate and grow your career and we have amplified your voice through 65 policy submissions.

All those things are very true, and indeed, very valuable. As a long-time member myself, I know firsthand how the Institute's resources can save a lot of time and headache in practice.

However, I'd hate to lose sight of the other important, though less quantifiable, aspects of membership, such as the connections made (both professional and personal), the satisfaction of being part of a bigger cause, and the soft skills gained through volunteering and attending events.

One of the things we have learnt as work became increasingly remote and digital, was the importance of these more intangible skills and experiences – and how challenging it can be to gain them in an online world. These days, the Institute's place as an educator of the tax community is not just through formal learning or even through CPD. We have also taken on a role facilitating the development of soft skills, networks and experience.

As our renewals window closes, I'd like to thank you for your continuing support. I would also encourage those of you leading teams of tax people to think about their development in this brave new world of work, and consider assisting them in becoming members. The tax profession is full of wonderful, generous individuals who have built it into a strong and inclusive community. It's our responsibility to ensure that the next generation of tax professionals are afforded the same valuable opportunities and experiences we have benefited from.

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The Tax Institute

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CEO's Report

by Scott Treatt, CTA

Our strong member community

CEO Scott Treatt reflects on our member community and beginning a new financial year.

Our formal membership renewals window has come to an end. I'd like to thank all of you who have renewed your membership, and for your continued support and contribution to the Institute. For those who may have missed the formal window, I would encourage you to renew promptly to retain continuity of your membership, your designation and your benefits.

The Institute is, first and foremost, an educational organisation. At our heart is the mission to increase knowledge of the tax system and its operation in Australia. We are a community of lifelong learners and generous spirits. Without our members, we cannot hope to achieve the level of knowledge exchange or the depth of ideas that we currently do. And as part of our community, you benefit from that depth and breadth of thinking and experience in a way that isn't possible elsewhere.

So thank you for your support. I look forward to another year supporting the members who support us.

New financial year, new horizons

Looking ahead to the new financial year, I'm excited by the potential on our horizon. When I began my role as CEO, I laid out a vision for an engaged and enthusiastic membership — one we actively work with to improve the services, resources and support on offer at the Institute.

I believe we are well on our way to realising that vision. Our committees are more engaged and active than ever. Our teams of volunteers and staff are working hard to ensure that effort goes to the areas that create the most value for our members.

From your side, please continue to engage with us. I am always pleased to hear from our members on their ideas and opinions. At many of our recent events, I have had the opportunity to speak directly with members, both as part of structured sessions in the event programs and informally during breaks. These opportunities are invaluable, and once again I thank you for your candour and thoughtfulness when engaging in discussions of how we can best serve you.

More close to home, although we have tipped over into a new financial year, I know many of you are still dealing with end of financial year tasks, including tax returns and advising clients on setting themselves up for success in the next tax year.

I encourage you to engage with resources such as *TaxVine*, our webinars or the Tax Time materials that we have released to streamline your own practice as much as possible. We are here to support you.

I also encourage you to look after yourself during the busy times and to remember that your career is just one piece of the puzzle — we give our best to our work only when we care for ourselves in other areas of life as well.

Thank you again for your support over the past 12 months, your continued support for the new financial year, and your contribution to our community.

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The Tax Institute

Associate's Report

by Sumitha Krishnan, FTI

Australia's housing crisis and tax reform

We reflect on and consider the implications of tax policy on the current housing crisis.

The issue of housing affordability in Australia is a heatedly debated topic. Rising costs have made it increasingly difficult for individuals and families to find suitable accommodation, leading to a housing affordability crisis. There is an imbalance between supply and demand, with demand surpassing the availability of properties, resulting in increased prices both for purchase and rent. Factors such as escalating land prices, limited land availability, and rising construction material and labour costs exacerbate this issue. It is important to note that the housing affordability crisis not only affects individuals and families, but also has broader implications for the economy, workforce mobility, productivity, social inequality and homelessness.

In response to this crisis, the government announced additional funding as part of the Federal Budget 2024–25 to address housing needs. This includes initiatives such as constructing more homes, investing in housing infrastructure, providing training for construction workers, and supporting social and affordable housing, as well as homelessness services.

National Housing Supply and Affordability Council

The National Housing Supply and Affordability Council was established last year. It aims to address the issues outlined above and has recently published its first annual report, highlighting the deterioration in housing affordability for mortgage holders due to rising interest rates. Rent prices have increased by 35% since 2020 and 8% in 2023, leading to a low vacancy rate of 1.6% and making it challenging for Australians to find rental homes.

The annual report outlines 10 areas that could improve the Australian housing system, emphasising the significant impact of the tax system on both housing supply and affordability. It suggests that there is room for improvement in the current tax settings and that this could lead to better outcomes in terms of housing supply and affordability. We support the need to put tax reform on the table to enhance housing supply and affordability. In our 2021 *Case for Change* discussion paper, we considered the importance of tax reform, the factors to be considered during the reform process, and potential avenues for reform, specifically in the context of housing affordability.

Introduction of quarantining rules

The tax framework in Australia incentivises investment in real estate through the availability of negative gearing and the CGT discount. However, these incentives can contribute to market instability and artificially inflated property prices. There are many options that should be canvassed to achieve more equitable outcomes and encourage market stability.

Substitution of stamp duties with general property taxes

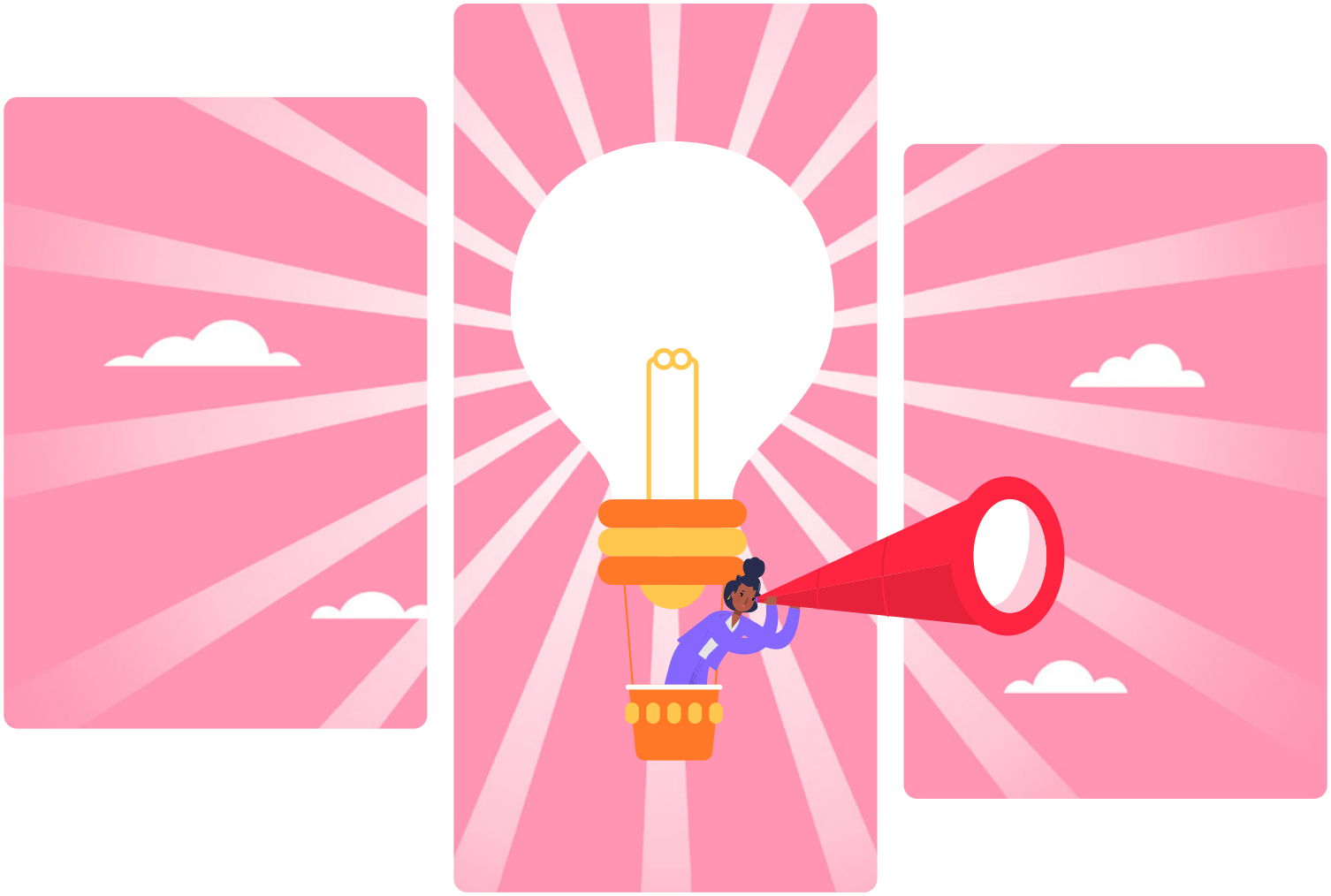
Stamp duties have been criticised for their inefficiency. When contemplating reforms in this domain, several pivotal factors must be taken into consideration. Establishing a broad tax base with minimal exceptions is crucial, as is determining the appropriate tax rates and the potential implementation of thresholds. Further, the issue of whether reforms in this space should be revenue-neutral and how to achieve the desired outcomes in the short, medium, or long term must be considered.

Additionally, the overlap between property tax and local government charges, such as council rates and levies, should be carefully examined to prevent double taxation and promote equity and efficiency. A reform package that addresses these factors would result in enhanced efficiency, stability and fairness in the property tax system.

The Tax Institute recommends property taxes as a viable option for reform, highlighting examples like the albeit short-lived proposal by the NSW Government to potentially replace stamp duties and land tax with an annual property tax. We are also of the view that the government should conduct a thorough analysis of the potential impact of property taxes on property prices. It is crucial for these findings to be communicated to the public, along with an understanding of standard banking mortgage assessment rules, to bring awareness to these issues and help mitigate any adverse effects.

Conclusion

While tax reform alone may not be the silver bullet for the housing affordability problem, it is certainly necessary, along with other changes. By taking a comprehensive approach that includes tax reform, law and policymakers can work towards creating a more affordable and sustainable housing market for all Australians.



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Tax News – the details

by TaxCounsel Pty Ltd

June – what happened in tax?

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

Government initiatives

1. 2024–25 Federal Budget

The 2024–25 Federal Budget, which was handed down by the Treasurer on 14 May 2024, contains a number of tax measures, the more important of which are noted below.

Instant asset write-off

The $20,000 instant asset write-off for small businesses is to be extended by 12 months until 30 June 2025.

Small businesses, with an aggregated annual turnover of less than $10m, will continue to be able to immediately deduct the full cost of eligible assets costing less than $20,000 that are first used or installed ready for use by 30 June 2025. The asset threshold applies on a per asset basis so that small businesses can instantly write off multiple assets.

Assets valued at $20,000 or more (which cannot be immediately deducted) can continue to be placed into the small business simplified depreciation pool and depreciated at 15% in the first income year and 30% each income year thereafter.

The provisions that prevent small businesses from re-entering the simplified depreciation regime for five years if they opt out will continue to be suspended until 30 June 2025.

Personal Income Tax Compliance Program

The ATO Personal Income Tax Compliance Program is to be extended for one year from 1 July 2027.

This extension will enable the ATO to continue to deliver a combination of proactive, preventative and corrective activities in key areas of non-compliance, including the over-claiming of deductions, the incorrect reporting of income, and inappropriate tax agent influence. This will enable the ATO to continue its focus on emerging risks to the tax system, such as deductions relating to short-term rental properties.

ATO counter fraud strategy

The government will provide $187m to the ATO over four years from 1 July 2024 to strengthen its ability to detect, prevent and mitigate fraud against the tax and superannuation systems.

Funding includes:

- $78.7m for upgrades to information and communications technologies to enable the ATO to identify and block suspicious activity in real time;
- $83.5m for a new compliance taskforce to recover lost revenue and intervene when attempts to obtain fraudulent refunds are made; and
- $24.8m to improve the ATO's management and governance of its counter fraud activities, including improving how the ATO assists individuals harmed by fraud.

Also, the government will strengthen the ATO's ability to combat fraud by extending the time the ATO has to notify a taxpayer if it intends to retain a business activity statement (BAS) refund for further investigation. The ATO's mandatory notification period for BAS refund retention will be increased from 14 days to 30 days to align with time limits for non-BAS refunds.

The extended period is intended to strengthen the ATO's ability to combat fraud during peak fraud events like the one that triggered Operation Protego. Legitimate refunds will be largely unaffected. Any legitimate refunds retained for over 14 days would result in the ATO paying interest to the taxpayer (as is currently the case).

This measure is to have effect from the start of the first financial year after the enabling legislation receives royal assent.

Shadow Economy Compliance Program

The ATO Shadow Economy Compliance Program is to be extended for two years from 1 July 2026.

This is intended to enable the ATO to continue to reduce shadow economy activity, thereby protecting revenue and preventing non-compliant businesses from undercutting competition.

Tax Avoidance Taskforce

The ATO Tax Avoidance Taskforce is to be extended for two years from 1 July 2026.

Extending the Taskforce will ensure that the ATO continues to be well-resourced to pursue key tax avoidance risks, with a focus on multinationals, large public and private businesses, and high-wealth individuals.

Foreign resident CGT regime

The foreign resident CGT regime is to be strengthened to ensure that foreign residents pay their fair share of tax in Australia and to provide greater certainty about the operation of the rules. The amendments will apply to CGT events commencing on or after 1 July 2025 to:

- clarify and broaden the types of assets that foreign residents are subject to CGT on;
- amend the point-in-time principal asset test to a 365-day testing period; and

- require foreign residents disposing of shares and other membership interests exceeding $20m in value to notify the ATO before the transaction is executed.

This measure is intended to ensure that Australia can tax foreign residents on direct and indirect sales of assets with a close economic connection to Australian land, more in line with the tax treatment that already applies to Australian residents. The new ATO notification process will improve oversight and compliance with the foreign resident CGT withholding rules, where a vendor self-assesses their sale as not being a sale of taxable real property.

Royalty payments

A new provision will be introduced that will, from 1 July 2026, apply a penalty to taxpayers which are part of a group with more than $1b in global turnover annually that are found to have mischaracterised or undervalued royalty payments, to which royalty withholding tax would otherwise apply.

Part IVA

The start date of the 2023–24 Budget measure "tax integrity – expanding the general anti-avoidance rule in the income tax law" will be extended from income years commencing on or after 1 July 2024 to income years commencing on or after the day the amending legislation receives royal assent, regardless of whether the scheme was entered into before that date.

Old tax debts

The tax law will be amended to give the Commissioner a discretion to not use a taxpayer's refund to offset old tax debts, where the Commissioner had put that old tax debt on hold prior to 1 January 2017. This discretion will apply to individuals, small businesses and not-for-profits, and will maintain the Commissioner's current administrative approach.

2. New administrative tribunal

Legislation that establishes a new and improved administrative review body (called the Administrative Review Tribunal (ART)) to replace the Administrative Appeals Tribunal (AAT) was passed by parliament on 28 May 2024 and received royal assent and became law on 3 June 2024.

The ART is being established with the objective of providing independent administrative review (including in taxation matters) that:

- is fair and just;
- resolves applications in a timely manner and with as little formality and expense as is consistent with reaching the correct or preferable decision;
- is accessible and responsive to the diverse needs of parties;
- improves the transparency and quality of government decision-making; and
- promotes public trust and confidence in the ART.

The principal legislation governing the establishment and operation of the ART is the *Administrative Review Tribunal Act 2024* (Cth), and the necessary consequential and transitional arrangements are being made by two consequential and transitional provisions Acts.

The new tribunal is to commence as soon as practicable before the end of 2024.

The Commissioner's perspective

3. Exempt income: international organisations

The Commissioner has released a new draft ruling which considers the income of international organisations and persons connected with them that is exempt income (TR 2024/D2).

The income is made exempt by s 6-20 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97) because of the application of the *International Organisations (Privileges and Immunities) Act 1963* (Cth) (IOPI Act). An amount is exempt income under s 6-20 if it is exempted from income tax by the ITAA97 or another Commonwealth law. This includes income exempted by the IOPI Act of:

- international organisations; and
- persons connected with international organisations.

TR 2024/D2 considers:

- when an international organisation is covered by the IOPI Act; and
- when a person is connected with an international organisation.

TR 2024/D2 does not consider excise duty, GST and other indirect taxes that may be paid by international organisations and persons connected with them.

4. Tax practitioner incapacity

The Tax Practitioners Board (TPB) has released guidance on the issues that may arise under the *Tax Agent Services Act 2009* (Cth) (TASA) where a registered tax or BAS agent becomes incapacitated due to an unforeseen event (for example, a health condition) and may not be able to run their practice in the short or long term.

The guidance points out that it is important for a practitioner to have a plan in place to minimise disruption to their clients and their practice caused by the practitioner's incapacity. For example, if the practitioner is a sole tax practitioner, the plan might allow for another registered tax practitioner to step in as a "caretaker" during a period of absence.

In the case of a registered company or partnership tax practitioner, it is important that there continues to be a sufficient number of registered individuals to provide tax agent services if one of its supervising tax practitioners becomes incapacitated for a period of time.

The guidance lists a number of considerations that are relevant when developing a plan or an arrangement to

address these types of events. These considerations include:

- the structure of the practitioner's business, in particular, whether the business is carried on by a sole registered tax practitioner or there are other supervising registered tax practitioners involved;
- how the business could continue should the practitioner or other key individuals (such as supervising registered tax practitioners) within the business become incapacitated in the short or long term;
- identifying an authorised contact to speak to the TPB and the ATO on the practitioner's behalf (for example, to notify of the incapacity and to request any necessary extensions for lodgments with the ATO and a registration renewal if due with the TPB);
- identifying one or more registered tax practitioner(s) who could act as a caretaker in the practitioner's absence (or in the absence of a key individual), specifying responsibilities, authorities and the extent of assistance to be provided;
- specifying circumstances that would initiate a caretaker registered tax practitioner stepping in;
- engaging with a caretaker registered tax practitioner to ensure that they are willing to step in under certain circumstances, and the terms of them doing so;
- if possible, specifying the period in which the caretaker registered tax practitioner can assist clients for short or long-term absences;
- specifying who is responsible for informing clients of the situation and if client permissions have already been obtained for the caretaker registered tax practitioner to have access to client files;
- obtaining legal advice and assistance to ensure that the caretaker registered tax practitioner has the appropriate legal authority to make business decisions, such as preparing a power of attorney;
- ensuring that the caretaker registered tax practitioner is covered by professional indemnity insurance that meets the TPB's requirements; and
- regularly reviewing the plan or arrangements to ensure that it remains up to date.

Client files

The maintenance of the practitioner's client files in the event of the practitioner's incapacity will depend on any caretaker plan or arrangements that are in place and the structure of the business.

Written communications with clients (such as letters of engagement or other modes of written communication, eg email communications) will be particularly beneficial in outlining a caretaker plan or arrangements to minimise any disruption to clients and the practice.

The TPB recommends that a written communication with the client should:

- inform the client clearly that, in the event of the practitioner's incapacity, information relating to their affairs may be disclosed to another registered tax practitioner who will act as a caretaker; and
- seek the client's permission in relation to such disclosures to ensure that, if necessary, the caretaker registered tax practitioner can perform work for the client (for example, by a return signed letter of engagement or consent from the client).

Recent case decisions

5. Onus of proof discharged

In a recent decision, the Federal Court (Logan J), in allowing the taxpayers' appeals from a decision of the AAT, held that the tribunal had incorrectly concluded that the taxpayers had not discharged the onus of proving that the amended assessments issued by the Commissioner (which were not default assessments) were excessive (*Liang v FCT*[1]).

It was uncontroversial before the AAT that the taxpayers (who were husband and wife) controlled two businesses or that they conducted businesses, namely, restaurant and takeaway businesses at various locations in Victoria via trustees of two discretionary trusts. It was also uncontroversial before the AAT that the taxpayers controlled the corporate trustee (the property trustee company) of another trust (the property trust) which conducted property investment activities.

It was accepted in the AAT by the Commissioner that the property trustee company conducted only property investment activities and that the only such property investment activities were those evidenced in the material before the AAT. It was common ground that the taxpayers were both the controllers of the trustees of the various trusts, as well as beneficiaries of those trusts.

In the 2017 and 2018 income years, seven deposits were made into the bank account of the property trustee company totalling $735,825 (the deposits). Also common ground was that the property trustee company made a number of property acquisitions in those income years.

In issuing the amended assessments, the Commissioner treated the deposits as ordinary income of the property trust. In turn, in terms of a basis for assessment, that led to a conclusion that there had been a commensurate understatement of the net income of the property trust under s 97 of the *Income Tax Assessment Act 1936* (Cth). Consequentially, in his amended assessments of the taxpayers, the Commissioner increased their assessable income on the basis that they were presently entitled beneficiaries of the net income of the property trust.

As to property acquisitions by the property trustee company in the 2017 and 2018 income years, the tribunal found that there were four such acquisitions. In their oral evidence, the taxpayers stated that their parents loaned or provided equity contributions to the property trust to fund the acquisitions.

Logan J referred to the view of the AAT that the vagueness and the numerous inconsistencies of the evidence of the taxpayers led to the position that it could not accept their evidence as being sufficiently reliable. This was despite the fact that the evidence of the taxpayers was sometimes virtually identical. The AAT considered that their evidence, in the absence of any independent contemporaneous documentation or records, was not credible in all of the circumstances. Significantly, the AAT said that that evidence failed to support the position of the taxpayers as it did not relevantly address how and where the taxpayers' parents obtained the cash and brought it to Australia.

Logan J said that it was accepted by the Commissioner that the material before the AAT disclosed, and that the position was, that the property trustee company engaged only in property investment. In other words, it did not provide services to anyone. It was further accepted that the deposits did not constitute interest, dividends or the like. It was further accepted that the deposits did not constitute an opportunistic gain made with a profit-making purpose in the course of the carrying on of a business such that the gain could form part of the ordinary income of the property trust.

Logan J said that the essential submission on behalf of the taxpayers was that, even accepting that it had been dissatisfied with the oral evidence of the taxpayers, it behoved the AAT nonetheless to consider whether, on the material before it and having regard to what was not at issue, the assessments had nonetheless been proved to be excessive. It was submitted by the taxpayers that the AAT had failed to do this, and in so doing had thereby failed to discharge its statutory function of reviewing, on the merits, the objection decision. It was put that, on the material before the AAT and given what was not in dispute, that material ought to have led to a conclusion that the taxpayers had nonetheless proved the assessments to be excessive.

The Commissioner contested these propositions on the basis that, on the true meaning and effect of the onus of proof provision (s 14ZZK of the *Taxation Administration Act 1953* (Cth)), the taxpayers had failed to prove the assessments to be excessive.

Logan J said:

> "52. In my view, the Tribunal has forgotten, with respect, that a rejection of the evidence of [the taxpayers] did not inexorably lead to a conclusion that the objection decision must be affirmed. That rejection did not relieve the Tribunal from its obligation to review, on the merits and on the material before it, the objection decision in light of the issue as refined and particular concessions. The question was always whether [the taxpayers] had proved the assessments to be excessive. It remained possible, and their submissions to the Tribunal embrace this, nonetheless for the assessments to be shown to be excessive just on other material before the Tribunal and what was common ground.
>
> 53. Given the way in which the parties had confined the issue, if that material admitted of, and only of, a conclusion that whatever the Deposits were, they were not ordinary income, the Tribunal was obliged to set aside the objection decision. And that was so even though the Tribunal had rejected the descriptions offered by [the taxpayers] as also reproduced in the books of account."

Logan J then said that it was for the taxpayers to demonstrate that the character of the deposits in the hands of the recipient property trustee company was not income under ordinary concepts. In terms of the material before the tribunal, including concessions, the deposits were not income from services, were not interest, were not dividends, and were not opportunistic profit-making gains. It was also conceded that the deposits were not in the nature of rent in respect of the investment properties. Logan J then went on:

> "55. … The material before the Tribunal ought, in my view, to have led the Tribunal inexorably to a conclusion that whatever these Deposits might be, they were not, in the hands of the Property Trustee Company, income."

Logan J said that, in cases where an estimate has been made of a taxpayer's income (that is, where there is a default assessment), "it is always for the taxpayer to show what his, her or its income was", and referred with approval to the point made by the AAT in *PNGR and FCT*[2] that, in such cases, if a taxpayer fails to establish what the assessment should have been, in other words, what their true taxable income was, then even if it is accepted that the amended assessments were excessive, if there remains uncertainty as to the correct amounts of taxable income, the onus of proof will not have been discharged. Logan J said that that was not to say that an onus of proof in a default-assessing context might not be able to be discharged if, on the material, the taxpayers demonstrated that their taxable income was not more than a particular amount.

Logan J concluded:

> "59. In this case, given the way in which the issue was confined, it was not sufficient for the Tribunal merely to act upon a rejection of the evidence of [the taxpayers]. The Tribunal remained obliged, particularly in light of the deliberate submission made to it, as to what ought to be concluded even if their evidence were rejected, to determine whether, on the material before it, the Deposits constituted income under ordinary concepts. This, it failed to do."

In allowing the taxpayers' appeals, Logan J said that it was in neither of the taxpayer's nor the Commissioner's, interests for the case to be remitted to the AAT.

6. NSW land tax exemption

The High Court (Gageler CJ, Gordon, Edelman, Steward and Jagot JJ), in a unanimous decision, has dismissed an appeal by the taxpayer from a decision of the New South Wales Court of Appeal and held that the taxpayer was not entitled to the land tax exemption provided for by s 10AA of the *Land Tax Management Act 1956* (NSW) for land used for primary production (as defined) (*Godolphin Australia Pty Ltd v Chief Commissioner of State Revenue*[3]).

That section exempts rural land from land tax "if it is land used for primary production". For this purpose, "land used for

primary production means land the dominant use of which is for … the maintenance of animals … for the purpose of selling them or their natural increase or bodily produce". The key issue was whether the requirement in the definition of "dominant use" of land applied to both the "maintenance of animals" and also to the purpose of sale in s 10AA(3)(b).

The taxpayer used two properties to undertake an "integrated" thoroughbred breeding and racing operation. For the 2014 to 2019 land tax years, the Chief Commissioner assessed the taxpayer as liable for land tax in respect of these properties. The taxpayer claimed that certain parcels of each property were exempt from land tax pursuant to the exemption in s 10AA(3)(b). While the Commissioner accepted that the parcels of land were being used to maintain horses, he did not accept that the dominant purpose of that use was for the sale of the horses, their progeny or their bodily produce.

At first instance in the New South Wales Supreme Court, Ward CJ in Eq held that, given the integrated nature of the taxpayer's business, it could not be said that there were two distinct purposes for the activities carried on at the properties. It was unnecessary to decide whether use for any one such purpose was the dominant use. Both parcels of land were used for primary production and were exempt from land tax. The Commissioner succeeded on appeal to the NSW Court of Appeal, with a majority of the Court of Appeal (Kirk JA and Simpson AJA, Griffiths AJA dissenting) deciding that the correct test required the word "dominant" to qualify the "use for a purpose" in s 10AA(3)(b).

The issue before the High Court was whether the requirement of "dominant use" of land applied to both "the maintenance of animals" and the purpose of sale in s 10AA(3)(b). Neither party disputed the critical finding of the Supreme Court that a "significant use" of the two properties was animal maintenance for the purpose of selling animal produce and progeny. The taxpayer argued that the word "dominant" governed the required use of the land and no more.

The High Court rejected the taxpayer's construction of s 10AA(3)(b). In dismissing the appeal, the court held that, when the text of s 10AA(3) is read in its immediate statutory context and in light of broader statutory and extrinsic context, the word "dominant" qualifies one composite phrase, namely, "use of which is for … the maintenance of animals … for the purpose of selling them". The "use-for-a-purpose" construction was correct. Further, that a significant use of the land was for breeding horses, fell short of demonstrating that the "dominant use" of the land was for the purpose of selling them or their natural increase or bodily produce.

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References

1 [2024] FCA 535.

2 [2013] AATA 942.

3 [2024] HCA 20.

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Tax Practitioners Board investigations

The Tax Practitioners Board investigation rules have been amended and its registration termination powers have been considered by the Federal Court.

Background

In recent times, significant legislative amendments have been made to the *Tax Agent Services Act 2009* (Cth) (TASA09). That Act and the regulations[1] made under it provide for the establishment of the Tax Practitioners Board (TPB) and the regulatory regime that governs the registration and oversight of tax agents and BAS agents.

Most of the amendments implement recommendations made by an independent review of the TPB and the TASA09 which was established by the former government. Those recommendations are contained in the final report of the review titled Independent review of the Tax Practitioners Board.[2] The amendments have been made against the backdrop of measures that are being implemented and have their origin in a media release titled "Government taking decisive action in response to PwC tax leaks scandal" that was issued by the Treasurer and other relevant ministers on 6 August 2023.

The recent amending Acts

The amending Acts that have made the recent tax agent regime amendments are the *Treasury Laws Amendment (2023 Measures No. 1) Act 2023* (which received royal assent and became law on 27 November 2023) and the *Treasury Laws Amendment (Tax Accountability and Fairness) Act 2024* (which received royal assent and became law on 31 May 2024).

Among the amendments made by the *Treasury Laws Amendment (2023 Measures No. 1) Act 2023* were amendments relating to "disqualified entities" and the previously unannounced rules relating to the reporting of breaches of the Code of Professional Conduct (the Code).[3]

The amendments made by the *Treasury Laws Amendment (Tax Accountability and Fairness) Act 2024* (the 2024 amending Act) increased the information published on the TPB Register, removed the 12-month time limit for certain information to remain on the Register, extended the time frame that the TPB has to conduct an investigation, and better targeted the TPB's delegation powers.

This article considers the amendments made by the 2024 amending Act that extended the time within which the TPB must complete an investigation and the related amendments that govern the information that may be included on the TPB Register following an investigation.

More amendments still to come

Further amendments to the TPB legislation are in the pipeline. For example, there has been Treasury consultation on the proposal that the TPB be permitted to use its information-gathering power to require the production of a document (or thing) without the need to commence a formal investigation.[4]

Case law

In addition to the legislative changes, there is a growing body of decisions of the Federal Court and the AAT that consider issues that arise out of the TASA09 and the TPB's administration of that Act. The most recent decision of the Federal Court affirmed a decision of the AAT that the registration of a tax agent be terminated.[5] This decision is considered in this article.

TPB investigations: time limits

Where the TPB exercises its power (under s 60-95 TASA09) to investigate conduct that may breach the TASA09 and finds that the conduct does breach the Act, the Board must either:

- make a decision that no further action will be taken; or
- do one or more of a number of specified actions (set out below under the heading "TPB Investigations: Register issues") (s 60-125(2) TASA09).

Before the amendments that were made by the 2024 amending Act, the TPB was required to make a decision under s 60-125(2) within six months after the day on which the investigation was taken to have commenced or, if a longer period was determined by the TPB under s 60-125(4), within that period.[6] Such a longer period could be determined if the TPB was satisfied that, for reasons beyond the control of the TPB (for example, undue delay that was caused by an entity other than the TPB or the complexity of the investigation), a decision could not be made within the six-month period (s 60-125(4) to (6)). The TPB's decision to determine a longer period was reviewable by the AAT (s 70-10 TASA09). It seems to be clear that the Board could only extend the six-month decision-making period once.

An investigation of an entity is taken to commence on the day the Board notifies the entity in writing that the Board has decided to conduct the investigation. Such a notice must be given within two weeks after the decision to investigate is made (s 60-95 TASA09).

If a decision under s 60-125(2) was not made within the prescribed six-month (or longer) period, the Board was taken to have decided to take no further action in relation to the matter that was the subject of investigation (s 60-125(7)).

The 2024 amending Act amended s 60-125(3) to extend the six-month decision-making period to 24 months. The TPB retains the power to extend this period in the circumstances mentioned but, as previously, it seems that the Board could only extend the 24-month period once.

The explanatory memorandum that is relevant for the 2024 amending Act states that the extension of the time period in which to conclude investigations by the TPB recognises the shortcomings of mandating a six-month period. Apart from where the TPB was able to justify an extension of the investigation time frame for reasons outside its control, the six-month period was insufficient for the TPB to be able to conduct detailed reviews of complex cases. Extending the standard investigation time frame to 24 months ensures that the TPB can address the underlying risks of a case and investigate a wider scope of issues raised by a potential breach. The investigative function of the TPB is, it may be noted, likely to increase as a result of the Code breach-reporting rules.

It may be noted that (before the amendment) the complexity of an investigation was one basis that the TPB had for extending the six-month investigatory period. However, a blanket extension of the period to 24 months should (as envisaged by the explanatory memorandum) ensure that, in many cases, an investigation will be able to be completed without the need for the Board to consider the making of a decision to extend the period, thus avoiding the possibility of the person affected by an extension decision of the TPB contesting the extension decision in AAT proceedings.

The explanatory memorandum also states:

> "3.24 The timely completion of each TPB investigation remains important. Further, it is acknowledged that an investigation process may be stressful or disruptive to the professional and personal lives of tax practitioners. Despite the extension of the timeframe in which to complete investigations, it is not intended that the vast majority of investigations should require the full 24 months in which to be completed. The TPB will publicly report on its investigation statistics, the time taken to complete investigations and any extensions. Reported information will be aggregated and anonymised. This will enhance the TPB's ongoing reporting to stakeholders via annual reports."

Commencement: post-30 June 2024 investigations

The amendment that extends the standard time frame for a TPB investigation into conduct from six to 24 months applies to investigations conducted by the TPB which commence on or after 1 July 2024.[7]

Transitional: pre-30 June 2024 investigations

There are transitional provisions by virtue of which the amendment that extends the standard time frame for a TPB investigation into conduct from six to 24 months can operate in relation to an investigation into conduct that commenced before 1 July 2024 but was not completed before that date.

This will be so if, immediately before 1 July 2024:

- the TPB had not made (and was not taken to have made) a decision in relation to the investigation; and
- the TPB had not determined that a longer period was needed to make a decision in relation to the investigation or, if the TPB had determined a longer period, the longer period was less than 24 months.[8]

If these transitional provisions apply in circumstances where the TPB had, before 1 July 2024, determined a longer period and the longer period that the TPB had determined was less than 24 months, the TPB's determination of the longer period is to be disregarded and the new 24-month determination period will apply. The TPB cannot make any further determination to extend the investigation period.[9]

If the TPB determined a longer period before 1 July 2024 which exceeded 24 months, the longer period would be unaffected by the transitional rules.

And, if the TPB had not determined a longer period before 1 July 2024, the 24-month investigation period will apply subject to the TPB's capacity to further extend the time frame for circumstances beyond its control.

The broad effect of these transitional provisions is that the TPB has a standard time frame of 24 months to make a decision, not only for new investigations that commence on or after 1 July 2024, but also for any existing investigations where, as at 1 July 2024, a decision was yet to be made by the TPB.

Example 1

On 10 March 2024, as a result of complaints received, the TPB commenced an investigation into the conduct of Patrick, who is a registered tax agent. The investigation had not been completed by 1 July 2024 and the TPB had not determined a period longer than six months within which to make a decision.

The TPB will have 24 months from 10 March 2024 to make a decision in relation to the investigation.

The TPB would have the power to extend this period where the TPB is satisfied that, for reasons beyond the control of the Board, a decision cannot be made within the 24-month period.

Example 2

On 20 May 2023, as a result of complaints received, the TPB commenced an investigation into the conduct of Fiona, who is a registered tax agent. On 20 October

Example 2 (cont)

2023, the TPB determined a further period ending on 20 November 2024 within which to complete the investigation. The extended period ends less than 24 months after the commencement of the investigation.

The TPB will have 24 months from 20 May 2023 within which to make a decision in relation to the investigation. However, in these circumstances, the TPB cannot extend the time frame again.

Example 3

On 20 August 2023, as a result of complaints received, the TPB commenced an investigation into the conduct of Barry, who is a registered tax agent. On 10 January 2024, the TPB determined a longer period within which to make a decision in relation to the investigation. The longer period is to expire on 15 October 2025 (which is more than 24 months after the commencement of the investigation).

The TPB's determination of the longer period will continue to operate.

TPB investigations: Register issues

As referred to above, where the TPB exercises its power to investigate conduct that may breach the TASA09 and finds that the conduct does breach the Act, the Board must either:

- make a decision that no further action will be taken; or
- do one or more of certain actions.

Before the amendments that were made by the 2024 amending Act, the actions that could be taken by the TPB were to:

- impose one or more sanctions (under Subdiv 30-B TASA09);
- terminate an entity's registration (under Subdiv 40-A TASA09);
- apply to the Federal Court for an order for payment of a pecuniary penalty (under Subdiv 50-C TASA09);
- apply to the Federal Court for an injunction (under s 70-5 TASA09).

The 2024 amending Act has added a further action or an alternative action that the TPB may take in the following terms:

> "(v) decide that the entity (the ***contravening entity***) that engaged in the conduct, and the information in respect of the contravening entity prescribed by the regulations[10] for the purposes of this subparagraph, be entered on the register for the period prescribed by the regulations for the purposes of this subparagraph."

The explanatory memorandum that is relevant for the 2024 amending Act envisages that the relevant information would include the findings of the investigation. The explanatory memorandum states:

> "3.26 The ability to publish findings of an investigation on the Register has been added as scenarios may arise where there has been a breach of the TAS Act, but pursuing sanctions is not a reasonable course of action. In particular, this can occur where entities were registered at the time the investigation commenced, but had their registration expire without renewal before the conclusion of the investigation. In these circumstances, publishing findings of misconduct from investigations provides the TPB with an additional option to ensure the public is aware of the entity's misconduct."

If the TPB decides to publish findings of an investigation where there has been misconduct, the relevant information about the contravening entity must be entered on the Register (s 60-125(2A)).

A decision of the TPB to publish findings of an investigation on the Register is reviewable by the AAT (s 70-10(ha)).

Commencement

The amendments made to s 60-125 that permit the TPB to include details of an investigation on the Register apply in relation to an investigation into conduct if the investigation commences on or after 1 July 2024 (the date of the commencement of the amendments).[11]

Transitional: investigations commenced pre-1 July 2024

Additionally, the amendments made to s 60-125 that permit the TPB to include details of an investigation on the Register apply in relation to an investigation into conduct if:

- the investigation commenced on or after 1 July 2022 but before 1 July 2024; and
- immediately before 1 July 2024, the TPB had not, in relation to the investigation, made a decision (under s 60-125(2)) or been taken to have made such a decision.[12]

Also, regulations made for the purposes of s 60-125(2)(b)(v) may:

- prescribe information in respect of a contravening entity that relates to matters occurring before, on or after 1 July 2024; and
- prescribe a period that starts before, on or after 1 July 2024.[13]

Investigations concluded pre-1 July 2024

Importantly, there are additional transitional provisions which apply in relation to an investigation into conduct under s 60-95 if:

- the investigation commenced before 1 July 2024;
- before 1 July 2024, the TPB had made a finding that the conduct breached the TASA09;

- on or after 1 July 2022, but before 1 July 2024, the TPB had made a decision (within the period under s 60-125(3)) that no further action would be taken; and
- the TPB made that decision because, at the time the decision was made, the entity (the contravening entity) who engaged in the conduct had ceased to be a registered tax agent or BAS agent.[14]

In those circumstances, the TPB may, within the period of six months after 1 July 2024, decide that:

- the contravening entity; and
- the information in respect of the contravening entity prescribed by the regulations,

be entered on the Register for the period prescribed by the regulations.[15]

If the Board makes such a decision (a publication decision), the effect of item 12(3) of Sch 3 to the 2024 amending Act is that, for the purposes of the TASA09 as it applies in relation to the investigation on and after the time when the publication decision is made:

1. the publication decision is taken to have been validly made;
2. the period prescribed by the regulations for the purposes of s 60-125(2)(b)(v) is taken to be a period of five years starting on the day when the Board made the decision that no further action would be taken; and
3. except for the purposes of (2) above, the Board's decision that no further action would be taken is to be disregarded.

The effects of item 12(3) include that the Board must give notice of, and reasons for, the publication decision under s 60-125(8), and that an application may be made to the AAT under s 70-10 for review of the publication decision.

The Federal Court decision

The decision of the Federal Court that is relevant for present purposes is the decision of Horan J in *Clifford v Tax Practitioners Board (No. 2)*.[16] The issues that arose for decision by the Federal Court in this case had their origins in a decision of the TPB to terminate the applicant's registration as a tax agent and to prohibit her from reapplying for registration for a period of two years.

On review, the AAT affirmed the decision of the TPB.[17] The AAT held that the applicant had failed to comply with the statutory Code of Professional Conduct and was also not a fit and proper person to be registered as a tax agent. The Federal Court has now dismissed an appeal of the applicant from the decision of the AAT.

A particular issue in the appeal to the Federal Court arose out of the fact that the TASA09 contains two provisions under which the TPB can potentially terminate the registration of a tax or BAS agent. One of these provisions is 30-15 TASA09 which provides that, where the Board is satisfied (after conducting an investigation) that the agent has failed to comply with the Code, the Board may do any one or more of the following: (1) give the agent a written caution; (2) give the agent an order under s 30-20 TASA09; (3) suspend the agent's registration under s 30-25 TASA09; or (4) terminate the agent's registration under s 30-30 TASA09.

The other provision is s 40-5 TASA09 which, so far as is relevant in the case of an individual, provides that the Board may terminate an agent's registration if (inter alia) the agent ceases to meet one of the tax practitioner registration requirements. The expression "tax practitioner registration requirements" is defined to mean the matters about which the Board must be satisfied before the Board is obliged to grant an application for registration under the TASA09. These matters include that the individual is a fit and proper person (s 20-5(1)(a) TASA09).

The AAT

The AAT held that the applicant had breached several provisions of the Code. She made false declarations to the TPB in her Renewal of Registration form submitted on 6 June 2019. In answer to the question, "do you have any overdue tax obligations?", she answered "no". In truth, at the time of submitting the form, the applicant owed the ATO $145,455, with no payment plan in place.

Further, the applicant lodged 10 false declarations with the ATO for the years 2009 to 2018, claiming that a particular client, a self-managed superannuation fund (SMSF), had been audited. In truth, the fund had not been audited in any of those years.

She made the same declarations to the ATO, in respect of another SMSF client, for the 2015 to 2019 income years. That fund had only been audited in respect of the 2015 income year (but no audit report had been provided by the date of lodgment) and there was no audit in respect of the other years.

By failing to obtain audit reports for her SMSF clients, the applicant exposed those clients to the risk of significant penalties under s 35C of the *Superannuation Industry (Supervision) Act 1993* (Cth). The AAT said that a tax agent acting honestly and competently would not expose their clients to such a risk.

The applicant also misled the TPB's officers about these defaults by claiming that they were the only SMSF clients in respect of which she had not received audit reports before lodging returns. In truth, the applicant had made similar false declarations in respect of several other clients for the 2014 and 2015 income years.

The AAT concluded that the applicant had breached the provisions of the Code relating to honesty and integrity, competency, and responding to TPB requests. Some of these breaches involved a pattern of conduct over significant periods of time. Having heard and seen the

applicant give evidence, the AAT was not satisfied that she truly appreciated the significance of her misconduct. She was all too ready to excuse her behaviour either on factors said to be beyond her control or on the conduct of the ATO or the TPB.

The AAT was also satisfied that the applicant was not a fit and proper person to be registered as a tax agent.

In all of the circumstances, the AAT considered that the appropriate sanction was that the applicant's registration be terminated and that she should be prohibited from applying for registration for a total of two years.

The Federal Court

On her appeal to the Federal Court from the decision of the AAT, the applicant relied on two grounds of appeal. The most fundamental ground was that, in deciding to affirm the decision to terminate the applicant's registration, the AAT erred in failing to consider alternative sanctions available under s 30-15(2) (caution etc) (the "alternative sanctions ground").

The other ground of appeal was that the AAT erred in failing to take into account two mandatory relevant considerations, namely, that the applicant was in the process of winding down her practice and was no longer accepting new clients, and that the termination of her registration would cause prejudice to her existing clients (the "relevant considerations ground").

The applicant did not challenge the AAT finding of fact that she was not a fit and proper person within the meaning of ss 20-5(1)(a) and 20-15 TASA09.

The alternative sanctions ground

The applicant submitted that the AAT was required to reach the correct or preferable decision, exercising all of the powers and discretions of the original decision-maker. In the circumstances of the present case, the applicant submitted that this required the AAT to consider whether the decision to terminate the applicant's registration was preferable to other decisions that it had the power to make.

Notwithstanding that an individual must be a fit and proper person in order to obtain registration, the applicant submitted that "a finding that a tax agent is not or [is] no longer a fit and proper person does not automatically lead to that person's registration being terminated". Rather, the Board has a discretion whether or not to terminate registration under s 40-5(1). Similarly, the applicant submitted, if the Board were to determine that a registered tax agent had failed to comply with the Code, there was no obligation to impose any sanction and, if the Board decided to do so, the available sanctions include giving a written caution or ordering the tax agent to take specified actions (such as undergoing education, being subjected to supervision, or limiting the tax agent services that may be provided).

In this regard, the applicant submitted that there were reasons for exercising the discretion not to terminate her registration under ss 30-15 and 30-30 or under s 40-5(1). In particular, the applicant submitted that termination of the registration of a registered tax agent might cause harm to their existing clients, and that the objects of the TASA09 include protecting those clients from "the prejudice and inconvenience of having to change tax agents".

In rejecting the applicant's submissions, Horan J said:

> "90. In my view, Subdiv 40-A of Pt 4 of the TAS Act confers a separate power to terminate the registration of a Registered tax agent that is independent of the power to impose administrative sanctions under Subdiv 30-B of Pt 3. This is consistent with the Note to s 40-5(1), which indicates that '[t]he Board may *also* terminate your registration for breach of the Code' (emphasis added), referring to Subdiv 30-B. The termination power conferred by s 40-5(1) covers the occurrence of certain events that affect the agent's continued registration (including conviction of a serious taxation offence or an offence involving fraud or dishonesty, or bankruptcy), ceasing to meet the tax practitioner registration requirements, or breach of a condition of the agent's registration. The termination power conferred by s 30-30, on the other hand, is one of a range of administrative sanctions that may be imposed for a failure to comply with the Code under s 30-15.
>
> 91. There may be cases in which a tax agent has failed to comply with the Code but none of the grounds for termination under s 40-5 have arisen. In such cases, the Board may impose one or more of the sanctions under s 30-15 including, if warranted by the circumstances, termination of the agent's registration. However, if there are also grounds for termination of the agent's registration under Subdiv 40-A, the Board may proceed to exercise the power conferred by s 40-5(1). The circumstances giving rise to a ground for termination under s 40-5(1) will not infrequently involve a failure by the agent to comply with the Code. For example, conviction of an offence involving fraud or dishonesty would often involve a failure by the agent to act honestly and with integrity as required by s 30-10(1). Similarly, one or more failures by the agent to comply with the Code could be sufficiently serious as to raise concerns that the agent was no longer a fit and proper person and had ceased to meet the tax practitioner registration requirements for the purposes of s 40-5(1). However, the Board is not required to consider whether any, and if so what, sanction should be imposed under Subdiv 30-B for the agent's failure to comply with the Code before addressing the exercise of power to terminate the agent's registration under Subdiv 40-A."

Horan J went on to say that the structure of the TASA09 separates the powers conferred by Pt 3 in relation to the Code and the powers conferred by Pt 4 in relation to termination of registration. There is a degree of overlap

between Pt 3 and Pt 4, in so far as the provisions in Subdiv 40-B TASA09 dealing with "Notice and effect of termination" are applicable to a termination of an agent's registration under ss 30-15 and 30-30 as a sanction for failing to comply with the Code. But this, his Honour said, did not detract from the structural separation of the provisions for enforcement of the Code under Subdiv 30-B TASA09 and the grounds for terminating registration under Subdiv 40-A TASA09.

After referring to the relevant explanatory memorandum, Horan J concluded that the introduction of the Code and the powers conferred on the Board by Subdiv 30-B to impose a range of administrative sanctions for breaches of the Code do not operate as a qualification or limit on the powers of the Board to terminate the registration of a tax agent pursuant to Subdiv 40-A in circumstances where a ground for termination was established.

In the present case, the AAT made findings that the applicant breached several provisions of the Code. However, the AAT proceeded to make a finding that the applicant was not a fit and proper person to be registered as a tax agent. That finding enlivened the discretion to terminate the applicant's registration under s 40-5(1). The AAT considered a range of matters going to the exercise of the discretion, and concluded that "the appropriate sanction is that the applicant's registration be terminated".

The power that was exercised both by the Board, and by the AAT on review, was under Subdiv 40-A and s 40-5(1), rather than under Subdiv 30-B. When giving notice to the applicant of the outcome of its investigation, the Board informed the applicant that it was satisfied that she had ceased to meet the tax practitioner registration requirement under s 20-5(1)(a) (the "fit and proper person" requirement) and that it had decided to terminate her registration in accordance with ss 60-125(2)(b)(ii) and 40-5(1)(b). That decision was affirmed by the AAT on review.

Horan J went on:

> "102. While the exercise of the power to terminate the applicant's registration under s 40-5(1) was discretionary, the Tribunal was not required to have regard to the availability of lesser alternative sanctions under Subdiv 30-B as a mandatory relevant consideration in exercising the power to terminate under Subdiv 40-A. Nor was it prevented from considering the exercise of its powers under Subdiv 40-A until it had first addressed the imposition of sanctions for breaches of the Code under Subdiv 30-B. Having found that the applicant was not a fit and proper person to be Registered as a tax agent, the Tribunal was entitled to consider the exercise of the power to terminate the applicant's registration under s 40-5(1). If the Tribunal were to have declined to exercise its discretion to terminate the applicant's registration, it would have been appropriate to consider the imposition of other sanctions under s 30-15 in respect of the applicant's failures to comply with the Code. But the Tribunal was not required to decide on a sanction under s 30-15, or otherwise to take into account the possibility of lesser alternative sanctions under Subdiv 30 B, before it considered whether or not it was appropriate to terminate the applicant's registration under s 40-5(1).
>
> 103. Further, and in any event, it is clear that the Tribunal was conscious that it had a discretion whether or not to terminate the applicant's registration under s 40-5(1), and was aware of the range of other sanctions that were available under Subdiv 30-B in respect of the applicant's failures to comply with the Code."

The relevant considerations ground

Horan J also rejected the applicant's relevant considerations ground of appeal.

In doing so, his Honour noted that there is no discretion to renew the registration of a person who is not a fit and proper person under ss 20-25 and 20-50 TASA09. If a registered tax agent is no longer eligible for registration, including because they are not a fit and proper person, an application for renewal must be rejected by the Board under s 20-25(1). This meant that, if the applicant's renewal application lodged on 27 June 2022 were ultimately determined, it would be inevitable that the Board would reject that application unless the applicant were able to establish to the Board's satisfaction that she is a fit and proper person at the time of the decision, despite the adverse findings that have been made against her. In such circumstances, any discretion to impose a lesser sanction than termination of the applicant's registration for failure to comply with the Code might arguably be regarded as somewhat academic.

In any event, having regard to the AAT's reasons as a whole, Horan J was not satisfied that the AAT failed to appreciate the applicant's position or the effect of the termination of her registration on her existing clients. The relevant considerations which the AAT was bound to take into account were to be ascertained from the text, context and purpose of the TASA09. The AAT clearly had regard to the protection of the public, in the light of its findings about the seriousness of the applicant's conduct, and the expectation of members of the public that registered tax agents are persons of high integrity. The AAT specifically referred to "protection of the clients who may engage the tax agent's service", together with protection of the revenue.

Horan J also said that, in so far as the matters now raised by the applicant involved aspects of the facts of this particular case, those matters were not in and of themselves mandatory relevant considerations that the AAT was required separately to address in its reasons for decision.

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The future of the tax profession

by Steve Healey, CTA (Life),
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This article explores the evolving landscape of professional services in the digital age, with a focus on the tax advisory sector. It discusses the increasing importance of emotional intelligence as a differentiator in a world where IQ can be digitally disrupted. It examines the impact of new and emerging technologies, including generative artificial intelligence, and considers the historic nature and characteristics of the professions and how they may be impacted by fundamental and unprecedented changes happening around us. The findings suggest that, while IQ remains important, emotional quotient is becoming increasingly critical. The future tax adviser will need to leverage technology and their intellect to develop deep specialisations, but the human-centric delivery of that expertise will be paramount. The article concludes by urging readers to consider the changes happening around them and the impact of those changes on their careers and businesses.

Introduction

At The Tax Institute's 32nd National Convention, I presented "The future professional".[1] This session was developed from my white paper of the same name that I wrote in 2016, and followed my tenure as President of the Institute in 2015 during which I made one of my core goals to increase the focus of our Board at that time on the digital transformation agenda, both with regard to our members and to the Institute itself. This article represents an update of that initial paper and provides me the opportunity to revisit the issues and themes.

At that time, the tax profession was experiencing unprecedented change, driven largely by the ATO's transformation agenda. By way of recap, the ATO had created, and was at the beginning of the implementation of, its blueprint for change. What we were seeing then (which now seems like the distant past) included:

- website enhancements;
- the introduction of a bot called Alex, a virtual assistant created in collaboration with Nuance Communications;
- an enhanced ATO app, including voice command login functionality;
- the replacement of eTax with the standard business reporting platform, myTax;
- the introduction of the myDeductions app;
- individuals and sole traders being able to use, for the first time, myGov to lodge, view and pay activity statements online;
- the introduction of a webchat service to assist small business; and
- enhancements to the ATO portal and ongoing work to streamline the login process for tax agents and taxpayers.

What we are seeing now are global revenue authorities closely connected using digital pathways, machine learning and generative artificial intelligence (GenAI) algorithms to analyse taxpayer data in increasingly larger volumes to identify patterns, trends and anomalies indicative of potential non-compliance and to predict taxpayer behaviour. Revenue authorities around the world are increasingly using predictive modelling techniques to assess risk, prioritise enforcement actions, target high-risk taxpayers, and allocate resources more effectively to maximise revenue collection. It is sobering to contrast this with what I summarised, just seven years ago, of the ATO's blueprint for change implementation at that time.

In 2020, I initially refreshed my paper and presented it under the title "Tomorrow's tax practice" as part of the 2020 Private Business online series during the COVID-19 pandemic. Certainly, things had moved on from 2017 and the pandemic was something that could only be described as a black swan event.[2] The term "black swan theory" was initially coined by Nassim Nicholas Taleb in 2021 and has been defined as "… a high-impact event that is difficult to predict under normal circumstances but that in retrospect appears to have been inevitable. A black swan event is unexpected and therefore difficult to prepare for but is often rationalised with the benefit of hindsight as having been unavoidable".[2]

Taleb considers that a black swan event has three attributes:[2]

1. it is an outlier, ie it lies outside the realm of regular expectations as nothing in the past can predict it;
2. it carries an extreme impact when it arrives; and
3. although it is an outlier, the human condition makes us try to find an explanation after the event to attempt to make it explainable and predictable in the future.

As Taleb suggests, when we investigate our own existence and give thought to the significant events in our lives, the inventions that have appeared and technological changes that impact us, and compare them to what we expected before they occurred, very few, if any, were scheduled nor did they occur according to any plan. They were unpredictable and fundamentally changed the world around us. Taleb posits that what we don't know is far

more powerful than what we do know. In terms of business, we can all think of those businesses that have become uber-successful, and most, it would appear, have done this by leveraging the new and unpredictable, the black swans. One of the most significant black swan events cited by Taleb is the emergence of the internet. It is relevant to consider the most successful companies in the world in 2000 and then again in 2024 (see Table 1). Not surprisingly, technology companies dominate the list in 2024.

Table 1 demonstrates that only one company appears in both 2000 and in 2024 (as number one in each year), being Microsoft. Did Bill Gates and Paul Allen found Microsoft based on what was known and predictable? I would suggest not — they saw an opportunity to create value from something that had never been done before by seizing new technology in a new space (BASIC interpreters, which enabled users to program commands on personal computers using the BASIC language). The rest, as they say, is history. On 4 September 1998, Google was born — it too was born of a black swan event (the emergence of the internet) and now it is the fifth largest organisation on the planet by market capitalisation.

The relevance of Table 1 to this article ties back to the significance of black swan events and the ability (for some) to be able to create opportunity from uncertainty and unpredictability.

Turning to the tax world, I am sure that many see tax as predictable and certainly not a black swan, but the future of our profession, as with all professions, will necessarily involve us reacting and adapting to change and seizing opportunities that arise from the impact of black swan events.

When I think of the black swans (to me, at least) that have had, are having and will continue to have a major impact on us as tax professionals, I think of:

- the internet and the internet of things — seamless global connectivity that has led to the rise of smart and interconnected devices;
- predictive analytics;
- COVID-19; and
- GenAI.

As the second-last bullet point suggests, it is not just the technology-driven black swans that are impacting us and will continue to do so. Perhaps one of the most significant and important black swan was the COVID-19 pandemic. Back in 2020, I expressed the view (along similar lines to many) that:

> "I don't believe anyone could have possibly predicted that by mid-2020 we would be in the midst of a global pandemic that has changed (and I believe will continue to change) how we live and go about our day-to-day lives. We often hear terms such as 'the new normal', 'social distancing', 'flattening the curve', 'self-isolation', 'herd immunity' and 'community spread', just to name a few.
>
> There is absolutely no doubt in my mind that we are all looking forward to our lives returning to normal in a post-COVID world. But what that ultimately looks like is anybody's guess. Is social distancing here to stay? Will our governments need to continue current to focus their efforts on funding initiatives to maintain economic and social order and, if so, for how long? Tax revenues around the world are in deficit and I am sure that it will be many years before we hear the term 'back in the black'."

Winding the clock forward to the present time, it is pleasing that most of those terms have been confined to history (at least for now) — we are now living in "the new normal" and much of it is positive. Although the pandemic was a terrible thing in so many ways, it also served to accelerate digital transformation across most industries[3] and arguably has changed the way we work as professionals forever.

We are now living in a flexible working world and, from where I sit and what I see, that is not going to change anytime soon. It was surprising to many (as studies have found) that remote working during the pandemic did not necessarily result in a reduction in productivity but in many

Table 1. Largest companies by market capitalisation (as at 10 May 2024)

	2000		2024	
Rank	**Organisation**	**Market cap**	**Organisation**	**Market cap**
1	Microsoft	$US586b	Microsoft	$US3100b
2	General Electric	$US477b	Apple	$US2680b
3	Cisco	$US366b	NVIDIA	$US2210b
4	Walmart	$US260b	Saudi Aramco	$US2001b
5	Exxon Mobil	$US260b	Alphabet	$US1840b
6	Intel	$US251b	Amazon	$US1810b
7	NTT Docomo	$US246b	Meta Platforms	$US1260b
8	Royal Dutch Shell	$US203b	Berkshire Hathaway	$US837b
9	Pfizer	$US202b	Eli Lilly	$US724b
10	Nokia	$US186b	TSMC	$US708b

ways saw it improve.[4] Many businesses prospered, although some employees faced challenges in balancing their work and personal lives.[5] In my mind at least, this is the new normal — a digitally transformed and transforming world where that transformation will continue at an exponential pace, and where people are empowered like never before as they can work from wherever they wish, whenever they wish and, potentially, for whomever they wish.

So, what does that mean for our profession?

Is a new model still needed?

I still firmly believe that the tax practitioner of the future will need a combination of traditional tax knowledge and new skills to navigate the evolving landscape of tax regulations, technology and client expectations. With the rise of GenAI in particular, our clients will become more empowered than ever before and their expectations of us will rise accordingly. We must be able to react with haste and a sense of urgency to change (particularly in response to black swan events), using the best of breed technology. Human judgement, empathy and communication skills will be at the core of what we as tax professionals do. GenAI, I believe, stands to narrow the gap between the "technical genius" and the "technically competent". I will return to that a little later.

Looking at the impact of emerging technologies and (arguably) the importance of the humanistic side, I believe that the future model will encompass the key components set out in Table 2.

As GenAI, machine learning and robotic process automation continue to develop, the greatest differentiator for a professional services firm is likely to be its ability to provide value-added services that go beyond automation and standardisation. I do suggest, however, that the heart of the professional services model of the future has not changed substantially — it is the human element. Human beings are social creatures and, most at least, enjoy engaging with people they like and trust. GenAI will not change that, although what it will do is make those human attributes more valuable than they ever have been. The differentiators for the future firm are therefore not that different from the differentiators of the current firm and so, in my mind, while a new model is needed, it is certainly founded on the current model, although the human element and emotional intelligence become much more important.

To remain relevant and indeed to increase our relevance to clients, we must continue to act with a sense of urgency. Our business models have been challenged in the past due to several black swan events. With both our own businesses and those of our clients, we have had to respond, react and pivot to new ways of working and adopting new technologies to deliver traditional services, in addition to responding to new needs by the creation of new services. This, I believe, underlies the importance of being able to

Table 2. Key characteristics of the future tax practitioner

Skillset	Attributes
Technical proficiency	Future tax practitioners will always need a strong foundation in tax law, regulations and understanding compliance requirements.
Technology proficiency	Traditionally, tax practitioners have relied on manual and Excel-based systems and processes. Future tax practitioners will need to invest and be proficient in using more sophisticated tax software, data analytics tools, and emerging technologies such as GenAI and machine learning. These technologies will likely streamline tax processes, automate routine tasks, and provide valuable insights for strategic tax planning and decision-making, enabling decisions to be made quickly and accurately.
Interpretation and analysis of data	Over 90% of the world's data was produced in 2022–23.[6] Data will continue to grow at an exponential rate. Future tax practitioners will need strong data analysis and interpretation skills (or access to them) to extract meaningful insights, and to uncover trends and tax-planning and savings opportunities for clients.
Critical thinking and problem solving	As we have seen with the OECD's BEPs and Pillar Two agendas, among other developments globally and domestically, tax laws and regulations will become increasingly complex and nuanced. Future tax practitioners will (continue to) need very strong critical thinking and problem-solving skills to interpret ambiguous tax laws, resolve disputes and optimise their clients' tax outcomes.
Communication and collaboration	As tax laws continue to increase in complexity, so too will the need for collaboration between specialists to bring the very best to the client. The future tax practitioner will possess outstanding communication skills and be willing and able to collaborate with others (inside and outside their organisation). Emotional quotient will become more important than IQ as increasingly intelligent machines become more pervasive. Humanistic attributes such as empathy and the ability to effectively communicate the complex simplistically will be key.
Resilience and adaptability	As history demonstrates, we will continue to see black swan events that challenge our paradigms and how we react to them. The future tax practitioner will be resilient and adaptable and cannot afford to get "stuck in" "it's my way or the highway" mentality. Humility will become increasingly important, recognising that clients will become more empowered with smarter technology at their fingertips — they will potentially come to us with 90%+ of the answer they seek.
Ethical and professional integrity	The events of recent times and their impact on our profession demonstrate just how important ethical and professional integrity is. The future tax practitioner will need to (continue to) focus on operating within a more stringent ethical environment, and integrity, coupled with humility, will be essential in all that we do.

embrace change but, even more importantly, has shown that we are resilient beings and capable of adapting quickly and effectively. Resilience and adaptability will become even more important as we navigate the future.

Regarding resilience, as I was preparing this article, I listened to Jensen Huang present to the Stanford Institute for Economic Policy Research (SIEPR).[7] For readers who have not heard of Jensen Huang, as CEO of NVIDIA, he is presiding over arguably the most significant corporation in the world, influencing the development of GenAI and at the forefront of computer chip development (central processing units (CPUs) and graphics processing units (GPUs) that empower GenAI). In response to an audience question, he posits that resilience is the most important attribute for students who want to succeed in the future GenAI-powered world, and noted that high-achieving students come with (deservedly) high expectations but that they typically lack resilience, and that greatness comes from character which is formed out of suffering and not intelligence. While this may be a controversial statement, it does resonate with this author. Resilience has always been important as a tax professional but, arguably, will become much more important going forward as we navigate even more rapid change.

As to the rate of change, readers may be familiar with Moore's Law, that is, the number of transistors in an integrated circuit doubles every two years. Interestingly, this seemed to remain true in 2016 when I authored my original paper. Wind the clock forward to 2024 though and it appears that Moore's Law may be a thing of the past. Over the past eight years, computer power has increased by 1,000 times. At the recent NVIDIA developer conference, Huang introduced NVIDIA's newest chip, the Blackwell B200. This chip, he said, will revolutionise GenAI and will facilitate the future of AI that is artificial general intelligence (AGI).[8] It is said that AGI systems will be capable of solving any intellectual task that a human being can — they will have human-like cognitive abilities including reasoning, problem solving, learning and language comprehension. That said, we may be able to relax a little for now according to a recent McKinsey report,[9] which notes that AGI is, at this stage, "purely theoretical" and that, to date, no AI has been able to pass the Turing test (first proposed by Alan Turing — where technology cannot be distinguished from a human being). The report notes a prominent roboticist, Rodney Brooks of the Massachusetts Institute of Technology and co-founder of iRobot, who believes that AGI won't arrive until the year 2300.

Huang, however, currently envisages a future where AI has moved from its current state to where it has "tapped into everything and understands context" and where AI learns continuously and that it is grounded with real world data through interaction and the creation of synthetic data. He notes that AI will be "imagining", rather than its current state where it trains and then infers.[7] He notes that, if we define AGI as being able to pass human tests — reasoning, biology, medical exams, engineering exams, bar exams, scholastic aptitude tests etc — AI will be able to do this within five years.[7] That said, he notes that AGI is half human intelligence — we currently cannot specify that and so "we are not sure" but "… we are endeavouring to make it (AI) better and better".[7]

So, at least in my mind, we seem to be rapidly moving towards a very new world and certainly one that was not envisaged by me in 2016. We seem to be at a new frontier. That said, I believe that the notion of the "trusted concierge", a term I first used in my 2016 white paper, *The future professional*, is more relevant than ever. While we will no doubt continue to experience exponential change in many facets of our lives (not just GenAI), I still believe that the human element is more important than ever before. I believe that the future truly belongs to those who embrace that which cannot be disrupted by the digital agenda — the importance of "being human" and human connectivity.

A return to the "trusted concierge"

In developing my white paper in 2016, I settled on a term that I still believe encompasses where we need to be as tax professionals in the future. That term is the "trusted concierge" and I believe it is more relevant than ever in the current environment as increasingly sophisticated technology solutions such as GenAI become all-pervasive.

It is critical that we adopt such a mindset, as the guardians of a body of knowledge that's no longer exclusive to us as tax professionals.

The concepts of "knowledge guardians" and trusted practitioners are not exclusive to accountants, lawyers and tax practitioners, but span all professions (eg the medical and education professions). With the expansion of GenAI and the potential future of AGI (and therefore rapidly increasing client empowerment), traditional models for delivering professional services and engaging practitioners will continue to disintegrate.

Having said this, these changes are also creating new platforms and paradigms for professional services practitioners and, in my mind at least, do not mean that there will no longer be a role for tax practitioners. Tax practitioners will continue to play an important role in distilling a plethora of information, unstructured data and knowledge to deliver forward-looking insights, using tools and connections across a far wider spectrum than was traditionally possible. However, there can be no doubt that GenAI will also be able to do this (this I did not envisage in 2016).

At the risk of stating the obvious, as GenAI becomes more pervasive and improved, the professional services practitioner needs to continue to focus on what GenAI cannot do — for now at least, it cannot be "human". As social beings, the importance of social interaction in all aspects of our lives will become even more important. The concierge is more relevant than ever.

Why concierge?

When we think of a concierge, we think of someone who may work in a hotel or, perhaps, a personal concierge performing errands for their affluent employer. That said,

the word "concierge" evokes thoughts of connectivity, resourcefulness, cooperation, problem-solving, advising, empathy and effective communication.

The concierge also seeks to ask questions to target customer needs more accurately. To me, it is a word that embodies trust, although, given the importance of trust in any profession (including our own), it is worth reinforcing that. Hence, the term "trusted concierge" represents a model in which the professional occupies a privileged position with the client (a position of absolute trust), can facilitate solutions to a wide range of complex problems and, while not necessarily having all the answers, can source and deliver those answers. The concierge will no doubt use GenAI (and other) tools to assist, but the notion of "trust" to me is inherently human — so GenAI tools will simply serve to provide the concierge with better, faster and more reliable information to be able to deliver to their client.

It is critical that we continue to recognise that our clients are far more empowered and armed with much greater knowledge and faster access to it than they ever have been, and that this will continue to grow as GenAI continues to become all-pervasive. They will continue to be increasingly demanding and determined to pay far less than they once did for what might be described as the provision of traditional services. With the ever-increasing amount of data being generated, it is essential to change both the services that we deliver to clients and the way we deliver these services.

What the pandemic taught us, and more recently what GenAI is showing us, is that responsiveness and agility are key. We need to be able to act quickly and decisively, to alter the traditional modes of doing things, and to embrace new and more effective ways of working. We all have greater expectations of our governments and businesses, and their ability to adapt and quickly deal with change.

Consumers, and therefore our clients, have much greater expectations and these expectations are fuelled from their personal experiences in all facets of their life, including responsiveness to dealing with the recent black swans but also through such things as Chat-GPT, Netflix, Google and Amazon. Communication channels have also fundamentally shifted to "real time" through X, Meta, Tik Tok and various other social media platforms. Not only will our clients demand more, but they will also want services to be delivered faster.

We will need to continue to be more inquisitive of our clients and seek information faster and more efficiently, using a combination of technology and human connectivity. We need to shift our mindset from the "expert who has all the answers" to the "trusted concierge who listens and works with clients and other sources to provide the answers". For many, this is a fundamental but critical shift in thinking and in the way we approach the relationship we have with our clients, our people and the broader connected community. Regardless of how sophisticated the future GenAI engines become, I do not believe (perhaps naively) that they will be able to demonstrate those truly important human traits of empathy and humility.

The future will, I believe, belong to those who can demonstrate humility and empathy but, at the same time, can also embrace new solutions to deliver traditional services to their clients. Rather than seeing the revenue authorities as negatively impacting on the services being able to be delivered, and seeing GenAI as tools replacing to some extent "our smarts", we need to see them as creating an opportunity to liaise with and advise our clients in real time and to use traditional compliance processes to deliver data-driven, future-focused insight. To those in a compliance-rich business, the opportunity is to use the compliance process (through the adoption of increasingly sophisticated analytics and GenAI) to gain a more timely and deeper understanding of our clients' businesses to deliver something much more valuable — human-centric insight.

Unprecedented change

No matter which way we turn, change is happening. This of course is somewhat of an understatement, with the impact of GenAI and the potential development of AGI. Regardless of where we turn, change is around us. In relation to business more specifically, Accenture notes (in early 2024)[10] that business leaders faced the greatest rate of change in history during 2023 and that this is expected to accelerate further in 2024. This index ranks six factors of change that affect business:

1. technology;
2. talent;
3. economic;
4. geopolitical;
5. climate; and
6. consumer and social.

Not surprisingly perhaps, technology disruption was rated as the number one driver of change in business (and was up from number six in 2022). Talent was ranked number two (identifying specific issues such as skills shortages and employee engagement). The Accenture report notes that the most significant source of change and disruption is technology, and goes on to say that Accenture believes that the companies that will succeed in the next decade are those that embrace a strategy of continuously reinventing every part of their business using technology and AI, including harnessing the power of GenAI and ensuring that their people are at the centre of their transformation.[10]

It is, of course, not just change that we need to acknowledge but, even more importantly, the rate of change. Many fail to appreciate just how quickly things are changing in the world and therefore fail to understand the resulting impact on their businesses and the businesses of their clients. It is essential that we appreciate this if we are to seize the opportunity that change affords us.

As accountants, lawyers and tax advisers, we are not immune to what is happening around us. It is incumbent on all of us to understand what this means for our clients, our

people and our businesses if we are to thrive or, indeed, survive.

Traditionally, we have been custodians of a body of knowledge that comprises enormous complexity. Tax is not a simple profession, and it is widely recognised that Australia is blessed with one of the world's most complex taxation systems. As our laws have developed, together with the global economy, the level of complexity has only increased and will no doubt continue to do so.

Does this mean "happy days" for the tax profession and for you as a tax professional?

This may very well be the case, but what we may be doing in five to 10 years from now and how we do it is likely to look very different to the way we currently serve our clients. Five years ago, we were very much embracing technology in our practices and the ATO was well underway with its digital transformation agenda. In 2020, I suggested that the human element would become more important, and that technology would create a significant shift in our roles as tax professionals. I pondered the impact of the sharing economy on the professions more broadly (a concept that I will return to in this article, although its impact has not been as I would have thought at that time). Additionally, I contemplated the role of AI and the need to avoid our "Kodak moment". I believe that we have experienced a shift, although acknowledge that it may not have been as palpable as I had expected. Having said that, a few of the more significant changes observed that have had an impact are:

- cloud computing applications have become increasingly sophisticated, enabling greater efficiencies in the delivery of compliance services (coupled with increasing client expectations and a reduced propensity to "pay" for traditional compliance services);
- improved connectivity, internet speeds and security protocols such as VPNs have enabled more effective remote working which is now ingrained into most of our workplaces; and
- AI has become ubiquitous, and GenAI is changing our world at a rate much faster than any of us could have imagined.

We must remain vigilant and do our best to keep up with the changes happening around us. These changes will continue to impact what we do, how we do it, where we do it, and how we interact with our clients, the revenue authorities, our people and our peers.

The notion of interaction and the significance of the human relationship will be key to remaining relevant as tax advisers into the future.

We will need to continue to adopt technology to automate the many systems and processes that have traditionally required the human touch, together with emerging technologies such as machine learning, GenAI, virtual reality and augmented reality that will, over time, supplement (but, I suggest, never replace) human intellect and emotional intelligence.

Exponentiality of change and embracing uncertainty

As I said in my earlier iterations of this article, we do not live in a linear world. Linear growth seems to be a concept firmly embedded in the past, although I believe growth has never been linear. The pandemic underscored the concept of exponentiality — in terms of just how fast the COVID-19 virus spread but, equally, how quickly human beings can adapt and pivot to new ways of doing things.

More recently, the rapid rise of GenAI is providing us with new challenges in our traditional business models and the way we look at solving complex problems. Like the pandemic, in the short-term, it is challenging us and we are starting to see the risk that it presents to our traditional business models. Some of us, however, are starting to look past the risk and are seeing the immense opportunity ahead of us.

Uncertainty as opportunity

We can of course view the change happening around us and, more specifically, the rate of such change as a challenge and indeed to do so would not be wrong. I believe that the corollary of change is opportunity, and the greater the change and the threat that change contains, the greater the opportunity. Although the changes happening around us may be described as exponential, human beings have proven throughout history that we can respond both quickly and effectively and not only adapt to change, but also profit from it. The following are just a few monumental black swans that have spawned enormous opportunity from what could be seen as a fundamental threat

The industrial revolution

In the late 18th century, the world comprised predominantly agrarian economies. The arrival of the industrial revolution was to change that forever, resulting in the urbanisation of economies around the world, technological innovations that revolutionised the production process, and productivity gains through mass production which led to economic growth and greater standards of living more generally.

The internet

The world wide web was introduced to the world by Tim Burners-Lee in 1993 (that does not seem very long ago …). It democratised access to information, enabling online communication and the rise of e-commerce.

Social media

Although technically perhaps not a black swan, it is still worth mentioning social media, given its impact on traditional media and modes of communication. Social media now dominates our interconnected lives, with its platforms allowing people to seamlessly connect, share information, and collaborate in real time.

Machine learning and GenAI

ChatGPT is what many think of when we hear "GenAI". It is a large language model developed by OpenAI that can generate human-like responses in natural language. It can

engage in conversation, provide answers to questions, and even write reports. It is of the current generation of AI that takes "pre-recorded" data and generates responses based on existing information. According to Jensen Huang, the next generation of GenAI will be tapped into everything through multiple modalities (including speech, language and video) and will understand context — it will generate exactly the right information for the user, and 100% of the content produced will be generative as opposed to the current state where 100% of the content is pre-recorded.[11]

Each of these developments created (or, in the case of GenAI, is creating) enormous uncertainty, unpredictability and challenge but all created (or, in the case of GenAI, will create) commensurate opportunity for those agile and resilient enough to seize and realise it.

For some time, we have all questioned the future of work. This of course is not just limited to our profession but applies to all fields of endeavour. Consider the pandemic — in responding to it, many businesses, and certainly those in the professional services sector, had to implement changes to their operating model arising from the need to work remotely. Working from home forced us to evaluate how we stay connected to our clients and teams without physical proximity, and how we embrace new and sometimes previously untested technology solutions to that end.

Although somewhat of a generalisation, in response to the pandemic, I believe that the professional services sector adapted its business models quickly and effectively, and in my own experience productivity did not decline. On the contrary, productivity in many instances improved. As businesses, we were forced to bring forward change that we may have been contemplating over a two to three-year time frame into two to three weeks. While we had to challenge our own paradigm of work, we embraced it and used it as an opportunity — initially perhaps to remain relevant but ultimately to augment our traditional face-to-face business models with digitally driven solutions. In many cases, we did this successfully.

It is often said that the only certainty in life (apart from death and taxes) is uncertainty. So we have a choice when faced with uncertainty — fear it or embrace it. We must be resilient, nimble, agile and open to change. Rather than fearing change, I believe that the pandemic served us extremely well from one perspective — it forced us to embrace change quickly and demonstrated once again that humans are incredibly adaptive and resilient beings.

Remote working has arrived and is here to stay

There can be no doubt now that remote working has arrived and is here to stay. Although the pandemic seems but a memory (albeit not a great memory), one of its great legacies is remote working. I believe that we are still grappling with what this means in the longer term, but the following considerations are still worth mentioning:

- how to attract and retain talent in a distributed, remotely enabled workforce;
- how to mentor, educate and supervise individuals, particularly those new to the business;
- how to build and maintain a strong culture;
- re-imaging the connection between productivity and physical presence;
- reviewing office space needs and the configuration of that space, including the creation of physical and technologically enabled "collaboration hubs";
- the prevention and management of mental health issues brought about by prolonged and sometimes enforced periods of remote working;
- re-directing business infrastructure cost savings (eg through a reduced real estate footprint) to employee and team wellbeing initiatives; and
- resisting returning to the "norm" — where operational efficiencies are identified, continue to embrace those and resist the temptation to return to the norm.

This list of course is not exclusive, but I do believe that it represents just a few of the opportunities before us as professional services practitioners. The contemporary physical tax practice has been radically and permanently changed. GenAI has arrived and is here to stay.

GenAI has arrived and is here to stay

Just four short years ago, I posited that AI and machine learning would have a significant impact on our profession. I certainly did not envisage just how quickly it would develop, nor did I envisage GenAI as such. Table 3 summarises a few threats and opportunities that may present themselves for business (and, I must say, this is 100% produced by Microsoft Copilot).

There seems no doubt that GenAI is here to stay and that its development will continue at an unprecedented rate.

The sharing economy

We are all aware of the sharing economy, the emergence and rapid evolution of which is a direct illustration of the exponentiality of growth.

The term "sharing economy" was coined in 2010. It is now ubiquitous. In her book, *Generation share: the change-makers building the sharing economy*,[12] Benita Matofska and Sophie Sheinwald define the sharing economy as:

> "a socio-economic ecosystem built around the sharing of human, physical and intellectual resources. It includes the shared creation, production, distribution, trade and consumption of goods and services by different people and organisations."

At its core, the sharing economy embraces the notion of wide collaboration across borders. Although still in its infancy, its impact on traditional business models is already significant.

Matofska identifies the following key characteristics of the sharing economy:

1. **people:** at its core, the sharing economy enables peer-to-peer (or person-to-person or P2P) interaction

Table 3. Opportunities, threats and risks from GenAI

Opportunities of GenAI	Threats and risks of GenAI
Enhanced creativity and content generation — GenAI can create new, original content such as text, images and videos. Businesses can leverage this capability for marketing campaigns, product design and content creation. GenAI can automate repetitive tasks, freeing up human resources for more strategic work.	Data quality and bias — the accuracy of GenAI depends on the quality of training data. If the data is biased or inaccurate, the AI results may also be flawed. Businesses must carefully curate and validate training data to avoid biased outcomes.
Improved customer service — GenAI can assist in handling customer inquiries, providing faster and more accurate responses. Chatbots powered by GenAI can enhance customer support experiences.	Intellectual property risks — employees using GenAI might inadvertently disclose sensitive company information or access third-party intellectual property. Clear policies and guidelines are essential to protect proprietary information.
Personalisation and recommendation systems — GenAI can analyse user behaviour and preferences to offer personalised recommendations. E-commerce platforms, streaming services and social media benefit from this feature.	Cybersecurity vulnerabilities — as GenAI generates more data, protecting it becomes more challenging. Cybercriminals can exploit AI-generated content for phishing scams or hacking attempts.

and collaboration. It is founded on the notion of people interacting directly with each other without the need for a traditional intermediary;

2. **production:** in the sharing economy, goods and services are produced collaboratively by active participants;
3. **values and systems of exchange:** as a hybrid economy, value is not seen only in terms of financial value. Of equal significance is economic, social and environmental value. Non-material and social rewards are important aspects of the sharing economy, as are alternative currencies and concepts such as social investment and social capital;
4. **distribution:** shared ownership models and distribution networks that are not hampered by traditional boundaries or borders and facilitated by the internet are an important aspect. The notion of fairness in the ownership and distribution of knowledge, products and services are essential aspects of the sharing economy;
5. **planet:** in addition to having people at the heart of the economic system, the sharing economy also has the planet at its core. The re-use of resources, the reallocation and re-purposing of waste, and the concept of sustainability rather than obsolescence in the development of products and services are important aspects;
6. **power:** people are naturally empowered in the sharing economy as traditional boundaries are eliminated. A natural consequence of this is the re-distribution of economic and social capital and power and the broader access by the general population facilitated by freely available infrastructure (the internet) to knowledge and services that may have been traditionally denied through the creation of barriers;
7. **shared law:** rules are made in the sharing economy through a natural process that is democratic, public and accessible. The rules are not hindered by traditional models and, rather than a top-down approach, may be thought of as a "bubble-up" or mass participation approach. By way of example, P2P accommodation and car-sharing services are relatively recent developments, and the rules, regulations and policies underpinning these have been affected largely by the participants in the system;
8. **communication**: the open sharing of knowledge via publicly and freely available infrastructure and the destruction of traditional "knowledge" boundaries is at the heart of the sharing economy;
9. **culture:** at its heart, the sharing economy is a collaborative culture where the individual is but part of the wider solution and where notions of trust and sustainability are fundamental. The culture of the sharing economy transcends geographic, racial and other demographic borders, and promotes active participation from all segments of the wider community who have access to the underlying infrastructure; and
10. **future**: given that sustainability is a core concept embedded in the sharing economy, it focuses on working towards the creation of a long-term vision and sustainable future state.

The professions

Professions Australia defines a profession as:

> "a disciplined group of individuals who adhere to ethical standards and who hold themselves out as, and are accepted by the public as, possessing special knowledge and skills in a widely recognised body of learning derived from research, education and training at a high level, and who are prepared to apply this knowledge and exercise these skills in the interest of others.
>
> It is inherent in the definition of a profession that a code of ethics governs the activities of each profession. Such codes require behaviour and practice beyond the personal moral obligations of an individual. They define and demand high standards of behaviour in respect

to the services provided to the public and in dealing with professional colleagues. Further, these codes are enforced by the profession and are acknowledged and accepted by the community."

If we accept this definition and the core concepts underlying it, the evolution of GenAI and other technology developments will continue to create some cause for concern for the traditional practitioner.

A profession, by definition, is a subgroup of society that possesses special knowledge and training. Members of the profession are essentially the custodians of such knowledge. All traditional professions have long-established barriers to entry (principally through education and satisfying stringent membership criteria for the relevant professional body or bodies).

The tax profession is certainly no exception — it comprises people who have undergone rigorous graduate and post-graduate training, who are members of a relevant professional body (eg The Tax Institute, Chartered Accountants Australia and New Zealand, and CPA Australia), and who have become "experts" in their chosen field of endeavour. The professional bodies impose and enforce strict rules and barriers to entry, principally through maintaining appropriate standards of education and experience and ensuring adherence to ethical principles.

These barriers are designed not just to protect the public from rogue practitioners and to mitigate the risk of unqualified or underqualified individuals practising, but equally to protect the tax professional and the profession itself. In this sense, the professional bodies have both a public-serving and self-serving purpose.

A core principle of any profession — and, consequently, the relevant professional body or bodies governing that profession — is trust, and bodies such as The Tax Institute are widely regarded as highly trusted and ethical organisations.

Trust is also at the heart of the sharing economy, although, in this case, trust is often established as a result of P2P interaction, such as ratings established and shared as a result of individual and personal experiences (eg Uber and Airbnb).

Given the notion of individual empowerment that is central to the sharing economy, the professional bodies appear to have a challenge. Certainly, this would be a controversial statement but, with the evolution of the sharing economy, the relevance of professional bodies arguably becomes less important for the public (and perhaps more important for the practitioner).

It may be said that the emergence of the sharing economy creates a significant threat to the tax profession as we know it — principally as knowledge becomes more freely available and infrastructure becomes more sophisticated, people in general become more empowered and communication channels change, enabling the further progression of (often cost-free) P2P engagement. It may, however, be said that the sharing economy will create significant opportunities for the entrepreneurial professional for precisely the same reasons.

Richard and Daniel Susskind, in their book *The future of the professions*, suggest that there are two possible futures for the professions.[13]

The first is that professionals will continue to do what they have always done, but they will do it more efficiently through the adoption of technology and other enhancements to systematise and streamline traditional systems and processes.

The second scenario is that the work professionals do in the future will be fundamentally transformed as knowledge becomes more widely shared and available and as systems become increasingly capable to deliver what professionals have traditionally been engaged to do.

The authors argue that the second future will ultimately prevail in that we will continue to find new, improved ways to share expertise, and the professions as we know them will become progressively dismantled.

The authors note that all professional jobs share a common element in that they can be broken up into several routine and non-routine components, although they note that the non-routine tasks require judgement, creativity and empathy. Such characteristics, to me, seem fundamentally human, and while GenAI may challenge this more over time, it is difficult to imagine a time when the human element becomes entirely redundant.

That said, all professions have several common characteristics and therefore are equally susceptible to being disrupted. Some of these common characteristics are that:

- they are custodians of a specialised body of knowledge and they occupy a place of privilege and esteem in society;
- their members are highly educated and respected in society;
- they wield significant economic and social significance;
- they are often considered a "labour of love" by the practitioner; and
- they can be regarded as elitist.

Given these characteristics, when one considers the characteristics of the sharing economy, there can be no doubt that the accounting, legal and tax professions will be significantly disrupted. The only questions are, to what extent and by when?

So, at a practical level, the P2P economy presents a number of threats to traditional professional services firms in several ways, some of which are discussed below.

Disintermediation

Clients (or potential clients) are connected directly with "freelance" service providers through the P2P platform, bypassing traditional intermediaries such as professional services firms. This disintermediation reduces the need for traditional firms, potentially diminishing their market share and relevance.

Price competition

Transactions can be delivered at a significantly lower cost by eliminating overhead expenses associated with traditional professional services firms. Consequently, traditional firms may see their fees increasingly challenged and profitability eroded.

Access to talent

Individual practitioners can offer their services directly to clients and source new clients by engaging on a P2P platform. This also provides a gateway to a diverse talent pool beyond what a traditional professional services firm can offer. In turn, this may provide clients with more options and greater flexibility, posing a competitive challenge to traditional firms that have built their business by being able to access the very best professionals.

Disruption of traditional business models

Given the elements of the P2P economy and considering the traditional foundation and elements of the professions more generally, sharing economy platforms are fundamentally disruptive to the traditional ways in which professional services are delivered to clients. They leverage cutting-edge technology to create new marketplaces and service delivery models.

Returning briefly to the concept of the trusted concierge, the sharing economy and the resulting ease of access to a wider, ever-increasing body of knowledge enables sufficiently connected individuals to access and deliver solutions faster than ever before.

A new paradigm of trust

A seminal work in the sphere of professional services is *The trusted advisor*,[14] first published in 2000.

A key contention in this book is that the technical mastery of one's discipline is not enough, given the fast-paced, networked economy of the day. Bear in mind that this was the position espoused by the authors some 20 years ago. I am sure not even they would have been able to predict some of the advances in the economy that we have witnessed since then (including, perhaps, the rise of the sharing economy).

The authors formed the view (widely accepted as a mantra by many) that the key to professional success is the ability to earn the trust and, therefore, confidence of clients. There is no doubt that the notion of trust referred to by the authors was primarily at the level of the individual adviser, but it also spanned the firm and the profession more broadly.

Trust was, and is, personal. Earning the trust of our clients and our people requires the investment of time, the creation of intimacy, and the sharing of experiences, both personal and business-related.

That said, it is relevant to consider how the trust paradigm more broadly appears to have shifted away from institutions and towards strangers. Considering the current significant shift in the political landscape globally, it seems that individuals are far less trusting of traditional political institutions. Banks, churches and professional institutions are also, apparently, suffering an erosion of trust. This is of relevance to members of all professions.

While trust is shifting away from institutions, it appears to be shifting towards individuals and even strangers. Technology is creating new ways for us to trust strangers and we are more accepting of this paradigm through platforms such as Airbnb, Uber and housesitters.com.au as a result of shared peer experiences and ratings.

The adage "don't get in a car with a stranger" seems to have changed forever. We now trust strangers, getting into cars with them, and staying in their houses. We increasingly take a chance on the unknown, based on our trust of strangers.

A thought leader in the area of trust, Rachel Botsman, believes that technology is changing the way we interact and therefore how we build trust — every time we interact on the internet and have a positive experience, we develop further trust in the platform and therefore those that are using the platform.[15] This appears to be the case, notwithstanding the increasing global concerns around cyber security.

> "While still important, IQ would seem to become relatively less important, at least as a point of differentiation."

What does this mean for the professions? It seems that trust will be more about technology-enabled trust and less about trust in the institutional guardians. In one sense, trust is becoming even more personal as institutions become less trusted and the mechanisms of how the individual earns and builds trust evolve.

Considering once again the sharing economy, take Airbnb, the classic disintermediation case in the travel industry. That platform facilitates the direct interaction of the end-user and property owner. In relation to the notion of "trust", the guest is rated by the host and the guest rates the host via the internet without ever meeting in person; it's very personal and (some may say) intimate, given that each party sees the other's photo, reads a personal story, and interacts directly via social media or email.

P2P platforms typically incorporate robust trust and reputation systems not unlike Airbnb, allowing consumers to evaluate and choose service providers based on ratings, reviews and past performance. This transparency and accountability fosters trust between consumers and service providers. In the context of professional services firms, this potentially reduces the reliance the firms have traditionally placed on reputation and brand recognition.

Our current environment and, as discussed earlier in this article, the pandemic have forced us to radically and

rapidly change our physical business model such that virtual interaction (as opposed to face-to-face) has become somewhat the norm, as has remote working. I would suggest that the success many of us have experienced in our own businesses from the changes forced on us (for the better, in many instances) stems from trust. Specifically, businesses have had to trust their employees to achieve an effective remote working culture. We have also had to place trust in the platforms applied and the technology underlying those platforms.

While there can be no doubt that our business models will continue to challenge us and require us to demonstrate resilience and adaptability (as the pandemic showed us, we can be), the human element can never, in my view, be eliminated. The services we provide are highly personal and require close collaboration and trust between us (as service providers) and our clients. The best professional services firms have not only survived, but have also excelled at building and maintaining deep personal relationships over time, offering tailored advice, ongoing support, and a high level of client service that I do not believe can be replicated in a pure P2P environment. The best firms will continue to be those that focus on developing deep personal relationships with their people and clients. Those, however, who have founded their business on purely transactional relationships (eg a pure compliance provider) face significant and permanent disruption.

The emotional quotient/IQ balance

While we are all familiar with the importance of IQ and indeed have all developed a career in a field seen as technically challenging and intellectually stimulating, we have, in more recent times, become accustomed to hearing about the importance of emotional quotient. Almost 100 years ago, Dale Carnegie said:[16]

> "… when dealing with people, let us remember we are not dealing with creatures of logic. We are dealing with creatures of emotion, creatures bristling with prejudices and motivated by pride and vanity."

Given the historical characteristics of the professions, and most notably that professionals have been the "guardians of expertise or knowledge" and relatively highly educated members of society, the professions have valued human intellect highly, and rightly so. Professional services firms have therefore recruited the "best and brightest" intellects and IQ has been valued. Being an "expert" in one's field of endeavour has been valued and technical expertise highly sought after by both clients and firms.

That said, with the rapid rise of new technologies, particularly GenAI and potentially AGI, the traditional position of the "expert" is changing. Traditionally, professional services firms and individual practitioners have sought to differentiate themselves based on their technical capability and mastery of their areas of expertise. In each profession, there are the gurus and the "technically sound" — the gurus have typically been sought after by both the firms and clients.

The question now is whether emerging technologies such as GenAI and AGI that supplement the human intellect have the potential to elevate the "technically sound" practitioner to the level of the guru (or even beyond) — to "level the playing field". If this is in fact the case, it will no longer be sufficient to differentiate based on technical expertise alone (or potentially at all). While still important, IQ would seem to become relatively less important, at least as a point of differentiation. Humility will also become more important as we have technology around us that may become "smarter" than us.

It has long been recognised that emotional intelligence is a highly valued attribute of the professional services practitioner, although some would say (particularly the gurus) that it is less important than human intellect. Initially developed by Peter Salovey and John Mayer in 1990,[17] but popularised by Daniel Goleman in 1996,[18] emotional intelligence has been described as reflecting:

> "… abilities to join intelligence, empathy and emotions to enhance thought and understanding of interpersonal dynamics."

The terms "emotional intelligence" and "emotional quotient" have gained significant traction in all fields of endeavour since that time. Goleman has identified the following five key elements to emotional intelligence.

Self-awareness

The ability to recognise and understand our own emotions and their effect on those around us. Self-aware individuals can be thought of as those who can monitor their own emotions, recognising different emotional responses and correctly identifying each emotion type. Significantly, self-aware individuals are open to new information and experiences, learn from their interactions with others, and readily recognise both their strengths and limitations.

Self-regulation

The ability to manage and express our emotions appropriately. Highly self-regulating individuals are described as flexible and adapt well to change. They are good at managing conflict and dealing effectively with difficult situations. They take responsibility for their own actions and are often described as thoughtful of others.

Motivation

Being motivated by internal factors rather than external rewards (such as wealth, position and public recognition). Emotionally intelligent individuals are often described as being motivated by an inner drive — a drive to meet their inner needs and goals. They are also described as action-oriented and achievement-driven, as well as being highly committed to the task at hand and good at taking the initiative.

Empathy

Often described as the "critical" element to emotional intelligence, empathy is the ability to recognise and understand how others are feeling and how to respond

appropriately in the circumstances. Those with high levels of empathy can "understand people" and the dynamics between people. They can readily sense the power balance in relationships and understand how that balance influences feelings and behaviours in others.

Social skills

The ability to interact appropriately with others, build relationships and establish connections. Those with highly developed social skills are capable of building trust quickly and effectively and can readily develop strong rapport with co-workers and others around them. They demonstrate highly developed listening skills, as well as verbal and non-verbal communication skills, and often occupy positions of leadership through their ability to persuade others.

More recently, with the rise of GenAI in particular, we have come to focus on the importance of emotional intelligence, particularly as it is a differentiator for human beings (from the machines) and is commonly viewed as something that cannot be readily disrupted by technology.

Given the ever-increasing abundance of information and the need to distil that information to produce knowledge, with the assistance of enabling technologies such as GenAI, coupled with the need to work with the knowledge-empowered client and understand their challenges, interpersonal dynamics seem to become absolutely fundamental. The importance of "being human" and being able to engage with our clients, ask the right questions and apply professional judgement become even more significant. The "trusted concierge" remains the one who will do just that — they work with the client to co-design outcomes using a combination of technology and multi-disciplinary teams. They are not the "expert who has all the answers", but rather they are the emotionally connected, inquiring and humble individual.

To me, at least, it seems that emotional quotient is much less susceptible to disruption than IQ. As such, the new differentiator between professional services firms and their practitioners seems to be shifting — the balance is moving and those who understand this will be able to profit as they realise the ever-increasing value of that which seemingly cannot be readily digitally disrupted.

Again, this is not to say that IQ is unimportant. Although the machines will undoubtedly get smarter and more capable, the future tax adviser will use that technology, coupled with their own intellect, to develop deep areas of specialisation, but the human-centric delivery of that expertise, I believe, will become even more critical.

Returning to the "trusted concierge"

Not unlike my previous papers on this topic, this article (still) does not give answers. It prompts readers to consider the changes happening around them and to ponder the impact of those changes on themselves and their business.

As tax professionals, we have built our careers, reputations and businesses by providing answers to complex problems, based on our education, our experience and our ability to interpret our clients' queries and apply the relevant law.

Hence, if I were to ask whether, as a tax professional, you are currently in the business primarily of providing answers or, alternatively, asking questions, you are more likely to say, "providing answers to my client's questions". If we were to consider why our clients have engaged us, historically, one may answer along the lines of, "because we have expert knowledge in a difficult field of endeavour, and can provide answers to our clients' most challenging problems (in the field of tax, of course)".

The pre-eminent tax advisers in our community (and we can all think of who they are) would generally be described as of high intellect and capable of delivering the answers to those difficult issues in a timely and effective manner. They would not have seen the need to use "supplementary tools" such as GenAI to deliver those answers.

Looking forward, however, I would argue that the pre-eminent tax advisers will be those who are constantly searching for better questions rather than having all the answers. They will use the tools at their disposal to do just that.

This is the future tax professional. In the new world of GenAI (and the possible future of AGI), we continue to hurtle towards a place where knowledge is so abundant and accessible that, for those of us who have built a career, a business and a reputation as an expert in a particular field, our income-generating days are seriously numbered unless we rethink what our clients will require of us and how we provide our services to them.

I believe that the future is very bright and that our clients will rely on us even more, but they will be increasingly informed, demanding and, at the same time, appreciative of those who show that they truly care and can interpret and understand their needs through the application of their highly developed emotional quotient.

We find ourselves living in a hyper-connected world, with access to more information and insight in real time than ever before, where we will need to know more about our clients and our people than perhaps they know about themselves.

Our clients and our people will continue to embrace new ways of interacting (and building trust) because of the rise and rise of GenAI, P2P platforms, social media and broader digital change, together with the constant barrage of information delivered to their smart devices in real time. In the future, we may interact with our clients and people differently, but it is that interaction that will be key.

Considered holistically, the combination of all of these developments means that we will have more time to interact with our clients and work with them to determine and solve their more difficult, individualised problems. So, who will our clients need to help them navigate through this increasingly complex world — the tax guru with all the answers or the trusted concierge asking the right questions? I firmly

believe that the future still belongs to the latter – the future is bright for the "trusted concierge".

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The new Administrative Review Tribunal

by Michael Bersten, Barrister

The new Administrative Review Tribunal (ART) is expected to replace the Administrative Appeals Tribunal by the end of 2024. There is lengthy legislation but, on a first look, the changes affecting tax litigation are nuanced rather than far-reaching. A new Taxation and Business Division will be one of the jurisdictional areas. Also, it is planned to strengthen the qualifications of ART members in relation to each jurisdictional area. The current practice of calling on Federal Court judges as Deputy Presidents is also entrenched. Practitioners will need to look out for changes in modernised drafting, despite an avowed lack of intention to change fundamental policy. The new legislative scheme builds in two notable devices to ensure continuous improvement of the system. The first is to introduce the Guidance and Appeals Panel and the second is to bring back the Administrative Review Council. Appeals to the Federal Court will remain.

Introduction

The legislative package to replace the current Administrative Appeals Tribunal (AAT) with the Administrative Review Tribunal (ART) is expected to commence, according to the federal Attorney-General's Department, as soon as practicable before the end of December.[1]

Tax controversy and dispute practitioners should therefore take some notice even though the arena of tax litigation, by which we mean litigation under Pt IVC of the *Taxation Administration Act 1953* (Cth) (TAA53), is far from the core reasons for the new legislation[2] and the changes affecting that arena seem to be nuanced rather than far-reaching.

This article aims to have a first look at the changes that may affect cases that will transition into the ART from current AAT cases or that commence afresh in the ART.[3]

Structure of the legislative changes

Before going into the changes, practitioners should observe that the legislative changes take the form of three statutes, but the two relevant to tax litigation are:

1. the *Administrative Review Tribunal Act 2024* (Cth) (the main Act); and
2. the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024* (Cth) (the consequential Act).[4]

The detailed explanatory memoranda, which were issued in revised and supplementary form during parliamentary debates, are useful references to explain their respective Acts.

The statutory scheme is for the main Act to apply generally to all proceedings that may be brought in the ART, and for the consequential Act to make amendments to specific legislation relating to particular types of proceedings, such as Pt IVC TAA53.

Changes in the main Act

Institutional changes

From the perspective of tax litigation, the main Act creates the institution of the ART to replace the AAT and sets out the general procedures of the ART in a modernised form.

The statutory recognition of taxation as an important and special area is found in s 196 which establishes "Taxation and Business" as one of its eight jurisdictional areas, mirroring the existing AAT Taxation and Commercial Division.

Further, under s 209 of the main Act, the Minister must establish a member assessment panel. According to the revised explanatory memorandum (EM), this provision is intended, by way of example, to ensure that there is:[5]

> "an assessment process for members who are suited to work in the Taxation and Business jurisdictional area [that] may prioritise specific tax or accounting experience in the composition of the panel or the manner of assessment."

Also, in tax litigation, it will sometimes be relevant to appoint Judicial Deputy Presidents,[6] who are also Federal Court judges, to run ART proceedings. Of course, judges are already occasionally appointed as Deputy Presidents in the AAT so the change is one of statutory title only. Nevertheless, the change entrenches the existing practice in cases of parallel proceedings where the tax liability challenge under Pt IVC goes to the Federal Court, while the challenge to the penalty goes to the AAT.[7]

New "guidance and appeals panel" under Pt 5 of the main Act

The guidance and appeals panel (GAP) is new and neither the second reading speech nor the EM refers to any precedent for it. It is therefore appropriate to refer to the simplified outline at s 121 of the main Act, which relevantly states:

> "The guidance and appeals panel is a way of constituting the Tribunal at a more senior level to:
>
> (a) review some decisions made by decision-makers; or
>
> (b) re-review some decisions that have been reviewed by the Tribunal.

Broadly, the circumstances in which the Tribunal may be constituted as a guidance and appeals panel are as follows:

(a) there is an issue of significance to administrative decision-making;

(b) a Tribunal decision may contain an error of fact or law materially affecting the Tribunal decision.

The first way a guidance and appeals panel proceeding can start is that an application to the Tribunal may be referred to the guidance and appeals panel by the President.

The second way is that, after the Tribunal has affirmed, varied or set aside a decision made by a decision-maker, a party to the Tribunal proceeding may apply to the President to refer the matter to the guidance and appeals panel. Timeframes apply to applications, but may be extended in some circumstances. The application to refer the matter does not affect the operation of the Tribunal decision unless the Tribunal orders otherwise.

If the President decides to refer the matter to the guidance and appeals panel, the Tribunal constituted as the guidance and appeals panel reviews the decision of the decision-maker, as affected by the earlier Tribunal review. Some different Tribunal powers and procedures apply in relation to guidance and appeals panel proceedings.

Only some kinds of Tribunal decisions can be referred to the guidance and appeals panel. For these decisions, a party to the proceeding in which the Tribunal decision is made can choose to apply to refer the matter to the guidance and appeals or to appeal on a question of law to the Federal Court under Part 7."

The revised EM further explains:

"792. The guidance and appeals panel will be a new feature of the Tribunal. It will provide a mechanism for escalating significant issues and addressing material errors in Tribunal decisions. This will promote consistent Tribunal decision-making and rapid responses to emerging issues. The guidance and appeals panel will increase confidence in Tribunal decisions — including by affording parties the chance to seek review of a Tribunal decision that may contain an error of fact or law or raises an issue of significance.

793. Applicants will not have an automatic right of review by the guidance and appeals panel. The President will have the discretion to refer a matter to the guidance and appeals panel. This discretion is intended to focus the guidance and appeals panel on matters that raise an error of fact or law materially affecting the Tribunal decision or that raise an issue of significance to administrative decision-making.

794. The guidance and appeals panel will consider matters de novo. That is, the guidance and appeals panel will step into the shoes of the original decision-maker and consider the decision afresh. Being a review by the Tribunal, constituted in a particular way, unless otherwise specified, the guidance and appeals panel has available to it all of the powers and procedures under this Bill as are available to the Tribunal when conducting Tribunal review."

Conceivably, a tax litigation matter could find its way to the GAP. That said, according to the revised EM, complex tax cases may be heading for judicial review rather than administrative tribunal review. To explain, the ART President may, on application, refer any decision of the ART to the GAP (s 128), but the EM says that the President may decide that some matters are better left to other review pathways:[8]

"For example, complex taxation matters and certain regulatory matters may be more appropriately dealt with through judicial review."

The reference to "judicial review" here is potentially unclear. If it is intended to mean an appeal of law against the ART to the Federal Court (which is provided for in Pt 7 of the main Act), the reference is clear. If it is intended to mean judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJRA) or review under s 39B of the *Judiciary Act 1903* (Cth), the reference is far from clear. This is because reviewable objection decisions that may be challenged under Pt IVC TAA53 in the ART are not reviewable under the ADJRA at all and rarely, if ever, reviewable under s 39B.[9]

It seems that a party to an ART decision that is referred to the GAP would still have available a right of appeal to the Federal Court on a question of law under Pt 7 of the main Act. The only limit on this right under s 172(1) of the main Act is that a decision of the President to refer a matter to the GAP under s 128 of the main Act is not reviewable under that provision (see s 172(2)).

Clarification of Federal Court role in fact-finding on appeal from ART

Under s 177(1) of the main Act:

"In hearing the appeal, the Federal Court may make findings of fact if:

(a) the findings of fact are not inconsistent with findings of fact made by the Tribunal (other than findings made by the Tribunal as the result of an error of law); and

(b) it appears to the Court that it is convenient to do so."

The provision is said to modernise drafting and be consistent with the Full Federal Court decision in *Haritos v FCT*.[10]

Changes in the consequential Act

Updating Pt IVC

Probably the most important change in the new legislative package for tax litigation is the replacement of ss 14ZZA to 14ZZM in Pt IVC TAA53.[11]

The new provisions have the lustre of being not only modernised (with few changes to policy intent), but also

stand alone. That is in contrast to the existing provisions which require reading them as modifications of the *Administrative Appeals Tribunal Act 1975* (Cth).

The revised EM says that these rules have basically not changed and that, where they do not apply to a topic, the general provisions of the main Act apply.[12]

Obligations of the Commissioner

The first observation as to the obligations of the Commissioner is a change is flagged in the revised EM:

> "326. The amendments also remove the general exemption from the standard framework for a decision-maker to give reasons for a decision on request, which currently applies for taxation matters. This is consistent with the current administrative practice of the Australian Taxation Office, where reasons are generally already given for decisions in accordance with best practice for administrative decision-making."

This intention is given effect in various provisions in the new ss 14ZZA to 14ZZM, principally, s 14ZZB(1) and s 14ZZF(2)(a).

> "Probably the most important change … is the replacement of ss 14ZZA to 14ZZM in Pt IVC TAA53."

The second observation concerns "T documents" or tribunal documents, which are the documents that the Commissioner is required to disclose in the AAT because they are relevant to the case. Under new s 14ZZF, the Commissioner will continue to be required to give documents that are "necessary to the review of the objection decision concerned" (see current s 14ZZF(1)(a)(v) and new s 14ZZF(2)(e)), as opposed to those that are "relevant" as is the case under the general provisions in ss 23 and 25 of the main Act. The revised EM confirms that this approach in tax cases "facilitate[s] efficient conduct of the proceedings, avoiding large volumes of documents being lodged with the Tribunal that may never be referred to or are otherwise unnecessary".[13]

A safeguard of sorts is written into s 14ZZF(5) (see current s 14ZZF(1)(b)(iii)) in that the ART can require the decision-maker to produce a list of "relevant" documents. This would presumably allow the ART to identify a population of documents that could be tested to ascertain whether their production is also "necessary".

Transition of matters from the AAT to the ART

The transition of current AAT matters into the ART will occur on proclamation of the main Act by the end of this year (as noted earlier). The scheme for transition is set out in the first consequential Act in Pt 5 of Sch 16. Basically, the ART continues and finalises the AAT proceedings in a manner that is required by s 24(2) in Pt 5 to be "efficient and fair" under the new law.

Watch this space

On a first look, the fundamentals of tax litigation in the tribunal are not changed. That said, practitioners cannot assume that AAT legislative concepts apply in the ART world without checking. The new legislation should be construed and applied using the normal principles — read the Act and so forth. Here the explanatory memoranda are helpful.

The explanatory memoranda float the balloon of a possible shift of complex tax and regulatory cases into the world of judicial review, presumably, the Federal Court on appeal, away from the ART. This change, which would require legislative amendment, warrants further debate, and the GAP and the revived Administrative Review Council (ARC) could be important venues for that. Certainly, it makes it hard for the ART to have to cope with the simplest to the most complex cases but, arguably, the AAT has handled that challenge pretty well and Judicial Deputy Presidents will enable the top end of cases, or cases with parallel ART/Federal Court matters, to be handled efficiently and fairly. However, the change would have some unfortunate jurisdictional consequences, for example, taking complex cases out of the ART altogether would deprive taxpayers of the current tribunal jurisdiction to stand in the shoes of the decision-maker in dealing with all issues, including penalties.

As practitioners look more at the new ART legislation, especially when dealing with live cases, perhaps there will be a little more to see by way of changes from the current AAT system.

Improvements will also come from the GAP, but also from the welcome return of the ARC (see Pt 9 of the main Act).

Practitioners and their professional bodies should therefore "mind the GAP" and "ARC up" as required as part of their policy agendas.

Michael Bersten
Barrister

References

1 See Australian Government, *Overview of draft Administrative Review Tribunal legislation*. Available at www.ag.gov.au/legal-system/new-system-federal-administrative-review/overview-draft-administrative-review-tribunal-legislation. The *Administrative Review Tribunal Act 2024* (Cth) (the main Act) passed both Houses of Parliament on 28 May 2024 and received royal assent on 3 June 2024. The main Act commences on proclamation.

2 The second reading speech barely mentions taxation: Commonwealth of Australia, House of Representatives, *Parliamentary debates*, Administrative Review Tribunal Bill 2023, 7 December 2023, 9198–9203 (the Hon. Mark Dreyfus KC).

3 For reasons of focus and space, this article will not go over the history of tax litigation, the policy considerations leading to the ART, or minor drafting changes with no intended policy change. For a useful account of how tax litigation in the AAT works, practitioners are referred to the leading text by former Federal Court justice GT Pagone, *Tax disputes*, Federation Press, 2018, ch 4.

4 There is a second consequential provisions Act but it is not relevant to tax litigation.

5 Para 1355 of the revised EM to the Administrative Review Tribunal Bill 2024.

6 See s 194 of the main Act for a definition of the functions of Judicial Deputy Presidents.

7 Para 1188 of the revised EM to the Administrative Review Tribunal Bill 2024.

8 Para 835 of the revised EM to the Administrative Review Tribunal Bill 2024; para 132 of the supplementary EM to the Administrative Review Tribunal Bill 2024.

9 See Sch 1(e) ADJRA; also see a summary of jurisdictional rules in M Bersten, "Practical compliance guidelines: Australian tax administration law innovation or overreach?", (2023) 21(1) *eJournal of Tax Research* 55 at 71–75, especially 73 and 77.

10 [2015] FCAFC 92. Para 1116 of the revised EM to the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2024.

11 See item 50 of the consequential Act.

12 Para 323 of the revised EM to the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2024.

13 Para 372 of the revised EM to the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2024.

Superannuation

by Fraser Stead, Bryce Figot and Daniel Butler, CTA, DBA Lawyers

When does Division 296 tax make super not worth it?

Detailed financial modelling can assist in making the right decision to withdraw assets or retain them in super in view of the new 15% Division 296 tax.

Short answer

When does Div 296 tax make superannuation *not* worth it? The short answer is that clients should conduct detailed financial modelling and make an objective decision based on the numbers after examining their available options having regard to their particular factual circumstances. Generally, clients should not act hastily and should be better positioned to make a more informed decision closer to 30 June 2026, as outlined below.

Introduction

From 1 July 2025, a new additional tax will apply to those who have a total superannuation balance (TSB) of greater than $3m. Consequently, we are often asked the question: should a client not have more than $3m in superannuation?

Of course, it is not a "one-size-fits-all" answer. Rather, it depends on many factors and assumptions. We feel it is best approached by detailed financial modelling of various scenarios. Naturally, accountants and actuaries are best qualified to perform financial modelling.

Generally, clients are well served by:

- making assumptions addressing various factors (see the discussion below under the heading "Factors to consider").
- their adviser (eg accountant or actuary) completing several different spreadsheet models of different scenarios. Such scenarios might include:
  - scenario 1: an asset is bought and then sold outside of an SMSF if the marginal tax rate outside the SMSF is 47%;
  - scenario 1A: an asset is bought and then sold outside of an SMSF if there is no other income outside the SMSF;
  - scenario 2: an SMSF is in 100% accumulation mode;
  - scenario 3: an asset is bought and then sold inside of an SMSF (the maximum transfer balance cap amount is in pension mode and the balance is in accumulation); and
- deferring any immediate action to see how things unfold and re-assessing their options closer to 30 June 2026 (discussed under the next heading).

Why you may be able to wait until 30 June 2026

Some people think that re-structuring needs to take place before 1 July 2025, that is, when the new tax takes effect. However, this is not necessarily correct. Rather, often the more relevant date is 30 June 2026.

Division 296 tax is only payable if (among other things) "your [TSB] at the end of the year is greater than the large superannuation balance threshold [ie $3m]" (proposed new s 296-35(1)(a) of the *Income Tax Assessment Act 1997* (Cth) (ITAA97)). Therefore, if someone had, say, $4m in an SMSF during most of FY2026 but, on 15 June 2026, withdrew $1m, that person would probably have no Division 296 tax.

Some people disagree with this statement because they think that withdrawals are added back. While there is provision for add-backs of withdrawals in respect of calculating "superannuation earnings" (proposed new s 296-40(2) ITAA97), this does not apply to s 296-35(1)(a). This means that someone with a TSB of no more than $3m as at the end of the relevant year does not pay Division 296 tax.

Thus, advising clients to withdraw prior to 1 July 2025 to minimise Division 296 tax may result in lost opportunities and potential complaints.

Naturally, there may still be reasons for clients to withdraw prior to 1 July 2025 or prior to 30 June. For example, clients may seek to reduce the impact of Div 296 by making a withdrawal that does not cause their TSB to fall below the $3m threshold.

Factors to consider

Advisers and clients can work on financial modelling to see if maintaining a superannuation balance above $3m beyond FY2026 makes sense. Naturally, this involves establishing a model that includes a number of assumptions and factors:

1. What tax rates will apply in the superannuation environment? Naturally, a complying superannuation fund typically pays:
   a. 15% on "regular" income;
   b. 10% on "discount" capital gains (assuming a one-third CGT discount applies); and
   c. 0% on assets supporting pensions.

   However, the above is of course an oversimplification. For example, a 45% tax rate applies if there is non-arm's length income.

Table 1. Summary of some basic modelling

	Total tax $	Tax rate %
Scenario 1: an asset is bought and then sold outside of an SMSF if the marginal tax rate outside the SMSF is 47%.	2,100,000	31
Scenario 1A: an asset is bought and then sold outside of an SMSF if there is no other income outside the SMSF.	1,800,000	26
Scenario 2: SMSF is in 100% accumulation mode.	1,400,000	20
Scenario 3: an asset is bought and then sold inside an SMSF (the maximum transfer balance cap amount is in pension mode and the balance is in accumulation).	1,100,000	16

Notes

- The figures in the total tax column are rounded to the nearest $100,000. Total tax = income tax + Division 296 tax.
- The figures in the tax rate column are rounded to the nearest percentage.

2. What tax rates (including the Medicare levy) will be applicable outside of superannuation (noting that personal marginal tax rates change from 1 July 2024)?
3. How long might the asset be held for? Remember that, if a taxpayer that is not a complying superannuation entity purchases an asset with the purpose of re-sale at a profit, the asset's disposal may be taxed as ordinary income, and not on capital account. Therefore, there may be no CGT discount available.
4. How much of the asset's return will be capital appreciation and how much will be ordinary income?
5. Are there any other taxes to consider besides income tax and Division 296 tax?

A worked example

In one model that we prepared for a recent webinar on Div 296, we considered various scenarios where a client was considering purchasing a $5m asset. Our assumptions included the following:

- the asset produces income per annum of 3%;
- the asset has an unrealised increase in value per annum of 7%; and
- the asset is owned for 10 years and then sold and that is taxed under the CGT regime (which might not be the correct assumption outside of the SMSF regime).

Naturally, we had to make many other assumptions when preparing this model.

A summary of the modelling is set out in Table 1.

Also note that there is no "one-size-fits-all" answer. However, the above example illustrates that, based on the assumptions in the modelling, superannuation might still be more tax-effective than certain alternative options, despite Division 296 tax.

Remember, this is not law yet

Division 296 is still just a proposed law in a Bill, namely, the Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023, and it could change before being finalised. In particular, there are numerous organisations still requesting changes, including that:

- unrealised gains should not be counted as taxable superannuation earnings;
- if unrealised gains are taxed, a loss carry back or refund system should apply as the proposed carry forward loss approach will result in tax being paid on unrealised gains that may result in a loss; and
- the $3m threshold should be indexed.

Conclusion

Superannuation may still be viable beyond a $3m balance and it is worth doing some financial analysis and obtaining appropriate advice where needed.

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Upcoming months

JULY
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Thu–Fri

NSW

State Taxes Convention

11 CPD hours

AUGUST
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WA

WA Tax Retreat

10 CPD hours

AUGUST
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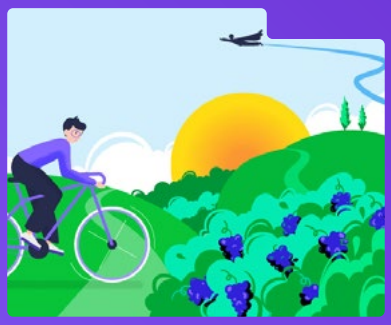
SA

Barossa Convention

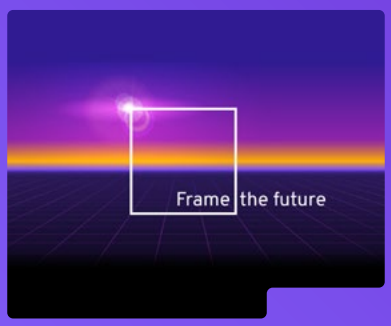


13 CPD hours

SEPTEMBER
11–13
Wed–Fri

NSW

The Tax Summit



20 CPD hours

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Giving back to the profession

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